IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Williams v. College Pension Board of Trustees,*** 2005 BCSC 788

Date: 20050530
Docket: L030951
Registry: Vancouver

Between:

Anthony Williams, Ashley Dermer, Michael Griffin, and Richard Scott

Plaintiffs

And

College Pension Board of Trustees, John Cook, Dan Bradford, Paul Martin, Jack Bradshaw, Marilyn Duggan, Andy Jani, Bruce Kennedy, Tom Kozar, Cliff Neufeld, Valerie Mitchell, Bonnie Pearson, Roseanne Moran, Dominique Roelants, and John Wilson

Defendants

And

College Institute Educators' Association of British Columbia, Post-Secondary Employers' Association, and Her Majesty the Queen in Right of British Columbia

Intervenors

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiffs: D. Klein, S. Tucker, M. Zigler

Counsel for the Defendant, Jack Bradshaw: J. Elwick

Counsel for the other Defendants: C.A.B. Ferris, M. Campbell, L. Chamzuk

Counsel for Her Majesty the Queen in Right of the Province of B.C.:	G. Morley
Counsel for the Post Secondary Employers' Association:	M. Coady S. Wiens C. Gibson
Counsel for the College Institute Educators' Association of British Columbia:	C. Askew D. Crane
Date and Place of Hearing:	May 10, 2004 December 13-16, 2004 Vancouver, B.C.

INTRODUCTION

[1] This is an application by the plaintiffs for certification of a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. The plaintiffs' claims are for breach of fiduciary duty against the College Pension Board of Trustees ("the Board") and certain individual trustees. They allege that the trustees inequitably allocated an actuarial surplus in the pension fund disproportionately in favour of the active members over the retired and deferred vested members.

[2] Certification is opposed by the defendants, as well as by the intervenors, the Provincial Government, the Post Secondary Employers' Association, and the College Institute Educators' Association. The defendants and intervenors say that the claim does not disclose a cause of action and that any possible relief must be by way of judicial review, which, in any event, they say is the preferable procedure. The defendants also say that the plaintiffs have neither put forward an identifiable class nor identified common issues with sufficient particularity, and that the proposed

representative plaintiff cannot fairly and adequately represent the interests of the proposed class by reason of conflict of interest and failure to provide an acceptable plan.

BASIC FACTS, PLEADINGS AND STATUTES

Facts

[3] The defendant Board is a board of trustees established pursuant to Schedule A of the ***Public Sector Pension Plan Act***, S.B.C. 1999, c. 44 ("the ***PSPPA***"). The Board is responsible for the administration of the College Pension Plan. The College Pension Plan was created to provide pension benefits to instructors, librarians, and senior administrative staff designated under the ***College and Institute Act***, R.S.B.C. 1996, c. 52.

[4] The ***PSPPA*** came into force on July 15, 1999 and continued the College Pension Plan as well as the Teachers, Municipal and Public Service pension plans.

[5] This case is concerned with the College Pension Plan ("the Plan"). The Board that is responsible for the management of the College Pension Fund ("the Fund") as set out in the ***PSPPA*** and in Schedule A is comprised of at least ten members who are appointed by the two Plan "employer partners" and the two Plan "member partners". The Plan employer partners are the B.C. Government and the Post Secondary Employers' Association. The Plan member partners are the College Institute Educators Association ("CIEA") and the British Columbia Government and Services Employee Union ("BCGEU").

[6] Each individual defendant was a member of the Board in 2001 when the motion concerning the allocation of surplus was passed.

[7] Schedule A to the ***PSPPA*** governs the Plan and provides for the establishment of rules for the administration of the Plan and contribution requirements, eligibility for benefits and rules regarding purchase of service. The Plan rules are contained in the ***College Pension Plan Regulation,*** B.C. Reg. 95/2000. Although the partners of the Teachers, Municipal and Public Service pension plans have negotiated joint trust agreements for each of those plans, the partners of the Plan have not; Schedule A of the ***PSPPA*** and the ***College Pension Plan Regulation*** continue to be the governing documents for the Plan.

[8] Section 3 of Schedule A establishes the Board and sets out how it is constituted. Of the minimum ten members of the Board:

- four must be appointed by the provincial government, and one of those nominated by the Post Secondary Employers' Association;
- three must be appointed by the College Institute Educators' Association,
- one by the BCGEU,
- one retired and appointed by the Plan member partners, and
- one who is a Plan member but not retired nor a member of the College Institute Educators' Association or the BCGEU and appointed by the Plan employer partners.

[9] The Plan is a defined benefit pension plan paying benefits based on a formula related to the individual's length of service and earnings. There are three categories

of beneficiaries of the fund: (1) a person making contributions (active members); (2) a person who previously made contributions which are left on deposit but is not receiving benefits (deferred vested members); and (3) a person who previously made contributions and is receiving benefits (retired members). As at year end (August 31) of 2001, the Plan had 8,670 active members, 1,677 deferred vested members, and 1,924 retired members.

[10] Section 15(2) of Schedule A of the ***PSPPA*** provides for the amendment of the Plan rules. It reads:

> The partners may direct the board to amend the pension plan rules and the board must amend the rules if
>
> (a) the partners have received and considered the advice of the board respecting the cost and administrative impact of implementing the proposed amendments, and
>
> (b) the proposed amendment is not inconsistent with subsection 1 or the trustees' fiduciary responsibilities.

[11] Section 12 of Schedule A of the ***PSPPA*** requires that the Board have an actuarial valuation of the Plan periodically conducted. In an actuarial report the Plan's actuary, Eckler Partners Ltd., reported that the Plan had an actuarial surplus of $120,000,000 as of August 31, 2000. The actuarial surplus is the amount by which the fund's assets and projected income exceed the fund's projected liabilities.

[12] On April 12, 2001, the Plan partners agreed to direct the Board to amend the Plan rules to provide certain improvements, the cost of which would be funded by the actuarial surplus (“Partners' Agreement”). The plaintiffs have pleaded that the partners allocated $115,000,000 to the active members. According to the

defendants' submission, the allocation under the Partners' Agreement specifically was as follows:

(a) $75,000,000 retained in the Plan to protect all plan members against potential future adverse actuarial experience;

(b) $20,000,000 retained in the Plan and allocated to insulate active contributing members from a contribution increase for five years between January 1, 2002 and December 31, 2006;

(c) $20,000,000 retained in the Plan and allocated to insulate the College and Institute Employers from contribution and rate increases over the same period;

(d) $5,000,000 to provide enhancements for retired members (about one-half by way of cash payments to retired members and one-half to enhance post-retirement group benefit packages).

[13] On June 11 and 12, 2001 the Board met and adopted the terms of the Partners' Agreement.

[14] This action was commenced by writ and statement of claim on April 1, 2003. The plaintiffs' allegation is that the defendants have statutory and equitable fiduciary duties that they have breached, including a duty of impartiality and even-handedness to administer the fund, including any surplus, in the best interests of the Plan members and for the sole benefit of the Plan members.

[15] The breaches of duty are summarized by the plaintiffs in their argument this way:

(a) certain trustees allowed their interests as representatives of Plan partners to conflict with their fiduciary obligations to administer the Plan and fund in the best interests of all Plan members;

(b) a majority of trustees by participation in the negotiation of the agreement rendered themselves incapable of impartiality and even-handedness in their assessment of the surplus allocation;

(c) the Board's decision was not even-handed and not proportional to the liabilities of the Plan and was in breach of their duty to act in an impartial and even-handed manner;

(d) the Board failed to issue timely or effective communications to members of the plaintiff class who elected to retire before January 1, 2002 without knowledge that a postponed retirement would materially enhance their financial benefits;

(e) the trustees behaved in a high-handed and arrogant manner in the treatment of the plaintiff class, which the plaintiffs suggest warrants imposition of punitive damages.

