

CITATION: *Thomas v. Canada (Attorney General) et. al*, 2024 ONSC 3396
COURT FILE NO.: CV-14-62471-CP
DATE: 2024 06 12

SUPERIOR COURT OF JUSTICE
Proceeding under the *Class Proceedings Act, 1992*

RE: SEAN THOMAS, MICHAEL DAYAL, LINDSAY WEBB, DOUGLAS
ROBINSON, and DIANA SCANLON

Plaintiffs

AND:

ATTORNEY GENERAL OF CANADA, ONTARIO PUBLIC SERVICE
EMPLOYEES' UNION PENSION BOARD OF TRUSTEES and ONTARIO
PUBLIC SERVICE PENSION BOARD

Defendants

BEFORE: C. MacLeod, RSJ

COUNSEL: Andrew Astritis and Zachary Rodgers, for the Plaintiffs

J. Sanderson Graham and Sharon Johnston, for the Attorney General of Canada

David Stamp, for OPSEU Pension Board of Trustees

Johnathan Ptak for OPSPB

HEARD: June 12, 2024

DECISION AND REASONS

[1] As described in my endorsement of February 1, 2024 (2024 ONSC 724), this action is a proposed class proceeding in relation to a series of pension transfers. When the parties appeared in February, they had reached a settlement. I made an Order approving the communication and notice plan proposed by the parties and I fixed this date to hear the motion to certify the proceeding and to approve the settlement.

[2] On the Motion today, all parties advocated in favour of approval. The hearing was a hybrid hearing in which most of the counsel were present in court but one counsel and a number of interested parties participated by videoconference (Zoom). No one present objected to the approval of the settlement or the proposed counsel fees.

[3] For the reasons that follow, I approved the settlement and the fees together with the proposed draft order with a minor amendment to provide an opt out period of 90 days from the date of the order.

BACKGROUND & SUMMARY

[4] In 2012 following the decision by the Province of Ontario to adopt the Harmonized Sales Tax (“HST”), a substantial number of employees of Ontario previously involved in administration and collection of Provincial Sales Tax (“PST”) transferred their employment to the Canada Revenue Agency (“CRA”). A Pension Transfer Agreement (“PTA”) between the federal and provincial governments and the relevant pension plans provided employees with the right to transfer their pensionable service from either the Ontario Public Service Employees’ Union (“OPSEU”) pension plan or the Ontario Public Service Plan to the Federal Public Service Superannuation Plan (“PSSP”).

[5] Each employee was provided with the amount to be transferred from one of the provincial plans to the federal plan and, to the extent that the amount transferred might not be sufficient to exactly match the years of service, the employee was given an estimate of the amount the employee would have to contribute to purchase the additional superannuation credits. There were time limits for exercising these options and rights.

[6] Unfortunately, during the period of the transfers there was a statutory recalculation of the actuarial assumptions underlying the PSSP. For many employees this resulted in a significant increase in the cost of buying into the PSSP. The increased cost was more than \$10,000 for some individuals. The Plaintiffs assert that the Defendants did not disclose this change and should be liable to the adversely affected employees who thus incurred an unexpected financial loss.

[7] This proposed class proceeding was launched in 2014. It was vigorously contested but following disclosure and cross examination on the affidavits in the certification record, following a mediation, the parties were able to reach a negotiated settlement. Under the proposed settlement, the Defendants, principally the Government of Canada, will set aside a sum to be paid out to individuals caught by the recalculation.

[8] The proposed amount is a percentage of the difference between the “federal transfer amount” that would have applied under the original actuarial calculations and the amount of the federal transfer amount applied to affected individuals under the new actuarial calculations. It is proposed that there be three classes of employees grouped according to the dates when they submitted (or would have submitted) their paperwork to initiate a pension transfer.

[9] In the proposed settlement, each individual in each class who was adversely affected will receive a cash payment. The parties have identified that there are approximately 456 affected class members if the action is certified and the settlement approved. The proposed settlement envisions a simplified and streamlined process in which all class members who do not opt out will be provided with a calculation and a payment without the need for any formal claims process.

[10] Any member of any of the classes who does not wish to be bound by the settlement will have the opportunity to opt out but as is common in settlements, if there are a significant number of opt outs, the Defendants will have the option to annul the settlement. Unless this threshold is

reached and the Defendants trigger this provision, then the settlement will be binding on class members who do not opt out and will not bind those who do opt out. Of course, those who opt out will not get the benefit of the settlement.

