IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Acreman v. Memorial University of Newfoundland*, 2010 NLTD 4
Date: 20100113
Docket: 2007 01T 0751 CP

BETWEEN:

JOHN ACREMAN AND GEORGE LEE PLAINTIFF

AND:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND DEFENDANT

Before: The Honourable Justice Maureen Dunn

Place of hearing: St. John's, Newfoundland and Labrador

Appearances:

Gregory M. Smith and Daniel Glover — Counsel for the Plaintiffs

Daniel M. Boone and Jonathan Dale — Counsel for the Defendant

Authorities Cited:

CASES CONSIDERED: Hollick v. Metropolitan Toronto (Municipality) 2001 SCC 68, 201 CarswellOnt 3577; **Wheadon v. Bayer**, (2004), 237 Nfld. & P.E.I.R. 179, 2004 CarwellNfld 105 (T.D.); **Gregg v. Freightliner Ltd.**, 2003 BCSC 241, 2003 CarswellBC 283; **Hunt v. T. & N**

plc, [1990] 2 S.C.R. 959; **Ormrod v. Etobicoke (City) Hydro-Electric Commission** 2001 CarswellOnt 614; **Hoffman v. Monsanto Canada Inc.**, 2007 SKCA 47, 283 D.L.R. (4th) 190, 2007 CarswellSask 190; **Hoffman v. Monsanto Canada Inc.** 2007 CarswellSask 725; **Dikranian c Québec (Procureur général)**, 2005 SCC 73; **Dayco (Can.) Ltd. V. C.A.W**., [1993] 2 S.C.R. 230; **Dinney v. Great-West Life Assurance Co.**, 2005 CarswellMan 78 (C.A.)**; Girardet v. Crease & Co.** (1987), 11 B.C.L.R. (2d) 361 at para. 3 (S.C.); **Rideout v. Health Labrador Corp.**, 2005 NLTD 116; **MacQueen v. Ispat Sidbec Inc.** 2007 NSCA 33**; Gladstone v. Canada (Attorney General**), 2005 CarswellBC 911 (S.C.C.); **Guerin v. R.**, 1984 CarswellNat 813 (S.C.C.); **Hodgkinson v. Simms** 1994 CarswellBC 438 (S.C.C.); **Ring v. Canada (Attorney General)**, 2007 NLTD 146; **Western Canadian Shopping Centres Inc. v. Dutton**, 2001 SCC 46; **Western Canadian Shopping Centres Inc. v.** Dutton [2001] 2 S.C.R. 534; **Controltech Engineering Inc. v. Ontario Hydro** 1998 CarswellOnt 4918; **Carom v. Bre-X Minerals Limited** (1999), 44 O.R. (3d) 173 (Ont. Sup. Ct.); **Rideout v. Health Labrador Corp.**, 2005 NLTD 116; **Doucette v. Eastern Regional Integrated Health Authority,** 2007 CarswellNfld 238; **Bennett v. British Columbia**, 2005 CarswellBC 2889 (S.C.), aff'd 2007 CarswellBC 3 (C.A.); **Kranjcec v. Ontario** (2004), 69 O.R. (3d) 231 (S.C.J.); **Gregg v. Freightliner Ltd. (c.o.b.)** 2003 CarswellBC 283 (S.C.)

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, rr. 7A, 7A.04

REASONS FOR JUDGMENT

DUNN, J.:

INTRODUCTION

[1] The plaintiffs seek an order pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 and Rule 7A of the *Rules of Court* for certification of a class action. The

class is comprised of former employees of Memorial University who retired or terminated employment prior to January 1, 1993 and all survivors, or such former employees who received the Memorial University post-retirement group insurance benefits at no cost to them (collectively the "pre-1993 Memorial University pensioners"); all estates of the pre-1993 Memorial University pensioners who died after November, 1996 (the "estates"). The class is made up of persons resident in the Province of Newfoundland and Labrador and persons non-resident in the Province of Newfoundland and Labrador. John Acreman and George Lee, the plaintiffs, are the representative plaintiffs for the resident class and Charles Rennie is the proposed representative plaintiff for the non-resident class.

[2] The defendant, Memorial University of Newfoundland, opposes the application for certification. It takes the position the material issues respecting liability and damages can only be determined by individual inquiries into what specific representations were made to each employee and what they each reasonably understood them to mean.

BACKGROUND

[3] It is undisputed that prior to 1978, University pensioners paid 50 percent of the premium for their post-retirement group insurance benefits with the University paying the remaining 50 percent. Between 1978 and 1992 the foregoing arrangement changed whereby the University pensioners were provided with no-cost post-retirement group insurance benefits. The plaintiffs say it was an unwritten term of the University's terms of employment which resulted in the no-cost provision. The University maintains it resolved to subsidize the pensioners' obligation toward their premium with payments from a trust fund that had originated from several refunds made by the defendant's former insurance carrier. Upon depletion of the trust funds the University submits the arrangement was to revert back to premium sharing as had existed up to 1978. The University signaled, in 1992, an intent to take away the no-cost post-retirement group insurance benefits effective January 1, 1993.

[4] Ultimately, the University decided to implement a graduated payment schedule on behalf and for the benefit of the pre-1993 retirees and their survivors for the period January 1, 1993 to March 31, 2002, as follows:

(i) From January 1, 1993 to March 31, 1997, the University paid the full amount of the 50 percent insurance premium cost and the pre-1993 retirees and the retirees did not pay anything;

(ii) From April 1, 1997 to March 31, 1998, the University paid 25 percent of the 50 percent insurance premium cost and the pre-1993 retirees and the survivors paid 25 percent;

(iii) From April 1, 1998 to March 31, 1999, the University paid 20 percent of the 50 percent insurance premium cost and the pre-1993 retirees and the survivors paid 30 percent;

(iv) From April 1, 1999 to March 31, 2000, the University paid 15 percent of the 50 percent insurance premium cost and the pre-1993 retirees and the survivors paid 35 percent;

(v) From April 1, 2000 to March 31, 2001, the University paid 10 percent of the 50 percent insurance premium cost and the pre-1993 retirees and the survivors paid 40 percent; and

(vi) From April 1, 2001 to March 31, 2002, the University paid 5 percent of the 50 percent insurance premium cost and the pre-1993 retirees and the survivors paid 45 percent of the cost.

Thereafter, the University stopped making payments in respect of the 50 percent premium cost and started charging the pre-1993 retirees and survivors the full amount. The University acknowledges it effected collection from the pre-1993 retirees of the amounts outlined through source deductions to monthly pension income cheques (where applicable) or through direct billing by the University's Department of Human Resources (for those receiving their pension income entitlement under an alternate pension plan).

EVIDENCE ON APPLICATION

[5] Evidence was called at the hearing of the application for certification on behalf of both the plaintiffs and defendant by way of affidavit.

Plaintiff's Evidence

[6] Four individuals filed affidavits on behalf of the plaintiffs: John Acreman, George Lee, Harold Squires and Charles S. Rennie.

[7] *John Acreman* was employed by the defendant, Memorial University of Newfoundland (the "University") from 1971 to 1993, retiring in 1993. At the time of his retirement he was an Associate Professor of the Faculty of Education. Following the retirement, he was appointed as Secretary of the Board of Regents holding the position from 1983 to 1989. Acreman points out the management, administration and control of the property, revenue, business and affairs of the University are vested in the Board of Regents. In his affidavit John Acreman also confirms George Lee was employed by the University retiring on March 31, 1984. At that time, Lee was Associate Director of Extension Services. He states his belief that both he and Lee can fully and adequately represent the interests of the proposed class affirming neither has an interest in conflict with the interests of the class members insofar as they relate to the common issues for the class as set out in the application.

[8] Essentially, John Acreman says evidence of the intent of the defendant to provide no-cost benefits is found in a letter dated July 26, 1993, provided to him by Lynda Parsons, Benefits Officer for the University, which letter states, in part:

> As of the date of your retirement, your life insurance coverage will remain at $30,000 to age sixty-five when it will reduce to $2,000 until you reach age seventy-two when it will cut off entirely. **You may retain your health coverage for life and this, with the life insurance, is at no cost to you.** [Emphasis added]
>
> Your estimated pension is $28,215.60 per annum or $2,351.30 per month, which is normally paid on the fifteenth of the month following your retirement. There will be a reduction of pension when you reach age sixty-five and entitled to the Canada Pension. You will be advised of the actual amounts when your pension calculation is audited and you will receive a copy of the calculation.

