

**SUPERIOR COURT OF
JUSTICE**

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Re: Barbara Kranjcec v. Her Majesty the Queen	Date: September 14, 2006

Pages: 9 Including cover page

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Page 2

February, 2006. Minutes of settlement effective as of June, 2006 were subsequently executed.

[2] September 7, 2006 was chosen as the date for the hearing of motions to approve the settlement and the fees of class counsel. An order was made for notice of the time and place of the hearing - and of an outline of the terms of the settlement - to be given to the class. This was to be effected by a direct mailing to each of the approximately 50,000 class members who had not opted out of the proceeding. Shortly before the hearing I was informed that, although the estates of deceased members who had surviving spouses had been included in the mailing, some 3000 estates where there were no surviving spouses had been inadvertently omitted. This matter was spoken to by counsel at the commencement of the hearing of the motions. I indicated that I would proceed with the hearing and consider subsequently whether the representatives of these estates should be given an opportunity to comment on the issues. In the circumstances, I do not think it is necessary to do this. Notice of a fairness hearing is not obligatory under the CPA and, although it is invariably ordered, it is a safe assumption that the notice that was given reached far more class members than is usually the case with a class of this size. Insofar as the purpose of notice is, for the most part, to permit the court to hear concerns that the members might have about the settlement, and the fees of class counsel, there is no reason to believe that the representatives of the estates that had been excluded from the mailing would wish to raise objections, or make submissions, that would not be shared with the approximately 47,000 members who received notice.

[3] Seventeen of the class members had provided class counsel with written objections to the settlement, or to the fees, or both, and a number of the members attended at the hearing. None of them responded to my invitation to comment on counsel's submissions, or to supplement counsel's summary of the written objections. I indicated that I would give the written objections consideration when addressing the merits of the motions.

[4] The facts and of the issues between the parties were set out in my reasons for certifying the proceeding ([2004] O.J. No. 19). The members of the class are persons who retired after August 28, 1974 who were eligible to receive retirement benefits from the Ontario Government as set out in a benefits plan in effect immediately prior to June 1, 2002. The claims asserted on their behalf by Ms Kranjcec relate to an alleged cancellation or reduction of benefits by the defendant as of June 1, 2002. It is pleaded that by doing this the defendant (the "Crown") incurred liability for breach of contract and breach of fiduciary duty and infringed the rights of class members under section 15 of the *Canadian Charter of Rights and Freedoms*. Ms Kranjcec sought declarations that the class members were entitled to the benefits in force immediately prior to June 1, 2002 or, alternatively, to compensatory and punitive damages.

[5] Following the certification of the proceeding, the Crown filed a statement of defence that took issue with each of the grounds on which liability was alleged and, in particular, challenged the claim of Ms Kranjcec that class members had vested rights to the benefits in force immediately prior to June 1, 2002.

The Settlement

[6] Under the terms of the settlement, the Crown would be released from all claims relating to changes to the benefits that were made prior to March 7, 2006. Claims relating to changes made after that date would not be released. In return, the Crown is to provide an amount of \$20 million that would be distributed among the class members equally *per capita* after payment of counsel fees and disbursements. It is estimated that this would result in a payment of approximately \$350 to each member of the class. In addition, the settlement agreement provides that class members will be entitled to all new benefits negotiated by OPSEU for its members in collective bargaining in 2005. These include the provision of a drug benefit card that will relieve members from having to pay for drugs and then claim reimbursement. An expert retained by the plaintiff gave reasons why the possession of such a card provides significant financial and health benefits.

[7] In support of the motion to approve the settlement, class counsel submitted that there were two principal factors that militated strongly against proceeding with a trial. These were the risks, and the uncertainty, of litigating the claims and the ages of many of the class members.

[8] The litigation risks arose, in part, from the lack of Canadian precedents supporting the causes of action on analogous facts. There was no formal written agreement on which Ms Kranjcec and the class members could rely. The uncertainty arose not only from the risk that the material facts that would constitute, or give rise, to the causes of action could not be proven, but also from the existence of issues relating to the computation of damages either in the aggregate, or on an individual basis in the not unlikely event that the trial judge declined to order the defendant to reinstate the previous benefits. Moreover, although, in the order certifying the proceedings, I had included, as a common issue, the question whether damages could be calculated on an aggregate basis equivalent to the total savings achieved by the Crown, a negative answer to the question would require an individual claims process to be established. This would probably have been intolerably expensive and administratively impracticable.

