

**IN THE MATTER OF:** *The Pension Benefits Act, R.S.M 1987, c. P32*

**AND IN THE MATTER OF:** An Notice of Objection by the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan to the Pension Commission of Manitoba pursuant to subsection 35(1) of *The Pension Benefits Act, R.S.M 1987, c. P32.*

**BETWEEN:**

Trustees of the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan  
(Appellants)  
and

Robert Edward Archambault  
Jacqueline Beaulieu  
Richard Borolinski  
Jean Borthorel  
Raymond Calvo  
Estelle Carbone  
Elsie Deneweth  
Claude L. R. Durand  
Doreen Gagnon  
Paul Gagnon  
Georgette Geswein  
Luc Girouard  
Bernice M. R. Gobeil  
Nora Godin  
Jacques Guenette  
Lucienne Guenette  
Annette Hupe  
Arthur J. Jeanson  
Edmond Labelle  
George Landry  
Clifford Lane  
Etienne Legal  
Georges Lemorvan  
Sheek Yen Lim  
Henry Russell Lucy  
Maurice J. Manaigre  
Vladimira Mohoric  
Paulette Muirie

Joan Parsons  
Raymond Paulhus  
George Paulusma  
Pierrette Pelland  
Leona Poole  
Laurette Remillard  
Laurette Rouillard  
Patricia Szekely  
Jacob E. Thiele  
Cheryl Toews  
Antonio Trudeau  
Clairette Trudeau  
Edward A. J. Trudeau  
Louise Vallee  
Lina Vandale  
Suzanne Vercammen  
Jeannette Wanlin

(Respondents)

**BEFORE:** Ron Hesford, Chairperson, Pension Commission of Manitoba  
Linda Stewart, Vice Chairperson  
Marsden Fenwick, Member  
Michael Byrne, Member  
Leigh Cunningham, Member  
Michelle Redekopp, Member

**APPEARANCES:** Murray Gold, Counsel, Trustees of the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan, (Trustees being Frank Ryplanski, Bernard A. Christophe, Ron Wally, Ray Erb, Bob Romphf, Phyllis Reader, Robert Ziegler, Donald Smith, Jean Piche, Bob Darling, Ray Spokes)  
Anne Gregory, Counsel, Manitoba Government Employees Union ("MGEU") representing the following affected MGEU respondents (Claude L. R. Durand, Luc Girouard, Arthur J. Jeanson, George Landry, Raymond Paulhus, George Paulusma, Edward A. J. Trudeau)  
David Lewis, Counsel, United Food and Commercial Workers representing the following affected UFCW respondents (Robert Edward Archambault, Jacqueline Beaulieu, Richard Borolinski, Jean Borthorel, Raymond Calvo, Estelle Carbone, Elsie Deneweth, Doreen Gagnon, Paul Gagnon, Georgette Geswein, Bernice M. R. Gobeil, Nora Godin, Jacques Guenette, Lucienne Guenette, Annette Hupe, Edmond Labelle, Clifford Lane, Etienne Legal, Georges Lemorvan, Sheek Yen)

Lim, Henry Russell Lucy, Maurice J. Manaire, Vladimira Mohoric, Paulette Muir, Joan Parsons, Pierrette Pelland, Leona Poole, Laurette Remillard, Laurette Rouillard, Patricia Szekely, Jacob E. Thiele, Cheryl Toews, Antonio Trudeau, Clairette Trudeau, Louise Vallee, Lina Vandale, Suzanne Vercammen, Jeannette Wanlin

Ernest Wehrle, Counsel, St. Boniface Hospital

Ray Spokes, Benefits Manager, St. Boniface Hospital

Ron Wally, Manitoba Association of Health Care Professionals

Gwen Kosheluk, Turnbull and Turnbull

Frank Ryplanski, Trustee of the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan, Senior Treasury Officer, St. Boniface Hospital

Annette Huppe, Employee

Nora Goodwin, Employee

Lorette Remillard, Employee

Clifford Lane, Employee

Robert Ziegler, Chairperson of the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan, Member of the Pension Commission of Manitoba, Executive Assistant to the President of UFCW

