

C A N A D A  
PROVINCE OF SASKATCHEWAN

IN THE COURT OF QUEEN'S BENCH  
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

**CROWN INVESTMENTS CORPORATION  
OF SASKATCHEWAN,**

APPLICANT

AND:

**THE BENEFICIARIES OF THE SURPLUS IN  
THE RETIREMENT ANNUITY FUND OF THE  
CAPITAL PENSION PLAN,**

RESPONDENTS

**AFFIDAVIT OF KEN KLEIN**

I, KEN KLEIN, of the City of Regina, in the Province of Saskatchewan, HEREBY  
MAKE OATH AND SAY:

1. I am employed by the Applicant, the Crown Investments Corporation of Saskatchewan ("CIC"). I began my employment with CIC in April of 1994, in the position of Information Officer. In March of 2001, I became the Executive Director of the Capital Pension Plan, and currently hold that position. As Executive Director, my duties involve overseeing the day to day administration of the Capital Pension Plan, and its associated Retirement Annuity Fund. As such, I have personal knowledge of the matters and facts hereinafter deposed to, except where stated to be on information and belief, and whereso stated I verily believe the same to be true.

**ORIGIN AND BACKGROUND OF PLAN**

2. The Capital Pension Plan is a money-purchase pension plan, registered pursuant to *The Pension Benefits Act, 1992*, where a member's eventual pension entitlement is dependent upon the contributions made to the Plan by the member and his employer, together with the rate of return experienced by the Plan.

3. The administrator and trustee of the Capital Pension Plan is the Crown Investments Corporation of Saskatchewan.

4. The Plan was originally established in 1976 (as the "CIC Pension Plan") to provide a pension plan to the employees of a few crown corporations. Today, there are over 60 employers participating in the Plan, which employers include private corporations, crown corporations, labour unions, and other selected organizations. While there are many employers, there is only one plan text that is applicable to all.

5. As at December 31, 2006, the Plan had 7,463 members (not including annuitants, of whom there were 383 at the same date).

6. Active Members make required contributions to the Plan based on a percentage of their individual earnings. Participating employers are required to at least match these contributions. Voluntary contributions by members are also permissible to a certain degree.

7. Generally speaking, a member's benefits under the Plan "vest" after two years. "Vesting" refers to the point in time at which a member becomes entitled to all past and future contributions made by an employer on their behalf.

**ORIGINS OF “SURPLUS” IN PLAN**

8. If a member terminated their employment prior to the two year vesting period referred to above, that employee would have their own contributions returned to them on separation and would have no further claim to any benefits provided by the Plan. However, the employee would not receive a return of their employer’s contributions made on their behalf prior to separation. These latter contributions are known as “non-vested employer contributions”.

9. From a review of the minutes and files held by CIC and the Capital Pension Plan, I have determined that in 1979, the CIC board of directors discussed what to do with the non-vested employer contributions. Up to that time, employers had utilized the same as a “credit” to offset their required future pension contributions on behalf of their employees.

10. With the consensus of all crown employers, the CIC Board passed a motion on 29 March 1979 to amend the pension plan text to provide that the non-vested employer’s contributions would be retained in the pension plan, to meet future liabilities or to benefit the fund. The Plan was so amended, and after May 1, 1979, the non-vested employer contributions were kept in a separate sub-account of the Plan known as the Retained Employers Contribution Account.

11. The Retained Employers Contribution Account grew over time. As at December 31, 1985, the balance in this account was \$2,948,797.14. No employees ever paid into this account; the monies therein were there entirely as a result of transfers of non-vested employers’ contributions only.

**TRANSFER OF SURPLUS**

12. Prior to 1986, the Capital Pension Plan had no mechanism for offering pensions to its members. On retirement, the value of the member's interest in the Plan was transferred on the member's instruction to a third party pension issuer.

13. By 1986, most other government pension plans had the ability to offer pensions to their members. Accordingly, CIC investigated this option for members of the Capital Pension Plan. As a result of various discussions held in 1985 and 1986, the CIC board of directors with the concurrence of the various employers of the Plan chose to implement a Retirement Income System effective July 1, 1986. The purpose of this system was to offer Capital Pension Plan members an "in-house" annuity option, whose fees and expenses would be less than those charged in the market.

14. To implement this retirement income system, a separate account was established known as the Retirement Income Fund, which has later become and is now known as the Retirement Annuity Fund. This Retirement Annuity Fund is in effect a defined benefit pension plan. When a member of the Capital Pension Plan retires, he/she has the option of transferring their pension funds to a third party issuer, as before, or purchasing an annuity from the Retirement Annuity Fund. The annuity from the Retirement Annuity Fund is calculated in accordance with standard actuarial principles, utilizing such factors as age, mortality rates, assumed interest rates, etc.