[11] As I will discuss in slightly more detail below, I am satisfied on the evidence and on the submissions that the proposed certification for settlement purposes is appropriate and the proposed settlement is reasonable, fair and in the best interests of the class members. I agree with counsel's description of the settlement as a highly favourable outcome.

[12] With regard to the fees proposed to be paid to class counsel, the cost component of the settlement was negotiated separately from the settlement on the merits. The fees to be charged by counsel will not come out of the settlement.

[13] In many cases, class counsel acts on a contingency agreement in class proceedings but that is not the case here. Class counsel was retained by the federal public service unions and has been billing and has been paid at regular rates. The costs award will be paid to the unions to reimburse or partially reimburse the costs actually incurred in pursuing this matter.

REASONS FOR APPROVAL

[14] Simple agreement between the parties is insufficient for either certification or approval of the settlement. The Court must first be satisfied that the criteria for certification in s. 5 (1) of the *Class Proceedings Act* ("CPA") are met. The fact of the settlement will be relevant in applying those factors and not all will attract the same scrutiny as they might if certification was contested but all of the criteria must still be addressed.¹

[15] In this case, while the Defendants do not concede that the Statement of Claim makes out a case for breach of fiduciary duty, the claims of negligence and negligent misrepresentation are plausible causes of action, the proposed amended class definitions create readily identifiable classes, liability and the methodology for calculating damages would be common issues, a class proceeding is preferable to numerous small claims court actions and the proposed representative plaintiffs are appropriate. I have no hesitation in granting certification for settlement purposes.

[16] In approving the settlement itself, the Court must not simply accept the proposal uncritically. A robust review of the proposed settlement is required. The Courts have identified various principles to be applied.² First and foremost, the settlement must be within the zone of reasonable settlements, it must be fair and it must be in the best interests of the class. The Court will examine the litigation history to ensure that this is a *bona fide* settlement following adequate investigation, disclosure and risk analysis and is not simply a *pro forma* class proceeding designed to bind affected parties to an inadequate settlement.³

¹ See the review of the law in *Cass v. WesternOne Inc.*, 2018 ONSC 4794, in particular, paras. 43 - 46

² See *Nunes v. Air Transat A.T. Inc.*, 2005 CanLii 21681 (SCJ) and *Redublo v. CarePartners*, 2022 ONSC 1398, paras 53 – 58.

³ See *Forbes v. Toyota Canada Inc.*, 2018 ONSC 5369

[17] I need not enumerate all of the factors that could be examined or consider them one by one although Plaintiffs' counsel was careful to do so in his Factum and his submissions. The three volume Motion Record sets out the detailed evidence required by s. 27.1 (7) of the *CPA*.

[18] In this case, it is unlikely the class members would have recovered compensation without the mechanism of a class proceeding. The evidence shows that notification was primarily by direct contact with each individual class member and there is only a small number of class members whose email or physical contact information appears to have changed and who have not yet been located.

[19] The proposed settlement will put a significant payment in the hands of each class member who was adversely affected without the risk and cost of further litigation. Given the defences available to the Defendants, the challenge in proving each individual claim and the simplicity of the claims process, the settlement is an excellent result for the class members and is also fair to the Defendants.

[20] I approve the settlement. As indicated above, the draft order had a 60 day period for individuals to opt out. Since there must be additional efforts made to locate up to 50 class members, I required the opt out period to be increased to 90 days. Notices will be posted on the web site maintained by class counsel but also on the union web sites.

[21] I need say little about the counsel fees because they are not coming out of the settlement. Moreover, there are to be no fees charged to class members for administering the settlement as that will be handled by class counsel. There is no separate claims administrator. In effect class counsel was retained at no cost to the class. I approve the costs component of the settlement and the terms set out in the draft order.

[22] In summary, the action is certified for settlement purposes, the terms of the settlement are approved along with the fees to be paid to class counsel. I will remain seized of the matter should any further direction be required pursuant to s. 27.1 (13) and to receive the report required by s. 27.1 (16) of the *CPA*.

[23] An Order may issue in the form approved by the parties and attached as Exhibit "J" to the Settlement Agreement (except that paragraph 11 is to be amended to read 90 days). Counsel may deliver an electronic copy of the Order to my office for signature.

Justice C. MacLeod

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Defendants

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Andrew Astritis and Zachary Rodgers, for the Plaintiffs
J. Sanderson Graham and Sharon Johnston, for the Attorney General of Canada
David Stamp, for OPSEU Pension Board of Trustees
Johnathan Ptak for OPSPB

DECISION AND REASONS

Regional Senior Justice C. MacLeod

Released: June 12, 2024