Guy Gordon, Superintendent, Pension Commission of Manitoba

M. A. Webb, Counsel, Pension Commission of Manitoba

**Hearing date:** June 24, 1997

**Decision:** September 16, 1997

#### **A. DEFINITION OF TERMS AND EXHIBITS:**

For ease of reference and consistency the following terms, as agreed on in the Agreed Statement of Facts, are used throughout this decision:

**The 1975 Act**                      *The Pension Benefits Act*, S.M. 1975, Cap.P32 (see Tab 14);

**The Amended 1975 Act**      Amendments contained in Bills 95 and 76, specifically sections 21(6.5) and 21(6.6) [NOTE: now subsections 21(19) and 21(20) of the Act] (see Tab 15);

**The Act**                              *The Pension Benefits Act*, R.S.M. 1987, c.P32 (see Tab 16);

**The 1964 plan**                      The pension plan certified on December 31, 1976 (*sic*) showing an effective date of January 1, 1964 (see Tab 1);

<b>The 1976 plan</b>	A pension plan certified on December 31, 1976 showing an effective date of January 1, 1964. The first pension plan that the Commission has on file (see Tab 3);
<b>The 1991 trustee plan</b>	A jointly trustee plan negotiated by the unions and St. Boniface Hospital effective January 1, 1991 (see Tab 5);
<b>The 1992 trustee plan</b>	The 1991 trustee plan restated effective January 1, 1992 by Resolution No. 1 dated April 25, 1994 (see Tab 6);
<b>The 1995 trustee plan</b>	The 1992 trustee plan restated effective January 1, 1995 by Resolution No. 2 dated January 31, 1995 (see Tab 7);
<b>IEU</b>	Institutional Employees' Union
<b>SBGH</b>	St. Boniface General Hospital
<b>Waiver Employees</b>	Employees of the IEU who revoked their membership in the 1964 plan
<b>Commission</b>	The Pension Commission of Manitoba

The following exhibits were introduced at the hearing and are referenced throughout this decision:

1. Binders prepared by M.A. Webb (Part 1 of 2 and Part 2 of 2)
2. Letter dated June 30, 1970 to Mr. K. O. Mackenzie from L. A. Quaglia, Executive Director, SBGH;
3. Letter dated December 4, 1969 to "Employees" from L. A. Quaglia, Executive Director, SBGH;
4. Agreed Statement of Fact.

## **B. NATURE OF THE APPLICATION:**

In 1991, the Trustees of the St. Boniface Hospital/Union's Jointly Trustee Pension Plan submitted an Application for Registration as required under subsection 18(2) of the Act and along with supporting documents, a copy of the pension plan text. The Commission, on November 7, 1996, refused to accept the 1991 trustee plan for registration on the grounds that the plan, in its opinion, was not organized and administered in accordance with the Act. On January 23, 1997, the Trustees filed in accordance with subsection 35(1) a Notice

of Objection which was subsequently revised on March 25, 1997, thus requiring the Commission to reconsider its opinion.

A meeting of the representatives from the Board of Trustees of the 1991 trustee plan and the Commission was held on March 21, 1997, at which time it was agreed by the parties present at that meeting that the Respondents would have to be involved in the matter. A notice outlining the reason for the Commission's refusal to accept the 1991 trustee plan for registration and that it would be reconsidering its decision, was prepared and mailed to each of the Respondents. The Respondents were given until May 9, 1997 to advise the Commission of their intent to make a submission to the Commission on the matter.

In order to accommodate the preparation of written submissions by all interested parties who chose to participate, hearing dates were scheduled for June 24th and 25th. The hearing was held on June 24, 1997.

### **C. AGREED STATEMENT OF FACT:**

Though the Agreed Statement of Fact set out the above-mentioned terms, they do not appear to have been adopted. Therefore, the Agreed Statement of Fact, as set out below, has been modified in a manner so as to incorporate the appropriate term, and marked with an asterisk \* to denote the difference.

