

Decision No. P0095-1999-2

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c.28 (the "Act");

AND IN THE MATTER OF a proposal by the Superintendent of Financial Services to Make an Order under section 87 of the Act respecting the **Retirement Plan for Employees of Dustbane Enterprises Limited**, Registration Number 229419 (the "Plan");

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

B E T W E E N:

DUSTBANE ENTERPRISES LIMITED

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES, 548264 ONTARIO INC., and 818787 ONTARIO LIMITED

Respondents

BEFORE:

Kathryn M. Bush
Vice Chair of the Tribunal and Chair of the Panel

Louis Erlichman
Member of the Tribunal and of the Panel

David Wires
Member of the Tribunal and of the Panel

APPEARANCES:

Andrew K. Lokan and
Karen Shaver
For the Applicant

Deborah McPhail
For the Respondent Superintendent

Linda Galessiere
For the Respondents

548264 Ontario Inc. and
818787 Ontario Limited
HEARING DATES: October 3, 4, 5 and 16, 2000

REASONS FOR MAJORITY DECISION

A. THE BACKGROUND

The Dustbane Pension Plan (the "Plan") was originally registered with the Pension Commission of Ontario on June 1, 1967. Prior to September 1, 1984, the Plan was an annuity purchase plan funded through a Group Deferred Annuity Contract with Standard Life Assurance Company of Canada. Effective June 1, 1984, the Plan became a defined benefit plan and was funded through a Trust Agreement with Mutual Life (now Clarica).

Dustbane Enterprises Limited ("Dustbane") is the Administrator of the Plan. The Plan is for the employees of Dustbane, its subsidiaries, associated or affiliated companies and distributors. The Respondents 548264 Ontario Inc. and 818787 Ontario Limited were at June 1, 1990 distributors under the Plan.

Subsequent to discussions about changing the contractual relationship between Dustbane and its distributors, the Directors of Dustbane passed a resolution on January 30, 1990 to amend the Plan effective June 1, 1990 to provide that distributors would no longer be part of the Plan and that assets equal to the transfer value would be transferred "to an RRSP, lock-in RRSP, or paid in cash to each employee depending on what they are entitled." The transfer value relative to the distributors was later determined to be \$303,700.

At June 1, 1990, the companies in the distributor group (the "Distributors") were J. W. Evans Lessee-Dealer Ltd., Masters Sanitation Ltd., S.M. Bouchard (1978) Inc., D.R. Huntington Sales Ltd., Robinson Sanitation, J.J. Edstrom (1974) Ltd., 818787 Ontario Limited, Mutual Sanitation & Supplies Ltd. and Columbia Distributors Ltd.

At that time none of the Distributors was an affiliate of Dustbane within the meaning of the term "affiliate" in the *Ontario Business Corporations Act*, R.S.O. 1990, c.B.16.

On February 27, 1991 the Plan Actuary filed the Partial Wind-Up Report relating to the June 1, 1990 wind-up. A revised Wind-Up Report was filed on September 23, 1991 which showed a deficit (apparently for the entire plan) of \$33,154. That report indicated that it was "decided to ignore the small going concern deficit because that deficit will be funded as outlined in actuarial valuation as of September 30, 1989." An Actuarial Valuation Report as at June 30, 1995 then showed that the wind-up related to the Distributors was now in a \$212,000 deficit. That Report noted "Benefits were valued at 12% interest. Between June 1, 1990 and June 30, 1995 those assets earned the same rate of return as the whole pension fund while the corresponding liabilities grew at a rate of 12%."

The increase in the deficit arose from the difference between actual Plan earnings and the 12% growth in the liabilities, as well as additional actuarial fees incurred.

In August 1997, Dustbane's Actuary apportioned the deficit for the partially wound-up portion of the Plan amongst the Distributors, notified each Distributor of the amount of its proportionate share of the deficit, and directed each Distributor to pay its share directly to Mutual Life, now Clarica. To date, only one Distributor, Mutual Sanitation, has paid its share of the deficit. One Distributor has become bankrupt since the partial wind up.

The Plan Actuarial Valuation as of June 30, 1998 for the Plan shows that the deficit in the partially wound-up portion of the Plan had increased to \$261,400 as of that date.

On December 21, 1999, the Superintendent made a Notice of Proposal to Make an Order requiring Dustbane to pay an amount equal to the total of all payments due or accrued and not paid as at June 1, 1990 plus interest to the date of payment.