[9] This deponent also tendered a copy of a similar letter provided to George Lee at the time of his retirement and dated August 16, 1983, pertinent parts of which state:

> Regarding your retirement on March 31, 1984, would you please complete the enclosed forms and return them to my office at your earliest convenience. Please note that a copy of your birth certificate is required.
>
> As of the date of your retirement, your life insurance coverage will be $30,000 to age sixty-five, when it will reduce to $2,000 until you reach age seventy-two, when it will cut off entirely. **You may retain your health coverage by completing the application and this, together with your life insurance, is at no cost to you.** [Emphasis added]

[10] Between 1986 and 1988 the University added dental insurance coverage to the no-cost post-retirement group insurance benefits. Acreman says these benefits were included at no cost to those who had retired prior to January 1, 1993. As to evidence of the defendant's intent to provide no-cost insurance benefit coverage to the foregoing retirees, John Acreman provides as Exhibit JA No. 4 true copies of a number of retirement letters extracted from Memorial University Pensioners Association files. These documents confirm what is set out in the letters to Acreman and Lee, that is, health coverage and benefits are at no cost to the retiree.

[11] A further issue addressed by Acreman is the identity of the class for which certification is requested. He states the pre-1993 retirees are made up of a number of employment groups within the University including the Memorial University Faculty Association which represents all faculty of the University who were not in administration; the executive, which includes the president, vice-president, deans and directors of the University; the Canadian Union of Public Employees which includes the clerical and technical employees of the University; the Newfoundland and Labrador Association of Public Employees which includes the cleaning, maintenance and security staff of the University and, finally, the non-bargaining profession which includes any employee of the University not otherwise covered by the previous groups. He adds all of the pre-1993 retirees and the survivors who belonged to the groups received the retirement benefits and rights including pension income entitlement and no-cost post-retirement group insurance benefits.

[12] Acreman is of the view the University knows the exact number and names of all of the pre-1993 retirees and survivors who have received the no-cost post-retirement group insurance benefits. Relying on information of affiant Harold Squires, Acreman believes costs charged by the University for single coverage to be approximately $34.30 per month or $411.60 per year and family coverage to be approximately $91.48 per month or $1,097.76 per year. The collective costs charged by the University for group coverage is approximately $15,207.76 per month or $182,493.12 per year. The foregoing figures are based on Squires' information that as at August, 2005 there were 265 individuals in receipt of benefits, 158 receiving single benefit coverage and 107 receiving family coverage.

[13] Utilizing the foregoing Acreman calculates the University has wrongly charged the pre-1993 retirees and their survivors approximately $1,612,023 from April 1, 1997 to July 31, 2007, and the University will continue to do in the approximate amount of $15,207.76 per month or $182,493.12 per year.

[14] In his affidavit, *George Lee* confirms he is one of the plaintiffs in the within proposed class action. He says he is a former employee of the defendant having retired March 31, 1984. Like Acreman, he states he received certain retirement rights and benefits including post-retirement life and health group insurance

coverage at no cost to him. Lee confirms the content of correspondence sent to him by the University setting out the no cost arrangement, as referenced earlier herein. To the best of Lee's knowledge, he verifies the truth of the supporting affidavits of John Acreman and Harold Squires. As well, he expresses his belief he can fully and adequately represent the interests of the proposed class, without conflict insofar as the common issues set out in the within application are concerned.

[15] Further evidence was provided by *Harold Squires*, a former employee of Memorial University of Newfoundland, who worked with the University from September 1970 to October 2000, retiring in October 2000. At the time of his retirement Squires says he was the Director of Budgets and Audits for the University. He became a member of the Memorial University Pensioners Association serving as Treasurer for the years 2000 to 2006. He says in response to discontent among the pre-1993 pensioners and their survivors a committee was established to look into the merits of and preliminary interest in the within class action proceeding. To this end the committee sought to identify potential class members by inserting a notice in the MUNPA newsletter in February, 2005; March, 2005 and April, 2005. Squires says by October 2005 the committee had received responses from 102 individuals. Thereafter a letter was forwarded to these people with an enclosed questionnaire – 82 responded, 68 indicated they wished to be included in the class action against the University, 9 did not and 5 did not indicate either way. The letter and questionnaire to the retirees also elicited copies of 30 retirement letters which are attached to Squires' affidavit. Like the letters forwarded to Acreman and Lee these letters confirm an intention, on the part of the University, to provide health coverage for life with life insurance at no cost to the retiree.

[16] Harold Squires contacted the University, particularly Brenda Mullett in the Department of Human Resources, requesting an updated list of the pre-1993 retirees and survivors and the monthly or annual amount of their deductions for the group insurance benefits. By email dated May 5, 2006, Mullett indicated to Squires that as of August 30, 2005, there were 265 pre-1993 retirees and survivors participating in the University's health plan (158 with single coverage and 107 with family coverage). Mullett advised Squires in order to arrive at an estimate of the

monthly or annual cost he could calculate same by using the University's group benefits rates found on its website. Squires did so arriving at the figures set out in Acreman's affidavit and noted earlier herein. Harold Squires also provided true copies of the University's 2006 and 2007 group insurance rates.

[17] At paragraph 30 of his affidavit Harold Squires expresses his belief the University can identify each individual class member along with their last known mailing address.

[18] The last affidavit filed on behalf of the plaintiff is that of *Charles S. Rennie*. This is a reply affidavit to the affidavit of Glen Roberts filed in support of the defendant. Rennie was employed by the University from 1973 to 1991, retiring in 1991. For the time period 1981 to 1990 he held the position of Director of Personnel and Director of Human Resources. Rennie addresses correspondence signed by him dated January 21, 1984 and April 20, 1987, referring to pre-retirement planning seminars for faculty and staff. He says he recollects attending the pre-retirement planning seminars and making a general presentation about retirement issues. He also recalled individuals from the Benefits Division of the Department of Human Resources attended and made specific presentations about the University's insurance benefits for retirees. Rennie states attendees were told, upon retirement, they would be eligible to receive the University's life, health and dental group insurance coverage at no cost. He does not recall any mention of the Trust Fund during the pre-retirement planning seminars or any suggestion the retirees would only be eligible to receive the University's life, health and dental group insurance coverage, at no cost, so long as there were funds in the Trust Fund.

[19] Like the other individuals Rennie, at his retirement, also received a retirement letter in which he was told he would receive his post-retirement group insurance benefits at no cost to him.

Defendant's Evidence

[20] In support of its position the University provided the affidavit of *Glen Roberts*, an individual who has been employed by the Defendant since October 15, 1996. He has been Manager of Benefits and Pensions since November 25, 2003. Roberts confirms, at some point in time, Memorial University retirees paid a portion of premiums for their post-retirement group insurance benefits coverage. He believes this point to be prior to 1979. Roberts confirms that through the 1970's the defendant received several refunds of surplus funds from it is former insurance carrier. He says it is these refunds that were subsequently used to pay the University pensioners' 50 percent obligation towards their post-retirement group insurance benefits. Roberts states the University has not yet been able to locate all of the original documentation surrounding the refund of the surplus funds. He has retrieved a paper dated February 26, 2003, prepared by Glenda Willis, the then Acting Manager of Benefits and Pensions. He states, "… the Briefing Paper is consistent with my more general understanding on this point and with the original documentation Memorial has thus far been able to locate and which I have reviewed, as summarized and discussed below. …" Thereafter he indicates the Briefing Paper notes refunds of surplus funds to Memorial from its insurance carrier were placed into a trust account in 1971. He is able to confirm the opening balance of the Trust Fund on March 31, 1992, at $249,986 with a closing balance on March 31, 1996, of $69,666. The Briefing Paper of 2003 notes the Trust Fund was used to pay 50 percent of the group benefits premiums for retirees. Roberts is unaware of the precise date that the defendant started using the trust fund to pay 50 percent of the group benefits premiums for retirees but believes it began in the latter half of 1978. He bases this belief on three principle reasons:

> First, the Briefing Paper is accurate and reliable on the date set out therein;
>
> Second, on June 13, 1978, the University's Joint Committee on Faculty/Staff Affairs resolved that a recommendation be made to the Board of Regents that the premium for pensioners for their life and health insurance coverage "be shared equally between the University and the surplus fund rather than between the University and the pensioners". He points out no formal ratification of this recommendation by the Board of Regents has been

located although he says it appears the recommendation was implemented around that time;

Third, his review of correspondence sent to the defendant's retirees suggests that the pensioners who retired before 1978 had to contribute towards their post-retirement group insurance benefits through deductions from their pension. Glen Roberts was able to point to one retirement letter a copy of which he has appended to his affidavit, dated September 13, 1977, wherein the following statement is made to the retiree:

> A deduction of $2.82 will be made to cover your group health and life insurance premium.

