

THE MANITOBA PENSION COMMISSION

IN THE MATTER OF: The Pension Benefits Act.
 C.C.S.M. c. P-32, as amended;

AND IN THE MATTER OF: The University of Winnipeg
 Pension Plan;

AND IN THE MATTER OF: an Order of the Superintendent of Pensions dated
 November 17, 2006, made pursuant to
 subsections 8(2) and 8(3) of The Pension Benefits
 Act relating to the University of Winnipeg Pension
 Plan;

AND IN THE MATTER OF: an appeal to the Pension Commission by the
 University of Winnipeg pursuant to subsections
 8(6) and 8(7) of The Pension Benefits Act.

FINAL DECISION

UNIVERSITY OF WINNIPEG APPEAL

APPEARANCES:

The Commission:	Robert Ziegler, Chairperson Ramona Tkachuk, Vice Chair Linda Zak Debra Woodgate Steve Gingera Barbara Smith Denis Fitzpatrick
Counsel for the Commission:	George Ulyatt
For the Superintendent:	Marjorie Webb
For the University of Winnipeg:	G. Patrick Riley Len J. Lucas Valerie Gilroy
For the University of Winnipeg Retirement Association:	Grant Stefanson Wesley Stevens Brent Stearns
For the University of Winnipeg Faculty Association:	Shannon Carson
For the Association of Employees Supporting Education:	Allan Forran Erin McNicol

FINAL DECISION

These proceedings relate to the University of Winnipeg Pension Plan (Plan) and an Order of the Superintendent dated November 17, 2006. While two appeals were heard simultaneously, it was clarified from the outset that both would be determined on their own merits and separate decisions would be issued. This decision relates to the appeal by the University of Winnipeg.

On January 15th, 2007, Patrick Riley /Len Lucas, on behalf of the University of Winnipeg, filed an appeal to the Superintendent's Order.

The appeal hearing commenced on February 14, 2007, and continued on April 4, 2007, to consider procedural and any preliminary issues raised by the parties. We have considered those matters and released our Interim Decision dated April 26, 2007 (attached as Appendix A).

Hearing dates were scheduled for September 13, 14 & 17, 2007, to consider the merits of the case. Mr. Stefanson, acting on behalf of the University of Winnipeg Retirement Association, indicated that Dr. Stevens would not be available on September 14 & 17 due to personal circumstances, and that he had a preliminary issue to deal with before he would provide the information requested in the Interim Decision. The panel met to consider his request on August 21st and then reconvened the hearing on September 13th to consider his issues. The panel considered those matters and released its second Interim Decision dated September 19, 2007 (attached as Appendix B). The hearing then was scheduled to proceed on the merits of the case.

BACKGROUND

On November 8, 2002, Mr. Frederick Barth and Dr. Wesley Stevens wrote to Robert Ziegler, Chair of the Pension Commission of Manitoba, requesting that the University of Winnipeg be removed as the Plan administrator and trustee of the pension plan and that a new trustee be appointed to administer the Plan. On November 8, 2002, Mr. Brent Stearns, Secretary of the University of Winnipeg Retirement Association, wrote to Mr. Ziegler expressing an interest in these matters.

Both letters were forwarded to Debbie Lyon, Superintendent of Pensions, who wrote on December 10, 2002, indicating that it was the Superintendent and not the Pension Commission that has the authority to appoint an administrator. Between December 20, 2002 and November 2006 the Superintendent did an investigation into the issues raised by the University of Winnipeg Retirement Association as well as issues that arose as a result of its investigation in regard to the complaint by the Retirement Association.

During the investigation the Superintendent became aware of an issue relating to the continuing defined benefit plan members. The matter related to their entitlement of benefit equal to a proportioned share of the surplus.

ORDER OF THE SUPERINTENDENT

On November 17, 2006, the Superintendent issued an Order containing six points. The Order states:

"I am of the view that based on the facts provided to me it is inappropriate to make an order to appoint a person to act in place of and to perform the duties of the University of Winnipeg as Administrator of The University of Winnipeg Pension Plan. However based on these facts, I hereby make an order that the University of Winnipeg:

- (a) develop and implement a written governance framework for The University of Winnipeg Pension Plan within 120 days of the date of this order;*
- (b) confirm to the Superintendent in writing within 30 days of the date of this order that it will develop and implement the written governance framework required by clause (a);*
- (c) provide to the Superintendent a copy of the written governance framework required by clause (a) within 30 days of its implementation;*
- (d) provide to the continuing DB plan members within 120 days of the date of this order benefits equal to a proportionate share of the surplus determined under paragraph 1.g. of the joint recommendation, adjusted with interest to the date of payment as required by the Act and Regulations;*

(e) pay by a lump sum to the UW Pension Fund the cost of the benefits under clause (d) within 120 days of the date of this order; and

(f) arrange to have the December 31, 2004 actuarial valuation report amended to reflect clauses (d) and (e) and to file the amended report with the Pension Commission of Manitoba within 120 days of the date of this order.”

The University of Winnipeg appeals both the issue of governance and the requirements relating to the continuing defined benefit members. The two issues will be dealt separately.

GOVERNANCE ISSUES

NATURE OF THE APPEAL

It should be noted that the Superintendent did have concerns about the manner in which the University of Winnipeg was administering the pension plan, but did not find that the conduct went to the point that justified the removal of the University as administrator and appointment of a replacement. On page 13 of the Order, she states:

“However, while the University did not breach the legislation in relation to the contribution holiday, it is clear that the University is not exercising the care, diligence and skill prescribed by the Act in relation to certain aspects of the UW Plan’s governance, structure and processes.”

