

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2006 SKQB 145

Date: 2006 03 27
Docket: Q.B. 863/2003
Judicial Centre: Regina

BETWEEN:

FRANCIS CHARLES MAY, RONALD MORGAN
and ALFRED HENRY ZIMMERMAN

PLAINTIFFS

- and -

THE GOVERNMENT OF SASKATCHEWAN

GOVERNMENT

Brought under *THE CLASS ACTIONS ACT*

Counsel:

Gordon G. Kuski, Q.C., Philip J. Gallet
and Megan D. Dolo
Donald A. McKillop, Q.C.

for the plaintiffs

for the Government of Saskatchewan

JUDGMENT
March 27, 2006

DAWSON J.

[1] This is an application for certification of an action as a class action pursuant to s. 6 of *The Class Actions Act*, S.S. 2001, c. C-12.01 (the "Act"). The proposed plaintiffs are all members of the Public Service Superannuation Plan ("PSSP"). They seek to bring this action on behalf of all individuals who are entitled to receive payments under the PSSP. The proposed class is composed of all persons who are or may be entitled to a pension payment from the PSSP.

[2] The defendant is the Government of Saskatchewan. The Government of Saskatchewan is responsible for the administration and operation of the PSSP and for

the payment of benefits to those individuals who are entitled to benefits from the PSSP. The plaintiffs claim damages against the defendant for the alleged breach by the defendant of its contractual and fiduciary obligations to the members of the PSSP. The plaintiffs also claim damages for unjust enrichment.

[3] Although there will be a more extensive description of the plaintiffs' factual allegations in the discussion that follows, a brief overview of the claim and issues is in order by way of introduction.

[4] The PSSP was created by the Government of Saskatchewan (the "Government") in 1927 by legislation. The current version of that originating legislation is *The Public Service Superannuation Act*, R.S.S. 1978, c. P-43 and *The Superannuation (Supplementary Provisions) Act*, R.S.S. 1978, c. S-64. The Government or an agency established by the Government has been and is responsible for the administration and operation of the PSSP, including payment to members of the PSSP.

[5] The members of the PSSP are or were all employees or spouses of employees of the Government. The Government required members, or members spouses, to make contributions to the PSSP during their period of employment with the Government. Being a member of the PSSP was mandatory and was a part of the employment contract. The Government prescribed the rates at which the members would contribute to the PSSP. These contributions were paid into the Government's general revenues. On retirement, the members were entitled to be paid a pension from the Government.

[6] The PSSP currently provides, in s. 22 of *The Superannuation (Supplementary Provisions) Act*, that retired members are entitled to an annual pension calculated as 2% of their average salary during the five years of highest salary earnings, multiplied by the total number of years of service, to a maximum of 35 years. At age 65, the member's pensions are reduced due to integration with the Canada Pension Plan. On the death of a member, that member's spouse is entitled to be paid a pension from the PSSP.

[7] As of March 31, 2003, there were 2,003 active participants in the PSSP, 133 inactive members and 5,800 pensioners, including surviving spouses.

[8] The PSSP accepted new members into the plan until October 1977 when the Government terminated the enrollment of new members and established an alternate pension plan called the Public Employees Pension Plan (the "PEPP"). As a result, no new members have joined the PSSP since 1977. Members of the PSSP were given the option to transfer into the PEPP at that time. Members who transferred from the PSSP to the PEPP, were credited in the PEPP with both their accumulated contributions and a matching contribution by the Government, both of which were paid out of the PSSP to the PEPP.

[9] From time to time, there were reciprocal transfer agreements made between the Government and other institutions and provinces. When a member transferred out of the PSSP to the other institution or province, under these reciprocal transfer agreements, an amount which equalled the member's accumulated contributions and the Government's notional matching contribution, including interest, were paid from the PSSP to the other institution or province's pension plan.

[10] The plaintiffs allege that the members of the PSSP and the Government had a contract for pension benefits which contract flowed from the employment contract. The plaintiffs allege that the terms of the pension agreement were established by various means, both express and implied terms, including *The Public Service Superannuation Act*; *The Superannuation (Supplementary Provisions) Act*; representations made by the Government, its agents or representatives to the members; benefit statements and other written material provided by the Government to the members; and, the pattern of conduct of the Government.

[11] The plaintiffs allege that the terms of the pension agreement included that the Government would provide pension benefits to the members having regard to the members' contributions, a corresponding matching contribution by the Government and interest earned on those contributions. The plaintiffs allege that the agreement included 50% employee contribution, 50% employer contribution; that the contributions and the Government's matching contributions would be placed into the consolidated fund of the province; that the total of the combined contributions would be invested in a prudent manner and that the administration costs would be borne by the employer; that the employee pensions would be determined by a formula plus the monies accrued from the investment of the joint contributions; and, that employees would expect that their pension would be increased to reflect increases in the cost-of-living and enriched by excess funds earned by wise investment. The plaintiffs allege further that it was a term of the contract that the Government was to treat the members equitably and fairly, having regard to other employees of the Government and its Crown corporations and the level of pension benefits being provided to those parties, including post-retirement pension adjustments or cost-of-living allowances increases, and post retirement medical and health and dental benefits; that the Government would arrange for the

administration of the PSSP and bear the costs of such administration of the PSSP for the exclusive benefit of the members of the PSSP.

[12] The plaintiffs allege that the Government breached the terms of the pension agreement by failing to make a matching contribution to the PSSP. The plaintiffs assert that from 1927 through to 1978 the members contributions to the PSSP were in excess of \$102 million, while the Government contributed only \$2.8 million. The plaintiffs allege that the employee contributions alone have made all of the pensions payments to members, refunds and lump sum payments. The plaintiffs allege that as a result, the PSSP appears to have a significant unfunded liability. The plaintiffs allege that this apparent unfunded liability is misleading and that this misleading information was used by the Government as a justification for terminating the PSSP and used by the Government for refusing to increase benefits to the members, including appropriate cost-of-living increases. The plaintiffs allege that the Government's continued failure to match the employees contributions is used as a rationale for denying increases in benefits to the members, which reasonable increases were a term of the agreement.

[13] The plaintiffs allege further, that in the mid 1980s, the Government implemented various programs to reduce the size of the public sector, including early retirement programs. These programs allowed members to retire early and begin drawing their pension earlier than they would otherwise have been entitled to draw. The plaintiffs allege this downsizing of the public sector increased the amount of pension payments being extracted from the PSSP and decreased the contributions to the PSSP. Those individuals were entitled to withdraw benefits from the PSSP at a much earlier age than was provided for by the terms of their employment, thereby increasing the amount of monies that would be required to be paid to them because of their longer

retired lives. The plaintiffs suggest that these programs were implemented with a view to allowing various department of the Government to reflect decreases in their budget through downsizing. The plaintiffs allege that as a result, salaries that had been previously properly charged to a governmental department were now being charged as a liability to the PSSP, thereby further placing the PSSP in a negative position. The plaintiffs allege that the Government should have properly charged the additional costs of those early retirements to those departments in which the early retirements occurred. The plaintiffs say that the Government should not have reflected the additional payments as liabilities or the deficit of the PSSP, especially when the Government was utilizing those numbers as a rationale for not paying additional benefits to the members of the PSSP.

[14] The plaintiffs allege that as a result, the members of the PSSP have received a pension smaller than that to which they would normally be entitled, given the level of contributions by them. They further allege that retired members of the PSSP have received less than would normally be expected by way of post-retirement increases to the pension payments and post-retirement medical, health and dental benefits.

[15] The plaintiffs suggests that the Government was not only obligated to the plaintiffs by agreement, but also had a fiduciary duty to the members, which fiduciary duty is established by the following: the Government was the employer of the member; the members were in a completely vulnerable position with respect to their relationship to the Government; the members were not entitled to negotiate with the Government concerning the benefits offered to them under the PSSP; the Government received from the members, for the use as the Government in its sole discretion determined, monies

from the members by way of pension contributions; the benefits to be paid to the members were established by legislation, which legislation was in the sole discretion and purview of the Government; the members trusted that the Government would act in their best interests both with respect to that portion of the members' salaries paid to the Government by way of contributions and the ultimate pensions to be paid to the members; and, all monies paid into the plan by the member and any monies required to be paid into the plan by the Government, which it did not pay, could and were used by the Government for its own purposes.