The plaintiffs allege that the Board is legally and vicariously responsible for individual trustees' breaches of fiduciary duty.

[16] The plaintiffs allege that as a result of these alleged breaches of fiduciary duty, they and others similarly situated were denied a distribution of benefits proportionate (in terms of actuarial liabilities) to that of the active members. On their own behalf and on behalf of all class members they seek an accounting, distribution of lump sum or periodic cash distributions from the fund in accordance with actuarial liabilities, and damages. Although the plaintiffs sought a declaration that the Plan

partners' direction was of no force and effect, the plaintiffs contended in argument that the declaration was not necessary to their claim for damages. The application for certification was argued on the basis that the plaintiffs were seeking "equitable, general, and punitive damages" for the alleged breach of fiduciary duty. Some amendments to the pleadings may be necessary given the argument, on the certification hearing, that is described in these reasons.

[17] What was an actuarial surplus of approximately $120,000,000 in the Plan as of August 31, 2000, was revealed by the most recent actuarial valuation conducted as of August 31, 2003, to have become an unfunded liability of approximately $50,000,000.

ISSUES

[18] Section 4(1) of the ***Class Proceedings Act*** reads as follows:

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

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

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

[19] The central issue, of course, is whether the action should be certified as a class proceeding. The requirements for certification give rise to these issues:

1. Whether the pleadings disclose a reasonable cause of action. This is an issue in two respects:

   (a) whether there is a cause of action; and

   (b) if there is a cause of action, whether it may only be advanced as a judicial review proceeding.

2. Whether there is an identifiable class.

3. Whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members

4. The fourth issue, which is related to the first, is whether, if the pleadings disclose a cause of action, the preferable procedure for the fair and efficient resolution of the common issues is a judicial review proceeding.

5. The final issue is whether there is a representative plaintiff who fairly and adequately represents the interests of the class and has produced a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and notifying class members of the proceeding, and does not have

> an interest in conflict with the interests of the other class members.

(a) Do the Pleadings Disclose a Cause of Action?

[20] The defendant has also filed a motion under Rule 19(24) to strike out the action for not disclosing a cause of action. The first issue on certification and on the defendants' motion to dismiss the plaintiffs' claim is essentially the same: do the pleadings disclose a reasonable cause of action? Although the burden is on the plaintiffs on the certification motion and on the defendants on the motion to strike out the action under Rule 19(24), the test is the same. It was set out in ***Elms v. Laurentian Bank of Canada*** (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429 at ¶20-21:

> It is common ground that the Chambers judge correctly stated that a court will only refuse to certify on the basis that the pleadings do not disclose a cause of action if it is plain and obvious that the plaintiff cannot succeed. The test under s. 4(1)(a) of the Act to determine whether a cause of action exists is similar to the test applied in application to dismiss a claim on the grounds that it fails to disclose a cause of action. The only difference between the two tests is that the onus to show a cause of action falls upon the party bringing the class action, rather than on the party challenging the proceeding. In his text, *Class Actions in Canada*, looseleaf, (Aurora, Ontario: Canada Law Book, 2001) at paras. 4.70-4.80, W. Branch correctly states the law in this regard as follows:
>
> > The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in *Edwards v. Law Society of Upper Canada* (1995), 40 C.P.C. (3d) 316 (Ont. Class Proceedings Committee):
> >
> > > There is a very low threshold to prove the existence of a cause of action . . . the court

> should err on the side of protecting people who have a right of access to the courts.
>
> Courts in B.C. have also adopted a low threshold for this requirement.
>
> In *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), Braidwood J.A. described the appropriate test as follows (at paras. 6-8):
>
> …
>
> The question to be decided, then, is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action. Is there some radical defect which would amount to an abuse of process of the court such that the claim should be struck? The fact that the point is a novel one would not prevent the issue proceeding to trial.

[21] I observe that in ***Endean v. Canadian Red Cross Society*** (1997), 148 D.L.R. (4th) 158 (S.C.), Smith J. (as he then was), in an aspect of his judgment that was not specifically discussed by the Court of Appeal, noted (at ¶ 26) that allegations of fact must be accepted as proved for the purposes of the motion unless they are patently ridiculous or incapable of proof and that the statement of claim must be read as generously as possible with a view of accommodating any inadequacies in the form of the allegations.

[22] In ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, the Supreme Court of Canada said, at 990-991:

> . . . where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[23] The test in a certification proceeding has been recently applied in ***James v. British Columbia***, [2005] B.C.J. No. 518, 2005 BCCA 136. There, Esson J.A. said at ¶ 2:

> … It now appears to be settled law that the plaintiff will be found to have met that requirement [(a) the pleadings disclose a cause of action] "unless it is plain and obvious that no reasonable cause of action is disclosed": *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465, 48 B.C.L.R. (3d) 90 (B.C.C.A.); *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at para. 7.

[24] At first blush, the statement of claim here appears to disclose a cause of action. The plaintiffs have alleged breaches of fiduciary duties allegedly arising both in equity and by way of statute. They say their case arises from breaches of private law duty. They rely on s. 9(6) of Schedule A of the ***PSPPA***, which stipulates that the fund is "for the sole benefit of the plan members" and s. 8(5) of the ***Pension Benefits Standards Act***, R.S.B.C. 1996, c. 352 ("the ***PBSA***"), which they assert requires the defendants (the trustees) to:

> (a) act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed, and
>
> (b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

The plaintiffs point out that s. 8(6) of the ***PBSA*** states that the trustees' statutory duties are "in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee."

[25] The plaintiffs point to the trustees' duty of fidelity, their duty of care based on the so-called "prudent person" standard, and most importantly for the present application their duty to hold the balance between beneficiaries, for which they cite D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984), p. 787. They also refer to Eileen E. Gillese, *The Law of Trusts*, (Concord, Ont.: Irwin Law, 1997), who writes:

> Trustees must act impartially when they deal with beneficiaries. They may not give preferential treatment to any one beneficiary or group of beneficiaries unless so authorized by the trust instrument. Trustees who treat beneficiaries unevenly, based on the trust instrument, must take care that their interpretation of the instrument is correct; actions based on honest but erroneous interpretations that have the effect of failing to hold an even balance among beneficiaries amount to a breach of trust.

[26] However, the defendants and the intervenors, while not disputing the existence of private law duties, say that for a number of reasons there is no cause of action, including that the duties do not apply to an actuarial surplus and that an alleged breach in that respect cannot ground a claim for damages. Some of these arguments, at least in part, relate to why judicial review is a preferable procedure in the defendants' view. I will outline some of the arguments on that question at this time, although I will discuss them later.

[27] Acknowledging that there may be an attack on the trustees' decision available by way of judicial review, the defendants say that the plaintiffs' claim is in substance an allegation that the trustees exceeded their statutory authority in adopting the Partners' Agreement and amending the Plan. They say, however, that there is no cause of action for the following general reasons:

(a) the claim for compensatory (and punitive) damages in relation to an actuarial surplus is bound to fail as the relief is unknown to law;

(b) in the circumstances, where judicial review is available, the proceeding must be brought in that fashion as it is essentially a claim for judicial review;

(c) the proceeding violates the collateral attack rule as the regulation adopting the Partners' Agreement and amending the Plan (a decision of a tribunal) is a decision that has not been quashed or set aside.

[28] Mr. Ferris does not dispute that the Board members are trustees, or that they owe fiduciary duties. The defendants' argument begins with the proposition that there cannot be an actionable breach of trust or breach of fiduciary duty where the trustees deal with an actuarial surplus. The fact that there is no cause of action, they submit, is clearer now that the actuarial surplus has disappeared. (While the disappearance of the actuarial surplus may impact the issue of damages, that fact, the plaintiffs argue, is not an answer to the allegation of breach of duty.). The defendants say that the plaintiffs cannot obtain a distribution of surplus in an ongoing pension plan and the relief they claim is unknown to law.

