

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
Giulia Belec) Joseph Obagi and Elizabeth Quigley, for the
) Plaintiff
Plaintiff/Moving Party)
)
- and -)
)
Sun Life Assurance Company of Canada) Linda Plumpton, David Outerbridge, Shalom
) Cumbo-Steinmetz, for the Defendant
Defendant/Responding Party)
)
)
)
) **HEARD:** February 8, 9, and 10, 2022 via
) Zoom in Ottawa

R. SMITH J.

REASONS ON MOTION FOR CERTIFICATION

1. Giulia Belec (“Belec”) has brought a motion to certify a class proceeding against Sun Life Assurance Company of Canada (“Sun Life”). Belec claims that Sun Life has erred in calculating her long term disability benefits by wrongfully deducting the inflation component (“COLA”) from her Canada Pension Plan (“CPP”) and her *Public Service Superannuation Act* (“PSSA”) benefits.
2. The parties agree that the LTD Policy prohibits Sun Life from deducting the COLA increases from any recipient’s CPP or PSSA benefits (sections 9, 4, A, a) and b) of the Policy).
3. Sun Life used a computer program called (“CHESS”) to calculate the amount of long term disability benefits that were payable to a recipient. The CHESS program calculated the indexing to adjust for inflation (COLA) in each year and deducted “other income” as defined in the Policy. The CHESS program’s calculations for Ms. Belec (attached at Schedule “A”) deducted the amount of her CPP and PSSA benefits (“offsets”) including the COLA increases for these two items, contrary to the specific terms in the LTD Policy (the “Policy”).

4. Sun Life does not dispute that its CHESS program interpreted the Policy, firstly to apply the COLA increase each year to her Gross Monthly Benefit (as argued by the Plaintiff) and then deducted the CPP and PSSA amounts including the COLA component for each year. However, Sun Life now argues that its CHESS program's methodology made two errors: a) applying the annual indexing to her Gross Monthly Benefit rather than her Net Monthly Benefit; and b) wrongfully deducting the Cola increases for her CPP and PSSA benefits. Notwithstanding these two alleged errors, Sun Life submits that the Monthly Benefit as calculated by the CHESS program, arrived at the correct result.

5. Sun Life argues that the Policy should be interpreted to apply the COLA increases effective on January 1 of each year to the net amount of the Monthly Benefit being received for the month of December of each year, after deducting all the "other income" she received, including the amount of her non-indexed CPP and PSSA benefits.

6. Ms. Belec submits that the annual COLA increases effective on January 1 of each year should be applied firstly to her "Gross Monthly Benefit", namely on 70% of her salary when benefits began being paid, indexed each year, before making deductions for "other income" received, including her un-indexed CPP and PSSA benefits.

7. The parties have used terms Gross Monthly Benefit and Net Monthly Benefit and so I will also refer to these terms even though the Policy only refers to a "Monthly Benefit". The parties agree that the Gross Monthly Benefit is 70% of Ms. Belec's salary when she commenced receiving benefits, increased each year by the COLA percentage. The Plaintiff submits that a correct interpretation of the Policy required Sun Life to apply the annual indexing factor to this (gross) amount before deducting "other income".

8. The term "Net Monthly Benefit" is the actual amount received each month in December of each year after deducting "other income", which in Ms. Belec's case includes her CPP and PSSA benefits. Sun Life submits that the term "Monthly Benefit" used in the Policy should be interpreted to mean the Net Monthly Benefit for the purpose of indexing the amount payable to her.

9. The Plaintiff submits that her claim meets the criteria required for certification. She further submits that a class proceeding is the preferable procedure to interpret the Policy to determine the correct methodology to be applied to index the Monthly Benefits each year for all long term

disability recipients. Determining this issue for all recipients in one proceeding would promote access to justice and make efficient use of judicial resources.

10. Sun Life argues that the Plaintiff does not meet any of the five criteria for certification, namely that:

- (a) The Plaintiff has failed to plead a reasonable cause of action;
- (b) The proposed class definition is overbroad due to class-wide limitation periods and is of an indefinite duration as there is no end date;
- (c) The Plaintiff has not shown “some basis in fact” for the proposed common issues;
- (d) The proposed representative Plaintiff cannot fairly and adequately represent the interests of the class; and,
- (e) A class action is not the preferable procedure because a decision in a single action would be sufficiently binding on all other disability claimants, which would make more efficient use of judicial resources.

