

Superintendent of
Financial
Services



surintendant des
services
financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990,
c. P.8, as amended (the “ *PBA*”);

AND IN THE MATTER OF a Proposal of the Superintendent
of Financial Services to Refuse to make an Order concerning
the **Colleges of Applied Arts and Technology Pension Plan**,
Registration Number 0589895;

TO: **Robert Pando**
66 Maccoomb Drive
Welland ON L3C 5T9

Applicant

NOTICE OF PROPOSAL

I PROPOSE TO REFUSE TO MAKE AN ORDER in respect of the Colleges of Applied
Arts and Technology Pension Plan, Registration Number 0589895 (the “ *Plan*”) requiring:

1. That the Board of Trustees (the “*Board*”) for the *Plan* be directed to cease and desist immediately functioning as the plan administrator until the measures in paragraphs 2. and 3. have been taken and filed with the Financial Services Commission of Ontario (“*FSCO*”) for registration;
2. That the *Plan* and/or the *Plan* Sponsors be directed to implement an amendment to the *Plan*’s Sponsorship and Trust Agreement to amend the composition of the *Board* in accordance with paragraph 3. and to file that amendment with *FSCO* for registration;
3. That the *Plan* be directed to implement procedures to be determined and/or approved by the *Plan* members that will enable the nomination and appointment by the *Plan* members of at least 6 member trustees;

4. That the Board composed in accordance with paragraph 2. and 3. be directed to approve an amendment to the Plan document respecting increases in contribution rates as required and deemed necessary, the effective date of which will be no earlier than the date of the amendment's approval; and
5. That the Plan be directed to rescind the removal of guarantee annual indexation increases for service earned after December 31, 2007.

REASONS:

1. The Plan is a multi-employer pension plan ("MEPP") established pursuant to a collective agreement or trust agreement. The Plan covers current and former employees of colleges of applied arts and technology in Ontario. Members of the Plan are represented by the Ontario Public Service Employees Union ("OPSEU") and the Ontario College Administrative Staff Association ("OCASA").
2. The Applicant is a former member of the Plan and is in receipt of a pension.

I. COMPOSITION OF THE BOARD

3. The Plan is subject to a Sponsorship and Trust Agreement effective as of January 1, 1995 (the "Trust"). The text of Article 4.01 of the Trust and section 16.01 of the Plan text as of 2005 state that the Board shall administer the Plan and trust funds for the Plan.

Prior to 2007

4. Prior to 2007, the Trust (the "Initial Trust") provided that the Board members are to be appointed by a Sponsor's Committee which is an eight-member committee of representatives of

the parties to the Trust agreement (i.e. the employers and bargaining agents). Specifically, article 11.02 of the Trust defined the composition of the Sponsor's Committee: four members appointed by the Employers collectively, three members appointed by OPSEU, and one member appointed by OCASA.

5. Article 4.02 of the Initial Trust described the composition of the twelve-member Board as follows:

- (a) Six Trustees appointed by the Employer Committee Members of the Sponsors' Committee;
- (b) Four Trustees appointed by the Employee Committee Members of the Sponsors' Committee appointed by OPSEU (the "OPSEU Trustees");
- (c) One Trustee who was a Former Plan Member appointed by the Sponsors' Committee as a whole, in accordance with Section 4.03 (the "Retiree Trustee");
and
- (d) One Trustee appointed by the Employee Sponsors' Committee member appointed by OCASA (the "OCASA Trustee").

6. In response to a prior complaint from the Applicant, the Superintendent issued a Notice of Proposal on November 9, 2006, on the basis that the composition of the Board of Trustees did

not comply with section 8(1)(e) of the *PBA*. Section 8(1)(e) requires that at least one-half of the members of a board of trustees administering a MEPP established pursuant to a collective agreement or a trust agreement (such as the Plan) be “representatives of members of the multi-employer pension plan”. The Superintendent concluded that the Retiree Trustee was a representative of the former members of the Plan not the members and, therefore, section 8(1)(e) was contravened. To remedy the contravention, the Superintendent proposed to issue an order requiring that the Board modify the composition of the Board to comply with section 8(1)(e) of the *PBA*.

7. No hearing before the Financial Services Tribunal was requested and the Superintendent issued the Order as proposed in the NOP on or about March 15, 2007 (the “Order”).

