

CANADA
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

**APPLICANT'S WRITTEN SUBMISSIONS
RESPECTING THE MAIN APPLICATION**

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INTRODUCTION

1. The essence of the factual background to this application is as follows:
 1. CIC is the trustee of a Pension Plan that has a surplus;
 2. This Court (in a decision affirmed by the Court of Appeal) ordered that a portion of this surplus be distributed to certain members of the Plan who have withdrawn from the Plan (which distribution has occurred); and

3. CIC wishes to fully and finally distribute the remainder of the surplus in a *pro rata* manner to the balance of the members who have an interest in the same, but difficulties have arisen in ascertaining the extent of this class of beneficiaries, and the precise distribution formula, and certain other related questions.

2. As a result, CIC seeks advice and directions from this Court in relation to these issues.

PART I: STATEMENT OF FACTS

BACKGROUND

3. For a full understanding of the facts that necessitate this application, a review of *Potash Corporation of Saskatchewan Inc. v. Crown Investments Corporation of Saskatchewan* (2003), 233 Sask. R. 278 (Q.B.) is necessary. Written reasons from the trial judgment are found at Tab 1 herein, and those from the Court of Appeal (reported at (2004), 249 Sask. R. 223) are found at Tab 2.

4. The salient facts behind these rulings are as follows.

5. In approximately 1976, the Government of Saskatchewan enacted, through the Government Finance Office, a pension plan for employees of crown corporations. The Government Finance Office later became known as the Crown Investments Corporation, and will be referred to as "CIC" hereafter. The pension plan was not mandatory for crowns, but all but the largest crowns (who had their own plans) became participants in the plan, which later became known as (and will be referred to hereafter as) the "Capital Pension Plan". PCS joined the plan in or about 1976.

6. The Capital Pension Plan was administered by CIC. While there were numerous employers, there was a single plan text, and the employers were simply participants in the plan; the administration was carried out by CIC according to the text of the plan.

7. The Capital Pension Plan is a defined contribution (or "money purchase" plan), in which an individual's eventual pension is defined by the amount of his and his employer's contributions, and the plan's rate of return over the years.

8. According to the terms of the plan, an employee's required contribution was 5.5% of his or her base salary, which figure was matched by the employer.

9. The plan also contained the usual provisions regarding vesting or lock-in – *i.e.* the period of time after which an employee’s pension contributions were locked into the pension fund, and could not be drawn out until permitted pursuant to the terms of the plan (typically at retirement age). The Capital Pension Plan provided a three-year vesting period before 1993, and two years thereafter.

10. However, if an employee was “separated” from his employment prior to that three-year period – *e.g.* by quitting, being terminated, etc. – that employee would receive back the entirety of their individual pension contributions as a lump sum, together with interest. When this occurred, the practice of the Plan before 1979 was to also “return” to the employer its contributions on behalf of the separated employee, which was accomplished by means of a credit against future required contributions by that employer.

11. In early 1979, an issue was raised as to whether, in the case of an employee separating prior to vesting, the employer’s contributions should be returned to the employer, or whether in fact those monies should simply be left in the pension fund for the betterment of the plan.

12. By the terms of the plan text, the CIC Board of Directors was responsible for, *inter alia*, approving amendments to the plan. At its meeting of 14 February 1979, the CIC Board asked management to report on this issue, namely, whether non-vested employer contributions should be retained in the pension fund “to meet possible future liabilities and/or to improve pension benefits”. Present at that meeting, and asked to report on the same was H.J. Matthies, the Plan Administrator designated by the text of the pension plan.

13. At the CIC Board meeting of 29 March 1979, Mr. Matthies reported on this issue. He noted that to that point, approximately three years after the plan had begun, \$81,000 had been returned to employers as a result of separated employees. He noted further that the plan text was already broad enough to permit the plan to retain those unvested employer contributions, irrespective of the employer’s wishes. However, “in the interest

of harmonious relationships”, as he noted, he sought the views of the twelve CEOs of the participating crown corporations. At the time of the meeting in March 1979, he had received formal responses from seven, and informal responses from three crowns, all of whom were in favour of retaining the unvested employer’s contributions in the fund. As a result, he recommended that the plan be amended to expressly include this change.

14. In addition to expressly agreeing that “non-vested employer contributions be retained in the pension fund”, the CIC Board at the March 29th meeting agreed to amendments to the plan according to an attached schedule as to the use of such retained funds. That schedule suggested that the plan be amended in accordance with another attached schedule, being Schedule A-5, section 9.00 of which provided as follows:

Provision made to allow non-vested employer contributions to be retained in fund for future liabilities and/or to improve the benefits, such a decision to be made on a calendar year basis.

15. Following CIC’s February 14, 1979 meeting, Mr. G.H. Beatty of CIC wrote to the President of PCS, Mr. David Dombowsky. After setting out the issue of non-vested employer contributions, Mr. Beatty requested as follows:

Current considerations are that such non-vested employer contributions should remain in the Fund. These monies would be used to meet possible future liabilities of the Plan and/or to improve the benefits of the members. The existing arrangements do not provide any reserves whatsoever and it is deemed to be inappropriate to continue in this manner.