[21] Glen Roberts suggests pre-1978 retirees may not have received notice of a cost elimination regarding premiums on benefits where he states at paragraph 15 of his affidavit:

> I am not personally aware of what notice, if any, was provided to memorial pensioners who retired before the Trust Fund was created which subsequently advised them that the Trust Fund would be used to subsidize their contribution towards their post-retirement group insurance benefits.

[22] Roberts points out on February 14, 1985, the Board of Regents approved guidelines for the use of the trust funds, which were called "Terms of Reference for the use and Operation of the Insurance Rebate (Trust) Fund". He recites part of the Terms of Reference as follows:

> <u>Purpose</u>
>
> <u>The Fund shall be used for the improvement and maintenance of the University's employee insurance benefit plans. Without restricting the generality of the foregoing, the Fund may be used for:</u>
>
> <u>a) The subsidization of the premiums for insurance benefits for existing members of the insurance benefit plans.</u>

> b) The subsidization or payment in full of the premiums for insurance benefits for faculty and staff pensioned from the University or their surviving spouses.
>
> …

The Terms of Reference were approved by the Board of Regents on February 25, 1985. John Acreman, one of the proposed representative plaintiffs was the Secretary to the Board at the time. Roberts is not aware of their having been any formal documentation setting out the purposes for which the Trust Fund was to be used prior to the adoption of the Terms of Reference on February 14, 1985. He expresses the belief the Trust Fund, however, was used in the same manner since its inception in or around 1971.

[23] By letter dated February 27, 1986, Glen Roberts points out the defendant advised all pensioners that the University's dental plan would be made available to those who retired prior to April 1, 1985, and that the premiums would be "cost shared, 50% - University and 50% - Trust Fund". Roberts states thereafter it became apparent the Trust Fund would eventually be depleted at the ongoing rate of withdrawal. He then outlines what transpired commencing in the autumn of 1992 to and including a resolution of the Board of Regents dated June 10, 1993, approving an amendment to the Trust Fund providing the University would continue to pay 100 percent of the premiums for the post-retirement group insurance benefits of pensioners who retired before January 1, 1993, until the Trust Fund was depleted after which time costs would be shared between those pensioners and the University in accordance with a phase-in schedule commencing with the University paying 75 percent of the pensioners 50 percent share in year one with a continuing deduction of 5 percent per year to the sixth year at which time the pensioners would be paying their 50 percent portion of the premium. Since April 1, 2003, the pensioners who retired before January 1, 1993, and their survivors, if any, have paid 50 percent of the premium toward the post-retirement group insurance benefits.

[24] Between November of 1996 and April 1, 1997, the pensioners who retired before January 1, 1993, according to the University, paid 25 percent of the premium for their post-retirement group insurance benefits, in accordance with the phase-in schedule. On March 20, 1997, Glen Roberts states the Board of Regents approved a recommendation that Memorial contribute an additional $70,000 per year for five years, to be put towards the obligations of the University pensioners who retired before January 1, 1993, as determined by the phase-in schedule. The additional contribution of $70,000 per year was shared equally between all pensioners who retired before January 1, 1993. In the result Roberts says that for the year April 1, 1997 to March 31, 1998, these pensioners received an individual allocation of approximately $223 each. If the annual contribution required of a pensioner was more than $223 a year, he says the pensioner would have paid the difference. For those pensioners who retired before January 1, 1993, and whose annual contribution (according to the phase-in schedule) was less than $223 per year, the excess was put into a group account. The accumulated excess was used in the sixth year of the phase-in schedule which followed five years of Memorial contributing $70,000 per year in accordance with the Board of Regents March 20, 1997 resolution.

[25] In addition to the foregoing background Glen Roberts provided a true copy of the University's alphabetical electronic listing of employees retired before January 1, 1993 and who were alive as of January, 1989. The list was created on or about August 14, 2007 and is current as of that date. It does not contain a record of retirees who were deceased as of January 1989. Roberts refers to the pensioners who retired before January 1, 1993, and who were alive as of January, 1989 as the pre-1993 retirees. He confirms there were 340 pre-1993 retirees. The list also signifies, through a letter designation, as to which of the pre-1993 retirees identified by the University were still living on August 14, 2007. Of the group identified as deceased, the list provides an indication as to which of the retirees died with or without a survivor. Further particulars of the list include whether or not the individual retiree was faculty or staff; the current city of residence; province of residence and country of residence as at August 14, 2007.

[26] Of the original 340 identified, Glen Roberts states 147 of the pre-1993 retirees are deceased, as of August 14, 2007, and 66 of them died without a

survivor. Some of the latter Roberts believes died before November of 1996 being the date of the phase-in schedule implementation; some of them died before the June 10, 1993 decision of the Board of Regents and 81 of them died without a survivor. He concludes there are 193 pre-1993 retirees alive at August 14, 2007.

[27] Of the original 340 pre-1993 retirees identified by Roberts he confirms 23 of the individuals resided outside of Canada or lived outside of Canada at the time of their death, up to August 14, 2007. He provides a breakdown of those individuals still alive at August 14, 2007 and an indication as to which province they resided in. Thirteen of the retirees on the date were living outside of Canada.

[28] In a section entitled “Survivors” Glen Roberts says the precise number of survivors is presently unknown to him. He believes some of these individuals reside outside of Newfoundland and Labrador. Also some may reside outside of Canada. He goes on to state some of the survivors died before November of 1996 when implementation of the phase-in schedule began.

[29] Glen Roberts affirms he reviewed the affidavits of John Acreman, George Lee and Harold Squires along with references to retirement letters containing phrases to the effect “provided at no cost to you”. Roberts states not all pre-1993 retirees received a retirement letter let alone a retirement letter containing language identical or comparable to that relied upon by the plaintiffs in the certification application. He bases this, in part, on the fact pre-1993 retirees who retired before the Trust Fund was first used to subsidize the University’s pensioners’ contributions towards their premiums in or around the year June of 1978, could not have received a retirement letter using the language “at no cost to you”, or comparable language. Secondly, he points out many pre-1993 retirees actually ceased their employment with Memorial as a result of their position being declared redundant. He states they would not have received a retirement letter making any representation as to post-retirement group insurance benefits. In some cases, the employee merely received a letter declaring their position redundant and advising them of their pension entitlement. Third, Roberts states several University employees died before January 1, 1993 while still employed in their pensionable position. They, he says, would not have received any type of retirement letter and

are not recorded as pre-1993 retirees. The survivors would have received letters advising of their entitlement to a survivors' pension. Roberts states at least some of the survivor letters did not refer to group insurance benefits. Finally, Roberts adds some pre-1993 retirees who retired in the normal course did not receive a retirement letter of the kind relied upon in the certification application. This group would have received letters advising as to their pension entitlement and wishing them a long and happy retirement. Occasionally, pre-1993 retirees received two retirement letters, one containing the language relied upon by the plaintiffs and the other setting out their pension entitlement and wishing them a happy retirement. Finally, Glen Roberts points to at least one individual who received a retirement letter noting the premium coverage might be changed in the future.

[30] As to retirement seminars held for the information of pre-1993 retirees, Glen Roberts confirms such seminars were offered by the University. He provides two different letters forwarded to individuals indicating when seminars will be held. He states the most recent retirement seminar letter found in an employee file was dated April 20, 1987. The earliest found is dated January 27, 1984. There are no records from these retirement seminars but Roberts believes attendance was voluntary and that not all pre-1993 retirees did in fact attend a retirement seminar.

[31] In the last section of his affidavit, Glen Roberts confirms the University pension plans have always been subject to the *Memorial University (Pensions) Act (Newfoundland and Labrador)* which provided for mandatory retirement at the age of 65, since before the Trust Fund was created. He notes it was in the discretion of the Board of Regents to allow an employee to remain working for up to three years after the employee reached the age of 65. He adds a large number of the pensioners, both pre-1993 and otherwise, retired pursuant to the legislatively mandated policy of mandatory retirement at age 65.

ISSUE

[32] The issue before me is whether or not this action should be certified as a class action pursuant to Section 5(1) of the *Class Actions Act*, S.N.L. 2001, c. C-18.1.

LAW

[33] The *Class Actions Act* is the legislation enabling class actions in the Province of Newfoundland and Labrador. A plaintiff(s) who has commenced a class action must apply for certification in accordance with Section 3 of the *Act*. The criteria for certification is set out in Section 5(1) and 5(2). The two foregoing sections read:

> **3.** (1) One member of a class of persons who reside in the province may commence an action in the court on behalf of the members of that class.
>
> (2) The member who commences the action shall apply to a judge of the court within the time period in subsection (3) for an order certifying the action as a class action and appointing the member as the representative plaintiff.
>
> (3) An application under subsection (2) shall be made
>
> (a) within 90 days after
>
> (i) the day on which the defence was served, and
> (ii) the day on which the time set in the *Rules of the Supreme Court, 1986* for filing the defence expires, if a defence is not served,
>
> whichever is later; or
>
> (b) with leave from a judge of the court.
>
> (4) A judge of the court may certify a person who is not a member of the class as the representative plaintiff if it is necessary to avoid a substantial injustice to the class.