On February 26, 2000, Dustbane brought an application to request a hearing before the Tribunal to direct the Superintendent to refrain from making or carrying out the proposed Order.

At the first pre-hearing conference convened by the Tribunal it was agreed that notice of the hearing would be provided to both the Distributors and the affected former members. As a result of that notice 548264 Ontario Inc. and 818787 Ontario Limited requested to be added as parties to this proceeding, along with Dustbane and the Superintendent. That request was granted upon the consent of the other parties.

B. THE ISSUES

At the Pre-Hearing Conferences the parties agreed that the issues to be determined in this proceeding were as follows:

- (a) As at Partial Wind-Up date, was the Plan a multi-employer plan within the meaning of s.1 of the Act?
- (b) If the answer to issue (a) is "yes", who is required to fund the deficit in the Plan's fund?
- (c) If the answer to issue (a) is "no", who is required to fund the deficit in the Plan's fund?
- (d) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?
- (e) If the answer to issue (d) is "yes", are Dustbane or any of the Distributors liable for the deficit in light of the delay by the regulator in the circumstances of this case?

C. ANALYSIS

- (a) As at the partial wind-up date, was the Plan a multi-employer plan within the meaning of section 1 of the Act?

The Act in section 1 defines an “employer” and a “multi-employer pension plan” as follows:

“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, and “employed” and “employment” have a corresponding meaning;

“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 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*;

Two issues were raised in this proceeding relating to this matter. The first was whether the Distributors were in fact employers within the meaning of the Act or whether in fact Dustbane was properly characterized as the “employer” of the Distributor’s workers for purposes of the Act. The second was whether even if the Distributors were employers for the purposes of the Act whether they agreed to contribute to the Plan.

Considerable evidence was presented on the relationship between Dustbane and the Distributors:

- all the Distributors were separate corporate entities from Dustbane;
- there was no common ownership between Dustbane and the Distributors;
- the Distributors were lessees of their business premises, which included office and warehouse facilities;
- the Distributors appointed their own board members and Dustbane had no role in the Distributors’ boards;
- the Distributors approved their own By-laws/Articles of Incorporation and Dustbane had no role in this;
- the assets of one Distributor were not available to satisfy the debts of another;
- Dustbane prepared cheques for Distributors. In the 1980’s, Dustbane began using a direct deposit system for payroll, in which funds were transmitted directly from Dustbane to the Distributors’ employees’ bank accounts;

- The Dustbane logo was used on the cheques, invoices, and other stationery used by the Distributors, in addition to the Distributor's name, and Dustbane's signs were prominently displayed Distributors' premises.
- Dustbane did not hire and fire, discipline, or set rates of pay for the Distributors' employees, although commission rates for sales staff were the same at Dustbane and each of the Distributors;
- Dustbane had no signing authority on the Bank accounts of the Distributors;
- if the Distributor required a bank loan (and at some point, all of the Distributors required financing), Dustbane guaranteed the loan; and
- Dustbane did not control the Distributors' access to funds. However, where Dustbane had guaranteed the Distributor's bank loan, Dustbane reviewed any withdrawals.

The 1984 restatement of the Plan provides as follows:

s.1.8 "Employer" shall mean Dustbane Enterprises Limited, its subsidiaries or affiliated companies and its distributors who have elected in writing to participate in the Plan.

No written elections were apparently ever made. Dustbane's witness testified that when the Plan was amended and restated in 1984 this was simply a continuation of the existing Plan and therefore that despite the Plan wording written elections were not necessary.

The standard clause in the Distributor agreements covering Dustbane's provision of services was as follows ("Buyer" is the Distributor):

8. Services

Buyer agrees to employ Dustbane exclusively to maintain its books and records of account and Dustbane agrees to provide, in addition to this service, advice by specialists in all areas of operation, advertising and merchandising program and the fulfillment of Buyer's reasonable request for assistance, all services to be provided at a fee of 5% on Buyer's sales volume.

Buyer shall have the irrevocable right at all reasonable times to complete access to and audit said Books and Records of Accounts by an independent auditor of its choice at its own expense. Dustbane agrees to supply the services described in this paragraph with respect of any matter only where, in the opinion of the advisors of Dustbane, the interests of Dustbane and of the Buyer do not conflict.

Dustbane maintained that the 5% fee in the “services” section of the Distributor Agreements was meant to cover the cost of administration of the Plan by Dustbane but not contributions to the Plan.

