

**APPENDIX "1"**

**Fresh As Amended Statement of Claim**

SCHEDULE "A"

Action No.: 1001-09969

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

LINDA MARCHUK, DANIEL LANG AND CATHY MACNAUGHTON

Plaintiffs

- and -

THE UNIVERSITY OF CALGARY,  
THE CROWN IN RIGHT OF THE PROVINCE OF ALBERTA  
as represented by THE MINISTER OF FINANCE AND ENTERPRISE,  
THE PUBLIC SERVICE PENSION BOARD and  
THE ALBERTA PENSIONS SERVICES CORPORATION

Defendants

Brought under the *Class Proceedings Act*, S.A. 2003, c. C-16.5

STATEMENT OF CLAIM (FRESH AS AMENDED)

I THE PARTIES

A. The Plaintiffs

1. The Plaintiff Linda Marchuk ("**Marchuk**") is a resident of the City of Calgary, and was continuously employed on a full time basis at the University of Calgary as a faculty technician with the Faculty of Medicine and subsequently as a Research Technician with Faculty of Medicine, from 1988 until December 31, 2009. Marchuk was a participant in the Public Service Pension Plan between January 1, 2009 and December 31, 2009.
2. The Plaintiff, Dan Lang ("**Lang**"), is a resident of the City of Calgary, and has been continuously employed on a full-time basis at the University of Calgary as an electronics technician since 1989. Lang has been a participant in the Public Service Pension Plan since January 1, 2009.
3. The Plaintiff, Cathy MacNaughton ("**McNaughton**"), is a resident of the City of Calgary, and has been continuously employed on a part-time basis at the University of

Calgary in the Faculty of Medicine as a research assistant since April, 1996. McNaughton has been a participant in the Public Service Pension Plan since January 1, 2009.

4. At all material times, each Plaintiff was a “**Trust Employee**”, namely a person who worked at the University of Calgary and provided services to other persons (“**Trust Holders**”) who also worked at the University. The services performed by Trust Employees and the terms on which Trust Employees were engaged to perform services varied; however, all Trust Employees were engaged directly by one or more Trust Holders and were paid from money (“**Trust Moneys**”) granted to the Trust Holders from sources outside the University, including through government research grants, private research monies and donations, and not from ordinary University budgets. The University provides administration services to Trust Holders on account of the Trust Moneys.

#### **B. The Defendants**

5. The Defendant, the University of Calgary, is a public university in Calgary established and maintained pursuant to section 3 of the *Post-secondary Learning Act*, S.A. 2003, c. P-19.5, as amended, and is a participating employer in the Public Service Pension Plan.

6. The Defendant, the Crown in Right of the Province of Alberta, as represented by the Minister of Finance and Enterprise (the “**Minister**”) is the Administrator of the Public Service Pension Plan (the “**Plan**”), pursuant to subsection 7(1) of the Public Service Pension Plan Regulations, Alta. Reg. 368/1993 (the “**PSPP**”), and is the Trustee of the Public Service Pension Plan Fund (the “**Plan Fund**”), pursuant to section 7(1) of the *Public Service Pension Plans Act*, R.S.A. 2000, c. P-41 (the “**Act**”).

7. The Defendant the Public Service Pension Board (the “**Board**”) is a board established pursuant to section 3(1) of the *Act* for the purposes, *inter alia*, of ensuring that the Plan is properly funded and for setting policy guidelines concerning the administration and funding of the Plan.

8. The Defendant, the Alberta Pension Services Corporation (“**APA**”), is corporation registered under the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, and has its headquarters in Edmonton, Alberta.

### **C. The Class Members**

9. The Plaintiffs, Marchuk, Lang and MacNaughton bring this action on their own behalf and as representative plaintiffs (“**Representative Plaintiffs**”) pursuant to the *Class Proceedings Act*, R.S.A. 2003, c. C-16.5, as amended (the “**CPA**”), on behalf of all persons of the class (“**Class Members**”):

All persons who worked as a Trust Employee at the University of Calgary on or prior to December 31, 2008 for any period or lengths of time including on a full-time, part-time, term, occasional, temporary or other basis and who has not Opted-Out.

