

**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.

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**FINAL DECISION**

**UNIVERSITY OF WINNIPEG APPEAL**

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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 15<sup>th</sup>, 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 21<sup>st</sup> and then reconvened the hearing on September 13<sup>th</sup> 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 1<sup>st</sup>, 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 25<sup>th</sup>, 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 24<sup>th</sup>, 2000, the Pension Committee reached an agreement on a comprehensive proposal from the University for sharing of the surplus;
- (i) On December 4<sup>th</sup>, 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 1<sup>st</sup>, 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..."***

- (i) 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 plan at December 31<sup>st</sup>, 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 31<sup>st</sup>, 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*, 3<sup>rd</sup> 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 4<sup>th</sup>, 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 4<sup>th</sup>, 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 I'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 4<sup>th</sup> 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 31<sup>st</sup>, 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.”

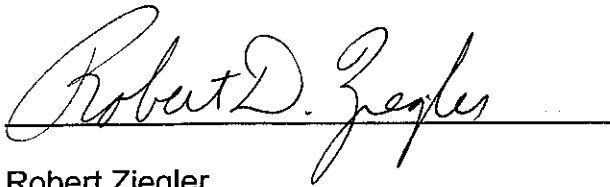
In respect to the timing of the actions mentioned in (d), (e) & (f) above, the panel directs the Superintendent to consider appropriate time frames and amend the Order accordingly. In addition, the December 31, 2007 actuarial valuation should reflect the above noted items.

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 23<sup>rd</sup> day of April, 2008.

A handwritten signature in cursive script, reading "Robert D. Ziegler", is written over a horizontal line.

Robert Ziegler,  
Chairperson  
On behalf of the Manitoba Pension Commission

**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;

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

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**INTERIM DECISION**

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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:	Wesley Stevens, Brent Stearns
For the University of Winnipeg Faculty Association:	Tony Marques, Shannon Carson
For the Association of Employees Supporting Education:	Allan Forran, Erin McNicol



## INTERIM DECISION

These proceedings relate to the University of Winnipeg Pension Plan and an Order of the Superintendent dated November 17, 2006. While there are two separate appeals, the panel will consider both appeals at the same time.

On January 15, 2007, the University of Winnipeg filed an appeal of the Order. On January 8th, 2007, Wesley Stevens, on behalf of the University of Winnipeg Retirement Association, requested an extension to file an appeal of the Order. That request was considered and he was given an extension until January 30, 2007, at which time an appeal was filed.

The appeal hearing commenced on February 14, 2007 in accordance with the Manitoba Pension Benefits Act requirements. The first day of hearing, the panel considered two primary issues: procedure and any preliminary issues raised by the parties. The parties had been given notice that they were to address the following issues:

1. role of the three affected parties;
2. documentation that is referred to in the Superintendent's order but was not provided because it was considered confidential or of a business nature;
3. recording the proceedings;
4. expected length of each party's submissions to the panel;
5. order of proceedings;
6. status of the Superintendent's order;
7. any preliminary issues they wish to raise.

After hearing submissions from the parties, the panel determined that it would receive written submissions on three issues:

1. status of the Superintendent;
2. form of the hearing (on the record or de novo)
3. status of the interested parties

The panel determined that the University of Winnipeg would be given until March 2, 2007 to submit their written argument. It would then be circulated to all parties. The other parties would have until March 16, 2007 to respond in writing. And finally, the University was given until March 23, 2007 to respond to those submissions.

Written submissions were received from the University of Winnipeg, the University of Winnipeg Faculty Association, the Association of Employees Supporting Education, and the Superintendent of Pensions. The hearing then reconvened on April 4, 2007, for the parties to give verbal arguments on the issues. Verbal submissions were received by all the parties.

The Commission is aware of and understands the distinction between the role and responsibilities of the Commission members and the staff of the Pension Commission. As a result, separate legal counsel was retained and there was no discussion between the Commission members and the staff on the issues.

On the second day of the hearing Mr. Riley, on behalf of the University of Winnipeg, indicated that he was considering raising the preliminary issue of bias because he was unsure whether Commission members were involved in the original decision. The Pension Commission would like to indicate that at no time were they involved in the steps leading up to the original order or was there any discussion of the case subsequent to the order being issued. Mr. Riley indicated that in light of that he would not be raising any preliminary objection.

The Commission is governed by the Manitoba Pension Benefits Act and associated regulations. Unfortunately, the Act gives very little guidance in regard to rules and procedures for an appeal. We are, therefore, guided by the duties and functions of the Commission as listed in the Act, as well as the generally accepted rules for administrative panels. In addition, the principles of natural justice were considered.