The 2006 Amendment

8. In response to the Notice of Proposal, the Trust was amended effective December 13, 2006 (the “2006 Amendment”). The appointment process for the Employer Trustees, the OPSEU Trustees and the OCASA Trustee was not altered in the Amendment. In substance, the Amendment did result in the following changes to the Trust:

- (a) The Retiree Trustee was eliminated and was replaced by a rotational Trustee (the “Rotational Trustee”) appointed by the OPSEU and OCASA members of the Sponsors’ Committee. Under the terms of the Amendment, the OPSEU appointees on the Sponsors’ Committee make the first appointment for a three year term. Then the OCASA appointee

on the Sponsors' Committee makes an appointment for another three year term. The position would then be filled on a three year term basis with the OPSEU appointees to the Sponsors' Committee appointing for two consecutive terms and then OCASA appointee to the Sponsors' Committee making a one term appointment. This appointment procedure would continue on an indefinite basis.

(b) Section 4.01 was amended to make it explicit that the OPSEU Trustees, the OCASA Trustee and the Rotational Trustees are representatives of the members of the Plan (the "Member Trustees").

II. THE COMPOSITION OF THE BOARD COMPLAINT

9. The Applicant raises two grounds in support of his contention that the composition of the Board does not meet the requirements of the *PBA* (specifically the requirement that at least one-half of the Trustees are representatives of the members as set out in section 8(1)(e) of the *PBA*). The first ground is substantive and the second rests on technical and procedural objections.

Substantive Grounds for Complaint

10. The substantive ground is based on the fact that the Trustees who are representatives of the members are not named and selected directly by the Plan members. The Applicant contends that the Trustees who are representatives of the members must be selected and named by the Plan members through a process determined democratically by the members that is consistent with "the applicable legal requirements". The Applicant contends that the current method of selecting

and appointing the Member Trustees does not meet this requirement because they are identified through a selection process run by OPSEU and OCASA and are appointed by the corresponding member of the Sponsors' Committee.

11. The Applicant states that OPSEU has no legal authority to collectively bargain in respect of pension issues and, therefore, lacks sufficient representational capacity to select and/or appoint (through its appointees on the Sponsors' Committee) Trustees who are representatives of the members.

12. The Applicant states that OCASA is not a union and cannot grieve in respect of any violation of the applicable employment agreement including any violation relating to pension matters and has no representational rights in respect of administrative employees who have chosen not to become members of OCASA. Consequently, OCASA also lacks sufficient representational capacity to select and/or appoint (through its appointee or appointees on the Sponsors' Committee) Trustees who are representatives of the members.

13. Further, the Applicant states that OPSEU and OCASA are Plan sponsors. As such, OPSEU and OCASA have interests that are distinct and in conflict with the interests of Plan members which would disqualify OPSEU and OCASA from any role in the selection and/or appointment of Trustees who are representatives of the members.

Technical Grounds for Complaint

14. The Applicant raises two technical or procedural grounds in support of his position that the Amendment is not valid:

- (a) The Applicant asserts that the Certificate that certifies that the copy of the Amendment filed with FSCO is a true and exact copy of the 2006 Amendment identifies the Amendment as “Amendment No. 1” rather than “Amending Agreement No. 1” which is the title on the 2006 Amendment. The Notice of Registration of Amendment (the “Notice”) issued by the Superintendent, in turn, also identifies the Amendment as “Amendment No. 1”. The Applicant contends, therefore, that the 2006 Amendment is not registered and “never has been, in force and effect.”

- (b) The Applicant asserts that the 2006 Amendment was never signed by one of the parties to the STA, the Association of Colleges of Applied Arts and Technology (“ACAATO”) and that correspondence from ACAATO purporting to evidence the ACAATO’s agreement is, in the Applicant’s view, not sufficient given the wording of the Amendment as it relates to the execution of the document. Again, the Applicant submits that the 2006 Amendment, is therefore, of no force and effect.

15. The Applicant maintains that these errors cannot be repaired by “backdating” newly issued documentation to correct these errors.

III. REASONS FOR DISMISSING THE COMPOSITION OF THE BOARD COMPLAINT

Substantive Grounds

16. Section 8(1)(e) of the *PBA* states that a MEPP “established pursuant to a collective agreement or a trust agreement” (such as the Plan) must be administered by a board of trustees “of whom at least one-half are representatives of members”.

