

**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

**FACTUM  
(MOTION TO APPROVE THE SETTLEMENT)**

**PART I - NATURE OF THE MOTION**

1. On this motion, the plaintiff seeks to have the settlement agreed to between the parties approved by this Court. The settlement was reached in the fourth year of this class proceeding, after the action was certified, much of the discovery process was complete, and the trial had been scheduled. No concrete settlement discussions took place until a full-day pre-trial was convened before the Honourable Justice W.K. Winkler in February, 2006. During a further day of discussions, approximately five weeks after the pre-trial, an agreement was reached and a Memorandum of Understanding was executed.

2. The Plaintiff submits that the settlement is fair, reasonable and in the best interests of the class.

## **PART II - FACTS**

### **Overview of the Action**

3. This action was brought by the representative plaintiff, Barbara Kranjcec, on behalf of more than 51,000 retirees of the Ontario government (the "Retirees") who receive extended health and dental benefits from the government.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 3

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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 4

### **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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 5

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 action certified.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 6

7. Following the release of the decision on the certification motion, the defendant served an extensive Demand for Particulars on the plaintiff, to which the plaintiff replied. The defendant then filed a Statement of Defence.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 7

8. The parties completed documentary discoveries, which included the production of 343 documents by the defendant. These documents were reviewed by Class Counsel.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 8

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 produce various requested documents, claiming Cabinet privilege. The plaintiff brought 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 9

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 examinations for discovery of class representatives were scheduled but the examinations had not taken place when the parties reached a settlement.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 10

11. In December, 2005, the parties reached an agreement whereby the common issue which related to the alleged breach of the Retirees' s. 15 *Charter* rights would be dismissed without costs. This agreement was made to facilitate an early trial. The trial of this matter was scheduled to take place over a three-week period in November, 2006.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, paras. 12-13

12. Class Counsel retained two experts over the course of the litigation. Fred Holmes is the former National Practice Leader, Group Health & Welfare Benefits, for Buck Consultants and former senior benefits consultant at Towers Perrin Inc. and William Mercer Ltd. in their group benefits practices. He provided advice on the benefits issues in this action. In addition, in order to obtain advice on aggregate damages, Class Counsel 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 14

13. Between the two law firms acting as Class Counsel, Class Counsel estimate that they have spoken and corresponded with over 2,000 Class Members through the course of this action. Class Counsel report that the Class Members they have spoken with have generally been very supportive of the action and have been concerned about 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 15

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2,  
para. 7

### **Settlement Agreement**

14. Despite several attempts to discuss resolution with the defendant, no concrete settlement discussions took place until a full-day pre-trial was convened in February 2006

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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 21

**(a) Key Settlement Terms**

15. The Settlement Agreement now entered into by the parties, subject to court approval, provides for a total payment to the class in the amount of \$20,000,000. This money was paid into trust on or about March 23, 2006. As of July 31, 2006, \$305,779.79 of interest had been earned. The current rate of interest is 4.15 percent.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 22

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2,  
para. 14

16. The Settlement Agreement also provides that Class Members will be entitled to all new benefits negotiated by the Ontario Public Service Employees' Union ("OPSEU") and the Ministry of Government Services during collective bargaining in 2005. These new benefits include increased vision care, expanded coverage for diabetic equipment (e.g., insulin pumps) and a new drug benefit card. The drug benefit card means that users will be required only to present their card and pay the applicable deductible when filling prescriptions, rather than incurring the expense of the prescription immediately and receiving reimbursement at a later date. The Settlement requires that all new benefits be implemented as soon as practicable and no later than November 30, 2007. The drug card in particular offers important financial and health benefits for Class Members.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 23

Affidavit of F. Holmes, Motion Record of the Plaintiffs, Tab 3

17. The Settlement includes a release of any claims arising from the June 1, 2002, benefit reductions. It does not, however, 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 and settlement of the matter, will serve to discourage the defendant from making any further changes to the benefit plans. It would be relatively simple and considerably more expeditious for counsel to relitigate the issues in this action.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 24