5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where

(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 a common issue, whether or not the common issue is the dominant issue;

(d) a class action is the preferable procedure to resolve the common issues of the class; and

(e) there is a person who

(i) is able to fairly and adequately represent the interests of the class,
(ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

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

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

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

(c) the class action would involve claims that are or have been the subject of another action;

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

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

> **8.** The court shall not refuse to certify an action as a class action solely for one or more of the following grounds:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not determined or may not be determined; or
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[34] The application for class certification is brought pursuant to Rule 7A.04 of the *Rules of the Supreme Court, 1986*, Ch. 42, Sch. D.

ANALYSIS

[35] A class action certification is a procedural mechanism whereby a number of individuals may make a claim with respect to a common interest(s). It serves to avoid duplication of fact finding and legal analysis while at the same time improving access to justice for individuals who might otherwise be prohibited from same, by lessening the costs to individual claimants. Finally, class actions have been utilized to effect deterrence upon potential defendants who might not be held to account for wrongs which are too small to pursue individually.

[36] The foregoing was well-stated in **Hollick v. Metropolitan Toronto (Municipality)**, [2001] 3 S.C.R. 158 (S.C.C.). The Supreme Court of Canada identified the importance of class actions to the administration of justice:

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. [page170] 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

[37] In order for class certification to be granted by a court, the applicant must establish:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise a common issue or issues;

(d) class action is the preferable procedure;

(e) there is a person who: is able to fairly and adequately represent the interests of the class; has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; does not have, on the common

issues, an interest that is in conflict with the interests of the other class members.

Section 5(1) of the *Class Actions Act*.

Cause of Action

[38] The test for certification under this heading discloses a low threshold. Courts have tended to give class proceedings a large and liberal interpretation to ensure that policy goals are realized. The test was described by Barry, J. (as he then was) in **Wheadon v. Bayer**, 2004 CarwellNfld 105 (T.D.), at paragraphs 90-93 inclusive:

> **90** I agree with the Plaintiffs that this test establishes a "low threshold" for class certification. This was confirmed in Hollick where the Chief Justice noted the evidentiary threshold is not an onerous one.[6] Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized.[7] Courts must be mindful not to impose undue technical requirements on plaintiffs.
>
> **91** Class certification is not a trial. It is not a summary judgment motion. Class certification is a procedural motion which concerns the *form* of an action, not its *merits*. Contentious factual and legal issues between the parties cannot be resolved on a class certification motion. The Supreme Court of Canada has stated:
>
>> Thus the certification stage is decidedly not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding")... Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.[8]
>
> **92** Similarly, Mercer J. previously ruled in the present case:

> ...the certification stage is not meant to determine the merits of the action. Indeed the court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim.[9]
>
> **93** That certification is not an inquiry into the merits is confirmed by section 6(2) of the Act which provides:
>
>> An order certifying an action as a class action is not a determination of the merits of the action.

[39] The test referenced in **Hollick v. Metropolitan Toronto (Municipality)** reads at paragraph 16:

> **16** It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly [page171] not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

[40] In the February 13, 2003 decision of **Gregg v. Freightliner Ltd.**, 2003 BCSC 241, 2003 CarswellBC 283, the test is described by Bennett J. as emanating from **Hunt v. T. & N plc**, [1990] 2 S.C.R. 959 at paragraph 22 of the decision:

> **22** The test as to whether the pleadings disclose a cause of action is not an onerous one. It is the same test that is applied in an application to strike pleadings pursuant to Supreme Court Rule 19(24), found in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980:
>
> > [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[41] The test was applied by Winkler J. in a case very comparable to the present one, **Ormrod v. Etobicoke (City) Hydro-Electric Commission**, 2001 CarswellOnt 614 at paragraph 7:

> [7] In my view, all of these arguments advanced by the defendant in support of its position that the pleadings disclose no cause of action are arguments going to the merits of the case. This is inappropriate on a motion for certification of a class proceeding. This court has adopted the test applicable on a motion under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, in determining whether a cause of action exists for the purposes of s. 5(1)(a) of the Class Proceedings Act. The test is whether it is "plain and obvious" that the plaintiff will fail because of a radical defect in the pleadings (see Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 49 B.C.L.R. (2d) 273). The plaintiffs' claims are arguable on the face of the pleadings. The issues raised by the defendant in response to the plaintiffs' allegations are all live issues. It is not "plain and obvious" that the plaintiffs cannot succeed nor that the pleadings contain a radical defect.

[42] It is argued that the foregoing test may have been somewhat modified in **Hoffman v. Monsanto Canada Inc.**, 2007 SKCA 47, 283 D.L.R. (4th) 190, 2007 CarswellSask 190 at paragraph 50 where the Saskatchewan Court of Appeal states:

> Understood in this light, we are of the opinion Justice Smith correctly identified the essential nature of the matter when she said that, assuming the facts as pleaded are true, the representative plaintiffs must persuade the court that there exists a plausible basis for supposing the defendants could be liable to the claims of the class. This is a way of saying, simply and effectively, that the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies. This also has the advantage of restoring balance to the screening process so far as it extends to the cause of action.

Leave to appeal the judgment to the Supreme Court of Canada was dismissed without costs (**Hoffman v. Monsanto Canada Inc.** 2007 CarswellSask 725.)

[43] The plaintiffs, Acreman and Lee, allege breach of contract, infringement of vested rights and breach of fiduciary duty. As to breach of contract they say the University committed a breach in relation to the plaintiffs and the retirees overall contracts of employment which included: the group insurance benefits and the post-retirement group insurance benefits for life at no cost to them and their survivors. The plaintiffs state the University committed an infringement of vested rights by denying the plaintiffs, the retirees and their survivors vested retirement rights and benefits to receive the post-retirement group insurance benefits for life at no cost to them and to receive the pension entitlement without any reduction for the cost of insurance premiums for the post-retirement group insurance benefits. Finally, they believe the University committed a breach of fiduciary duty on the basis the University was in a position of trust in relation to the plaintiffs, the retirees and the survivors, who received the University's promise and representation of post-retirement group insurance benefits for life at no cost to them, and who reasonably expected the University to act in their best interests with respect to the retirement rights and benefits when those rights and benefits accrued and vested in the plaintiffs, the retirees and survivors. They submit the University's unilateral change of policy and practice caused them to suffer damages.

Breach of contract

[44] The University has conceded, at paragraph 78 of the defence brief and in oral argument, there exists a cause of action for breach of contract. Paragraph 78 states:

> The University concedes that there exists a plausible basis in principle and presumed fact, on the basis of the allegations contained in the Statement of Claim, for supposing that the University could be held liable to the proposed class in breach of contract, and admits, for the purposes of section 5(1)(a) of the *CAA* only, that the pleadings do disclose a cause of action in breach of contract.

Accordingly, the criteria required under Section 5(1)(a) of the *Class Actions Act* is met insofar as this cause of action is concerned.

Vested rights claim

[45] The defendant takes the position there is no cause of action known in law regards the breach of vested rights claim of the plaintiffs.

[46] The Statement of Claim pleads the facts set out hereafter in support of the vested rights claim as follows:

> 9. The Plaintiffs, the retirees and the survivors' retirement rights and benefits accrued upon retirement of the Plaintiffs and retirees, and vested in the Plaintiffs, the retirees and the survivors at that time.
>
> 10. Prior to December 31, 1992, the Plaintiffs, the retirees and the survivors received the post-retirement group insurance benefits at no cost to them, and without any insurance premiums for them, and without any insurance premiums for these benefits being charged to them.

11. Prior to December 31, 1992, the Plaintiffs, the retirees and the survivors received the pension entitlement without any reduction for the cost of the insurance premiums for the group insurance benefits.

12. In about the Fall, 1992, the university announced a unilateral change to the Plaintiffs, the retirees and the survivors' retirement rights and benefits.

13. In accordance with the university's unilateral change, the Plaintiffs, the retirees and the survivors would no longer receive the post-retirement group insurance benefits at no cost to them, and they would be made to pay 50% of the cost of the insurance premiums for these benefits through a source reduction to the pension entitlement.

14. The university's unilateral change was at first to take effect January 1, 1993, but it was later delayed and phased in over a 6 year period commencing April 1, 1997, with the Plaintiffs, the retirees and the survivors being made to pay 25% of the cost of the insurance premiums in the first year, which amount increased by 5% in each consecutive year until reaching 50% in the sixth year, being April 1, 2002 to March 31, 2003.

