

Court File No.

06cr-324475 PD 3

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DIANNE LECLAIR

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

Proceeding Under the *Class Proceedings Act*, 1992

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1500 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

Date: *December 20, 2006*



Local Registrar

Address of Court office:
393 University Ave, 10th Fl.
Toronto, ON M5G 1E6

TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Ministry of the Attorney General
Crown Law Office (Civil Law)
720 Bay St., 8th Floor
Toronto, ON M5G 2K1

CLAIM

1. The Plaintiff claims:

- a. an Order declaring that, by their actions, the Defendant has caused and will cause them financial losses to her pension benefits, as further described below;
- b. \$100,000,000.00 in special damages;
- c. pre and post-judgment interest pursuant to the *Courts of Justice Act, R.S.O. 1990. c.C.43*;
- d. costs on a substantial indemnity basis; and
- e. such further and other relief as to this Honourable Court deems just.

The Parties

2. This is a proposed class proceeding, brought by the proposed Representative Plaintiff, Dianne Leclair, who is an employee of the Niagara CCAC in Ontario. At all material times, Ms. Leclair was represented in her employment with her employer or its predecessor by the Ontario Nurses' Association ("ONA").

3. Ms. Leclair and the proposed class of employees ("the employees") represented by Ms. Leclair are:

- a. employees and former employees of municipalities or service providers associated with municipalities (hereinafter referred to as "municipal providers");
- b. members of ONA whose employment was transferred from the municipal employers to newly-established "Community Care Access Centres" ("CCACs"); and
- c. who, as a result of the transfer and other actions by the Defendant, as described below,
 - i. have and will continue to experience financial losses to their pension benefits as provided through their employment with the CCACs and their predecessors; or
 - ii. will experience financial losses to their pension benefits as provided through their employment with the CCACs and their predecessors.

4. The Defendant has assumed financial responsibility for and legislative control over the provision of the type of services offered by CCACs In Ontario.

Background

5. This action concerns employees who provide home care and co-ordination placement services in Ontario through CCACs, who are represented by ONA, who formerly belonged to the Ontario Municipal Employees Retirement System or the Victorian Order of Nurses Pension Plan and whose pension plan membership was transferred to the Hospitals of Ontario Pension Plan as a result of the transfer of services to the CCACs as hereinafter described.

6. Home Care Programs are programs designed to provide direct medical, therapeutic, personal, homemaking and other services to persons in their homes. Placement Coordination Services co-ordinate the home care service providers with the persons they serve.

7. Prior to 1997, in Ontario, these types of services were provided by:

- a. home care organizations operated by municipal governments or privately through organizations such as the Victorian Order of Nurses; and
- b. placement co-ordination services operated by municipal governments.

8. Staff in these programs and services included over 3,000 people who were members of the following pension plans, as a term and condition of their employment, before 1997:

- a. Direct service staff and placement coordination staff which came from municipal providers and who participated in the Ontario Municipal Employees Retirement System pension plan ("OMERS").
 - b. Direct service staff from home care organizations who participated in the Victorian Order of Nurses Pension Plan ("VON").
 - c. Staff who participated in the Family Services Association pension plan ("FSA").
 - d. Staff who participated in the Hospitals of Ontario Pension Plan ("HOOPP").
9. Approximately 50% of the affected staff were and are unionized. The trade unions include: ONA; the Ontario Public Service Employees Union ("OPSEU"); the former Association of Allied Health Professionals: Ontario which is now part of OPSEU; Canadian Union of Public Employees; the Office & Professional Employees International Union; and Service Employees International Union. Each trade union is permitted under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, sched. A, as amended, to represent only its own members.

Transfer of Services and Employment in 1997

10. In or about 1996 and 1997, forty-three (43) CCACs across the province were incorporated by the Defendant as not-for-profit corporations, governed by independent boards of directors, accountable to the Ministry of Health and Long-Term Care (the "Ministry") through service agreements through which the Ministry funded the operations of the CCACs.