[16] The plaintiffs also allege that the Government failed to properly account for the contributions being made to the plan by the members in such a manner which would make it possible for members to make an informed decision as to whether they were, having regard to their contributions, being treated fairly and equitably by the Government. The plaintiffs allege that any reports prepared by the Government downplayed the effect of the contributions made by the members and made it impossible to determine if the Government was fulfilling its obligations to the members. The plaintiffs allege further that in preparing annual reports the Government did not include any calculation with respect to the matching contribution required to be made to the plan by the Government. The plaintiffs allege further that, notwithstanding, that the Government did not contribute when a member transferred from the plan to another plan, amounts were paid on behalf of that member reflecting not only the member's contributions but also the Government's notional matching contributions, including interest, which monies had never been paid into the plan by the government. The plaintiffs allege that these calculations and payments out of the PSSP contributed to the significant unfunded liability in the plan, a factor which the plaintiffs allege was

and is used by the Government as justification for refusing any benefit enhancements to the plan.

[17] The plaintiffs also allege that the Government has been unjustly enriched by the use of the members' money, and, in particular, when the Government paid out of the members' contributions the Government's notional matching contribution.

[18] The Government has not filed a statement of defence to date.

[19] The Government in response to the certification application primarily takes the position that the plaintiffs' claim does not disclose any cause of action. The Government concedes that it is able to identify all of the members of the pension plan in question, but submits that membership in an identifiable class must be, as a matter of law, tied to a common issue and, in the Government's submission, no common issues have been raised by the plaintiffs. The Government submits that the plaintiffs raise no common issues firstly because of the Government's contention that no cause of action at all arises from the plaintiffs' materials and, additionally, because on the plaintiffs' materials their claim is based upon individual contracts between the plaintiffs and the Government. The Government submits that a class action would not be the preferable procedure of the resolution for the common issues, because no common issues have been raised and, because the Government will rely on limitation of action defences which will need to be individually considered. The Government takes no issue with the appropriateness and preparedness of the representative plaintiffs.

[20] The criteria for certification of an action as a class action are set out in s. 6 of the Act, as follows:

6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class;
- (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
- (d) a class action would be a preferable procedure for the resolution of the common issues; and
- (e) there is a person willing to be appointed as a representative plaintiff who:
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[21] The Supreme Court of Canada has issued three decisions which have guided the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*; 2001 SCC 68; [2001] 3 S.C.R. 158; (2001), 205 D.L.R. (4th) 19; and *Rumley v. British Columbia*; 2001 SCC 69; [2001] 3 S.C.R. 184. In *Hollick, supra*, the Supreme Court of Canada had its first opportunity to state the interpretive approach to be applied to class action legislation in general. Speaking for the Court at paras. 14 and 15, McLachlin C.J.C., made it clear that class action legislation should be construed generously and that an overly restrictive approach must be avoided to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and, encouraging behaviour modification by those who cause harm. Justice McLachlin also emphasized that the certification stage is not meant

to be a test of the merits of the action, but rather focuses on the form of the action. At para. 16 she stated: “The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.” It is against this backdrop that the issues of certification must be considered.

A. Criterion 1: Is the Court satisfied that the pleadings disclose a cause of action?

[22] Section 6(a) of the Act provides that on an application for certification the Court must be satisfied that the pleadings disclose a cause of action. The onus is on the plaintiffs here to establish that the pleadings disclose a cause of action.

[23] It appears accepted that the test to be applied on an application for certification under s. 6(a) is the same test that is applied in relation to Rule 173(a) of *The Queen’s Bench Rules*. Rule 173(a) permits the Court to order any pleading or part thereof to be struck out if it discloses no reasonable cause of action. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Wilson J. stated at p. 980 the test to be applied for striking out a claim as disclosing no cause of action is as follows:

... [A]ssuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case....

[24] The Ontario Court of Appeal in *M.C.C. v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; (2004), 247 D.L.R. (4th) 667; [2004] O.J. No. 4924 (C.A.), confirmed that this is the approach to be applied on the issue of cause of action on a certification application. The court stated at paragraph 41:

[41] It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959....

[25] In *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 at 511 it appears that the Ontario Court (Gen. Div.) applied the same approach to this criteria. Justice Moldaver, therein stated at p. 511:

The principles to be applied when considering whether pleadings support a legal cause of action are as follows:

- (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
- (c) The novelty of the cause of action will not militate against the plaintiffs; and
- (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

[26] The approach in *Abdool, supra*, was cited with approval by McLellan J. in *Daniels v. Canada (Attorney General)*, 2003 SKQB 58; (2003), 230 Sask. R. 120 (Q.B.). Justice McLellan went on to state at para. 14:

[14] The test to be applied in certification applications is similar to those used in applications to strike a statement of claim as disclosing no cause of action. Firstly, all allegations of fact pleaded are to be accepted as true and secondly, pleadings will only be struck if it is plain and obvious that the plaintiffs cannot succeed. In my view a court should be reluctant to deny a plaintiff his or her day in court.

[27] In this application there is a preliminary issue in dispute between the parties with respect to whether the plaintiffs' pleadings disclose a cause of action. This issue revolves around what material can be considered by the Court in determining whether under s. 6(a) "the pleadings disclose a cause of action." The Government seeks to have the Court consider the affidavits of the proposed representative plaintiffs and cross-examination thereon in determining whether or not the pleadings disclose a cause of action. The plaintiffs' position is that the Court cannot consider the cross-examination on the affidavits in considering whether the pleadings disclose a cause of action.

[28] In *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 564; (2003), 242 Sask. R. 286 (Q.B.), Justice Smith (as she then was) stated, in para. 23, that in considering the question of whether the pleadings disclose a cause of action on an application for certification, the determination must be made solely on the basis of the pleadings. Smith J. (as she then was) stated at para. 23:

[23] ... Similarly, whether the claim discloses a cause of action is an issue to be determined solely on the basis of the pleadings. However, a liberal view of relevance should be applied in relation to questions directed to the other criteria set out in s. 6 of the Act even if such questions inevitably touch on the merits of the proposed action....

[29] A “pleading,” according to s. 2 of *The Queen’s Bench Act, 1998*, S.S. 1998, c. Q-1.01, is described as follows:

Interpretation

2 In this Act;

...

“**pleading**” includes a petition, a summons and the statement in writing of:

- (a) the claim or demand of:
 - (i) a plaintiff against a defendant;
 - (ii) a defendant against a third party;
 - (iii) a third party against a subsequent party; or
 - (iv) a subsequent party against any other subsequent party;
- (b) a defence or counterclaim of a defendant, third party or subsequent party to a claim or demand mentioned in clause (a);
- (c) a reply to a defence or counterclaim mentioned in clause (b);
and
- (d) a rejoinder to a reply mentioned in clause (c).

[30] Madam Justice Gunn in *Collins v. McMahon*, 2002 SKQB 201, [2002] S.J. No. 318 (QL) (Q.B.), at para. 11 in enunciating the principles which apply to an application to strike a plaintiff’s claim for failing to disclose a cause of action discussed the material the court can consider in relation to this criterion:

¶11 The principles which apply to an application to strike a plaintiff’s claim under Rule 173(a) are the following:

- (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. (*Sagon v. Royal Bank of Canada et al.* (1992), 105 Sask. R. 133 at 140 (C.A.);

- (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (*Sagon*, at 140; *Milgaard v. Kujawa et al.* (1994), 123 Sask. R. 164 (Sask. C.A.));
- (iii) **The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case (*Sagon*, at p. 140);**
- (iv) The court can strike all, or a portion of the claim (Rule 173);
- (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (*Sandy Ridge Sawing Ltd. v. Norrish and Carson* (1996), 140 Sask. R. 146 (Q.B.)). [Emphasis added]

[31] It appears well-established that on an application for certification a Court, in considering whether the pleadings disclose a cause of action, will determine the issue solely on the basis of the pleadings. Here, the plaintiffs have incorporated the affidavits of each of the three proposed representative plaintiffs into the pleadings, by virtue of their reply to demand for particulars. The plaintiffs stated in their second reply to demand for particulars:

- (b) The information contained in the Affidavits of Alfred Zimmerman sworn January 28, 2004, Ronald Morgan Reavley sworn March 25, 2004 and Francis Charles May sworn March 18, 2004.

This reference to the affidavits in the reply to demand for particulars incorporates the affidavits into the pleadings. The Government argues that it is nonsensical to consider the affidavits as pleadings, but not the cross-examination on the affidavits. While that argument may seem, at first blush, attractive, it does not hold up to scrutiny having regard to the test established in determining whether the pleadings disclose a cause of action. The test at this stage is not a test of the merits, as McLachlin J. said in *Hollick*,

supra. To adopt the approach suggested by the Government would result, effectively, in a summary judgment proceeding at this stage of the proceedings. While the insertion of the affidavits of the proposed plaintiffs by the plaintiffs in their reply to demand for particulars is a cumbersome and awkward method of pleading, it does not result, in my view, to extending the scope of what can be considered under s. 6(a). Only the pleadings, which here include the affidavits of the proposed representative plaintiffs, may be considered under the criteria of whether pleadings disclose a cause of action.

