

Schedule A

Further Amended Pursuant to Order of the Court
Original Statement of Defence Filed December 24, 2004
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Further Amended Statement of Defence Filed []

No. 04 3706
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FREDERICK BENNETT

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

AND:

THE PUBLIC SERVICE PENSION BOARD OF TRUSTEES

THIRD PARTY

FURTHER FURTHER AMENDED STATEMENT OF DEFENCE

1. Except as hereafter expressly admitted, the Defendant Her Majesty the Queen in Right of the Province of British Columbia (the "Province") denies every allegation in the Statement of Claim.
2. The Province admits paragraphs 1, 2, 17 and 29 of the Statement of Claim.

Overview

3. In reply to the whole of the Statement of Claim, the Province has never offered its employees medical services plan premiums or extended health benefits on retirement as a term of their employment. At all times, terms and conditions of employment for employees of the Province have been exhaustively set out either in collective agreements (for those in bargaining units) or subordinate legislation under the *Public Service Act* (formerly *Civil Service Act*), and no such collective agreement or subordinate legislation has ever provided for or promised these benefits.

4. Until 2000, the Province paid for medical services premiums and extended health benefits under the *Public Service Benefit Plans Act*. These statutory benefits were never incorporated in any contract with the Province's employees, and were subject to unilateral change at the will of the Lieutenant Governor-in-Council. In 2000, the Province agreed with the unions representing its employees to provide a defined level of funding for these benefits and for inflation protection for retirees, and agreed that a joint Board of Trustees, which includes a representative of the British Columbia Government Employees Association, Ed Bodner, would have responsibility and authority to make financial decisions concerning how to manage these funds and benefits (the "Partners' Agreement").

5. In 2002, rising costs caused the Board of Trustees to make the complained-of changes to the medical services plan premium subsidy and extended health benefits. The Province has at all times met its funding obligations under the Partners' Agreement and even agreed to increase them in 2003.

6. The Province therefore owed no contractual or fiduciary duty to the Plaintiff to provide extended health benefits or medical services plan premiums.

7. In the alternative, if the Plaintiff ever had a contractual right to extended health and medical services plan subsidies, the unions who signed the Partners' Agreement compromised that right on behalf of the Plaintiff in exchange for increased defined funding of post-retirement group benefits and inflation protection. The Partners' Agreement is made binding on all members of the Public Service Pension Plan, including the Plaintiff, by statute.

General Nature of Post-Retirement Group Benefits

8. Some employers and some occupational pension plans make available to retired employees or their beneficiaries group insurance plans, including extended health and dental plans. For reasons relating to the economics of insurance, the employees or beneficiaries may thereby obtain cheaper and better insurance that they would otherwise be able to get.

9. Some of these employers and pension plans go further, and subsidize, in whole or in part, the retired employees' or beneficiaries' premiums in the sponsored group insurance plans. Employer- or pension plan- subsidized group insurance for retired employees and their beneficiaries are referred to as "post-retirement group benefits."

10. The cost of post-retirement group benefits is a function of the following:

- (a) procedures and drugs covered;
- (b) utilization of procedures and drugs covered;
- (c) cost of procedures and drugs covered;
- (d) limitations on coverage, including
 - (i) deductibles;
 - (ii) co-payments;
 - (iii) maximum payment per procedure or drug;
 - (iv) maximum annual payment;
 - (v) maximum lifetime payment; and,
 - (vi) geographic restrictions (e.g., on out-of-province procedures or residents).
- (e) alternative coverage provided by universal health, pharmaceutical and dental programs;
- (f) number of retirees and beneficiaries; and
- (g) the proportion of the premium funded by the retiree or beneficiary.

11. Of the factors mentioned in paragraph 10, (a), (d) and (g) are controlled by the design of the benefit ("design parameters"), while (b), (c), (e) and (f) are external to the design of the benefit ("external parameters").

12. Post-retirement group benefits can be provided by employers or pension plans on any of the following bases:

- (a) such that the continued provision of post-retirement group benefits is solely within the discretion of the employer or pension trustees (“discretionary” basis);
- (b) such that the amount of funding for the post-retirement group benefits is guaranteed into the future (“defined funding” basis);
- (c) such that the design parameters in place at retirement are guaranteed for the life of the employee and his or her beneficiary (“defined benefit” basis); or
- (d) some combination of these bases.

