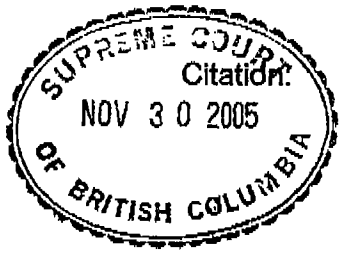
IN THE SUPREME COURT OF BRITISH COLUMBIA



Citation: ***Bennett v. British Columbia,*** 2005 BCSC 1673

Date: 20051130
Docket: 04-3706
Registry: Victoria

Between:

Frederick Bennett

Plaintiff

And:

Her Majesty The Queen in Right of the Province of British Columbia

Defendant

Before: The Honourable Mr. Justice Melvin

Reasons for Judgment

Counsel for the Plaintiff:	P. I. Waldmann, M. Zeigler and A. C. Peeling
Counsel for the Defendant:	D. C. Prowse, J. G. Morley and T. Callan
Dates and Place of Trial/Hearing:	November 14, 15 and 16, 2005 Victoria, B.C.

[1] By his notice of motion dated August 16, 2005, the plaintiff seeks orders as follows:

> 1. this proceeding be certified as a class proceeding;
>
> 2. the Class be comprised of:
>
> (a) persons who are Residents of British Columbia and are members of the British Columbia Sector Pension Plan (the "Pension Plan") who retired on or before November 30, 2002 (the "Retirees"), and who were entitled to receive premium-free Medical Services Plan Benefits and Extended Health Care Benefits (the "Retiree Benefits") at their respective dates of retirement;
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> (b) the surviving spouses and dependents of the Retirees who are Residents of British Columbia and who were entitled to receive premium-free Retiree Benefits as of November 30, 2002; and
>
> (c) the beneficiaries and/or estates of persons in paragraphs (a) and (b) above who died prior to any settlement or judgment in this action; ...

[2] In addition to the foregoing orders, the plaintiff seeks orders which would be consequent upon certification dealing with subjects such as the representative plaintiff, opting out of the class, certification of common issues and notice.

[3] The notice of motion was issued as a result of the action commenced by the plaintiff as a retired former employee of the defendant, and a current member of the Public Service Pension Plan. In his amended statement of claim, the plaintiff refers to the class as being members of the pension plan who retired or terminated employment on or before November 30, 2002. The group of individuals so described comprise approximately 27,000 retired members.

[4] In the statement of claim, the plaintiff alleges that as a term of his employment with the defendant, the plaintiff received *inter alia* the benefits of a pension plan which included Medical Services Plan payments and Extended Health Plan benefits without premiums for these benefits being charged to the employees. The plaintiff alleges that that arrangement of non-payment for these benefits by employees was in existence for a number of years and was to continue through retirement.

[5] Specifically, in paragraph 18 of the amended statement of claim, the plaintiff alleges that he and retired members were promised by the defendant post-retirement benefits including the Extended Health Plan benefits and Medical Services Plan payments and that these benefits vested in the plaintiff class upon retirement or termination of employment. It is alleged that the defendant agreed to pay monthly premiums for these benefits for the retirees and their dependents after retirement.

[6] Accordingly, the plaintiff alleges a breach of contract in relation to the overall contract of employment which included these benefits during employment and after and upon retirement without cost to the retirees, and in addition, the plaintiff alleges a breach of fiduciary duty alleging that the defendant was in a position of trust in relation to the retired members who had received the defendant's promise and reasonably expected the defendant to act in their best interests with respect to those promised benefits.

[7] With this history, the plaintiff alleges that in October 2002 the defendant announced that it would not longer pay one hundred percent of the premiums for those with pensionable service, and as a result, effective December 2002, the plaintiff and the retired members began paying premiums. In this context, the unilateral change by the defendant, it is alleged, constituted a breach of their employment contract and violated retirees' vested retirement rights and benefits.