**(b) *Distribution of Settlement Benefits***

18. The total Settlement Amount, including interest but less Class Counsel fees, disbursements, taxes, notice and administration, and withholding for taxes payable on the interest, will be paid to Class Members on a per capita basis. Class Members will for the most part receive payment by direct deposit (if direct deposit is how they receive their regular pension payments), with some payments made by cheques sent in the mail. Class Members will not need to complete a claim form or submit any evidence.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 25

19. Class Counsel initially sought to devise a distribution plan whereby Class Members would receive settlement proceeds in proportion to the loss they had suffered. Each of the following plans was considered, but ultimately rejected, by Class Counsel after meeting with government and Great West Life representatives, as set out further below: (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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 28

20. 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 lack of information could cause complications in distribution if a settlement was reached.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 28

21. On April 3, 2006, after the parties reached an agreement on quantum, Class Counsel met to discuss potential distribution options with John Field, counsel for the Defendant; Jeanette Jozafacki, 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 29

22. At that meeting, the government and Great-West Life representatives provided Class Counsel with background information regarding the nature of the services Great-West Life provides and the information available through its database. It became clear that it would be extremely difficult, if not impossible, to implement a distribution plan which differentiated between Retirees, for the following reasons:

- (i) Great-West Life does not have a system which allows it to run queries about different users;
- (ii) 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, there is no merged data system to search for the period before 2005. Moreover, the dental plan included retirees and active employees, whereas the supplementary health and hospital plan was for retirees only;

- (iii) 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 the approximately 50,000 Class Members from somewhere else and to build a database to perform queries about each individual Class Member. 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, paras. 30-31

23. In spite of this information, Class Counsel questioned the government and Great-West Life representatives about the specific distribution options they had considered, as set out above. However, each option was eventually rejected due to problems caused by unavailable or imperfect information, significant cost and potentially inequitable results for Class Members.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, paras. 32-36

24. After the meeting with government and Great-West Life representatives, Class Counsel 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 37

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

25. 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 \$17,250,000 available for distribution to Class Members. This would amount to \$353.53 per Class Member.

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2,  
para. 21

26. Most settlement payments will be made by direct deposit into Class Members' accounts by the OPSEU Pension Trust or Ontario Pension Board. The remaining settlement payments will be made by cheques which will be mailed. The mailing list has been developed in consultation with the OPSEU Pension Trust and Ontario Pension Board. The same mailing list used to send out the Notices of Certification and Settlement Approval will be used to mail those settlement proceeds sent by cheque. Addresses will be updated as advised by Class Members. Any returned mail will be carefully monitored. Class Counsel are confident that, between the direct deposits and mailed settlement cheques, a very high percentage of settlement payments will reach the intended recipient.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 39

27. It is anticipated that some of the payments made by cheque will never be cashed. Although the settlement provides for the 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 Member.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 40

28. The Settlement Agreement provides that any monies remaining in the account on the first anniversary of the Effective Date as a result of, *inter alia*, returned or uncashed cheques, will be paid to a non-profit registered charitable group selected exclusively by Class Counsel and approved by the Court.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 42

### **Recommendation of Class Counsel**

29. Class Counsel have extensive experience in dealing with class actions in the labour and employment context. One of the firms representing the class, Cavalluzzo Hayes Shilton McIntyre & Cornish <sup>LLP</sup> (“CHSMC”), is a pre-eminent employment and labour law firm. Michael Wright, who has carriage of this file at that firm, has over 15 years of experience in the labour and employment law field. Hugh O’Reilly, who also consulted on this case, is an expert in benefits issues, having practised in this 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 43

