COURT FILE NO.: 02-CV-238484CP
DATE: 20040107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
BARBARA KRANJCEC, on her own behalf and on behalf of all retired former employees of the Ontario Government receiving coverage under the Supplementary Health and Hospital Insurance, Dental and Life Insurance Plan as of June 1, 2002	***Michael D. Wright, Charles M. Wright*** and ***Shaun O'Brien***, for the Plaintiffs
Plaintiffs	***John C. Field, Lisa J. Mills, Glenn P. Christie*** and ***Lauri A. Wall***, for the defendants
- and -	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	***Michel Heli***, for the Attorney-General of Ontario
Defendant	
	HEARD: November 19, 20 and 21, 2003

Proceeding under the *Class Proceedings Act*, 1992

REASONS FOR DECISION

CULLITY J.:

[1] The plaintiff retired from the Civil Service of Ontario on August 31, 1993 after 27 years' employment in the Ministry of Health. Upon, and by virtue of, her retirement she became eligible to receive dental, supplemental health and hospital Benefits (collectively the "Benefits") from the Government of Ontario. In her statement of claim she alleges that the government unilaterally reduced certain of the Benefits effective June 1, 2002.

She seeks declarations that she and other retired employees ("Retirees") of the Crown are entitled to receive the Benefits that were available immediately prior to that date and that any reduction of such Benefits would be a violation of the Retirees' rights under section 15 of the *Canadian Charter of Rights and Freedoms*. In the alternative, damages are claimed for breach of contract and breach of fiduciary duty as well as punitive damages in respect of the alleged "arbitrary, callous and high-handed actions of the Defendant in unilaterally altering their retirement benefits contrary to their legal rights, and at a time when the Retirees were most vulnerable to health problems and could least afford to assume increased financial burdens".

[2] In this motion the plaintiff seeks certification of the action as a class proceeding on behalf of:

> All persons retiring after August 28, 1974 and eligible to receive retirement benefits from the Ontario Government as set out in the Supplemental Health and Hospital Insurance, Dental and Life Insurance Plan in effect immediately prior to June 1, 2002.

THE FACTS

[3] The following is a summary of relevant facts that are, for the most part, undisputed.

[4] The Benefits are provided pursuant to an insured benefit plan underwritten by Great West Life Assurance Company. It determines, at the first instance, whether claims are to be paid. Disputes are dealt with by the appeals committee of the Management Board Secretariat of the Government of Ontario. Benefits are paid by the Crown.

[5] The Benefits were first made available to Retirees in 1974. Before that time, they were provided only to active employees. Over the years these have been negotiated by each of approximately nine collective bargaining agents including the Ontario Public Service Employees Union ("OPSEU") of which the plaintiff was a member. The collective agreements continue to make provision for Benefits available to active employees only.

[6] By an Order in Council approved by the Lieutenant Governor on August 28, 1974, the Benefits provided for active employees were extended to former employees in receipt of pensions from the Public Service Superannuation fund. Since the original Order in Council (2237/74) a number of others dealing with the Benefits available to Retirees have been approved. Although the correspondence between them and those in various collective agreements with OPSEU has been retained, they have continued to be made available pursuant to the various Orders in Council. There is no statutory foundation for the provision of the Benefits and it was not suggested on this motion that there is any legal obligation on the Crown to provide them other than the alleged contractual and fiduciary obligations pleaded in the statement of claim. In the submission

of counsel for the Crown, the provision of the Benefits to Retirees was, and is, simply an exercise of the Crown prerogative and, in consequence, they are subject to the Crown's power to vary them unilaterally at any time, or times, by further prerogative acts.

[7] The Orders in Council that followed after 2237/74 provided, in 1978, for the government to enter into agreements with an insurer for the provision and administration of the Supplemental Health and Insurance Plan for Retirees and, in 1985, for the provision of the dental coverage applicable to civil servants as negotiated by the OPSEU bargaining unit. In 1989, Order in Council 2622/89 provided that the supplemental health, hospital and dental benefits coverage was to be available to "eligible persons" (as defined) and their survivors and that the Benefits would be provided:

> ... as nearly as may be, on the same terms and conditions as are from time to time applicable to similar benefits for civil servants pursuant to a collective agreement between the Crown and the Ontario Public Service Employees Union.

[8] The same provision appears in Order in Council 162/91 that revoked 2622/89 and expanded the definition of eligible persons. Order in Council 162/91 remains in force.

[9] There is no evidence that copies of the Orders in Council were ever provided to employees or Retirees. The statement of claim pleads that neither their existence, nor their terms, were ever communicated to Retirees during their employment and that the plaintiff first heard of Order in Council 162/91 when she received a memorandum from the Management Board Secretariat informing Retirees of the changes to be implemented as of June 1, 2002.

[10] Commencing in September, 1978, various booklets that provided information about the Benefits were released from time to time. These, generally, purport to set out the "entitlement" of Retirees to the Benefits provided to them pre-retirement and the most recent contain statements that the contents are simplified descriptions of the insurance benefit provisions, that the booklet is "an informative guide, not a legal document" and that the governing provisions are in the Master Policies under which the insurer administered the Benefits.

