

## Judge OKs memos in \$30B fight over PS pensions: Documents 'reliable, relevant' in battle over fate of fund surplus

The Ottawa Citizen  
Saturday, December 31, 2005  
Page: A1 / FRONT  
Section: News  
Byline: Kathryn May  
Source: The Ottawa Citizen  
Idnumber: 200512310244  
Edition: Final  
Story Type: News  
Length: 1077 words

A controversial stack of internal and secret government documents will be allowed as key evidence in an unprecedented court battle over who owned the \$30-billion surplus in federal workers' pension plans.

Ontario Superior Court Justice de Lobe Panet recently ruled the 128 documents, which include reports, secret memos, correspondence, notes and briefing papers to and from the highest ranks of the bureaucracy, can be admitted as evidence when the long-awaited trial resumes later this year.

In a 24-page ruling, Judge Panet concluded the documents were "reliable," "accurate," "relevant" and even "necessary" to sorting out the critical issues at the centre of the \$30-billion dispute, including how the pension plan was created, structured, managed and financed, as well as how its books were kept.

The ruling didn't accept the claims or facts made in the documents as gospel, but Judge Panet concluded they were "reliable" because they were written by senior or "knowledgeable" bureaucrats, who often explained to ministers how the three pension plans at the centre of the lawsuit were managed.

"In my view, it is reasonable to expect that a high premium would be placed on their accuracy. There is also the expectation of candour, given the circumstances and the fact that there was no litigation existing at the time," Judge Panet wrote.

The ruling is a significant win for the 18 unions and pensioner groups representing about 700,000 existing and retired public servants, military workers and RCMP officers. The two sides had spent a week in court arguing over the relevance and admissibility of the documents.

"It's significant because it allows us to get before the court the evidence of what was happening behind closed doors in terms of how the pension plans were operated and how that surplus was used," said lawyer Dougald Brown, who represents 13 of the plaintiffs.

The government had argued the documents, all written by bureaucrats, were hearsay and could not be counted on as "truth" of what was happening at the time. Hearsay evidence is something that someone learns from someone else rather than having personal knowledge or directly observed it.

If federal lawyers had successfully barred the documents, the unions would be forced to call the bureaucrats who wrote the documents as witnesses -- most of whom would be reluctant to testify against their employer -- to explain the contents of the documents. The ruling means the federal government will now be obliged to call the authors of the documents or other officials if it wants to challenge or disprove their contents.

"It would be somewhat unfair to require the plaintiffs to call witnesses to tender in evidence these documents prepared by them, who, it may be expected, might be witnesses adverse to the position of the plaintiffs," Judge Panet wrote.

The \$30-billion dispute has been billed as a landmark case, involving unprecedented sums of money, that could be one of the most significant of its kind in history. It goes back to the days of the Liberals' massive downsizing of government in the 1990s and then-finance minister Paul Martin's drive to wipe out the deficit. The Liberals have built their election campaign around Mr. Martin's legacy as a fiscal manager, including the successful elimination of a \$42-billion deficit that threatened to cripple the country.

The 18 unions and pensioner groups, however, accuse the government of "raiding" or "stealing" the surplus in their pension funds with "questionable" accounting practices to pay down the deficit. They claim a portion of the surplus belongs to them and they want the court to order the government to return \$30 billion to their pension accounts.

They argue the government violated its "legal obligation" to use the surplus in the best interest of the federal workers and retirees who contributed to the plans over the years. They say the government's decision to take the surplus was a "breach of contract" because the pension fund is part of the terms and conditions under which public servants work. The heart of their argument is that the legislation passed in 1999 that allowed the government to scoop the \$30-billion surplus -- the Public Sector Investment Board Act -- discriminates against public servants under Canada's Charter of Rights and Freedoms.

The documents and flurry of memos at the time show Treasury Board and the powerful Finance Department had significant disagreements over the ownership and handling of the surplus.

The Finance Department claimed the government was entitled to the surplus because it was on the hook to make up any deficit in the plan. Treasury Board, however, said the ownership wasn't clear and a portion belonged to employees. One secret memo said then-Treasury Board president Marcel Masse -- who publicly said public servants weren't entitled to the surplus -- privately felt employees had a "claim" to the surplus and Finance's decision to use it to offset the deficit "was not right."

Federal lawyers argued during the hearing the accounting and legal issues are too complex to rely on the opinions and interpretations of public servants. They said conflicts between departments with different mandates is all part of policy-making in government. They argued it's not the opinions of public servants who matter because it's the government of the day who makes the decisions.

But Judge Panet rejected a "narrow and highly technical" view of the documents' relevance. He said the "rights and obligations" of the government and pension members should be determined by examining "all the surrounding circumstances in which the pension plans operated."

Judge Panet argued resolving the dispute must involve a thorough examination of the pension plans and how they ran over the years. He said the internal memos discussing the government's legal obligations and the public servants' rights to the surplus are relevant because they showed the opinions "honestly held," communicated and admitted by the government at the time.

"In my view, all of the documents contain statements that are relevant to the issues in this action. I conclude that all of the documents are relevant to the issues and are therefore admissible," he wrote.

Judge Panet dismissed the government's request for the relevancy of documents to be argued during the trial as they came up because it could turn the trial into a series of motions and objections and "deflect attention from the real issues before the court." He said it would "unfairly prejudice" the case of public servants and pensioners if they didn't know in advance what documents could be used as evidence.