May I ask that you provide me with your views with respect to relinquishing the non-vested employers’ contributions by February 27, 1979.

16. PCS, and eventually all of the employers participating in the Capital Pension Plan agreed to this proposal. Accordingly, commencing May 1, 1979, employers’ non-vested contributions were not returned to the employers, but instead were kept in a sub-account of the fund, known as the Retained Employers’ Contribution Account. Over the years, the funds in this account grew, and on an annual basis, the CIC Pension Board, which

contained employer's representatives, specifically agreed to retain the monies in the account.

17. It bears noting that no employees ever paid into this fund; the monies therein were there entirely as a result of transfers of employers' contributions only.

THE RETIREMENT INCOME SYSTEM

18. Before 1986, the Capital Pension Plan contained no mechanism for the provision of annuities to retiring members. Instead, when a member retired, her only option to obtain an annuity was to purchase the same through a third party issuer, through the transfer of the pension monies standing to that person's credit in the fund at the time of retirement. While the pension plan was obligated to shop for quotes on annuities, it could not actually provide them.

19. By late 1985, it was apparent that this state of affairs needed to be changed. By this time, all other government pension plans in the province were offering annuities "in-house", with the exception of CIC. Accordingly, a proposal was brought forward in early 1986 to allow CIC to begin offering annuities itself, as an alternative to members going to market. The idea for this plan, which was to become known as the Retirement Income System, was originally developed at the level of the Pension Board. As noted above, the Pension Board was a board created by the plan text, which was responsible for all administrative and management functions relating to the plan, except for those specifically delegated to the CIC Board. The Pension Board is made up of various CIC and employer representatives.

20. On 29 January 1986, the CIC Pension Board met to review and approve the implementation of the Retirement Income System. It was agreed at this meeting that a proposal to develop a "Retirement Income System" would be recommended to the CIC Board of Directors. The Retirement Income System would operate as follows. First, a separate account would be established, known as the Retirement Income Fund (hereinafter "RIF"). Second, when a member retired, he or she would now have the

option of either transferring their money to a third party issuer, as previously, or drawing an annuity through the CIC Retirement Income System. If the latter option was chosen, the monies standing to their credit in the pension fund would be transferred to the RIF, from which their annuity would then be provided.

21. When the proposal for the Retirement Income System was first made, it was actuarially forecasted that there would be cash shortfalls for the first fifteen years of its operation. This was due to the fact that the annual call for annuity payments would amount to more cash than was on hand annually; this was a cash flow problem, given that the RIF was to invest in medium and long-term bonds, which would not mature for a number of years. Once the RIF had been in operation for a number of years, the investments would then begin maturing on a more or less annual basis. It was determined that a cash injection of \$2.7 million would be needed from the participants at the start-up of the Retirement Income System. This would cover the expected shortfalls between 1986 and 2001 that would be present if the cash injection was not made, by which time it was forecasted that the Retirement Income System would then be self-sufficient.

22. While the issue of how the initial cash injection would be proportioned amongst the various employers was debated, it was eventually agreed that each employer would contribute a figure amounting to 3.17% of the equity standing to their credit in the pension fund. Based on the total balance in the fund at 31 December 1985, this would amount to a total cash injection of \$2.7 million to the RIF.

23. There were two important features as to how this transfer of funds would occur.

24. First, the monies would not be transferred to the RIF itself; instead, a separate sub-account within the RIF account was set up, known as the Retirement Reserve Account.

25. Second, as to how each employer was to provide these funds, this is where the Retained Employers' Contribution Account again enters the picture. By this time, the

funds in this account had grown substantially, such that at 31 December 1985, the balance of this account was \$2,948,797.14. The agreement reached at the January 29, 1986 meeting was as follows:

1. Each employer would be "assessed" 3.17 % of their corporation's total equity in the pension fund, and this amount would be transferred from the retained employer's contribution account;
 2. This would leave some employers in a surplus position – *i.e.* as more than the necessary funds existed in the retained employer's contribution account – and others in a shortfall position;
 3. If an employer was in a surplus position, the remainder of their credit in the retained employer's contribution account after the 3.17 % transfer to the RIF would be credited to the employer for future required contributions;
 4. If an employer was in a shortfall position, that shortfall would be recovered from future transfers by that employer to the retained employer's contribution account; it would not be recovered through any other means;
 5. Transfers to the retained employer's contribution account for the 1986 year would, at 30 December 1986, be credited to employers for future required contributions, assuming they were not in a shortfall position; and
 6. For 1987 and subsequent years, it was agreed that contributions to the Retained Employers' Contribution Account would either be credited to employers at December 30 of each year, or transferred to the RIF "on the basis of residual shortfalls, actuarial evaluations and/or policy reviews," and that this decision be made annually.
26. The Retirement Income System proposal was considered by the CIC Board of Directors at its meeting of 12 March 1986, and the Board agreed with the Pension Board's recommendation.
27. On July 1, 1986, the Retirement Income System was brought into effect.
28. In 1986 and subsequent years, PCS's non-vested employer contributions retained in the Retained Employers' Contribution Account were transferred annually to the Retirement Reserve Account to cover PCS's shortfall identified in January of 1986. These transfers continued between 1986 and 1992, though the shortfall was ultimately

never paid in full.

