

**In the Matter of the Pension Benefits Standards Act,
RSBC 1996 Chapter 352**

and

**Pension Plan for the Employees of STEMCELL Technologies Inc.,
British Columbia Registered Plan number P086496-1 (“the Plan”)**

RECONSIDERATION DECISION

STEMCELL Technologies Inc. (“STEMCELL”) is the employer and administrator for the Plan. This decision is in response to the May 21, 2009 Notice of Objection filed by the STEMCELL to the Direction for Compliance (“Direction”) issued to it by the Acting Superintendent of Pensions on April 30, 2009.

The Pension Benefits Standards Act (“PBSA”)

Section 15 of the PBSA provides that the Superintendent may refuse to register an amendment to a Pension Plan if it does not comply with the PBSA, and that an administrator must ensure that an amendment does not contain a prohibited provision.

15 (1) If an amendment is made

(a) to a pension plan that is registered or in respect of which an application for registration is pending, or

(b) to any document referred to in section 14 (2) (a) (ii), (iii) or (v),

an administrator must, within 60 days after the amendment is made, file a copy, certified by the administrator to be a true copy, of the amendment to the plan or document, together with a statement in the prescribed form that, in the opinion of the administrator the plan or document as amended complies with this Act and the regulations.

(2) If a new document of the type referred to in section 14 (2) (a) (ii), (iii) or (v) is made, the new document must be filed in the same manner as required by subsection (1) of this section.

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(3) Unless the superintendent is of the opinion that an amendment filed under subsection (1) (a) does not comply with this Act and the regulations, the superintendent must

(a) register the amendment filed for registration under subsection (1), and

(b) issue to the administrator a notice of registration for the amendment.

(4) For the purposes of this section, the superintendent, with the consent of the plan administrator who filed the plan amendment, may sever from a plan amendment filed under subsection (1) (a) that portion of the amendment that does not comply with this Act and the regulations, and register in accordance with subsection (3) the portion of the amendment that remains.

(5) The administrator must ensure that an amendment to a document referred to in section 14 (2) (a) (ii), (iii) or (v) does not contain any provision that a pension plan is prohibited under this Act from containing.

Section 59 of the PBSA prohibits amendments in plans like the STEMCELL Plan from retroactively reducing a person's benefits:

59 (1) An amendment to a pension plan or the adoption of another plan in place of a pension plan must not

(a) reduce a person's benefits in respect of employment on or after the initial qualification date and before the effective date of the amendment or the adoption of the other plan, or

(b) reduce the commuted value of a person's benefits in respect of remuneration, employment or membership before January 1, 1966 by reference to the person's pension under the Canada Pension Plan (Canada) or the Quebec Pension Plan (Quebec).

(2) Unless the plan provides otherwise, subsection (1) (a) does not apply to the portion of the benefits that is based on the earnings of a member projected in relation to a period after the date of the amendment or adoption of the other plan.

...

Section 71(2) of the PBSA provides the Superintendent with the authority to direct compliance with the PBSA and the terms of a pension plan, and to direct the performance of acts which are necessary:

71(2) If, in the opinion of the superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the superintendent may

(a) direct the administrator, the employer or any person to

(i) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance, and

(ii) perform such acts as in the opinion of the superintendent are necessary to remedy the situation, or

(b) institute any action that could be initiated by a member or any other person entitled to a benefit under the plan.

The Objection

On February 11, 2009, STEMCELL submitted an amendment to retroactively reduce contributions to their pension plan.

Subsequent discussions with the employer confirmed that STEMCELL was not contributing to the defined contribution ("DC") plan in accordance with the terms of the Plan document. Clause 4 of the Plan required contributions of:

- o 1% of earnings from May 1, 2004 to April 30, 2005;
- o 2% of earnings from May 1, 2005 to April 30, 2006; and
- o 3% of earnings on and after May 1, 2006.

