IN THE MATTER OF
***THE PENSION BENEFITS ACT, 1992*, S.S. 1992, c. P-6.001, AS AMENDED**

AND

IN THE MATTER OF
A DECISION OF THE SUPERINTENDENT OF PENSIONS PURSUANT TO SECTION 17 OF *THE PENSION BENEFITS ACT, 1992* RELATING TO THE REGISTRATION OF THE AMENDMENT P-22 TO THE CCRL PETROLEUM EMPLOYEES' PENSION PLAN (THE "PLAN"), PLAN REGISTRATION NUMBER 0358986

Superintendent of Pensions, Roger Sobotkiewicz

Date of decision: **December 12, 2019**

Date of written reasons: **December 19, 2019**

Reasons and Decision of the Superintendent:

1. On September 4, 2019, Consumers' Co-operative Refineries Limited ("CCRL") filed an amendment which CCRL labeled No. P-22 ("Amendment P-22") to the CCRL Petroleum Employees' Pension Plan ("Plan") with my office in accordance with s.17(1) of *The Pension Benefits Act, 1992* ("PBA"). In summary, Amendment P-22 purports to amend a number of provisions of the Plan with the primary intended effect to freeze earnings of active management members of the Plan as of December 31, 2019 and to immediately thereafter effect a partial termination of the Plan for all active management members.

2. A number of stakeholders, including retirees and both management and union Plan members, made submissions to me concerning the registration of Amendment P-22. Many of the submissions opposed the registration of Amendment P-22 on a number of grounds. After reviewing the PBA and the Plan and considering the submissions of CCRL and the stakeholders who provided submissions concerning the registration of Amendment P-22, I issued a decision on December 12, 2019 to register Amendment P-22. I indicated in my decision that written reasons for my decision would follow. These are the reasons for my December 12, 2019 decision.

Background:

3. The Plan was originally registered under the predecessor to the PBA effective as of January 1, 1971 and has been amended on a number of occasions since that time. The Plan is a non-contributory defined benefit plan, meaning only the employer contributes to the funding of the plan. As set out in s.2.01 of the Plan, the Plan is intended to provide certain retirement and related benefits for and on behalf of all employees, unionized and management, who become members of the Plan on or after January 1, 1971. The Plan was closed to new management employees effective December 31, 2007 and closed to new unionized employees effective April 3, 2017.

4. In or about February 2007 the Plan was amended as a result of collective bargaining between CCRL and the union representing unionized employees of CCRL to include a provision that the Plan may not be amended, modified or terminated without the mutual agreement between CCRL and the union [s.14.02(4)]. At the time, the union referred to was the Communication, Energy & Paperworkers Union Local 594, which has since merged with another union to become Unifor Local 594 (the "Union"). A subsequent amendment was made to the Plan modifying this provision to exclude from the restriction in 14.02(4) amendments, modifications or terminations of the Plan that solely affect management members of the Plan [s.14.02A]. The net result of these two modifications of the Plan is that the Union must agree to any amendment, modification or termination of the Plan that affects Union members; and conversely an amendment, modification or termination of the Plan that does not affect Union members can be made by CCRL without the Union's agreement.

5. By way of an email and attached letter addressed to me dated September 4, 2019 (the "Filing Letter"), CCRL's Pension Manager filed Amendment P-22 for registration. Attached to the Filing Letter was a Certificate of the Chair of CCRL's Pension Committee adopting Amendment P-22. The Filing Letter was carbon copied to the Vice President of Administration for the Union.

6. In the Filing Letter, the CCRL Pension Manager described the basis for CCRL's position that Amendment P-22 solely affected management members and did not require the agreement of the Union in the following words:

> …
> Under section 14.02 of the Plan text, Unifor Canada Local 594 (the **"Union")** must consent to any amendments to the Plan text. However, under section 14.02A, if an amendment solely affects out-of-scope employees, the Union's consent is not required. Amendment No. P-22 is made in reliance on section 14.02A.

…We have determined that Amendment No. P-22 only affects out-of-scope employees for the following reasons.

- *Amendments impact out-of-scope employees only:* The amendments to the Plan text will crystallize the benefits of active out-of-scope employees. The amendments do not impact the benefits of any other members of the Plan, including the active in-scope employees.
- *No effect on funded position of the Plan:* As explained in CCRL's April 16, 2018 submission to your office, CCRL has committed to immediately and fully funding the solvency deficiency associated with the out-of-scope employees identified in the partial termination report approved by your office pursuant to section 56(2) of the *Pension Benefits Act.* This commitment is confirmed in section 14.06 [should have referred to section 14.07] of the Plan text being added as part of Amendment No. P-22.
- Consequently, the Partial Termination will have no effect on the funded position of the Plan, and will not directly or indirectly adversely affect the remaining members of the Plan, including in-scope employees. Therefore, I would ask you to register pursuant to section 17 of *The Pension Benefits Act, 1992,* Amendment No. P-22 to the Plan text. This amendment is attached as Appendix A to the enclosed Certificate of the Chair of the CCRL Pension Committee.

Amendment P-22:

7. Amendment P-22 purports to make nine key changes to the Plan with respect to management members who are employees of CCRL on December 31, 2019. A description of those amendments, including where applicable a comparison of the current version of the provision that would be impacted by Amendment P-22 to the version of the provision modified by Amendment P-22, is set out in more detail below.

<u>Partially Terminates the Plan</u>

8. Clause 6 of Amendment P-22 adds a new provision to the Plan, s.2.09, which states that the Plan is terminated as at December 31, 2019 in respect of each management member who is an employee on December 31, 2019. This new section goes on to provide that each such individual shall become entitled to receive the individual's then existing entitlements under the Plan, being the benefits payable under the Plan calculated having regard to the individual's earnings, continuous service and pensionable service to and including December 31, 2019. It concludes by stating that each such individual member shall cease to accrue further benefits under the Plan on December 31, 2019, and shall accrue no further benefits under the Plan after that date.

Freezes Earnings and Highest Average Earnings

9. Clause 2 of Amendment P-22 amends the definition of "Earnings" in s.1.08 of the Plan to provide that if a management member is an employee on December 31, 2019, no form of compensation paid after that date to that person shall be recognized as earnings of that person.

10. Clause 3 of Amendment P-22 amends the definition of "Highest Average Earnings" in s. 1.11 of the Plan to provide that if a management member is an employee on December 31, 2019, that person's highest average earnings shall be determined having regard solely to the person's earnings to that date. This amendment goes on to provide that if a management member who is an employee on December 31, 2019 has less than 36 months of employment with the company at that date, that person's highest average earnings shall equal the person's average annual earnings during the person's period of employment with the company to December 31, 2019.

Freezes Continuous Service

11. Clause 1 of Amendment P-22 amends the definition of "Continuous Service" in s.1.05 of the Plan to provide that if a management member is an employee on December 31, 2019, no period of employment, paid sick leave or accident leave, approved unpaid absence or disability while in receipt of benefit payments under the company's insured long term disability plan by that person after that date shall be recognized as continuous service of that person.

Freezes Pensionable Service

12. Clause 5 of Amendment P-22 amends the definition of "Pensionable Service" in s.1.21 of the Plan to provide that if a management member is an employee on December 31, 2019, no period of employment, paid sick or accident leave, approved unpaid absence or disability while in receipt of benefit payments under the company's insured long term disability plan by that person after that date shall be recognized as pensionable service of that person.

Ceases Eligibility for Membership in the Plan

13. The Plan was closed to new management members effective December 31, 2007 with the exception, provided in s.3.03(b) of the Plan, of members who are individually designated by CCRL specifically to be management members after December 31, 2007. Clause 7 of Amendment P-22 deletes and replaces s.3.03(b) of the Plan with new wording to clarify

that any member who is specifically designated by CCRL to be a management member between December 31, 2007 and December 31, 2019 shall continue to be eligible for membership in the Plan until December 31, 2019, and the membership of all management members who are employees on December 31, 2019, including employees specifically designated as management employees in accordance with that clause, shall terminate on that date.

Amends the Manner in Which Indexing is Determined

14. Clause 8 of Amendment P-22 adds a new s.6.06(3) to the Plan which provides that despite the indexing provisions in the Plan, for any management member who is affected by the Plan termination as at December 31, 2019, retirement benefits shall be increased annually on each January 1 after pension commencement by the lesser of (1) three-quarters of the implied percentage increases in the Consumer Price Index that would be used to determine such a management member's commuted value as at December 31, 2019, and (2) 5.0%. The new subsection goes further to state the annual increase so determined will be pro-rated for a partial year and adds for greater certainty that the implied percentage increases in the Consumer Price Index referred to are the increases in the Consumer Price Index for the applicable years determined by the actuary in accordance with paragraph 3540.10 of the Standards of Practice of the Canadian Institute of Actuaries when calculating the commuted values payable to the management members affected by the Plan termination as at December 31, 2019.

Establishes Benefit Entitlements

15. Clause 9 of Amendment P-22 adds a new s.14.05 to the Plan which provides that management members affected by the partial Plan termination will be given the following options in terms of benefit entitlements:

    1. If a management member has, as of December 31, 2019, either (1) attained age 65, (2) attained age 60 and completed 10 years of continuous service, or (3) attained age 55 and completed 30 years of continuous service, he or she will be given the choice between:

        - an immediate unreduced pension calculated in accordance with the provisions in the Plan, adjusted to take into account the revised definitions of earnings, highest average earnings, continuous service, and pensionable service, and to reflect the changes to the manner in which indexing is calculated; and

        - the transfer of the commuted value of that immediate unreduced pension in accordance with the portability provisions in the Plan.

2. If a management member has, as of December 31, 2019, attained age 55 but is not eligible for an immediate unreduced pension in accordance with option 1, he or she will be given the choice between:

   - an immediate reduced pension calculated in accordance with the provisions in the Plan, adjusted to take into account the revised definitions of earnings, highest average earnings, continuous service, and pensionable service, and to reflect the changes to the manner in which indexing is calculated; and

   - the transfer of the commuted value of that immediate reduced pension in accordance with the portability provisions in the Plan.

3. If a management member has as of December 31, 2019 not attained age 55, he or she will be given the choice between:

   - a deferred pension calculated in accordance with the provisions in the Plan, adjusted to take into account the revised definitions of earnings, highest average earnings, continuous service, and pensionable service, and to reflect the changes to the manner in which indexing is calculated; and

   - the transfer of the commuted value of that deferred pension in accordance with the portability provisions in the Plan.

   The management member may elect to have his or her deferred pension commence payment on the first day of any month after the management member attains age 55. If the management member elects to commence the payment of the deferred pension before the management member's normal retirement date, the deferred pension will be reduced in the manner described in the Plan, adjusted to take into account the revised definitions of earnings, highest average earnings, continuous service, and pensionable service.

16. The new section goes further to state that if a management member does not elect within the time limit specified in the Plan, or such later time limit as is required to comply with the PBA*,* to transfer the commuted value of the management member's immediate or deferred pension to one of the vehicles described in the portability provisions of the Plan, such pension will, after giving notice to the management member in accordance with the rules established in the PBA, be provided through the purchase of an immediate or deferred life annuity.

Provides the Terms Under Which Annuities Will be Purchased by the Company

17. Clause 10 of Amendment P-22 adds a new s.14.06 to the Plan which states that if a management member affected by the December 31, 2019 partial termination elects to receive an immediate or deferred pension, or fails to elect to transfer the commuted value of such pension within the time limit, such pension will be provided through the purchase of an immediate or deferred life annuity from an insurance company licensed to transact annuity business in Saskatchewan. The new section goes further to state that such annuity must be payable in the same amount and on the same terms and conditions as the management member's retirement benefit under the Plan and it must also be payable in accordance with all applicable requirements of the PBA, including the requirements relating to non-assignment and non-commutation of benefits and division of benefits upon breakdown of a spousal relationship.

Establishes a Requirement That the Company Make Extra Contributions to the Plan

18. Clause 11 of Amendment P-22 adds a new s.14.07 to the Plan which states that whenever the company purchases a group annuity policy or transfers a commuted value for the management members affected by the partial termination, it shall contribute to the pension fund the amount necessary to ensure that the solvency ratio for the remaining members of the Plan is not adversely affected by that purchase or commuted value transfer.

The Submissions:

19. A number of stakeholders of the Plan, including current Union and management members, retirees and an executive of the Union provided written submissions to me concerning CCRL's application to register Amendment P-22 (the "Submissions"). I have summarized the Submissions below, organized by topic.

Freezing of Earnings

Submissions from active management members:

20. Three active management members expressed concern that Amendment P-22 freezes their earnings as of the date of the partial termination and that the calculations of their commuted values do not take into account their projected earnings at the date of their retirement as promised under the plan. They refer to s.19(3) of the PBA, which provides

"No amendment to a plan shall reduce a person's benefits that accrued before the effective date of the amendment".

21. They also refer to the federal Office of the Superintendent of Financial Institutions Guideline for Converting Plans from Defined Benefit to Defined Contributions (the "OSFI Guideline") and note that it states, in part, as follows:

> **4.2 Actuarial Basis**
>
> …The value of benefits tied to final average or best average earnings must be calculated with a projection of salaries,
>
> …The conversion basis should reflect the effect that inflation, merit and service would have had on accrued defined benefits.
>
> … The assumptions used to convert accrued benefits tied to salary projection are key to ensuring that removal of the plan's obligation with respect to accrued defined benefits is carried out in a manner **that is fair to members.** This is of particular importance when the sponsor has notified members that it does not intend to maintain a pension fund for defined benefits.

22. Finally, they refer to the "Standards of Practice of the Canadian Institute of Actuaries" (the "CIAS") and in particular, article 3330.17, which provides as follows:

> **.17** If future benefits depend on continued employment (e.g., the pension plan is terminating but employment is not), the actuary would consider reflecting contingencies such as future salary increases and termination of employment.

23. Based on the noted provisions, they take the position that CCRL has not complied with "the requirements". They submit:

- the amendment should be denied and the employer should be "forced to comply with its employer-employee contract";
- if the termination is to proceed, the calculations of the commuted value need to be fair and recognize that "DB pensions due to the nature of 'best 3 of your last 5-years' service' are 'back-end heavy' and "payments should reflect the value that one would have expected at the end of their careers'".

Submission from an active union member:

24. One active Union member also commented on the proposed amendment to freeze earnings for active out-of-scope employees as of the date of the partial termination. While he noted that he was not affected by Amendment P-22, he indicated that he was worried that Amendment P-22 would set a precedent for future changes.

25. In his submission, he stated:

> Our value of benefits is tied to our best average earnings but I don't believe they are calculating a projection of salary in their formula. The projection of salary could have huge implications for most members. Younger members in the bargaining unit have lower base salaries because of their experience or seniority. One of the benefits of our plan is it takes a members highest 36 months of earnings when calculating pension benefits and applying it to all of the years of service. For example a process operator in the lowest position has an hourly wage of $41.72 while the top rate for process operator has an hourly wage of $56.18. Should the plan stay unchanged it's likely that the younger operator would in fact retire with their best 3 years at the top rate.

26. In support of his position that the value of the benefit must be calculated with a projection of salaries, he referred to:

- The Conversion Bulletin prepared by my office (the "FCAA Bulletin"), on page 2 under "Plan Amendments" regarding the preservation of benefits that accrued prior to the plan amendment; and

- Section 4.2 of the OSFI Guideline which provides that the "value of benefits tied to final average earnings must be calculated with a projection of salaries, in accordance with the terms of the plan".

Freezing of Service

Submissions from active management members who have reached the age 55 but do not meet the years of service requirement for an immediate unreduced pension:

27. In the submission provided by seven active management members, they take the position that their remaining years of service with the employer should be taken into account in determining their benefits. They object to being forced to take an early reduced pension as a result of the amendment to partially terminate the Plan.

28. In their submission, they indicate that:

> They feel the pension option "immediate pension (reduced for early commencement) provided through an annuity purchased from an insurance company" is being forced upon us. The objection we have is that we were not given the option to defer receiving the immediate reduced pension. We all would like the opportunity to continue working until our unreduced retirement date (URD), allowing us to obtain an unreduced pension.
>
> The range of reduced pension for this group is -5% to -25%, the rate of reduced pension is -5% per year prior to our URD.

Submissions from active management members who have not reached the age 55:

29. In the submissions provided by six active management members, they express concern about losing the ability to retire with an unreduced pension and take the position that their remaining years of service with their employer should be taken into account in the determination of their benefits.

30. Based on the information provided, most of the members in this group have met the years of service requirement to retire with an early unreduced pension under s.6.02(2) of the Plan, however, they do not currently meet the age eligibility criteria in the Plan to retire early under s.5.02 of the Plan.

31. The members refer to s.6 of the OSFI Guideline as follows:

> **6. Ancillary Benefits**
>
> …the administrator must account for the requirements of section 17 of the PBSA, which provides that a member (whose benefit is vested) is entitled upon termination to a "deferred pension benefit, based on employment and salary up to the time of termination…**that, if the member had attained pensionable age, the member would have been eligible to receive**."
>
> …Additionally, where members whose benefits are converted are not yet entitled to an ancillary benefit, **conversion values should account for the possibility that, had the plan remained unchanged, they might have subsequently qualified.**

32. They also refer to the CIAS, and in particular, article 3330.17, which provides as follows:

> **.17** If future benefits depend on continued employment (e.g., the pension plan is terminating but employment is not), the actuary would consider reflecting contingencies such as future salary increases and termination of employment.

33. Finally, they reference the Plan regarding amendment or terminations of the plan and cite s. 14.02(1):

> **14.02 Right to Amend, Modify or Terminate**
> (1) no amendment shall have the effect of reducing any Member's or beneficiary's then existing entitlements under the Plan.