15. At the time that the Retirement Income System was being established, it was actuarially forecasted that there would be cash shortfalls for the first 15 years of the Retirement Annuity Fund's operation, given the fact that while the funds would be invested in medium and long term bonds, there would be an immediate call for cash annuity payments. The estimate at the time was that this Retirement Annuity Fund would need a cash injection of \$2.7 million.

16. Each employer participating in the Plan agreed, and was required to contribute a proportionate share of this \$2.7 million. The proportionate share was calculated as 3.17% of each employer's equity in the Capital Pension Plan Pension Fund.

17. Rather than each employer raising this capital from its own sources, it was agreed that the employers would be permitted to use the funds standing to their credit in the Retained Employers Contribution Account.

18. Some employers had enough in the Retained Employers Contribution Account to cover their 3.17% share; others had a shortfall, and had to contribute in years following 1986 from their non-vested contributions until their share was satisfied.

19. Regardless of the mechanics of making up shortfalls, the Capital Pension Plan financial statements disclose that the total amount transferred on or about July 1, 1986 from the Retained Employers Contribution Account to the new Retirement Annuity Fund was \$2,097,799.00. These monies were transferred into what was known as the "Retirement Reserve Account" within the Retirement Annuity Fund.

20. The balance of the funds in the Retained Employers Contribution Account in 1986 was used to credit the employers who had a "surplus" with this amount, to be used to offset future contributions.

21. After 1986, the amounts transferred from the Retained Employers Contribution Account to the Retirement Reserve Account were as follows:

1987: \$105,829.00

1988: \$ 67,635.00

1989: \$ 31,923.00

1990: \$ 43,975.00

1991: \$ 41,852.00

1992: \$ 10,638.00

1993: \$ 2,065.00

22. In 1994, CIC discontinued the practice of transferring funds from the Retained Employers Contribution Account to the Retirement Reserve Account, and returned to the pre-1979 practice of using non-vested employer contributions to offset a particular employer's future mandatory contributions.

23. No transfers have been made to the Retirement Reserve Account from the Retained Employers Contribution Account since December 31, 1993. Accordingly, the total amount transferred was \$2,401,716.00.

24. The funds in the Retirement Reserve Account (along with the funds in the RAF) were invested and bore interest, and each year an interest component was credited to the Retirement Reserve Account, based upon the average interest earned by the RAF funds over the year. In addition, the account was adjusted on an annual basis to reflect actuarial gains or losses in the RAF, and was charged with operating expenses of the Retirement Annuity Fund.

25. In light of the health of the Retirement Annuity Fund, and the fact that when the monies were transferred from the Retained Employers Contribution Account to the Retirement Annuity Fund it was noted that the funds could subsequently be used for enhancing benefits if not required for "start up" purposes, CIC decided in 1993 to provide an *ad hoc* increase to the annuities payable from the Retirement Annuity Fund, and did so. While no promise of increases were made to annuitants when they purchased an annuity from the Retirement Annuity Fund, the annuities from the Retirement Annuity Fund are not indexed for inflation, and therefore an increase was felt warranted in light of the Retirement Annuity Fund's surplus. The cost of the increase was approximately \$660,000.00.

### THE LITIGATION OVER SURPLUS

26. One of the participating employers in the Capital Pension Plan was the Potash Corporation of Saskatchewan (“PCS”). PCS participated in the Plan as a crown corporation since the Plan’s inception in 1976. In 1989, PCS was privatized by legislation. The new privatized corporation (“PCS Inc.”) continued to participate in the Plan until 1992, when it established its own pension plan. Effective September 14, 1992, PCS Inc. employees were thereafter required on a future basis to be members of the PCS Inc. Pension Plan, and make contributions to that plan.

27. However, PCS Inc. ultimately gave its employees the choice of leaving their past contributions with the CIC Pension Plan, or transferring the same to the new PCS Inc. Pension Plan. Approximately 73% of PCS Inc.’s employees chose to transfer all of their past contributions from the Capital Pension Plan to the new PCS Inc. Plan. This group of employees became known as the “electing employees”.

28. CIC duly transferred the pension funds of the electing employees to the new PCS Inc. Pension Plan. However, PCS Inc. demanded, on behalf of the electing employees, that CIC also transfer a proportionate share of the surplus in the Retirement Annuity Fund as contributed by PCS, effective December 31, 1993.

