

**APPENDIX "2"**

**Joint Application for Certification and Settlement  
(without noted Schedules)**

**Form 27**  
[Rules 6.3 and  
10.52(1)]

COURT FILE NUMBER

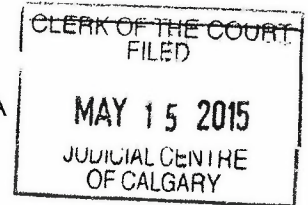
1001-09969  
~~1101-04595~~

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY



PLAINTIFFS / JOINT  
APPLICANT

LINDA MARCHUK, DANIEL LANG and CATHY  
MCNAUGHTON

DEFENDANTS / JOINT  
APPLICANT

THE UNIVERSITY OF CALGARY, THE CROWN IN  
THE 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

DOCUMENT

**JOINT APPLICATION  
FOR CERTIFICATION AND SETTLEMENT**

Proceeding under the *Class Proceedings Act*, SA 2003

PARTIES FILING THIS  
DOCUMENT

**ALL PLAINTIFFS and DEFENDANTS**

ADDRESS FOR SERVICE  
AND CONTACT  
INFORMATION OF PARTY  
FILING THIS DOCUMENT

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The Province Of Alberta

**NOTICE TO RESPONDENTS**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date: June 4, 2015  
Time: 10:00am  
Where: Calgary Court House  
Before Whom: The Honourable Justice A.D. Macleod

Go to the end of this document to see what else you can do and when you must do it.

**Remedy claimed or sought:**

1. In this Application, capitalized terms not otherwise defined herein shall have the meaning as set out in the settlement agreement which is to be executed by the Parties substantially in the form attached hereto as **Schedule "B"** (the "**Settlement Agreement**"). However, for convenience of the Court, certain definitions are reproduced below:
  - (a) "**AUPE**" means The Alberta Union of Provincial Employees;
  - (b) "**Claims**" has the meaning given to that term in Section 12(c) and means any and all claims asserted by the Plaintiffs in the Fresh as Amended Statement of Claim;
  - (c) "**Eligible**" means that an individual has satisfied all of the requirements of Eligibility;
  - (d) "**Eligibility**" means the requirements of those Plan rules and its ancillary documents, particularly those respecting participants and participation in the

Plan, which define an individual's eligibility to be a member of the Plan, to acquire current pensionable service in arrears, and to subsequently draw pension benefits, except the requirement of being an employee of the University;

- (e) "**Opt-Out Form**" means the form, appended as Schedule "2" to the Court Order, by which a person may indicate their choice to opt-out of the Settlement Class entirely;
  - (f) "**Plan**" means the Public Service Pension Plan, established under the *Public Service Pension Plans Act*, R.S.A. 2000, c. P-41, as amended, and as contained in Alta. Reg. 368/1993;
  - (g) "**Trust Employee**" means a person who worked at the University 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 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;
  - (h) "**University Records**" means records (including incomplete records) related to any Trust Employee within the actual possession of the Human Resources Department of the University and which, for greater clarity, do not include records that are only within the possession of a Trust Holder or a Trust Employee;
2. The Plaintiffs in Action No. 1001-09969 (the "**Proposed Class Proceeding**"), Linda Marchuk, Daniel Lang and Cathy McNaughton, seek an order permitting them (to the extent leave is necessary) to amend the Amended Amended Statement of Claim, filed, in the form appended hereto as **Schedule "A"** (the "**Fresh as Amended Statement of Claim**");
3. The Plaintiffs in the Proposed Class Proceeding, AUPE as the Applicant in Action No. 1101-04595 (the "**Judicial Review**"), and the Defendants/Respondents in both proceedings, namely the University of Calgary (the "**University**") and the Crown In The Right Of The Province Of Alberta as represented by the Minister Of Finance and Enterprise (now called the President of Treasury Board and Minister of Finance) (the "**Minister**"), the Public Service Pension Board and the Alberta Pensions Services Corporation (collectively, the "**Crown**"), jointly seek orders:
- (a) certifying the Proposed Class Proceeding pursuant to the *Class Proceedings Act*, S.A. 2003 c. C-16.5 (the "**CPA**") and, as part of that:

- (i) defining a class comprised of the following persons (the “**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.

