CITATION: O'Neill v. General Motors of Canada, 2013 ONSC 4654
COURT FILE NO.: CV-10-402515CP
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joseph Michael O'Neill, Plaintiff / Moving Party

AND:

General Motors of Canada Limited, Defendant / Cross-Moving Party

Proceedings under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Steven Barrett, Louis Sokolov and Christine Davies* for the Class

Larry Lowenstein, Laura Fric and Eric Morgan for General Motors Canada

HEARD: May 27 and 28, 2013

MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON CLASS ACTION COMMON ISSUES

[1] Retirement benefits, such as extended health care and life insurance, are obviously important to retired employees and their families. No one disagrees with this. Nor is there any disagreement about the fact that retirement benefits can be changed even after the employee has retired, provided the contractual language allowing the employer to do so is clear and unambiguous.

[2] In this case, General Motors of Canada substantially reduced the health care and life insurance benefits of former salaried and executive employees after they retired.

[3] The question on these motions for partial summary judgment is whether the applicable contractual language allowing GMCL to do so was sufficiently clear and unambiguous. In my view, it was not—at least not for the salaried employees.

[4] Under the "reservation of rights clauses" that were in place over the years in question, General Motors of Canada had every right to reduce benefits, even retirement benefits, while the salaried employee was actively employed, but had no right to do so after the employee had retired.

[5] The four Common Issues that are before me on these motions for partial summary judgment, as they relate to the salaried retirees, are answered in favour of the plaintiff class. As for the executive retirees, the applicable Common Issues are answered in favour of the defendant General Motors of Canada.

[6] The reasons that follow deal mainly with the salaried retirees who make up about 98% of the class. Only 2% (about 67 individuals) of the class are executive retirees. I will discuss the executive retirees in a special section at the end of these Reasons and explain why the outcome on these motions is different for them.

I. Background

[7] In an effort to lower operating costs and avoid insolvency during the 2007-09 financial crisis, General Motors of Canada Limited ("GMCL") reduced the retirement benefits that were being provided to its non-unionized salaried and executive retirees. GMCL believed it was entitled to do so because of a provision in the benefit documents that allowed the company "to amend, modify, suspend or terminate" any of the benefit programs "at any time."

[8] The salaried retirees, some of whom had worked for decades at GMCL and were told repeatedly in the benefit documents that they could rely on the promised health care and life insurance benefits, were stunned. Surely, they said, GM's right to make changes to the benefit programs didn't mean that GM could cut retirement benefits *after* retirement. If that's what the company intended, they argued, GM should have told them while they were still working, in language that was clear and unambiguous.

(1) The post-retirement reductions

[9] In December 2007, GMCL announced various reductions to post-retirement benefits that would take effect at various points over the next three years. The reductions in health care benefits affected the availability of semi-private hospital coverage, the right to add new dependents for coverage, out-of-province coverage and co-payments on the cost of prescription drugs. At first, GMCL explained that it was proceeding with these cuts due to competitive "benchmarking" against other major companies. GMCL then said it was responding to financial pressures. In any event, GMCL made clear that the reductions would only apply to salaried employees who had retired after January 1, 1995.

[10] In September 2009, GMCL sent a letter to its salaried retirees, advising them that it would reduce their life insurance benefits starting in 2010. The amount of the basic life insurance benefit, for employees who retired between January 1, 1995 and January 1, 2010, would be reduced to $25,000 effective January 1, 2010, and further reduced to $20,000 effective July 1, 2010. Many of the retirees were counting on a basic life insurance benefit of $100,000 or more. The reduction to $20,000, at a time in their lives when few would be able to purchase affordable replacement coverage was, to say the least, significant.

(2) The class action

[11] Joseph O'Neill had worked at GMCL for more than 40 years. He retired in 2002. Several years into his retirement, the company reduced his health care benefits, as described above, and cut his life insurance benefit from just under $100,000 to $20,000. Mr. O'Neill commenced a class action on behalf of the more than 3,000 salaried and executive retirees in May 2010. Unfortunately, Mr. O'Neill passed away in 2012.

[12] Lynn McCullough, who replaced Mr. O'Neill as the representative plaintiff, had worked at GMCL for 44 years. He retired in 2008. Like the other salaried retirees who retired after January 1, 1995, Mr. McCullough's health care benefits were reduced and, in his case, his basic life insurance coverage was cut from $155,000 to $20,000.

(3) Consent certification and settlement agreement

[13] This class action was certified on consent in October 20, 2011.[1] The class was defined as "all salaried and executive retirees of GMCL who retired from GMCL between January 1, 1995 and October 20, 2011, and all surviving spouses and dependent children beneficiaries [of these retirees]."[2]

[14] The reason the Class Period began on January 1, 1995 is that GMCL itself used this date as the cut-off line. According to the head of Human Resources at GMCL, "the changes were limited to retirees who had retired on or after January 1, 1995 because since at least 1994 GMCL had consistently included in its communications to employees, language which explicitly stated that GMCL reserved its right to terminate and change post-retirement benefits."

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

[2] Several exclusions are noted in the class definition but none are important for the discussion herein.

[15] The class has 3,297 members (3,045 retirees and 252 surviving spouses). Of the 3,045 retirees, 2,978 are salaried retirees. Only 67 are executive retirees. As already noted, I will deal with the executive retirees in a special section at the end of these Reasons.

[16] The Certification Order incorporated a Settlement Agreement. The Order and Settlement Agreement confine this action to a series of documents common to the class and listed as Schedule A to the Settlement Agreement.

[17] Under the Settlement Agreement, the Common Issues are to be decided on the basis that the terms of the contract between class members and GMCL regarding post-retirement benefits are set out in documents listed in Schedule A. The court must determine the Common Issues and the terms of the post-retirement benefits plan by focusing on "the objective meaning" of the Schedule A documents. No subjective meaning is relevant or admissible under these agreed-upon terms. As noted by this court in an earlier procedural decision, "[t]he documents in Schedule A are all contract documents – that is, they are all documents that flowed between the parties and which could form part of an overall contract."[3]

[18] In all, there are about 260 benefit documents that fall within the Schedule A listing. Most of the documents are dated; a few are undated. Most of them are GMCL brochures or booklets describing general working conditions and the various benefits available to salaried employees. Some of them are company letters, announcements or other forms of communication between GMCL and the class members.