17. The *PBA* does not impose any particular procedure for selecting and/or appointing trustees who are representatives of members. The *PBA* does not require that representatives of the members be elected or selected and named by the members through a process determined democratically by the members as a group.

18. In this case, there is sufficient basis to conclude that the Member Trustees are representatives of the members. The Member Trustees are specifically designated as such in the Trust Agreement as amended by the 2006 Amendment. Moreover, the Member Trustees are selected by OPSEU and OCASA and appointed by the OPSEU and OCASA appointees sitting on the Sponsors’ Committee. Even if OPSEU and OCASA do not have full authority to collectively bargain or grieve in respect of pension issues for all members of the Plan, it is clear that OPSEU’s and OCASA’s primary function is to represent their members in respect of terms

and conditions of employment. Accordingly, OPSEU and OCASA are in an appropriate position to select trustees who are member representatives and their appointees to the Sponsors' Committee are the appropriate persons to make the formal appointments.

19. In respect of OPSEU's and OCASA's alleged conflict of interest, the Applicant has not provided any particular examples or evidence of issues where the interests of either OPSEU and/or OCASA conflict with the members. The Plan is sponsored by both the employers and OPSEU and/or OCASA. Jointly sponsored pension plans are common as are MEPPS which are sponsored and administered solely by bargaining agents. Often, in such pension plans, the bargaining agents select and appoint the trustees who represent the members. Generally, such structures are viewed as affording a greater level of involvement for members and a greater level of recognition of member interests. Also, such structures mitigate or eliminate the inherent conflicts which apply to employers who are both pension plan sponsors and administrators. The Applicant fails to cite any specific instances of conflict which would suggest that OPSEU and OCASA are in a different position such that they cannot have a role in the selection and appointment of the member representatives on the Board of Trustees.

20. Moreover, once appointed, the Member Trustees do not have any obligation to represent the interests of either OPSEU or OCASA. Any conflict of interest which OPSEU or OCASA may experience (assuming it does exist which is denied) would not extend to the Member Trustees.

21. Accordingly, the Superintendent is of the view that there is no substantive basis to invalidate the 2006 Amendment as requested by the Applicant.

Technical Grounds

22. Likewise, the Superintendent is of the view that the procedural/technical grounds advanced by the Applicant do not have merit.

23. The Superintendent rejects the Applicant's submissions concerning the error in the Certificate for the following reasons:

(a) The error in the Certificate appears to be an inadvertent administrative error. The actual text of the 2006 Amendment is attached to the Certificate. There appears to be no room for confusion as to what changes were made to the Trust.

(b) The error is in the Certificate and not in the 2006 Amendment itself. The error in the Certificate does not affect the fact that the Plan was indeed amended; and

(c) Assuming that the Notice also erroneously names the 2006 Amendment, the effective date for the Amendment and the date of issue of the Notice leave little doubt as to the document which is being registered as an amendment to the Plan.

Moreover, it cannot be said that a defective notice of registration implies that the Amendment is of no force and effect. As stated by the Financial Services Tribunal, there is no “magic in registration”.¹

24. The Applicant’s submission that the Amendment is not valid because the actual 2006 Amendment was not signed by the ACAATO is also without merit because the Trust does not require that a party sign the actual amending document. Rather the Trust requires the “unanimous written agreement of the parties to” the Trust. The correspondence from the ACAATO would appear to be sufficient to constitute such agreement.

25. Moreover, the Applicant’s position necessitates the conclusion that the configuration of the Board of Trustees is legally invalid and, therefore, all decisions of the Board of Trustees are a nullity. However, it does not appear that the adoption of such a regulatory position by the Superintendent (assuming the complaint is well founded on the merits which the Superintendent denies) is consistent with the statutory scheme in the *PBA* nor in the interest of Plan members. Section 8(1) states that “[a] pension plan is not eligible for registration unless it is administered by an administrator” that meets the criteria set out in the section. Accordingly, a pension plan that is not compliant with section 8(1) would face deregistration and wind up pursuant to section 18(5) which requires that a plan which has been deregistered be wound up. There is no suggestion in the *PBA* that all decisions and actions by a non-compliant administrator are nullified. Since it would appear that there is no issue that the Board of Trustees’ configuration is

¹ *Consumers Packaging Inc. v. Superintendent of Financial Services*, (2002), FST Decision No. P0162-2001-2.

otherwise legal and valid for trust law purposes, there is no basis for the conclusion that all the decisions of the Board of Trustees are null and void.