34. Based on this, they take the position that they should be "assumed" to grow into the minimum age requirement of the Plan because they argue that they have not chosen to stop their participation in the Plan and that the Plan and its benefit are being removed from their future. They point out that they would have qualified because they "have not quit nor died", and there is no reason why they would not have reached their early retirement date as they have no intention of terminating their employment and all of their performance appraisals have been satisfactory. They also point out that they were not consulted, they did not approve the termination and there was no vote. They request that, if the partial termination is to proceed, their entire retirement benefit be held whole, inclusive of its present and future benefit. They argue that they have accrued this benefit under the Plan and that it is their view that the entire commuted value of their retirement benefit should be reflected in their commuted value calculation or annuity value. They also question why "people at different stages of their careers didn't have personalized options to make the conversion to the new pension plan beneficial to them".

Submission from an active union member:

35. An active Union member with just over 11 years of pensionable service with the Plan also expresses concern that the early retirement benefit and salary projections are not included in the commuted values as "employees stand to lose a terrible amount of money". He notes that employees have worked a good portion of their careers with the expectation of a defined benefit and that the change mid-career will have lasting effects on retirement security and retirement planning.

36. In his submission, he refers to the FCAA Bulletin, on page 2 under "Plan Amendments", s.24 and s.25.1 of the Act, the OSFI Guideline, and Article 3330.17 of the CIAS.

37. Finally, he requests that CCRL be kept accountable to the full extent of the regulations to ensure employees are protected and fully compensated for their earned benefits.

Loss of Bridge Benefit from 55-65 Years of Age

Submissions from active management members:

38. Six active management members made submissions regarding the loss of the bridge benefits. Under the Plan, a member may retire at the age of 55 with 30 years of service without reduction. Some of the active management members will not meet the age or service requirements on the effective date of the partial termination of the Plan. However, if the partial termination did not occur, the members would be expected to qualify for the "unreduced early retirement benefit as they expect to continue to be employed by CCRL and have no intention to terminate their employment before meeting the age and service requirements for the unreduced early retirement benefit".

39. It is the position of these members that they have "accrued" the unreduced early retirement benefit and that they are entitled to the value of this benefit. They argue that the value of this accrued benefit should be reflected in the calculation of their commuted values or annuities. In support of their argument, they refer to:

- The FCAA Bulletin,
- sections 24(1), 25.1 and 55 of the PBA;
- The OSFI Guideline, and in particular s. 4. "Conversion of defined benefits" and s.6 "Ancillary Benefits";
- The CIAS, Article 3330.17;
- Sections 1.04, 5.02, 6.02 and 14.02 of the Plan;
- The reference to "Early Retirement from Active Service" on their 2018 Pension Statements; and
- An example from the Financial Services Commission of Ontario referencing bridging for partial wind up of defined benefit pensions.

40. Essentially, these members argue that because the Plan provides an unreduced early retirement pension (or bridge benefit), a Plan member should be entitled to the value of the bridge benefit even though they will not meet the age or service requirement on the date of the partial Plan termination (similar to the Ontario example that they provided which allows for grow in for members who meet the criteria under the rule of 55 and who had at least 10 years of service).

41. The members pointed out that "this Pension transfer does not treat all people the same. I have colleagues that are in a situation where they are months from retirement and they are being treated like they are terminated; in turn they lose the bridge and the RA is not available to them (or greatly reduced). But then on the flip side of that others can retire under the old pension, with full bridge benefits, and can continue to work (We call it Double dipping)". One of the members suggests that the loss of his bridge benefit would be approximately $850,000. They also raise a number of concerns with the retiring allowance that is being offered as a bridge to some of the members.

Submission from an active union member:

42. An active Union member also raised the issue of the bridge benefit. In his submission, he points out that "the commuted values presented don't consider the ancillary benefit of unreduced early retirement. They commute the value as if the employee quits or dies which commutes the value to their normal retirement date of 65 rather than as early as 55".

43. He suggests that CCRL should be kept accountable to the full extent of the regulations to ensure employees are protected and fully compensated for their earned benefits. He specifically refers to the FCAA Bulletin, under "Plan Amendments", s.24 and s.25.1 of the PBA, the OSFI Guideline, and Article 3330.17 of the CIAS.

Change to Indexing

Submissions from active management members:

44. Six active management members made submissions regarding the change to the manner in which indexing is to be determined for management members who retire after the partial Plan termination. Essentially, the members submit that the change to the indexation provision takes away rights that the members have already accrued in accordance with the Plan terms.

45. They assert this transfers the risk to the member by not having adequate inflation protection on what they would term as benefits earned to the date of termination. They take the position that the new section appears to retroactively change the terms of the currently registered Plan on benefits earned to date.

46. In support of their position, they rely on the Plan text and the reference to future retirement benefits in their past pension statements.

Plan Amendments Should be Negotiated

Submissions from active management members:

47. Four active management members made submissions that the Amendment P-22 should have been negotiated with the Union. In particular, they refer to s.14.02(4) of the Plan which provides that the Plan may not be amended, modified or terminated without the mutual agreement between CCRL and the Union.

48. They also refer to s.22(1) of *The Pension Benefit Regulations, 1993* which provides:

> **Amendments**
> **22**(1) Amendments to a plan that confer ownership of surplus assets to an employer pursuant to subsection 19(5) of the Act must comply with the prescribed condition in this section.
>
> (2) The amendment must be authorized by: (a) the employer; (b) any collective bargaining agent of the members of the plan; (c) at least two-thirds of the members who are not represented by a collective bargaining agent; and (d) the number of former members and other persons who are entitled to payments under the plan as of the effective date of the amendment that the superintendent considers appropriate in the circumstances.

Union Consent Required to Amend

Submission from active management member:

49. One active management member indicates "that the most recent copy of the registered pension provided by the company clearly states that the company must have the union's permission before making changes".

Effect on Solvency Position of the Plan

Submissions from retirees:

50. This concern was raised by the Co-chairs for the Retirees Chapter 594. In their submission dated September 24, 2019, the retirees indicate that they realize that their concerns stray from the issue of CCRL's application to register Amendment P-22, but the issues raised go back many years.

51. The questions raised in their submission were as follows:

Solvency Ratio of the Plan
"Describe the methodology involved with regards to the solvency ratio of the plan, prior to the transfer out of the out-of-scope members and will this occur prior to any transfer out."

Buy-in and Buy-out Annuities
"Will the same methodology and process apply with the 'buy-in buy-out annuities' for the 132 members? Can the new 14.07 be expanded so that it applies to the buy-in buy-out annuities?"

Definition of Company in the Plan text
"What recourse is there for definition of Company in the plan text and when will an updated Plan text be made available?"

Timing of Request to Enroll in Co-operative Superannuation Society Pension Plan

Submissions from active management members:

52. Four active management members raised concerns that they have been requested to enroll in the Co-operative Superannuation Society Pension Plan ("CSS") before they know if the termination will be approved by me.

Union Representative Submissions

53. The VP of Administration for the Union provided a submission that raised the following issues:

- He would like to know more about the partial termination report and whether members would have access to this report, 60 days after the proposed termination date?
- Is the retirement allowance that managers are proposed to receive on termination required by law to represent the "bridging benefit" referenced in the Plan text?
- With regard to communication to the members of the Plan of the partial termination, retirees and out of scope management members were communicated to, however the communication was only sent to him instead of all Union members. He asked if it was the responsibility of the Plan administrator to communicate the amendment change to all the Union members and in turn give them an opportunity to present submissions?

- With the substantial Plan text changes, they would like an official consolidated copy of the Plan in a timely manner.

- They would like to have access to a copy of the December 31, 2018 actuarial valuation report.

Additional Matters

Submissions from active management members:

54. In their submissions, some of the active management members also raised the following additional matters:

- the changes to the Plan are unfair;
- the information provided to the members regarding the changes has been confusing and has not been clarified in the member meetings;
- the commuted values that they received are more than 18 months old and they have not received updated numbers on the dollar amount or how their commuted values were calculated.

The Pension Benefits Act, 1992:

55. The PBA provides the regulatory framework for employer sponsored pension plans in Saskatchewan. The regulatory framework establishes a registration requirement for plans governed by the legislation and also imposes a number of minimum requirements or obligations that all plans governed by the legislation must comply with.

56. The governing provisions of the PBA pertaining to plan registrations and amendments are sections 16 to 19. Those sections provide:

PART IV
Registration and Amendment of Plans

Registration
16(1) The administrator of a plan shall apply for registration of the plan by filing with the superintendent, not later than 60 days after the establishment of the plan, an application accompanied by:

(a) a certified copy of:

(i) the plan;

(ii) any document that creates the plan or pursuant to which the plan is constituted;

(iii) any trust deed or agreement, insurance contract, bylaw or resolution that relates to the plan;

(iv) any agreement that relates to the investment of the pension fund of the plan; and

(v) any other prescribed document; and

(b) a copy of:

(i) the valuation report and cost certificate mentioned in clause 11(4)(b); and

(ii) the explanation or summary mentioned in subclause 13(1)(a)(i).

(2) An application for registration of a plan must be in the form required by the superintendent and must contain the information mentioned in clause 11(4)(a).

(3) The superintendent shall register and issue to the administrator a certificate of registration with respect to the plan if, in the opinion of the superintendent, the plan meets the requirements of this Act.

Amendments

17(1) Where an amendment is made to a plan that is registered or with respect to which an application for registration is pending or to any document mentioned in subclauses 16(1)(a)(ii) to (v), the administrator shall file a certified copy of the amendment with the superintendent within 60 days after the amendment is made.

(2) Where a new document mentioned in subclauses 16(1)(a)(ii) to (v) is executed, the document is deemed to be an amendment to the plan for the purposes of this Act.

(3) Where the superintendent is satisfied that the amendment complies with this Act, the superintendent may issue to the administrator a notice of registration with respect to the amendment.

Administration pending registration or amendment

18(1) An administrator shall not administer a plan unless:

(a) the plan is registered; or

(b) subject to subsections 22(5) and 23(3), the application for registration has been duly made and the superintendent has not notified the administrator in writing that the superintendent refuses to register the plan.

(2) An administrator shall not administer a plan in a manner that reflects an amendment to it unless:

(a) the amendment is registered; or

(b) subject to subsections 22(5) and 23(3), the amendment has been duly filed for registration and the superintendent has not notified the administrator in writing that the superintendent refuses to register the amendment.

Retroactivity of plan or amendment

19(1) Subject to subsections (2) to (5), a plan or an amendment to a plan may be made effective from a date before its registration or the application for its registration.

(2) No amendment to a plan that reduces pensions or benefits is effective until the amendment has been registered by the superintendent.

(3) No amendment to a plan shall reduce a person's benefits that accrued before the effective date of the amendment.

(4) Subject to the approval of the superintendent, subsection (3) does not apply where the amendment is required for the purpose of maintaining registration as a registered pension plan pursuant to the Income Tax Act (Canada).

(5) Where an amendment that confers on an employer any ownership or entitlement to the benefit of any surplus assets of a plan is made to a plan, the amendment is not effective unless it has been approved in the prescribed manner by the persons entitled to benefits pursuant to the plan.

57. Also relevant for my decision on CCRL's application to register Amendment P-22 is subsection 11(1) of the PBA, which provides:

Duties of administrators

11(1) The administrator of a plan is responsible for administering and shall administer the plan in accordance with this Act, the regulations and the terms and conditions of the plan.

Issues:

58. The broad issue is whether Amendment P-22 should be registered by me pursuant to s.17(3) of the PBA. The following sub-issues arise when applying s.17(3) to the facts and circumstances of Amendment P-22:

1. Do the amendments, modifications or the partial termination encompassed within Amendment P-22 reduce accrued benefits in contravention of s.19(3) of the PBA?

2. Did CCRL contravene s.11(1) of the PBA in making Amendment P-22, in light of s.14.02(1) of the Plan?

3. Did CCRL contravene s.11(1) of the PBA in making Amendment P-22, in light of s.14.02(4) of the Plan?

59. The Submissions opposing registration of Amendment P-22 do not separate their arguments along the lines of the issues framed above and in many instances the same ground or argument advanced would be relevant to consider in respect of more than one of the identified issues. Accordingly, I will deal with the Submissions on their own as a separate item following the analysis of the three above issues for the sake of efficiency and to avoid unnecessary duplication.

Analysis:

1. Do the amendments, modifications or the partial termination encompassed within Amendment P-22 reduce accrued benefits in contravention of s.19(3) of the PBA?

60. The amendments to the Plan that would be brought about by Amendment P-22 clearly reduce the benefits of management members. The key question is whether any of the benefits reduced by Amendment P-22 are accrued benefits within the meaning of s.19(3) of the PBA. There are no court decisions interpreting s.19(3) of the PBA. However, the pension benefits legislation in several other provinces has similar prohibitions on reducing benefits, and some of those provisions have been judicially considered. As well, many pensions plans have clauses prohibiting amendments to the plan that reduce benefits and there are judicial decisions interpreting those clauses. This case law is relevant and should be considered when interpreting s.19(3) of the PBA.

61. As will be seen, there appears to be a lack of clarity in the cases on how to interpret "accrued benefits" when used in provisions that restrict plan amendments in order to protect members' benefits or rights. However, I am of the view that a common set of principles lurks beneath.

62. A leading case on the definition of "accrued benefits" in the context of pension plan interpretation is *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, ["*Schmidt*"] a decision of the Supreme Court of Canada. That case involved the entitlement to surplus funds both during the ongoing operation of the defined benefit plan in question and after

the plan had been wound up. Justice Cory, writing for the majority of the Court, noted at the outset of the decision that Alberta's pension legislation went no further on the issue of entitlement to surplus than to provide that the entitlement to surplus is to be determined based on the wording of the pension plan. Justice Cory concluded that the principles of trust law and contractual interpretation would govern the issues.

63. One of the issues raised in the case was whether the employer was entitled to take a contribution holiday from the plan that was the subject of a trust, utilizing an actuarial surplus to fund future contributions. The plan members and beneficiaries argued that by doing so, the employer was encroaching upon the trust fund of which they were the beneficiaries. Justice Cory disagreed, saying:

> Once funds are contributed to the pension plan, they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. **Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystalized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits**.
>
> Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.
>
> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. **Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper**, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. **When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries.** The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.
>
> [emphasis added]

64. Later in his decision, Justice Cory considered another issue, whether a 1983 amendment to a predecessor plan providing for the reversion of surplus funds to the employer on termination of the plan was valid or prohibited by the amendment clause (Article 14.1(a))

in the plan which prohibited amendments that would operate to reduce any participant's…. then existing interest in the pension fund. The clause dealing with surplus on plan termination prior to the 1983 amendment provided that the surplus may be returned to the company or may be used for the benefit of the plan participants in such equitable manner as the company may in its discretion determine. In concluding that the amendment clause did not prohibit the 1983 amendment to expressly revert surplus funds to the employer, Justice Cory said:

> In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. **The amendment does not violate Article 14.1(a) because at the time it was enacted it did not reduce any "then existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.**
>
> [emphasis added]

65. While the passages of Justice Cory's judgment quoted above dealt with two separate issues and different contractual wording, I glean from them a common principle. A potential right or interest of plan members that has not yet crystalized or become definite because some prerequisite is still unfilled is not an "accrued benefit". Nor was it a "then existing interest", in the context of the amendment clause of the plan in question in that case. The converse of this is that in order for a benefit or interest under a pension plan to have accrued, the right of the members to obtain that benefit or interest must be certain and complete, with no further contingencies applicable.

66. As I will discuss below, subsequent cases tend to be quick to distinguish *Schmidt* on the basis that it is authoritative only with respect to the limited issue of the right to pension surplus or to take contribution holidays. In my respectful view, Justice Cory's decision should be viewed with a broader lens. After stripping away the specific focus on surplus, the first principle that emerges is, as noted above, that rights under pension plans are not accrued until they are certain and no longer contingent or potential only. The second principle is that in order to know whether a member right is at a particular point in time certain or only contingent, one must look to the pension plan contract and surrounding context. This is what Justice Cory did when considering the issue of the 1983 amendment that granted to the employer the sole right to any surplus on termination of the plan. Key to Justice Cory's decision that the members' right to surplus was only potential and not accrued was the fact that the wording of the plan relating to surplus prior to the 1983

amendment provided that the employer had the sole discretion to determine whether to distribute any of the surplus to the members.

67. In *C.A.S.A.W. v. Alcan Smelters and Chemicals Ltd.*, 2001 BCCA 303, ["*Alcan*"] the British Columbia Court of Appeal considered whether amendments relating to the definition of earnings contravened the pension plan provision that prohibited amendments that "adversely affect any right with respect to benefits which have accrued under the Plan prior to the time such action is taken". Up until January 1, 1990, the plan included overtime earnings in the calculation of earnings used to determine contributions to the plan by the employees and the calculation of benefits on their retirement. On January 1, 1990, the employer modified the definition of earnings to exclude overtime earned on or after January 1, 1990. At the same time, the employer amended the plan to guarantee that highest average earnings after 1989 continued to include pre-1990 overtime earnings until post-1989 earnings exceeded that amount. In this way, the employer ensured that the level of benefits payable to a member retiring after the amendment took effect would never be less than the level of benefits to which the member would have been entitled if he or she had retired immediately before the amendment took effect.

68. The employees argued that while the employer was free to change the rules with respect to earnings in the future, it could not do so in a way that affected the calculation of earnings for years of service that had already been earned. In other words, for each year of service that had been completed prior to the amendment, it was an accrued benefit of the employees to receive the benefit value equal to the highest average earnings (average annual earnings during the 36 consecutive months of service for which his or her earnings were greatest) including overtime, regardless of whether those highest 36 months of earnings fell before or after the amendment. For each year of service earned after the amendment, they acknowledged the employee would be entitled to the benefit value based on the highest 36 months of earnings, with pre-1990 years including overtime and post 1989 years not including overtime. In other words, the formula for determining the value of the benefit was itself an accrued benefit that could not be taken away other than prospectively.