[19] The point of the Settlement Agreement is clear. In deciding the Common Issues, the court must confine itself to the evidence before it, mainly the documents listed in Schedule A. The court must assume that each of these documents was received and read by the retiree on or about the time that the document is dated (whether that was the case or not). The court must also make decisions about the overall contract even though the reservations of rights clauses ("the ROR clauses") were neither uniformly worded nor regularly used.

(4) The motions for partial summary judgment

[20] The parties have moved for summary judgment on four of the six Common Issues which are set out in full in the attached Appendix. Two of the Common Issues that deal with damages and unjust enrichment, namely (D) and (F), are not before me. Counsel for

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[3] *O'Neill v. General Motors of Canada Ltd.*, 2013 ONSC 924, [2013] O.J. No. 577 at para. 19.

GMCL has accurately paraphrased the Common Issues that are before me, namely (A), (B), (C) and (E) as follows:

> (A) did GMCL contract to provide post-retirement benefits that vest; if so, when do they vest; and in reducing benefits, did GMCL breach this promise?
>
> (B) did GMCL contract to provide class members who were hired after 1999 (the "new hires") with post-retirement benefits that vest?
>
> (C) did GMCL contract to provide class members who retired under early retirement programs (the "early retirees") with post-retirement benefits that vest?
>
> (E) did GMCL make a negligent misrepresentation in a "final notice" letter regarding life insurance?

[21] There are two motions before me. The plaintiff brings a motion for partial summary judgment to determine Common Issues (A) and (E) namely, whether GMCL was contractually entitled to reduce post-retirement benefits after the employees' retirement, and whether GMCL made an actionable misstatement in a letter regarding basic life insurance benefits. In response, GMCL brings a cross-motion for partial summary judgment on Common Issues (B) and (C) dealing with "new hires" and "early retirees."

[22] The parties have agreed that summary judgment is an appropriate method for fairly and justly resolving these Common Issues. For my part, I agree with the parties that the four Common Issues that are before me are completely amenable to summary adjudication.

[23] I pause here, however, to note the following: given my approach to the core question in this class action litigation—namely, whether GMCL was contractually entitled to reduce post-retirement benefits after the employee had retired—I may not have to answer all of the sub-questions that are set out in the Common Issues. I will return to this point below.

II. The documents before the court

[24] As already noted, GMCL's post-retirement benefits are not governed by a single document. There is no stand-alone "benefits agreement." I am obliged to examine all 260 of the documents listed in Schedule A in order to answer the questions before me: namely, what if any promises were made, what rights were reserved, and was GMCL

contractually entitled to reduce the health care and life insurance benefits after the employee had already retired?

[25] The relevant benefit documents consist of booklets, brochures, letters and other communications provided to the salaried employees over the years in question. Putting aside the one-off letters and other communications, there are five kinds of booklets or brochures that are relevant herein: *Working with General Motors*; *You and Your Benefits; Personal Benefit Summary*; *Your Benefits in Retirement*; and the *Total Compensation Journal.*[4]

[26] I have reviewed each of these documents and the related affidavit material in detail. Having done so, I am now able to set out the following findings.

III. Key findings

[27] These findings will provide the factual foundation for the analysis that follows.

[28] I am mindful of the general legal proposition that contracts must be interpreted as a whole and not in a piecemeal or selective fashion. In other words, whether GMCL was contractually entitled to reduce post-retirement benefits after the employee had already retired will depend upon an "objective" interpretation of the entire agreement which must include the interaction between what was said in the body of the benefit documents and what rights were reserved in the ROR clause.

[29] In order to do this in a sensible fashion and objectively measure the scope and content of the ROR clause that was in use during the Class Period, I will first set out my findings about what was said in the body of the benefit documents. I will then describe the content and reach of the ROR clause and from there determine a fair, reasonable and objective interpretation of the contract as a whole.

(1) Reasonable expectations

[30] It is often said the law of contracts protects the reasonable expectations of the parties, or more specifically, the expectations "induced by others' conduct."[5] Based on

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[4] There is a sixth document called *Your Health Care and Insurance Benefits in Retirement*, but the only two copies before me are dated 2008 and 2009. The ROR clause in the 2008 version refers to "salaried employees/retirees" and in the 2009 version to "employees and former employees, including retirees." I will say more about these documents and their ROR clauses later in my Reasons. I note, however, that neither document figured very prominently in either side's submissions.

[5] S.M. Waddams, *The Law of Contracts* (6th ed., 2010) at p. 11.

the numerous and repeated reassurances provided over the years by GMCL in the body of the benefit documents, I find that salaried employees could reasonably expect that they could plan for and rely on a core of health care and life insurance benefits that would be provided to them in their retirement. I will come to the ROR clause in a moment. My point here, based on what was said in the body of the various benefit documents, is that it was reasonable for the salaried employees to expect retirement security. Consider the company's oft-repeated reassurance that the benefits information "should be of interest to your family and a useful tool for your own financial planning." For example, the 1975 booklet *Highlights of Your Benefits*, said this:

> As a GM Salaried Employee…you enjoy one of the finest and most comprehensive employee benefit packages in industry. GM has been and continues to be a leader in providing a broad range of benefit programs to protect employees and their families. Today's GM benefits are an important factor in making your life more enjoyable and the future of yourself and your family more secure.

[31] The salaried employees could also reasonably expect that a core of health care and life insurance benefits would continue post-retirement and would be provided for life. For example, in the *You and Your Benefits* binder dated 2004 and subtitled, "A Handbook for Salaried Employees in Canada," one finds in the "When You Retire" section, the explicit reassurance that "Your health care coverage…will be provided at GM's expense for your lifetime." In the section labeled, "In the Event of Death," the basic life insurance coverage is explained as follows: provided the eligibility requirements are satisfied (not at issue here), "your basic life insurance will be continued for you for your lifetime."

[32] The promise of basic life insurance coverage requires some explanation. The benefit documents made clear that the amount of basic life insurance would be reduced according to a described formula until the "final" amount was reached.

