

**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 "*PBA*");

**AND IN THE MATTER OF** a Notice of Registration of Amendment pursuant to section 17 of the *PBA* confirming the registration of an Amending Resolution adopted by the Board of Trustees of the International Union of Painters and Allied Trades Province of Ontario Pension Plan, Registration No. 0391680, dated November 24, 2009;

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

**B E T W E E N:**

**RESIDENTIAL PAINTING CONTRACTORS ASSOCIATION**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BOARD OF TRUSTEES OF THE INTERNATIONAL UNION OF PAINTERS  
AND ALLIED TRADES, PROVINCE OF ONTARIO PENSION PLAN,  
INTERIOR SYSTEMS CONTRACTORS ASSOCIATION OF ONTARIO,  
ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS &  
ALLIED TRADES, THE INTERNATIONAL UNION OF PAINTERS & ALLIED  
TRADES AND THE INTERNATIONAL UNION OF PAINTERS & ALLIED  
TRADES, LOCAL 1891, ONTARIO PAINTING CONTRACTORS  
ASSOCIATION, ACOUSTICAL ASSOCIATION OF ONTARIO,  
ARCHITECTURAL GLASS AND METAL CONTRACTORS' ASSOCIATION**

Added Parties

**Date of Hearing:**  
February 16, 2010

**Before:**

Elizabeth Shilton,  
Member of the Tribunal and Chair of the Panel

Heather Gavin,  
Member of the Tribunal and of the Panel

David Short,  
Member of the Tribunal and of the Panel

**Appearances:**

Keith Burkhardt for the Residential Painting Contractors Association

Mark Bailey for the Superintendent of Financial Services

Michael Mazzuca and Anthony Guindon for the Board of Trustees of the International Union of Painters and Allied Trades, Province of Ontario Pension Plan

Jeff Murray for the Interior Systems Contractors Association of Ontario

Joseph Russo for the Ontario Council of the International Union of Painters & Allied Trades, the International Union of Painters & Allied Trades and the International Union of Painters & Allied Trades, Local 1891

Mark Newton for the Architectural Glass and Metal Contractors' Association

Herbert Law for the Acoustical Association of Ontario

Andrew Sefton for the Ontario Painting Contractors Association

**DECISION ON THE JURISDICTIONAL ISSUE**

On May 20, 2009, the Superintendent of Financial Services (the “Superintendent”) issued a Notice of Registration of an amendment to the International Union of Painters and Allied Trades, Province of Ontario Pension Plan (the “Plan”). On June 18, 2009, the Residential Painting Contractors Association (the “RPCA” or the “Applicant”) filed a Request for Hearing (the “application”) in connection with that registration pursuant to s.18(1) of the Pension Benefits Act (“PBA”). In that application, the RPCA challenged the decision to register the amendment, and sought, among other relief, an order “refusing to register the amending resolution” to which the Notice of Registration pertained. The application named the Superintendent as respondent. The Board of Trustees of the International Union of Painters and Allied Trades, Province of Ontario Pension Plan (the “Trustees”), the Interior Systems Contractors Association of Ontario (the “ISCA”), the Ontario Painting Contractors Association (the “OPCA”), the Acoustical Association of Ontario (the “AAO”), the Architectural Glass and Metal Contractors’ Association (the “AGMCA”), and the Ontario Council of the International Union of Painters & Allied Trades, the International Union of Painters & Allied Trades and the International Union of Painters & Allied Trades, Local 1891 (collectively, the “Union”) all filed applications for status as parties. The Board of Trustees is the Plan administrator. The ISCA, the OPCA, the AAO and the AGMCA, along with the Applicant RPCA, are employer associations who represent employers participating in the Plan. The Union represents the members of the Plan. At a pre-hearing conference held on December 4, 2009, the applications for party status were granted.

The respondent and all added parties oppose the application; they will be referred to collectively in these reasons as the “responding parties”.