69. Madam Justice Levine, speaking for the unanimous Court, disagreed with the employees' position. Beginning at paragraph 24 of her decision, she states:

> [24] Nonetheless, I do not agree that the decision stands for the proposition that the Plan in this case could not be amended (or that it was amended) to reduce the value of years of credited service. **The appellants will obtain credit for all of their years of service in calculating their pension benefit, and the value of those years of service will be determined based on their highest average earnings at the date of retirement.**

> [25] **The Plan did not guarantee that their highest average earnings would include overtime; indeed, for most employees, their highest average earnings would not include overtime. The amendment expressly preserves the value of the appellants' years of service prior to 1990, including overtime, provided that those years are included in their highest average earnings.**
>
> [26] **In my view, a plain reading of the words "right to benefits which had accrued" prior to January 1, 1990 is that the appellants had a right to have their pension benefit calculated taking into account their highest average earnings, including overtime earned prior to January 1, 1990. They had no right to any benefits resulting from anything that occurred after that date, whether those things were additional earnings, service, contributions or anything else that had not yet occurred**.
>
> [emphasis added]

70. And then at paragraph 48 of her decision, she states:

> [48] Furthermore, the interpretation given by Paris J. and adopted by Baker J. accords with the plain meaning of the words in the context in which they are used. The power to amend is limited by the prohibition on adversely affecting accrued benefits. In order to know whether an amendment can be made, the employer has to have some method of determining what the accrued benefits are, so that it can determine if they are adversely affected. The interpretation of the appellants, rejected by Baker J., postpones the determination of the amount of the accrued benefits to some unknown future date. **While many aspects of the administration of pension plans involve dealing with unknown future events, "...the word 'accrued' according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted..."** (see ***The Hydro-Electric Power Commission of Ontario and the Ontario Power Company of Niagara Falls v. John Joseph Albright*** (1922), 64 S.C.R. 306 at 312, cited by Paris J. in ***Hockin*** at p. 349).
>
> [49] For all of the above reasons, I find no errors in the judgment of Baker J., and would dismiss the appeal.
>
> [emphasis added]

71. Justice Levine refers to the *Schmidt* case in passing, but notes it dealt with the issue of contribution holidays and has no application to the case before her [see paragraph 19 of her decision]. While the specific issues are different, the approach taken by Justice Levine is, in my view, perfectly consistent with that of Justice Cory in *Schmidt*. In paragraphs 24 to 26 of her decision, Justice Levine confirms the certain (non-contingent) right of the employees provided in the plan to receive the value of their pre-1990 years of service based on earnings that included overtime would be preserved by the amendment. She notes that any right to have future service or earnings included in determining their

retirement benefits is not accrued, because that future service or future earning hasn't happened yet, and presumably because it is not certain to occur. As an example, the employees in *Alcan* could have had their employment with the company terminated immediately following the amendment coming into effect, in which case they would have no future service or earnings. Justice Levine's reference in paragraph 48 to 'accrued' meaning 'fully constituted' was another way of saying what Justice Cory held in *Schmidt* that for rights to be accrued they must be certain and not contingent.

72. In *Dinney v. Great-West Life Assurance Co et al.*, 2005 MBCA 36, ["*Dinney*"] the Manitoba Court of Appeal considered whether The Great-West Life Assurance Company could amend its pension plan to change the way in which indexing benefits were calculated for retirees. The retirees argued that the company could not amend the indexing provision in the plan due to s.21(8) of *The Pension Benefits Act* (Manitoba), which provided:

> **Vesting on retirement at normal retirement age**
> **21**(8) Every pension plan shall provide that a member of the pension plan who retires on or after reaching the normal retirement age for the pension plan is entitled to an annuity in accordance with the terms of the pension plan, as those terms are at the date of retirement and that is not less than the pension benefits in respect of service as an employee after January 1, 1984.

73. The retirees also argued that the amendment was prohibited by s.29 of the plan in question, which provided:

> 29 **Amendment or Repeal**
> The foregoing rules, regulations and provisions shall be subject always to such repeal, amendment or substitution, including but without limiting the generality of the foregoing discontinuance under this Part of the granting or receiving of further contributions or other payments, all as the Board of Directors of the Company may from time to time determine, but such repeal, amendment or substitution **shall not reduce any benefits accrued to the credit of an employee to the date of such repeal, amendment, substitution or discontinuance**.
>
> [emphasis added]

74. Scott, C.J.M. discussed the interpretation of "accrued right" beginning at paragraph 30 of his decision:

> 30 In their submissions, all counsel used the words "accrued right" and "vested right" interchangeably. In my opinion, they were correct in so doing. The word "accrue" means:

> Derived from the Latin, "ad" and "creso," to grow to. In past tense, in sense of due and payable; vested. It means to increase; to augment; to come to by way of increase; to be added as an increase, profit, or damage. Acquired; falling due; made or executed; matured; occurred; received; vested; was created; was incurred.
>
> .....
>
> [*Black's Law Dictionary*, 6th ed., *s.v.* "accrue"]

31 An accrued right is defined in *Black's Law Dictionary*, *ibid.*, as a "matured cause of action, as legal authority to demand redress," and according to the same authority rights are "vested" when the

> ... right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested right."

When used in the context of "rights," the words "accrue" or "vested" refer to rights that have matured. For example, a cause of action "accrues" when an action can be maintained. *Dillon v. Board of Pension Com'rs of City of Los Angeles*, 18 Cal.2d 427, 116 P.2d 37, 39; income "accrues" to a taxpayer when he has a fixed or unconditional right to receive it. *Black's Law Dictionary, ibid.*, *s.v.* "accrue, *taxation*."

32 **But a conclusion that the words "accrue" and "vested" mean the same thing in the context of rights is not of much assistance in determining the specific question before this court**, namely, whether the plaintiff's entitlement to annual increments "based on investment performance" established a right in favour of retired employees that could not be altered by Great-West….

[emphasis added]

75. After referring to American and Canadian case law establishing that pension benefits fully vest in employees upon retirement, Justice Scott then went on to consider whether the previous indexing formula was a benefit that had inalterably vested in the retirees upon retirement. On the issue of using extrinsic aids to determine the legal relationship between the parties, Justice Scott considers *Alcan* and, focusing on Justice Levine's holding, states:

> 67 The appeal was dismissed, with the Court of Appeal deciding (at para. 26):
>
> > ... a plain reading of the words "right to benefits which had accrued" prior to January 1, 1990 is that the appellants had a right to have their pension benefit calculated taking into account their highest average earnings, including

> overtime earned prior to January 1, 1990. They had no right to any benefits resulting from anything that occurred after that date, whether those things were additional earnings, service, contributions or anything else that had not yet occurred.
>
> 68 **In my opinion, this authority simply confirms that the terms and conditions of the plan itself are paramount in determining exactly what "right" vested in a retiree.**
>
> [emphasis added]

76. Then, after considering the *contra proferentem* rule, Justice Scott distinguishes *Schmidt* and summarizes his findings:

> 70 **In my opinion, having regard to the provisions of secs. 29 and 30 of the plan, the trial judge was right in concluding that employees of Great-West who were members of the plan acquired on their retirement a vested or accrued right to their entitlements under the then existing plan, including annual pension increments. The decision in *Schmidt*, upon which Great-West places so much reliance, is a "pension surplus" case where an "actuarial surplus" may never become an "actual surplus." This case is not about when entitlement to a plan "surplus" crystallizes.** The point in issue before this court is whether Great-West has the right to amend a deferred benefit plan to change benefits under the plan, including pension increments, that have vested in retired employees.
>
> 71 **Great-West cannot adversely affect the contractual and statutory rights of retired employees to future benefits. The defined benefits, including pension increments, are accrued rights within the meaning of sec. 29 of the plan and** sec. 21(8) **of the** Act**. I reject the argument of counsel for Great-West that benefits that are not quantified do not meet the definition of a "pension benefit" in the** Act**. The quantum of the annual increment need not be a fixed amount so long as it is calculable in accordance with the provisions of the plan itself.**…
>
> [emphasis added]

77. In *Dinney*, we again see *Schmidt* distinguished by the Court on the grounds that it was on the narrow issue of the right to surplus. Notwithstanding that finding, Justice Scott follows the same broad approach that Justice Cory did in *Schmidt* and Justice Levine did in *Alcan*.

78. Justice Scott arrives at the finding in paragraphs 30 and 31 of his decision that accrued means the same thing as vested in the context of rights, namely rights that have matured or are fixed and unconditional. He states in paragraphs 56 and 68 that to determine

whether a benefit is fixed and unconditional one must look to the precise wording of the plan. Ultimately, Justice Scott concludes from his review of the wording of the plan that the right of the employees to receive future indexing based on the formula set out in the plan vested or accrued on the date of retirement and could not be altered. *Dinney* is also an example of a specific right in which both the current value and future value of the right were accrued and could not be altered, due to the specific nature of the right and the bargain in the pension plan. In effect, it was found that the promise in the plan to provide indexing in the future was non-contingent for retirees and there were no circumstances in which they might not be entitled to it.

79. In *Patrick v. Telus Communications Inc.*, 2005 BCCA 592, leave to SCC refused, [2006] SCCA No. 35, ["*Patrick*"] the British Columbia Court of Appeal considered an appeal from a British Columbia Supreme Court decision finding that a proposed amendment by Telus of its pension plan that would effectively remove certain employees' right to take early retirement contravened the amendment clause of the applicable plan. In order to take early retirement, the plan prior to the impugned amendment required the employee to meet two criteria (20 years of service and 55 years of age) and the company had to consent to the employee taking early retirement. The specific group in question for the purposes of the appeal had met the 20 years of service criteria, but not the 55 years of age criteria.

80. The amendment clause of the plan provided:

> CHANGES TO OR TERMINATION OF THE PLAN
>
> 1. The Board of Directors may, from time to time, make such changes in the Plan as in its judgment will more effectually carry out the purposes expressed therein, or may terminate the Plan, in whole or in part, but such changes **shall not affect the rights** of any Member, Former Member, Spouse or beneficiary, without his consent, **to any benefit or pension to which he may previously have become entitled hereunder**.
>
> [emphasis added]

81. In reversing the trial judge's decision, Justice Donald, speaking for the unanimous Court, said:

> [4] In his reasons for judgment, 2005 BCSC 1248 (CanLII), the trial judge found the changes did not apply to the respondents because of the meaning he placed on the amending clause, in particular the phrase "may previously have become entitled". He ruled that the respondents may become entitled to seek an early pension as soon as they reach both milestones relating to age and length of service and therefore their

entitlement cannot be affected by the amendment. All the respondents have the requisite service; none had attained the requisite age at the time the changes were made. The judge said this:

> [19] The permissible amendments under Section XX are, in my judgment, narrower than those allowed by ***Pension Benefits Standards Act***. Section XX makes no mention of "accrued rights". It prohibits amendments, in the absence of the consent of the member, "…that affect the right of any…Former Member…to any…pension to which he ***may*** previously have become entitled…" (***emphasis [of Barrow J.]***). The use of the word "may" extends the prohibition on amendments beyond accrued rights. There can be no doubt that, absent the amendments, the applicants "may have become entitled" to a consent pension under Section VII(5) or (6). Upon achieving the necessary milestones they will, absent the amendments, be entitled to seek the defendant's consent to a pension under that provision. Whether that consent is granted or must be granted is a matter to be resolved in the broader litigation. There can be no doubt, however, that such a pension is one to which the applicants may, previous to the impugned amendments, have become entitled. Viewed from that perspective, there can be no doubt that the proposed amendments affect that potential entitlement. It follows, in my view, that the impugned amendments are prohibited by Section XX and are, in relation to these applicants, of no force.
>
> [20] I recognize that the interpretation that I find applies to this provision limits the ability of the defendant to amend the plan. It was, however, open to the drafters of the plan to either simply adopt the language of the ***Pension Benefits Standards Act*** or to expressly reserve the right to amend the consent provisions of the plan, if they wished to do so. They chose to do neither.
>
> [Underlining added.]

[5] With respect, I think the trial judge failed to give the operative words their ordinary and grammatical meaning and in doing so reached an erroneous conclusion. **The proper interpretation, in my view, is that the Pension Plan member must have become entitled to make a claim for an early pension before the changes**.

….

[11] The company submits that the key phrase "may previously have become entitled" means that the Plan member's entitlement must have actually come into existence prior to the change; it does not, and grammatically speaking cannot, refer to a future event, as the trial judge found.

[12] The respondents submit that having reached the service milestone of 20 years prior to the change, they are "entitled" to the benefit in the sense that they will get it simply with the passage of time, assuming of course that the company cannot withhold

its consent as contended in the main action. They argue that, for all practical purposes, their entitlement arose when they put in 20 years and only death can intervene to prevent drawing the pension.

[13] **I cannot give effect to the respondents' argument. The grammatical structure of the amendment clause will not support it. The chief difficulty with the argument is that it treats a future event, reaching the age milestone, as though it were a completed fact when the changes occurred. This is not permissible on the language of the Plan.**

[14] What must be analyzed is the verb phrase, "may previously have become entitled". **The trial judge attributed to "may" a meaning that carried the entitlement into the future**: see paragraph 19, quoted at paragraph 4 of these reasons. With respect, this construction uses the wrong tense… S**o when the verb phrase is understood in its proper tense, especially as modified by the adverb "previously", it is apparent that full entitlement, at least insofar as the two milestones are concerned, must have been reached before the changes.** In the result, I would allow the appeal on the interpretation question.

82. Unfortunately, Justice Donald's decision in *Patrick* does not refer to any of the other cases mentioned in my decision, so no attempt was made to reconcile it with the holdings in those cases. What is clear from the decision is that based on the wording of that contractual provision, an employee did not become entitled to a right to early retirement if they had not yet met both of the criteria (service and age) in the plan to qualify for early retirement.

83. This decision of Justice Donald is entirely consistent with all of the cases previously mentioned, in that early retirement was still at that point only a potential or contingent right of the employees in question. Due to the fact that there was an upcoming trial involving other employees dealing with whether the requirement that the company consent to the early retirement precluded the amendment in question, Justice Donald did not address that point.

84. In *Halliburton Group Canada Inc. v. Alberta* 2010 ABCA 254, ["*Halliburton*"] the Alberta Court of Appeal considered whether an amendment to freeze earnings under a defined benefit pension plan as part of a forced conversion to a defined contribution pension plan contravened s.81(1)(a) of the *Employment Pension Plans Act* (Alberta) ("EPPA") and the amendment clause under the affected pension plan. In dismissing the appeal by the employer, the Court affirmed the decision of the Alberta Court of Queen's Bench and the Alberta Superintendent of Pensions that the freeze amendment did contravene the EPPA.

85. In my view, *Halliburton* is the one decision that is truly distinguishable from *Schmidt* and the other cases cited in these decisions. For this reason, I will provide a more extensive summary to highlight the unique and distinguishing aspects of *Halliburton*.

86. Key to the decision in *Halliburton* are the relevant provisions of the EPPA and the plan. This was noted by Justice Berger, writing for the unanimous Court, when he said:

> [28] There is no question that the Appellant is entitled to amend the Plan. There are, however, limitations. The first is s. 9.01 of the Dresser Retirement Income Plan which states:
>
> "... [P]rovided that no such amendment **shall reduce the value of benefits vested** in Participants as of such effective date or cause a reversion of any funds to any Employer prior to satisfaction of or provision for all benefits then accrued ..."
>
> (Extracts, Vol. I, A108)
>
> [29] The second limitation is set out in s. 81(1)(a) of ***EPPA***. It reads as follows:
>
> "An amendment to a pension plan or, where one plan has been adopted in place of another, the plan so adopted, may not reduce
>
> a) a **person's benefits in respect of employment** on or after the initial qualification date and before the date of the amendment or the adoption of the other plan,"
>
> [30] Regard must also be had to s. 81(2) of ***EPPA*** which reads as follows:
>
> "81(2) Unless the plan so provides, subsection (1)(a) does not apply to that portion of the benefits that is based on the earnings of a member projected in relation to a period after the date of the amendment or adoption of the other plan." [emphasis added]
>
> [emphasis added]

87. Beginning at paragraph 33 of the decision, Justice Berger succinctly summarized the positions of the Superintendent and the company as follows:

> [33] The Superintendent acknowledges that the issue is tied so closely to the specific wording of the Plan that no case law provides guidance on the matter. The Superintendent submits that because the Plan includes no provisions for tying a determination date to the formula in case of an amendment, the formula must be taken as a vested right. Apparently, many, if not most plans, do not include a determination

date provision. That is why all the other Halliburton plans could be converted from DB to DC under the amendments. But, the Superintendent argues, this one cannot.

[34] Halliburton, by contrast, argues that a benefit is vested or accrued (the terms are used interchangeably in the case law in accordance with ***Dinney v. Great-West Life Assurance Co.*** (2005) 2005 MBCA 36 (CanLII), 252 D.L.R. (4th) 660 (Man. C.A.) at paras. 30-32) if the member would be entitled to it if he or she retired today. In this case, the Appellant submits that the amendment did not reduce the benefits that the members would be entitled to if they retired immediately. Rather, it reduced future benefits which are not vested.

88. In concluding that the amendment to freeze future earnings violated s.81(1)(a) of the EPPA, Justice Berger held:

[35] Sections 81(1)(a) and 81(2) of EPPA contemplate a temporal analysis. Section 81(1)(a) speaks of benefits acquired from day one of employment ("the initial qualification date") accruing thereafter to the day of the amendment of the Plan. An amendment may not reduce those benefits. The Appellant argues that the provision should be read to permit reduction of benefits that would otherwise have accrued after the amendment. I disagree. At best the enactment is silent. **In any event, the effect of** s. 81(2) **is that** s. 81(1)**(a) does not apply to projected benefits. A plain reading of the Plan makes clear that the Plan contemplates that projected earnings are to be taken into account in the determination of employee benefits. The cumulative effect of all of the foregoing is that as at the point that any individual becomes a participant in the Plan, they are entitled to have their defined benefit calculated in accordance with the DB formula. The formula requires that the compensation number used is the one that is the highest for five of their last ten years of employment "prior to [an employee's] normal retirement date."**

…

[39] The Appellant submits that the seventeen employees lose nothing acquired to the date of amendment pursuant to their DB Plan and accrue further benefits thereafter under their DC Plan. The contention is that the seventeen employees have, in effect, two pension plans. In my view, that argument is without merit if, at the end of the day, the Plan is read to confer upon the seventeen employees an acquired or "vested" entitlement to benefits extending beyond the date of the amendment. **Indeed, as I read the Plan, the seventeen employees prior to the effective date of the amendment were entitled to a pension premised upon their projected five years of employment preceding their normal retirement date. Amendments that deprive them of that entitlement contravene the Act** and entitle the Superintendent to order deregistration of the amendments.

