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**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990,  
c. P.8, as amended (the “*PBA*”)

**AND IN THE MATTER OF** a Proposal of the Superintendent of Financial Services to Refuse to Consent to an Application under sections 78(1) and 79(3) of the *PBA* relating to the Montreal Trust Pension Plan (2001), Registration Number 0279034 (Canada Revenue Agency) and 6428 (Régie des rentes du Québec) as it relates to Ontario members or former members of the Plan

**TO:** **Montreal Trust Company of Canada**  
40 King Street West  
6<sup>th</sup> Floor, Scotia Plaza  
P.O. Box 4085, Station A  
Toronto, ON M5W 2X6

**Attention:** Karim Dhanani  
Director, Transitions – Scotiabank Corporate Pensions

**Applicant, Employer and Administrator of the Plan**

### **NOTICE OF PROPOSAL**

**I PROPOSE TO REFUSE TO CONSENT** to the Application dated July 12, 2007 for consent to payment of money that is surplus to the employer out of the pension fund in respect of the Montreal Trust Pension Plan (2001), Registration Number 0279034 (Canada Revenue Agency) and 6428 (Régie des rentes du Québec) (the “Plan”) under sections 78(1) and 79(3) of the *PBA* as it relates to Ontario members or former members of the Plan.

#### **REASONS:**

- 1) The Plan is a multi-jurisdictional pension plan, registered with the Régie des rentes du Québec, the “major authority” for the purposes of the Memorandum of Reciprocal Agreement (the “Reciprocal Agreement”) signed by participating authorities.
- 2) The Plan has members or former members who are or were employed in Ontario.

- 3) The Reciprocal Agreement provides that any participating authority may except itself from the operation of the Reciprocal Agreement in respect of a specific plan by giving written notice to that effect to the major authority (section 3).
- 4) The Plan has been excepted from the operation of the Reciprocal Agreement in respect of Ontario members, former members and other persons entitled to benefits under the Plan on Plan wind up.
- 5) The Plan was formally terminated and fully wound up effective November 30, 2006 by resolution of authorized officers of the Montreal Trust Company of Canada, the employer, sponsor and administrator of the Plan ("Montreal Trust"). According to the Plan Actuaries, 90.7% of all members have been paid their basic benefits as at February 1, 2008, including 89.1% of Ontario members.
- 6) Prior to the full wind up of the Plan, there were Ontario members of the Plan who were affected by two partial wind ups of the Plan. The partial wind ups occurred December 2, 1993 to November 20, 1998 and March 31, 1997 to September 30, 1997. As at the effective date of the full wind up of the Plan, there has been no distribution of the surplus related to these two partial wind ups to the affected Ontario members.
- 7) The surplus in the Plan as at the Plan wind-up date of November 30, 2006 has been estimated by the Plan Actuaries to be approximately \$28,978,000, after payment of all Plan benefits, and payment of expected expenses in connection with the Plan wind-up.
- 8) On July 12, 2007, Montreal Trust submitted an application for consent of the Superintendent of Financial Services (the "Superintendent") to a payment to Montreal Trust of a portion of the surplus in the Plan, under sections 78(1) and 79(3) of the *PBA*.
- 9) Section 79(3)(b) of the *PBA* provides that the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless the pension plan provides for payment of surplus to the employer on the wind up of the pension plan.
- 10) The application as it relates to Ontario members or former members does not comply with section 79(3)(b) of the *PBA* because it fails to establish that the Plan provides for the payment of surplus to the employer on wind up.
- 11) The Plan provides for payment of surplus to members, former members and other persons entitled to benefits under the Plan on wind up. Since the Plan does not provide for payment of surplus to Montreal Trust on wind up, the Superintendent cannot consent to the application as it relates to Ontario members or former members of the Plan.

#### **The 1946 Trust**

- 12) The Plan was established as a defined contribution plan effective December 31, 1946 (the "1946 Plan"). Even though it was a defined contribution plan, surplus may have

accumulated under the 1946 Plan due to forfeitures, where members left the 1946 Plan without being fully vested (full vesting occurred after 20 years of service).