Background/Facts

11. Ms. Belec was employed by the Federal Government of Canada since March 29, 1982. She was diagnosed with a major depression and fibromyalgia and started receiving disability benefits under Sun Life’s Policy on September 13, 2006. She has continued to receive long term disability benefits to the present date.

12. The Policy dates back to April 30, 1997 and was issued by Sun Life to Her Majesty the Queen in Right of Canada represented by the President of the Treasury Board.

13. Ms. Belec currently receives LTD benefits under a group life and disability insurance Policy bearing Policy number 12500-G entered into between Sun Life and Her Majesty the Queen in Right of Canada Represented by the President of the Treasury Board ("Treasury Board"). Sun Life underwrites and administers the Policy for the Treasury Board, which is the Policyholder or plan sponsor.

14. The Policy covers eligible federal government employees who are represented in the collective bargaining process — i.e., unionized employees of the Government of Canada. Ms. Belec is one of these employees.

15. The original Policy number 12500-GD was purchased by the Treasury Board in 1970. It was amended from time to time, and in 1997 it was terminated and replaced with the initial form of the current Policy bearing Policy number 12500-G.

16. The 2006 Policy was issued on November 10, 2006 with retroactive effect to January 1, 2006. Prior to the 2006 Policy, the version of the Policy that was in force had an effective date of April 30, 1997 (the "1997 Policy"). There are no changes between the 1997 Policy and the 2006 Policy in the wording of the provisions relating to COLA and its application to the Net Monthly Benefit under the Policy.

17. Treasury Board had the ability in 1970, and continues to have the ability today, to specify the desired features of its plan. Subject to applicable legal and underwriting restrictions (including restrictions against over-insurance, as explained below), the plan sponsor has discretion to control the content of the plan. This includes the ability to specify the terms and conditions of the COLA that applies to increase LTD benefits from year to year.

18. The Policy was designed with input from union and management representatives within the federal government. It continues to be reviewed on a regular basis with union input.

The Policy

Payment Of Monthly Benefit

19. At page 9-5 of the Policy, under the heading of “payment of Monthly Benefit” a number of conditions are set out as follows:

Upon receipt of Notice and Proof of Claim that:

1. an Employee became Totally Disabled while insured and is under a Reasonable and Customary Treatment Program,

and

2. Total Disability continued beyond the Elimination period, the Monthly Benefit will be paid while the Employee continues to be Totally Disabled, subject to the terms and provisions of this Policy.

[...]

Benefits are payable monthly in arrears, commencing on the completion of (but not payable in respect of) the Elimination period.

20. To summarize, benefits are payable after Sun Life receives the required Notice and Proof of Claim and upon the later of: (i) 13 continuous weeks of Total Disability (or 13 weeks within a year of being unable to work due to the same cause), and (ii) the exhaustion of all of the plan member's sick leave credits and other paid leave, other than vacation leave.

Insured Earnings

21. The term "Insured Earnings" is defined in the section of the Policy bearing that title at p. 4-3 as follows:

For Full-Time Employees:

The Employee's current annual salary, at the relevant date, as defined in Part II of the Public Service Superannuation Act, adjusted to the next higher multiple of \$250, if not already such a multiple. [...]

Other Income

22. The term "Other Income" is defined in the section bearing that title at p. 9-1 of the Policy. The relevant portions are under sections (a), (d) and (f). Sections (d) and (f) relate to the CPP and PSSA benefits, which specifically exclude a deduction for indexing increases under these plans. The relevant exclusions for "other income" also referred to as "offsets" are as follows:

(a) compensation or profit from an occupation or business enterprise (subject to exceptions where that compensation or profit is from a rehabilitative program approved by Sun Life);

(b) not applicable;

(c) not applicable;

(d) disability benefits provided under the legislation of any government, including under the CPP and Quebec Pension Plan ("QPP"), but excluding

- (i) the amount of any increases paid under the CPP or QPP as a result of the COLA provisions of those plans related to changes to the Consumer Price Index ("CPI") for Canada,
 - (ii) not applicable, and
 - (iii) not applicable;
- (e) not applicable; and
- (f) income provided through an immediate annuity, annual allowance, or deferred annuity payable in respect of the plan member's own service under the federal PSSA or Special Retirement Arrangements Act, but excluding the amount of any increases paid as a result of the COLA provisions of those Acts related to changes in the CPI for Canada.