[33] Following their retirement, GMCL provided the salaried retirees with an Initial Notice of Continuing Life Insurance. This document set out the life insurance benefits before the reductions contemplated by the formula, and explained that:

> Under the provisions of the General Motors insurance program, the amount of your Basic Group Life insurance in effect at [age 65/retirement] is reduced [in accordance with this formula]. Your insurance continues to be reduced by the same amount each month until the fully reduced amount of your continuing Life Insurance remains in effect, without premium cost to you, for the rest of your life.

[34] The Initial Notice indicated that a Final Notice of Continuing Life Insurance would be mailed once the fully reduced amount was reached, and described this as the

attainment of the "Ultimate Amount of Continuing Life Insurance." [6] Neither the Initial nor Final Notice letters contained a reservation of rights clause. For example, Mr. O'Neill's Final Notice letter stated:

> Clarica Life Insurance Company records show that you now have $98,488.00 of continuing life insurance in effect for the rest of your life.

[35] Apart from the reasonable expectations of the salaried employee as set out above, it is interesting to note that GMCL itself fully expected that the health care and life insurance programs would continue "indefinitely."[7] This particular reassurance, however, can only be found in the benefit documents from the 1960s and 70s.

[36] In any event, I am satisfied and I find as a fact, based on the representations and reassurances set out over the years in the body of the benefit documents, that it was a reasonable expectation of the salaried employees that they could plan for and rely on a core of health care and life insurance post-retirement benefits that would continue unchanged for the remainder of their life.

(2) Deferred compensation

[37] I further find that the benefits were provided as deferred compensation for services rendered and not gratuitously.

[38] GMCL took the position initially that the health care and life insurance benefits were provided gratuitously and were non-binding. To its credit, it appeared to abandon this argument as the hearing went on. In my view, it is beyond dispute that the benefits in questions were earned by the salaried employees and were viewed by GMCL itself as deferred compensation for services rendered.

[39] In numerous benefit documents, beginning in at least the mid-1970's, GMCL reminded employees that the benefits represented a substantial cost to the company and were an important part of the "compensation from your job"; that "your benefits, in a

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[6] The salaried employees who retired between 1995 and 2008 received both the Initial and Final Notices. The salaried employees who retired between approximately 2008 and 2010 would have received an Initial Notice, but would not have received the Final Notice as they had not yet reached their final amount pursuant to the reduction formula at the time that GMCL reduced the life insurance benefit.

[7] In the benefit documents until at least 1974, one can find the following: "The company believes wholeheartedly in this insurance program for GM men and women and expects the program to continue indefinitely. However…" [and the ROR clause follows.]

very real sense, are a part of your compensation"; and that "the combined GM benefit plans add significantly to the total pay you receive for the work you do."

[40] In any event, courts have repeatedly held that employee benefits, even those that were voluntarily introduced by an employer, are enforceable as a matter of contract. Although offered unilaterally, they become contractually enforceable as employees continue to work.[8] In this case, the evidence shows that GMCL consistently described the benefits as a fundamental component of the salaried employees' compensation package. GMCL consistently stated that the benefits would provide security for salaried employees' families and that the benefits enhanced GMCL's competitive position in attracting and retaining employees.

[41] There can be no doubt about the fact that the benefits were being provided by GMCL as deferred compensation for the employees' services and formed an important part of the employees' compensation agreement.

(3) Recent GMCL revisions to the ROR clause

[42] In 2010 and again in 2012, GMCL made important revisions to its ROR clause.

[43] Following the commencement of this lawsuit in May 2010, the ROR clause in the *Total Compensation Journal* dated October 2010 was changed to add the words "including retirees":

> General Motors of Canada Limited ("General Motors") reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies covering employees and **former employees, including retirees**, at any time without notice by action of its Canadian Executive Committee or other committee expressly authorized by the Canadian Executive Committee to take such action. The programs, benefits and policies to which an employee or **former employee, including retiree**, is entitled are determined solely by the provisions of the applicable program, benefit or policy as amended from time to time… [Emphasis Added.]

[44] In the June 2012 edition of the *Total Compensation Journal*, a further revision was made that much more explicitly authorized modifications/terminations to retiree benefits even after retirement:

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[8] *Lacey v. Weyerhaeuser Company Limited*, 2012 BCSC 353, [2012] B.C.J. No. 481 at paras. 5 and 104, and cases cited therein, aff'd 2013 BCCA 252, [2013] B.C.J. No. 1083.

> General Motors of Canada Limited ("General Motors") reserves the right to amend, modify, suspend or terminate any of its programs (including benefits) and policies covering employees and **former employees, including retirees, at any time, <u>including after employees' retirements</u>**."… [Emphasis Added.]

[45] In my view, the June 2012 revision is clear and unambiguous. Class counsel agrees that if this particular ROR clause was in place over the years in question, the salaried retirees would have had no basis for complaint.

[46] The question here, of course, is whether the earlier versions of the ROR clauses that were in place during the Class Period entitled GMCL to reduce retirement benefits after the salaried employee had retired.

(4) The ROR clauses before and after 1994

[47] The benefit documents fall into two categories: before and after 1994. The most one can say about the ROR clauses that appeared before 1994 was that their use was sporadic and their scope and content uneven. In only 10 of the 26 years, from 1968 to 1994,[9] can one even find an ROR clause in the benefit document. In other words, in 16 of the 26 years, there were no ROR clauses at all. The ROR clauses began to appear with regularity in 1994. As I have already noted, that is why GMCL chose January 1, 1995 as the start date for their post-retirement reductions.

[48] The ROR clause that was added to many of the benefit documents in 1994 reads as follows:

> General Motors <u>reserves the right to amend, modify, suspend or terminate any of its programs (including benefits)</u> and policies by action of its Board of Directors or other committee expressly authorized by the Board to take such action. The Programs, benefits and policies to which a <u>salaried employee</u> is entitled are determined solely by the provisions of the applicable program, benefits or policy. Absent an express delegation of authority from the Board of Directors, no one has the authority to commit the Corporation to: any program, benefit, policy or provision under a program, benefit or policy not provided for under the written terms of applicable programs, benefits or policies; or Change the eligibility criteria or any other provisions of such programs, benefits or policies. [Emphasis Added.]

