

IN THE COURT OF QUEEN'S BENCH  
JUDICIAL CENTRE OF REGINA

BETWEEN:

FRANCIS CHARLES MAY, RONALD MORGAN REAVLEY  
and ALFRED HENRY ZIMMERMAN

PLAINTIFFS

- and -

THE GOVERNMENT OF SASKATCHEWAN,

DEFENDANT

BROUGHT UNDER *THE CLASS ACTIONS ACT*

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**EXECUTIVE SUMMARY  
OF  
MEMORANDUM OF FACT AND LAW ON BEHALF OF THE PLAINTIFFS**

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**EXECUTIVE SUMMARY  
OF  
MEMORANDUM OF FACT AND LAW ON BEHALF OF THE PLAINTIFFS**

1. The Memorandum of Fact and Law on behalf of the Plaintiffs is extremely detailed and comprehensive. It is 182 pages. This summary will highlight the major points.
  
2. The Public Service Superannuation Plan (“PSSP”) or (“Plan”) or (“Old Plan”) was established on May 1, 1927 by the Government of Saskatchewan. It covered all employees of Executive Government. All employees were required as a term of their employment to be members – they had no choice.
  
3. The Government took a portion of each employee’s salary by way of contributions. The Government made no contributions. There was no separate fund for the Plan established. The monies were not used for pensions, but were simply placed in the General Revenue Fund of the Government. The employees had no say in either how much money was taken from their salaries or pension contributions, nor did they have any say in how it was used.
  
4. The employees took no issue with the actions of the Government as they trusted the Government completely.
  
5. It was the Government who decided what the pension benefits would be. The employees had no input.

6. The Government unilaterally and on an ad hoc basis determined what, if any, would be received by retired members relative to increases in the cost of living. The Government allowed the value of the employees' pensions to seriously erode over the passage of time. The Government was fully aware that this was one of the greatest problems facing pensioners and yet did little, if anything to address the problem.

7. It remains a mystery as to the reason the Government chose not to fund the Plan. Saskatchewan was unique from other jurisdictions in Canada, both provincial and federal, in that it did not establish any kind of fund.

8. The SaskTel Plan was started in 1928. It had a separate fund.

9. The Workers' Compensation Plan was established in 1940. It had a separate fund.

10. The SaskPower Plan was established in 1944. It had a separate fund.

11. The Liquor Board Plan was established in 1945. It had a separate fund.

12. Most employees did not understand that a separate fund for the Old Plan had not been established.

13. From 1927 up until 1978 (when the PSSP was closed and all new employees thereafter were required to join the new Plan), employees had made contributions totaling approximately

\$100 Million. Pension payments made to employees during that same period totaled approximately \$102 Million. So, for the first 50 years of the Plan, the employee contributions themselves (without even a calculation for notional interest or investment earnings) were sufficient to pay the pension allowances, saving and excepting for approximately \$2 Million.

14. Changes to the Plan were implemented by the Government over the years. Contribution rates were increased. The retirement benefit was decreased. These decisions were made solely and arbitrarily by the Government.

15. In the 1970's, William Fyles, was the chairman of the Superannuation Board which oversaw the Plan. He prepared a memorandum in 1974 after studying the Plan. Many of his comments are insightful. For instance he said:

*"Let me tell you that wages and pensions are the two most important things in an employee's career, in that order. ...  
And indeed they should because once you become a pensioner you are just another tax payer with a single voice, and the possibility of convincing a government that your pension is inadequate, for whatever reason, is unlikely to produce anything more than futility and disappointment...  
For this reason it is considered of prime importance that something be written into the Superannuation Act to assure present pensioners and indeed future pensioners that their earned pension is not going to be eroded and shrunk due to the ever inspiring increase in the cost of living.*

There were many other comments in Mr. Fyles' report that are prescient. But his report was deemed by the Government of the day to be "confidential" so it had very limited circulation.

16. Mr. Fyles recommended that a cost of living adjustment clause be included in the pension. He suggested that the contribution rates of the employees be increased to partially pay

for such a COLA clause. In fact, the contribution rates were increased, but nothing was done with respect to the inclusion of a COLA provision.

17. In the mid-70's there was much discussion amongst the politicians about the inequities of the PSSP. A significant actuarial deficit had accumulated in the Plan. All of observers agreed that something had to be done about that.

18. It is clear that rather than addressing the inequities that it had visited upon its employees, the Government did not implement a COLA provision and did not move to provide for a funded pension plan to pay for those benefits. Rather, again, motivated by its own selfish interests, the Government moved to close the Plan to new members, and establish a new plan which would be a defined contribution plan rather than a defined benefit plan. All new employees were required to join the new Plan.