At a pre-hearing conference, the Trustees indicated that they would be moving to dismiss the application on the basis that the amendment to which the Superintendent’s Notice of Registration pertained was an amendment to a trust agreement, taking the position that a trust agreement was not a “pension plan” within the meaning of the registration requirements for amendments set out in s.12(1) of the *PBA*. The parties agreed that the Trustees’ motion would be dealt with on a preliminary basis. The issue on the motion was stated as follows:

Is the Applicant entitled to a hearing and does the Tribunal have the jurisdiction to convene a hearing under section 89 of the *PBA* in respect of the Notice of Registration issued May 20, 2009 in view of the fact that the Notice pertains to an amendment to a trust agreement?

The ISCA, the OPCA, the AAO and the Union support the Trustees on the motion. The Applicant opposes the motion. Although they oppose the application on the merits, the Superintendent and the AGMCA support the Applicant on the motion.

At the pre-hearing conference, a number of responding parties made it clear that they will also be objecting on jurisdictional grounds to some (or all) of the specific issues raised by the Applicant in its pre-hearing conference brief (which is not before the Tribunal on this motion) and to the remedies set out in that brief, on the grounds that they raise matters over which the Tribunal has no jurisdiction. This motion does not touch in any way on those more specific objections. It addresses only the very narrow issue stated above: the issue of whether the application should be dismissed because it deals with an amendment to a trust agreement.

We have decided that under the circumstances before us, the Tribunal has jurisdiction to proceed with an application challenging the decision of the Superintendent to register an amendment to a trust agreement as an amendment to a pension plan. Accordingly, we dismiss the Trustees’ preliminary motion.

We have set out below the reasons for our decision.

## **BACKGROUND FACTS**

This motion was argued on the basis of an Agreed Statement of Fact. The following, based primarily on that Agreed Statement, sets out the relevant facts as we have found them.

1. The International Union of Painters and Allied Trades, Province of Ontario Pension Plan is a multi-employer pension plan (“MEPP”) established primarily to provide retirement benefits for employees working under collective agreements between and binding upon employers and several Locals of the International Union of Painters and Allied Trades.

2. The Plan has over 5,700 active members and over 5,400 former members and beneficiaries, of which over 1,700 are either retirees or spousal beneficiaries in receipt of monthly benefits.
3. The Plan was established pursuant to an Agreement and Declaration of Trust dated October 4, 1994 (the “Trust Agreement”). The parties to the Trust Agreement are:
  - The Ontario Painting Contractors Association (“OPCA”);
  - The Residential Painting Contractors of Ontario (“RPCA”);
  - The Acoustical Association of Ontario (“AAO”);
  - The Interior Systems Contractors Association of Ontario (“ISCA”);
  - The International Brotherhood of Painters and Allied Trades (now, the International Union of Painters and Allied Trades) (the “International Union”);
  - The Ontario Council of the International Brotherhood of Painters and Allied Trades (the “Ontario Council”); and,
  - The International Brotherhood of Painters and Allied Trades, Local Union 1891 (“Local 1891”).
4. Benefits and eligibility under the Plan are determined in accordance with the Plan text. The Plan text is established and amended by the Trustees.
5. Pursuant to a merger agreement dated May 22, 1996 (the “Merger Agreement”), all parties to the Trust Agreement recognized the Architectural Glass and Metal Contractors Association (“AGMCA”) as an additional party to the Trust Agreement.
6. Pursuant to both the Trust Agreement and the *Pension Benefits Act* (the “PBA”), the Trustees are the administrators of the Plan.
7. Prior to the Merger Agreement referred to in para. 5, the Trust Agreement had provided as follows:

### **3.01 Number of Trustees and Residence**

The Board of Trustees of the Pension Fund shall consist of fifteen (15) Trustees, eight (8) of whom shall be appointed by the Association (“Association Trustees”) and seven (7) of whom shall be appointed by the Union (“Union Trustees”). All Trustees shall reside in Canada.