[11] The contents of the information booklets reflected changes made to the Benefits from time to time applicable to active employees as amendments were made to the provisions of the collective agreements with OPSEU. However, prior to the changes made as of June 1, 2002, these invariably enhanced or augmented the Benefits. In the statement of claim the plaintiff alleges that the memorandum that described the changes intended to have effect as of June 1, 2002 involved a departure from this practice in that certain Benefits would be reduced and, in some cases, eliminated. The extent to which some of the alleged reductions in the Benefits were first introduced as of June 1, 2002 is disputed. In addition, while the reductions may increase the overall cost of health-care products and services for some Retirees, others with different needs may benefit from the changes. While, for example, a $100 annual deductible for dental services - and a drug-

prescription deductible - were introduced, the daily hospital coverage was increased from $75 to $120.

[12] The introductory paragraphs of the memorandum were as follows:

> The benefit plan for retirees of the Ontario Public Service will be changing, effective June 1, 2002. If you are eligible for retiree benefits then the following changes will apply to your benefits coverage.
>
> CONTEXT
>
> Since 1974, insured benefits for retirees have been established by Order in Council (OIC). Since that date, benefit changes negotiated with Ontario Public Service Employees Union (OPSEU) have been applied to retirees. The latest Order in Council, signed January 24, 1991, states that all benefits for retirees, other than life insurance, will be the same as those benefits negotiated with OPSEU.
>
> The benefits package for OPSEU employees has been changed as a result of the recent negotiations between the government and OPSEU. The changes negotiated with OPSEU will also apply to Retirees.
>
> Your pensioners' benefits package has been improved in some areas. Controls have been implemented in other areas in order to manage projected health and dental care cost increases now and in the future. The government remains committed to providing a fair benefits package to eligible pensioners, at a reasonable cost.
>
> WHAT'S NEW
>
> Effective June 1, 2002, the following benefit plan changes will be implemented for Retirees: ...

ANALYSIS

[13] For this action to be certified as a class proceeding, the plaintiff must have established that each of the five requirements in section 5 (1) of the *Class Proceedings Act, 1992* has been satisfied. Counsel for the defendant submitted that the plaintiff has not discharged the onus with respect to any of them. I will consider each in turn.

1. Existence of a cause of action

[14] Section 5 (1) (a) requires that the pleadings disclose a cause of action. The applicable law under this heading is well-established. The question is to be determined on the basis of the pleadings and the principles are essentially the same as those that apply in

motions under rule 21.01(1)(b). The requirement will be satisfied unless it is plain and obvious that no reasonable cause of action is disclosed by the statement of claim. Neither novelty of the action, the complexity of the issues nor the potential for the defendant to present a strong defence will prevent the requirement from being satisfied. This will occur only if the action, as pleaded - and assuming that the facts set out in the statement of claim can be proven - is certain to fail: *Hunt v. Carey* (1990), 74 D.L.R. (4th) 321 (S.C.C.), at page 336; *Abdool v. Anaheim Management Ltd* (1995), 21 O.R. (3d) 453 (Div. Ct.), at page 469. The requirement in section 5 (1) (a) will be satisfied if the claims could, in law, succeed on the basis of the material facts pleaded.

(a) Implied contract

[15] The plaintiff's claim for a declaration that she and the other members of the proposed class are entitled to the Benefits that were available immediately before June 1, 2002, is based, in the first place, on the alleged existence of an implied term in their employment contracts. Paragraphs 5, 6, 8 and 15 and 16 of the statement of claim read as follows:

> 5. In or about 1974, the Defendant entered into an agreement with its employees to provide retirement health and group insurance benefits for existing and future retirees.
>
> 6. The terms of the benefits agreed to are set out in "A Guide to your benefits after Retirement" (the "Guide"), which the Defendant distributed to all employees and retirees. ...
>
> 8. The Retirees state that it was an implicit term of the Plan that their benefits vested upon retirement. Upon achieving retired status, the Retirees were no longer in a position to negotiate with the Defendant regarding benefits, nor to assume new and unpredictable financial burdens. It was implicit and remained uncontradicted by the Guide that once an employee retired, his or her retiree benefits could not be unilaterally reduced or eliminated by the Defendant. ...
>
> 15. The Retirees pleaded that the retiree benefits as set out in the plan became a fundamental term of their employment and retirement, having been communicated to them through the Guide and accepted by them during the course of their active employment. The benefits constituted deferred compensation for their employment service.
>
> 16. The Defendant's reduction of the Retiree's benefits was contrary to the implied term that the benefits vested on retirement and could not be reduced or eliminated thereafter. The reduction thus constituted a serious breach of the Defendant's binding promise to the Retirees.

[16] The question whether the plaintiff would be able to prove the existence of the implied term at trial – or even to demonstrate that there is a triable issue on a motion for summary judgment by the defendant – is not in issue in this essentially procedural motion. As " the certification stage is decidedly not meant to be a test of the merits of the proceeding [and] focuses on the form of the action" rather than on "whether the claim is likely to succeed " (*Hollick v. City of Toronto* (2001), 205 D.L.R (4th) (S.C.C.), at page 29), it is possible for a proceeding to be certified that could not withstand a defendant's motion for summary judgment. The likelihood that this will occur will be increased when, as here, defendants are permitted to contest certification without having delivered a statement of defence.