Indexation

23. The Policy contains a COLA provision, known as an "indexation" provision, or what the PSSA refers to as an "escalation" provision. This provision is found in the section entitled "Indexation" (at p. 9-5 of the Policy). The COLA under the Policy is linked to the CPI, with a cap at 3% per annum. It states as follows:

While benefits are payable, the Monthly Benefit will be increased on January 1st of each year to reflect any increase which is provided by the escalation provisions of the *Public Service Superannuation Act*. In no event, will any increase exceed 3%.

Analysis

24. Ms. Belec submits that the Policy should be interpreted to apply the COLA indexation on January 1 of each year to the Gross Monthly Benefit she received the previous December, that is to 70% of her insured earnings indexed each year, and then to deduct any "other income" she received each month. The "other income" she received was CPP and PSSA benefits. The COLA increases that are applied each year to her CPP and PSSA benefits are not to be deducted. Sun Life calculated the indexing on Ms. Belec's benefits using its CHES program, which applied the indexing firstly to her Gross Monthly Benefits, but it deducted the COLA increases to her CPP and PSSA benefits contrary to the terms of the Policy.

25. Sun Life argues that even if its CHES program applied the indexation to the Gross Monthly Benefit before deducting other income and it wrongfully deducted the COLA increases

to her CPP and PSSA benefits, it still paid Ms. Belec the correct Monthly Benefit. The CHES printout (attached as schedule "A") shows the indexing of benefits for Ms. Belec. The printout indicates that the indexing increases to her CPP and PSSA benefits were deducted contrary to the terms of the Policy. Sun Life's actuarial report applied the indexing on the net amount, rather than the gross amount, that Ms. Belec received and then deducted the amount of her nonindexed CPP and PSSA benefits. The actuary concluded that his method produced the same result as that of the CHES program used by Sun Life.

26. The confusion in implementing the indexing provisions to Ms. Belec's LTD benefits on January 1 of each year is caused by the language of the Policy. The Policy sets out six different types of "other income", which are to be deducted from her Gross Monthly Benefit (70% of salary). Two of the categories of "other income" defined in the Policy are CPP and PSSA benefits, which have their own COLA increases each year. A third category of "other income" to be deducted is any compensation from an occupation or business, which would include part-time employment income. This category of "other income" does not have any annual COLA increases and the amount may vary from month to month.

27. If "other income" was earned from part-time employment in December, which was subsequently discontinued, then the intention of the Policy would be to apply the indexing increase in January to her Gross Monthly Benefit to avoid having a situation where there would be practically no indexing increase on January 1.

For example, if on December 31, 2006, Ms. Belec's Gross Monthly Benefit was \$4,068.75 ($\$69,750.00 \times 70\% = \$48,825 \div 12 = \$4,068.75$).

If she had earned \$1,000 of income from part time employment in December of 2006, her Monthly Benefit would be reduced to \$3,068.75 for December 2006.

If the indexing increase of 2.3% was applied to her Net Monthly Benefit (\$3,068.75) then in January of 2007, the amount of her indexing increase would be \$70.58 ($2.3\% \times \$3,068.75$) as opposed to \$93.58 ($2.3\% \times \$4,068.75$) if the indexing was calculated on her Gross Monthly Benefit. As a result, if Ms. Belec didn't have any employment income in January and February of 2007 then she would receive a Monthly Benefit of \$4,139.33 ($\$4,068.75 + \70.58) if the indexing was calculated on her Net Monthly Benefit. If the indexing was calculated on her Gross Monthly Benefit, then she would have received an increased Monthly Benefit of \$4,162.33.

Where employment or occupational income is deducted as “other income”, the intention of the policy would be to apply the indexing increase to her gross benefit on January 1 of each year before deducting the employment income that would be anticipated for January.