- (ii) defining sub-classes comprised of the following Class Members:

A. “**Group 1 Trust Employee**” means a Class Member who:

- a) 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;
- b) was enrolled in the Plan on or after January 1, 2009 pursuant to their employment at the University;
- c) is an employee of the University; and
- d) is Eligible to contribute to the Plan.

B. “**Group 2 Trust Employee**” means a Class Member who:

- a) is not a Group 1 Trust Employee;
- b) 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
- c) 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:

- a) is not a Group 1 Trust Employee or a Group 2 Trust Employee;

- b) was engaged as a Trust Employee at any time prior to January 1, 2009; and
  - c) may or may not be an employee of the University.
- (iii) appointing the Plaintiffs as the representative plaintiffs (“**Representative Plaintiffs**”) of the Class Members and each of the three sub-classes;
- (b) certifying as a common issue whether Trust Employees with service prior to January 1, 2009 were employees of the University and thereby potentially eligible to participate in the Plan and receive Employment Benefits in respect of that period of employment;
  - (c) approving the Settlement Agreement and ordering its implementation as set forth in the Settlement Agreement;
  - (d) requiring that notice of the within settlement (the “**Notice Program**”) will consist of a letter plus associated documentation, as required pursuant to the Settlement Agreement, to certain Class Members (the “**Settlement Notice**”) and a newspaper advertisement (the “**Newspaper Notice**”) to all Class Members, both of which will be transmitted or published, as applicable, to Class Members within two [2] months from the date on which the Settlement Order is granted, as follows (or as otherwise required by the Court):
    - (i) by the University, by transmitting the Settlement Notice way of regular mail to the current or last known address in the University Records and by causing publication of the Newspaper Notice in each of the Calgary Herald and Edmonton Journal on one week day and one weekend edition, as applicable; and
    - (ii) by AUPE, by posting the Settlement Notice and Newspaper Notice on its website and on bulletin boards in the workplace;
  - (e) permitting Class Members to opt-out of the proceeding by executing and delivering a completed Opt-Out Form to AUPE/Class Counsel by email to [akaplan@kmlaw.ca](mailto:akaplan@kmlaw.ca) which to be effective shall be received no later than 5:00 p.m. (mountain time) on the date specified in Newspaper Notice which will be no less than three [3] months after the date on which the first Newspaper Notice is published (the “**Take-Up Period Deadline**”);

- (f) providing that if more than 15% of the Group 1 Trust Employees opt-out of the proceeding, the Settlement Order shall be set aside on application by the University;
- (g) ordering, declaring and confirming that, effective immediately upon the parties filing a Joint Certificate of Completion with the Court, which will be filed not earlier than one day after the Take-Up Period Deadline, and save and except with respect to the Defendants' remaining obligations set forth in the Settlement Agreement and Settlement Order which have not been completed by the time of filing of the Joint Certificate:
  - (i) all of the Claims asserted in the Fresh as Amended Statement of Claim are dismissed, with-prejudice and without costs to any party, and the dismissal is binding on the parties and all Class Members who have not opted-out;
  - (ii) the Judicial Review is dismissed, with-prejudice and without costs to any party;
  - (iii) each of the Representative Plaintiffs, the AUPE and each Class Member who has not opted-out has released, remised and forever discharged the defendants, Trust Holders, and each of their officers, directors, governors, employees, agents, insurers, successors or assigns from any and all Claims; and
  - (iv) each Class Member who has not opted-out of the proceeding is bound by the Settlement Agreement and Settlement Order and is deemed to have released any and all Claims whatsoever against and to have forever discharged the defendants, Trust Holders, and each of their officers, directors, governors, employees, agents, insurers, successors or assigns in relation to any and all Claims;
- (h) declaring that the Arbitrator(s) and Actuaries, as those terms are defined in the Settlement Agreement, will not be liable for any error or omission in the conduct of their work except in the case of gross negligence or willful misconduct; and
- (i) ordering that no costs be ordered to any party except as provided under the Settlement Agreement.

