

IN THE MATTER OF a proceeding before a Disciplinary Tribunal of the Canadian Institute of Actuaries
B E T W E E N;

PROFESSIONAL CONDUCT BOARD (“PCB”)

and

KEVIN SORHAITZ, FAISAL SIDDIQI, CAROL WONG and JOHN GAO (the “Respondents”)

CIA File:

2019–1(B, C, D and E)

Disciplinary Tribunal Panel:

Hon. Colin L. Campbell Q.C. (Chair)
Guy Martel, FSA, FCIA
Stephen Cheng, FCIA, FSA

Appearances:

Antoine Aylwin
Fasken Martineau DuMoulin LLP, Counsel for the Professional Conduct Board

V. Ross Morrison
Morrison Brown Sosnovitch LLP, Counsel for the Respondents

Heard virtually:

May 17, 18, 24 and 31, 2022

DECISION

1. The four above named actuaries are each charged with breach of Rules 1 and 6 of the *Rules of Professional Conduct* of The Canadian Institute of Actuaries (“CIA”). The charges were heard together by this Disciplinary Tribunal Panel (“DT”).

2. Each charge asserts that the named actuary failed to fulfil their professional responsibility to the public with honesty and competence and to uphold the reputation of the actuarial profession (Rule 1).
3. In addition, each charge alleges that the member failed to take steps to ensure that the actuarial services were not used to mislead parties including the public.
4. At their essence, each charge alleges that each CIA member at the time they were providing actuarial services to Degussa Canada Inc. (“Degussa” or “Client”) failed to advise the Client and others that the Supplemental Pension Plan (“SUPP”) of the Client was unregistered and should be registered to provide the contractual benefits to certain employees thereby misleading the Client.
5. This DT has had the benefit of a Statement of Facts agreed to by counsel and the parties on each charge together with two volumes of documents comprising some 72 tabs together with the testimony of a number of witnesses, particularly that of Mr. Scott Simpson, who was the senior actuary providing services to the Client in the period 1997 (prior to plan formation) to 2005.
6. Evidence was also received from the Complainant, Mr. John G. Deinum, Mr. Marvin Ens, a member of the Investigation Team (“IT”) of the PCB, as well as the four accused, Mr. Kevin Sorhaitz, Mr. Faisal Siddiqi, Ms. Carol Wong and Mr. John Gao, and experts on both sides, Ms. Azita Bassiji, and Mr. Owen O’Neil who were called on behalf of the Respondents and Ms. Rosalind Gilbert who was called on behalf of the PCB.
7. While most of the factual background to the charges is not in issue, however, as noted below that background context to the charges is less than complete.
8. From the documents made exhibits at the hearing, Scott Simpson, on behalf of Buck Consultants (“Buck”) provided actuarial services to the Client in connection with the purchase by Degussa of the peroxygen operations of DuPont Canada Inc. (“DuPont”). Just what the extent of those actuarial services were, is not clear from any of the documentation to which we have been provided.

9. The transaction included the transfer of 55 DuPont employees to Degussa located in both Ontario and Alberta.

10. In summary, Degussa wished to provide a guarantee to the transferred employees from DuPont to Degussa that their total pension benefits under all the Degussa retirement schemes combined will not be less than the pension benefit that would have been payable to them under the Dupont plan had they remained in the Dupont plan until their termination or retirement. The attached Appendix "A" to this Decision is what all parties agree is the wording from section 11.07 of the April 1998 Purchase and Sale Agreement ("PSA") intended to provide as the "Minimum Pension Guarantee". The "Minimum Pension Guarantee" is a potential top up benefit at termination or retirement, and it is not a pre-determined or a fixed benefit.

11. Prior to finalization of the 1998 PSA, Scott Simpson was involved in considering options for providing equivalence to the former DuPont employees. A letter to Degussa (Tab-7) provided for employees being transferred a calculation of the projected pension information consisting of four parts:

- i. a defined benefit plan which provides pension equal to the DuPont DB plan but only in respect of service prior to the sale.
- ii. defined contribution plan to which it contributes 4 ½% of pay.
- iii. group registered retirement savings plan where the employer matches 50% of employee contributions up to a maximum employee/employer contribution of 6%/3% of pay.
- iv. Supplementary Plan established to guarantee that you will receive a total employer-provided pension from the Degussa plans not less than the pension you would have received from the DuPont plan had you continued in that plan.