1. A group annuity contract for the employees of the Children's Hospital of Winnipeg, St. Boniface General Hospital ("SBGH"), Sanatorium Board of Manitoba, and the Winnipeg General Hospital (the "Participating Employers") was introduced effective January 1, 1964 (the "1964 plan").
2. Coverage under the 1964 plan was compulsory for, among others, all employees covered by collective agreements with the Participating Employers.
3. On October 28, 1968 the IEU made the following demand with respect to its January 1, 1969 contract with SBGH:
 

"That the St. Boniface General Hospital Retirement Plan become an optional benefit for all employees covered by the agreement. All members of the plan shall have the right to withdraw from the plan subject to a time limit to be mutually agreed upon between the parties to the agreement". (See historical documentation from L. A. Quaglia, Section 3.11)
4. After extensive discussions and debate, the membership of the IEU voted on December 10, 1969 whether they wished the 1964 plan\* membership to be mandatory or optional. By a margin of more than two to one, the employees voted

that their membership in the 1964 plan\* should be optional.

5. Accordingly, the plan certified April 10, 1964 with an effective date of January 1, 1964 (the "1964 plan")<sup>1</sup> was amended to allow employees who were members of the IEU and employed by SBGH to revoke their authorization for the SBGH to deduct employee contributions to the 1964 plan. The amendment, dated April 1, 1970, provided as follows:

(a) It is hereby understood and agreed that at any time not later than May 31, 1970 an employee who is a member of the Institutional Union (*sic*) of the St. Boniface General Hospital may revoke his authorization for his Employer to deduct from his earnings his employee contributions, in which event subparagraph (i) of the definition of "future service pension" in section 11 of Article 2 of this policy shall in respect of such employee be deleted and the following substituted therefor.

- (i) 1/12 of the sum 1-1/2% of the portion of the earnings of the employee that is not more than the Government Pension Earnings Amount and 2% of the excess, if any, of the earnings of the employee over the Government Pension Plan Earnings Amount in each policy month beginning with the month of January 1969 in which he is covered prior to June 1, 1970.

Any employee who revokes his authorization as aforesaid shall have the option of taking a cash payment forthwith after said May 31, 1970.

The amount of such cash payment shall be the With Interest Accumulation to such date of his employee contributions. The coverage and all benefits in respect of such employee shall automatically terminate upon such cash payment having been made.

If an employee does not revoke his authorization as aforesaid prior to June 1, 1970 this amendment shall not affect the coverage of such employee under this policy.

- (b) This policy is hereby amended as of December 31, 1969 by deleting section 1 of Article 2 and substituting therefor the following:

Section 1. On the Register Date or Upon Application for Coverage

An employee whose name is included in Schedule "X" shall become covered under this policy as of the register date. As of the date specified by an

---

1

A copy of this 1964 plan (see Tab 1) and relevant amendments to it (see Tab 2) was obtained by the Commission on May 20, 1997.

Employer in the individual application for coverage in respect of any other employee such employee shall become covered under this policy.

Application for coverage shall be submitted to the Insurance Company by an Employer in respect of an employee promptly after the date as of which such Employer accepts from such employee written application to be covered hereunder and authorization for such Employer to deduct from his earnings his employee contributions.

If such application in respect of an employee, who on May 31, 1970 is a member of the Institutional Union of St. Boniface General Hospital, is not submitted to his Employer by such employee on or before the later of the 30th birthday and the date 3 months after commencement of service of such employee, such employee shall give written notice to his Employer that he understands that he will have no subsequent option of making application to be covered hereunder.

6. A number of IEU members took advantage of this option (the "Waiver employees"), and executed waivers in the form as set out at Tab 12 of the Agreed Documents.
7. The Waiver Employees were provided with a letter from the SBGH in the form set out in a letter dated December 4, 1989 (*sic*) prior to executing the waiver.
8. The *Pension Benefits Act* (the "1975 Act") was introduced in 1976 and required registration of pension plans established before July 1, 1976. The 1976 plan was accepted for registration and given registration number M-65293<sup>2</sup>.
9. The 1976 plan was amended from time to time, and remained registered with the Commission\* until 1991. (See Tab 4)
10. On January 1, 1984, the 1975 Act was amended and introduced compulsory eligibility and membership requirements and exceptions to the compulsory requirements. (See Tab 15, subsections 21(6.5) and 21(6.6)).

