

**CITATION:** O'Neill v. General Motors of Canada, 2014 ONSC 4742  
**COURT FILE NO.:** CV-10-402515CP  
**DATE:** 20140827

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Joseph Michael O'Neill / Plaintiff

**AND:**

General Motors of Canada Limited / Defendant

*Proceedings under the Class Proceedings Act, 1992*

**BEFORE:** Justice Edward P. Belobaba

**COUNSEL:** *Louis Sokolov and Jordan Goldblatt* for the Class

*Laura Fric and Eric Morgan* for General Motors Canada

**HEARD:** August 7, 2014

**SETTLEMENT APPROVAL**

[1] This class action has settled. I advised counsel at the settlement approval hearing that the proposed settlement not only reflected well on General Motors of Canada ("GMCL") but was also in the best interests of the class and would easily be approved by this court for written reasons to follow.

[2] These are the reasons.

**Overview**

[3] In an effort to lower operating costs and avoid insolvency during the 2007-09 financial crisis, GMCL reduced the retirement benefits that it was paying its non-

unionized salaried and executive retirees. The affected retirees commenced a class action that was certified on consent in October 2011.<sup>1</sup> The representative plaintiff, Lynn McCullough (who had replaced Joseph O'Neill following the death of the latter) moved for partial summary adjudication of the breach of contract claim in June 2013. The class members were largely successful on the summary judgment motion.<sup>2</sup> The appeal and cross-appeal from the summary judgment decision were scheduled to be heard in June 2014. Just days before the hearing of the appeals the parties settled the action in its entirety.

[4] The proposed settlement establishes a \$9 million fund for past life and health claims to cover the period up to August 31, 2014, and restores most of the class members' health and life insurance benefits effective September 1, 2014.

### **Factual background**

[5] For many years, GMCL had provided the class members with post-retirement benefits, including healthcare and basic life insurance benefits. In addition to the post-retirement benefits, GMCL had also provided its executive employees with additional retirement benefits, including a pension top-up benefit (Canadian Supplemental Executive Retirement Program ("CSERP")/ Canadian Executive Retirement Program ("CERP")) and additional insurance benefits, including Supplemental Group Life Insurance ("SGLI") and Personal Umbrella Liability Insurance ("PULI").

[6] In late 2007, GMCL announced reductions to the healthcare benefits to take effect at various points beginning July 1, 2008. For example, GMCL eliminated semi-private hospital coverage and the right to add new dependents for coverage, reduced out-of-province coverage and increased the co-payments on the cost of prescription drugs. In August 2008, GMCL announced a new monthly healthcare contribution and in February 2009, a temporary reduction to the CSERP/CERP benefit for executives. In September 2009, GMCL announced planned reductions to the basic group life insurance benefit to take effect in 2010. The basic group life insurance benefit, which had been worth over \$100,000.00 to many retirees, was reduced to \$20,000.00 for most of the class members. In addition, GMCL announced that the CSERP/CERP benefit for executives would be reduced on a permanent basis, and the elimination of the option to continue the SGLI benefit in retirement. In December 2009, GMCL announced the elimination of the PULI benefit for executives.

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<sup>1</sup> *O'Neill v. General Motors of Canada Ltd.*, 2011 ONSC 6291, [2011] O.J. No. 4785.

<sup>2</sup> *O'Neill v. General Motors of Canada Ltd.*, 2013 ONSC 4654, [2013] O.J. No. 3239.

[7] In the summary judgment decision released in July, 2013 I found for the class members on most of the issues.<sup>3</sup> GMCL appealed the decision and the plaintiff cross-appealed on the issues on which he was not successful. Shortly after the parties served their appeal factums, they began to explore the possibility of resolving the action in its entirety. They agreed to adjourn the appeal for three months to see if the matter could be settled. The parties obtained actuarial valuations of the class members' claims, tried mediation without success and then, just days before the appeals were to be heard, reached agreement.

### **Details of the settlement**

#### *(i) Applies to entire class*

[8] The settlement applies to the entire class, including those who retired after benefit cuts were "announced" (who would not have recovered under the partial summary judgment decision) and early retirees (who faced increased litigation risk in an appeal due to the releases they signed on retirement). Thus, while the settlement involves some compromises, as set out below, it also improves on the result that had been obtained in the summary judgment by securing compensation for all class members.

#### *(ii) Healthcare benefits reinstated*

[9] The settlement provides that, as of September 1, 2014, most of the health benefits that GMCL has reduced will be reinstated for all Class Members, and that they will now be treated the same as those persons who retired on or before December 31, 1994 with respect to healthcare benefits.

[10] Class members will still be required to make healthcare contributions. The amount of the contribution, which was announced in August 2008, ranges from \$15 to \$70 depending on the class member's age and coverage (single, couple or family). Under the terms of the settlement, GMCL has the right in the future to modify and increase the contributions, provided that such modification or increase is reasonable and proportionate based on GMCL's experience. This right is subject to review by an arbitrator. In addition, class members will still be subject to the restriction on over-the-counter medications (the same restriction applies to GMCL retirees who retired on or before December 31, 1994).

[11] The settlement provides that GMCL does not reserve the right to reduce the healthcare benefits provided to Class Members in the future (except as specifically provided in the agreement, i.e. with respect to the amount of the healthcare contribution).

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<sup>3</sup> *Ibid.*

*(iii) Most of the life insurance and SGLI benefits reinstated*

[12] The settlement provides that, as of September 1, 2014, two-thirds of the reduced basic life insurance benefits (and SGLI for executives, where applicable) will be reinstated. The settlement further provides that GMCL does not reserve the right to reduce the Basic Group Life Insurance or Supplemental Group Life Insurance in the future.