[17] When the above paragraphs of the statement of claim are read without regard to the evidence in the record, I consider them to be sufficient - as a matter of pleading – to support the claim for a declaration that the plaintiff, and members of the putative class, are entitled to the Benefits that were in effect immediately prior to June 1, 2002. The contents of the "Guide" referred to cannot be dismissed as incapable of affecting legal rights as between employees and an employer. As Cory J. stated in *Schmidt v. Air Products of Canada Limited,* [1994] 2 S.C.R. 611 in the context of pension benefits:

> Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees. (at page 669)

[18] While the terms of the Guide, and those of the Orders in Council, may be treated as incorporated into the statement of claim, I do not believe it is plain and obvious that they cannot reasonably be considered to contain a promise that, when accepted, became contractually binding. The various versions of the Guide refer repeatedly to a Retiree's entitlement to the Benefits, the continuation of Benefits enjoyed prior to retirement and the payments that "will" be made. The task of determining the extent to which the Crown reserved the right to reduce the Benefits in place at the time of retirement should, I believe, be undertaken in the light of any relevant evidence relating to the circumstances in which the Benefits were provided, and continued, and should not be disposed of solely on the basis of the pleadings.

[19] The principal challenge by defendant's counsel to the existence of a cause of action based on the Crown's alleged contractual obligation to provide the Benefits set out in the "Guide" was that no valid contract to provide the Benefits could exist between the Crown and "almost all" of the members of the proposed class – including Ms Kranjcec – as they were represented by OPSEU as their exclusive bargaining agent. In counsel's submission, "where an exclusive bargaining agency is in place, there can be no collateral or subsisting contract touching upon any subject matter of the employment relationship". Whether or not the statement of law is correct – and in the submission of plaintiff's counsel it is too broad – the challenge goes to the merits of the plaintiff's claim of the

existence of a binding contract and it is based on evidence which is not admissible for the purpose of section 5 (1) (a). The plaintiff has not pleaded that she, or any member of the proposed class, was a member of OPSEU and no statement of defence has been delivered.

[20] Moreover, it was accepted in the principal decision on which defendant's counsel relied that individual bargaining by unionized employees is permitted "when the terms fall outside the scope" of a collective agreement: *Loyalist College of Applied Arts and Technology v. O.P.S.E.U.* (2003), 225 D.L.R. (4th) 123 (Ont. C.A.), at page 136. I do not understand this to mean that matters which could have been, but were not, dealt with in a collective agreement can be the subject of bargaining by individual employees. Post-retirement benefits may, however, be in a special position. In *Dayco (Canada) Ltd v. CAW-Canada*, [1993] 2 S.C.R. 230, the majority of the Supreme Court of Canada expressly left open the question whether former employees could enforce such provisions when they were included in a collective agreement.

[21] In *Ormrod et al v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285 (S.C.J.), retirees had sued their former employer for breach of an alleged contract to provide post-retirement benefits. The evidence on which they relied consisted of documents provided to them by the defendant during the period of their employment. The plaintiffs had then been covered by the terms of a collective agreement that did not provide for the benefits. Although the defendant took the position that it had no contractual obligation either to provide, or to continue to provide the benefits, it is not clear whether the existence of the collective agreement was relied on to exclude the possibility of individual contracts with employees, or merely to challenge their standing to sue. Winkler J. referred to the issue that had been discussed, but not decided, in Dayco and held that it was not "plain and obvious" that the claim for breach of contract could not succeed.

[22] Insofar as agreements to provide post-retirement benefits can be considered to relate to the terms and conditions of employment, labour relations arbitrators, and tribunals, have repeatedly followed the reasoning of Laskin C.J.C. in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.) and held that "an employer is not free to negotiate terms and conditions of employment with individual employees to any degree": *Re Province of British Columbia and British Columbia Government Employees' Union* (1988), 2 L.A.C. (4th) 247 (at page 13 (QL))). However it has also been held that retirees are outside the bargaining process and the union cannot insist that an employer negotiate benefits for current retirees: see, for example, *O.P.S.E.U. v. The Crown* (1989), Decision T. 137/88. It does not follow, and it was not suggested by the Crown in that case, that collective bargaining cannot deal with benefits to be provided for current employees on their retirement.

[23] As I have indicated, the point is not raised by the pleadings in this case and evidence is not admissible for the purposes of section 5 (1) (a). If it were necessary to decide it, I believe I should defer to, and follow, the finding in Ormrod that there is, at present sufficient uncertainty with respect to the rights of Retirees to enforce Benefits

that the employer agreed to provide to make it not plain and obvious that the action based on breach of contract in this case cannot succeed.

[24] As the inquiry under section 5 (1) (a) is based solely on the pleading, I do not believe that the claim based on the existence of the allegedly implied contractual obligation is defective. It is when the evidence is considered in connection with the definition of the class and the proposed common issues that some problems with the statement of claim emerge. I will refer further to this in connection with the requirements of sections 5 (1) (b) and 5 (1) (c).