29. CIC refused this request for a proportionate share of the surplus in the Retirement Annuity Fund. As trustee, CIC felt obliged to protect those monies from encroachment, for one of the stated purposes for transferring the funds to the Retirement Annuity Fund was to enhance the Retirement Annuity Fund pensions. As the electing employees were not annuitants under the Retirement Annuity Fund, nor could they be as they were withdrawing from the Plan, CIC as trustee took the position that they could not receive a share of those monies without CIC being in breach of trust.

30. PCS Inc. commenced litigation in 1995 to recover a proportionate share of the surplus in the Retirement Annuity Fund, on behalf of the electing employees. In a Judgment of this Honourable Court dated 6 May 2003, CIC was ordered to transfer a proportionate share of the surplus in the Retirement Annuity Fund to PCS Inc. on behalf of the electing employees. By written reasons dated May 25, 2004, the Court of Appeal upheld this determination.

31. The appeal period from this Judgment has expired, no appeal has been launched, and CIC considers the Court of Appeal's decision in this matter final and binding. Accordingly, CIC has since transferred to the PCS Inc. Pension Plan the sum of \$2,021,000.00, being the principal of \$853,593.16 as directed in the Judgment, together with interest as actually earned on this sum from December 31, 1993 to date of payment.

32. After payment of the PCS Inc. sums, there is still substantial surplus remaining in the Retirement Reserve Account, attributable to the transfers from the Retained Employers Contribution Account. As at December 31, 2006, the amount of surplus in the Retirement Annuity Fund attributable to the Retained Employers Contribution Account, together with interest thereon, is \$6,615,000.00. This figure has been calculated by essentially "grossing up" the amount which was transferred into the Retirement Reserve Account between 1986 and 1993 with interest as actually earned thereon to the date of December 31, 2006. Attached hereto and marked as Exhibit "A" to this my affidavit are the audited Financial Statements for the Retirement Annuity Fund ending December 31, 2006.

**THE NEED FOR DIRECTIONS**

***A. Directions on the Class of Beneficiaries***

33. While the PCS Inc. court judgment only applies to the electing employees of PCS Inc. who withdrew their monies from the Plan, it is apparent to CIC that, as trustee, it must ensure that other beneficiaries who are similarly situated to the electing employees of PCS Inc. receive the same treatment.

34. Further, CIC does not consider it appropriate to simply wait until potential beneficiaries make a demand for payment, for the vast majority of potential beneficiaries would be unaware of any possible claim to a proportionate share of the surplus that they might have.

35. Therefore, following the court decisions, CIC attempted to determine who the remaining beneficiaries of the Retirement Reserve Account surplus were, and what their proportionate share of the surplus would be. In doing so, however, complications arose due to facts which were not relevant to the PCS Inc. decisions, but which very much affect who the beneficiaries are, and what share they might receive.

36. Two significant questions have arisen in defining the precise class of beneficiaries.

37. The first question of administration of the trust is as follows: Do the court decisions apply to all members and former members of the Plan (active members, inactive members, and those who have withdrawn their funds), or do the court decisions apply only on the exact same set of facts and in the same manner as the decisions (meaning that only those members who have withdrawn their funds from the plan will receive a proportionate share of the surplus)?

38. CIC believes that the court decisions are capable of either of these interpretations, for the following reasons.

39. First, simply extrapolating the facts from the courts' decisions and applying them only to those in an identical position would restrict the surplus distribution to former members who have withdrawn their funds from the Plan – for this was the class of persons represented by the Plaintiffs in the action. This might be described as a literal interpretation.

40. Second, however, there is a different interpretation based upon the reasons given by the Courts in support of the judgment. In particular, the Court of Appeal reasons stated that the non-vested employer contributions left in the Plan “were impressed with a trust in favour of all members of the pension plan” (emphasis added), while this court stated that “All of the members contributing to the Pension Plan were beneficiaries” (emphasis added). Neither of the courts restricted the beneficiaries of the surplus solely to those who had withdrawn from the Plan. This might be described as an expansive interpretation.

41. CIC believes that this expansive interpretation is the appropriate one, given that it does not “reward” people for withdrawing from the Plan and “penalize” those who remain as active or inactive members. However, the question is not free from doubt, and hence direction is required.

42. Regardless of the answer to the first question, a second question regarding the composition of the class arises. The question arises in this manner.

43. In the court decisions, the employees who had withdrawn from the Plan and who were claiming a share of the surplus happened to be employees of an employer who had contributed funds to the Retirement Reserve Account surplus, and substantial funds at that. The distribution formula applied by the court gave these employees a proportionate share of how much their employer had contributed to that surplus.