STEMCELL has only made 1% contributions since the inception of the Plan.

On April 30, 2009, the Acting Superintendent of Pensions ("A/Superintendent") refused to register the amendment, as it violates section 59 (1) of the PBSA, which prohibits a reduction of accrued benefits. On April 30, 2009, the A/Superintendent issued a Direction for Compliance under section 71 (2) of the PBSA ("Direction") to compel STEMCELL to make the contributions as required under the Plan text.

STEMCELL was given approximately 30 days to make the required contributions for active members to reflect the value that would have been held in the Plan if the contributions had been made in accordance with the Plan documents.

The A/Superintendent also required that the administrator provide a proposed action plan to ensure that former Plan members, who have already transferred their benefits, receive the full value of their entitlements.

STEMCELL's objection to the April 30, 2009 refusal and directions is as follows:

"This letter is in response to your letter dated April 30, 2009 and to clarify that we would like to put forward an objection pursuant to Section 20 (3) that we increase the contributions to 2% and 3% respectively as this was never agreed to or communicated to our employees."

Furthermore, its agent TRG Group Benefits & Pensions, Inc. submitted on STEMCELL's behalf that the 2% and 3% levels set forth in clause 4(d) of the Plan was an "error" and "the contribution level should have remained and continued at a 1% matching level back from the effective date of May 1, 2004".

The documents that this office has on file do not reflect STEMCELL's assertion that the increase in contributions was never intended, nor communicated to employees. The Plan document on file states that contributions would be as follows, as set forth in Clause 4(d) of the Plan:

The Employer is required to contribute to the Plan an amount equal to one per cent of each Member's Earnings for each Member for each full or partial year of membership in the Plan.

Effective May 1, 2005 the Employer is required to contribute to the Plan an amount equal to two per cent of each Member's Earnings for each Member for each full or partial year of membership in the Plan.

Effective May 1, 2006 the Employer is required to contribute to the Plan an amount equal to three per cent of each Member's Earnings for each Member for each full or partial year of membership in the Plan.

In addition, other documents on file also counter STEMCELL's position that an error was made, and that STEMCELL employees were never advised of the increasing contributions to the Plan. These documents are:

1. The *Application for pension plan and policy* between STEMCELL and Great-West Life Insurance Company ("Great-West"), submitted with the original Application for Registration. The *Application for pension plan and policy* includes handwritten instructions from STEMCELL setting out the contributions listed above. The *Application for pension plan and policy* was signed by you on March 3, 2004. Section 9 of this *Application* states that "The applicant...[u]nderstands and agrees that all benefits and benefit payments will be governed by the terms of the pension plan and the pension plan policy from the effective date of the application."
2. An Employee Booklet, received with the Application for Registration in 2004, reveals that the increase in contributions was communicated to STEMCELL employees. The following section is included:

"Does my employer have to contribute to the plan?"

Yes. Your employer contributes an amount equal to one per cent of your Earnings.
Effective May 1, 2005 your employer will contribute an amount equal to two per cent of your Earnings.
Effective May 1, 2006 your employer will contribute an amount equal to three per cent of your Earnings."

In addition to the Notice dated May 21, 2009, I have also reviewed the other submissions that were provided by STEMCELL's agent at a meeting with staff on May 26, 2009, including:

Additional Document #	Description
1	A covering letter dated May 21, 2009 that you attached to a previously issued offer of employment letter, given to M.B., a new STEMCELL employee, on May 13, 2008.
2	The offer of employment letter, dated May 13, 2008, to M.B.
3	A January 2009 booklet describing the terms of the pension plan for each STEMCELL employee.
4	Question and Answer communications document dated April 1, 2004, entitled <i>"We're pleased to introduce the Stemcell Retirement Plan"</i> .
5	E-mails sent between the plan agent TRG Group Benefits & Pensions Inc. and Great- West Life in August 2004.