8. The Merger Agreement amended the total number of trustees by adding three new Association Trustees and three new Union Trustees, but did not alter the fact that the Trust Agreement provided for more Association-appointed than Union-appointed trustees.
9. On May 26, 2008, the Deputy Superintendent of Pensions issued a Notice of Proposal which proposed to make an order to revoke the registration of the Plan, if the Plan was not amended so as to comply with the provisions of s. 8(1)(e) of the *PBA*, which requires

a MEPP board of trustees to be appointed such that “at least one-half are representatives of members” of the MEPP. The Trustees, OPCA, AAO, ISCA, and the Union all requested a hearing before the Tribunal in respect of the Notice of Proposal. The RPCA and AGMCA were granted party status in the proceeding at the Pre-Hearing Conference held on October 29, 2008.

10. On November 24, 2008, in response to this Notice of Proposal, the Trustees amended the Trust Agreement, pursuant to article 10.06 of the Trust Agreement (the “Amending Resolution”). The Amending Resolution amended the Trust Agreement so as to ensure that the Trust Agreement provided for the Plan to be administered by a board of trustees that is established in compliance with section 8(1)(e) of the *PBA*. On its face, the Amending Resolution gave all parties to the trust agreement the right to appoint specified numbers of trustees, with the exception of the RPCA, the Applicant in this proceeding.
11. When advised of the Amending Resolution, the Superintendent, by its counsel, advised the Tribunal, in a letter dated November 25, 2008, that it was satisfied that the concerns outlined in the Notice of Proposal had been addressed. Accordingly, the Superintendent stated that he would withdraw the Notice of Proposal once all the Applicants had withdrawn their respective Requests for Hearing. The Requests for Hearing were all withdrawn.
12. In a letter dated November 27, 2008 to the Registrar for the FST, counsel for the RPCA advised that the RPCA took the position that the Amending Resolution was invalid and that the hearing should proceed. In a letter dated November 28, 2008 to the Registrar, counsel for the Superintendent submitted that the matters raised by the RPCA went beyond the scope of the matters then before the Tribunal and ought to be raised with the Superintendent before they could be raised with the Tribunal.
13. In a letter dated December 1, 2008 to the Registrar, counsel for the Superintendent advised that subject to any rulings from the Tribunal, the Notice of Proposal was withdrawn.
14. In a decision communicated via e-mail on December 2, 2008, the Chair of the hearing panel advised that the Tribunal had no further jurisdiction to conduct a hearing in the matter given the withdrawal of the hearing requests and the Notice of Proposal.
15. On November 25, 2008, the Trustees’, by their agent, filed with the Superintendent a completed Application for Registration of a Pension Plan Amendment (Form 1.1) in respect of the Amending Resolution, together with an original of the Amending Resolution. Under para. 6 of the application, which asks the Applicant to indicate the matter concerned and lists a number of specific items, the Applicant has checked “other” and typed in where details are requested, “Amendment to a Trust Agreement dated November 24, 2008”.

16. On or about February 17, 2009, the Pension Officer for the Plan at FSCO wrote to the parties to the Trust Agreement and the Trustees requesting submissions concerning whether or not the Amending Resolution should be registered.
17. With the exception of the Applicant, no party objected to the registration of the amendment. In their responses, the Trustees, the AAO and the Union, explicitly requested the Superintendent to register the amending resolution.
18. On May 20, 2009, the Superintendent issued a Notice of Registration in respect of the Amending Resolution.
19. On June 18, 2009, the RPCA filed a Request for Hearing in respect of the Registration.

### **RELEVANT STATUTORY PROVISIONS**

The amendment at issue in this case was registered pursuant to s.12 of the *PBA*, which provides as follows:

- (1) The administrator of a pension plan shall apply to the Superintendent, within sixty days after the date on which the pension plan is amended, for registration of the amendment.
- (2) An application for registration of an amendment shall be made by paying the fee established by the Minister and filing,
  - (a) a certified copy of the amending document;
  - (b) certified copies of any other prescribed documents;
  - (b.1) a certification in a form approved by the Superintendent and signed by the administrator of the pension plan in which the administrator attests that the amendment complies with this Act and the regulations; and
  - (c) any other prescribed information.
- (3) The administrator of a pension plan shall file a certified copy of each document that changes the documents that create and support the pension plan or pension fund.