[32] As the discussion below will reveal, in some circumstances the defendant in this case argues not so much that the existence of the cause of action presumed in the pleadings finds no legal support, as that the plaintiffs have failed to plead sufficient facts to support a particular allegation essential to the cause of action asserted. This portion of the Government's argument with respect to the terms of the alleged contract between the plaintiffs and the Government is not unlike that advanced by the defendants in *Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225; [2005] 7 W.W.R. 665; (2005) 264 Sask. R. 1 (Q.B.). As Smith J. (as she then was), stated at para. 31:

31 ... [I]n some circumstances the defendants ... argue ... that the plaintiffs have failed to plead sufficient facts to support a particular allegation essential to the cause of action asserted. This particular objection, where determined to be well founded, raises the question of whether such a defect is merely a technical failure of pleading or is more substantive—a question which comes down to whether or not the defect could be readily cured by an amendment.... The general rule on an application pursuant to Rule 173(a) is that the Court is to look only at the pleadings, assuming the truth of the facts as pled, and that extraneous evidence is inadmissible, for the test is not a test of the merits of the claim. As the defendants point out, this procedure permits the Court to evaluate the legal basis of the plaintiffs' claim on the most optimal view of the facts, presupposing that the plaintiffs have, in the pleadings, stated their factual case at its highest.

33 ... [T]he test to be applied assumes that all factual determinations will be favourable to the plaintiffs. The plaintiffs, however, bear the burden of enunciating in the pleadings (or the pleadings as amended, if amendment is permitted) the facts upon which they rely for each cause of action asserted....

It is clear that the plaintiffs bear the burden of enunciating in the pleadings the facts upon which they rely for the cause of action. However, the claim should be read generously with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies (*Abdool, supra*). I will return to this in the discussion below.

1. Do the pleadings disclose a cause of action for breach of contract?

[33] The plaintiffs allege that the members of the PSSP and the Government had a contract for the provision of pension benefits and that the Governments breached that contract. The plaintiffs allege that the Government failed to perform its obligations under the pension contract. The plaintiffs claim for breach of contract is set out in paragraphs 11, 12 and 15 of the statement of claim:

THE RIGHTS AND OBLIGATIONS OF PLAN MEMBERS AND THE GOVERNMENT

11. The rights and obligations of the Members of the PSSP and the Government are established by the following:

- (a) The legislation promulgated, from time to time, by the Government which presently includes *The Public Service Superannuation Act*, S.S. 1978, c. P-43 and *The Superannuation (Supplementary Provisions) Act*, S.S. 1978, c. S-64;
- (b) Representations made by the Government to the Members of the PSSP with respect to, *inter alia*, the benefits they would be entitled to receive;

- (c) Benefits statements, and other written material, provided by the Government to the Members of the PSSP;
- (d) The conduct of the Government, and the agencies retained by it, in the operation and administration of the PSSP.

12. The terms, some express and some implied, of the agreement between the Government and Members of the PSSP as reflected in the above included the following;

- (a) the individual Members of the PSSP would make contributions to the PSSP at an amount determined by the Government;
- (b) the Government would provide benefits to the Members of the PSSP having regard to the members' contributions, a corresponding notional matching contribution by the Government, and interest earned on those contributions;
- (c) the Government would treat the Members of the PSSP equitably and fairly, having regard to other employees of the Government and its Crown corporations, and the level of pension benefits being provided to those parties, including post-retirement pension adjustments or cost of living allowances ("COLA") increases, and post retirement medical, health and dental benefits; and
- (d) the Government would arrange for the administration, and bear the costs of such administration, of the PSSP for the exclusive benefit of the Members of the PSSP.

...

THE GOVERNMENT'S BREACH OF ITS OBLIGATIONS

15. The Government has breached its obligations, both contractual and fiduciary, to the Members of the PSSP, particulars of which are:

(a) Downsizing

Embarking on numerous programs to reduce the size of the public sector ("downsizing"), including Members of the PSSP, which activities had a negative impact on the Plan for the following reasons:

- (i) Certain individuals were able to retire and leave the PSSP earlier than provided for by the terms of their employment and as such their contributions to the Plan were less than anticipated and planned for:
- (ii) Those certain individuals were entitled to withdraw benefits from the PSSP at a much earlier age than was

provided for by the terms of their employment thereby increasing the amount of monies that would be required to be paid to them because of their longer retired lives:

- (iii) Downsizing carried out in particular years dramatically increased the amount of pension payments extracted from the PSSP:
 - Following downsizing in 1983 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$24 million to \$33.2 million;
 - Following downsizing in 1984 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$33.2 million to \$43.1 million;
 - Following downsizing in 1986 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$44 million to \$65.7 million;

(b) Erroneous and Misleading Reports

The Government failed to properly account for, or account for in any fashion, the contributions being made to the Plan by the Members of the PSSP in such a manner which would make it possible for Members of the PSSP to make an informed decision as to whether they were, having regard to their contributions, being treated fairly and equitably by the Government. To the contrary, any reports prepared by the Government, or the agency retained by it to administer the PSSP provided reports the sole purpose of which were to downplay the effect of the contributions made by the Members of the PSSP and illustrate, improperly and wrongfully, that there was a significant unfunded liability in the Plan. Any reports prepared by the Government made it impossible to determine if the Government was fulfilling its obligations to the Members of the PSSP. Examples of these reports included actuarial valuations completed for the PSSP in 1973 and 1978. These valuations did not portray a realistic assessment of the financial position of the PSSP. Annual Reports for the PSSP have been prepared up to and including the present time which are misleading and erroneous, and do not portray a realistic assessment of the financial position of the PSSP.

(c) Failure to Account for the Government's Required Contributions

In preparing the Annual Reports for the PSSP, and statements to the Plan's position, the Government did not include any calculation with respect to the matching contribution required to be made to the Plan by the Government. Notwithstanding, when a member transferred from the Plan to another pension plan, amounts were paid on behalf of that member reflecting not only the member's contributions, but the Government's notional matching contributions, including interest, which had never been paid into the Plan by the Government. These calculations and payments contribute to the significant unfunded liability in the Plan, a factor which was and is used by the Government as a justification for refusing any benefit enhancements to the Plan members;

(d) No New Entrants

In a plan such as the PSSP, new entrants are a critical and important source of funding. In closing the Plan to new members in 1977, the Government acted solely in its own interests and without any regard to the interests of the Members of the Plan. In particular:

- (i) The closing of the PSSP to new entrants together with the failure to establish a reasonable or any pension fund for the Members of the PSSP, led to the inevitable result of significant unfunded liabilities, which the Government now uses as a justification for refusing any additional benefits to the Members of the PSSP;
- (ii) The Government failed to provide the Members of the PSSP with adequate or any information in order that a member could make an informed decision as to whether the member should remain in the PSSP, or whether the Government was fulfilling its obligations, both contractual and fiduciary, to the Members of the PSSP;
- (iii) Up to and including the time that the Plan was closed to new entrants in 1977, the members of the Plan had contributed in excess of \$100 million to the Plan. Up to and including that time, the Government had only contributed \$2.8 million;
- (iv) In 1977, the last full year prior to the closing of the Plan to new entrants, employee contributions alone were such that they had been and were sufficient to pay all pension

payments, refunds, lump sum payments and administrative and expenses costs of the Plan leaving a positive balance of approximately \$1.65 million;

- (v) The 1979 Annual Report showed that over \$13.8 million was refunded or paid to Members, the majority of which was paid on behalf of individual members who transferred to the PEPP. The amount paid on behalf of those members included not only that employee's contributions but also an amount for notional matching contributions from the Government, notwithstanding that the Government had not made such contributions to the PSSP. There is no reflection in any annual report up until that time of any matching contributions or interest being paid into the Plan or credited to the account of the individual members by the Government.

(e) Failure to Pay Regular COLA Increases

The Government failed to provide regular increases to the retirement benefits received by the Members of the PSSP, which was unfair and inequitable to the said Members of the PSSP, for the following reasons:

- (i) The decision to grant an increase was made arbitrarily and solely for political reasons and without regard to the Members of the PSSP and their contributions to the Plan;
- (ii) The increases were not consistent with increases provided by the Government to other government employees, and employees of its crown corporations;
- (iii) The increases were not based on any formula which related in any manner to increases in the Consumer Price Index.