While documents #1-3 reveal STEMCELL's desire to adjust the contribution rate to 1%, they are very recent with regard to one employee and do not show a history of communication to employees from the inception of the plan. I find them of little assistance.

In my view, document #4 provides consistent messaging with the language in the Plan text. The communications document reveals, in accord with the terms of the Plan at that time, that "Stemcell will match your contribution up to 1% of your annual earnings". The document also indicates that: "There are "concrete plans" to increase the contribution amount in 2005 to 2% and in 2006 to 3%." The Plan text explicitly captures these "concrete plans" by progressively increasing the contribution rates.

The documents listed under #5, the e-mails between STEMCELL's agent Great-West Life, reveal that concerns were raised about the contribution increase in August 2004, after the Plan was submitted to the Superintendent's office. It appears, however, that no attempt was made to correct the rate of contributions at an earlier stage (i.e., while the Plan was being drafted); or, despite the concerns expressed in these e-mails, by an amendment during or shortly after the registration of the Plan in September 2004.

STEMCELL is in effect asking me to allow STEMCELL to correct a drafting error and treat the amendment as a rectification of that error. In effect, STEMCELL asks me for a remedy which is akin to a rectification order.

Rectification is judicial remedy that is provided to correct errors in written documents to reflect the intent of the parties. Rectification is an equitable remedy that is only applied in limited circumstances by the courts.

I cannot find authority in the PBSA which enables me to order rectification of a pension plan document. I am only aware of two cases regarding rectification orders in pension plans in Canada. I have referred to the case of *Denham Ford Sales Ltd. v. Canada Life Assurance Co.* (2006), 54 C.C.P.B. 302 (Alta. Q.B.) in my decision *Re: Interior Lumbermen's Pension Plan*, June 13, 2007. In *Interior Lumbermen's* I decided that I do not have the jurisdiction to order rectification of a pension plan document. The other case is *Kraft Canada Inc. v. Pitsadiotis*, a recent decision of the Ontario Superior Court in February 2009. There the court found that rectification of pension plan documents are properly brought before the courts and not within the jurisdiction of the regulator:

20 *Rectification is an equitable remedy developed to relieve against a mistake in a document. It is invoked in situations where the true intentions of the party or parties are not accurately recorded in the written instrument. (See Royal Bank of Canada v. El-Bris Ltd. (2009), 92 O.R. (3d) 779 (C.A.) at para. 13.)*

21 *Most Canadian judicial decisions that deal with rectification relate to bilateral or contractual agreements entered into between separate parties. This application differs because the instrument sought to be rectified is a pension plan document, which is more akin to a unilateral instrument than a bilateral agreement resulting from negotiation between separate parties.*

22 *Rectification of a pension plan document or other unilateral instrument has not been the subject of much judicial consideration in Canada. There appears to be only one reported Canadian case where rectification of a pension plan was sought: Denham Ford Sales Ltd. v. Canada Life Assurance Co. (2006), 54 C.C.P.B. 302 (Alta. Q.B.). There, the Court cited English jurisprudence and considered that rectification of a pension plan as a remedy is available in Canada. In the result, however, the Court in Denham, supra, held that rectification should not be granted on the facts of that case because the evidence was insufficient to prove that a mistake was made.*

23 *English courts have held that the settlor of a unilateral instrument may seek rectification by proving that the instrument does not express the settlor's true intention. When the transaction is unilateral, proof that the intention of the settlor is not accurately reflected in a trust document will justify rectification. These principles have been applied to rectify pension plan documents to correct unintended or mistaken language: see Drake Insurance plc v. MacDonald, [2005] EWHC 3287 (Ch.D.); ZF Lemforder U.K. Ltd. v. Lemforder U.K. Pension Trustee Ltd., [2005] EWHC 2882 (Ch.D.); Gallaher Ltd. v. Gallaher Pensions Ltd., [2005] EWHC 42 (Ch.D.); AMP (U.K.) plc v. Barker, [2000] E.W.J. 7155 (Eng. & Wales H.C.J., Ch. D.).*

...