[40] **I cannot accept the Appellant's submission that "prospective rights" in this case must be distinguished from "vested rights". After all, a vested right is capable of measurement and, as I have held, is properly measured in the case at bar, given the**

> **language of the Plan, on the basis of "prospective calculations". To repeat, the seventeen employees had acquired a right to measure their pension entitlements on a prospective basis. To deprive them of that entitlement constitutes a contravention of the Act**.
>
> [41] I conclude that the directions of the Superintendent must stand. The decision to issue those directions was reasonable….

89. On its face, *Halliburton* appears to contradict the decision of Justice Levine in *Alcan*. In essence, the Court in *Halliburton* concluded that on the particular facts and specific wording of the plan, the employees' right to the specific formula for calculating their final average monthly earnings that ultimately determined their benefit amount was found to be a protected right, not capable of modification by unilateral plan amendment, even if the modification only related to future years of service that had not yet occurred. The Court in *Alcan* reached the opposite conclusion with respect to the inclusion of overtime in the calculation of earnings in the future for the purpose of determining the ultimate benefit amount the employees were entitled to. They appear at first glance difficult to reconcile, the ultimate policy position reached on the extent of protected benefits and rights lands in two very different spots. However, the decisions are clearly distinguishable as the wording of the relevant legislation and plans in question are quite different.

90. In *Alcan*, the key issue in question was the proper interpretation of the plan provision prohibiting amendments that adversely affect "accrued" benefits. In *Halliburton*, the benefits protected by s.81(1)(a) of the EPPA are not qualified by the word "accrued" or "vested" or any similar concept. The Court in *Halliburton* ultimately decided not to imply the concept of "accrued" or "vested" in s.81(1)(a) to narrow the scope of inalterable benefits, presumably because s.81(2) of the EPPA implies that no such limitation was intended. Subsection 81(2) creates an exception from the protection in s.81(1)(a) in relation to projected earnings, which by any definition used in the cases discussed above are not accrued. The exception in s.81(2) would be meaningless if s.81(1)(a) was to be interpreted to only protect accrued benefits, as projected earnings would already be excluded directly on the face of the wording in s.81(1)(a) and there would be no need for s.81(2). For this reason, in my view the *Halliburton* decision is distinguishable from *Alcan* and not inconsistent.

91. This distinction perhaps also explains why, aside from the reference to *Dinney* in the summary of the position advanced by the company, Justice Berger makes no other references to the pension cases dealing with the interpretation of accrued or vested rights.

92. Subsection 81(2) of the EPPA does in effect exclude from the statutory protection in s.81(1)(a) benefits based on projected future earnings, however, it expressly contemplates this can be overridden by the wording of the plan. While there may be different views as to whether the wording used in s. 9.01 or otherwise in the plan was sufficient to trigger the "Unless the plan so provides…" carve out from s.81(2), the Court in *Halliburton* appears to have concluded, based on applying principles of contract interpretation to the specific wording of the plan, that the plan wording was sufficient to exclude the application of s.81(2). This resulted in those projected earnings being protected under s.81(1)(a).

93. In the decision of the New Brunswick Court of Queen's Bench in *Quinn v. New Brunswick (Minister of Finance)*, 2011 NBBR 182, ["*Quinn*"] Justice Grant considered whether a pension plan established by the Province of New Brunswick for certain unionized employees could be amended to, among other things, remove the indexation provisions for both active members and retirees. The plan was not subject to the pension benefits legislation of New Brunswick or any other jurisdiction and Justice Grant proceeded to decide the issue based on contract interpretation principles.

94. The relevant amendment clause read:

> 23.01 Subject to the provisions of any applicable Collective Agreement, the Plan may be amended by Board of Management or in accordance with Section 15.04(viii) from time to time, **but no such amendment shall in any way operate to reduce retroactively the benefits earned** by any Member **in respect of Pensionable Service prior to the date of such amendment**.

95. Justice Grant frames the issue to be whether the indexation provisions **vested** in actives and retirees. Justice Grant then goes on to consider the meaning of "earned" and "vested", where he states:

> [61] Vesting is the cornerstone of pension law. Because no legislation applies to this Plan I must look to both the Plan and the common law to determine when the right to vested benefits crystallizes in this Plan. See ***Baxter v. Abbey*** (1986) 1986 CanLII 840 (BC CA), 9 BCLR (2d) 91 (BCCA).
>
> [62] In the case of ***Dinney v. Great-West Life Assurance Co.***, 2005 CarswellMan 78 (Man. C.A.) Scott, C.J.M. stated at para. 72:
>
> > 72. … In considering the provisions of the plan, subsequent conduct, extrinsic evidence and the application of the *contra proferentem* rule may be of assistance.
>
> **THE PLAN**
>
> [63] Under Sections 4, 5, 6, 7, 10 and 11 of the Plan, COLA becomes calculable and payable on the happening of one of three triggering events: death, leaving employment

or retirement (whether at normal, early, or late retirement age).

[64] If termination from the Plan occurs as a result of the death of the member, then the value of COLA is part of the payment made to the member's designated beneficiary. If termination occurs by way of leaving employment, then COLA forms part of the commuted value transfer made under Section 10.04 of the Plan. If termination occurs by way of retirement, then the retiree is eligible to receive annual COLA increases, if there is an increase in the Index referred to in the Plan. There is no "averaging" or other provision in the Plan to deal with deflation.

[65] Section 23.01, *supra.,* of the Plan limits the Committee's amending power but in doing so it does not use the term "vest" or "vested" but provides that "…no…amendment shall in any way operate to reduce retroactively the benefits earned by any Member in respect of Pensionable Service prior to the date of such amendment."

[66] Because the Plan does not speak specifically of benefits "vested" but rather benefits "earned" I must now consider whether or not the term "earned" as used in section 23.01 means the same as the term "vested".

[67] In **Black's Law Dictionary**, 9th edition, "earn" is defined as:

1. To acquire by labour, service or performance.
2. To do something that entitles one to a reward or result, whether it is received or not.

[68] Both definitions establish a *quid pro quo,* whereby doing something leads to an entitlement.

[69] In **The Dictionary of Canadian Law** by Dukelow and Nuse, (Carswell, 1991) the term "vested rights" is defined as follows:

> **VESTED RIGHT. A right which is not contingent or may not be defeated by a condition precedent.**

[70] In the ***Dinney*** case, *supra.* Scott, C.J.M. considered the meaning of the term "vested" at para. 31 as follows:

> 31. An accrued right is defined in *Black's Law Dictionary, ibid*, as a "matured cause of action, as legal authority to demand redress," and according to the same authority rights are "vested" when the
>
> … right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested right."

When used in the context of "rights," the words "accrue" or "vested" refer to rights that have matured. For example, a cause of action "accrues" when an action can be maintained. *Dillon v. Board of Pension Com'rs of City of Los Angeles* (1941), 18 Cal. 2d 427, 116 P.2d 37 (U.S. Cal. Sup. Ct. 1941), 39; income "accrues" to a taxpayer when he

has a fixed or unconditional right to receive it. *Black's Law Dictionary, ibid, s.v.* "accrue, taxation."

[71] These definitions both reference **rights which are not contingent or dependent on the fulfillment of any condition precedent and they both include rights, the enjoyment of which could be present or future provided the future rights are not contingent**. They also reference **rights which have matured and are thus enforceable**.

[72] **Earned benefits vest at some point in time but their vesting may be delayed. For example, for most employees, salary is earned daily but not payable until an agreed upon payday. Similarly, a basic pension under the Plan is an earned benefit but it doesn't vest until the triggering event occurs.**

[73] **The definitions of "vested" reference the status of the right or benefit, i.e. they are matured or enforceable while the definition of "earned" benefits reference the manner in which they are acquired, i. e. by labour, performance or service. In my opinion, then, "benefits earned" as used in section 23.01 is not synonymous with "benefits vested".**

96. Regarding the active plan members, Justice Grant finds:

[84] In my opinion, an active member with more than five years continuous employment **could not maintain a cause of action to enforce her right to COLA any more than she could her right to her basic pension because, while the right to COLA has begun to grow, it has not matured or vested. It has not become an enforceable right. Before a triggering event (death, leaving employment or retirement) the member is simply accumulating pensionable service as defined in section 2.17 of the Plan. It is only when a triggering event occurs that the right to COLA becomes vested**.

[85] **The phrase "… the benefits earned by any Member in respect of Pensionable Service…" as used in section 23.01 of the Plan means benefits acquired by the member at termination from the Plan by the accumulation of Pensionable Service**.

[86**] The fact that a calculation is made prior to a triggering event does not mean that COLA has vested.** Until a triggering event occurs any calculation made by the actuary with respect to COLA value is made for funding or commuted value transfer purposes only. As Mr. Ferguson was careful to point out, he did not rely on the vesting concept when making his calculations.

[87] **Considering the provisions of the Plan, the nature and purpose of the COLA benefit as set out above and the intent of the parties in enacting section 15.04(viii) of the Plan, it is my opinion that under the terms of the Plan, it is only when a triggering event occurs that the right to COLA matures and becomes vested**. Until then, the member is simply accumulating Pensionable Service.

[88] My answer to question 1(a), then, is "no". It is also my opinion that the Committee

may make the proposed amendments with respect to the COLA provisions which do not apply to retirees.

[emphasis added]

97. Regarding the retirees, Justice Grant finds:

> [89] The second question which the Committee has asked the Court to answer is:
>
> > When retiring, does the member vest annually in each COLA adjustment, or does the member vest once in a series of COLA adjustments which are annually calculated?
>
> [90] **The terms of the Plan are also paramount in determining this issue.** Moreover, in answering this question it is also important to keep in mind the nature and purposes of the COLA benefit, particularly that its purpose is to protect retired members from inflation because, *inter alia*, they can no longer bargain an increase in their wages and benefits. As Mr. Kaplan stated in his submission, pension plans form part of the contract of employment. **During their working lives the retirees have fulfilled their contractual obligations and earned the benefits in the Plan which, when they retire, have vested.** Those vested benefits include, in this case, COLA: see *Dayco (Can) Ltd. V C.A.W*. 1993 CanLII 144 (SCC), [1993] 2 S.C.R. 230 at para. 49. Moreover, once these rights have vested, as a matter of contract they cannot be divested: see *Dayco, supra*., at para. 89.
>
> [91] Furthermore, once a member has retired from the Plan and COLA has vested, **the retiree can no longer earn this benefit so COLA has become a fully earned benefit which the retiree has accumulated in respect of Pensionable Service. Consequently, at this point, Section 23.01 would, in my opinion, render Section 15.04(viii) inoperative and prohibit the Committee from reducing or removing future COLA adjustments for retirees. In other words once the triggering event occurs and COLA has vested it's untouchable by virtue of both the Plan and the common law.**
>
> [92] The only point that gives me any pause on this issue arises from the fact that under section 7.03 of the Plan which, *inter alia,* **sets out the formula for calculating COLA, there is uncertainty as to whether or not it will be payable each year because there is no certainty that the Pension Index will rise. It could thus be argued that vesting in COLA only occurs annually. The answer to that argument is found in the words of the Manitoba Court of Appeal in *Dinney, supra.,* at paragraph 71 which I adopt:**
>
> > **… The quantum of the annual increment need not be a fixed amount so long as it is calculable in accordance with the provisions of the plan itself. For example, a provision in a pension plan tying annual increments to the CPI would meet that requirement**. …
>
> [93] In this case, under section 7.03 of the Plan the COLA adjustments are tied to the Pension Index and are therefore calculable in accordance with the provisions of the Plan.

> [94] **Furthermore, I accept Mr. Kaplan's submission that in this Plan the introductory portion of section 7 confers the substantive right to COLA on the member when it says her pension "shall be adjusted" each year and the fact that the method of calculation could result in a zero adjustment in a particular year doesn't derogate from the substantive right already conferred**.
>
> [95] Finally, on this issue **I accept Mr. Kaplan's submission that the Plan should not be interpreted to allow the Committee to remove the retirees' right to COLA *in futuro* on the basis of elementary property law principles. As he stated:**
>
> > **It's no different than a person who owns his or her house and spends his or her lifetime paying off the mortgage, so to speak – it's kind of like the reverse of the pension – and, hopefully by the time she retires, she'll have paid off her mortgage and owns her house outright; no one can come and take away that house without expropriation.**
>
> [96] Based on the foregoing, then, it is my opinion that under the Plan when a member retires she/he vests once in a series of COLA adjustments which are calculated annually. I therefore direct the Committee to refrain from making the proposed amendments to the COLA provisions for the retirees.
> [emphasis added]

98. In his holding with respect to actives, Justice Grant finds that on the wording and surrounding circumstances of the plan, indexation was not protected until a triggering event occurs for indexation (death, leaving employment or retirement). In arriving at this conclusion, he appears to conclude that the parties intended the amendment clause to protect vested rights, despite pointing out earlier in his judgment that 'vested' can have a different meaning from 'earned', where earned rights or benefits may not vest or be enforceable until a future point in time (see paragraphs 72 and 73 of his decision). Regarding retirees, not surprisingly Justice Grant finds that the retirees' right to indexation is protected, citing the holdings in *Dinney* and other cases.

99. Some might read paragraph 84 of Justice Grant's decision to say that in order for rights to vest, they must have met all of the triggers to make them immediately enforceable by the plan member, in the sense that a cause of action could be maintained at that time by the member to enforce payment of the benefit. If that statement of the law is correct, then it is my view that 'accrued benefits' must be given a different meaning. Otherwise it would be inconsistent with the other decisions discussed, including *Alcan*. After all, the plan members in *Alcan* did not have an immediately enforceable right to have the plan pay them the value of their earned retirement benefit based on their current years of service and earnings up until the date of amendment. They did, however, have a certain (non-

contingent) right to ultimately receive that value when a trigger for payment set out in the plan occurred.

100. Looking at the decision as a whole, I do not think it was Justice Grant's ultimate conclusion that rights or benefits can only ever vest when the recipient has a right to immediately enforce payment of that right or benefit. I read his decision to say that the proper interpretation of the plan led to the conclusion that active employees did not have a certain (non-contingent) right to indexation until retirement. This is evidenced by his conclusion with respect to retirees. Even though the plan provided indexation was to occur annually, he held that retirees had an inalterable right to get the future annual payments at the formula fixed at the time of retirement, notwithstanding that the retirees did not have an immediately enforceable right to be paid all future annual indexation payments up front upon retirement. Justice Grant was led to this conclusion based on the wording of the plan and the nature of the specific right in question, as was Justice Scott in *Dinney*.

101. The last case that requires noting with respect to the determination of 'accrued' benefits is *The Royal Ontario Museum Curatorial Association v. Ontario (Superintendent Financial Services)*, 2013 ONFST 9 ["*ROM*"]. The Financial Services Tribunal of Ontario considered in *ROM* whether an amendment to change the final average earnings ("FAE") formula violated the amendment clause of the plan in question and s.14(1)(a) of the *Pension Benefits Act* (Ontario) ("PBAO").

102. The relevant portions of clause XIII(1) of the plan dealing with amendments to the plan provided:

> Although the Plan is intended to be permanent and to continue indefinitely, the Employer may, at any time, amend the Plan by resolution of the Board. No such amendment shall:
> ...
>
> (b) reduce accrued benefits except upon termination of the Plan when, due to insufficient funds, a reduction in benefits is authorized by a federal or provincial jurisdiction administering a Pension Benefits Act or by the Canada Revenue Agency;
>
> [underline added]

103. Subsection 14(1) of the PBAO provided:

> 14(1) An amendment to a pension plan is void if the amendment purports to reduce,

> (a) **the amount or the commuted value of a pension benefit accrued** under the pension plan with respect to employment b**efore the effective date of the amendment**;
>
> (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or
>
> (c) the amount or the commuted value of an ancillary benefit for which a member, former member or retired member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

[emphasis added]

104. Prior to the impugned amendment, the FAE formula in the plan took into account the employee's best 3 consecutive years prior to retirement ("FAE3") in order to calculate the retirement benefit for the employee. The amendment to the plan would have utilized a best 5 consecutive years prior to retirement ("FAE5") formula in determining the retirement benefit, including for past service. However, to avoid the amendment being viewed as a reduction of accrued benefits, the amendment further provided that the retirement benefits ultimately provided to an employee would be based on the greater of (i) a FAE3 formula applied to years of service up to the effective date of the amendment, and (ii) a FAE5 formula applied to all years up until the date of retirement.

105. An employee union challenged the amendment before the Ontario Deputy Superintendent of Pensions, claiming that the amendment resulted in a reduction of accrued benefits because the new, less generous FAE5 formula applied to past service. They argued that to avoid reducing accrued benefits, the less generous FAE5 formula could only apply to years of service after the amendment was effective, but the FAE3 formula was a protected right for the years of past service.

106. The decision of the Deputy Superintendent rejecting the union's request for an order that the amendment violated s.14(1)(a) of the PBAO was described by the Tribunal as follows:

> [29] On August 8, 2012, the Deputy Superintendent issued a NOID in which he indicated his intention to refuse to make the order requested by the Applicant. In para. 12 of the NOID, he gave the following reasons:
>
> > The Amendment preserves the highest average salary accrued under the terms of the Plan prior to the effective date of the Amendment. The change in the way pension benefits are calculated applies only to earnings after the effective date of the Amendment. Future earnings are contingent events that do not form part

of the amount of the commuted value of a pension benefit that has accrued as at the effective date of an amendment.