44. Not relevant to the court decisions, but very relevant in attempting to apply the court decisions to others, is the fact that some employers contributed very little to the Retirement Reserve Account surplus, or nothing at all. The former situation (little contribution) arose in cases where the employer had few terminated employees, or where the employer joined the pension plan relatively recently. The latter situation (no contributions) arose in one of two cases: where either the employer’s employees who separated did so after their pension funds had vested (such that the employer’s contribution did not go into the Retained Employer’s Contribution Account), or where the employer

joined the Plan after December 31, 1993, when the non-vested employer contributions stopped being retained in the Plan.

45. As a result of these facts, the second question of administration of the trust is as follows: For the individuals who are considered to be beneficiaries as per the first question above, do the court decisions apply to all of those individuals (meaning that all will receive a proportionate share of the Retirement Reserve Account surplus, regardless of whether or how much their employer contributed to that surplus), or do the court decisions apply only on the same set of facts and in the same manner as the decisions (meaning that only those beneficiaries whose employers contributed to the surplus will get a share of the same, and then only in proportion to the extent to which their employers contributed to that surplus)?

46. The answer to this second question will have significant ramifications on the amount of work required to be undertaken by CIC to distribute the surplus. CIC has estimated that if the class is defined as beneficiaries whose employers contributed to the surplus, there will be approximately 4,104 beneficiaries as at December 31, 2006 (not counting those who have withdrawn from the Plan). If the class is defined as all members, regardless of whether their employer contributed to the surplus or not, there will be some 7,463 beneficiaries as at December 31, 2006 (not counting those who have withdrawn from the Plan).

47. In addition, if the class is defined without reference to whether the member's employer made contributions or not, CIC will have to calculate a proportionate share of the Retirement Reserve Account surplus for every member (regardless of how much (if any) their employer contributed to the surplus). Although this possibility was not discussed in the court decisions as it was not relevant to the issues in dispute, CIC is able to make this calculation, with some work.

48. However, it is important to note that utilizing this larger class will significantly "dilute" the amount of surplus available for distribution, for there will be many, many

more employees who will share in the surplus than if the class is restricted to employees of contributing employers. For example, if the class is defined as the smaller class (only employees or former employees of employers who contributed to the reserve account), an employee employed by SGI with a pension balance of \$50,000.00 in the Plan as at December 31, 2006 stands to receive a distribution of approximately \$505.35. However, if the class is defined as the larger class (all members and former members, whether the employer contributed to the surplus or not), that same employee's distribution of surplus will only amount to \$368.91.

49. Utilizing the larger class will also lead to some anomalies. For example, two employees of PCS Inc. (one electing, one non-electing) who had identical Capital Pension Plan balances will receive two significantly different shares of the surplus: the electing employee has already received her "undiluted" share according to the court decisions; the non-electing employee with the same pension balance would receive a much smaller share, as the surplus must be spread across a much broader base.

50. With directions on these questions, CIC proposes to create a list of the proposed beneficiaries, set out the proposed surplus distribution for each, and provide the same to the court for approval. This proposal will divide up the entire surplus remaining as of December 31, 2006, and no more. It will be CIC's further proposal that, following approval of the distribution formula, it will provide a cheque to each contributing employer for it to distribute to the applicable employee in the manner it sees fit (whether in cash or by way of pension adjustment), and where the beneficiary is no longer employed by a contributing employer, CIC will provide a cheque to that individual directly, less the applicable withholding tax.

51. While the above issues are the main ones on which directions are required, there are several subsidiary issues also requiring directions.

***B. Directions on the application of the formula***

52. A second area requiring direction deals with the concept of “withdrawal” from the Plan. In the PCS case, this was not an issue, for the electing employees had physically withdrawn their pension funds and were no longer related to the Plan in any way. However, technically speaking, all of the annuitants of the Retirement Annuity Fund can be said to have withdrawn funds from the Plan: they are no longer members of the Capital Pension Plan, they withdrew the funds standing to their credit in the Capital Pension Plan, and they are now part of the Retirement Annuity Fund. Therefore, two questions arise. First, are annuitants of the Retirement Annuity Fund to be treated as individuals who have withdrawn from the Plan, and who are therefore entitled to a proportionate share of the Retirement Annuity Fund surplus as of the date of their withdrawal? Second, and if so, directions are required as to whether the *ad hoc* increase to the pension that was granted to the annuitants (if applicable) must be set off against this share.

***C. Directions as to notification of beneficiaries***

53. Third, depending upon the directions made by this court, it may also be necessary to deal with the issue of notification of beneficiaries. Many of the beneficiaries may be able to be located through their current or former employers. Others, however, left no contact information with the Capital Pension Plan on their withdrawal. Further, many of the beneficiaries may have passed away since withdrawing from the fund, raising questions as to notification of their estates.