19. The actuarial study completed in the 1970's showed a significant unfunded liability in the Plan totaling several hundred millions of dollars. The actuarial evaluations were bogus and misleading because there was no fund, there were no earnings because there was no fund, there were no government contributions, and there was no valuation done for future contributions.

20. If the Government had established a fund to which they were required to make contributions and which would have had the opportunity to earn interest and other investment earnings, there is little doubt that the situation would have been vastly different. But the Government could not resist the seductive lure of doing nothing.

21. So, rather than looking after the interests of the members of the Old Plan, the Government, once again motivated by its own self interest, closed the Old Plan. Thereafter it proceeded on a course of ignoring the significant liability that accrued (and would continue to grow) in the Old Plan. And, to add insult to injury, the Government used the sorry financial condition of the Old Plan to deny enhanced benefits, such as COLA, to its members, when such payment of benefits had been found by the Chair of the Superannuation Board back in the 70's to be of critical importance.

22. Most of the employees thought that the Government was making matching contributions to the employee's contributions. They thought the separate fund had been established. These beliefs by employees were supported by two objective factors:

- (a) If a member elected to join the New Plan in 1978 he or she would have transferred into their account not only all of their contributions that they had made to date but also a matching amount – the Government contribution, and interest earned on those contributions;
- (b) The Government had reciprocal arrangements with other pension plans. In those reciprocal arrangements the Government established a protocol whereby an individual could transfer to another pension plan and there would be transferred to his or her credit not only their total contributions but matching contributions by the Government and earned interest.

23. It was the Government's inadequate communications concerning the Plan that allowed that misconception to prevail.

24. During the past several years, members of the SGSA would make an annual pilgrimage to visit with Government officials to seek enhanced benefits. One of the responses from the Government of the day that was routinely received by the SGSA when they sought some COLA protection in the Plan was that pensions were a matter that were negotiated between the Government, as employer, and the employees. They were told that if they had wanted that type of protection it should have been obtained in those collective bargaining negotiations. That position taken by the Government was, and is, not only galling but completely disingenuous. To put that position forward is nothing more than an insult. Pensions were never the subject of collective bargaining. And further, many of the members of the Pension Plan were out of scope and did not have the benefit of collective bargaining.

25. Another justification used by the Government in not paying COLA was the significant unfunded liability in the Plan. But that significant unfunded liability was the sole fault of the Government and the numbers were completely misleading.

26. The loss of purchasing power suffered by the members of the Pension Plan is dramatic. The Government has completely failed its duty – legal, moral or otherwise – to the members of their Plan. Their failure is both reprehensible and pathetic.

27. Occasionally, ad hoc increases in pensions were provided by the Government. However there were numerous years between 1985 and 1996 where absolutely no increases were provided – 1987, 1991, 1992, 1994 and 1996. In other years, the increase rarely equated to the increase in the Consumer Price Index.

28. In 2007, legislation was finally introduced in which the increases were tied to the Consumer Price Index (70%). It is clear that the legislation was a half-baked response by the Government to this lawsuit. Interestingly, the Saskatchewan Party, which forms the present government, supported a 100% COLA at the time.

29. There was a report prepared by the Economic Council of Canada in 1979, another report prepared by the Federal Government in 1976, as well as the report by William Fyles in 1973. All of the reports underscore the requirement for keeping pensions current with the increase in the cost of living. Despite the compelling and unequivocal evidence provided in these reports, the Government chose to leave the members of the Old Plan flailing. The decrease in the purchasing power of pensions has been, year after year, relentless. The Government continued to treat the members as third class citizens while holding itself out as a fair and even-handed employer.

30. For the longest time it was only Saskatchewan and Newfoundland that did not provide COLA increases to its pensioners. Newfoundland saw the light in the 2002. It took the Saskatchewan Government another five years.



31. At the same time:

- (a) The Teacher's Superannuation Plan provides 80% COLA;
- (b) SaskTel Pension Plan includes COLA equal to 100% of the change in CPI to a maximum of 2%;
- (c) SGI employees receive 100% indexing;
- (d) The SAHO Pension Plan includes benefit improvements as a result of collective bargaining; and
- (e) The Federal Government provided indexing at 100% CPI.

32. And in the face of that, somewhat unbelievably, the pension contributions required to be made by the members of the Old Plan were among the highest in the Canadian Public Sector.