#### NATURE OF THE APPEAL

The first issue the panel needed to address was the nature of the appeal. Was the Commission being asked whether the Superintendent made a reviewable error of fact, of law or of procedure, or were they being asked to review the original issues before the Superintendent?

In the situation before us the applicants are requesting the Commission to review the original issues. In addition, in their written submission, the University states, "that it did not receive a full and fair hearing before the Superintendent as it relates to the order made to pay benefits to DB Plan members". They further state "there are significant factual matters that need to be filled in."

It is important to note that the events leading up to the Superintendent's order date back to November 8, 2002, and span a period of four years. Having considered all the matters, the Commission has decided that it will consider both aspects, that is, whether there is an error in law and whether the Superintendent's order is appropriate in the circumstances.

#### NATURE OF THE HEARING

One of the issues the Commission requested the parties to make submissions on was whether it should be an appeal on the record or a de novo hearing. Both the University of Winnipeg and the University of Winnipeg Faculty Association have requested an opportunity to submit additional evidence to the panel. As a matter of interest, while the Commission members have not reviewed the affidavit of John Corp, which is attached to the University of Winnipeg appeal, the Superintendent points out that it contains documents not included in the Superintendent's order.

While the Superintendent in her written submission states that the hearing should be an appeal on the record, there was an acknowledgment that a hybrid approach may be appropriate.

One of the challenges facing the Commission is to be made fully aware of and understand all the issues that were considered over the last four years leading to the Superintendent's decision. It, therefore, seems that if there is additional evidence that may be presented to allow the Commission to make a full informed decision, it should be considered. Therefore, the decision of the panel is that we will consider new material provided that it is relevant to the issue at hand.

That being decided the next issue is how best to receive the additional evidence. Based on the submissions of the parties, it does not appear that there will be any issues of credibility. One option would be to allow for the parties to produce affidavits and transcripts of the cross-examination by all other parties. This could lengthen and unnecessarily complicate the process. Another option would be to allow the parties to meet and produce any documents they wish to introduce. If there is agreement, those documents could be filed as consent documents. If there are any disputed documents, they could be ruled on at the continuation of the hearing. While it appears that the new evidence will be primarily documentary, the Commission will allow verbal evidence that is sworn or affirmed.

The decision of the panel is that the parties will be given until May 25, 2007, to provide any new material they wish the panel to consider. This material should be produced to Mr. Ulyatt and the other parties. If a party

intends to provide verbal evidence they will be required to state the name of the witness and nature of the evidence by May 25, 2007. Parties wishing to produce verbal evidence in response to the documents or witness provided by another party, will be given until June 8, 2007 to indicate the name and nature of the evidence. Prior to June 8, 2007, all parties will be required to indicate if they agree to the material being filed as consent documents. If there are any documents that are in dispute they will be identified and the appeal panel will rule on whether they are admissible at the continuation of the hearing. If there is a significant concern on an evidentiary issue the panel will entertain reconvening in advance of hearing the merits of the case.

#### STATUS OF SUPERINTENDENT

The parties were asked to make submissions on the role of the Superintendent in this appeal process. The University of Winnipeg was the only party to take the position that the Superintendent should not take a role in this hearing. A starting point to consider in this matter is the Supreme Court of Canada decision in the case of *Northwestern Utilities Ltd. V. Edmonton (City)* [1979] 1 S.C.R. 684. In that case the court ruled,

“The policy of this Court is to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.”

While this case provides early guidance to administrative panels, the law has evolved and recent decisions have expanded the role of administrative panels in the appeal of their decisions. The Supreme Court of Canada again considered this issue in *CAIMAW Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983,

LaForest J., writing for himself and Dickson C.J.C., accepted as beyond question a tribunal’s standing to explain the record before the court and to advance its view of the appropriate standard of review. He also approved the tribunal’s standing to explain why its decision was a reasonable approach to adopt and could not be said to be patently unreasonable. To this extent, the Board was free to argue the merits of its approach although not to the point of defending the decision as correct.

One of the points argued at the hearing was the issue of who was there to represent the members' interest in this appeal. In respect of the part of the order relating to the defined benefits members issue, there would be no-one if the Superintendent is not given status. This was conceded by Mr. Riley in respect of the Superintendents submission on the lis inter party.

The Ontario Court of Appeal in the case of *Children's Lawyer for Ontario v. Goodis et al*, (2005), 253 D.L.R. (4<sup>th</sup>) 489 (Ont. C.A.) granted the Information and Privacy Commission of Ontario full standing on a judicial review of the application. The court wrote:

"Ultimately, if the legislation does not clearly articulate the tribunal's role, the scope of standing to be accorded to a tribunal whose decision is under review must be a matter for the court's discretion. The court must have regard in each case, to the importance of a fully informed adjudication of the issues before it and to the importance of maintaining tribunal impartiality. The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.