[8] In the amended statement of defence, filed June 10, 2005, the defendant denies these allegations, stating that at all times terms and conditions of employment were set out either in collective agreements or subordinate legislation under the ***Public Service Act*** and that neither a collective agreement nor subordinate legislation provided for or promised the benefits alleged.

[9] In support of his claim, the plaintiff alleges that his claim against the defendant is based on employment history with the benefits being paid by the defendant and the documentation by way of letters, brochures and pamphlets issued by the defendant to potential retirees, who were approaching their retirement dates, advising them that these extended health benefits and medical services benefits would be paid by the defendant for life.

[10] The plaintiff in his affidavit sworn August 6, 2005 attaches as Exhibit A the document prepared by the defendant entitled "NOTICE OF RETIREMENT AND APPLICATION FOR SUPERANNUATION ALLOWANCE". Paragraphs 4 and 5 of that document, filled out by the plaintiff and certified by an authorized signing officer of the defendant, contains the following language:

4. GROUP APPLICATION FOR MEDICAL PLAN COVERAGE

This form is to be completed and returned to the Superannuation Commission if you will be residing in British Columbia following retirement and elect group medical plan coverage. The government will pay the monthly premium for you and your dependents after retirement. A new identity card will be sent to you from the medical plan within approximately three months after the effective date of your pension. In the interim you may continue to use your previous plan number.

5. EXTENDED HEALTH CARE PLAN COVERAGE

Complete, sign and return the Extended Health Care Plan card if you will be residing in British Columbia following retirement and elect coverage as described in the enclosed brochure. The Government will pay the monthly premium for you and your dependents after retirement. Dental coverage is not available.

Your coverage under this plan will begin the first of the month following the month in which your pension is effective. For example, if you retire in February, your pension will be effective March 1 and your extended health care plan coverage will be effective from April 1. If you do not defer the payment of your pension there should be no interruption in your coverage.

If you do not wish to have this Extended Health Care Plan coverage, please inform the Superannuation commission. Coverage will not be available to you at a later date unless you can show that you have had continuous coverage under an extended health care plan.

Pensioners who cease to reside in British Columbia, and thereby become ineligible for coverage, may later apply for coverage under the Extended Health Care Plan provided they apply within one month of their return to residence in British Columbia.

[my emphasis]

[11] With reference to other retirees, documentation is attached to the plaintiff's affidavit describing correspondence received. In this respect, Exhibit B to the plaintiff's affidavit is a letter from the Superannuation Commission of the defendant addressed to a Mrs. Downey on retirement, specifying that "Premium-free Medical coverage was elected for yourself and one dependent" and "Premium-free Extended

Health Benefits coverage was elected". It is interesting to note that the letter contains language that the "selection of plan options is irrevocable". This same type of documentation was issued to a number of retirees. In some respects, the letter issued on behalf of the Public Service Pension department of the defendant contains language such as "the full premium rate is to be paid by the Provincial Government", with reference to medical coverage.

[12] In addition, there is evidence that the defendant provided Medical Service Plan and Extended Health Plan benefits prior to retirement without cost to employees and that a large number (27,000) of retirees predicated their retirement on the understanding that the Government of the Province of British Columbia would honour their premium-free status.

[13] It is alleged, and is common ground between the parties, that in November of 2002 the pension scheme was revisited and the Province began, through the pension plan, to charge retirees premiums for Medical Services Plan and Extended Health Plan benefits. With this general background, it is alleged by the plaintiff that there should be certification of his action as a class action on behalf of the 27,000 retired persons who were receiving the Medical Service Plan benefits and Extended Health Plan benefits without premium. Mr. Bennett's affidavit, and other affidavits filed on behalf of the plaintiff, also describe seminars and pre-retirement meetings which were conducted for or on behalf of the defendant for the benefit of potential retirees, at which times oral representations or statements were made confirming that Medical Services Plan and Extended Health Plan benefits were available to retirees without charge.