29. In 1989, as noted above, PCS was privatized. However, its successor PCS Inc. and its employees continued to be members of the Capital Pension Plan, and continued making contributions thereto. PCS Inc. employees were ultimately given the option of retaining their membership in the Capital Pension Plan, or transferring their monies to the new PCS Inc. Pension Plan. In early 1994, the Capital Pension Plan transferred to the PCS Inc. Pension Plan all appropriate pension monies standing to the credit of the employees who chose to transfer to the new plan (the "electing employees").

30. This transfer occurred pursuant to the terms of a Settlement Agreement entered into between the parties dated 14 January 1994. That Settlement Agreement set out a formula for how the parties might agree to calculate a transfer of funds, if any, from the RIF to the PCS Inc. Pension Plan, and expressly gave the parties the right to proceed to court were such an agreement not reached.

31. By 31 December 1992, the assets in the RIF exceeded liabilities by nearly \$4.35 million. Accordingly, in 1993, CIC decided to make its first *ad hoc* increase to the annuities payable to members of the RIF, and did so.

32. On the withdrawal of PCS Inc. from the Capital Pension Plan, PCS Inc. demanded that a proportionate share of the monies in the Retirement Reserve Account (now reported as a surplus in the RIF) be transferred to the PCS Inc. Pension Plan. CIC refused, and a lawsuit was commenced against CIC by PCS Inc.

33. In the decision of this Honourable Court in 2003 (see Tab 1), the following specific findings were made:

1. That the Retained Employers Contribution Account was a trust fund from when it was first established in 1979 [Decision, para. 97];

2. That the beneficiaries of that trust were all members of the Capital Pension Plan [Decision, para 97];
3. That the monies in that trust were to be used “for the future liabilities and/or to improve the benefits in the Pension Plan” [Decision, para. 97];
4. That the trust continued in 1986 when the funds were transferred into the Retirement Reserve Account [Decision, paragraph 103];
5. That PCS employees were the beneficiaries of PCS’s contributions to that Retirement Reserve Account [Decision, paragraph 103]; and
6. That CIC had a fiduciary duty to return and account to the employees of PCS Inc. for their proportionate share of the Retirement Reserve Account established in 1986 [Decision, paragraph 129].

34. In the decision of the Court of Appeal in 2004 (see Tab 2), this Court’s decision was upheld, with the Court of Appeal ruling that the surplus monies “were impressed from the beginning to the end with a trust in favour of all members of the Pension Plan” [Appeal Decision, paragraph 3].

35. As is apparent from these reasons, CIC was found to have a legal obligation as trustee to distribute a proportionate share of the surplus in the Retirement Reserve Account to members of the Plan employed by PCS Inc. who withdrew their contributions from the Plan on their employer’s privatization. Those funds have since been distributed in full.

36. However, there is nothing in the PCS judgments which would restrict CIC’s obligation to PCS Inc. members only. To the contrary, the Courts’ reasons appear to stand for the proposition that (at least) any employee of an employer who has withdrawn from the Plan ought to have received a proportionate share of the surplus in the RAF.

37. CIC accepts this obligation. However, in attempting to carry out this obligation vis-à-vis other Plan members who are similarly situated to the PCS Inc. electing employees, several questions have arisen in applying the Courts' judgment. While CIC could distribute the funds using its best interpretation of the rulings, doing so without giving the affected parties the right to be heard may engender further litigation, which could be avoided with this application.

38. While there are several subsidiary issues upon which CIC seeks the Court's advice, the two main issues are as follows:

1. Who precisely falls within the class of beneficiaries that is entitled to share in the surplus? and
2. Whoever the precise beneficiaries are, can the formula for distribution of surplus as set out by the Court in the PCS case be utilized, or must it be modified?

39. At the court hearing regarding this application on June 12, 2008, the Court suggested that CIC prepare a list of the precise questions requiring directions. CIC has done so, and that list can be found at Tab 3 herein. This list of Issues Requiring Directions has also been sent to each employer and former employer, and each member and former member. Further, it has been placed on the website created by CIC to advise of the status of this court application.

PART II: THE COURT'S JURISDICTION ON THIS APPLICATION

40. The jurisdiction for this application for advice and directions is found in section 79 of *The Trustee Act*, R.S.S. 1978, c.T-23, and Rule 452(d) of *The Queen's Bench Rules*, which provisions read as follows:

Power of trustee, etc., to apply for advice in management of trust property

79(1) A trustee, guardian, executor or administrator may, without the institution of an action, apply in court or in chambers in the manner prescribed by rules of court for the opinion, advice or direction of a judge of the Court of Queen's Bench on any question respecting the management or administration of the trust property or the assets of a testator or intestate.