- 13) The 1946 Plan was funded in part through contributions to a trust held by The Canadian Trust Company, and partly through contributions towards a group annuity contract from the Government of Canada.
- 14) The earliest funding document for the 1946 Plan, a trust agreement dated March 22, 1947 and effective December 31, 1946 (the "1946 Trust"), established a trust fund to hold contributions related to the "Supplementary Plan". The Supplementary Plan provided benefits in excess of \$1,200 per year. Benefits up to \$1,200 per year were provided under the "Basic Plan", which was funded under a group annuity contract from the Government of Canada. Both the Basic Plan and the Supplementary Plan were contained in the Plan text from 1946; they were components of the same Plan.
- 15) The 1946 Plan was annexed to and made a part of the 1946 Trust and was also effective as of December 31, 1946. The Trust Fund comprised of all the contributions, together with any earnings from those monies. Therefore the 1946 Trust covered any surplus assets in the Plan, including the Supplementary Plan.
- 16) Under the terms of the 1946 Trust the assets in the Trust Fund were to be held by the Trustee "solely for the purpose of providing the benefits granted under the Plan to Members to the extent that they are respectively entitled or eligible thereunder to receive benefits under the Supplementary Plan." (section 7)
- 17) Montreal Trust was not expressly made a beneficiary under the 1946 Trust. On the contrary, the 1946 Plan provided that "(i)f the Plan should be discontinued, the contributions made by the Company will not be subject to withdrawal by the Company, but will remain to the credit of the members respectively who will be entitled to benefits hereunder, to the extent then paid up, resulting from all contributions." (Article XXXVI)
- 18) The terms of the 1946 Trust did not provide for the payment of surplus to Montreal Trust. The 1946 Plan and 1946 Trust did not address the treatment of any surplus upon termination of the Plan. However, they indicated that the only persons for whom the Trust Fund was to be held in trust were employees who would receive pension benefits. Therefore any surplus in the Trust Fund was impressed with a trust in favour of members (*Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (SCC); *Sadler v. Watson Wyatt & Co.* (2001) 27 C.C.P.B. 291 (BCSC); *Markle v. Toronto (City)* (2003) 34 C.C.P.B. 70 (OCA)).
- 19) There was no provision in the 1946 Trust or in the 1946 Plan authorizing Montreal Trust to revoke the trust. On the contrary, the 1946 Trust provided that the "Trust Fund shall be held by the Trustee *irrevocably*..." (section 7).
- 20) A resulting trust could not arise as the 1946 Plan and 1946 Trust indicated that the only persons for whom the Trust Fund was to be held were employees who will receive pension benefits (*Schmidt v. Air Products Canada Ltd.* (*supra*)).

### The 1954 Trust

- 21) Montreal Trust implemented the "Improved Retirement Income Plan" (the "1954 Plan") effective December 31, 1954. The 1954 Plan was a defined benefit pension plan for service after the effective date. The 1954 Plan provided that the contributions made to the trust fund under the "Supplementary Plan" would be deposited into the fund for the 1954 Plan. A new trust agreement was entered into between Montreal Trust and The Canadian Trust Company effective December 31, 1954 (the "1954 Trust").
- 22) The 1954 Plan was annexed to and made a part of the 1954 Trust effective as of December 31, 1954. The Trust Fund comprised all the contributions, together with any earnings from those monies. Therefore the 1954 Trust covered any surplus assets in the Plan.
- 23) Under the terms of the 1954 Trust, assets in the Fund were to "be held by the Trustee...solely for the purpose of providing the benefits granted under the Plan to Members to the extent that they are respectively entitled or eligible thereunder to receive the benefits under the Plan."
- 24) Montreal Trust was not expressly made a beneficiary under the 1954 Trust. On the contrary, the 1954 Plan provided "If the Plan should be discontinued, the contributions made by the Company will not be subject to withdrawal by the Company, but will remain to the credit of the members, retired members, joint annuitants and beneficiaries who will be entitled to the benefits hereunder." (Article XXVII)
- 25) The terms of the 1954 Trust did not provide for payment of surplus to Montreal Trust. The 1954 Plan addressed the treatment of surplus upon plan termination. It provided for payment of surplus to "members, retired members, joint annuitants and beneficiaries". It stated "(i)n the event of termination, all assets of the Fund shall be used for the exclusive benefit of members, retired members, joint annuitants and beneficiaries. Each member, retired member, joint annuitant and beneficiary shall be entitled to a share of such assets of the Fund as may be determined by the Retirement Board under an equitable and non-discriminatory formula, satisfactory to the Minister of Revenue." (Article XXVII)
- 26) There was no provision in the 1954 Trust or the 1954 Plan authorizing Montreal Trust to revoke the trust. On the contrary, the 1954 Trust provided that the "Trust Fund shall be held by the Trustee *irrevocably*..." (Section 8).
- 27) A resulting trust could not arise as the 1946 Plan and 1946 Trust indicated that the only persons for whom the Trust Fund was to be held were employees who will receive pension benefits. Moreover, an employee booklet from the period, which was undated but appeared to be from 1954 or shortly thereafter, indicated that Montreal Trust's intention was that no trust funds were to revert to it on Plan termination (*Schmidt v. Air Products Canada Ltd.(supra)*).
- 28) There is no evidence that the 1954 Trust was terminated or exhausted at any time.