[25] A further argument on which counsel for the defendants relied was that the provision, continuation and amendment of the Benefits pursuant to the Orders In Council were exercises of the Crown prerogative and as such, not actionable apart from the claim under the Charter. Although some eminent writers have advocated acceptance of a distinction between powers that are unique to the Crown and those that are enjoyed equally with private persons – with only the former being usefully classified as pertaining to the prerogative – there is support for the wider proposition that "every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of the prerogative": Dicey, *The Law of the Constitution* (10th edition, 1959), at page 445; Hogg and Monahan, *Liability of the Crown* (3rd edition, 2000), at page 16. On either view, however, it has long been established that the Crown can enter into contracts that were formerly enforceable by petition of right and now can be enforced by the equitable remedy of a declaration or, by virtue of the *Proceedings Against the Crown Act* R.S.O. 1990, Chapter P – 27, in an action.

[26] For the submission of counsel for the defendant to be accepted, it would be necessary to find either that all contracts between the Crown and its employees, or contracts made pursuant to an exercise of a prerogative – as distinct from a statutory – power are to be treated differently than other contracts. Since the decision of the Supreme Court of Canada in *Wells v. Newfoundland,* [1999] 3 S.C.R. 199, the notion that contracts between the Crown and its employees will not be enforceable by the latter – whether the contract is made in the exercise of statutory powers or powers based on the prerogative – is I believe untenable. The issue in the case was whether the holder of a statutory office could sue for breach of contract when the office was abolished by statute. It was held that, although the legislature of the province had power to override the Crown's contract with an employee, the latter's remedies for such a breach of the contract would continue to exist unless they were explicitly abrogated by the legislation that abolished the office. In delivering the unanimous judgment of the court, Major J. stated:

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord

> with the nation's understanding of the relationship between the state and its citizens.
>
> [Reilly v. The King] should be taken as turning on the interpretation given to the specific statute of abolition. To the extent it is relied upon for the proposition that the Crown can implicitly avoid its contractual obligations by indirectly legislating for a breach, it is no longer the law in Canada. A contract of employment with the Crown remains binding unless and until it is explicitly displaced by statute.

[27] The learned judge then quoted with apparent approval a passage from Professor Hogg's, *Liability of the Crown* (second edition, 1989), at pages 171-2, in which the somewhat indeterminate doctrine of executive necessity – one that was not relied on in this case – was criticized on the ground that, even where a government has sound reasons of policy for abrogating a contract, it should be liable to compensate the other party.

[28] I note also that the question was not addressed by Laskin C.J. in *Nova Scotia Government Employees v. Civil Service Commission* (1981), 119 D.L.R. (3d) 1 (S.C.C.), at page 10 – the authority cited by defendant's counsel in his factum.

[29] Nor do I believe that counsel's submission is supported by the reasoning in *Black v. Chretien* (2001), 54 O.R. (3d) 215 (CA.) – another case on which he relied. The claims in that case were based on an alleged abuse of power, misfeasance in public office and negligence, and not on contract. However the Court of Appeal endorsed a distinction drawn by Lord Roskill in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H L), at 417 between issues that are " amenable to the judicial process" and those which are not and the further statement that an exercise of a prerogative will be amenable to the judicial process if it affects the rights or legitimate expectations of individuals. Laskin J.A. stated:

> Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative. (at page 232)

[30] The conclusion of the Court of Appeal on the facts before it was stated earlier in the reasons of Laskin J.A. in terms that deny that there is any relevant distinction between statutory and prerogative powers:

> I agree with Mr. Black that the source of the power – statute or prerogative – should not determine whether the action complained of is reviewable. However, in my view, the action complained of in this case – giving advice to the Queen or communicating to her Canada's policy on the

> conferral of an honour on a Canadian citizen – is not justiciable. (at pages 229-30)

[31] Although neither Wells, nor Black, was concerned directly with whether agreements that would be enforceable by an employee against an employer other than the Crown will be enforceable if made by the Crown in an exercise of the prerogative – in the wider sense – I do not believe the reasoning in those cases leaves any room for the proposition that the Crown will be immune from liability in such a case. Wells is authority that the Crown is bound by its employment contracts entered into under statutory authority while the Court of Appeal in Black denied that justiciability will vary according to whether a power exercised by the Crown was authorized by statute or under the prerogative. In the light of these principles, it would be extremely anomalous if the enforceability of the employment agreements of Crown employees varied according to their source in the prerogative, on the one hand, or statute on the other. As Laskin C.J.C. commented in *Nova Scotia Government Employees* in connection with the suggestion that the Crown has a right to dismiss its employees at pleasure notwithstanding the terms of its agreements with them:

> The law in Canada, in Canadian provinces, as well as in other common-law jurisdictions has gone far down the road to establishing a relative equality of legal position as between the Crown and those with whom it deals, too far in my opinion to warrant a reversion to an anachronism. (at page 9)

(b) Breach of fiduciary duty

[32] The claim that, by reducing the Benefits as of June 1, 2002, the Crown breached a fiduciary duty owed to the plaintiff is made in the following paragraphs of the statement of claim:

> 18. The Defendant was in a position of trust and confidence in relation to employees who had worked for it for many years. The Retirees understood that certain benefits had been promised to them and reasonably expected that the Defendant would act in their best interests with respect to those Benefits.
>
> 19. Moreover, the Retirees, no longer active employees in a position to negotiate benefits with the Defendant, were in a position of peculiar vulnerability in relation to the Defendant's control over their benefits. They were also particularly vulnerable as a result of their advanced age and susceptibility to health problems, and their limited capacity to assume increased financial burdens as a result of their retired status.
>
> 20. The Retirees state that the Defendant accordingly owed them a fiduciary duty with respect to their benefits. The Retirees relied on their

> reasonable expectation that the Defendant would act in their best interests and the Defendant's unilateral action to reduce such benefits was contrary to their best interests.