30. Siskind, Cromarty, Ivey & Dowler <sup>LLP</sup> (“Siskinds”), the other firm representing the Class, is a leading class action law firm. Charles Wright, who has carriage of this matter at Siskinds, has extensive experience dealing with large scale class actions and is a co-author of *Class Actions Law and Practice* (Butterworths, 1999). C. Scott Ritchie, the senior partner in Siskinds’ class action practice group, was involved in developing the strategy when this action was commenced and remained involved and apprised of developments. In addition he was cross-examined in the context of the certification motion. Andrea DeKay, an associate from Siskinds who assisted with this file, practises exclusively in the area of class actions.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 44

31. Class Counsel have recommended this settlement to the Court.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 45

### **Endorsement of Representative Plaintiff**

32. The representative plaintiff, Barbara Kranjcec, has had extensive communication with Class Counsel throughout this litigation and, in particular, regarding the Settlement. She spoke with Class Counsel following the first day of mediation and during the course of the second day of mediation. During the second day of mediation, Class Counsel explained the proposed settlement to her. Following the mediation, Ms Kranjcec corresponded at length and had several further discussions with Class Counsel regarding the proposed settlement.

Affidavit of B. Kranjcec, Motion Record of the Plaintiffs, Tab 4, para. 3

33. Ms Kranjcec raised various concerns regarding the settlement with Class Counsel. In particular, she would have preferred to see a settlement which reinstated benefits rather than providing a payment of money to Class Members. She was initially concerned that a payment of money would not adequately compensate Class Members for the losses they have suffered, nor provide them with protection for the ongoing loss of their benefits going forward.

Affidavit of B. Kranjcec, Motion Record of the Plaintiffs, Tab 4, para. 4

34. However, having discussed her concerns extensively with Class Counsel, Ms Kranjcec is now of the view that it is in the best interests of the Class for the settlement to be accepted. In particular, Ms Kranjcec is aware of the risks in the litigation considering the novelty of the causes of action. She is also aware that a Court may not order reinstatement of benefits in any event. Finally, she is aware of the uncertainty as to when

the Class would obtain recovery, particularly considering a potentially lengthy appeal process.

Affidavit of B. Kranjcec, Motion Record of the Plaintiffs, Tab 4, paras. 6, 8

35. Considering the benefits of an immediate settlement now for a Class of advanced age and in precarious health, Ms Kranjcec supports the implementation of this settlement as soon as possible.

Affidavit of B. Kranjcec, Motion Record of the Plaintiffs, Tab 4, para. 9

### **Endorsement of OPSEU Retirees**

36. This settlement has also been endorsed by the representatives of OPSEU retirees. In particular, on April 20, 2006, Class Counsel met with the Executive of the OPSEU Retired Members' Division, which represents retired former OPSEU members. The Executive is composed of the Region Chairs of the seven (7) regions in the province into which the membership is divided.

Affidavit of M. Alloi, Motion Record of the Plaintiffs, Tab 5, paras. 3,5

37. During this meeting, Class Counsel explained to the Executive the details of the settlement. Executive members had the opportunity to ask questions and to discuss the settlement at some length.

Affidavit of M. Alloi, Motion Record of the Plaintiffs, Tab 5, para. 6

38. The members of the Executive were generally impressed with and supportive of the settlement. In the weeks following the meeting with Class Counsel, each Region Chair held a meeting with his or her members to discuss various issues, including the settlement.

Affidavit of M. Alloi, Motion Record of the Plaintiffs, Tab 5, para. 7

39. The Region Chairs met with a total of approximately 250 members in the various regions during the course of their individual meetings. The response to the settlement from members was generally very positive. Although members did express some questions and concerns about the settlement, a vote on the settlement was held and the settlement was accepted.

Affidavit of M. Alloi, Motion Record of the Plaintiffs, Tab 5, para. 8

40. The Chair of the Executive, Mario Alloi, has stated on behalf of his members, the OPSEU retirees, that they support this settlement.