[34] The losses or damages alleged are summarized at paragraph 17:

DAMAGES SUFFERED BY PLAN MEMBERS

17. As a result of the actions of the Government, and the breaches above described, the Members of the PSSP, and the Plan collectively, have suffered damages, which damages are continuing, accumulating and ongoing, particulars of which are as follows:

- (a) The Members of the PSSP have received a pension smaller than that to which they would normally be entitled given the level of contributions made by them;
- (b) As a retired member of the Plan the individual member has received less than what would normally be expected by way of post-retirement increases to his pension and post-retirement medical, health and dental benefits.

[35] The Government demanded particulars respecting paragraphs 11(b), (c) and (d) of the statement of claim. In relation to paragraph 11(b) the Government demanded:

- 2. As regards paragraph 11(b) provide details of what "representations were made, when they were made, in what form they were made, by whom they were made, and to whom they were made".

[36] The plaintiffs' response was:

- 3. In response to paragraph 2 of the Demand for Particulars:
 - (a) the particulars are matters of evidence and not required by the Defendant in order to properly plead to the Statement of Claim;
 - (b) in any event, the Plaintiffs do not rely on any one particular representation made by the Government, or an individual authorized to speak on behalf of the Government, but rather rely on the understanding developed by the Plaintiffs and the Members of the PSSP as to the terms of the pension arrangement between the Members of the PSSP and the Government as reflected in paragraph 12 of the Statement of Claim;
 - (c) the information is within the knowledge of The Government of Saskatchewan. The Plaintiffs will identify the particulars of the nature of the representations as they are obtained through the discovery process.

[37] The Government demanded the following particulars respecting paragraph 11(c) of the statement of claim:

3. As regards paragraph 11(c) with respect to the "other written material" referred to, what material is this meant to describe, by whom was it provided, to whom was it provided, and when was it provided.

[38] The plaintiffs response was:

4. In response to particulars demanded in paragraph 3 of the Demand for Particulars:
 - (a) the particulars are matters of evidence and are not required by the Defendant in order to properly plead to the Statement of Claim;
 - (b) the majority of the written material relating to the within matters is in the possession of The Government of Saskatchewan and the Plaintiffs will only be able to identify the particulars of some of the written material once they have had an opportunity to review documents disclosed in the Statement as to Documents by The Government of Saskatchewan and to conduct a discovery of the proper officer on behalf of The Government of Saskatchewan. The Plaintiffs will provide such particulars as are obtained through the discovery process.

[39] The Government demanded the following particulars respecting paragraph 11(d) of the statement of claim:

4. As regards paragraph 11(d) what conduct is this meant to refer to, whose conduct is it meant to refer to and on what date and place did this conduct occur.

[40] The plaintiffs responded:

5. In response to the particulars demanded in paragraph 4 of the Demand for Particulars:

- (a) the particulars are matter[s] of evidence and are not required by the Defendant in order to properly plead to the Statement of Claim.
- (b) some instances of the conduct of The Government of Saskatchewan which are known to the Plaintiffs to date are as follows:
 - (i) in instances where Members of the Plan transferred out to another pension plan, The Government of Saskatchewan would pay not only the contributions made by the Member, but an additional amount reflecting contributions made by The Government of Saskatchewan, and earned interest;
 - (ii) at the time of closing the Plan to New Members in 1977, and allowing Members to transfer into the PEPP, the Government paid an amount into the Member's Contributory Account in the PEPP reflecting not only the Member's contributions but an additional amount reflecting the contributions made by The Government of Saskatchewan, and earned interest.
- (c) The information is within the knowledge of The Government of Saskatchewan. The Plaintiffs will provide such particulars as are obtained through the discovery process.

[41] The plaintiffs then provided further particulars respecting clauses 11(b), (c) and (d) of the statement of claim as follows:

The Plaintiffs do hereby provide this further reply to the Demand for Particulars of the Government of Saskatchewan, and in particular paragraphs 2, 3 and 4 thereof.

1. The Plaintiffs state that other than the following:
 - (a) The information contained in the Statement of Claim and the Reply to Demand for Particulars dated April 8, 2004;
 - (b) The information contained in the Affidavits of Alfred Zimmerman sworn January 28, 2004, Ronald Morgan Reavley sworn March 25, 2004 and Francis Charles May sworn March 18, 2004;

the Plaintiffs are not aware at this time of any other representations, written material or conduct on the part of the Government of

Saskatchewan with respect to the allegations contained in paragraphs 11(b), (c) and (d) of the Statement of Claim.

[42] The portions of the affidavits of the proposed representative plaintiffs that are relevant to this issue are as follows:

Affidavit of Ronald Morgan Reavley

...

23. THAT when I joined the Plan in 1950 my understanding as to how the Plan worked was as follows:

- (a) That it was a requirement for me to enroll in the Public Service Superannuation Plan;
- (b) Contributions were made at rates unilaterally set by the Government;
- (c) The design of the plan was based on:
 - (i) 50% employee contribution
 - (ii) 50% employer contribution
 - (iii) My contributions to the Plan and the Government's matching contributions would be placed in the Consolidated Fund of the Province of Saskatchewan (General Revenue)
 - (iv) The total of the combined contributions would be invested in a prudent manner
 - (v) Administration costs would be borne by the employer
 - (vi) Employee pensions would be determined by a formula plus the monies accrued from the investment of the joint contributions
 - (vii) Employees could expect their pension would be increased to reflect increases in the cost-of-living and enriched by excess funds earned by wise investment
- (d) My understanding was that the Government contributed equally to my pension was further reinforced by the following:

From time to time, there were reciprocal transfer agreements struck with other provinces or institutions. When an individual transferred out of the PSSP to that other province or institution amounts were paid from the PSSP on behalf of that member reflecting not only the member's accumulated contributions but also the Government's matching contributions, including interest which had never been paid into the PSSP by the Government....

- (e) Both because it was the Government, and my employer, I assumed that my pension benefit would be provided and calculated in a fair and equitable manner. I did not at any time have any input into the setting of my pension. I trusted the Government completely.

Affidavit of Alfred Zimmerman

...

25. THAT when I joined the Plan in 1963 my understanding as to how the Plan worked was as follows:

- (a) contributions were made at rates prescribed by the Government. I had no input into the determination of those rates and as far as I am aware they were unilaterally set by the Government;
- (b) the Government would make equal contributions for my pension. I did not understand that I would be solely responsible for the cost of my pension. My understanding was that the Government contributed equally to my pension was further reinforced by the following facts:
 - (i) from time to time there were reciprocal transfer agreements struck with other provinces or institutions. When an individual transferred out of the PSSP to that other province of [sic] institution amounts were paid from the PSSP on behalf of that member reflecting not only the member's accumulated contributions but the Government's notional matching contributions, including interest, which had never been paid into the PSSP by the Government....
 - (ii) With the advent of the PEPP in 1977, individuals that elected to transfer to that Plan were credited not only with

their accumulated contributions but a matching government contribution;

- (c) Based on that level of contributions, that is, my actual contributions to the Plan and the Government's notional contributions to my pension, the Government would have a sum of money which on my retirement would provide me with a pension based on that level of contributions.
- (d) Both because it was the Government, and my employer, I assumed that my pension benefit would be provided and calculated in a fair and equitable manner. I did not at anytime have any input into the setting of my pension. I am unaware as to calculations done or obtained by the Government to determine what an appropriate pension would be. I trusted the Government completely.

Affidavit of Frances Charles May

21. THAT following was my understanding (which has changed over the years) as to how the Plan operated at various times:

- (a) from 1953 through to 1977:
 - (i) Employees under 45 years of age, upon successful completion of the probationary period required for their position, would be enrolled in the Public Service Superannuation Plan.
 - (ii) Design of the Plan — 50% Employee Contribution
— 50% Employer Contribution
Administered by employer
 - (iii) Employees would contribute to the plan at 7, 8 or 9% based upon their age at commencement of employment.
 - (iv) Employees would be required to contribute to the plan for 35 years.
 - (v) Employees who resigned prior to 35 years would receive a refund of contribution plus accrued interest. Those with 10 or more years of service could receive a deferred allowance at age 65.

