

May 27, 2011

**Susan Philpott**  
Direct Dial: 416-595-2104  
Direct Fax: 416-204-2882  
sphilpott@kmlaw.ca

**VIA E-MAIL**

Financial Services Commission  
Suite 601, 1919 Saskatchewan Drive  
REGINA SK S4P 4H2  
Phone (306) 787-7650 Fax (306) 798-4425

**ATTENTION: Mr. Dave Wild, Superintendent**

Dear Mr. Wild:

**Re: May 3, 2011 Decision of Regina City Council  
Correspondence of Board to Superintendent of Pensions, Dated May 13, 2011  
Our File No. 10-1961**

We are counsel to the Canadian Union of Public Employees (“CUPE”) and the Membership Benefits Committee of the Regina Civic Employees' Superannuation and Benefit Plan (the “Plan”). We write with reference to the recent decision of the Regina City Council to refuse to pay the contributions to the Plan as recommended by the Plan’s actuary and required by law. We also write with reference to the Plan’s Administrative Board correspondence to you requesting direction.

The City of Regina (the “Employer”) and the other participating employers have a statutory duty to contribute to the Plan in accordance with the Plan and the *Pension Benefits Act*, 1992 (“PBA”).

On behalf of our client, who represents members of the Plan, we urge you to give notice of a proposed order to bring the Plan into compliance with the PBA on the basis of the following facts and law:

1. Section 21 of the Plan requires contributions from both employers and employees based on recommendations of the Actuary.
2. At pages 11-12 of the 2009 Actuarial Valuation, the Actuary determined that contribution increases for both employees and employers are required effective January 1, 2010. That Actuarial Report was filed with the Superintendent of Pensions. These contributions are now required to be paid by the employers and members. By the terms of the Plan, employee contributions are required to be deducted and withheld, and employer contributions must match employee contributions, and be remitted to the Plan’s fund (the “Fund”).

3. The contribution rate increases have been approved by the Canada Revenue Agency by letter dated December 15, 2010.
4. Section 42 of the PBA states that an employer “shall, within the prescribed period, remit employer and member contributions due to the plan”, failing which the “administrator or the fund holder who should have received them shall immediately notify the Superintendent in writing of the failure.”
5. Section 37 of the Regulation to the PBA states:
  - (1) The period within which contributions must be remitted pursuant to subsection 42(1) of the Act is:
    - (a) in the case of member contributions, 30 days after the end of the month in which the contributions were received by the employer from a member or were deducted from the member's remuneration;
    - (b) in the case of employer contributions determined in accordance with a formula relating to a defined contribution provision:
      - (i) that relates to profits of the employer, 90 days after the end of the fiscal year;
      - (ii) that does not relate to profits of the employer, 30 days after the end of the month for which those contributions are payable; or
    - (c) in the case of employer contributions with respect to defined benefit provisions, 30 days after the end of each month with respect to which they are payable.
7. The Employer has clearly stated that it is not in compliance with and will not comply with the PBA. The other employers have also not remitted their required contributions.
8. The Board has notified you in writing of the failure to remit required contributions, and the intent of the Employer not to remit required contributions in the future. The Board has failed to notify you that the other employers have failed to remit contributions.
9. Similar contribution provisions in other jurisdictions have been judicially considered.
10. In *Re St. Mary's Paper Inc* (1994), 19 O.R. (3d) 163, aff'd 73 O.A.C. 1, the Court held that an employer may not choose which of its funding obligations it will honour, and may not, even with the consent of employees, permit dilution of funding requirements of pension plans.
11. In *Corewall Inc. v. Superintendent of Pensions* (May 17, 1995) 12 C.C.P.B. 103 (Ontario Pension Commission) the Superintendent was directed to consider prosecuting a plan sponsor and participating employer for the “most serious matter” of failure to remit contributions.

12. Section 3 of the PBA creates the statutory obligation on the Superintendent to enforce the PBA.
13. Section 8 of the PBA provides the Superintendent with the power to apply to the court by notice of motion for an order enforcing compliance with the PBA.
14. In *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 at paragraph 56, the Supreme Court of Canada stated that “the Superintendent’s power [under the P.B.S.A.] becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the P.B.S.A.”
15. The Employer is aware and has been advised of its legal obligations under the PBA. As noted in the memo of February 18, 2009 in respect of the last filed valuation for the Pension Plan, a copy of which is enclosed for your reference, the City Administration, through Brent Sjoberg, General Manager and Byron Werry, City Solicitor, provided the following advice with respect to the increases in contributions recommended by the Plan’s actuary:

“If City Council were not to approve the rate change recommended in the 2007 Actuarial Report, the Pension Plan would be in breach of subsection 40(3) of the Pension Benefits Act 1992, which requires a plan to be funded in accordance with the applicable actuarial valuation report. In addition, the City would be in breach of subsection 40(4) of the Act which requires an employer to make contributions that are sufficient, in accordance with the prescribed test for the solvency of the plan, to provide for payment of all benefits under the plan.

If the provincial Superintendent of Pensions determines that the Pension Plan and/or any of the participating employers under the Pension Plan are in breach of the pension legislation, the Superintendent may rely on its statutory authority to seek a court order to compel the participating employers to remit their increased contributions required under the 2007 Actuarial Report.”
16. The contribution increases required in the 2007 Actuarial Report were implemented in accordance with these recommendations.
17. The very same legal obligations exist with respect to the 2009 Actuarial Report which was filed with the Superintendent on October 13, 2010. On the basis of this opinion, the City Administration is also of the view that a refusal to implement contribution changes recommended by the actuary is in violation of the PBA.
18. The Collective Agreements to which the Employer is bound require compliance with the terms of the Pension Plan and the contributions requirements set out therein. The Pension Plan requires contributions to be made in accordance with the recommendations of the actuary, including those set out in the 2009 Valuation. Failure to remit contributions in accordance with the 2009 Valuation is a breach of those Collective Agreements.
19. The intentional failure to make required contributions in compliance with the PBA places the Plan and members’ benefits further at risk.

Our client remains committed to a meaningful negotiation with the employers and is making every effort to ensure those negotiations take place in a timely fashion. They are committed to negotiating a number of plan design changes that will bring the current contribution rates to a more affordable level for all of the parties involved and are looking forward to returning to the negotiating table as soon as the 2010 draft actuarial valuation results are made available to them.

Until the successful conclusion of these negotiations, our client submits that an immediate Order of the Superintendent is necessary to bring the Plan into compliance with the PBA.

We therefore submit that you consider immediately give notice of the following Order:

1. Participating employers in the Plan immediately deduct and remit the required employee and employer contributions, recommended by the Plan's Actuary in its 2009 actuarial report, to the Plan's Fund, in accordance with the Plan terms and section 37 and 42 of the Pension Benefit Act and Regulations thereto.
2. This Order remains in force pending the negotiation and amendment of the Plan in accordance with its terms or variation upon motion to the Court.

Yours truly,

**KOSKIE MINSKY LLP**



Susan Philpott  
SP:mp

c Canadian Union of Public Employees  
Members Benefits Committee  
City of Regina  
Bucks Consultants Ltd.