15. Since March 31st, 2003, the university's unilateral change has remained in effect, and the Plaintiffs, the retirees and the survivors have been made to pay 50% of the cost of the insurance premiums for the post-retirement group insurance benefits through a source reduction to the pension entitlement.

16. … (b) The university committed an infringement of vested rights by denying the Plaintiffs, the retirees and the survivors' vested retirement rights and benefits to receive the post-retirement group insurance benefits for life at no cost to them, and to receive the pension entitlement without any reduction for the cost of the insurance premiums for the post-retirement group insurance benefits.

[47] The defendant's position is set out in its brief from paragraph 80 to 89. the defendant submits the only arguable situation where the alleged infringement of a vested right could constitute a separate cause of action is in the context of a vested statutory right citing **Dikranian c Québec (Procureur général)**, 2005 SCC 73. Secondly, the defence says rights conferred under a collective agreement can

'vest', although it points out no argument has been made in the present case that the no-cost insurance benefits vested on the basis of a provision contained in a collective agreement. The nature of vesting rights arising out of a collective agreement is set out in paragraph 89 of the **Dayco (Can.) Ltd. v. C.A.W**., [1993] 2 S.C.R. 230:

> To summarize, I am of the view that retirement rights can, if contemplated by the terms of a collective agreement, survive the expiration of that agreement. Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights. As such, I have concluded that the arbitrator's general propositions in this respect were correctly stated, and the arbitrator had jurisdiction to hear the union's grievance. Of course, I make no comment on whether the terms of the agreement between the company and the union do in fact create such a vested right. That is a question for the arbitrator to decide when the arbitration hearing proceeds on the merits.

[48] The plaintiffs' reply to the argument, in rebuttal, is found in their reply brief from paragraphs 3 to 6, inclusive. Two extracts exemplify the position. The first is from the **Ormrod** case of Winkler, J. (as he then was), at paragraph 26 of the decision:

> The defendant submits that even if it is liable in breach of contract to those persons retiring between September 1, 1988 and June 13, 1996, it was not liable in contract to those retiring before September 1, 1988 because the premium-sharing arrangement was not a term of their employment contract upon retirement. In other words, if the premium-sharing arrangement is said to vest upon the date of retirement, pursuant to the above reasoning in *Dayco*, it could not apply to these retirements because upon the date of their respective retirements, the premium-sharing was not yet in effect. If the employment relationship *per se* constitutes the only consideration for the contract, and in respect of this group the employment relationship had ended, this is not fatal to the plaintiffs alleged cause of action. In *Sloan v. Union Oil Co. of Canada*, [1955] 4 D.L.R. 664 (B.C.S.C.), a decision in an employment context, the court held that there are instances where a promise will be binding on the party making it even though it may be difficult to find any consideration for it. The court stated at p. 674:

> There has been a series of decisions over the last fifty years which, although they are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which in fact so acted on. In such cases the courts have said that the promise must be honoured. … As I have said they are not cases of estoppel in the strict sense. They are really promises – promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden v. Money* can be distinguished, because there the promisor made it clear that she did not intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. … The decisions are a natural result of the fusion of law and equity…

Applying this reasoning in the present context, it is not "plain and obvious" that the plaintiff cannot succeed in respect of its claim on behalf of those persons retiring before the premium-sharing arrangement was implemented, but who had benefited from the arrangement.

[49] The second point argued by the plaintiffs addresses the "novel" nature of the claim for infringement of vested rights submitted by the defendant. The plaintiffs say none of the defendant's authorities give due consideration to the developing law in the area. In support of their position they cite **Dinney v. Great-West Life Assurance Co.**, 2005 CarswellMan 78 (C.A.) at paragraphs 34-38, inclusive:

> **34** But even employers' unilateral pension plans create contractual rights. An illustration of the many American authorities to this effect is the leading case of Rochester Corp. v. Rochester, 450 F. (2d) 118 (4th Cir. 1971), which holds that an employee who benefits from such a plan acquires a "right no less contractual than if the plan were expressly bargained for" (at p. 121). More recently, in Williams v. Cordis Corp., 30 F. (3d) 1429 (11th Cir. 1994), the court approved the description of a pension plan in the earlier decision of Hurd v. Illinois Bell Telephone Co., 234 F. (2d) 942 (7th Cir. 1956), and explained the matter this way: "[A] pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years" (at p. 1432). See as well Walker v. Board of Trustees, Regional Transportation District, 69 Fed. Appx. 953, U.S. App. LEXIS 14603 (10th Cir.

2003), and Kemmerer v. ICI Americas Inc., 70 F. (3d) 281, U.S. App. LEXIS 32518 (3rd Cir. 1995).

35 In Canada, a number of decisions have specifically noted the formation of a unilateral contract in relation to pensions and accepted the existence of a unilateral contract in such circumstances. Maier v. E. & B. Exploration Ltd. (1986), 69 A.R. 239 (C.A.). See as well Bradley v. Saskatchewan Wheat Pool (1984), 31 Sask.R. 254 (Q.B.), Reid v. International Union of Mine, Mill and Smelter Workers, [1960] O.J. No. 39 (H.C.), Chorny v. Freightliner of Canada Ltd., [1995] 4 W.W.R. 706 (B.C.S.C.), Sloan v. Union Oil Company of Canada Limited (1955), 16 W.W.R. 225 (B.C.S.C.).

36 The rights of employees vest, at the latest, upon retirement. In "Pension Plans and the Rights of the Retired Worker," Note (1970), 70 Col. Law Rev. 909, the author states (at p. 917):

> ... Initiation of the plan may be constructed as an offer by the employer. The employee accepts by fulfilling the requirement that he continue in his position for a specified number of years. At this point benefits either vest and begin to accrue as the employee continues in service or vest immediately if the employee retires.

37 The same point is made in Hurd v. Hutnik, 419 F.Supp. 630 (N.J. Dist. Ct., 1976), where District Judge Stern wrote (at p. 653):

> There can be no question that the rights of pensioners who retired in compliance with all the terms and conditions of the governing pension plan and who are already receiving benefits are vested, ...

38 Not surprisingly, what Canadian authority there is, is to the same effect. In Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230, La Forest J. said (at p. 274):

> ... on retirement a worker withdraws from that relationship [collective bargaining], and at that point his or her accrued employment rights crystallize into some form of "vested" retirement right.

And (at p. 305):

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

[50] As I understand the plaintiffs' submissions, they will argue the no-cost health and insurance benefits arose out of the contractual arrangement between the defendant and the plaintiffs particularly as evidenced by letters forwarded to a significant group of individuals indicating same, statements made by the defendant's representatives at seminars and the general treatment of all pensioners, survivors and their estates in respect of the no-cost practice adopted by the University. The plaintiffs will also submit the no-cost benefits vested either at the time of retirement or when the practice and benefit commenced.

[51] It would seem to me to be premature to determine no cause of action exists with respect to the plaintiffs' claim of infringement of vested rights. Upon full submissions and analysis at trial, the claim may be struck, viewed as a separate claim or considered as a component part of the claim in contract. To foreclose the opportunity for the plaintiffs to make submissions on this cause of action, at this procedural stage, would be inappropriate.

Breach of fiduciary duty

[52] The defendant opposes the plaintiffs' argument of breach of fiduciary duty in respect of the claim herein. They take the position Canadian courts have been critical of its frequent use. **Girardet v. Crease & Co.** (1987), 11 B.C.L.R. (2d) 361 at para. 3 (S.C.). They also say paragraph 16(c) of the Statement of Claim is not a factual allegation but rather a legal principle. Paragraph 16(c) states:

> The university committed a breach of fiduciary duty on the basis that the university was in a position of trust in relation to the Plaintiffs, the retirees and the survivors, who received the university's promise and representation of post-retirement group insurance benefits for life at no cost to them, and who reasonably expected the university to act in their best interest with respect to the retirement rights and benefits when those rights and benefits accrued and vested in the Plaintiffs, the retirees and the survivors.

