

would have to be made to the court under the governing provincial Trustee Act for advice and direction. In the absence of any precedent known to me on the subject, and the silence of the Plan on the subject, I cannot advise on what the outcome of that application is likely to be. Clearly, if the occurrence of the Question's assumed fact situation is at all likely, moves should be undertaken without delay to amend the Plan so that provision of some kind is made before the situation arises.

If the Question is to be read that, though the surplus cannot be ascribed entirely to CN's contributions or to the employees' contributions, but the proportions subscribed by each can be determined, it is my opinion that the members of the Plan who did contribute to the employees' portion of the surplus would only be able to recover their portion under Reg. 11(4) with the approval of the Superintendent. However, I would draw attention to Rule 11(2). They would claim, if claim to surplus survives Rule 11(2), as resulting trust beneficiaries further to the governing law of trusts. As I have earlier stated, I am not aware of how the Superintendent handles such applications to withdraw surpluses, but I would assume that he would be concerned that in this case no termination of the Plan is intended, and that all those who contributed to the surplus receive an appropriate share of the returned surplus. I do not see on what basis increased benefits could be paid to the contributing members, because the Plan is silent on what form those benefits might take. The Trustee can only act in accordance with the terms of the Plan as they are at the moment of the surplus occurring. If increased benefits are to be paid out of any surplus, it would be my opinion that an amendment to the Plan under Rule 29 would be necessary.

*Answer:* 4(d)(ii) If the proportions in which the CN and employees contributed to the surplus can be determined, so that a resulting trust is possible, then it is my opinion that all those who contributed as employees are entitled to an appropriate share. Where members have in the meantime retired, they are entitled as pensioners or through their qualified pensionable survivors or through their estates. If they have left the service of CN or died prior to retirement, such persons or their estates are entitled to the appropriate share. The principle of the resulting trust governs, namely, that every settlor of his estate is entitled to participate to the extent of his share for the purposes of any refunding.

*Answer:* 4(d)(iii) In my opinion a *pro rata* division, i.e., proportionate to the contribution of each group, is the only possible solution. The case of *Martin & Robertson Administration Ltd. v. The Pension Commission of Manitoba*, 21 February, 1980, *per* Nitikman J., could be an example of what I believe is an unreported case. A surplus occurring upon the termination of a plan, and the plan being silent as to how it should be handled, the trial judge noted: "The only feature [of the Plan] that stands out is that on discontinuance of the plan, the company shall inter alia wind up the plan in an equitable manner as further in the section is set out." He later concluded that, as "it was actuarially possible to make an estimate dividing the surplus between the employer and the employees in accordance with their respective contributions to the fund", he would make an order that the fund "be wound up on that basis and payments be made accordingly". There is no provision in the CN Plan requiring equitable distribution of surplus in either an on-going or a termination situation, but in my opinion that principle should and would be drawn upon in order to settle on a division of the surplus between contributing member groups.