33. In 1967 the Government of Saskatchewan introduced legislation regulating pension plans – *The Pension Benefits Act*. Notably, the Provincial Government Pension Plans and in particular the PSSP were exempted from the provisions of the Act. The legislation was aimed at protecting pension plan members from unscrupulous employers. The irony is patent. The Act had funding requirements. Again, the Government was motivated for its own selfish reasons to the detriment of its employees to exempt itself from the legislation. It is obvious that if it were to be subject to *The Pension Benefits Act* it would have required a significant payment by the Government into a fund to protect the members.

34. Again in 1981 *The Pension Benefits Act* was amended. Again, the purpose was to protect members of pension plans. The Government again exempted itself.

35. As part of this action against the Government, it is alleged that the Government stands in a fiduciary relationship with the PSSP members. The following facts are relied on:

- (a) The Government was the employer of the members of the PSSP;
- (b) The members of the PSSP were in a completely vulnerable position with respect to their relationship with the Government;
- (c) The members of the PSSP were not entitled to negotiate with the Government concerning the benefits offered to them;
- (d) The Government received for use as the Government may in its sole discretion determine, monies from the members by way of pension contributions;
- (e) The benefits to be paid were established by legislation, which legislation was in the sole discretion and purview of the Government;
- (f) The members trusted that the Government would act in their best interests both with respect to that portion of the members' salaries paid to the Government by way of contributions, and the ultimate pensions to be paid to the members;
- (g) All monies paid by the members were used by the Government for its own purposes such as building highways, hospitals and any other government enterprises.

36. There are three basic tests for determining whether a party acts in a fiduciary capacity:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest;
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

37. The evidence will show that:

- (a) The Government could alter the contribution levels for employees from time to time;
- (b) It could alter the pension formula;
- (c) It was the Government's sole determination to not fund the Plan;
- (d) It determined that the Plan would not be subject to the minimum requirements as established by the Government under *The Pension Benefits Act*;
- (e) It determined when, if, and how much ad hoc COLA increases could be granted;
- (f) The Government increased the required contributions in the 1970's with no corresponding increase in benefits;
- (g) It closed the Plan in 1978 as a means for the Government to avoid addressing the significant unfunded liability of the Plan, which was of its own creation;
- (h) It did not allow pensions to be bargained collectively;
- (i) The members trusted the Government completely. The Government was regarded as a good employer. The members believed the Government would look after their best interests, particularly with respect to the pension.

38. The members justifiably thought they would be treated equitably and fairly having regard to the other employees of the Government and its crown corporations and the level of pension benefits being provided to those parties.

39. It is also alleged that the Government breached its contract of employment with the members of the PSSP. The Government failed to provide benefits to the members of the PSSP in the form of a corresponding notional matching contribution together with interest on the contributions. Further, they have failed to treat the members of the PSSP equitably and fairly. Many of the allegations concerning the Government's breach of fiduciary duty also support the assertion that it had breached its employment contract with its members.

40. The third cause of action asserted against the Government is that it has been unjustly enriched by failing to establish a fund and failing to make contributions. The three elements of an action for unjust enrichment are:

- (i) Enrichment of the Defendant (the Government);
- (ii) Corresponding deprivation of the Plaintiffs (the members of the Plan); and
- (iii) Absence of a juristic (legal) reason for the enrichment.

41. The Memorandum of Fact and Law contains a thorough examination and discussion of the applicable law for each of the causes of action (breach of fiduciary duty; breach of contract; and unjust enrichment).

42. At a bare minimum it is asserted that the class should be compensated for the decreased value in the purchasing power of their pensions caused by the Government's sorry record concerning COLA increases. A determination as to the amount to be paid to each individual class member will have to be made. A lump sum payment to each of the retired members is required to provide them with adequate redress for the wrong they have suffered at the hands of

the Government. Concurrently, a new base pension amount should be established for each retired member which will include a calculation of what their pension should be at the present if adequate COLA had been provided.

43. Going forward, COLA should be provided yearly in an amount equal to 100% of any increase in the Consumer Price Index, and calculated on the basis of the new basic pension as determined for the immediately preceding year, as set out in paragraph 42 above.

44. Surviving spousal allowances should be increased from the 60% of the retiree's pension that is presently paid to 75% of the new pension entitlement, as described in paragraphs 42 and 43 above.

45. Extended health coverage for medical, dental, prescription drug costs, and the like should be provided and subsidized at the same level as permanent employees and members of the Legislative Assembly.

46. Finally, death benefits should be paid based on rates in place at the time of death, rather than the rates in place at the time of retirement.

DATED at the City of Regina, in the Province of Saskatchewan, this 9<sup>th</sup> day of  
December, 2009.

McDOUGALL GAULEY LLP

PER: 

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