

**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**

Plaintiffs

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Defendant

**Proceeding under the *Class Proceedings Act, 1992***

**AFFIDAVIT OF CHARLES M. WRIGHT**

I, **Charles M. Wright**, of the City of London, in the County of Middlesex,  
MAKE OATH AND SAY:

1. I am a partner with the law firm of Siskind, Cromarty, Ivey & Dowler<sup>LLP</sup>, which, along with Cavalluzzo Hayes Shilton McIntyre & Cornish<sup>LLP</sup> is Class Counsel in this matter, and as such have knowledge of the matters to which I hereinafter depose. Where I make statements in this affidavit which are not within my personal knowledge, I have identified the source of that information and belief. All of the information I have deposed I verily believe.

2. This motion is for an order approving the settlement agreement (“Settlement Agreement”) between the parties. Terms defined in the Settlement Agreement have the same meaning herein. A copy of the Settlement Agreement and its appendices is attached hereto as Exhibit **“A”**.

## **I. Background**

3. This action was brought by the representative plaintiff, Barbara Kranjcec, on behalf of approximately 51,000 retirees of the Ontario government (the “Retirees”) who receive extended health and dental benefits from the government. Following the certification motion, 1098 persons opted out of the class proceeding, leaving a class of approximately 50,000 retirees.
4. The plaintiff commenced this action after the government unilaterally reduced the Retirees’ health and dental benefits, effective June 1, 2002. The plaintiff claimed that the reductions were contrary to a binding promise made to Class Members and in breach of its fiduciary duty to Class Members. The Amended Statement of Claim (amended after the certification motion) is attached hereto as Exhibit **“B”**.

## **II. Conduct of the Litigation**

5. Even in the face of a very large class and novel legal issues Class Counsel have consciously strived to advance this proceeding at a rapid pace throughout. The Class Members, by definition, are an aging population and may not benefit from protracted litigation and appeals.
6. The defendant has vigorously defended this action. The defendant contested the certification motion, resulting in the cross-examination of seven affiants, including the representative plaintiff. Extensive records and facta were filed. Argument

before the Honourable Mr. Justice Cullity took place over three days. The plaintiff was successful in having the class certified. Attached hereto and marked as Exhibit “**C**” is a copy of the decision on the certification motion, dated January 7, 2004. Attached hereto and marked as Exhibit “**D**” is a copy of the certification Order dated January 7, 2004.

7. Following the release of the decision on the certification motion, the defendant served an extensive Demand for Particulars of the plaintiff, to which the plaintiff replied. The defendant then filed a Statement of Defence. Attached hereto and marked as Exhibit “**E**” is a copy of the Statement of Defence.
8. The parties completed documentary discoveries, which included the production of 343 documents by the defendant, which were reviewed by Class Counsel.
9. In addition, Class Counsel completed an examination for discovery of the defendant's representative, John Goodman, over two days. At the examination for discovery, the defendant refused to provide various requested documents, claiming cabinet privilege. The plaintiff filed a motion for an order requiring the defendant to produce the requested documents and to answer undertakings. Shortly before the motion date, the defendant agreed to produce the disputed documents and to comply with its undertakings.
10. Arising from the examinations for discovery, the defendant provided answers to 62 undertakings, including the production of numerous further documents which were reviewed by Class Counsel. Dates for the examination for discovery of class representatives had been scheduled but had not yet taken place when the parties reached a settlement.