---

2

The 1976 plan (see Tab 3) was filed in compliance with subsection 18(1) of the 1975 Act (now 18(1) of the Act) which reads as follows:

Registration of plans established before July 1, 1976

18(1) Subject to subsection (5), every employer of employees in Manitoba covered by a pension plan established before July 1, 1976, in respect of employment in Manitoba shall, unless under the terms of the pension plan the employer is not required to make contributions to or under the plan,

- (a) where a copy of the pension plan was not filed with the commission for registration on or before October 1, 1976, file a copy on such later date as the commission may, on application, allow; and
- (b) while such plan remains in force, maintain its qualification for registration as required by this Act.

11. A Letter of Intent was sent and executed by E. Dubinski of the Health Sciences Centre on behalf of the 1976 plan and its participating employers (see Tab 13), subsequent to the January 1, 1984 amendments to the 1975 Act, indicating that the 1976 plan would be administered in compliance with the Amended 1975 Act.
12. In 1990, the unions at SBGH\* negotiated a jointly trustee plan effective January 1, 1991. All active employees of the signatory unions<sup>3</sup> ceased participation in the 1976 plan and commenced participation in the 1991 trustee plan.

3

The signatory unions were Manitoba Association of Health Care Professionals, Manitoba Government Employees Association, United Food and Commercial Workers, Local 832, and the Manitoba Nurses Union.

13. In 1991, the 1991 trustee plan\* was submitted by Turnbull and Turnbull for registration to the Commission. Section 3.06 of the 1991 trustee plan excluded eligibility and membership to the Waiver Employees<sup>4</sup>.
14. The 1991 trustee plan was restated effective January 1, 1992 by Resolution No. 1 dated April 25, 1994 (the "1992 trustee plan"). (see Tab 6).
15. Effective January 1, 1995, section 3.06 of the 1992 trustee plan was amended to offer participation to the Waiver Employees on a prospective basis effective January 1, 1994 and ending December 31, 1995<sup>5</sup>. Of the 45 remaining Waiver Employees, 23 elected to join the trustee plan on that basis<sup>6</sup>.
16. Notwithstanding this amendment to the 1992 trustee plan, the Commission was still of the opinion that the Waiver Employees had a right to join the 1976 plan, at a minimum from January 1, 1986.
17. The 1992 trustee plan was restated effective January 1, 1995 by Resolution No. 2

4

Section 3.06 reads as follows:

3.06 Each person who is an employee on the Effective Date who was not a member of the Prior Plan due to the fact that the person signed a waiver of participation form in respect of the Prior Plan shall not be eligible or required to become a Member of the Plan. (see Tab 5).

5

Section 3.06 of the 1992 trustee plan (see Tab 6) reads as follows:

3.06 Each Employee who was an Employee on the Effective Date and who was not a Member of the Prior Plan due to the fact that the Employee signed a waiver of participation form in respect of the Prior Plan was not eligible or required to become a Member of the Plan on the Effective Date.

Such Employees are eligible to become Members of the Plan during the period commencing January 1, 1994 and ending December 31, 1995.

6

See a March 17, 1997 letter from Ron J. Youngson, Consultant, Turnbull and Turnbull to Guy Gordon, Deputy Superintendent. (See Tab 30).

dated January 31, 1995 (the “1995 trustee plan”). (See Tab 7).

18. The 1995 trustee plan was amended by a June 19, 1996 resolution (see Tab 8) which deleted section 3.06 in its entirety and replaced it with the following:
 

Effective January 1, 1996 such an Employee is eligible to become a Member of the Plan upon fulfilling the requirements of section 3.07 and receiving approval of the Board of Trustees.
19. Notwithstanding, the Commission continued to refuse to register the 1991 trustee plan\*.
20. The Superintendent of Pensions brought this registration to the Commission’s attention on November 7, 1996.
21. At this time, the Commission revoked its delegation<sup>7</sup> to the Superintendent to register the 1991 trustee plan.
22. The Commission refused to register the 1991 trustee plan\*. The Commission provided written reasons on December 19, 1996. (See Tab 11)
23. On January 23, 1997, the Trustees of the trustee plan filed a Notice of Objection under section 35 of the Act, which permits the Commission to reconsider its opinion when it has refused to accept a pension plan for registration. (See Tab 20)
24. The Trustees of the 1995 trustee plan\* filed an Amended Notice of Objection on March 25, 1997. (see Tab 21)

#### **D. Issues**

1. Was there a reasonable apprehension of bias in that the original decision not to register the 1991 trustee plan was made by the Superintendent of Pensions and therefore Counsel for the Superintendent could not act as Counsel to the Commission on any appeal from the Superintendent’s decision?
2. Did the involvement of Counsel for the Pension Commission and the Superintendent up to and including the hearing itself taint the process and create an apprehension of bias?

