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Woodbine Entertainment Group Mutuel Employees' Pension Plan - January 13, 2009.

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 under section 87 of the *PBA* relating to the **Woodbine Entertainment Group Mutuel Employees' Pension Plan**, Registration Number 0430165

TO:

CAW Local 2007

129 Riverwalk Place
PO Box 549
Rockwood, ON
N0B 2K0

Attention:

Brian D. Henderson
President

Bargaining Agent

AND TO:

Woodbine Entertainment Group

555 Rexdale Boulevard
PO Box 156
Toronto, ON
M9W 5L2

Attention:

Debra Carey
Vice-President, Human Resources

Employer and Administrator

NOTICE OF PROPOSAL

I PROPOSE TO REFUSE TO MAKE AN ORDER in respect of the Woodbine Entertainment Group Mutuel Employees' Pension Plan Registration Number 0430165 (the "Plan") under section 87 of the *PBA* requiring the Administrator of the Plan to accept all Non-Seniority List mutuel employees of Woodbine Entertainment Group ("Woodbine") who meet the minimum service requirements under the *PBA* as members of the Plan retroactive to 1988.

REASONS:

1. The establishment of the Plan and eligibility for membership in it arise out of collective agreements (the "Collective Agreement") bargained between Woodbine and the union representing its mutual employees. The latest Collective Agreement was negotiated between the Canadian Racetrack Workers Union (Mutuels) and Woodbine. The Canadian Racetrack Workers Union (Mutuels) has since merged into the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and the employees of Woodbine are currently represented by CAW Local 2007 (the "CAW").
2. The Plan provides for the participation of employees who are placed on a seniority list (the "Seniority List" employees). Employees not on the Seniority List are not entitled to membership in the Plan.
3. The Seniority List is prepared in accordance with the terms of the Collective Agreement which governs the terms of employment of the mutual employees of Woodbine and the exclusion of employees not on the Seniority List from Plan membership is consistent with the terms of the Collective Agreement.
4. Under the current Collective Agreement there are three categories of employee – Seniority List, Non-Seniority List – on Eligibility List ("Eligibility List") and Non-Seniority List – not on Eligibility List ("Non-Seniority List"). Eligibility List employees were added in 1981 and constitute a list of employees eligible to be promoted to the Seniority List provided they meet certain conditions.
5. Section 31 of the *PBA* requires that every employee "of a class of employees for whom a pension plan is established" is eligible to be a member of the pension plan and requires part-time members of the class be admitted to membership in a pension plan after no later than twenty-four months of less than continuous full-time employment (provided the member has earnings of not less than 35% of the Year's Maximum Pensionable Earnings under the *Canada Pension Plan* R.S.O. 1990 c. P.8 s.1 or 700 hours of employment with the employer, whichever is less).
6. Section 33 of the *PBA* authorizes the Superintendent to order an administrator to accept an individual employee as a member of a pension plan where the Superintendent is of the opinion that, on the basis of the nature and terms of employment of the employee, the member is a member of the class for whom the pension plan was established. FSCO Policies C100-100 and C100-300 confirm that in determining what constitutes a class of employees, the Superintendent will be guided by section 33 of the *PBA* in his examination of the nature and terms of employment of the employees in question. Policy C100-300 states "One of the goals of pension reform is to expand coverage for employees who work part-time. That is to be achieved within the framework of a voluntary private pension system and without artificial or arbitrary distinctions among plan members."
7. Both the CAW and Woodbine agree that all employees perform the same type of job functions.
8. The CAW is of the view that Seniority List employees (who are eligible for membership in the Plan) and Non-Seniority List/Eligibility List employees (who are not eligible for membership in the Plan) are members of the same class on the basis that the only significant difference

between Seniority List employees and other employees is the number of hours worked. The CAW claims that all Seniority List employees are "full-time" employees and all other employees are "part-time" employees. The CAW submits that all employees must be admitted to membership in the Plan accordingly. Woodbine disagrees with this position.

9. The Superintendent has reviewed the submissions of the CAW and Woodbine and is of the opinion that Seniority List employees, based upon the nature and terms of their employment, constitute a distinct and separate class of employee.
10. In making this determination, the Superintendent relies upon submissions confirming that the Collective Agreement, bargained between unions representing the employees and Woodbine, creates and establishes the different classes of employees and differentiates between them in numerous ways, including:

Seniority List employees are granted preference in the allocation of work and required to be available for a minimum of twenty-six (26) hours of work a week;

Where jobs are reduced as a result of automation, Seniority List employees are entitled to be moved to other available positions with similar work and remuneration or to train for other positions at the Company's expense. Non-Seniority List employees are not entitled to these job security provisions;

Seniority List employees who are not scheduled for at least 90% of the maximum hours for five shifts in any given week may request training in another job classification if there is work available in that classification that would have enabled him or her to be scheduled for the full complement of hours or shifts in the week. Non-Seniority List employees are not entitled to this job security provision;

Seniority List employees may only be terminated for "just and sufficient cause" while other employees are "deemed terminated" if they do not work at least one shift over a period of 12 consecutive months unless unable to work due to extended illness or injury;

Seniority List employees must apply to the Company for permission to take a leave of absence. Other employees are not required to do so;

Hourly wages are higher for Seniority List employees than for other employees;

Seniority List employees received a signing bonus of \$250 upon ratification of the Collective Agreement. Other employees received a signing bonus of \$150;

Seniority List employees are entitled to vacation pay based on length of service up to 11%. Vacation pay for other employees is fixed at 4%, regardless;

Seniority List employees earn sick credits at the rate of three hours per month while other employees are not entitled to sick credits;

The minimum shift length for Seniority List employees is longer (5 hours) than other employees (4.5 hours);

Seniority List employees are entitled to be paid the difference between jury duty pay and their regular remuneration while serving on jury duty. Other employees are not entitled to the difference;

Seniority List employees are provided with group life, health, dental, accidental death and dismemberment, and short-and long-term disability benefits, including post-retirement benefits from early retirement age to age 65;

Prior to February, 2007, the Collective Agreement provided employee benefits only to Seniority List employees. The level of coverage provided to other employees as a result of recent bargaining remains significantly lower than the level provided to Seniority List employees.

11. The Superintendent also notes that:

Qualification for membership in the Plan is not based upon "full-time" employment. Rather, the Plan, as bargained, is open to all new employees on the date they are placed on the Seniority List.

The Collective Agreement does not define and assign "full-time" and "part-time" status to employees and it appears that under the terms of the Collective Agreement, it is possible that a Non-seniority List employee/Eligibility List employee could work more hours per week than a Seniority List employee.

12. The Collective Agreement agreed to between Woodbine and the CAW, in establishing the different classes of employee and differentiating between them with respect to the terms of their employment, has effectively constituted the Seniority List employees as a regular or "core" group of employees, whose terms of employment differ substantially from the other employees, including the provision of a pension plan.

13. The differentiation between Seniority List and other employees established in the Collective Agreement is not reflective of an artificial or arbitrary distinction made by Woodbine and the unions and limitation of membership in the Plan to that class of employee alone does not violate section 31 of the *PBA*.

14. Such further and other reasons as may come to my attention.

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. *

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street, 14th Floor
Toronto, ON 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 13th day of January, 2009.

K. David Gordon
Deputy Superintendent, Pensions

copy:

TO:

Fasken Martineau DuMoulin LLP
66 Wellington Street West
Suite 4200, Toronto-Dominion Bank Tower
Box 20, Toronto-Dominion Centre
Toronto, ON
M5K 1N6

Attention:

Peggy A. McCallum

* **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.