The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of a fully informed adjudication may well be the governing consideration."

In addition, the issues raised in the order dealing with benefit improvements and plan governance, raise complex issues that affect public policy. The case of *B.C.G.E.U. v. Indust. Rel. Council* (1988) 26 B.C.L.R. (2d) supports an expanded role for a panel to protect public policy. Taggart J.A. states,

"That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties

to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.”

In the case of *Otis Canada Inc.*, Re 12 1997 C.C.P.B. 117, the Ontario Pension Commission stated,

“If we do not hear from the Superintendent on these types of questions which are extremely complex, complicated and legal, how will both sides be argued?”

In light of the Commission’s decision to allow the parties to introduce evidence, there is a further reason to allow the Superintendent to participate. If there is evidence that the Superintendent was aware of but did not rely on, she should be allowed to explain why. If there is new evidence that the Superintendent was not aware of, she should be allowed to point out any issues that should be considered.

The biggest concern in deciding whether to allow the Superintendent to participate in the process is a perception of unfairness if an official who works closely with the Commission as its chief administrative officer were to appear before the Commission to defend her decision and to oppose the University’s appeal. The Commission believes this perception must be balanced with the other concerns mentioned above.

Mr. Riley on behalf of the University of Winnipeg conceded that when you balance the concern between allowing new evidence and restricting the role of the Superintendent, it is more important for the new evidence to be considered.

When considering all the case law and position argued, it is the decision of the panel that the Superintendent will be granted status in this appeal. The Commission reserves the right to limit the role of the Superintendent should it deem that she goes beyond what is appropriate.

#### STATUS OF THE THREE AFFECTED PARTIES

While the parties were asked to make written submissions on the status of the University of Winnipeg Faculty Association, the Association of Employees Supporting Education, and the International Union of Operating Engineers, all parties agreed that since their members would be affected by the decision they should be granted status. Even if the parties had not consented to them having status, the principles of administrative law and natural justice would have strongly supported their participation in the

hearing as their members could very directly be limited by the process of these proceedings.

#### MATERIAL REFERRED TO IN THE SUPERINTENDENT ORDER

At the first day of the hearing, the panel addressed the request by the University of Winnipeg Retirement Association for all the material referred in the Superintendent order. The Commission had received a letter from Ms. Webb raising a concern that some of the material was of a confidential nature. The Commission asked the parties if they were prepared to give an undertaking that if the information was provided, it would only be used for the purpose of the hearing and would not be shared or used for any other purpose. All the parties have agreed to such an undertaking. It is the decision of this panel that as long as the parties sign the undertaking which will be provided by the Commission, they will be entitled to copies of the Superintendent's material only to be used for the purpose of this hearing. Any information deemed to be of a confidential nature shall be returned at the completion of the hearing, and any appeal period provided under the Act.

While not all the material supplied and submissions made by the parties have been referred to in this Interim Decision, they were considered. This panel would like to acknowledge the parties cooperation in this process. The hearing will now address the merits of the case. The parties are requested to provide Mr. Ulyatt with their availability for dates in June, July and August. They are also reminded of the process to be followed for any new evidence they intend to introduce.

The order of appearance will be: the University of Winnipeg, University of Winnipeg Retirement Association, the Superintendent, the University of Winnipeg Faculty Association, the Association for Employees Supporting Education, and the International Union of Operating Engineers.

This Interim Decision is made in the City of Winnipeg this 26th day of April, 2007.

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Robert Ziegler,  
Chairperson

On behalf of the Manitoba Pension Commission

**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;

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

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**INTERIM DECISION**

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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

## INTERIM DECISION

These proceedings relate to the University of Winnipeg Pension Plan and an Order of the Superintendent dated November 17, 2006. While there are two separate appeals, the panel will consider both appeals at the same time.

On January 15<sup>th</sup>, 2007, the University of Winnipeg filed an appeal of the Order. On January 8<sup>th</sup>, 2007, Wesley Stevens, on behalf of the University of Winnipeg Retirement Association, requested an extension to file an appeal of the Order. That request was considered and he was given an extension until January 30, 2007, at which time an appeal was filed.

The appeal hearing commenced on February 14, 2007 in accordance with the Manitoba Pension Benefits Act requirements. The first day of hearing, the panel considered two primary issues: procedure and any preliminary issues raised by the parties.