### The 1963 Trust

- 29) A new trust agreement was entered into between Montreal Trust and The Canadian Trust Company on July 2, 1963 (the "1963 Trust") to replace the 1954 Trust. The 1954 Plan was annexed to and made a part of the 1963 Trust. The 1963 Trust, like the 1954 Trust, provided that all contributions and income would constitute the trust fund. Therefore the 1963 Trust covered surplus assets.
- 30) The recitals of the 1963 Trust provided the Trust Fund would be "held for the benefit of the employee members of the Plan or their beneficiaries".
- 31) Montreal Trust was not expressly made a beneficiary under the 1963 Trust. The 1963 Trust, as in the case of the 1946 and 1954 Trusts, indicated that the only persons for whom the Trust Fund was to be held were employees who would receive pension benefits. The 1963 Trust had exclusive benefit language in favour of members of the Plan or their beneficiaries or estates. The THIRD Article of the 1963 Trust provided "Anything contained in this Agreement to the contrary notwithstanding no part of the Trust Fund, other than such part as is required to pay taxes and administration fees and expenses) shall be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan or their beneficiaries or estates."
- 32) The terms of the 1963 Trust did not provide for payment of surplus to Montreal Trust. The 1963 Trust addressed the treatment of surplus upon plan termination. The TWELFTH Article of the 1963 Trust provided that upon termination of the 1963 Trust the "Trust Fund shall be paid out by the Trustee as directed by the Retirement Board subject to the provisions of Article THIRD hereof."
- 33) There was no provision in the 1963 Trust authorizing Montreal Trust to revoke the trust. Further, a resulting trust could not arise as the 1963 Trust indicated that the only persons for whom the Trust Fund was to be held were employee members of the Plan or their beneficiaries or estates.
- 34) There is no evidence that the 1963 Trust was terminated or exhausted at any time.
- 35) The terms of the 1954 Plan were replaced by the Montreal Trust Pension Plan (1964) effective December 31, 1964 (the "1964 Plan"). Section 15.4 of the 1964 Plan stated that the Plan could be discontinued at any time "but only on the condition that such action shall render it impossible at any time for any part of the corpus of the trust or income thereon to be used for, or diverted to, purposes other than for exclusive use of members, retired members or other recipients of benefits under the Plan, or to the Company, except after full provision had been made for all benefits accrued under the Plan". Section 15.5 of the 1964 Plan stated that if the Plan was discontinued, after provision for administrative expenses and subject to section 15.4, the Fund "shall be allocated in an equitable and suitable manner...among members, retired members and any other recipients of benefits under the Plan."

- 36) Montreal Trust submits that it would appear that sections 15.4 and 15.5 of the 1964 Plan contemplated the reversion of surplus to Montreal Trust after the provision of accrued benefits under the Plan. However, the 1964 Plan did not expressly provide for surplus to revert to Montreal Trust. In any event, the 1964 Plan was made a part of the 1963 Trust and therefore was overridden by the THIRD and TWELFTH Articles of the 1963 Trust.
- 37) The Plan was restated January 1, 1973, July 1, 1976 and October 1, 1983. The wording in sections 15.4 and 15.5 of the 1964 Plan remained essentially unchanged in these restatements. However, as was the case with the 1964 Plan, the 1973, 1976 and 1983 restatements were subject to the 1963 Trust.