(2) The trustee, guardian, executor or administrator acting upon the opinion, advice or direction given by the judge shall be deemed so far as regards his own responsibility to have discharged his duty as trustee, guardian, executor or administrator in the subject matter of the application, unless he has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

Rule 452 The following proceedings may be commenced by originating notice:

...

Trusts, administration, etc.

(d) *applications* by the executors or administrators of a deceased person, or the sureties for administrators, or *the trustees under any deed or instrument*, or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee or next of kin of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise, under such creditor or other person as aforesaid, for such relief of the nature or kind following as may by the notice be specified, and as the circumstances of the case may require, or *for the determination of any of the following questions or matters*:

(i) the administration of the estate of the deceased;

(ii) *the administration of the trust*;

(iii) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or *cestui que trust*;

(iv) *the ascertainment of any class of creditors, legatee, devisee, next of kin, or others;*

(v) the furnishing and vouching of any particular accounts by executors, administrators or trustees;

(vi) the payment into court of any money in the hands of the executors, administrators or trustees;

(vii) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors, administrators or trustees;

(viii) the approval of any sale, purchase, lease, compromise or other transaction;

(ix) *the determination of any question arising in the administration of the estate or trust;*

Staying actions pending performance of trusts

(x) an order that no action be brought, or that all actions and proceedings pending against trustees, executors or administrators be stayed for such period, as to the court may seem necessary or expedient, in order that sufficient time be allowed to such trustee, executor or administrator for the performance of the trusts imposed upon him:

Interference with discretion of trustee

provided that the proceedings under this rule shall not interfere with, or control, any power or discretion vested in any executor, administrator or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought. [emphasis added]

PART III: ISSUES REQUIRING DIRECTIONS

41. There are 9 issues upon which CIC is seeking directions. Depending, however, on how they are answered, not all of these issues may be required to be decided by the Court.

42. Those issues, taken directly from the list prepared by CIC and filed with the Court, are as follows:

ISSUE NO. 1: Is the surplus existing in the Capital Pension Plan (which arose from the monies originally transferred from the Retained Employer's Contribution Account) to be distributed only to members and former members whose employer has withdrawn from the Plan and set up its own pension plan, or are all members and former members (subject to the answer to Issue Number 2) potentially eligible to share in the distribution, regardless of whether their employer withdrew from the Capital Pension Plan?

ISSUE NO. 2: Is the surplus existing in the Capital Pension Plan to be distributed only to members and former members whose employers contributed to the surplus, or is it to be distributed to all members and former members, regardless of whether their employer contributed to the surplus (which would therefore include employers who did not contribute anything to the surplus)?

ISSUE NO. 3: For those entitled to a share of the surplus, would the distribution of such surplus include individuals currently receiving a pension from the Capital Pension Plan through the Retirement Annuity Fund, and if so, is the amount of surplus distribution to be reduced for

those annuitants who received an increase to their pensions from the surplus in approximately 1993?

ISSUE NO. 4: For those entitled to a share of the surplus, how is CIC to distribute those monies – by separate cheque to each individual, or by single cheque to the applicable employer for distribution to the individual's pension plan account? Further, where the individual is no longer employed by an employer or former employer who is/was part of the Capital Pension Plan, is a cheque to be issued less the required withholding tax?

ISSUE NO. 5: If this issue becomes necessary, how is CIC to calculate the interest to be applied to the pension accounts of former members, where that account information is no longer within CIC's computer system, but must be ascertained manually?

ISSUE NO. 6: If this issue becomes necessary, how is CIC to notify individuals who are entitled to a distribution of the surplus where CIC does not have that individual's current address, or where the individual has passed away?

ISSUE NO. 7: Is the surplus existing in the Plan to be charged with the expenses of this Court application, including legal fees, notification expenses, etc.?

ISSUE NO. 8: Is the formula to be used by CIC to calculate any particular surplus distribution (as may be directed by the Court) the same formula that was used in the PCS decision, or is a different formula required?

ISSUE NO. 9: If this issue becomes necessary, what date is to be used to determine eligibility for entitlement to share in the surplus? That is, is

there a "cut off" date after which employees employed after that time do not share in the surplus, and if so, what is that date?

43. CIC will briefly explain each of these issues, and why directions are required, and that follows next.

PART IV: DISCUSSION OF ISSUES

ISSUE NO. 1: Is the surplus existing in the Capital Pension Plan (which arose from the monies originally transferred from the Retained Employer's Contribution Account) to be distributed only to members and former members whose employer has withdrawn from the Plan and set up its own pension plan, or are all members and former members (subject to the answer to Issue Number 2) potentially eligible to share in the distribution, regardless of whether their employer withdrew from the Capital Pension Plan?

44. This issue is by far the most significant stumbling block that CIC has had in applying the PCS Court Judgments to others in similar situations. Depending upon how this question is answered, it may eradicate most, if not all, of the other issues requiring directions.

45. The reason this issue arises, and why advice is needed, is as follows:

46. When the PCS case was decided, the specific facts that the Court was dealing with only involved a withdrawal from the Plan. That is, the precise question raised and answered was whether a portion of the surplus should be transferred to an employer (for its employees) who had withdrawn from the Plan.