After hearing submissions from the parties, the panel determined that it would receive written submissions on three issues:

1. status of the Superintendent;
2. form of the hearing (on the record or de novo)
3. status of the interested parties

Written submissions were received from the University of Winnipeg, the University of Winnipeg Faculty Association, the Association of Employees Supporting Education, and the Superintendent of Pensions. The hearing then reconvened on April 4, 2007, for the parties to give verbal arguments on the issues. Verbal submissions were received by all the parties. The decision of the panel is contained in its' interim Decision dated April 26<sup>th</sup> 2007.

Over the summer the panel was informed that Dr. Stevens had retained Mr. Grant Stefanson as counsel to represent him. Mr. Stefanson informed the Panel that Dr. Stevens was unavailable for the Sept 14<sup>th</sup> and 17<sup>th</sup> dates 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 21<sup>st</sup> and decided that they would adjourn the hearing in respect to the merits of the case and consider his request on September 13<sup>th</sup> 2007.

The adjournment was subject to Mr. Stefanson submitting to the Commission and all parties a detailed brief as to his objections and concerns within five (5) working days, and that the other parties would submit their positions to the Commission and the other parties by September 10<sup>th</sup>, 2007.

Written submissions were received by:

The University of Winnipeg Retirement Association,  
The Superintendent,  
The University of Winnipeg Faculty Association,  
The Association of Employees Supporting Education,  
The University of Winnipeg.

The hearing reconvened on September 13<sup>th</sup> for the purpose of hearing verbal argument on the preliminary issue and setting dates to hear the merits of the case. At the onset of the hearing Ms. Webb counsel for the Superintendent requested clarification of the status of Mr. Stefanson. More specifically was he representing Dr. Stevens personally or was he representing the University of Winnipeg Retirement Association. After hearing representation from all parties and the representation from Dr. Stevens that Mr. Stefanson was representing the University of Winnipeg Retirement Association the hearing continued.

### **Preliminary Issue**

Mr. Stefanson has been representing Dr. Stevens in two lawsuits filed against the University of Winnipeg. The first lawsuit deals with the University's use of surplus to fund an early retirement program and the second relates to a contribution holiday. They were filed in May 2003 and May 2006 respectively. Mr. Stefanson acknowledged that he became aware of the Superintendent Order in February 2007. His argument was that the Panel should limit its consideration only to the issue of governance.

In his written brief Mr Stefanson focused on three primary arguments;

1. That because of the principles of res judicata and/or issue estoppel it was inappropriate to proceed with the appeal on the issue of the DB benefit, in light of the two court actions filed by Dr. Stevens against the University of Winnipeg
2. The Superintendent / Commission does not have jurisdiction to make an order that goes beyond the original complaint
3. The Superintendent does not have the jurisdiction to order a monetary repayment

### **Jurisdiction to deal with issues not part of the complaint**

In his verbal argument he conceded that the Superintendent does have the authority to make an order without a complaint. Even if this point was not conceded the panel would have dismissed that aspect of his preliminary objection. Various sections of the legislation and those duties delegated by the Commission under Section 10(2) require the superintendent to enforce the Pension Benefits Act without any requirement of a complaint. For example if a plan failed to file an actuarial valuation or the valuation was deficient the Superintendent could not wait for a complaint to take action.

### **Res Judicata and Issue Esstoppel**

In regard to Mr. Stefanson's position that the Commission should limit its' hearing because the decision may affect his court action, the following should be considered. While the issues raised in the two lawsuits were addressed in the Superintendent's reasons for decisions, they are not mentioned in the order. Further, neither the appeal by the University of Winnipeg Pension Plan nor the Appeal by the University of Winnipeg Retirement Association refer to these issues in the grounds for appeal or requested relief.

While not fully determined at this time it is the intention of the Panel to focus on the points of the order that have been appealed and the relief requested. While the panel has not considered the matter on its merits it does not appear that the matters being considered are the same issue before the courts, so issue of Res judicata and or issue estoppel would not apply.

### **Concurrent Jurisdiction**

In his verbal argument Mr. Stefanson also expanded on the issue of concurrent Jurisdiction. His contention was that the superintendent does not have the authority to make a determination on questions of Fact or the Law. Rather that was a role the courts should play. In his brief he referred to the decision of the Saskatchewan Court of Queen's bench in the matter of Saskatchewan (Superintendent of Pensions) vs Mackenzie Financial Corp. What is important to note is that the Saskatchewan legislation in Section 8 states:

*The superintendent **may apply to the courts** by notice of motion for an order compelling a person to do anything required, or prohibiting a person from doing anything prohibited, by this act ....*

There is no requirement for the superintendent in Manitoba to apply to the courts.