The Act has many references to multi-employer pension plans (MEPPs) in addition to the definition in Section 1.

- Section 8(1)(e) provides that MEPPs “established pursuant to a collective agreement or a trust agreement” must be governed by a board of trustees with at least 50% member representation.
- Section 10(2) requires that “the documents that create and support a multi-employer pension plan pursuant to a collective agreement or a trust agreement shall set out the powers and duties of the board of trustees that is the administrator of the multi-employer pension plan.”
- Section 14(2) exempts MEPPs “established pursuant to a collective agreement or a trust agreement” from the general prohibition on reducing earned benefits.
- Section 61 requires that an employer who is required to make contributions to a MEPP “shall transmit to the administrator of the plan a copy of the agreement that requires the employer to make the contributions or a written statement that sets out the contributions the employer is required to make and any other obligations of the employer under the pension plan.”
- Section 85 exempts “Pension benefits provided under a multi-employer pension plan” from the guarantees of the Pension Benefits Guarantee Fund (PBGF).
- Section 40(t) of Regulation 909 requires that the annual statement for members of MEPPs include a statement that benefits are not guaranteed by the PBGF and are subject to reduction if liabilities exceed assets at plan wind up.

This is not an exhaustive catalogue of references to multi-employer pension plans in the Act, nor are the references entirely consistent. In some cases, the reference is to a MEPP “established pursuant to collective agreement or trust agreement”, while in others, notably Sections 61 and 85 and Section 40 of the Regulation, the reference is simply to a multi-employer pension plan.

One of the key aims of the Act is the protection of the benefits earned by plan members and beneficiaries. The Act lays down stringent wind up obligations for employers, and establishes a Guarantee Fund to protect members in the event of employer insolvency at wind up.

The provisions of the Act, read together, create a class of multi-employer plans, which are qualitatively different than plans sponsored by a single employer. The Act accepts the limitation of employer liabilities within MEPPs, and exempts MEPPs from Guarantee Fund

coverage, but insists on a clear statement of employer obligations, for the protection of plan members and beneficiaries, and an arguably higher level of trust obligations.

Dustbane has argued for the lowest possible standard in assessing whether a plan qualifies as a multi-employer plan. Referring only to Section 1 of the Act, Dustbane argues that participation in the plan by members employed by corporate entities with some level of independence, and indirect evidence of funds flowing from these entities to the pension fund, are sufficient to render a pension plan a MEPP.

In this case, Dustbane made no effort, prior to the partial wind up, to constitute their pension plan as a MEPP. There were no written agreements concerning pension plan participation with any of the entities which Dustbane now purports to have been separate employers within the MEPP. In none of the Dustbane's reporting to the Pension Commission, from their initial application for registration in 1964 until the partial wind up application, was the plan ever referred to as a MEPP, even when the existence of a MEPP was a specific question on the report. In the three years prior to the partial wind up, the Dustbane pension plan made contributions to PBGF, which would have been unnecessary contributions for a MEPP.

The annual statements sent by Dustbane to pension plan members did not contain the prescribed (by Section 40(t) of the Regulations) warning that, since the plan was a MEPP, there was no PBGF protection, and that benefits could be reduced on wind up.

These were not minor technical breaches of the legislation. It goes directly counter to the protection of plan members and beneficiaries, which is at the core of the Act, to allow an employer to claim, after having failed to meet the clear requirements of the legislation, that the plan is a multi-employer plan, and thereby to evade liabilities on partial wind up.

The Dustbane pension plan clearly failed to meet the requirements of a multi-employer plan under the Act.

Even if it were concluded that the threshold for a MEPP is at the low level proposed by Dustbane, would their argument that each of the Distributors is a separate employer be successful?

On the question of what constitutes an employer, we cannot simply look at whether the Distributors would be considered as separate employers for the purposes of income tax, labour relations, or other legislation. There are a variety of precedents in a variety of legal contexts which require us to consider the specific facts of each case in relation to the legislation at hand, in deciding who is the actual employer.

There is no doubt that each of the Dustbane Distributors was separately incorporated, and named as the employer on employee T-4 forms.

The relationship between Dustbane and its Distributors was a tangled one. Each Distributor was set up to act as Dustbane's sole distributor in a particular geographic area. Dustbane strictly controlled the actions of the Distributors through a distributor agreement. For each of the Distributors, Dustbane laid down sales quotas, limited sales of non-Dustbane products, set wholesale and retail prices, acted as lessor for the Distributors' offices, guaranteed

bank loans to Distributors and generally oversaw all of the financial and other operations of the distributors (for a management fee of 5% of gross sales). The distributor agreements make no mention of the pension plan, or of any employee benefit plan.