11. For the most part, it was Class Counsel's opinion that evidence obtained during the discovery process did not significantly change the factual outline presented to the court at the motion for certification. Specifically, the plaintiffs' view of the evidence was that:
  - a) There was no explicit advice given to the class or any specific member of it that their post-retirement benefits would be reduced;
  - b) There was no explicit advice given to the class or any specific member of the class that their post-retirement benefits would be preserved without change;
  - c) There was no specific language which promised retirees that their benefits could be increased; and
  - d) The phrase "you will receive" dominated information disseminated to Class Members at or around the time of their retirement.
12. In December, 2005, Class Counsel reached an agreement with the defendant whereby the common issue which related to the alleged breach of the *Charter of Rights and Freedoms* would be dismissed on a without costs basis. This agreement was made to simplify the proceeding and thereby facilitate an early trial.
13. The trial of this matter was scheduled to take place over a three week period in November, 2006.
14. Class Counsel retained two experts over the course of the litigation. Fred Holmes, the former National Practice Leader, Group Health & Welfare Benefits for Buck Consultants and former senior benefits consultant at Towers Perrin and Mercer in their group benefits practices, provided advice on the benefits issues in this action. In addition, in order to obtain advice on the aggregate damages, we retained Cara

Brown, principal of Brown Economic Consulting Inc. and author of *Damages: Estimating Pecuniary Loss*, which is the leading Canadian text on determining damages. Attached hereto and marked as Exhibit “F” are copies of the curriculum vitae of both experts.

15. Members of our firm have spoken with approximately one hundred Class Members. I am advised by Shaun O’Brien, an associate at Cavalluzzo Hayes Shilton McIntyre & Cornish <sup>LLP</sup> who has been involved in this matter on behalf of her firm, and verily believe, that members of her firm have spoken with over 1,000 Class Members through the course of this action. The Class Members we have spoken with have generally been very supportive of the action and have been concerned with the government’s reduction of their benefits. As the litigation progressed, Class Members also expressed concern about the time it was taking to obtain a remedy. I am advised by Ms O’Brien and verily believe that members of her firm have had similar communications with Class Members.

### **III. Risks of Litigation**

16. The following common issues were certified by the Court:
  - a) Did the Class Members’ benefits vest upon retirement?
  - b) 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?
  - c) If improvements to Class Members’ benefits took place after retirement, is the Defendant entitled in law to reduce or eliminate such benefits?

- d) 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?
  - e) Does the reduction of benefits violate the equality rights of Class Members pursuant to s. 15 of the *Canadian Charter of Rights and Freedoms*?
  - f) Have all Class Members, or some identifiable subset of them, suffered damages?
  - g) Are the Class Members entitled to damages on an aggregate basis equivalent to the total savings realized by the Defendant?
17. The Defendant has raised numerous substantive defences to the common issues, including the following:
- a) The Ontario Government did not enter into a binding promise or contract with its retired employees. There were no individual contracts or collective agreements dealing with the benefits and no negotiation of terms and conditions for the provision of benefits. Employees/retirees provided no consideration for the provision of benefits. Rather, the Government provided the benefits voluntarily and gratuitously. Accordingly, retirees are not in a position to enforce the benefits.
  - b) The Ontario Government was not in a fiduciary relationship with retirees. Employer-employee relationships are not *per se* fiduciary and there was no evidence of a mutual understanding that the Government would relinquish its self-interest and agree to act solely on behalf of the retirees. The Government was required to balance the interests of retirees against those of others competing for scarce fiscal resources and there could be no

reasonable expectation that it would subordinate its interests, and those of others it serves, to retirees.

- c) There is no statutory regime for the vesting of retiree benefits and the benefits did not presumptively vest. *Dayco v. C.A.W. Canada*, [1993] 2 S.C.R. 230 does not hold that retiree benefits presumptively vest. Rather, it holds that retiree benefits only vest if contemplated by the terms of the relevant contract or collective agreement. In this case, since the benefits were conferred through gratuitous and unilateral action, the right to modify or amend the benefit plan was reserved. In addition, the notion of retiree benefits as deferred compensation which cannot be subsequently bargained away does not hold here, where the benefits were not bargained in the first place, and where the plaintiff is claiming a right to improvements which were granted post-retirement.
- d) Vesting of retirement benefits under an agreement does not necessarily mean that the scope of the benefits must remain the same. Here, the Government did not intend that the scope of benefit plan would remain frozen. Indeed, its practice of altering the plan from time to time establishes a contrary intention.
- e) The retirees did not have a vested right to the improvements in the benefits since retirement. Even if rights accrued to employees to the day of retirement, retirees should not be able to benefit from entitlements which had not yet crystallized at the time of retirement.
- f) The retirees were not entitled to calculate damages on an aggregate basis. Damages may be awarded on an aggregate basis where liability can be determined without proof of individual loss. In this case, the impact of the benefit changes on retirees varies by individual, since each retiree has

individual medical conditions. In addition, some retirees will have coordination of benefits with a spouse or new employer while some retirees do not use their benefits. Accordingly, individual proof of loss is required.