The issue in the matter before us is, was the conduct of the University appropriate for the administrator of the plan. The relevant sections of the PBA are 8(3) and 8(2). The University of Winnipeg Retirement Association request is made under 8(3)(c) which reads:

8(3)(c) appoint a person to act in place of and to perform the duties of the insurer, administrator or trustee of a pension plan;

Section 8(2) gives guidance but no clear criteria under which the Superintendent can make an Order to the plan administrator. The relevant sections of 8(2) read as follows:

8(2) The Superintendent may make an order in accordance with subsection (3)

(b) where, in the opinion of the Superintendent, a pension plan or the manner in which it is being administered is not in conformity with this Act or the regulations;

(c) where, in the opinion of the Superintendent, an employer or the insurer, administrator or trustee of a pension plan or any other person has committed a breach of a provision of this Act or the regulations;

In addition, guidance is given under section 28.1(2) and 28.1(5):

28.1(2) The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

28.1(5) An administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the plan and the pension fund.

After reviewing the documentation in the original Superintendent's file, as well as the documentation in evidence of witnesses during the hearing, the Commission agrees that there is concern with the manner in which the University of Winnipeg was administering the pension plan. Some of the significant areas include:

1. The Canadian Association of Pension Supervisory Authorities (CAPSA) issued guidelines on pension governance. Those guidelines were sent to plans throughout the province in January 2005 and plan administrators were expected to voluntarily take measures necessary to follow the guidelines (item 2 under Governance in the Superintendent's original file, Exhibit 2). It should be noted that the University of Winnipeg plan covers almost 600 individuals including members, inactive and pensioners, and had assets in excess of \$100 million at December 31, 2001. From a review of the documentation and evidence of John Corp, it appears that the University does not have any written governance guidelines which for a plan of this size is concerning.

2. In the original Order of the Superintendent, addressed on page 13 of the Reasons for Decision, she found that:

“the University as administrator does not have clear knowledge of its duties. There appears to be some role confusion created by the two “hats” worn by the University – as employer and as administrator – which can create the potential for miscommunication and differing expectations in respect of the Plan and its governance as between the University and members. It is noteworthy that at times some of the members of the Board of Regents (the “Board”) themselves felt that they are, at times, in a conflict and uncertain of their roles.”

Addressed on page 13 of the Reasons for Decision which reads as follows:

“At the June 24, 2002 Board meeting an exchange took place where one Board member said ‘...that the Board has competing legal obligations (its obligation to the Pension Plan and its members and its obligation to the University). The Board needs to have the power to decide which competing obligation to carry out. This gives away a power we cannot give away.’ While another member said that “...the Board’s primary concern is the long-term viability of the University.”

3. Further, notwithstanding that the Pension Committee was to communicate appropriate information about the plan to all members of the plan, the members of the plan received communication from Graham Lane (Exhibit 13 tab M), Dr. Frank Hector (Exhibit 13 tab C), Dr. Constance Rook (Exhibit 13 tab N) who did not appear to be writing or communicating on behalf of the Pension Committee.
4. As well, while the Pension Committee was responsible for the preparation of annual audited statements and to ensure that the actuarial valuations of the plan are made at least tri-annually, it appears that the Pension Committee did not oversee the preparation of the December 31, 2001 actuarial valuation (see Exhibit 2, tab 5). In fact when questioned by the Chair about his role as the independent actuary to the pension plan, the transcript on page 285, line 14 of the November 29, 2007 hearing reads as follows:

Q. In some of the documents, and I think under your own testimony (sic), you’re referred to as an independent actuary working on behalf of the Pension Committee. Is that correct or who did you view your client as? Your boss?

- A. It was not a clear situation, okay. One that one wasn't always particularly comfortable with.

Without limiting all the items considered these are some of the examples that the panel took into consideration when considering whether to uphold the Superintendent's decision to order items (a), (b) & (c) of her Order.

It is interesting to note that the University of Winnipeg did not address governance in its original written argument. In its reply brief there is only one paragraph on the matter. The substantive point of that paragraph being,

"...The University is close to transferring administration of the plan to the new trustee board. Rather than the University being ordered to now develop a written governance framework, that part of the Superintendent's Order should be deferred until the transition of the plan to the trustees is completed..."

While the panel accepts the parties' representation that a joint board of trustees is imminent, it has been claimed numerous times since 2001. Further, it is very possible that many of the individuals who have been dealing with the pension plan for the past number of years will be trustees on the new board.

DECISION

After considering all the documentation and evidence presented, it is the view of the panel that the applicant has not shown grounds to overturn the Order of the Superintendent. In fact, the evidence during the hearing supports the finding. It should be stated that the actions stated in the Superintendent's Order could easily be considered the first steps in the removal of the University as administrator should they fail to correct the areas of concern.

The panel does concur with the original decision of the Superintendent that a written governance framework should be developed, but that in light of time since the issuing of the order and the transition to a new Board of Trustees which may be finalized shortly, rules as follows:

The portion of the Superintendent's Order relating to the requirement to:

- (a) develop and implement a written governance framework for the University of Winnipeg Pension and;

- (b) confirm to the Superintendent in writing that it will develop and implement the written governance framework required by clause (a);
- (c) that the Superintendent be provided a copy of the written governance framework be maintained.

are appropriate and are upheld.