27 *In Canada, it is well established that a party seeking rectification in respect of a written contract must present "convincing proof" of the requirements for rectification on the reasoning that a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts: see Performance Industries Ltd. v. Sylvan Golf & Tennis Club Ltd., [2002] 1 S.C.R. 678 at para. 41.*

28 *The necessity for "convincing proof" also applies to claims for rectification of a pension plan such as the 1992 Plan B that was not the result of a negotiated bargain. In such cases, in order to satisfy the evidentiary burden, it has been held that the person seeking rectification proves that his or her intention was objectively manifested: see Denham, supra, at para. 64; AMP (U.K.), supra, at paras. 64, 66-67.*

29 *As rectification is an equitable remedy its award is in the discretion of the Court...*

...

62 *The respondent submits that FSCO is in the best position to resolve the dispute and potentially provide the interpretation that the Company seeks on the present wording of Article 3.04 in the 1992 Plan B without the necessity of the Company seeking rectification from the Court.*

63 *If, however, the Company does not succeed before FSCO on the interpretation issue, FSCO does not have the power to grant the remedy of rectification. Moreover, the proceedings before FSCO have been adjourned pending resolution of this application and the respondent does not seek a stay of this application. In these circumstances, it is not inappropriate for the Company to seek rectification relief from the Court.*

64 *The respondent also argues that alternatively, the Company has its rights to proceed against Watson Wyatt for negligence and that they have, in fact, entered into an Arbitration and Standstill Agreement as the mechanism to resolve the consequences of the mistake. However, there is no agreement as to liability and resort to arbitration may be unnecessary if the Company is able to obtain rectification relief from the Court.*

Decision

The amendments have the effect of retroactively reducing benefits under the Plan. As such they are prohibited under sections 15(3), (5) and 59 of the PBSA. I do not find, on the basis of the limited evidence before me, on a balance of probabilities, that there was a drafting error in Clause 4(d). However, it is not within my jurisdiction to provide for the remedy sought even if I had found an error. If I were to permit the amendments by reason of the need to correct a drafting error, if indeed there was an error, I would be issuing what is in effect an order for rectification and rectification of a pension plan document is not within the jurisdiction of my office. STEMCELL may seek such an equitable remedy from the court. Since STEMCELL has not been administering its plan in accordance with the terms set forth in Clause 4(d), I also confirm my finding that STEMCELL has not been administering the Plan in accordance with its terms.

I confirm my refusal to register this amendment, pursuant to sections 15(3) and 59 of the PBSA.

My directions are issued pursuant to section 71(2) of the PBSA.

I confirm my direction that contributions be made in accordance with the terms of the plan.

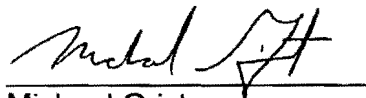
I confirm my direction that contributions be made on behalf of all active members so that their entitlements reflect the value that would be held in the plan if contributions had been made in accordance with the terms stated in the plan document. This amount is to include interest foregone as a result of the under contributions.

I confirm my direction that STEMCELL provide me with its proposed action to ensure that former plan members who have already transferred their benefits receive the full value of their entitlements reflecting the contribution increases on May 1, 2005 to 2% of member's earnings and May 1, 2006 of 3% member's earnings plus interest.

I confirm my direction that STEMCELL provide me with confirmation that contributions according to the plan text have been recalculated and made for all active members and your proposed action for former members and I extend the date to provide the confirmation to August 31, 2009.

I add another direction which in my opinion is necessary to remedy the situation, and that is that STEMCELL provide me with a proposed plan of action for my consideration, which may include employee elections, for dealing with the outstanding employee contributions.

Dated at the City of Surrey,
British Columbia, on the
29th day of July, 2009.



Michael Grist
A/Superintendent of Pensions