

Policy Bulletin #4

Issued July 2000 / Revised August 2006

Removal of Funds From Pension Plans

The purpose of a pension plan and its related fund is to pay pension benefits to plan members. There are, however, circumstances in which payments are made out of a pension fund for purposes other than paying pension benefits or administration costs. These circumstances are: refund of surplus assets to a plan sponsor on plan termination; refund of excess assets to an employer from an ongoing plan; removal of funds to avoid revocation of registration under the *Income Tax Act* (Canada); and reimbursement of employers for administrative costs.

This Bulletin outlines legislative requirements and regulatory policies of the Superintendent of Pensions as they relate to each of these payment possibilities. It has no legal authority. The Act and Regulation should be used to determine specific legislative requirements.

Refund of Surplus or Excess Assets requirements and related guidelines for dealing with refunds of surplus and excess assets in Alberta.

Legislative Requirements

ACT The Act distinguishes between "excess assets" and "surplus assets" in the definitions of terms used in the Act (Section 1).

(p) "excess assets" means, with respect to the prescribed assets and liabilities of a pension plan that is not being wound up, the amount, if any, by which those assets exceed those liabilities;

(uu) "surplus assets" means, with respect to a pension plan that is being wound up, the amount, if any, by which the plan's assets exceed its liabilities, as stated in the report filed under section 76(3) or, where applicable, the more recent report filed under section 76(4);

The following is an outline of the legislative

"excess assets" means the going concern assets and going concern liabilities of a defined benefit plan according to the latest valuation report, and for a defined contribution plan, employer and employee contributions with interest, plus any other assets that may be in the plan.

The assets and liabilities in the case of "surplus assets" are those stated in the termination valuation, or the updated valuation filed immediately before the end of a delayed wind-up.

Pension plan documents that were drafted before March 2000, likely use the word "surplus" to describe assets in excess of liabilities in both ongoing and terminating plans. This need not present an interpretation problem. It should be clear from the context in which the term is used in the plan document whether the plan is dealing with "excess" or "surplus" assets, or both, in any given reference. In applying the Act, a reader of a plan document should consider the meaning of the words in the document, regardless of whether the term used in the document is "excess" or "surplus".

Section 83 of the Act states that surplus or excess assets shall not be paid or transferred to an employer unless the following conditions are met:

1. the plan document must have a provision to permit a refund of surplus to the employer, or the employer must have established a claim to a one-time withdrawal of the surplus or excess by obtaining the consent of members, former members and other persons entitled to receive benefits;
2. the plan sponsor must comply with the conditions prescribed in section 67 of the Regulation (as explained in greater detail elsewhere in this Bulletin); and
3. the plan sponsor must receive written notice of consent to the payment or transfer from the Superintendent.

"Prescribed assets and liabilities" in the case of

REGULATION

Section 67 of the Regulation requires the plan sponsor to

1. provide all members and former members (active, deferred vested and pensioners) who have not transferred their entitlements out of the plan, all pension partners of deceased members, and non-member pension partners (to the extent that these pension partners have an entitlement to a benefit under the plan), with a written statement outlining the intention to transfer surplus or excess assets out of the fund (or asking for their consent and the consent of other beneficiaries if the plan does not give the employer entitlement) and providing information acceptable to the Superintendent;
2. provide the Superintendent with a formal request to proceed with a withdrawal and to provide any other information required for the Superintendent to make a decision; and
3. ensure that the portion of the excess required by the Regulation to be retained remains in the plan in cases where the plan is to continue after the refund.

Where the plan provides for the payment or transfer of surplus / excess, the written notice to members / former members / pension partners must be provided at least 30 days before submitting a request to the Superintendent.

Where the employer must establish a claim to the surplus / excess, the written notice to members / former members / pension partners must be provided at least 90 days (but not more than 180 days) before submitting a request to the Superintendent.