Section 12 uses two phrases which are important to this issue. The first, found in s.12(1), is “pension plan”. That term is defined in s.1(1) of the Act as follows:

“pension plan” means a plan organized and administered to provide pensions for employees...

The second, found in s.12(3), is “documents that create and support the pension plan or pension fund”. That term is not defined in the *PBA*. Section 10(1), however, provides that:

The documents that create and support a pension plan shall set out the following information:

1. The method of appointment and the details of appointment of the administrator of the pension plan.
2. The conditions for membership in the pension plan.
3. The benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death.
4. The normal retirement date under the pension plan.
5. The requirements for entitlement under the pension plan to any pension benefit or ancillary benefit.
6. The contributions or the method of calculating the contributions required by the pension plan.
7. The method of determining benefits payable under the pension plan.
8. The method of calculating interest to be credited to contributions under the pension plan.
9. The mechanism for payment of the cost of administration of the pension plan and pension fund.
10. The mechanism for establishing and maintaining the pension fund.
11. The treatment of surplus during the continuation of the pension plan and on the wind up of the pension plan.
12. The obligation of the administrator to provide members with information and documents required to be disclosed under this Act and the regulations.
13. The method of allocation of the assets of the pension plan on windup.
14. Particulars of any predecessor pension plan under which members of the pension plan may be entitled to pension benefits.
15. Any other prescribed information related to the pension plan or pension fund or both.

With respect specifically to MEPPs, s.10(2) spells out 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.

The basic requirement to register the pension plan itself, the keystone requirement under the *PBA* for supervision of pension plans by the regulator, is imposed by s. 9, as follows.

- (1) Within the prescribed period of time, the administrator of a pension plan shall apply to the Superintendent for registration of the pension plan.
- (2) An application for registration shall be made by paying the fee established by the Minister and filing,
  - (a) a completed application in the form approved by the Superintendent;
  - (b) certified copies of the documents that create and support the pension plan;
  - (c) certified copies of the documents that create and support the pension fund;
  - (d) a certified copy of any reciprocal transfer agreement related to the pension plan;

- (e) a certified copy of the explanations and other information provided under subsection 25 (1);
- (e.1) a certification in a form approved by the Superintendent and signed by the applicant in which the applicant attests that the pension plan complies with this Act and regulations; and
- (f) any other prescribed documents.

(3) For the purpose of subsection (2), “document” includes “collective agreement”.

Also relevant is s.8(1)(e) of the *PBA*. That section provides that:

(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 such representatives of the members shall be Canadian citizens or landed immigrants;

## POSITIONS OF THE PARTIES

The Trustees’ position can be stated quite simply. They argue that s.12 of the *PBA* creates two distinct requirements, applying to two distinct types of documents: “pension plans” and “documents that create and support pension plans and pension funds”. Amendments to a “pension plan” are required by s.12(1) to be *registered*. This registration requirement triggers the decision-making power of the Superintendent under s.18(1)(d). The Superintendent may decide either to register or not to register the amendment; the decision is subject to appeal to this Tribunal pursuant to s.18(2) and s.89 of the *PBA*.<sup>1</sup> Under s.12(3), however, “documents which create and support a pension plan or pension fund” are not required to be registered; they are required merely to be *filed*. There is no approval process triggered, no Superintendent’s decision required, and hence no right of appeal to this Tribunal.