- (vi) Employees 45 years or older when they joined the Public Service were able to contribute to the Employees Savings Account.
- (b) from 1977, the date of the closure of the Plan to New Members, to my Retirement in 1987:
 - (i) Employer had not placed deductions from employees' earned income into an actual fund.
 - (ii) Employer had not placed matching contributions into an actual fund,
 - (iii) Employer would continue to provide the defined benefits plan to employees who had joined the service prior to 1978.
 - (iv) Employer distributed a condensed summary of the Public Service Superannuation Plan 1982. The booklet briefly outlined the provisions of the defined benefits plan....
 - (v) Section 10 of the summary dealt with employees transferring to other employers covered by reciprocal agreements with the province. It provided for the transfer of the employee contributions and service plus an employer's matching contribution.
- (c) since my Retirement in 1987:
 - (i) Employer would provide the benefits defined in the Public Service Superannuation Plan.
 - (ii) Employer recognized the effects of inflation upon pensions and pointed to their good record of regular economic adjustments to that point. Verbal assurance was given at retirement seminars that the practice of economic adjustment for inflation would continue.
 - (iii) Economic adjustments were given on an arbitrary basis, however, they have become increasingly infrequent and have failed to deal with inflation.
 - (iv) The employer has allowed a devaluation of the pensions to take place. The retired employees are not receiving pensions of the same value as those they received upon retirement under the defined benefits plan.
 - (v) Employees fear the devaluation will continue unabated until they and/or their spouse will be left with only a small fraction of the pension they paid for.

22. With respect to the various issues I understand as follows:

- (i) Design of the Plan — 50% Employer Contribution
— 50% Employee Contribution
— Administration by employer
- (ii) Purchasing power of individual pensions would remain constant.
- (iii) Fund established by contributions would generate investment income.
- (iv) Government was trusted as a good employer, would treat its retirees fairly.
- (v) Believed that employee/employer contributions were recorded in a fund at market rates.
- (vi) Examples of government actions that supported the belief were the treatment of employee/employer contributions when employees transferred to other employers under reciprocal agreements i.e. Government of Canada, other Provincial Governments, School Boards, Sasktel, SaskPower, SAHO, etc.
- (vii) Treatment of employee/employer contributions when employees transferred to the Public Employee Pension Plan, 1978, provided another example.
- (viii) Although provision for employee involvement in plan design, governance and administration was not made, employees gave their trust and felt their interests were being protected by the employer.
- (ix) Employees later came to realize that the government made all of the rules, and were not required to meet the conditions of their own statutes. Changes could be implemented at will by the Government, who was also the employer.

[43] The essential elements of an action for breach of contract are failure (breach) by the defendant, without legal excuse, to perform any promise which forms part or the whole of the contract and, damage to the plaintiffs caused by the breach.

[44] In general, the plaintiffs allege that the members of the PSSP had a contract with the Government for the provision of pension benefits, which contract flowed from or was part of the member's employment contract with the Government. Both the plaintiffs and defendant acknowledge that being a member of the PSSP was a mandatory part of the employee's employment contract. The members allege that the terms of the pension agreement arose from the two specific pieces of legislation and from representations made by the Government, benefit statements, written material provided by the Government and the Government's conduct. The members allege that the terms of the contract included: that the member would contribute an amount set by the Government; that the Government would provide benefits based on the member's contributions and a matching contribution by the Government and interest earned; that the Government would treat members like other employees ensuring they received pension benefits, including cost-of-living allowances and post-retirement benefits, relatively equal to other employees; that the Government would arrange and pay for the administration of the PSSP.

[45] The plaintiffs allege the Government breached the pension contract by under calculating the pension benefits, by downsizing the public sector so as to reduce contributors to the PSSP; by closing the PSSP to new entrants; by failing to contribute or account for the Government's required equal contributions, by filing misleading reports, by failing to pay consistent or appropriate increases and/or increases to post-retirement benefits.

[46] The plaintiffs' action for breach of contract is a cause of action well known in law. The defendant does not dispute that there was an employment contract. Despite this, the defendant argues strenuously that the plaintiffs' action cannot succeed,

primarily, because the plaintiffs have failed to plead sufficient facts to support the allegations essential to the cause of action and in particular, they have failed to plead sufficient facts to disclose that the parties had an agreement for the provision of pension benefits or rights beyond the legislation.

[47] The defendant understands that, in this aspect of the claim, the plaintiffs are alleging that the contract with the Government for pension benefits is based on both express and implied terms. The defendant says that the plaintiffs have alleged that their pension benefits arise in part from the legislation but, also from representations made to them by the Government, by the Government's written material provided to them, and by the conduct of the Government. The defendant says, however, that the plaintiffs have been unable to provide particulars of any such representations, written material or conduct which supports these allegations. The principle issue here in relation to the claim of breach of contract, as I stated above, is whether the facts alleged support the conclusion that a contract for pension benefits existed beyond the terms set out in *The Public Service Superannuation Act* and *The Superannuation (Supplementary Provisions) Act*. The defendant points out that the plaintiffs, in response to the demand for particulars about the alleged representations stated:

(a) the particulars are matters of evidence and not required by the Defendant in order to properly plead to the Statement of Claim;

(b) in any event, the Plaintiffs do not rely on any one particular representation made by the Government, or an individual authorized to speak on behalf of the Government, but rather rely on the understanding developed by the Plaintiffs and the Members of the PSSP as to the terms of the pension arrangement between the Members of the PSSP and the Government as reflected in paragraph 12 of the Statement of Claim;

(c) the information is within the knowledge of The Government of Saskatchewan. The Plaintiffs will identify the particulars of the nature of the representations as they are obtained through the discovery process;

[48] The defendants point out neither the reply nor the affidavits refer to any specific representation made by the Government. The Government asserts that as the plaintiffs have failed to provide any particulars of the representation, there are no effective allegations of representations before the Court to support the allegation that there are terms of the pension contract beyond those contained in the legislation. The Government refers to the case of *Koop v. Saskatchewan Power Corp.* (1997), 159 Sask. R. 290 (Q.B.), where Chief Justice MacPherson stated at paras. 12 and 13:

[12] The defendant served on the solicitors for the plaintiff a demand for particulars ... in each instance, the plaintiff has simply stated "... that the particulars demanded are wholly within the knowledge of the defendant".... In my view, to properly comply with this rule, if the plaintiff has no particulars, in his reply he should so state. Clearly, he is not in compliance by only stating that the particulars are within the defendant's knowledge.

[13] The reply to the demand for particulars becomes, in effect, a part of the statement of claim, and in preparing its statement of defence the defendant is entitled to know what particulars, if any, the plaintiff has to support the various clauses in the statement of claim.... It is difficult to understand how the plaintiff can plead as a fact that a promise was made but when asked to give particulars as to who made the promise and when it was made, the plaintiff's response seems to be that it has no such particulars. This logically raises the question as to how the plaintiff can plead the existence of a certain fact but when asked to give particulars in respect to that fact, simply gives no particulars. If the plaintiff has no knowledge of the promise which he pleads, how can he comply with the Rule by stating only that the particulars of the promise are wholly within the knowledge of the defendant? Logically, one should look at the plaintiff's responses to paragraphs 2 to 5 of the demand for particulars as being an admission that the plaintiff has no particulars—no knowledge—of those matters which he has pleaded, and if the plaintiff has no knowledge, on what basis can the pleading constitute a fact?

[49] The Government argues that *Koop, supra*, stands for the proposition that a plaintiff may not plead the existence of representations, if the plaintiff is unable to

provide particulars of the representation. The Government argues further that the cause of action must fail if there are no facts pled to support the allegations that the Government made representations or provided written material which formed the terms of the contract beyond the legislation.

[50] Here, the plaintiffs use the word “representation,” a word that usually has a specific understanding in law. However, the plaintiffs’ particularization clarifies that there was not a particular representation, but a course of conduct on the part of the defendant which led the plaintiffs to assert that the terms of the pension contract were as alleged. The affidavits of the proposed plaintiffs assert that their understanding of the terms of the pension agreement was developed from various sources, including the legislation, written materials, and the conduct of the Government. They also assert that it was an implied term of the agreement that members would be treated similar to other government employees and that the Government would act in good faith.

[51] Terms of a contract may include express terms and terms implied by custom, conduct, statute or by the courts. There may be terms which are expressly adopted and there may be terms imported into the contract from its context. (Cheshire, Fifoot and Furmston’s, *Law of Contract*, 14th ed. (Markham, Ont.: Butterworths Canada Ltd., 2001) at p. 145).