10. The Class Members include the following sub-classes:

(a) “**Group 1 Trust Employee**” means a Class Member who:

- (i) Was engaged as a Trust Employee at any time during the Settlement Period and was Eligible, as determined by the Actuaries, to contribute to the Plan during the Settlement Period;
- (ii) was enrolled in the Plan on or after January 1, 2009 pursuant to their employment at the University;
- (iii) is an employee of the University; and
- (iv) is Eligible to contribute to the Plan.

(b) “**Group 2 Trust Employee**” means a Class Member who:

- (i) is not a Group 1 Trust Employee;
- (ii) was engaged as a Trust Employee at any time during the Settlement Period and was Eligible, as determined by the Actuaries, to contribute to the Plan during the Settlement Period; and

- (iii) is not an employee of the University or is an employee of the University but is not Eligible to contribute to the Plan.
- (c) “**Group 3 Trust Employee**” means a Class Member who:
- (i) is not a Group 1 Trust Employee or a Group 2 Trust Employee;
  - (ii) was engaged as a Trust Employee at any time prior to January 1, 2009; and
  - (iii) may or may not be an employee of the University.

## II THE FACTS

### A. Establishment of The Public Service Pension Plan

11. The Plan was established in 1947 for employees of the Government of Alberta and other public service organizations, including public universities such as the University of Calgary. The Plan is a defined benefit, contributory pension plan established by regulation, and governed by a statutory trust.

12. The Plan is established and maintained through section 2 of Schedule II of the Act.

### B. The Public Service Pension Board

13. The Board is established pursuant to section 3(1) of the Act, and its powers and duties are, *inter alia*, to make plan provisions by regulation governing Plan funding, to make recommendations regarding amendments to Plan rules, to set policy guidelines governing the Plan, and to review administrative decisions.

14. The Board is the Trustee of the Plan pursuant to subsection 16(1) of the Act. Pursuant to subsection 16(4) of the Act, all of the Board’s duties, powers and functions as trustee, save its legal ownership of the assets of the plan fund, are deemed to be delegated to the Minister.

**C. The Role of the Minister**

15. The Minister is the Trustee of the Plan Fund pursuant to section 6(1) of the Act, and is required to administer the Plan Fund in accordance with Schedule 2 of the Act, and the regulations thereunder. The Minister is required to invest the Plan Fund assets, and to manage those assets, for the sole benefit of Plan beneficiaries.

16. Pursuant to section 4(1), the authority to establish Plan provisions by regulation is vested in the Lieutenant Governor in Council. The terms of the Plan, as established by the Lieutenant Governor in Council, are set out in the PSPP.

17. Pursuant to section 7(1) of the PSPP, the Minister is the administrator of the Plan.

**D. Pension Plan Terms - Membership**

18. The rules governing participation in the Plan are set out in subsection 10(1) of the PSPP, which provides, *inter alia*, that employees of a public body listed in schedule 2 of the regulation are required to participate in the Plan. Schedule II, Part 2(4), specifies that employees of the University of Calgary are required to participate in the Plan.

19. The term “employee” is defined at subsection 2(1) of the PSPP as follows:

2(1)(p) (p) “employee” means

- (i) a person employed by an employer on a full-time continuous basis,
- (ii) a person who is employed by an employer under a contract of service if that contract provides for
  - (A) his employment on a full-time basis for a period of
  - (I) more than one year, or
  - (II) one year or less if the employer, pursuant to his established policy for pension coverage of persons or classes of persons employed by him, applies to the Minister for the person’s participation in the Plan,

or

- (B) his employment other than on a full-time basis where

(I) the regularly scheduled hours of work are not fewer than 14 hours per week or 728 hours per year,

(II) the employment is on a continuous basis, and

(III) the employer, pursuant to his established policy for pension coverage of persons or classes of persons employed by him, applies to the Minister for the person's participation in the Plan,

(iv) any person specified in section 3(1), (2), (3), (4) or (5) to be an employee of an employer, or

(v) a person to whom section 3(7) applies,

and includes a member of a corporation that is an employer notice of whose inclusion as an employee for the purposes of the Plan has been given by that employer to the Minister, but does not include a person to whom MEPP, the *Universities Academic Pension Plan* or the *Teachers' Pension Plans Act* applies or a person excluded under section 28(6) of the *Public Service Act* or a member of the Legislative Assembly or a person described in section 3(5.3) or (5.5);

20. The Plaintiffs and the Class Members are, or were, "employees" as statutorily defined above, of the University of Calgary, at all material times.