[14] In submissions, counsel for the plaintiffs acknowledged that they do not base their claim on oral representations to various people at various meetings over a period of time, but point to that conduct as indicative or perhaps supportive of their claims of the promise of the Province of British Columbia. It is submitted that the documents, by way of letters, memoranda, brochures and pamphlets were confirmed by the oral representations to various people at various pre-retirement seminars. In addition, it is submitted by the plaintiff that some retirees may have taken early retirement based on representations concerning the health care premiums.

Legislation - *Class Proceedings Act*

[15] Section 4(1) of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50, identifies the requirements for certification. That section is set out as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Jurisdiction

[16] Before proceeding with the analysis of s. 4(1) of the ***Class Proceedings Act*** and a determination of whether or not on the merits there should be certification, it is necessary to deal with the position of the defendant as it relates to the jurisdiction of the court. Shortly stated, the defendant's position is that as the claim of the plaintiff arises out of his employment with the defendant, it is a matter then for grievance and/or arbitration in the context of a labour dispute as distinguished from a court

action. In that respect, the defendant submits that the plaintiff's cause of action relates to premium subsidies and extended health benefits which arose as a result of the plaintiff's employment contract. The Province, in its written submissions, alleges that the health premiums for retired employees were never part of the employment contract and never defined benefits. The position of the defendant is that the retiree benefits in this respect have never been included in any collective agreement and instead were granted as purely statutory benefits without consideration.

[17] Despite this latter submission, the Province seeks to have the action dismissed or alternatively stayed on the basis that the claim should be determined through grievance arbitration under the ***Labour Relations Code***. Consequently, it is submitted that the ordinary courts have no jurisdiction to determine the terms and conditions of employment of a unionized employee.

[18] It is clear on the evidence that the majority of the persons who purport to be part of this class were union employees and only approximately eighteen percent were non-union or excluded employees. In addition, the defendant points out that some of the "employees" were not employed by the defendant directly. Nevertheless, it appears that the 27,000 employees were employed by the defendant, a Crown corporation or some other corporation which utilizes the same pension plan. Excluded personnel were all subject to the same alleged promise and received the same brochures, pamphlets, letters, etc. Under these circumstances, in my view, the employer in the first instance is not determinative of whether or not the plaintiff has a proper cause of action with reference to certification of these individuals.

[19] On the specific issue as to whether or not a labour arbitrator has jurisdiction over the claim, it is submitted that the plaintiff's claim relates to benefits that flow from his employment and is based on promises made during the currency of the employment relating to post-employment (retirement) benefits.

The Law

[20] Counsel for the defendant rely on the decision of the Supreme Court of Canada in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929. In ***Weber***, the court dealt with the issue as to whether or not an employee who is in receipt of sick benefits provided for in the collective agreement was precluded from commencing a court action based on tort and breach of rights claiming damages for a surveillance which was undertaken by investigators who had been retained by the employer to determine whether or not the employee was malingering. In approaching this particular subject, the court on the issue of whether or not the dispute must be resolved by arbitration stated at paragraph 52:

> The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

[21] In that respect, it further stated at paragraph 54 that the approach did not preclude all actions in the courts between employer and employee:

> Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts.

[22] In ***Weber***, the plaintiff's rights in relation to sick benefits were created by the collective agreement. Consequently, the court concluded that the arbitrator had

exclusive jurisdiction over all aspects of the dispute which existed between the employer and the employee.

[23] This approach was considered in ***Fasslane Delivery v. Purolator***, [2004] B.C.J. No. 1059 (B.C.C.A.), which involved a commercial contract between two corporate entitities with reference to the provision of trucking services. However, the owner operator of the truck, although operating under a corporate entity, was a member of the union which was certified and had a collective agreement with Purolator. Purolator was a party to that collective agreement with the Teamsters Union which was the bargaining agent for certain of Purolator's employees, including owner operators in British Columbia. In this instance, Fasslane was an owner operator. Fasslane commenced proceedings against Purolator for breach of contract and the issue as to whether the court had jurisdiction was determined by the Court of Appeal in the Province of British Columbia and the court stated, applying the "Weber Rule", at paragraphs 16 and 17:

> [16] ... Generally, issues of this kind arise where it is clear that the party is a member of the bargaining unit, the issue sought to be litigated generally being whether the subject matter of the dispute comes within the scope of the collective agreement. Nevertheless, when regard is had to the matters which arise from the evidence to which I referred earlier, it is clear that the essential character of the dispute arises from the "interpretation, application, administration or violation of the collective agreement."
>
> [17] The master collective agreement in this case requires, as did the agreement in Weber, that any question as to the interpretation, application or alleged violation of the agreement must proceed to arbitration.