In regard to who is the proper party to comply with these requests, the panel directs the Superintendent to amend the Order to reflect that it is the University of Winnipeg and/or the successor administrator, possibly a new joint Board of Trustees, who would be required to comply with these items.

In respect of the timing of items (a) to (c), we direct the Superintendent to use her discretion to address the timelines accordingly.

The panel reserves jurisdiction should there be any issues relating to the above noted items.

CONTINUING DEFINED BENEFIT MEMBERS

BACKGROUND

Central to the understanding of the issue is an understanding of the University of Winnipeg Pension Plan:

- (a) the University of Winnipeg established a defined benefit plan on September 1st, 1972;
- (b) the Plan has undergone several amendments from its inception;
- (c) the Plan actuary (John Corp) in early 1999 identified significant surplus in the Plan;
- (d) in 2000 the Plan actuary identified the surplus as being \$13.1 million, in addition to an investment reserve of \$9.4 million on liabilities of \$91.7 million;
- (e) this surplus presented a problem because Canada Revenue Agency (CRA) would ultimately bar further University contributions to the plan while a surplus of that size existed;

- (f) in early 2000 the University of Winnipeg Pension Committee reviewed and accepted a proposal from the University whereby it would be permitted to take a contribution holiday for two years commencing April 2000, which would be accompanied by a benefit improvement for the Plan members of equivalent value (\$3 million);
- (g) on July 25th, 2000, the Executive Committee of the Board of Regents passed a resolution amending the plan to provide for a contribution holiday subject to the approval of the Pension Commission;
- (h) on November 24th, 2000, the Pension Committee reached an agreement on a comprehensive proposal from the University for sharing of the surplus;
- (i) On December 4th, 2000, the Board of Regents of the University of Winnipeg passed a motion which indicated

“that the comprehensive Resolution of Outstanding Pensions Issues be approved as recommended by the Pension and Finance Committee.”

Judge Wyant, Chair of the Board of Regents, said that he was reluctant to adopt a resolution which assigned responsibility to a named individual. He felt that the assignment ought to be to a person by office.

As a result it was agreed that the third point would be altered to read, *“The Vice-President (Finance & Administration) and Executive Officer to the Pension Committee be vested with the authority to...”* The amended resolution was then put and carried.

- (j) In January 2001 three subcommittees were established. The Defined Benefit (DB) subcommittee was co-chaired by John Corp and Doug Poapst, who was the actuarial consultant for the Faculty Association, and were given the task of recommending to the Pension Committee how the remaining defined benefit members should benefit from their share of the surplus;
- (k) On August 1st, 2001, Graham Lane, Vice-President of Finance of the University of Winnipeg, wrote to the plan members (Exhibit 10). The letter reads,

“The plan was amended to allow for the following events effective January 1, 2000:

- a. *an allocation of the Plan surplus and investment reserve totalling approximately **\$11.3 million to Plan Members;***

Further in Note 1 of the December 31, 2000 audited financial statements, it indicates:

“At January 19, 2001, the Plan was amended to allow for the following events effective January 1, 2000:

- a. ***An allocation of the pension fund surplus and investment reserve totalling approximately \$11,269,500 to plan members;***
- b. *The granting to the University of a pension contribution holiday, with a value of approximately \$11,269,500 (Note 5);*
- c. ***Provide for the surplus allocated to plan members to be used to make a lump sum payment and/or provide for improvements to pension benefits...”***

- (l) In the audited financial statements for the year ending December 31, 2001 (Exhibit 2, item 2, statements and records), the report on financial statements by Douglas Prophet, Acting Chief Financial Officer of the University of Winnipeg, indicates:

“In 2000, discussions at the Pension Committee related to amending the Pension Plan were concluded and recommendations arising from those discussions were adopted by the Board of Regents in late 2000.

“...components of the understanding by all stakeholders to the plan, including their status, are:

- a. *A plan for eventual distribution to Plan members of approximately \$11.3 million of Plan surplus and investment reserve as of December 31, 1999. **(Distribution of a part of the surplus was made in 2001 to Plan members and there remains \$6.4 million to be distributed in the future.)***

*“In respect to the defined benefit part of the plan, the actuarial present value of accrued pension benefits was \$93.1 million. At December 31, 2001, **the remaining balance of an estimated \$6.4 million of defined benefit members’ share of the surplus has yet to be distributed.** Had the distribution taken place at December 31st, the liabilities would have increased to \$99.6 million and when compared to plan assets in the defined benefit part of the plan, leaves a surplus of \$622,000. “*

Also note 5B of the audited financial statements reads:

*“At December 31st, 2001, the remaining balance of an estimated \$6,422,000 of **the defined benefit members’ share of the surplus at December 31, 1999, has yet to be distributed.**”*

- (m) In the December 31, 2002, audited financial statement and the report of the Vice-President (Finance & Administration, University of Winnipeg) Stephen Willetts, it indicates:

*“After the initial allocation of surplus to members, the two year contribution holiday for the University to March 31, 2002, and as a result of a serious downturn in the investment market in 2001 and 2002, it was determined that the pension surplus no longer existed and that **the full implementation of their original agreement was not feasible.**”*

Also in the note (1) to the financial statement in no. 1:

*“In 2000 and 2001 the defined benefit segment of **the Plan was amended to split the existing surplus between the members and the University, with the members’ share to be paid out or used to enhance benefits and the University’s share to provide a contribution holiday... An initial surplus distribution was made to the members in 2001 and the University was granted a contribution holiday of approximately equivalent value from April 2000 to March 31, 2002. Subsequent to the date of the financial statements, certain amendments were agreed to as disclosed in Note 8.**”*

- (n) In the December 31, 2003, audited financial statements in Note 8 it reads:

“In April 2003, the University and all Pension Plan stakeholders of the defined benefit segment of the Plan agreed to amend the provisions of Plan Amendment 2001/1, that was approved in the Board of Regents resolution of December 4, 2000.