**Grounds for making this application:**

(a) Introduction

4. On July 7, 2010, the Plaintiffs commenced the Proposed Class Proceeding. The Statement of Claim was amended on December 3, 2010 and again on December 15, 2010 (the "Amended Amended Statement of Claim").
5. On April 1, 2011, the AUPE commenced the Judicial Review seeking an order in *mandamus* directed at the Minister of Finance raising issues similar to the Class Proceeding. The University was subsequently joined as a party to the Judicial Review.
6. The parties to the Class Proceeding and the Judicial Review have agreed to settle all claims in both actions and jointly seek orders certifying the Proposed Class Proceeding for the purpose of implementing the settlement, approving the proposed settlement which will be binding on all Class Members who do not opt-out and the parties, dismissing the Proposed Class Proceeding and dismissing the Judicial Review.
7. The proposed settlement was reached with professional assistance at mediation plus extensive subsequent negotiations, over a period of approximately two and a half years, between the parties, who have each had the benefit of legal advice and actuarial support.
8. The parties propose a comprehensive Notice Program that includes transmission of Settlement Notices and the publication of several Newspaper Notices to inform Class Members of the proposed settlement and give them an opportunity to opt out of the settlement.
9. All parties agree that the proposed settlement is fair, just and in the best interests of the Class Members and all parties.
10. The orders sought are within the jurisdiction of the Court.

(b) Claims

11. The Claims are made on behalf of certain persons who worked at the University known as as "Trust Employees". The Plaintiffs (in the Proposed Class Proceeding) and the AUPE (applicant in the Judicial Review) claim that the University and the Minister failed



to enroll certain Trust Employees in the Plan prior to January 1, 2009 and they seek damages and remedies in relation to their alleged employment by the University.

12. The proceedings were brought following the decision of the Alberta Labour Relations Board ("ALRB") on May 14, 2008 and July 7, 2008 (the "ALRB decisions") that certain test case Trust Employees engaged directly by faculty members of the University (called "Trust Holders") were considered to be employees of the University for the purposes of the *Public Service Employees Relations Act* and so were entitled to bargain collectively.
13. Following the ALRB decisions, the AUPE and the University entered into a Letter of Understanding ("LOU") with effect as of January 1, 2009. Pursuant to the LOU, the University issued offers of employment to certain Trust Employees who were employed at the University as of January 1, 2009 (referred to as "Fixed Term Employees" in the LOU). Some of those Trust Employees accepted offers of employment with the University and became eligible and were enrolled by the University in the Plan effective as of January 1, 2009. Those Trust Employees who accepted offers of employment with the University also received other Employment Benefits (as that term is defined in the Fresh as Amended Statement of Claim). The LOU also resulted in the AUPE becoming the certified bargaining agent for those Trust Employees who accepted the University's offers of employment.
14. The central issue in the Proposed Class Proceeding and the Judicial Review is whether the Trust Employees are employees of the University and therefore potentially eligible to participate in the Plan and receive Employment Benefits from the beginning of their employment as a Trust Employee, specifically for periods of service prior to January 1, 2009.

(c) Procedural History

15. The Hon. Mr. Justice A.D. Macleod was appointed case manager of the Proposed Class Proceeding and the Judicial Review.
16. On December 6, 2011, the Court held a case conference with the parties in connection with certain procedural, sequencing, jurisdictional and standing issues raised by the defendants. On December 13, 2011, counsel submitted to the Court minutes of the case conference. Subsequently, the parties each delivered written submissions to the Court as directed by Justice Macleod at the case conference.

17. On January 25, 2012 the Court issued Reasons for Direction in connection with the case conference. The Court also issued Case Management Directions. The Court adjourned the Class Proceeding *sine die* on consent of the parties, added the University as a party to the Judicial Review and directed a further case conference to clarify the issues arising on the Judicial Review, establish how the issues ought to be resolved and direct deadlines and dates for filing briefs and holding further argument.
18. On June 20, 2012, the Court held a further case conference and ordered a filing schedule for hearing preliminary applications to be brought by the University and the Minister in connection with the Judicial Review. The Court directed a further case conference to be heard on November 13 or 14, 2012 to address the sequencing of hearing the Judicial Review and the preliminary applications.
19. On July 30, 2012, the University and the Minister each brought preliminary applications seeking a dismissal of the Judicial Review and other relief affecting the Class Proceeding.
20. On October 5, 2012, the parties conducted oral questioning of witnesses on the affidavits filed in connection with the Judicial Review and the preliminary applications.
21. On October 12, 2012, the parties advised the Court that they had agreed to the sequencing of hearing the Judicial Review and the preliminary applications.
22. On October 24, 2012, the Court set down three days namely March 20, 21 and 22, 2013 for hearing the Judicial Review and the preliminary applications.
23. In December, 2012, the parties agreed to enter into without-prejudice settlement discussions with the assistance of a mediator to attempt to resolve all issues arising directly and inferentially from the Judicial Review and Class Proceeding.
24. On January 25, 2013, the parties engaged Mr. Andy Sims as mediator and on request the Court agreed to adjourn the hearing dates scheduled for March 20, 21 and 22, 2013.
25. On March 7 and 8, 2013 the parties commenced mediation with Mr. Sims.

