IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***B.C. Nurses' Union et al v. Municipal Pension Board of Trustees et al,*** 2006 BCSC 132

Date: 20060126
Docket: S035595
Registry: Vancouver

Between:

BRITISH COLUMBIA NURSES' UNION, WENDY WURFLINGER, SHEILA BLAIKIE

PLAINTIFFS

And:

MUNICIPAL PENSION BOARD OF TRUSTEES, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA (MINISTRY OF FINANCE)

DEFENDANTS

Before: The Honourable Mr. Justice S.R. Romilly

Reasons for Judgment

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Date and Place of Hearing:	November 28, 29, 30, December 1, 2, 2005 Vancouver, B.C.
Supplemental Submissions Received:	January 6, 2006

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A. NATURE OF THE PROCEEDINGS

[1] The plaintiffs, Wendy Wurflinger and Sheila Blaikie, are retired nurses and members of the Municipal Pension Plan (the "Plan"). The plaintiff, British Columbia Nurses' Union (the "BCNU") is their former union. The Plan provides a pension and certain post-retirement group benefits to retired members of the BCNU and other retired public sector employees. These post-retirement group benefits include subsidized premiums for medical, extended health and dental plan coverage. From its inception until 2001, the Plan was sponsored and administered by the defendant, Her Majesty the Queen in Right of British Columbia (the "Province"). Since 2001, the defendant, Municipal Pension Board of Trustees (the "Board") has administered the Plan. Beginning in 2002, the coverage and premium subsidy levels of the post-retirement group benefits were reduced. These reductions were effected by B.C. Regulation 276/2002 and the Post-Retirement Group Benefit Rules, and lie at the heart of these proceedings.

[2] In this action for summary judgment pursuant to Rule 18A of the ***Rules of Court***, the plaintiffs seek a declaration that retired members of the BCNU acquired a vested right to receive post-retirement group benefits at the coverage and premium subsidy levels in force as of their date of retirement. Specifically, they seek declarations that:

> a. the post-retirement group benefits to which the BCNU retirees are entitled under the Municipal Pension Plan are vested and not subject to reduction; and
>
> b. B.C. Regulation 276/2002 made pursuant to the ***Public Service Benefit Plan Act***, R.S.B.C. 1996, c. 386 and the Post-

> Retirement Group Benefit Rules under the Joint Trust Agreement are, to the extent of their conflict with Schedule B to the ***Public Sector Pension Plans Act***, S.B.C. 1999, c. 44, and with the vested rights of the BCNU retirees, of no force and effect.

[3] Both the Board and the Province deny that the post-retirement group benefits constitute vested entitlements, and they characterize them as contingent benefits subject to available funding and open to modification. They concede, however, that neither had authority to interfere with vested rights, and that if the post-retirement group benefits are held to have vested, then the impugned amendments are invalid.

[4] The parties had agreed that in the event of an outcome in favour of the plaintiffs, they would address the issue of remedy separately at a later stage. That will not be necessary since, for the reasons stated below, the plaintiffs' action is dismissed.

B. FACTS

[5] The hearing of this matter proceeded on a comprehensive Agreed Statement of Facts appending numerous exhibits, and supplemented by affidavits from each of the individual plaintiffs. The nature of the issues raised compels a detailed review of these facts. For purposes of thoroughness, the Agreed Statement of Facts is appended as a schedule to these Reasons.

1. Overview of the Plan

[6] The Municipal Pension Plan provides pension and other benefits for employees of municipalities, hospitals, school districts and other eligible public sector employers. The Plan is self-described as a contributory defined benefit

pension plan. The parties take differing positions as to the legal implications of that description. The Municipal Pension Fund (the "Pension Fund") is the trust fund consisting of cash, investments and other assets held by the Board, as well as contributions from employers and Plan members and any other payments or funds received by the Board. The Plan has approximately 128,267 active members, 41,681 retired members, and 18,648 inactive members. It has over $16 billion in assets.

[7] Retired members of the Plan are eligible to receive certain post-retirement group benefits which currently consist of a Medical Services Plan ("MSP") subsidy, an Extended Health Benefit Plan ("EHB"), a Dental Plan and partial subsidies therefore.

[8] The Plan is administered by the Board pursuant to the following enactments and agreements:

a. the ***Public Sector Pension Plans Act***, S.B.C. 1999, c. 44, and regulations;

b. the Municipal Pension Plan Joint Trust Agreement (the "Joint Trust Agreement");

c. the Municipal Pension Plan Rules (2004) (the "Plan Rules"); and

d. the Municipal Pension Plan Post-Retirement Group Benefit Rules (the "Post-Retirement Group Benefit Rules").

2. History of the Plan

[9] The Plan and the Pension Fund (originally called the Superannuation Fund) were created in 1921 by the ***Superannuation Act***, S.B.C. 1921, c. 60. They have been continued over time under various enactments including the ***Municipal***

Superannuation Act, S.B.C. 1938, c. 55, the ***Municipal Superannuation Act***, S.B.C. 1958, c. 55, and the ***Pension (Municipal) Act***, R.S.B.C. 1979, c. 317.

[10] The current structure of the Plan is set out in the ***Public Sector Pension Plans Act***, S.B.C. 1999, c. 44, which received Royal Assent on July 15, 1999. Effective April 1, 2000, the Plan and Pension Fund provided for under the ***Pension (Municipal) Act*** were continued under Schedule B to the ***Public Sector Pension Plans Act*** and the regulation made pursuant to that Act, the ***Municipal Pension Plan Regulation***, B.C. Reg. 113/2000.

[11] Schedule B also contemplated that over time, the employers and employees with an interest in the Plan would assume joint responsibility for its administration through a joint trusteeship. Effective April 2, 2001, the Joint Trust Agreement was entered into between the Province, the Union of British Columbia Municipalities (the "UBCM") and the Health Employers Association of British Columbia on the one hand, and the Municipal Employees' Pension Committee (the "MEPC") on the other. The MEPC, in turn, is comprised of representatives from the Hospital Employees Union, the Canadian Union of Public Employees, B.C. Division, the Health Services Association of British Columbia, the plaintiff BCNU, the British Columbia Federation of Police Officers, the British Columbia Fire Fighters' Association and the Council of Joint Organizations and Unions. The MEPC is the Plan Member Partner, while the Province and the UBCM are together defined as the Plan Employer Partner.

[12] With the coming into force of the Joint Trust Agreement, Part 1 of Schedule B to the ***Public Sector Pension Plans Act***, which had continued the Plan and Pension Fund, was repealed and the transition to joint trusteeship was completed.

[13] Prior to the implementation of joint trusteeship, the rules governing the administration of the Plan were set out in various regulations, as will be discussed in detail later in these Reasons. Those rules were repealed and replaced, effective April 5, 2001, by the Municipal Pension Plan Rules enacted by the Board pursuant to Article 11 of the Joint Trust Agreement. Accordingly, as of that date, the Plan and the Pension Fund have been administered pursuant to the Joint Trust Agreement and the Plan Rules.

3. Administration of the Plan and Pension Fund

[14] Prior to the implementation of the Joint Trust Agreement, the Plan was sponsored and administered by the Province pursuant to the various statutes noted above. However, from as early as 1921 under the ***Superannuation Act***, groups of employees and employers were entitled to elect representatives to act in an advisory capacity to the Superannuation Commissioner (who was appointed by the Province to administer the Plan). The Municipal Employees Pension Committee was established in 1958 to represent Plan members in an advisory capacity.

[15] Nurses became eligible to join the Plan in 1959. The collective agreement between the Health Employers Association of British Columbia and the Nurses' Bargaining Association requires that regular employees covered by the collective agreement be covered by the provisions of the Municipal Pension Plan.

[16] In the fall of 1992, the Province initiated a review of the Plan. As part of the consultation process, a Municipal Pension Advisory Board was established to make recommendations to the Province regarding possible changes. It was composed of Plan member and employer representatives, and chaired by the Superannuation Commissioner, John Cook.

[17] In 1994, amendments to the ***Pension (Municipal) Act*** established the Municipal Pension Board which had authority to make recommendations to the Minister and the Treasury Board with respect to changes in benefits, funding policies, contribution rates, modifications to the Plan, and the budget of the Superannuation Commissioner. The Municipal Pension Board was composed of member representatives from the MEPC as well as employer representatives from the Province, the UBCM, and the Health Employers Association.

[18] The Municipal Pension Board had three committees: a Benefits Committee, an Employer Contribution Rate Committee, and a Regulations Committee. The mandate of the Benefits Committee was to "review the existing benefit structure of the plan, to identify new developments in the field of benefit provision, to make recommendations to the board on the adequacy of existing benefits and regarding consideration of new ones".

[19] When the ***Pension (Municipal) Act*** was repealed by the ***Public Sector Pension Plans Act*** in 1999, a new Municipal Pension Board was established under Schedule B of the latter Act. It was chaired by the Superannuation Commissioner who was the sole trustee of the Plan and the Pension Fund. This board was in turn

replaced by the defendant Board in 2001 upon the coming into force of the Joint Trust Agreement. That agreement established the current Board as the trustees and administrators of the Plan and the Pension Fund. Like the previous Municipal Pension Board, the current Board also has a Benefits Committee with a similar mandate.

[20] The Board is composed of 16 members, half appointed by member organizations and half appointed by employer organizations as dictated by the Joint Trust Agreement. The Board is also required by that agreement to retain the services of the B.C. Pension Corporation as the provider of administrative services for the Plan.

4. The Pension Fund

[21] The Pension Fund was created in 1939 as the Municipal Superannuation Fund.

[22] In 1993 the Pension Fund was restructured to contain four accounts:

a. the Basic Account;

b. Inflation Adjustment Account (“IAA”);

c. Retirement Annuity Account (“RAA”); and

d. Supplemental Benefits Account.

[23] This remains the basic structure of the Pension Fund and is set out in further detail in s. 75 of the Plan Rules.

[24] The Basic Account provides monthly pensions, including previously granted indexing, and is funded from employer and member contributions. Employees

contribute a set percentage of their salaries and employers contribute at varying rates depending on the mix of employees in the group classifications specified by the Plan.

[25] The IAA provides for future indexing on a contingent basis. Each year if members' pension payments are adjusted for current indexing, monies are transferred from the IAA to the Basic Account to cover the present value of all future payments arising from the current indexation supplements. Historically, if monies in the IAA were sufficient, indexation supplements equal to the previous year's rate of consumer inflation were granted to members. If the assets in the IAA were not sufficient to cover the present value of a future payment equal to the rate of inflation, retired members obtained a partial indexation supplement equal to the amount that could be funded from the IAA.

[26] The IAA is funded by contributions from employers and members, from the investment income that it earns on its own assets, and from excess interest earned in the Basic Account. Employees contribute 1% of salaries and employers contribute an amount equal to 1% of salaries (pensionable earnings) payable to active Plan members, less amounts allocated to the Supplemental Benefits Account.

[27] The RAA contains extra contributions by employers and certain members under special agreements. Monies are transferred at retirement from the RAA to the Basic Account as additional pensions are purchased.

[28] The Supplemental Benefits Account is used to pay supplemental benefits such as benefits which exceed Revenue Canada limits and post-retirement group

benefits. It is funded from a portion of the employer and Plan member payments that would otherwise be allocated to the Basic Account and the IAA. Post-retirement group benefits are funded from the employer contributions of 1% of salaries of active members that would otherwise be allocated to the IAA and, in the case of MSP premiums, from employer contributions that would otherwise be allocated to the Basic Account.

[29] Under s. 8(1) of the Post-Retirement Group Benefit Rules, the Supplemental Benefits Account is structured as a flow through account that does not accumulate funds or assets. This is in contrast to the IAA which accumulates assets and for which a separate investment trust fund exists. As group benefit costs are billed to the Plan on a monthly basis, the amount of the costs and the amount of funding required, net of premiums collected from retired members, is recorded in the Supplemental Benefits Account.

5. Post-Retirement Group Benefits

a. General Background and History

[30] Post-retirement group benefits generally comprise health and welfare benefits provided under group insurance contracts, often on a subsidized basis. Some components of the Plan are registered under the ***Income Tax Act*** while others are not. Post-retirement group benefits cannot be provided out of a registered pension plan under the ***Income Tax Act*****.**

[31] The cost of providing post-retirement group benefits is a function of various factors:

a. the proportion of the premium funded by the beneficiary/member;

b. deductibles, co-payments and maximum coverage, if any;

c. cost and utilization of procedures and drugs covered;

d. coverage provided by government-sponsored universal health, pharmaceutical and dental plans;

e. other coverage issues (e.g., coverage of out-of-country care); and

f. the number of retirees.

[32] Factors (a), (b) and (e) are under the control of the designer of a plan of post-retirement group benefits; factors (c), (d) and (f) are not.

[33] The funding available for post-retirement group benefits depends on whether they can be paid for out of accumulated assets or are strictly pay-as-you-go. If they are pay-as-you-go, funding is a function of rates of contribution, number of active employees and salary levels. If they can be paid for out of accumulated assets, funding is a function of these factors and investment returns.

[34] Post-retirement group benefits were first introduced into the Plan in 1973. Members could elect to have 50% of their MSP premiums paid from their pension and the other 50% paid for by employer contributions.

[35] In 1994, the Plan was amended to include an Extended Health Benefits Plan ("EHB Plan"). Premiums for the EHB Plan and for MSP were subsidized up to 100% depending upon years of service. In 1996, a dental plan was added. Again, levels of subsidy up to 100% were determined by years of service.

[36] Between 1996 and 2000, various changes to the EHB and Dental Plans were made as a result of public service collective bargaining. These changes amounted to overall improvements to the benefits available under the plans.

[37] Beginning in 2001, however, the Board became aware of the significant increase in the cost of providing the post-retirement group benefits. As a result, in 2002, the maximum subsidy for MSP premiums was reduced from 100% to 50%. Effective January 2004, the maximum subsidy for EHB and Dental Plan benefits was reduced from 100% to 50% with corresponding reductions at all levels of service. In addition, coverage under the plans was also reduced. These changes are the subject of this proceeding.

b. Overview of Parties' Positions

[38] The background to and legislative history of the post-retirement group benefits are central to the analysis in this case. Before embarking upon a detailed review, I propose to briefly summarize the parties' core submissions in order to provide context for the dense thicket of facts that follow.

[39] The plaintiffs rely quite substantially on the language of the various legislative enactments that create and define the Plan and the post-retirement group benefits in submitting that these benefits vested. They say that where the Legislature intended particular entitlements to be contingent or limited in some fashion, they used appropriate language to communicate that intention. In contrast, there is no such limiting language with respect to the post-retirement group benefits, which, they note, are provided within the context of a defined benefit plan. Further, trust

principles apply to statutory pension plans, including the principle of irrevocability. The plaintiffs point to the absence of any reservation of authority to amend or revoke the benefits in the legislative enactments and Trust Agreement in submitting that they cannot be unilaterally reduced or revoked.

[40] The defendants submit that the post-retirement group benefits would never have been conferred had they been understood to constitute a vested entitlement. (Although the Board and the Province made independent submissions, there is considerable overlap between them and, accordingly, I largely address their positions collectively.) Such an entitlement would have contradicted the Province's stipulation during the consultation process that any improvements in benefits provided under the Plan occur without an increase in employer contributions and an adverse effect on the financial solvency of the Plan. This, they say, was understood by the employee groups involved, including the BCNU.

[41] The Board submits that it is apparent from the legislative history that since the inception of the post-retirement group benefits, the governing language in the various enactments has been permissive rather than mandatory, with the exception of Schedule B of the ***Public Sector Pension Plans Act***. When first implemented, the post-retirement group benefits were within the sole discretion of the Province. As of January 1, 2004, the benefits were within the sole discretion of the Board. This is antithetical to the plaintiffs' claim that the benefits vested.

[42] The Province stresses the limited source of funding for the post-retirement group benefits. The enabling legislation provided that coverage, subsidy and other

design features of the benefits would be determined by the Superannuation Commissioner, subject to Cabinet approval, and set out in subordinate legislation. The enabling legislation contained a limitation that the benefits be paid for out of a fixed amount of annual funding from employers to the IAA. That account funded inflation protection which was a contingent, not vested, benefit. Since it necessarily follows that coverage was subordinate to funding, the post-retirement group benefits could not have vested.

c. Detailed Review

[43] Post-retirement group benefits were first introduced into the Plan in 1973 under the ***Municipal Superannuation Act***. Members could elect to have 50% of their MSP premiums paid from their pension and the other 50% paid for by employer contributions.

[44] In the fall of 1992, the Province initiated a dialogue with representatives of the four statutory public sector pension plans to canvass issues such as plan governance, investment of plan assets, plan funding and benefit improvements. The review included government and Plan member representatives, collectively referred to as the “Municipal Pension Advisory Board”. In December of that year, Glen Clark, then Minister of Finance, and Lois Boone, then Minister of Management Services, met with John Cook, the Superannuation Commissioner and employee representatives for the major public sector pension plans. The purpose of the meetings was to establish the scope of the consultations and review. Mr. Clark and Ms. Boone communicated, on behalf of the government of the day, that the Province was prepared to consider benefit improvements only if they:

a. did not increase the unfunded liabilities of the statutory plans; and

b. did not increase employer contributions.

[45] The MEPC held meetings to develop recommendations for the Plan and to discuss proposals coming from the Municipal Pension Board. The MEPC's priorities for changes to the Plan included post-retirement group benefits.

