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Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada, Registration Number 302851

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

AND IN THE MATTER OF the decision of the Superintendent of Pensions for Ontario (the "Superintendent") dated January 13, 1997, with respect to the transfer of assets from the Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada, Registration Number 302851 (the "Pension Plan") to the St. Joseph's Health Centre Pension Plan, the Providence Centre Pension Plan, and the Morrow Park Plan (the "New Plans");

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act.

BETWEEN:

**THE CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCALS No. 1144 and 1590 ("CUPE")
Applicant**

- and -

**SUPERINTENDENT OF PENSIONS, THE SISTERS OF ST. JOSEPH FOR THE DIOCESE OF
TORONTO IN UPPER CANADA (the "Sisters"), ST. MICHAEL'S HOSPITAL,
ST. JOSEPH'S HEALTH CENTRE and PROVIDENCE CENTRE (the "Hospitals")
Respondents**

BEFORE: C.S. (Kit) Moore, Chair
M. Elizabeth Greville, Member
David E. Wires, Member

APPEARANCES: **For CUPE:**
Mr. M. Zigler
Mr. R. Tomassini

**For the Superintendent of
Pensions:**
Ms. D. McPhail
Ms. L. McDonald

For the Sisters and the Hospitals:
Ms. F. Kristjanson
Mr. A. Fanaki

Hearing Dates: October 26, 27 and November 17,
1998, Toronto, Ontario
Decision Released: December 18, 1998, Toronto,
Ontario

REASONS FOR DECISION

Nature of the Application

The Superintendent of Pensions for Ontario (the "Superintendent") refused to grant relief requested by the Canadian Union of Public Employees Locals No. 1144 and 1590 ("CUPE"), including a request by CUPE that the Superintendent issue an order under s. 87(1) of the Act that the Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada, Registration Number 302851 (the "Pension Plan") and its successors constitute a multi-employer pension plan (a "MEPP"). CUPE filed a Request for Hearing under s. 89 of the Act with the Pension Commission of Ontario (the "Commission") asking that the Commission declare the Pension Plan to be a MEPP subject to s. 8 (1)(e) of the Act, and requesting the Commission to make orders regarding: (I) the Pension Plan's administration under s. 8 (1) (e); (ii) the proposed transfer of assets to the Hospitals' New Plans; and (iii) the status of the New Plans. Following a hearing on the Commission's jurisdiction in these matters, the Commission determined that it had jurisdiction to determine whether the Pension Plan is a MEPP subject to s. 8 (1)(e) of the Act (the "MEPP issue") and declined to take jurisdiction of the other matters prior to determining the MEPP issue.

The Facts

The following facts can be found in the Agreed Statement of Facts on Jurisdictional Issues provided to the hearing panel, on consent, at the hearing on jurisdiction.

Effective January 1, 1958, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada (the "Sisters") established a pension plan for certain employees, and amended the plan from time to time.

In Article 1.20 of the Pension Plan, amended and restated as at January 1, 1992, "employee" is defined as meaning "any employee who is employed on a full-time or less than full-time basis at an Hospital", but not meaning "any person who is a casual or temporary employee of the Hospital or who is remunerated under contract for special services or on a fee for service basis".

"Employer" is defined in Article 1.21 of the Pension Plan as meaning "for the purposes of this Plan only, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its personal capacity as employer with respect to the Hospitals".

"Hospital" is defined in Article 1.23 of the Plan as follows: "Hospital" means with respect to an Employee either Fort Bonne Association of Ontario, St. Joseph's Health Centre, St. Michael's Hospital, Providence Centre (formerly Providence Villa and Hospital) or the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada with respect to the employees of the Sisters of St.

Joseph for the Diocese of Toronto in Upper Canada whose duties relate to the aforementioned hospitals plus any other health facility of the Sisters of St. Joseph as designated by the Sisters of St. Joseph from time to time.

The term "administrator" is defined in Article 1.03 of the Plan as meaning "the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its capacity as administrator under the Pension Benefits Act and Income Tax Act".

In 1994, the Commission received a letter written on behalf of the Sisters, stating that St. Joseph's Health Centre and Providence Centre would be separately incorporated on January 1, 1995, that the Sisters' plan would be split as of that date so that two new plans would apply to the two new corporations, and that St. Michael's Hospital would be incorporated on January 1, 1996, at which time the Sisters' plan would become the St. Michael's Hospital Plan. On December 6, 1994, the Sisters sent letters to Pension Plan participants, informing them of the Sister's intent to incorporate Providence Centre and St. Joseph's Health Centre on December 31, 1994 and to incorporate St. Michael's Hospital a year later.