In so stating the defendant does not discuss or acknowledge the factual basis for the claim as set out in paragraphs 5 through 15, inclusive of the Statement of Claim. Paragraphs 9 through 15 are found in paragraph 46 of this decision. Paragraphs 5 to 8, inclusive, of the Statement of Claim state:

> 5. As part of their employment with the university, the Plaintiffs and the retirees were provided with retirement rights and benefits.
>
> 6. The university established, created, organized and administered the retirement rights and benefits.
>
> 7. The retirement rights and benefits included, *inter alia*, the following:
>
> (a) the Plaintiffs, the retirees and the survivors were entitled to receive, *inter alia*, a pension entitlement award under The Memorial University Pension Fund created by the *Memorial University's Pensions Act* (the "pension entitlement"), and post-retirement life, health and dental group insurance coverage (the "post-retirement group insurance benefits"),
>
> (b) the Plaintiffs, the retirees and the survivors were entitled to receive the post-retirement group insurance benefits for life at no cost to them, and without any insurance premiums for these benefits being charged to them, and
>
> (c) the Plaintiffs, the retirees and the survivors were entitled to receive the pension entitlement without any reduction for the cost of the insurance premiums for the post-retirement group insurance benefits.
>
> 8. The Plaintiffs, the retirees and the survivors' retirement rights and benefits were set out in, *inter alia*, retirement seminars presented by the university, and letters from the university to the Plaintiffs and the retirees in anticipation of their pending retirement.

[53] Paragraph 16(c) encompasses both the legal argument the plaintiffs intend to make as well as some of the facts which must be proven. Facts to be proved include the defendant was in a position of trust in relation to the plaintiffs, the retirees and their survivors; the foregoing individuals were entitled to receive post-retirement group insurance benefits for life at no cost to them and that the

University failed to act in their best interest with respect to the retirement rights and benefits.

[54] The defendant in its brief reviews the three characteristics which have to be established in making an argument pertaining to breach of fiduciary duty, as set out in **Rideout v. Health Labrador Corp.**, 2005 NLTD 116:

> 66 A fiduciary relationship has the following characteristics:
>
> > 1. Scope for the exercise of some discretion or power,
> >
> > 2. that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interest and,
> >
> > 3. a peculiar vulnerability to the exercise of that discretion or power. (See: *Hodgkinson v. Simmons*, [1994] 3 S.C.R. 377 (S.C.C.) and *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.))

[55] While the defendant recognizes a pinch-and-plan administrator "might" owe its employees a fiduciary duty to exercise reasonable skill and caution in investing the pension funds over which it has discretion they argue it does not follow all aspects of the relationship between the administrators and employees give rise to fiduciary duties. In support of this they cite **MacQueen v. Ispat Sidbec Inc.** 2007 NSCA 33 at paragraph 30. In that case the Court determined the judge ought to have conducted an analysis of pled facts and asked himself whether the factual foundation could support the existence of fiduciary duty obligations applying the current test for such obligations. In the result, the Court struck part of the claim against the defendant corporation but declined to do so in respect of the Crown defendants. In her decision Hamilton, J.A. states at paragraphs 33 through 40 as follows:

> **33** However, the Supreme Court of Canada most recently dealt with fiduciary duty in **Gladstone v. Canada (Attorney General)**, [2005] 1 S.C.R. 325:
>
> > 24 **The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. At its core is**

the obligation of one party to act for the benefit of another. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. (as he then was) stated at p. 384:

> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

25 Also, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 409, La Forest J. stated:

> **In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.**

26 Other characteristics of a fiduciary relationship were described by Sopinka J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 599. **These are: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. However, these are simply characteristics and not necessarily determinative of a fiduciary relationship.**

(Emphasis mine)

34 **Gladstone**, supra, suggests that in a case such as this, where there is no allegation that the fiduciary duty claimed arose from a statute or an agreement, that the central question to ask is whether on the basis of the facts pled the respondents could reasonably have expected that the appellants, or any of them, would act in their best interests with respect to the ownership and/or operation of the plant and/or ovens and with respect to the dissemination of any information they had with respect to the harmful effects of the emissions. The discretion the appellants had as to how they operated the plant and/or ovens, and what they did with any information they had with respect to the emissions, and the fact the respondents had no input into these decisions, may be characteristics found in fiduciary relationships, but are not necessarily determinative of them.

35 In **Hodgkinson**, supra, referred to in the quote from **Barrett**, supra, set out in para 27 above, LaForest, J., in addition to setting out the central question to be asked to determine whether a fiduciary duty arose, sets out some factors that may be relevant in answering this question: the presence of loyalty, trust and confidentiality in the relationship, giving rise to a duty of loyalty, p. 405, discretion, influence, vulnerability and trust, p. 409, evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party, p. 409, and trust, confidence, complexity of subject matter, and community or industry standards, p. 412.

36 With respect to the importance of vulnerability in determining whether a fiduciary duty arose, LaForest, J., downplayed its importance in determining the existence of a fiduciary relationship in circumstances outside the established fiduciary categories. He used the term "power dependant relationships" to describe relationships characterized by unilateral discretion in which a party has power to make decisions that affect others. He noted that power imbalance is not the key factor to determine the existence of a fiduciary duty and stated at p. 412:

> In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". In my view, this concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. *Ipso facto*, persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. ...

37 Taking these factors into account with respect to Ispat, in light of the central question, 'Could the respondents reasonably have expected that Ispat would act in the respondents' best interests with respect to the operation of the plant and ovens and the dissemination of any information they had respecting the emissions?' I am satisfied the judge erred in deciding that it was not plain and obvious that the respondents have no cause of action against Ispat based on fiduciary duty.

38 It is true that the respondents were vulnerable to the decisions Ispat made as to how it operated the plant and ovens and what it did with information it had relating to that operation. While this characteristic is often found in fiduciary relationships, vulnerability is not a defining aspect

> of a fiduciary relationship; **Hodgkinson**, p. 412 and **Gladstone**, para 26. Not every exercise of discretion gives rise to a fiduciary duty to those affected by the decision.
>
> **39** There is no suggestion that Ispat and the respondents were anything but strangers. It is not alleged that there was any contact, discussion or dealings of any sort between them. There is no suggestion Ispat provided any information or advice to the respondents or that it was asked for any. Nothing in their alleged relationship suggests that Ispat owed the respondents any trust, loyalty or confidentiality. There is no suggestion in the statement of claim that there are community or industrial standards requiring companies like Ispat to operate in the manner the respondents suggest Ispat should have done. There is no suggestion Ispat acted any differently than other plant operators in its relationship with its geographical neighbours, the respondents. The respondents have not provided us with any case suggesting that Ispat had an obligation to correct any information provided to them by Canada or Nova Scotia.

[56] In response the plaintiffs cite **Gladstone v. Canada (Attorney General)**, 2005 CarswellBC 911 (S.C.C.) where the Court noted that a fiduciary duty can derive from a unilateral undertaking following **Guerin v. R.**, 1984 CarswellNat 813 (S.C.C.) and **Hodgkinson v. Simms** 1994 CarswellBC 438 (S.C.C.) the plaintiffs cite paragraphs 97 and 98 of the **Guerin** case and paragraph 36 of the **Hodgkinson** case as support for their position on this point:

> 97 This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article “The Fiduciary Obligation” (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
>> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

> 98 I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> **Guerin** case
>
> 36 More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply a species of a broader family of relationships that may be termed "power-dependency" relationships. I employed this notion, developed in an article by Professor Coleman, to capture the dynamic of abuse in Norberg v. Wynrib, supra, at p. 255. Norberg concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in Norberg was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. Because of the particular context in which the relationship between the plaintiff and the doctor arose in that case, I found it preferable to deal with the case without regard to whether or not a fiduciary relationship arose. However, my colleague Justice McLachlin did dispose of the claim on the basis of the fiduciary duty, and whatever may be said of the peculiar situation in Norberg, I have no doubt that had the situation there arisen in the ordinary doctor-patient relationship, it would have given rise to fiduciary obligations; see, for example, McInerney v. MacDonald, [1992] 2 S.C.R. 138.
>
> **Hodgkinson** case

[57] Turning again to the decision of Russell, J. in the **Rideout** case where he discusses the characteristics of a fiduciary relationship, it is evident the first characteristic set out by him is found in the present factual situation, that is, the defendant had scope for the exercise of some discretion or power over the class. The power could be exercised by the defendant unilaterally. If the plaintiffs establish monies were automatically deducted from pension benefits to cover

premium payments then their practical interest as well as their legal interest have been affected. Finally, on the third prong of the test it can be argued there is a particular vulnerability to the exercise of the discretion or power in the present circumstances in that the individuals have retired and it might be said are at the "mercy" of the defendant. Contrast this with a situation where individuals continue in the employment of an entity such as the defendant and may by virtue of their contractual employment agreement or collective agreement be able to exert pressure on the employer ameliorating or eliminating the actual or perceived imbalance of power between the two. The individuals affected by the actions of the defendant are elderly pensioners who are completely dependent for payment of their full pension and benefits including no cost benefits upon the defendant.

[58] The question, "could the plaintiffs reasonably have expected the defendant would act in their best interest with respect to the provision of no-cost pension benefits", must be answered in the affirmative. It is not plain and obvious that the plaintiffs have no cause of action against the defendant based on fiduciary duty.