[29] The defendants rely on the seminal decision in ***Schmidt v. Air Products Canada Ltd.***, [1994] 2 S.C.R. 611, and this particular passage at ¶ 87-89:

> Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The

> other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.
>
> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

[30] The defendants point to ***Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board*** (1999), 22 C.C.P.B. 49 (Ont. S.C.J.), aff'd (2000) 190 D.L.R. (4th) 689 (Ont. C.A.), a case where an actuarial surplus from a supplementary agreement was used to fund an actuarial surplus in the main plan. Nothing was provided for the retirees who sued. Epstein J. ruled (at ¶ 76) that even if the "[e]xcess [f]unds were impressed with a trust, there has been no withdrawal of the trust property". She held that the retirees had no legal or equitable interest in the excess funds and that therefore the claim of breach of fiduciary duty could not be made because the fiduciary could not unilaterally exercise power to affect the beneficiaries' legal or practical interests. Madam Justice Epstein's judgment was

upheld by the Ontario Court of Appeal. As the Court of Appeal put it, the retirees were only entitled to the level of benefits that they bargained for.

[31] The plaintiffs say that they are not seeking an actual allocation of an actuarial surplus but rather that according to the principles of trust law their cause of action is in relation to a breach of trust that has already occurred. The plaintiffs also argued the ***Police Retirees*** case is distinguishable as the surplus was not being distributed, whereas here it has been distributed, but, they say, in a manner inconsistent with the trustees' fiduciary duties of even-handedness to all beneficiaries. They describe the distribution that has occurred in the case at bar as a crystallizing event.

[32] Thus, the plaintiffs argue that where there is an actuarial surplus, particularly where there is a distribution, the general principles of trust law nevertheless apply to the manner in which the trustees deal with an actuarial surplus and they submit that in appropriate circumstances there may be actionable breaches of fiduciary duty. They rely on ***Markle v. Toronto (City)*** (2003), 63 O.R. (3d) 321 (C.A.), where O'Connor J.A. said at ¶ 24-25:

> Accordingly, the actuarial surplus in this case constitutes part of the trust fund held for the employees. The fact that the employees' entitlement to those funds may not crystallize until the Plan is terminated, at which point an actuarial surplus (if there is one) becomes an actual surplus, does not change the fact that the actuarial surplus is part of the trust fund and that as such it may only be dealt with during the life of the trust in a manner that is consistent with the principles of trust law or relevant statutory provisions.
>
> The conclusion that trust principles apply to the trust in this case is not altered by the fact that the Plan was created by a municipal by-law. Where the language of a statute or a by-law creating a pension plan indicates an intention to create a trust in favour of the employees, the courts will respect that intention in the same way as if the plan was

> created by private instrument. See for example, *Canadian Union of Public Employees - C.L.C. Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620, 58 D.L.R. (4th) 552 (C.A.) at p. 634 O.R., where this court stated that assets of a pension plan established pursuant to a provincial statute and regulation are trust assets.
>
> [Emphasis added.]

[33] ***Markle*** provides some support for the contention that actions of the trustees with respect to an actuarial surplus may give rise to private law causes of action.

[34] In reply, the defendants say that in ***Markle*** the court did not address whether disputes about the exercise of a statutory power should be handled by judicial review.

[35] Since hearing argument in this matter, Mr. Ferris has brought to my attention two decisions: ***Association Provinciale Des Retraités D'Hydro-Québec v. Hydro-Québec*** (2005), Montreal Registry No. 500-09-012724-027 (500-06-000039-970) (Québec C.A.) and ***Neville v. Wynne,*** [2005] B.C.J. No. 712, 2005 BCSC 483. Both were decisions on their merits, not whether the pleadings disclosed a cause of action, and while perhaps helpful to the defendants are not determinative on the issue of whether the pleadings here disclose a cause of action.

[36] In ***Association Provinciale***, the Court considered a number of grounds of appeal in a case where the provisions of a pension plan were improved for active members. The issue was whether retirees could demand an improvement in their defined benefits under contract or trust principles. One ground of appeal from the dismissal of the class proceeding was the contention that the employer, who was designated as trustee, could not use the surplus of the fund for its benefit, or allow

active employees to take benefit of it without ensuring that the retirees benefited fairly. There are obvious parallels to this case.

[37] The Court of Appeal considered the argument that Hydro-Québec failed in a duty to act impartially as between all beneficiaries of the plan where active members would benefit up to $1,180,000,000 and the retirees would receive only $25,000,000. The Court of Appeal noted that Hydro-Québec was a trustee under the incorporating statute, but was reluctant, given the statute, to consider that the retirement fund was a trust established by law and managed by the respondent as a trustee. The Court said, at ¶ 88, 89 and 91:

> However, it should be pointed out that not all of Hydro-Québec's actions must be gauged by the yardstick of its duty as trustee. The respondent wears several hats, depending on the circumstances. When it is seated at the bargaining table with the unions representing 95% of its employees, it acts as an employer, not as trustee of the fund. As such, it negotiated the amendments to the plan that the appellant finds unfair.
>
> In that exercise, the respondent did not have to ensure that the amendments were fair to retirees or to propose improvements in their benefits, which would have been tantamount to imposing on it a duty to represent the retirees. In fact, if such a duty existed, why would it have to be limited solely to the interests of the retirees of the trust …
>
> …
>
> … I think it is worthwhile to point out that, even though the respondent was not obliged to act as trustee in regard to retirees in negotiating the amendments to its pension plan, it had to abide by the law and, in particular, not implement an amendment that would infringe the vested rights of retirees … No criticism can be levelled at the respondent in its capacity as trustee.

[38] It appears to me that the circumstances in ***Association Provinciale*** which the Quebec Court of Appeal described as giving rise to novel and complex questions

are different from the allegations before me. I cannot say that the claims for breach of duty alleged by the plaintiffs are bound to fail.

[39] The other case referred to by Mr. Ferris was a recent decision of this court in ***Neville v. Wynne***. There, Mr. Justice Preston considered a claim on a summary trial where the plaintiff contended that the trustees of a union pension plan breached their duty when they reduced benefits unequally as between beneficiaries. He described the duty to act impartially imposed on trustees this way at ¶ 45:

> I am satisfied that, within the context of a pensions scheme, the duty to act impartially imposed on trustees by the traditional law of trusts is as stated by the English Court of Appeal in *Edge [and others v. Pensions Ombudsman and another,* [1999] All. E.R. 546 (C.A.)]:
>
> > … the so-called duty to act impartially … is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises that power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant.

[40] As I noted earlier, this was a decision on the merits and Preston J. concluded that the trustees' decision was based on proper considerations and that they had properly discharged their duty. Again, this case, while instructive, does not assist the defendants in showing that the plaintiffs' pleadings do not give rise to a cause of action.

[41] If what I have set out above were all the defendants had to say, I would conclude that it is not plain and obvious that the plaintiffs are not bound to fail and I would conclude that the pleadings disclose a cause of action.

[42] However, the defendants' argument that there is no cause of action goes a step further.

[43] The defendants and the intervenors make additional arguments that there is no claim maintainable by action, which arguments are also precursors to their preferable procedure argument. They say that if there was a breach of fiduciary duty, the only remedy available to the plaintiffs is by way of judicial review of the conduct in question. The conduct in question is the adoption of the Partners' Agreement. If successful, the remedy, they submit, is an order that the matter be remitted to the Board for a re-determination. The defendants say that there is no maintainable claim for damages. The defendants say that if the impugned conduct, the adoption by regulation of the Partners' Agreement, is subject to judicial review then that is the only means of attacking the conduct.