During the past year, provisions of the agreement that have been implemented include:

- i. *all stakeholders and the University (Plan Sponsor) to **forego any further implementation of the Board of Regent’s resolution of December 4, 2000 amendment to the Pension Plan.**”*

- (o) On or about May 10, 2002, the DB subcommittee considered a draft proposal to distribute the balance of the surplus which included:

“A. Distribution Rate

1. *The latest figure for the amount of surplus available at December 31, 1999, before any adjustment is made for the pensioner increase in 2001 is \$6,454,000. Please note that this is not the final figure but, as I have indicated before, I do not expect material changes.*

2. *This is made up of*

a. 50% of original surplus plus investment reserve	\$11,270,000
b. less cost of initial surplus distribution	- 3,038,000
c. less 50% of contribution reserve	- 956,000
d. less full surplus share to DC members in excess of 6.5%	- 624,000
e. less full surplus share to 2000 terminations in excess of 6.5%	- 198,000
	<u>\$6,454,000 *</u>

- (p) On June 12, 2002, Dr. Constance Rooke, President of the University of Winnipeg, wrote to all members of the Pension Plan:

“The University has made a commitment to distribute the remaining share of surplus due to Defined Benefit Plan members on or before December 31, 2002, or as soon thereafter as possible.”

“The University has been aware for some weeks that the payment of the \$6.4M to which Defined Benefit members are entitled, as the remainder due on their share of the pension surplus, is very likely to place the Fund in a deficit position, according to a test called the solvency test. If the Plan goes into a deficit position, the University will be obliged to make substantial additional payments into the Plan, over and above the regular matching contributions.”

“We are not yet certain how the Manitoba Pension Commission would rule in these circumstances, with respect to the distribution of the \$6.4M still due to the DB plan members....”

“The University, of course, continues to recognize the commitment made with respect to the \$6.4M. The commitment is to distribute that money by December 31, 2002, or as soon thereafter as possible.”

- (q) On July 12, 2002, Dr. Constance Rooke wrote to Louise Gordon, Acting Executive Director, Council on Post-Secondary Education, which indicated,

“As you know, the University reached an agreement in 2000 with members of the Pension Plan to share a substantial surplus (approximately \$22M) on a 50/50 basis.”

It continued on,

“This commitment is understood as morally binding by members of the plan, and is also understood to be legally binding... It will appear as a liability, not a contingent liability, in the plan, and thus create a deficit and the need for additional payments into the plan by the University.”

- (r) On August 26, 2002, Dr. Constance Rooke wrote to the Plan members. In that letter there is reference to:

“Given the dramatic downturn in the investment climate, it appears very likely that the Pension Plan will not be in a surplus position at December 31, 2002, in which case the Plan Actuary will not be able to certify a December 31, 2002 actuarial surplus, one of the prerequisites for a cash distribution of Defined Benefit member surplus at the time.”

*“Therefore, **the potential effect to Defined Benefit members is that the intended cash distribution would have to be delayed until the Pension Plan is again in a surplus position sufficient to obtain the necessary actuarial certification and Pension Commission approval.**”*

- (s) At the October 7, 2002, meeting of the Board of Regents a motion was passed to rescind the motion from the June 24, 2002, meeting and a new motion was passed that includes:

“that the University will be guided by the following principles in respect to future initiatives to restore the financial health of the University of Winnipeg Pension Plan:

- 1. **that no distribution of the remaining, undistributed surplus shall be made to defined benefit plan members that would adversely impact the financial condition of the University and the Pension Plan;***

2. *that any such distribution in future be subject to the following conditions:*
 - a. *that at the time of distribution of all or part of the undistributed surplus, the Pension Plan has sufficient surplus at the date of distribution, as confirmed by the Plan's actuary, to enable such a distribution to take place;*
 - b. *any distribution requires final approval by the Manitoba Pension Commission before it takes place; and*
 - c. *that any arrangement to distribute the remaining undistributed surplus shall not, in any way, increase the liabilities of the Pension Plan, other than those already provided for in the existing Pension Plan text filed, as amended, with the Manitoba Pension Commission..."*

(t) At a meeting of the stakeholders of the Plan on February 27, 2003, a proposed agreement to resolve all outstanding pension issues at the University of Winnipeg was discussed. The components include:

"1. The "deal" as set out in the Board of Regents resolution of December 4, 2000, should be revised as follows:

- a. *the Contribution Credit Balance introduced by 2001/1 will be eliminated;*
- b. there will be no further surplus distribution to the defined benefit (DB) members arising out of the original 'deal'***

(u) In his affidavit John Corp calculated the defined benefit share of surplus with interest to be \$8.5 million on or about the time his affidavit was filed.