21. The Plan is funded through joint employer and employee contributions. Pursuant to section 13(1) of the PSPP, employee contributions are set at 9.10% of salary that does not exceed the year's maximum pensionable earnings, and 13% of an employee's salary in excess of the year's maximum pensionable earnings. The year's maximum pensionable earnings is an amount with reference to the Canada Pension Plan. Amounts up to the year's maximum pensionable earnings are covered by the Canada Pension Plan.

22. Pursuant to subsection 13(1)(b)(2), the employer is liable for remittance of employee contributions to the Plan Fund. The University of Calgary failed to make such remittances on behalf of the Plaintiffs and Class Members, prior to January 1, 2009.

23. The amount of contributions that an employer is required to pay to the Plan is set out at section 15(1) of the PSPP. Employer contribution rates are set at 9.10% of an employee's salary that does not exceed the year's maximum pensionable earnings, and 13% of an employee's salary in excess of the year's maximum pensionable earnings.

24. Where an employer has failed to remit contributions within 15 days of the end of salary period for which such contributions are payable, the employer is liable for the payment of such contributions to the Minister, subject to a charge of interest at a rate of per year equal to the prime interest rate, according to the Canadian Imperial Bank of Commerce, on the first banking day of each quarter, plus 2%.

25. Pursuant to section 36 and 47 of the PSPP, a participant in the Plan who terminates employment and is vested, and either 1) has attained the age of 55, and for whom the sum of his or her age plus pensionable service is equal to or greater than 85, or 2) has attained the age of 65, is entitled to a pension benefit under the Plan, calculated as follows:

**For Service Prior to 1992**

Pension benefit = An amount equal to the aggregate of:

2% of the person's highest average salary multiplied by the number of years of his pensionable service before 1966

1.4% of the whole of the person's highest average salary if it does not exceed, or of that part of it that does not exceed, the annual average of the year's maximum pensionable earnings for the period or periods over or in respect of which that highest average salary is determined, multiplied by the number of years of his pensionable service occurring after 1965 and before 1992, and

2% of that part, if any, of his highest average salary that exceeds the annual average of the year's maximum pensionable earnings for that period or those periods, multiplied by the number of years of his pensionable service occurring after 1965 and before 1992

**For Service After 1991**

Pension benefit = An amount equal to the aggregate of:

1.4% of the whole of the person's highest average salary if it does not exceed, or of that part of it that does not exceed, the annual average of the year's maximum pensionable earnings for the period of, or periods aggregating, 5 years over or in respect of which that highest average salary is determined, multiplied by the number of years of his pensionable service, and



2% of that part, if any, of his highest average salary that exceeds the annual average of the year's maximum pensionable earnings for that period of, or those periods aggregating, 5 years, multiplied by the number of years of his pensionable service.

26. Pursuant to section 4.1 of Schedule 2 of the *Public Sector Pension Plans (Legislative Provisions) Regulation*, Alta. Reg. 365/1993, every participating employer in the Plan, including the University of Calgary, is required to file a report prepared by an independent accountant, or other person acceptable to the Minister, every three years, or at such other intervals required by the Minister, certifying that the employer has complied with its obligations under the Plan.

#### **E. The Plaintiffs' and Class Members' Employment with the University of Calgary**

27. The Plaintiffs and Class Members are or were all employed as "Trust Employees" at the University of Calgary.

28. Prior to January 1, 2009, the University of Calgary treated Trust Employees as employees of individual professors who received the research grants, private research moneys and donations.

29. However, the University of Calgary's position that it was not the employer of Trust Employees for labour relations purposes was challenged by the Alberta Union of Provincial Employees (the "AUPE"). On May 14, 2008, the Alberta Labour Relations Board (the "ALRB") determined that a number of Trust Employees, on whose behalf the challenge was brought through a number of test cases, were employed by the University of Calgary, and not by individual Trust Holders. Pursuant to a reconsideration request filed by the University of Calgary, on July 7, 2008 the ALRB issued a reconsideration of its decision to find that the University of Calgary was the employer of the test case Trust Employees in question for the purposes of the *Public Service Employee Relations Act*.

30. As a result of this labour relations decision of the ALRB, the University of Calgary enrolled the Trust Employees in the Plan effective January 1, 2009. However, it did not recognize the past employment service of Trust Employees for the purposes of the Plan.