[44] The defendants' position is that where judicial review is available, that is the only claim maintainable. As an example of judicial review being used to attack a decision of a tribunal allowing for the withdrawal of surplus, the defendants point to ***Re Collins et al. and Pension Commission of Ontario et al.*** (1986), 56 O.R. (2d) 274 (C.A.), where the decision of the Pension Commission to grant consent for the withdrawal of a pension surplus by the employer was quashed when the company failed to give notice to the plan members or their union.

[45] The defendants recognize that there is a threshold question whether the defendants were exercising a statutory power such that judicial review is available.

[46] The parties are not seriously at issue as to what the test is for whether the decision is an exercise of a statutory power. Those factors include whether the board is a public body, the source of the power to amend, and the nature of the body. This test is described in J.M. Brown and The Hon. J.M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 2003) ("***Brown and Evans***").

[47] The defendants and intervenors argue that the Board is a tribunal as defined in the ***Judicial Review Procedure Act***:

> "Tribunal" means one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred.

[48] The defendant and the intervenors say that at the heart of this litigation is an attack on ***B.C. Regulation 314/2001***, which amended the ***College Pension Plan Regulation*** and altered the benefits and contributions under the Plan by adopting the terms of the Partners' Agreement. The defendants and intervenors say the amendments were enacted by the defendant Board pursuant to its power to make regulations, and under s. 13(1) of Schedule A of the ***PSPPA***.

[49] Section 1 of the ***Judicial Review Procedure Act*** defines a "statutory power" to include: "a power or right conferred by an enactment … (a) to make a regulation, rule, bylaw or order, …".

[50] The defendants' and intervenors' submission is that the core or vital issue in this litigation is whether the amendments are consistent with the Board's fiduciary

responsibility, and that is a matter within the jurisdiction of the Board to determine. The Partners' Agreement, the defendants argue, could only be implemented after a determination that the amendment (which was by regulation) was not in breach of the Board's fiduciary duty. The proper interpretation of the power to implement the amendment, the defendants say, is that the Board must decide whether the amendment is in breach of its fiduciary obligation. That is within the Board's jurisdiction to determine and the real question, the defendants and intervenors say, is whether the Board exceeded its jurisdiction. The Board, the defendants say, was simply acting pursuant to its delegated statutory authority and exercising a duty which had historically been performed by government.

[51] The plaintiffs' argument might be put this way: there is an inherent conflict in the trustees deciding the issue of whether its actions were in breach of fiduciary duty, or at least, the Board was acting as a trustee, not as a tribunal, in making its decision concerning the surplus.

[52] The parties disagree on whether the Board is a public body but I do not find it necessary to determine that question. I will assume, for the moment that judicial review is available to attack the decision of the trustees to approve the Partners' Agreement concerning the allocation of the actuarial surplus.

[53] The intervenors and defendants say that if judicial review is available to attack the regulation it is the only way, and not merely the preferable, way of proceeding. Indeed they go one step further. Not only must the proceeding be brought by judicial review, they submit, but the action has a fatal flaw in that it violates the collateral

attack rule. The action, the defendants say, cannot be brought while the trustees' decision is outstanding and has not been quashed because the regulation implementing the Partners' Agreement amounts to a binding determination that the amendment was not in breach of fiduciary duty. The regulation operating as a bar to the attack by the plaintiff, they say, is a species of *res judicata*, and the plaintiffs' action for collateral or consequential relief based upon that conduct is a collateral attack and bound to fail. Thus, there can be no action for compensatory damages because the Board acted lawfully (pursuant to the unattacked regulation).

[54] The collateral attack rule, although not applicable on the facts of that case was described in ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25 at ¶ 71:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[55] The plaintiffs dispute the defendants' and intervenors' characterization of the amendment or the underlying purpose of the legislation. Although they say that the defendants had an obligation to discharge their fiduciary obligation in adopting the amendment, the adoption of the regulation, they say, is not a determination of that issue by the Board that binds the parties in this litigation.

[56] The plaintiffs argue that even if the regulation, or decision, is subject to attack under the ***Judicial Review Procedure Act***, claims against pension administrators and trustees for breach of private law obligations of trustees, breach of fiduciary duty and misrepresentation can and should proceed in the ordinary courts, or, at least, it is not plain and obvious that there is no such cause of action that might succeed. It is in this respect (the claim for damages) that the plaintiffs say that this claim is different from claims for prerogative relief, claims which normally proceed by judicial review.

[57] Does it follow that where there is a breach of a private duty alleged and the underlying conduct may be the subject of judicial review (and there is as well a claim for damages), the challenge must be brought by judicial review?

[58] The question, at this stage, is not what is the preferable procedure, but whether it is plain and obvious that there is no cause of action because there is a decision that must be first set aside before a damage claim can be advanced. The defendants and intervenors have not provided me with any authority stating that where there is a private law claim for damages that might also be characterized as conduct reviewable by judicial review, that the proceeding must first be brought by

way of judicial review. Although the defendants rely on the decision of ***Berscheid v Ensign,*** [1999] B.C.J. No. 1172 (S.C.), that decision merely says that judicial review must be brought by way of petition; it does not decide the point here.

[59] I have concluded that it is not plain and obvious that there is no reasonable cause of action disclosed in the plaintiffs' statement of claim.

[60] Accepting that the decision of the trustees implementing the agreement might be characterized as an exercise of a statutory power and that it may be possible to attack the decision under judicial review, I nevertheless do not think that it is plain and obvious that the claim must fail if that regulation is not first successfully attacked. It is at least arguable that the relevant legislation required only that the arrangement not be in breach of fiduciary duty, and that the adoption of such an agreement does not constitute a binding determination that the arrangement is not in breach of fiduciary duty.

[61] The plaintiffs say that the claim for damages for breach of fiduciary duty may exist even in light of the unchallenged regulation and even if the regulation might be said to amount to an implicit determination that there was no breach of fiduciary duty. The plaintiffs' submission receives some support, if only by analogy, from the decision of the Supreme Court of Canada in ***Wells v. Newfoundland*****,** [1999] 3 S.C.R. 199.

[62] Although ***Wells*** may not be directly on point, there are parallels relevant to the issue of whether there is a cause of action disclosed. The Supreme Court in ***Wells*** declined to follow a decision of the Privy Council in ***Reilly v. The King***, [1934]

A.C. 176 (P.C.), which held that insofar as a government employee was concerned, it was irrelevant whether or not a contract existed since performance of the contract was rendered impossible by the statutory abolition of the office. In ***Reilly***, the Privy Council held that if the relationship was statutory, then all rights and obligations were created by statute, and the common law regarding wrongful dismissal did not apply. A similar argument might be made in the case at bar in the sense that the conduct complained of, the making of the regulation, was statutorily related.

[63] The Supreme Court of Canada in ***Wells*** rejected the Privy Council's line of reasoning and held that the common law will apply to such situations. Let me refer to ¶ 24 and 30:

> As the Crown is bound to act according to the rule of law, it must normally respect the principles of natural justice in exercising its legal rights in relation to contracts of employment. In cases such as *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978)*, [1979] 1 S.C.R. 311 (S.C.C.) and *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), when a civil servant's terms of employment permitted the employee to be dismissed without cause, the Crown was still required to act fairly in deciding to do so. In the absence of contractual rights, a civil servant may still be able to resort to administrative remedies. However, that is irrelevant in this appeal as the respondent's contract provides the remedy.
>
> ...
>
> As Beetz J. clearly observed in *Labrecque*, *supra*, the common law views mutually agreed employment relationships through the lens of contract. This undeniably is the way virtually everyone dealing with the Crown sees it. <u>While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superceded by explicit terms in the statute or the agreement</u>. [Emphasis added.]

[64] It may well be that there are administrative law remedies available to the plaintiffs in connection with the amendment/regulation adopting the Partners' Agreement, but it is not plain and obvious to me that the private law remedies against trustees for damages for breach of fiduciary duty are thereby precluded. Accordingly, I am not persuaded that, even if the conduct complained of is subject to judicial review, it is necessarily incapable of sustaining a claim for breach of fiduciary duty.