47. Of course, the Court ruled that such a portion must be transferred.

48. Therefore, if the PCS decision is to apply only to the exact same set of facts (ie. to employers who have withdrawn), then CIC will apply the decision only on those facts. Presently, that would mean that it is only Cameco who would receive its proportionate share of the surplus (for its employees), for the only other employers who have withdrawn – PCS Inc. and Sask. Oil – have received their proportionate share of the surplus. There are other employers who have discontinued participation in the Plan, either due to being taken over by a larger employer, or going out of business. However,

these are not “withdrawals” in the sense of the employer having transferred monies from the Plan into a new Plan for its members, as in PCS or Cameco’s case.

49. However, there is a different interpretation that can be given to the PCS decisions if the reasons given by the Courts in support of the judgments are examined. In particular, both sets of Court judgments spoke of all members having an interest in these monies, seemingly regardless of whether their employer had withdrawn from the Plan or not. For example, in the Queen’s Bench Judgment, the Court held as follows:

All of the members contributing to the pension plan were the beneficiaries as that was the only plan or fund in existence as the Retirement Annuity Fund and Retirement Reserve Account did not come into existence until 1986. [emphasis added; at paragraph 97]

50. In the Court of Appeal Judgment, the Court of Appeal confirmed this broad language on several occasions:

In our opinion there is one thread that runs throughout the history of the administration of the funds in issue: That they were impressed from the beginning to the end with a trust *in favour of all members of the Pension Plan*.

...

... these contributions thereupon fell into the Pension Plan for the benefit, directly or indirectly, *of all members of the Plan*.

...

The point is that this once intended purpose was not realized, leaving the funds dedicated to their original purpose – *the benefit of all members of the Plan, not a particular group*.

And so it is that we believe the funds were impressed with the trust *in favour of all members of the Pension Plan* from the beginning. . . . [emphasis added; at paragraphs 3-7]

51. CIC accepts that a judicial decision will normally only apply to the same set of facts in the future – meaning that it is only employees of employers who have withdrawn from the Plan that would be entitled to a proportionate share. However, given the very broad wording (“all members”) used by two levels of Court, and in particular the statement by the Court of Appeal that the funds were not for the benefit of “a particular group”, this issue is not at all free from doubt – and paying out a disproportionate share to a smaller group of members or former members could lead to potential liability for CIC, and hence this application.

52. CIC takes no position as to how this issue should be decided by the Court.

ISSUE NO. 2: Is the surplus existing in the Capital Pension Plan to be distributed only to members and former members whose employers contributed to the surplus, or is it to be distributed to all members and former members, regardless of whether their employer contributed to the surplus (which would therefore include employers who did not contribute anything to the surplus)?

53. Whether this issue needs to be decided will depend upon the answer to Issue No. 1.

54. If the answer to Issue No. 1 is that it is only the employees of withdrawn employers who are to receive a proportionate share of the surplus, then this question need not be answered – for all of the withdrawn employers (PCS Inc., Sask. Oil, and Cameco) contributed to the surplus.

55. However, if the answer to Issue No. 1 is that the surplus is to potentially be distributed to all members and former members, regardless of whether their employer withdrew from the Plan or not, then this issue becomes relevant.

56. The issue raised here deals with the fact that not all of the employers contributed to the surplus. This was not an issue in the previous Court Judgments, as there was only one employer being considered (PCS Inc.), and it had contributed to the surplus. As it was not an issue, the question was not argued, nor considered by the Court.

57. However, as pointed out at paragraph 44 of the Affidavit of Ken Klein sworn April 12, 2007, not all employers who are part of the Plan contributed to the surplus. Some employers contributed very little to the surplus (either because they had few terminated employees, or they joined the Plan relatively recently). Some employers contributed nothing to the surplus, either because their employees who separated did so after their pension funds had vested (such that the employers contribution did not go into the Retained Employers Contribution Account), or because the employer joined the Plan

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

58. The same interpretative difficulty arises for CIC as in the first issue: While the PCS judgments dealt only with employers who contributed to the surplus (and is therefore possibly confined to those situations), the Courts' statements that the beneficiaries of the surplus were all members of the Pension Plan were made without any limitation or restriction to members who were employed by employers who contributed to the surplus. As noted above, the Court of Appeal specifically said that the surplus was not for "a particular group". This issue is of some significance if the surplus is to be distributed to members and former members, as it will very much affect the amount of the distribution in such a case. That is, there are some 7400 members and former members of the Plan – but only 4,104 are employees of employers who contributed to the surplus.

59. CIC takes no position as to how this issue should be decided.

ISSUE NO. 3: For those entitled to a share of the surplus, would the distribution of such surplus include individuals currently receiving a pension from the Capital Pension Plan through the Retirement Annuity Fund, and if so, is the amount of surplus distribution to be reduced for those annuitants who received an increase to their pensions from the surplus in approximately 1993?