In paragraph 23 of the decision Hunter J. noted;

*In reality the, the superintendent is **purporting to interpret and apply the provisions of a court judgment and adjudicate an award of damages** in favour of Faye McMaster under the general administrative powers granted in the legislation establishing the office of the Superintendent and regulating pensions in the province. **This is far beyond the scope of the act.***

After considering the facts of the case and the differences in the Pension Benefit Acts we do not find the case to be determinative of the issue.

It was suggested that the appropriate course of action for the Pension Commission was that if a court action was commenced by a party, the Pension Commission should not proceed unless it was a frivolous case. It does not seem appropriate that a party could stay an Order of the Superintendent or an prevent an appeal hearing from proceeding, by simply filing a court action. Further such a position would require the Commission to make a determination of whether there was a Prima Facie case in the law suit which would appear to go beyond the Commission's role.

Many administrative panels have concurrent jurisdiction with the courts. Generally the courts will defer to administrative panels as the primary venue to resolve disputes because of their specialized expertise and knowledge of the subject matter. We are not persuaded that there is any policy reason to deviate from that practice.

Finally if a party feels their court action could be jeopardized by an administrative panel they always have the option to go to the courts for a stay of proceeding.

Mr. Stefanson argued that Sections 8(3)a and 8(3)b do not give the Superintendent the jurisdiction to order repayment. He indicated that the provision should be read in a narrow manner and also compared the Ontario legislation which has specific provision. When requested if he had any case law to support the narrow interpretation or that the inclusion of wording in one Province should be used to interpret another province's legislation he was not able to provide any.

Section 8(3) states

8(3) *The superintendent may, by an order made pursuant to subsection (2),*

*(a) require any person in breach of a provision of this Act or the regulations to **remedy the breach** without delay or within a specified period of time;*

*(b) require an employer who has established a pension plan or the insurer, administrator or trustee of the pension plan, or any person charged with a duty in respect of the pension plan, **to take** or to refrain from taking **a specified action** or proposed action with respect to the pension plan;*

While Mr. Stefanson suggests that Subsection (a) would not apply to the University of Winnipeg Pension Plan, Ms. Webb draws attention to the Interpretation Act definition of person as

**"person"** includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

While not making determination on the merits of the case, it would appear that an order for payment or repayment of money would be within the scope of Section 8(3).

### **Decision**

Giving consideration to all the written material received from the parties and the oral arguments of the parties it is the decision of the panel to dismiss the preliminary issues raised by Mr. Stefanson on behalf of the University of Winnipeg Retirement Association.

Accordingly, the hearing will resume to hear the merits of the case on November 27<sup>th</sup>, 28<sup>th</sup> and the afternoon of the 29<sup>th</sup>, December 13<sup>th</sup>, 17<sup>th</sup>, afternoon of the 19<sup>th</sup> and December 20<sup>th</sup>, 2007. The parties will be notified of a location once it is finalized.

Further, the University of Winnipeg Retirement Association will be given until October 12, 2007 to provide any new material they wish the panel to consider. In addition, if they intend to provide oral evidence they will be required to state the name of the witness and nature of the evidence by October 12, 2007. Parties wishing to produce verbal evidence in response to the documents or witness provided by the University of Winnipeg Retirement Association will be given until October 26, 2007 to indicate the name of any rebuttal witness and nature of the evidence.

In addition, the parties are requested to clarify their position by October 12, 2007 in regard to the following aspects of the Superintendent's order:

1. What is their position on the requirement for the University of Winnipeg Pension Plan to develop and implement a written governance framework;
2. What is their position on the requirement for the University of Winnipeg Pension Plan to provide the continuing DB plan members with benefits equal to a proportionate share of the surplus;
3. What is their position on the requirement for the University of Winnipeg Pension Plan to pay by a lump sum the costs of item 2 above and;
4. What is their position on the requirement for the University of Winnipeg Pension Plan to amend the December 31, 2004 actuarial evaluation

While not all the material supplied and submissions made by the parties have been referred to in this Interim Decision, they were considered. This panel would like to acknowledge the parties cooperation in this process.

The order of appearance will be: the University of Winnipeg, University of Winnipeg Retirement Association, the Superintendent, the University of Winnipeg Faculty Association, the Association for Employees Supporting Education, and the International Union of Operating Engineers.

This Interim Decision is made in the City of Winnipeg this 19<sup>th</sup> day of September 2007.

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Robert Ziegler,  
Chairperson  
On behalf of the Manitoba Pension Commission