[33] The question whether the claim for breach of fiduciary duty can withstand an application of the test in Hunt depends, again, on the pleadings and these must be read on the basis of an assumption that the allegations of fact pleaded would be proven at a trial. Applying this approach, I am of the opinion that the above paragraphs - read in the light of the statement of claim as a whole - disclose a cause of action within the meaning of section 5 (1) (a).

[34] I accept that the relationship of employer and employee is not one of those that La Forest J. described in *Hodgkinson v. Simms*, [1994] 3 S. C. R. 377, at page 409 as having "as their essence discretion, influence over interests, and an inherent vulnerability" and as thereby giving rise to "a rebuttable presumption arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party".

[35] It follows that, in a case like this - quoting again from the reasons of La Forest J. (at pages 409-10):

> The question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust [are] non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[36] This analysis was applied by Blair J. in *Re Attorney-General of Canada and Confederation Life Insurance Company* (1995), 24 O.R. (3d) 717 (G.D.), at pages 763 - 4 where, after noting that the employer - employee relationship may have aspects of power dependency that distinguish it from other contracts, but that the relationship is not *per se* fiduciary, the learned judge concluded:

> The search for a fiduciary element in the employer - employee relationship, then, must move to the fact-driven analysis articulated by La Forest J. in Hodgkinson. Does a fiduciary obligation, although "not innate" to the relationship "arise as a matter of fact out of the specific circumstances of [the] particular relationship"? To assess this question, one must ask: was it within the reasonable expectation of the parties that the employer would forsake its own interests and oblige itself to act solely in the interests of the employee in relation to the matter in question?

[37] My function on this part of a motion is not to consider - let alone weigh - the evidence that may bear on the reasonable expectations of the parties. The question under section 5(1)(a) is to be decided on the pleadings. There may, perhaps, be issues with respect to the nature and degree of power dependency in relation to the Benefits and to the "peculiar vulnerability" referred to in paragraph 19 of the statement of claim. Attention may also need to be given to the statement of Sopinka J. in *Lac Minerals Ltd v. International Corona Resources Ltd,* [1989] 2 S.C.R. 574, at page 597 that fiduciary obligations "must be reserved for situations that are truly in need of the special protection that equity affords". However, on the present state of the authorities in this developing area of the law I do not believe it is plain and obvious that the claim for breach of fiduciary duty, as pleaded - in paragraphs 18 and 20 of the statement of claim in particular - cannot succeed. I do not accept that the pleading is seriously defective - as counsel for the defendant submitted - in that the reliance referred to in paragraph 19 is not explicitly stated to have occurred prior to retirement or on the ground that "matters akin to trust, reliance and vulnerability are inherently individual in nature". Nor do I accept the submission that the terms of Order in Council 162 / 91 - which must be read as part of the statement of claim - are a complete answer to the claim for breach of duty. For the purpose of this motion, I must accept the allegation in the statement of claim that neither the existence nor the terms of the Order in Council were ever communicated to the Retirees prior to their retirement and I am not prepared to find that this is irrelevant to a determination of the reasonable expectations of the parties.

(c) Breach of Section 15 of the Charter

[38] I am satisfied that the constituent elements of a claim under section 15 (1) of the Charter have been pleaded. It is alleged that:

1. The changes made as of June 1, 2002, constituted a denial of Benefits which disproportionately impacted the Retirees as a result of their relative age, consequential health problems and financial vulnerability;

2. The Retirees were also in a disadvantageous position as compared with active employees in that they were not able to negotiate with the Crown, to obtain employment with more favourable Benefits elsewhere or to negotiate wage increases; and

3. The reduction in Benefits has demeaned their human dignity.

[39] In their factum, counsel for the defendant challenged the adequacy of the pleading principally on the ground that the reductions did not impose a burden, or deny a benefit, in a manner that affronts human dignity because the effect of all of the changes made as of June 1, 2002 was to maximise the overall benefit to the Retirees. Whether this is so, and whether the other allegations in the statement of claim can be proven are, in my opinion, matters that cannot properly be determined on this part of the certification motion for which evidence is not admissible. I make the same comment with respect to the defendant's submissions that the link with the Benefits available to active employees

represented the only practical approach available to the Crown, that it had been beneficial to the employees over the years and that the changes represented an attempt by the Crown to contain future cost increases.

[40] Counsel for the Attorney-General relied on the decisions of the Court of Appeal in *Ferrel v. Ontario (Attorney-General)* (1998), 42 O.R. (3d) 97 and *Lalonde v. Ontario* (2001), 56 O.R. (3d) 505 for the proposition that section 15 (1) of the Charter does not prevent the repeal or other revocation of a law, or governmental act, implementing a regime that was not established pursuant to any obligation imposed by the constitution of Canada.