[46] The Office of the Superannuation Commissioner oversaw the drafting of a Treasury Board submission, dated November 19, 1993 (Submission No. 23/94), which outlined a proposed policy framework for dialogue. The proposed policy framework for government representatives in the discussions included the following:

a. the funding of the pension plans was not to be weakened by liberalizing the actuarial basis in order to provide more benefits from the current asset base (as was being proposed by some member representatives); and

b. IAA assets could be used as a source of funding for new basic benefits, so long as the government was provided written assurances from plan member representatives that the government bore no additional financial obligations for pension indexing as a result of such re-deployment of assets.

[47] The Treasury Board approved the recommendations set out in that submission as a strategy for managing public sector pension plan benefits and funding issues.

[48] In January 1994 the Municipal Pension Advisory Board submitted a consensus report to the Province entitled "Report on the Municipal Pension Plan". That Report recommended making additional MSP premium subsidies and EHB available to Plan members. It reiterated that there was "general agreement that

many of the benefit improvements identified … can be funded without violating the constraints imposed by the Ministers". As noted above, those constraints were that any proposals not increase the Plan's unfunded liabilities or increase the employers' required contributions. Instead, the Report proposed to square the circle by loosening the purposes for which employer contributions to the IAA could be used to include post-retirement group benefits:

> …We believe that the benefit changes we are recommending where consensus has been reached can be financed through an increase in the valuation interest rate assumption from 6.5% to 7.5%, and in some cases through the payment of improved benefits directly from the IAA.
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> Since it was established in 1982, the IAA has provided full indexing on pensions even though full indexing is not guaranteed in the Plan. In addition, the IAA has developed a substantial account balance. As of December 31, 1992, this balance was $747 million. The original design of the IAA did not contemplate the accumulation of a significant asset base in the IAA. These assets themselves now generate returns that represent a substantial funding source. There is certainly sufficient funding to the IAA to provide full inflation protection for many years to come. Should inflation return to historical levels, however, the IAA will not provide full inflation protection in perpetuity.
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> …
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> Payment of new benefits directly from the IAA constitutes a reallocation of a portion of the inflation protection benefit to the provision of other types of financial protection.
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> It should be noted that even with the proposed changes to the IAA, there is sufficient funding to provide full inflation protection for many years to come. …
>
> We recognize that these changes would have the effect of amending the agreement on the IAA that was developed in 1981 and that a measure of inflation protection is being given up. The Board understands that inflation protection is not guaranteed and that at some future point, should there be insufficient funding to provide full indexing, inflation protection will only be provided to the extent possible from the funds available from the IAA. Both plan member and government representatives understand and accept these facts.

[49] The Municipal Pension Advisory Board recommended that "the additional payments required for increased MSP and EHB premiums (Recommendation 5) be financed from employer contributions to the Inflation Adjustment Account".

[50] An appendix to the Report addressed in slightly more detail how the new proposal would impact the IAA. It concluded with the following caution:

> Over the short term, there are likely sufficient funds to provide the additional benefits to pensioners that have been recommended, as well as providing basic inflation protection. Should high levels of inflation return for an extended period, such that the existing asset base is eroded, plan members may eventually have to choose between paying more for benefits, reducing the benefits provided or identifying the priority for payment of benefits subject to the availability of funding.

[51] The Office of the Superannuation Commission oversaw the drafting of a further Treasury Board Submission No. 36/94 dated January 31, 1994 that recommended approval of the proposals set out in the January 1994 consensus report of the Municipal Pension Advisory Board, as well as similar proposals put forward by the boards of the other public sector pension plans. The Submission noted the following with respect to the financing of the proposed benefit improvements:

> The pension boards recommend that the benefit changes be financed within exiting contribution levels, by re-allocating assets now earmarked for pension indexing, or by paying for the benefit improvement directly from the Inflation Adjustment Account. This recommended financing arrangement ensures that the plans' contribution requirements and unfunded liabilities will not rise as a result of the benefit changes. The pension board reports contain an acknowledgement and acceptance by the plan member representatives of the negative implications this re-allocation and additional use of assets could possibly have at some time on future indexing levels.

[52] Cabinet considered Treasury Board Submission No. 36/94 at its meeting held on March 2, 1994 but deferred any decision until receiving a report from the Plan's actuary. That report was provided on March 24, 1994. The actuary had been asked to confirm that the Board's recommendations for benefit and financing changes to the Plan were within the financial constraints that had been set by government. No member of the MEPC recorded an objection to the assumptions in that opinion. One of those assumptions was the following:

> The proposed changes to the group insurance arrangements (benefit item 5) and the indexing provisions (benefit item 6) are to be financed from contributions and assets currently earmarked for the Inflation Adjustment Account. Our regular actuarial valuations have generally been concerned only with the benefits provided from the Basic Account; the Inflation Adjustment Account has been ignored on the presumption that future indexing supplements financed by it will be limited, if necessary, by the extent of the available assets; thus, future indexing should not generate additional unfunded liabilities in the Basic Account. Accordingly, we have continued to restrict our attention to the Basic Account, and have neither costed the proposed changes nor made any projections of the impact of these changes on future indexing levels within the current financing structure.

[53] The actuarial report concluded that overall, the proposed financing changes provided reasonable assurance that contribution rates would not have to be raised in future to finance the recommended changes to the Plan's basic benefits in accordance with current funding policy.

[54] Following receipt of the March 24, 1994 actuarial report, Cabinet approved the changes to the Pension Plan as proposed in the January 1994 report of the Municipal Pension Advisory Board and recommended in Treasury Board Submission No. 36/94. Cabinet's decision was communicated in a memorandum dated April 20, 1994:

> Cabinet received confirmation from the plans' actuary that the proposed benefit improvements are within the financial constraints set by government, i.e., there will be no increase in unfunded liabilities and no increase in the employer's required contribution rate. Given this assurance, Cabinet approved amendments to the four statutory, public sector pensions plans:
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> ...
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> - to make the benefit improvements recommended by Treasury Board Staff, based on proposals from the interim pension boards for each of the four plans. The benefit enhancements will be funded from the plans' inflation adjustment accounts. [emphasis in original]

[55] Following the decision to approve the addition of post-retirement group benefits to the Plan, the ***Pension (Municipal) Act*** was amended to authorize the Superannuation Commissioner, with the approval of the Lieutenant Governor in Council, to make regulations prescribing group benefit entitlements to be paid out of the 1% of salaries employers were required by the ***Act*** to pay into the Inflation Adjustment Account. As a result of the amendments, s. 39 of the ***Pension (Municipal) Act*** read, in part, as follows:

> The Commissioner, subject to the approval of the Lieutenant Governor in Council, may make regulations, including those:
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> …
>
> (m) prescribing group benefit entitlements which may be provided for pensioners, including extended health plans and dental plans;
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> (n) prescribing terms and conditions under which the group benefit entitlements referred to in paragraph (m) may be provided and funded from employer contributions under section 4.1(1)(g);
>
> (o) prescribing the terms and conditions under which coverage under the Medical Services Plan of British Columbia may be funded from employer contributions under section 4.1(1);
>
> …

[56] Section 4.1(1)(g) of the ***Pension (Municipal) Act*** provided that participating employers were to contribute to the IAA an amount equal to employee contributions to that account. Employee contributions, in turn, were set at 1% of salary.

[57] In August 1994, the Public Service Employee Relations Commission wrote to Legislative Counsel explaining that under amendments to the relevant legislation, Extended Health Care benefits had been extended to pensioners under three statutory pension plans including the ***Pension (Municipal) Act***. The Commission proposed a subsidy schedule and draft language, neither of which were incorporated into the actual Regulation. In describing the proposed premium subsidies for each group benefit, the Commission proposal contained the following sentence adapted to each benefit, "[t]he member will pay the percentage of the … premium, this maybe [sic] as amended from time to time, as set out in the following table…".

[58] Pursuant to the new powers under s. 39 of the ***Pension (Municipal) Act***, the Superannuation Commissioner, with the approval of the Lieutenant Governor in Council, enacted the ***Pension (Municipal) Regulation***, B.C. Reg. 499/94 in 1994 which set out the mechanism by which EHB and further MSP premium subsidies would be made available to retired Plan members. That regulation provided that, from July 1, to December 31, 1994, 100% of the applicable premiums would be paid from employer contributions. Thereafter, the full amount of the premium would be provided from employer contributions or the member's superannuation allowance, or both, in accordance with regulations made under the ***Public Service Benefit Plan Act***. The regulation also provided, with respect to extended health benefits, that "100% of the amount required to be paid from employer contributions to the fund …

must be provided from employer contributions under section 4.1(1)(g) of the Act" (that is, contributions of 1% of member salaries that would otherwise be paid to the IAA).

[59] Consistent with that stipulation, the Lieutenant Governor in Council enacted the ***Pensioner Group Benefit Funding Regulation***, B.C. Reg. 141/95 pursuant to ss. 3 and 6 of the ***Public Service Benefit Plan Act***, effective March 30, 1995. Section 3 of the Act as it read in 1994 at the time of the enactment of the regulation provided:

> 3. Subject to this Part, the Lieutenant Governor in Council, or the persons or committees the Lieutenant Governor in Council appoints,
>
> b. shall determine the terms and conditions to be included in a contract made under this Part;
>
> c. shall determine and establish the rates and methods of contribution toward payment of premiums to be made by persons insured under a contract made under this Part, and different rates and methods of contribution may be determined and established for different groups of persons.

[60] The contracts referred to are insurance contracts.

[61] Section 6 read:

> 6(1) The Lieutenant Governor in Council may make regulations to carry out this Part.
>
> (2) Without limiting the generality of subsection (1), the regulations may
>
> a. prescribe conditions to be met by a person who wishes to elect to be excluded from any or all contracts entered into under this Part; and

b. define or identify the composition of groups of persons referred to in section 3(b).

[62] The ***Pensioner Group Benefit Funding Regulation*** established the premium subsidy levels for MSP and EHB plans, which varied based on years of service:

MSP

a. less than 2 years, 0% subsidy;

b. 2 – 5 years, 50% subsidy, and

c. 5 or more years, 100% subsidy.

Extended Health Benefits

a. less than 2 years, 0% subsidy;

b. 2 – 4 years, 50% subsidy;

c. 4 – 6 years, 60% subsidy;

d. 6 – 8 years, 70% subsidy;

e. 8 – 10 years, 80% subsidy;

f. 10 or more years, 100% subsidy.

[63] Also in 1995, the ***Municipal Pension Plan Group Benefit Regulation***, B.C. Reg. 142/95 was enacted under the authority of s. 39 of the ***Pension (Municipal) Act***. It contained three sections. The first set out the specific contracts under which the MSP and extended health plans would be provided. The second provided that the terms and conditions under which those benefits would be provided were as set out in those contracts. Finally, it described the funding mechanism:

3. Employer contributions under section 4.1(1)(c) to (f) [basic employer contributions according to a formula] of the ***Pension (Municipal) Act*** must pay cost of coverage for the group benefit

> entitlements described in section 1, except insofar as a pensioner is required by regulation under the ***Pension Service Benefit Plans Act*** to contribute toward these premiums.

[64] As a result of these changes, approximately 25% of the employers' contributions to the IAA were diverted to pay premiums for EHB and MSP.

[65] After the 1994 reform, the MEPC representatives on the Board proposed a Dental plan benefit to be paid by diverting further employer contributions to the IAA. Before it was implemented, John Cook did a review of the future financial status of the IAA under various assumptions, including whether the Dental plan benefit would be introduced or not. His report, entitled "Municipal Pension Plan: Inflation Adjustment Account Projections for the 22 Year Period 1994 – 2015", was distributed to all the members of the Board, including the MEPC representatives. No member of the Board recorded an objection to the assumptions in the report that the Dental plan benefit could be revoked if renewed inflation made it necessary.

[66] The Board was unable to agree on a proposal to provide dental benefits under the Plan, thus the issue was put before the Treasury Board for determination. John Cook, as chair of the Advisory Board, prepared a Submission to the Treasury Board dated February 6, 1996. In describing the background to the situation, he explained:

> Following establishment of the Municipal Pension Board, plan member representatives, acting on a motion from their Municipal Employees' Pension Committee, have requested the same retiree dental benefits that were approved for the other plans. As with the other plans, dental benefits would be funded from the Plan's Inflation Adjustment Account. Details are provided in Attachment A.

> Board members reached consensus on two underlying issues (that the account's primary purpose is to provide inflation protection and that there is an ongoing need to monitor the health of the Inflation Adjustment Account). However, other members of the Municipal Pension Board have not endorsed the proposal by plan member representatives to provide retiree dental benefits. Government representatives have refrained from making a specific recommendation, while the UBCM representative is not in favour of the proposal.
>
> Government representatives did not express support for the proposal because of concerns the Inflation Adjustment Account may not have adequate funding to provide both a dental plan and inflation protection on a long term basis. Government members expressed concern that there is significant risk the provision of this additional benefit would unfairly shift benefits from future to present retirees. Projections presented to the board suggest that under unfavourable, but not improbable, circumstances, the provision of a dental plan would exhaust the Inflation Adjustment Account several years earlier than would otherwise be the case and would shift the balance of benefits received in favour of the present generation of retirees.

[67] Under the heading "Discussion", the submission continued:

> Plan member representatives recognize both the need for adequate financial monitoring and the fact that if money is not available from the Inflation Adjustment Account, benefits will have to be reduced. For them the key issue is whether municipal retirees should be denied a benefit provided in other plans.
>
> The issue of financial monitoring is not unique to the Municipal Pension Plan. The ability of the plan to provide indexing protection is estimated to lie between that of the Teachers' Pension Plan which is less able and the ability of the Public Service Pension Plan which is more able to do so. One larger question which may need to be addressed is government's overall position with respect to retiree medical and dental benefit funding.
>
> There is no cost to government for this proposal as benefits would be provided from existing funds. Plan member representatives understand and accept that provision of a retiree dental plan may reduce the ability of the plan to provide inflation protection. …

[68] The Treasury Board approved the proposal for a Dental Plan and communicated that decision to Mr. Cook in a letter dated April 29, 2966. In overruling the employer representatives and the UBCM, the Treasury Board stated:

> In response to concerns raised by the Union of British Columbia Municipalities and government representatives about the ability of the Inflation Adjustment Account (IAA) to provide inflation indexing, Treasury Board requests that you ask each of the four pension boards to undertake a more detailed analysis of the financial health of their IAA and to establish rules to guide them in deciding when remedial action is required before an IAA is exhausted.
>
> As you are aware, inflation protection and the provision of benefits from IAA contributions are not in any way guaranteed. Treasury Board would also request that you stress to all four boards that decisions on benefits and annual adjustments for inflation should take into consideration the long term health of the IAA. The onus is on each of the boards to ensure equitable treatment to all plan members, present and future.

[69] Dental Plan coverage was added to the Plan by way of amendments to the ***Municipal Pension Plan Group Benefit Regulation*** and the ***Pensioner Group Benefit Funding Regulation*** (B.C. Regs. 150/96 and 151/96 respectively). B.C. Reg. 151/96 provided the following subsidy schedule for dental benefits based on years of service:

a. Less than 2 years of service, 0% subsidy,

b. 2-4 years of service, 20% subsidy,

c. 4-6 years of service, 40% subsidy,

d. 6-8 years of service, 60% subsidy,

e. 8-10 years of service, 80% subsidy,

f. 10 years or more, 100% subsidy.

[70] In 1996 and 1997, changes resulting from public service collective bargaining were extended to the EHB and Dental Plans. These included:

a. an increase for registered clinical psychologist fees;

b. reduction in eligibility for minor dependents at 19 years of age instead of 21 unless the dependent was in full time attendance at a post-secondary institution;

c. an increase to the maximum payable for hearing aids;

d. an end to coverage under the Dental Plan 30 days after the pension ceased if the pensioner or dependent beneficiary was still alive;

e. an increase to the lifetime EHB benefits;

f. an increase to the coverage for breast prosthetics;

g. an increase to the maximum for corrective lenses; and

h. harmonization of the drug reimbursement portion of the EHB Plan with Pharmacare.

[71] Further changes were made to the EHB contract in 1999 and 2000, including:

a. increases in the maximum claims for acupuncture and hearing aids; and

b. a decrease in the maximum claim for registered clinical psychologists.

[72] The EHB and Dental Plans are provided pursuant to contracts with third party carriers, currently Pacific Blue Cross.

[73] The ***Pension (Municipal) Act*** was replaced by the ***Public Sector Pension Plans Act*** in 1999. Section 16(1)(h)(v) of Schedule B provided that the Lieutenant Governor in Council, on the recommendation of the Board, may make regulations "respecting benefits including…post retirement group benefits, and the type and

level of benefits, entitlement to benefits, terms and conditions of how benefits are provided and funded, and how and by whom they are funded".

[74] Part 2 of Schedule B to the ***Public Sector Pension Plans Act*** authorized the Joint Trust Agreement that was subsequently entered into effective April 2001. Section 18(4) of the Act mandated that the pension plan provide for certain elements:

> The pension plan continued under the agreement must provide for all of the following:
>
> …
>
> d. eligibility to receive a benefit and the determination of the amount of that benefit;
>
> …
>
> f. post retirement group benefits;
>
> …
>
> j. continued recognition of any rights vested in a plan member or beneficiary, in the same manner and to the same extent as provided under the pension plan;
>
> …

[75] The type and level of the benefits, and the funding mechanism were not stipulated.

[76] Section 9(1) of Schedule B continued the Municipal Pension Fund. Section 9(4) provided that benefits and disbursements be paid out of the Pension Fund which, for that purpose, was to be considered one and indivisible:

> 9(4) Benefits and disbursements payable under this Schedule and the pension plan rules must be paid from the pension fund and,

> for this purpose, the pension fund must be considered one and indivisible.