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<sup>1</sup> Section 18(1)(d) of the Act provides that “the Superintendent may... refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations. Section 18(2) expressly makes “the authority of the Superintendent under (1)... subject to the right to a hearing under section 89.” S. 89(1) provides that “[w]here 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.” A Notice of Proposal triggers a right to a hearing before this Tribunal. While s.89 on its face applies only to a negative decision of a Superintendent (i.e a refusal to register), it is common ground among the parties that pursuant to case law, there is an equivalent right to a hearing under s.89 to challenge a positive decision by the Superintendent (i.e. a decision to register): see *Maynard v. Ontario (Superintendent of Pensions) (Superintendent of Pensions)* (2000), 23 C.C.P.B. 145, [2000] O.J. No. 881 (Div. Ct.); see also *CUPE v. Ontario Hospital Association* (1992) 91 D.L.R. (4<sup>th</sup>) 436 (Div. Ct.); *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 43 C.C.P.B. 1, [2004] O.J. No. 4909 (Div. Ct.).

The Trustees argue that the term “pension plan”, in its “plain and ordinary meaning”, refers to a document which deals with ‘pension benefits and minimum standards’, distinguishable from trust agreements or other plan-related documents; it is a document often referred to as a “plan text”. It is only amendments to this document, they argue, that are subject to the registration requirement. In their view, a trust agreement falls into the second category; it is not a pension plan, but merely one of the many “documents that create and supports a pension plan or a pension fund”. The amendment at issue, therefore, was required to be filed under s.12(3), but it was not required to be registered under s.12(1), and it should never have been registered. The Trustees argue that since it should not have been registered, this Tribunal has no jurisdiction to hear an application challenging that registration. They acknowledge, of course that the Superintendent *did* register the amendment as an amendment to a pension plan; indeed, they acknowledge that the Superintendent did so on their application and at their request. They argue, however, that because the amendment involved a trust agreement and not a “pension plan”, the registration is in effect a nullity. In their written submission they argue that “the parties cannot, through or by their consent or action, grant the FST the jurisdiction to hear the dispute” if in fact it does not have such jurisdiction; accordingly, the Trustees’ conduct in applying for registration cannot be used against them as a basis for jurisdiction.

As a key pillar of their argument, the Trustees rely on the manner in which the term “trust agreement” is used in the *PBA*. The term is nowhere defined in the Act. In the few places in which it is used, however, the grammatical context suggests that it is a document which provides a foundation for a pension plan, rather than being part of the pension plan itself. The Trustees point first of all to s.8(1)(e), which refers to a “pension plan ...established pursuant to a collective agreement or trust agreement”. Section 10(2) refers to “the documents that create and support a multi-employer pension plan pursuant to a collective agreement or a trust agreement”. Section 14(1) exempts from certain requirements of the Act a “multi-employer pension plan established pursuant to a collective agreement or a trust agreement”. In addition, s.26(4), dealing with notice requirements for adverse amendments, provides an exemption for “a multi-employer pension plan established pursuant to a collective agreement or a trust agreement”. The Trustees make a simple logical point: if a pension plan is established “pursuant” to a trust agreement, the trust agreement appears to be conceptualized as something different than the pension plan itself.

As additional support for their position, the Trustees argue strenuously that matters involving the interpretation and application of trust agreements do not fall within the jurisdiction of this Tribunal; they fall within the jurisdiction of the common law courts (see, for example, *McGee v. London Life Insurance Co.*, [2008] O.J. No. 1870, para. 42). They point to the fact that many of the issues raised by the Applicant in its Pre-Hearing Brief relate to the common law of trusts rather than to allegations of violation of the *PBA*. Since the Tribunal’s jurisdiction is confined by and to the *PBA*, they argue that we have no jurisdiction to deal with these issues.

Counsel for the other responding parties supporting the motion adopted the Trustees’ submissions.