12. It would appear from the correspondence that the exact delineation of the plan had not been finalized as of the date of the sale but did become final sometime later.

13. What is unclear both from the documents and from the testimony of Scott Simpson who had little recollection of specifics, is the extent of the Buck retainer before and after December 1998. The proposed draft retainer (Tab-8) of April 8, 1998 appoints Buck as consultants and actuaries “to work on behalf of Degussa and deal with interested parties as need be with regard to the Degussa plans.”

14. Scott Simpson’s letter of December 22, 1998 (Tab-10) confirmed the administration by Buck of the “defined benefit pension entitlements of the former DuPont employees”. The letter goes on to note “the administration and record-keeping for the defined contribution plans are the responsibility of Manulife Financial providing the required services.”

15. Confirmation of what appears to be the limited retainer of Buck dealing with the defined benefit pension is found in the email correspondence query from Human Resources at Degussa to Buck confirmed by Scott Simpson that “(the promise of the minimum guarantee that was made under the asset purchase and sales agreement was to be handled outside of the registered plan.) The company is to pay the difference out of general operating revenues”. (Tab-9)

16. The Buck prepared Actuarial Valuation Report as of April 1, 1998 and dated November, 2000 is confined to the DB and DC plans (no mention being made of either the RRSP or SUPP components of an employee’s entitlement). (Tab-11)

17. As of January 2002, the work by Buck on behalf of Degussa was limited to only the defined benefit pension and did not include even the DC portion of the registered plans. (Tab-12)

18. The ongoing correspondence between 2004 and 2008 (Tab-13 to Tab-17) evidences queries from Degussa Human Resources personnel to Buck inquiring how benefits beyond the DB/DC registered plans operates.

19. These culminate in a letter from Karim Gangji (successor to Scott Simpson on the file) to PricewaterhouseCoopers LLP (“PWC”) dated January 4, 2008 setting out the accounting valuations for the DB portion of the plan and the SUPP but not including either the DC portion or the RRSP.

20. The difficulty confronted by this DT dealing with the charges against the four above-named individuals is the lack of evidence in the time before any of those individuals were involved.

21. The DT did not hear from the Client or anyone else on its behalf, either lawyers or accountants, who were involved in the planning process and administration to assist with respect to the retainer and expectations with respect to services by Buck.

22. The DT was unable to obtain comprehensive evidence from Scott Simpson whose evidence was of limited assistance. Apart from testifying to the fact that there were numerous discussions in which he participated to achieve for the transferred employees what they may have had if they had remained at DuPont, he was unable to further assist somewhat understandably given the passage of 25 years.

23. The DT did not hear from Mr. Gangji who prepared the Actuarial Valuation Reports between 2005 and 2008 which apparently made no mention of the SUPP or possible registration of it and he has not been charged.

24. This lack of evidence makes it difficult to conclude what knowledge or decision-making was made by the Client and other advisors who may or may not have sought advice from Buck. What is clear is that the SUPP was, to the knowledge of the Client, a benefit that was not part of a registered plan.

25. The complaint in this matter was raised by Mr. Deinum, a Fellow of the Canadian Institute of Actuaries, and a successor to Buck on the Degussa file for a period of time.

26. In his letter of complaint (Tab-48) Mr. Deinum expressed “our concern that the SUPP Plan has not been administered in compliance with applicable pension laws. Mr. Gao and Mr. Tom Madrinic, the Canadian Pension Practice Leader at Buck were not able to explain why the SUPP Plan was not subject to applicable pension laws given the magnitude of the situation and implications of noncompliance...”

27. There is no information before us to suggest that Mr. Deinum had discussed the matter with the Client before making his complaint.