The Sisters amended and restated its plan as at January 1, 1995. The Preamble to the amended and restated plan states in part:

Effective January 1, 1995, all assets and liabilities with respect to the employees or former employees of the St. Joseph's Health Centre and the employees or former employees of Providence Centre, who were Members or the Spouses, former Spouses, Beneficiaries, Dependent Children or joint annuitants of former Members entitled to benefits pursuant to the terms of the Plan as of December 31, 1994, subject to regulatory approval, will be transferred to the St. Joseph's Health Centre Pension Plan and the Providence Centre Pension Plan, respectively.

During 1996, the Superintendent received submissions written on behalf of CUPE, opposing the Sisters' splitting of the Pension Plan and transfer of assets. The Superintendent also received written submissions made on behalf of the Sisters, responding to the submissions made on behalf of CUPE.

On January 13, 1997, the Superintendent wrote to CUPE's legal counsel refusing to grant the relief requested in CUPE's submissions. In particular, the Superintendent refused to issue an order under s. 87(1) that the Pension Plan and any of its successors constitute a MEPP established pursuant to a collective agreement or a trust agreement within the meaning of s. 8(1)(e) of the Act. On the same day, the Superintendent consented to transfers of assets from the Pension Plan to the St. Joseph's Health Centre Plan and to the Providence Centre Plan.

On January 27, 1997, on CUPE's behalf, letters were sent to the Superintendent and to counsel for the Sisters stating that CUPE intended to appeal the Superintendent's decisions dated January 13, 1997 and requesting that transfers of assets be held in abeyance pending the outcome of the appeal.

On February 11, 1997, a Request for Hearing Under Section 89 of the Act was submitted to the Commission on CUPE's behalf.

Preliminary Matters

Following an initial pre-hearing conference and telephone conference call among the parties, a further pre-hearing conference was held at which a preliminary question arose as to whether the Commission had jurisdiction to conduct the hearing. The parties agreed to argue the issue of jurisdiction in advance of the merits. The Commission received written submissions on the matter, heard oral argument and advised the parties, by letter dated March 13, 1998, that it had determined that the Commission had jurisdiction to determine whether the pension plan is a MEPP under the Act. Written reasons were published in a decision released April 24, 1998 and amended May 13, 1998.

At the hearing on jurisdiction, the hearing panel was also asked to determine its jurisdiction in respect of four other issues relating to division of the Pension Plan, transfer of assets, section 80 and section 81 of the Act. In a subsequent letter dated May 29, 1998, the Commission advised the parties that it did not then have jurisdiction to hold a hearing under s. 89 of the Act regarding any of these four issues. Written reasons were published in a decision released May 29, 1998.

At a further pre-hearing conference held June 15, 1998, the parties agreed that disclosure of certain documents requested by CUPE was contested. A hearing into the disclosure was held on July 27, 1998 before the full panel. The Commission received written submissions, heard oral argument, and advised the parties by letter that all documents sought by CUPE and relevant to the issues to be determined in the hearing on the MEPP issue were to be disclosed by the Sisters as requested by CUPE, on a confidential basis. Written reasons were published in a decision released September 9, 1998.

The Issue

Was the Pension Plan a multi-employer pension plan (a "MEPP") within the meaning of the Act, and therefore required to be administered in accordance with s. 8 (1)(e) of the Act?

The Relevant Legislation

In the Act, Section 1 includes the following definitions:

1.--"employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related,

1.--"multi-employer pension plan" means a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made

to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the *Business Corporations Act*.

Other relevant excerpts from the Act follow:

8.--(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such¹ representatives of the members shall be Canadian citizens or landed immigrants;

87.--(1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.

(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,

- a. that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;
- b. that the pension plan does not comply with this Act and the regulations; or
- c. that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

89.--(1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.

(2) Where the Superintendent proposes to make an order under,

(e) section 87 (administration of pension plan in contravention of Act or regulation), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

(6) A notice under subsection (1), (2), (3), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Commission if the person delivers to the Commission, within thirty days after service of the notice under that subsection, notice in writing

requiring a hearing, and the person may so require such a hearing.

94. (4) The Superintendent shall exercise the powers and perform the duties that are vested in or imposed upon the Superintendent by this Act, the regulations and the Commission.