31. The terms and conditions of the Trust Employees' employment were the same both before and after January 1, 2009.

32. The University of Calgary failed to enrol the Plaintiffs and other Trust Employees in the Plan, effective their first day of employment, notwithstanding the fact that it maintained a policy of enrolling all employees in the Plan, including part time and term employees.

***Particulars with Respect to the Plaintiffs***

33. The Plaintiff Marchuk was employed as a Trust Employee with the University of Calgary since 1988. Marchuk was employed on a full-time basis throughout this period. From the outset of her employment as a Trust Employee, until January 1, 2009, she was denied the right by the University of Calgary to participate in the Plan, and no contributions were remitted to the Plan on her behalf, notwithstanding her clear statutory right pursuant to the terms of the PSPP. The Board, the APA and the Minister each failed to require the University of Calgary to enrol Marchuk in the Plan, and to ensure that contributions were remitted to the Plan on her behalf until December 31, 2008.

34. The Plaintiff Lang was employed as a Trust Employee with the University of Calgary. Lang was employed on a full-time basis throughout this period. From the outset of his employment as a Trust Employee in 1989, until January 1, 2009, he was denied the right by the University of Calgary to participate in the Plan, and no contributions were remitted to the Plan on his behalf, notwithstanding his clear statutory right pursuant to the terms of the PSPP. The Board, the APA and the Minister each failed to require the University of Calgary to enrol Lang in the Plan, and to ensure that contributions were remitted to the Plan on his behalf until December 31, 2008.

35. The Plaintiff MacNaughton was employed as a Trust Employee with the University of Calgary. MacNaughton was employed on a part-time basis throughout this

period. From the outset of her employment as a Trust Employee in 1996 until January 1, 2009, she was denied the right by the University of Calgary to participate in the Plan, and no contributions were remitted to the Plan on her behalf, notwithstanding her clear statutory right pursuant to the terms of the PSPP. The Board, the APA and the Minister each failed to require the University of Calgary to enrol Marchuk in the Plan, and to ensure that contributions were remitted to the Plan on her behalf until December 31, 2008.

36. Each of the Plaintiffs Marchuk, Lang and McNaughton had a reasonable expectation that the University of Calgary, as their employer and as a public institution, would comply with its contractual and statutory obligations to them.

### **III. CAUSES OF ACTION**

#### **A. The University of Calgary**

##### ***Breach of Contract***

37. The University of Calgary is a participating employer in the Plan. As a participating employer in the Plan, it is subject to certain statutory obligations respecting enrolment of its employees in the Plan. These mandatory obligations are a term of the contract of employment of employees of the University of Calgary who meet the conditions for enrolment in the Plan, including the Plaintiffs and Class Members.

38. As employer of the Plaintiffs and Class Members and as a participating employer in the Plan, the University of Calgary owed the Plaintiffs and Class Members a contractual duty to enrol them in the Plan, to remit contributions to the Minister on account of the Plaintiffs' and Class Members' service in accordance with the terms of the Plan, effective their first date of employment, as is further particularized below.

39. Subsection 10 of the PSPP, which was incorporated by operation of law into the Plaintiffs' and other Class Members' contracts of employment, specifies, *inter alia*, as follows:

10(1) Subject to section 11, the following are the persons who are to participate in the Plan:

[. . .]

(c) employees of

(i) any other Provincial corporation or Provincial committee, as defined in the *Financial Administration Act*,

(ii) a university established or continued under the *Post-Secondary Learning Act*, or

(iii) another public body

that is listed in Part 2 of Schedule 2. . . .

40. Part 2 of Schedule 2, section 4, specifies that the University of Calgary is a participating employer.

41. Subsection 13(2) of the PSPP, which formed a further term of the Plaintiffs' and other Class Members' contracts of employment, renders the University of Calgary liable to remit current service contributions to the Plan on behalf of its employees, and to "withhold those contributions from the remuneration of payments" of employees.

42. Pursuant to subsection 15(1) of the PSPP, which formed a further term of the Plaintiffs' and other Class Members' contracts of employment, "whenever current service contributions are made, the participant's employer is liable to make contributions for current service" at the specified rate.

43. Finally, pursuant to section 36 of the PSPP, which formed a further term of the Plaintiffs' and other Class Members' contracts of employment, where an employee terminates employment and is vested, and either 1) has attained the age of 55, and for whom the sum of his or her age plus pensionable service is equal to or greater than 85, or 2) has attained the age of 65, that employee is entitled to a pension benefit under the Plan.