Dustbane argued that, despite the lack of any written agreement by any of the Distributors, a decades-long history of plan contributions was clear evidence of a tacit agreement by the Distributors to participate in the pension plan as employers. This argument conflicts somewhat with the Dustbane proposition that each of the Distributors was an independent corporate entity. All of the Distributor Corporations do not have an unbroken history to 1959, and in at least one case, the Distributor Corporation was formed less than a year before the partial wind up.

In 1984, the Dustbane Board of Directors unilaterally converted the Dustbane pension plan from an insured basis to a trustee defined benefit basis, a major change, which increased the possibility of the partial wind up deficit. The decision to convert the plan was made without participation of, or consent by, any Distributor.

The 1984 plan text explicitly requires a written agreement to participate in the pension plan by each employer. It also names the employer as administrator. No written participation agreement was ever obtained from any Distributor, even those who came into being after the 1984 plan changeover. The decision to partially wind up the plan, which Section 68(1) of the Act gives to the Administrator of a multi-employer plan, was made unilaterally by Dustbane. The use of actuarial services for the partial wind up, which accounts for a significant portion of partial wind up deficit, was directed solely by Dustbane.

Prior to the partial wind up, Dustbane did not inform the Distributors that they were Employers (and also, according to plan text, Administrators), and might have particular legal and financial obligations as Employers and Administrators. Dustbane provided the Distributors with no plan documents, other than annual statements sent to the Distributors personally as plan members (which did not identify the plan as a MEPP). Evidence was presented that members' plan statements were distributed via Distributors.

Distributors never took any role as plan administrators, never formally ceded their responsibilities as administrators, or were even consulted on matters like the use of plan surpluses, which would normally be a matter for discussion by plan sponsors and administrators.

When, subsequent to the wind up, the Distributors were told that they could bear some extra liability as the result of the wind up, they requested, first informally, and then formally, basic plan documents, including the plan text. Dustbane refused to provide this information.

Dustbane has argued that the lack of written participation agreements signed by Distributors was a minor clerical oversight. The sections of the Act quoted above show the importance, in the legislation, of clear documentation of Employer obligations in a multi-employer pension plan. Dustbane, acting as sole Administrator of the plan, in sole possession of plan documents, would have been aware, as the Distributors would not, that the plan required Distributors, if they were separate Employers for purposes of the plan, to sign written participation agreements. This was never done.

Dustbane has argued that the fact that “employer contributions” were made by the Distributors is clear proof of the Distributors’ tacit agreement to participate in the Dustbane pension plan as employers. Leaving aside the requirements of both the Act and the Dustbane plan text for explicit written documentation, this assertion is questionable.

On the basis of the evidence presented, it would appear that the cheques prepared by Dustbane for Distributor signature covered overall payroll costs, with no breakdown of payments for the benefits package, let alone payments for employer pension contributions. It is difficult to read employer agreement to participate into payments of which the Distributors were largely unaware.

It is clear that Dustbane acted, until the possibility arose of transferring the responsibility for partial wind up liabilities to the Distributors, as if it were the sole employer and sole administrator of the Dustbane Pension Plan.

If the Distributors were, in fact, separate employers under the Dustbane Plan, Dustbane seriously breached its fiduciary duties as Administrator, under Section 22 of the Act, to the Plan members, and to the Distributors as Employers and co-Administrators, in failing to obtain written participation agreements and consistently failing to act to ensure that employer obligations were broadly understood and would be met.

We therefore conclude that, for purposes of the Act, this plan is not a multi-employer plan, and that Dustbane is the employer.

(c) If the answer to issue (a) is “no”, who is required to fund the deficit in the Plan’s fund?

As we have concluded that this is not a multi-employer plan, the obligation to fund the deficit falls on the Employer, Dustbane.

(d) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?

There is no question that delay occurred in this matter. A June 1, 1990 partial wind-up resulted in a Notice of Proposal over nine years later.

In addition, it appears that a total of 28 employees or officers of PCO/FSCO worked on the Dustbane application between its filing and Notice of Proposal, including 11 Pension Officers, 4 Analysts, Acting Officers or Assistants, 4 Plan Examiners, 2 Actuaries, 5 Consultants, and 3 Directors.

