

# Pensions and Benefits

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## Court Rules Pension Plan Members Not Entitled to Indexing

In a decision released this month, the Saskatchewan Court of Appeal ruled that members of the Saskatchewan public service pension plan are not entitled to indexed pension benefits, beyond what was already provided for in legislation: *May et al. v. Government of Saskatchewan* 2013 SKCA 11.

The plaintiffs who were representative plaintiffs in a class action on behalf of members of the pension plan, alleged that the government of Saskatchewan had breached employment contracts with its employees and had also breached its fiduciary duties toward the members in failing to fully index the pensions payable from the plan.

The pension plan for public servants in Saskatchewan migrated from a defined benefit plan to a defined contribution plan in 1977. However, members of the plan at that date could elect to continue participating in the defined benefit plan. It is a very rich plan, providing a benefit equal to 2% of a member's final average earnings, multiplied by years of service.

The benefits in the plan were not indexed originally. The government later indexed benefits on an *ad hoc* basis. Over time, the pension benefits lost a fair bit of purchasing power due to the lack of full indexation. The public service union attempted on several occasions to bargain cost-of-living increases to the pension benefits, but had not succeeded. Legislative changes were later made in 1997 to provide protection for 70% of increases in the cost-of-living.

The plaintiffs argued that the government had promised to treat the members of the plan "equitably and fairly, having regard to other employees of the government and its Crown corporations", which arguably included providing fully indexed pensions. The trial judge held against the plan members, because they had not established a contractual right or a breach of fiduciary duties by the government:

*"These plaintiffs, and those they seek to represent, have developed a construct of the kind of pension plan that they now wished they had. However, they have not established, by the evidence presented in this case, the legal foundation required to support such a conclusion by this Court on a balance of probabilities. ... the court is required to rule upon legal, including contractual, rights, not upon expectations -- upon legal entitlements not aspirations."*

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The court of appeal agreed with the trial court's findings. The plaintiffs could not point to any specific written document that granted a right to additional indexation. The court found that they "were able to describe their sense of the 'implied term' only in the broadest of language". Oddly, the plaintiffs argued before the court of appeal that the trial court erred by not attaching more weight to a 1996 retirement booklet that included the following question and answer:

*"Is the pension benefit indexed?"*

*The Plan is not indexed. The government of Saskatchewan annually reviews pensions paid to superannuates and may make discretionary increases. An increase cannot exceed the Consumer Price Index (CPI) for a given period."* (underlining added)

This case illustrates that a "pension promise" can be derived from many sources. Plan members will naturally seek to assert a case based upon the most favourable wording and in the case of ambiguity or inconsistency between pension documents or information, courts will often resolve the ambiguity or inconsistency in favour of the plan members. The members in this case, however, were unable to put forth any convincing evidence that the employer had promised fully indexed benefits.

Courts will look to not only the pension plan text and employee booklet, but also to presentation materials, pensioner statements, summaries in actuarial reports and other documents and also to oral representations to determine the specific details of what pension benefit the members have been promised. This is consistent with the *Schmidt v. Air Products* decision of the Supreme Court of Canada from 1994.

Employers, administrators, actuaries, insurance companies and others involved with the administration and communication of pension plans need to use the utmost care and diligence to ensure that pension benefits are described accurately, consistently and clearly. This applies equally to defined benefit and defined contribution pension plans, as well to non-pension retirement savings plans, equity-based plans such as stock option and stock purchase plans and group benefit and post-retirement benefit plans.

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