18. Class Counsel was aware of most if not all of the defendant's arguments when we commenced the case, and yet we believed there was a reasonable prospect of success. However, the issues were novel and we recognized that a court could have decided the issues in favour of either party. Further, Class Counsel recognized that the defendant could succeed on just a minority (or even one) of its defences and still prevail in the action.
19. In addition to the risks associated with the defendant's substantive defences, the plaintiff was concerned that, even assuming her success at trial, the defendant would file an appeal, possibly pursuing the appeal process over several years to the Supreme Court of Canada. Meanwhile, the plaintiff class, which relies heavily on its benefits, is aging. The class includes members who retired as long ago as 1974 and, therefore, are, in some cases, more than 80 or 90 years of age. In some cases, Class Members have died since the commencement of the action, or have already lost a spouse who was entitled to the benefits. As indicated above, Class Members have advised us, and we have been aware throughout this case, that the passage of time is an important factor for them.
20. There were also significant difficulties which Class Counsel encountered in attempting to determine the quantum of the aggregate damages suffered by the Class. Class Counsel had an opportunity to obtain all of the relevant reports generated by the Defendant's claims administrator, Great West Life Assurance Company. The expert retained by Class Counsel, Brown Economic Consulting Inc., advised us that it was necessary to make broad assumptions regarding the impact of benefit plan changes and that a specific calculation was not possible due to the limitations in the available data. Among other difficulties, we were advised by Brown

Economic Consulting Inc. that the available data had the following shortcomings: it did not exclude individuals who may have opted out of the action; it did not provide sufficient demographic information for the class members such as age, gender, and the age of spouses; and it did not provide a detailed breakdown of claims history, which is the best predictor for future costs. Leaving aside the significant expense and time involved in obtaining the data necessary to quantify the damages, the available data bases and resulting reports did not break down claims experience in sufficient detail to allow for specific calculations. In short, we were advised that a broad approach with a number of assumptions was required which in the end could only yield a rough estimate of the damages.

21. In the event that the plaintiff could not obtain a reliable expert opinion which assessed aggregate damages, Class Members may have been required to file individual damage claims. Although this could have been accomplished through an expedited "paper" process, the following hurdles may have been problematic:
  - a) Individual losses were modest in many cases and therefore many Class Members would likely not engage in the process;
  - b) Damages could not necessarily be calculated simply as the additional costs borne by class members. Simultaneous improvements in the benefit plan would potentially have to be accounted for;
  - c) Many Class Members would not have the necessary records to support an individual proof of loss;
  - d) With respect to the reduction of out-of-country coverage, Class Members could have to prove that the cost of purchasing similar insurance was a loss (and if so, what product would be "similar"), and/or that a claim for actual

medical costs incurred out-of-country are compensable (or whether such a loss ought to have been mitigated); and

- e) Whether and to what extent the defendant and the entity which administers the Plan would be required to disseminate its records, pay costs of administration, and otherwise cooperate in facilitating a claims process.

#### **IV. The Settlement Agreement**

- 22. Despite several attempts by Class Counsel to discuss resolution with the defendant, no concrete discussions took place until a full-day pre-trial was convened before the Honourable Justice W.K. Winkler. The parties' positions were not reconcilable at the pre-trial. During a further day of discussions, approximately five weeks after the pre-trial, an agreement was reached and a Memorandum of Understanding was executed.