There is, however, a question as to the cause of that delay.

The following is a chronology of the partial wind-up application which is clearly illustrative of delay.

March 29, 1990	Dustbane advises Pension Commission of Ontario (“PCO”) of its intention to partially wind up Plan;
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April 5, 1990 -	PCO Officer acknowledges letter and requests additional information;
April 11, 1990 -	Dustbane provides PCO with copy of Notice to Distributors dated March 24, 1990 regarding the partial wind-up;
May 7, 1990 -	Dustbane provides Distributors with estimates of employer obligations as a result of partial wind up of plan – states that exact options and amounts will only be available “after June 1, 1990 once contribution data to June 1 st has been received from your offices”;
February 27, 1991 -	Dustbane files first Partial Wind-Up report;
July 11, 1991 -	Dustbane requests review and approval of Modern Building Transfer by July 31, 1991;
August 8, 1991 -	PCO requests that Dustbane complete Checklist and questions the Dustbane actuary’s interest rate assumptions;
August 15, 1991 -	Dustbane certifies that all contributions have been made to pension fund to date of partial wind-up;
September 20, 1991 -	Dustbane requests approval to pay benefits to Huntington employee – G. Courtney;
September 23, 1991 -	Dustbane files Revised Wind Up Report including Superintendent’s Checklist and the Dustbane actuary explains basis for attributing interest rates;
October 22, 1991 -	Superintendent authorizes payment of benefits to G. Courtney on condition that transfer ratio maintained at “1”;
November 1, 1991 -	PCO staff advises actuary of deficiencies in Superintendent’s checklist and that Partial Wind-Up Report cannot be approved until Modern Building Transfer asset approved;
November 6, 1991 -	Dustbane actuary advises administrator that Huntington must pay \$173.03 with respect to G. Courtney to maintain transfer ratio of “1”;
December 13, 1991 -	Dustbane submits Revised Superintendent’s Checklist addressing all deficiencies in PCO letter of 1/11/91;
March 20, 1992 -	Letter from PCO staff regarding further deficiencies and requests information about revised Partial Wind-Up report filed on September 23/91;
October 2, 1992 -	Dustbane provides expanded solvency valuation and responds to all issues raised in letter of 03/20/92;

May 3, 1993 -	Dustbane files Final Asset Transfer report for Modern Building Cleaning Inc. sale;
August 30, 1993 -	Superintendent approves Asset Transfer on condition that Dustbane files certified Notice to Plan Members of asset transfer;
November 8, 1993 -	Dustbane files Final Partial Wind Up Report including revised interest rates;
May 31, 1994 -	Dustbane files certified copy of Notice to employees regarding Modern Building Asset Transfer and Superintendent gives final approval of asset transfer;
September 7, 1994 -	Dustbane actuary writes letter to PCO regarding summary of events, breakdown of member benefits using revised interest rates and requests direction and approval to file valuations;
January 5, 1995 -	Dustbane actuary contacts PCO requesting response to letter of 09/07/94;
January 13, 1995 -	Letter from PCO asking Dustbane to clarify partial wind-up report information and requests other information;
April 30, 1996 -	Dustbane resubmits all documents requested, responds to all issues raised and indicates dates that documents addressing issues were originally filed with PCO;
July 22, 1996 -	Letter from PCO requesting clarification about information included in all partial wind up reports;
December 19, 1996 -	Telephone call between PCO and Dustbane actuary regarding triennial valuation as at June 30, 1995;
January 30, 1997 -	Letter from PCO to Dustbane actuary indicating that the partial wind-up will be forwarded to Superintendent for decision by February 6, 1997;
January 31, 1997 -	Dustbane files June 30, 1995 actuarial valuation;
February 3, 1997 -	Dustbane responds to PCO letter of 7/22/96 by referring PCO to previous partial wind-up reports and submissions;
February 28, 1997 -	PCO sends enforcement letter regarding deficit at June 1, 1990;
March 4, 1997 -	Dustbane responds with letter from Mutual Life confirming that special payment - \$78,000 made on January 22, 1997;