[65] Both the allegation of breach of fiduciary duty resulting from the trustees' failure to act in an even-handed manner with respect to an actuarial surplus and the allegation that there has been a distribution of surplus or a "crystallizing" event, as the plaintiffs put it, are novel aspects to this claim. The defendants have also pointed out potential difficulties regarding proof of damages. However, the plaintiffs' claim is made in a complex and increasingly important area of law. It is connected with a well known obligation: the duty of even-handedness on the part of trustees. This duty (as opposed to its content) is essentially not disputed by the defendants. Notwithstanding the somewhat novel aspects of the claim and potential problems with proof of damages, in all the circumstances, it cannot be said that the claim is bound to fail.

[66] Accordingly, I have concluded that the first aspect of the requirements for certification has been satisfied.

(b) Is There is an Identifiable Class of 2 or More Persons?

[67] Section 4(1)(b) of the ***Class Proceedings Act*** requires that there be "an identifiable class of 2 or more persons".

[68] The plaintiffs propose that the class for certification be comprised of the following:

(a) persons who previously made contributions to the fund and were receiving benefits from the fund as of December 31, 2001 (the "retired members");

(b) surviving spouses of retired members who were receiving post-retirement survivor benefits from the fund as of December 31, 2001;

(c) persons who previously made contributions to the fund which contributions were left on deposit, and were not receiving benefits from the fund as of December 31, 2001 (the "deferred vested members");

(d) spouses, beneficiaries, and/or estates who are entitled to pre-retirement or post-retirement survivor benefits from the fund due to a relationship with a retired member or a deferred vested member; and

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

[69] The plaintiffs assert that there were likely more than 3,000 retired and deferred vested members in the plan as of December 31, 2001.

[70] The defendants argue that the class definition is inadequate, "because it does not adequately respond to the return of deferred vested member to the ranks of active members of the Plan". The defendants explain that a deferred vested member is a person who has ceased to be an active member but who has a vested entitlement to receive a pension in the future at a deferred date and that it is not uncommon for a deferred vested member to be reemployed by a participating employer in the Plan, thereby returning to active membership. Apparently there are 106 deferred vested members who have returned to active membership. The defendants argue that either the plaintiffs must amend the class to exclude those deferred vested members (and their spouses, beneficiaries, and/or estates) who have since returned to active employment or there are members of the proposed class who do not, on the plaintiffs' theory, have a claim against the Board.

[71] McLachlin C.J.C., speaking for the Court, said in ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46, at ¶ 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.

[72] The issue is whether the plaintiffs have failed to put forward an identifiable class capable of clear definition as there is some movement of plan members. While it is open to me to amend the class (although I do not think that it has been shown to be necessary at this point), I think that the plaintiffs have demonstrated that at the time of the alleged breach of duty a class consisting of an identifiable class of two or more persons pursuant to s. 4(1)(b) exists and have identified that class by stated objective criteria: see ***Hollick v. Toronto (City),*** [2001] 3 S.C.R. 158, 2001 SCC 68 at ¶ 17. I have concluded that the plaintiffs have satisfied this requirement.

(c) Do the Claims of the Class Members Raise Common Issues?

[73] There is a requirement that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members".

[74] The plaintiffs' proposed common issues as set out in their notice of motion are:

(a) Did the defendants breach their fiduciary duties to the class members as alleged in the statement of claim?

(b) If the defendants did breach their fiduciary duties to the class members, what relief should be granted to the class members?

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

[75] The defendants say that the common issues are not defined with sufficient particularity, something which they say is very important. The defendants say that the plaintiffs simply refer to the statement of claim. Some examples of the defendant's concerns are expressed by them this way:

(a) The statement of claim identifies two actuarial methods of ascertaining class members' actuarial liabilities and it is unclear whether the common issue identifies which one should be used.

(b) There is a lack of clarity as to whether the plaintiffs are seeking to certify as a common issue whether the direction that any actuarial surplus in the 2003 report be directed to contribution rate stabilization reserves or to fund a future reduction of contribution rates was also a breach of fiduciary duty.

(c) Paragraph 23 of the statement of claim refers to surplus allocations other than the allocation which is the subject of the Partners' Agreement and the defendants ask whether it is clear whether these previous allocations are included in the alleged breaches of fiduciary duty.

(d) The plaintiffs fail to specify what duty was breached by the defendants "failing to issue timely and/or effective communications to members".

(e) The defendants say it is unclear whether the allegation that the trustees rejected requests from retired members for a proportional distribution of surplus constitutes a breach of fiduciary duties;

(f) The defendants say that the plaintiffs fail to identify what actions were arrogant and high-handed in support of their claim for punitive damages.

[76] The defendants say that the lack of specificity is problematic because the defendants are entitled to know what questions are proposed as common issues, the assessment of common issues cannot be made as the matter proceeds, and if the common issues are those described in the statement of claim, the members and possible members may be unable to determine whether they wish to opt in or out.

[77] The defendants also say that the claim has been waived by the cashing of cheques made to parties from the actuarial surplus. (I understood the plaintiffs to suggest, however, that the fact that funds were actually transferred undercuts the argument that the surplus merely existed on paper and was not a trust asset.) Finally, if the only possible common issue is punitive damages, the defendants say that this is not a proper basis for certifying the action.

[78] Let me set out some general principles before considering these arguments specifically.

[79] As McLachlin C.J.C said in ***Western Canadian Shopping Centres Inc.*** at ¶ 39:

> Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not

> essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[80] Smith J., as he then was, stated principles in a passage at ¶ 35 in the chambers decision in ***Endean*** with which no issue was taken on appeal:

> The proper approach to the third statutory requirement engages the following principles. The question of whether individual issues predominate over common issues, which so permeates the American law on this subject, is expressly excluded as a relevant consideration by s. 4(1)(c) of the Act. Further, a common issue need not be dispositive of the litigation. A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary: *Harrington v. Dow Corning Corporation et al* (1996), 22 B.C.L.R. (3d) 97 at 105, 110 (S.C.).

[81] The common issues that are proposed by the plaintiffs appear to me to avoid the duplication of fact finding and legal analysis. The plaintiffs say, and I agree, that the issues are common to each member of the class.

[82] Let me return to the underlying principles. In ***Campbell v. Flexwatt*** (1997) 44 B.C.L.R. (3d) 343, [1997] B.C.J. No. 2477 (C.A.), Cumming J.A. said at ¶ 51-53:

> 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. Section 1 of the *Class Proceedings Act* defines common issues as:
>
> > (a) common but not necessarily identical issues of fact; or
> >
> > (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.
>
> This question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.
>
> 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.

[83] It appears that all class members share a common interest in whether the defendants have breached their fiduciary duty as alleged in the statement of claim and, if so, the nature of the relief that may be ordered. The plaintiffs point out that the statement of the common issues is not dissimilar to other certified actions. For example, the class defined as students at the Jericho School between 1950 and 1992 claiming to have suffered injury, loss or damages resulting from misconduct of a sexual nature at the school, had the following question certified: "Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation of the management of the school to protect students from misconduct of a sexual nature by employees, agents, or other students at the school?": see ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184, 2001 SCC 69 at ¶ 21.

[84] I think that the requirement of commonality is satisfied. Resolving the first two issues (listed at ¶ 74) is necessary to the resolution of each person's claim. As McLachlin C.J.C said in ***Rumley*** at ¶ 29:

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[85] Here, the questions posed are not overly broad. In ***Rumley***, although there were differences between class members, those differences were not seen by the Court of Appeal or the Supreme Court of Canada to be insurmountable. Here any differences among members do not significantly affect the commonality issue.