[77] B.C. Reg. 113/2000, effective April 1, 2000, repealed the ***Pension (Municipal) Regulation*** and the ***Municipal Pension Plan Group Benefit Regulation***. It also set out the ***Municipal Pension Plan Regulation***, which constituted the pension plan rules. Section 91 set out the contract carriers. Sections 92 to 94 described the eligibility requirements for the Dental Plan, EHB Plan and MSP respectively. Section 92, for instance, read:

> If a retired member
>
> (a) applies for and is enrolled in, or continues to be enrolled in, the dental plan provided through the contract carrier under the ***Public Service Benefit Plan Act***,
>
> (b) commences to receive or is in receipt of a pension, the amount of which is sufficient to pay for any portion of the dental plan premium which the member may be required to pay, and
>
> (c) elects or has elected, in writing to the plan administrator, to have the monthly premium payable to the dental plan,
>
> the plan administrator must pay to the dental plan carrier the fees or costs required by the contract for dental care, and that amount must be funded by employer contributions to the pension fund in accordance with section 95 or by the monthly premium deducted from the member's pension, or both, in accordance with regulations made under the ***Public Service Benefit Plan Act***.

[78] Section 95, which is referenced in the section, provides:

> 95(1) Amounts under sections 92 and 93 that are required to be paid from employer contributions to the supplemental benefits account must be provided from employer contributions under section 6(1)(c).
>
> (2) Amounts under section 94 that are required to be paid from employer contributions to the supplemental benefits account must be provided in the following manner:

(a) 50% must be provided from employer contributions under section 6(1)(a) and (b);

(b) 50% must be provided from employer contributions under section 6(1)(c).

[79] Section 6(1)(c), in turn, refers to the employer's requirement to pay to the pension fund "1% of the aggregate of all salaries payable during that pay period to active members".

[80] Premium subsidy levels remained determined by regulation made under the ***Public Service Benefit Plan Act***.

[81] Beginning in 2001, the Board became aware of the significant increase in the costs of providing post-retirement group benefits. This increase was due to a number of factors including rising drug costs, the growing number of retirees and the increasing costs of claims per member. In addition, certain changes implemented by the Province contributed to the escalating costs, including:

a. Effective May 1, 2002, the Province increased the premiums for coverage under MSP by 50% for everyone in British Columbia;

b. Effective January 1, 2002 , Pharmacare coverage for prescription drugs was reduced with additional changes to Pharmacare implemented effective May 1, 2003; and

c. Effective January 1, 2002, MSP coverage for para-medical services (chiropractic, naturopathy, massage therapy and physiotherapy) was eliminated.

[82] In April 2002, the Board was provided with actuarial projections by Hewitt Associates indicating that unless changes were made to the post-retirement group benefits, the cost of providing those benefits would exceed the funding available from the employer contribution of 1% of salaries of active members by 2003. The

report also projected the financial impacts of various possible changes to the plan, such as introducing plan deductibles, decreasing subsidy levels, establishing internal contract limits or conditions, eliminating certain areas of coverage and introducing additional plan funding through employee contributions in some fashion.

[83] The Board's Benefit Committee requested a meeting with the Plan Partners to discuss increasing contribution rates or other alternatives to protect group benefits. The then Minister of Finance, Gary Collins, replied in a letter to Mr. Cook dated September 20, 2002 in which he agreed to a meeting with the Plan Partners so long as "the trustees of public sector pension boards understand that government cannot provide additional sources of funds with which to absorb these cost pressures".

[84] A meeting of the Plan Partners was held on November 21, 2002. The Plan Partners requested the Board to review all realistic options for addressing the funding shortfall issue. The Benefits Committee and the Board undertook an extensive review and consideration of available alternatives. As part of this review, they were provided with actuarial projections and studies that considered various design options for the post-retirement group benefits.

[85] In July 2002, the Board had recommended to the Lieutenant Governor in Council that it enact regulations to change the MSP premium subsidies as follows:

a. Under 2 years, 0 %,

b. 2-5 years, 25%,

c. 5 or more years, 50%.

[86] These changes were made effective November 1, 2002 by B.C. Reg. 276/2002.

[87] The remaining 50% MSP subsidy for Plan members with more than five years of service is paid from employer contributions that would otherwise be intended for the Basic Account. As set out in s. 8(2) of the Post-Retirement Group Benefit Rules, the funds necessary to pay for the 50% MSP subsidy are deducted from employer contributions, allocated to the Supplemental Benefits Account and then paid to the Medical Services Plan.

[88] The Benefits Committee held a meeting on October 21, 2003 at which the funding of the remaining 50% subsidy was discussed. It recommended that the Board request that the Plan partners grant it discretion to adjust the allocation of contributions between the Basic Account and the IAA as needed to cover the cost of MSP premiums out of the IAA so as to bring the Plan into compliance and avoid an increase in contribution rates.

[89] In October 2003, the ***Pension Statutes Amendment Act, 2003***, S.B.C. 2003, c. 62, transferred full authority to the Board to determine matters relating to post-retirement group benefits. Part 2.1 was added to Schedule B of the ***Public Sector Pensions Plan Act***. For ease of reference, it reads in its entirety as follows:

Part 2.1 Post Retirement Group Benefits

18.1 In this Part, “retired plan member” means a person who is receiving a monthly pension benefit from the pension plan, including a person who receives a pension following the death of a plan member, but does not include a limited member as defined in the ***Family Relations Act***.

18.2 Any portions of an insurance contract made under the ***Public Service Benefit Plan Act*** that related to retired plan members are continued under this Part for the benefit of retired plan members, as if made by the municipal board under the authority of this Part.

18.3(1) Subject to any limits set by the partners in or pursuant to the joint management agreement referred to in section 18(2), the municipal board may sponsor a program of post retirement group benefits for retired plan members and their dependents.

(2) Insurance under this section may be provided directly or by entering into contracts of insurance.

(3) A contract under this section may be a contract under which the insurer assumes the risk or under which the municipal board assumes the risk and under which the insurer disburses benefits and generally manages a scheme of insurance on the municipal board's behalf.

(4) The municipal board may determine the following:

a. the type and level of post retirement group benefits;

b. the eligibility to receive post retirement group benefits;

c. the terms and conditions of how post retirement group benefits are provided;

d. the rate of contribution toward payment of any premium required to be made by retired plan members and the methods by which those contributions can be made;

e. the rate of contribution toward payment of the cost of post retirement group benefits required to be deducted from employer contributions to the pension plan and the methods by which those contributions can be made;

f. any other matter necessary or advisable to provide post retirement group benefits.

(5) For the purpose of subsection (4)(d), the municipal board may determine different rates of contribution for different groups of persons.

(6) Despite the ***Pension Benefits Standards Act***, with the retired plan member's consent, the municipal board may deduct the required premiums for any post retirement group benefits provided under this section from the person's monthly pension benefit.

18.4 Despite section 1(8) of the ***Pension Benefits Standards Act*** and section 3(b) of this Act, the ***Pension Benefits Standards Act*** does not apply to post retirement group benefits provided pursuant to this Schedule.

[90] After authority to administer group benefits was transferred to the Board, it enacted the Plan Rules and the Post Retirement Group Benefit Rules which reduced the post-retirement group benefits. Effective January 1, 2004, the Post-Retirement Group Benefit Rules, made under Article 11 of the Joint Trust Agreement, amended the EHB and Dental Benefits subsidy schedule to the following:

a. Under 2 years, 0%,

b. 2-4 years, 15%,

c. 4-6 years, 30%,

d. 6-8 years, 45 %,

e. 8-10 years, 60%,

f. 10 or more years, 75%.

[91] At the same time, there were changes to the EHB and dental benefits coverage, including:

a. an increase in the deductible from $25 to $100,

b. elimination of out-of-country coverage,

c. coverage made available for members living outside B.C. but within Canada,

d. an increase in the lifetime claim maximum,

e. a cap on claims for paramedicals,

f. a decrease from 75% reimbursement to 70% reimbursement for the Dental Plan,

g. a change in the recall period in the dental plan from six months to one year.

[92] The introduction to the Post-Retirement Group Benefits Rules described the post-retirement group benefits in the following terms:

> Post-retirement group benefits are contingent benefits and are subject to the availability of funding. Coverage for these benefits can be increased, decreased or eliminated at the discretion of the Municipal Pension Board of Trustees.

[93] Plan Members were consulted about the proposed changes through their MEPC representatives on the Board. The BCNU recognized the funding problems faced by the Board and the concomitant need to take action with respect to the post-retirement group benefits. The Minutes of a June 2002 BCNU Council meeting, for example, note the following on the issue:

> There are insufficient funds in the account to pay for group benefits and for inflation adjustment. Pension money is used for pensions but 1% of that is taken for inflation adjustment account for benefits and they are running out of money. This problem must be fixed. There is a surplus from the last evaluation.
>
> Recommendation is not to go to co-insurance groups as it is the least preferred method. Need to discuss where we go with benefit reduction. Have had many preliminary discussions on this and the principles involved. Narrowed it down to five things as outlined in the report. Want to shift the burden to the government.

[94] The Council approved a recommendation, to be taken to the Board, that the Board make changes to the post-retirement group benefits, including "raising a deductible for Extended Health benefit" and "charging the retiree for some portion of the premium for some or all benefits (MSP, EX, Dental)."

[95] A BCNU Pensions Committee Report to Convention 2002 noted the following:

> Members' basic pension benefits are vested and therefore subject to pension legislation and jurisprudence associated with vested rights.
>
> Other benefits, such as inflation protection and extended health, dental and Medical Service Plan coverage are not guaranteed. The board monitors the financial ability to continue to provide these benefits on an ongoing basis.

6. Communications with Members

[96] From time to time, the Superannuation Commission and subsequently the B.C. Pension Corporation published and distributed informational material regarding the Plan. Some documents referenced post-retirement group benefits as being contingent; others were silent on the issue:

a. "Guidelines - Staff Responses to Member Enquiries Re: Medical Benefits" (December 20, 1994) contains no statement that post-retirement group benefits are limited;

b. "Municipal Pension Plan: Plan Member Booklet" (July 1994 and June 1999) contain no statement that post-retirement group benefits are limited;

c. "A Guide for Plan Members: Everything you need to know about your pension plan" (2000) – in the discussion of health care coverage, the document states that post-retirement group benefits are not guaranteed features of the Plan;

d. Winter 2001 B.C. Pension Corporation newsletter contains no statement that Post-Retirement Group Benefits are limited;

e. "Extended Health Benefits Plan for Pensioners" booklet – the August 1999 version contains no statement that post-retirement group benefits are limited. The May 2001 version states that extended health benefit coverage is a contingent benefit;

f. "Dental Benefits Plan for Pensioners" booklets – the October 1998 version contains no statement that dental benefits are limited. The July 2000 version states that dental benefit coverage is a contingent benefit;

g. Application/Waiver forms for Extended Health Benefits and Dental Benefits – prior to December 17, 1999, these forms did not state that EHB and Dental Benefits were limited;

h. The Ministry of Health: Medical Services Plan produced an "Application for Group Enrolment: Municipal Pension Plan" – it contains no statement that MSP group coverage is limited;

i. Facts Sheet regarding "Health Benefits: MSP, EHB and Dental Coverage: Municipal Pension Plan" – the May 22, 2001 version contains no statement that post-retirement group benefits are limited. The version dated June 27, 2001 states that health benefit coverage is a contingent benefit; and

j. Fact Sheet regarding "Termination of Employment: Municipal Pension Plan" – the version dated September 5, 2001 contains no statement that post-retirement group benefits are limited. The December 20, 2001 version indicates that MSP, EHB, dental benefits and cost of living increases are not guaranteed.

[97] The Board distributed a Pension Bulletin to retired members of the Plan. The version dated April 4, 2002 regarding "Extended Health, Dental and MSP Benefits" advised members of an increase in MSP premiums and indicated that the cost of paying for these benefits could not exceed the employer contributions dedicated to the IAA.

7. Individual Plaintiffs

[98] Ms. Wurflinger is a retired nurse and resides in Fruitvale, British Columbia. She is a former active member of the BCNU, and is a member of the Plan. She

retired on March 22, 2002, and began receiving a monthly pension as well as post-retirement group benefits under the Plan. Ms. Wurflinger had 22 years of pensionable service as of the date of her retirement.

[99] Ms. Blaikie is also a retired nurse and resides in Burnaby, British Columbia. She is a former active member of the BCNU, and is a member of the Plan. She retired on September 30, 1998, and began receiving a monthly pension as well as post-retirement group benefits under the Plan. Ms. Blaikie had 29 years of pensionable service as of the date of her retirement.

C. POSITIONS OF THE PARTIES

[100] The parties made oral submissions that extended over five days and also filed thorough and comprehensive written submissions. Although I have provided only skeletal outlines of their respective positions, the parties can be assured that I have considered all of their submissions carefully.

1. Position of the Plaintiffs

[101] The plaintiffs submit that upon retirement, BCNU members acquire a vested right to receive post-retirement group benefits at the coverage and premium subsidy levels in force as of the date of retirement. They advance the following arguments in support of this position:

a. The context within which this issue presents itself is important to the analysis. Retirees collect a fixed income and are therefore vulnerable to financial changes. Moreover, retirement benefits have been earned through past employment service and, as such, constitute a form of

deferred compensation. For these reasons, retirement benefits are not to be interfered with lightly.

b. Where, as here, a pension fund is subject to a trust, trust law principles apply and prevail over any conflicting term in the pension plan: ***Schmidt v. Air Products Canada Ltd.***, [1994] 2 S.C.R. 611. The trust principle of irrevocability bars any unilateral reduction in benefits where that right was not explicitly reserved at the time the benefits were created.

c. The Plan is a defined benefit pension plan. Group benefits provided through a defined benefit plan acquire the same characteristics as other benefits therein; they are guaranteed and vest in accordance with the terms of the plan.

d. There is an inference that health and welfare benefits vest upon retirement and survive subsequent attempts to revoke them: ***Dayco Canada Ltd. v. C.A.W. - Canada***, [1993] 2 S.C.R. 230 (S.C.C). Consequently, there must be clear language in the amending legislation where the opposite effect is intended. None of the statutory instruments conferring the post-retirement group benefits reserve a power to amend, revoke, or place any conditions upon receipt of those benefits.

e. The ***Pension Benefit Standards Act*** defines “benefit” as a pension “or any other benefit under a pension plan”. Section 26(3) provides that,

> …for the purposes of this Act, a benefit vests when the person acquires an unconditional entitlement under the pension plan to receive the benefit, whether at the present time or in the future.

This provision clearly contemplates the vesting of the post-retirement group benefits.

f. The statutory instruments that create and define the Plan support the vesting of the post-retirement group benefits. Where the legislature or Board intended to provide for a contingent benefit, they used language that clearly communicated that intention. For example, s. 19(6) of the ***Pension (Municipal) Act*** and s. 73 of the Plan Rules limit the payment of cost of living benefits to the funds available in the IAA. The provisions regarding post-retirement group benefits do not contain any such limiting language.

g. The statutory instruments and the Trust Agreement require that benefits payable thereunder be paid from the Pension Fund, which, for that purpose, is considered "one and indivisible". This is inconsistent with the defendants' submissions that the limited funding source for the post-retirement group benefits stipulated in the various enactments renders them contingent.

2. Position of the Defendants

[102] The Board and the Province submit that the post-retirement group benefits have never been vested components of the Plan. Rather, since their inception, they

have been contingent benefits subject to available funding and open to modification by first the Province and later, the Board.

[103] Their principal arguments against the vesting of the post-retirement group benefits are these:

a. The plaintiffs have no contractual entitlement to post-retirement group benefits as those benefits were created by statute, not contract or collective agreement. There is nothing in the relevant legislative enactments that purports to vest the benefits.

b. The unique statutory framework that created the benefits is wholly inconsistent with the notion that the post-retirement group benefits were intended to, or did, vest. Under that scheme, the coverage and premium subsidies were determined under subordinate legislation, but the statute itself limited the source of funding. This scheme cannot be reconciled with a vested benefit. It is also consistent with the extrinsic evidence that the Province only intended to divert funds otherwise going to inflation protection and did not intend a new defined benefit with corresponding new actuarial liabilities.

c. Intention is a critical factor in the analysis. Unlike pension benefits that vest in accordance with the governing legislation, the post-retirement group benefits have no similar statutory protection. They will vest only where the parties intend them to do so and where that intention is set out in clear and express language. The evidence regarding the history

of the post-retirement group benefits is unequivocal in demonstrating that their creation was conditional upon the understanding, expressly acknowledged by employee representatives, including the plaintiff BCNU, that the benefits were contingent upon available funding. That mutual intention is reflected in the legislative provisions pursuant to which the post-retirement group benefits were implemented.

d. By their nature, health and welfare benefits are subject to significant cost fluctuations due to factors that are impossible to predict or control, such as changing utilization rates, changes in government health programs and rising cost of drugs and other treatments. Further, they are provided under contracts with third party carriers which are explicitly subject to termination and amendment. These factors are inconsistent with an intent that the post-retirement group benefits vest.

D. ANALYSIS

1. Pension Terminology

[104] The Plan is self-described as a “contributory defined benefit pension plan”. A “contributory” pension plan is one in which contributions by both employer and employee are mandatory. A “defined benefit pension plan” guarantees employees belonging to the plan specific benefits upon retirement. It is to be distinguished from a “defined contribution pension plan” in which set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds. In a “contributory defined benefit plan”, employees are required to contribute a set

amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan. (These definitions are drawn from ***Schmidt****, supra*, the leading Canadian authority on pension trusts.)