August 11, 1997 -	Dustbane actuary allocates deficit among distributors and advises each to make payments directly to Mutual Life;
March 18, 1998 -	Dustbane advises former member that benefits cannot be paid until deficit paid;
September 8, 1998 -	PCO advises Dustbane that Superintendent gave blanket approval to pay benefits;
October 26, 1998 -	Dustbane advises the Financial Services Commission of Ontario (“FSCO”) that it is not in position to finalize member benefits because of unfunded liability and member’s employer is bankrupt;
November 27, 1998 -	s.98 letter to Dustbane demanding copy of written agreement to participate in plan and up-to-date list of distributors;
December 21, 1998 -	Dustbane responds to FSCO, provides copies of distribution agreement and explains service provision, how distributors and employers contribute to plan and the names and addresses of distributors as requested;
March 2, 1999 -	s.98 letter to Dustbane;
March 8, 1999 -	Response from Dustbane;
March 19, 1999 -	Dustbane files actuarial valuation as at June 30, 1998;
June 28, 1999 -	Distributor S.M. Bouchard provides T4 slips 1989-1990 showing S.M. Bouchard Inc. as employer;
June 29, 1999 -	s.98 letter states that the information provided does not adequately address issue of written or oral agreement;
June 29, 1999 -	s.98 letter to distributors regarding the deficit in plan at June 1, 1990;
August 4, 1999 -	FSCO requests that Dustbane actuary provide breakdown of deficit and professional fees since partial wind-up;
August 12, 1999 -	Dustbane actuary responds to FSCO and provides a reconciliation of asset changes from 1990 – 1995 and from 1995 – 1998;
August 30, 1999 -	Distributor J.W. Evans provides copy of distribution agreement;

September 14, 1999 -	Dustbane actuary provides further response to FSCO request regarding a reconciliation of professional fees for 1990-1998;
October 18, 1999 -	Letter from solicitor for J.W. Evans – Distributor explaining relationship with Dustbane, including copies of T4 slips 1985, 1988 – 1990 showing J.W. Evans as employer; and
December 21, 1999 -	Superintendent issues Notice of Proposal to Make an Order against Dustbane.

The Superintendent led evidence on the issue of delay to show that Dustbane was aware each year of the Plan's fund's rate of return and of the 12% interest rate being applied to the partial wind up and that the size of the deficit as revealed in early 1997 should have caused concern. Further, the Modern Building asset transfer took what appeared to be an inordinate amount of time, 4 years, to complete and this hampered the completion of the partial wind-up. In addition, no funding schedule had ever been filed for the deficit shown in the 1989 report, and a funding schedule was necessary in order to obtain approval of the partial wind-up report. Finally, the fact that Dustbane did not complete actuarial valuations between 1986 and 1995 also seemed to slow down the process.

Without commenting on the source of the delay at this time, it is clear that the time spent to complete this partial wind-up contributed significantly to the deficit in this Plan. The members' benefits ought to be protected irrespective of any delay and therefore we do not believe that any delay should affect our findings above.

The question of delay, however, may be relevant to any party seeking an award of costs in this matter.

D. THE DISPOSITION

We reject Dustbane's application and direct the Superintendent to carry out her proposal contained in the Notice of Proposal.

We make no order as to the costs of this proceeding but the panel will entertain written representations on that matter from any of the parties who wish to make them.

DATED at Toronto, this 15th day of February, 2001.

"Louis Erlichman"
Louis Erlichman
Member of the Tribunal and of the Panel

“David Wires”

David Wires

Member of the Tribunal and of the Panel

REASONS FOR MINORITY DECISION

A. ANALYSIS

For the reasons described below I disagree with the Majority Decision except with respect to the issues of delay and costs.

- (a) As at the partial wind-up date, was the Plan a multi-employer plan within the meaning of section 1 of the Act?

The Majority Decision sets out (i) the definitions of an “employer” and a “multi-employer pension plan” from section 1 of the Act and (ii) the testimony of the witnesses for all the parties on the issue of employer status and I will not repeat them.

Two issues were raised in this proceeding relating to this matter. The first was whether the Distributors were in fact employers within the meaning of the Act or whether in fact Dustbane was properly characterized as the “employer” of the Distributor’s workers for purposes of the Act. The second was whether even if the Distributors were employers for the purposes of the Act whether they agreed to contribute to the Plan.

While it is clear that Dustbane had significant influence on the Distributors by virtue of the bank guarantees and the terms of the Distributorships relating to signage and logo usage among other matters, it is also clear that the relationship of the Distributors and their workers was one of employer/employee. The Distributors chose who to hire, including family members, who to fire and the salary levels. Day-to-day operations were controlled entirely by the Distributors. The Distributors maintained employer status for tax purposes.