[59] As to the whole of the arguments placed before me regards the three causes of action I conclude whether the test is as set out by the Supreme Court of Canada in **Hollick v. Metropolitan Toronto (Municipality)** and as applied in **Wheadon v. Bayer Inc.** or the more stringent test found in **Hoffman v. Monsanto Canada Inc.**, the plaintiffs have met the requirement set out in Section 5(1)(a) of the *Class Actions Act* as it relates to all three claims made in the Statement of Claim and the factual foundations upon which those claims are based. I am of the opinion, however, the appropriate test is that as found in both the **Hollick** and **Wheadon** cases.

Identifiable Class

[60] The plaintiffs define the class as follows:

a) All former employees of Memorial University who retired or terminated employment prior to January 31, 1993 and all survivors of such former employees who received the Memorial University post-retirement group insurance benefits at no cost to them (collectively the "pre-1993 Memorial University pensioners");

b) All estates of the pre-1993 Memorial University pensioners who died after November, 1996 (the "estates").

The class is made up of persons resident in the Province of Newfoundland and Labrador and persons non-resident in the Province of Newfoundland and Labrador. John Acreman and George Lee are the proposed representative plaintiffs for the resident class and Charles Rennie is the proposed representative plaintiff for the non-resident class.

[61] The description of the proposed class should provide objective criteria by which the class members can be determined. This is one of those cases where the identity of the class members, generally, is self-evident, in a manner similar to that as set out by Winkler, J. in **Ormrod** at paragraph 31 and 32 of the decision:

> [31] The second requirement of the test for certification is that there must be an identifiable class of two or more persons. The purpose of a class definition is found in Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10:
>
> > The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.
>
> The plaintiff proposes to define the class as follows: all retired former employees of Etobicoke Hydro who received coverage under the Plan as of June 13, 1996.

> [32] There is a discrete number of persons in the proposed class, 85 in total, and the identity of each person is known to both the plaintiffs and the defendant. All of those persons are former employees of the defendant. The pointed issue in this proceeding is whether the premium-sharing arrangement constitutes a vested term of the employment contract or an enforceable promise. The defendant asserts that there is no definable class in the present circumstances. I disagree. The Court of Appeal stated in Hollick v. Metropolitan Toronto (Municipality) (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (C.A.) (leave to appeal to the Supreme Court of Canada granted, [2000] S.C.C.A. No. 41, 262 N.R. 395n), at para. 15:
>
>> In most instances, such as disasters or defective autos, evidence to assist in the identification of a class will be unnecessary, its identity being self-evident.
>
> In the instant case, 85 persons retired from their employment with Etobicoke Hydro, and were in receipt of the benefit of the premium-sharing arrangement as of June 13, 1996. These persons lost that benefit on that date, and thus constitute the appropriate class to seek remediation in respect of its discontinuance. The identity of the class is self evident. I accept the class definition as proposed by the plaintiffs.

[62] As noted by John Acreman the University is able to identify all pre-1993 retirees and survivors who have received the no-cost post-retirement group insurance benefits. Glen Roberts provided electronic printouts of pre-1993 retirees and their survivors as at the dates set out in his affidavit. He did not specify which individuals were provided with no-cost group insurance benefits after they had retired, however, record keeping should enable the University to bring forward this information.

[63] The defendants argue the class as defined is improper. They dispute there is a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. The proposed common issues will be dealt with hereafter. In support of their submission they rely on **Ring v. Canada (Attorney General)**, 2007 NLTD 146 which case relied on **Western Canadian Shopping Centres Inc. v. Dutton**, 2001 SCC 46 and **Hollick v. Metropolitan Toronto (Municipality)**, *supra*, at paragraphs 120 and 121 of the decision:

> **120** The purpose of the class definition is to identify the individuals:
>
> (i) entitled to notice;
>
> (ii) entitled to relief; and
>
> (iii) bound by the judgment.
>
> See, **Dutton**, at para. 38.
>
> **121** The class definition should be comprised of "stated, objective criteria":
>
> (i) by which members of the class can be identified;
>
> (ii) which bears a rational relationship to the common issues asserted by all class members; and
>
> (iii) does not depend on the outcome of the litigation or a determination of the merits.
>
> See, **Dutton**, at paras. 38 and 52, and **Hollick**, at para. 17.
>
> The class definition should not be unnecessarily broad in the sense of including those who have no interest in the resolution of the common issues: See, **Hollick**, at para. 21.

[64] The plaintiffs, too, cite **Western Canadian Shopping Centres Inc. v.** Dutton [2001] 2 S.C.R. 534, at paragraph 38:

> **38** While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, supra, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993),

> at pp. 726-27; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

[65] As previously stated the class is readily identifiable. Even if one or more of the individuals in a proposed class cannot be precisely identified, or in my view located, this would not preclude certification of the class (**Western Shopping Centres Inc. v. Dutton** as quoted above on the first point).

[66] The class definition proposed by the plaintiffs coincides with the purpose of a class definition found in the **Bywater v. Toronto Transit Commission** case referenced in the **Ormrod** decision. It identifies those persons who have a potential claim for relief against the defendant; it defines the parameters of the lawsuit so as to identify those persons who are bound by its result and it describes who is entitled to notice pursuant to the act. It is neither unduly narrow nor broad.

[67] Although the claims may vary somewhat depending on how members of the class came to be in receipt of no-cost benefits, as stated by the plaintiff, they cover the interests of the members of the class identified. The same may be said in respect of the common issues discussed hereafter.

[68] In the result, I conclude the requirement of Section 5(1)(b) of the *Class Actions Act* has been met.

Common Issues

[69] The third element of the test for certification is whether the claims of the class raise common issues. A great many of the University's submissions focused on this element.

[70] The plaintiffs state the common issues to be:

a) Are the pre-1993 Memorial University pensioners entitled to receive the Memorial University post-retirement group insurance benefits at no cost to them?

b) In charging the pre-1993 Memorial University pensioners a cost for receiving the Memorial University post-retirement group insurance benefits, did Memorial University commit a breach of contract?

c) In charging the pre-1993 Memorial University pensioners a cost for receiving the Memorial University post-retirement group insurance benefits, did Memorial University commit a breach of vested retirement rights and benefits?

d) In charging the pre-1993 Memorial University pensioners a cost for receiving the Memorial University post-retirement group insurance benefits, did Memorial University commit a breach of fiduciary duty?

e) Can the class members recover the cost that Memorial University has charged the pre-1993 Memorial University pensioners for receiving the Memorial University post-retirement group insurance benefits?

f) Can Memorial University be enjoined from further charging the pre-1993 Memorial University pensioners a cost for receiving the Memorial University post-retirement group insurance benefits?

[71] The defendant submits the appropriate common issue is:

Did the provision of the post-retirement group insurance benefits at no cost to the class, from 1978 until 1996, in conjunction with the course of conduct of the parties and their representatives, create a contractual obligation on the part of the University to continue to provide those benefits at no cost to the class?

[72] The defendant has submitted the fiduciary duty claim is inappropriate for certification but states the appropriate common issue for this claim, if certified, is:

1) Did the University owe the class a fiduciary duty of care to continue providing the post-retirement group insurance benefits to the class at no cost?

2) Did the University's decision to require the class to contribute towards the premiums for their post-retirement group insurance benefits constitute a breach of any fiduciary duty owed to the class?

[73] A common issue is one where its resolution will move the matter in dispute forward. There must be a rational connection between the class as defined and the common issue. The answer to a common issue need not be identical for each individual claimant. In this case, the issues will be common to all individuals who received post-retirement group insurance and other benefits at no cost to them. This group is not restricted to those individuals in receipt of same between 1978 and 1996. Rather, it includes all pre-1993 retirees and their survivors and/or estates.

[74] Common issues is defined in this province's *Class Actions Act* as follows:

2. In this Act

(b) "common issues" means

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[75] In **Ormrod v. Etobicoke (City) Hydro-Electric Commission**, 2001 CarswellOnt 614, Winkler J. quotes at paragraph 33 an extract, on this point, from the Ontario Court of Appeal:

The Ontario Court of Appeal in Anderson v. Wilson (1999), 44 O.R. (3d) 673, held per Carthy J.A. at para. 35:

> I agree with the British Columbia Court of Appeal's observation, as did Campbell J., that the common issues need only involve a matter, that if determined, would move the litigation forward. In Campbell v. Flexwatt Corp. (1998), 15 C.P.C. (4th) 1 (B.C.C.A.), leave to appeal to the Supreme Court of Canada denied, Cumming J.A., speaking for the court a pp. 17-18 reasoned:
>
>> The Class Proceedings Act requires that the claims of the class members raise common issues which, for reasons of fairness and efficiency, ought to be determined within one proceeding. Common issues can be issues of fact or law and do not have to be identical for every member of the class.
>>
>> .....
>>
>> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible. [Emphasis added.]