[24] Relying on that line of authority, counsel for the defendant submit that this dispute, arising out of employment with the defendant, should be a matter which is referred to arbitration. The court does not, or should not, exercise jurisdiction.

[25] In this respect, I disagree. It is to be noted initially that none of the collective agreements in existence dealt with retiree benefits, Medical Service Plan or Extended Health Plan. Secondly, it is to be noted that the retirees are not members of or parties to the collective agreement. Stopping there, it is clear that the collective agreement is silent. Consequently, as the silence of the collective agreement is acknowledged by all parties, the question arises as to how can it be interpreted or applied, or how can there be an alleged violation of the provision which is not contained in the agreement?

[26] More importantly, however, in my view, the provincial legislation in force from time to time makes it abundantly clear that under no circumstances could the subject be contained in a collective agreement. In that respect, I refer to the ***Public Service Labour Relations Act***, R.S.B.C. 1996, c. 388, s. 12(b):

> **12** Every collective agreement must include all matters affecting wages or salary, hours of work and other working conditions, except the following:
>
> ...
>
> (b) all matters included under the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act,* and the pension plan rules made under that plan; ...

[27] In that respect, it is interesting to consider the position taken in written argument by the defendant; that is, the British Columbia Government Employees'

Union attempted to introduce post-retirement group benefits into the collective agreement on two occasions, and the Province refused each time, at the risk of strike. As a result, it is submitted that retiree benefits have never been included in any collective agreement and instead were covered by statutory benefits. In my view, the position taken by the defendant in these circumstances is somewhat inconsistent with the submission that the matter should be dealt with as if it involved interpretation, application or alleged violation of a collective agreement.

[28] I am satisfied under the circumstances the court has jurisdiction and there is no exclusive jurisdiction in an arbitrator.

[29] The defendant's further argument is if jurisdiction is concurrent, then arbitration is preferable for a number of reasons, as follows:

(a) grievance arbitration is faster and cheaper;

(b) specialized expertise in arbitrators;

(c) principle of labour relations policy to decide issues of unionized employees' contractual entitlements through grievance, not civil;

(d) grievance arbitration fulfills the purpose of judicial economy, acts as the justice in behaviour modification.

[30] All of this is predicated on the labour arbitrator having jurisdiction. In my view, the labour arbitrator does not have jurisdiction; consequently, the issue of concurrent jurisdiction does not arise. Nevertheless, in light of the submissions, it should be noted as follows.

[31] Approximately 18% of the 27,000 retirees had not been and never were members of a union which had a collective agreement as alleged in the case at bar. These individuals are referred to as excluded employees and as a result any benefits they receive were as a result of statute or order in council. These individuals would not have an opportunity to become involved in the grievance procedure assuming such was an appropriate forum.

[32] There is another anomaly that arises as a result of the peculiarity of the pension plan and that is executives of the three unions in question are members of the plan. These executives are not employees of the defendant or any of its Crown corporations or other agencies. They are employees of the respective unions that they belong to, in this instance the largest being B.C.G.E.U. A labour grievance process would involve the union grieving the employee's alleged dispute with the employer. In this instance, the retired employee (who is not a member of a collective agreement) would have to ask the union to grieve the union, as the union is the employer of this limited group of individuals. This peculiarity is not determinative of the issue but it points out some of the difficulties in the position taken by the defendant.