26. Between March, 2013 and May, 2015 the parties engaged in numerous meetings and discussions, including with their respective actuaries and legal counsel, aimed at settling the proceedings.
27. On October 22, 2013 the Court, on consent of the parties, ordered that the parties may exchange certain confidential personal information and other confidential documentation for the purpose of mediation and settlement discussions and on a without prejudice basis.
28. The parties have concluded a comprehensive proposal for which they jointly seek approval of the Court in settlement of all claims.

(d) Settlement

29. The proposed settlement is set out in the Settlement Agreement. However, for the convenience of the Court, the following is a very general summary of the central terms of the Settlement Agreement:
  - (a) the University will set aside settlement funds totalling \$6.5 million from which Trust Employees may claim a settlement share during a three-month take up period;
  - (b) Certain Class Members, namely Trust Employees with service at the University prior to January 1, 2009 who have been determined to be Eligible, are to receive payments from the University for up to two years of employer contributions that would have been required to be made by the University to the Plan if these Trust Employees had been enrolled during the period January 1, 2007 through December 31, 2008 (the called the "Settlement Period"), with applicable interest. Class Members who are currently employed by the University (Group 1 Trust Employees) have an option to receive their settlement share as a pension contribution to be remitted to the Plan, in exchange for up to two years of retroactive pension service credit in the Plan, otherwise (and for Group 2 Trust Employees) the settlement funds are paid to the Class Member in cash (minus statutory withholdings or deductions).
  - (c) In addition, the University will make certain fixed lump sum payments to Class Members ranging from \$300 to \$1,000 on account of:
    - (i) service as a Trust Employee prior to January 1, 2009 (including, as applicable, a "Group 3 Trust Employee" without Eligible service during the Settlement Period); and
    - (ii) in satisfaction of all other potential employment and benefit claims in respect of service prior to January 1, 2009 (applicable to all Class Members) (namely Employment Benefit Claims) including for employees

on whose behalf the AUPE has filed grievances for termination benefits applicable to pre-January 1, 2009 service;

- (d) the Minister has confirmed that Alberta Pension Services is able to administer the settlement applicable to Group 1 Trust Employees who elect to apply their individual settlement share as pension contributions for service in the Plan, in accordance with the Plan;
  - (e) there is a claim verification and dispute resolution process including, as applicable, the engagement of an arbitrator in the event an Eligible Class Member disagrees with the service and employment information in the University Records used to calculate the Member's individual settlement share;
  - (f) any Class Member who does not wish to accept the Settlement Agreement may opt out of the settlement and out of the Class Proceeding and will not be bound by the Settlement Order. If more than 15% of Group 1 Trust Employees opt out, the University may apply to set aside the Settlement Order;
  - (g) any settlement funds not claimed by Class Members at the end of the Take-Up Period, or not otherwise paid out in accordance with the Settlement Agreement, will revert to the University; and
  - (h) upon making the payments contemplated by the Settlement Agreement, the defendants shall be released from all liability in connection with any and all Claims asserted and the shall be forever discharged in relation to any and all Claim; all Class Members who do not opt-out will be bound by the Settlement Order and will be deemed to have released the defendants.
30. The Settlement Agreement is subject to certain conditions precedent, as set out in sections 12(a) and (b) therein, both of which have been satisfied, namely approval by the Board of Governors of the University and approval by the President of AUPE.
31. The parties propose a Notice Program for informing Class Members of the proposed settlement. In particular:
- (a) the University will transmit a Settlement Notice by direct mail to Group 1 Trust Employees and Group 2 Trust Employees that will include, as applicable, an individual settlement amount and option form;
  - (b) the University will publish four Newspaper Notices to announce the settlement to all Class Members and explain where to obtain more information and the requisite forms; and
  - (c) the AUPE will post a Settlement Notice and Newspaper Notice on its website and on bulletin boards in the workplace and will hold one or more meetings in person for Group 1 Trust Employees and Group 2 Trust Employees to explain the settlement.