96. It is the duty of the Commission,

(a) to administer this Act and the regulations;

The Arguments

CUPE argues that the Pension Plan meets the definition of a MEPP under s.1 of the Act and so must be administered in accordance with s. 8 (1)(e) of the Act. Its argument may be summarized as follows:

1. Before incorporation, the Hospitals operated as divisions and unincorporated entities. Each Hospital viewed itself as a separate organization and was viewed as such under other statutes. Each Hospital described itself in organizational terms, and each had a Board supervising and overseeing its business operations. In addition to a Board, each Hospital had all the trappings of a separate corporation, including an audited financial statement, chief executive officer, other signing officers, and a by-law.
2. Pension Plan annual reports identified the Hospitals as contributing employers, and Pension Plan text wording was ambiguous in this regard. Collective agreements were concluded separately by each Hospital and required Hospital employees to participate in the Pension Plan. Employee payroll stubs and income tax forms showed the Hospitals, not the Sisters, as employers. Since 1959, the Sisters made little or no financial contribution to cover Hospitals' costs, which are largely government funded.
3. CUPE argues that each Hospital, on a broad and purposive interpretation of the Act, falls within the definition of "employer", which includes reference to " the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related ". CUPE also argues that the Pension Plan is not a "plan where all the employers are affiliates within the meaning of the Business Corporations Act", and therefore is not excluded from the Act's definition of "multi-employer pension plan".

The Respondent Sisters and Hospitals argue that the Pension Plan does not meet the definition of a MEPP under s.1 of the Act, and that in any event it should not be administered in accordance with s. 8 (1)(e) of the Act. Their arguments are summarized below:

1. The Sisters owned and operated all bank accounts from which the Hospitals' payroll and benefit costs were met, in the business names of the Hospitals, and government funding was deposited into the Sisters' bank accounts. Although the Sisters nominated signing officers at each Hospital, no Hospital had authority to borrow or to operate those bank accounts. The requirement of the Public Hospitals Act that a hospital be governed and managed by a board did not confer separate legal existence on the Hospitals, nor did it disregard the Sisters as owner.

2. Prior to the Hospitals' incorporation, the Hospitals were business divisions of the Sisters. The only employer, the only source of remuneration to Hospital employees, was the Sisters. In addition, there was no agreement, statute or municipal by-law requiring any person or organization other than the Sisters to contribute to the Pension Plan.

3. Where a "person" is the employer (as was the Sisters), then the full meaning of "person" in the Act's definition of employer should be accorded and the enquiry should be at an end. Use of the term "organization" in this definition is not intended to confer separate legal status to divisions of persons.

4. If, in the alternative, the Commission were to find that the Sisters was not the sole employer, then on a purposive interpretation of the Act, the Hospitals would be affiliates, as each Hospital is controlled by the same person, the Sisters.

5. Finally, if the Commission were to find the Pension Plan to be a MEPP within the meaning of s.1 of the Act, the Respondent Sisters and Hospitals argue that it was not originally established "pursuant to a collective agreement or a trust agreement" and therefore would not be subject to s. 8(1)(e).

For many of the same reasons put forward by the other Respondents, the Superintendent also argued that the Sisters was the only source of Pension Plan members' remuneration and the only employer required to contribute to the Pension Plan, with the result that the Pension Plan was not a MEPP. The Superintendent added that, in the alternative, the Sisters owned and controlled the Hospitals, which meant that the Hospitals were affiliates of the Sisters, and the Pension Plan was not a MEPP.

Laches and Delay

The Respondent Sisters and Hospitals also argued that CUPE's delay in requesting this hearing, and the resulting prejudice to the Sisters, should cause the Commission to give effect to the equitable doctrine of laches, and refuse to grant any relief requested by CUPE in this matter.

CUPE argued that efforts had been made during the past ten years to deal with the MEPP issue; for example, when discussions were held with the Sisters regarding amalgamation of the Pension Plan with the Hospitals of Ontario Pension Plan ("HOOPP"). Reference to those discussions was noted in the minutes of the Sisters' General Council meeting of November 19, 1992.

Given the significance of the MEPP issue, the lack of specific authority in the Act to consider a delay of this nature, and the time required for CUPE to deal fully with the HOOPP discussions, the hearing panel did not find that the delay warranted a refusal to consider the MEPP issue. In the panel's view laches is not covered by s.113 of the Act.

Reasoning and Result

In deciding the MEPP issue, the hearing panel must first determine whether the Pension Plan meets the Act's definition of a MEPP. In doing so, the panel must address the following three

questions:

1. Was the Pension Plan established and maintained for two or more employers?
2. Were contributions made to a pension fund, by those employers or on their behalf, by reason of agreement, statute or municipal by-law?
3. Were the employers affiliates within the meaning of the *Business Corporations Act*?

If the panel were to conclude that the answers to questions (1) and (2) are "yes" and the answer to question (3) is "no", the plan would be a MEPP. The panel must then determine whether the MEPP is subject to s. 8(1)(e) of the Act, which requires the MEPP to be "established pursuant to a collective agreement or a trust agreement".