28. In Ms. Belec’s situation, where she ultimately received both CPP and PSSA benefits, which each have their own indexing increases, the intention of the Policy terms with regard to indexing is unclear. Is the indexing to be calculated on the gross benefit (70% of salary indexed) or on her net benefit after deducting the unindexed amount of CPP and PSSA? This is the issue to be decided.

29. The Policy does not specify a different methodology to implement the indexing provisions where the offset has its own indexing factor such as for CPP and PSSA. The Policy only provides for one method to apply the indexing increase, for both situations where CPP and the PSSA benefits which have their own indexing increases, and for the situation where occupational income may be being received where there is no indexing.

30. The CHESS, the computer program used by Sun Life to apply the indexing and to calculate the Monthly Benefit used the same interpretation of the Policy as sought the Plaintiff, namely it calculated the annual indexing increase firstly based on her Gross Monthly Benefit and then deducted the “other income”. Sun Life’s CHESS program also deducted the COLA increases to both the CPP and the PSSA benefits, which is against the specific terms of the Policy.

31. Sun Life argues that even if the CHESS calculations applied the annual indexing to her Gross Monthly Benefit rather than her Net Monthly Benefit, and wrongfully deducted the COLA increases to her CPP and PSSA benefits, it came to the right answer anyway. The CHESS methodology arrives at the same indexed Monthly Benefit as if the indexing increase was applied to her Net Monthly Benefit, which it now argues is the correct interpretation of the Policy. This situation of mathematical equivalence occurs where the offsets are for CPP and PSSA, which have the same rate of indexing. The methodology proposed by Sun Life does not produce equivalent results if the offset deduction is for occupation or business income which does not have any indexing.

Summary of Positions

32. The Plaintiff claims that Sun Life's CHES program has correctly interpreted the Policy and applied annual indexing, firstly to her Gross Monthly Benefit, but has breached the Policy by wrongfully deducting the COLA increases for both Ms. Belec's CPP and PSSA benefits.

33. Sun Life acknowledges that its CHES computer program calculated the annual indexing firstly on her Gross Monthly Benefit (as argued by the Plaintiff) and then erroneously deducted the COLA increases to Ms. Belec's CPP and PSSA benefits. However, it submits that it paid the correct indexed Monthly Benefit to her in any event. Sun Life argues that the CHES method of calculating the indexed Monthly Benefit came to the same result as if the annual indexing was applied to her Net Monthly Benefit, which it argues is the correct interpretation of the Policy. Sun Life has filed an expert actuary's report giving the opinion that the CHES methodology and calculating the indexing increases on the Net Monthly Benefit, both produce the same result where the CPP and PSSA benefits are indexed at the same rate. In cross examination the actuary was unable to provide a formula or methodology that would produce the same result if the offset was for occupation or employment income, which is not indexed.

Applicable Law

34. In *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 15, the Supreme Court stated that the *Class Proceeding Act*, 1992, S.O. 1992, c. 6 (the "CPA") was remedial legislation that should be given a large and literal interpretation to achieve its three primary objectives:

1. The promotion of access to justice;
2. Judicial economy; and,
3. Modification of the behaviour of actual or potential wrongdoing.

35. The five criteria, that must be met for certification are set out in section 5(1) of the CPA, as follows:

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
- a. The pleadings disclose a cause of action;

- b. There is an identifiable class of two or more persons that would be represented by the representative Plaintiff;
- c. The claims of the class members raise common issues;
- d. A class proceeding would be the preferable procedure for the resolution of the common issues; and
- e. There is a representative Plaintiff who,
 - i. Would fairly and adequately represent the interests of the class;
 - ii. Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceedings; and
 - iii. Does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

36. Section 6 of the *CPA* states that the court shall not refuse to certify a proceeding as a class proceeding on any of the following grounds:

- (1) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
- (2) The relief claimed relates to separate contracts involving different class members.
- (3) Different remedies are sought for different class members.
- (4) The number of class members or the identity of each class member is not known.
- (5) The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

37. Section 6 of the *CPA* states that it is not a bar to certification if the class members' damages will require individual quantification or if it is necessary to create subclasses.

38. In *Hollick* at paras. 20 and 25, the Supreme Court of Canada stated that the representative Plaintiff must show some basis in fact for each of the certification criteria, as set out in section 5 of the *CPA*, as outlined above.