11. In or about 1997, a transfer of services and employment from municipal providers and private providers occurred ("the transfer"). At that time, Home Care Programs and Placement Co-ordination Services across the province were brought together and "housed" in CCACs. The transfer was brought about through the Defendant's choice to fund such services through service agreements with CCACs instead of with municipal providers and private providers.

12. At the time of the transfer, the employees were represented by ONA.

13. The division of the Ministry with responsibility for the service agreements was at all material times the Long Term Care Division. Neither the Defendant nor the Ministry and its Long Term Care Division are parties to prior or existing collective agreements between the bargaining agents and the CCACs. Neither the Defendant nor the Ministry and its Long Term Care Division have responsibilities for administering the pension plans which cover or in the past have covered the employees.

The Impact of the Transfer on the Employees' Pensions

14. While employed by municipal providers, some of the employees were enrolled in the Ontario Municipal Employees Retirement System ("OMERS") pension plan, regulated by the *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, c. 0.29. Enrollment in this pension plan was a contractual obligation under collective agreements between ONA and municipal employers. These collective agreements became binding on the CCACs when the employees were transferred. Due to the operation of s.69 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, sched.

15. CCACs are non-municipal employers. At the time of the transfer, CCACs were unable to enroll employees in OMERS because the government failed to make necessary legislative changes to the *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, C. 0.29 that would have permitted non-municipal employers to belong to the plan. The necessary changes were made in 1999 but were too late to affect the situation of the employees.

16. Others in the group of employees represented by ONA had been previously enrolled in the Victorian Order of Nurses Pension Plan ("the VON plan"). Because of restrictions in that plan, the CCACs could not participate and these employees were unable to continue their membership in the VON plan.

17. Because of the transfer, the question of which pension plan the affected employees would belong to after the transfer became an issue.

18. Ultimately, after receiving representations from the Defendant as described below, the forty-three (43) CCACs chose to enrol their employees in the Hospitals of Ontario Pension Plan ("HOOPP").

19. As a result of this enrolment, the employees will receive two pensions upon retirement: one from OMERS or the VON plan in respect of pre-1997 employment and one from HOOPP in respect of employment with a CCAC thereafter.

20. This situation leads or will lead to various financial disadvantages for the employees. For example, pension benefits in OMERS are calculated on the basis of the employee's best five years of highest earnings. Typically, such earnings occur at the end of an employee's career. Thus, many employees' combined benefits from the two plans are and/or will be significantly lower than they would have received had they remained in OMERS or had their service in OMERS been fully transferred to HOOPP.

Representations and Other Actions by the Defendant Leading to Enrolment in HOOPP

21. On or about December 10, 1996, as part of the transfer and ensuing discussions about affected employees' pensions, Patrick Laverty, Acting Executive Director of the Long Term Care Division of the Ministry, issued a letter to chairpersons of the CCAC Boards of Directors, which was copied to ONA. In it he 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.

22. Attached to that document was another document entitled: "The Provision of Pensions with the Implementation of Community Care Access Centres". This document originated with the Ministry. In it, the following statement appears:

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. [emphasis added]

23. These documents were copied by the Defendant to the ONA and other trade unions representing employees being transferred and the trade unions communicated their contents to their membership.

24. These documents also contained a strong recommendation from the Defendant to the CCACs that the CCACs enroll employees in the Hospitals of Ontario Pension Plan ("HOOPP").

25. The letter and attached document were prepared following the Ministry's engagement, in 1995, of KPMG Actuarial, Benefits & Compensation Inc. to prepare a report and make recommendations on pension arrangements in the new CCACs. The report stated that:

[t]he government's position is that individuals should not lose out with respect to pension coverage as a result of the formation of CCACs.

26. The documents referred to in paragraph 25, above, referred at several points to the government's stated "no loss" position. These documents also stated that if a HOOPP model were to be adopted, it may be necessary for a member to pay a "top-up" cost to the importing plan to ensure the member receives full benefits in respect of the imported service. These documents recommended that OMERS and HOOPP be explored as the most viable alternatives.