[86] Punitive damages is an issue that has been certified as a common issue and I do not see why it should not be here as well given that I find that it meets the requirement of commonality. The defendants are free to seek particulars of the conduct that is alleged to give rise to the claim, as this litigation proceeds. One of the concerns of the defendants was the certification of this issue as the sole issue, but it is not the sole issue.

[87] The claims of the class members raise common issues. I find that the plaintiffs have satisfied this requirement.

(d) Would a Class Proceeding be the Preferable Procedure?

[88] One of the criteria for certification is whether a class proceeding "would be the preferable procedure for the fair and efficient resolution of the common issues" to be certified. The issue that often arises is class proceedings versus similar individual actions.

[89] The plaintiffs argue that this proceeding will serve the goal of judicial economy because there are 3,000 potential class members. Many individual actions are impractical, as the case will involve actuarial assessments and expert reports. Once the common issues are determined, any remaining issues can be dealt with inexpensively and expeditiously under s. 27(3) of the ***Act***. The plaintiffs argue that a class action might also foster a global settlement.

[90] The argument raised by the defendants and intervenors is that the individual claims for damages are substantial given that the plaintiffs appear to be claiming as damages 24%-41% of an actuarial surplus. They say that individual actions, given the amounts involved, would not be uneconomical.

[91] The main question on preferability is a little different than the normal question of individual proceedings versus class proceedings. The defendant and intervenors say that judicial review, if not the only available procedure, is at least the preferable one. (I recognize that the plaintiffs argue that the Board's decision is not subject to judicial review and that the defendants are mischaracterizing the claim as essentially one for a declaration rather than for damages.)

[92] The plaintiffs say that a class proceeding is preferable to a judicial review proceeding for the fair and efficient resolution of the common issues for several reasons:

(a) First, the dispute involves matters of private law that are properly brought by way of action, not judicial review.

(b) Second, the claims are for damages for breach of fiduciary duty and punitive damages which are not available in a judicial review proceeding.

(c) Third, the matters in dispute can most practically and efficiently be resolved by way of an action where discovery and document production are available to the parties as of right.

[93] The defendants and intervenors say that judicial review is the preferable procedure because, even if declaratory relief is available in an action, a class action has no advantage over a summary judicial review application which they say would be cheaper, faster, and fairer. A judicial review application could be resolved in a much shorter time than a class proceeding and be less costly, as the disbursements for the class proceeding are suggested to be in the range of $100,000, they say. The defendants and intervenors argue that if a declaration of invalidity is obtained through judicial review, the outcome will bind all claimants and satisfy any behaviour modification goals. I took the defendants to argue that if judicial review was successful from the plaintiffs' perspective, the plaintiffs might then, in separate proceedings, pursue their claims for damages, if those claims exist at law.

[94] Section 4(2) of the ***Class Proceedings Act*** provides guidance for determining the preferable procedure:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[95] Although required to look at those enumerated factors, the court's consideration is not limited to them; the court must consider all relevant factors. The considerations underlying such factors were discussed by our Court of Appeal in ***Elms,*** *supra,* at ¶ 53 where the court referred to Winkler J.'s comment in ***Carom v. Bre-X Minerals Ltd.*** (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) at 239:

> … A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

[96] In terms of those three major objectives, Chief Justice McLachlin in ***Hollick*** spoke of the advantages of class actions over a multiplicity of individual suits at ¶ 15:

> 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.

[97] I think the factors mentioned in s. 4(2)(a), (b) and (c) largely favour a class proceeding over a series of individual actions. The common issues identified by the plaintiffs (summarized at para. 74) predominate over the issues that would require individual determination. The movement of class members from “deferred vested” to “active member” status, as well as the quantum of damages for such claimants may possibly require individual determination, but these may be dealt with under Part 4 of the ***Class Proceedings Act***. Although the defendants have alleged that individual actions would be economical, there is no evidence to support a finding that a significant number of class members have a valid interest in maintaining individual actions.

[98] I think that it is the factors in s. 4(2)(d) and (e) and a consideration of other relevant factors which give rise to the issue of the appropriateness of judicial review over a class proceeding. The factors in s. 4(2)(d) (relative practicality and efficiency of other available means of resolving the claim) and s. 4(2)(e) (comparative ease of administration) are interrelated in this case. On the latter factor, while I am of the

opinion that the administration of a class proceeding would not present greater difficulties when compared to individual litigation, a class proceeding may not share the same advantage with respect to an application for judicial review.

[99] The analysis under s. 4(2)(d) of whether other means of resolving the claims are less practical or efficient gives rise to a threshold issue: is the decision of the trustees subject to judicial review? (It can not be the preferable procedure if it is not an available procedure.) Is the decision maker sufficiently public to be subject to judicial review?

[100] In ***Ehrcke v. Public Service Pension Board of Trustees*** (2004), 32 B.C.L.R. (4th) 388, 2004 BCSC 757, Justice Neilson found that the board of trustees there was a “private body”, and that “the trust scheme envisaged by the legislature was intended to create an arm's length relationship between the government and the administration of civil service pensions” (¶ 62-63). There the application for judicial review was declined on the basis that the board’s decision was not subject to judicial review but that the petitioner’s proper claim was for breach of trust.

[101] The defendants say that this case is the converse of ***Ehrcke***. The defendants here say all of the appointments to the Board are pursuant to a statutory provision, the source of their power is statutory, and, the defendants say, the source of its power to decide the question of whether the amendment breaches a fiduciary duty is assigned to it by statute. The defendants say that the Board’s origins have always been and remain statutory, and its actions are governed by the ***PSPPA***. Finally, the defendants say that the final factor used to determine whether the Board is a public

body is the nature of its activities. In this instance, the Board is regulating a pension plan established for certain public sector employees. Further, prior to the Board having been established pursuant to the ***PSPPA*** the government was solely responsible for administration of the Plan.

[102] I need not review all of the plaintiff's arguments as to why judicial review is not available because, for the purposes of analysis on this aspect of the certification application, I will proceed on the basis that the trustees' decision to implement the Partners' Agreement is a decision that may be subject to judicial review. That however is not without doubt.

[103] If a judicial review procedure application is available to the plaintiffs to seek to quash the regulation implementing the amendment to the Plan, although no award of damages could be made in that judicial review proceeding, is it nevertheless the preferable procedure? If the regulation were set aside, could the plaintiffs then seek to bring a class proceeding for damages or bring individual claims for damages?

[104] One way of putting the preferable procedure question is whether the issue of the validity of the regulation should be addressed in a judicial review proceeding (a decision binding on all parties) or should the plaintiffs be able to litigate their claim for damages in the class proceeding that they wish to continue? Even if the question of whether the Board exceeded its jurisdiction can be determined summarily, is that the claim that the plaintiffs wish to and have advanced in their class proceeding? The plaintiffs' main claim, they say, is damages for breach of fiduciary duty.

[105] The defendants say that if the decision of the Board is quashed in a judicial review proceeding, then it is quashed. The decision will bind all plaintiffs at far less time and expense than a class proceeding. The speedy resolution of whether the trustees' actions were appropriate perhaps is an attraction to judicial review, if it is available.

[106] The plaintiffs point to the general absence, without leave, of pre-hearing discovery of documents and parties which they say is a disadvantage in proving their claim.

[107] The defendants disagree that there are procedural disadvantages in a judicial review proceeding and say that the need for documentary production is available as a matter of judicial discretion in a petition proceeding. The defendants also say that in appropriate circumstances the court may order payment of costs to a petitioner out of the fund.

[108] Certain cases in the context of the preferable procedure question have considered the question of judicial review versus a claim by way of action. These include: ***Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*** (1999), 32 C.P.C. (4th) 305 (B.C.S.C.); ***S.R. Gent (Canada) Inc. v. Ontario (Workplace Safety and Insurance Board)*** (1999), 45 O.R. (3d) 106 (S.C.J.); ***Buffett v. Ontario (Attorney General)*** (1998), 42 O.R. (3d) 53 (Gen. Div.).