The Superintendent, who led the argument against the motion, acknowledges that the registration requirement in s.12(1) of the *PBA* applies only to “pension plans”. He takes a much more comprehensive view than the Trustees, however, as to meaning of the term “pension plan”. He

points first of all to the basic definition of that term in s.1(1) of the *PBA*: “‘pension plan’ means a plan organized and administered to provide pensions for employees...” He argues that this is a functional definition, which does not refer or limit itself to any specific type of document. He argues that there is no magic to a label; if a document deals with an issue required by the *PBA*, as for example the composition of a board of trustees of a MEPP, it is part of the pension plan, and amendments to that document are subject to the registration requirements of s.12(1). In his oral submissions, he argued that:

The amendment regime in the *PBA* [i.e.s.12(1)] would apply to all documents which affect members entitlements and rights, broadly defined, and raise issues concerning compliance with the *PBA*.

Unlike the Trustees, who argued that there was a common understanding in the industry about what issues are dealt with in specific types of documents and hence a “common and ordinary meaning” for the term pension plan, the Superintendent argues that individual plan sponsors, including co-sponsors of MEPPs, make a variety of choices about how to document the issues which the statute requires pension plans to address. Some do so in a single document, labelled a “pension plan” or “plan text”. Some choose to deal with these matters in a variety of separate and variously labelled documents, including plan texts, trust agreements and collective agreements. It is for that very reason, he argues, that the legislation chose to define “pension plan” in functional and substantive terms rather than by confining its reach to a single document.

The Superintendent argues that his position is well-grounded in the provisions of the *PBA*. He points to the requirements of the initial registration regime, set out in s.9 of the Act. That section requires a plan administrator to apply “for registration of a pension plan”. The application requires the filing of multiple documents. It nowhere refers to a single document labelled “pension plan”; instead, it contemplates a package which includes all “documents that create and support the pension plan”, as well as all “documents that create and support the pension fund”. Section 10 addresses the content of those documents in substantive terms which would include, but are clearly not limited to what the Trustees characterized as ‘pension benefits and minimum standards’. One of the requirements of s.10 is that plan documents address “the method of appointment and the details of appointment of the administrator of a pension plan” (s.10(1)¶1). The Superintendent argues that to the extent that such plan documents address matters pertaining to the regulatory regime, they are part of the package, taken together, that constitute the “pension plan” within the meaning of the *PBA*. The provisions of the trust agreement at issue in this case address matters required to be addressed to ensure compliance with s.8 of the *PBA*. Accordingly, the Superintendent argues, the amendment is an amendment to a “pension plan” within the meaning of s.12(1) of the *PBA*.

The Applicant adopted those submissions. In addition, it argues that the Trustees approach would undermine the authority of the regulator by placing undue emphasis on the *name* the parties choose to apply to any particular document creating and supporting their overall plan, encouraging an approach in which parties would register a “bare bones” document labelled “pension plan”, supplementing it with various other key documents which would then be exempt from the amendment registration regime. In the Applicant’s view, a substantive approach to the interpretation of the term “pension plan” is more consistent with the regulatory purpose of the

statute; documents which contain key information required to bring the plan into regulatory compliance, including provisions of a trust agreement dealing with the composition of the board of trustees, must be considered part of the pension plan. In its written submissions, the RPCA relied on the conduct of the parties in this case as support for its interpretive approach; while it did not argue that the Trustees and other responding parties supporting the motion were estopped from taking the position that the amending resolution was an amendment to a pension plan within the meaning of the Act, it did argue that their conduct was evidence of an understanding in the pension community that such amendments were indeed subject to the amendment registration regime.

The AGMCA echoed the submissions of both the Superintendent and the Applicant. For its part, the AGMCA submitted that the broad wording of the definition of “pension plan” was deliberate; there was no legislative intention to limit the meaning of “pension plan” to the document often referred to in the industry as the “plan text”. Like the Superintendent, it took the position that the industry uses a broad matrix of documents to address the minimum standards required by the *PBA* for pension plans; all of these documents may have significant implications for member rights, and not just member benefits. MEPPs may take a different approach to plan documentation than many single-employer plans, but the *PBA* applies to both types of plan. For MEPPs, the AGMCA argued, the trust agreement is a critical document for addressing member rights under the *PBA*. Like the Superintendent, it sees the registration (and hence the amendment) regime as applicable to all plan documents necessary to bring the “pension plan” as a whole into compliance with the Act.