107. The Tribunal described the position of the applicant union as follows:

> [47] The Applicant alleges that the Challenged Amendment violates both s.14(1)(a) of the *PBA* and Section XIII(1)(b) of the Plan, in that it reduces benefits accrued to Plan members.
>
> [48] In its written submissions, the Applicant framed its core argument as follows:
>
> > The answers to questions i. and ii. [see para.41 above] hinge on the Tribunal's determination of the meaning of "accrued benefits" for purposes of the PBA and the Plan. ROMCA asserts that, in a Plan that incorporates an earnings definition that requires the determination of earnings for purposes of calculating the retirement benefits to be calculated "prior to retirement", the accrued benefit earned as of December 31, 2009 must include a right to have the pension determined based on future earnings in respect of the pre-2010 service. ROM is free to amend the Plan to modify the earnings definition for future service, but, under both section 14 of the PBA and section XIII(1) of the Plan, freezing earnings in respect of already accrued service is prohibited. To state this another way, if there is no qualification in the Plan that would allow an amendment to crystallize the earnings base, the projected earnings requirement is considered a vested and accrued benefit for service up to the effective date of an amendment (ROMCA Written Submissions, para. 9).
>
> [49] The essence of the argument is that pension benefits are earned by service and take their value from the benefit formula in place at the time the service was performed. It follows, the Applicant argued, that the right to have that formula applied to that service at the time of retirement is a benefit which has accrued to Plan members as of the effective date of the Challenged Amendment; "an amendment that has the effect of reducing the earnings base can only apply to the calculation of pension benefits in respect of future service" (ROMCA Written Submissions, para. 29).
>
> [50] The Applicant's argument is a narrow and sophisticated one. It is *not* claiming that the ROM has no power to amend the Plan; it acknowledges that the ROM can amend the Plan with respect to future service and that the Challenged Amendment is valid insofar as it substitutes the New Formula for the Old Formula for future service. Nor does it claim that Ontario law would never permit amendments that would freeze the earnings base in a defined benefit formula as of a date prior to retirement; it argues that the validity of such an amendment would depend on the terms of the specific plan. Under the ROM Plan, however, it argues that such an amendment is not permitted because the Old Formula unequivocally guarantees that members' pensions will be calculated based on their best three years of earnings *prior to their retirement*. Under such language, the Applicant argues, "the projected earnings requirement is considered a vested and accrued benefit for service up to the effective date of an amendment" (ROMCA Written Submissions, para. 9).

[51] In addition, the Applicant does not claim that the Challenged Amendment reduces the commuted value of the pension benefit accrued under s.14(1)(a). It acknowledges that the concept of commuted value implies a point-in-time calculation, based on service and earnings as of that moment. However, it rejects the idea that the concept of an accrued benefit likewise implies any such point-in-time calculation. "The calculation of an accrued benefit", the Applicant argues, is a "simple mathematical calculation" (ROMCA Written Submissions, para. 10) which does not require actuarial analysis; it simply requires taking account of the benefit formula in place at the time service was accumulated, and applying that formula at the time of retirement to the service Plan members acquired prior to the effective date of the amendment.

[52] As previously noted, the Applicant grounds its argument on both the statute and the terms of the Plan. With respect to the interpretation of the Plan, it invokes the *contra proferentum* rule, which contemplates that where documents are ambiguous, they should be construed against the interest of the party who drafted or tendered them (ROMCA Written Submissions, para. 46). The Applicant does not assert that the Plan is ambiguous; indeed, it asserts that its "plain and ordinary meaning ... leaves no room for ambiguity" (para. 39). To the extent that the Tribunal may find it ambiguous, however, the Applicant pointed out that the Plan members had no role in plan drafting, and therefore the Plan should be construed against the ROM's interest.

108. The company's position is set out by the Tribunal in its decision as follows:

[55] The Responding Parties take the position that the Challenged Amendment does not reduce accrued benefits within the meaning either of the *PBA* or the Plan.

[56] Like the Applicant and its supporters, the ROM's argument focuses primarily on the meaning of the term "accrued", and the nature of the accrued benefits. The ROM argues that the only amount of pension which has accrued to a member as of the effective date of the Challenged Amendment is the amount to which that member would be entitled if she retired or otherwise left the Plan as of that date. It argues that accrued benefits are determined as of the effective date of the amendment, based on information current as of that date: i.e. service accumulated and earnings as of that date (ROM Written Submissions, para. 23). Since the Challenged Amendment ensures that the pension earned by a member for service prior to January 1, 2010 will never fall below the amount calculated on that basis, the ROM argues that the amendment does not violate either the statute or the Plan.

[57] The ROM acknowledges that pension benefits are earned benefits. It argues, however, that the only pension benefit which has been earned by service accumulated prior to the effective date of the amendment is the amount of pension that would be payable if the employee left the Plan as of that date. While an employee's past service might generate a larger pension amount after that date if the Plan were not amended, any such larger amount is purely hypothetical. It is not a benefit that has "accrued" as of that date; it is merely a projection of what benefits might accrue in future, based on contingent events, such as future salary increases, that have not yet occurred and may never occur.

> [58] In support of its interpretation of "accrued benefits", the ROM relies heavily on the argument that its approach is supported by expert actuarial opinion. It pointed to consensus among all three actuaries who testified that according to standard actuarial practice, a member's "accrued benefit" is calculated as of a specific date, based on information current as of that date. It argues that the implications of interpreting the term "accrued" in a manner that deviates from this standard practice would be very broad and very drastic, requiring actuaries to recalculate plan values in a wide variety of contexts.
>
> [59] In response to OPSEU's submissions that the ROM's approach violates the "pension promise" reflected in the terms of the Plan at the time service was accumulated, it argues that the "pension promise" is contained in the *whole* Plan, not simply in the benefit formula. The whole Plan, the ROM argues, includes Section XIII(1) which contemplates modifications to the Plan, always provided that those modifications do not "reduce accrued benefits". To argue that the formula cannot be changed simply because it was in place at the time service was accumulated is to ignore the fact that the Plan gives the employer an explicit right to amend, limited only by its obligation to respect "accrued benefits".

109. As the ROM decision is the latest in the line of cases dealing with this subject matter and the parties to the proceeding and Tribunal had the benefit of the decisions I reference above, I find the Tribunal's reasons particularly insightful. For this reason, I will include significant portions of the decision in ROM verbatim as it is difficult to capture the breadth and nuances of the discussion succinctly.

110. Beginning at paragraph 62 of the decision, the Tribunal assesses the position of the applicant union as follows:

> [62] The evidence before us establishes that the Challenged Amendment is likely to reduce the amount of the pension received on retirement by Plan members who remain in the employ of the ROM after the effective date of the amendment. This probable effect is not contested by the Responding Parties; indeed, the amendment was designed for that purpose. A significant part of that reduction will result from the impact of the amendment on the amount of pension generated by past service: i.e. by employment before the effective date of the amendment (see para. 22, above). The question before us is whether an amendment with this effect is void pursuant either to s.14(1)(a) of the PBA or Section XIII(1)(b) of the Plan: in other words, whether such an amendment "purports to reduce the amount...of the pension benefit accrued", or "reduce[s] accrued benefits" within the meaning of those provisions.
>
> …
>
> [64] The dispute centres on the meaning of the terms "accrued" and "accrued benefit". The applicant argues that in a defined benefit plan of this type, in which the retirement pension is generated by a formula in which service is multiplied by an earnings-based formula, the benefit which has accrued to a plan member as of the effective date

of the Challenged Amendment includes not simply the amount of pension that would be generated by that formula on any given date, but also the formula itself, as applied to that accumulated service. **Under the terms of the Plan, it argues, employees who have accumulated service prior to the amendment have been given an irrevocable promise that they will receive a pension on retirement in which that service is multiplied by the earnings formula in effect at the time the service was accumulated. This promise, the Applicant asserts, is itself an "accrued benefit" under the Plan**.

[65] The Applicant bases this argument primarily on what it sees as the logic of earned pension benefits. It argues that retirement pensions are entitlements earned through service. Since the entitlement flows from the service, it takes its value and should be calculated in accordance with the formula in effect at the time that service was rendered. By prohibiting plan amendments which reduce the pension amount "with respect to" past service, it argues, s.14(1)(a) prohibits amendments which substitute a less valuable earnings formula for a more valuable earnings formula with respect to that service.

[66] The Applicant argues that for active employees who are not retiring or otherwise leaving the Plan, calculating pension amounts as of the effective date of the amendment is an artificial exercise which deprives them of a significant part of the value of the pensions they have been promised under the terms of the Plan if they remain in the ROM's employ until they retire. For active employees, it argues, the only realistic focus is on the pension amount accumulated service will yield at the time of retirement. It concedes that this amount can only be estimated as of the effective date of the amendment, since for each individual employee, it depends on whether and how rapidly her salary increases prior to retirement (which in turn may depend on how long she remains in the ROM's employ). Such estimates are well within the capacity of actuaries, however; the lack of absolute certainty as to the ultimate pension amount a Plan member will receive based on prior accumulated service is not an obstacle to a determination that the right to pension calculated on that basis is an accrued benefit protected by s.14(1)(a).

[67] **This argument depends for its normative resonance on the assertion that the benefit claimed – a pension at retirement based on the Old Formula – has already been "earned" as of the effective date of the amendment. To that extent, it begs the question before us: what is the benefit to which the employees' service has entitled them up to the effective date of the amendment? That question can only be answered by construing the language of s.14(1)(a) and the terms of the Plan, and in particular by determining the meaning to be ascribed to the terms "accrued" and "accrued benefit"**.

[68] What the Applicant is arguing is that what has accrued to Plan members as of the effective date is not a specific pension amount, but a set of rights, including a right to have the portion of the pension amount generated by past service calculated on the basis of the Old Formula when the individual Plan member retires. To use its own words, it argues that "the accrued benefit earned as of December 31, 2009 must include a right to have the pension determined based on future earnings in respect of the pre-2010 service" (ROMCA Written Submissions, para. 9). This formulation of the argument acknowledges, in the broad sense, that we must determine what benefits have accrued as of the effective

date of the amendment. But it resists the argument of the Responding Parties that there should be a calculation of the *amount* of that benefit as of the effective date of the Challenged Amendment; on its argument, any such calculation must await individual decisions to retire.

[69] **This approach does not sit easily within the wording of s.14(1)(a). The subsection is not framed in the language of vested or accrued *rights* (the Applicant and its supporters use the terms "vested" and "accrued" interchangeably). It is explicitly framed in the language of accrued "amounts". In our view, this language cannot be intelligibly applied to any specific plan amendment without making a determination of the "amount of the pension benefit" that has "accrued with respect to employment before the effective date of the amendment**", followed by a determination as to whether or not the amendment will have the effect of reducing that amount. **There must be more than a global assessment of rights as of the effective date; there must be a calculation made of "amounts". Our task in this case is to determine what "amount" has accrued to plan members, and whether the Challenged Amendment reduces that amount**.

[emphasis added]

111. The Tribunal then went on to consider when should the pension amounts referred to in s.14(1)(a) be calculated and ultimately concludes they must be calculated as of the date of the challenged amendment. The Tribunal noted there was strong consensus in the actuarial evidence provided that the calculation of accrued amounts would only include current earnings and service data as of the date of the challenged amendment and would not include projected earnings. On this aspect, the Tribunal noted:

[84] We accept, of course, that the question of what the relevant terms mean in the context of the statute is a legal question, and it would be open to us to conclude that actuaries have been operating on an incorrect understanding of the meaning of "accrued benefits", or that the legislature intended to use the term "accrued" in s.14(1)(a) in a different sense than it is normally employed by pension actuaries. However, we would not be quick to dismiss an actuarial consensus with respect to the meaning of an essentially technical term which the legislature has chosen not to define. **In our view, it is more probable than not that in using a term like "accrued" and a concept like "accrued benefits" in a pension statute, the legislature intended to adopt the meaning commonly given to the term by pension professionals such as actuaries**.

[emphasis added]

112. The Tribunal then considered the authorities cited by the parties, including *Alcan* and *Dinney*. The Tribunal summed up its view of the authorities beginning at paragraph 94:

[94] **On this broader question, the Applicant finds little authority in the caselaw to support its position, with the exception of the *Halliburton* decision**, discussed below.

….

[96] In general, the Applicant's response to the authorities of the Responding Parties was to argue in effect, that the *Indalex* decision was a "game changer" which effectively over-ruled decisions like *CASAW*. We are far from persuaded that this is the case, since the matters directly at issue in *Indalex* were quite remote from those at issue in this case.
[97] The only case that appears to provide direct support for the Applicant's position here is the decision of the Alberta Court of Appeal in *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254 (CanLII)...

[emphasis added]

113. The Tribunal considers *Halliburton* at length and distinguishes it from the case before them, noting the significant differences in the wording of the respective statutory provisions prohibiting benefit reductions. At paragraph 107, the Tribunal states:

[107] **Two differences between s.81 of the *EPPA* and** s.14(1)**(a) of the** PBA **stand out as critical. First, the *EPPA* protects "a person's benefits in respect of employment" prior to the amendment, while the** PBA **protects "the amount of pension accrued in respect of employment prior to the effective date of the amendment". As the Responding Parties have pointed out, s.81 of the *EPPA* does not refer to the "amount" of the benefit, nor does it contain the crucial word "accrued". Second, the *EPPA* specifically addresses the issue of projected earnings and provides that those earnings fall outside the scope of s.81(1)(a) of the *EPPA*; the** PBA **makes no reference to projected earnings.**

[108] **It appears to us that the *Halliburton* decision may ultimately turn on those differences,** although we confess that we have not found all of the court's reasoning on the core issues easy to follow…
…
[110] Equally pertinent to our situation is the question of how the Alberta court characterized the nature of benefit claimed: i.e. a benefit based on projected earnings. As noted above, the Alberta statute does not use the term "accrued". The court nevertheless discussed the issue partly in terms of accrual. The court stated: "The Appellant argues that the provision should be read to permit reduction of benefits that would otherwise have accrued after the amendment. I disagree. At best the enactment is silent" (para. 35).

[111] This passage is consistent with the interpretation that the benefits at issue are benefits that accrue *after* the effective date of the impugned amendment. It certainly implies that in the court's view, the validity of the amendment does not turn on whether the benefits at issue accrue *before* or *after* the effective date of the impugned amendment. **In Ontario, this question is clearly crucial, since s.14(1)(a) unequivocally applies *only* to protect benefits which accrue *prior* to the effective date of the amendment.**

[112] **The *Halliburton* decision therefore does not assist us in interpreting the statutory language before us; we accept the argument of the Responding Parties that the clear distinctions between the Alberta and Ontario statutes give Halliburton limited value as a precedent for applying in** s.14(1)**(a) of the** PBA.

[emphasis added]

114. The Tribunal states its final conclusion on the application of s.14(1)(a) as follows:

[117] We are not persuaded that the *Halliburton* approach is applicable in Ontario. We must address the problem before us on the basis of the Ontario statute and the language of the ROM Plan. **In the context of Ontario law, we hold that the Challenged Amendment does not reduce "the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment" within the meaning of s.14(1)(a), or any "accrued benefit" within the meaning of Section XIII(1) of the Plan.**

[118] As we have already indicated, we take the view that s.14(1)(a) does not focus on abstract questions of "rights"; instead, it requires the concrete calculation of "the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment". We have determined that the accrued pension amount contemplated by s.14(1)(a) must be calculated as of the effective date of the Challenged Amendment. **We are also persuaded that in a defined benefit plan with a "service x earnings" formula, an accrued pension amount calculated as of that date would be based on earning data current as of that date, unless the plan otherwise provides; such a calculation would not include an estimate of projected future earnings. The Challenged Amendment protects that amount. Accordingly, there is no violation of s.14(1)(a)**.

[119] We have not reached this view of the meaning of s.14(1)(a) simply because it is the view taken by actuaries, although we do, of course, take some comfort in that fact that our view is consistent with actuarial practice. **We have reached this view because we are persuaded that it reflects the compromise intended by the legislature. In a plan structured like the one before us, it is only the amount generated on the basis of current data to which a Plan member could legitimately claim entitlement as of the effective date of the amendment. Further entitlements may indeed accrue after that date, based both on further service and on the impact of higher earnings both on past and future service. Those impacts can be estimated as of the effective date of the amendment. But estimates are not entitlement; they are merely estimates, which may or may not accrue to the member, depending on events which remain contingent until they have actually occurred.**

[120**] We take the same view of the meaning of the term "accrued benefits" under Section XIII(1)(b) of the ROM Plan.** We note that while the Applicant and its supporters asserted a violation of both the statute and the Plan, the original application, the NOID and the Applicant's request for hearing addressed only s.14(1)(a), and no party before us seriously asserted that Section XIII(1) provided broader protection than s.14(1)(a). We

acknowledge that Section XIII(1)(b) refers to "accrued benefits" rather than to "amounts…..accrued." **However, in our view there is a functional equivalence between the statutory language ("the amount of the pension benefit accrued") and the Plan language ("accrued benefits"); the focus of both the statute and the Plan is on ensuring that amendments do not deprive the parties of the pensions they have earned and could claim if they retired as of the effective date of the amendment**.

[121] In reaching our conclusion on the meaning of Section XIII(1)(b) of the Plan, we have taken due note of the fact that Plan members had no role in the drafting of the Plan language. We do not, however, find the language ambiguous and no ambiguity was asserted. Accordingly, there is no basis for the application of the *contra proferentum* rule….

[emphasis added]

115. The Tribunal recognized that its decision in ROM drew a clear policy line in the sand. At the outset of the decision, the Tribunal summarized its conclusion and its perspective of the applicable policy landscape as follows:

[4] This case raises the important question of the nature and scope of the limitations placed by s.14(1)(a) of the PBA on amendments to defined benefit pension plans. Section 14(1)(a) prohibits plan amendments which reduce the amount of pension benefits which have already accrued to plan members on the basis of service accumulated as of the effective date of the amendment. The parties disagree on what those benefits are, and how (or when) they should be quantified. This case requires us to determine whether s.14(1)(a) protects the amount of pension that would be generated by accumulated service *at the time the plan is amended,* or whether it protects the amount that service would have been generated *at the time of retirement* if the plan has not been amended. As we shall see, those two amounts may be significantly different.