(v) In his testimony on Wednesday, November 29, 2007, when questioned by Ms. Webb, Mr. John Corp indicated:

Q. I say to you at that particular point in time, did you not see that the improvement was an absolute liability?

A. Yes I did.

Q. *And that they were going to try to change it to a contingent liability?*

A. *Yes, I did.*

Q. *Okay. When did they convert it to a contingent liability.*

A. *What happened from the end of May to the end of July was that the plan lost six percent approximately. I indicate here that the information that I had was that it was a slightly negative return to the end of May. By the end of July it was I think minus 5.9 percent. So there had been a significant deterioration in the financial position of the plan.*

Q. ***If it was an absolute liability to pay the remaining DB members it really doesn't make it contingent liability if the funding in the plan no longer exists. I put that to you, Mr. Corp.***

A. *And I would accept that.*

Under further questioning on November 28, 2007, Mr. John Corp responded:

Q. ***So if I make the statement that they received an entitlement at that time, would you agree or disagree with that statement?***

A. ***I would agree with that.***

Q. *Okay. And what 1.i was doing was **only dealing with the form of that entitlement?***

A. ***Yes.***

Q. *And the form was going to be determined*

A. *Yes*

THE ISSUE TO BE DETERMINED

The issue relates to a group of members (the continuing Defined Benefit members) of the University of Winnipeg plan and whether they had a pension benefit credit as a result of the December 4, 2000, motion. The applicable portions of the Pension Benefits Act and Regulations are as follows:

1. **PBA 26(5)** *No reduction of credits – No amendment of a pension plan shall adversely affect the pension benefit credits of any member in respect of remuneration and service or membership in the plan prior to the effective date of the amendment.*

2. PBA Definitions

- *“pension benefit credit” means the value at a particular time of the pension benefits and any other benefits provided under the pension plan to which the employee has become entitled as of that time;*
- *“pension benefit” means the aggregate annual, monthly or other periodic amounts to which an employee is or will become entitled upon retirement or to which any other person is entitled under a pension plan by virtue of the death of the employee after his retirement;*

3. **PBR Section 9(2)** *Documents to be filed for registration – Where a plan or a portion of a document under which a plan is constituted is amended, the employer shall file with the commission*

- a. *a certified copy of the amendment within 60 days after the amendment is made; and*
- b. *any additional information required by the commission to determine whether the plan continues to qualify for registration.*

4. **University of Winnipeg Pension Plan Section 14.1 – Amendment**

The University may at any time supplement, modify or amend this Plan, provided that no such supplementation, modification or amendment of the Plan shall permit any part of the assets of the Fund to revert to or be recoverable by the University or be used or diverted to purposes other than for the exclusive benefit of Members, retired Members or their beneficiaries and joint annuitants under the Plan and

provided further that no such amendment shall adversely affect the entitlement of any Member accrued prior to the effective date of such amendment other than an amendment which has been approved by the Pension Commission of Manitoba and which is for the sole purpose of avoiding revocation of registration under the Income Tax Act. The University shall amend this Plan in any other respect which may be required in order to meet the requirements of the Pension Benefits Act of Manitoba and the Income Tax Act (Canada) in order to maintain the Plan as a registered pension plan under the provisions of such Acts or of any statute applicable to this Plan.

No amendment shall be made to the Plan that would result in the liabilities of the Defined Benefit Account exceeding the assets of the Defined Benefit Account reduced by an amount equal to the sum of the Contribution Credit Balance and the Contribution Reserve.

5. University of Winnipeg Act 12(4) – Except as otherwise provided in this Act, the Board may act by bylaw or resolution.

Central to this case is the Board Resolution of December 4, 2000. The relevant section reads:

*“1. Upon the recommendation of the Pension Committee and with the support of the Finance Committee, **the following amendments be made with respect to the Pension Plan.**”*

The University’s initial contention was that the portion of the motion relating to the continuing defined benefit members was a work in progress and not an amendment to the Plan. Therefore, the benefits would not accrue until a formal amendment to the Plan was prepared and filed. The University submits that the wording of the motion

*“1i. with respect to continuing defined DB plan Members, **as may be determined,**”*

confirms that it was a work in process. Only those portions of the resolution that were formalized in the University of Winnipeg Pension Plan amendment 2001/1 were amended.

This raises the central issue in the case of what constitutes an amendment and when is the amendment effective. Does it require a formal application to be approved by the Pension Commission, or are there some other factors to determine that an amendment has been enacted.

The PBA does not prescribe the form that an amendment must take, only restrictions on when the notice of amendment must be filed with the Commission, and restrictions on what an amendment can or cannot do.

In the case of Consumers Packaging Inc., and Superintendent of Financial Services of Ontario and United Steelworkers of America, Local 203G, FST File No. P0162-2201 at p.9, the Plan took the position that, because the amendment had not been registered it was not effective.

*“...It was submitted that this evidence was in aid of interpreting the PBA such that **it provided for plan amendments to be binding and effective only on registration**, meaning that pending a registration an amendment could be withdrawn – even if implemented.”*

The tribunal in that case ruled:

“It is clear from the *PBA* provisions above that the administrator of a pension plan has an obligation to administer a pension plan in accordance with filed documents and **can implement or make effective plan amendments prior to the issuance of a Notice of Registration by the Superintendent**. The Tribunal agrees with the Superintendent’s and Union’s submission that there is “no magic” in registration. **Provided that the amendment is not void or contrary to the PBA, a plan amendment can be implemented and is thereby binding and enforceable pending registration**. Indeed, there is no timeframe in the PBA within which the Superintendent must register or refuse to register an amendment.”