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[9] The earliest example of a benefit document containing an ROR clause is dated 1968.

[49] Class counsel points out that even after 1994 there were many communications from GMCL to class members concerning post-retirement benefits that made no mention of any reservation of rights. For example: life insurance certificates and individualized letters about "initial" and "final" amounts, various memorandum and letters about benefit improvements or changes in insurance carriers, some of the benefit booklets, and claim summary documents. I understand class counsel's submission but I do not find it to be particularly probative. I agree with GMCL that it was not reasonable to add an ROR clause to every letter or communication and that it was sufficient if the ROR clause was included in the main benefit documents that were provided to the employees.

[50] My concern, to repeat, is the ROR clause that was in place after 1994. I recognize that there were several variations of this clause, each one worded a bit differently. However, for the purposes of these motions, I am content to focus my attention on what is arguably the most explicit ROR clause—the one that appeared in 1994 as quoted above in para. 48.

[51] Before doing so, however, I must mention the ROR clause that appeared two years later in 1996 in the *Your Benefits in Retirement* booklet. The word "salaried employee" in the second sentence of the 1994 clause quoted above was changed to read "salaried employee/retiree." This was the first time that the word "retiree" was used in the ROR clause and it was not used again until 2009.

[52] The addition of the word "retiree" in the 1996 benefits document could arguably have assisted GMCL in its submissions. However, I was strongly advised by counsel for GMCL that the reference to "salaried employee/retiree" in the second sentence of the ROR clause, as just quoted, formed no part of GMCL's argument and should be effectively ignored. Counsel for GMCL made this very clear at the hearing and again in writing after the hearing had concluded - that GMCL was only relying on the first sentence. I set out GMCL's position on this important point in full:

> The defendant confirms that its position is (i) it is the first sentence of the Reservation of Rights Clauses that gave the defendant the authority to modify or terminate benefits, and not the second sentence, and (ii) all of the RORs (including the 1996 *Your Benefits in Retirement* booklet) provide GMCL with the right to modify post-retirement benefits after the employees retired.

[53] As I will explain below, the addition of the word "retiree" in the second sentence would not have been determinative in any event. However, given GMCL's repeated submission that everything turns on the first sentence in the ROR clause, I must confine my analysis accordingly. Thus, my focus is only on the following sentence:

> General Motors reserves the right to amend, suspend or terminate any of its programs (including benefits) and policies by action of its Board of Directors or other committee expressly authorized by the Board to take such action.

[54] GMCL tried to argue that the typical ROR clause also contained the words "at any time." Thus, the above-quoted clause would read "General Motors reserves the right to amend, suspend or terminate any of its programs *at any time*…." And, as counsel for GMCL argued, what could be clearer than "at any time?"

[55] The difficulty with this argument is twofold: one, the "at any time" phrase was only used in a handful of benefit documents dated 1968, 1971, 1974 and 1977. The three-word phrase then disappeared from the ROR clauses, only to reappear 22 years later in 1999, and then only in the *Total Compensation Journal.* It was included in the ROR clause in the *Personal Benefits Summary* in 2006, but not in the 2007 and 2008 versions, and was again included in the 2009 version. One can also find "at any time" in the ROR clause in the *Your Health Care and Insurance Benefits in Retirement* brochure from 2008 to 2010. The first difficulty, then, is the irregular and sporadic usage of the "at any time" language.

[56] The second difficulty is one of substance. In my view, the words "at any time" add little to the so-called "first sentence" of the 1994 ROR clause. If GMCL reserved the right to "amend, suspend or terminate any of its programs (including benefits) and policies" it would follow that this would mean "at any time."

[57] The question for me is whether the ROR clause, even if it said "at any time," was sufficient in the context of the overall agreement, that is, in the context of what was said in the body of the benefit documents and in the ROR clause itself, to allow GMCL to reduce health care and life insurance benefits *after retirement.*

IV. Analysis

(1) Starting points

[58] I begin by noting two propositions that are not in dispute. First, both sides agree that "vesting" is a matter of contract—that is, whether retirement benefits can be changed after retirement is a matter of contractual interpretation.[10] Secondly, both sides agree that an employer has the contractual right to do so, but only if the contractual language

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[10] *Dayco Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230 at paras. 62, 71 and 80.

allowing it to do so is clear and unambiguous, or as one arbitrator put it, "clear and unequivocal."[11]

[59] I am grateful to counsel for their agreement on these two points because it makes my job easier. I can decide the Common Issues that are before me by simply applying principles of contractual interpretation. I don't have to deal with arguments about consideration or waiver. I don't even have to use the word "vesting", which carries its own judicial baggage as evident in the case law. I am able to decide these motions on the basis of straight-forward contractual interpretation.

[60] Before doing so, however, I should add a third starting point that is not necessarily shared by both sides. Because this is a breach of contract case, some factors are simply not relevant. For example, the fact that GMCL reduced the post-retirement benefits to its salaried retirees because it was genuinely trying to cut costs and avoid bankruptcy. Or, that a finding in favour of the class members and the continuation of the benefits in question to them would somehow exacerbate the concerns about "inter-generational equity." Neither of these factors is relevant in a breach of contract case. Absent arguments of economic duress (which were not made), this court is only concerned with what the contract (as based on the Schedule A documents) provided and whether it was breached.

(2) Discussion

[61] As I have already found, the reassurances and representations made by GMCL in many of the benefit documents in question and in follow-up life insurance "notices"—about how the salaried employees could rely on the information for retirement planning and could count on a core of "lifetime" health care and life insurance benefits after retirement—were, to say the least, significant. This is not to say that GMCL could not protect itself against changing economic conditions by making it clear and unambiguous in the ROR clause that changes/reductions were possible even after retirement. The question is whether GMCL did so.

[62] In my view, GMCL failed to do so. I find that even the most explicit ROR clause that was in use during the Class Period was insufficiently clear about GMCL's right to make changes to the health care and basic life insurance benefits after the salaried employee had retired. I say this for the following five reasons that, in combination, support this conclusion.

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[11] See e.g. *TRW Canada Ltd. v. Thompson Products Employees' Assn.*, [2012] O.L.A.A. No. 232 (Kaplan) at para. 26, aff'd 2012 ONSC 6796, [2012] O.J. No. 6211 (Div. Ct.).

(i) Not clear and unambiguous

[63] It is not at all clear that GMCL reserved the right to make changes and reduce benefits after salaried employees retired. I say this because in all of the main benefit documents that I have reviewed, the ROR clause refers specifically to "salaried employees." That is, they refer specifically to "the Programs, benefits and policies to which a salaried employee is entitled." In other words, one can reasonably interpret the ROR clause as allowing (and limiting) GMCL's right to make changes to the salaried employees' retirement benefits while the employee is still a salaried employee (i.e. an active employee)—but not after he or she retires (and becomes a "retiree").

[64] For example, beginning in 1994, the ROR clause in:

- the *Working with General Motors* booklet referred only to "salaried employees"—there is no mention of "retirees" even in later years;
- the *You and Your Benefits* booklet (which is sub-titled "A Handbook for Salaried Employees in Canada) referred to "salaried employees." This language was amended, much later, in 2009, to "employees, including retirees";
- the *Personal Benefits Summary* brochure referred to "salaried employee." There is no mention of "retirees" in the ROR clause even in later years;
- the *Total Compensation Journal* dated 1999 reserved the right to make changes to "employee" benefit plans "at any time." This was amended in 2009 to "salaried employees/retirees";
- the *You and Your Benefits in Retirement* booklet dated 1988 provided nothing more than "from time to time you may receive information concerning changes in your benefits." In 1996 the more explicit ROR clause, noted above, was added and included the words "salaried employees/retirees."

[65] The first time that the ROR clause went beyond "salaried employee" and explicitly referred to "retirees" was in the 1996 document that was just discussed. However, as already noted, GMCL has made it clear that nothing turns on adding the word "retirees." It is GMCL's submission that it was always enough to simply say that GMCL reserved the right "to amend, suspend or terminate any of its programs (including benefits) and policies," (with some benefit documents adding "at any time").

[66] I do not agree. At its highest, the ROR clause inserted in 1994 gave GMCL the right to amend benefits prospectively for active employees. The ROR clause claimed a right to amend "programs (including benefits) and policies" to which "a salaried employee is entitled". Retirees were not specifically mentioned, and the clause did not

specifically avert to the possibility of reductions after the point of retirement when the benefits had been fully earned.

[67] By contrast, later ROR clauses, introduced after the reductions at issue in this action, referred explicitly to "retirees." In 2009, GMCL amended the ROR clause to say that the programs, benefits and policies to which a "salaried employee/retiree" is entitled are determined by the terms of those programs, benefits and policies. In 2010, after being served with this action, GMCL further altered the clause to say that it extended to programs (including benefits) "covering employees and former employees, including retirees." However, even this language may not have gone far enough. In my view, it was only in 2012 when GMCL further amended the clause to say that changes to benefits could be made "after employees' retirements" that both the meaning and intention were clear and unambiguous.

[68] GMCL promised to provide benefits offering substantial protection and peace of mind for salaried retirees and their families. It would be inconsistent with that promise of post-retirement security if GMCL could reduce or eliminate these very benefits after retirement.

(ii) Contra proferentem

[69] It is a basic principle of contractual interpretation that a provision that is ambiguous or capable of more than one reasonable interpretation shall be interpreted against its drafter. Given the context of unequal bargaining power between employees and employers, the policy reasons underscoring this principle are magnified.[12] For this reason, courts have interpreted reservation of rights clauses restrictively against employers, finding that they must be explicit about affecting the benefits of retired employees (and cannot simply refer to the benefits of current employees) and that they must also be explicit in conveying a right to introduce changes after the point of retirement.

[70] In a recent decision in British Columbia, affirmed on appeal, the trial judge acknowledged the need to read ROR clauses in employment agreements strictly, particularly when the question is whether changes can be made after the employee has retired.[13] The general thrust of the ROR clause in *Lacey*[14] allowed the employer to "make

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[12] *Pathak v. Royal Bank of Canada*, [1994] B.C.J. No. 3038 (S.C.) at paras. 17-18, aff'd [1996] B.C.J. No. 447 (C.A.); *Christensen v. Family Counselling Centre of Sault Ste. Marie and District*, [2001] O.J. No. 4418 (C.A.) at paras. 8 and 14; *Taggart v. Canada Life Assurance Co*., [2005] O.J. No. 472 (Sup. Ct.) at para. 40, aff'd [2006] O.J. No. 310 (C.A.) at paras. 18-19.

[13] *Lacey*, *supra* note 8 at para. 125.

changes from time to time" to the benefit programs. I set out the B.C. court's reasoning in *Lacey*, not because the case is exactly on all fours with ours, but because what was said by the court applies equally here:

> The…question is whether the right to make changes includes a right to change the terms of a retiree's coverage after the date of retirement. Is this phrase properly construed as expressing a right to change the terms of all retirement health coverage at any time, including the right to change a retiree's coverage after the date of retirement? Or does it only permit the employer to impose changes to retirement health benefits on those currently employed when the change is made, changes that will affect only them in their future retirement?
>
> No right to make changes in health benefit coverage *specifically* after the retirement date was asserted in the Partnerships binder. No such reservation of rights appears in any of the letters that are in evidence addressed to employees that outline their retirement benefits. Furthermore, the Partnerships binder said that if changes are made, the changes would be communicated through updates to the Benefits section of the binder; there is no mention made of any mechanism for advising retirees. These factors all give weight to the proposition that "changes" would only affect current employees, not those who had already retired.
>
> …[I]t would reasonably have been within the contemplation of both [the employer] and its employees that retirees had a particular need for security; that persons on a fixed income would have a particular desire for certainty and predictability. Therefore, a more restricted interpretation of the reservation of a right to make changes, as affecting only current employees, would be at least as reasonable as the broader interpretation. Given these two reasonable alternative interpretations of the language in the Partnerships binder, I find the reservation of the right to make changes to be ambiguous. I therefore interpret the language *contra proferentem*, against the interests of the party who drafted it and who relies upon it.[15]

[71] As we know from the revisions in 2010 and 2012, GMCL could very easily have drafted the ROR clause to make it clear that unilateral changes may be made even after retirement. And as I outlined above, it is certainly not clear that the ROR clause gives GMCL the right to modify the benefits programs after the employees' retirement. Since

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[14] *Ibid* at para. 119.

[15] *Ibid* at paras. 124-126.

the ROR clause can just as reasonably be interpreted to limit GMCL's right to modify the benefit programs, including the retirement programs, while the "salaried employee" is actively employed and not after he or she retires, then it should be so interpreted.

(iii) Employment contracts

[72] The third reason relates to the special place of employment contracts. Courts have recognized that because of the importance of employment to individuals and the need to protect employees who are generally vulnerable in the bargaining relationship, employment contracts are unlike ordinary commercial contracts.[16] Legal commentators have noted that in employment law, these policy goals inform the interpretive process, and as a result, in the absence of "clear language mandating some other result," employment contracts are interpreted so as to protect employees."[17]

[73] Again, the emphasis on clear contractual language.

(iv) Good faith

[74] The fourth reason relies on the doctrine of good faith and in particular the employer's implied duty under an employment contract to exercise unilateral powers in good faith.[18]

[75] The duty of good faith is inherent in the employment relationship and applies to both the execution and the performance of the employment contract to ensure that an employer not act in a manner that eviscerates an employee's contractual rights.[19] It is an integral tool in the interpretation of the employment contract, regardless of the specific terms of the contract, flowing from the inherent power imbalance between employee and

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[16] *Wallace v. United Grain Growers Ltd*., [1997] 3 SCR 701 at para. 91. See also *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.) at paras. 48-49.

[17] G.R. Hall, *Canadian Contractual Interpretation Law* (2nd ed., 2012) at pp. 187-93.

[18] *Transamerica Life Canada Inc. v. ING Canada Inc*. (2003), 68 O.R. (3d) 457 (C.A.).

[19] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, [2010] O.J. No. 716 at paras. 76-78 and cases cited therein, aff'd 2012 ONCA 443, leave to appeal denied [2012] S.C.C.A. No. 326. See also *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328, [2012] B.C.J. No. 443 at para. 145; *TSP-Intl Ltd. v. Mills* (2005), 74 O.R. (3d) 461 (Sup. Ct.) at paras. 61, 79 and 81, rev'd on other grounds (2006) 81 O.R. (3d) 266 (C.A.); *Wallace, supra* note 16 at paras. 95 and 98.

employer, which exists not only when the contract is formed, but throughout its performance.

[76] I agree with the plaintiff that the terms of the contract at issue in this case must be interpreted through the lens of good faith. The employer must be presumed to have acted in good faith in drafting the reservation of rights clause. The contract should be interpreted in a way that gives effect to the most fundamental aspect of the employment relationship, which is compensation for the services an employee has performed. An interpretation in line with the duty of good faith favours the plaintiff's claim that the benefits could not be reduced after the employee had retired, reasonably relying on the oft-repeated reassurances of retirement security.

(v) Subsequent conduct

[77] GMCL knows how to draft a clear and unambiguous ROR clause. Recall the 2012 version, already discussed. The meaning and warning in the 2012 version is clear and unequivocal: GMCL reserves the right to amend, modify, suspend or terminate any of its programs covering employees and former employees, including retirees, "at any time, including after employees' retirements."

[78] The fact that this revision was drafted and included in the benefit documents so easily and so quickly is relevant to the task of contractual interpretation. Subsequent conduct, as evidenced through the objective documentary record, is an important tool of contractual interpretation.[20] As the Court of Appeal has noted, "Under modern Canadian law, the subsequent actions of the parties may be helpful in explaining the true meaning and intent of their agreement."[21] This principle has been applied in the context of cases involving vesting.[22]

[79] In deciding whether the 1994 ROR clause was sufficiently clear and unambiguous to allow the post-retirement reductions in question, this court can properly consider the 2012 revision because "it offers evidence of the meaning the parties attributed to the

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[20] *Canadian National Railways v. Canadian Pacific Ltd*., [1978] B.C.J. No. 1298 (C.A.) at paras. 82-83, aff'd [1979] 2 S.C.R. 668; *Montreal Trust Company of Canada v. Birmingham Lodge Ltd*. (1995), 24 O.R. (3d) 97 (C.A.) at paras. 21-22; *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, [2010] O.J. No. 212 at para. 162.

[21] *3869130 Canada Inc. v. I.C.B. Distribution Inc*., 2008 ONCA 396, [2008] O.J. No. 1947 at para. 55.

[22] *Dinney v. Great-West Life Assurance Co.*, 2005 MBCA 36, [2005] M.J. No. 69 at paras. 57-60.

agreement after its execution and, by reasonable inference, what might have been intended at the time of execution."[23]

Conclusion about salaried retirees

[80] In sum, for the reasons set out above, I find that GMCL was not contractually entitled to reduce the health care and basic life insurance benefits after the salaried employees had retired. When the unclear and ambiguous ROR clause is interpreted and assessed in the context of the oft-repeated reassurances in the body of the various benefit documents of retirement security and when the applicable principles of contractual interpretation, as set out above, are properly applied, it becomes readily apparent that GMCL was not contractually entitled to do what it did.

[81] Class counsel argued that this breach of contract finding should also apply to the salaried employee who had reached the prescribed age and years of service, and thereby became eligible to retire, but continued to work. Regrettably, given my interpretation of the ROR clause (i.e. changes can be made during active employment but not after the employee has actually retired), I am unable to include the retirement-eligible employees who continued working and whose benefits were reduced while they were still actively employed.

V. The common issues

[82] I now turn to the four Common Issues that are before me. I remind the reader that I am still dealing with the salaried retirees. I will deal with the executive retirees in the section that follows.

(1) Common issue (A) – breach of contract

[83] I find that GMCL in the documents listed in Schedule A of the Settlement Agreement did indeed contract to provide salaried employees with post-retirement benefits that vested (i.e. could not thereafter be altered and reduced) upon retirement.

[84] I further find, for the reasons already stated, that in reducing or eliminating the benefits after retirement, GMCL breached its contract with the salaried retirees.

[85] However, as already noted, this finding does not include the salaried retirees who were eligible to retire but were still working when the benefit reductions were announced.

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[23] J.D. McCamus, *The Law of Contracts* (2nd ed., 2005) at pp. 757-58, discussing the decision the Court of Appeal in *Montreal Trust*, *supra* note 20.

(2) Common issue (B) – the "new hires"

[86] The class includes seven individuals that were hired after 1999 and are referred to as the "new hires." Their employment contracts included an ROR clause that was similar to the ones that have already been discussed:

> The Company reserves the right to amend, modify, suspend, or terminate any policy or program (including benefits) from time to time without notice or consultation.

[87] In my view, the above ROR clause is, in essence, the same as the 1994 clause that has already been discussed at length. The "new hires" therefore stand or fall on the same analysis that applies to all of the other salaried retirees and that was considered above under Common Issue (A). There is no good reason to treat the "new hires" any differently.

[88] In responding to Common Issue (B) I find as follows. Class members hired between 1999 and 2006 accepted written offers of employment and those hired after 2006 received written benefit summaries. These documents formed part of these class members' agreements with GMCL regarding post-retirement benefits. GMCL contracted to provide these employees with post-retirement benefits which could not be changed or reduced after retirement. By reducing the health care and basic life insurance benefits, GMCL breached it contract with these "new hires."

(3) Common issue (C) – the "early retirees"

[89] Over one-third of the class, about 1,201 individuals, accepted early retirement packages. The early retirement programs' documentation almost always (in all but four cases) included a retirement form to be signed by the retiree which included the following provision:

> I understand the General Motors Canadian Retirement Program for Salaried Employees and the other General Motors benefits programs provide that the Company reserves the right to amend, modify, and suspend or terminate each program.

[90] GMCL says the ROR clause could not be clearer: post-retirement is the only time when the company could conceivably have intended to exercise the rights that it was reserving. There is a tantalizing logic to this submission. However, on balance, I do not agree. The provision just quoted is not a stand-alone ROR clause. Rather it appears to be an acknowledgment clause—the retiring employee "understands" and acknowledges that all GMCL benefit programs contain the ROR clause as described. But the scope and reach of that ROR clause is not further defined or determined. Whether or not retirement

benefits can be reduced after retirement depends on how one interprets the ROR clauses in these very benefit documents, which is the focus of Common Issue (A). If this first issue is answered in favour of the regular retirees, then the same answer applies to Common Issue (C) and the early retirees.

[91] In other words, the ROR clause can have no broader application for the early retirees. The ROR language in the early retirement documents did not grant GMCL any different or greater authority to reduce benefits than it had for the other class members.

[92] Further, the releases contained in the "statements of acceptance" that were signed by the early retirees do not preclude the claim herein. The Court of Appeal has made clear that a release cannot bar a claim in respect of a breach of the very agreement that contains the release.[24] Moreover, a release can only apply to claims of which a plaintiff is aware at the time he or she signed the release.[25]All but a few of the early retirement agreements in the record pre-dated the reductions to benefits. The early retirees could not have known that years down the line, GMCL would reduce and eliminate their post-retirement benefits. They cannot be said to have released claims in respect of such reductions.

[93] In short, the answers provided for Common Issue (C) are no different than those provided for Common Issue (A). Yes, some of the class members entered into early retirement agreements; but no, none of the early retirement agreements released GMCL from liability or otherwise preclude the class action claims in this proceeding.

(4) Common issue (E) – the life insurance letter

[94] Recall what was said in the Final Notice letter that was sent to the salaried retirees. Here again is the letter that was sent to Mr. O'Neill:

> Clarica Life Insurance Company records show that you now have $98,488.00 of continuing life insurance in effect for the rest of your life.

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[24] *John Doe v. Ontario*, 2009 ONCA 132, [2009] O.J. No. 570 at paras. 34-35. See also *Burgener v. Haldimand (County)*, 2012 ONSC 5230, [2012] O.J. No. 5036 at paras. 19-21.

[25] *Humberplex Developments Inc. v. Wycliffe Humberplex Ltd.*, 2011 ONSC 556, [2011] O.J. No. 291 at para. 41; aff'd 2011 ONCA 591, [2011] O.J. No. 4018; *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2009 BCCA 273, [2009] B.C.J. No. 1189 at para. 59; *Drader v. Abbotsford (City)*, 2012 BCSC 873, [2012] B.C.J. No. 1203 at para. 360; *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, [2000] B.C.J. No. 903 at para. 17; *York University v. Markicevic*, 2013 ONSC 378, [2013] O.J. No. 249 at para. 52.

[95] It seems obvious to me that in this letter the recipients were being told that they were entitled to a fixed basic life insurance benefit. The fixed benefit was represented to be guaranteed for "life" and was not subject to modification or termination. Given the explicit content of the representation and the ambiguity of the ROR clause, I find that GMCL was not contractually entitled to reduce the basic life insurance benefit post-retirement as it did.

[96] The balance of the sub-questions listed under Common Issue (E) relate more specifically to the claim in negligent misrepresentation. Having found that GMCL was in breach of contract in reducing the basic life insurance benefit, there is no need to consider, in the alternative, the negligent misrepresentation claim and I decline to do so.

VI. The executive retirees

[97] I will now explain why GMCL was not in breach of contract in reducing the benefits for the 67 executive retirees and their dependents. In my view, the ROR clause in place for the executive retirees stated with much more clarity that this is exactly what might happen.

[98] In 1991, GMCL created the Canadian Supplemental Executive Retirement Program ("CSERP") that was changed later, in 2007, to CERP. The executive retirement program basically provided for monthly payments above the individual's registered pension, liability insurance and supplemental life insurance. In February and September 2009, GMCL advised its executive retirees that it was reducing or eliminating each of these benefit programs.