60. If the answer to Issue No. 1 is that it is only the employees of withdrawn employers who are to receive a proportionate share of the surplus, then this issue need not be answered – for one cannot be an annuitant from the Retirement Annuity Fund if one has withdrawn from the Plan.

61. However, if the answer to Issue No. 1 is that the surplus is to potentially be distributed to all members and former members, regardless of whether their employer withdrew from the Plan or not, then this issue becomes relevant.

62. There are two questions raised here in relation to annuitants. The first deals with the notion of “withdrawal” from the Plan. In the Court judgments, 73% of PCS Inc. employees elected to withdraw their funds from the Plan, and did so. While annuitants may not have withdrawn their funds in the exact same manner (ie. due to their employer withdrawing from the Plan), for all intents and purposes their situation is no different than PCS Inc. electing employees, and are probably to be treated as having withdrawn from the Plan as well.

63. Assuming that is the case, this presents a second issue, which deals with the fact that part of the surplus that the Courts found to be a trust had already been used (obviously before the Court judgments) to provide an *ad hoc* pension increase to annuitants. In 1993, before any of the PCS litigation had commenced, CIC elected to use part of the surplus in the Retirement Reserve Account to provide a one-time increase in pensions from the Retirement Annuity Fund. Those pensions are not indexed to inflation, and the decision was therefore made to provide an increase for this purpose, in the amount of 60% of the CPI.

64. Therefore, the argument can be made that the annuitants from the Retirement Annuity Fund have already received a portion of the surplus, in that they benefitted from this pension increase. If this is correct, and these annuitants are found to be entitled to a portion of the surplus, then the question is whether the amount they have received by way of a pension increase is to be deducted from any such distribution.

65. CIC takes no position as to how this issue should be decided, but does wish to note that CIC's decision, and the receipt by the annuitants of this benefit, were all prior to the Court declaring these monies to be trust funds.

ISSUE NO. 4: For those entitled to a share of the surplus, how is CIC to distribute those monies – by separate cheque to each individual, or by single cheque to the applicable employer for distribution to the individual's pension plan account? Further, where the individual is no longer employed by an employer or former employer who is/was part of the Capital Pension Plan, is a cheque to be issued less the required withholding tax?

66. In the PCS Inc. case, the surplus funds were transferred from the CIC Pension Plan by means of a single cheque made payable to PCS Inc. from CIC, with PCS Inc. being left to distribute the funds to the pension accounts of the individual PCS Inc. employees.

67. CIC has learned that this created significant difficulties for PCS Inc., and is therefore prepared, if the Court directs, to issue individual cheques to individual members and former members.

68. CIC simply seeks confirmation from the Court that this is an acceptable way to proceed (if necessary), given that only one cheque was issued at the Court's direction in the PCS case. If this procedure is acceptable, CIC also proposes to simply deduct the required withholding tax from each distribution, as required by law.

ISSUE NO. 5: If this issue becomes necessary, how is CIC to calculate the interest to be applied to the pension accounts of former members, where that account information is no longer within CIC's computer system, but must be ascertained manually?

69. The problem that necessitates this question being asked of the Court is set out at paragraphs 57 and 58 of Ken Klein's Affidavit sworn April 12, 2007. It is as follows.

70. If a distribution of the surplus to individual members is required (which will depend upon the answers to the above questions), a specific cut-off date must be used. CIC has proposed that this cut-off date be December 31, 2006.

71. Then, the pension balance of each member must be ascertained as of that date, so that the distribution of surplus may be done in a proportionate manner. This was the procedure followed in the PCS distribution.

72. For active members, their pension balances as at December 31, 2006 are easily available. For inactive members, CIC will simply "gross-up" the member's pension balance with the Plan's rate of return from the date of their last contribution, to December 31, 2006.

73. These two situations do not present any difficulties. However, 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 that member's individual paper file.

74. 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 8th, 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.

75. 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 30th), 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 31st immediately preceding the withdrawal. Conversely, if the member withdrew their funds in the second half of the year (i.e. between July 1st and December 31st), 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 31st 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.

ISSUE NO. 6: If this issue becomes necessary, how is CIC to notify individuals who are entitled to a distribution of the surplus where CIC does not have that individual's current address, or where the individual has passed away?

76. If it becomes necessary to notify individuals for whom CIC no longer has a current address, directions will be required as to how this should occur.

77. Similar to the typical practice regarding Notices to Creditors, CIC would propose to place two consecutive notices in the "Notices" section of the Saskatoon Star Phoenix and Regina Leader Post newspapers, one week apart.

ISSUE NO. 7: Is the surplus existing in the Plan to be charged with the expenses of this Court application, including legal fees, notification expenses, etc.?

78. CIC takes the position on this issue that the Retirement Reserve Account Surplus should be charged with legal fees and expenses associated with this application, on the basis that the same were incurred by the Trustee (CIC) solely in relation to the surplus itself.

79. In terms of the Court's jurisdiction to make such an Order, it clearly has (and regularly exercises) that jurisdiction pursuant to Rules 545(2)(e) and 552(2), as follows:

545(2) The court in exercising its discretion as to costs may determine: ...
(e) the fund or estate or portion thereof out of which costs are to be paid.

