CITATION: McSheffrey v. Ontario, 2012 ONSC 6803
COURT FILE NOS.: 02-CV-236588 CP & 06-CV-324475PD3
DATE: 20121203

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
SUE McSHEFFREY	)	*Susan Ursel* and *Andrea Wobick*, for the plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	*Dennis Brown Q.C.* and *Judie Im*, for the defendant
	)	
Defendant	)	

AND BETWEEN:

DIANNE LECLAIR	)	*Stephen J. Moreau*, for the plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	*Dennis Brown Q.C.* and *Judie Im*, for the defendant
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	
	)	
Defendant	)	
	)	**HEARD:** November 28, 2012

C. HORKINS J.

INTRODUCTION

[1] This is a motion for approval of the settlement of two class actions and class counsel fees pursuant to s. 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6 ("*Class Proceedings Act*"). Notice of this approval hearing has been given to the class in both actions.

[2] The parties have reached a joint settlement and these reasons apply to both class actions (McSheffrey action and Leclair action).

[3] In 1997, the defendant created 43 Community Care Access Centres ("CCACs") to deliver the home care programs and placement coordination services previously delivered by municipalities and private entities. As a result, these services and the employees who delivered the services for municipal and private employers were transferred to the CCACs.

[4] Prior to the transfer, the employees were enrolled in the Ontario Municipal Employees Retirement System ("OMERS") pension plan. At the time of the transfer, the CCACs were not able to enroll their employees in OMERS because the OMERS Act at the time did not allow non-municipal employers to belong to the plan. The CCACs were also unable to enroll their employees in the Victorian Order of Nurses ("VON") pension plan because of certain restrictions in the VON plan. A decision was made to enroll the employees in what is now the Health Care of Ontario Pension Plan ("HOOPP") (formerly the Hospitals of Ontario Pension Plan).

[5] The two class actions have been managed together and involve the same issue: an alleged deficiency in the class members' pension benefits. The actions allege that this deficiency arose out of the defendant's decision to change the delivery of home care programs and placement coordination services and the resulting change in the employees' pension plans.

[6] The McSheffrey action was commenced by statement of claim in 2002 and certified as a class proceeding in 2005. The Leclair action was commenced by statement of claim in 2006 and was certified as a class proceeding in 2007. Two causes of action were certified: negligent misrepresentation and breach of a contractual undertaking.

[7] In the McSheffrey action the court certified the following class: All former employees of municipal and other home-care service providers who subsequently became employees of CCACs and who were members of the Ontario public Service Employees Union or the Association of Allied Health Professionals at the time of such change in their employment.

[8] In the Leclair action the court certified the following class: All former employees of the municipal and other home care service providers who subsequently became employees of CCACs and who were members of the Ontario Nurses' Association ("ONA") at the time of such change.

BACKGROUND EVIDENCE

The Representative Plaintiffs

[9] Ms. McSheffrey has been employed as a physiotherapist at Champlain Community Care Access Centre ("Champlain CCAC") since 2007. She is a member and vice president of Local 4101 of the Ontario Public Service Employees' Union ("OPSEU") which represents therapists at Champlain CCAC.

[10] From 1992 to 1997, Ms. McSheffrey was employed as a physiotherapist by Renfrew County & District Health Unit, a home care service provider. Through her employment with Renfrew County & District Health Unit, and the collective agreements governing the terms and conditions of employment, Ms. McSheffrey was originally a member of the Association of

Allied Health Professionals: Ontario ("AAHP:O") and was enrolled in the OMERS pension plan.

[11] AAHP:O merged with OPSEU in 1999 and Ms. McSheffrey was therefore represented by OPSEU from that time. Other AAHP:O and OPSEU members similarly transferred had membership in either OMERS or the VON pension plan.

[12] Through her employment with the CCACs, the collective agreement governing the terms and conditions of her employment and following the actions of the defendant, Ms. McSheffrey was enrolled in HOOPP in 1997, with the initial transfer of her employment to Renfrew CCAC.

[13] Between 1997 and 2007, Ms. McSheffrey was employed by Renfrew CCAC, one of four CCACs that were ultimately merged to form the Champlain CCAC in or about 2007.