[9] The ages of so many of the class members was a factor that, in the judgment of class counsel, was of equal importance to their decision to settle rather than to proceed to trial. The possibility of a costs award against Ms Kranjcec if the action was unsuccessful was not a fact that influenced them greatly. At the outset of the litigation they had advised her that, in their experienced judgment, such an award would be unlikely. They were far more concerned with the delay that would ensue if, which they considered to be very likely, an appeal was taken from any decision of the trial judge. Many of the class members have died since the action was commenced four years ago and the likelihood of a further delay of two to four years, or even more, made it highly desirable to negotiate a settlement that would provide immediate benefits to the class. In their discussions with class members, they had been under considerable pressure to achieve results and not to permit the proceedings to drag on.

Page 4

[10] I believe counsel were right to give considerable weight to each of the considerations I have mentioned. I mean no disrespect to the class members who filed objections but I do not believe they appreciated fully the unpredictability of the outcome of a trial, or the possibility of a further delay of some years if the issues were to be resolved in that manner. There was, I believe, a tendency to conclude that, if the trial judge agreed that they had been treated unfairly by the defendant, this would be sufficient to terminate the litigation in their favour once and for all. Class counsel could not afford to be guided by the same spirit and degree of optimism.

[11] It does not of course follow from the above considerations that any settlement that class counsel could negotiate would be acceptable. The role of the court is to determine whether the settlement falls within a range of reasonableness in the light of the circumstances and the interests of the class as a whole. The court has no power to impose a settlement on the parties. It acts as a watchdog to ensure that only settlements that are in the interests of class members are effected. Sweetheart deals that are primarily in the interests of counsel - or a representative plaintiff - and a defendant cannot be tolerated. On the other hand, it is well established that the court should give weight to the recommendations of experienced counsel who have been involved in the litigation and are in a much better position than the court, or the class members, to weigh the factors that bear on the reasonableness of a particular settlement.

[12] As litigation settlements invariably involve a compromise of the competing rights asserted by the parties, there is some truth in the saying that it is a sign of a good settlement if none of the parties is satisfied with its terms and effect. In this case, the Crown has asserted, and continues to assert, that it is under no legal obligation to maintain benefits at a particular level. In my judgment, this is by no means a hopeless position. Notwithstanding its denial of liability, it has agreed to provide a payment of \$20 million to members of the class - together with the benefits negotiated by OPSEU in 2005 - in return for the release of their claims with respect to past alterations to the benefits plan. As any changes it may make in the future will not be protected, it will face the prospect of future litigation if further reductions in benefits occur. The possibility that, if liability was established, the plaintiff would be able to obtain damages, but not a mandatory restoration of benefits, has been recognised from the outset and is provided for in the statement of claim.

[13] There is evidence that \$20 million is an amount approximately equivalent to the savings that the Crown achieved from the time of the June 2002 alterations to the plan to the end of 2005. In the light of the difficulties in computing the losses that have been suffered by the class as a whole - and, in particular, assumptions that would have to be made with respect to the resolution of issues arising from the availability of different benefits, and levels of benefits, at different times in the class period and thereafter, - an actuary retained by class counsel to estimate the damages that might be awarded if liability was established was not able to do more than provide a rough estimate of a maximum potential recovery in excess of \$150 million. This was based on an assumption that all of the potentially disputable problems of computation would be resolved in favour of the class. In my judgment, it would have been most unreasonable for counsel to enter

into settlement negotiations with the belief that such an assumption was justified. The initial estimate of damages that counsel provided to Ms Kranjcec – a range of \$5 million to \$50 million – may well be much closer to the mark.

[14] Class counsel in this case have had extensive experience of class proceedings and - having examined the representative of the defendant for discovery and the documents produced, and having had extensive consultations with their client and with other class members - the settlement reflects their judgment of what could reasonably be achieved at a trial, and when attempting to negotiate a settlement with a defendant who continued to deny liability and was similarly informed of the relative strengths and weaknesses of the case presented on behalf of the class. I am satisfied that counsel's decision to recommend approval of a lump-sum payment - rather than an individualized claims process - was virtually inevitable and I am not prepared to find that the settlement amount of \$20 million falls outside an acceptable range of reasonableness.

[15] It was a recurring theme in the written objections that were received that, if the Crown would not agree to restore the benefits, the case should proceed to trial. As I have indicated, I am in agreement with the opinion of class counsel that such an approach could not be justified on the basis of an experienced assessment of the litigation risks and the delays that would inevitably ensue. Class counsel's recommendation has been endorsed by the executive of the OPSEU Retired Members' Division after consultation with its members. It has also been endorsed by Ms Kranjcec despite her disappointment that it does not provide for a restoration of benefits.

[16] For the above reasons, there will be an order approving the settlement.