[105] The ***Pension Benefits Standards Act***, R.S.B.C. 1996, c. 352, s. 1, also provides definitions for some of these concepts, though they are rather less helpful than those in ***Schmidt***:

> "defined benefit plan" means a pension plan that is not a defined contribution plan;
>
> "defined benefit provision" means a provision of a pension plan under which benefits are determined in any way other than that described in the definition of "defined contribution plan";
>
> "defined contribution plan" means a pension plan under which benefits are determined solely by reference to what is provided by
>
> (a) contributions made by a member and on a member's behalf by an employer, and
>
> (b) interest and any other amounts allocated in respect of a member or former member;
>
> "defined contribution provision" means a provision of a defined contribution plan, and includes a defined contribution provision of a defined benefit plan.

[106] A pension plan can also be a hybrid arrangement that contains both defined benefit and defined contribution characteristics: ***Bathgate et al. v. National Hockey League Pension Society et al.*** (1992), 11 O.R. (3d) 449 (Ont. Ct. Gen. Div.). That

fact is apparent, as well, from the definitions in the ***Pension Benefits Standards Act***.

2. Analytical Framework

[107] The post-retirement group benefits implemented under the ***Pension (Municipal) Act*** in 1994 are statutory benefits and must therefore be interpreted in light of statutory presumptions.

[108] As the defendants submit, statutes and regulations are subject to amendment from time to time as reflected in various provisions in the ***Interpretation Act***. Section 15(1), for example, provides that

> Every Act must be construed as to reserve to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying a power, privilege or advantage that it vests in or grants to any person.

[109] This principle is also well recognized at common law: see, for example, ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue***, [1977] 1 S.C.R. 271 (S.C.C.); ***British Columbia (AG) v. Esquimalt & Nanaimo Railway Co.***, [1950] 1 D.L.R. 305 (P.C.); ***Canada (Attorney General) v. Kowalchuk***, [1990] F.C.J. No. 447 (Fed. C.A.). In ***Gustavson Drilling***, for example, Dickson J. wrote:

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may change.

[110] There is also, however, a presumption against statutory interference with vested rights. That principle states that it is to be inferred, in the absence of a clear indication in the legislation to the contrary, that Parliament or the Legislature did not

intend to prejudicially affect the interests of the subject. The Supreme Court of Canada recently discussed this concept in ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, where the majority cited the following passage from ***Spooner Oils Ltd. v. Turner Valley Gas Conservation Board***, [1933] S.C.R. 629 at 638 (S.C.C.), which it described as the leading case on this presumption:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (***Main v. Stark*** [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

[111] The presumption against interference with vested rights had historically been held to apply only when the legislation at issue was ambiguous, that is, reasonably susceptible of two constructions. The Supreme Court in ***Dikranian*** modified that position, cautioning against a literal approach to interpreting legislation:

> This statement [that the presumption applies only where the relevant legislation is ambiguous] must be qualified somewhat in light of this Court's recent decisions. As Professor Sullivan says, care must be taken not to get caught up in the last vestiges of the literal approach to interpreting legislation:
>
> > In so far as this language echoes the plain meaning rule, it is misleading. The values embodied in the presumption against interfering with vested rights, namely avoiding unfairness and observing rule of law, inform interpretation in every case, not just those in which the court purports to find ambiguity. The first effort of the court must be to determine what the legislature intended, and … for this purpose it must rely on all the principles of statutory interpretation, including the presumptions.

[112] Accordingly, the entire context of a provision must be considered to determine whether it is reasonably capable of multiple interpretations.

[113] Statutory pension plans are interpreted in the same manner as other statutes. The fact that they are trusts does not alter the fact that the legislation governing the Fund must be interpreted in accordance with conventional methods of statutory interpretation. In the context of the BC Hydro and Power Authority Pension Plan, also a statutory pension plan, the Court of Appeal had this to say:

> In my opinion the answer to the intent and meaning of s. 7 [of the ***Metro Transit Operating Company Act***] can best be arrived at by conventional methods of statutory interpretation. The Supreme Court of Canada has endorsed many times, most clearly in ***Chieu v. Canada (Minister of Citizenship and Immigration)***, [2002] 1 S.C.R. 84, the approach to statutory interpretation as set out by E.A. Dreidger in ***Construction of Statutes*** (2d ed. 1983) at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(***Sneddon v. British Columbia (Hydro and Power Authority)***, 2004 BCCA 292 at para. 57)

[114] Nevertheless, trust principles do apply to a statutory pension: ***Cape Breton Development Corp. (Devco) v. United Mine Workers of America***, [2004] C.L.A.D. No. 492 (Labour Arbitration, Hon. P. DeC. Cory, Arbitrator); ***Markle et al v. The City of Toronto et al.*** (2003), 63 O.R. (3d) 321 (Ont. C.A.); ***Canadian Union of Public Employees, Local 1000 v. Ontario Hydro*** (1989), 68 O.R. (2d) 620 (Ont. C.A.). Although not in a statutory pension context, the Supreme Court of Canada has observed that a pension trust is governed by equity and to the extent that applicable

equitable principles conflict with plan provisions, equity prevails: ***Schmidt****, supra*, at para. 92.

[115] It is not in dispute that the Plan is a statutory pension plan trust. The plaintiffs rely heavily on the principle arising from these cases that once a statutory pension plan trust is created, it cannot subsequently be amended to allow all or part of the trust to be revoked unless an express power of revocation existed at the time the trust was created. As Arbitrator Cory noted in ***Cape Breton Development Corp.***, a power to amend or revoke a statute or bylaw does not include a power to revoke a trust created by statute: para. 63. Specifically, the plaintiffs submit that no power to amend or revoke was reserved in any of the statutory instruments conferring the post-retirement group benefits, and that, as a consequence, it was not open to the defendants to reduce the benefits.

[116] I can dispense with this submission at the outset since the trust principle of irrevocability is quite distinct from, and has no bearing upon, the question of whether the post-retirement group benefits vested.

[117] In basic terms, irrevocability means that once impressed with a trust, property no longer belongs to the settler. The settler therefore cannot unilaterally withdraw it or use it for purposes not authorized by the trust instrument. The Ontario Court of Appeal in ***Markle v. Toronto***, *supra*, explained the concept as follows at para. 39:

> A central element of the creation of a trust is the transfer of property. The essence of a revocation is removal of property or assets from the trust fund. Absent a power of revocation, the transfer of property to a trust is absolute; the settler disposes of the property irrevocably to the trustees in the same way that one makes an outright gift. Once the

> trust assets are received by the trustee they are held for the benefit of the beneficiaries and the settler loses all rights to control the property.

[118] In the case of a pension fund, the result is that "the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created": ***Schmidt***, *supra*, at para. 58.

[119] The central issue in ***Schmidt*** was the distribution of surplus funds upon wind-up of a pension fund. A corollary matter was whether employers were entitled to refrain from contributing to ongoing pension plans that were in surplus. The first issue was decided in favour of the plan members; the second, the employers. The distinction turned on the difference between property already alienated to the trust and property not yet alienated.

[120] Cory J. held that the surplus upon wind-up belonged to the employees because that property had already been alienated. Actuarial surplus, however, was different, and it was not contrary to trust principles for an employer to take advantage of such a surplus to reduce its contributions (where not excluded by the terms of the plan). He wrote at para. 86:

> The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the

> trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

[121] Revocation commonly arises in cases involving the treatment of surplus pension funds, such as in ***Schmidt*** itself. Another circumstance in which the principle was applied is that which arose in ***Markle v. Toronto***, *supra*, where the employer sought to use pension funds to pay for administrative expenses contrary to the terms of the original plan. There, the Ontario Court of Appeal held that because no power of revocation had been reserved at the time, the partial revocation authorized by an amending by-law enacted by the City to that end constituted a breach of the trust and was thus invalid.

[122] In the present case, there is no suggestion that trust funds were improperly withdrawn or used in any way other than for the benefit of the Plan members. The concept of revocation simply does not apply. Its inapplicability is, in fact, underscored by the plaintiffs' position that post-retirement group benefits do not vest until retirement, and can be altered or even revoked prior to that time. Active Plan members, however, are just as much trust beneficiaries as are retired members. That even the plaintiffs acknowledge that the benefits can be altered or revoked prior to retirement highlights the distinction between revocation of a trust and vesting.

[123] The issue here is not whether the Province and the Board can revoke benefits that have vested; rather, it is whether those benefits vested in the first place.

3. Dayco (Canada) Ltd. v. C.A.W. - Canada

[124] Both the plaintiffs and the defendants directed submissions to the Supreme Court of Canada's decision in ***Dayco (Canada) Ltd. v. C.A.W. - Canada***, the

leading authority with respect to the vesting of health and welfare benefits. The Court's conclusion was that:

> ….retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights.

[125] In that case, Dayco had transferred its operations to Mexico and closed its plant in Hamilton. During the currency of a collective agreement, Dayco and the union negotiated a shutdown agreement pursuant to which group insurance benefits would be discontinued six months after the plant closed. The agreement did not address retiree benefits. Following expiry of the collective agreement, Dayco gave notice that the insurance benefits provided to retired employees under the agreement (including hospital insurance coverage, extended health care and dental insurance) would be terminated as of the same date that the benefits for active employees were to cease under the shutdown agreement. The union initiated a grievance claiming that the retired employees had a vested right to the benefits being discontinued that extended beyond the term of the collective agreement. Dayco objected to the jurisdiction of the arbitrator on the basis that the collective agreement had expired.

[126] The arbitrator's preliminary decision on jurisdiction was judicially reviewed, and appealed to the Ontario Court of Appeal and the Supreme Court of Canada. Although the Supreme Court's decision was primarily concerned with the

jurisdictional issue, it also addressed at some considerable length the nature of retirement benefits and whether such benefits can vest.

[127] La Forest J., writing for the majority, observed that post-retirement welfare benefits do not enjoy the same statutory vesting protections as do pension benefits (para. 66):

> Canadian jurisdictions do not provide for an explicit dichotomy between pension and welfare benefits for retirees, but provincial pensions legislation, to varying degrees, protects the vested nature of pension plans; see, for example, ***Pension Benefits Act***, R.S.O. 1990, c. P8, ss. 10, 35-38, 75. To my knowledge there is no equivalent legislative protection for welfare benefits, thus mirroring the American position.

[128] He noted that while the question of vesting of retirement benefits was relatively novel in Canada, there was a substantial body of American case law on point. Notwithstanding certain structural differences in the labour relations regimes in the two countries, he found the American authorities to be "highly persuasive" of the approach the Court should adopt in determining whether post-retirement benefits have vested.

[129] La Forest J. canvassed the American jurisprudence, referring in particular to the widely cited decision of the Sixth Court of Appeals, ***International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Yard-man, Inc.***, 716 F.2d 1476 (6th Circuit 1983) ("**Yard-man**"), which he summarized as follows at para. 71:

> The Sixth Circuit Court of Appeals reviewed the case law stemming from ***Wiley***, citing it as authority for the proposition that parties to a collective agreement can contract for rights that extend beyond the term of a collective agreement. Whether such vesting had in fact

> occurred would depend, of course, on the intent of the parties, and the court found that many of the basic principles of contractual interpretation are appropriate for discerning such intent. As such, the court established the following approach for determining whether retirement benefits have vested. It suggested that courts should look first to the disputed language in the collective agreement, interpreting each provision as part of an integrated whole. If ambiguities exist, courts should then look to other provisions of the agreement, and to the context in which the agreement was negotiated. Finally, the interpretation of the agreement should be consonant with federal labour policy.

[130] As La Forest J. describes in ***Dayco***, the American authorities indicate that unions and employers can agree to vest welfare benefits. Much of the debate in those authorities surrounds the question of whether, when interpreting the collective agreement or other contract, there is an inference in favour of the vesting of such benefits where the parties have not explicitly turned their attention to that issue.

[131] The Court in ***Yard-man***, *supra*, for example, endorsed the existence of such a presumption while others such as ***Anderson v. Alpha Portland Industries, Inc.***, 836 F.2d 1512 (8th Cir. 1988), certiorari denied 489 U.S. 1051, rejected any inference of vesting. La Forest J. endorsed neither, but rather, the "middle of the road" approach suggested in ***United Paperworks v. Champion International Corp.***, 908 F.2d 1252 (5th Cir. 1990). He cited the following passages from that decision at para. 73 of ***Dayco***:

> In none of these cases did the court assume as a general principle of law that the termination of a collective bargaining agreement terminates the retirement benefits conferred by that agreement. In each case the court looked to the specific agreement in question to discern whether there was an intent to confer lifetime health insurance benefits on the covered retirees.
>
> As to the disputed point [whether there is an inference of vesting], the court concluded in a footnote at pp. 1261-62 as follows:

> To the extent that ***Yard-Man*** held that there is, as a general proposition, an inference of an intent to vest retirement benefits (because they are "status" benefits), we find merit in the Eighth Circuit's criticism in ***Anderson*** of this aspect of ***Yard-Man*** and find no basis in logic or federal labor policy for such a broad inference. However, we note that this would not prevent the district court from considering, as some evidence of intent, for example, the fact that retirees have no voice in negotiating a new collective bargaining agreement, a fact of quite general applicability to cases where the vesting of retirement benefits is at issue. In other words, this matter must be determined on a contract-by-contract basis.

Thus, the Fifth Circuit stakes out a compromise position.

[132] In adopting that approach, La Forest J. stated at para. 84:

> …As we have seen, this "inferred" intention to vest has been the most controversial element of the ***Yard-Man*** case. However, it seems to me that such an inference, as one measure of the context in which bargaining took place between the parties, is a useful tool that can be employed by arbitrators in Canada on a case-by-case basis. In that respect, I would endorse the middle-of-the-road approach suggested by the Fifth Circuit in ***Champion International Corp.***, supra.

[133] As a result of endorsing the Fifth Circuit's approach, La Forest J. adopted what I consider to be a relatively weak inference or presumption of intention to vest, given his characterization of it as "one measure of the context in which bargaining took place between the parties" that can provide a "useful tool…on a case-by-case basis".

[134] The central proposition to be drawn from ***Dayco*** is that the question of vesting is to be determined by reference to the intention of the contracting parties, as reflected in the underlying agreement. The various courts in the American authorities relied upon by La Forest J. examined the specific language of the collective agreements to determine whether there was a bargain or promise to provide guaranteed health benefits that was intended to survive the termination of

the collective agreement. The present case provides different circumstances in that there is no contract. The benefits here are statutory and principles of statutory interpretation will therefore determine the outcome. That said, statutory interpretation principles, namely, that legislative enactments are to be considered "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]", are largely similar to the approach mandated by the Court in ***Dayco*** for contractual pension plans.

4. Statutory Interpretation

[135] Nothing in the ***Pension (Municipal) Act*** as it stood in 1994 and 1996 when the post-retirement group benefits were implemented expressly indicates whether they vest.

[136] The ***Pension Benefits Standards Act*** was enacted in 1991 and established minimum standards for pension plans registered in the Province. Section 26 of the current version sets out when entitlements to pensions and benefits vest:

> **Vesting of pension**
>
> 26(1) If a member completes 2 years of continuous plan membership, which period may begin before January 1, 1998, and terminates his or her membership while employed in British Columbia, there immediately vests in the member, on that termination, an entitlement to receive a pension in respect of his or her membership in the plan.
>
> …
>
> (3) For the purposes of this Act, a benefit vests when the person acquires an unconditional entitlement under the pension plan to receive the benefit, whether at the present time or in the future.

[137] Section 1 defines “pension” as “a series of payments that continue for the life of a former member, whether or not the pension is afterward continued to another person”. “Benefit” is defined broadly as “a pension or any other benefit under a pension plan, and includes a return of contributions and any payment in a series of payments that constitutes a benefit”.

[138] In October 2003, the ***Pension Benefits Standards Act*** was declared by the ***Pension Statutes Amendment Act, 2003*** not to apply to post-retirement group benefits retroactive to April 1, 2000.

[139] The plaintiffs submit that the vesting provisions in the ***Pension Benefits Standards Act*** applied when the post-retirement group benefits were created in 1994 and 1996. Section 26(3) clearly contemplates the vesting of more than just basic pension benefits. They say it is evident that at least prior to April 2000, retired members had a vested right to various post-retirement group benefits under the ***Public Sector Pension Plans Act*** and the Plan Rules, subject only to the specified eligibility criteria. The Crown’s attempt to retroactively declare the ***Pension Benefits Standards Act*** inapplicable to post-retirement group benefits as of April 2000 has no effect on retired nurses who acquired an unconditional entitlement to receive those benefits before that time.

[140] The defendants respond that the ***Pension Benefits Standards Act*** is of no assistance to the plaintiffs. “Benefit”, they say, encompasses other pension-type benefits available under a plan, such as survivor benefits which are specifically referred to in ss. 34 and 35 of that Act. They submit that group health benefits

cannot be paid for out of a registered pension plan and are therefore not governed by the ***Pension Benefits Standards Act***. As well, they rely on the declaration in the ***Pension Statutes Amendment Act, 2003*** that the ***Pension Benefits Standards Act*** has no application to post-retirement group benefits.

