
# WE'VE OVERPAID, NOW WHAT? OLRB CONFIRMS EMPLOYERS' OBLIGATIONS IN ADDRESSING PENSION OVERPAYMENTS

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For employers with unionized employees, disputes involving any issue related to the applicable collective bargaining agreement ("CBA") are usually addressed by the Ontario Labour Relations Board ("Board") or by private arbitration.

Of course, there are exceptions to every rule. In *Coco Paving Inc. v. International Union of Operating Engineers, Local 793*, the Board recently confirmed that an application to address an overpayment into a pension plan – even one established in accordance with a CBA – is one such exception. Instead, as required under the *Pension Benefits Act*, R.S.O. 1990 C. P-8, a reimbursement for an overpayment must be approved by Ontario's Superintendent of Financial Services ("Superintendent").

The decision in *Coco Paving* came about after the company discovered that it had been overpaying into a jointly-sponsored pension plan for approximately four years. Coco Paving contributed different rates to the Plan for its employees in Toronto and Simcoe County and had recently learned that it over-contributed for its Simcoe County employees by about $350,000 between 2010 and 2014.

Coco Paving, therefore, applied to the Board for an order permitting it to address the overpayment by through credits against future contribution obligations. Among other submissions, Coco Paving argued the following in support of its request:

> First, since the Plan was linked to the union's CBA, the matter was fundamentally an issue of CBA interpretation and, therefore, properly before the Board.
>
> Second, since the union could seek redress through the Board for alleged underpayments into the Plan and could act as Agent for Plan Trustees in related collection matters, an employer that contributes to the Plan should equally be able to apply to the Board where the opposite – an alleged overpayment – has occurred.

In reaching its decision, the Board looked to the express language of section 62.1 of the Pension Benefits Act, which states:

"62.1(1) This section applies,

[...]

(b) if an employer makes an overpayment into the pension fund.

**Prerequisite for reimbursement**

(2) the administrator of the pension plan is not permitted to make or authorize a payment from the pension fund to reimburse the employer for a payment described in subsection (1) unless the Superintendent consents in advance to the payment ..."

Notwithstanding the logic of Coco Paving's position, the Board looked to the express language of section 62.1 and concluded that the issue must be determined by the Superintendent, writing:

> "... The Legislature has created a specific statutory process for precisely this problem – the alleged overpayment of contributions to a pension plan by an employer. That alone should cause the Board to defer to that process."

The Board added that the Superintended has specific expertise in the general area of pension plans and, more specifically, in dealing with adjustments to the quantum of assets in a pension plan. The Board did acknowledge, however, that questions of CBA interpretation may still exist and, therefore, decided to hold the matter in abeyance pending the Superintendent's assessment.

While the decision in *Coco Paving Inc*. may not be ground-breaking, it is a useful reminder for unionized employers that make contributions to jointly-sponsored plans. The apparent double-standard (regarding union underpayment collections) aside, applications to address overpayments should be brought before the Superintendent.

by Kyle Lambert

**A Cautionary Note**