[14] Since 2007, Ms. Leclair has been employed as a case manager with the Hamilton Niagara Haldimand Brant CCAC, and is a member of the ONA by virtue of her employment. Ms. Leclair is an ONA Vice-President and sits on its Board of Directors.

[15] Like Ms. McSheffrey, Ms. Leclair was employed with a home care provider before her employment was transferred to a CCAC. She was likewise enrolled in OMERS. After her employment was transferred to the Hamilton Niagara Brant CCAC in 1997, she was enrolled in HOOPP.

The Change in Employee Pensions

[16] Before or around the time the class members employment was transferred to the CCACs, the Ministry of Health ("MOH") retained KPMG to examine the provision of community services in Ontario. KPMG produced a report titled "Summary of the Report entitled 'The Provision of Pension Benefits in the Long-Term Care Community Services Industry'", (the "KPMG Summary"). Ms. McSheffrey received a copy of the KPMG Summary through the course of her employment around the time employees were transferred to the CCACs.

[17] The KPMG Summary stated, among other things, that the Long Term Care Divisions' goal was to "maintain comparable pension benefits to those that many Employees in this industry already enjoy". It also stated:

> The Government's position is that individuals should not lose out with respect to pension coverage as a result of the formation of CCACs. The majority of organizations currently employing individuals who will ... become employed by a CCAC, provide pension coverage. As such, the Government's "no loss" position creates a mandate for pension coverage to continue and, in all likelihood, expand.

[18] The KPMG Summary recommended that employees in the newly formed CCACs be enrolled in either OMERS or HOOPP, stating that these plans would assist the government's stated objective of making it easy for the CCACs to set up ongoing pension arrangements.

[19] The KPMG Summary also identified that if a HOOPP model was adopted, it might be necessary to pay a "top up" cost to HOOPP as the importing plan, to ensure that the employees

would receive full pension benefits for all years of service in respect of the service imported. This was based on:

(a) the concept that the employees should not belong to different pension plans as a result of their transfer to CCACs;

(b) that their service credit should therefore be transferred from OMERS to HOOPP; and

(c) the cost for the transferred years of service was higher in HOOPP than OMERS, leading to a shortfall.

[20] In or around December 1996, the MOH released a letter from Patrick Laverty, Acting Executive Director of the Long Term Care Division of the MOH to the Boards for CCACs (the "Laverty letter"), which was shared with some employees including Ms. McSheffrey and Ms. Leclair. The letter stated:

> The Long Term Care Division's goal for employees moving from various organizations into the Access Centres is to maintain *comparable pension benefits* to those that many employees in this sector already enjoy. [Emphasis added.]

[21] A document entitled "The Provision of Pensions with the Implementation of Community Care Access Centres" was attached to the Laverty letter. That document contained the following statement:

> With the formation of CCACs, the Long-Term Care Division's goal for employees moving from various organizations into the Access Centres is to maintain comparable pension benefits to those that many employees in this sector already enjoy. A commitment to protect the number of years of pensionable service the transferring employees had built to date was made. This means that employees transferred to the new CCACs will receive the same number of years of pensionable service in any new pension plan if service is transferred to the new plan.

[22] On March 10, 1997, Ms. McSheffrey attended an information session that the MOH arranged for employees who were transferred into the Renfrew County CCAC. The session was conducted by Ashu Dave, a representative of HOOPP. A representative of the MOH was present at the meeting. However, Ms. McSheffrey could not specifically recall any statements about employees' pensions being made by anyone other than Mr. Dave.

[23] At the March 10, 1997 meeting, someone at the meeting (either Mr. Dave or a government representative) stated that the government had decided that HOOPP was the best plan for CCACs. Ms. McSheffrey's notes and recollection indicate that Mr. Dave said that the government will be combining HOOPP and OMERS so that there would be no lost pension. He further said that the government had pledged to ensure continuous service in the new pension plan, and that the government would cover any shortfall.