Excluded Employees and Non-Government Employers

[33] The defendant also points out that in the case at bar that there are a number of different employers, not all of whom are Crown agencies; some may be employed by private corporations. In addition, there are a number of employees of the defendant who are excluded from the collective bargaining process as mentioned

above. With reference to these individuals, because of their excluded nature, and because they may be employed by other non-defendant agencies such as private companies, it is submitted that it is inappropriate for a certification process to be undertaken.

[34] That position, in my view, ignores the creation of the relation and the funding of the plans. With reference to each of the 27,000 prospective class members, they are all parties to and beneficiaries under a pension plan which was under the direction and control from time to time of the defendant. During their employment period, they contributed to the pension plan. Although they may not have been direct employees of the defendant, they were either direct or indirect contributors through deduction of their cheques and payment by their employers to the plan under the direction and control of the defendant.

[35] The plaintiff's action is not in relation to benefits which flow from employers, but is in relation to benefits that flow from the pension plan and retirement. All of these 27,000 persons participate in the plan; all rely on the same contractual basis of pamphlets, letters, brochures and memoranda as evidence of the existence of this benefit (health care). Under those circumstances, in my view, the relationship between the employee and the employer, and the nature of the employer vis-à-vis the defendant, is immaterial. The nexus between the retirees and the defendant is their participation in the plan under the direction and control of the defendant.

Certification

[36] Section 4(1) of the ***Class Proceedings Act*** outlines the requirements which are to be met in an analysis of the application for certification of the class action. If each of these requirements is met, the court is required to certify. In short, I am satisfied that each of the requirements, (a) through (e) is satisfied on the evidence before me.

[37] However, dealing with each of the requirements, I have the following observations:

(a) The pleadings clearly disclose a cause of action based on breach of contract and a breach of a fiduciary relationship. Whether or not a plaintiff is successful at trial is not a matter for me to consider, nor is it a matter for comment. Suffice it to state that it is not plain and obvious that the plaintiff cannot succeed in the litigation.

(b) There is a clear class of two or more persons. Shortly stated, every individual receiving pension cheques or benefits each month, who retired on or before November 30, 2002, is clearly identifiable. The defendant, through the pension plan under its direction and control, or through the trustees of that plan, will be able to determine with exactitude those individuals who fall within the class.

(c) The common issue relates, of course, as to whether or not there was a promise made in the documentation by the defendant through its agents or

servants to these retirees concerning their entitlement to health care benefits without the payment of premiums. Although the individual documents relied on by the plaintiff may vary in form, on the basis of the evidence before me, they do not vary in substance.

(d) The class proceeding is the preferable procedure as all of the 27,000 potential claimants will have their issue resolved once and for all. The only viable alternative would be a representative action brought by one or two plaintiffs alleging the same style of cause on the understanding that all of the remaining 27,000 would be bound by the result. That is an extremely difficult matter to resolve considering the size of the class.

(e) I am satisfied that the plaintiff Frederick Bennett is a representative plaintiff who would fairly and adequately represent the interests of the class as demonstrated by his affidavit material and his involvement in the retired employees' association, and although the plan which is prepared for the proceeding has been criticized by the defendant, in my view, it is the basis of a workable plan which can be modified from time to time as the circumstances require. In addition, Mr. Bennett does not have an interest that is in conflict with the interests of the other class members. His interest is identical.

[38] Consequently, although I have not exhaustively analyzed each and every one of these components, the evidence, in my view, compels one inexorably to the conclusion that a class action is the only logical way to determine the rights of the

27,000 claimants to the benefits which they allege are owed to them by the defendant. Twenty-seven thousand small claims actions would not be a meaningful way of resolving the issues between the class and the defendant.

[39] With reference to s. 4(2), the court is to consider all relevant matters. With reference to subsections (a) through (e), in my view, on any analysis, the class proceeding would be a preferable procedure.

[40] In this respect, the defendant submits that there is too much individuality to support the excluded employees' class and that there is no common core of facts across the breadth of the proposed class in causes of action. In the written submissions advanced on behalf of the defendant, counsel have identified a number of issues which they feel demonstrate that there are individual causes of action and that there is not a common issue which would allow the court to provide a fair, just and accurate determination of the claims.