44. Notwithstanding the University of Calgary's contractual obligations to the Plaintiffs and the Class Members, the University of Calgary refused to enrol the Plaintiffs and Class Members in the Plan or to remit contributions on their behalf to the Plan prior to January 1, 2009, and as such, breached the terms of the Plaintiffs' and Class Members' contracts of employment, as well as the terms of the Plan.

45. As a result of the University of Calgary's breaches, as set out above, the Plaintiffs and the Class Members suffered significant financial losses, including loss of future retirement benefits.

***Breach of Fiduciary Duty***

46. The Plaintiffs and Class Members were, at all relevant times, in a position of vulnerability in relation to the University of Calgary vis-à-vis their pension rights and Employment Benefits. As a participating employer in the Plan, the University of Calgary was in a position to unilaterally affect the Plaintiffs and Class Members' rights under the Plan, by failing or refusing to: i) properly comply with the terms of the Plan; ii) enrol the Plaintiffs and Class Members in the Plan, and iii) remit contributions to the Plan on the Plaintiffs' or the Class Members' behalf. Accordingly, the University of Calgary, as a participating employer in the Plan stood in a fiduciary relationship with the Plaintiffs and the Class Members.

47. Particulars giving rise to the University of Calgary's fiduciary duty to the Plaintiffs and Class Members include the following:

- a) Pursuant to the Plan, the University of Calgary has a duty to ensure that it properly enrolls all employees entitled to participate in the Plan and is solely liable to remit contributions to the Plan fund in a timely manner on behalf of its employees who are entitled to participate in the Plan, including Class Members;
- b) The University of Calgary, as employer of Class Members, is unilaterally entitled to set policies governing human resource management, including setting conditions under which certain categories of its employees are entitled to participate in the Plan; and,
- c) Employees of the University of Calgary, including Class Members, are vulnerable to the exercise by the University of Calgary of its duties as a participating employer in the Plan.

48. The duties owed by the University of Calgary, as fiduciary to the Plaintiffs and the Class Members, include the following:

- a) The duty to ensure that it follows the terms of the Plan as it relates to the Plaintiffs and Class Members;

- b) The duty to act in the best interests of Plaintiffs and Class Members in its capacity as participating employer in the Plan;
- c) The duty to administer its internal human resource policies in a fair and even-handed manner; and,
- d) The duty to remit contributions on behalf of the Plaintiffs and Class Members to the Plan fund in a timely manner, as agent of the Plaintiffs and Class Members.

49. The University of Calgary has breached its fiduciary duty to the Plaintiffs and Class Members by:

- a) Failing to adhere to the terms of the Plan in failing or refusing to enrol the Plaintiffs or Class Members in the Plan, effective their first day of employment;
- b) Failing to administer its internal human resource policies as they relate to enrolment of employees in the Plan in a fair and even-handed manner; and,
- c) Failing to remit contributions to the Plan fund on behalf of the Plaintiffs and Class Members in a timely manner.

50. As a result of the foregoing breaches by the University of Calgary, the Plaintiffs and Class Members have suffered significant financial losses, including the loss of future retirement income and other Employment Benefits.

***Breach of the Duty of Good Faith***

51. The Plaintiffs and Class Members are in a position of vulnerability in relation to the University of Calgary, and can be affected by the unilateral actions of the University of Calgary. As a result of the vulnerability of the Class Members, as well as by virtue of the University of Calgary's status as the employer of these Class Members, the University of Calgary owes a duty to the Plaintiffs and Class Members to act in good faith, which includes a duty to honour its statutory and contractual obligations to them.

52. The University of Calgary has breached its duty of good faith by:

- a) Failing to adhere to the terms of the Plan in failing or refusing to enrol Class Members in the Plan, effective their first day of employment;
- b) Failing to administer its internal human resource policies as they relate to enrolment of employees in the Plan in a fair and even-handed manner;

- c) Failing to remit contributions to the Plan fund on behalf of Class Members in a timely manner; and
- d) Failing to take active measures to ensure that Class Members were properly enrolled, as required and provided for by the PSPP and the Act.

53. As a result of the University of Calgary's breach of good faith, the Plaintiffs and Class Members have suffered significant financial losses, including the loss of future retirement income and other Employment Benefits.