13. If post-retirement group benefits are provided on a discretionary or defined funding basis, the design parameters can be changed if the external parameters drive costs higher. If, on the other hand, post-retirement group benefits are provided on a defined benefit basis, the design parameters cannot be changed, and the cost of providing post-retirement group benefits will rise if utilization, costs of procedures or drugs, the size of the retiree/beneficiary population increases or the coverage of alternative universal programs are cut back.

14. The financial implications to the employer or pension plan of each of these bases for provision of post-retirement group benefits are therefore very different:

- (a) A post-retirement group benefit provided on a discretionary basis is a current expense.
- (b) A post-retirement group benefit guaranteed by a defined funding formula is a predictable long-term liability.
- (c) A post-retirement group benefit guaranteed on a defined benefit basis creates a long-term liability of highly uncertain and variable magnitude.

15. By providing a post-retirement group benefit, an employer or pension plan does not thereby necessarily or implicitly promise to continue to provide it on a defined benefit basis. If employers or pension plans could not provide post-retirement group benefits on a discretionary or defined funding basis, but only on a defined benefit basis, fewer would provide them at all.

16. The intention to provide post-retirement group benefits on a defined benefit basis must be specifically manifested, either expressly or by implication, in an agreement or enactment applying to that retiree.

17. The right to a post-retirement group benefits on a defined benefit basis vests, if at all, on retirement. In the case of a unionized employee, it must be found, either implicitly or expressly, in the collective agreement governing that employee at the time of retirement. In the case of a non-unionized employee, it must be found, either implicitly or expressly, in that employee's individual contract of employment.

18. No collective agreement, contract or enactment has ever manifested the intention to provide the Plaintiff or other retired employees of the Province with post-retirement group benefits on a defined benefit basis.

Origin of Post-Retirement Group Benefits in the Public Service

19. In 1955, the Legislature enacted the *Public Services Medical Plan Act*, SBC 1955, c. 63 (the "*PSMPA*"). The *PSMPA* authorized the Lieutenant Governor-in-Council to provide for medical insurance plans, available to active civil servants and persons receiving an allowance under the *Civil Service Superannuation Act*, the predecessor to the Public Service Pension Plan (referred to herein with its predecessors as the "Plan"). Some, but not all, persons in receipt of pensions under the Plan were formerly employees of the Province.

20. The *PSMPA* allowed the Lieutenant Governor-in-Council to provide that some portion of the premiums of the medical insurance plans provided would be paid out of the consolidated revenue fund.

21. Under section 11 of the *PSMPA*, the Lieutenant Governor-in-Council had full authority to set and alter the "design parameters", including the portion of premiums paid by the persons receiving an allowance from the Plan (the "retirees"), the procedures and drugs covered, and the limitations on coverage set out at paragraph 10(d).

22. The Lieutenant Governor in Council did, in fact, fund a medical insurance plan called the British Columbia Government Employees Medical Plan.

23. Contributions from employees, retirees and from the Province, and disbursements in the form of premiums, were accounted for by the Province in the Public Services Medical Plan Account (“PSMPA”). The PSMPA was funded on a “pay as you go” basis: it did not accumulate assets.
24. Retirees paid part of the premiums for the British Columbia Government Employees Medical Plan. The remainder were funded by the Province, and therefore constituted a post-retirement group benefit.
25. Post-retirement group benefits under the *PSMPA* were provided on a discretionary basis, with the discretion vested in the Lieutenant Governor-in-Council.
26. Post-retirement group benefits were not part of compensation for positions in the civil service. Compensation for positions in the Civil Service were as prescribed by the Lieutenant Governor-in-Council under ss. 29 and 30 of the *Civil Service Act*, SBC 1945, c.29. Orders-in-Council under the *Civil Service Act* did not incorporate benefits under the *PSMPA* as a component of compensation.

Evolution of Post-Retirement Group Benefits in Public Service

27. The *PSMPA* was amended by SBC 1958, c. 43 and SBC 1963, c. 37.
28. Through the proclamation into force of s. 10 of the *Medical Services Plan Act*, SBC 1967, c. 24, the Province created a universal Medical Services Plan (“MSP”).
29. Effective July 1, 1968, the British Columbia Government Employees Medical Plan was wound up by B.C. Reg. 167/68.
30. By B.C. Reg. 168/68, also enacted pursuant to the *PSMPA*, the Province paid for 70% of universal MSP premiums for current employees and recipients of an allowance under the Plan. These payments were accounted for through the PSMPA.
31. The Lieutenant Governor in Council retained the right to alter the amount or proportion of the MSP premium subsidy. It was therefore a discretionary post-retirement group benefit.