---

<sup>7</sup>

The Commission had delegated its authority for registration of pension plans to the Superintendent on May 4, 1993. On November 7, 1996, the Commission revoked that authority. (See Tabs 18 and 19 respectively for minutes delegating authority for registration of plans to the Superintendent of Pensions and the revocation of that authority.)

3. Do subsections 21(19) and (20) create a requirement that pension plans provide compulsory eligibility to plan members?

4. Does the Pension Commission have the right to withhold registration of a plan where the issue of non compliance relates to a pre-existing or predecessor plan?

### **E. Preliminary Motion**

With respect to the first issue raised by Counsel for the Trustees, this matter appeared to be resolved by the date of the hearing, and is therefore no longer an issue. As indicated in the Agreed Statement of Facts, the parties acknowledged that the initial decision not to register the 1991 trustee plan was made by the Commission and not the Superintendent. The Agreed Statement of Facts indicates at paragraphs 20 to 22 as follows:

20. The Superintendent of Pensions brought this registration to the Commission's attention on November 7, 1996.
21. At this time, the Commission revoked its delegation<sup>7</sup> to the Superintendent to register the 1991 trustee plan.
22. The Commission refused to register the 1991 trustee plan\*. The Commission provided written reasons on December 19, 1996. (See Tab 11)

With respect to the second matter, Counsel for the Trustees argued that the circumstances surrounding the hearing unfolded in such a way "that our client does not have a sense that...it will have the opportunity for a fair hearing."

In support of his position that the law requires Commission Counsel to play one or the other of these two roles several cases were cited, Mitchell v. Institute of Chartered Accountants (Manitoba) (1994) 22 Admin. L.R. (2d) 182 and Adair et al v. Health Disciplines Board (1993) 15 O.R. (3d) 705.

The Commission ruled on this motion at the hearing finding that it did not support the contention that the role of Commission Counsel could be construed as having tainted the process and created an apprehension of bias in respect of the respondents.

The Commission does not believe that counsel for a body such as the Commission is confined to as narrow a role as suggested by Counsel for the Trustees. Boards such as the Commission are entitled to ask for and receive legal counsel; counsel can be supplied by the attorney general's office. As masters of their own process, the Commission can have counsel provide a wide range of services including providing guidance and assistance respecting process so long as the Commission exercises its right to accept or reject the advice offered and ultimately renders its own decision.

Sufficient case law exists in support of this position (ie. Omineca Enterprises Ltd. v. British Columbia (Minister of Forests) [1994] 2 W.W. R. 422, Pasiechnyk v. Procrane Inc. (1992) 90 D.L.R. (4th) 344, Motor Transport Board of Manitoba v. Purolator Courier Ltd. (1981) 126 D.L.R. (3d) 385, Melanson v. Workers' Compensation Board (N.B.) (1994) 114 D.L.R. (4th) 75).

Moreover, the Commission is of the view that the role played by Counsel in the days and weeks leading up to the hearing was appropriate. In particular, in determining an agreed statement of facts, Counsel as the representative of the Commission, represented the one source of all historical documents pertaining to the plan's registration with the Commission since 1977. It appears only reasonable that, as the depository of statutorily required documents and associated correspondence, Counsel to the Commission play a role in developing an agreed statement of facts.

The Commission requested Counsel to prepare an opinion on the issues arising from the Notice of Objection including interpretation of subsections 21(19) and 21(20). This opinion was shared with all parties. In the first instance, there was no other party that could have taken this position, that is, the Respondents were not involved at the time. The Commission, of its own undertaking, took this opinion into account in its independent assessment of the Superintendent's recommendation not to accept for registration the plan in question.

As a reconsideration of its initial assessment, the process outlined in subsections 35(1) through 35(3) is somewhat adversarial. The objective is to provide the parties filing a Notice of Objection with an opportunity to outline additional evidence or argument before the Commission which it has not heretofore considered.