***Other Employment Benefits***

54. The Plaintiffs and Class Members, as Trust Employees, have also suffered non-pension-related losses and damages as a result of the University of Calgary's failures to recognize the Trust Employees as employees of the University including lost salary, wages, overtime pay, vacation pay, termination pay, severance pay, medical, dental, health care, disability premiums or benefits, union dues, and other employment-related benefits and contributions (collectively, "**Employment Benefits**").

55. At all material times the University of Calgary, as the Plaintiffs' and Class Members' employer, sponsor and/or administrator of various Employment Benefits, owed a contractual duty, statutory duty, fiduciary duty and duty of good faith to

- (a) provide them with the Employment Benefits;
- (b) pay them salary, wages, overtime pay, vacation pay, termination pay, severance pay, and all other remuneration in accordance with the *Employment Standards Code* and pursuant to their respective employment agreements; and
- (c) make all corresponding employer contributions and/or enrol the Plaintiffs and Class Members in various employee benefit programs, for the benefit of the Plaintiffs and Class Members.

56. The University failed to:

- (a) provide the Employment Benefits to the Plaintiffs and Class Members;

- (b) pay to the Plaintiffs and Class Members the salary, wages, overtime pay, vacation pay, termination pay, severance pay, and all other remuneration in accordance with the *Employment Standards Code* and pursuant to their respective employment agreements; and
- (c) make all corresponding employer contributions and/or enrol the Plaintiffs and Class Members in various employee benefit programs, for the benefit of the Plaintiffs and Class Members.

57. The University's failures to provide the Employment Benefits to the Plaintiffs and Class Members, to pay the above-mentioned payments, and to contribute the employer's share of the Employment Benefits constituted a breach of the University's contractual duty, statutory duty, fiduciary duty and duty of good faith owed to each Plaintiff and Class Member and caused each of them damage in an amount to be proven at the trial of this Action.

**B. The Minister of Finance and Enterprise**

***Breach of Statutory and Fiduciary Duty***

58. The Minister, as administrator of the Plan, and as trustee of the Plan and Plan Fund, has an express statutory and fiduciary duty to administer the Plan and the Plan fund in the best interests of beneficiaries of the Plan, including the Plaintiffs and Class Members.

59. The Plaintiffs and the Class Members, as persons entitled to participate in the Plan, are dependant upon the Minister exercising his duties as administrator and as trustee of the Plan and Plan Fund in their best interest. They were, at all relevant times, in a position of vulnerability in relation to the Minister.

60. As the administrator and trustee of the Plan, the Minister was in a position to unilaterally affect the Plaintiffs' and Class Members' rights under the Plan, by failing or refusing to: i) ensure that all qualifying employees, including the Plaintiffs and Class Members, were properly enrolled in the Plan by their employer; ii) ensure that all participating employers, including the University of Calgary, were properly complying with their statutory and contractual obligations under the Plan; and, iii) take appropriate remedial



steps to ensure compliance with the terms of the PSPP, including commencing enforcement proceedings to ensure that required contributions were made to the Plan. Accordingly, the Minister, as administrator and trustee of the Plan and Plan Fund stood in a fiduciary relationship with the Plaintiffs and Class Members.

61. The fiduciary duties owed by the Minister, as administrator of the Plan and as Trustee of the Plan Fund, to the Plaintiffs and Class Members, include the following:

- a) To act in the best interests of Class Members and persons entitled to participate in the Plan, when dealing with the Plan fund;
- b) To ensure that the terms of the Plan are properly complied with by participating employers, including the University of Calgary;
- c) To ensure that individuals entitled to participate in the Plan are properly enrolled in the Plan effective their first day of employment;
- d) To ensure that contributions from participating employers, including the University of Calgary, are properly remitted to the Plan fund;
- e) To minimize harm, be compassionate to and pro-active with Plan participants, including Class Members where there is an issue with a participating employer,
- f) To take such steps as were necessary to ensure that participating employers, including the University of Calgary, are complying with the terms of the Plan.