In the case of *Maurer v McMaster University* [1991] O.J. No. 1067, para. 56 indicates:

“56. On December 15, 1988 **the University authorized by resolution of its Board of Governors a number of amendments** to the pension plan text to take effect from January 1, 1987. These fall into two separate resolutions. The first covered changes to the benefit structure under the plan involving, for example, 60 per cent joint and survivor benefits; interest on members’ contributions; eligibility; and division of pension credits on marriage breakdown. In my view these were amendments affecting the nature and extent of the pension benefits and were subject to the joint agreement.

57. The second resolution amending the plan dealt with the following:
- c. the right of the University to take contribution holidays;
 - d. the right of the University to return of actuarial surplus during the continuation of the plan;
 - e. the right of the University to amend or change the plan;
 - f. the right of the University to receive surplus on termination or wind up.
58. For plan members who are not members of the Faculty Association **I find that the University had the power to amend the plan unilaterally** as it did in both resolutions, subject to any approvals required by the Pension Benefits Act.
59. **For members of the Faculty Association I find that the University has the right to amend the plan unilaterally** to deal with (a) and (b) above. These do not fall within the ambit of the joint agreement because they concern the funding of the pension plan and not the nature and extent of the benefits. The benefits promised under the plan are defined benefits which are not changed by the financial arrangements made to fund those benefits.”

This case is an example of a plan where the Board of Governors by resolution amended a pension plan.

It is interesting to note that in the University’s written reply brief they concede in Item 3,

“The University agrees that amendments to pension plans in general do not have to be in a particular form, nor do they have to be filed with the Commission to be effective.”

In the alternative the University took the position that the motion relating to the continuing defined benefit members was in principle or conditional, and therefore the members did not accrue pension benefit credits. The Superintendent’s position was that the motion was not conditional or in principle. Ms. Webb argued that the wording is clear and unambiguous, but in the alternative she went on to argue that if there is any ambiguity the panel should consider the University’s conduct, statement and representations to determine the intent of the motion.

When looking for guidance on whether to consider subsequent events, the panel reviewed the material supplied by the parties.

As indicated by the Ontario Supreme Court of Justice in *Electrical Industry of Ottawa Pension Plan v Cybulski* [2001] O.J. No. 4593 at para. 22:

- 22 In the instance of **ambiguous contract language, the interpretation should give effect to reasonable expectations of the parties.** Courts are reluctant to interpret a contract in such a way as to produce an unrealistic result. The Supreme Court has held that the most reasonable and fairest interpretation of a contract is one, which promotes the intention of parties to the contract. (See *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551 at para. 68 onward.)
- 23 The Court after reviewing the documents and the facts must give careful consideration to the complete picture. **In interpreting pension plan contracts, the Courts are guided not only by the language of the pension plan document, but also by the parties' conduct, statements, and representation made to each other.** (See *Bathgate et al. v. National Hockey League Pension Society et al.* (1994), 16 O.R. (3df) 761 (C.A.) at 768.)

In *Essentials of Canadian Law – Pension Law* by Ari N. Kaplan, he states at page 14:

“Beyond the strict terms of the pension plan document itself, **effect can in some circumstances be given to the parties' conduct, statements, and representations made to each other.** Pension plan brochures, employee booklets, and annual pension statements in particular are considered to form part of the legal matrix within which pension rights may be conferred. The extent to which collateral pension documentation can have legal effect ‘will depend upon the wording of the documents, the circumstances in which they were produced and the effect which they had on the parties, particularly the employees...”

In *Dinney v. Great-West Life Assurance Co.* [2006] M.J. No. 401 at para. 13 the Manitoba Court of Queen's Bench indicated that:

“Assuming an ambiguity in the provision, there is an argument to be made that the “subsequent conduct” of the defendants, namely, to use the ‘formula’ demonstrates that this was how they interpreted the document. The Court of Appeal noted, as Laskin J.A. observed in *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (at p. 108):

...subsequent conduct resolves any doubt about the extent of the appellants' liability under art. 10.1. **Subsequent conduct maybe used to interpret a written agreement because ‘it may be helpful in showing what meaning the parties attached to the document after its execution**, and this in turn may suggest that they took the same view at the earlier date’: S.M. Waddams, *The Law of Contracts*, 3rd ed. (1993), at para. 323. Often, as Thomson J wrote in *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S. 193 at p. 199 (Sask Q.B.) ‘there is no better way of determining what the parties intended than to look to what they did under it.”

Having reviewed the material, the panel has concluded that it would be appropriate to consider the actions of the University subsequent to the motion of December 4, 2000. In fact, in the University's written argument Mr. Riley indicates in Item 5,

“The issue is what did the amending party (in this case the Board of Regents) intend at the time that the alleged amendment was made.”

Further, in his argument on February 11, 2008, at page 454 in response to a question from the Chair, Mr. Riley indicated:

“The Chair: The essence as I understand it of your argument, Mr. Riley, is that no amendment is finalized, until it is formalized and submitted to the Pension Commission, is that correct?”

Mr. Riley: No. I think that the, if, if the Board of Regents on December 4th, 2000 had said, had passed a resolution saying we are now amending the plan, right now, unconditionally, and there are the terms that we are going to amend it. And we are going to give the DB surplus, and here is who is going to get it, and here is how it is going to be calculated. I would say that that would be, they then choose not to register that amendment with the Pension Commission, I don't think that invalidates it as an amendment. So it is the intention of the Board of Regents that matters. **If, on December 4th, they had intended to completely amend the plan as relates to the DB surplus, doesn't matter whether they subsequently filed it or not.**

Mr. Gingera: So because all of the l's weren't dotted and Ts weren't crossed.