[41] I do not believe it necessarily follows from those decisions that, once a plan for the provision of Benefits was in place, it could with impunity be amended in a manner that offends the Charter. The implications of the decisions will no doubt be explored in the future but, again, for the purposes of section 5 (1) (a), I do not believe it is "plain and obvious" from them that the plaintiff's claim based on section 15 (1) must fail. It has been held that questions of law that are not fully settled in the jurisprudence should not be disposed of on motions under rule 21.01(1)(b): *Toronto-Dominion Bank v. Deloitte Haskens & Sells* (1991), 50 O.R. (3d) 417 (G.D.); and I believe the same principle must apply to questions that arise under section 5 (1) (a).

[42] Moreover, in this case, the Charter claim is based on an alleged distinction, or differential, between the position of Retirees and active employees. The alleged discrimination is said to be found not in any difference in the Benefits available to each but, rather, from the fact that the Benefits in each case are exactly the same. It is said to arise from a disproportionate impact of the changes to the Benefits on the Retirees. The plaintiff claims, in effect, that there is discrimination because the burden of the reductions falls more heavily on the Retirees as their needs are greater and, in consequence, that they should be entitled to greater Benefits than the active employees.

[43] The claim is, therefore, essentially that there is "adverse effect discrimination" in the sense described by McIntyre J. *in Ontario Human Rights Commission v. Simpson-Sears Ltd,* [1985] 2 S.C.R. 536, at page 551:

> It arises where an employer for genuine business reasons adopts a rule or standard that is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees...

[44] In *Eldridge v. British Columbia (Attorney General)* (1997), 151 D. L. R. (4th) 577, at page 662, La Forest J. commented:

> This court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from expressed distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not

> establish a claim of discrimination based on the adverse effects of a factually neutral benefits scheme. Section 15 (1) expressly states, after all, that every individual is "equal before and under the law *and* has the right to the equal protection and equal benefit of the law without discrimination..." (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits.

[45] The questions (a) whether the alleged adverse effects exist and amount to a denial of equal benefits; (b) whether they are to be attributed to one of the enumerated grounds in section 15 (1) - in this case the age of the Retirees; (c) whether the human dignity of Retirees has been materially infringed; and (d), if so, whether the discrimination can be justified under section 1, are not matters that, in this case, can properly be dealt with solely on the basis of the pleadings. As Iacobucci J. said in *Symes v Canada*, [1993] 4 S.C.R. 695, at pages 764 - 651.

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between the effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

[46] In *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4^{th}) 1 (S.C.C.), the same learned judge stated:

> In every case ... a court's central concern will be whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim. In order to succeed under s.15 (1), it is up to the claimant to ensure that the court is made aware of this context in the appropriate manner. (at page 36)

[47] The plaintiff is, in my opinion, entitled to have an opportunity to provide the court with the contextual evidence to which Iacobucci J. referred and, if she can, to make out her case on that basis. The objectives implicit in the legislative endorsement of class proceedings should not be defeated by expanding the inquiry in section 5(1) (a) beyond the limits established by Hunt.

2. Existence of a class and common issues

[48] It will be convenient to deal with the requirements of section 5 (1) (b) and 5 (1) (c) together.

[49] In the slightly revised form provided in paragraph 2 of the notice of motion the proposed class is defined as

> All persons retiring after August 28, 1974 and eligible to receive retirement benefits from the Ontario Government as set out in the Supplemental Health and Hospital Insurance, Dental and Life Insurance Plan in effect immediately prior to June 1, 2002

[50] One of the grounds on which counsel for the defendant challenged the adequacy of this definition is that, as drafted, membership will depend on the outcome of the litigation:

> The class definition presupposes entitlement to receive Benefits when the source and nature of the "entitlement" is the very issue at play in the litigation.

[51] While I think it is possible to read the proposed class definition in that way, the problem would disappear if the definition was altered so that it began "All persons retiring after August 28, 1974 who were eligible etc". This, I believe, is more likely to have been the intention of the drafter of the statement of claim.

[52] As set out in the notice of motion, the proposed common issues are:

1. Did the Class Members' benefits vest upon retirement?

2. If the Class Members' benefits vested upon retirement, is the Defendant able to rely on Order in Council 162/91 in defence of its reduction of the benefits provided to Class Members?

3. If improvements to Class Members' benefits took place after retirement, is the defendant entitled in law to reduce or eliminate such benefits?

4. Does the reduction in benefits violate the equality rights of class members pursuant to section 15 of the *Canadian Charter of Rights and Freedoms*?

5. Have all class members, or some identifiable subset of them, suffered damage?

6. Are the Class Members entitled to damages on an aggregate basis equivalent to the total savings realized by the Defendant?