62. The Minister failed to exercise the care, diligence and skill in the administration of the Plan that a person of ordinary prudence would exercise in dealing with the property of another person, and thereby breached his fiduciary duties to the Plaintiffs and to Class Members. Particulars of the Minister's breaches include:

- a) Failing or refusing to require the University of Calgary to enrol the Plaintiffs and Class Members in the Plan effective their first day of employment;
- b) Failing to ensure that the University of Calgary remitted all necessary contributions to the Plan Fund to ensure that the Plaintiffs and Class Members were credited with service in the Plan;
- c) Failing to properly administer the Plan in accordance with its terms;
- d) Refusing to require the University of Calgary to fund the Plaintiffs' and the Class member's past service in the Plan; and,

- e) Denying he had any responsibility to take any action whatsoever in relation to the Plaintiffs and the Class Members.

63. As a result of the breach of fiduciary duty by the Minister, the Plaintiffs and Class Members have suffered significant financial losses, including loss of retirement income.

***Breach of the Duty of Good Faith and Duty to Care***

64. The Plaintiffs and the Class Members are in a position of vulnerability in relation to the Minister, and can be affected by the unilateral actions of the Minister. As a result of the vulnerability of the Class Members, as well as by virtue of the Minister's status as the administrator and trustee of the Plan and Plan Fund, the Minister owes a duty to the Plaintiffs and Class Members to act in good faith, which includes a duty to honour its statutory and fiduciary obligations to them.

65. The Minister has breached his duty of good faith by:

- a) Failing or refusing to require the University of Calgary to enrol the Plaintiffs and Class Members in the Plan effective their first day of employment;
- b) Failing to ensure that the University of Calgary remitted all necessary contributions to the Plan Fund to ensure that the Plaintiffs and Class Members were credited with service in the Plan;
- c) Failing to properly administer the Plan in accordance with its terms;
- d) Refusing to require the University of Calgary to fund the Plaintiffs' and the Class members' past service in the Plan; and
- e) Denying he had any responsibility to take any action whatsoever in relation to the Plaintiffs and the Class Members.

66. The Minister represents the Crown which owes constitutional obligations to the Plaintiffs and Class Members including under the *Canadian Charter of Rights and Freedoms* and a positive duty at law to care for aging persons including pension holders. The Plaintiffs and Class Members plead that the Minister's actions and inactions has deprived them of (a) their right to life and security of person and these deprivations are not in accordance with principles of fundamental justice in accordance with Section 7 of the *Charter* and (b) their right to be free of harm by the Crown, contrary to the Crown's duty to care.

67. As a result of the Minister's breach of his duty of good faith and constitutional duties including the duty to care, the Plaintiffs and Class Members have suffered significant financial losses, including their loss of dignity and future retirement income. The Minister by his actions and inactions has increased the risk and likelihood of harm to the life, liberty and security of person of the Plaintiffs and Class Members, in violation of their rights under the *Canadian Charter of Rights and Freedom*.

### **C. The Public Service Pension Board**

#### ***Breach of Fiduciary Duty***

68. The Board is responsible, pursuant to the PSPP, for ensuring the proper funding of the Plan, and for adjusting current service contributions to the Plan on the recommendation of the Plan's actuary, where necessary. The Board is also responsible, under the PSPP, for setting policy guidelines concerning the administration and funding of the Plan.

69. By virtue of the duties and powers granted to the Board to ensure the proper funding and administration of the Plan, the Board is in a position to unilaterally exercise discretion and power in respect of the rights and interests of the Plaintiffs and Class Members. Class Members are vulnerable to the exercise by the Board of its discretion in matters related to the funding and administration of the Plan. As such, the Board owes fiduciary duties to the Plaintiffs and the Class Members.

70. The Board failed to exercise the care, diligence and skill in the administration and funding of the Plan that a person of ordinary prudence would exercise in dealing with the property of another person, and thereby breached its statutory and fiduciary duties to the Plaintiffs and Class Members. Particulars of the Board's breaches include:

- a) Failing to take positive steps to ensure that the University of Calgary remitted contributions on behalf of the Plaintiffs and Class Members to the Minister, in order to ensure that the Plan was properly funded and that the Plaintiffs and Class Members were properly credited with service under the Plan; and,
- b) Setting appropriate policies and administrative guidelines for the administration of the Plan, in order to ensure that all persons with a right to

participate in the Plan, including the Plaintiffs and Class Members, were properly enrolled in the Plan.

71. As a result of the breach of statutory and fiduciary duty by the Board, the Plaintiffs and Class Members have suffered financial losses, including loss in retirement income.