OTHER ACTS

It should be noted that where the plan has members in other jurisdictions, the legislative requirements of those jurisdictions must also be considered in the asset withdrawal application.

Although a pension plan is registered in one province only, the plan must meet the standards of all the provinces in which its employees are employed. The province where the plan is registered oversees the plan, and is responsible for ensuring that all the rules of all the relevant jurisdictions are followed. The administrator of a multi-jurisdictional plan should seek the professional advice of the plan's consultants regarding the rules of each jurisdiction. If the plan administrator has any questions, they should be referred to the office of the Superintendent of Pensions, or equivalent, in the jurisdiction where the plan is registered. The supervising authority will deal with the other jurisdictions if necessary. Some of the issues where differing rules should be considered are: which plan beneficiaries must be notified, content of notification, deadlines for notifications, entitlement of persons whose benefits have previously been transferred from the plan.

Role of the office of the Superintendent of Pensions

The role of the office of the Superintendent of Pensions in this process is to ensure that:

- all necessary information is given to plan members,
- the Act's other requirements are met, and
- where the plan is not being terminated (excess assets refund), it will continue to meet the solvency tests under the Act after the refund is made, and a cushion of excess assets remains in the plan as required by the Regulation.

It is not the role of the Superintendent to determine surplus entitlement or the legal validity of plan provisions dealing with surplus ownership. However, if the Superintendent identifies any concerns about ownership while reviewing the documentation, we may request further clarification. (This is the role of the plan sponsor, the fund holder and the members of the plan). If there is a dispute that cannot be resolved by the parties, they may apply to the Court of Queen's Bench to settle the issue.

Guidelines and Procedures

WHERE CONTRACTUAL PROVISIONS PERMIT WITHDRAWAL

The first step an employer must take in the refund process is to determine whether he has valid contractual entitlement to surplus. To do this, he must thoroughly review all plan texts, trust agreements, insurance contracts and other related documents. The review should also include all prior documents and documents from merged plans where funds have been transferred into the current plan. In all cases, the documents must clearly state that the employer is entitled to a surplus refund.

If there is any doubt as to surplus entitlement, the employer may wish to seek Court direction before proceeding further, or seek consent of plan members and other beneficiaries to a one-time withdrawal (see "Obtaining Consent" section below).

Where plan wording provides that members are entitled to surplus or excess assets, a refund request will not be considered unless the plan sponsor can provide a legally valid plan amendment changing plan provisions related to surplus or excess ownership or prove consent of the members to a one-time withdrawal.

Where plan wording is unclear or the plan has no provision regarding the disposition of surplus or excess assets, the plan sponsor may wish to examine the possibility of amending the plan; however, the amendment section of all documents must clearly allow for this type of amendment. It should be noted that although a plan document may be silent regarding excess asset refunds, a Court may look to the plan wind-up provisions for guidance.

It is also advisable to ask the plan's fund holders to state their position on their ability to act on a surplus refund request.

OBTAINING CONSENT

An amendment to section 83 of the Act which came into effect March 1, 2000 allows an employer to seek consent of members and other beneficiaries for a one-time withdrawal of excess or surplus funds even if the plan document is silent or ambiguous, or states that employees are entitled to surplus or excess assets. To establish a claim, the employer must canvass

- 1) all active members (including suspended members if applicable), and
- 2) all deferred vested former members, pensioners, and surviving pension partners or divorced pension partners who are entitled to benefits under the plan.

The employer must be able to demonstrate to the Superintendent that he has the consent of 2/3 of the individuals in each of the above groups. This means 2/3 of all of the individuals in each category, not merely 2/3 of those who voted on the proposal.

ACTUARIAL VALUATION

Regardless of whether a clear contractual entitlement exists, or consent is being sought, a current actuarial valuation is required indicating how much surplus or excess is available. The actuarial valuation must use methods and assumptions that are acceptable under the Act and must contain all the information required by the Regulation. In the case of a defined contribution plan, a statement of plan assets and plan member account liabilities will be sufficient.