39. In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court emphasized that the certification stage does not allow for an extensive assessment of the evidence, nor of the complexities and challenges that a Plaintiff may face in establishing their case at trial.

Cause of Action

40. The Plaintiff claims that Sun Life has breached the terms of its LTD Policy by deducting the COLA increases to her CPP and PSSA benefits, when this is specifically prohibited in the Policy in section 9, Other Income, 4B, and 6. The Plaintiff also claims for punitive damages.

41. Sun Life submits that the Plaintiff has not pleaded the material facts necessary to disclose a reasonable cause of action, specifically, the alleged breach of contract.

42. In *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.), the Ontario Court of Appeal affirmed that the “plain and obvious” test established in *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, applies to determine if a cause of action has been pleaded. As in a Rule 21 motion, when determining whether the Plaintiffs have pleaded a cause of action, all of the facts pleaded are assumed to be proven, claims that are unsettled in the jurisprudence should be allowed to proceed, and the pleadings should be read generously to allow for inadequacies due to drafting frailties and the Plaintiff’s lack of discovery information.

43. At paragraph 14 of her statement of claim the Plaintiff pleaded that since April 30, 1997, the Defendant has failed to pay the class members the cost of living increase to which they are entitled under the terms of the Policy.

44. Paragraph 16 of the Plaintiff’s claim also states as follows:

The Defendant has misled all of the Class Members by paying them only a portion of the cost of living increase to which they were entitled. The Defendant did so by limiting the cost of living increase to the net monthly

disability benefit payable to any given Class Member after applying specified deductions thereto when they knew, or ought to have known, that the cost of living increase is to be calculated against the gross monthly disability benefit payable before any specified deductions are applied.

45. Sun Life is fully aware of that the Plaintiff is alleging that it breached the Policy by calculating the cost of living increases on the net monthly disability benefit when the Plaintiff claims it should have calculated the indexing increase firstly based on the Gross Monthly Benefit.

46. The Plaintiff has also provided some evidence of a basis in fact as it has presented Sun Life's CHESS computer calculation that shows that it calculated the indexing increases to Ms. Belec's disability benefits on her Gross Monthly Benefit rather than on the Net Monthly Benefit. The CHESS computer printout also demonstrates that it wrongfully deducted the COLA indexing increases to her CPP and PSSA benefits, contrary to the specific terms of the Policy.

Punitive Damages

47. The Plaintiff claims punitive damages on the grounds that Sun Life knowingly breached the terms of the Policy, willfully concealed and misled class members that it was paying cost of living increases in accordance with the terms of the Policy, and breached its duty of good faith. The Plaintiff pleaded that this amounts to reprehensible conduct which deserves to be punished.

48. In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para 36, the Supreme Court stated that punitive damages could be awarded in exceptional cases, namely for "malicious, oppressive, and high-handed" misconduct that "offends the court's sense of decency".

49. At this point, the pleadings are deemed to be proven but the Plaintiff has not presented any evidence of a basis in fact to support the pleading that Sun Life knowingly breached the Policy or concealed from or misled class members that it was not paying cost-of-living increases in accordance with the Policy. If such evidence is subsequently discovered, then the claim may be amended.

50. Sun Life's CHESS computer program calculated Ms. Belec's annual indexing increase based on her Gross Monthly Benefit, which is the manner that the Plaintiff argues is the correct interpretation. However, Sun Life deducted the indexed increases to her CPP and PSSA amounts contrary to the specific provisions of the Policy. Sun Life now argues that while the CHESS

methodology to calculate her indexing increases was wrong, it arrived at the correct result in any event. Sun Life argues that the correct approach is to interpret the Policy to apply the indexing annual increase to her Net Monthly Benefit.

51. The Policy does not specify whether the annual indexing increases should be calculated on the Gross Monthly Benefit or the Net Monthly Benefit, which makes it possible for two different interpretations of the Policy.

52. Sun Life gave all recipients a booklet each year advising them that it calculated the indexing increase on the Net Monthly Benefit that they received. While Sun Life's interpretation of the Policy may be incorrect, it did not conceal the method it used to calculate the indexing increases. As a result, the Plaintiff would not have any possible chance of success to establish abusive, oppressive, or high-handed conduct that offends the court's sense of decency on the evidence presented.

Disposition of Cause of Action

53. I find that the Plaintiff has introduced evidence of some basis in fact and pleaded a reasonable cause of action by claiming that Sun Life breached the terms of the terms of the Policy by calculating the annual indexing increases to her the Monthly Benefits based on her Net Monthly Benefit instead of her Gross Monthly Benefit. The Plaintiff has also claimed that Sun Life has breached the terms of the Policy by deducting the COLA increases to her CPP and PSSA benefits.

54. For the reasons given above I do not find that the Plaintiff has introduced evidence of some basis in fact to support the claim for punitive damages at this time.

Class Definition

55. In *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 (CanLII), [2013] 3 SCR 545, at paras 57-58 the Supreme Court stated that the purpose of the class definitions is:

- (a) To identify those persons who have a potential claims for relief;

(b) To define the parameters of the lawsuit, to identify those persons who are bound by its result, and

(c) Describing who is entitled to notice of the action. The class definition should allow for a class member to self identify – to determine if they are in fact a member of the class.

56. The Plaintiff initially proposed the following class definition:

Any and all persons who are currently, or were at any time subsequent to April 30, 1997, in receipt of long term disability benefits, payable by the Defendant under the terms of the Policy, and whose disability benefits were reduced by reasons of a specified deduction under the Policy.

57. Sun Life objected to the definition on the grounds that the class definition was overbroad because it included plan members with statute barred claims, there was no end date, it included plan members whose Monthly Benefit was never subject to indexing, and it did not refer to a specific section in the Policy.

58. The Plaintiff has submitted a revised class definition in its amended litigation plan which addresses some of Sun Life’s objections and defines the class more narrowly as follows:

Any and all persons who received disability benefits under Sun Life Assurance Company of Canada number 12500-G (“the Policy”) from April 30, 1997 up to the date of certification whose disability benefits were increased by indexation and reduced by (“other income”).

59. The proposed amended class definition addresses two of Sun Life’s objections, namely there is an end date and it limits membership to individuals whose benefits were indexed and reduced by (“other income”) as defined in the Policy. Otherwise, there is no substantive change to the proposed class definition.

60. Sun Life submits that the class definition is still overbroad because it includes individuals whose claims are statute barred, either by the limit of 2 years in Ontario or 2-6 years in other provinces. Alternatively, it submits that the temporal boundary could be defined by reference to the ultimate limitation period of 15 years as set out in s. 15 of the *Limitations Act, 2002* for Ontario residents. This approach was adopted by the Court of Appeal of *Amyotrophic Lateral Sclerosis Society of Essex (ALS) v. Windsor (City)*, 2015 ONCA 572 at para 43.

61. In the *ALS Society* decision, the Court of Appeal stated as follows at para. 41:

However, the case law is clear: where the resolution of the limitation issue depends on a factual inquiry, such as when the Plaintiff discovered or ought to have discovered the claim, the issue should not be decided on a certification motion.

62. Based on the *ALS Society* decision, I find that the class definition should have a temporal limit defined by reference to the ultimate limitation period of 15 years as set out in s. 15(2) of the *Ontario Limitations Act*. This results in membership in the class commencing on January 20, 2005. The limitations issue in general and specifically for residents of provinces other than Ontario may be addressed after the common issue is decided as ordered in *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718.

Disposition of the Class Definition

63. The class definition is approved as follows:

All persons who received long term disability benefits under Sun Life Assurance Company of Canada Policy Number 12500-G (the “Policy”) between January 20, 2005 and the date of certification where disability benefits were increased by indexation and reduced by “other income”.

Common Issues

64. The Plaintiff proposes the following three common issues:

- (a) Has Sun Life breached the Policy of insurance by failing to index disability benefits and/or by deducting indexation increases on “other income” contrary to the terms of the Policy?
- (b) In the event that Sun Life has breached the Policy of insurance by failing to index disability benefits properly and/or deducting indexation on “other income” improperly, what methodology should be applied to determine the correct calculation of benefits?
- (c) Should punitive or exemplary damages be awarded, and if so, what is the appropriate quantum of these damages?

65. Section 1(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”) requires that the claims of class members raise common issues and defines “common issues” as follows:

- (a) Common but not necessarily identical issues of fact; or
- (b) Common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

66. At paragraph 18 of *Hollick*, the Supreme Court held that for an issue to be common, it must be a substantial ingredient of each class member’s claim. The Plaintiff must adduce evidence to show some “basis in fact” that the issues are common.

67. In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 39, the Supreme Court stated that the underlying question is whether the resolution of its proposed common issues will avoid duplication of fact finding or legal analysis.

68. In *Western Canadian Shopping Centres Inc.*, at paras. 39 and 40, the Supreme Court set out the following factors to be considered:

- (a) The commonality question should be approached purposedly;
- (b) An issue will be “common” only where the resolution is necessary to the resolution of each class member’s claim;
- (c) It is not necessary that class members be identically situated vis-à-vis the opposing party;
- (d) It is not necessary that common issues predominate over non-common issues. However, the class member’s claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to the individual issues; and
- (e) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

69. Sun Life argues that the Plaintiff has not put forward any evidence of a basis in fact to support the proposed common issues. I do not agree with this submission because the Plaintiff has put forward evidence from Sun Life's CHES computer printout, which calculated the annual indexing based on the Gross Monthly Benefit from 2007/2013 to 2019, a period of at least twelve years, which is the interpretation of the Policy that the Plaintiff submits is correct. This evidence supports the Plaintiff's claim that the correct interpretation of the Policy is to apply the indexing increase on January 1 of each year, firstly to the Gross Monthly Benefit and then subsequently to deduct any "other income" received.

70. Sun Life's CHES printout is also evidence that Sun Life deducted the indexed increases for Ms. Belec's CPP and PSSA benefits contrary to the specific terms of the Policy.

71. The Plaintiff initially proposed 5 common issues and then in its factum for the certification motion, increased the number of common issues to six and following the certification hearing has submitted 3 proposed common issues in her revised litigation plan. Notwithstanding the revisions, the Plaintiff has not changed the substance of the proposed common issues. The Plaintiff has always alleged that the Policy should be interpreted to calculate the indexing increases, firstly on her Gross Monthly Benefit and that Sun Life wrongfully deducted the COLA increases on her CPP and PSSA benefits.

72. This issue was argued by both parties in their factums and based on the evidence they presented over 3 days during the hearing of the motion for certification and Sun Life's motion for summary judgment. Sun Life has not been taken by surprise by the various formulations of the common issue made by the Plaintiff.

73. In the event the action is certified, Sun Life seeks to add a further common issue to address the limitations issues. Sun Life has not produced any basis in fact that the limitation issue is common. Such an issue would involve an individual inquiry which would make the proposed class proceeding unmanageable. As a result, Sun Life's proposed limitation questions are not certified as common issues.

74. Proposed common issues #1 and #2 are essentially the same. The first proposed common issue addresses interpreting the terms of the Policy involving indexing when "other income" is deducted and the second proposed common issue addresses the methodology to calculate the

indexing of benefits in accordance with the Policy. The first issue requires an interpretation of the intention of the parties to determine whether Sun Life breached the Policy and the second question asks the court to decide the correct methodology to be used to calculate indexing increases to the Monthly Benefit when other income is being deducted. The two proposed common issues can be combined.

75. The issue of whether Sun Life has breached the Policy in the manner that it interpreted the indexing provisions, when calculating the amount of the indexing increase to the Monthly Benefit, is common to all members of the proposed class. Success for one member on this issue would mean success for all class members.

76. As such, I am satisfied that the Plaintiff's proposed issues #1 and #2 are common issues. I do not approve issue #3 on the issue of punitive damages as a common issue for the reasons given under the Cause of Actions section as I found that there was no evidence of a basis in fact to support a claim for punitive damages with any chance of success at this time.

Disposition of Common Issues

77. Proposed common issues #1 and #2 can be combined as follows:

Has Sun Life breached the terms of the insurance Policy by failing to index increases to the Monthly Benefit in accordance with the terms of the Policy or by deducting indexation increases on "other income" contrary to the terms of the Policy? If so, what is the correct methodology to be used to calculate the annual indexation increase to the Monthly Benefit where "other income" is deducted?

