

that a surplus of assets over liabilities, following the withdrawal by a terminating employee of his contributions (mandatorily without interest), shall remain in the Fund. In my opinion this sub-rule is applicable purely for the purposes of supplemental annuities under Rule 144, but this is a matter of construction, and it is possible that a court would give a wider applicability to it, though I doubt this in the light of Regulation 144(15).

My conclusion, therefore, is that, subject to the Superintendent's approval, and my interpretation of Reg. 144(14) being correct, CN is entitled to remove from the Plan part of any surplus which remains in the on-going plan after all benefits given by the Plan have been adequately funded. That part is to be determined on a ratio basis with employees' funding of the plan. Of course, such a ratio calculation assumes actual payments by CN, i.e., notional contributions or payments are not included. If the ratio cannot be agreed upon by CN and Plan members, the whole surplus would have to remain in the Fund.⁽⁹⁾

Answer: 4(c)(ii) In my opinion the only other way it would be possible for CN to use its share of the surplus for its own benefit, if it is not to remove that share from the Fund, is for it to leave its share in the Fund and use it to pay down future current service contributions (in fact MNR requires this to be done for the next 24 month period, as already discussed), or future unfunded liability arising on future ad hoc improvements to the benefits of members. I see no reason why this should not be done by CN under the case law, which I have discussed, or the PBSA which is silent on the point. After all, as I have concluded CN is entitled to remove a share of such a surplus for its purposes, it must follow that it can leave it in the Fund for its purposes.

Answer: 4(c)(iii) If the PBSA had not been enacted, my answers would be the same, save for the fact that no approval would be required from the Superintendent to the *removal* from the plan of the share of the surplus to which CN is entitled under the case law of resulting trust.

4(d) If the plan were fully funded — if there were no unfunded liability — and there were an experience surplus:

- (i) assuming that the surplus could not be ascribed entirely to CN contributions plus interest or employee's contributions plus interest, would Fund beneficiaries be able to remove their portion from the Fund, or demand that their portion be used immediately to benefit them, by increasing their benefits, for example?
- (ii) if the answer to (i) is in the affirmative, which of the following groups could make this claim: active employees, pensioners, survivors, estates of pensioners, any others?
- (iii) if the answer to (ii) involves more than one group, would each group share *pro rata* or in some other way?

Answer: 4(d)(i) In my answer to Question 4(c) I suggested that the most useful way in which to approach questions about surplus is to ask, first, what the case law provides; secondly, what the PBSA and its regulations provide; and thirdly, what the terms of the Plan

⁽⁹⁾ *Re Gillingham Bus Disaster Fund*, [1958] Ch. 62, [1958] 2 All E.R. 749.