#### **The 1990 Plan and subsequent restatements**

- 38) The Plan was re-named the "Montreal Trust Pension Plan (1990)" and amended and restated effective January 1, 1990 (the "1990 Plan"). The 1990 Plan and subsequent restatements of the 1990 Plan, including the current version of the Plan, contained provisions similar to section 15.4 of the 1964 Plan. In addition it contained wording to the effect that provisions of the Plan "shall override and preempt any contradictory provision contained in any trust agreement" (paragraph D of the Forward to the 1990 Plan).
- 39) Montreal Trust submits that this wording lends support to the interpretation that the terms of the Plan (which contain "exclusive benefit" language in favour of the members, but only to the extent of the members' accrued benefits), take precedence over the provisions of the trust agreement, which provides that no part of the fund can revert to the Company. Montreal Trust therefore submits that the "exclusive benefit" language applies only to protect the members' accrued benefits, but does not apply to any surplus under the Plan.
- 40) The 1990 Plan and subsequent restatements of the 1990 Plan did not expressly provide for surplus to be paid to Montreal Trust on wind up of the Plan. Montreal Trust will only be able to claim entitlement to the surplus if the terms of the trust make Montreal Trust a beneficiary (*Schmidt v. Air Products Canada Ltd. (supra)*; *Sadler v. Watson Wyatt & Co. (supra)*; *Markle v. Toronto (City) (supra)*). In any event, the amendment to the 1990 Plan and subsequent plans providing that the terms of the Plan take precedence over the provisions of the prior trusts - which provided that no part of the fund could revert to the Company - constitutes a revocation of the prior trusts and is invalid. Montreal Trust did not reserve for itself the power to revoke the trusts at the time it established the prior trusts.

#### **Final Amendment: Court Order**

- 41) Section 13.04 of the most recent version of the Plan (2001) was amended effective November 15, 2006 (the "Final Amendment"). The Final Amendment provided that surplus assets would be distributed in accordance with a Surplus Sharing Agreement dated February 1, 2006 (as amended) ("SSA"), with a portion of the surplus being payable to the Company as set out in the SSA. However, the Final Amendment was

subject to Montreal Trust obtaining “*all necessary regulatory approvals*”. (Emphasis added)

- 42) An Order of the Ontario Superior Court of Justice dated October 3, 2006, obtained on consent in the context of a proceeding under the *Class Proceedings Act, 1992* (the “CPA”) by Montreal Trust and James Robert Armstrong, Kenneth James McGregor and Donald Ross Large as representative respondents for the Surplus Sharing Group (the “Court Order”) declares the Final Amendment valid and binding except in respect of one person who opted out of the class proceeding (the “Opt Out”).
- 43) The Court Order states that Montreal Trust is entitled to receive a payment of surplus from the Plan in accordance with the SSA and that the SSA is valid and binding on the parties to the proceeding and the Surplus Sharing Group, except for the Opt Out. However, the Order states that the distribution of surplus pursuant to the SSA amongst Montreal Trust and the Surplus Sharing Group (except the Opt Out) would proceed “*following applicable regulatory approval and subject to compliance with applicable legislation*” (Emphasis added). The SSA was approved pursuant to section 29(3) of the CPA.
- 44) The Surplus Sharing Group is made up of 3,614 individuals. The surplus distribution proposal as set out in the SSA was accepted by 84.3% of the Surplus Sharing Group (3,047 individuals). The SSA provides that 50% of the Net Surplus (as defined in the SSA) would be allocated to members of the Surplus Sharing Group and 50% of the Net Surplus would be allocated to Montreal Trust.
- 45) Montreal Trust and members of the Surplus Sharing Group (the “Parties”) submit that, apart from the issue of the Opt-Out, based on the Court Order and the Final Amendment, the Plan provides for payment of surplus to Montreal Trust.
- 46) The Parties submit that the Court Order gives the Superintendent the jurisdiction to consent to Montreal Trust’s application regardless of the 1946, 1954 and 1963 Trusts. They submit that the PBA does not require a variation of trust. They also submit that an amendment to a pension plan permitting payment of surplus to the employer can be obtained by other means, i.e, a compromise approved by the Court in a class proceeding binding all beneficiaries of the trust that allows for the appropriate Plan amendment, because the Court has jurisdiction to deal with all matters of trust law.
- 47) The PBA does not require a variation of trust where the pension plan provides for a payment of surplus to the employer within the meaning of section 79(3)(b) of the PBA, as this requirement has been interpreted by the courts and the Financial Services Tribunal in prior decisions. However, the Court Order and the Final Amendment do not state that the Plan provides for the payment of surplus to Montreal Trust within the meaning of section 79(3)(b) of the PBA. In making the Court Order under the CPA, the Court had only to be satisfied that the SSA was fair, reasonable and in the best interests of those affected. This is not the test that has to be met under section 79(3)(b) of the PBA, which is the test the Superintendent must address before he can consent to Montreal Trust’s application.

