in question provide. Applying that approach again, I would say that, if a surplus arises and the objects of the trust are already fully funded, there is a resulting trust in favour of the settlors. I.e., they are entitled to the return of the surplus. However, in this instance the Plan is assumed to be on-going when the surplus occurs, and, though this has not been the subject-matter of any decision known to me, it is arguable that a surplus can only be said truly to exist when the trust is at an end.[10] It is not without significance that in the reported cases where the return of surplus was discussed, the plans in question were being terminated or wound-up. All the same, whatever the validity or invalidity of that argument, surplus can only be returned when the proportions to which each settlor is entitled can be calculated. The question put to me assumes this is not possible, so under the law of trusts the surplus would have to remain in the Plan.[11] Since the Plan is also assumed to be on-going when the surplus occurs, we need not canvass the question of what would happen to that surplus in the event of termination or wind-up. On the state of the authorities, the answer to that question is in any event only conjectural.

Does the PBSA and its regulations change this state of the law? The only reference in this context is Reg. 11(4)(b) which provides that no funds shall be paid out of a plan for the benefit of an employee, "except in accordance with the terms of the plan", unless the Superintendent approves. Assuming the plan in question is silent as to the entitlement of employees to any surplus, everything now turns on the Superintendent's exercise of his discretion. Some agreed mode of distribution of the surplus between the employer and the employees would presumably be necessary, but I have no knowledge of how the Superintendent would react to this or any other arrangement. He would certainly be concerned that the plan, here the CN Plan, is to continue beyond the time when moneys are so returned. This is not a termination. In summary, since the legislation and the regulations are effectively silent on surpluses and employees' contributions, the PBSA and its regulations only assist the situation through the discretion of the Superintendent.

Save for Reg. 144(14), which I have previously discussed and believe to be localised to a specific situation, the Plan here is silent on the subject of surpluses.

I conclude therefore that the surplus would have to remain in the Plan, and, since the Plan provides what benefits the members are to receive, the members are not entitled under the terms of the Plan to call upon the Trustee for increased benefits. The surplus is literally a surplus to the provision of stated benefits. Assuming that the source of the funds is not clearly determinable, as the Question does, the only solution I can see is that the employer and the members who have subscribed to this surplus come to some agreement — 50% and 50%? — that the surplus be applied to future contribution obligations of the employer (i.e., current service contributions) and of the members. If the period during which the surplus occurred includes contributing members who have since retired, but there is an agreement, the court might be willing to entertain an application under the governing Variation of Trusts Act, and consent on behalf of those former active members who cannot be traced, or whose estates have a claim.[12] However, if an agreement cannot be reached, an application

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[10] This was the situation in *Re Trusts of the Abbott Fund*, supra, footnote 3.

[11] *Re Gillingham Bus Disaster Fund*, supra, footnote 9.

[12] In *Re Sandwell & Co. Ltd. and Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 (B.C.C.A.), the origin of the surplus was conceded by all parties to be from the employer's contributions. However, if the amount of the surplus is known, and there is an agreement, the principle of this case is clearly on point.