[109] The defendants and intervenors rely most heavily on ***Auton.*** Before I address that case I will refer to the Ontario cases I mentioned that have touched on the issue.

[110] In ***S.R. Gent (Canada) Inc. v. Ontario***, *supra*, Swinton J. of the Ontario Superior Court of Justice considered an application for certification under the Ontario ***Class Proceedings Act*** as part of an application that was itself a judicial review proceeding. The issue in the judicial review proceeding was whether the Workplace Safety and Insurance Board patently and unreasonably exceeded its jurisdiction by imposing a merit-adjusted premium retroactively, and by ceasing to make refunds under a different experience rating program. Swinton J. did not certify the action:

> . . . It need not be shown that a class proceeding is the superior procedure -- only that it is preferable to resolve the common issues.
>
> . . .
>
> In this case, there is one significant common issue within the meaning of the *Act* -- the validity of the MAP programme. This is an issue of administrative law that is the subject of the judicial review application. If the application for judicial review were to proceed in the absence of certification of a class proceeding, a decision of the Divisional Court that the board acted without jurisdiction would affect all subject to the programme, since the programme would be held to be invalid in whole or in part. [Emphasis added.]

[111] In ***Buffett v. Ontario***, *supra,* the Ontario Court of Justice, General Division, considered an application for certification as a class proceeding of an action brought by originating application for a declaration that certain portions of a statute infringed s. 15(1) of the ***Charter***. Crane J. held that a motion for a declaration of invalidity under s. 52 of the ***Constitution Act*** was a relatively simple procedure contrasted with what would follow a certification period and that a successful ***Charter*** challenge would apply to everyone and the law would be of no force and effect.

[112] In ***Kranjcec v. Ontario*** (2004), 44 C.P.C. (5th) 376 (Ont. S.C.J.), Cullity J. considered an application to certify a class action where the plaintiff sought a declaration that retired employees were entitled to benefits available immediately prior to a unilateral reduction of benefits by the government employer and that any reduction would be a violation of their rights under s. 15 of the ***Charter***. Alternatively, they claimed damages for breach of contract and breach of fiduciary duty, as well as punitive damages. Cullity J. found that the statutory requirements were met for certification. On the issue of whether the class action was the preferable procedure, Cullity J., after commenting on the cost of individual actions, turned to the issue I am addressing and said at ¶ 66:

> In addition, the defendant relies on decisions such as *Buffett v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 53 (Ont. Gen. Div.), at pages 59 and 61 in which the appropriateness of seeking Charter relief in class proceedings was doubted. While I acknowledge the force of this reasoning when a plaintiff's claims are based solely, or primarily, on alleged infringements of *Charter* rights, the position is not necessarily the same where, as here, there are also claims based on other causes of action. If, in such cases, the objectives of the *Class Proceedings Act* would be achieved by certification in connection with the other causes of action, those values should be enhanced further by including the common issues relating to the *Charter* in the class proceeding: see, for example, *Hislop v. Canada (Attorney General)*, [2003] O.J. No. 5212 (Ont. S.C.J.).

[113] Where the common issues can be resolved through a judicial review proceeding that is binding on many plaintiffs, there is a very compelling argument that judicial review is preferable, particularly where the time and expense of such a proceeding is less. However, where it is uncertain whether judicial review is available or what issues might reasonably be determined on judicial review and

there are claims that can not be determined on judicial review, then it appears less attractive and hence, perhaps, not preferable.

[114] The defendants rely most heavily on ***Auton*** at the Supreme Court of British Columbia level. There, Allan J. considered an application by the petitioners, parents of an autistic child, for a declaration that the government had breached the petitioners' equality rights, accompanied by an application for mandamus if the government failed to redress its breach and compensation for certain costs of treatment.

[115] As Allan J. summarized at ¶ 56 of her reasons, she was persuaded that a class proceeding was inappropriate where the remedies sought included mandamus as well as a declaration. One purpose, she said, of the ***Judicial Review Procedure Act*** was to ensure that the nature and extent of public duties be determined summarily. Allan J. held that a declaration, whether obtained in an action or by way of judicial review, may determine the common issues.

[116] Although the plaintiffs seek a declaration, their counsel suggested in argument that the declaration was not the focus of their claim; rather it was the claim for damages. Mr. Zigler says that the action could stand without the declaratory relief mentioned in the statement of claim. Therefore, regardless of whether the ***Judicial Review Procedure Act*** might apply to the declaratory relief sought, there are private law claims for breach of fiduciary duty and there are claims for damages by the plaintiffs rather than what is clearly a public law proceeding for prerogative remedies in the nature of mandamus or certiorari. In that respect this case is

distinguishable from ***Buffet*** and from ***S.R. Gent*** but has similarities to ***Kranjcec***. Moreover, there was no issue of a private law breach in ***Auton***.

[117] It has been held that absent a special rule, claims for damages or rectification cannot be made in a judicial review proceeding unless the relief is necessarily incidental: ***Haagsman v. British Columbia (Minister of Forests)***, [1998] B.C.J. No. 2735 (S.C.); ***Yellowridge Construction Ltd. v. Anmore (Village)***, 2005 BCSC 304 per Slade J.; and ***McLean v. British Columbia (Minister of Human Resources)***, 2004 BCSC 285 per Gerow J. Where the relief sought includes damages, judicial review has been refused on the ground that the more appropriate remedy is an action for damages: ***Brown and Evans*** at para. 3.2312.

[118] Which is the preferable procedure for the fair and efficient resolution of the common issues in this case?

[119] Fairness and efficiency must be considered from the perspective of all parties, but significant weight should be attached to the common issues that the plaintiffs wish to assert in the class action.

[120] I note the caution expressed by Esson C.J. in ***Tiemstra v. Insurance Corp. of British Columbia***, (1996) 22 B.C.L.R. (3d) 49 (S.C.) at ¶ 20 upon his refusal to certify class proceedings in that case, that class actions have the potential for becoming “monsters of complexity and cost.” Judicial review would likely be faster and less costly.

[121] However the judicial review proceeding would create certain disadvantages for the plaintiffs: there would be no oral discovery as of right; there would be no discovery of documents as of right; the plaintiffs would be potentially liable for costs; and, perhaps of most importance, the issue that the plaintiffs seek to advance is not necessarily the same issue as would be advanced in the ***Judicial Review Procedure Act*** application.

[122] The last point is of some significance. Leaving aside the question of the declaration sought, the plaintiffs say that the central issue is whether there has been an actionable breach of fiduciary duty sounding in damages. In contrast, the defendants and intervenors say that central and fundamental issue is one of administrative law: did the Board act outside its jurisdiction in finding that it was not acting in breach of its fiduciary duty to the members?

[123] Not only does a judicial review proceeding not address the issue of whether there can be a claim for damages or not, there may be differences in the central questions in the different proceedings. In the proposed class proceeding the plaintiffs seek to establish a breach of fiduciary duty. In the judicial review proceeding, even if the issue of whether there was a breach of fiduciary duty can be answered, there may well be questions of deference to the Board in its assessment of that question. As one intervenor put it: “an application for judicial review will focus on the crucial substantive issue of how much deference the Court should give to the Board in determining whether different treatment between classes of beneficiaries is equitable.”

[124] Upon a consideration of all of these factors I have concluded that proceeding by way of a class action, not judicial review, is the preferable procedure for the resolution of the common issues.

(e) Is There an Appropriate Representative Plaintiff?

[125] In ***Western Canadian Shopping Centres,*** McLachlin C.J.C. said at ¶ 41:

> … [T]he class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, supra, at paras. 4.210-4.490; Friedenthal, Kane and Miller, supra, at pp. 729-32.