32. In 1974, the Province proclaimed into force the *Public Service Labour Relations Act*, SBC 1973, c. 144 ("*PSLRA*"). With certain exclusions, employees of the Province became represented by statutory bargaining agents and their terms and conditions of employment governed by collective agreements between those bargaining agents and the Province.

33. Under the *PSLRA*, all terms and conditions of employment, with immaterial exceptions, for employees with a bargaining agent, must be found in a collective agreement between the bargaining agent and the Province.

34. No collective agreement signed by the Province has provided for post-retirement group benefits as a term and condition of employment, on either a defined funding or defined benefit basis.

35. The terms and conditions of employees excluded from collective bargaining under the *Public Service Labour Relations Act* have, since 1974, been governed by subordinate legislation under the *Public Service Act*, the successor to the *Civil Service Act*, as amended from time to time.

36. No such subordinate legislation has provided for the provision of post-retirement group benefits on either a defined funding or defined benefit basis.

37. In 1976, the *PSMPA* was incorporated as Part II of the *Public Service Benefit Plans Act*, RSBC 1976, c. 344 (the "*PSBPA*").

38. During the 1977 master round of collective bargaining between the Province and the BCGEU, the statutory bargaining agent for the biggest bargaining unit of employees of the Province, the BCGEU obtained a right to a dental plan and an extended health plan for active employees of the Province. This right was not vested, and could be altered by subsequent rounds of collective bargaining.

39. During the 1977 master round of collective bargaining, the BCGEU proposed a provision in the collective agreement giving those who retired from the bargaining unit a right to be covered by the extended health and dental plan. The Province refused to agree to this, and the BCGEU signed a collective agreement without this provision.

40. Effective August 1, 1978, the Lieutenant Governor in Council enacted, pursuant to the *PSMPA*, a regulation which provided that the Province would cover 100% of retirees' universal MSP premiums as they were at that time. No restriction, whether by enactment or contract, was imposed on the Province's ability to reduce this subsidy in the future.

41. During the 1979 master round of collective bargaining, the BCGEU again proposed a provision in the collective agreement giving those who retired from the bargaining unit a right to be covered by the extended health and dental plan. The Province again refused to agree to this, and no such provision has been part of that or any subsequent collective agreement.

42. The British Columbia Government Retired Employees Association ("BCGREA"), independent of the BCGEU, approached the Province and proposed that an extended health and dental benefit be extended to members of the Public Service Pension Plan, outside of the contractual or collective bargaining context.

43. The BCGREA represented by words and by conduct that it understood that any new post-retirement group benefits would be discretionary and not defined benefits, including by stating that it proposed the benefits as a "pilot project."

44. The Province agreed to provide an extended health benefit, but not a dental health benefit.

45. If someone had proposed that the extended health benefit was a defined benefit, the Province would not have provided it. The Province only quantified the cost of the extended health benefit as a current expense, and funded it on a "pay as you go" basis. No consideration was given to the long-term and uncertain financial consequences of a defined benefit, because the Province considered that it could always change the extended health benefit in future if financial circumstances changed.

46. Effective April 1, 1981, the Lieutenant Governor-in-Council introduced B.C. Reg. 34/81 pursuant to ss. 3, 6 of the *Public Service Benefit Act*, extending an Extended Health Benefit Care Plan to all recipients of a pension from the Public Service Pension Plan.

47. The Extended Health Care plan was extended by the Province without consideration, and without any intention to create a contractual relationship.

Introduction of Dental Benefit through the *Public Service Pension Plan*

48. In 1992, the Province launched an initiative to reform the governance of the major public sector occupational pension plans, including the Public Service Pension Plan. For this purpose, the Province initiated a process of consultation with employee groups, including the BCGREA.

49. As part of this process, the Province told employee groups that new benefits, including post-retirement group benefits, could be considered providing (a) they did not require increased employer contributions and (b) they did not increase any unfunded liabilities for the Plan.

50. It was proposed by employee groups that employer contributions to the Plan's Inflation Adjustment Account ("IAA") be diverted to pay for improved post-retirement group benefits.

51. Under the Plan, retirees receive indexation allowances, equal to their basic pension entitlement times the rate of inflation, to the extent that there is money in the IAA to pay for them. Inflation protection is therefore a contingent benefit. At the material time, the *Pension (Public Service) Act*, RSBC 1976, c. 318 (the "*P(PS)A*") required employers, including the Province, to contribute an amount equal to 1.25% of the salaries of its participating employees to the IAA.