[52] The plaintiffs have pled here that the terms of the pension agreement included express terms contained in the legislation, express terms from written material, express terms from the Government’s conduct and implied terms. The plaintiffs assert that the Government’s written material and conduct, both of which provided for matching contributions and interest by the Government in some

circumstances and certain occasions, support the allegation that it was part of the pension agreement that the Government would provide a contribution matching the members' in all situations. The plaintiffs have asserted certain facts, primarily the conduct of the Government, in the pleadings (which include the affidavits of the proposed representatives) upon which they rely to assert that the terms of the agreement included that the members would receive benefits based on matching contributions plus interest. While there may be some deficiencies in the pleadings, the claim must be read generously. The plaintiffs' claims are arguable on their face.

[53] The Government also notes that the pleadings and in particular paragraphs 11(b) and (d) of the claim and the particulars furnished seem to assert that there are implied contractual terms that advance the plaintiffs' claim. The Government, in this regard, simply submitted that it relies on the decision of the Saskatchewan Court of Appeal in *Wind Power Inc. v. Saskatchewan Power Corp.*, 2002 SKCA 61; [2002] 7 W.W.R. 73; (2002), 217 Sask. R. 193 (C.A.) at paras. 56-71 with respect to implying terms into a contract. That case stated at those paras.:

56 Iacobucci J. discussed the law pertaining to implying terms in *M.J.B. Enterprises Ltd.*:

[29] As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, [[1987] 1 S.C.R. 711], that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may

not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

...

63 The further difficulty is that the appellants ask the Court to imply a term that would either deny the existence of s. 10 of *The Power Corporation Act* or compel Cabinet to act in a particular way. To imply a term to the effect that SaskPower was obligated to enter into a contract would fly in the face of s. 10. It could not have been the intention of the parties for SaskPower to act in breach of its legislated authority. An implied term cannot have the effect of contravening the law.

...

65 I recognize that the effect of a section like s. 10 has been a matter of some debate. In addressing the question of statutory limits, Hogg, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000), writes (at 226):

While there is no doubt about the obligation to adhere to statutory restrictions, the tendency of the cases is to require very clear statutory language to displace the normal rules of agency. For example, provisions regulating contracting power have been interpreted narrowly so as not to apply to the contract in issue. Or such provisions have been interpreted as empowering rather than restricting and not precluding the operation of the normal rules of agency. Or the provisions have been construed as directory rules of indoor management, rather than mandatory restrictions on the authority of Ministers or officials. By these various devices, the Crown has been held to be bound by contracts that did not comply with statutory requirements. In each of the footnoted cases, the Crown tried to escape from its contractual obligations by invoking a defect in its own internal contracting procedures. It is not surprising that the Courts struggled to find a way to avoid the injustice to the private contractor by holding that the Crown was bound.

[footnotes omitted]

66 Similar sentiments have been expressed in such authorities cited by the appellants as *Somerville Belkin Industries Ltd. v. Manitoba*, [1988] 3 W.W.R. 523 (Man. C.A.) and *Canada (Attorney General) v. Saskatchewan Water Corp.* (1993), 106 D.L.R. (4th) 250 (Sask. C.A.).

67 These cases, however, are distinguishable both on their facts and with respect to their application to this case. Neither *Somerville Belkin*, nor *Saskatchewan Water Corp.*, nor any of the cases cited by Professor Hogg, pertain to a statutory provision like s. 10 of *The Power Corporation Act* which precludes the Government entity from entering into a contract without the approval of the Lieutenant Governor in Council. In *Somerville Belkin*, the Court was not concerned with legislative provisions but rather Cabinet policy, and in *Saskatchewan Water Corp.* the section empowered the Minister to enter into an agreement with the approval of the Lieutenant Governor in Council. The section did not preclude the corporation from entering into the contract unless such approval had been obtained. Moreover, *Somerville Belkin*, *Saskatchewan Water Corp.* and the cases referred to by Professor Hogg address the validity of a contract entered into without Cabinet's or the Lieutenant Governor in Council's approval.... [Emphasis in original]

[54] I assume from this indolent submission that the Government is suggesting that it is plain and obvious that no term would be implied into the contract here because, having regard to the legislation, the suggested implied terms are not obvious and the legislation provides a contrary intention. I assume, as well, that the Government asserts that the pension legislation precludes any other contract for pension benefits. However, those are determinations of law which must be made based on the evidence. The pleadings have alleged a factual basis that there were implied terms in this contract, including that the members would be treated fairly *vis-a-vis* other employees. At this stage, I am not in a position to weigh evidence and all the circumstances to determine whether, having regard to all matters, there is such an implied term. Further, there is no provision here in the legislation which specifically precludes the Government (unlike in *Wind Power, supra*) from entering into a contract for the provision of pension benefits so as to limit any implied term. In my view, the defendant's argument here goes to the merits of the case.

[55] I am satisfied that there are sufficient facts pled to support the plaintiffs' allegations as to the terms of the pension agreement. The pleadings must be read generously. I am satisfied that on a plain reading of the pleadings they contain the necessary facts to support the claim advanced by the plaintiffs in contract. There is no issue that all of the members of the proposed class were engaged in an employer-employee relationship (or were the spouse of an employee) with the Government. The facts pled are sufficient in the present context to provide an arguable basis that there was a pension agreement. The facts pled are also sufficient to assert a cause of action for the breach of the alleged contract and damages flowing therefrom.

[56] I next must turn to consider whether, assuming the facts pled with respect to breach of contract are true, is it plain and obvious the claim cannot succeed?

[57] The Government asserts that it is plain and obvious that the claim must fail because the plaintiffs are asserting that the statutory pension scheme was altered by contract and because the pension scheme was established by legislature and the legislation makes no provision for amendment by any other person or body, it cannot be altered by agreement but can only be altered by legislation. The Government argues as the plaintiffs have not alleged there has been any legislative amendment to the pension legislation, it is plain and obvious that the claim must fail. The Government asserts that even if the plaintiffs prove there was a pension agreement with terms that are not included in the legislation, the legislation limits their entitlement, and, as such, their claim must fail. The Government alleges that support for this proposition is found in two decisions of the Saskatchewan Labour Relations Board. The first is *Saskatchewan Government Employees Union v. The Government of Saskatchewan*,

Public Service Commission, LRB File No.563-81, [1982] Vol. 3, No. 5, May, Sask. Labour Rep. 44; wherein the Labour Relations Board said the following at p. 15:

With reference to the Pension Plan, the Union correctly points out that nothing in *The Trade Union Act* which creates the obligation to bargain collectively, or *The Public Service Act*, which empowers the Public Service Commission to bargain collectively on behalf of the Government, or in *The Public Service Superannuation Act* or *The Superannuation (Supplementary Provisions) Act* in any way prohibits collective bargaining with respect to the terms of the Pension Plan. On the other hand, since the Pension Plan is created by and governed by acts of the legislature, changes to it can only be made through Acts of the legislature. Terms of the Pension Plan may be the subject of collective bargaining with a view to recommending to the Legislature, changes in the Pension Plan. It is clear that any such negotiations can lead to recommendations only since the Public Service Commission, and any agreement reached by it through collective bargaining, cannot bind the Legislative Assembly of the Province of Saskatchewan which is supreme in its sphere of jurisdiction....

[58] In the second case referred to by the Government in support of this position (*Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] S.L.R.B.D. No. 43 (QL) LRB File Nos. 250-88 and 290-88), the Labour Relations Board said at pp. 9 and 10:

Quite apart from an employer's general right to communicate with its employees, and quite apart from its right in this case to respond to the union's own publications, the Board is of the view that the respondent had a right to communicate its version of the Public Participation program to everyone, including its own employees. On LRB File No. 563-81, *SGEU v. Government of Saskatchewan*, the Board stated that pensions and other insured benefit plans are subject matters created by and governed by the Legislature and that they could only be changed through acts of the Legislature. Statements in the letter and brochure about what would happen to employee pensions and other benefits were supported by Section 7 of Bill No. 55, *The Public Participation Act*.