- 48) The surplus distribution proposal as set out in the SSA was not accepted by all the members of the Surplus Sharing Group or beneficiaries of the 1946, 1954 and 1963 Trusts. The Court has power to bind the class only on issues that are within its jurisdiction to decide independently of the *CPA*. It has no jurisdiction under the *Variation of Trusts Act*, or otherwise, to override, or exercise the rights of a *sui juris* individual as a beneficial owner of property – including rights recognized under the principles of equity referred to in the rule in *Saunders v. Vautier (Sutherland v. Hudson's Bay Co. (2005), 46 C.C.P.B. 225 (Ontario Superior Court))*. Therefore, it appears that the Court Order does not bind all beneficiaries of the 1946, 1954 and 1963 Trusts.
- 49) Since the Court Order under the *CPA* does not vary the trusts or furnish or dispense with the consents required for a variation of the trusts, and since in the Court Order the Final Amendment and the provision that allows for the distribution of surplus to Montreal Trust are subject to Montreal Trust obtaining all necessary regulatory approvals and/or compliance with applicable legislation, the Superintendent is not relieved of the obligation to ensure that the criterion in section 79(3)(b) of the *PBA* has been met.
- 50) Based on the terms of the Plan, including its historical terms and its funding documents, the Superintendent cannot consent to Montreal Trust's application under sections 78(1) and 79(3) of the *PBA*, as the Plan does not provide for payment of surplus to Montreal Trust. Section 79(3)(b) of the *PBA* requires that the Plan provide for payment of surplus to Montreal Trust as a pre-condition to the Superintendent's consent (*Kent v. Tecsyn International Inc. (2000) 24 C.C.P.B. 229*).
- 51) The Parties also submit that even if the Plan does not provide for a payment of surplus to Montreal Trust and instead states that plan members and other beneficiaries are entitled to the surplus on wind up, members could be said to have consented to give some of the surplus to the employer in exchange for obtaining a wind up, avoiding the uncertainties of litigation and obtaining some tax benefits.
- 52) A member's consent is not relevant to the Superintendent's determination under section 79(3)(b) of the *PBA*. There is no requirement for member consent in section 79(3)(b). The only requirements for member consent are found in section 8 of Regulation 909. However, section 8 of Regulation 909 only comes into play, if the pension plan provides for payment of surplus to the employer on wind up (*Kent v. Tecsyn International Inc. (supra)*).
- 53) The Plan provides for payment of surplus to members, former members and other persons entitled to benefits under the Plan on Plan wind up as the pension fund of the Plan is subject to three trusts established in 1946, 1954 and 1963 respectively in favour of plan members. The only way in which surplus can be paid out of the Plan to Montreal Trust is by varying these trusts. Since the trusts have not been varied and the Plan does not provide for payment of surplus to Montreal Trust on wind up of the Plan, the Superintendent cannot consent to Montreal Trust's application for payment of money that is surplus to Montreal Trust out of the pension fund of the Plan as it relates to Ontario members and former members of the Plan.



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

**YOU ARE ENTITLED TO A HEARING** by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Proposal is served on you.** <sup>1</sup>

**YOUR WRITTEN NOTICE** must be delivered to:


Financial Services Tribunal  
5160 Yonge Street  
14<sup>th</sup> Floor  
Toronto, Ontario  
M2N 6L9

Attention: The Registrar

**FOR FURTHER INFORMATION** on a Form for the written notice, please see the Tribunal website at [www.fstontario.ca](http://www.fstontario.ca) or contact the Registrar of the Tribunal by phone at 416-590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

**IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE PROPOSAL AS DESCRIBED IN THIS NOTICE.**

**DATED** at Toronto, Ontario, this 10<sup>th</sup> day of March, 2008.

  
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K. David Gordon  
Deputy Superintendent, Pensions

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<sup>1</sup> NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the seventh day after the date of mailing.

**COPY:**

**TO:** **Osler, Hoskin & Harcourt LLP**  
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**Attention:** Mr. Douglas Rienzo

**AND TO:** **Koskie Minsky LLP**  
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**Attention:** Mr. Mark Zigler/Ms. Susan Philpott