*(iv) Executive post-retirement benefits*

[13] The settlement does not restore the CERP/CSERP benefits for executives (an issue on which the plaintiff was not successful before this court). However, executive members of the class have had their SGLI benefits restored (where applicable) and will receive the same improvements to the basic group life insurance and healthcare benefits as the other class members.

*(v) Settlement fund for past claims*

[14] The settlement provides that GMCL will pay \$9 million into a fund to compensate class members for the loss of life insurance benefits and health benefits between July 1, 2008 (when cuts to healthcare benefits first took effect) and August 31, 2014. The fund will be set up and administered by the representative plaintiff and class counsel. The \$9 million fund will be distributed as follows:

First, to the beneficiaries of class members who died (or die) between January 1, 2010 (when the cuts to life insurance first took effect) and August 31, 2014 and have received (or receive) reduced life insurance benefits from GMCL (basic group life insurance and SGLI). These class members will be compensated at the same 2/3 rate that applies to the rest of the class.

The remaining funds will be distributed to class members to compensate them for health benefits lost between July 1, 2008 and August 31, 2014. The settlement contemplates that the distribution of these funds is within the discretion of the representative plaintiff. The representative plaintiff proposes that each class member will receive an equal amount for past healthcare claims.

[15] The plaintiff will mail cheques for any past life insurance benefits directly to class members by November 17, 2014, and for past healthcare benefits by January 15, 2015. In the event that any funds cannot be distributed by May 1, 2015, class counsel will seek further direction from the court.

### **Settlement approval**

[16] There are about 3200 class members. I agree with class counsel that the cuts to the post-retirement healthcare benefits have had a significant impact on class members given their age, susceptibility to health problems, and inability to assume new financial burdens. The settlement provides a real and immediate benefit to class members by restoring their healthcare benefits on a going-forward basis, while also providing for compensation for past health losses.

[17] Class members were also adversely affected by the cuts to post-retirement life insurance benefits. The cuts were severe, with many class members losing \$80,000 or more in coverage. The settlement provides a real and immediate benefit to class members by restoring most of the life insurance coverage on a going-forward basis, while also providing for compensation for past life insurance losses.

[18] The settlement also avoids further appeal proceedings which could easily have consumed another five or more years. And, while the plaintiff was confident in his case, success on appeal was by no means guaranteed. On the basis of all of these considerations, class counsel and the representative plaintiff have recommended the settlement for approval.

[19] I have no difficulty approving this settlement. The settlement provides substantial recovery for the class members in a timely and efficient manner, and eliminates the litigation risk and delay associated with further appeals and additional proceedings. The settlement easily meets the criteria for approval. In my view, it is fair and reasonable and in the best interests of the class.

[20] The proposed settlement is approved.

### **Legal fees approval**

[21] I also have no difficulty approving class counsels' legal fees.

[22] Class counsel initially agreed to work on a straight hourly basis. The retainer agreement with GENMO Salaried Pension Organization (that funded the class action) provided that class counsel would render monthly accounts and be paid on the basis of their hourly rates and incurred disbursements. Class counsel advise that they have been billed (and have been paid) just over \$903,000 on the basis of this retainer.

[23] This initial retainer agreement was formally revised in July, 2014. GENMO agreed to pay a "premium" if the result achieved justified such a premium and if the payment of the premium did not come from the members of the class.

[24] As part of the settlement agreement, and separate and apart from the settlement of the benefits payable, GMCL will pay \$3 million as a lump sum that will be used as

follows: to remit the 10 percent amount owing to the Class Proceedings Fund for funding the disbursements; repay the legal fees paid to date by GENMO; pay class counsel for any remaining or anticipated legal fees; pay any remaining or anticipated administration expenses; with the balance to be the “premium” payment as agreed to by GENMO.

[25] Class counsel have provided the court with a detailed breakdown as to how the \$3 million will be allocated: \$1,033,334 to the Class Proceedings Fund; \$903,200 repaid to GENMO for legal fees paid to date; \$6881 repaid to GENMO for costs of public meetings; \$201,836 to class counsel for unpaid or anticipated legal fees; \$50,000 for anticipated administrative expenses and disbursements; leaving \$804,746 to be paid to class counsel as a premium.


[26] I pause here to note that normally I would view payment of “premium” requests with suspicion. I take initial retainer agreements seriously and, as a general rule, would only approve an additional premium if I was satisfied that the premium was agreed to not just by the representative plaintiff but by a significant majority of class members, and that the premium would not come from funds that belong to the class. Here, I am satisfied on both points. The premium was agreed to by GENMO, an organization that funded the litigation and *de facto* represented the class; and the premium would not come from class members but was included in a separate payment from GMCL.

[27] With the premium, the total in legal fees paid to class counsel will be about \$1.9 million. I find that this is completely reasonable. Given that the actuarial value of the overall settlement is in the range of \$130 million, a payment to class counsel of legal fees in the amount of \$1.9 million is only about 1.5 percent of the overall recovery – well under the 10 or 20 percent that, in my view, would have been readily approved had the retainer been on a contingency basis.

[28] The legal fees are approved.

### **Disposition**

[29] Both the proposed settlement agreement and legal fees request are approved. My congratulations, again, to both sides for achieving a fair and reasonable resolution to this class proceeding.

  
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Belobaba J.

**Date:** August 27, 2014