[41] In that respect, I disagree. The plaintiff's action is not based on any oral representations made by persons on or behalf of the defendant in any particular conversation. Were it so, it is clear that there would be great difficulties in determining whether or not there is a common issue as the evidentiary basis for the claims may vary substantially between the various plaintiffs that may have a cause of action. In the case at bar, the plaintiff's claim is not dependent upon these oral statements. It is dependent upon the documentation issued by or on behalf of the defendant in relation to the pension plan, coupled with years of a course of conduct by the defendant or the plan. The course of conduct is common to all 27,000

persons who retired on or before November 30, 2002 and as mentioned earlier, the documentary evidence which is the basis of the claim of the plaintiff, is documentary evidence which all contains language to the effect that post-retirement medical services premiums will be paid by government. In stating that, I am not finding as a fact that that was a term of the employment contract with the defendant, or its agents. I refer to it as being the evidentiary basis upon which the cause of action of the class is brought against the defendant. At no time during the certification hearing did the defendant refer to any documentary evidence inconsistent with the foregoing which could result in a different issue arising in relation to individual members of the class. Whether or not there was a contractual intention on the part of the defendant at the time the documents, pamphlets, brochures and letters were issued, is, in my opinion, a triable issue and not a matter to be determined at this hearing.

[42] In many respects, this application for certification is similar to ***Kranjcec v. Ontario*** (2004), 69 O.R. (3d) 231 (Ont. S.C.J.), where the plaintiff, a retiree from the Ontario Civil Service, alleged that the Ontario Government unilaterally reduced certain benefits. The action was for a declaration that she and other retirees were entitled to receive the benefits, and that the reduction of benefits violated their rights. She sought damages for breach of contract and breach of fiduciary duty. As in the case at bar, in ***Kranjcec***, various booklets providing information about benefits were released from time to time, purporting to set out entitlement of retirees to benefits provided to them pre-retirement. The court considered whether or not the pleadings disclosed a cause of action and was satisfied that unless it was plain and obvious

that no reasonable cause of action was disclosed, the action should be certified. In that respect, the court expressed the view that only if the action as pled is certain to fail will this occur. As stated earlier, in my view, the pleadings do disclose a cause of action, and it is not plain and obvious that the action as pleaded is certain to fail. It should be noted in ***Kranjcec*** that the court concluded it was not plain and obvious that the guide to retirement benefits that the defendant had distributed to its employees and retirees could not reasonably be considered to contain a promise that when accepted became contractually binding. In many respects, that is the case advanced by the plaintiff in the case at bar. In the course of determining that it was an appropriate case for certification as a class action, the court stated at paragraph 66:

> It is estimated that there are approximately 51,000 members of the class whose losses will vary but will typically be measured by hundreds, rather than thousands of dollars. As, for such persons, the cost of individual actions is likely to be prohibitive and as a resolution of common issues will determine the question of liability, the goal of access to justice should be substantially achieved by a class proceeding.

[43] The same analysis was carried out in ***Ormrod v. Etobicoke (Hydro-Electric Commission)*** (2001), 53 O.R. (3d) 285 (Ont. S.C.J.), where the plaintiff sought certification as a class action, the proposed representative plaintiff seeking to represent all retired former employees of the Hydro-Electric Commission of the City of Etobicoke. It is of interest to note that the defendant in ***Ormrod*** characterized the plaintiff's claims as a series of individual claims arising from individual representations, and on that basis, there were no common issues; therefore, a class

proceeding was not the preferred procedure for the resulting claims. In that context, the court stated at paragraph 8:

> The defendant, for the purposes of these arguments, attributed an entirely different case to the plaintiffs [from] that which the plaintiffs put forward. The plaintiffs state categorically that they rely only on the documentary evidence emanating from the defendant as constituting the foundation for its cause of action. Indeed, they expressly state that they do not rely on any individual oral representations. Thus, the defendant's arguments, based as they are, supply a false premise as to what comprises the theory of the plaintiffs' case and the facts which drive it. In my view, the plaintiffs' case is tailor-made for a common issues trial in a class proceeding. The plaintiffs meet all of the tests for certification.