[126] The plaintiffs have proposed that Ashley Dermer be the representative plaintiff. The plaintiffs in their notice of motion have requested the creation of a sub-class for any non-resident class members and have produced a plan setting out in various stages the steps after certification: examination for discovery, document production, and exchange of expert opinions. The lawyers representing the representative plaintiff have extensive experience in class proceedings, including a number of pension and benefit cases brought by class proceeding.

[127] The specific issue that is raised here by the defendants is whether there is a representative plaintiff who (1) would fairly and adequately represent the interests of

the class, (2) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (3) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[128] The defendants object to the proposed representative plaintiff and say he cannot fairly and adequately represent the interests of the proposed class because his interests conflict with the interests of the other members of the class and he has failed to provide an acceptable plan for the litigation.

[129] Let me deal with the issue of conflict first.

[130] The suggested conflict allegedly arises in circumstances where Mr. Dermer will be a representative plaintiff and the plaintiffs seek to quash the Board's decision to approve the Partners' Agreement which established how the actuarial surplus determined to exist was to be distributed. The distribution was approved and implemented by the Board and included a one time lump sum payment of about $2.6 million to retired members, which they say is about $1,324 per retiree. The position of the defendants is that if the court accepts the plaintiffs' position that the Board's decision should be quashed (the plaintiffs have a different approach and seek damages) and the actuarial surplus has to be returned once the matter is sent back to the Board for their reconsideration, it is possible that the Plan partners will issue another direction. The Board or Plan partners could conceivably determine that no money should be paid out of the Fund, that it should all be held in reserve to protect against investment losses, and the monies paid out to retirees would have to

be recovered. That the defendants say places a retired person in a conflict with non-retired persons.

[131] The defendants say that there is a further conflict between the retired and deferred vested members of the proposed class in that the plaintiffs propose one class of both retired and deferred vested members within the same class and that the deferred vested members did not share in the $2.6 million cash payment made to the retired members, and may or may not have shared in the improvements made to the extended health benefits. The defendants argue it is conceivable that the retired members and deferred vested members would have opposing views on how quashing the Board's decision affects the cash payments to retired members. They argue that the certification should be refused, or in the alternative, a separate representative plaintiff and counsel must be appointed to represent the deferred vested members and their spouses, estates, and beneficiaries.

[132] On this issue of conflict, the plaintiffs referred to two cases, ***Western Canadian Shopping Centres*** and ***Samos Investments Inc. v. Pattison*** (2001), 22 B.L.R. (3d) 46, 2001 BCSC 1790. At ¶ 109 of ***Samos***, Bauman J. referred to the ***Western Canadian Shopping Centres*** case where Chief Justice McLachlin stated at ¶ 40:

> Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[133] The plaintiffs say that the alleged conflicts mischaracterize the plaintiffs' claim in that they are not seeking to quash the Board's decision and have monies repaid from retirees and are not seeking reimbursement of monies paid out; rather, they are claiming damages for breach of a private law duty.

[134] The plaintiffs in their reply argument also said this:

> … the Defendants suggest that Mr. Dermer, as a retired member, has a conflict with deferred vested members and particularly deferred vested members who return to active membership. In essence, all of these arguments go to quantum of relief. The Defendants assert that deferred vested members who have returned to active membership may or may not be entitled to relief or the same relief as others because they are now enjoying the benefits of the surplus distribution to active members. The Defendants also state that deferred vested members, who got no share of the surplus distribution, might be differently entitled than retired members who have already received a small disproportionate share of the Surplus. This is not a conflict; it simply points out that different class members will be entitled to receive different amounts of compensation if the lawsuit is successful. Deferred vested members who have returned to active membership, the remaining deferred vested members, and retirees share the same causes of action against the Defendants. It is alleged that they were deprived of benefits commensurate with those enjoyed by active Plan members from December 31, 2001 by reason of the breach of fiduciary duty of the Defendants. The only difference between these class members is with respect to the quantum of relief. In the words of Mr. Justice Maczko, cited in the Plaintiffs' Brief, Mr. Dermer shares a similar *claim* against the defendants. It is not reasonably foreseeable that this should lead to disputes between class members concerning the common issues. Should, this happen, however, the appropriate action would be to create a sub-class for the affected deferred vested members. At this stage of the proceeding, however, in the absence of *actual conflict concerning the common issues,* there is no need for a subclass.

[135] I agree generally with these submissions of the plaintiffs' counsel. I also find the reasons of Cullity J. in ***Kranjcec***, *supra* at ¶ 67-69 to be instructive:

> … It follows, I believe, that the only conflicts that are likely to exist arise: (a) from the possibility that some members of the class may not be in favour of the litigation on the ground that it will not resolve - and will give rise to uncertainty - of the question of their entitlement to the post-May, 2002 improvements; and (b) that, in the event of settlement negotiations, a Benefits package that might be acceptable to Ms Kranjcec would not be in the interests of other members of a class.
>
> I am satisfied that conflicts of the first kind can be adequately addressed by the opting out process. This is designed to permit putative class members to divorce themselves from the litigation, for whatever reason, and, by so doing, to preserve their rights. The possibility that some members of the putative class may be concerned that - irrespective of its resolution - the litigation may provoke an unfavourable reaction from the defendant should not be permitted to prevent members who do not choose to opt out from proceeding with the action as a class proceeding.
>
> Whether conflicts of the second kind will arise will depend on whether settlement negotiations take place and on the proposals then under consideration. At that stage, the possibility of creating subclasses with separate representative plaintiffs will exist (*Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.), at pages 53 - 4) and I am not prepared to find at this stage that this procedure - and the requirement that the court must approve any settlement - will not be sufficient to protect the interests of all members of the class.

[136] Although there may be the potential for conflict, I do not think that there is presently a conflict facing the representative plaintiff concerning the common issues and as such I do not see that there is a need at this stage for a subclass or separate counsel. Should it become necessary in the future because a conflict arises during settlement discussions or otherwise, the certification order can be amended at that time.

[137] As to the litigation plan, the defendants say that it appears to be modelled on a generic precedent that generally repeats the requirements of the ***Class Proceedings Act*** and does not contain actual reference to the proceedings or the unique issues, and in particular does not address the need for individual liability trials, the summary determination of any legal issues, the nature of issues to be addressed by the experts or the plaintiffs' theory on how to effectively and efficiently manage the litigation. The defendants rely on ***Pearson v. Inco Limited*** (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) as authority for the proposition that this court may dismiss or alternatively delay certification due to the inadequate litigation plan that has been provided.

[138] The plaintiffs say that the plan is adequate.

[139] At the certification stage, litigation plans are generally not scrutinized in great detail, as it is anticipated that the plan may be amended throughout the proceeding. A plan should, however, be sufficiently clear and workable so as to demonstrate that the plaintiffs and class counsel have thought through the process of the proceeding. This aspect of litigation plans was discussed by Gerow J. in ***Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)***, (2003) 26 B.C.L.R. (4th) 152, 2003 BCSC 1717 at ¶ 77:

> The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated

> that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. *Hoy v. Medtronic*, at [paragraphs] 81-82; *Scott v. TD Waterhouse Investor Services*, [paragraphs] 164-167.

[140] I think that the proposed litigation plan both demonstrates that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case and provides a basic framework within which the case may proceed. I find that it is sufficient for the purposes of certification.

CONCLUSION

[141] I have concluded that the plaintiffs have satisfied the certification requirements set out in s. 4 of the ***Act***. The plaintiffs' pleadings disclose a cause of action, there is an identifiable class, the claims of the class members raise common issues and a class proceeding by way of action is the preferable procedure. I also conclude that Mr. Demers is an appropriate representative plaintiff and grant certification of this class proceeding. The parties, if they require, have liberty to apply for further directions.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson