Court File No. CV-11-439656-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CHARLOTTE PERRENOUD and RAJESH BEDI

Plaintiffs
(Moving Party)

- and -

eHEALTH ONTARIO and HER MAJESTY THE QUEEN in right of Ontario as represented by the MINISTER OF HEALTH AND LONG –TERM CARE

Defendants
(Responding Parties)

Proposed Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDING PARTIES,
eHEALTH ONTARIO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(Returnable November 14, 2012)

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PART I - OVERVIEW

1. The Plaintiffs, employees of eHealth Ontario ("eHealth"), move to certify this proceeding as a class proceeding. They have also brought a motion to amend the statement of claim. The Defendants, eHealth and Her Majesty the Queen in right of Ontario ("HMQ"), oppose the motion for certification and the motion to amend the statement of claim for the reasons set out below.

2. Specifically, the Defendants submit that the Statement of Claim and draft Amended Statement of Claim do not disclose a reasonable cause of action in breach of contract or inducing breach of contract.

3. Based on the facts pled and the unambiguous express terms of the Performance Incentive Plan Policy, there can be no liability for not providing performance incentive awards to employees. Similarly, with respect to the claim for breach of contract for a merit salary increase, the pleading does not contain any material facts that would make any promise or statement of intention to provide a merit increase by eHealth a contractually binding obligation.

4. Given that there is not a reasonable cause of action in breach of contract, there cannot be a reasonable cause of action in inducing breach of contract since a breach of contract is an element of the tort of inducing breach of contract. In addition, the facts pled do not establish other requisite elements of the tort of inducing breach of contract.

5. In any event, this action is not suitable for certification because of deficiencies in the Plaintiffs' proposed class definition, formulation of the common issues, and substantial elements of the Plaintiffs' litigation plan.

PART II –SUMMARY OF FACTS

6. eHealth is a non-profit corporation without share capital, and is an agent of HMQ within the meaning of the *Crown Agency Act*, RSO 1990, c C 48. It was established by Regulation 43/02 of the *Development Corporations Act*, RSO 1990, c D 10**,**[1] which was amended in 1998 to continue the corporation known as Smart Systems for Health Agency under the name of eHealth.

7. The Minister of Health and Long-Term Care has various powers and responsibilities in respect of eHealth as set out in the regulation.

[1] O Reg 43/02, s 2, *Responding Parties' Book of Authorities* ["BOA"], Tab A.

Performance Management Process

8. eHealth manages the performance of employees through the Performance Management Process. Managers generally meet with employees three times during the fiscal year to set employment objectives and individual development plans, measure progress and provide and receive feedback.[2]

9. The Performance Management Process supports career growth and development, and is utilized as a tool or factor in making determinations regarding promotions, work assignments, and employee retention.[3]

10. As part of the Performance Management Process, regular full-time employees or contract employees with contracts of 18 months or greater, hired on or before December 31, 2011, complete a Performance Management Plan. The Plan of the employee is used to manage and evaluate performance. There are five possible overall performance ratings: Exceptional; Exceeds; Achieved Targeted Expectations; Developing; and Not Meeting.[4]

11. The performance rating in the Performance Management Plan is a factor in assessing eligibility to participate in the Performance Incentive Plan Policy (the "Policy"). Determinations of performance incentive awards are made pursuant to the Policy.[5]

Performance Incentive Plan Policy

12. Participation in the Policy is subject to meeting the eligibility criteria set out in the Policy. In particular, in order to be eligible to participate, an individual must:[6]

[2] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, pp 2-3, paras 5-7 and Exhibits "A" to "C", pp 8-33.

[3] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 2, para 5.

[4] *Ibid*, p 2, paras 3-4.

[5] *Ibid*, pp 2-4, paras 5, 9-10 and Exhibit "D", pp 35-41.

(a) Be a full time regular employee, or an employee on contract of one year plus one day (s. 2.1);[7]

(b) Have a rating of "2" or higher when assessed according to the Performance Management Process (s. 2.1);[8]

(c) Have started employment on or before December 31 of the plan year (s. 3.5); and

(d) Subject to certain exceptions,[9] be actively employed at the time the award is paid (ss. 2.1 and 3.7).

13. Employees eligible to participate in the Policy may be considered for a performance incentive award. Performance incentive awards under the Policy range from 0% to 15% of an employee's eligible earnings. In other words, an eligible employee may not receive any performance incentive award (i.e. 0%), or receive an award up to 15% of eligible earnings under the Policy.[10]

14. Based on the provisions in the Policy, factors considered in determining whether to grant performance incentive awards, and if so their amounts, include the achievement of corporate goals, success of eHealth, and rating under the Performance Management Plan.[11]

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[6] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 10 and Exhibit "D", pp 35-41.

[7] Part time employees, temporary agency staff, procured contractors, independent contractors, and those on employment contracts of one year or less are not eligible to participate in the Performance Incentive Plan Policy. These terms are further defined in the Policy's glossary (ss 2.1 and 5).

[8] Note that eHealth no longer uses numerical ratings for employee performance. Rather, the ratings of Exceptional, Exceeds, Achieved Targeted Expectations, Developing, and Not Meeting are used, and applied to the Policy. A rating of Developing would meet the rating eligibility criteria: Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 11; Cross-examination of Ms. Abbott, *Record of Cross-examinations*, Tab A, p 43, qq 179-182.

[9] For example, in the event of retirement, total and permanent disability, or death, and where the employee has been actively employed for at least six consecutive months during the course of the plan year, the employee may receive a pro-rated award.

[10] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, pp 4-5, para 12 and Exhibit "D", pp 35-41; Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5, p 26, para 5; Affidavit of Mr. Bedi, *Motion Record*, Tab 6, p 80, para 7.

[11] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1 and Exhibit "D", p 38.

15. Employees who receive a performance incentive award may also elect within a prescribed time period to direct a percentage of the award to eHealth's Defined Contribution Pension Plan ("DCPP") at their pre-existing contribution rate. If employees choose this option, eHealth makes a matching contribution at the pre-existing matching rate.[12]

16. The Policy contains a provision for its termination, suspension or amendment which states as follows:

> The eHealth Ontario Board of Director's, HR Sub-Committee of the Board, or CEO may terminate, suspend, or amend the Performance Incentive Plan, in whole or in part, at any time and at their sole discretion, without any liability.[13]

Letters of Employment

17. The letters of employment for Mr. Bedi and Ms. Perrenoud state that they are "eligible to earn an additional annual 'Pay for Performance' one time pay…".[14] The Plaintiffs' Supplementary Factum, in claiming that the "letters of employment state that in addition to their base salaries, they are entitled to earn, 'an additional annual "Pay for Performance" one time pay' on top of their salaries",[15] mischaracterizes the content of the letters.

Fiscal Year 2010-2011

18. Following the Performance Management Process in early 2011 the Plaintiffs were evaluated and provided with a rating under the Performance Management Plan. Thereafter,

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[12] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1 and Exhibit "D", p 39.

[13] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 5, para 14 and Exhibit "D", pp 35-41, s 3.8 [emphasis added].

[14] Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5 and Exhibit "A", p 36-37; Affidavit of Mr. Bedi, *Motion Record*, Tab 6 and Exhibit "A", pp 90-91 [emphasis added].

[15] At para 24 [emphasis added].

Compensation Statements were provided to the Plaintiffs setting out information in respect of the amount of an award under the Policy and a merit increase.[16]

19. On May 20, 2011, the CEO of eHealth emailed employees advising that performance incentive awards and merit increases would not be paid for the 2010-2011 fiscal year. The email stated as follows:

> Since assuming responsibility for eHealth Ontario, our management team has been guided by two principal goals: to create a culture of accountability and achievement at the agency and to help build the electronic health care system which is so essential to improving the quality of health care people receive across Ontario. While much work lies ahead, I believe we have made significant progress during the past year. In that respect, we offered agency employees a certain level of individual performance-linked incentive compensation.
>
> However, when placed in the context of the hard work eHealth Ontario still has to do in overcoming past challenges, and in light of the pressing financial circumstances that all Ontarians face, it is clear that this decision needs to be revisited. Indeed, it threatens to obscure the genuine progress agency employees are making to help deliver a stronger, more responsive health care system.
>
> Accordingly, I have advised the Minister that we are reversing the previous decision immediately. Merit increases and performance linked incentives will not be paid to employees of the agency this year. In addition, I have advised the board of directors that, as CEO, I am declining the performance payment previously offered to me in recognition of the restructuring and turnaround efforts of the past year.
>
> Hopefully, these steps will serve to demonstrate that our first and fullest priority at eHealth Ontario is serving the cause of creating an electronic health care system that responds to the needs of Ontarians in every corner and community of the province.[17]

[16] Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5, pp 27-28, paras 12-13 and Exhibit "G", p 65; Affidavit of Mr. Bedi, *Motion Record*, Tab 6, p 81, paras 10-11 and Exhibit "F", p 113.

[17] Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5, pp 28-29, para 17 and Exhibit "H", p 67; Affidavit of Mr. Bedi, *Motion Record*, Tab 6, p 82, para 16 and Exhibit "H", p 117.

Fiscal Year 2011-2012

20. The Plaintiffs seek to amend their pleading to claim entitlement to a performance award for the fiscal year 2011-2012. The Defendants oppose the amendments because, as set out herein, the proposed claim is untenable.

21. The Plaintiffs were evaluated through the Performance Management Process for the fiscal year 2011-2012 and Performance Management Plans were completed.[18] Although Mr. Bedi and Ms. Perrenoud claimed in their affidavits that they received a Performance Management Plan rating under the Policy, they admitted in cross-examination that the Performance Management Plan is separate from the Policy, and that the performance review was under the Performance Management Plan, not the Policy.[19]

22. Mr. Bedi and Ms. Perrenoud further clarified that despite the claim in their affidavits that receipt of a Performance Management Plan rating "entitles" them to a performance incentive award under the Policy, there is no such language in the Policy.[20]

23. No Compensation Statements were provided to any employees for the fiscal year 2011-2012; and indeed, there is no allegation pleaded that any decision or communication was made by eHealth regarding any awards for this fiscal year.[21]

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[18] Supplementary Affidavit of Ms. Perrenoud, *Supplementary Motion Record*, Tab 2, p 12, para 2 and Exhibit "A", p 15-27; Supplementary Affidavit of Mr. Bedi, *Supplementary Motion Record*, Tab 3, p 29, para 2 and Exhibit "A", p 30-41.

[19] Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, pp 16-17, qq 58-63; Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, pp 18-19, 22, 26, 33-34, qq 83-84, 92-97, 109-112, 140-141.

[20] Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, pp 21-22, qq 82-86; Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, pp 34-25, qq 142-146.

[21] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 5, paras 15-16; Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, p 20, qq 75, 76; Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, p 31, q 128.

PART III - ISSUES

24. The issue to be determined in this motion is whether the Plaintiffs have satisfied all of the requirements prescribed by section 5 of the *Class Proceedings Act, 1992* in order to have this action certified as a class proceeding.[22]

PART IV – ARGUMENT AND LAW

25. In order for an action to be certified a plaintiff must meet each requirement in section 5 of the *Class Proceedings Act*:[23]

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[22] SO 1992, c 6 [*Class Proceedings Act*]. Note that the Defendants oppose the amendments to the claim on the basis that they do not disclose a reasonable cause of action, which is the same as the issue for s 5(1)(a) of the *Class Proceedings Act.*

[23] *Ibid*, s 5(1).

26. The plaintiff bears the burden of satisfying the court that an action is appropriate for certification. While the plaintiff is not required to adduce any evidence to meet the requirement in subparagraph 5(1)(a), the plaintiff does bear the burden of adducing sufficient evidence to meet the requirements in subparagraphs 5(1)(b)(c)(d) and (e).[24]

1) NO REASONABLE CAUSE OF ACTION

27. A claim will not be certified where it fails to disclose a reasonable cause of action. The test under s 5(1)(a) of the *Class Proceedings Act* is the same as under Rule 21 of the *Rules of Civil Procedure*; namely: (a) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven; (b) the moving party, in order to succeed, must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed; (c) a claim will not be dismissed simply because it is novel; and (d) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.[25]

28. Following delivery of a statement of defence, defendants may take the position on the certification motion that the statutory criteria for certification, including the requirement of a reasonable cause of action, are not met. Indeed, a class proceeding cannot be certified where it fails to disclose a reasonable cause of action. As this court has recently held, the filing of a statement of defence does not relieve the plaintiff from meeting its burden to satisfy all of the certification criteria.[26]

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[24] *Hollick v Toronto (City)*, [2001] 3 SCR 158 at para 25 [*Hollick*], BOA Tab 1; *Fulawka v Bank of Nova Scotia*, [2012] OJ No 2885 at paras 78-79 (CA) [*Fulawka*], BOA Tab 2.

[25] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 33, BOA Tab 3; *Wellington v Ontario* (2011), 105 OR (3d) 81 at para 14 (CA), BOA Tab 4; *Hollick*, *supra* note 24 at para 25, BOA Tab 1; *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 at para 41 (CA), leave to appeal to SCC refused, [2005] SCCA No 50, BOA Tab 5.

[26] *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at para 106 [*Martin*], BOA Tab 6; *Arora v Whirlpool Canada LP*, 2012 ONSC 4642, paras 107, 134-136, 162 [*Arora*], BOA Tab 7; *Labourers' Pension Fund*

29. The Defendants state that the Plaintiffs have failed to plead material facts to establish a reasonable cause of action in breach of contract.

Breach of Contract: Merit Increase Fiscal Year 2010-2011

30. The Plaintiffs claim damages for breach of contract for failure to provide the Plaintiffs with reasonable notice of the retraction of merit increases.[27] The only material fact pleaded to support this claim is that the Plaintiffs were provided with Compensation Statements that set out a merit increase.[28] The claim does not establish a reasonable cause of action because the Plaintiffs do not plead (nor could they plead) that they provided any consideration for the merit increase such as to create a legally binding contract for the merit increase.

31. Under basic contract principles, consideration is required to make an offer or promise binding.

32. The Plaintiffs' pleading that they were provided with Compensation Statements setting out a merit increase is, at best, only sufficient to establish that a non-binding promise or statement of intent was made to provide a merit increase. It is not sufficient to establish a legally binding contract for a merit increase. For the pleading to establish a reasonable cause of action for breach of contract, it must plead material facts to first establish the formation of a contract.

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of Central and Eastern Canada (Trustees of) v Sino-Forest Corp, 2012 ONSC 1924 at paras 12, 45-56, 66-72, BOA Tab 8; *Delgrosso v Paul*, [1999] OJ No.5742 at paras 5, 7 (Ct J (Gen Div)) BOA Tab 9; *Class Proceedings Act, supra* note 22, s 5(1)(a).

[27] Statement of Claim, *Motion Record*, Tab 7, p 132, para 1(g).

[28] Statement of Claim, *Motion Record*, Tab 7, p 141, para 34.

The Plaintiffs have not pleaded the essential elements to establish the formation of a contract that could in turn be breached.[29]

33. In *Yarlett v Re/Max Realtron Realty Inc*, the Ontario High Court of Justice on a Rule 21 motion dismissed a claim in breach of contract for a failure of consideration.[30] The court held that an undertaking by a vendor of a house was unenforceable due to lack of consideration for the undertaking.

34. Courts have found that promises to pay salary increases are unenforceable because there was no consideration to make the promise contractually binding. In *Simpson v Ontario*, the Ontario Court General Division rejected the employees' class action claim for a salary increase in part on the basis that there was no fresh consideration for the promise to pay the salary increase.[31]

35. Similarly, in *Brock v Matthews Group Ltd*, the Ontario High Court of Justice found that the employer's promise of a salary increase to an employee was an unenforceable gratuitous promise because the employee did not give any consideration for it.[32]

36. In *Bennett v British Columbia*, the British Columbia Court of Appeal similarly found that promises of premium free medical and health insurance to employees following retirement were

[29] See *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2012 ONSC 5619 at paras 39-40, BOA Tab 10, where the Court dismisses the breach of contract claim on a Rule 21 motion on the basis that no facts were pleaded "upon which a court could conclude that there was a contract to breach."

[30] *Yarlett v Re/Max Realtron Realty Inc*, [1989] OJ No 1379 (HC), BOA Tab 11.

[31] *Simpson v Ontario*, [1997] OJ No 3082 (Ct J (Gen Div)) at para 24, aff'd [1997] OJ No 3082 (CA), BOA Tab 12.

[32] *Brock v Matthews Group Ltd*, [1988] OJ No 370 (HC), aff'd [1991] OJ No 83 (CA), BOA Tab 13.

not contractually binding because employees did not provide fresh consideration for the promise.[33]

37. In the converse situation, where detrimental changes are purportedly made to an employee's contract of employment, such as a new termination clause, courts have been strict in requiring consideration for the detrimental change. Employers have not been permitted to rely on the employee's continued employment as consideration to the employee for the detrimental change.[34] Similarly, where purported favourable changes are made to an employee's contract of employment, such as a merit increase, an employee cannot rely on his continued employment as consideration to the employer for the favourable change. In both cases, there is no fresh consideration.

38. In short, the claim for a merit increase does not contain the necessary elements for the formation of a contract, and thus, there is not a reasonable cause of action for breach of contract.

Breach of Contract: Performance Incentive Award Fiscal Year 2010-2011

39. The Plaintiffs plead that eHealth is liable in breach of contract for non-payment of performance incentive awards.[35] However, the Plaintiffs rely on eHealth's Performance Incentive Plan Policy which by its very terms expressly permits eHealth to not pay performance incentive awards without incurring liability. There is no reasonable cause of action for breach of contract because the unambiguous terms of contract expressly permit the conduct alleged to be a breach.

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[33] *Bennett v British Columbia*, [2012] BCJ No 497 at paras 24-26, 32-33, 37 (CA), BOA Tab 14.

[34] *Francis v Canadian Imperial Bank of Commerce*, [1994] OJ No 2657 (CA), BOA Tab 15; *Hobbs v TDI Canada Ltd* (2004), 37 CCEL (3d) 163 (CA), BOA Tab 16; *Braiden v La-Z-Boy Canada Ltd*, [2008] OJ No 2314 at paras 56, 60 (CA), BOA Tab 17.

[35] Statement of Claim, *Motion Record*, Tab 7, p 141, para 32.

40. Since the Plaintiffs rely on the Policy in the claim, the Policy forms part of the claim and may be relied upon in determining whether the Plaintiff has pled a reasonable cause of action.[36] The relevant provision of the Policy states as follows:

> 3.8 Amendment and Termination of the Plan
>
> The eHealth Ontario Board of Directors, HR Sub-Committee of the Board, or CEO may terminate, suspend, or amend the Performance Incentive Plan, in whole or in part, at any time and at their sole discretion, without any liability.[37]

41. By virtue of the announcement of non-payment of incentive awards, the Policy was in substance suspended.[38] In similar circumstances, the Federal Government's wage freeze was a suspension of the performance pay system.[39] This court also concluded in *ArcelorMittal Dofasco Inc v U.S. Steel Canada Inc* that, while the defendant had not expressly advised that it was relying on the "Termination Right" in the contract, it in substance had done so, and was not required to refer to the specific termination provision to effect a valid termination.[40]

42. Pursuant to the express terms of the Policy, it could be suspended at any time, without liability. The clear unambiguous intent is to reserve to eHealth the discretion not to pay performance incentive awards without incurring liability. The Plaintiffs' claim is necessarily that eHealth could not suspend the Policy without incurring liability. Accordingly, the claim is contrary to the express terms of the contract and it is plain and obvious that it cannot succeed.

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[36] *Martin*, supra note 26 at paras 160-161, BOA Tab 6; *Stitt v Ontario*, [2001] OJ No 1337 at para 12 (Sup Ct) [*Stitt*] BOA Tab 18.

[37] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 10 and Exhibit "D", p 40 [emphasis added].

[38] Statement of Claim, *Motion Record*, Tab 7, pp 139-140, paras 26-27; Affidavit of Mr. Bedi, *Motion Record*, Tab 6, p 82, para 16 and Exhibit "H", p 117; Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5, pp 28-29, para 17 and Exhibit "H", p 67.

[39] *Granger v Canada (Treasury Board)*, [2000] FCJ No 836 at para 13 (CA), BOA Tab 19.

[40] *ArcelorMittal Dofasco Inc v US Steel Canada Inc* [2008] OJ No 4412 at paras 69-79 (Sup Ct) [*ArcelorMittal*], BOA Tab 20.

43. Similarly, in *ArcelorMittal Dofasco Inc v U.S. Steel Canada Inc*, referred to previously, the court considered a comparably worded contractual provision on a Rule 21 motion and found, based on an interpretation of the contract, that there was no reasonable cause of action.[41] That decision involved a takeover of the vendor Stelco leading the new takeover company to terminate a share purchase agreement in accordance with the "Termination Right" in the contract which was as follows:

> If the circumstances referred to in subparagraph (ii) above occur, then Stelco or Cliffs, as the case may be, shall be entitled to give three business days notice to the Purchaser of termination and this offer, even if accepted, and the definitive agreement, if entered into prior to the Closing, shall automatically terminate <u>without liability</u> to Stelco or Cliffs, as the case may be…[42]

44. The court rejected the plaintiff's multiple possible interpretations and found the Termination Right provision to be clear and unambiguous in providing the defendant a right to terminate the agreement "for any reason whatsoever". The court further rejected the claim of an implied duty of good faith in the exercise of the termination right as being inconsistent with the termination provision.[43]

45. In *Stitt v Ontario*, the court also dismissed a breach of contract claim on a Rule 21 motion.[44] The plaintiffs, bear hunt guides, claimed that their Bear Management contracts with Ontario contained an express right of renewal and that Ontario failed to renew the contracts thereby breaching the contracts. Alternatively, the plaintiffs claimed that the contracts were ambiguous and contained an implied right of renewal. The court found that the contact was not ambiguous, did not raise complex issues of fact and law, and that the case did not raise a novel

[41] *Ibid* at paras 30-36, 38-39.

[42] *Ibid* at para 5 [emphasis added].

[43] *Ibid* at paras 39-40, 60.

[44] *Stitt*, *supra* note 36, BOA Tab 18.

legal proposition. The court determined the action based on the pleadings and the express terms of the contract. In particular, it found that the contract did not contain a right of renewal, so non-renewal of the contract did not amount to a breach of contract.

46. In *Lincoln Canada Services LP v First Gulf Design Build Inc*, the court considered competing interpretations of the terms of a lease between the parties on a Rule 21 motion and found that the terms of the lease precluded liability to the plaintiff.[45] The Court of Appeal affirmed the decision noting that there were no facts in dispute material to the interpretation of the lease and further stating that the construction of the lease was "a question of law and that the motion was correctly brought under rule 21.01(1)(a)".

47. More recently, this court in *Arora v Whirlpool Canada LP* rejected the argument that complex and important issues should only be decided on a full record after trial as being "problematic and an invitation to shirk the court's obligation under s. 5(1)(a) of the *Class Proceedings Act, 1992*". In that case, the court interpreted the contract between the parties and found that the plaintiffs' contractual claims did not disclose a reasonable cause of action.[46]

48. Similarly, no further evidence is required to assess the present claim. This is not a case that requires evidence as to the surrounding circumstances and business context in which the contract was negotiated and entered into. Rather, the contractual document at issue is a company policy as opposed to a commercial contract negotiated and entered into by the parties.[47]

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[45] *Lincoln Canada Services LP v First Gulf Design Build Inc*, [2007] OJ No 4167 at paras 4, 10, 12, 44, 51 (Sup Ct), aff'd [2008] OJ No 2611 (CA), BOA Tab 21.

[46] *Arora*, *supra* note 26 at paras 136, 177, 180-182, BOA Tab 7.

[47] *ArcelorMittal*, *supra* note 40 at paras 30-36, BOA Tab 20.

49. Furthermore, where a contract is unambiguous then the parties are precluded by the parol evidence rule from adducing evidence to support a particular interpretation of the provisions.[48] The suspension provision in the Policy is unambiguous such that any evidence in respect of its interpretation would be barred by the parol evidence rule. In any event, the Policy itself affords to the Vice-President of Human Resources the full power and authority to "interpret and administer" the Policy. Accordingly, any other evidence in respect of the interpretation of the Policy would be at odds with the Policy which leaves its interpretation to the VP of Human Resources.[49]

50. While courts have implied terms of good faith into the exercise of an employer's discretion, and while eHealth maintains that its decision was made in good faith, the fact is that the above provision of the Policy, in particular, the reference to "without liability", displaces any implied terms that could act to impose liability. An implied term, such as a duty to exercise discretion in good faith which could act to impose liability, would be contrary to the express provision in the contact that precludes liability for suspending the Policy. A court cannot imply a term into a contract where such a term would be inconsistent with the express provisions of the contract.[50]

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[48] *Eli Lilly & Co v Novopharm Ltd*, [1998] SCJ No 59 at paras 54-58, 61, BOA Tab 23; *ArcelorMittal*, *ibid* at para 33.

[49] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1 and Exhibit "D", p 40. See *Lincoln Canada Services LP v First Gulf Design Build Inc*, [2008] OJ No 2611 at para 1 (CA), BOA Tab 22 for an analogous situation wherein the Court of Appeal affirmed a decision to interpret a lease on a Rule 21 motion in part on the basis that the lease excluded resort to extrinsic evidence.

[50] *Arora*, *supra* note 26 at para 182, BOA Tab 7; *ArcelorMittal*, *supra* note 40 at paras 60, 67, BOA Tab 20; *Transamerica Life Canada Inc v ING Canada* (2003), 68 OR (3d) 457 at para 53 (CA) [*Transamerica Life*], BOA Tab 24; *Marinangeli v Marinangeli*, [2003] OJ No 2819 at para 65 (CA), BOA Tab 25; *G Ford Homes Ltd v Draft Masonry (York) Co Ltd*, [1983] OJ No 3181 at para 9 (CA), BOA Tab 26.

51. In any event, even if a duty of good faith could be implied, the act of not paying incentive awards does not amount to a defeat or evisceration of the purpose or objective of the employment contract as alleged.[51] Acting in a manner expressly contemplated by the Policy (i.e. suspending it) cannot be an evisceration of the Policy, or more broadly the employment agreement.[52]

52. In summary, no evidence is required and, on the basis of the pleading, it is plain and obvious that this part of the claim cannot succeed.

Breach of Contract: Performance Incentive Award Fiscal Year 2011-2012

53. The proposed claim in the draft amended pleading for the incentive award for 2011-2012 is more tenuous than the claim for the fiscal year 2010-2011 and is also untenable. The sole fact pleaded in support of this claim is that the Plaintiffs had their performance evaluated and received a performance rating.[53] Based on this alone, the Plaintiffs claim an entitlement to a performance incentive award.

54. However, *eligibility* to participate in the Policy does not *entitle* the Plaintiffs to an award. Rather, as expressly stated in the Policy and as acknowledged by the Plaintiffs, an employee would merely be "eligible" for consideration of an award from "0% to 15%" of the employee's earnings.[54] In other words, under the Policy, an employee, even if eligible to participate in the

[51] Statement of Claim, *Motion Record*, Tab 7, p 141, para 35; *Transamerica Life*, *supra* note 50 at para 53, BOA Tab 24; *Nareerux Import Co v Canadian Imperial Bank of Commerce*, [2009] OJ No 4553 at para 69 (CA), BOA Tab 27.

[52] Statement of Claim, *Motion Record*, Tab 7, p 141, para 35.

[53] Amended Statement of Claim, *Supplementary Motion Record*, Tab 4, p 53, para 21(a)-(b).

[54] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, pp 4-5, para 12 and Exhibit "D", pp 35-41, s 3.1; Affidavit of Ms. Perrenoud, *Motion Record*, Tab 5, p 26, para 5; Affidavit of Mr. Bedi, *Motion Record*, Tab 6, p 80, para 7; Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, pp 21-22 and qq 82-86; Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, pp 34-35 and qq 142-146.

Policy, may not receive any incentive award, or may receive an award up to 15% of eligible earnings.

55. The claim does not plead facts to establish that non-payment of incentive awards is a breach of the Policy, and thus, a breach of the Plaintiffs' employment contracts. Indeed, not paying incentive payments to employees eligible to participate in the Policy is contemplated by the express terms of the Policy. It is also contemplated within the express terms of the Policy that the Policy itself can be suspended at any time without any liability as addressed above.

56. In short, simply being evaluated under the performance management process and receiving a rating does not "trigger" a contractual right to a performance incentive award.[55] The proposed amended claim does not plead facts to establish an entitlement to a performance incentive award such that its non-payment could be a breach of contract.

57. No Compensation Statements were provided to any employees and there is no allegation that any decision or communication was made by eHealth regarding any awards for the fiscal year 2011-2012.[56]

58. Notably, Plaintiffs' counsel admitted that the question of eligibility is different from the question of entitlement stating in her letter of July 26, 2012, "[w]hether or not the employees would be entitled to an award is, in our opinion, a question of law", and at the cross-examination of the Plaintiffs stating, "we'll ask her to adopt my answer that that is a legal question, whether

[55] Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, pp 23-24, qq 90-9; Amended Statement of Claim, *Supplementary Motion Record*, Tab 4, p 53, para 21.

[56] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 5, paras 15-16; Cross-examination of Mr. Bedi, *Record of Cross-examinations*, Tab B, p 20, qq 75, 76; Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, p 31, q 128.

she is entitled".[57] The Defendants state that it is plain and obvious that eligibility to participate in the policy does not entitle an employee to an award, and as such, this claim does not disclose a reasonable cause of action.

Inducing Breach of Contract

59. Two required elements of inducing breach of contract are an enforceable contract and a breach of that contract.[58] Accordingly, if there is no reasonable cause of action for a breach of contract there can be no reasonable cause of action for inducing breach of contract. Since there is no reasonable cause of action for breach of contract, the claim for inducing breach of contract should also be dismissed.

60. In addition, the pleading does not plead material facts to establish other elements of the tort of inducing breach of contract.

61. The elements for this cause of action have been articulated by the Ontario Court of Appeal in the following manner, adopting a definition of the English House of Lords:

> The Lords defined the elements of the tort of inducing breach of contract as follows: (1) the defendant had knowledge of the contract between the plaintiff and the third party; (2) the defendant's conduct was intended to cause the third party to breach the contract; (3) the defendant's conduct caused the third party to breach the contract; (4) the plaintiff suffered damage as a result of the breach (see *OBG* at paras. 39-44 (Hoffman L.)). The Lords confined the tort to cases where the defendant actually knew that its conduct would cause the third party to breach (it is not enough that the defendant ought reasonably to have known that its conduct would cause the third party to breach); the defendant must have intended the breach (it is not enough that a breach was merely a foreseeable consequence of the defendant's conduct); and there

[57] Cross-examination of Ms. Perrenoud, *Record of Cross-examinations*, Tab C, p 36, q 151. Note that Ms. King later retracted all statements on the record other than that the documents speak for themselves: p 46, q 187.

[58] *Alleslev-Krofchak v Valcom Ltd*, 2010 ONCA 557 at paras 92-96, leave to appeal to SCC refused, [2012] SCCA No 403, BOA Tab 28.

must be an actual breach (it is not enough for the conduct to merely hinder full performance of the contract).[59]

62. The only facts pled by the Plaintiffs to support this tort are: that the Minister knew eHealth had awarded the bonuses and merit increases; that the Minister stated that she was "disappointed" with the decision; and that she "directed" or "requested" eHealth to "reconsider" its decision. Further, it is pled that the Minister's request intended to, and did, "affect" the decision of eHealth to rescind the bonus and merit increase.[60] Assuming these facts to be true, they do not satisfy the knowledge and intent elements of the tort of inducing breach of contract.

63. Specifically, the claim does not plead that in requesting eHealth to reconsider the bonuses and merit increases, the Minister knew that eHealth would not pay the bonuses and merit increases, and further, that the Minister knew that such non-payment would amount to a breach of the employees' contracts of employment.

64. Furthermore, while the claim pleads that the Minister's actions were intended to "affect" eHealth's decision whether to pay performance incentive awards and merit increases, it does not plead that the Minister intended for eHealth to breach employees' contracts of employment. Even if a breach of contract was a foreseeable consequence of the Minister's comments, this is insufficient to establish the elements of the tort. There must be a specific intent to breach the employees' contracts of employment and the Minister's comments as pled do not establish this requisite intent. Pursuant to Rule 25.06(8), where intent is alleged, the pleading shall contain full particulars.

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[59] *Correia v Canac Kitchens*, 2008 ONCA 506 at paras 97, 99, BOA Tab 29; see also *SAR Petroleum et al v Peace Hills Trust Company*, 2010 NBCA 22 at paras 39-41, BOA Tab 30.

[60] Statement of Claim, *Motion Record*, Tab 7, pp 54-55, paras 25, 28-29.

65. In short, there is nothing improper or illegal about a principal telling its agent that they are disappointed with their decision and asking them to rethink it.

66. Notably, the Ontario Court of Appeal in *Correira* concluded that the defendant was not liable for inducing breach of contract because, through its investigation of the plaintiff employee it intended that the employee be lawfully terminated for cause, not wrongfully terminated. Similarly, the Plaintiffs have not pled facts to establish that the Minister acted with the knowledge and intent for eHealth to breach employees' contracts of employment.

67. The Plaintiffs have also not pled that the Minster's actions "caused" a breach of contract. Rather the pleading is limited to the allegation that the Minister's actions "affect[ed]" eHealth's decision not to pay performance incentive awards and merit increases.[61]

68. In sum, the pleading has not pled facts to support the necessary elements of the cause of action of inducing breach of contract. Accordingly, the pleading does not disclose a reasonable cause of action in inducing breach of contract and should be dismissed.

2) NO IDENTIFIABLE CLASS

69. The three purposes of a class definition are: 1) identification of the persons who have a potential claim against the defendants; 2) identification of the persons who will be bound by the court's judgment on the common issues; and 3) identification of those entitled to notice.[62]

70. As stated by the Supreme Court of Canada a class must be defined at the outset of the litigation, using objective criteria, while bearing some rational relationship to the common issues, and without dependence on the outcome of the litigation.[63]

[61] Statement of Claim, *Motion Record*, Tab 7, pp 54-55, para 29.

[62] *Bywater v TTC*, [1998] OJ No 4913 at para 10 (Ct J (Gen Div)), BOA Tab 31.

71. The class definition should not include people who have no claim against the defendants. The class definition will be rejected where it is overly broad or over-inclusive because it includes persons without any possible claim.[64]

72. The class definition proposed by the plaintiff should be rejected for a variety of reasons.

73. The plaintiffs' proposed class definition as set out in the Plaintiffs' Amended Statement of Claim is as follows:[65]

> All past and current full time regular eHealth employees and those on employment contracts of one year plus one day who:
>
> a) Were awarded a Performance Award and/or Merit Increase for the 2010/2011 fiscal year; and or
>
> b) Were evaluated by eHealth on the basis of their performance and received a performance rating of "2" or higher or the equivalent rating of "Developing" or higher for the 2011/2012 year.

Class Definition Part (a)

74. The class definition for Part (a) is objectionable because it presupposes liability (i.e. that the class members were awarded something). As such it is inconsistent with the principles in *Hollick* as it is dependent on the outcome of the litigation.[66]

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[63] *Hollick*, *supra* note 24 at paras 17, 20-21, BOA Tab 1; *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 38 [*Western Canadian*], BOA Tab 32; *Merck Frosst Canada Ltd v Wuttunee*, 2009 SKCA 43 at paras 54-56, leave to appeal to SCC refused, [2008] SCCA No 512 [*Merck Frosst*], BOA Tab 33.

[64] *Hollick*, *supra* note 24, BOA Tab 1*; Pearson v Inco Ltd*, (2006) 78 OR (3d) 641 at para 57 (CA), BOA Tab 34**;** *Hoffman v Monsanto Canada Inc*, 2007 SKCA 74 at paras 73-76, leave to appeal to SCC refused, [2007] SCCA No 347, BOA Tab 35.

[65] Supplementary Notice of Motion, *Supplementary Motion Record*, Tab 1, pp 3-4, para 2.

[66] *Hollick*, *supra* note 24 at paras 17, 20-21, BOA Tab 1; *Western Canadian*, *supra* note 63 at para 38, BOA Tab 32; *Merck Frosst*, *supra* note 63 at paras 54-56, BOA Tab 33.

75. Further, the class definition is inconsistent with the pleading. In the statement of claim and in the draft Amended Statement of Claim it is alleged that all Class Members received Compensation Statements.[67] The class definition should correspond with the pleading.

76. The class definition is also over-inclusive. One of the criteria under the Policy for receipt of a performance incentive award is that the employee be actively employed at the time the award is paid, which under the Policy is prior to May 31.[68] An employee who was not actively employed as of May 31 may still fit within the class definition even though under the Policy they would not be eligible for an award.

Class definition Part (b)

77. Class definition Part (b) read in conjunction with its preamble should be rejected because it is over-inclusive. The class definition is based on some, but not all of the eligibility criteria for participation in the Policy. As noted above, the criteria for eligibility are that an employee must:

(a) Be a full time regular employee, or an employee on contract of one year plus one day (s 2.1);[69]

(b) Have a rating of "2" or higher when assessed according to the Performance Management process;

(c) Have started employment on or before December 31 of the plan year (s 3.5); and

(d) Subject to certain exceptions,[70] be actively employed at the time the award is paid (ss 2.1 and 3.7).

[67] Statement of Claim, *Motion Record*, Tab 7, p 138, para 21; Amended Statement of Claim, *Supplementary Motion Record*, Tab 4, p 53, para 21.

[68] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 10 and Exhibit "D", pp 35-41.

[69] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 10 and Exhibit "D", pp 35-41. Part time employees, temporary agency staff, procured contractors, independent contractors, and those on employment contracts of one year or less are not eligible to participate in the Performance Incentive Plan. These terms are further defined in the Policy's glossary (ss 2.1 and 5).

78. Accordingly, the fact that a person is a past or current full time regular eHealth employee or on an employment contract of one year plus one day, and received a performance rating of "2" or higher or the equivalent rating of "Developing" or higher for the fiscal year 2011-2012, does not mean that they are "eligible" for an incentive award under the Policy. For example, if the employee was hired after December 31, they would not be eligible. Employees that are no longer employed, subject to certain exceptions, would not be eligible.[71]

79. The proposed class definition only addresses eligibility requirements (a) and (b) above. Accordingly, employees that would fall within the class definition may not be "eligible" to participate in the Policy, under the Policy terms, such as to even have a potential claim for a breach of the Policy.

3) THE PROPOSED COMMON ISSUES

80. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Resolution of the common issues must be necessary to resolve each class member's claim and be a "substantial ingredient" of each claim. Common issues "cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant".[72]

81. There must be "some basis in fact" for the issues to be common issues. Although only a minimum evidentiary basis is required, there must be some evidence to show that the issue exists

[70] For example, in the event of retirement, total and permanent disability, or death, and where the employee has been actively employed for at least six consecutive months during the course of the plan year, the employee may receive a pro-rated award.

[71] Affidavit of Ms. Abbott, *Responding Motion Record*, Tab 1, p 4, para 10 and Exhibit "D", pp 35-41.

[72] *Fulawka*, *supra* note 24 at para 81, BOA Tab 2; *Hollick*, *supra* note 24 at para 18, BOA Tab 1.

and that the trial judge is capable of assessing the issue in common. As stated by the Court of Appeal:

> While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings.[73]

Proposed Common Issues

82. As a preliminary comment, it should be noted that the proposed common issues in the Notice of Motion, Draft Order, and Supplementary Notice of Motion, differ from the proposed common issues cited in the Plaintiffs' factum.[74] The wording is different, the Plaintiffs' factum is silent on the second common issue as outlined below, and issue seven below has been added as a new issue in their factum. The Defendants are concerned that the common issues are a moving target during this motion. They will address the issues set out in bold below as framed in the Notice of Motion, Draft Order and Supplementary Notice of Motion, and respond to the additional issue raised in the factum.

Issue 1: Was the Defendant eHealth entitled to revoke the Performance Awards that had already been awarded to Class Members, pursuant to the Incentive Plan Policy, for their performance in the prior (2010/2011) fiscal year?

83. This issue is not a proper common issue in that it presupposes liability. Specifically, it presupposes that class members were "awarded" something and that the onus is on the Defendants to justify "revoking" it.

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[73] *Fulawka*, *supra* note 24 at paras 78-79, BOA Tab 2; *McCracken v Canadian National Railway Co*, [2012] OJ No 2884 at paras 75-81 (CA) [*McCracken*], BOA Tab 36; *Hollick*, *supra* note 24 at paras 24-25, BOA Tab 1.

[74] Notice of Motion, *Motion Record*, Tab 1, p 4; Draft Order, *Motion Record*, Tab 2, p 12; Supplementary Notice of Motion, *Supplementary Motion Record*, Tab 1, pp 4-5; Plaintiffs' Factum, para 79(e).

Issue 2: Was the Defendant eHealth entitled to unilaterally revoke, without notice, the Merit Increases awarded to Class members, which were to be effective April 1, 2011?

84. This issue is not a proper common issue for the same reason – it presupposes that class members were "awarded" something and that the onus is on the Defendants to justify "revoking" it.

Issue 3: Did the Defendant Her Majesty the Queen in Right of Ontario as represented by the Minister of Health and Long-Term Care, induce the defendant eHealth to breach its express and implied contractual commitment to the Class Members?

85. This issue is not a proper common issue since it contains an assumption that there is an enforceable contract, it was breached, and that there are no defences.

Issue 4: Are the proposed Class Members who were evaluated by eHealth on the basis of their performance and received a performance rating of "2" or higher or the equivalent rating of "Developing" or higher on their Performance Management Plan appraisal for the 2011/2012 fiscal year entitled to a Performance Award?

86. There is no basis in fact to support this as a common issue. As noted above, eligibility to participate in the Policy does not amount to entitlement to a performance incentive award. Once an employee is eligible, eHealth may elect not to provide a performance incentive award either by providing an award of 0% or suspending the Policy.

87. Further and in any event, the decision for employees in respect of the 2011/2012 performance incentive awards has yet to be made. Accordingly, there can be no claim for damages at this time.

88. Finally, the proposed common issue as framed is objectionable, because it only incorporates eligibility criteria 1-2 of the Policy, omitting criteria 3-4.

Issue 5: Did the Defendants act in bad faith?

89. This issue lumps both defendants together when separate considerations apply for each defendant.

90. The Plaintiffs plead that due to the Minister's authority, she owed the employees of eHealth a duty of good faith which was breached.[75] However, there is no basis in law for concluding that the Minister owed a duty of good faith to the Class Members. There is no free-standing or stand-alone duty of good faith. There is no tort of breach of a duty of good faith.[76] In addition, the Defendant HMQ through the Minister was not in a contractual relationship with the Class Members to give rise to any duty to act in good faith under a contract. There is no legal basis for the proposed issue of whether HMQ through the Minister acted in bad faith. Accordingly, it should not be certified as a common issue.