Mr. Riley: **They had no intention at that point to amend**, it is not a technical issue. **On December 4th they had no intention to amend the plan specifically at that time to give a right to the DB surplus.** They had, they had to get some details worked out in order to be able to make an amendment that would be effective. In principle, they said, we like that half of the surplus to go to the DB members, they said that. But.”

Looking at the wording of the motion, there is no reference to the motion being conditional or in principle. This is contrary to the wording of other motions that are reflected in the minutes of the Board of Regents. Therefore, it would be appropriate to conclude that if they intended the motion to be in principle they would have noted it as such.

Another issue raised by the University of Winnipeg is that because the form of benefit had not been determined the amendment was not possible. The wording of the resolution indicates that

“The Members’ share of the surplus at December 31, 1999, as arrived at under 1.g. will be used as follows:

- (a) pay for the distribution of \$3 million as already agreed;
- (b) effect the transfer to the DC plan as described above
- (c) with respect to continuing DB plan Members, as may be determined.”

While the total amount of the members’ share was known (\$11.3 million) the amount to be allocated to (b) and (c) were not. It was clear that the money was to be allocated to these three areas. One was fixed at \$3 million. The DC portion became a fixed amount after the members had made their choice, and as indicated in the December 31, 2001 audited financial statements, the portion to be allocated to Item (c) was \$6,422,000. The Superintendent’s Order directed that the defined benefit Members be provided with benefits equal to a proportioned share of the surplus determined under paragraph 1(g) of the joint recommendations, adjusted with interest. It does not state the form of the benefit that those members should receive their share.

Throughout the process of the surplus sharing, different methods were considered including the “Eureka” solution. The panel does not find the nature of the benefit is determinative of whether or not there was a benefit accrual.

The panel then considered subsequent events after the December 4, 2000, resolution to see if that could be of assistance in discovering the intent of the Board of Regents. Those events include:

1. In January 2001 a subcommittee was established to determine how the defined benefit members should share in the surplus (not if or how much surplus they were entitled to).
2. In the August 1, 2001, letter from Graham Lane, he wrote indicating that the surplus was \$11,269,500.
3. In the December 31, 2001, report to the financial statements, Doug Poapst indicated that there remains \$6.4 million to be distributed.
4. On June 12, 2002, Dr. Constance Rooke wrote to all members indicating that the University had made a commitment to distribute the remaining surplus on or before December 31, 2002, or as soon thereafter as possible.

5. On July 12, 2002, Dr. Constance Rooke wrote to Louise Gordon, Acting Executive Director on the Council on Post Secondary Education, indicating that the University had reached an agreement in 2000 to share a substantial surplus, and that the commitment is understood to be morally binding by the members of the Plan, and it is also understood to be legally binding. She continues, indicating that it will appear as a liability, not a contingent liability in the plan.
6. On August 6, 2002, Dr. Constance Rooke wrote to the members of the Plan indicating that the intended cash distribution would have to be delayed.
7. On February 7, 2003, agreement of the stakeholders to resolve outstanding pension issues at the University of Winnipeg, indicates:
 - a. "The 'deal' as set out in the Board of Regents resolution of December 4, 2000, should be revised as follows:
 - b. There will be no further surplus resolution to the defined benefit (DB) members arising out of the original 'deal'.
8. In his testimony the Plan actuary (John Corp) confirms that it was first characterized as an absolute liability and then the University was going to change it to a contingent liability. He goes on to say,
 - A. ***That was the intention of the Board at the time, that they would get that share of the surplus. No question about it.***
 - Q. *So if I make the statement that they **received an entitlement at that time, would you agree or disagree with that statement.***
 - A. ***I would agree with that statement.***
 - Q. *Okay. And what 1.i was doing was only dealing with the form of that entitlement?*
 - A. Yes.

9. In the testimony of Barry Barske, contract administrator and board rep for AESES, he indicated that he viewed it a definite commitment on behalf of the University. This is confirmed by the January 15, 2003 letter from Janet Sealey, President of AESES to the Manitoba Pension Commission (exhibit 13a) which reads:

“We confirm that the original amendments to the Plan allowing for the University’s contribution holiday would never have been agreed to by AESES and certainly not in the manner portrayed in the draft 2001 valuation if a subsequent commitment was required by the University to effect payment of the remaining obligations to DB members. It is clear from the correspondence and enclosures that all parties, including AESES, understood that there was and remains an obligation to pay the remaining surplus to the Plan members. This surplus was quantified as at December 31st, 1999. The only remaining step is to distribute the funds.”

Having reviewed the various documents and testimony, the panel determined that the Board of Regents intended to grant the continuing defined benefit members with the balance of the surplus that was not allocated to Items (a) and (b) of 1(i) (approximately \$6.4 million). The resolution was not conditional or in principle.

While there was limited time spent on the issue at the hearing, the first portion of the University of Winnipeg’s written argument is that amendments 2004-A and 2004-B do not expressly contravene subsection 26(5) of the Act. In effect they argue that there was no amendment filed with the Commission that specifically takes away or reduces the pension benefit credit of any member. While it is true that 2004-A and 2004-B do not contain wording or reference that specifically takes away or reduces pension benefit credits of any member, what is important to keep in mind is that in 2004 the University of Winnipeg was taking the position that there was no pension benefit credit to take away. If the panel accepts that no amendment was made by the December 4, 2000 resolution of the Board of Regents then we would have to allow the appeal.