27. In or around 1996 to 1998, the Ministry also set up information sessions for affected employees and the CCACs to review a proposal from HOOPP, and sent out copies of the HOOPP proposal. The Ministry made favourable statements to the attendees of such sessions about joining HOOPP. The Ministry strongly encouraged the CCACs and their employees to join HOOPP by suggesting to them that there was really no alternative to such a course of action.

28. In or around 1997, the Ministry prepared a sample letter of understanding to replace the OMERS plan or the VON plan, as the case may be, with HOOPP for the CCAC employers and the bargaining agents to sign and include in their collective agreements and provided this letter to the CCACs for their use.

29. In or around 1996 to 1998, additional statements were made by duly authorized representatives of the Ministry at meetings as described in paragraph 26 including but not limited to the statement in or about December 1997 that "the Ministry is prepared to pay legitimate employment expenses, within reason, for CCACs".

30. As a result of these representations and the Ministry's strong recommendation that the employees be enrolled in HOOPP, all forty-three (43) CCACs enrolled their employees in HOOPP.

Efforts to Deal with the Financial Losses Caused by Enrolment in HOOPP

31. The Defendant and the CCACs were aware that the enrolment of affected employees in HOOPP would lead to financial loss to the affected employees in respect of their pension benefits as previously described.

32. In the five years following the transfer of services, OMERS, the VON and HOOPP, in conjunction with the Ministry and the Ontario Association of Community Care Access Centres ("OACCAC"), an umbrella group for CCACs, engaged in discussions about how to compensate affected employees for these losses.

33. They discussed the transfer of assets from OMERS and the VON plan to HOOPP in order to permit all CCAC employees to have all their service recognized under HOOPP pursuant to the Ministry's earlier statements referred to above. Such a transfer would prevent the financial loss concerned.

34. They discussed the amount of money which would have to be provided by OMERS and the VON plan to HOOPP in order to have the members' past service recognized as though they had always been enrolled in HOOPP.

35. They discussed other means by which the financial loss could be redressed, including a fund which would provide payments to affected employees upon retirement to compensate them for these losses.

36. In the course of those discussions, it became apparent that the amount available to be transferred out of OMERS and the VON plan (representing the entitlements of the transferred employees according to the *Pension Benefits Act*, R.S.O. 1990, c. P. 8, as amended, and its regulations) would not be sufficient to purchase the same number of years of credit in HOOPP. There would be a shortfall or "gap".

37. In or about March 2001, Mel Norto an actuary for the OACCAC, working with the Ministry, OMERS, the VON plan, and HOOPP, drafted a document summarizing the situation. The document provided the following figures in respect of such a transfer:

OMERS-VON-FSA-HOOPP
Pension Transfer Reserve Gap
as at December 31 1999

Moving From	No. Employees	HOOPP Requires	OMERS/VON Has Available	Gap
OMERS	2438	\$ 147.366	\$132.044	\$ 15.322
VON	411	\$24.885	\$ 15.969	\$8.916
FSA approx.	45	estimated		\$1.0
Totals	2849			\$25.441

All figures (except employees numbers) are in millions.

NB. This chart does not include employees who may have retired, died, moved to another employer, or been divested between the time that their CCAC was created and OMERS/HOOPP/VON compiled these numbers.

38. In addition, Mr. Norton included the following statement with his March 2001 document:

Since December 1999 the dollar amounts have grown by about 8% annually, such that the total current gap is approximately \$ 28 million.

39. Repeated requests by the OACCAC, on behalf of the employees of its members, were made to the Defendant to fund this shortfall in accordance with its Ministry's promises and undertakings.

40. In or about 2001, Ministry officials indicated that they were considering three options to address this issue:

Option 1: The government would fully fund the gap so that employees would be in the same position as if they had belonged to HOOPP from the first day of their employment.

Option 2: The government would do nothing to address the pension transfer issue.

Option 3: The government would establish a special fund to be administered by one of the previous pension plans, eg. OMERS, VON, FSA. This fund would be available at the time of each employee's retirement to offset any specific financial shortfall occasioned by the transfer to HOOPP.