91. In respect of eHealth, the claim alleges a duty on the part of eHealth to act in good faith, which is described as a duty to "honour its contractual obligations to the Class Members and to not act in a manner so as to eviscerate or defeat the objective of the Class Members' contracts of employment, including express and implied terms of remuneration…".[77] In other words, a duty not to breach the contract. Specifically, the Plaintiffs claim that:

> eHealth breached its duty of good faith to the Class Members by failing to pay the performance Awards and related DCPP Matching Contributions, and unilaterally reducing the Class Members' base salary without notice.[78]

[75] Statement of Claim, *Motion Record*, Tab 7, pp 141-142, paras 36-37.

[76] *Transamerica Life*, *supra* note 50, BOA Tab 24.

[77] Statement of Claim, *Motion Record*, Tab 7, p 141, para 35.

[78] *Ibid*, p 142, para 39.

92. If eHealth was within its rights not to pay the performance incentive awards and merit increases, then there cannot be a breach of a duty of good faith. The allegation of a breach of a duty of good faith is redundant of the claim/issue for breach of contract set out in issues 1-2. No legal consequences, separate from the breach of contract claim flow from this proposed issue. Resolution of this issue does not advance the litigation in any meaningful way. Accordingly, it should not be certified as a common issue.

93. Finally, there is no evidence to meet the minimal evidentiary requirements to show such an issue exists. Rather, the minimal affidavit evidence advanced is restricted to the basic claim for breach of contract further highlighting the redundancy of this issue.

Issue 6: Is this a case for punitive damages and if so, in what amount?

94. As above, the minimal evidence advanced is restricted to the breach of contract claim. There is no evidence beyond the breach of contract claim that would support a claim for punitive damages, or that such an issue can be determined by a common issues trial judge.

95. If the court were to consider punitive damages as a common issue, then the Plaintiffs' formulation of the issue is problematic. In *Robinson v Medtronic*, the court declined to certify punitive damages as a common issue, citing the Supreme Court of Canada's decision in *Whiten v Pilot Insurance Co.*[79] The court reasoned that an assessment of punitive damages required an appreciation of the: 1) degree of misconduct; 2) the amount of harm caused; 3) the availability of other remedies; 4) the quantification of compensatory damages; and 5) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence and denunciation.

[79] *Peter v Medtronic Inc; Robinson v Medtronic, Inc*, [2010] OJ No 3056 at paras 37, 40 (Div Ct), BOA Tab 38.

Furthermore, that these factors must be known to ensure that punitive damages are rational and that the amount of damages is not greater than necessary to accomplish their purposes.[80]

96. The Court has subsequently relied on *Robinson v. Medtronic* addressing the issue of punitive damages as follows:

> For the Reasons I expressed in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.), aff'd [2010] O.J. No. 3056 (Div. Ct.), a claim for punitive damages will not be suitable for a common issue when the court cannot make a rational assessment about the appropriateness of punitive damages until after individual assessments of the compensatory losses of class members has been completed. However, where the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the common issues trial: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2010 BCCA 560.[81]

97. In this case, all of the factors that are relevant to a determination of whether punitive damages should be awarded will not be known until after individual issue trials. In particular, the harm or compensatory damages are individual issues that will not be known until after individual trials. For example, the determination of the reasonable notice period for each employee to determine any damages for withdrawal of the merit increase must be assessed on a case-by-case basis. The reasonable notice period will depend on an assessment of an employee's position, length of service, age, and the availability of alternate employment, among any other relevant factors. The amount of each employee's performance incentive awards for 2010-2011 and 2011-2012, and amounts claimed in respect of the DCPP, must also be assessed on a case-

[80] *Robinson v Medtronic, Inc*, [2009] OJ No 4366 at para 170 (Sup Ct), aff'd [2010] OJ No 3056 (Div Ct), BOA Tab 37.

[81] *Blair v Toronto Community Housing Corp*, [2011] OJ No 3347 at para 49 (Sup Ct), BOA Tab 39; *Waldman v Thomson Reuters Corp*, [2012] OJ No 792 at para 190 (Sup Ct), leave to appeal refused, [2012] ONSC 3436 (Div Ct), BOA Tab 40; *Parker v Pfizer Canada Inc*, [2012] OJ No 2867 at para 115 (Sup Ct), BOA Tab 41.

by-case basis. Notably, the Plaintiffs have not claimed that compensatory damages are a common issue.

98. Considering the jurisprudence and the nature of the claim in this case, the common issue as framed would not be appropriate.

Issue 7: Are the proposed Class Members entitled to elect to transfer a portion of their Performance Award into a DCPP and have that portion matched by eHealth?[82]

99. This issue is not a proper common issue in that it presupposes liability. Specifically, it presupposes that class members were "awarded" something which they could transfer into their DCPP.

4) PREFERABLE PROCEDURE

100. Preferability involves consideration of (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation and any other means of resolving the dispute.[83]

101. Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behavior modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[84]

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[82] This issue is present in the Plaintiffs' Factum, para 79(e), but not the Notice of Motion, Draft Order or Supplementary Notice of Motion.

[83] *Hollick*, *supra* note 24 at paras 30-31, BOA Tab 1; *Markson v MBNA Canada Bank* (2007), 85 OR (3d) 321 at para 69 (CA), leave to appeal to SCC refused, [2007] SCCA No 346 [*Markson*], BOA Tab 42.

[84] *Hollick*, *supra* note 24 at paras 27, 30, BOA Tab 1; *Markson*, *supra* note 83 at para 69, BOA Tab 42.

102. The Defendants state that the Plaintiffs have not met their onus to satisfy the court that a class action is the preferable procedure. As set out below in respect of the Plaintiffs' litigation plan, there is generally no plan or an inadequate plan to address the numerous significant individual issues in the claim. The Defendants submit that given the lack of a workable plan to move the action forward as a class proceeding, it cannot be determined at this time whether a class proceeding is the preferable procedure.

103. The Defendants further reject the claim in paragraph 69 of the Plaintiffs' Factum that the Defendants have demonstrated a disregard for employees' contractual rights, and rights to access the justice system, so that a class action is preferable for the purposes of modifying behaviour.

5) THE PROPOSED REPRESENTATIVE PLAINTIFF

104. This certification criteria has three components:[85]

a) The representative plaintiff must fairly and adequately represent the interests of the class;

b) The representative plaintiff must produce a plan that sets out a workable method of advancing the proceeding on behalf of the class and notify class members of the proceeding; and

c) The representative plaintiff must not have an interest or conflict with the interests of the class members.

105. The Defendants do not object in respect of requirements (a) and (c). The Defendants state that, in respect of requirement (b), the Plaintiffs' litigation plan is unworkable.[86]

106. Specifically, the "Damages and Distribution of Amounts Recovered" section is based on the claim that damages for breach of contract are a "specific amount" awarded to each Class

[85] *Class Proceedings Act, supra* note 22, s 5.

[86] Revised Litigation Plan, *Motion Record*, Tab 4, pp 20-24.

Member.[87] Accordingly, it is claimed that these damages can be determined on an aggregate basis and distributed *pro rata* to the class members. Damages for performance incentive awards are a specific amount for each employee and thus are not appropriate for aggregate assessment; nor is an aggregate assessment of damages claimed to be a common issue.

107. More significantly, the determination of damages for the merit increase would involve an assessment of the reasonable notice period for each employee, which in turn is based on each employee's position, length of service, age and the availability of alternate employment, among other factors. In short, individual determinations are required for each employee and there is no plan for such determinations.

108. In addition, there is no specific amount for performance incentive awards for the fiscal year 2011-2012. If this court were to conclude that eHealth under the Policy was required to pay performance incentive awards for 2011-2012, such an amount is at the discretion of eHealth in respect of each employee. There is no plan for an assessment of awards for each employee for 2011-2012.