32. The Plaintiffs ask the Court for permission to amend the Amended Amended Statement of Claim in the form of the Fresh as Amended Statement of Claim (to the extent leave is required) in order to: (a) define the class in accordance with the descriptions of Class Members in the Settlement Agreement, and (b) add additional Claims in relation to Employment Benefits inferentially arising from the period prior to January 1, 2009.
33. The parties contemplate filing a Joint Certificate of Completion with the Court after the TakeUp Period Deadline confirming that all conditions of settlement have been met and that the remainder of the Settlement Order is in the process of being implemented.

(e) Jurisdiction and Certification

34. The Court of Queen's Bench has jurisdiction to hear this application. The Plaintiffs bring the Proposed Class Proceeding on their own behalf and on behalf of all Trust Employees. The *Public Service Employee Relations Act* precludes the jurisdiction of the Alberta Labour Relations Board. The LOU establishes the AUPE as the bargaining agent for Trust Employees effective January 1, 2009. The class and claims in the Proposed Class Proceeding are restricted to pre-January 1, 2009 service and do not arise under a collective agreement. The majority of Class Members are not represented in employment by the AUPE.
35. Grounds exist for certification, namely:
  - (a) pursuant to section 4 of the CPA, where, as here, the Plaintiffs have reached a settlement with the Defendants in respect of the Proposed Class Proceeding (prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purposes of imposing the settlement on persons who will be Class Members in respect of the proceeding), if the proceeding is certified as a class proceeding, then the Class Members, on the application for certification being commenced, shall constitute a settlement class with respect to the Proposed Class Proceeding;
  - (b) in accordance with section 5 of the CPA:
    - (i) the Fresh as Amended Statement of Claim discloses multiple causes of action;
    - (ii) there is an identifiable class of 2 or more persons;
    - (iii) the claims of the prospective class raise common issues;

- (iv) a class proceeding is the preferable procedure for the fair and efficient resolution of the claims and common issues; and
- (v) the proposed Representative Plaintiffs are eligible to be appointed as such and will fairly and adequately represent the interests of the class; they have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class, namely the Settlement Agreement, and of notifying class members of the proceeding, namely the Notice Program; and they do not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

**Material or evidence to be relied on:**

- 36. The Amended Amended Statement of Claim; the Fresh as Amended Statement of Claim.
- 37. The Affidavit of Larry Murray, sworn May 15, 2015.
- 38. The Affidavit of Tom Fuller, sworn March 31, 2011.
- 39. The Affidavit of Trika Macdonald, sworn July 27, 2012.
- 40. Affidavits of the Proposed Representative Plaintiffs [to be sworn].
- 41. The Settlement Agreement [to be executed] plus schedules and attachments.
- 42. Such further and other documentary and affidavit material and written and oral submissions as may be submitted to and accepted by the Court.

**Applicable rules:**

- 43. Rules 1.3, 2.6, 2.7, 2.9, 4.11, 4.14, 6.1, 6.9, 6.11 and 10.32 of the Alberta *Rules of Court*, Alta. Reg. 124/2010.

**Applicable Acts and regulations:**

- 44. *Class Proceedings Act*, R.S.A. 2000, c. C-16.5.
- 45. *Public Service Employee Relations Act*, R.S.A. 2000, c. P-43.
- 46. *Public Sector Pension Plans Act*, R.S.A. 2000, c. P-41.
- 47. *Public Service Pension Plan*, Alta. Reg. 368/1993.

**Any irregularity complained of or objection relied on:**

48. N/A.

**How the application is proposed to be heard or considered:**

49. In person (Special Application before Case Management Justice, Mr. Justice A.D. Macleod).

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.