##### **(A) Key Settlement Terms**

- 23. The Settlement Agreement provides for a total payment to the "Settlement Class" in the amount of \$20,000,000. The "Settlement Class" is defined in the Settlement Agreement as "all persons retiring after August 28, 1974 who were 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 and who have not validly opted out of the Settlement Class." This money was paid into trust on or about March 23, 2006, and as of May 31, 2006 had earned interest of \$165,699.26.
- 24. While the final settlement figure was very much a product of the give and take of negotiations, in addition to the various litigation risks referenced herein, Class Counsel did consider the following:

- a) Plaintiffs' assessment of the estimated savings experienced by the Defendant as a result of the changes to the benefit plan in 2002 were approximately \$20 million to the time of the pre-trial conference;
- b) While the plaintiffs had an opinion from Brown Economic Consulting Inc. that a complete "win" at trial could result in an aggregate damages award in excess of \$150 million, that figure could be significantly reduced in the face of the following:
  - i) a court could fail to award Class Members damages for benefits which were conferred through improvements to the plan which occurred after their retirement, which was a significant concern for benefits such as dental coverage, which was only introduced in 1985 (i.e. 11 years after the first Class Members retired);
  - ii) a court could require Class Members to give credit for improvements negotiated in 2005 and/or potential future improvements (or find that any future losses had not crystallized at the time of trial because they might be negotiated away at a later date); or
  - iii) the plaintiffs may not have been able to provide a sufficiently reliable figure for aggregate damages (which was a concern given the relatively poor data available); and
- c) What amount would serve as a sufficient deterrent to assist the class by affecting and potentially modifying future behaviour.

25. The Settlement Agreement also provides that Class Members will be entitled to all new benefits negotiated by OPSEU and the Ministry of Government Services during collective bargaining in 2005. These new benefits include increased vision care,

expanded coverage for diabetic equipment (eg. insulin pumps) and a new drug benefit card. The drug benefit card means that users will only be required to present their card and pay the applicable deductible or co-insurance when filling prescriptions, rather than incurring the expense of the prescription up-front, and receiving reimbursement at a later date. The Settlement Agreement requires that all new benefits be implemented as soon as practicable and no later than November 30, 2007.

26. The Settlement Agreement includes a release of any claims arising from the June 1, 2002 benefit reductions. However, it does not release claims in respect of any future benefit reductions implemented by the defendant. It is the opinion and hope of Class Counsel that the within proceeding, including the certification of the matter, will serve to discourage the Defendant from making any further reductions to the benefit plans.

**(B) Distribution of Settlement Benefits**

27. The total Settlement Amount, including interest but less Class Counsel fees, disbursements, and taxes, notice and administration, and withholding for taxes payable, will be paid to Class Members on a per capita basis. Class Members will receive payment by either direct deposit or direct mail (however their monthly pension benefit is received), without the need for them to complete a claim form or to submit any evidence.
28. Class Counsel had not initially intended for the settlement benefits to be distributed on a per capita basis. We initially sought to devise a distribution plan whereby Class Members would receive a proportion of the settlement proceeds in relation to the loss they had suffered. Each of the following plans was considered, but ultimately rejected, by Class Counsel: (1) a contingency fund which would allow those with extraordinary losses to apply for additional recovery beyond a base amount to be

paid to all Class Members; (2) a calculated refund based on records in the Defendant's possession and control; (3) a going-forward payment of deductibles from the Settlement Amount (until exhausted); or (4) tiered payments based on history, age, retirement date, or death preceding the distribution of funds.

29. Great West Life administers the retirees benefit plan. In advance of the pre-trial, Class Counsel were aware that the Great West Life database contained limited information. Class Counsel understood that this could cause a distribution complication if a settlement was reached.
30. On April 3, 2006, Class Counsel met with John Field, counsel for the Defendant, Janette Jozefacki, Lead Benefits Policy, Total Compensation Branch, Human Resources Management and Corporate Policy Division, Ministry of Government Services and Tom Rouse, Senior Account Manager, Group Marketing, Great West Life to discuss potential distribution options.
31. Mr. Rouse and Mr. Field provided us with background information about Great West Life's data systems. We were advised that Great West Life administers benefits on behalf of the government, but does not provide them with insurance. Great West Life pays and adjudicates claims but it does not provide any risk assessment. Because of the nature of the services it provides, the database maintained by Great West Life contains only user names, along with very limited information about each user, including: date of birth, ID number and relation code (ie whether it is single or family coverage).
32. For the following reasons, Mr. Rouse and Mr. Field explained their view that it would be extremely difficult, if not impossible, to implement a distribution plan which differentiated between retirees:

- a) Great West Life does not have a system which allows it to run queries about different users;
  - b) Until 2005, the dental plan was administered under a separate policy from the supplementary health and hospital policy. Although all benefits are now administered under the same policy, prior to 2005, there is no merged data system to search. Moreover, the dental plan included retirees and actives, whereas the supplementary health and hospital plan was only for retirees; and
  - c) Great West Life does not have any way of isolating Class Members in its current data system. The only way to gather information about Class Members would be to obtain a complete list of Class Members from somewhere else, and build a database to perform queries about each individual Class Member (approximately 50,000). Even if one undertook that expense, Great-West Life cannot perform historical queries about individual users. Mr. Rouse explained that in any event, due to privacy and confidentiality constraints, information would not be provided to Great-West Life's customers.
33. Having heard Mr. Rouse and Mr. Field explain why they did not believe individual distributions would be feasible, we questioned Mr. Rouse, Mr. Field and Ms Jozefacki about the specific distribution options which Class Counsel had considered, and which are outlined in paragraph 28 above.
34. With respect to the option of creating a contingency fund whereby individual retirees could submit proof of their extraordinary losses, Mr. Rouse explained that Great West Life would face great challenges in retrieving information in support of the claims to the contingency fund. He anticipated that retirees would contact Great West Life for historical information since most retirees would not have kept all of

their receipts and statements. While Great West Life is capable of obtaining this information on an ad-hoc basis, it has no established query or report system to provide the information on more than an ad-hoc basis. It would be very onerous if they had a large number of these requests. Additionally, he explained that such a claim system would also be imperfect because there would be no data to account for coverage which had been removed, such as over-the-counter drugs and out of country coverage. Great West Life would be unable to provide retirees with information necessary to support proof of loss in respect of these types of coverage. Class Counsel was also aware that a contingency fund distribution plan would involve extensive administration costs for an administrator to review each claim and determine eligibility for the fund.

35. With respect to the option of creating a plan which distinguished between Class Members based on their usage, Mr. Rouse, Mr. Field and Ms Jozefacki were questioned about the possibility of conducting a query of Class Members who are non-users of the benefits – that is, those Class Members who never made a claim or at least had not made a claim since June 1, 2002. They advised that such a plan would be problematic because Class Members could not be separated in the data system. Therefore, it would be necessary to conduct a query for each Class Member from a separate list. Also, they would have to search both the previously separate dental and supplementary health and hospital plans.
36. With respect to the option of creating tiered payments based on history, age, retirement date, or death preceding the distribution of funds, we were advised that Great West Life is unable to search its database for Class Members who are deceased because Great West Life is not always made aware when a retiree dies. For example, family members may continue to submit claims if it is a family plan and, in any event, claims can be submitted for 12 months after the person's death. Mr. Rouse also noted that a person who had died might have been a disproportionately high user of the plan for the year leading up to death, so to

distinguish on that basis and provide that user with a lesser payment could result in an inequity. We were further advised that a distinction on the basis of retirement date would not be possible because Great West Life does not maintain retirement dates for its users (in addition to its inability to search the class itself except on an ad-hoc basis).