7. What are the total savings which the Defendant has realized as a consequence of the June 1, 2002 benefit changes?

[53] I understand the word "vested" in the first of the proposed common issues to refer to the concept of vesting described by La Forest J. in Dayco in the following passage:

> While an employee continues to be a part of the bargaining unit, he or she is of necessity subject to the vicissitudes of a collective bargaining process. However,

> on retirement a worker withdraws from that relationship, and at that point his or her accrued employment rights crystallize into some form of "vested" retirement right. It is quite possible that this right may only be enforceable through collective action by the union on the retiree's behalf. However, if that is the case, this arises out of structural peculiarities of our labour law system rather than any apparent point of principle." (at pages 637 - 8)

[54] Later in his reasons, after considering American case law relating to vested retirement benefits, the learned judge commented:

> In my view, the different labour relations structures in the two countries point to only one potential difference in the conception of "vested" retirement benefits. This difference aside, the following propositions hold true in both countries: retirement benefits are in the nature of accrued rights; those benefits may (depending on the terms of the [collective] agreement) vest; and the vested rights can be enforced by union grievance on behalf of retirees. The sole difference is remedial in nature. In the United States the term "vested retirement benefits" connotes a right that is enforceable at the instance of an individual retiree, without resort to assistance from his or her former bargaining agent. Such enforceability may not be available in Canada, although I find it unnecessary to decide that point in this appeal. (at page 643).

[55] One of the issues before the Supreme Court of Canada in Dayco was whether retirement rights contemplated by the terms of a collective agreement can continue to be enforceable after the termination of the agreement. After giving an affirmative answer to this question, La Forest J. added:

> Moreover, although it is not strictly necessary to decide the point in this appeal, I would also find that these surviving rights vest at the time of retirement, and would survive subsequent collective bargaining that purported to divest such rights (at page 659)

[56] While I have no hesitation in accepting the first of the proposed common issues - compare Ormrod at page 301 - I believe that the question of standing that arises from the existence of collective agreements affecting some members of the class should, as in Ormrod, be dealt with at the trial of common issues. For this purpose, and in order to raise the question of liability more directly if proposed common issues #s 1 and 2 are resolved in favour of the Retirees, I would include the following after issue No. 3:

> Was the reduction in benefits a breach of a contractual, fiduciary or other duty owed to Class Members that is enforceable by them in this court.

[57] The third of the proposed common issues accommodates the inclusion of persons who retired at any time after 28th August, 1974 in the proposed class. As I have indicated, there is evidence that was not disputed that Benefits were augmented at various

times between that date and June 1, 2002. The declaration requested in paragraph 1 (a) of the statement of claim would confirm the entitlement of all members of the proposed class to the Benefits in place immediately before June 1, 2002 even though such Benefits included enhancements made after particular members retired. The only difficulty I see with this is that the material facts pleaded in the statement of claim contain no reference to the improvements made to the Benefits over the years and the entitlement of Retirees who retired before they were made. Read literally, the statement of claim appears to refer to one set of Benefits contained in one Guide or booklet so that, upon retirement, each Retiree obtained a vested right to precisely the same Benefits irrespective of such member's date of retirement after August 28, 1974. For the purpose of this motion, I do not consider this to be a crucial defect in the pleading. At this stage of the proceedings the plaintiff is entitled to amend the statement of claim without leave in order to plead the enhancement of Benefits over the period and the factual and legal bases for a Retiree's entitlement to improvements in Benefits made after the date of retirement.

[58] Proposed common issues #s 4 and 5 are raised by the pleading and satisfy the requirement of commonality.

[59] Counsel for the defendants submitted that the class is over-inclusive because some members would not have suffered any loss. Some may, for example, never take advantage of available Benefits, require only Benefits that have not been reduced or have access to Benefits through their spouses - or their own present - employment. To this objection, the response of plaintiff's counsel was that every member of the class would suffer in a sufficient sense if Benefits are reduced as such Benefits will no longer be available if, and when, they are needed. I accept that submission. If damages are awarded at a trial of common issues, the court might find it appropriate to award them on an aggregate basis. If not, the fact that some members of the class may not be able to quantify their claims should not preclude others from recovering.

[60] As is now traditional on motions for certification, counsel for the defendants also submitted that a trial of common issues would not avoid the need for such a degree of fact-finding and legal analysis relating to the claims of each member of the class that resolution of the proposed common issues would not materially advance the litigation.

[61] Counsel for the defendant provided a list of factors that, in his submission, demonstrated that there is no suitable common issue. Some of these referred to factual differences affecting members of the proposed class that, in my judgment, are not relevant to, and do not detract from, the existence of commonality. Some refer vaguely, and without specifics, and material supporting evidence, to variations in the positions of different members arising, for example, from "a detailed historical matrix of information, written and oral representations concerning the entitlement to retirement benefits and the fact that benefits could change" and the possibility that, because of differences in the wording of the Orders in Council, their effect, if any, may not be identical for all class members. The defendant has not, in my judgment, identified relevant variations in the information provided – or representations made – on behalf of the Crown, or in the terms

of the Orders in Council, that would be relevant to a determination of the reasonable expectations of different Retirees.

[62] One individual issue that might possibly give rise to some difficulty is the assessment of damages in the event that the Retirees are found to have obtained vested rights on retirement and an aggregate award of damages is not made. However, I am not prepared to assume that the defendant would ignore the finding with respect to vesting and, unless it were to do this, I do not believe the determination of damages on an individual basis is likely to prove difficult. If the Benefits were restored, the damages recoverable by Retirees would, presumably, be limited to the additional costs they incurred after June 1, 2002. Counsel for the plaintiff stated in their factum that their client "would not be seeking damages for foregone opportunities (whether they be dental appointments not attended or vacations not taken), and would be giving full credit for any improvements made to the Plan."