Affidavit of M. Alloi, Motion Record of the Plaintiffs, Tab 5, para. 9

### **Public Guardian and Trustee**

41. The settlement was also reviewed with Risa Stone, Client Counsel at the Office of the Public Guardian and Trustee. Ms. Stone's office represents the interests of over 50 Class Members. Ms. Stone advised Class Counsel that the Office of the Public Guardian and Trustee has no concerns regarding the settlement.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 47

### **The Number of Objectors and the Nature of Objections**

42. As of August 29, 2006, Class Counsel had received thirteen objections to the proposed settlement. Six objections are in one letter and two objections are in another letter. The majority of these objections concern the elimination of out-of-country coverage from the benefits package. The out-of-country coverage provided pursuant to the former benefits package was for emergency coverage only. Medical costs relating to pre-existing medical conditions were not covered. When out-of-country coverage was offered, Class

Members were still required to obtain additional coverage to bring their out-of-country coverage to a level that would be considered adequate.

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2, para. 9

43. It is estimated that the elimination of out-of-country coverage will cost the members who took advantage of this coverage an additional 33 per cent if they qualify for optimum rates and an additional 45 to 57 per cent if they have a pre-existing condition. Based on estimates obtained through the discovery process, the elimination of out-of-country coverage represented less than 13 per cent of the changes which were made to the benefit package. Some of the objectors are persons who used this coverage regularly.

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2, paras. 10-11

44. Other objections reflect diverse concerns and priorities, including the inability of retirees to affect bargaining between the government and its employees, and more generalized concerns about the effect of additional changes which might be made to the retirees' health and dental benefits going forward.

### **PART III - ISSUES AND THE LAW**

45. The Plaintiff submits that the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole. The Plaintiff has instructed Class Counsel to seek approval of the Settlement.

#### **General Principles**

46. The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy.

*Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.) at p. 147

*Vitapharm Canada Ltd. v. Hoffman-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.), at para. 111

*Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.J.), at para. 7

47. For a settlement to be approved, it must be fair, reasonable, and in the best interests of the class as a whole. A settlement proposal is not required to meet the demands of a particular Class Member. In determining whether to approve a settlement, the court may take into account factors such as the following:

- (i) Likelihood of recovery or likelihood of success;
- (ii) Amount and nature of discovery, evidence or investigation;
- (iii) Settlement terms and conditions;
- (iv) Recommendation and experience of counsel;
- (v) Future expense and likely duration of litigation and risk;
- (vi) Recommendation of neutral parties, if any;
- (vii) Number of objectors and nature of objections;
- (viii) The presence of good-faith, arm's-length bargaining and the absence of collusion;
- (ix) The degree and nature of communications by counsel and the representative plaintiff with Class Members during the litigation; and

- (x) Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

*Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at paras. 71, 72

*Vitapharm Canada Ltd.*, *supra* at para. 117

*Nunes*, *supra* at para. 7

48. These factors should be a guide in the process and no more. In any given case, some factors will have greater significance than others and weight should be attributed accordingly.

*Parsons*, *supra* at para. 73

### **Litigation Risks and the Likelihood of Success**

49. The Plaintiff submits that the litigation risks inherent in this case militate in favour of accepting the Settlement.

#### **(a) Defences**

50. The Defendant's defences presented notable hurdles in this case. The Plaintiff was aware of most, if not all, of the Defendant's arguments from the outset of the case and believed there was nonetheless a reasonable prospect of success. She also recognized, however, that the issues were novel and could have been decided in favour of either party.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 18

51. In particular, the Defendant raised numerous substantive defences to the common issues, including the following:

- (i) 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 by the Government. 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.
  
- (ii) 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.
  
- (iii) There is no statutory regime for the vesting of retiree benefits and the benefits did not presumptively vest. The Supreme Court of Canada's decision in *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 vest only 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 true in this case 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.

- (iv) 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 the benefit plan would remain frozen. Indeed, its practice of altering the plan from time to time establishes a contrary intention.
  