It is true that the employee/employer status has been interpreted with respect to the purpose of the relevant legislation. The question then arises as to whether the purposes of the Act would alter the determination of the Distributors as employers.

The Act is remedial intended to ensure that pension benefits which are promised are paid. The purposes of the Act do not; however, prefer payment by one employer rather than the other. Accordingly, the purposes of the Act do not justify any alteration in the finding of the Distributors as employers in this proceeding.

The second issue now to be considered is whether the Distributors agreed to contribute to the Plan.

It should be recalled that the definition of “multi-employer pension plan” in section 1 of the Act, as quoted above, has three requirements:

- (a) two or more employers contribute to a pension plan for employees, or contributions are made on their behalf;
- (b) the contributions are made by reason of an agreement, statute, or municipal by-law; and

- (c) the employers are not affiliates within the meaning of the *Business Corporations Act*.

The third requirement was accepted by all parties as being satisfied. Given the finding that the Distributors are employers the first requirement is also satisfied. Accordingly, the matter to be determined was whether contributions were made to the Plan by the Distributors as a result of an agreement.

The 1984 restatement of the Plan provides as follows:

s.1.8 “Employer” shall mean Dustbane Enterprises Limited, its subsidiaries or affiliated companies and its distributors who have elected in writing to participate in the Plan.

No elections were apparently ever made. Dustbane’s witness testified that when the Plan was amended and restated in 1984 this was simply a continuation of the existing Plan and therefore that despite the Plan wording written elections were not necessary.

Dustbane maintained that the 5% fee in the “services” section of the Distributor Agreements was meant to cover the cost of administration of the Plan by Dustbane but not contributions to the Plan.

8. Services

Buyer agrees to employ Dustbane exclusively to maintain its books and records of account and Dustbane agrees to provide, in addition to this service, advice by specialists in all areas of operation, advertising and merchandising program and the fulfillment of Buyer’s reasonable request for assistance, all services to be provided at a fee of 5% on Buyer’s sales volume.

Buyer shall have the irrevocable right at all reasonable times to complete access to and audit said Books and Records of Accounts by an independent auditor of its choice at its own expense. Dustbane agrees to supply the services described in this paragraph with respect of any matter only where, in the opinion of the advisors of Dustbane, the interests of Dustbane and of the Buyer do not conflict.

The evidence supports the following findings:

Initially, Dustbane prepared and sent out payroll cheques to the Distributors for signature by them and distribution to their own employees. At some point in the 1980’s, following an incident in which a group of cheques were lost, Dustbane moved to a system whereby Dustbane (still merely providing a payroll service) would send or deposit pay cheques directly to the Distributors’ employees, and be reimbursed by the Distributors.

Both employee and employer remittances to the Plan (as well as other benefits) were effected by means of cheques prepared by Dustbane and sent to the Distributors for signature, payable in the case of the Plan directly to the Mutual Group.

The witnesses for the Distributors could not recall signing such cheques; however, one admitted that his recollection generally was hazy and the other admitted that it was possible that he had signed such cheques.

It was not contested that the Distributors made other employer remittances by way of cheques prepared as described above, such as Canada Pension Plan, Employment Insurance and other employer-funded benefits.

Accordingly, the evidence supports the determination that the Distributors were contributing to the Plan.

The question then turns to whether the Distributors agreed to participate in the Plan.

With respect to this issue some facts are troubling. The evidence suggests that not only did the Distributors not sign elections as required under the 1984 Plan text they never even received a copy of the Plan text. Rather the Distributors only received annual statements for delivery to their employees and cheques for payment of contributions to the Plan.

The provision of the Distributor Agreement stated above is not at all clear with respect to the obligations that the Distributors under the Plan. However, the Distributors had been part of the Pension Plan since 1959. The Distributors could decline to participate in the Pension Plan, and some in fact did so. Eventually, the topic of the Pension Plan came up at the Advisory Board of Dustbane and Distributors, in the context of the Distributors' desire to terminate or renegotiate their Services Agreement with Dustbane. At this point, some Distributors specifically wanted to remain in the Plan (while not paying the 5% fee and not participating in other benefits). Dustbane was not prepared to agree to this and the decision was made that the Distributors would then cease to participate in the Plan. I disagree with the Majority Decision as to whether this decision was made unilaterally.