28. Mr. Deinum's complaint was referred to an IT by the Committee on Professional Conduct of the CIA in October 2019. (Tab-50)

29. In its Investigation Report of October 22, 2020 the IT noted that "the IT found no evidence of instructions from Client to treat the SUPP as non-registered as there is no documentation of any discussions with the Client on that point." (Tab-51, p.19)

30. On the following page having reviewed three or four documents, the IT concluded as follows:

"Based on the above, the Transferred Employees would have understood that the administration of the SUPP could be different (e.g. in the ability to transfer the commuted value to an RRSP from that of the registered plan.)"

31. And on the following page:

"The IT found no evidence that prior to 2013 Transferred Employees understood that the guaranteed top up payable from the SUPP would no longer have some of the other benefits of registration (e.g. benefit security)."

32. Tab-58 contains a response from counsel on behalf of Evonik (successor to Degussa) with respect to the CIA's view of the extent of Buck's obligation to produce documents and information pursuant to the CIA's By-Laws:

"For the record, we disagree with Mr. Aylwin's suggestion that the CIA's By-Laws somehow trump Buck's contractual obligations owed to Evonik. Evonik continues to strenuously object to oppose any disclosure by Buck to the CIA of Evonik's privileged and/or confidential communications. Without the express consent of Evonik, any such disclosure in breach of Buck's contractual duties owed to Evonik may result in legal action against Buck."

33. There is no evidence before us that the IT ever sought to contact an employee or former employee of Degussa to confirm the statement that "likely the transferred employees did not understand that the SUPP would no longer have some of the other benefits of registration (benefit security)."

34. There is no evidence before this DT to support the conclusion above. As noted below the Buck file does not detail what advice was sought or given to the Client.

35. Again, there is no evidence to enable this DT to conclude that the Client did not achieve the benefit plan it sought for its employees knowing of any limitations with respect to its full registration and Ontario legislation.

36. Counsel for the PCB asserted in his submissions that registration of a plan was a question of professional responsibility that had to be taken carefully by actuaries. Again, there is no evidence to support the conclusion that the issue was not taken seriously in 1997–98 when the Client adopted a plan with a non-registered SUPP.

37. Reliance is placed on a letter at Tab-72. Again, we did not have evidence as to the assumptions behind the belief that the SUPP required registration. Without more the letter does not assist us.

38. We accept the legal case references from counsel to the PCB at paragraphs 19 and 20 of his submissions with respect to the public policy purpose behind pension plans.

39. The case statements must be looked at in context. The plan in question here in its entirety gave added benefits to certain transferred employees above and beyond those to which other employees were entitled.

40. Most of the benefits with the exception of the SUPP were in fact in a registered plan. Only the top up portion was not.

41. Contrary to the submissions of the PCB, other than the assumption by Marvin Ens there is no expert evidence to support (and indeed evidence to the contrary) that the SUPP could have been registered. Ms. Gilbert for the PCB put the issue of registration no higher than a “possibility”.

42. The evidence of Ms. Gilbert assumed that the Client was unaware of the possible limitation of the SUPP.

43. One could pose the question the other way around. Assume the plan was designed and implemented by a fully informed Client and that the plan operated as intended for at least 10 years

without any incidence. Was there a failure on the part of the four actuaries charged to raise a question about lack of registration of the plan when the two actuaries on the file before them, namely Scott Simpson and Karim Gangji may or may not have?

44. The PCB asserts that actuaries with adequate knowledge of the legislative environment would have concluded that a pension plan that provides benefits under the ITA limits should be registered by default.

45. Degussa decided to meet its obligations with the SUPP by paying additional lifetime benefits resulting from the application of the “Minimum Pension Guarantee” to transferred employees from general revenue, and not from a registered pension plan.

46. The PCB and its expert have taken the position that the “Minimum Pension Guarantee” as written in the agreement must be delivered through a registered pension plan since it provides benefits within the ITA limits.

47. We question whether a minimum “hybrid” guarantee must be delivered through a registered pension plan if benefits being provided are within the ITA limits, particularly when the minimum guarantee is so complexly defined with reference to a future accumulated RRSP balance which is outside the pension plan.

48. When a certain design is neither specifically exempt nor specifically prohibited, we would consider that a grey area and different professionals or experts may have differing interpretations.

49. In this regard we find the expert testimony of Azita Bassiji most convincing and agree that the SUPP could not have been registered under pension legislation as the plan exists.