[141] I incline to the view that "benefit" as that term is used in the ***Pension Benefits Standards Act*** includes post-retirement group benefits of the nature at issue here. I note that the ***Pension (Municipal) Act*** was amended in 1992 to incorporate a definition of "benefit" that mirrored that contained in the ***Pension Benefits Standards Act***. The ***Pension (Municipal) Act*** defined "benefit" as "a pension or any other benefit payable under this Act, and includes a return of contributions and any payment in a series of payments that constitute a benefit". This definition was in the ***Pension (Municipal) Act*** when the post-retirement group benefits were introduced in 1994 through amendments to that Act authorizing regulations relating to such benefits. Further, throughout the various legislative and Plan documents, the definition of "benefit" has consistently included the language "any other entitlement payable under this [Plan or Act]". For example, s. 96(1) of the Plan Rules 2000 defined "benefit" as "a commuted value, pension, refund or any other entitlement payable under this Plan to a member or the beneficiary of a member".

[142] However, it is not necessary to decide this issue since s. 26(3) of the ***Pension Benefits Standards Act*** expressly states that vesting occurs when the plan member acquires an "unconditional entitlement" to the benefit. Even assuming, without deciding, that the Act applied to post-retirement group benefits prior to April 2000, the determinative issue is whether the retired members acquired an

unconditional entitlement to receive those benefits. In view of the language of the relevant enactments, the scheme of the Plan, and the intent of the Legislature as unequivocally reflected in the evidence, I conclude that they did not.

[143] I pause to note that there are provisions in various of the enactments continuing the Plan and Pension Fund that protect vested rights. For instance, s. 2(4) of Schedule B of the ***Public Sector Pension Plans Act*** reads:

> Any rights vested in each plan member or beneficiary under the plan provided for by and under the ***Pension (Municipal) Act*** continue to apply to the plan member or beneficiary, in the same manner and to the same extent, under the Municipal Pension Plan.

[144] To like effect is Article 3(d) of the Joint Trust Agreement.

[145] These provisions do not assist in the analysis since the issue continues to distil to whether the post-retirement group benefits constitute vested rights. To determine that, it is necessary to turn to the scheme of the Act and the intent of the Legislature.

[146] It is evident from the documents reflecting the consultations that resulted in the implementation of the post-retirement group benefits that the Province had no intention that they vest. To reiterate, the addition of EHB and a further MSP premium subsidy in 1994 were elements of a package of changes to the Plan as reflected in the 1994 report of the Municipal Pension Advisory Board. Some key elements of that report as they relate to post-retirement group benefits include:

a. the recommendations were intended to comply with the restrictions imposed by the government, namely, that any

enhancement of benefits not increase the Plan's unfunded liabilities or employers' required contributions;

b. benefit enhancements were to be paid for out of employer contributions otherwise intended for the IAA to pay for inflation indexing; and

c. both employer and employee representatives acknowledged that, by funding the enhanced benefits in this manner, the future ability of the Plan to provide full indexing was potentially undermined and that it might be necessary in the future to make choices as to what benefits should or could continue to be funded in the event high levels of inflation returned.

[147] The contents of this report, with the exception of the issue of early retirement, were unanimously agreed to by all employer and employee representatives on the Municipal Pension Advisory Board.

[148] The situation was similar with respect to the implementation of the dental benefits a few years later in 1996. A dental plan was proposed by the MEPC to be funded in the same manner as the other post-retirement group benefits. This was opposed by the UBCM on the basis that the addition of a dental plan paid out of funds otherwise intended for the IAA eroded the Plan's ability to provide inflation indexing under the IAA. The UBCM also raised the question of fairness and whether it was reasonable for active members of the Plan to pay for benefits for retirees when the impact of doing so might restrict their ability to receive indexing in the future.

[149] Given the UBCM's position, the Board was unable to agree on the proposed dental plan and the issue was put to the Treasury Board for a decision. The Treasury Board approved the dental plan on certain conditions, and expressly noted the concerns of the UBCM regarding the impact on the IAA. It also underscored the

fact that neither inflation protection nor post-retirement group benefits were guaranteed under the Plan. The dental benefits were paid out of the same limited source of funding as EHB and pursuant to the same statutory authority.

[150] The documents, as reviewed in detail in the “Facts” portion of these Reasons, demonstrate that the stakeholders envisioned the possibility of cost of living inflation exceeding the availability of funds to pay for it. They do not appear to have contemplated the scenario that in fact arose, that is, a dramatic increase in the cost of providing the group benefits. That, in my view, is of little import since not only does it not alter the rationale of the benefit scheme that was put in place, but concerns about the potential erosion of the Plan’s ability to pay for inflation indexing are also consistent with an intention that the post-retirement group benefits not vest.

[151] The defendants submit that it is significant that at the time the recommendations regarding post-retirement group benefits were prepared and presented to the Province, it was understood and agreed by all the parties that the proposed funding mechanism for the post-retirement group benefits involved a trade-off of security against future inflation protection. Representatives of the Plan members, including the plaintiff BCNU, acknowledged and agreed to this trade-off. The plaintiffs, however, point out that the mutual intention of the parties is not relevant where, as here, the analysis is one of statutory interpretation. The only intention that matters, they say, is that of the Crown.

[152] Even if I put to one side the BCNU’s participation in the consultation process and its understanding and acceptance of the constraints of the Province, there is no

question but that the Province only intended to divert funds otherwise going into inflation protection, and did not intend to create a new defined benefit with corresponding actuarial liabilities. Further, the Province's intention in this regard is manifested in the enabling legislation and the post-retirement group benefit scheme that was put in place.

[153] The addition of the post-retirement group benefits in 1994 was affected by amendments to the ***Pension (Municipal) Act*** authorizing the Superannuation Commissioner to make regulations prescribing group benefit entitlements to be paid out of the 1% of salaries employers were required to pay into the IAA:

> 39. The Commissioner, subject to the approval of the Lieutenant Governor in Council, may make regulations, including those:
>
> …
>
> (m) prescribing group benefit entitlements which may be provided for pensioners, including extended health plans and dental plans;
>
> (n) prescribing terms and conditions under which the group benefit entitlements referred to in paragraph (m) may be provided and funded from employer contributions under section 4.1(1)(g); and
>
> (o) prescribing the terms and conditions under which coverage under the Medical Services Plan of British Columbia may be funded from employer contributions under section 4.1(1);

[154] There are two things to note. Firstly, the language used is permissive: the Superannuation Commissioner *may* make regulations prescribing group benefits. Secondly, funding for such benefits was limited to a fixed portion of employer

contributions. Both of these factors are inconsistent with the vesting of the post-retirement group benefits.

a. Discretionary Language

[155] Since the inception of the post-retirement group benefits, the governing language in the relevant enactments has been permissive rather than mandatory.

[156] Section 39 of the ***Pension (Municipal) Act*** authorized, but did not require, the Superannuation Commissioner to provide for group benefits. The provision of such benefits and their terms and conditions were thus at the discretion of the Commissioner. Regulations passed pursuant to the Act continued to use permissive language: i.e., the ***Municipal Pension Plan Group Benefit Regulation***, B.C. Reg. 142/95. Consequently, the Superannuation Commissioner and the Lieutenant Governor in Council retained authority to amend the regulations with respect to the benefits within the financial constraint imposed by s. 39.

[157] The ***Pension (Municipal) Act*** was replaced by the ***Public Sector Pension Plans Act*** in 1999. Schedule B thereto continued the Plan. Section 16(1)(h)(v) of Schedule B provided that the Lieutenant Governor in Council, on the recommendation of the Municipal Pension Board, may enact regulations respecting "post retirement group benefits, and the type and level of benefits, entitlement to benefits, terms and conditions of how benefits are provided and funded, and how and by whom they are funded". Again, the language was permissive.

[158] Part 2 of Schedule B also authorized the Joint Trust Agreement that was subsequently entered into in April 2001. Section 18(4)(f) mandated that the Pension

Plan continued under the Joint Trust Agreement provide for post-retirement group benefits. Nevertheless, it was silent with respect to the type and level of such benefits, the terms and conditions of entitlement, and the mechanics of funding.

[159] In 2001, in conjunction with the implementation of joint trusteeship, the ***Municipal Pension Group Benefit Regulation*** was repealed and the provisions stipulating the specific contracts under which post-retirement group benefits were to be provided were incorporated into the Plan Rules. Those Rules provided that the amounts to be paid from employer contributions or by members were to be set by regulation enacted under the ***Public Service Benefit Plan Act***. Thus, those levels remained subject to amendments of the regulations.

[160] Pursuant to Order in Council 440/02 effective May 30, 2002, the Province delegated to the Board the authority under s. 3 of the ***Public Service Benefit Plan Act*** to determine the terms and conditions under which post-retirement group benefits were to be provided and the contributions required by members to fund those benefits. Then in October 2003, the ***Pension Statutes Amendment Act, 2003*** removed authority for post-retirement group benefits out of the ***Public Service Benefit Plan Act*** and transferred it to the Board under the ***Public Sector Pension Plans Act***. Specifically, the Board was empowered to determine:

a. the type and level of post-retirement group benefits;

b. eligibility;

c. terms and conditions;

d. the rate of contribution toward payment of any premium required to be made by retired members and the methods by which those contributions could be made;

e. the rate of contribution toward payment of the cost of post-retirement group benefits required to be deducted from employer contributions to the Plan and the methods by which those contributions could be made; and

f. any other matter necessary or advisable to provide post-retirement group benefits.

[161] Accordingly, since their inception, post-retirement group benefits, including the content of those benefits, their terms and conditions, and subsidy levels, have been within the discretion of first the Province and then the Board. This is inconsistent with an intention to vest.

b. Defined Funding Source

[162] Section 39(1)(n) of the ***Pension (Municipal) Act*** required that post-retirement group benefit entitlements be paid out of the 1% of salaries employers were required to pay into the IAA. The defendants submit that the decision to fund the benefits out of employer contributions to the IAA is particularly significant to the issue of whether they were intended to or did vest. They say that since it was acknowledged by all concerned that inflation indexing was not a guaranteed benefit but was contingent upon available funding, it follows that by funding the post-retirement group benefits from a stream of funds otherwise earmarked for the IAA, they, too, were necessarily contingent upon available funding.

[163] This submission is not accurate on a straight reading of s. 39(1)(n). Subsection (n) merely limits the stream of funding to employer contributions under s. 4.1(1)(g). It does not make the post-retirement group benefits contingent upon

there being sufficient assets to cover the cost as is the case with the cost of living allowance. Section 19(6) of the 1996 consolidation of the ***Pension (Municipal) Act***, for example, explicitly mandates that "the total capitalized value of all supplementary allowances granted on any January 1 under this section must not exceed the amount that the commissioner determines is in the inflation adjustment account on the preceding September 30". (That provision had first been added to the Act in 1980.) To like effect is s. 73(6) of the Plan Rules. What makes the cost of living benefit contingent is not the fact that it is funded from the IAA but the stipulation that the total of such allowances not exceed funds in the account.

[164] Nevertheless, although there is nothing in the language of the enabling legislation that expressly makes the post-retirement group benefits contingent, it is my view that the combination of the unpredictable cost of providing these benefits together with the defined funding stream is inconsistent with an intention that they vest.

[165] The cost of providing post-retirement group benefits is a function of numerous factors, including:

a. the proportion of the premium funded by the retired member;

b. deductibles, co-payments and maximum coverage, if any;

c. the cost and utilization of procedures and drugs covered;

d. coverage provided by government universal health, pharmaceutical and dental plans;

e. other coverage issues, such as coverage of out-of-country care; and

f. the number of retired members.

[166] While certain of these factors are within the control of the administrator of a pension plan, others (i.e., (c), (d) and (f)) are not. This prevents an accurate prediction of future costs. While contributions to the Basic Account could be increased as a result of an actuarial report disclosing an increase in unfunded liability, there was no mechanism for increasing the funding available for post-retirement group benefits other than amendment of the ***Pension (Municipal) Act***. The subordinate legislation setting out the post-retirement group benefits could therefore become invalid if costs exceeded the funding that the enabling legislation permitted. That coverage of an unknown and unpredictable liability was subordinate to funding is inconsistent with an intention to vest.

[167] It is noteworthy in this regard that the post-retirement group benefits were never costed prior to their implementation. Had the intent been that they vest, it would have been necessary to ascertain their anticipated long-term cost. If that long-term cost could potentially exceed the 1% of salaries earmarked for inflation indexing and the benefits, then either the financial constraints imposed by the Province would not be met or the benefits would have to be reduced. The actuarial opinion of March 24, 1994 did not cost the benefits on the assumption that they came out of contributions otherwise going into the IAA and were, in effect, contingent.

[168] The grandfathering of existing MSP entitlements where they exceeded pro-rated entitlements is consistent with this interpretation of the statutory scheme. MSP premiums have been subsidized since 1973. The initial benefit was the payment of one half of the monthly premium from the employer contributions to the Municipal

Superannuation Fund and was extended to all retirees regardless of their pensionable service: ***Municipal Superannuation Act***, R.S.B.C. 1960, c. 258, s. 15; ***An Act to Amend the Municipal Superannuation Act***, S.B.C. 1973, c. 61, s. 15. The MSP premium subsidy was similarly restated in the 1979 consolidation of the ***Pension (Municipal) Act***, R.S.B.C. 1979, c. 317, s. 13(6). In the 1979 consolidation of that Act, s. 13(6) provided that the 50% premium was payable out of employer contributions that otherwise would have gone into the Basic Account; it did not narrow the stream of funds as was the case with the benefit enhancements in 1994. This 50% premium coverage has remained an entitlement under subsequent enactments and in the Post-Retirement Group Benefit Rules, grandfathered to December 31, 1994.

[169] The Plan is self-described as a defined benefit pension plan. The basic pension it provides is based on a formula of years of service and best earnings; entitlement vests after two years. The cost of living allowance discussed earlier is conditional on annual cost of living inflation and the availability of funding in the IAA. It is clearly a conditional benefit notwithstanding that it is provided through a defined benefit plan. It is thus the language defining a particular entitlement that dictates whether or not it is a defined benefit.

[170] There is nothing in the language regarding the initial 50% MSP premium subsidy to suggest it was conditional, hence the grandfathering of that entitlement to 1994. In contrast, the post-retirement group benefits added in 1994 and 1996 contained a funding limitation which, for the reasons discussed, is inconsistent with it being a defined benefit.

[171] One final point I wish to briefly address under this heading is the provision contained in the legislative enactments and the Joint Trust Agreement to the effect that the Pension Fund is to be considered “one and indivisible” for the purpose of payment of benefits and disbursements. In the event of a conflict between a specific statutory provision dealing with a particular matter and a more general provision dealing not only with that matter but others as well, the specific provision prevails. Particularly in the present case where the re-allocation of funds from the IAA otherwise earmarked for pension indexing was the pivotal factor in the decision to confer the post-retirement group benefits in the first place, the specific provision must necessarily prevail.

5. Contract

[172] An additional factor that supports the conclusion that the post-retirement group benefits are not vested entitlements is the fact that they are provided pursuant to contracts of insurance with third party carriers.

[173] The application forms for EHB and dental plan coverage expressly provide that the benefits are subject to the contracts of insurance. For instance, an applicant for EHB coverage acknowledges the following:

> I understand that all provisions of the plan are subject to the terms and conditions of the EHB Plan Contract between the Superannuation Commission of BC and the Medical services Association (MSA).

[174] The contracts of insurance contain clauses stipulating that they are subject to amendment or termination upon appropriate notice. The Group Benefit Contract between the Province and the Medical Services Association in effect following the

implementation of the post-retirement group benefits contained various termination provisions including:

> III. TERM
>
> (1) This Contract shall continue until terminated by either party giving to the other 30 days prior written notice to that intent.
>
> (2) Any Schedule hereto may be terminated by either party giving to the other 30 days prior written notice to that intent.
>
> …
>
> V. TERMINATION OF COVERAGE/EXTENSION OF COVERAGE
>
> (a) Coverage for a Member and his Dependents shall terminate on the last day of the month in which the earliest of the following occurs:
>
> …
>
> 5) the Benefit terminates under this Contract.
>
> XI AMENDMENTS
>
> (1) This Contract may be amended by MSA effective from and after the giving of not less than thirty (30) days written notice of amendment.
>
> (2) If, at any time, MSA amends any of the terms and conditions of this Contract, it reserves the right to adjust the contribution rates and/or administration charges then in effect.

[175] The plaintiffs submit that the insurance contract termination provisions are not part of the terms and conditions for the beneficiaries. Rather, they say, the post-retirement group benefits were conferred by statute and regulation, and the power to amend or revoke must therefore also be contained in those enactments.

[176] I observe that the regulations which identified the governing contracts pursuant to which the post-retirement group benefits were to be provided

incorporated the contractual terms and conditions. Section 2 of the ***Municipal Pension Plan Group Benefit Regulation***, B.C. Reg. 142/95, for example, provided that "the terms and conditions under which the group benefit entitlements referred to in section 1 may be provided to pensioners are as set out in each plan referred to in section 1." That the content of the post-retirement group benefits is set out in separate contracts that may be terminated or amended at the instance of the third party is inconsistent with the notion that they are vested or guaranteed entitlements.

6. Dikranian v. Quebec (Attorney General)

[177] On December 2, 2005, the last day of oral argument, the Supreme Court of Canada released reasons in ***Dikranian v. Quebec (Attorney General)***, *supra*, a case dealing with the vesting of statutory rights. The parties were granted leave to file further written submissions with respect to this decision.

[178] ***Dikranian*** introduced a new analytical framework with respect to determining whether an entitlement has vested. As I will shortly discuss, the Court articulated two criteria: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement. This framework is rather imprecise, and, in my view, its application to the facts of the present case first required consideration of the issues raised by the parties in their initial submissions and addressed above.