[5] For the reasons that follow, we have determined that s.14(1)(a) of the PBA protects only the amount of pension that past service would generate at the time the plan is amended. Since the Challenged Amendment does not reduce that amount, it does not violate the statute. We have also determined that the Plan itself permits amendments of this type. Accordingly, we dismiss the Application.

[6] We recognize that this conclusion may disappoint the expectations of employees who are members of defined benefit plans with benefit formulae based on best or final average earnings. Such employees may believe that if they remain in the employer's service until they reach retirement, they will be entitled to a pension based on the language of the pension plan in place when they were first hired. In fact, the protection offered by Ontario pension law does not fully protect such expectations. **For good or ill, the legislature has chosen to offer only limited protection against plan amendments, prohibiting only those which reduce accrued benefits, and not those which relate to benefits not yet accrued.** Many if not most employers in Ontario have drafted the plan language to take advantage of this statutory "permission" to "change the

pension deal". **We see s.14(1)(a) as a legislative compromise which holds employers to the pension liabilities they have already incurred, but permits them to contain the expansion of future pension liabilities. Our interpretation of s.14(1)(a) reflects that compromise.**

[emphasis added]

116. For our purposes, there are a few key things to note about the *ROM* decision. The Tribunal in *ROM* placed great emphasis throughout the decision on the fact that s.14(1)(a) of the PBAO protected the "amount" of the pension benefit accrued as critical to interpreting the scope of the benefit protection offered by that clause, hinting at times that it was sufficient to distinguish the decision in *ROM* from other cases dealing with these issues, such as *Alcan* and *Halliburton*. However, the Tribunal ultimately concludes that the same meaning must be given to the scope of protected benefits set out in the amendment clause of the plan which referred to accrued benefits and not the "amount" of accrued benefits. The Tribunal found the protections provided by s.14(1)(a) of the PBAO and the amendment clause of the plan were functionally equivalent and shared the same goal.

117. The other important take away from *ROM* is that, while the Tribunal didn't expressly reconcile its interpretation with previous decisions, it appears the Tribunal followed the broad approach set down in *Schmidt* and applied in subsequent cases. The arguments made by the applicant unions were complex and sophisticated, however, at the end of the day they could all be boiled down to the assertion that the provisions of the plan in question made, by its terms, an irrevocable promise that members were entitled to have their service accumulate retirement benefits based on the formula in place at the time the service is earned, and that involves including projected earnings. While the Tribunal's decision on this aspect is somewhat muted, it can be implied that the Tribunal disagreed where it says in paragraph 119 of its decision that the amount of a plan member's accrued benefits cannot include things that may happen in the future, but which remain contingent until they have actually occurred. In other words, the plan members' right to include future service and earnings in the formula was contingent and not guaranteed, based on the proper interpretation of the plan and the nature of the right in question. In my view, this is all the Tribunal had to decide. Based on *Schmidt* and *Alcan*, a contingent right to include certain future service and earnings in determining the calculation of the ultimate retirement benefit is not an accrued right.

118. The extensive discussion of the Tribunal regarding when the amount of an accrued benefit must be calculated and the evidence relating to standard actuarial practice regarding projected earnings were important inquiries and factors to take into account in determining the proper interpretation to give to the plan in terms of the nature of the

right given in respect of projected future earnings. Ultimately, only the wording of the plan, properly interpreted, could determine when the right accrued.

119. Before making a decision on the impact of s.19(3) of the PBA on Amendment P-22, I also must discuss the decision of the Ontario Financial Services Tribunal in *McGrath v. Ontario (Superintendent Financial Services)* 2010 ONFST 5 ["*McGrath*"]. In that case, it was proposed to amend the plan to change the method of calculating the indexation benefit, including for retirees. The issue was whether the amendment contravened s.14(1) of the PBAO. It should be noted that no issue was raised regarding the authority in the plan to amend the plan in this manner and the Tribunal did not turn its mind to that issue.

120. The facts were presented that the pre-amendment method of calculating the indexing was appropriate from an actuarial standpoint, but highly volatile. This method was referred to in the decision as the Old Method (the "OM"). The post amendment method of calculating the indexing was an averaging method based on the approach followed by the Canada Pension Plan (the "CPP" or the "NM"). The intention of the amendment to the method of calculating the indexing was to provide an actuarially equivalent indexation, but with less volatility.

121. The comparative evidence presented at the hearing demonstrated the two methods produced very similar results over time. In 6 of the 16 years compared, the OM produced a larger increase. In 8 of the 16 years, the CPP produced a larger increase. In the remaining 2 years, the result would have been the same. Overall, the CPP method would have produced slightly better results over the entire period considered.

122. The actuarial experts of the parties to the hearing agreed that over time, the two methods were actuarially equivalent. The applicant retiree opposed the amendment on the ground that it was intentionally being implemented at a time when the volatile OM would be expected to produce a larger increase.

123. Based on the evidence of the actuarial experts who testified, the Tribunal made the following findings with regard to the impact of the implementation of the NM:

> We have identified above a number of differences of opinion in the evidence of the expert witnesses. On a number of very key points, however, the expert witnesses were in substantial agreement. They both agreed that:
>
> - The OM and the NM are "actuarially equivalent". It is not possible to speculate on whether the OM or the NM will produce higher indexation rates in future years, but it is expected over time that the two methods will produce the same result.

- The change from the OM to the NM did not affect either the amount or the commuted value of pension benefits for active members because both methods would be treated by actuaries as formulae providing 100% indexation to the CPI.

- On October 3, 2007, the date of the SC's decision to change the method effective January 1, 2008, an actuary calculating the commuted value of an OMERS pension in pay would come up with the same value regardless of which method was employed because the formulae are actuarially equivalent and the future impact of the change in method would not be known.

- On January 1, 2008, the actual pension of an OMERS pensioner for 2008 would be lower under the NM than it would have been if the OM had still been in effect.

- On January 1, 2008, an actuary determining the commuted value of an OMERS pension in pay on that date would find that the commuted value was lower under the NM than it would have been under the OM because the impact of the change would now be known for that year.

124. In considering whether the amendment contravened s.14(1)(b) of the PBAO by reducing both the amount and commuted value of the applicant retiree's pension, the Tribunal noted that the parties agreed that the applicant retiree did have a vested right to a pension with 100% Consumer Price Index indexation, which both the OM and the NM met. However, the parties disagreed whether the applicant retiree had a vested right to indexation in accordance with the formula built into the plan when she retired.

125. The Tribunal noted the key issue to decide is:

> In our view, there is no doubt that Ms McGrath has a vested or "accrued" right to pension indexing based on the OM. **However, s. 14(1) of the *PBA* does not "carve in stone" all accrued benefits. What it does is protect those benefits from *reduction*.**
> Accordingly, the crucial question before us is whether the impugned amendment *reduces* the amount or commuted value of the Applicant's pension, within the meaning of s.14(1)(b).
>
> [emphasis added]

126. The Tribunal goes on to decide that it is the effect of the amendment on the pension (the accrued right) that should be the focus of the determination and not the purpose of the amendment, and then dismisses two of the applicant retiree's arguments based on disputes concerning the appropriate actuarial approach to determine the effect of the amendment on the pension. With one argument advanced by the applicant retiree remaining, the Tribunal notes:

> The Applicant is asking us to decide the case based solely on a single narrow snapshot that is unlikely, based on all the evidence, to be representative. **In our view, s.14(1) does not dictate so arbitrary a result. We are persuaded that for amendments such as the one before us, the statute does not gauge whether or not the amount of a pension has been reduced based only on its immediate impact on the first periodic payment after it comes into effect (or indeed, only on its impact on periodic payments during the period between the date of implementation and the date of hearing). It instructs us to take a longer view.** From that perspective, what does the evidence show us? As we have already noted, we do not accept the expert evidence of Mr. Duxbury that the short-term impact of the NM will be "locked in" in perpetuity. **Indeed, it appears quite probable that the relatively minor deviations between the OM and the NM will be ironed out very soon. Likewise the evidence before us (both expert and non-expert) does not support the Applicant's argument that shifting from one method to the other leads to a benefit reduction over the longer term. The persuasive evidence on the long-term (i.e. "aggregate") impact of the amendment is the evidence of both actuaries, that the OM and the NM, are actuarially equivalent, and that "over time" they are expected to produce the same level of protection, 100% inflation protection as indexed to the CPI.** On the basis of the overall evidence, then, **the Applicant has failed to persuade us that the amendment has the effect of reducing the amount of her accrued pension within the meaning of s.14(1)(b)**.
>
> [emphasis added]

127. The *McGrath* decision is important to highlight that not every change to an accrued benefit contravenes s.19(3) of the PBA, only those amendments that reduce accrued benefits are offside the legislation.

128. After reviewing the pertinent case law, the remaining relevant interpretive guide to look at is the PBA itself. The word accrued is not defined in the PBA. Aside from s.19, the concept of accrued benefits is referenced in a few other provisions in the PBA. Some of those other references do not assist in identifying the specific meaning attributed to the phrase in the PBA. However, some do provide additional clarity. Subclause 54(1)(b)(ii) of the PBA provides:

> **Payments to and from employer on termination**
> **54**(1) Within 30 days after the termination of a plan, the employer:
> (a) shall pay into the plan all amounts whose payment is required by the terms of the plan or this Act; and
> (b) without limiting the generality of clause (a), shall make all payments that, by the terms of the plan or this Act:

(i) are due from the employer to the plan but have not been made at the date of the termination; or
(ii) **have accrued to that date but are not yet due**.

[emphasis added]

129. It is clear from the express wording of s.54(1)(b)(ii) that accrued is being used to mean payments that are legally required, but not necessarily presently due and payable. This definition shows accrued being used in the PBA in a manner consistent with the case law beginning with *Schmidt*. The payments identified in that subclause are amounts for which a certain (non-contingent) legal obligation to pay has arisen, but the timing for making those payments into the plan has not otherwise arrived. It also confirms that accrued was not used by the drafters of the PBA to mean 'immediately enforceable', as in the intended recipient can bring an immediate action to enforce payment. Otherwise, 'accrue' would not be followed by the wording "but are not yet due".

130. I would also note s.2(1)(j) and s.47(2) of the PBA where accrued is used in a context that necessarily implies the amounts referred to are not immediately enforceable. Those provisions provide:

Interpretation
2(1) In this Act:
….

(j) "defined contribution plan" means a plan that consists of defined contribution provisions and, except to the extent that it relates to benefits **accrued** with respect to employment before the effective date of the plan, does not contain any defined benefit provisions;

Value of pension to be divided
47(1)
…

(2) In the case of a defined benefit plan pursuant to which a member or former member has not become eligible to receive a pension without reduction, the value of the pension or other benefit is to be calculated as the commuted value of the pension that **accrued** during the period beginning on the date of the commencement of the spousal relationship and ending on the date mentioned in the order or agreement, calculated as if the member or former member had terminated membership on the date mentioned in the order or agreement mentioned in subsection 46(2).

[emphasis added]

131. In these provisions, 'accrued' cannot mean "immediately enforceable" as the recipient of the benefits cannot maintain an action to enforce immediate payment due to the fact that they are locked-in amounts pursuant to the PBA.

132. It is a principle of statutory interpretation that where an Act uses the same word or phrase in multiple provisions, there is a presumption that the word or phrase was intended to have the same meaning throughout. This presumption is rebuttable, however, I see nothing in the PBA that would indicate a different meaning was intended in s.19(3) sufficient to rebut the presumption.

133. I now must turn my mind to the issue of whether Amendment P-22 contravenes s.19(3) of the PBA. None of the above referenced court and tribunal decisions are technically binding on me due to the fact that it is a different statutory provision and pension plan that I am required to interpret than was before any of the other decision-makers mentioned.

134. What is clear to me from the authorities discussed above beginning with *Schmidt* is that in order to determine whether a benefit is accrued, the provisions of the plan are paramount. One must identify the nature of the promise regarding the benefit in the pension plan contract to determine not only when the benefit accrues, but also how it accrues. The point of accrual is the point at which the pension plan provides that the member's right to the benefit or portion thereof has become certain (non-contingent). The last step in the decision-making process for determining compliance with s.19(3) of the PBA is, if a benefit or portion thereof impacted by an amendment has accrued prior to the amendment, does the amendment have the effect of reducing the benefit or portion thereof that accrued prior to the amendment?

135. Upon reviewing the Plan and Amendment P-22, I am of the view that none of the individual amendments to the Plan that would be effected by Amendment P-22 would reduce benefits of plan members that accrued before the date the amendments are scheduled to become effective.

136. The partial termination effectively means the affected management members will no longer have a right to continue membership in the Plan, however, that right is not an accrued benefit. The potential for the Plan to terminate is contemplated both in the PBA and in the Plan (see s.14.02, s.14.03, etc.). It cannot be said that the pension contract made the affected management members an irrevocable promise that their membership in the Plan would never be terminated. The freezing of Continuous Service and Pensionable Service are related to this. If the Plan contemplates the affected

management members might have their membership terminated, then there is no irrevocable right to continue to earn service and it is not an accrued benefit to continue to earn service in the future.

137. The amendments to freeze Earnings and Highest Average Earnings after December 31, 2019 for affected management members are also not reductions of those members' accrued benefits. Those member rights, up until Amendment P-22 becomes effective, to have post-December 31, 2019 service and compensation included in calculating their retirement benefit was contingent on them continuing to be employed by CCRL. As there is no absolute guarantee that any particular management member will continue in employment with CCRL post December 31, 2019, the management members' right to have post-December 31, 2019 service and compensation included in determining the value of their retirement benefit is a potential right only. It is contingent on circumstances occurring that, while likely for most if not all of the affected management members, is not a certainty. Of course, immediately prior to Amendment P-22 becoming effective on December 31, 2019 all past earnings will be accrued benefits, or more accurately, the retirement benefit generated by the amount of service and those earnings, will be an accrued benefit. These accrued amounts, however, will not be affected by Amendment P-22.

138. The optional forms of receiving entitlements on the partial termination and the new default annuity entitlement option in respect of the partial termination are either the same as is currently contained in the Plan or are new additional options, none of which could be said to be a reduction of accrued benefits. I would also note that all of these options, other than the portability option for affected members over age 55, are already mandated under the PBA. The new entitlement options do refer to the new indexing provision, however, on the basis of the reasoning below, I do not view the change to the indexing provision for active management members in the new 6.06(3) to be a contravention of s.19(3).

139. The current indexing benefit contained in s.6.06(2) of the Plan provides that members who retire after February 1, 2007 will have their retirement benefits increased annually on January 1 by three-quarters of the percentage increase in the Consumer Price Index ("CPI") for Saskatchewan for the previous calendar year up to a maximum of 5% pro-rated for a partial year. It also expressly provides that the indexing will commence on the member's retirement date.

140. The entire current s.6.06 of the Plan reads as follows:

> 6.06 Increase in Pension Payment

(1) Retirement before February 1, 2007

All retirement benefits earned in respect of Pensionable Service after 1 January 1990 shall be increased annually on January 1 by one-half of the percentage increase in the Canada Consumer Price Index for the previous calendar year to a maximum of 5% per year, pro-rated for a partial year, commencing on the later of the Member's 60th birthday or the Member's retirement date, including the deferred retirement date of a Terminated Vested Member.

Notwithstanding the above, effective August 1, 2005, where the original annuity, as identified in Appendix A or in accordance with Section 6.09, has been purchased from an insurance company, such indexing shall be provided out of general corporate revenues.

(2) Retirement on or after February 1, 2007

All retirement benefits shall be increased annually on January 1 by three- quarters of the percentage increase in the Consumer Price Index for the province of Saskatchewan for the previous calendar year to a maximum of 5% per year, pro-rated for a partial year, commencing on the Member's retirement date, including the deferred retirement date of a Terminated Vested Member.

141. The new s.6.06(3) established by Amendment P-22 provides:

(3) Management Members affected by December 31, 2019 Plan termination

Despite subsection 6.06(2), for any Management Member who is affected by the Plan termination as at December 31, 2019, retirement benefits shall be increased annually on each January 1 after pension commencement by the lesser of i) three- quarters of the implied percentage increases in the Consumer Price Index that would be used to determine a Management Member's Commuted Value as at December 31, 2019, and ii) 5.0%. The annual increase so determined will be pro-rated for a partial year. For greater certainty, the implied percentage increases in the Consumer Price Index referred to in the previous sentence are the increases in the Consumer Price Index for the applicable years determined by the Actuary in accordance with paragraph 3540. IO of the Standards of Practice of the Canadian Institute of Actuaries when calculating the commuted values payable to the Management Members affected by the Plan termination as at December 31, 2019. The percentage increases for all applicable years determined in this manner will be identified and reported as such in the partial termination report prepared and submitted to the Superintendent of Pensions in accordance with section 56 of *The Pension Benefits Act.*

142. The new s.6.06(3) changes the indexation formula that will apply to management members affected by the partial Plan termination on December 31, 2019. In effect, for those management members who on partial Plan termination elect to take a pension in the form of an annuity, the annual adjustments to pension payments will no longer float in a formulaic relationship with the CPI as was provided in s.6.06(2), but instead will be adjusted by annual amounts fixed in advance at the time of the purchase of the annuity. Those pre-determined annual adjustments are intended to correlate to the predicted future CPI increases calculated by the actuary in accordance with CIAS 3540.10, which also establishes how actuaries are to calculate commuted values that include the value of indexation tied to the CPI. Presumably, this change to the indexation benefit was made by CCRL because it is less expensive to purchase an annuity with pre-determined annual adjustments than to purchase an annuity with floating annual adjustments that correlate to the CPI. The new s.6.06(3) goes on to provide that the percentage increases identified using this methodology will be identified in the partial termination report that is filed with my office for my approval in accordance with s.56 of the PBA. Under that provision, my approval of the termination report, including how indexed benefits were valued, is required prior to the distribution of assets of the Plan to implement the partial termination.