Costs follow the event

552(1) The costs of a proceeding shall follow the event.

(2) Notwithstanding subrule (1), trustees, personal representatives or mortgagees who have acted reasonably in instituting, carrying on or resisting any proceedings shall retain their entitlement to costs out of a particular fund or estate. [emphasis added]

80. In terms of the law that would justify such an Order, there is much of it, and it is very well established.

81. The leading case is *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.) [Tab 4] which for a century has continued to be the foundation authority for identifying the principles under which the assessment of legal costs against an estate may be considered. Kekewich J identified estate cases as being of three kinds:

1. An application made by trustees of a will or a settlement, asking the court to construe the trust instrument for their guidance; to ascertain the interests of the beneficiaries; or to answer a question which arises in the administration of the trust. *In such instances, the costs of all parties, which are necessarily incurred*

for the benefit of the estate, should be taxed as between solicitor and client and paid out of the estate;

2. An application made by the beneficiaries as a result of a difficulty of construction or administration of the trust which would have justified an application by the trustees. Again, the application is necessary for the administration of the trust and the costs of all parties, which are necessarily incurred for the benefit of the estate, are paid out of the estate;

3. An application made by the beneficiaries who make claims adverse to other beneficiaries. Such litigation is adversarial in nature and, subject to the Court's discretion, the unsuccessful party bears the costs of those whom he or she brings to the Court. [emphasis added]

82. These principles have been applied in estate law jurisprudence across Canada for the 100 years since *Buckton*. In *Frymer v. Brettschneider*,¹ in awarding legal costs from the estate to the executor, Adams J wrote:

However, this does not mean each time a plaintiff sues a trustee defendant, the plaintiff is at risk, if unsuccessful, of paying to the defendant what amounts to a full indemnity as to legal costs. Rather, it means the trustee is entitled to full indemnity from the capital and/or income of the trust. The trustee and, thus, the successfully defended trust fund are, of course, entitled to the benefit of a court's normal approach to inter-party costs.

83. The Manitoba Court of Appeal described the responsibilities of an estate trustee in *Wilson Estate, Re*² stating: "It is the duty of the trustees to guard and preserve the trust fund as jealously as they would their own funds" and cited *Buckton* to further provide a clear rationale for the use of trust funds for the legal clarification of trust issues:

Trustees should not apply to the Court without due cause on questions which are too clear for argument, but the Court acts on the principle that trustees are entitled to the fullest possible protection which the Court can give them. When the application is made by some of the beneficiaries by reason of some difficulty which would have *justified* an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient, the same order as to costs is made as on a summons by trustees.

¹ *Frymer v. Brettschneider*, (1992), 9 C.P.C. (3d) 294. (Ont. Civ. Div.).

² *Wilson Estate, Re*, 1954 CarswellMan 19 (Man. C.A.).

84. The general principle as to costs when an issue is brought to the courts for interpretation by the trustee or executor was stated by Rand J in *Thompson v. Lamport*, [1945] S.C.R. 343 [Tab 5]:

The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

85. The Supreme Court of Canada has restated this principle a number of times.³

86. This law has also been confirmed in Saskatchewan. In *Landsall v. Lysyshyn*, [1998] No. 401 (Q.B.) [Tab 6], the Court held as follows:

It is the rule, rather than the exception, to permit legal costs incurred in resolving disputes regarding the administration of estates to be recovered from the estate, particularly when a dispute arises from an interpretation of the testator's intention.

87. While the above law is generally in relation to testamentary instruments and estates, it has been held to apply as well to trusts arising from pension plans. A useful summary of the law in this area can be found in *White v. Halifax (Regional Municipality) Pension Committee*, [2007] N.S.J. No. 61 (N.S.C.A.) [Tab 7], at paragraph 96 *et seq.*

88. For all of the above reasons, CIC submits that the costs and expenses to which it has been put in bringing this application and notifying the Plan's members and former members should be charged against the surplus.

³ Eg. *Re Millar* (1937), [1938] S.C.R. 1 (S.C.C.); *Re West*, [1942] S.C.R. 120 (S.C.C.); *Re Shaw Estate*, [1942] S.C.R. 513 (S.C.C.); *St. Andrews-Wesley Church v. Toronto General Trusts Corp.*, [1948] S.C.R. 500 (S.C.C.); *Diocesan Synod of Fredericton v. Perrett*, [1955] S.C.R. 498 (S.C.C.); *Re Fasken*, [1953] 2 S.C.R. 10 (S.C.C.); *Brewer v. McCauley*, [1954] S.C.R. 645 (S.C.C.); *Royal Trust Co. v. Crawford*, [1955] S.C.R. 184 (S.C.C.); *Gettas v. Karavos*, [1962] S.C.R. 390 (S.C.C.); *National Trust Co. v. Fleury*, [1965] S.C.R. 817 (S.C.C.).