If on the other hand we find that an amendment was made by the December 4, 2000 resolution then we are left with the question, was there an amendment that takes away that benefit. To that effect the Panel considered the actions of the Board of Regents, including the October 7, 2002 and the December 9, 2002 meetings at which the Board of Regents passed the following motions:

October 7, 2002:

“that the University will be guided by the following principles in respect to future initiatives to restore the financial health of the University of Winnipeg Pension Plan:

- 1) that **no distribution of the remaining, undistributed surplus shall be made to the defined benefit plan members** that would adversely impact the financial condition of the University and the Pension Plan;
- 2) ...”

December 9, 2002:

“that the **recommendations in the document *Proposal to Resolve Outstanding Pension Issues at the University*** of Winnipeg drafted by John Bulman, Jim Osborne, and John Corp, dated November 19, 2002, and attached to the report of the Table Officers, be approved.

Item 1(b) of that proposal reads:

There should be no further surplus distribution to the Defined Benefit (DB) members arising out of the original “deal”.”

The panel finds that if we determine that the December 4, 2000 resolution of the Board of Regents created an amendment then the defined benefit members either have an entitlement that has not been taken away, or that the subsequent actions of the University of Winnipeg were an attempt to amend the Plan to adversely affect the pension benefit credit of the continuing defined benefit members.

EFFECT OF SEPTEMBER 2004 STAKEHOLDERS AGREEMENT

One of the areas that the Commission spent time considering was the effect of the second deal, the September 2004 agreement by the stakeholders. It effectively had the parties agreeing to give up any claim to the surplus share. The parties were asked if there was any case law that would indicate that the stakeholders could give up rights that they had under the Pension Benefits Act. None of the parties were able to provide any case law. What the panel is faced with is the fact that the legislation under subsection 9(2) clearly indicates that a benefit once accrued cannot be removed and we would have no jurisdiction to override the statute.

IMPACT ON THE PLAN

Another factor that the panel looked at was the impact of the requirement on the University of Winnipeg to make a payment of approximately \$8.5 million and the increased liability it would create for the Plan. While this is a significant financial liability for both the University and the Plan, it is not a factor that the panel could consider in this matter. We do not find any bad faith on the part of the University of Winnipeg and had it not been for the financial position of the University and the downturn in the market, we would probably not have had this matter come before us.

DECISION

After considering all the evidence and material before us, the panel has determined that the December 4, 2000 resolution amended the Plan and created a pension benefit credit for the continuing defined benefit members. The Panel also determined that the University of Winnipeg attempted to amend the Plan to reduce the benefits contrary to subsection 26(5) of the Act. The Panel comes to this conclusion on the following basis:

- (a) an amendment does not have to be filed or approved by the Pension Commission for it to be effective;
- (b) Based on the wording of the December 4, 2000 resolution, minutes of the meeting of December 4, 2000 and the documentation, the motion was not conditional or in principle.
- (c) This is supported by the actions of the University of Winnipeg and its various representatives' conduct and documentation.

(d) As well, if this was not the case why would the stakeholders have reached a second agreement which includes references to

“the full implementation of their original agreement was not feasible” or

“all stakeholders and the University (Plan sponsor) to forego any further implementation of the Board of Regents resolution of December 4, 2000 amendment to the pension plan.”

(e) While amendments 2004-A and 2004-B are not contrary to subsection 26(5), the University of Winnipeg did attempt to amend the Plan to reduce pension benefit credits in violation of 26(5).

(f) In respect of the University’s argument that the form of benefit must be determined in order for the amendment to be enacted, the panel does not agree that that is a requirement. It was clear that the continuing defined benefit members were to be granted the benefit of the surplus that was not used for items (a) and (b) of item 1(i) of the December 4, 2000 resolution. That amount has been identified in several of the documents before the panel. We make no determination on what form the benefits should be provided and leave that to be determined by the Trustees, other than it should only be applied for the benefit of continuing defined benefit members.

As a result, the panel determined that the Superintendent’s Order in regard to items (d), (e) and (f) are upheld and directs the Superintendent to make the following modifications:

(d) provide to the continuing DB plan members benefits equal to a proportionate share of the surplus determined under paragraph 1.g. of the joint recommendation, adjusted with interest to the date of payment as required by the Act and Regulations;

(e) pay by a lump sum to the UW Pension Fund the cost of the benefits under clause (d); and

(f) arrange to have the December 31, 2004 actuarial valuation report amended to reflect clauses (d) and (e) and to file the amended report with the Pension Commission of Manitoba.”

In respect to the timing of the actions mentioned in (d), (e) & (f) above, the panel directs the Superintendent to consider appropriate time frames and amend the Order accordingly. In addition, the December 31, 2007 actuarial valuation should reflect the above noted items.

The panel reserves jurisdiction should there be any issues related to the above noted items.

While the Panel has not commented on the submissions made by the affected parties, namely, the University of Winnipeg Faculty Association, the Association for Employees Supporting Education, and the University of Winnipeg Retirement Association, their submissions were considered and did assist the Panel in reaching a conclusion.

Although not all materials supplied and submissions made by the parties have been referred to in this Final Decision, they were considered. The panel would like to acknowledge the parties' cooperation in this process.

This Final Decision is made in the City of Winnipeg this 23rd day of April, 2008.

Robert Ziegler,
Chairperson
On behalf of the Manitoba Pension Commission