[59] It is true that the pension legislation, like any legislation, can only be changed by the legislature. However, as Peter W. Hogg and Patrick J. Monahan, in *Liability of the Crown*, 3d ed. (Scarborough, Ont.: Carswell, 2000) state at p. 234, that does not limit the Government from entering into a contract contingent on legislation:

It is of course true that the executive cannot fetter the sovereignty of Parliament in the sense that no statute can be declared ultra vires on the basis of a conflict with a contractual provision. Nor could Parliament or any of its Members be enjoined from freely considering and voting for legislation on the basis of a contractual commitment to the contrary. **But simply because the executive cannot actually control the future behaviour of the legislature does not provide any reason why a government should not be permitted to enter into a contract whereby a private party is granted certain rights contingent upon the enactment or repeal of legislation.** [Emphasis added]

[60] A similar analysis was accepted and applied by the Supreme Court of Canada in *Wells v. Newfoundland* (1999) 3 S.C.R. 199. The Supreme Court of Canada in *Wells, supra*, clarified the law with respect to Crown employees and brought the law into line with the contemporary understandings of the state's role and obligations in dealing with its employees. In *Wells, supra*, Major J. held that while the terms and conditions of employment relationships with the Crown might be dictated by statute, the relationship remains a contract in substance. Therefore the general law of contract will apply unless specifically superseded by explicit terms in a statute or agreement. Major J. said the following at para. 30:

30 As Beetz J. clearly observed in *Labrecque, supra*, the common law views mutually agreed employment relationships through the lens of contract. This undeniably is the way virtually everyone dealing with the Crown sees it. While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply

unless specifically superceded by explicit terms in the statute or the agreement.

And at para. 33:

33 In such cases as this, the Court's inquiry should focus on the terms of the civil servant's contract. These are to be found in the written and verbal manifestations of agreement, applicable statutes and regulations, and the common law....

And at para. 41:

41 At the cost of repetition, there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. There is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party....

[61] The authors noted in *Liability of the Crown* at p. 236, in commenting on the *Wells* case, *supra*:

... the Newfoundland House of Assembly had abolished a statutory office. When the holder of the office sued for breach of contract, the government argued that holding the government liable would amount to a fetter on the legislature's ability to enact law. The Supreme Court of Canada unanimously rejected this argument, distinguishing between the legislature's right to override the contract on the one hand and the government's obligation to pay damages in the event of breach on the other. Holding the government accountable does not impair in any way the legislature's jurisdiction to enact laws or establish public policy. According to Major J., government must honour its obligations unless it explicitly exercises its power not to, through the enactment of legislation

abrogating the right to compensation. Since no such express exclusion to compensation had been provided for in this case, the appointee was entitled to damages when the government breached its contract with him.

[62] The plaintiffs here allege that the terms of their pension contract are found in the legislation and in the conduct of the Government and in implied terms. As stated in *Wells, supra*, the contract remains in substance an employment contract. At this stage of the inquiry, the question is whether it is plain and obvious that the plaintiffs cannot succeed. There is nothing in the pension legislation which specifically denies compensation to the plaintiffs for a broken pension agreement. While the Government argues that the pension agreement was established by legislation and cannot be altered by contract, the plaintiffs assert that the employment contract included pension terms which were more beneficial to the plaintiffs than the enacted legislation and as the Government breached those terms, they are entitled to damages. Applying the reasoning in *Wells, supra*, it is not plain and obvious that the claim will fail.

[63] The Government also says that it is plain and obvious that the plaintiffs' claim in contract cannot be enforced as s. 6 of *The Crown Employment Contracts Act*, S.S. 1991, c. C-50.11, voids any contract of the sort the plaintiffs have alleged. The Government argues that the plaintiffs only entitlement is to their statutory benefits as provided for by clause 8(b) of that statute.

[64] Section 6 of *The Crown Employment Contracts Act* states:

6(1) In this section, “**payment**” or “**benefit**” means any payment or any benefit and includes:

(a) any payment or any benefit that may be characterized as deferred income, a retirement allowance, a separation allowance, a

severance payment or payment in lieu of notice, whether that payment or benefit is earned or deemed to have been earned before the termination or expiration of a Crown employment contract; and

(b) an obligation or promise by the Crown or a Crown employer to:

(i) pay premiums or make contributions after termination or expiration of a Crown employment contract, on behalf of or for the benefit of a Crown employee or his or her family, respecting any benefit program or insurance policy; or

(ii) provide any benefit to the Crown employee or his or her family on or after termination or expiration of a Crown employment contract;

but does not include any payment that is described in section 7 or 8.

(2) All provision in a Crown employment contract respecting:

(a) making any payments; or

(b) providing any benefits;

by the Crown or a Crown employer resulting from the termination or expiration of the Crown employment contract are void.

(3) Subject to sections 7 and 8, neither the Crown nor any Crown employer are required to make any payments or provide any benefits resulting from the termination or expiration of the Crown employment contract. [Emphasis added]

And s. 8 states:

8 In addition to any payments to which a Crown employee may be entitled to under section 7, a Crown employee is entitled, on termination or expiration of a Crown employment contract, to:

...

(b) any pension benefits or refund of pension contributions to which the Crown employee is entitled by law....

[65] The Government suggests that s. 6 of *The Crown Employment Contracts Act* would void any contract of the sort that the plaintiffs alleged. The Government also suggests that this view was adopted by the Court of Appeal in *Larsen v. the Saskatchewan Transportation Co.* (1993), 113 Sask. R. 185; [1993] S. J. No. 465 (QL) (Q.B.) at paras. 10 and 11. The Government argues that the plaintiffs' only entitlement is to their statutory benefits as provided for in clause 8(b) of the same statute.

[66] The Saskatchewan Court of Appeal in *Larsen, supra*, said the following:

[10] Under the terms of his contract with STC, Mr. Larsen was entitled on "Involuntary Termination" to a severance payment "equal to twelve (12) months salary and benefits plus an additional two (2) months salary and benefits for each year of service calculated using February 1, 1982 as the beginning date ..." This was capped with a two year maximum. These terms were obviously founded on the whole of his previous Crown corporation service and would have entitled him in effect to two years notice of termination had it not been for the *Crown Employment Contracts Act*.

[11] Since the *Act* set aside those terms of the contract ...

The Court of Appeal in *Larsen, supra*, confirmed that any provisions of an employment contract that provided for the making of payments or providing of benefits resulting from the termination or expiration of an employment contract is void by reason of s. 6. The Court of Appeal in *Larsen, supra*, however, was only concerned with the severance payment to an employee when the employee was terminated without cause. The Court did not concern itself with any pension benefits. Further, s. 6 specifically excludes the payment of a pension benefit from the operation or limitations in s. 6. Section 8 specifically provides that an employee is entitled on the expiration of his/her employment to pension benefits to which the Crown employee is entitled to by law.

[67] The Government argues further that the only pension benefits the employees are “entitled to by law” are those provided in the pension legislation. I am of the view that the case of *Hiltz v. Saskatchewan Property Management Corp.* (1993), 108 Sask. R. 49 (Q.B.) is relevant to this issue. In that case, the plaintiff brought an action for damages for wrongful dismissal, tortious interference with contractual relations, and violation of the plaintiff's freedom of belief and opinion under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The defendants moved under Rule 173(a) of *The Queen's Bench Rules* for an order striking out certain paragraphs in the statement of claim on the ground that the causes of action set out in those paragraphs have been extinguished by *The Crown Employment Contracts Act*. Justice Hrabinsky dismissed the motion stating that the court should not strike out a pleading the sufficiency of which depends on the determination of a point of law. He said that whether the Act had the effect alleged by the defendants was an issue which had to be raised by way of statement of defence. Hrabinsky J. also held that the court would have to determine, as a matter of law, whether torts such as wrongful interference, intimidation, defamation and mental distress formed independent actionable wrongs outside the contract of employment. He held that this was not within the scope of Rule 173(a).

[68] Here, the defendant has not entered a statement of defence. Yet it asks the Court to interpret *The Crown Employment Contracts Act* as having the effect it alleges. That is an issue which must be raised by a statement of defence and it is a determination of a point of law. Of course the common law requirements of employment contracts can be displaced by statute. In Saskatchewan the employment of nearly all civil servants is regulated by statutes or by collective agreements made under the authority of the statute. These statutory or mixed statutory and contractual regimes

cover many incidents of employment. However, at this stage of the inquiry it cannot be said that it is plain and obvious that *The Crown Employment Contracts Act* precludes the plaintiffs recovery.

[69] The Government argues further that it matters little whether the government made matching contributions to the plan, as the plaintiffs have received all of the benefits they are entitled to under the legislation and if the legislature had intended there to be matching contributions it would have specifically provided for that in the legislation. The Government argues that the legislation which establishes this pension plan contains very considerable detail about the plan, the obligations of the Government and the entitlements of the plaintiffs, but make absolutely no mention of matching contributions by the Government. On the other hand the PEPP which now governs the pension plan implemented by the Government for its new employees beginning in 1977, specifically requires, by s. 17, that the employers make specified contributions to a separate superannuation fund. The Government argues that as a matter of statutory interpretation it is clear that the legislature did not intend the PSSP as having matching employer contributions. The Government argues that authority for the use of that statutory interpretation is in *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614. Again, this argument may be correct but it is an argument of law which should be made at trial.