37. Finally, we discussed with Mr. Rouse the fact that Great West Life administered a claims process for two class actions involving breast implants; (i) *Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company*; and (ii) *Jones & Furneaux v. Baxter Healthcare Corporation and Baxter International Inc.* The administration costs of those processes have been in excess of \$750,000 and \$500,000 respectively and are continuing to increase. Mr. Rouse estimated that given the much higher number of Class Members in the current case, and the anticipated number of inquiries from Class Members, even if it were possible to administer a sophisticated distribution scheme which distinguished between users in this case, it would cost many multiples of the cost in the breast implant cases.
38. After our meeting with Mr. Field, Mr. Rouse and Ms Jozefacki, Class Counsel conferred and reluctantly concluded that the only sensible and equitable way to distribute the settlement proceeds was to provide an equal per capita payment to each class member.

## **V. Notice and Distribution of Settlement Funds**

39. If the Court approves this settlement, and grants an order approving Class Counsel fees and disbursements in the amount sought, it is estimated that there will be approximately \$17,000,000 available for distribution to Class Members. This would amount to approximately \$340 per class member.

40. Class Counsel has worked with the OPSEU Pension Trust and the Ontario Pension Board, as well as two separate banks, to make it possible for the vast majority of the settlement funds to be paid to class members by direct deposit into the bank account where the class member's monthly pension benefits are deposited. Any class members who do not receive their monthly pension benefits by direct deposit will receive their settlement cheques by mail.
41. The legal notice and, where there is no direct deposit the settlement cheques, will be mailed to Class Members. The mailing list has been developed in consultation with the OPSEU Pension Trust and the Ontario Pension Board. The same mailing list was used to send out the Notice of Certification and Settlement Approval. Any returned mail has been carefully monitored and therefore we are confident that a very high percentage of settlement cheques will reach the intended recipient.
42. Although there will only be a small number of cheques issued because of the prevalence of direct deposit, it is anticipated that some will never be cashed. Although the settlement provides for steps to be taken upon the receipt of returned mail, settlement cheques could be lost or become stale dated, or estates may be unidentifiable. The Settlement Agreement requires Class Counsel to take reasonable steps to replace stale dated or lost settlement cheques up to a maximum of two replacement cheques per Class Members.
43. Class Counsel anticipates retaining Distributech, a company located in Brantford and Markham, to send out the legal notice and any settlement cheques to Class Members. Class Counsel will be providing the Court with an updated estimate for this service, but is satisfied that it has obtained a cost-effective service provider.
44. Section 5.1(2) of the Settlement Agreement provides that any monies remaining in the account as a result of *inter alia* returned or uncashed cheques, on the first

anniversary of the Effective Date, will be paid to “a non-profit registered charitable group selected exclusively by Class Counsel and approved by the Court”.

## **VI. Recommendation of Class Counsel**

45. Class Counsel have extensive experience in dealing with class actions in the labour and employment context. Cavalluzzo Hayes Shilton McIntyre & Cornish Cornish<sup>LLP</sup> (“CHSMC”) is a pre-eminent employment and labour law firm. Michael Wright has over 15 years of experience in the labour and employment law field and Hugh O’Reilly, who also consulted on this case, is an expert in benefits issues, having practised in that area for the past 15 years. Shaun O’Brien, who assisted in the case as an associate lawyer, practises exclusively in civil litigation arising out of labour and employment issues. Attached hereto and marked as Exhibit **“G”** are copies of the profiles of the CHSMC lawyers who assisted with this case.
46. Siskind, Cromarty, Ivey & Dowler<sup>LLP</sup> (“Siskinds”) is a leading class action law firm. C. Scott Ritchie, the senior partner in our class action practice group, was involved in developing the strategy when this action was commenced and remained involved and apprised of developments (he was cross-examined in the context of the certification motion). Andrea DeKay, an associate from our firm who has assisted with this file, practises exclusively in the area of class actions. I have extensive experience dealing with large scale class actions and am a co-author of Class Actions Law and Practice (Butterworths, 1999). Attached hereto and marked as Exhibit **“H”** are copies of the profiles of the Siskinds lawyers who assisted with this case.
47. In developing our recommendation, Class Counsel sought input from the representative plaintiff, Barbara Kranjcec, who has sworn an affidavit in support of this motion. Class Counsel also sought input from the OPSEU Retirees Division,