[179] Prior to the Supreme Court's judgment in ***Dikranian***, there had been little judicial consideration of the precise definition of "vesting", a fact noted by the Court

in that decision. The definition from ***Black's Law Dictionary*** – "a present right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future" – was often cited in cases involving vesting. In the pension context, see, for example, ***Sneddon v. British Columbia (Hydro and Power Authority)***, *supra*.

[180] ***Dikranian*** concerned the recovery of interest paid on student loans granted under the ***Act respecting financial assistance for students***, R.S.Q., c. A-13.3 (the "Act") and the ***Regulation respecting financial assistance for students***, R.R.Q., c. A-13.3, r.1 (the "Regulation"). Under the Quebec student loan program, loans are made under private contracts between students and individual financial institutions, while the repayment terms are set by the government in the Act and Regulation. A loan certificate is issued by the Ministry of Education in which it guarantees the loan in the event of default and pays the interest during the exemption period. Once this certificate is issued, the student enters into a private contract with a financial institution. Although the government dictates some of the terms of that contract by incorporating them into the loan certificate, it is not a party to the contract between the student and the financial institution.

[181] Dikranian obtained student loans between 1990 and 1996. He signed his last loan certificate with the Royal Bank in November 1996. He completed his studies in January 1998. At the time he signed the loan agreement, the Act and the Regulation (which were incorporated into the loan certificate) provided that he had an 11 month exemption period before becoming obliged to repay the principal and assume interest payments on January 1, 1999.

[182] In July 1997, after Dikranian signed the contract but before the completion of his studies, legislative amendments reduced by one month the period during which students were exempt from making interest payments and repayments on the principal. Further legislative amendments in 1998 eliminated the grace period entirely. As a result of the amendments, Dikranian was charged interest on his loans that, under the 1996 loan certificate, was to have been paid by the Minister. He initiated a class action against the government seeking reimbursement of that interest.

[183] Bastarache J., writing for the majority, began his analysis with the observation that there was a private law contract between Dikranian and the financial institution, albeit one in which the government, which was not a signatory, had unilaterally undertaken to guarantee the loan and pay the interest for a period of time. He characterized the substantive issue to be decided as whether the rights conferred by the contract of loan could be unilaterally modified by the legislature, which was not a signatory to the contract.

[184] Commencing at para. 29, Bastarache J. discussed the concept of vested rights, describing them as resulting from "the crystallization of a party's rights and obligations and the possibility of enforcing them in the future": para. 30. He then articulated an analytical framework for recognizing when rights have vested:

> Few authors have tried to define the concept of "vested rights". The appellant cites Professor Cote in support of his arguments. Cote maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's

> commencement (Cote, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in ***Scott v. College of Physicians and Surgeons of Saskatchewan*** (1992), 95 D.L.R. (4th) 706, at p. 727.
>
> I am satisfied from a review of the case law of this Court and the courts of the other provinces that the analytical framework proposed by the appellant is the correct one.

[185] With respect to the first criterion, he continued:

> A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Cote, at p. 161. As Dickson J. (as he then was) clearly stated in ***Gustavson Drilling***, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also ***Abbott v. Minister for Lands***, [1895] A.C. 425, at p. 431; ***Attorney General of Quebec***, at p. 743; ***Massey-Ferguson Finance Co. of Canada v. Kluz***, [1974] S.C.R. 474; ***Scott***, at pp. 727-28. In other words, the right must be vested in a specific individual.

[186] As for when an individual's legal situation is sufficiently constituted or concrete to have vested, Bastarache J. explained:

> … The situation must also have materialized (Cote, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. I will come back to this point later. Suffice it to say for now that, just as the hopes or expectations of a person's heirs become rights the instant the person dies (see, for example, ***Marchand v. Duval***, [1973] C.A. 635, at p. 637, and art. 625 C.C.Q.), and just as a tort or delict instantaneously gives rise to the right to compensation (see, for example, ***Holomis v. Dubuc*** (1974), 56 D.L.R. (3d) 351 (B.C.S.C.); ***Ishida v. Itterman***, [1975] 2 W.W.R. 142 (B.C.S.C.); and arts. 1372 and 1457 C.C.Q.), rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Cote, at p. 163).

[187] Applying that analysis to the legislation before him, Bastarache J. held that "the basic fact" was that Dikranian and the financial institution had signed a loan

certificate provided by the Minister, thereby turning the certificate into a contract and crystallizing the parties' rights and obligations. Subsequent changes to the applicable legislation could not alter the terms of that contract in the absence of clear evidence evincing an intention to do so. He found that the 1997 amending legislation contained no clear and unambiguous language to that effect, and he saw nothing in the record to justify imputing to the legislature an intent to interfere with vested rights. Accordingly, he concluded that it could not apply to contracts already entered into.

[188] The 1998 amending legislation contained a transitional provision indicating that it applied to "juridical situations in progress". Bastarache J. held that the right was provided for in legislation but was later incorporated into a private contract in which the parties freely, and on an informed basis, defined their rights and obligations. Those rights and obligations crystallized as soon as the contract was entered into, and were no longer "in progress" at the time the new provisions came into force.

[189] In the result, Bastarache J. held in favour of Dikranian, finding that students with loans active as of the dates of the legislative amendments had vested rights with respect to the duration of the exemption periods applicable when their contracts were signed.

a. Application

[190] The analytical framework for recognizing vested rights articulated in ***Dikranian*** comprises two parts:

a. the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and

b. this legal situation must have been sufficiently constituted at the time of the new statute's commencement.

[191] The plaintiffs submit that the analysis in ***Dikranian*** is applicable to the present case and should not be distinguished on the basis that it involved a private contract that pre-dated the legislative amendments at issue. They say that the collective agreement in effect from time to time between the BCNU members and their employers required that the parties participate in the Plan. Article 49 of their collective agreement provides:

> Regular employees shall be covered by the provisions of the Municipal Pension Plan. All regular employees shall be entitled to join the Pension Plan after three (3) months of employment and shall continue in the Plan as a condition of employment.

[192] The plaintiffs submit that this clause incorporates the terms of the Plan into the collective agreement. Just as the terms of the loan agreements in ***Dikranian*** were set by the government, the terms of the Plan were dictated by legislation and the Joint Trust Agreement. While conceding that the specific rights under the Plan are not strictly contractual, the plaintiffs describe them as private employment rights akin to contracts.

[193] The plaintiffs say that under the Plan, they have a specific, individualized right to a certain level of post-retirement group benefits at the time of retirement. Entitlement to the benefits requires only two things: membership in the Plan for a prescribed number of years (for various subsidy levels) and election by the individual

upon retirement to receive the benefits. At that stage, the situation has crystallized into a concrete and tangible entitlement.

[194] The defendants reply that ***Dikranian*** does not alter the fundamental legal principles at work. In contrast to ***Dikranian***, the present case involves statutory, not contractual, benefits. A true understanding of the plaintiffs' interests in the statutory benefits at issue demonstrates that their future enjoyment was expressly and necessarily contingent upon economic factors beyond anyone's control. As such, an interest in future enjoyment never became sufficiently constituted or concrete to satisfy the conditions for vesting articulated in ***Dikranian***. The defendants further point out that the collective agreement between the BCNU and the Health Employers Association applies only to active employees, not retirees, and does not deal with post-retirement group benefits which, by definition, are only available to Plan members once they cease active employment.

[195] In my view, the circumstances of the present case satisfy the first criterion set out in ***Dikranian***. Retired members of the Plan who are in receipt of post-retirement group benefits have a right that is tangible and concrete. This is in contrast with the circumstances in ***Gustavson Drilling***, which was cited by Bastarache J. in his discussion of this first criterion for the proposition that a general right to take advantage of a repealed enactment does not constitute an accrued right. In that case, a business had wished to deduct from its income for tax purposes expenses which it had earlier incurred at a time when they could be legally deducted. The amended legislation, however, no longer permitted that. Here, however, we are not dealing with statutory rights that were not exercised prior to the legislative

amendments. To the contrary, the individual plaintiffs were already in receipt of the post-retirement group benefits that were affected by the amendments. To use the language in ***Dikranian***, their legal situation is tangible and concrete rather than general and abstract.

[196] I am not satisfied, however, that the second prong of the analysis has been met, that is, that the legal situation was sufficiently constituted at the time of the amendment. Bastarache J. was vague in articulating what this means, beyond noting that it "will vary depending on the juridical situation in question". Nevertheless, the examples he cites cast some light in this regard. He notes that rights from a will or intestacy arise upon death, rights in tort arise upon the injury, and contractual rights generally arise at the time of contract formation.

[197] A key aspect of the analysis in this regard is the fact that the plaintiffs have no contractual entitlement to the post-retirement group benefits. This distinguishes their circumstances from that in ***Dikranian*** where the incorporation of the statutory terms into the contract was critical to the Court's conclusion. In ***Dikranian***, the specific obligations of the parties, including the student's repayment obligations, were expressly set out in the private contract. Upon execution of that contract, there was certainty for both parties with respect to the amount of principal, the interest to be repaid, and the required repayment dates. At that point, the rights and obligations of the parties crystallized and became concrete.

[198] The same cannot be said of the requirement in the collective agreement between the BCNU and the Health Employers Association that employees

participate in the Municipal Pension Plan. That agreement applies to active employees, while post-retirement group benefits by definition are only available to Plan members after they cease employment. The plaintiffs themselves submit that the benefits do not vest until retirement and can be changed or revoked prior to that time. Thus, the fact that active members are required by their collective agreement to be covered by the provisions of the Plan cannot be said to crystallize their rights in a manner comparable to ***Dikranian***.

[199] Further, the contingency on funding in the legislative scheme of the post-retirement group benefits has no analogue in ***Dikranian***. While the plaintiffs are entitled, as retired members of the Plan, to participate in the post-retirement group benefits plans made available under the Plan, for the reasons discussed above, it was not intended that those entitlements be guaranteed. There is nothing in the Plan itself or the governing legislation that purports to guarantee specific benefit or premium subsidy levels. Indeed, the content of the benefits is set out in separate group insurance contracts which may be amended from time to time. Similarly, the extent to which the plaintiffs were required to make contributions toward the cost of the benefits was determined by regulations made under the ***Public Service Benefit Plan Act***, which were also subject to periodic amendment. Consequently, the right to post-retirement group benefits is not sufficiently concrete to satisfy the second part of the test under ***Dikranian***.

7. Additional Submissions

[200] A number of additional submissions advanced by the parties warrant comment.

a. Deferred Compensation Theory

[201] The plaintiffs stress that the larger context within which these issues present themselves is important to the analysis. Retirees collect a fixed income and are, accordingly, not well positioned to respond to changes that affect their financial security. The plaintiffs further submit that post-retirement group benefits have been earned through past service and, as such, constitute a form of deferred compensation.

[202] According to the theory of deferred compensation, retirement benefits comprise an aspect of the compensation provided to an employee. As the Supreme Court explained at para. 66 of ***Schmidt***, *supra*:

> … This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.

[203] To like effect, see also ***Bathgate et al. v. National Hockey League Pension Society et al.***, *supra*.

[204] However, reliance on deferred compensation theory is somewhat attenuated in the circumstances of this case for a number of reasons. The various changes to the Plan were not negotiated between employers and employees as part of an employment agreement, but rather, were enacted by the Legislature. As well, improvements to the post-retirement group benefits were at times extended to those who had already retired and, thus, were without consideration. On the other side of the same coin, the effect of the plaintiffs' submissions is that post-retirement group

benefits cannot be reduced once vested, with the result that in the case of limited funding, benefits must be reduced for those who have yet to retire but have been furnishing consideration through their labour. Both aspects are difficult to square with deferred compensation theory.

[205] At the end of the day, this case reduces to statutory interpretation. The concept of deferred compensation, while perhaps of relevance in other cases, is of limited utility here.

b. Inter-Generational Equity

[206] The Province submits that the notion of inter-generational equity is a further factor that militates against a conclusion that the post-retirement group benefits vested. It says that the practical result of the plaintiffs' interpretation that the benefits vested is that active members would be required to pay substantially increased premiums without any hope of receiving benefits themselves. This, the Province contends, is inconsistent with the clear statutory purpose of providing retirement security for all participating members. I agree.

[207] Trustees are obliged to interpret trust agreements in a way that is even-handed as between beneficiaries. Interpretive results that favour a beneficiary group over others are to be avoided unless the trust documents mandate that result. Where the suggested interpretation of a pension document creates extra benefits for some beneficiaries, it must be kept in mind that this extra benefit creates a corresponding burden on others, including other beneficiaries: ***Electrical Industry of Ottawa Pension Plan v. Cybulski*** (2001), 30 C.C.P.B. 95 at 99 (Ont. Sup. Ct. of

J); ***Rivett v. Hospitals of Ontario Pension Plan*** (1995), 9 C.C.P.B. 284 at 298 – 299 (Ont. Gen. Div.). Courts must be careful in interpreting pension plans in such a way as to confer additional benefits on some members at the expense of others.

[208] To accede to the plaintiffs' submission that the post-retirement group benefits vested would shift the balance of benefits received in favour of the present generation of retirees.

c. Communications to Members

[209] The plaintiffs place some reliance on the fact that prior to 2000, Plan materials that described the post-retirement group benefits did not indicate that they were subject to change. These documents are summarized at paragraphs 96 and 97 of these Reasons.

[210] The Supreme Court has acknowledged that documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees: ***Schmidt***, *supra*, at p. 669.

[211] Plan communications from 2000 began stating explicitly that post-retirement group benefits were not guaranteed features of the Plan. Accordingly, the only communications upon which the plaintiffs can rely in this regard are those during the 1994 to 1999 period.

[212] There is no evidence in the evidence of Ms. Blaikie that she relied on the Plan communications in concluding that the post-retirement group benefits were vested entitlements. Ms. Wurflinger deposes that:

> 13. I attended seminars and information sessions regarding the Plan whenever I had the opportunity. In the years prior to my retirement I attended approximately 5 or 6 seminars regarding my retirement planning, several of which were sponsored by the Superannuation Commission or the Pension Corporation.
>
> 14. At these seminars I was told that the Plan included MSP, extended health, and dental coverage. I was not told that these benefits could be taken away.

[213] However, in her applications for EHB and dental plan coverage, she specifically acknowledged that:

> I understand the EHB [or Dental Benefits] Plan coverage is a contingent benefit of the plan; that is, the benefit is not guaranteed. The coverage may be changed at any time by the pension board, including, but not necessarily limited to, increasing, decreasing or eliminating: a) coverage for people and benefits, or b) amounts for premiums and deductibles.

[214] In the face of this explicit acknowledgment, it is not open to Ms. Wurflinger (or similarly situated retired members) to claim or suggest that she was led to believe from Plan communications that the post-retirement group benefits were guaranteed entitlements.

[215] In any event, there is nothing in the Plan communications covering the 1994 to 1999 period that indicates that the post-retirement group benefits are guaranteed or immune to modification. I consider the brochures to be simply descriptions of the content of the benefit plans as they exist from time to time. Many also explicitly circumscribe their effect. By way of example, a 1999 brochure distributed by the

Superannuation Commission at seminars for members approaching retirement entitled “Your Retirement Income – Municipal Pension Plan” clearly states on the first page that “this is not a legal document, and in the event of any conflict between it and the ***Pension (Municipal) Act***, the provisions of the Act will apply”. Others, such as the “Extended Health Benefits Plan for Pensioners” brochure, indicate that their contents are subject to change. Particularly given the absence of any evidence regarding the effect of these Plan communications on members, they do not affect my conclusion that the post-retirement group benefits are not vested entitlements.

E. CONCLUSION

[216] In light of the foregoing, the plaintiffs’ action is dismissed.

[217] I will hear submissions from counsel regarding costs at a later date.

“S.R. Romilly, J.”
The Honourable Mr. Justice S.R. Romilly

SCHEDULE

NO. SO35595
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA NURSES' UNION
WENDY WURFLINGER
SHEILA BLAIKIE

PLAINTIFFS

AND:

MUNICIPAL PENSION BOARD OF TRUSTEES
HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA
(Ministry of Finance)

DEFENDANTS

AGREED STATEMENT OF FACTS AND DOCUMENT AGREEMENT

For the purposes of this proceeding only, the parties admit the truth of facts set out below but do not admit their relevance to the matters at issue in the proceeding. The parties further agree, for the purposes of this proceeding only, that all Documents attached hereto are authentic and admissible in the proceeding. In particular, the Documents are admitted to have been created and sent on or about the date noted on the specific document and are admitted to have been created by the person noted on the specific document. The parties do not admit to the truth of the contents of any of the Documents or their relevance to the matters at issue in the proceeding, except as otherwise agreed.

I. Overview of the Plan

1. The Municipal Pension Plan provides pension and other benefits for employees of municipalities, hospitals, school districts and other eligible

public sector employers (the "**Plan**"). The Plan is self-described as a contributory defined benefit pension plan. The parties take differing positions as to the legal implications of that description. The Municipal Pension Fund is the trust fund consisting of cash, investments and other assets held by the Defendant, Municipal Pension Board of Trustees (the "**Board**" or the "**Trustees**") as well as contributions from employers and Plan members and any other payments or funds received by the Board(the "**Pension Fund**").

2. The Plan has approximately 128,267 active members, 41,681 retired members, and 18,648 inactive members. It has over $16 billion in assets.

3. Retired members of the Pension Plan are eligible to receive certain Post-Retirement Group Benefits which currently consist of a Medical Services Plan ("**MSP**") subsidy, an Extended Health Benefit Plan ("**EHB**") a Dental Plan and partial subsidies therefore.