50. Ms. Gilbert for the PCB admitted that it is not possible to deliver the “Minimum Pension Guarantee” as written in the Agreement using a registered pension plan.

51. In our view, the onus is on the prosecution to establish that neither the Client nor any employees in 1998 or more importantly after 2008 lacked understanding of the nature of the SUPP or its effect including that it was not registered.

52. It is with this background that we look at the conduct of the four members individually charged in the period commencing at least some 10 years following establishment of the Degussa Plans which had been operating without incident.

53. In our view, the prosecution has failed to satisfy us that the premise on which the conclusion of the IT is based and the assumptions on which the expert for PCB based her conclusion, namely that likely neither the Client nor employees understood the limitation of the SUPP which could and should have been registered.

54. The DT accepts the evidence of the expert called on behalf of the Respondents, Azita Bassiji, in its entirety and in particular the conclusion that “the four respondent actuaries (or any of them) did not breach the standard of care required of a reasonably prudent actuary in the circumstances of this case.”

55. We also accept Ms. Bassiji’s opinion that “the Buyer would not have been able to register an amendment to the Buyer Pension Plan 1 to provide for the Minimum Pension Guarantee benefits. The only permissible method of delivery of such benefits was through a non-registered arrangement.”

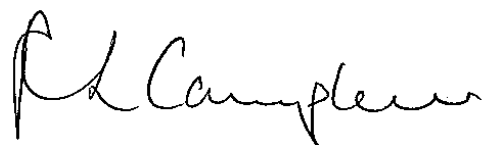
56. We are asked on behalf of the prosecution to reject the evidence of Mr. O’Neil also called on behalf of the Respondents as being that of an advocate rather than an expert. While Mr. O’Neil may have been somewhat energetic in his response to oral questions we do find that he is in fact an expert whose opinion in support of the Respondents is worthy of deference.

57. We find that each of the four Respondents acted reasonably and professionally in carrying out their actuarial retainers in each of the years they were involved and in not questioning Client decisions made in the many years before they were each involved.

58. In conclusion we find the PCB has failed to produce reliable evidence to satisfy us to reach a conclusion that any of the four named Respondents breached either of Rules 1 or 6 of the *Rules of Professional Conduct* in failing to raise with the Client deficiencies in the Clients’ SUPP.

59. The charges are hereby dismissed. If it is necessary to deal with the issue of costs the panel will receive submissions in writing from counsel.

Dated this 26th day of July, 2022.



The Honourable Colin L. Campbell, Q.C.
Chair



Stephen Cheng, FCIA, FSA



Guy Martel, FSA, FCIA

APPENDIX "A"

11.07 Minimum Pension Guarantee:

If, upon the termination, retirement or death of each of the Transferred Employees excluding those Transferred Employees who elect to retire from Seller's Non-Contributory Plan (the "Terminating Transferred Employee"), a calculation, on a case by case basis, of the value of the Accrued Benefit the Terminating Transferred Employee will have received from Seller's Non-Contributory Plan if such Terminating Plan Participant were eligible to receive benefits from the Seller's Non-Contributory Plan based on service to and including the Closing Date plus the Buyer's portion of the New Accrued Benefit such Terminating Transferred Employee is eligible to receive from Buyer's Pension Plan 2 results in a situation where such total amount is less than the amount the Terminating Transferred Employee would have received under the Seller's Non-Contributory Plan if such Seller's Non-Contributory Plan had continued to apply until the death, retirement or termination of such Transferred Employee (assuming that the earnings of such Transferred Employee used for purposes of calculating such benefit under the Seller's Non-Contributory Plan shall include any increases to such earnings received by such Transferred Employee after the Closing Time), then Buyer shall make an adjustment in the pension benefits payable to such Transferred Employee(s) on a monthly basis equivalent to the difference. In calculating Accrued Benefits hereunder, such Accrued Benefit shall be adjusted by increases in earnings subsequent to the Closing Date. Buyer shall make a specific provision in or an amendment to Buyer's Pension Plan 2 or in a non-registered supplemental plan to incorporate the provisions of this Section 11.07.