Section 67(5) of the Regulation states the minimum amount of excess assets that must be left in the fund when a withdrawal of excess is made. In addition, the Regulation states that the refund must not result in the plan's failing to meet the solvency tests set out elsewhere in the Act and Regulation.

In the case of a plan consisting solely of defined contribution provisions, the amount must be at least equal to one year's worth of employer contributions (estimated normal contributions).

Where a plan has a defined benefit provision, the amount of excess left in the plan must be at least equal to the greater of

- a) 2 years' worth of employer contributions relating to normal actuarial cost, and
- b) 125% of the plan's liabilities determined on a plan termination basis less the plan's going concern liabilities.

The Superintendent may adjust the above amounts where such an adjustment is considered appropriate.

DISCLOSURE

Notification where Consent was not Required

Where the employer has established a right to the withdrawal by contractual entitlement, the plan sponsor must provide plan members, former members, beneficiaries and pensioners who are still entitled to benefits under the plan with a written statement of the intention to refund surplus or excess assets to the employer. The information given members must include:

1. an explanation of the legal authority under which the employer is claiming the right to a withdrawal; for example, citation of the relevant section of the plan document or a Court decision interpreting the provisions of the plan regarding surplus/excess asset ownership;

MINIMUM AMOUNTS TO REMAIN IN FUND

surplus assets will be paid or transferred to the employer any time after 90 days following the date of the written notice;

3. the amount of surplus or excess assets in the plan fund as determined in the most recent actuarial valuation;
4. the amount of the intended refund;
5. the right of members to examine plan documents under sections 15(4), (5) and (6) of the Act;
6. in the case of excess assets refunds, the right of members to authorize representatives to make written representations to the Superintendent regarding the effect the refund may have on the solvency of benefits; and
7. the address of the Superintendent.

The notice may be sent by ordinary mail to the last address known to the administrator, but alternate methods of delivery may be used as long as they are at least as effective.

A copy of the statement given to members must be filed with the Superintendent 30 days before it is given to the members, so that it may be reviewed to ensure that it complies with the Act and Regulation. After the notice has been sent to members, the plan sponsor must also advise the Superintendent, in writing, that members have been given the notice. Where the plan is being terminated, the information in point 6 above is not included in the statement given to members.

Where the Superintendent is advised that members are taking legal action regarding surplus or excess assets ownership, notice of the Superintendent's consent under section 83(1)(c) of the Act will be delayed until the legal action is resolved.

2. a statement that the excess or

To obtain the consent of members and other beneficiaries as per section 83(2) of the Act, the plan administrator must send a written notice to the persons listed in the "Obtaining Consent" section above, at least 90 days, but not more than 180 days before the employer intends to submit a request for the Superintendent's approval. The proposed notification must be filed with the Superintendent 30 days before it is to be distributed to members and beneficiaries, to be reviewed for compliance with the Act and Regulation.

The written notice must contain all of the information set out in points 1 to 7 above (except for 6 in the case of terminating plans), with the following variation. Instead of point 1, the administrator must either state that the plan does not address surplus or excess asset ownership (if that is the case), or explain the contractual provisions that exist – for example, the plan provides that surplus assets on plan termination are to be used to improve employee benefits (if that is the case).

The notification for consent may be sent by ordinary mail or some other effective method.

The employer is not restricted from making a proposal that includes other elements besides the withdrawal – for example, benefit improvements – but must ensure that the proposed uses of surplus and excess assets are consistent with the permitted uses set out in section 48(11) of the Regulation.

Whether or not the employer obtains the necessary levels of consent, the administrator must send another notification to all those who were canvassed, informing them of the result of the vote, by the same method of communication that was used for the notification.

*Notification where Consent
of Members and Others is
Sought*

Where the consent of members and others has been obtained, or, where the consent of members was not required, 90 days after the date members were advised, the plan sponsor may make a formal request to the Superintendent to issue notice under section 83(1)(c) of the Act.