143. As s.6.06(2) currently reads, the final trigger that must occur before actual indexing starts, in the sense of a member having their periodic pension payments adjusted annually by the amount specified in that section, is the member commencing retirement. There is nothing currently in s.6.06(2) or elsewhere in the Plan that would override that result. Therefore, it is my view that the indexing benefit contemplated in the current s.6.06(2) of the Plan to have pension payments adjusted annually in accordance with the specific formula prescribed therein has not accrued until a member retires. However, I do not view the right to indexation to be an "on-off switch" at retirement. I read s.6.06(2) to provide members with a certain (non-contingent) right to have the retirement benefits generated by their service while the provision is in effect to be adjusted in accordance with the indexing formula set out in the provision, with the actual annual adjustments to their periodic pension payments to begin occurring on their retirement date. This is because they are promised indexing of their retirement benefits and the only qualification is it is "to commence" on their retirement date. There is no specific age or service criteria required to gain the benefit, or the meeting of any other eligibility criteria, other than the two-year service vesting requirement that applies to all benefits. I would note that CCRL has been in practice including the value of the indexing benefit in calculating the commuted values of terminated vested members, which is consistent with my interpretation of the provision.

144. My conclusion in this regard is also supported by the wording of s.6.06(1), where it provides: "All retirement benefits **earned in respect of Pensionable Service** after 1 January 1990 shall be increased annually…" This wording is even more express that members accrue the value of the indexing as they earn service. Although differences in wording often suggest different meanings, in this case I think the opposite conclusion is appropriate. The wording of s.6.06(2) is very similar and the words omitted in that subsection are readily implied, otherwise it would have been a reduction of an accrued benefit to amend the plan to include s.6.06(2) in the first place, in the sense that s.6.06(1) provides for the value of indexation to accrue before retirement and a narrow reading of s.6.06(2) would have taken away that pre-retirement accrual. I do not believe such outcome should be presumed to have been intended.

145. The new s.6.06(3) is modifying a current right of the affected management members. That current right is, for those members who ultimately receive their retirement benefits in the form of a pension, to receive annual floating indexation, tied to the CPI, of their periodic pension payments. The new modified right will provide those management members who choose to receive a pension upon the partial Plan termination with fixed annual adjustments determined in advance at the time of purchase of the annuity using actuarially predicted CPI results. The current right is not an accrued benefit. By definition, none of the affected management members will be retired on the date of the amendment, as the amendment only applies to active management members. As I have found, the right to receive actual adjustments of pension payments in accordance with the indexation formula prescribed in s.6.06(2) only becomes accrued on the retirement of the member. Therefore, the modification of the method of determining annual adjustments to affected management members' pension payments is not a reduction of an <u>accrued</u> benefit for the purposes of s.19(3).

146. While affected management members do not have an accrued right to have their pension payments annually adjusted in accordance with the formula in s.6.06(2), they are unconditionally entitled to have the value of the indexing benefit based on the formula set out in the current s.6.06(2) applied to their retirement benefits earned prior to the amendment included in their commuted values. In this sense, the right to have the value of the indexing benefit applied to pre-amendment earned service is an accrued benefit and cannot be reduced. Although not required for this decision, I would also note that I do not view the new s.6.06(3) to remove the current member right to have their retirement benefit adjusted annually in accordance with the indexation formula in force at the time the service is earned. This means affected management members who elect to receive their commuted values will also be entitled to have the value of the indexing benefit based on the formula set out in the new s.6.06(3) applied to their retirement benefits

earned after the amendment and prior to the termination included in their commuted values.

147. Having identified the full nature of the indexing right provided in the Plan, I am of the view that the amendment to add the new s.6.06(3) does not change or modify an accrued benefit in regards to indexing. If I am wrong in this conclusion, I would find that the change or modification to the current indexing benefit does not in any event reduce the accrued benefit. It is important to note that the formulaic relationship to the CPI does not change and is the same in both approaches, however, one is applied to upfront predictions of the CPI experience in future years and the other is applied to the actual CPI experience over time. Logically, the results will not be exactly the same in every year and may in fact vary frequently, however, it is impossible to say at this point which method will do better and which will do worse. Based on the principles set out in the *McGrath* decision, and the fact that the method of determining the indexation adjustments in the new s.6.06(3) is intended by the CIAS to be the actuarial equivalent of the indexing in s.6.06(2), the amendment to the current indexation benefit does not represent a reduction of the benefit.

148. While some pension plan members may feel the legislation should protect future earnings and other contingent benefits, the current line in the sand drawn by s.19(3) of the PBA broadly benefits all workers by promoting fiscal stability of employers and long term sustainability of pension plans. In this regard, I note the decision of the Supreme Court of Canada in *Monsanto Canada v Ontario (Superintendent of Financial Services)*, 2004 SCC 54, where the Court said the following about the objectives of the pension benefits legislation of Ontario:

> 14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. **On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system…**
>
> [Emphasis added]

149. It is my view the same objectives are embedded in the PBA. I find that Amendment P-22 does not contravene s.19(3) of the PBA.

2. **Did CCRL contravene s.11(1) of the PBA in making Amendment P-22, in light of s.14.02(1) of the Plan?**

Subsection 14.02(1) of the Plan provides:

> 14.02 Right to Amend. Modify or Terminate
> Notwithstanding Section 14.01 hereof, the Company retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:
>
> (1) **no amendment shall have the effect of reducing any** Member's or beneficiary's **then existing entitlements under the Plan**;

[emphasis added]

150. The key question I must answer with respect to this issue is what does "then existing entitlements under the Plan" mean? Does it mean the same thing as 'accrued benefits' as discussed above?

151. In *Schmidt*, Justice Cory had to consider the amendment clause of the plan in question before him. That provision protected "any participant's…. then existing interest in the pension fund". The wording of the provision in *Schmidt* is strikingly similar to the wording in s.14.02(1) of the Plan. The only difference between the operative components is the provision in *Schmidt* protected "interests" of plan members, whereas s.14.02(1) protects "entitlements" of Plan members.

152. If *Schmidt* dictated how all pension plan contracts with similarly worded amendment clauses were to be interpreted, then we would have our answer. However, *Schmidt* only determined how the wording of the specific amendment clause in that particular pension plan contract was to be interpreted. I must turn my mind to the specific interpretation to be given to s.14.02(1) of the Plan, taking into consideration the surrounding circumstances and the other provisions of the Plan.

153. Subsection 14.02(1) was included in the original Plan text in 1971 and has not been amended. Looking at the Plan as a whole, the word 'entitlement' is used extensively, as is the word 'benefit'. When 'entitlement' is used on its own, it appears it was intended to mean 'benefit'. For example, s. 1.15 provides:

> ***Locked-In*** means the entitlements that the Member has accrued cannot be withdrawn in cash. The funds must be used to provide retirement income. A Member's entitlements are considered to be Locked-In at the point where the Member satisfies the vesting requirements described below.
>
> A Member's benefit entitlement is considered to be vested at the earliest of…"
>
> [underline added]

154. In some provisions, the words are used together, where it speaks to 'entitlement to benefits' or 'benefit entitlements'. The second paragraph of s.1.15 set out above is one example. Another is the definition of "Commuted Value" in s.1.04:

> ***Commuted Value*** means, in relation to benefits that a person has a present or future entitlement to receive, a lump sum amount…."
>
> [underline added]

155. In those sections, entitlement appears to mean 'right', as in the right to receive the benefit.

156. I can see nothing in the wording of the other provisions of the Plan that suggests 'entitlements', when not combined with 'benefits', was meant to include anything other than benefits.

157. Looking at the common meaning of the words, the Merriam-Webster online dictionary defines "entitlement" as:

> **Definition of *entitlement***
>
> **1a:** the state or condition of being entitled **:** RIGHT
>
> **b:** a right to benefits specified especially by law or contract
>
> **2:** belief that one is deserving of or entitled to certain privileges

3: a government program providing benefits to members of a specified group *also* **:** funds supporting or distributed by such a program

["Entitlement." *The Merriam-Webster.com Dictionary*, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/entitlement.]

158. Black's Law Dictionary, online version, defines "entitlements" as:

What is ENTITLEMENT?

In general, that which is entitled. 1. Old age pension, social security, unemployment stipend stating a distribution or privilege or right to an economic benefit. Typically granted by contract or law. Meeting the required qualification triggers the entitlement. 2. Reference to a precedence or established procedure defends a right or claim. 3. Benefits to members of a particular group in a Government scheme. 4. Offer to the holder of a security, or physical transfer of cash or stock shares as a payment.

[By Black's Law Dictionary Free 2nd Ed. and The Law Dictionary]

Black's Law Dictionary (11th ed. 2019), provides:

ENTITLEMENT

Bryan A. Garner, Editor in Chief

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entitlement (19c) An absolute right to a (usu. monetary) benefit, such as social security, granted immediately upon meeting a legal requirement.

159. These definitions show "entitlements" and "benefits" often go hand in hand and "entitlements" is sometimes used to mean "benefits", particularly when used in the context of contracts and membership in a particular group, both of which are relevant here.

160. Having reviewed s.14.02(1) of the Plan, as well as the other provisions of the Plan, and having regard to the context and the common meaning of the words, I am of the view that "entitlements" in s.14.02(1) of the Plan was intended to refer to benefits.

161. The remaining question is what does "then existing" mean? "As indicated above, 'entitlements' is used extensively throughout the other provisions of the Plan. Sometimes there is other wording to qualify the reference to 'entitlements' to limit its scope. For

example, s.1.15 refers to "…the entitlements that a Member has accrued…". In s.1.04 it speaks of "...benefits that a person has a present or future entitlement to receive…" Sometimes there is no express qualifier and the reader must imply the meaning of 'entitlements' from the context. What resonates with me on reviewing the Plan is that in some instances the drafter(s) of the Plan very intentionally chose to qualify the scope of entitlements being dealt with. Those deliberate word choices should be given effect.

162. Subsection 14.02(1) of the Plan uses the phrase "then existing" in front of 'entitlements' as a qualifier. Clearly, it was intended to restrict or narrow the broader scope of 'entitlements' to a smaller subset with the distinguishing feature being the time of existence. In *Schmidt*, Justice Cory interpreted "then existing" to exclude contingent or only potential interests, the same meaning he gave to "accrued" earlier in his judgment.

163. Everything considered, I am of the view that "then existing" was referring to non-contingent entitlements. In other words, "then existing entitlements" was intended to mean "accrued benefits", in the same way as those words are used in s.19(3) of the PBA. When one considers the effect of interpreting "then existing entitlements" broader to include contingent or potential entitlements, the awkwardness becomes quickly apparent. The moment an employee joins the plan, he or she becomes <u>potentially</u> entitled to all entitlements (benefits) available under the Plan. If that was the meaning of "then existing entitlements" in s.14.02(1), then almost no amendment of the Plan would be possible unless it resulted in increased or additional benefits for members. If that was the intended interpretation of the parties, there would be little need for s.14.02(4) which prohibits CCRL from amending, modifying or terminating the Plan without the consent of the Union.

164. Having come to the conclusion that the test for complying with the restriction on amendments in s.14.02(1) of the Plan is the same as the test used in s.19(3) of the PBA, then the answer here must be the same as the answer I provided above in respect of s.19(3) of the PBA. Amendment P-22 does not contravene s.14.02(1) of the Plan.

165. Even though it was not raised in the Submissions, like the Tribunal in *ROM* I find that the *contra proferentem* rule is not engaged, because I do not find the wording of s.14.02(1) to be ambiguous.

3. **Did CCRL contravene s.11(1) of the PBA in making Amendment P-22, in light of s.14.02(4) of the Plan?**

166. Subsection 14.02(4) of the Plan provides:

> 14.02 Right to Amend. Modify or Terminate
> Notwithstanding Section 14.01 hereof, the Company retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:
>
> (1) …
> (2) …
> (3) …
> (4) the Plan may not be amended, modified or terminated without the mutual agreement between the Company and the Union.

167. Also relevant to decide this issue is s.14.02A of the Plan, which provides:

> 14 .02A Plan Changes that Solely Affect Management Members
>
> Any amendment, modification or termination of the Plan that solely affects Management Members is not subject to Subsection 14.02(4). Without limitation, any such amendment, modification or termination does not have to be consented to by the Union, nor be the subject of a mutual agreement between the Company and the Union.

168. In reaching my decision I turned my mind to whether any of the amendments, modifications or the partial termination made to the Plan by Amendment P-22 affect Union members of the Plan in any way. In this regard, I note that one Union member of the Plan made a submission suggesting CCRL breached s.14.02(4) by making Amendment P-22 without obtaining the Union's consent to Amendment P-22.

169. All of the amendments and modifications and the partial termination effected by Amendment P-22 are by express wording directed solely at management members. Amendment P-22 also establishes a new requirement on CCRL to provide any additional funding to the Plan necessary to ensure the solvency ratio for the remaining members of the Plan after Amendment P-22 takes effect is not adversely affected.

170. I considered the potential argument that could be made that the partial termination of the Plan that would be effected by Amendment P-22 limits current Union members' eligibility to be members of the Plan if they were to be subsequently offered and accept a management position with CCRL, and that this loss of a future potential "right" might be said to "affect" Union members. In my view, this loss of a future potential option could not be considered to be something that "affects" Union members for the purposes of

interpreting s.14.02 of the Plan. If the loss of a future potential option that a union member may have had available to them solely as a result of limiting management members' rights under the Plan is considered to "affect" Union members, then almost no changes whatsoever to the Plan could be made that do not somehow "affect" Union members. Section 14.02 would have no purpose and be for the most part functionally inoperable. The fact that the section was expressly added to the Plan as a result of collective bargaining by the parties means that CCRL and the Union intended it to be given some effect and it cannot be interpreted that broadly that it would be rendered essentially meaningless.

171. In light of the above, I am of the view that CCRL was not in contravention of s.14.02(4) of the Plan when it made Amendment P-22 without the agreement of the Union, as it was entitled to do so under s.14.02A. It should be noted that the Union, while provided notice of the filing of Amendment P-22 and the opportunity to make submissions to me on whether it should be registered, chose not to raise this issue.

The Submissions

172. As I indicated when setting out the issues, I have decided it best to deal with the Submissions separately from the issues addressed above as the Submissions contain arguments that apply to more than one issue and it would be unnecessarily duplicative and inefficient to deal with the arguments raised multiple times. To be clear, I considered all of the Submissions in reaching the conclusions set out above.

173. I will deal with the Submissions organized by topic.

Freezing of Earnings

174. Several active management members and one active Union member expressed concern that Amendment P-22 freezes the affected management member earnings as of the date of the partial termination and that the calculations of their commuted values do not take into account their projected earnings at the date of their retirement as promised under the plan.

175. Some of the submissions refer to s.19(3) of the PBA, which they interpret as prohibiting the freezing of earnings contemplated by Amendment P-22. I considered the application of s.19(3) of the PBA to the freezing of the affected management members' Earnings and

Highest Average Earnings in detail under the first issue above and concluded that the freezing does not contravene s.19(3).

176. Some of the Submissions refer to the OSFI Guideline and note that it states, in part, as follows:

> **4.2 Actuarial Basis**
>
> …The value of benefits tied to final average or best average earnings must be calculated with a projection of salaries,
>
> …The conversion basis should reflect the effect that inflation, merit and service would have had on accrued defined benefits.
>
> … The assumptions used to convert accrued benefits tied to salary projection are key to ensuring that removal of the plan's obligation with respect to accrued defined benefits is carried out in a manner **that is fair to members.** This is of particular importance when the sponsor has notified members that it does not intend to maintain a pension fund for defined benefits.

177. The difficulty with this argument is that OSFI's guideline speaks to conversions of pension plans, not amendments. When a plan is being converted from defined benefit to defined contribution, the valuation that is occurring is intended to accurately capture the commuted value of all benefits, not just accrued benefits. The first two points excerpted from OSFI's Guideline above that refer to projection of salaries are, in my view, speaking to all benefits, whereas the last paragraph excerpted is only speaking to accrued benefits. The question before us now is only whether accrued benefits are being reduced. The right to have projected earnings included in a commuted value is a benefit, it is just not an accrued benefit, as I have found in the discussion earlier in this decision. If CCRL was not amending the Plan to freeze earnings prior to the partial termination, the commuted values of the affected management members calculated on termination would have to include projected earnings. However, CCRL is, in making Amendment P-22, amending the Plan to freeze earnings of the active management members so that those projected earnings are not taken into account in calculating the commuted values on partial termination of the Plan. That may disappoint the affected management members, however, based on the wording of the PBA and the Plan, it is my view CCRL has the legal right to do so and I have no discretion to interfere with CCRL exercising this right.

178. The reference to ensuring accrued benefits are valued fairly in the last excerpt is referring to the actuarial assumptions used to determine the commuted value of the accrued benefits. As I indicated previously, the distribution of Plan assets implementing the partial

termination will need to be approved by me prior to the assets being distributed. That is where questions concerning the fairness of assumptions used in calculating the commuted value of accrued benefits will be addressed. I do not understand that paragraph to be saying the federal regulator has the discretion to determine what is an accrued benefit based solely on whether it is viewed to be fair to members. In any event, that is certainly not a discretion I have under the PBA.

179. Reference is also made in these Submissions to the FCAA Bulletin, on page 2 under "Plan Amendments" regarding the preservation of benefits that accrued prior to the plan amendment. This bulletin is dealing with the issue of conversion just like OSFI's Guideline discussed above. The discussion regarding the OSFI Guideline is equally applicable to the FCAA Bulletin. In our bulletin, when we refer to including projected earnings, that is for situations where earnings have not been frozen at the time of conversion, in which case projected earnings are benefits that must be included in the calculation of the commuted values. That is not the case here.

180. Finally, the Submissions on this topic refer to the CIAS and in particular, article 3330.17, which provides as follows:

> **.17** If future benefits depend on continued employment (e.g., the pension plan is terminating but employment is not), the actuary would consider reflecting contingencies such as future salary increases and termination of employment.

181. Like the OSFI Guideline and FCAA Bulletin discussed above, this clause of the CIAS is referring to scenarios where at the time of termination of membership in the plan, the member's right to have future earnings included in determining the value of their retirement benefit has not been frozen by amendment to the plan. For the reasons discussed above in regards to the OSFI Guideline and FCAA Bulletin, that scenario is not the case here.