## **F. The 1976 Plan and The Amended 1976 Act**

In accordance with the amendments which were made to the 1975 Act effective January 1, 1984 introducing compulsory eligibility and membership, the original plan sponsored by SBGH was amended. Section 3 of the amendment read as follows:

### **3. ELIGIBILITY**

Each employee who is named in Schedule "X" was eligible to become a member of the plan on the effective date.

**Each other and each new employee will be eligible on the first day of the month coinciding with or next following the completion of three months of service.** (emphasis added)

Each employee who was covered under Policy 7051GP prior to January 1, 1974 was eligible to become a member of the Plan on January 1, 1974.

It is the opinion of the Commission that the provisions of Section 3 of the amended 1976 plan sponsored by SBGH, in particular the second paragraph, would have permitted the Waiver Employees to join the plan on April 1, 1984. There was no evidence presented to the Commission indicating that the Waiver Employees were advised of the provisions of Section 3 of the amended 1976 plan.

Therefore, it is the opinion of the Commission that, pursuant to the terms of the 1976 plan effective January 1, 1984, the Waiver Employees had the right to join the plan as early as April 1, 1984.

Section 3.06 of the 1991 trustee plan attempted to remove this right by excluding eligibility and membership to the Waiver Employees, an attempt which is not only contrary to the amended 1976 plan, but also does not meet the compulsory eligibility and membership requirements under the Amended 1975 Act.

### **G. Interpretation and Interrelationship between subsections 21(19) and 21(20)**

Subsections 21(19) and 21(20) of the Act read as follows:

#### **Compulsory eligibility and membership**

21(19) Subject to subsection (20), where a pension plan is in effect for a class of employees of an employer, the pension plan shall provide

- (a) that each full-time or temporary employee of that class shall be a member of the pension plan subject to any eligibility period which shall not be greater than two years;
- (b) that each part-time or temporary employee who, if he were a full-time employee, would come within that class, is eligible for membership in the pension plan in the same basis as full-time employees of that class; and
- (c) that each part-time or temporary employee who, if he were a full-time employee, would come within that class, and who has been so employed by the employer during two consecutive numerical years in each of which he has earned not less than one quarter of the

maximum pensionable earnings for that numerical year under the Canada Pension Plan (Canada), shall be a member of the pension plan.

**Exemption**

21(20) The provisions of a pension plan for employees of an employer required under subsection (19) do not require

- (a) a person who is an employee of the employer and who is a student on a substantially full-time basis; or
- (b) a person who is an employee of the employer and who is a member of a religious group which has as one of its articles of faith the belief that members of the group are precluded from being members of the pension plan; or
- (c) a person who is a full-time employee of the employer and was so employed as a full-time employee before January 1, 1984 or the commencement date of the pension plan, whichever is the later, and who before that date was not a member of the pension plan; or
- (d) a person who is a part-time or temporary employee of the employer, was so employed as a part-time or temporary employee before January 1, 1984, or the commencement date of the pension plan, whichever is the later, and whose employment after that date is broken only by temporary suspensions of employment; or
- (e) a person who retires from the employment of the employer and is in receipt of a pension benefit, but subsequently returns to work for the same employer or another employer covered by the same pension plan;

to become a member of the pension plan.

...

Counsel for the Trustees argued that a plain reading of these sections does not lead to the conclusion that they were constructed to create an obligation upon a plan sponsor to offer

eligibility to employees who had previously waived their right to join a pension plan. The crux of the argument is that the interpretation arrived at by the Commission relies upon the separation of the concept of compulsory eligibility and membership into two distinct and operable concepts. Rather, Counsel for the Trustees stated “I think it is one concept that means compulsory membership and these are your eligibility criteria that have to be met in order to be mandatory.”

Central to the Trustees’ argument is the assertion that subsection 21(20) qualifies subsection 21(19) in its entirety. To arrive at the interpretation that optional membership exists requires, it is argued, that subsection 21(20) does not qualify the entire section; that the mandatory membership elements are “trumped” by subsection 21(20) but that the mandatory eligibility elements survive. Moreover, it was asserted that as the concept of mandatory eligibility does not make sense in and of itself, it should be recognized that 21(19) contains eligibility and membership and should be viewed as operating together and not as separate constructs.

