

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

(Court seal)

CHARLOTTE PERRENOUD and RAJESH BEDI

Plaintiffs

- and -

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

Defendants

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*
S.O. 1992, c.6, as amended

SUPPLEMENTARY MOTION RECORD

July 30, 2012

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Lawyers for the Plaintiffs

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Defendants

Proceedings under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended

**SUPPLEMENTARY NOTICE OF MOTION FOR
CERTIFICATION**

The Plaintiffs, Charlotte Perrenoud and Rajesh Bedi, will make a motion to the Honourable Justice Perrell on October 2, 2012, at 10:00 a.m., at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

Since the motion to amend the statement of claim and the motion for certification are to be heard on October 2, 2012, the proposed amendments are also reflected in this supplementary notice of motion (in underlined paragraphs) and in the factum in order to be cost-effective and expedient.

Definitions

1. For the purposes of this Notice of Motion, the following definitions apply:
 - (a) "**Compensation Statement**" means a document which sets out the employee's name, division, manager, and performance management rating, as well as his/her Performance Award percentage and dollar amount, his/her Merit Increase percentage and dollar amount, and new base salary, These statements were personalized for each employee of eHealth and entitled "*2010/2011 Compensation Details Statement*" and were provided to eHealth employees in or around April 2011;
 - (b) "**DCPP**" means Defined Contribution Pension Plan;
 - (c) "**DCPP Election**" means an election authorizing eHealth to pay a portion of the Performance Award to the employee's DCPP account, which election entitled the employee to receive a DCPP Matching Contribution;
 - (d) "**DCPP Matching Contribution**" means a contribution that eHealth is required to make to the employee's DCPP account, which contribution matches contributions made, or directed to be made, by Class Members;
 - (e) "**Incentive Policy**" means the eHealth Performance Incentive Plan Policy in force in and before April, 2011;

- (f) "**Merit Increase**" means the base salary increase declared by eHealth to the eHealth employees based on a performance review under the Performance Management Plan and which were effective April 1, 2011;
- (g) "**Minister**" means the Minister of Health and Long Term Care (at all relevant times Deb Matthews);
- (h) "**Ministry**" or "**MOHLTC**" means the Ministry of Health and Long Term Care;
- (i) "**Performance Award**" means the award declared to eHealth employees based on a review of their individual performance during the previous fiscal year and made pursuant to the Performance Incentive Plan;
- (j) "**Performance Management Plan**" or "**PMP**" means the eHealth Performance Management Plan in force in or about April, 2011; and
- (k) "**SSHA**" means Smart Systems for Health Agency.

THE MOTION IS FOR THE FOLLOWING:

- 2. An Order, in the form attached at tab 2 to the Motion Record:
 - (a) Certifying this action as a class proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "CPA");
 - (b) Defining the Class as all past or 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 fiscal year.
- (c) Appointing the plaintiffs Charlotte Perrenoud and Raj Bedi as representative plaintiffs of the Class who will fairly and adequately represent the interests of the Class and who have produced a Litigation Plan attached;
- (d) Appointing Shibley Righton LLP as lawyers for the Class;
- (e) Stating the nature of the claims asserted on behalf of the Class as arising from breaches of their contract of employment with eHealth;
- (f) Approving the relief sought by the Plaintiffs and the Class as damages and declarations arising from breach of contract as outlined at paragraph 1 of the Statement of Claim;
- (g) Stating the common issues as set out in the following list:
- (i) 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?

- (ii) 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?
- (iii) 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?
- (iv) Are the proposed Class Members who were evaluated by eHealth on the basis on 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?
- (v) Did the defendants act in bad faith?
- (vi) Is this a case for punitive damages and if so, in what amount?
- (h) Requiring counsel for eHealth and the Ministry to provide a list of all employees of eHealth that would be considered Class Members;
- (i) Approving the Draft Revised Litigation Plan attached;
- (j) Approving the notice procedure set out in the Draft Order attached;
- (k) Approving the opt-out mechanism set out in the Draft Order attached;

- (l) Staying any other putative class action relating to this class proceeding pending further order of this Court;
- (m) Requiring the defendants to pay to the plaintiffs the costs of this motion; and
- (n) Such further and other order this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Overview

1. The action arises out of the eHealth's decision to unilaterally rescind the "Performance Awards" and merit increases that had been awarded, by eHealth, to eHealth employees pursuant to the employees' contracts of employment with eHealth.
2. eHealth is funded by the Ministry and reports to the Ontario Legislature through the Minister.
3. eHealth has an Incentive Policy designed to "*reward employees for their contributions to the successful achievement of corporate goals and individual objectives and to share in the success of eHealth Ontario*".
4. In or around March 2011 the plaintiffs, and other eHealth employees, were evaluated on their performance in the previous (2010/2011) fiscal year. The employees were subsequently given a "*Compensation Details Statement*", which sets out the employee's performance rating for the previous fiscal year, the incentive award percentage, the award amount, and the payment date. This is consistent with past years.

5. In early 2011, prior to issuing the Compensation Details Statements for the 2010/2011 fiscal year, eHealth held a "town hall" meeting with employees which included a video clip of the Minister congratulating and commending the employees for their hard work and contributions towards eHealth's success.
6. A few days after the performance awards were communicated in writing to the qualifying employees, the Toronto Star wrote an article condemning the actions of the Ministry in awarding the bonuses.
7. eHealth's Senior Director of Stake Holder Relations defended the performance awards and is quoted in the Toronto Star article as saying *"the payments are in recognition of performance results"*. She is further quoted as responding to the wage freeze initiative of the Minister of Finance by stating that the freeze legislation does not apply to these payments because *"incentive compensation linked to individual performance is permitted, as it is a standard means of managing and improving employee performance"*.
8. The next day Greg Reed, President and CEO of eHealth issued the following public statement, which reads in part:

"... 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."

9. In early 2012, Charlotte and Raj and other eHealth employees were evaluated in accordance with eHealth's Performance Incentive Policy for the 2011/2011 fiscal year and provided with a rating in a document called the Performance Management Plan.

10. eHealth failed to grant Charlotte and Raj and other eHealth employees Performance Awards commensurate with their ratings, despite the fact that evaluation under the Performance Incentive Policy and the provision of the Performance Management Plan triggered the employees' right to a Performance Award.

Test For Certification

11. Section 5(1) (a)-(e) of the CPA sets out the criteria for certification of a claim:

- (a) **Section 5(1)(a): the pleadings or the notice of application discloses a cause of action.**

The Statement of Claim discloses a cause of action framed in, *inter alia*, breach of contract and inducing breach of contract.

- (b) **Section 5(1)(b): there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant.**

There is an identifiable class, consisting of approximately 620 persons, who will be represented by the proposed representative Plaintiffs Charlotte Perrenoud and Rajesh Bedi. The proposed class is defined as all past or current eHealth employees 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 fiscal year.

- (c) **Section 5(1)(c): the claims or defences of the class members raise common issues.**

The claims of all the class members arise from the same set of facts, namely that class members were awarded a quantified Performance Award and/or Merit Increase in May of 2011 in accordance with their job performance in the previous year, and eHealth subsequently refused to pay the amounts awarded.

The following year, eHealth failed to grant Charlotte and Raj and other eHealth employees Performance Awards commensurate with their ratings, despite the fact that evaluation for the 2011/2012 fiscal year under the Performance Incentive Policy and the provision of the Performance Management Plan triggered the employees' right to a Performance Award.

(d) **The class proceeding is the preferable procedure for resolving the common issues.**

The Representative Plaintiffs will fairly and adequately represent the Class, have a workable litigation plan (see Schedule "B" to the Notice of Motion) for advancing the proceeding and notifying the Class, and have no conflicts of interest with other Class Members.

12. The CPA, and in particular sections 1, 2, 5, 6, 8, 9, 12, 17, 20, 21, 22-25, 34(1) and 35.
13. The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including rr. 1, 2, 12 and 37.04.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

1. The affidavits and exhibits of the proposed representative plaintiffs Charlotte Perrenoud and Rajesh Bedi, each sworn on April 30, 2012;
2. The affidavits and exhibits of the proposed representative plaintiffs Charlotte Perrenoud and Rajesh Bedi, sworn July 26 and July 25, 2012, respectively;
3. The Pleadings in the action;
4. The Plaintiffs' proposed Revised Litigation Plan, attached;
5. The proposed Notice of Certification, attached as Schedule "A" to the draft Order; and
6. Such further and other material as counsel may advise and this Honourable Court may permit.

July 30, 2012

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Lawyers for the Defendants

Charlotte Perrenoud and Rajesh Bedi
Plaintiffs

- and -

eHEALTH ONTARIO et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

Proceedings under the *Class Proceedings Act*, 1992,
S.O. 1992, c. 6, as am.

**SUPPLEMENTARY MOTION
RECORD
(Certification)
(returnable October 2, 2012)**

SHIBLEY RIGHTON LLP
Barristers & Solicitors
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Lawyers for the Plaintiffs, Charlotte Perrenoud and Rajesh Bedi

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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Defendants

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*
S.O. 1992, c.6, as amended

SUPPLEMENTARY AFFIDAVIT OF CHARLOTTE PERRENOUD

I, Charlotte Perrenoud, of the city of Toronto, in the province of Ontario, MAKE OATH AND SAY:

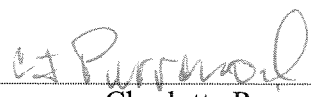
1. I am a proposed representative plaintiff in this action. I have personal knowledge of the facts in this affidavit. Where my knowledge is based on information obtained from others, I have indicated the source of the information.
2. In or around March 13, 2012, I received a Performance Management Plan rating (the "PMP Rating") under eHealth's Performance Incentive Plan, reviewing my performance in 2011-2012 fiscal year. A copy of this PMP Rating is attached as Exhibit "A".
3. I have not been notified by anyone at eHealth that the Performance Incentive Policy has been suspended or rescinded. My understanding is that the Performance Incentive Policy is still in place as I was recently reviewed under the same.

- 4. Although my PMP Rating entitled me to a Performance Award for the 2011-2012 fiscal year under the Performance Incentive Plan, I have not received a Performance Award as for 2011-2012.
- 5. On or around May 31, 2012, during a town hall meeting with eHealth Ontario employees, the CEO Greg Reed told us that they are working "behind the scenes" on something for compensation, but he could not elaborate right now since the government is trying to get everyone to accept wage freezes.
- 6. I make this affidavit in support of this motion for certification of this action and my appointment as a representative plaintiff in the same and for no improper purpose.

SWORN BEFORE ME at the City of Toronto,
 in the Province of Ontario, on this 26th
 day of July, 2012.



Commissioner for Taking Affidavits



Charlotte Perrenoud

SARAH S. GLICKMAN

This is Exhibit "A" referred to in the
affidavit of Charlotte Perrenoud
sworn before me, this 25th
day of July 2012

S. Glickman

A COMMISSIONER FOR TAKING AFFIDAVITS
Sarah Glickman

Exhibit
Redacted

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

(Court seal)

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Plaintiffs

- and -

eHEALTH ONTARIO
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Defendants

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*
S.O. 1992, c.6, as amended

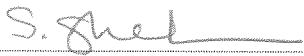
SUPPLEMENTARY AFFIDAVIT OF RAJESH BEDI

I, Rajesh Bedi, of the city of Toronto, in the province of Ontario, MAKE OATH AND SAY:

1. I am a proposed representative plaintiff in this action. I have personal knowledge of the facts in this affidavit. Where my knowledge is based on information obtained from others, I have indicated the source of the information.
2. In or around March 13, 2012, I received a Performance Management Plan rating (the "PMP Rating") under eHealth's Performance Incentive Plan, reviewing my performance in 2011-2012 fiscal year. A copy of this PMP Rating is attached as Exhibit "A".
3. I have not been notified by anyone at eHealth that the Performance Incentive Policy has been suspended or rescinded. My understanding is that the Performance Incentive Policy is still in place as I was recently reviewed under the same.

4. Although my PMP Rating entitled me to a Performance Award for the 2011-2012 fiscal year under the Performance Incentive Plan, I have not received a Performance Award as for 2011-2012.
5. I make this affidavit in support of this motion for certification of this action and my appointment as a representative plaintiff in the same and for no improper purpose.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario, on this 25th
day of July, 2012.



Commissioner for Taking Affidavits



Rajesh Bedi

SARAH S. GLICKMAN

Exhibit
Redacted

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

ONTARIO
SUPERIOR COURT OF JUSTICE

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Defendants

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*
S.O. 1992, c.6, as amended

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. 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 plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, 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.

Date	<u>"November 16, 2011"</u>	Issued by	<u>"LOCAL REGISTRAR"</u>
			Local registrar
		Address of court office	393 University Ave. - 10th Fl. Toronto, Ontario M5G 1E6

TO: **eHEALTH ONTARIO**
777 Bay St., Suite 701
Toronto, ON M5G 2B3

AND TO: **HER MAJESTY THE QUEEN in right of Ontario as represented by the
MINISTER OF HEALTH AND LONG-TERM CARE**
Hepburn Block
80 Grosvenor St., 10th Floor
Toronto, ON M7A 2C4

AND TO: **ATTORNEY GENERAL FOR ONTARIO
MCMURTRY-SCOTT BUILDING**
720 Bay Street, 11th Floor
Toronto, ON
M7A 2S9

CLAIM

The Claim

1. The plaintiffs, Charlotte Perrenoud and Rajesh Bedi, claim on their own behalf and on behalf of the Class Members:
 - (a) an order certifying this action as a class proceeding under the *Class Proceeding Act, 1992*, S.O. 1992, c. 6, as amended (the "**Act**") and for the appointment of Charlotte Perrenoud and Rajesh Bedi as the representative plaintiffs;
 - (b) an interim, interlocutory and final mandatory order directing eHealth to disclose to the plaintiff's lawyers the contact information of all Class Members;
 - (c) an order for directions with respect to service on the Class Members pursuant to s. 17 of the Act;
 - (d) damages against eHealth for breach of contract for failing to pay to the plaintiffs and the Class Members the Performance Awards that they were entitled to pursuant to their contract of employment and eHealth's Performance Incentive Plan Policy;
 - (e) damages against eHealth for breach of contract as a result of eHealth having failed to make the matching contributions to the pension plan of the Class Members who filed an election to have a portion of the Performance Award paid into their pension plan account;
 - (f) a declaration and determination that Class Members who did not have an opportunity to file an election to have a portion of their Performance Award paid to their pension plan account are entitled to do so within 30 days of any declaration or

determination made by this Honourable Court, and are entitled to have such portion matched by eHealth;

- (g) damages against eHealth for breach of contract for failing to provide the plaintiffs and the other Class Members with reasonable notice of the retraction of their Merit Increase;
- (h) punitive damages against eHealth in the amount of \$1,000,000;
- (i) damages against the Minister of Health and Long Term Care for inducing eHealth to breach its contract with the Class Members as set out above in (d), (e), and (g);
- (j) punitive damages against the Minister of Health and Long Term Care in the amount of \$1,000,000
- (k) an order pursuant to s. 24 of the Act directing an aggregate assessment of damages, if necessary;
- (l) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended;
- (m) costs of this action on a substantial indemnity basis, plus, pursuant to s. 26(9) of the Act, the costs of notice and of administering the plan and the distribution of the recovery in this action, plus applicable taxes; and
- (n) such further and other relief as required by the Act or as this Honourable Court deems just.

Definitions

2. These terms used throughout this pleading have the following meaning:

- (a) "**Compensation Statement**" means a document which sets out the employee's name, division, manager, and performance management rating, as well as his/her Performance Award percentage and dollar amount, his/her Merit Increase percentage and dollar amount, and new base salary, These statements were personalized for each employee of eHealth and entitled "*2010/2011 Compensation Details Statement*" and were provided to eHealth employees in or around April 2011;
- (b) "**Class Members**" means all past and current full time regular eHealth employees as of or about May 20, 2011 and those on employment contracts of one year plus one day who:
- A. (i) were awarded a Performance Award and/or Merit Increase for the 2010/2011 fiscal year; and/or
- (ii) were awarded a Merit Increase effective April 1, 2011;
- 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 fiscal year.
- (c) "**DCPP**" means Defined Contribution Pension Plan;

- (d) "**DCPP Election**" means an election authorizing eHealth to pay a portion of the Performance Award to the employee's DCPP account, which election entitled the employee to receive a DCPP Matching Contribution;
- (e) "**DCPP Matching Contribution**" means a contribution that eHealth is required to make to the employee's DCPP account, which contribution matches contributions made, or directed to be made, by Class Members;
- (f) "**Incentive Policy**" means the eHealth Performance Incentive Plan Policy in force in and before April, 2011;
- (g) "**Merit Increase**" means the base salary increase declared by eHealth to the eHealth employees based on a performance review under the Performance Management Plan and which were effective April 1, 2011;
- (h) "**Minister**" means the Minister of Health and Long Term Care (at all relevant times Deb Matthews);
- (i) "**MOHLTC**" means the Ministry of Health and Long Term Care'
- (j) "**Performance Award**" means the award declared to eHealth employees based on a review of their individual performance during the previous fiscal year and made pursuant to the Performance Incentive Plan;
- (k) "**Performance Management Plan**" or "**PMP**" means the eHealth Performance Management Plan in force in or about April, 2011;
- (l) "**SSHA**" means Smart Systems for Health Agency.

Overview of the Claim

3. This is a proposed class proceeding for damages arising from the actions of eHealth and/or the Minister in awarding Performance Awards and Merit Increases to eHealth employees. The Class Members seek damages from eHealth for breach of contract for the Performance Awards and Merit Increases, which were unilaterally revoked, without notice and in bad faith, by eHealth for the 2010/2011 fiscal year. The Class Members also seek damages against the Minister of Health and Long Term Care for inducing eHealth to breach its contract with the Class Members, and acting in bad faith toward the Class Members. The Class Members also seek damages from the Defendants for their failure to award Performance Awards for the 2011/2012 fiscal year.

Parties

Rajesh Bedi and Charlotte Perrenoud

4. The Plaintiff Rajesh Bedi ("**Raj**") resides in Ontario and is a Technical Specialist hired by eHealth in August 2004.
5. The Plaintiff Charlotte Perrenoud ("**Charlotte**") resides in Ontario and is a Service Manager hired by eHealth in November 2006.
6. Raj and Charlotte bring this action on behalf of themselves and on behalf of a proposed class of current and former employees of eHealth who were awarded a Performance Award and/or a Merit Increase to their base salary.

eHealth

7. eHealth is a corporation of Her Majesty the Queen in Right of Ontario as established by Ontario Regulation 43/02 of the *Development Corporations Act* ("the **Regulation**"). The objects of eHealth as set out in section 3 of the Regulation are:
 1. To provide eHealth Services and related support for the effective and efficient planning, management and delivery of health care in Ontario.
 2. To develop eHealth Services strategy and operational policy.
 3. To protect the privacy of individuals whose personal information or personal health information is collected, transmitted, stored or exchanged by and through the Agency, in accordance with the *Freedom of Information and Protection of Privacy Act*, the *Personal Health Information Protection Act, 2004* and any other applicable law.
8. eHealth was created in 2008 to take over and replace the Smart Systems for Health Agency (SSHA). Prior to 2008, the SSHA was tasked with creating and connecting the medical community to a secure electronic network. Alongside the SSHA, the MOHLTC was responsible for electronic health records strategy, applications, and databases development. The functions of the Minister as well as the SSHA vested in eHealth upon its creation in 2008.
9. eHealth reports to the Legislature of Ontario through the Minister. Currently, and at all material times, this ministerial position was held by Deb Matthews. All of eHealth's funding comes from the MOHLTC.
10. The Minister presides over and has charge of eHealth and its functions. Subsection 2(3) of the Regulation states:

The Agency is, for all its purposes, an agent of Her Majesty within the meaning of the *Crown Agency Act* and its powers may be exercised only as an agent of Her Majesty.

And further, at subsection 5(1):

The Agency, with the written approval of the Minister, may provide eHealth Services to support the operation of the health care system in Ontario and for other purposes that are consistent with the Agency's objects.

11. eHealth's composition is set out in subsection 2(2) of the Regulation which states: "The Agency is composed of the members of its board of directors." Subsection 6(1) states that there shall be a maximum of 12 directors. This subsection further states that the board members shall be appointed by the Lieutenant Governor in Council "on the recommendation of the Minister". This subsection further requires one director to be from the MOHLTC.
12. e-Health's board of directors exercises powers under the Regulation. Subsection 7(1) states: "The affairs of the Agency are under the management and control of the board of directors, subject to any directions given under section 8." Section 8 allows the Minister to issue binding policy directions to the board of directors when the Minister decides "it is in the public interest to do so". Subsection 7(2) further allows the board to pass by-laws "generally for the conduct and management of the affairs of the Agency."

Facts

13. In or around March 2011, eHealth evaluated Raj and Charlotte as well as the other Class Members based on their performance for the previous fiscal year.
14. The results of the evaluation were set out in a Compensation Statement provided to each employee.

15. Class Members with a specific performance rating were eligible to be awarded a Performance Award and/or a Merit Increase under eHealth's Incentive Policy..
16. The purpose of the Performance Awards as set out in the eHealth Incentive Policy is to *"reward employees for their contributions to the successful achievement of corporate goals and individual objectives and to share in the success of eHealth Ontario."* Merit Increases are evaluated based on *"merit, which includes performance, internal and external equity, and the impact of the position or team on the mission of the department and eHealth Ontario."*
17. Raj's Compensation Statement stated that he was awarded a Performance Award of 12%, in the amount of \$10,658, and a 3% Merit Increase in his base salary, in the amount of \$2,798.
18. Charlotte's Compensation Statement stated that she was awarded a Performance Award of 7.5%, in the amount of \$7,246, and a 1.65% Merit Increase in her base salary, in the amount of \$1,594.
19. eHealth employees are members of a defined contribution pension plan ("**DCPP**"). Pursuant to the Incentive Plan, Class Members were able to elect to have a portion of their Performance Award payable to their pension plan account by filing a **DCPP Election**, and eHealth would make a matching contribution to their pension plan.
20. On May 16, 2011 Raj filed a DCPP Election. Charlotte had intended to file a DCPP Election but before she was able to do so eHealth's CEO Greg Reed announced that eHealth would not be paying either the Merit Increases or the Performance Awards.

21. All of the Class Members received Compensation Statements. The Performance Awards varied by Class Member ranging from 0% to 15% of the Class Member's eligible base earnings, and were to be paid by June 3, 2011. The Merit Increases ranged from 0% to 5% of the Class Member's base salary, and were effective April 1, 2011.
- 21.(a) On or about January 2012, Charlotte and Raj and other eHealth employees were evaluated in accordance with eHealth's Performance Incentive Policy for the 2011/2012 fiscal year and provided with a rating in a document called the Performance Management Plan.
- 21.(b) eHealth failed to grant Charlotte and Raj and other eHealth employees Performance Awards commensurate with their ratings, despite the fact that evaluation under the Performance Incentive Policy and the provision of the Performance Management Plan triggered the employees' right to a Performance Award.

Breach of Contract and Inducement to Breach the Contract

22. On May 18, 2011, the Toronto Star published an article titled "*Hundreds at eHealth Ontario get bonus, raise, despite call for wage freeze*" which was in reference to eHealth's decision to award the Class Members Performance Awards and/or Merit Increases (the "**Star Article**").
23. The Star Article asserted that senior officials in the Ontario Government, with an election on the horizon, were "furious" with eHealth's decision to pay the Performance Awards and Merit Increases, with one high ranking Liberal official quoted as saying in reference to eHealth, "These guys just don't get it".

24. Muriel Deschênes, eHealth's senior director of stakeholder relations, is quoted in the Star Article as stating: "*These payments are in recognition of performance results*". In response to the Ontario Finance Minister's wage freeze initiative, she is recorded in the article as stating that eHealth was in compliance with government legislation, policy, as well as the practice of other government bodies, and that "*incentive compensation linked to individual performance is permitted, as it is a standard means of managing and improving employee performance*".
25. On the same day, CTV published an article from The Canadian Press titled "*Opposition wants Liberals to axe eHealth staff bonuses*". In this article, the Minister is quoted as publicly stating that she was "*disappointed*" with eHealth's decision to award the Performance Awards and Merit Increases. The CTV article further states that the Minister had directed eHealth's Board of Directors to reconsider the decision to award the Performance Awards and Merit Increases to eHealth employees.
26. Subsequent to these events, on May 20, 2011, the Class Members were informed of eHealth's decision through an email from Greg Reed, President and CEO of eHealth, which stated "*I have just issued the following public statement. While I know this will be disappointing, I believe it is the right thing to do.*"
27. The public statement read in part as follows:
- ...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.*

28. Regardless of whether the Minister's request, comment, or suggestion amounted to a binding policy direction which eHealth was required to follow, the Minister clearly knew that the Performance Awards were already awarded as she requested that eHealth rethink the decision.
29. Considering the Minister's position, authority, and influential relationship with eHealth, this request appears intended to, and in fact did, affect the decision of eHealth to grant the Performance Awards and Merit Increases to the Class Members.
30. Upon learning of eHealth's decision not to pay the Performance Awards and Merit Increases, Raj and Charlotte took action to pursue their legal rights. They organized a group of individuals at eHealth and then engaged legal counsel and coordinated with the Class Members in order to proceed with this action.

Class Members Had Already Earned Performance Awards

31. The Incentive Plan, which formed a part of the Class Members' contract of employment, is a deferred compensation scheme in which employees received a portion of their compensation for the previous year following an evaluation of their performance.
32. eHealth breached its contract with Raj, Charlotte and the Class Members by refusing to pay Performance Awards which were already awarded based on performance in the previous year.

Class Members Were Entitled to DCPD Contributions

33. eHealth breached its contract with Raj, Charlotte and the Class Members who filed, or planned to file, a DCPD Election, by refusing to pay the elected portion of the Performance

Award, as well as eHealth's matching contribution, to the electing Class Member's pension plan account.

Merit Increases Could not Be Revoked Without Notice

34. The Compensation Statement set out each Class Member's compensation effective April 1, 2011. The Merit Increases established a new level of base compensation for the Class Members and eHealth was not entitled to unilaterally revoke the Merit Increases without reasonable notice.

eHealth's Duty of Good Faith

35. eHealth owes a duty to the Class Members to act in good faith, which duty includes 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 in accordance with eHealth's employment policies and the Incentive Plan.

The Minister's Duty of Good Faith

36. eHealth is an agency of the Ministry of Health and Long Term Care, acts under the authority and direction of the Minister, and is fully funded by the MOHLTC. The Minister has knowledge of eHealth's Performance Awards policy and has directly or indirectly approved and implemented the Performance Awards in previous years. The Minister, by her comments as reported in the press and referenced herein at paragraph 47, acknowledges her influence over eHealth. The Minister has directly or indirectly exercised her influence in these circumstances.

37. The Minister's authoritative and inextricable relationship with eHealth, as well as her influence over eHealth's decision making process in relation to eHealth employees, created a duty of good faith between the Minister and the Class Members.

Breach of Duty of Good Faith and Punitive Damages

38. The Class Members are in a position of vulnerability in relation to eHealth as a result of the extreme inequality of financial and legal resources between eHealth and individual Class Members. The Class Members' vulnerability is further emphasized by the absence of protection of a union or other means of securing adherence to policies relating to the Class Members.
39. eHealth breached its duty of good faith to the Class Members by failing to pay the Performance Awards and related DCPD Matching Contributions, and unilaterally reducing the Class Members' base salary without notice.
40. It appears that eHealth refused to pay the amounts based solely on the Minister's response to the Star Article and to avoid negative press in the media.
41. In fact, prior to issuing the Compensation Statements to Raj, Charlotte and the Class Members, eHealth held a "town hall " meeting with the employees which included a video clip of the Minister congratulating and commending the employees for their hard work and contribution towards eHealth's success.
42. eHealth's decision to deny Raj, Charlotte and the Class Members their Performance Awards, which necessitated bringing this action to enforce their legal rights, has led to a

media firestorm which has subjected the Class Members of eHealth to negative public criticism.

43. eHealth has clear policies in place in regard to Performance Incentive Awards and Merit Increases, and clearly spent considerable time assessing each employee, budgeting for the Performance Awards and Merit Increases and, in order to avoid negative publicity, simply chose not to pay.
44. The Class Members were forced to initiate this action to recover the compensation for which they had previously qualified and to which eHealth had informed them they were entitled.
45. The actions of eHealth warrant an award of punitive damages as eHealth took advantage of its position of power over the Class Members and acted in a way that is arbitrary and capricious.
46. The Class Members repeat and rely on the content of paragraph 39 of this claim to the extent that it applies to the Minister based on her position of authority and influence over eHealth, as well as her ability to directly and indirectly affect the Class Members.
47. The Minister's response to the notice of this intended class action has contributed to the criticism of eHealth Class Members. In various news stories published in August 2011 about this intended class action, the Minister was quoted as follows:

It's not just unfortunate, it's wrong that they're taking this legal action. We will do everything we need to do to protect the people of Ontario.

48. The clear message by the Minister is that Ontarians need to be protected from the employees of eHealth. The Minister knew, or ought to have known, that her comments in the public media would result in a negative public backlash against the Class Members. Furthermore, the Minister's comments, if accurate as recorded, illustrate that she believes, and in reality does, exercise control over eHealth and its employees.
49. The Minister breached her duty of good faith to the Class Members. The Class Members merely accepted their Performance Awards and Merit Increases. They were then subjected to an embarrassing and unwarranted revocation of their Performance Awards and Merit Increases at the behest of the Minister. The Minister then used this revocation as political leverage in the face of an upcoming election by making unnecessary negative comments about the Class Members to the public.
50. The Class Members were particularly vulnerable as they could not, nor should they have been expected to, publicly defend themselves against the humiliating comments made by the Minister for simply seeking to determine their legal entitlement.
51. On behalf of the Class Members, Raj and Charlotte seek punitive and exemplary damages as against eHealth in the amount of \$1,000,000, and the Minister in the amount of \$1,000,000, or in such amount as this Honourable Court deems appropriate.

Administration Costs

52. Raj, Charlotte and the Class Members are entitled to recover the costs of administering the distribution of any award in this action.

General

53. Raj and Charlotte propose that this action be tried in Toronto.

November 16, 2011

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Plaintiffs

- and -

eHEALTH ONTARIO et al.
Defendants
Court File No. CV-11-4396561143956-00CP

Ontario

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceedings Under the Class Proceedings Act, 1992,
S.O. 1992, c.6, as amended

AMENDED STATEMENT OF CLAIM

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SUPPLEMENTARY MOTION RECORD

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