One Distributor witness did not recall receiving monthly statements setting out employer contributions. However, he admitted in cross-examination that he was aware when he bought the shares of his company that company made Canada Pension Plan, Employment Insurance and "group insurance" remittances, and that at least by 1983, he was aware his employees were participating in the Plan, his company was being charged for regular employer contributions for the Plan, and that he was "content" with this participation.

Accordingly, while the elections reference in the 1984 Plan text were never completed, and the Distributors do not seem to have been provided with Plan documents as would have been appropriate, it does appear that a 31 year course of participation in the Plan, including the payment of retiree benefits during that time, establish an agreement to participate in the Plan.

In summary, having found that the Distributors were employers contributing to the Plan by agreement the Plan was a multi-employer plan within the meaning of s.1 of the Act.

This Tribunal's decision in *The Canadian Union of Public Employees, Locals No. 1144 and 1590 ("CUPE") and Superintendent of Pensions, the Sisters of St. Joseph for the Diocese of Toronto and Upper Canada (the "Sisters"), St. Michael's Hospital, St. Joseph's Health Centre and Provident Centre (the "Hospitals")* (1998) No. XDEC-42, 12/18/98, (Financial Services Tribunal) ("*Sisters of St. Joseph*") is readily distinguishable from the present case.

In *Sisters of St. Joseph*, the Tribunal found that the Sisters of St. Joseph Plan was not a multi-employer pension plan but was established and maintained only for one employer, the Sisters. The Tribunal reached its conclusion on the basis that there were no separate corporate entities – only divisions of one entity and the Sisters:

- (a) owned and operated all bank accounts from which the Hospital's payroll and benefits costs were met;
- (b) appointed signing officer, auditors and board members to the Hospitals;
- (c) approved the by-laws of the Hospital;
- (d) owned the Hospital properties;
- (e) retained the power to own and operate each Hospital;
- (f) controlled bank accounts from which employee remuneration was paid; and
- (g) had the authority to transfer the assets of one Hospital to satisfy the debts of another.

The Majority Decision cites a number of provisions of the Act which relate to multi-employer plans. The Act and the Regulations thereunder do not provide a systematic code for understanding the intended treatment of multi-employer plans. Rather the legislation contains a series of apparently unconnected provisions that seem to have been intended to address only limited concerns. Multi-employer plans in the collectively bargained arena have different concerns than those in the present case. It would be preferable that the legislation would be amended to provide a more systematic consideration of these plans and to consider the different contexts in which these plans may arise. However, the circumstances under consideration in this matter do not appear to justify overriding the appropriate legal conclusion regarding who was the employer in relation to the relevant employees and who is responsible for the liabilities of the pension plan.

- (b) If the answer to issue (a) is "yes", who is required to fund the deficit in the Plan's fund?

While the Plan documentation could have been clearer on this issue, it would seem appropriate that given that the Distributors were employers participating in the Plan that they would be liable to the deficit allocable to their employees.

No evidence was adduced in this proceeding as to the proper allocation of the deficit and therefore we make no finding on this issue.

We do, however, note two matters arising from the evidence in this matter which are troubling and the parties may wish to consider further.

Firstly, it is unclear whether the Distributors agreed to pay the actuarial fees related to the partial wind-up. No evidence of such agreement was adduced. Prior to the wind-up all actuarial fees seemed to have been paid for out of the 5% service fee quoted above. In March 1990, Dustbane advised the Distributors by letter that the wind-up may result in financial obligations:

“As you are aware, severing from the Dustbane pension plan may result in financial obligations on the part of the Distributor. Our actuarial consultants are presently in the process of preparing an estimate of what each Distributor’s obligations will be at June 1, 1990. Since the final figures can change depending on the options chosen by your employees, it will not be possible to know the exact amounts until after June 1, 1990.”

However, that statement is quite vague as to the source of the financial obligations and certainly no mention is expressly made of the actuarial fees until most of those fees had been incurred.

Secondly, the evidence raises issues as to whether Dustbane properly supplied information regarding the Plan to Distributors and plan members, even upon request.

- (c) Does the Tribunal have a jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?
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I agreed with the Majority Decision with respect to this issue.

B. THE DISPOSITION

In light of our conclusions, I would order the Superintendent to refrain from carrying out the proposal contained in the Notice of Proposal.

I agree with the Majority Decision with respect to the issue of costs.

DATED at Toronto, this 15th day of February, 2001.

“Kathryn M. Bush
Kathryn M. Bush
Vice-Chair of the Tribunal and
Chair of the Panel