#### **D. The APA**

##### ***Breach of Fiduciary Duty***

72. The Minister has delegated certain of his duties as Plan administrator to the APA. By virtue of this delegation, the APA, as agent of the Minister, is responsible for executing the following duties:

- a) Collecting Plan contributions from participating employers;
- b) Maintaining Plan participants' accounts;
- c) Paying Plan participants' benefits; and,
- d) Providing information concerning the Plan to Plan participants.

73. As a delegate and agent of the Minister, the APA is subject to the same statutory and fiduciary duties and the same standard of care as the Minister.

74. More particularly, the APA owes Plan participants, including the Plaintiffs and Class Members, the following fiduciary duties:

- a) To act in the best interests of Plan participants and persons entitled to participate in the Plan, including the Plaintiffs and Class Members, when dealing with the Plan fund;
- b) To ensure that contributions from participating employers, including the University of Calgary, are properly remitted to the Plan fund; and,
- c) To take such steps as were necessary to ensure that participating employers, including the University of Calgary, are complying with the terms of the Plan.

75. The APA failed to exercise the care, diligence and skill in the administration of the Plan that a person of ordinary prudence would exercise in dealing with the property of

another person, and thereby breached his fiduciary duties to the Plaintiffs and Class Members. Particulars of the APA breaches include:

- a) Failing to ensure that the University of Calgary remitted all necessary contributions to the Plan Fund to ensure that the Plaintiffs and Class Members were credited with service in the Plan;
- b) Failing to properly administer the Plan in accordance with its terms; and,
- c) Refusing to require the University of Calgary to fund the Plaintiffs' and the Class members' past service in the Plan.

76. As a result of the breach of fiduciary duty by the Minister, the Plaintiffs and Class Members have suffered significant financial losses, including loss in retirement income.

77. The Plaintiffs propose that the trial of this matter will not take more than 25 days. The trial will be heard at the Court House in the City of Calgary, in the Province of Alberta.

#### **IV. RELIEF SOUGHT**

78. The Plaintiffs claim, on their own behalf, and on behalf of the Class Members:

- a) An order certifying this action as a class proceeding, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5;
- b) An order appointing the Plaintiffs Marchuk, Lang and MacNaughton as Representative Plaintiffs;
- c) A declaration that the Plaintiffs and Class Members are entitled to past or retroactive service credit in the Public Service Pension Plan, effective their first day of employment with the University of Calgary;
- d) In the alternative, a declaration that the Plaintiffs and Class Members are, subject to fulfilling the requirements of an arrangement adopted under s.21(1.1)(d) of the PSPP, entitled to credit for service while employed by the University of Calgary prior to January 1, 2009;
- e) A declaration that the Crown is liable to the Plaintiffs and Class Members for damages caused by its breach of fiduciary and statutory duties in relation to the administration of the Plan and by its breach of the Plaintiffs' and Class Members' rights under the *Canadian Charter of Rights and Freedoms*;
- f) Damages as against the University of Calgary in an amount equal to the difference between the current service costs that Class Members would have paid had the

Plan terms been complied with, and the actuarial value of the Plaintiffs' and Class Members' service for the period prior to January 1, 2009;

- g) Damages as against the University of Calgary for loss of Employment Benefits that would have been received by the Plaintiffs and Class Members were they recognized as employees by the University of Calgary at any time prior to January 1, 2009 ("Employment Benefit Claims"), which claims include every possible claim of any Trust Employee arising out of or related to their employment as a Trust Employee in respect of any period prior to January 1, 2009, whether arising under statute, contract or any other legal or equitable basis, whether in respect of salary, wages, overtime pay, vacation pay, termination pay, severance pay, medical, dental, health care, disability premiums or benefits, union dues, pension contributions, any claim or assertion for recognition of service—and whether in respect of any other matters incidental to the employment relationship;
- h) Costs of this action on a substantial indemnity basis or in an amount that provides full indemnity; and,
- i) Such further and other relief as the situation may require and the court considers appropriate.

DATED at the City of Calgary, in the Province of Alberta, this 6<sup>th</sup> day of July, 2010, AND DELIVERED by Docken & Company, Barristers and Solicitors, address for service is in care of said solicitors at #900, 800 6<sup>th</sup> Avenue S.W., Calgary, Alberta, T2P 3G3.

ISSUED OUT of the Office of the Clerk of the Court of Queen's Bench, Judicial District of Calgary, this 6th day of July, 2010.

CLERK OF THE COURT

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