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Superintendent of
Financial
Services



Surintendant des
services
financiers

IN THE MATTER OF the Pension Benefits Act, R.S.O. 1990, c. P.8, (the "PBA");

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 62.1 of the PBA relating to The IUOE Local 793 Pension Plan for Operating Engineers in Ontario, Registration Number 0389890.

TO:

Coco Paving Inc.

949 Wilson Avenue
Toronto ON M3K 1G2

Attention

Jenny Coco
Chief Executive Officer

Applicant for Refund of Alleged Overpayment

AND TO:

**Board of Trustees of The IUOE Local 793 Pension Plan
for Operating Engineers in Ontario**

2245 Speers Road
Oakville ON L6L 6X8

Attention:

Michael Gallagher, Business Manager

Administrator for the Plan

AND TO:

International Union of Operating Engineers, Local 793

2245 Speers Road
Oakville ON L6L 6X8

Attention:

Kirsten Agrell, Counsel
Jeff Smith, Delinquency Control Officer

Collective Bargaining Agent

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER in respect of the I.U.O.E. Local 793 Pension Plan for Operating Engineers in Ontario, Registration Number 0389890 (the “Plan”), under section 62.1 of the PBA.

Si vous désirez recevoir cet avis en français, veuillez envoyer votre demande immédiatement à: Adjointe, audiences, Greffe, Commission des services financiers de l'Ontario, 5160 rue Yonge, boîte 85, Toronto ON M2N 6L9.

YOU ARE ENTITLED TO A HEARING before the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the PBA. **A hearing before the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing (Form 1) and submitting it to the Tribunal within 30 days after this Notice of Intended Decision is served on you.**¹ **A copy of that form is included with this Notice of Intended Decision.** Additional copies of the enclosed Form 1 can be obtained by visiting the Tribunal’s website at www.fstontario.ca.

If a Request for Hearing (Form 1) is submitted to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, sections 89(8) and 89(9) of the PBA provide that the Tribunal shall appoint a time for and hold a hearing, and by order may direct the Superintendent of Financial Services (the “Superintendent”) to make or refrain from making the intended decision indicated in this notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the PBA and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

IF NO WRITTEN REQUEST FOR A HEARING IS MADE within thirty (30) days after this Notice is served on you, TAKE NOTICE THAT the Superintendent will carry out the Refusal to make an Order pursuant to section 62.1 of the PBA.

A completed Request for Hearing form must be received by the Tribunal within 30 days after this Notice is served on you. The form may be mailed, faxed, or delivered to:

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

Attention: The Registrar
Fax: 416-226-7750

The hearing before the Tribunal will proceed in accordance with the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Those Rules are available at the website of the Tribunal: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at 416-590-7294, or toll free at 1-800-668-0128 ext. 7294.

REASONS FOR INTENDED DECISION:

1. The Plan is a multi-employer pension plan under the PBA that was established on November 1, 1973, and has approximately 11,300 active members.

2. The Board of Trustees for the Plan (the “Trustees”) is the administrator of the Plan.
3. The International Union of Operating Engineers, Local 793 (the “Union”), is a trade union representing members of the Plan.
4. Coco Paving Inc. (the “Applicant”) is one of the participating employers under the Plan.
5. On March 13, 2017, the Applicant filed an application requesting the consent of the Superintendent to refund alleged overpayments by the Applicant into the pension fund for the Plan. The alleged overpayments were made from April 2010 to September 2014.
6. The Applicant brought the alleged overpayments to the attention of the Union in November 2014. The Union requested information to support the claim, which the Applicant supplied by June 2016. The Union objected to the requested refund in or about June 2016, and the Applicant filed a grievance with the Ontario Labour Relations Board (the “OLRB”) in June 2016.
7. The parties to the OLRB proceeding were the Applicant, the Union, and the Trustees. The Union brought a motion, supported by the Trustees but opposed by the Applicant, to have the grievance dismissed on the ground that the Superintendent had the expertise to deal with the case. On February 17, 2017, the OLRB issued a decision that it was appropriate to defer the hearing of the grievance to a determination by the Superintendent. As stated above, the Applicant made the application to the Superintendent on March 13, 2017.
8. Article VII of the Plan states that each employer shall make contributions under the terms of the applicable collective agreement or the participation agreement between the Trustees of the Plan and the employer. Contributions are to be remitted to the pension fund by the 15th day of the month following the month in which the contributions are payable. Employers are also required to submit to the Trustees reports respecting the names of employees, social insurance numbers, hours worked, and such other relevant data as the Trustees may require.
9. The Plan is silent on the refunding of overpayments, aside from Article VII.08, which allows a return of contributions to avoid revocation of the Plan’s registration by the Canada Revenue Agency.
10. An Agreement and Declaration of Trust dated July 20, 1994, states in Article 3.05(b) that nothing in the agreement shall prevent an employer contribution “made by a mistake of fact” from being returned by the Trustees to the employer.
11. Section 62.1 of the PBA governs the refund of overpayments related to pension plans, and states that if an employer makes an overpayment into the pension fund, an application may be made for the Superintendent’s consent to the payment from the fund to the employer related to the overpayment if the application is made by the later of: a) 24 months after the date on which the employer made the payments; b) 6 months after the date on which the administrator, acting reasonably, became aware of the overpayment.
12. Section 62.1(3) of the PBA states:

The employer or, in the case of a jointly sponsored pension plan or a multi-employer pension plan, the administrator may apply to the Superintendent for consent to the

payment from the pension fund to reimburse the employer for a payment described in subsection (1). (That is, an overpayment into the pension fund.)

13. Based on the statutory provisions, there are two jurisdictional reasons to refuse the application:
 - a. The Plan is a multi-employer pension plan. Therefore, an application under section 62.1 of the PBA must be made by the plan administrator. The Applicant is a participating employer, not the administrator of the Plan. The Applicant therefore has no status to bring the application, and the Superintendent consequently has no jurisdiction to consent to it.
 - b. Even if it is held that the Applicant has status to make the application, the application was not brought to the Superintendent within the time limits set out in section 62.1 of the PBA. The last alleged overpayment was made in September 2014. Therefore, the application to the Superintendent should have been made either by September 2016 (24 months after the date of the last payment) or by December 2016 (within six months of the date the Trustees became aware of the claim, which may have been as late as June 2016 when the OLRB grievance was filed)
14. An extension of the deadline for making an application has the potential of causing prejudice to both the members on whose behalf the alleged overpayments were made (as they relied on those payments as being accurate) and to the other members of the Plan (as a refund could negatively impact the solvency of the Plan)
15. Although section 105 of the PBA allows the Superintendent to extend a procedural time limit upon application by an affected person, the Superintendent must be satisfied that there are reasonable grounds for doing so. The Superintendent is not satisfied that there are reasonable grounds in this case.
16. Such further reasons as come to the Superintendent's attention.

DATED at Toronto, Ontario, this 13th day of May, 2019.

Original Signed By

Lester J. Wong
Deputy Superintendent, Pensions
By delegated authority from the
Superintendent of Financial Services

Copy

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1 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 fifth day after the date of mailing.

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