[70] The Government submits further that the plaintiffs' pleadings which allege that the Government was required to make matching contributions is irrelevant as the issue raised by the claim is the level of pension contributions to which the plaintiffs are entitled. The Government argues that the plaintiffs cannot succeed as they have received all pension benefits that they are entitled to under the legislation. Again that

is a matter that goes to the merits of the action. The inquiry here is whether it is plain and obvious that the plaintiffs' cause of action for breach of contract, a contract that the plaintiffs' assert required the Government, *inter alia*, to match the member's contributions and pay a pension benefit which included things over and above the legislation, has no chance of success. The Government's argument in this respect is a matter for trial.

[71] In my view, the arguments advanced by the Government in support of its position that the pleadings disclose no cause of action for breach of contract are arguments going to the merits of the case. Applying the test set out, I find that the pleadings disclose a reasonable cause of action for breach of contract.

Conclusion on Breach of Contract

[72] I am satisfied that the pleadings for breach of contract disclose a reasonable cause of action.

2. Do the pleadings disclose a cause of action for breach of fiduciary duty?

[73] The plaintiffs allege that the Government had a fiduciary obligation to the members of the PSSP and that the Government breached that duty. The plaintiffs claim for breach of fiduciary duty as set out in paragraphs 13, 14 and 15:

THE GOVERNMENT'S FIDUCIARY OBLIGATION

13. In carrying out its obligations to the PSSP and the Members of the PSSP, the Government was not only obligated by agreement but also had

a fiduciary duty to the Members of the PSSP, which fiduciary duty was established, inter alia, by the following:

- (a) the Government was the employer of the Members of the PSSP;
- (b) the Members of the PSSP were in a completely vulnerable position with respect to their relationship with the Government;
- (c) the Members of the PSSP were not entitled to negotiate with the Government concerning the benefits offered to them under the Plan;
- (d) the Government received from the Members of the PSSP, for use as the Government may in its sole discretion determine, monies from the Members of the PSSP, by way of pension contributions;
- (e) the benefits to be paid to the Members of the PSSP, were established by legislation, which legislation was in the sole discretion and purview of the Government;
- (f) the Members of the PSSP trusted that the Government would act in their best interests both with respect to that portion of the member's salaries paid to the Government by way of contributions, and the ultimate pension to be paid to the Members of the PSSP;
- (g) all monies paid into the Plan by the Members of the PSSP and any monies required to be paid into the Plan by the Government, which it did not pay, could and were used by the Government for its own purposes.

THE PENSION BENEFITS ACT

14. *The Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, and its predecessor legislation provided, inter alia, for various rules and regulations governing the administration of pension plans generally and established a regulatory body to administer such pension plans to protect the rights of pension plan members. The Government's fiduciary duty together with its obligation to treat the Members of the PSSP fairly and equitably arises in part as a result of the Government's deliberate act in exempting the PSSP and its members from legislation promulgated by the Government to protect members of pension plans generally, which legislation included *The Pension Benefits Act*.

THE GOVERNMENT'S BREACH OF ITS OBLIGATIONS

15. The Government has breached its obligations, both contractual and fiduciary, to the Members of the PSSP, particulars of which are:

(a) Downsizing

Embarking on numerous programs to reduce the size of the public sector ("downsizing"), including Members of the PSSP, which activities had a negative impact on the Plan for the following reasons:

- (i) Certain individuals were able to retire and leave the PSSP earlier than provided for by the terms of their employment and as such their contributions to the Plan were less than anticipated and planned for:
- (ii) Those certain individuals were entitled to withdraw benefits from the PSSP at a much earlier age than was provided for by the terms of their employment thereby increasing the amount of monies that would be required to be paid to them because of their longer retired lives:
- (iii) Downsizing carried out in particular years dramatically increased the amount of pension payments extracted from the PSSP:
 - Following downsizing in 1983 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$24 million to \$33.2 million;
 - Following downsizing in 1984 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$33.2 million to \$43.1 million;
 - Following downsizing in 1986 pension payments extracted from the PSSP to those leaving the employ of the Government increased from \$44 million to \$65.7 million;

(b) Erroneous and Misleading Reports

The Government failed to properly account for, or account for in any fashion, the contributions being made to the Plan by the Members of the PSSP in such a manner which would make it possible for Members of the PSSP to make an informed decision as to whether they were, having regard to their contributions, being treated fairly and equitably by the Government. To the contrary, any reports prepared by the Government, or the agency retained by it to administer the PSSP provided reports the sole purpose of which were to downplay the effect of the contributions made by the Members

of the PSSP and illustrate, improperly and wrongfully, that there was a significant unfunded liability in the Plan. Any reports prepared by the Government made it impossible to determine if the Government was fulfilling its obligations to the Members of the PSSP. Examples of these reports included actuarial valuations completed for the PSSP in 1973 and 1978. These valuations did not portray a realistic assessment of the financial position of the PSSP. Annual Reports for the PSSP have been prepared up to and including the present time which are misleading and erroneous, and do not portray a realistic assessment of the financial position of the PSSP.

(c) Failure to Account for the Government's Required Contributions

In preparing the Annual Reports for the PSSP, and statements to the Plan's position, the Government did not include any calculation with respect to the matching contribution required to be made to the Plan by the Government. Notwithstanding, when a member transferred from the Plan to another pension plan, amounts were paid on behalf of that member reflecting not only the member's contributions, but the Government's notional matching contributions, including interest, which had never been paid into the Plan by the Government. These calculations and payments contribute to the significant unfunded liability in the Plan, a factor which was and is used by the Government as a justification for refusing any benefit enhancements to the Plan members;

(d) No New Entrants

In a plan such as the PSSP, new entrants are a critical and important source of funding. In closing the Plan to new members in 1977, the Government acted solely in its own interests and without any regard to the interests of the Members of the Plan. In particular:

- (i) The closing of the PSSP to new entrants together with the failure to establish a reasonable or any pension fund for the Members of the PSSP, led to the inevitable result of significant unfunded liabilities, which the Government now uses as a justification for refusing any additional benefits to the Members of the PSSP;
- (ii) The Government failed to provide the Members of the PSSP with adequate or any information in order that a member could make an informed decision as to whether the member should remain in the PSSP, or whether the

Government was fulfilling its obligations, both contractual and fiduciary, to the Members of the PSSP;

- (iii) Up to and including the time that the Plan was closed to new entrants in 1977, the members of the Plan had contributed in excess of \$100 million to the Plan. Up to and including that time, the Government had only contributed \$2.8 million;
 - (iv) In 1977, the last full year prior to the closing of the Plan to new entrants, employee contributions alone were such that they had been and were sufficient to pay all pension payments, refunds, lump sum payments and administrative and expenses costs of the Plan leaving a positive balance of approximately \$1.65 million;
 - (v) The 1979 Annual Report showed that over \$13.8 million was refunded or paid to Members, the majority of which was paid on behalf of individual members who transferred to the PEPP. The amount paid on behalf of those members included not only that employee's contributions but also an amount for notional matching contributions from the Government, notwithstanding that the Government had not made such contributions to the PSSP. There is no reflection in any annual report up until that time of any matching contributions or interest being paid into the Plan or credited to the account of the individual members by the Government.
- (e) Failure to Pay Regular COLA Increases

The Government failed to provide regular increases to the retirement benefits received by the Members of the PSSP, which was unfair and inequitable to the said Members of the PSSP, for the following reasons:

- (i) The decision to grant an increase was made arbitrarily and solely for political reasons and without regard to the Members of the PSSP and their contributions to the Plan;
- (ii) The increases were not consistent with increases provided by the Government to other government employees, and employees of its crown corporations;
- (iii) The increases were not based on any formula which related in any manner to increases in the Consumer Price Index.

[74] The claim for breach of fiduciary duty must raise sufficient facts that there was a fiduciary relationship between the members and the Government and that as a result the Government owed a fiduciary duty to the Members and that it breached its fiduciary obligations to the members of the PSSP.

[75] The concept of fiduciary has been considered by the courts on many occasions. Several relationships, in addition to the relationship between trustee and beneficiary, have been recognized as giving rise to fiduciary obligations. Justice LaForest in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 said the following at pp. 408-410:

... [O]ver the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a “fiduciary principle” which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J (as he then was) in *Guerin v. The Queen*, [1984] 2 SCR 335 at p. 384:

... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus employed becomes a fiduciary....

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added]

This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope of the exercise of some discretion or power; (2) that power or discretion can be exercised