52. Because inflation protection was, and is, a benefit contingent on funding, reducing the amount paid into the IAA would not increase employer contributions or unfunded liabilities for the Plan. Instead, it would create a tradeoff between the generosity of post-retirement group benefits so funded and future security against inflation.

53. The employee groups represented to the Province that they understood this tradeoff, and were prepared to accept the risk to their members' future security against inflation.

54. In 1994, the Province enacted s. 52 of the *Pension Statutes Amendment Act, 1994*, which amended the *P(PS)A* to allow the Lieutenant Governor in Council to provide for extended health

benefits and dental plan benefits out of the employer's contributions to the IAA. The post-retirement group benefits so provided for would be paid out of a "pay-as-you-go" account in the Public Service Plan, the Supplemental Benefits Account ("SBA"). Employers would pay 1.25% of the salaries of participating employees, in total, to the SBA and the IAA, so that the SBA would balance at \$0.00 after paying for post-retirement group benefits and the IAA would accumulate the difference between the 1.25% of salaries and the amount needed to pay for post-retirement group benefits.

55. In 1994, the Lieutenant-Governor-in Council introduced a dental post-retirement group benefit under the Plan on this basis. Extended health and medical services plan benefits continued to be paid for through the PSMMPA. In 1995, B.C. Reg. 34/81 was replaced by the *Pension Group Benefit Funding Reg.*, B.C. Reg. 141/95, also pursuant to the *PSBA*.

56. The dental plan was a post-retirement group benefit provided on a modified defined funding basis. The Lieutenant-Governor-in-Council had the power to change the level and nature of the post-retirement group benefits, but only so long as the percentage of salaries earmarked for combined IAA and post-retirement group benefits was not exceeded. The total funding for the IAA and post-retirement group benefits was fixed by statute, and could only be changed by the Legislature. Extended health and medical services plan benefits continued to be paid on a purely discretionary basis.

Joint Trusteeship and the Creation of Modified Defined Funding Post-Retirement Group Benefits

57. After 1994, employee and retiree groups, including the BCGREA, continued to advocate for a greater role in governing public sector pension plans and post-retirement group benefits.

58. In 1999, the Legislature enacted the *Public Sector Pension Plans Act*, SBC 1999, c. 44 (the "*PSPPA*"). The *PSPPA* set out a legislative framework for the transition to full joint trusteeship for each of the statutory plans. The statutory basis for the Plan is now Schedule C to the *PSPPA*.

59. Schedule C empowered the Province, the British Columbia Government and Service Employers' Union (BCGEU), the Professional Employees Association (PEA) and the Union of

Psychiatric Nurses (UPN) (collectively, the “Plan Partners”) to negotiate a joint management agreement binding on all the members of the Public Service Pension Plan, including the retirees.

60. Although the BCGREA was not a party to a joint management agreement, Mr. Bodner, on behalf of the BCGREA, was consulted and involved in the negotiations.

61. One objective of the Province in the negotiation of the joint management agreement was to ensure that all the post-retirement group benefits would be funded out of the employer contributions to the IAA, as the dental post-retirement group benefit was, and as all post-retirement group benefits for other retired public sector employees were.

62. On December 8, 2000, representatives of the Province and of employees under the Public Service Pension Plan concluded the Joint Trust Agreement (the “Joint Trust Agreement”). The Joint Trust Agreement provided for the following:

- (a) guaranteed funding, from the participating employers, including the Province, for post-retirement group benefits and inflation protection, calculated as a percentage of payroll, changeable through agreement between the Province and the BCGEU;
- (b) an increased amount of funding from employers for inflation protection and post-retirement group benefits from 1.25% of payroll to 2.25% of payroll;
- (c) a one-time transfer of \$100 million from the surplus in the Basic Account, of which the Province had the beneficial interest prior to Joint Trusteeship, to the IAA;
- (d) a joint Board of Trustees, one of whom is appointed by the BCGREA to make decisions about the Plan within existing financial constraints, including the design parameters of post-retirement group benefits and the necessary tradeoffs with inflation protection; and,
- (e) recognition that all post-retirement group benefits, including the extended health benefits and MSP premium subsidy previously provided through the *PSBPA* would be funded on the same basis as the dental benefit.