ISSUE NO. 8: Is the formula to be used by CIC to calculate any particular surplus distribution (as may be directed by the Court) the same formula that was used in the PCS decision, or is a different formula required?

89. The need to answer this question will depend upon whether the Court orders that there be distributions to employees of employers who did not contribute to the surplus.

90. If the Court rules that there is to be a distribution of the surplus solely to employees of employers who contributed to the surplus, then directions will not be required. This is because this was the exact situation in the PCS case, and CIC will simply use the same formula as directed by the Court, modified to suit the circumstances.

91. However, if the Court orders that all employees are to receive a proportionate share of the surplus, the formula for calculating those shares will need to be substantially different. This is because the PCS formula bases an employee's share upon how much his/her employer contributed to the surplus. If this is not a factor to be considered, it would seem that the most sensible basis for distribution of the surplus would therefore be based solely on the proportionate share of the individual member's interest in the Plan. That formula would therefore look as follows:

$$\frac{\text{Individual Member's Pension Balance as at December 31, 2006}}{\text{Total Pension Plan Balance as at December 31, 2006}} \times \text{Amount of Surplus}$$

92. While simple to state, there are a number of "wrinkles" that CIC may subsequently need directions upon if this is the formula to be used, such as:

- Are annuitants to be included, and if so, what pension balance should be used (as their monies have been withdrawn from the Pension Plan when they became members of the Retirement Annuity Fund)?

- What is to be done with members who have changed employers on several occasions, sometimes being employed with an employer in the Plan, and sometimes not?

93. As pointed out in Ken Klein's original Affidavit at paragraph 50, upon receiving directions from the Court, CIC will prepare a proposed distribution schedule for the Court's approval. Any of the above concerns, or additional concerns, that CIC has in preparing this distribution could be raised at that time.

ISSUE NO. 9: If this issue becomes necessary, what date is to be used to determine eligibility for entitlement to share in the surplus? That is, is there a “cut off” date after which employees employed after that time do not share in the surplus, and if so, what is that date?

94. Should a distribution of surplus be ordered by the Court to members or former members of the Plan, there are two questions that arise as to “cut-off” dates.

95. The first is the date by which the surplus is to be valued. The date proposed by CIC in this case is December 31, 2006. This is due to the fact that some date had to be chosen, and this date coincided with CIC’s decision in early 2007 to bring this Court application forward. The two ramifications of this are, first, that the surplus will have been “frozen” as of that date. Having said this, CIC has earmarked the surplus funds in a Money Market Account so they will continue (and have continued) to bear interest, albeit not at the Plan’s same rate of return.

96. Secondly, by bringing all members’ and former members’ pension account balances current to December 31, 2006 (for the purposes of surplus distribution, if this becomes necessary), by definition this means that those employed after December 31, 2006 will not share in the surplus.

97. The second question is related somewhat to the first. It is whether the date of one’s employment with a participating employer should have any relevance to the issue of surplus distribution. There are three distinct time periods relating to the surplus:

1. Between 1979 and 1986, when the monies began accumulating in the Retained Employers Contribution Account;
2. Between July 1, 1986 and December 31, 1993, when these monies were transferred to the Retirement Reserve Account, and were added to and accumulated as a surplus in that fund; and

3. After January 1, 1994, when contributions to the Retirement Reserve Account surplus stopped, and non-vested employer contributions were simply returned to employers as a credit against future contribution requirements.

98. This issue was raised in these proceedings when the Court asked the parties to divide the potentially affected individuals into various groups, according to their interest in this application. It was suggested by one of the parties during that process that members could be grouped according to the above dates.

99. CIC takes the position that if the Court rules that a distribution of surplus to individual members is to occur, the date of that member's employment should not have an effect on their proportionate share. CIC takes this position for two reasons.

100. First, in the original PCS decision, these distinctions were not drawn amongst PSC employees, although they clearly existed. If it was not argued in the original PCS decision, and the Court did not see fit to examine dates of employment, it should not start now.

101. Second, as noted in the Court of Appeal's reasons, the funds in the Retirement Reserve Account were for the benefit of all members of the Plan, "not a particular group". While this was a reference to a different "group" – namely annuitants – the Court does seem to be saying that there are to be no distinctions drawn that would disqualify members, and that would include distinctions based on date of employment.

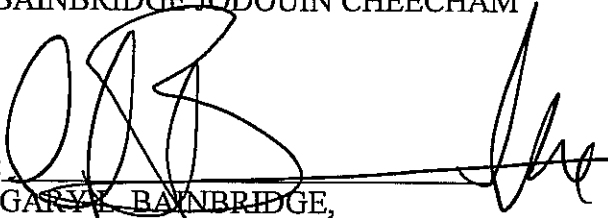
102. Therefore, CIC takes the position that the only "cut-off" date is December 31, 2006, which was simply the date chosen by CIC based on when it had the financial statements in hand to be able to quantify the surplus, at the same time that it was prepared to proceed with this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

. DATED at Saskatoon, Saskatchewan, this 1st day of October, 2008.

BAINBRIDGE JODOUIN CHEECHAM

PER:


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