With respect to the Trustees’ argument that the application would require this Tribunal to deal with broad issues of trust law falling within the exclusive jurisdiction of the courts, the AGMCA emphasized the narrowness of the issue before us on this motion. It reminded us that the AGMCA, as well as other responding parties, would be raising specific objections in due course to many of the issues raised by the Applicant. On the narrow issue of whether an amendment to a trust agreement was an amendment to a pension plan, however, it submitted that the Trustees argument was misconceived.

## **ANALYSIS**

As noted above, we have decided to dismiss the motion. We base our decision on two grounds. The first ground is a narrow one: we hold that because the impugned amendment is *de facto* registered as an amendment to a pension plan, the Applicant has a right to challenge that registration. More broadly, however, we hold that the impugned amendment is an amendment to a “pension plan” within the meaning of the *PBA*, and was properly so characterized by the Superintendent. Whether it was properly registered, of course, is a question for another day.

We address first of all the narrow ground of *de facto* registration. The amendment in question was passed in response to the Superintendent’s initial Notice of Proposal, which threatened to revoke the registration of the pension plan unless the pension plan were amended to comply with the *PBA*. The Trustees, clearly indicating on the application that it was an amendment to a trust agreement, submitted an application to register the amending resolution as an amendment to a pension plan. (Indeed, counsel for the Trustees advises us that the Trustees did not advert to the

possibility that it was not, in law, an amendment to a pension plan until they received this application.) The Superintendent, in full knowledge that it was an amendment to a trust agreement, registered it as an amendment to a pension plan. The Superintendent continues to assert that it *is* an amendment to a pension plan. If the Trustees were correct in their interpretation of ‘pension plan’, it would follow that the Superintendent *should not* have registered the amendment. But it would not alter the incontestable fact that the Superintendent *did* register it. There exists a Notice of Registration and a registered amendment which the Superintendent continues to assert is a valid amendment to the pension plan. Surely the Applicant must have a right to challenge that *de facto* registration; if not, the registration, which all parties except the Superintendent now assert is improper, although for very different reasons, would stand. The issue now raised by the Trustees might affect the nature of the arguments that could be put forward as a basis for challenging the registration. But it does not affect our jurisdiction to hear the application. On that basis alone, therefore, we would dismiss this motion.

In addition, however, we take the view that the amendment in question is an amendment to a “pension plan” within the meaning of the Act. We are persuaded that the definition of “pension plan” in the *PBA* is a functional one, and does not refer to any specific document. It is obvious from the wording of s.9 that the initial requirement to register pension plans carries with it a requirement to register (and not merely to “file”) a very broad range of documents, including but not limited to the “documents which create and support a pension plan”. Section 10, in our view, imposes a requirement on the parties to document their compliance with the regulatory requirements for pension plans, while leaving them free to choose the form of that documentation. Whatever form that documentation takes, however, it is required to be registered as part of the registration of the “pension plan”, in order to enable the Superintendent to assure himself that the registered pension plan complies with the Act. Such a documentary package would clearly include a document setting out ‘pension benefits and minimum standards’ (the type of document Mr. Mazzuca argued was a ‘pension plan’). It would equally clearly, in our view, include any trust agreement, such as the one in this case, which deals with issues specified in s.10(1), including the issue of “the method of appointment and the details of appointment of the administrator of the pension”.

Together, these documents are registered pursuant to the obligation imposed by s.9 to register the “pension plan”. There would be little logic to making the requirement to register amendments any narrower than the original requirement to register the “pension plan”. The trust agreement, or at least those portions of the trust agreement which deal with the establishment of the board of trustees and are required to comply with s.8(1)(e) of the *PBA*, are part of the documented and registered “pension plan”. Accordingly, amendments to the trust agreement dealing with these issues are amendments to the pension plan, and are required to be registered under s.12(1).