[44] The same reasoning applies, in my view, in the case at bar.

[45] I note as well that the learned trial judge, in dealing with the issue that the plaintiff's statement of claim lacked sufficient material facts to support the alleged cause of action for breach of contract, was satisfied that the pleadings must be read generously and that the claim contained all the necessary material facts to support the claims advanced. As stated at paragraph 20:

> There is no issue that all of the members of the plaintiff class were engaged in an employer-employee relationship with the defendant. This is sufficient in the present context to provide an arguable basis that there was consideration flowing between the parties.

[46] In the case at bar, however, there is some evidence that some of the class were not in an employer-employee relationship with the defendant, but nevertheless, as stated earlier, they were participants in the plan which was under the direction or control of the defendant, and was created by the defendant. In conclusion, the court

in ***Ormrod*** used the following language in paragraph 37 which, in my view, is appropriate to the case at bar:

> This is a case where the advantages of a class proceeding are so apparent as to be uncontrovertible. Against this, one must weigh the disadvantages, in terms of cost and inaccessibility to justice, that this group of retired persons would face in obtaining individual determinations of their alleged claims. A certification motion is not a determination on the merits. It is entirely procedural. The motion is granted.

[47] I am satisfied under all the circumstances that a consideration of the provisions of s. 4(1) and (2) of the ***Class Proceedings Act*** lead inexorably to the conclusion that a certification of the class as presented by the plaintiff is the most appropriate way of determining the issues which are outstanding between the parties.

[48] The defendant's application for a stay of proceedings on the basis that the claims should be determined through grievance arbitration is dismissed, as I am satisfied that grievance arbitration is not available.

[49] Consequently, the plaintiff's application for certification as a class action is granted and the following orders are made:

> The class is to be composed of:
>
> (a) persons who are Residents of British Columbia and are members of the British Columbia Sector Pension Plan (the "Pension Plan") who retired on or before November 30, 2002 (the "Retirees"), and who were entitled to receive premium-free Medical Services Plan Benefits and Extended Health Care Benefits (the "Retiree Benefits") at their respective dates of retirement;

(b) the surviving spouses and dependents of the Retirees who are Residents of British Columbia and who were entitled to receive premium-free Retiree Benefits as of November 30, 2002; and

(c) the beneficiaries and/or estates of persons in paragraphs (a) and (b) above who died prior to any settlement or judgment in this action; ...

[50] Also, as requested in the notice of motion:

3. members of the class may opt out of this action by delivering a signed Opt-Out Form to Peter I. Waldmann, Barrister & Solicitor, delivered or post-marked no later than the opt-out deadline to be fixed by this Court;

4. Frederick Bennett be appointed the Representative Plaintiff;

5. the claims of the Class allege breach of contract and breach of fiduciary duty against the Defendant with respect to the Defendant's administration and provision of the Retiree Benefits;

6. the relief sought by the Class is for declarations, orders, damages, punitive damages and interest against the Defendant;

7. the following questions be certified as common issues in the class proceeding:

a. Did the Defendant breach its contractual promise and fiduciary duty to provide and fund Retiree Benefits to the Class Members as alleged in the Amended Statement of Claim?

b. If the Defendant did breach its contractual promise and fiduciary duty to the Class Members, what relief should be granted to the Class Members?

c. Should punitive damages be awarded and if so, in what amount?

8. by a date to be set by the Court, notice of certification be given to the Class Members by the following means:

a. a notice to Class Members and Opt-Out Form mailed to all class members known to the Defendant at the expense of the Defendant;

b. the issuance of a press release in a form to be agreed upon by the parties or if the parties cannot agree, in a form ordered by the Court;

c. posting of the Notice to Class Members and Opt-Out Form on class counsel's website.

[51] If counsel require further direction they may contact the trial co-ordinator for a suitable date and time.

The Honourable Mr. Justice Melvin