- (v) The Retirees did not have a vested right to the improvements in the benefits made post-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.
  
- (vi) 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 as 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.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 17

**(b) Canadian Case Law**

52. In addressing these defences, the Plaintiff was aware that the within action deals with novel issues about which there is little Canadian case law. The most relevant case, *Dayco v. C.A.W. Canada*, provides helpful discussion but is not determinative of the fact scenario in this case.

*Dayco v. C.A.W. Canada*, [1993] 2 S.C.R. 230

53. Moreover, *Dayco* arguably requires examining the agreement between the parties in order to determine whether benefits vested. It is submitted that in this case such an examination raises complicated interpretive questions which must consider the following factors: (i) there is no single contract to interpret, but rather a series of documents and representations; and (ii) the Plaintiff's case hinges on the *absence* of language (that is, language reserving the right to alter benefits). While, in the Plaintiff's view, the absence of language reserving the right to amend benefits strongly supports a vesting argument, she recognizes that there is little or no Canadian case law which has specifically made that finding.

54. The most recent Canadian case addressing the vesting of retirement benefits and related issues is *B.C. Nurses' Union v. Municipal Pension Board of Trustees*, [2006] B.C.J. No. 156 (S.C.). As in the case at bar, this case involved a claim by retired public sector employees regarding the reduction of their health and dental benefits. A notable difference between the two cases was that the benefits in that case were provided to retirees pursuant to various enactments rather than pursuant to Orders in Council and, as the Plaintiff claims in this case, an agreement to incorporate post-retirement benefits into the employees' terms and conditions of employment. The B.C. Court made the following findings:

- The central proposition of *Dayco* was that the question of vesting is to be determined by reference to the intention of the contracting parties, as reflected in the underlying agreement.
- The province had no intention that retirement benefits would vest.
- The facts of the case did not square with the theory of retirement benefits providing deferred compensation for employment.

- Nothing in the benefit plan communications over the relevant period indicated that the post-retirement benefits were guaranteed or immune from modification.

*B.C. Nurses' Union v. Municipal Pension Board of Trustees*, [2006] B.C.J. No. 156 (S.C.)

55. The Plaintiff would argue that each of these findings is distinguishable on the facts of the case, that the case is under appeal and that in any event the decision is not binding. She recognizes, however, that the case did provide one example of judicial reluctance to find retirement benefits to be vested. Given the paucity of Canadian case law in this area, the Plaintiff considered this decision to present at least some risk to her case.

**(c) U.S. Case Law**

56. The Plaintiff is also aware that the case law from the United States in this area does not definitively support her position. According to *Dayco*, the case law from the United States in this area is relevant in Canada.

57. In particular, the Plaintiff's case rests in part on a presumption that retirement benefits vest, unless the employer has clearly and specifically communicated otherwise to employees before retirement. However, U.S. case law reveals a controversy as to whether there is a presumption that retirement benefits vest. This controversy has existed since before *Dayco* and there continues to be no decision of conclusive precedential value in the U.S. regarding an automatic inference of the intent to vest benefits where the contract or collective agreement is found to be ambiguous. While many U.S. courts have dealt with the issue of vested retirement benefits, and some have commented (both positively and negatively) upon the inference (often referred to as the *Yard-Man* inference), the debate has not yet been settled by the United States Supreme Court. For every decision by a U.S.

Court of Appeal that supports the vesting presumption, there exists an equal and opposite case to negate that position.

For example:

*International Union, United Auto., Aerospace, and Agr. Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)

*Linville v. Teamsters*, 206 F. 3d 648 (6<sup>th</sup> Cir. 2000)

*Maurer v. Joy Technologies*, 212 F. 3d 907 (6<sup>th</sup> Cir. 2000)

*International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Lorai Corporation and Aircraft Braking Systems Corporation.*, 107 F.3d 11 (6<sup>th</sup> Cir. 1997)

*Williams v. WCI Steel Co.*, 37 Fed.Appx. 723 (6th Cir. 2002)

*Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996)

**(d) Benefit of Early Settlement**

58. The Courts have repeatedly recognized that the prospect of lengthy, expensive litigation, with the possibility of an appeal process extending over several years, is a factor militating in favour of approving a settlement.