We acknowledge that this interpretation does not resolve all of the interpretive conundrums in the statute. There are clearly some inconsistencies in how the *PBA* conceptualizes a “pension plan”, and a strictly grammatical approach does not always yield intelligible results. The Trustees argued that when it refers to a trust agreement, the *PBA* uses a grammatical structure implying that a trust agreement is a document separate from a pension plan. This argument obviously has some force. His approach, however, leaves us with grammatical problems which are at least equally challenging. He asks us to define “pension plan” narrowly as a plan text, or as

a document dealing only with pension benefits. Such a document, however, would clearly fall into the broader category of “documents which create and support a pension plan” as that phrase is fleshed out in s.10(1). We would then be faced with the same grammatical problem as the one previously identified: our “pension plan”, as defined by Mr. Mazzuca, would be a document which created and supported itself. It surely makes more sense to take a functional approach which focuses not on the name of the document, but on the function it performs as part of a “plan organized and administered to provide pensions for employees”.

A functional approach does provide a response, if a somewhat untidy one, to another argument made by the Trustees: the argument that s.12(3) would be rendered redundant by too broad an interpretation of “pension plan”. They argued that if all “documents supporting and creating a pension plan” were treated as part of the pension plan and required to be registered under s.12(1) as part of that plan, s.12(3), which requires the filing of certified copies of “document which create and support the plan”, would be left with no meaning. In response, the Superintendent emphasized that his argument did not require a finding that *all* portions of *all* document that create and support a pension plan or a pension fund to be subject to the registration requirement. He conceded that these documents may deal with issues that fall outside the “substantive” definition of pension plan, and to that extent, would not require to be registered. Section 9(3), for example, expressly includes “collective agreements” among the documents that must be registered if they “create and support the pension plan”. It is clear, however, that there are many provisions of collective agreements to which the regulatory regime in the *PBA* could not apply, and to which the registration amendment regime would have no application. This is not a completely satisfactory response from a policy perspective. It leaves a plan administrator with a “substantive” rather than merely a formal choice to make as to whether an amendment to a document must be registered, or must simply be filed. Furthermore, it is not clear why parts of documents need be filed at all if they do not relate in any way to the regulatory regime. It may, however, be the only practical answer we can get, given the nature of some of the documents that fall under the heading “documents that create and support the pension plan”.

In any event we must, of course, deal with the *PBA* as we find it. As Mr. Newton pointed out in his submissions, this will not be the first case in which the drafting of certain provisions of the *PBA* has been identified as imperfect. The Supreme Court of Canada in *Monsanto v. Ontario*, [2004] 3 S.C.R. 152 has made it clear that we are required to interpret the *PBA* as a whole:

.... the words of the an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (para. 19).

In the same case, the Supreme Court also clearly articulated the purpose of the *PBA*: “to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans” (para. 60). We believe a substantive interpretation of the term “pension plan” best gives effect to the provisions of the statute “in their entire context”, and best complies with the statutory purpose.

Accordingly, we dismiss the motion. In doing so, however, we caution the parties that in making this ruling, we are mindful that the Tribunal's jurisdiction flows from statute, and that it does not play the same role as the courts in interpreting and applying trust agreements. We have held that the Applicant has the right to challenge the Superintendent's decision to register the amendment to the trust agreement; for that challenge to succeed, however, it must be brought within the four corners of the *PBA*. As noted above, the responding parties have signalled their intention to make other more specific challenges to the basis upon which the Applicant has, to date, formulated its challenge, and to the remedies it seeks. Nothing in these reasons is intended to prejudge those issues.

The Parties are directed to contact the Registrar of the FST to schedule a pre-hearing conference to make arrangements for the continuation of the hearing.

**DATED** at Toronto, Ontario, this 25th day of February, 2010

“Elizabeth Shilton”

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Elizabeth Shilton,  
Member of the Tribunal and Chair of the Panel

“Heather Gavin”

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Heather Gavin,  
Member of the Tribunal and of the Panel

“David Short”

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David Short,  
Member of the Tribunal and of the Panel