26. Further, any remedy granted under the *PBA* should be consistent with the overall purpose and objects of the *PBA*, which focus on the protection of members. It is difficult to see how the retroactive nullification of all decisions by the Board of Trustees can benefit members. It would throw into doubt all transactions (including investment decisions made by the Board of Trustees) and leave the Plan exposed to claims by third parties that they are free to repudiate agreements or transactions where it is to the financial advantage of such third parties to do so.

IV. COMPLAINT CONCERNING THE AMENDMENT TO INCREASE MEMBER CONTRIBUTIONS

27. The Applicant also raises an issue about an amendment to the Plan effective December 13, 2006 which increases required member contributions (the “2006 Contribution Amendment”). The Applicant asserts that in January 2007 the Board of Trustees made an administrative decision (not supported by any amendment to the Plan text) whereby automatic indexation of pension benefits for service after December 31, 2007, was removed. The Applicant asserts that this administrative decision is contrary to the terms of an earlier amendment to the Plan adopted on July 22, 1992 (the “1992 Contribution Amendment”), under which member contributions were increased. The Applicant alleges that the specific purpose of this contribution increase in the 1992 Contribution Amendment was to provide for the indexation of all member pensions for their credited years of service from 1992 forward.

28. The Applicant also asserts that the 2006 Contribution Amendment and indexation decision are invalid because the 2006 Amendment was not filed with the FSCO in accordance with the requirements of the *PBA*. The Applicant submits that, while the 2006 Contribution Amendment was filed with FSCO by the Board of Trustees, section 12 of the *PBA* was not complied with because the Board of Trustees, for the reasons outlined above, was not validly composed and could not, as a result, legally be the administrator and could not legally meet the administrator's obligations under section 12 of the *PBA* to file the 2006 Contributions Amendment. Moreover, the Applicant relies on section 13(1) of the *PBA* which states that "an amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment and the application meets the requirements of section 12".

29. The Applicant's issue concerning the 2006 Contribution Amendment also lacks merit for the following reasons:

- (a) What the Applicant identifies as an administrative practice adopted in 2007 which removed automatic indexation was actually a validly adopted amendment to the Plan under which automatic indexation for service after December 31, 2007, was made contingent on the existence of "unutilized funding excesses or cumulative gains" as disclosed in the most recent actuarial valuation of the Plan.
- (b) There is no indication in the text of the 1992 Contribution Amendment that the increase in member contributions was in any way linked to the provision of

indexation in respect of service after 1992 or that the fact of the contribution increase in 1992 prohibited any alteration of the indexation provisions in the Plan.

(c) The 2006 Contribution Amendment was validly adopted by the Sponsor's Committee who had the authority to amend the terms of the Plan. This conclusion is not affected by any assertion (which the Superintendent denies) that Board of Trustees was somehow invalidly composed at the time because the Board of Trustees did not have the authority to amend the plan and did not purport to do so.

(d) The Applicant's assertion that the 2006 Contribution Amendment is invalid because it was filed with FSCO at a time when the Board of Trustees was not validly composed (which the Superintendent denies) ignores the fact that the 2006 Contribution Amendment was indeed filed in compliance with FSCO requirements and in compliance with the *PBA*. As a practical matter, a pension plan administrator does not need to personally file an amendment to comply with the *PBA*. Further, for the reasons set out above, there is no basis in the *PBA* or otherwise at law to invalidate every act on the decision of the Board of Trustees even if the composition of the Board is not in compliance with section 8(1)(e) of the *PBA*.

30. Such further reasons as the Superintendent may advise.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Proposal is served on you.** ²

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, Ontario
M2N 6L9

Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416-590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE PROPOSAL AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this **1st** day of **December, 2009.**

K. David Gordon
Deputy Superintendent, Pensions

² NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the seventh day after the date of mailing.

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Attention: Daniel Hayhurst
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Solicitors for the Plan