*Vitapharm Canada Ltd.*, *supra* at para. 147

*Parsons*, *supra* at para. 92

*Gariepy v. Shell Oil Co.*, [2003] O.J. No. 5820 (S.C.J.), at para. 8

59. In this case, this factor is of particular significance. Even if the Plaintiff were successful at trial, the Defendant might well 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 are therefore in some cases, more than 80 or 90 years of age. In some cases, Class Members have already lost a spouse who was entitled to the

benefits. Class Members have indicated to Class Counsel throughout that the passage of time is a critical factor in this case.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 19

**(e) Damages**

60. The Plaintiff also recognized potential risks with respect to proving damages in this case. Her claim for aggregate damages would be difficult to ascertain with a high degree of accuracy. A paper process would also present various hurdles, including the cost of such a process and the likelihood that Class Members would not have the necessary records.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, paras. 20-21

**Amount of Evidence and Investigation**

61. The amount of evidence produced and the investigation by Class Counsel in this case has been significant. The proceedings to date have included a lengthy and hard-fought certification motion, which involved the production of extensive material and completion of numerous cross-examinations. They have also included voluminous documentary production, including a settled motion to deal with production issues, and the completion of examinations for discovery of the Defendant. Other than the examination for discovery of the Plaintiff's representatives, all anticipated steps leading up to trial had been completed. Indeed, at the time of settlement, the trial itself, scheduled for the Fall of 2006, was imminent.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, paras. 6-13

62. In addition, throughout the proceeding, Class Counsel have spoken with many Class Members, most of whom have been supportive of the action.

Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 1, para. 15

## **Objections**

63. In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding and accordingly do not have the rights of a party.

*Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.),  
at p. 100

64. Even in the presence of objectors, the nature of the settlement process is non-adversarial:

It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598, at  
para. 21

65. An objector who suggests that Class Counsel ought to have structured the settlements differently essentially seeks to substitute the personal judgment of such objector for the judgment of Class Counsel. In the face of an effort by an objector to substitute his or her personal judgment, the court may “rely upon the judgment and experience of counsel.”

*Cotton v. Hinton*, 559 F. 2d 1326 (5th Cir. 1977), at p. 1330  
*Vitapharm Canada Ltd.*, *supra* at para. 144

66. It is not within the jurisdiction of the Court to consider an objection based upon extra-legal concerns. The court approval process does not contemplate an assessment of the proposed settlement from a social or political context:

The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

*Parsons v. Canadian Red Cross Society, supra at para. 77*

67. The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. A settlement is not required to meet the demands of a particular Class Member.

The fact that a settlement is less than ideal for any particular Class Member is not a bar to approval for the class as a whole.

*Parsons v. Canadian Red Cross Society, supra at para. 79*

*Dabbs v. Sun Life Assurance Co. of Canada (Gen. Div.), supra at para. 11*

68. The concerns expressed by the objectors are diverse. The majority of objectors are opposed to the elimination of out-of-country coverage from the benefits package as they used this coverage regularly. Based on estimates obtained through the discovery process, the cost of this coverage represented less than 13 per cent of the changes which were made to the benefits package. Of the approximately 51,000 Class Members, thirteen objections have been submitted and most raised concerns with this issue.