[24] Like Ms. McSheffrey, Ms. Leclair attended a similar meeting with representatives of HOOPP and the government of Ontario, but not with representatives of her past or future employers. Ms. Leclair recalls that she was reassured there would be no negative impact from the transfer.

[25] Ultimately, the divested unionized employees, after commencing employment with one of the 43 CCACs in 1997, were enrolled in HOOPP, regardless of the provisions of the collective agreements which required enrolment in either OMERS or the VON pension plan.

[26] At the time of the transfer, the CCACs were not able to enroll their employees in OMERS because the OMERS Act at the time did not allow non-municipal employers to belong to the plan. CCACs also could not enroll their employees in the VON pension plan because of certain restrictions in the VON plan.

[27] From 1997 to 2002, the MOH, in conjunction with OMERS, VON and HOOPP, and the Ontario Association of Community Care Access Centres ("OACCAC"), engaged in protracted and detailed discussions on how to deal with affected divested employees with respect to the impact on their pension benefits of being enrolled in two different pension plans.

[28] From these discussions it became apparent that the amount available to be transferred out of OMERS and VON to HOOPP would not be sufficient to purchase the same number of years of credited service in HOOPP.

[29] By letter dated March 27, 2002 from Helen Johns, Associate Minister of Health to Robert Morton, Board Chair, OACCAC, the government stated conclusively that it did not intend to fund the "shortfall" between the pension plans or take any steps to address the pension issue for divested employees. As a result of this decision, these actions were commenced.

SUMMARY OF THE SETTLEMENT

[30] In 2009, the parties attended a mediation with the Honourable George W. Adams, Q.C. After the mediation the parties continued to negotiate and in December 2011, they executed Minutes of Settlement that apply to both actions. The settlement provides that the defendant will pay the following:

(a) The amount of $6,500,000.00 for all class members in both actions, to be distributed equally between all members, with no reversion to the defendant.

(b) The amount of $575,000 for class counsel fees payable to Green & Chercover/Ursel Phillips Fellows Hopkinson LLP, solicitors for the McSheffrey class.

(c) The amount of $175,000 for class counsel fees payable to Cavalluzzo Hayes Shilton McIntyre & Cornish LLP, solicitors for the Leclair class.

(d) The amount of $250,000 for administration expenses, with reversion of any unused monies to the defendant.

[31] The settlement provides for a claims administration process with NPT RicePoint acting as the administrator. If there is a deficiency in the documentation that the class member submits the Administrator will give the class member 30 days to correct the deficiency. Failure to respond within the 30 days means that the class member will be barred from receiving a payment out of the final settlement fund and there is no right of appeal from this result.

[32] Aside from the above, the process allows for a right of appeal if a class member disputes the Administrator's decision. It is agreed that the appeal is to a referee (Michael Eizenga) and the referee's decision is final and binding.

[33] Based on the best estimate of the class size (2,500), this settlement will provide each class member with approximately $2,700. On one actuarial analysis, this represents approximately 50% of Ms. McSheffrey's projected losses as compared to an all OMERS pension, with a normal retirement age of 65 years.

[34] The settlement includes the expansion of each class. This is fair and necessary because after certification, the defendant decided to implement further changes in the delivery of the health care services. The class definitions are amended to include certain employees whose pensions were allegedly impacted as a result of the further changes. The new class members share common characteristics with the other class members. The expanded class definitions are set out in the judgment approving the settlement.

Legal Framework

[35] Section 29(2) of the *Class Proceedings Act* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement.

[36] When considering the approval of negotiated settlements, the court may consider, among other things the following factors: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440-44 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society* (1999), 103 O.T.C. 161, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.); *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62, [2007] O.J. No. 148 at para. 8 (S.C.J.); *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.T.C. 36 (S.C.J.), [2005] O.J. No. 175 at paras. 12-13; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.T.C. 233, [2002] O.J. No. 1361 at para. 10 (S.C.J.).

[37] These factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may be that all of the factors are not applicable or should not be given equal weight. (See *Parsons v. Canadian Red Cross Society*, *supra*, at para. 73.)

[38] The court is not required to have evidence sufficient to decide the merits of the issue. This "is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants" (*Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 at para. at 92 (S.C.J.)).