***D. Directions as to the proper parties to be served with this application***

54. Fourth, there are any number of groups of persons who potentially have an interest in the outcome of this application. The first of course are all members of the Plan. CIC as trustee feels that its responsibility on this application is to act in those members’ best interests. Another group is all of the current employers participating in the plan (over 60), on the basis that the Plan is paying out surplus which is essentially constituted from forfeited non-vested employer contributions. Third, the annuitants may have an interest, in that the vast majority of the surplus in the RAF will be disbursed following the directions

of this court. There is no Retiree Association under the Capital Pension Plan who might be notified of this application.

***E. Directions as to expenses of this application***

55. Fifth, CIC seeks directions as to whether the surplus for distribution is to be charged with the expenses of this application, prior to distribution. The expenses contemplated relate to administration costs in locating and notifying the beneficiaries, as well as legal fees and expenses as a result of this application.

***F. Directions on the method of payment of surplus share***

56. Sixth, CIC seeks directions as to how the individual surplus shares are to be paid out to the individual beneficiaries. As noted above, it is CIC's proposal, where the beneficiary is still employed by a contributing employer, for CIC to provide the employer with a surplus cheque for distribution to specified employees. However, for the hundreds of other beneficiaries who are no longer employed by contributing employers, any number of different scenarios may be present: the employee may have retired, passed away, changed employers to an employer with a pension plan, changed employers to an employer without a pension plan, transferred their funds to a LIRA, etc. As it will be essentially impossible for CIC to determine, in each of the hundreds of cases, what method of payment might be most advantageous to a particular beneficiary, CIC proposes to, and seeks directions on, simply providing a cheque to each individual inactive or past member, less the required withholding tax.

***G. Directions on the method of calculating interest***

57. Finally, CIC seeks directions as to how the individual pension accounts are to be "grossed up" to December 31, 2006 for those members who have withdrawn their pension funds from the Plan. CIC has this information for active and inactive members, but the information must be manually calculated for those who have withdrawn. In general, for those members who have withdrawn from the Plan, CIC will take a member's pension balance as of the date of their withdrawal, and gross it up (as was done in the PCS Inc.

case) to a specified date (December 31, 2006), utilizing the Plan's rate of return over the years. A problem arises because while a member's pension balance is readily available if the member is active or inactive, the pension balance of a member who has withdrawn can only be ascertained by manually "pulling the file". While this can be done, the largest part of the work will be in calculating the interest, for members could have withdrawn their funds any day of the year. For example, a member may have withdrawn their funds on March 8, 1999. That member will have received interest on their funds to March 8, 1999. However, to calculate the interest for the balance of 1999 (in order to bring this account forward to December 31, 2006) would require that CIC compute the number of days remaining in 1999 after March 8<sup>th</sup>, and then pro-rate the interest for that year. While not overly difficult for a few dozen employees, this work will be extremely time-consuming for hundreds if not thousands of cases, as each calculation has to be done separately.

58. Accordingly, CIC proposes, and seeks direction, on simply using a half-year calculation, whereby if the member withdrew their funds in the first half of the year (i.e. prior to June 31<sup>st</sup>), they will be treated as if they have received no interest for that year, and the pension fund balance that will be used for "grossing up" to December 31, 2006 will be their balance as of the December 31<sup>st</sup> immediately preceding the withdrawal. Conversely, if the member withdrew their funds in the second half of the year (i.e. between July 1<sup>st</sup> and December 31<sup>st</sup>), the member will have already received interest for the majority of that year, so they will be treated as if they have received a full year's interest for that year, and the pension fund balance that will be used for "grossing up" to December 31, 2006 will be their pension fund balance as of the December 31<sup>st</sup> in the year of their withdrawal. While this proposal will leave some members slightly over-compensated, and others slightly under-compensated, it will be a "rough and ready" way to calculate the interest for one of the years without putting CIC to many additional hours of work.

59. I make this affidavit in support of an Order of the Court providing directions to CIC as to the administration of the trust.



SWORN BEFORE ME at the City )  
of Regina, in the Province of )  
Saskatchewan, this \_\_\_\_ day )  
of April, 2007. ) \_\_\_\_\_

KEN KLEIN

\_\_\_\_\_)  
A COMMISSIONER FOR OATHS  
in and for the Province of Saskatchewan.  
My commission expires:

THIS AFFIDAVIT DELIVERED BY BAINBRIDGE JODOUIN CHEECHAM