The request should include:

1. a written request stating the updated amount of the intended refund,
2. a copy of any Court ruling on contractual entitlement, where applicable,
3. proof that the consent of members and other beneficiaries was obtained, where applicable,
4. a copy of the actuarial valuation,
5. a written statement from the Fund holder of the plan stating that its contract with the administrator permits the refund, and
6. any other documents the plan sponsor or the Superintendent believe are relevant.

FEE FOR SERVICES

The Superintendent's office charges a fee for all services performed leading up to and for providing the notice under section 83(1)(c) of the Act. The fee is \$100 for each hour or portion thereof spent by our office in performing a service related to the surplus refund, to a maximum of 25% of the surplus assets to be refunded. There is no charge where the surplus to be refunded is less than \$500.

A statement of the total fee payable will be sent to the plan sponsor prior to issuing a notice under section 83(1)(c) of the Act. The notice will not be issued until the fee is paid in full.

**FORMAL
APPLICATION**

NOTICE FROM THE SUPERINTENDENT

The Superintendent will review all documentation and request any information needed to make a decision regarding the application for asset withdrawal.

When all documents are in order, the requirements of the Act have been met, and the plan continues to meet the solvency tests (where applicable), the Superintendent will issue a notice as outlined in section 83(1)(c) of the Act. A copy of the notice will be sent to the plan sponsor, the trustee of the plan and to any plan member or representative of a plan member who made written representation to the Superintendent.

COURT DECISIONS

Where the Superintendent has advised the plan sponsor that a surplus or excess asset refund request will not be considered due to plan provisions that are unclear or prohibitive, the plan sponsor may seek a court decision to determine entitlement, or to permit a plan amendment. In this event, the following guidelines should be followed.

DISCLOSURE

Prior to the hearing date, plan members must be advised of the intended Court hearing and of their right of access to documents in accordance with sections 15(4), (5) and (6) of the Act.

Notice to the Superintendent

The Superintendent should be provided with notice of the pending Court action and with copies of all documentation to be submitted to the Court. This will ensure that all relevant information is being considered.

Failure to advise the Superintendent's office as outlined may result in delays and further expense.

Withdrawal Necessary to Avoid Revocation of Registered Status **LEGISLATIVE REFERENCE**

Section 8506(2)(d) of the Regulations under the *Income Tax Act* requires all registered plans to include a provision stating that the employer and employee contributions will be returned to the contributor, where necessary, to avoid revocation of registration of the plan. The Act permits such a return of contributions subject to certain requirements.

Section 84(1) of the Act permits a refund of contributions to the person who made the contributions where the refund is required to avoid revocation of registration under the *Income Tax Act*. The refund may be made only if the administrator has received the prior written consent of the Superintendent. A request for consent must be made in writing and must be accompanied by supporting information that will enable the Superintendent to make a decision.

GUIDELINES AND PROCEDURES

The written request for consent to a refund under Section 84(1) of the Act must include:

1. a detailed description of the reasons the refund is required;
2. where notice from Canada Revenue Agency has been issued, a copy of that notice; and
3. a copy of the information to be provided to affected members: If the refund is in respect of an employer contribution to a defined benefit provision, the information must be provided to all members.

Where the issue is with the remittance of an employee contribution, the appropriate amount must be returned to that employee. Where the issue is with employer contributions, the return must be to the employer. A refund is not permitted unless the administrator has received the prior written consent of the Superintendent.

**Reimbursement of
Employer-paid Administrative
Expenses**

LEGISLATIVE REFERENCE:

Section 28.1 of the Regulation permits an employer to be reimbursed from the plan fund for expenses that the employer paid directly, in plans where administrative expenses are to be paid from the plan's fund.

GUIDELINES AND PROCEDURES

The plan's provisions must explicitly state that the employer may be reimbursed in such situations; therefore, a plan amendment will be necessary if no such explicit provision is in place.

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