4. The Plan is administered by the Trustees pursuant to the *Public Sector Pension Plans Act* and regulations, the Municipal Pension Plan Joint Trust Agreement ("the **Joint Trust Agreement**"), the Municipal Pension Plan Rules (2004) (the "**Plan Rules**") and the Municipal Pension Plan Post-Retirement Group Benefit Rules. Copies of the Joint Trust Agreement, the Plan Rules and the Municipal Pension Plan Post-Retirement Group Benefit Rules are attached at Tabs 1 – 3.

5. The Plan Partners are the Municipal Employees' Pension Committee ("**MEPC**") as the Plan Member Partner and the Union of British Columbia Municipalities and the Defendant Her Majesty the Queen in right of the Province of British Columbia (the "Province") who are together defined as the Plan Employer Partner.

6. The MEPC is comprised of representatives from the Hospital Employees Union, the Canadian Union of Public Employees, B.C. Division, the Health

Services Association of British Columbia, the British Columbia Nurses' Union, the British Columbia Federation of Police Officers, the British Columbia Fire Fighters' Association and the Council of Joint Organizations and Unions.

7. The Board of Trustees is composed of 16 members, half appointed by member organizations and half appointed by employer organizations. The specific composition of the Board of Trustees, as dictated by section 4.1 of the Joint Trustee Agreement, is as follows:

(a) Two persons appointed by the Province;

(b) Two persons appointed by the Union of British Columbia Municipalities;

(c) Two persons appointed by the Health Employers Association of B.C.;

(d) One person appointed by the B.C. Public School Employers' Association;

(e) One Plan Member appointed by the Plan Employer Partner;

(f) Seven employee representatives appointed as follows:

(i) One person appointed by the Hospital Employees' Union;

(ii) One person appointed by the Canadian Union of Public Employees, B.C. Division;

(iii) One person appointed by the Health Sciences Association of B.C.;

(iv) One person appointed by the B.C. Nurses Union;

(v) One person appointed jointly by the B.C. Federation of Police Officers and the B.C. Professional Firefighters' Association;

(vi) One person appointed by the Council of Joint Organizations and Unions; and

(VII) One member appointed by the Plan Member Partner;

(g) One person who is a Retired Plan Member appointed by the Plan Member Partner.

In addition, there are up to 16 Alternate Trustees. The trustees jointly appoint a chair.

8. The Board of Trustees is required pursuant to the Joint Trust Agreement to retain the services of the B.C. Pension Corporation as the provider of administrative services for the Plan.

II. Plaintiffs

a) **BCNU**

9. The British Columbia Nurses' Union is a trade union representing currently employed nurses and allied personnel, with an office at 4060 Regent Street, in Burnaby, British Columbia (the "**BCNU**").

10. The BCNU is a member of the MEPC.

b) **Sheila Blaikie**

11. The plaintiff, Sheila Blaikie, is a retired nurse and resides in the City of Burnaby, British Columbia ("**Blaikie**").

12. Blaikie is a former active member of the BCNU, and is a member of the Plan. Blaikie retired on September 30, 1998 and began to receive a monthly pension as well as Post-Retirement Group Benefits under the Plan. Blaikie had 29 years of pensionable service as of the date of her retirement.

13. Blaikie applied for MSP, EHB, and Dental coverage. Copies of her application forms, dated August 7, 1998 are attached at **Tab 4**.

14. Blaikie received a letter dated October 20, 1998 advising of her pension calculation. A copy of that letter is attached at **Tab 5**. The letter advises that her pension will be increased annually based on the increase in the consumer price index to the extent permitted by funds available in the special account. It also advises that she had elected MSP, EHB, and Dental coverage.

15. A copy of Municipal Superannuation Fund Payment Statement for Blaikie for October 1998 is attached at **Tab 6**. The premium deducted for MSP, EHB, and Dental is listed as "$0.00".

16. Attached at **Tab 7** is a copy of Municipal Superannuation Fund Payment Statement for Blaikie for July 2003. The premium deducted for MSP is $27.00.

c) **Wendy Wurflinger**

17. Wendy Wurflinger is a retired nurse and resides in the Village of Fruitvale, British Columbia ("**Wurflinger**").

18. Wurflinger is a former active member of the BCNU, and a member of the Plan. Wurflinger retired on March 22, 2002, and began to receive a monthly pension as well as Post-Retirement Group Benefits under the Plan. Wurflinger had 22 years of pensionable service as of the date of her retirement.

19. Wurflinger received a letter dated April 23, 2002 advising her of her pension calculation. A copy of that letter is attached at **Tab 8**.

20. Wurflinger applied for MSP, EHB, and Dental Benefit coverage. Copies of her application forms, dated March 15, 2002 are attached at **Tab 9**.

III. History and Structure of the Plan

a) Legislative History

21. The Plan and the Pension Fund (originally called the Superannuation Fund) were created in 1921 by the *Superannuation Act*, S.B.C. 1921, c. 60.

22. In 1939, the *Superannuation Act* was replaced by the *Municipal Superannuation Act,* S.B.C. 1938, c. 55.

23. In 1958 a new *Municipal Superannuation Act*, S.B.C. 1958, c. 55 was enacted.

24. The Plan and the Pension Fund were continued under *the Pension (Municipal) Act*, R.S.B.C. 1979, c. 317 in 1979.

25. The *Public Sector Pension Plans Act* was enacted in 1999 and repealed the *Pension (Municipal Act)*. Schedule B to the *Public Sector Pension Plans Act* continued the former Plan and Pension Fund as the Municipal Pension Plan and the Municipal Pension Fund.

26. The *Public Sector Pension Plans Act* was phased into effect between July 15, 1999 and April 5, 2001. It provided for the implementation of joint trusteeship of the Plan.

b) Administration of the Plan and Pension Fund

27. The Superannuation Act was originally administered by the Department of the Provincial Secretary and the Civil Service Commission.

28. A Superannuation Commissioner was appointed by the provincial government to administer the Plan under the legislation in force from time to time. The Commissioner was the sole trustee of the Plan and Pension Fund.

29. As early as 1921, under the *Superannuation Act*, groups of employees and employers were entitled to elect representatives to act in an advisory capacity to the Commissioner.

30. The Municipal Employees Pension Committee was established in 1958 to represent Plan members in an advisory capacity.

31. Nurses became eligible to join the Plan in 1959.

32. The Provincial Collective Agreement between the Health Employers Association of British Columbia and the Nurses' Bargaining Association requires that regular employees covered by the Collective Agreement are covered by the provisions of the Municipal Pension Plan. A copy of "Article 49 – Pension Plan" from the April 1, 2001 – March 31, 2004 Collective Agreement is attached as **Tab 10**.

33. In the fall of 1992, the Province initiated a review of the Plan. A copy of a 1992 Briefing Note titled "Policy Changes in Public Sector Pension Plan Management Structure" is attached at **Tab 11**.

34. As part of the consultation process, a Municipal Pension Advisory Board was established to make recommendations to the Province on changes to the Plan. It was composed of Plan member and employer representatives, and chaired by the Superannuation Commissioner, John Cook.

35. Effective July 1, 1994, the Municipal Pension Board was formally established pursuant to an amendment to the *Pension (Municipal) Act* with the power to make recommendations to the Minister and to Treasury Board with respect to changes in benefits, funding policies, contribution rates, modifications to the Plan, and the budget of the Superannuation Commissioner. The Municipal Pension Board was composed of member representatives from the MEPC as well as employer representatives from the provincial government, the UBCM, and the Health Employers Association.

36. The Municipal Pension Board had three committees: a Benefits Committee, an Employer Contribution Rate Committee, and a Regulations Committee.

37. The mandate of the Benefits Committee was "to review the existing benefit structure of the plan, to identify new developments in the field of benefit provisions, to make recommendations to the board on the adequacy of existing benefits and regarding consideration of new ones"

38. In November 1996, the Internal Audit Branch, Office of the Comptroller General, Ministry of Finance and Corporate Relations conducted a "Review of Roles and Responsibilities: Superannuation Commission". A copy is attached at **Tab 12**.

39. In 1999, the *Public Sector Pension Plans Act* (the "PSPP Act") provided for the continuation of the Plan and identified the Plan Partners with the authority to negotiate a joint management agreement.

40. The PSPP Act also established a new Municipal Pension Board that was chaired by the Superannuation Commissioner who was also the sole trustee of the Plan and Pension Fund.

41. Effective January 1, 2000, the Superannuation Commission was replaced by the BC Pension Corporation as the provider of administrative services for the Plan. The Board of Trustees is required to retain the services of the Pension Corporation.

42. The Board of Directors of the BC Pension Corporation is composed of one plan member representative and one plan employer representative from each of the four public sector pension plan boards: the College Pension Board of Trustees, the Municipal Pension Board, the Public Service Pension Board, and the Teachers' Pension Board.

43. Also effective January 1, 2000, the Office of the Chief Investment Officer was replaced by the British Columbia Investment Management Corporation

("BCIMC"). The BCIMC provides investment management services to the Municipal Pension Board.

44. The BCIMC board includes representatives from the College Pension Board of Trustees, the Municipal Pension Board, the Public Service Pension Board, and the Teachers' Pension Board.

45. Effective April 2, 2001, the Joint Trust Agreement was entered into between the Province, the Union of British Columbia Municipalities, the Health Employers Association of British Columbia and the Municipal Employees Pension Committee.

46. The Joint Trust Agreement established the current Board of Trustees as the trustees and administrators of the Plan and the Pension Fund.

47. Like the prior Municipal Pension Board, the Board of Trustees has a Benefits Committee with the mandate referred to in paragraph "37" of this Agreed Statement of Fact.

48. In February 2003, the Office of the Auditor General of British Columbia released a 2002/2003 Report titled "Review of Government Oversight of Multi-Employer Public Section Pension Plan in British Columbia". A copy is attached at **Tab 13**.

c) **Structure of the Plan and Pension Fund**

49. The Pension Fund was created in 1939 under the name Municipal Superannuation Fund.

50. In 1993 the Pension Fund was restructured to contain four accounts: Inflation Adjustment Account ("IAA"), Retirement Annuity Account ("RAA"), Supplemental Benefits Account and Basic Account. This remains the basic structure of the Pension Fund and is set out in more detail in section 75 of the Plan Rules.

51. The Basic Account provides monthly pensions, including previously granted indexing, and is funded from employer and member contributions. Employees contribute a set percentage of their salaries and employers contribute at varying rates depending on the mix of employees in the group classifications specified by the Plan.

52. The IAA provides for future indexing, on a contingent basis. Each year if members' pension payments are adjusted for current indexing, monies are transferred from the IAA to the Basic Account to cover the present value of all future payments arising from the current indexation supplements. Historically, if monies in the IAA were sufficient, indexation supplements equal to the past year's rate of consumer inflation were granted to members. If the assets in the IAA were not sufficient to cover the present value of a future payment equal to the rate of inflation, retirees obtained a partial indexation supplement equal to the amount that can be funded from the IAA.

53. The IAA is funded by contributions from employers and members, from the investment income that it earns on its own assets, and from excess interest earned in the Basic Account. Employees contribute 1% of salaries and employers contribute an amount equal to 1% of salaries (pensionable earnings) payable to active Plan members, less amounts allocated to the Supplemental Benefits Account.

54. The RAA contains extra contributions by employers and certain members under special agreements. Monies are transferred at retirement from the RAA to the Basic Account as additional pensions are purchased.

55. The Supplemental Benefits Account is used to pay supplemental benefits such as benefits which exceed Revenue Canada limits and Post-Retirement Group Benefits. It is funded from a portion of the employer and Plan member payments that would otherwise be allocated to the Basic Account and the IAA. Post-Retirement Group Benefits are funded from the employer contributions of 1% of salaries of active members that would otherwise be

allocated to the IAA and, in the case of MSP premiums, from employer contributions that would otherwise be allocated to the Basic Account.

56. Under section 8(1) of the current Municipal Pension Plan Post-Retirement Group Benefits Rules, the Supplemental Benefits Account is structured as a flow through account that does not accumulate funds or assets, in contrast to the IAA which does accumulate assets and for which a separate investment trust fund exists. As group benefit costs are billed to the Pension Plan on a monthly basis, the amount of the costs and the amount of funding required, net of premiums collected from retired members, is recorded in the Supplemental Benefits Account.

57. The structure of the various accounts and the account practices utilized in connection with those accounts is more fully described in the audited financial statements of the Pension Plan. A copy of the audited financial statements for the year ended December 31, 2004 is attached at **Tab 14**.

58. The responsibility for any unfunded liabilities in the Pension Plan as well as the issue of accounting for Post-Retirement Group Benefits was considered in the Report on the 1993/94 Public Accounts and the Report on the 1994/95 Public Accounts. Copies are attached at **Tab 15** and **Tab 16**.

IV. Post-Retirement Group Benefits

59. In general, Post-Retirement Group Benefits consist of health and welfare benefits provided under group insurance contracts, often on a subsidized basis.

60. Some components of the Pension Plan are registered under the *Income Tax Act* and some are not. Post-Retirement Group Benefits cannot be provided out of a Registered Pension Plan under the *Income Tax Act*.

61. The annual cost of basic defined benefit pensions is a function of:

(a) the pension formula (usually a combination of years of service and salary);

(b) past salaries;

(c) patterns of work history; and

(d) the number of retirees.

62. The funding available for basic pensions depends upon:

(a) rates of contribution from employers and employees;

(b) salary levels;

(c) number of active employees; and

(d) investment returns on fund assets.

63. The costs of providing Post-Retirement Group Benefits is a function of the following:

(a) the proportion of the premium funded by the beneficiary/member;

(b) deductibles, co-payments and maximum coverage, if any;

(c) cost and utilization of procedures and drugs covered;

(d) coverage provided by government-sponsored universal health, pharmaceutical and dental plans;

(e) other coverage issues (e.g., coverage of out-of-country care); and

(f) the number of retirees.

Factors (a), (b) and (e) are under the control of the designer of a plan of Post-Retirement Group Benefits. Factors (c), (d) and (f) are not.

64. The funding available for Post-Retirement Group Benefits depends on whether they can be paid for out of accumulated assets or are strictly pay-as-you-go. If they are pay-as-you-go, funding is a function of rates of contribution, number of active employees and salary levels. If they can be paid for out of accumulated assets, funding is a function of these factors and investment returns.

65. In 1973, the *Municipal Superannuation Act* was amended (S.B.C. 1973, c. 61) to provide that members could elect to have 50% of their MSP premiums paid from their pension and the other 50% paid by employer contributions.

66. [Paragraph Deleted]

67. In the fall of 1992, the Province initiated a review of the Plan. The review included government and plan member representatives. Again, those representatives were termed the Municipal Pension Advisory Board.

68. In December 1992, Glen Clark, then Minister of Finance, and Lois Boone, then Minister of Management Services, met with John Cook, the Superannuation Commissioner and employee representatives for the major public sector pension plans. The purpose of the meetings was to establish the scope of the consultations and review referred to above in paragraph 67 and the conditions attaching to them.

69. Mr. Clark and Ms. Boone communicated, on behalf of the government of the day, that the Province was prepared to consider benefit improvements only if they (a) did not increase the unfunded liabilities of the statutory plans and (b) did not increase employer contributions.

70. The MEPC held meetings to develop recommendations for the Plan and to discuss proposals coming from the Municipal Pension Board. The MEPC priorities for changes to the plan included Post-Retirement Group Benefits. The Report of MEPC Meeting of January 7, 1994 is attached at **Tab 17**.

71. An Issues Analysis paper dated October 21, 1993 was prepared for the Municipal Pension Board on the Issue of "Extended Health and Medical Services Plan Benefits". A copy is attached at **Tab 18**.

72. The Office of the Superannuation Commissioner oversaw the drafting of a Treasury Board submission, dated November 19, 1993, a copy of which is attached at **Tab 19**.

73. The Treasury Board approved the recommendations set out in Treasury Board Submission No. 23/94. Attached as **Tab 20** is a copy of the Treasury Board decision.

74. In January 1994 the Municipal Pension Advisory Board submitted a report entitled "Report on the Municipal Pension Plan" to the Province. A copy of that report is attached at **Tab 21**.

75. The parties admit that the Report set out at **Tab 21** represented the joint product of the Municipal Pension Advisory Board, except where otherwise expressly stated, and that employers and employee representatives agreed to the statements contained therein.

76. The Office of the Superannuation Commission oversaw the drafting of a further Treasury Board Submission No. 36/94 dated January 31, 1994 that recommended approval of the proposals set out in the January 1994 Report of the Municipal Pension Board, as well as similar proposals put forward by the Boards of the other public sector pension plans. A copy of Treasury Board Submission No. 36/94 is attached at **Tab 22**.

77. Cabinet considered Treasury Board Submission No. 36/94 at its meeting held on March 2, 1994 but deferred any decision until receiving a report from the plans' actuary. An excerpt from the Minutes of that meeting is attached at **Tab 23**.

78. An actuarial opinion of Jack Levi, for the Municipal Pension Board, dated March 24, 1994 is attached at **Tab 24**.

79. No member of the MEPC recorded an objection to the assumptions in the report found at Tab 24.

80. Following receipt of the March 24, 1994 actuarial report, the Provincial Cabinet approved the changes to the Pension Plan as proposed in the January 1994 Report and recommended in Treasury Board Submission No. 36/94. Cabinet's decision was communicated in a memorandum dated April 20, 1994, a copy of which is attached at **Tab 25**.