109. There is also no plan to assess the damages claimed in respect of the DCPP. Specifically, the claim for damages on the basis that the Class Members filed, or intended to file, a DCPP election making a contribution to the Plan and triggering a requirement of eHealth to match the contribution.[88]

110. There is further no plan in respect of any damages for inducing breach of contract.

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[87] *Ibid*, p 23, para 16.

[88] Statement of Claim, *Motion Record*, Tab 7, p 141, para 33.

111. This claim contains significant damages issues. The damages element of the plan is wholly inadequate.

112. The Ontario Court of Appeal has recently emphasized the importance of the litigation plan and that a workable plan is a requirement for certification. The litigation plan must explain, in concrete terms, the process for deciding the common issues and the individual issues.[89] The Plaintiffs' plan fails to do so.

113. The timelines in the litigation plan are also unworkable.[90] Instead of 60 days for the exchange of affidavits of documents from the date of the certification order, the Defendants, who presumably will have the vast majority of the documents, propose 120 days for service of the affidavits and productions. Requiring examinations for discovery to be completed within 60 days thereafter is unrealistic. The Defendants propose that discovery be completed within 180 days following service of the affidavits and production of documents. For responses to undertakings to be completed within 30 days thereafter is also unrealistic. The Defendants propose that responses to undertakings be completed within 90 days.

114. In respect of providing notification of certification, there is no need for providing notice by mail to hundreds of employees.[91] All current employees could be notified by way of email. There is no need in addition for the notice to be physically mailed to employees, save former employees. If the Plaintiffs are of the view that physically mailing the notice is necessary, and the court agrees that it is necessary, then the mailings should be at the Plaintiffs' expense. Furthermore, emailing employees and the Plaintiff issuing a press release containing the notice

[89] *McCracken, supra* note 73 at paras 145-46, BOA Tab 36.

[90] Revised Litigation Plan, *Motion Record*, Tab 4, p 22, para 8.

[91] *Ibid*, p 21, para 5.

would be sufficient notification such that there is no need for an intrusive order requiring eHealth to post the notice on its internal intranet site. Such an order is unnecessary and would be redundant.

PART V- ORDER REQUESTED

115. For all of the aforesaid reasons, the Defendants request an order dismissing the motion to certify this action as a class proceeding, and the motion to amend, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated: October 31, 2012

_____
Joseph D'Angelo

_____
Christopher P. Thompson

Counsel for the Respondents

SCHEDULE "A"

JURISPRUDENCE

1) *Hollick v Toronto (City),* [2001] 3 SCR 158

2) *Fulawka v Bank of Nova Scotia*, [2012] OJ No 2885 (CA)

3) *Hunt v Carey Canada Inc*, [1990] 2 SCR 959

4) *Wellington v Ontario* (2011), 105 OR (3d) 81 (CA)

5) *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), leave to appeal to SCC refused, [2005] SCCA No 50

6) *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744

7) *Arora v Whirlpool Canada LP*, 2012 ONSC 4642

8) *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) et al v Sino-Forest Corp*, 2012 ONSC 1924

9) *Delgrosso v Paul*, [1999] OJ No.5742 (Ct J (Gen Div))

10) *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2012 ONSC 5619

11) *Yarlett v Re/Max Realtron Realty Inc*, [1989] OJ No 1379 (HC)

12) *Simpson v Ontario,* [1997] OJ No 3082 (Ct J (Gen Div)), aff'd [1997] OJ No 3082 (CA)

13) *Brock v Matthews Group Ltd*, [1988] OJ No 370 (HC), aff'd [1991] OJ No 83 (CA)

14) *Bennett v British Columbia*, [2012] BCJ No 497 (CA)

15) *Francis v Canadian Imperial Bank of Commerce*, [1994] OJ No 2657 (CA)

16) *Hobbs v TDI Canada Ltd* (2004), 37 CCEL (3d) 163 (CA)

17) *Braiden v La-Z-Boy Canada Ltd*, [2008] OJ No 2314 (CA)

18) *Stitt v Ontario*, [2001] OJ No 1337 (Sup Ct)

19) *Granger v Canada (Treasury Board),* [2000] FCJ No 836 (CA)

20) *ArcelorMittal Dofasco Inc v US Steel Canada Inc* [2008] OJ No 4412 (Sup Ct)

21) *Lincoln Canada Services LP v First Gulf Design Build Inc*, [2007] (Sup Ct), aff'd [2008] OJ No 2611 (CA)

22) *Lincoln Canada Services LP v First Gulf Design Build Inc*, [2008] OJ No 2611 (CA)

23) *Eli Lilly & Co v Novopharm Ltd*, [1998] SCJ No 59

24) *Transamerica Life Canada Inc v ING Canada* (2003), 68 OR (3d) 457 (CA)

25) *Marinangeli v Marinangeli*, [2003] OJ No 2819 (CA)

26) *G Ford Homes Ltd v Draft Masonry (York) Co Ltd*, [1983] OJ No 3181 (CA)

27) *Nareerux Import Co v Canadian Imperial Bank of Commerce*, [2009] OJ No 4553 (CA)

28) *Alleslev-Krofchak v Valcom Ltd*, 2010 ONCA 557, leave to appeal to SCC refused, [2012] SCCA No 403

29) *Correia v Canac Kitchens*, 2008 ONCA 506

30) *SAR Petroleum et al v Peace Hills Trust Company*, 2010 NBCA 22

31) *Bywater v TTC*, [1998] OJ No 4913 (Ct J (Gen Div))

32) *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46

33) *Merck Frosst Canada Ltd v Wuttunee*, 2009 SKCA 43, leave to appeal to SCC refused, [2008] SCCA No 512

34) *Pearson v Inco Ltd*, (2006) 78 OR (3d) 641 (CA)

35) *Hoffman v Monsanto Canada Inc*, 2007 SKCA 74, leave to appeal to SCC refused, [2007] SCCA No 347

36) *McCracken v Canadian National Railway Co*, [2012] OJ No 2884 (CA)

37) *Robinson v Medtronic, Inc*, [2009] OJ No 4366 (Sup Ct), aff'd [2010] OJ No 3056 (Div Ct)

38) *Peter v Medtronic, Inc; Robinson v Medtronic, Inc*, [2010] OJ No 3056 (Div Ct)

39) *Blair v Toronto Community Housing Corp*, [2011] OJ No 3347 (Sup Ct)

40) *Waldman v Thomson Reuters Corp*, [2012] OJ No 792 (Sup Ct), leave to appeal refused, [2012] ONSC 3436 (Div Ct)

41) *Parker v Pfizer Canada Inc*, [2012] OJ No 2867 (Sup Ct)

42) *Markson v MBNA Canada Bank* (2007), 85 OR (3d) 321 (CA), leave to appeal to SCC refused, [2007] SCCA No 346

SCHEDULE "B"

LEGISLATION

***Class Proceedings Act, 1992*, SO 1992, c 6, s 5**

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Court File No. CV-11-439656-00CP

CHARLOTTE PERRENOUD and RAJESH BEDI **- and -** **eHEALTH ONTARIO, et al.**

Plaintiffs (Moving Party) **Defendants (Responding Parties)**

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

FACTUM OF THE RESPONDING PARTIES
(Returnable November 14, 2012)

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