Class Counsel's Fees

[17] A motion for approval of a retainer agreement between Ms Kranjcec and class counsel - and for the approval of class counsel's fees - was heard immediately after the motion to approve the settlement. The two motions were independent of each other in that, although an order was sought in the second motion for the fees to be paid out of the settlement fund of \$20 million plus accumulated interest, no attempt was to make approval of the settlement conditional on approval of the fees. This is an approach that I would commend to counsel in other cases.

[18] The retainer agreement - executed on July 30, 2002 - provided that class counsel were to be paid for fees and disbursements only in the event of success in the proceeding. In consequence, the provision was part of the terms on which class counsel agreed to act. I emphasise this because I believe more deference might well be shown to such agreements than to those made shortly before a fee approval hearing - a practice that is not uncommon.

[19] For the purpose of the agreement, success in the proceeding was understood to include a settlement that would benefit one or more of such members. In the event of success, fees would be charged at 25 per cent of all benefits obtained for class members -

Page 6

including party and party costs - if there was a settlement after the proceedings were certified. An example of a percentage fee calculation was contained in the agreement together with a preliminary estimate that a reasonable settlement, or judgment, could be in a range of \$5 million to \$50 million.

[20] In their notice of motion, counsel requested approval of a fee of 15 per cent of the monetary portion of the settlement, rather than 25 per cent, of the total benefits obtained. After including in such benefits the costs awarded previously in the proceedings, and the interest that has accumulated on the settlement amount of \$20 million (less taxes), the fee would be \$3,045,928.12 of which \$46,500 has already been received as costs. In consequence, an amount of \$2,999,428.12 would be payable from the settlement fund. Any unpaid disbursements and GST would come from this amount.

[21] For the following reasons, I have no hesitation in approving payment the fee requested:

1. The fee is significantly smaller than the amount that would be payable pursuant to the retainer agreement and that the representative plaintiff might expect to be payable.
2. The 15 per cent percentage is well within the range of percentages that have been approved in similar cases.
3. The issues in the litigation were difficult and an acceptable degree of success has been achieved.
4. Although two firms were involved, there was a separation of roles and the time expended was not excessive given the complexity of the issues, the contested certification motion and the tenacity with which the claims were opposed.
5. By entering into the retainer agreement, the financial risks assumed by class counsel with respect to fees and disbursements in the event that success was not obtained were considerable.
6. From my involvement with the proceedings since its inception, I am satisfied that class counsel applied a very high degree of competence and diligence throughout its course.
7. By accepting responsibility for disbursements, rather than applying to the Class Proceedings Fund, a potential savings of \$2 million has been achieved.

[22] The above finding will not sit happily with several of the objectors who expressed the opinion that such a fee was excessive and could not be justified. For the most part they tended to focus on an apparent disparity between the fee and the \$350 each class member is projected to receive. This ignores the basic fact that class counsel were

engaged in litigating, and assuming the financial risks attendant on, a multi-million-dollar lawsuit, and not one in which only \$350 was at stake.

[23] It was evident that the views of most of the objectors who challenged the amount of the fees were strongly influenced by the failure of class counsel to negotiate a settlement that would restore the previous level of benefits. As I have already indicated, such an approach gives insufficient weight to the factors that militated in favour of the settlement that was effected.

[24] Overall, however, I believe the objectors may not have appreciated the special role of class counsel in class proceedings, the financial risks they assume and the fact that the goals of the CPA - and, in particular, those of access to justice and behavioural modification - can only be achieved if incentives are provided for counsel to assume the risks and accept the financial burden of carrying litigation that, unfortunately, is very often protracted. Without the willingness of counsel to do this, the likelihood of a judicial or other effective challenge to the legality of the defendant's conduct was remote. Class members, of course, have had an opportunity to opt out of the proceeding and have assumed no financial risk by choosing not to do so. For these reasons, the CPA has, from the time it was enacted, permitted counsel to charge fees that are contingent on success in the litigation and that are calculated as a percentage of the amount recovered. Whether or not I would have approved a fee based on 25 per cent, the inclusion of that percentage in the retainer agreement was not out of line with agreements that have received approval in a number of other cases.

[25] For the reasons I have given, the motion for an order to prove the retainer agreement, as modified by the substitution of 15 per cent for 25 per cent, is granted and payment to class counsel of a fee of \$3,045,928.12 (inclusive of disbursements and GST) is approved. Of this amount, \$46,500 has been received as costs of previous hearings leaving \$2,999,428.12 to be paid from the settlement fund.


CULLITY J.

Released: September 14, 2006

**COURT FILE NO.: 02-CV-238484CP
DATE: 20060914**

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: September 14, 2006