81. The *Pension (Municipal Act)* was amended in 1994 to empower the Superannuation Commissioner to make regulations prescribing group benefit entitlements with the approval of the Lieutenant Governor in Council to be paid out of the 1% of salaries employers were required, by the *Act,* to pay into the Inflation Adjustment Account.

82. In August 1994, the Public Service Employee Relations Commission wrote to Legislative Counsel explaining that under amendments to the relevant legislation, Extended Health Care benefits had been extended to pensioners under three statutory pension plans including the *Pension (Municipal) Act*. The Commission proposed a subsidy schedule and draft language, neither of which were incorporated into the actual Regulation. In describing the proposed premium subsidies for each group benefit, the Commission proposal contained the following sentence adapted to each benefit, "[t]he member will pay the percentage of the … premium, this maybe [sic] as amended from time to time, as set out in the following table…".

[Tab 26 Removed].

83. Effective December 16, 1994, the *Public Service Benefit Plan* Act, R.S.B.C. 1996, c. 318 was extended to cover members of the Plan. The *Pension (Municipal) Regulation*, B.C. Reg. 499/94, was enacted, providing for MSP

premium subsidies and an EHB plan for Plan members effective July 1, 1994. Between July 1, 1994 and December 31, 1994, 100% of the premiums were paid by employer contributions. Thereafter, the amounts to be paid from employer contributions and by Plan members for the required premiums would be set by regulation made under the *Public Service Benefit Plan Act*.

84. Effective January 1, 1995, the *Pensioner Group Benefit Funding Regulation* was enacted, establishing the following subsidy levels based on years of service:

Mr. St. Pierre

(a) Under 2 years, 0% subsidy,

(b) 2-5 years, 50% subsidy,

(c) 5 years or more, 100% subsidy.

Extended Health Benefits

(a) Less than 2 years of service, 0% subsidy,

(b) 2-4 years of service, 50% subsidy,

(c) 4-6 years of service, 60% subsidy,

(d) 6-8 years of service, 70% subsidy,

(e) 8-10 years of service, 80% subsidy,

(f) 10 years or more, 100 % subsidy.

85. Also in 1995, the *Municipal Pension Plan Group Benefit Regulation*, B.C. Reg. 142/95 was enacted, which prescribed the specific contracts under which the EHB plan would be provided to retired members of the Plan.

86. The EHB plan included coverage for such expenses as: hospital charges, ambulance, prescription drugs, para-medical fees, medical aids, supplies and equipment, vision care and hearing aids, and dental accidents.

87. As a result of these changes, approximately 25% of the employer's contributions to the IAA (set at 1% of salaries of active members) were diverted to pay premiums for the extended health benefit and MSP.

88. After the 1994 reform, the MEPC representatives on the Municipal Pension Board proposed a Dental Plan benefit to be paid by diverting further employer contributions to the IAA.

89. Before the Dental plan benefit was implemented, John Cook did a review of the future financial status of the IAA under various assumptions, including whether the Dental plan benefit would be introduced or not. The report is attached at **Tab 27**.

90. The report attached at Tab 27 was distributed to all the members of the Municipal Pension Board, including the MEPC representatives. No member of the Board recorded an objection to the assumptions in Tab 27 that the Dental plan benefit could be revoked if renewed inflation made it necessary.

91. The Municipal Pension Board was unable to agree on a proposal to provide Dental Plan benefits under the Plan thus the issue was put before the Treasury Board for determination. John Cook, as chair of the Advisory Board, prepared a Submission to the Treasury Board dated February 6, 1996. The Submission was provided to the Treasury Board as an attachment to Treasury Board Submission No. 25/96, a copy of which is attached at **Tab 28**.

92. The Treasury Board approved the proposal for a Dental Plan and communicated that decision to Mr. Cook in a letter dated April 29, 2966, a copy of which is attached at **Tab 29**.

93. Effective August 1, 1996, B.C. Reg. 150/96 amended the *Municipal Pension Plan Group Benefit Regulation* to introduce group Dental Plan coverage for retired members of the Pension Plan.

94. The following subsidy schedule for Dental Benefits based on years of service was established by B.C. Reg. 151/96:

(a) Less than 2 years of service, 0% subsidy,

(b) 2-4 years of service, 20% subsidy,

(c) 4-6 years of service, 40% subsidy,

(d) 6-8 years of service, 60% subsidy,

(e) 8-10 years of service, 80% subsidy,

(f) 10 years or more, 100 % subsidy,

95. In 1996 and 1997, the changes made to the EHB and Dental Plans as a result of public service collective bargaining were extended to the Plan. These changes involved:

(a) An increase for Registered Clinical Psychologist Fees,

(b) Eligibility for minor dependents ending at 19 instead of 21 unless the dependent is in full time attendance at a post secondary institution,

(c) An increase to the maximum payable for hearing aids,

(d) An end to coverage under the Dental Plan 30 days after the pension ceases if the pensioner or dependent beneficiary is still alive,

(e) An increase to the lifetime EHB benefits,

(f) An increase to the coverage for breast prosthetics,

(g) An increase to the maximum for corrective lenses,

(h) Harmonization of the drug reimbursement portion of the EHB Plan with Pharmacare,

96. The EHB and Dental Plans are provided pursuant to contracts with third party carriers, currently Pacific Blue Cross. By way of example, copies of the Pacific Blue Cross contracts effective January 1, 1995 (with Pacific Blue Cross' predecessor MSA) and January 1, 2004 are attached at **Tab 30**.

97. Further changes were made to the EHB contract in 1999 and 2000. These changes included:

(a) An increase in the maximum claim for Acupuncture,

(b) A decrease in the maximum claim for Registered Clinical Psychologists,

(c) An increase in the maximum claim for hearing aids.

98. In 2001, in conjunction with the implementation of joint trusteeship, the Municipal Pension Plan Group Benefit Regulation was repealed and the provisions governing the specific contracts, under which the Post-Retirement Group Benefits were to be provided, were incorporated into the Pension Plan Rules. However, the Rules continued to provide that the amounts to be paid from employer contributions or to be deducted from retirees' pensions to fund those benefits would be set by regulations made under the *Public Service Benefit Plan Act*.

99. In October 2003, the *Public Sector Pension Plans Act* was amended by the *Pension Statutes Amendment Act, 2003*, S.B.C. 2003, c. 62. That amendment transferred full authority for Post-Retirement Group Benefits to the Board of Trustees. It also provided that the *Pension Benefits Standards Act* did not apply to Post Retirement Group Benefits under the Plan retroactive to April 1, 2000.

100. Pursuant to this authority, the Board of Trustees enacted the Municipal Pension Plan Post-Retirement Group Benefit Rules effective January 1, 2004

V. Changes to Post-Retirement Group Benefits

101. Beginning in 2001, the Board of Trustees became aware of the significant increase in the costs of providing Post-Retirement Group Benefits. This increase in costs was due to a number of factors including rising drug costs, growing number of retirees and the rising costs of claims per member.

102. In addition, certain changes implemented by the Province contributed to the escalating costs, including:

(a) Effective May 1, 2002, the Province increased the premiums for coverage under MSP by 50% for everyone in British Columbia;

(b) Effective January 1, 2002 , Pharmacare coverage for prescription drugs was reduced with additional changes to Pharmacare implemented effective May 1, 2003, and

(c) Effective January 1, 2002, MSP coverage for para-medical services (chiropractic, naturopathy, massage therapy and physiotherapy) was eliminated.

103. In April 2002, the Board of Trustees was provided with actuarial projections indicating that unless changes were made to the Post-Retirement Group Benefits, the cost of providing those benefits would exceed the funding available from the employer contribution of l% of salaries of active members by 2003.

104. The Board of Trustees Benefits Committee requested a meeting with the Plan Partners to discuss increasing contribution rates or other alternatives to protect group benefits. A copy of the letter from John Cook, Chair of the Municipal Pension Board, to the Plan Partners dated August 16, 2002 is attached at **Tab 31**.

105. The then Minister of Finance, Gary Collins, replied in a letter to Mr. Cook dated September 20, 2002. Minister Collins agreed to a meeting of the Plan Partners but also indicated that no additional funds would be forthcoming from the Province to pay for the increased cost of providing Post-Retirement Group Benefits. A copy of Minister Collins' letter is attached at **Tab 32**.

106. A meeting of the Plan Partners was held on November 21, 2002. The Plan Partners requested the Board of Trustees to review all realistic options for addressing the funding shortfall issue. A copy of the Minutes of the Plan Partners' Meeting is attached at **Tab 33**.

107. The Benefits Committee and the Board of Trustees undertook an extensive review and consideration of available alternatives. As part of this review, the Board of Trustees and the Benefits Committee were provided with a number of actuarial projections and studies including the following:

(a) Hewitt Associates Municipal Pension Board of British Columbia Discussion Guide dated April 2002; including revised exhibits dated May 7, 2002 and July 10, 2002. Copies of these presentations are attached at **Tab 34**.

(b) Mercer Presentation dated September 9, 2002 entitled "Retiree Benefit Plan Review – The College, Municipal, Public Service and Teachers' Pension Board of Trustees" with additional updated scenarios dated September 17, 2002, September 30, 2002, October 18, 2002 and November 1, 2002. Copies of these presentations are attached at **Tab 35**.

108. In July 2002, the Board of Trustees recommended to the Lieutenant Governor in Council that it enact regulations to change the MSP premium subsidies to:

(a) Under 2 years, 0 %,

(b) 2-5 years, 25%,

(c) 5 years or more, 50%.

109. These changes were made effective November 1, 2002 by B.C. Reg. 276/2002.

110. The remaining 50% MSP subsidy for Plan members with more than 5 years of service is paid from employer contributions that would otherwise be intended for the Basic Account. As set out in section 8(2) of the Municipal Pension Plan Post-Retirement Group Benefit Rules, the funds necessary to pay for the 50% MSP subsidy are deducted from employer contributions,

allocated to the Supplemental Benefits Account and then paid to the Medical Services Plan.

111. The Board of Trustees held a meeting on October 21, 2003 at which the funding of the remaining 50% subsidy was discussed. A copy of the minutes from that meeting is attached at Tab 36.

112. **[Tabs 37 and 38 Removed].**

113. In 2003, the *Pension Statutes Amendment Act*, 2003, S.B.C. 2003, c. 62 transferred to the Board of Trustees full authority to determine the type and level of Post-Retirement Group Benefits, the terms and conditions of benefits, and the subsidy levels.

114. Effective January 1, 2004 the *Municipal Pension Plan Post-Retirement Group Benefit Rules*, made under Article 11 of the Joint Trust Agreement, amended the EHB and Dental Benefits subsidy schedule to the following:

(a) Under 2 years, 0%,

(b) 2-4 years, 15%,

(c) 4-6 years, 30%,

(d) 6-8 years, 45 %,

(e) 8-10 years, 60%,

(f) 10 or more years, 75%.

115. At the same time, there were changes to the EHB and Dental Benefits coverage. These changes included:

(a) An increase in the deductible from $25 to $100,

(b) Elimination of out-of-country coverage,

(c) Coverage made available for members living outside B.C. but within Canada,

(d) An increase in the lifetime claim maximum,

(e) A cap on claims for paramedicals,

(f) A decrease from 75% reimbursement to 70% reimbursement for the Dental Plan,

(g) A change in the recall period in the Dental plan from 6-months to one-year.

116. Plan Members were consulted about the proposed changes through their MEPC representatives on the Board of Trustees. Attached at **Tabs 39 to 41** are the following BCNU documents:

(a) BCNU Pensions Committee Report to Convention 2002;

(b) Fran Macdonnell Report to Council dated June 14, 2002 concerning Group Benefits under the Municipal Pension Plan;

(c) Minutes of BCNU Council Meeting held on June 18 – 19, 2002.

Communications with Members

117. From time to time, the Superannuation Commission held seminars across the province for members of the MPP who were approaching retirement. Brochures entitled "Your Retirement Income" were distributed at such seminars and were included in retirement kits provided by the Superannuation Commission on request from Plan members. These brochures advised that inflation adjustment increases were limited to the funds available in the IAA. There was no similar statement regarding Post-Retirement Group Benefits. A copy of the brochure dated 1999 is attached at **Tab 42**.

118. The Superannuation Commission produced a document entitled "Guidelines - Staff Responses to Member Enquiries Re: Medical Benefits" dated December 20, 1994. A copy is attached at **Tab 43**. There is no statement that Post-Retirement Group Benefits are limited.

119. The Superannuation Commission produced booklets entitled "Municipal Pension Plan: Plan Member Booklet". Copies of these booklets were

provided to Plan employers for distribution employees and on request to Plan members. A copy of the booklet dated July 1994 is attached at **Tab 44**. A copy of the booklet dated June 1999 is attached at **Tab 45**. There is no statement that Post-Retirement Group Benefits are limited.

120. After 2000, the Pension Corporation published a documented entitled "A Guide for Plan Members: Everything you need to know about your pension plan". The Guide was similarly provided to Plan employers for distribution. A copy of the Guide dated 2000 is attached at **Tab 46**. In the discussion of health care coverage, the Guide states that Post-Retirement Group Benefits are not guaranteed features of the Municipal Pension Plan

121. The Superannuation Commission and subsequently the B.C. Pension Corporation produced a newsletter for members outlining developments in the pension plan. This newsletter was typically mailed to retired Plan members and to Plan employers. A copy of the newsletter dated Winter 2001 is attached at **Tab 47**. There is no statement that Post-Retirement Group Benefits are limited.

122. The Superannuation Commission, and subsequently the B.C. Pension Corporation, produced booklets entitled "Extended Health Benefits Plan for Pensioners". Copies of these booklets were included in retirement kits, handed out at retirement seminars and provided to Plan members on request. A copy of the booklet dated August 1999 is attached at **Tab 48**. There is no statement that Post-Retirement Group Benefits are limited. A copy of the booklet dated May, 2001 is attached at **Tab 49**. It states that extended health benefit coverage is a contingent benefit.

123. The Superannuation Commission, and subsequently the B.C. Pension Corporation, produced booklets entitled "Dental Benefits Plan for Pensioners". Copies of these booklets were included in retirement kits, handed out at retirement seminars and provided to Plan members on request. A copy of the booklet dated October 1998 is attached at **Tab 50**.

There is no statement that dental benefits are limited. A copy of the booklet dated July, 2000 is attached at **Tab 51**. It states that dental benefits coverage is a contingent benefit.

124. The Superannuation Commission, and subsequently the B.C. Pension Corporation, produced Application/Waiver forms for Extended Health Benefits and Dental Benefits. Prior to December 17, 1999 these forms did not state that EHB and Dental Benefits were limited. Copies of the Dental Benefits Plan Application/Waiver and the Extended Health Benefits (EHB) Plan Application Waiver dated October 22, 1998 are attached at **Tabs 52 and 53**. Copies of the Dental Benefits Plan Application/Waiver and the Extended Health Benefits (EHB) Plan Application Waiver dated December 17, 1999 are attached at **Tabs 54 and 55**.

125. The Ministry of Health: Medical Services Plan produced an "Application for Group Enrolment: Municipal Pension Plan". A copy of the Application dated January 4, 2002 is attached at **Tab 56**. There is no statement that MSP group coverage is limited.

126. The Superannuation Commission produced Fact Sheets titled "BC Pensionfacts" on various aspects of the MPP. These fact sheets were included in retirement kits, handed out at retirement seminars and provided to Plan members on request. A copy of the Fact Sheet on the topic of "Health Benefits: MSP, EHB and Dental Coverage: Municipal Pension Plan" dated May 22, 2001 is attached at **Tab 57**. There is no statement that Post-Retirement Group Benefits are limited. A copy of the Fact Sheet dated June 27, 2001 is attached at **Tab 58**. It states that health benefit coverage is a contingent benefit.

127. A copy of the Fact Sheet on the topic of "Termination of Employment: Municipal Pension Plan" dated September 5, 2001 is attached at **Tab 59**. There is no statement that Post-Retirement Group Benefits are limited. A copy of the Fact Sheet dated December 20, 2001 is attached at **Tab 60**. It

states that MSP, EHB, dental benefits and cost of living increases are not guaranteed.

128. The Municipal Pension Board of Trustees distributed a Pension Bulletin to retired members of the MPP.

(a) A copy of the Bulletin dated April 4, 2002 on the topic of "Extended Health, Dental and MSP Benefits", is attached at **Tab 61**. It advises members of an increase in MSP premiums and indicates that the cost of paying for these benefits cannot exceed the employer contributions dedicated to the IAA.

(b) A copy of the Bulletin dated July 2002 on the topic of "Increase to Medical Services Plan Payment Rates" is attached at **Tab 62**. It advises that the portion of MSP premiums paid by pensions will increase effective the October 2002 pension payment.

(c) A copy of the Bulletin dated March 2003 on the topic of "Changes to Group Benefits for Retired Members" is attached at **Tab 63**. This document advises of reductions to Post-Retirement Group Benefits and reductions to premium subsidies.

129. The Municipal Pension Board issued a guide titled "Joint Trusteeship of the Municipal Pension Plan" dated August 2000 and October, 2000. The guides were mailed to Plan employers and members. Copies are attached at **Tab 64**.

130. The Municipal Pension Board of Trustees sent a Benefits Survey to 37,000 members. A copy of Summary of Results dated September 9, 2002 is

attached at **Tab 65**. A copy of a summary of Survey Comments is attached at **Tab 66**.

AGREED TO this 23rd day of November, 2005.

"Gary Caroline"
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COUNSEL FOR THE DEFENDANT,
MUNICIPAL PENSION BOARD OF TRUSTEES

"Clifton Prowse"
COUNSEL FOR THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA (MINISTRY OF FINANCE)