After a reconsideration of this thoughtful argument, the Commission finds that it cannot concur and therefore will not vary its decision of November 7, 1996 to refuse to register the plan.

The statute does create an obligation for an employer’s pension plan to provide optional membership for employees who meet the eligibility criteria of subsection 21(19). A statute’s interpretation should be the one which accords with the intention of the legislature and the object of the Act. The Act contains a coherent policy initiative aimed at expanding the rights of pension plan members and of seeking to enroll a larger number of Manitobans in pension plans without mandating their provision by employers. Subsection 10(1) (a) speaks to these issues.

Subsection 10(1) reads as follows:

**Duties and functions of the commission**

- 10(1) The commission shall
- (a) actively promote the establishment, extension and improvement of pension plans throughout Manitoba, the reciprocity between pension plans and the further protection of rights under pension plans.

...

In assessing subsections 21(19) and 21(20) it is important to recognize that the locus of decision making rests with the individual and not the employer. The assertion that the option to join a plan rests with the employer is contrary to the goal of expanding coverage as employers would be disinclined to expand coverage given the added costs involved.

Providing individuals with the right to join the plan is consistent with a desire on behalf of the legislature to not only protect rights of members to decide that they wish to have their

previous intentions not to participate respected, but also to afford the individuals the right to join the plan where they deem it to be in their best interests, thereby resulting in expanded plan coverage.

## H. Subsection 21(19) Mandatory and Compulsory

A review of the compulsory membership and eligibility clauses in 21(19), is as follows:

- i. Subsection 21(19) of the Act is headed **Compulsory eligibility and membership**. While there is no legal force and effect to these notations, they are of some use in determining what that subsection attempts to do.
- ii. A review of subsection 21(19) reveals the following:
  - (1) Clause (a) is the only clause which deals with full-time employees and combines the compulsory eligibility and membership requirements. For ease of reference clause 21(19)(a) is duplicated here as follows:

### **Compulsory eligibility and membership**

21(19) Subject to subsection (20), where a pension plan is in effect for a class of employees of an employer, the pension plan shall provide

(a) that each full-time or temporary employee of that class shall be a member of the pension plan **[compulsory membership]** subject to any eligibility period which shall not be greater than two years **[compulsory eligibility]**;

(b) that each part-time or temporary employee who, if he were a full-time employee, would come within that class, is eligible for membership in the pension plan in the same basis as full-time employees of that class **[compulsory eligibility]**; and

(c) that each part-time or temporary employee who, if he were a full-time employee, would come within that class, and who has been so employed by the employer during two consecutive numerical years in each of which he has earned not less than one quarter of the maximum pensionable earnings for the numerical year under the Canada Pension Plan (Canada), shall be a member of the pension plan **[compulsory membership]**.

- (2) Clause (b) and (c) deal with part-time employees with clause (b) addressing compulsory eligibility (being the same as for full-time employees) and clause (c) addressing compulsory membership.
- iii. The effect of subsection 21(20) on 21(19) is to remove only the mandatory membership requirement leaving the compulsory eligibility intact.

Clause 21(20)(c)'s effect on clause 21(19)(a) is seen as follows:

21(19) Subject to subsection (20), where a pension plan is in effect for a class of employees of an employer, the pension plan shall provide

- (a) that each full-time or temporary employee of that class may be a member of the pension plan subject to any eligibility period which shall not be greater than two years;

- iv. The eligibility sections are not affected by 21(20) and once an employee becomes eligible, they are always eligible for membership even though for them membership may not be required.

If they are always eligible to join, it is the employee who maintains the option of joining the pension plan. The employer has no authority whatsoever to remove or tamper with compulsory eligibility.

### **I. Is the 1991 Trusteed Plan a New or Successor Plan?**

Counsel for the Trustees further argued that it is inappropriate for the Pension Commission to be withholding approval for registration based on matters of compliance which pre-date the plan's effective date of registration; in this case January 1, 1991.

The thrust of this argument is that the plan in question is in effect a new plan, as the 1991 trusteed plan has different funding obligations, administration and governance. Therefore, it was argued, the plan sponsor, being the Trustees, is not responsible for administrative or substantive matters of compliance allegedly arising in 1986. Further, the refusal to register the plan based on questions of misadministration going back 20 years is inappropriate. Registration and ongoing compliance with the provisions of The Pension Benefits Act should be viewed separately and efforts to link the two are argued to be unreasonable and excessive.