41. By letter dated March 27, 2002, Helen Johns, Associate Minister of Health, informed the Board Chair of the OACCAC with copies to ONA and other bargaining agents for employees, that the government would not fund the shortfall and would take no other steps to address the issue.

42. As a result of their move to the HOOPP plan, the shortfall, and the failure of the Defendant to honour commitments made by its Ministry, the employees have suffered, and will suffer serious financial losses in their pension benefits.

Causes of Action

General Duty of Care, Negligent Misrepresentations and Detrimental Reliance

43. ONA and the employees relied to their detriment upon the representations of the Defendant that it would ensure that employees suffered no pension losses as a result of the transfer, that it would pay for legitimate employment expenses of the CCACs and that HOOPP was the best plan for the employees.

44. In making the statements contained in its letter of December 10, 1996 and other communications promoting HOOPP, the Defendant ought reasonably to have foreseen that ONA, management of the CCACs, and the employees would rely upon the representations contained therein. Reliance by these organizations and individuals was reasonable in the circumstances. The Defendant therefore owed them a duty of care.

45. The Defendant breached its duty of care owed to the employees by making these representations negligently, carelessly, or wilfully and recklessly in the following ways:

- a. the Defendant knew or ought reasonably to have known that the transfer would cause the employees to suffer losses to their pension benefits;
- b. the Defendant knew or ought reasonably to have known that the transfer of credited service from OMERS or the VON plan to HOOPP would be insufficient to prevent the losses to their pension benefits;
- c. the Defendant knew or ought reasonably to have known that it would not take steps to ensure that the employees suffered no losses in their pension benefits as a result of the transfer; and
- d. the Defendant nevertheless represented that it would ensure the employees suffered no such losses, represented that it would pay

legitimate employment expenses and represented to the Plaintiff that HOOPP was the best plan for them to join on that basis.

46. The Plaintiff relied upon these representations to her detriment. This detrimental reliance includes but is not limited to:

- a. foregoing opportunities to pursue the option of amendments to the *Ontario Municipal Employees Retirement System Act* which would have allowed the employees to remain in OMERS thus preventing the losses to the employees' pension benefits;
- b. foregoing opportunities to grieve the matter at the time and/or placing existing grievances in abeyance and permitting members to be enrolled in HOOPP and contributions to be made for them on the basis that the Defendant would ensure they suffered no losses.
- c. foregoing opportunities to seek amendments to the VON plan that would have permitted continuing membership in that plan.

47. The Plaintiff has suffered and will suffer losses as previously described as a result of this detrimental reliance.

Breach of Undertaking

48. In the documents and statements set out above, the Defendant undertook to ensure that the affected employees would not suffer financial losses with respect to their pension rights. In exchange, ONA and the employees, which includes the Plaintiff, expressly or implicitly agreed not to pursue or vigorously pursue grievances against the CCACs for failure to respect pension rights. The Plaintiff also expressly or implicitly agreed not to vigorously pursue political opposition to the Defendant's plan on the basis that it negatively impacted upon employees' pension rights. As a result, the Defendant obtained a more orderly transfer to the CCACs with less labour disruption. The Defendant's promises therefore constitute binding contractual undertakings that it is legally bound to respect. In failing to ensure that employees suffered no pension losses as a result of the transition, the government breached this contract with the Plaintiff.

49. Notice has been given pursuant to section 7 of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

50. The Plaintiff commence this action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

51. The Plaintiff proposes that this action be tried at Toronto.

Date of issue: *December 20, 2006*

**CAVALLUZZO HAYES SHILTON
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Solicitors for the Plaintiff

DIANNE LECLAIR

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

06-01-3224475 PD 3

Court File No.:

SERVICE OF A COPY
 ADMITTED THIS *20th* DAY OF *December*, 2006.
 Crown Law Office (Civil Law)
 MINISTRY OF THE ATTORNEY GENERAL
 FOR ONTARIO
 Per *[Signature]*.....Time *10:20 a.m.*
 720 BAY STREET
 TORONTO, ONTARIO M5G 2K1

**ONTARIO
 SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Toronto

STATEMENT OF CLAIM

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