[76] The defendants argue the common questions of fact are all either intrinsically individualistic and founded on an improper theory of aggregation, are unnecessary for any of the claims, fail to substantially advance any of the claims, or are poorly phrased and ask for confirmation of a specific factual allegation as opposed to a factual investigation into a specific issue. They also will submit the proposed common questions of fact are of no assistance to establishing liability or quantifying damages.

[77] The issues are common to all members of the class, in my view. As to whether the plaintiffs will succeed on the merits is another matter. I do not accept the defendant’s argument the questions of fact are intrinsically individualistic.

Within the class there are likely to be four groups: retirees who received a letter indicating post-retirement benefits would be provided to them at no cost; retirees who attended seminars where it was indicated verbally to them they would receive post-retirement benefits at no cost to them; individuals who received both a letter and attended a seminar where they were advised post-retirement benefits would be provided to them at no cost; and a further group that neither received a letter nor attended a seminar but were treated in a manner similar to the others in that they, too, were provided with post-retirement insurance and other benefits at no cost. The claim of survivors and estates arises in respect of the pensioners falling into the foregoing categories. Although the factual foundation upon which the plaintiffs rely may be somewhat dissimilar I am of the view they are inextricably connected. They are bound by one common bond, that is they did receive benefits at no cost to them.

[78] A purposive approach requires a court not get bogged down in how issues are stated by either side or, for that matter, whether or not an issue which will require a determination of both fact and/or law ought to be disposed of at this stage of the proceedings.

[79] I agree with the defendants proposition it is improper for common issues to contemplate the need for proof by individual class members. However, I reject this principle applies in the present case. The defendant relies on the case of **Controltech Engingeering Inc. v. Ontario Hydro** 1998 CarswellOnt 4918 at paragraph 19:

> 19 In my view, the claim for misuse of confidential information does not give rise to common issues within the meaning of s. 5. The first proposed common issue under this heading is: "Was valuable information assembled by the bidders and provided to Ontario Hydro?" I find it impossible to see how that question could be answered without detailed consideration of the circumstances of each bid and the information supplied therein. The fact that one bid contained valuable information would not be helpful in determining whether another bid contained valuable information. Similarly, the second proposed common issue asks: "What were the expectations of the parties in connection with the use of such information?" Again, I fail to see how that question can be answered globally. Expectations are very individual matters. One bidder's expectation would not

> necessarily be the same as another's. Indeed, one bidder's expectations might not even be relevant in determining the expectations of another bidder. The problem is compounded in the third question: "Did Ontario Hydro use the information provided by the plaintiffs in a manner contrary to the mutual expectation of the parties?" This calls for consideration of how Ontario used the information of each of the bidders in relation to their expectations. Both the use of the information and the expectations of the bidder appear to me to require case by case consideration as to the nature of the information provided, the manner in which it was used and the expectations of the party that provided it. The remaining issues under this heading do not stand in isolation and could survive only if the earlier issues were accepted.

This case can be distinguished from the present on its facts.

[80] I conclude the proposed common issues identified by the plaintiff and defendant are not dissimilar. They are stated somewhat differently. The defendant attempts to circumscribe the issue regarding the action in contract by restricting the argument to a timeframe between 1978 and 1996. I reject this approach. Similarly, I do not believe it is necessary to define the issues with absolute precision at this time.

[81] With respect to liability issues determination in any one of the areas raised will at the very least move the litigation forward and may result in a resolution of the litigation in its entirety. As to quantification of damages, this will require individual assessments, if the plaintiffs are successful in their claim. In light of the discrete number of individuals affected and the record keeping of the defendant, this task should not be overly onerous. In conclusion the issues stated by the plaintiffs have sufficient significance to the claims asserted by them and their resolution will advance the litigation or dispose of it in an orderly fashion. In the result, I find the plaintiffs have met the requirement as set out in Section 5(1)(c) of the *Class Actions Act*.

Preferable Procedure

[82] In deciding whether or not class action is preferable to other procedures and can be conducted in a fair, efficient and manageable way Russell J. in **Rideout v. Health Labrador Corp.**, 2005 NLTD 116, states the inquiry should be "conducted through the lens of judicial economy, access to justice, behaviour modification …". In this case, the class members are a discrete group of elderly individuals or survivors and/or estates of deceased members of the class. The advanced age of the surviving pensioners, including the plaintiffs named in the action, necessitate a procedure which will minimize the requirement of individuals having to commence separate actions. Indeed, were certification to be denied it is likely the majority of claimants might not proceed due to age and health considerations. As stated by Winkler J. in **Ormrod**, a case similar to this, at paragraph 38, "… the plaintiffs are all retired persons. To require them all to pursue their claims individually would be expensive, inconvenient and repetitious, particularly given the amount of damages claimed. … A certification of this motion clearly advances the goals of the act of promoting judicial economy and providing access to justice. This is precisely the type of dispute the act was created to address. …"

[83] In considering the defendant's argument regards members of the class, I understand the defendant would require every individual to establish some form of written proof as to the arrangement when, indeed, such proof may not exist. Such a defence might require numerous individuals to repeatedly have to establish their case, in part, based on the University's treatment of other members of the class. This is neither efficient nor practical. The view expressed by Winkler J. in **Ormro**d at paragraph 37 although differing somewhat on the facts and causes of action is equally applicable, in my view, to the present case:

> **37** This case constitutes the quintessential class action. It is apparent that certain of the individual issues as set out in s. 6 of the Act are present here: the claims relate to separate contracts of employment in respect of each retired former employee, and the relief claimed may include individual damage assessments. On the other hand, the plaintiffs case, as formulated, rests entirely on the written representations made by Etobicoke Hydro regarding the premium-sharing arrangement, and the subsequent elimination of that arrangement. The damages

> are, in essence, liquidated damages claims, and although some processes may be required to determine those claims in respect of each member, these will be simple and brief and could be conducted in a variety of forms.

[84] Certification of the within proceeding will eliminate the necessity for potentially in excess of 250 individual claims. Additionally, it advances the policy goals of the *Class Actions Act*. I am satisfied class action is the preferable procedure because it will achieve the objectives of judicial economy, access to justice and behaviour modification should the plaintiffs be successful. Section 5(1)(d) is, therefore, met.

Representative plaintiffs

[85] I am of the view the representative plaintiffs can fairly and adequately represent the class. The defendant suggested John Acreman, having served in certain capacities with the defendant after he had retired ought to be precluded as such representative plaintiff. I disagree with the defendant’s submissions on this point. There is nothing to suggest Acreman entered into any type of confidentiality agreement with the defendant either during his time of employment or activities in retirement. The fact that he may possess information relevant to the proceedings should not act as a barrier to his acting as one of the class representatives. Were he not a representative he would, in any event, testify to the information available to him and relevant to the proceedings. I am satisfied both Acreman and Lee can fairly and adequately represent the class. I see no conflict as between them and other class members. The parties agree the appointment of Charles Rennie to represent the non-resident individuals is not in dispute.

[86] Finally, the plaintiffs’ proposed litigation plan is approved. Modifications may be made to the plan if required by this decision. Further, as recognized by Thompson, J. in **Doucette v. Eastern Regional Integrated Health Authority,** 2007 CarswellNfld 238 at page 98 a litigation plan is a preliminary projection and may be adjusted. It is not to be unexpected that a litigation plan may undergo

change as the matter progresses. The plaintiff has met the criteria set out in Section 5(1)(e) of the *Class Actions Act*.

Comment

[87] Both plaintiff and defendant filed comprehensive briefs. I have particularly noted a number of cases similar to the within case where certification has been granted including **Ormrod** cited herein. (See also: **Bennett v. British Columbia**, 2005 CarswellBC 2889 (S.C.), aff'd 2007 CarswellBC 3 (C.A.); **Kranjcec v. Ontario** (2004), 69 O.R. (3d) 231 (S.C.J.); **Gregg v. Freightliner Ltd. (c.o.b.)** 2003 CarswellBC 283 (S.C.).) As this decision reflects, I accept the plaintiffs' position on the issues argued.

DISPOSITION

[88] A certification order shall issue in the form required by Section 9 of the *Class Actions Act*. I allow the plaintiff time to file a new draft order should they be of the view this decision necessitates some modification in respect of the draft order previously filed. The parties may apply for further direction on any issue requiring clarification or not specifically addressed in this final disposition if such assistance is required.

MAUREEN DUNN
Justice