[99] Unlike the salaried retirees, the executive retirees knew from the outset that their retirement benefits were not guaranteed and could be reduced or eliminated even after retirement. I say this because the foundational CSERP document dated July 15, 1992 made clear that:

(i) The CSERP program was not "pre-funded" and that any benefits under the CSERP program would be provided to retiring executives "out of current earnings of the Company;"

(ii) The benefits provided under CSERP were "not guaranteed" and "may be reduced or eliminated with the prior approval of the Board of Directors;"

(iii) When the executive retired, he or she would be required to sign the document attached as Exhibit II which provided that the executive has read and understands the terms and conditions of the CSERP Program including the provision that "benefits paid under this Program may be reduced or eliminated with the prior approval of the Board of Directors."

[100] In other words, it was made sufficiently clear to the executive retirees that CSERP was unfunded, was being provided to the executives by GMCL out of current earnings and was not guaranteed. The executive retirees also knew and understood that *when they retired* they would be asked to sign a Monthly Benefits Authorization form which provided (just above the signature line) that the "benefits paid under *this Program* may be reduced or eliminated with the prior approval of the Board of Directors." (Emphasis added.)

[101] In my view, the executives should reasonably have understood that the CSERP benefits (i.e. their retirement benefits) were not guaranteed and could be reduced or eliminated even after retirement. The printed warning that benefits could be reduced or eliminated applied specifically to retirement benefits, and was clear and unambiguous. The level of clarity about post-retirement changes to retirement benefits was much higher and, indeed, the reservation of rights message to the executive retirees was very different from the language used in the salaried employees' 1994 ROR clause or in the "acknowledgement" clause that was signed by the early (salaried) retirees.[26]

[102] I therefore conclude that GMCL was contractually entitled to reduce or terminate the benefits of the 67 executive retirees.

VII. Conclusion

[103] Given the representations and reassurances that were made by GMCL in the benefit documents, the ambiguities in the reservation of rights clauses, and the applicable principles of contractual interpretation, GMCL was not contractually entitled to reduce the health care and basic life insurance benefits of the salaried retirees after they had retired.

[104] However, GMCL was contractually entitled to reduce or eliminate the benefits of the executive retirees.

[105] The class members have generally prevailed on these motions—that is, almost all of the salaried retirees, including the new hires after 1999 and the early retirees. The two categories of class members that have not prevailed are (1) the salaried retirees who

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[26] The retiring executive was not being asked to simply acknowledge the existence of the ROR clauses found in the benefit documents but was required to sign off on the day he or she retired that the "benefits paid under this Program [i.e. retirement benefits] may be reduced or eliminated…"

continued to work after becoming eligible to retire and were working when the impugned reductions were announced, and (2) the 67 executive retirees.

VIII. Disposition

[106] Order to go in accordance with these Reasons.

[107] The plaintiff class is entitled to all, or almost all, of its costs on these motions and cross-motions. The quantum may require adjudication. If the costs issues cannot be resolved by the parties, brief costs submissions should be forwarded to my attention—by the plaintiffs within 21 days and by GMCL within 14 days thereafter.

[108] I am obliged to counsel for their assistance.

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Justice Edward P. Belobaba

Date: July 17, 2013

Appendix: Certified Common Issues

A. Breach of Contract

(a) Did GMCL in the documents listed in Schedule "A" attached

(i) contract to provide employees with post-retirement benefits which vest, and if so,

(A) at what time do the post-retirement benefits vest, in whole or in part?

(B) did improvements to any post-retirement benefits vest in whole or in part, and if so at what time?

(b) In reducing or eliminating the post-retirement benefits, did GMCL breach its contracts with the Class Members?

B. New Hires After 1999

(a) Did any of the Class Members hired after 1999 accept written offers of employment when hired (1999-2006) or receive a written benefit summary (after 2006)? If yes, then

(i) Which Class Members, and

(ii) Did those documents form part of those Class Members' agreement with GMCL regarding post-retirement benefits? If yes, then did GMCL:

(A) contract to provide those employees with post-retirement benefits which vest, and if so,

(1) at what time do the post-retirement benefits vest, in whole or in part?

(2) did improvements to any post-retirement benefits vest in whole or in part, and if so at what time?

(B) In reducing or eliminating the post-retirement benefits, did GMCL breach its contracts with these Class Members?

C. Early Retirement

(a) Did any of the Class Members enter into early retirement agreements (aka mutually satisfactory retirement agreements) with GMCL? If yes, then:

(i) Which Class Members, and

(ii) Did those early retirement agreements release GMCL from any liability or otherwise preclude the Breach of Contract and Negligent Misrepresentation claims in this proceeding?

D. Remedies for Breach of Contract/Unjust Enrichment (alternative claim)

(a) Is it appropriate for damages to be assessed in the aggregate, in whole or part, or should questions regarding damages be determined on an individual basis, in whole or in part?

(b) If the answer to (a) is that damages may be assessed in the aggregate, then:

(i) Are Class Members entitled to damages on an aggregate basis equivalent to the total savings realized by the Defendant?

(ii) What is the quantum of aggregate damages owed to Class Members?

(iii) What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

E. Negligent Misrepresentation (Life Insurance)

(a) Did GMCL in the letter listed at Schedule "B" make representations to certain Class Members that they were entitled to a fixed basic life insurance benefit?

(b) If the answer to (a) is yes, then:

(i) Was that fixed benefit represented to be guaranteed "for life" or any other period of time, or was that benefit subject to modification or termination?

(ii) Was GMCL in a special relationship with the Class Members?

(iii) To which Class Members were the representations made?

(iv) Were the representations untrue, inaccurate or misleading?

(v) Was GMCL negligent in making the representations?

(vi) Did the representations otherwise constitute negligent misrepresentations?

F. Unjust Enrichment –Alternative Claim

(a) If the Class Members as defined in (a) of the class definition ("Former Employees") are successful on common issue "A – Breach of Contract", and if the Class Members as defined in (b) of the class definition ("Spouses/Dependents")are not successful on common issue "A-Breach of Contract" because they are found not to have had a direct contractual

relationship with GMCL, then the Spouses/Dependents may pursue in the alternative to the Breach of Contract claim a claim in Unjust Enrichment, where the common issue would be:

(i) In the alternative, and in respect of Spouses/Dependents only, in reducing or eliminating the post-retirement benefits payable, was GMCL unjustly enriched?

For greater clarity, this alternative common issue may not be pursued if the Former Employees are not successful in their Breach of Contract Claim, common issue A.

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