[63] Proposed common issue # 6 would ask the court at a trial of the common issues to decide whether this is a case in which an aggregate assessment of damages on the basis of the total savings realised by the defendant would be appropriate. Common issue # 7 addresses the quantification of any such saving. I do not accept that this question should be considered to have been pre--emptied by an affidavit sworn on our behalf of the defendant that denies that any saving was achieved as, at his cross-examination, the affiant, on the advice of counsel, took the position that the point was irrelevant and declined to answer questions on it. In the circumstances of this case, the comments of Professor Garry D. Watson Q. C. may well be in point:

> Aggregate assessment provides a particularly effective way of assessing damages where individual claims are small or where there is no economical way of determining each member's individual loss": Watson and McGowan, *Ontario Civil Practice 2003, Forms and Other Materials*, page 795.

[64] I see no reason why common issues #s 6 and 7 should not be raised for consideration by the court at a trial. This is not a case where, as in *Chadha et al v. Bayer Inc., et al* (2003), 63 O.R. (3d) 22 (C. A.), the issue relating to an aggregate assessment of damages would necessarily beg the question whether the plaintiffs or some other persons had suffered a loss necessary to establish liability. Here, as I have indicated previously, there is a sense in which every member of a class will be adversely affected if the reduction in benefits was a violation of their rights.

[65] Overall, I am persuaded that a resolution of the common issues – in favour of, or against, the plaintiff - will substantially advance the litigation.

3. The preferable procedure

[66] It is estimated that there are approximately 51,000 members of the class whose losses will vary but will typically be measured by hundreds, rather than thousands of

dollars. As, for such persons, the cost of individual actions is likely to be prohibitive and as a resolution of common issues will determine the question of liability, the goal of access to justice should be substantially achieved by a class proceeding. The submissions of defendant's counsel to the contrary were very largely based on the asserted difficulties of assessing damages on an individual basis that I have already referred to. In addition, the defendant relies on decisions such as *Buffett et al v. Ontario (Attorney General)* (1990), 42 O R. (3d) 53 (G. D.), 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 (S. C. J.).

4. The representative plaintiff and the proposed litigation plan

[67] A continuing theme in the submissions of defendant's counsel was that the interests of Ms Kranjcec are not the same as - and would conflict with - those of other members of the class whose particular needs might be better addressed by the Benefits introduced as of June 1, 2002. This possibility has particular relevance to the question whether Ms Kranjcec can properly be appointed to represent such other members. Pursuant to section 5 (1) (d) (iii), this cannot be done if she has "on the common issues for the class, an interest in conflict with the interests of other class members." It is, I believe, clear that the suggested conflicts could concern only the changes made as of June 1, 2002 as no Benefits were reduced prior to that date and the plaintiff's claim includes all benefits previously in place. However, it is no part of the claim that improvements in Benefits introduced as of that date are, or are not, enforceable by members of the class. The claim relates exclusively to the power of the defendant to reduce benefits in place before June 1, 2002 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.

[68] 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.

[69] 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.

[70] The plaintiff's proposed litigation plan is acceptable for the purpose of this motion with the necessary proviso that modifications and changes may be required as the proceedings progress. In its present form, the plan is, to a large extent, premised on an assumption that an aggregate award of damages will be made at the trial of the common issues. Whether procedures for a determination of damages on an individual basis will be required will not be known until the common issues have been tried and the correctness of the plaintiff's assumption has been decided. If they are required, the choice of the most appropriate, and efficient, procedures will be affected by the manner, if any, in which the other common issues are resolved in favour of the plaintiff.

[71] As I indicated earlier in these reasons, I do not anticipate that significant problems in devising such procedures are likely to arise if the plaintiff is successful in establishing that the Benefits vested on retirement and that the defendant's reliance on the Order in Council is unfounded. In the circumstances, I believe it would be premature to require further crystal-ball gazing at this point. Section 25 of the Act gives the trial judge ample authority and powers to deal with the question if and when it arises.

[72] The proposed timetable is very tight and may be unduly optimistic. This, and any other outstanding matters, may be discussed at a case conference to settle the terms of the formal order certifying the proceedings - including the costs of providing notice to class members. Any amendments to the statement of claim are to be made prior to the conference.

[73] For the above reasons, I find that the statutory requirements for certification of the action as a class proceeding are satisfied. Subject to the matters to be dealt with before, and at, the case conference to which I have referred, the relief sought in the plaintiff's motion is granted. Costs may be spoken to at the conference or, if the parties would so prefer, I will accept written submissions on behalf of the plaintiff within 30 days of the release of these reasons. Defendant's counsel will have a further 14 days in which to reply.

CULLITY J.

Released: January 7, 2004

COURT FILE NO.: 02-CV-238484CP
DATE: 20040107

ONTARIO

SUPERIOR COURT OF JUSTICE

BARBARA KRANJCEC, on her own behalf and on behalf of all retired former employees of the Ontario Government receiving coverage under the Supplementary Health and Hospital Insurance, Dental and Life Insurance Plan as of June 1, 2002

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

CULLITY J.

Released: January 7, 2004