1. Was the Pension Plan established and maintained for two or more employers?

In its argument that the Hospitals are separate employers, CUPE stresses the perception given to employees that the Hospitals are separate organizations responsible for pension plan management and other employment-related activities. For example, the panel heard evidence from CUPE representatives that collective bargaining matters were addressed directly by Hospital personnel. Reference was also made to Pension Plan Annual Reports and Hospital planning documents referring to the Hospitals as Pension Plan contributors and separate organizations. CUPE also noted that pay stubs and T4 income tax forms showed the Hospitals, not the Sisters, as employers, and that day-to-day banking transactions were carried out by the Hospitals.

On the other hand, these same CUPE representatives gave evidence that they had little or no knowledge of the Sisters' role in Hospital employment matters, nor did any of those witnesses deal directly with the Sisters on these matters. With these two facts in mind, it is not surprising that these witnesses viewed the Hospitals as employers.

When the panel heard from witnesses who were familiar with the Sisters' relationship to the Hospitals, or who were directly involved in the Sisters' operations, a quite different picture began to emerge. For example, the Sisters owned and operated the bank accounts, in the business names of the Hospitals, and appointed signing officers through banking resolutions passed by the Sisters. All Ministry of Health funding pursuant to the *Public Hospitals Act* was deposited to these bank accounts, and all payroll and benefit costs were paid from them.

While Hospital names were shown on pay stubs and T4 forms, there is no question in the minds of the hearing panel that employees' remuneration, to which pension benefits were related, was paid from bank accounts under the control of the Sisters. The Sisters also appointed the auditors for Hospital financial statements, approved appointments of Hospital Board members and other senior officers, and approved Hospital by-laws. Not only did the Sisters own the property used in the operation of the Hospitals, but evidence was also given that assets of one Hospital were available to the Sisters to satisfy the debt of another Hospital.

In the panel's view, none of the three Hospitals controlled bank accounts from which employees remuneration was paid, with the result that none of the Hospitals could be considered employers as defined in the Act. Instead, the Hospitals were functioning as business divisions of a single employer, the Sisters, which had retained the powers to own and operate each of the Hospitals.

As a result, the panel concludes that prior to incorporation of the Hospitals, the Pension Plan was established and maintained for employees of only one employer, the Sisters.

2. Were Pension Plan contributions required to be made to the pension fund by more than one employer by reason of agreement, statute or municipal by-law?

Having determined that, prior to the Hospitals' incorporation, only one employer, the Sisters, existed for purposes of the Pension Plan, the panel then directed its attention to the question of whether contributions were required from more than one employer by reason of any agreement, statute or municipal by-law. The hearing panel was presented with no evidence that Pension Plan contributions were made by reason of statute or municipal by-law.

Was there an agreement under which contributions to the Pension Plan were required from more than one employer? The Sisters first established the Pension Plan effective January 1, 1958 through a group annuity contract with the Canada Life Assurance Company, which identified only the Sisters as the employer contributing to the Pension Plan. The group annuity makes no reference to Hospitals contributing to the Pension Plan. A trust agreement made March 31, 1975 between National Trust Company and the Sisters provided for "pension contributions on account of its said hospital employees" to be received by the trustee. This trust agreement makes no reference to Hospitals contributing to the Pension Plan.

The collective agreements for CUPE members require participation in the Pension Plan, but no reference is made to the amount of any contributions, how those contributions are made, or who makes them.

The Pension Plan text contains the following definitions:

1.20 "Employee" means any employee who is employed on a full-time or less than full-time basis at an Hospital.

1.21 "Employer" means for purposes of this Plan only, the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada in its personal capacity as employer with respect to the Hospitals.

The "Contributions" section of the Pension Plan, in addition to requiring Employees to contribute, states that:

3.02 "The Employer shall pay into the Pension Fund.....in such amounts and at such times as the Sisters of St. Joseph shall determine."

While the Pension Plan text contains some ambiguous wording, the Employer is clearly defined as the Sisters and it is only the Sisters and the Employees that are required to contribute to the Pension Plan.

As a result, the panel concluded that the Sisters was the only employer required to contribute to the Pension Plan by reason of agreement, statute or municipal by-law.

3. Were the employers affiliates within the meaning of the Business Corporation Act?

Given the panel's finding that the Sisters was the only employer contributing to the Pension Plan, and the only employer required to contribute to the Pension Plan, there is no need to address this third aspect of the MEPP definition.

CONCLUSION

For these reasons, the hearing panel finds that the Pension Plan did not meet the definition of a MEPP under the Act, and therefore is not subject to the requirements of s. 8 (1)(e) of the Act.

Dated this 18th day of December, 1998 at the City of North York, Province of Ontario.

C.S. (Kit) Moore, Chair

M. Elizabeth Greville, Member

David E. Wires, Member