[39] A settlement does not have to be perfect. It need only fall "within a zone or range of reasonableness": *Ontario New Home Warranty Program v. Chevron Chemical Co.*, *supra*, at para. 89: See also *Parsons*, at para. 69 (S.C.J.); *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 at paras. 45-46 (S.C.J.); *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, at pp. 439-440; *Frohlinger v. Nortel Networks Corp.*, *supra*, at para. 8.

[40] The "zone of reasonableness" concept helps to guide the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[41] As stated in *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

Factors Supporting Approval

[42] I accept that the settlement was the product of hard fought negotiations conducted by experienced counsel at arm's length. The settlement is grounded in a principled approach to the assessment of damages and is reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[43] Class counsel are experienced lawyers who took all of the risks into consideration in arriving at a settlement. As well, they factored in the time it would take to reach a trial, the risk of an appeal and further delay and the ongoing cost of litigation. There were several risks that the

class faced. There was the risk that liability would not be established. In particular, the negligent misrepresentation cause of action involved a high degree of risk.

[44] Proving damages presented further risks. In particular, the actuarial opinions highlighted that class members may have suffered no loss. Calculating damages created a range of possible outcomes that depended on factors such as the employee's length of service and the date of retirement. Further, different actuarial methods of calculating the loss could produce different results. One of the actuarial opinions concluded that the only way to determine the impact of the enrolment in two pension plans instead of one pension plan was to calculate the value of the pension on the date of actual retirement or termination from the pension plan for each class member. While some class members have retired or terminated, others continue to work (such as the two representative plaintiffs) and may do so for some time.

[45] Class counsel also took into consideration the cost of ascertaining damages for the two classes. The actuary estimated the cost in the range of $375,000 to $1,000,000.

[46] Counsel had a sufficient evidentiary basis to evaluate liability and damages. The parties engaged in extensive documentary production prior to the mediation. The defendant produced several hundred documents in each action that class counsel reviewed and considered. Several days of discoveries took place in 2007 and 2008. In addition, class counsel had assistance from two actuarial experts.

[47] Throughout this litigation class counsel regularly communicated with the representative plaintiffs and the class. Notice of this settlement was given to the class and there are no objections. The representative plaintiffs support and recommend approval of the settlement. They understand the inherent risks associated with a trial. They were actively involved in the settlement negotiations and have concluded that the settlement is in the best interests of the class

APPROVAL OF CLASS COUNSEL FEES

Legal Framework

[48] The court's task is to determine a fee that is "fair and reasonable" in all of the circumstances: see *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at paras. 13 and 56 (S.C.J.).

[49] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.T.C. 208, [2005] O.J. No. 1117 at para. 67 (S.C.J.), Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[50] The amount sought for class counsels' fees is very reasonable given the time expended, the complexity of the case, the risks assumed, and the quantum of recovery achieved for the class. The representative plaintiffs agree that these fees are reasonable.

[51] Class counsel in the McSheffrey action seek approval of $575,000 for fees. A team of lawyers at Ursel Phillips Fellows Hopkinson LLP has been involved in the prosecution of this action since early 2002. Since certification they have docketed over 1,400 hours.

[52] Class counsel in the Leclair action seek approval of $175,000 for fees. They have been involved in the prosecution of this action since early 2006 and have docketed over 600 hours. The fees requested represent about 78-80% of the total fees that counsel will bill the client.

[53] The time incurred by class counsel involved an extensive amount of work: research and investigation, pleadings, certification, cross-examinations on affidavits, production of documents, mediation and settlement. The defendants vigorously defended the action throughout. The outcome of the action was not certain and the result that class counsel achieved is fair and reasonable.

CONCLUSION

[54] In summary, I approve the settlement and the fees and disbursements of class counsel. I grant the relief set out in the notice of motion dated November 20, 2012 in accordance with my reasons. Class counsel shall notify the court when the administration of the settlement is completed.

C. Horkins J.

Released: December 3, 2012

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REASONS FOR JUDGMENT

C. Horkins J.

Released: December 3, 2012