Supplementary Affidavit of C. Wright, Motion Record of the Plaintiffs, Tab 2, paras. 9-10

69. Other objectors oppose the inability of retirees to affect bargaining between the government and its employees. This issue was canvassed at some length during the motion for certification as it involves a statutory restriction on OPSEU's scope of bargaining. In *Ontario Public Services Employees Union v. Ontario (Management Board Cabinet)*

(July 21, 1989), Ontario Public Service Labour Relations Tribunal Decision T137/88, the Tribunal held that OPSEU's "representation rights did not extend to persons other than employees and thus could not encompass retirees". The Tribunal held specifically that retiree benefits do not fall within the scope of collective bargaining pursuant to the statute governing negotiations between the government and its unionized employees. Thus, retirees are statutorily excluded from being represented at the bargaining table in negotiations between OPSEU and the government.

*Ontario Public Services Employees Union v. Ontario (Management Board Cabinet)* (July 21, 1989), Ontario Public Service Labour Relations Tribunal Decision T137/88 (P. Picher) at pp. 24-25

70. Given the size of the of the class and the small number of objections, the court should take account of the paucity of objections and conclude that the vast majority of the class is supportive of the settlement. As noted above, in addition to the absence of any significant number of objectors, the settlement is supported by the OPSEU Retired Members' Division, which consulted its membership throughout the province. The Office of the Public Guardian and Trustee has no objection to the settlement.

While approval of a proposed class settlement is not a matter to be determined by a plebiscite, the views of putative Class Members are certainly relevant and entitled to great weight.

*In re: Silicone Gel Breast Implant Products Liability Litigation v. Dow Corning*, 1994 WL 578353 at 5 (N. D. Ala.)

## **Settlement Terms**

71. Considering all of the risks inherent in this case, including the novel issues at stake and, critically, the impact of the passage of time on this Class, it is submitted that this Settlement yields significant benefits for Class Members.

72. There is a strong initial presumption of fairness when a proposed class settlement which was negotiated at arm's-length is presented to the court for approval. A court will

reject a proposed settlement only when it finds that the settlement does not fall within a range of reasonableness. The courts have recognized that a settlement is a product of compromise which by definition necessitates give and take. Accordingly, there is no perfect settlement.

*Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (S.C.J.), at paras. 9-10

*Vitapharm Canada Ltd.*, *supra* at paras. 113-115

73. The courts have also established that the recommendation of experienced counsel with respect to a proposed settlement should be accorded deference and considerable weight.

*Gilbert*, *supra* at para. 17

*Currie v. McDonald's Restaurants of Canada Ltd.*, [2006] O.J. No. 813 (S.C.J.), at para. 12

74. It is submitted that, in this case, the Settlement falls well within the range of reasonable outcomes. It provides each Class Member with a payment of several hundred dollars, in addition to new benefits such as a drug card. It also preserves the Class Members' rights going forward with respect to any changes in benefits.

75. In addition, this Settlement was negotiated after more than three years of extensive litigation by experienced counsel and after arm's-length negotiations over two days of mediation with the Honourable Mr. Justice Winkler. Class Counsel, who have significant experience in both class actions and employment and benefits law, have recommended this Settlement.

76. With respect to the distribution of settlement payments, the courts have recognized that it is not always possible to tailor a settlement to allow for payment of individual amounts; in many cases, the appropriate data is simply not available.

*Gilbert, supra* at para. 20

77. After significant investigation and due diligence, Class Counsel concluded that it was not practicable nor equitable to implement a distribution scheme which would distinguish between Class Members. It is submitted that the *per capita* distribution sought is the only reasonable manner to implement a Settlement for this Class.

78. Finally, this Settlement has been endorsed by the representative Plaintiff. As well it has been endorsed by the Executive representing retired OPSEU members, who constitute a significant portion of this Class. It is submitted that these endorsements should also carry substantial weight in underscoring the reasonableness of this Settlement.

79. Class Counsel and the Plaintiff therefore now recommend the approval of this Settlement to the Court.

#### **PART IV - RELIEF SOUGHT**

80. The Plaintiff requests that the Settlement be approved as fair, reasonable and in the best interests of the class.

August 30, 2006

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