182. In concluding on this topic, some of the Submissions take the position that CCRL has not complied with "the requirements" and they submit:

- the amendment should be denied and the employer should be "forced to comply with its employer-employee contract";

- if the termination is to proceed, the calculations of the commuted values need to be fair and recognize that "DB pensions due to the nature of 'best 3 of your last 5-years' service' are 'back-end heavy' and "payments should reflect the value that one would have expected at the end of their careers".

183. With regard to these arguments, I have found that CCRL, in making Amendment P-22, has complied with the applicable requirements. I have not been given discretion by the PBA to refuse to register an amendment on any grounds other than what is in s.19 of the PBA. I have found that nothing in that section would justify me in refusing to register Amendment P-22. I have also discussed in detail why the commuted values calculated in respect of the partial termination of the Plan only have to include the accrued portion of the retirement benefit and are not required to take into account projected earnings. The accrued portion of the retirement benefit only has to include earnings up to the date of termination for the purposes of the calculation of the commuted values.

Freezing of Service

184. In Submissions provided by a number of active management members, they take the position that their remaining years of service with the employer should be taken into account in determining their benefits. They object to being forced to take an early reduced pension as a result of the amendment to partially terminate the pension plan.

185. The Submitters are a mix of different cohorts, including some who have reached age 55 but do not meet the years of service requirement for an immediate unreduced pension, and some who have met the years of service requirement but do not currently meet the age eligibility criteria for an unreduced pension in s.6.02 of the Plan.

186. The members refer to s.6 of the OSFI Guideline as follows:

> **6. Ancillary Benefits**
>
> …the administrator must account for the requirements of section 17 of the PBSA, which provides that a member (whose benefit is vested) is entitled upon termination to a "deferred pension benefit, based on employment and salary up to the time of termination…**that, if the member had attained pensionable age, the member would have been eligible to receive**."
>
> …Additionally, where members whose benefits are converted are not yet entitled to an ancillary benefit, **conversion values should account for the possibility that, had the plan remained unchanged, they might have subsequently qualified.**

187. They also refer to CIAS article 3330.17, which has been set out above under the Freezing of Earnings topic. Finally, they reference the Plan regarding amendment or terminations of the plan and cite s. 14.02(1):

14.02 Right to Amend, Modify or Terminate

(1) no amendment shall have the effect of reducing any Members or beneficiary's then existing entitlements under the plan.

188. Based on this, they take the position that they should be "assumed" to grow into the minimum age requirement of the plan because they argue that they have not chosen to stop their participation in the plan and that the plan and its benefit are being removed from their future. They point out that they would have qualified because they "have not quit nor died", and there is no reason why they would not have reached their early retirement date as they have no intention of terminating their employment and all of their performance appraisals have been satisfactory. They also point out that they were not consulted, they did not approve the termination and there was no vote. They request that, if the partial termination is to proceed, their entire retirement benefit be held whole, inclusive of its present and future benefit. They argue that they have accrued this benefit under the plan and that it is their view that the entire commuted value of their retirement benefit should be reflected in their commuted value calculation or annuity value. They also question why "people at different stages of their careers didn't have personalized options to make the conversion to the new pension plan beneficial to them".

189. As I indicated in the reasons I provided when discussing the Submissions with respect to the freezing of earnings, the OSFI Guideline, FCAA Bulletin and CIAS provision referred to in these Submissions are not applicable as they are speaking to future benefits still contained in the plan at the time of termination. In this case, CCRL, as part of Amendment P-22, is amending the Plan in advance of the termination to freeze both earnings and service, so the Plan no longer contains a right for affected management members to a future benefit in terms of earnings and service.

190. Subsection 14.02(1) of the Plan which prohibits amendments that reduce then existing rights has been fully dealt with above in my reasons with respect to Issue 2 in this decision. I found that the rights to future earnings and service frozen by Amendment P-22 were not accrued or "then existing" entitlements, and CCRL was legally entitled to remove those future benefits prior to the partial termination. The specific reference to the fact that they have not 'quit nor died", they have no intention of terminating their employment and their performance appraisals have been satisfactory to show that it should be assumed they will qualify for an unreduced pension does not meet the test set down in the case law. Those facts suggest it is likely they will qualify for an unreduced pension in the future, but not that it is a certainty. As we saw in *Patrick*, all of the express criteria for a benefit must be attained before it can be said the members had become entitled to the benefit. In that case, similar to the facts presented by some of these Submitters, the group in question met the service criteria but not the age criteria needed to qualify for an unreduced pension.

The Court in that case held that the members had not become entitled to an unreduced pension benefit on those facts.

191. The points made that they were not asked and had no vote, and that personalized options should have been offered to make the change beneficial to individual terminated members reflect understandable frustrations. However, CCRL was not required by either the PBA or the Plan to take those routes. In the end, the fact that Amendment P-22 did not incorporate those approaches is an employer decision. It is not a factor I am authorized by the PBA to take into account and base my decision on.

Loss of Bridge Benefit from 55-65 years of age

192. Several active management members and an active Union member expressed concerns about the loss of the bridge benefits. Under the Plan, a member may retire at the age of 55 with 30 years of service without reduction. Some of the active management members will not meet the age or service requirements on the effective date of the partial termination of the Plan. However, if the partial termination did not occur, the members would be expected to qualify for, as they put it, the "unreduced early retirement benefit as they expect to continue to be employed by CCRL and have no intention to terminate their employment before meeting the age and service requirements for the unreduced early retirement benefit".

193. In support of their argument, they refer to:

- The FCAA Bulletin,
- sections 24(1), 25.1 and 55 of the PBA;
- The OSFI Guideline, and in particular s.4. "Conversion of defined benefits" and s.6 "Ancillary Benefits";
- CIAS article 3330.17;
- Sections 1.04, 5.02, 6.02 and 14.02 of the Plan;
- The reference to "Early Retirement from Active Service" on their 2018 Pension Statements; and
- An example from the Financial Services Commission of Ontario referencing bridging for partial wind up of defined benefit pensions.

194. This is the same issue discussed above with respect to the freezing of service, expressed another way. The FCAA Bulletin, OSFI Guideline, and the CIAS article have been fully dealt with under the topic of freezing of service.

195. Sections 24, 25.1 and 55 of the PBA provide:

> **Contents of plans – minimum requirements**
> **24**(1) Subject to subsection (2), a plan must provide for the benefits, contributions, entitlements and obligations provided for by this Part, or for benefits, contributions, entitlements and obligations that are more favourable for members and former members and their spouses, beneficiaries and estates, than those provided for by this Part.
> (2) A plan is not required to include or incorporate a provision of this Part if:
> (a) the inclusion of the provision in a plan is indicated as being optional; or
> (b) in the opinion of the superintendent, the provision is not and will not be applicable to the particular plan in question, and the superintendent permits its exclusion from that plan.
> (3) To the extent that the plan does not in any respect effect a provision required by this Part, the plan is deemed to include the required provision.
>
> **Contents of plans – optional ancillary benefit provisions**
> **25.1**(1) A defined benefit plan that includes an optional ancillary benefit provision must provide for the method of conversion of the optional ancillary contributions made by a member to optional ancillary benefits on the occurrence of the following events:
> (a) termination of membership in the plan;
> (b) pension commencement;
> (c) death of the member before retirement;
> (d) termination of the plan.
> (2) For the purposes of subsection (1), the method of conversion of optional ancillary contributions to optional ancillary benefits must be made on the basis of actuarial assumptions and methods that are appropriate and in accordance with accepted actuarial practice.
> (3) A defined benefit plan that includes an optional ancillary benefit provision must retain any amount by which the accumulated optional ancillary contributions of a member exceeds the amount that can be converted to optional ancillary benefits on the occurrence of any of the events set out in clauses (1)(a) to (d) and that, if paid out, would result in the revocation of the registration of the plan pursuant to the Income Tax Act (Canada).
>
> **Partial termination**
> **55** Where only part of a plan is terminated, the pensions and other benefits affected by the partial termination shall not be less than they would have been if the whole of the plan had been terminated on the date of the partial termination.

196. The cumulative effect of these provisions of the PBA does require that upon partial termination of a plan, the value of benefits in the plan, for example a bridging (early retirement) benefit, must be valued and provided to the entitled members. However, in this case, Amendment P-22 is amending the Plan effective prior to the partial termination

to freeze service, effectively removing the bridging (early retirement) benefit for affected management members who will not otherwise meet all of the criteria to qualify for the bridging benefit by the date of the partial termination. As I have found above, CCRL is entitled pursuant to the PBA and the Plan to take this approach.

197. Regarding the reference to "Early Retirement from Active Service" on their 2018 Pension Statements, this statement is a description by the plan administrator of a benefit of the Plan at the time the statements were provided to members and up until registration of Amendment P-22. However, as discussed above, CCRL has amended the Plan by making Amendment P-22. The result of the registration of Amendment P-22 is that active management members no longer have the right to earn service after the date of the partial termination, meaning that any member who does not otherwise meet the criteria for early retirement on the date of partial termination no longer has the right to earn the early retirement benefit in the future.

198. The example from the Financial Services Commission of Ontario referencing bridging for partial wind up of defined benefit pensions is, I understand, a correct portrayal of the law in Ontario. It is, however, not the law in Saskatchewan. Ontario's pension legislation has a specific "grow in" provision, s.74, that overrides plan provisions and establishes a right to bridging benefits for plan members in certain circumstances. The PBA has no such provision. I can only decide this registration question based on the PBA and the Plan, not the law in Ontario.

199. The members pointed out that "this Pension transfer does not treat all people the same". Understandably, this would be very frustrating for members who are missing out on benefits they had not yet qualified for and were looking forward to obtaining. However, CCRL and other employers, unless prohibited in their respective plans, are permitted to remove future benefits that have not accrued yet. Subsection 14.02(1) of the Plan also recognizes this. Inevitably, this will lead to differences in the benefits that are ultimately available to different groups of members. As this potential outcome is recognized in the PBA and in s.14 of the Plan, I have no authority to refuse to register the amendment based on this.

200. Some of the Submissions received on this topic raise a number of concerns with the retiring allowance that is being offered as a bridge to some of the members. The retiring allowance is a voluntary payment offered by CCRL and not included in the Plan. As it is not part of the pension, it is not governed by the PBA and not something that I am able to take into account in making my decision regarding registration of Amendment P-22.

Change to Indexing

201. Several active management members took the position that the change to the indexation provision takes away rights that the members have already accrued in accordance with the Plan. As set out in my reasons above with respect to issues 1 and 2, I do not view the new s.6.06(3) of the Plan added by Amendment P-22 to actually change or modify an accrued indexation benefit. I also found that in any event, even if I was wrong about that, it would not be a reduction from the indexation right in s.6.06(2).

202. With this in mind and as with the bridging benefit described above, any references to indexation as a future retirement benefit in their past pension statements may have been reflective of the Plan as it stood at that time, but CCRL was entitled to amend the Plan to remove that right in the future for active management members.

Plan Amendments Should be Negotiated

203. Several active management members made submissions that Amendment P-22 should have been negotiated with the Union. In addition to s.14.02(4) of the Plan, they refer to s.22(1) of *The Pension Benefit Regulations, 1993* ("PBR") which provides:

> **Amendments**
> **22**(1) Amendments to a plan that confer ownership of surplus assets to an employer pursuant to subsection 19(5) of the Act must comply with the prescribed condition in this section.
>
> (2) The amendment must be authorized by: (a) the employer; (b) any collective bargaining agent of the members of the plan; (c) at least two-thirds of the members who are not represented by a collective bargaining agent; and (d) the number of former members and other persons who are entitled to payments under the plan as of the effective date of the amendment that the superintendent considers appropriate in the circumstances.

204. I have fully dealt with the application of s.14.02(4) of the Plan to Amendment P-22 in Issue 3 above and will not recite my findings on that issue again for the sake of brevity.

205. Subsection 22(1) of the PBR is not applicable to Amendment P-22 or this decision as it deals expressly with amendments that confer ownership of surplus assets to the employer, which Amendment P-22 does not purport to do.

Union Consent Required to Amend

206. I have fully dealt with this topic in Issue 3 above and will not repeat my reasons here for the sake of brevity.

Effect on Solvency Position of the Plan

207. A Submission was made on this topic on behalf of a group of retirees under the Plan. The Submission did not expressly oppose the registration of Amendment P-22 or argue that CCRL was not legally entitled to make Amendment P-22. The Submission was made to my office to ask questions about the operation of the Plan and potential future changes. However, out of an abundance of caution, I will address the specific question in the Submission regarding solvency of the Plan. That question was:

> **Solvency Ratio of the Plan**
> *"Describe the methodology involved with regards to the solvency ratio of the plan, prior to the transfer out of the out-of-scope members and will this occur prior to any transfer out.*

208. As I indicated above in the description of Amendment P-22, s.11 of the amendment adds a new s.14.07 to the Plan that expressly provides that CCRL will contribute all additional funding to the Plan necessary to ensure the solvency ratio for the remaining members of the Plan is not adversely affected by the partial termination of the Plan. Accordingly, Amendment P-22 will not impact the solvency ratio of the Plan in any way that would justify my refusing to register Amendment P-22.

209. I will address the remaining aspects of the questions posed in this Submission in the ordinary course and will not address them any further in this decision, because they do not purport to advance a ground on which to refuse registration of Amendment P-22.

Timing of Request to Enroll in CSS Plan

210. Several active management members raised concerns that they have been requested to enroll in the CSS plan before they know if the termination will be approved by me. I appreciate affected management members would have preferred to know my decision before they were asked by CCRL to enroll in the new plan. At the end of the day, there was no risk of harm involved to the members who were asked to enroll as any enrollment decision they made would have been of no effect if I did not approve the registration of

Amendment P-22. In any event, this concern is not something I can take into account in making my decision whether to register Amendment P-22.

Union Representative Submissions

211. The VP of Administration for the Union provided a Submission that raised a number of questions, but only the following could be said to be relevant to this decision:

- Is the retirement allowance that managers are proposed to receive on termination required by law to represent the "bridging benefit" referenced in the Plan text?

- With regard to communication to the members of the Plan of the partial termination, retirees and out of scope management members were communicated to, however the communication was only sent to him instead of all Union members. He asked if it was the responsibility of the Plan administrator to communicate the amendment change to all the Union members and in turn give them an opportunity to present submissions?

212. The retirement allowance is a voluntary payment offered by CCRL and not included in the Plan. As such, it is not part of the pension and not governed by the PBA. Accordingly, it is not something I can take into account in making my decision whether to register Amendment P-22.

213. Regarding the communication of Amendment P-22 to Union members, the PBA does not set out express requirements concerning who should receive notice of amendments in order to have the opportunity to make submissions opposing registration of the amendments. Without any further information as to why it is felt this approach to notifying Union members of Amendment P-22 was not adequate, or information demonstrating that Union members were not actually made aware of Amendment P-22 and their opportunity to make submissions to me regarding its registration, I am not able to conclude that it was inappropriate. If the concern relates to a collective bargaining or labour standards issue, then that is not something that, without further information, I am able to take into consideration in making my decision whether to register Amendment P-22.

214. I will address the remaining aspects of the questions posed in this Submission in the ordinary course and will not address them in this decision, because they do not purport to advance a ground on which to refuse registration of Amendment P-22.

Additional Matters

215. In their Submissions, some of the active management members also raised that the changes to the Plan are unfair; the information provided to the members regarding the changes has been confusing and the commuted values that they received are more than 18 months old and they have not received updated numbers on the dollar amount or how their commuted values were calculated.

216. Regarding the fairness of Amendment P-22, as I indicated previously in this decision, I am not provided with discretion in the PBA to refuse to register an amendment to a plan based on whether it is unfair or viewed to be unfair. The decisions made in making Amendment P-22 were decisions of the employer and my role is limited to making sure those changes comply with both the PBA and the Plan. For the reasons provided above, I have found that they do comply.

217. The fact that some Plan members found the communication of the changes by CCRL to be confusing is unfortunate, but also understandable. Pension plans are very complex contracts that even courts struggle with interpreting on occasion. With that said, that fact by itself cannot affect my decision to register Amendment P-22. I would note that I was copied on the notice provided by CCRL to the affected management members and the Union describing the effects of Amendment P-22 and found the notice to be appropriate, everything considered.

218. Similarly, the fact that affected members have not received updated numbers or an explanation as to how their commuted values were calculated cannot, without anything more, affect my decision to register Amendment P-22. Final calculation of commuted values will occur after termination when the termination report is prepared by CCRL. That report must be approved by me before entitlements can be transferred out of the Plan. If a terminated member believes the calculation of their benefit amount contains errors, they can bring those errors to my attention.

Conclusion:

219. I have found that Amendment P-22 does not contravene the PBA nor the Plan, and that CCRL is entitled to have it registered. On these facts, I am obliged to register Amendment P-22.

220. This means that some future benefits have been removed for the affected management members, and this is understandably upsetting for some. However, as I concluded under Issues 1 and 2, this is the balance struck by the PBA as well as the Plan itself.

221. As indicated above, if a terminated member believes the calculation of their benefit amount contains errors, they can bring those errors to my attention in writing by sending correspondence or an email to:

Email:

To: pensions@gov.sk.ca
Subject Line: CCRL Amendment – Attention Mr. Roger Sobotkiewicz

Fax:

Fax: 306-798-4425
Subject Line: CCRL Amendment – Attention Mr. Roger Sobotkiewicz

Mail or Courier:

Attn: Mr. Roger Sobotkiewicz, Superintendent of Pensions
Pensions Division
Financial and Consumer Affairs Authority
601 – 1919 Saskatchewan Drive
Regina, SK S4P 4H2

Dated at Regina, Saskatchewan, this 19th day of December, 2019.

"ROGER SOBOTKIEWICZ"
Roger Sobotkiewicz
Superintendent of Pensions
Financial and Consumer Affairs Authority
of Saskatchewan