The Commission finds that it disagrees with these arguments.

The 1991 trusteed plan is not devoid of history as it holds pension benefits accrued by its members prior to its effective date, and therefore, is responsible for the corresponding

liability. The facts clearly demonstrate that, as of January 1, 1991, this plan assumed all assets and liabilities with respect to those members who previously participated in the original SBGH pension plan. Subsection 13(3) of the regulations under the Act states the following:

13(3) Where contributions to a pension plan cease on or after July 1, 1976, as a result of the adoption of a new plan, the original pension plan shall be deemed not to have been terminated or wound-up under this section or under subsection 21(21) of the Act and the benefits of the original plan shall be deemed to be benefits associated with the new plan, in whole, or in part, in respect of service prior to the establishment of the new plan, whether or not the assets and liabilities of the original plan have been consolidated with those of the new plan.

This section speaks to the relationship that a 'new' or successor plan has with the original plan in the context that benefits under one are associated with benefits under the other. The history of the original plan is also that of the successor plan, whether or not actual assets and liabilities are transferred. A new plan is one which has no history, that is, no benefits associated with service prior to its establishment, other than those which may be granted after its effective date in respect of "past service". The fact that the 1991 trustee plan was filed with the Commission accompanied by an Application for Registration under the Act cannot be construed as meaning this plan is a new pension plan. Further, plans change over time in relation to their construction, governance and administration, and these changes do not mean that the resulting plan is a new plan. This is demonstrated in case law which suggests that when dealing with surplus entitlement, for example, in order to determine entitlement, the provisions of the first plan on through to the last plan must be reviewed. To suggest that should one change the funding media, or convert from defined benefit to money purchase, that the plan becomes a new plan, runs contrary to the above-mentioned principles. Plans throughout their lifetimes have a history, and that history must be recognized.

Consequently, the Commission cannot accept the argument that the 1991 trustee plan is a "new" plan without prior history. It is, in the Commission's opinion, as a result of its being spun-off from the original plan, a continuing plan for the specified classes of employees of SBGH.

With respect to the registration of the 1991 trustee plan, its registration was necessary for purposes of assigning a separate registration number to it, as the original plan was continuing for those not eligible to join the 1991 trustee plan. It is not the fact of registration that denotes a new pension plan, but rather the lack of existence of a history.

The registration is accepted and a registration number assigned once the Commission is of the opinion that the plan is organized and administered in accordance with the Act. Further, in the case of a successor plan, the Commission's review of the plan's

organization and administration is not confined to service after the plan's establishment. In the event the Commission believes the plan is either not organized or administered in accordance with the Act with respect to any period of time for which the plan provides benefits, it will not accept the plan for registration. This is clearly set out in section 19 of the Act which states the following:

**Acceptance for registration**

19 The commission shall accept for registration and issue its certificate in respect of each pension plan filed for registration under section 18 that in the opinion of the commission is a pension plan organized and administered in accordance with this Act.

In this case, the inclusion of an explicit prohibition of the Waiver Employees constitutes a violation of the Act and section 19 precludes the Commission from registering the 1991 trustee plan until such time as the matter is rectified by both amending the plan in such a manner as to bring it into compliance with subsection 21(19) of the Act, and giving the Waiver Employees the option of "buying back" their pensionable service with effect from January 1, 1984.

**J. Conclusion**

In conclusion, the Commission remains of the opinion that, until the plan text of the St. Boniface Hospital/Union's Jointly Trusteed Pension Plan is modified to comply with subsections 21(19)(a) and (b) of the Act, and the Waiver Employees permitted to buy-back service with effect from January 1, 1984, the plan cannot be approved for registration.

Written Decision Rendered: December 8, 1997

\_\_\_\_\_  
Original Signed by  
Ron Hesford, Chairperson

\_\_\_\_\_  
Original Signed by  
Linda Stewart, Vice Chairperson

Original Signed by  
Marsden Fenwick, Member

Original Signed by  
Michael Byrne, Member

Original Signed by  
Leigh Cunningham, Member

Original Signed by  
Michelle Redekopp, Member