Preferable Procedure

78. Section 5(1)(d) of the CPA requires that a class action be the preferable procedure for the resolution of the common issues.

79. In *Pro-Sys*, at para. 38, the Supreme Court held that two concepts underly the preferability analysis, namely whether the class action would be a fair, efficient and manageable method of advancing the claims and second, whether a class action would be preferable to other reasonably available means of resolving the claims.

80. In *Cloud*, at paras. 41 and 73, the Supreme Court held that the preferability analysis is conducted through the lens of three goals: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues.

81. Sun Life submits and argued at the certification motion that the preferable procedure would be to have individual actions to determine the correct interpretation of the Policy. Sun Life also argued that all other potential claims would follow the result of a single action and as a result this approach would dispose of all other potential actions.

82. Sun Life further submits that a summary judgment in a single action would decide the common issue for all the members of the class and as a result would increase judicial economy.

83. In *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont Gen Div.), Winkler J. (as he then was), the Defendant submitted that an admission of liability, as it related to the proposed representatives Plaintiff's case, would be binding on all other members of the proposed class. Winkler J. held that the admission of liability with regards to the Plaintiff's case was no more than a bare promise which was not binding on all of the other members of the class. He held that granting certification promoted judicial economy because it bound the Defendant to its promise with all class members. I find that the same reasoning applies in this case.

84. A decision on the summary judgment motion may have persuasive value for subsequent claims but the principles of *res judicata* would not apply because the parties would not be the same.

85. I am satisfied that judicial economy will be enhanced if the issue of the interpretation of the Policy to determine the correct methodology to be followed to implement the annual indexing of benefits when some "other income" is being deducted is done in one legal proceeding. Having a single trial to decide the common issue, rather than have many legal proceedings to determine the same common issue, would promote judicial economy and access to justice.

86. Interpreting the indexing provisions of the long term disability Policy for many disabled individuals would also enhance access to justice. This is especially so where the individual class members are very vulnerable due to their long term disability which prevents them from being able to work.

87. The final factor is behaviour modification. This factor is given lesser weight as Sun Life has an arguable position that the indexing increases should be applied to the Net Monthly Benefit as opposed to the Gross Monthly Benefit. The Policy does not state whether the indexing increase was to be applied to the gross or Net Monthly Benefit. If the evidence discloses that Sun Life knew that it was not applying the increase in accordance with the Policy or if it knowingly wrongfully deducted the COLA increases to Ms. Belec's CPP and PSSA benefits as the CHESS printout discloses, then this factor would be given greater weight.

Disposition of Preferable Procedure

88. For the above reasons, I find that a class proceeding is the preferable procedure to decide the common issue for all class members in one legal proceeding, which will promote judicial economy and access to justice to this vulnerable group.

Representative Plaintiff

89. Sun Life submits that Ms. Belec is not a suitable representative Plaintiff because when cross examined, she was unable to explain the theory of her claim based on a mathematical analysis. I find that this is not surprising as Sun Life had to hire an actuary to perform the equivalency calculations. In addition, very competent counsel for both parties spent three days on these motions to explain the “simple math” and why the methodology used by Sun Life was correct or incorrect. Ms. Belec is aware that she is claiming that her long term disability benefits were not correctly indexed by Sun Life, which is the essence of her claim.

90. Ms. Belec seeks to represent a group of vulnerable individuals who are all unable to work as a result of a long term disability. Ms. Belec has engaged competent counsel and has brought this motion for certification as a class proceeding.

91. The approval of a representative Plaintiff must be approached with the main objectives of the *Class Proceedings Act* in mind, namely with the objective of promoting access to justice and promoting judicial economy. The amount of each individual’s claim may not be that large making it uneconomic to advance a claim on an individual basis as proposed by Sun Life.

92. I find that the proposed representative Plaintiff, with the assistance of her counsel, is able to fairly and adequately represent the interests of the class. The claim has been vigorously presented to date and there is no evidence that this will not continue. Ms. Belec is interested in pursuing the litigation and her limitations in understanding the exact nature of the legal argument or the mathematics involved

93. This is not grounds to disqualify Ms. Belec from acting as the representative Plaintiff.

Disposition of Representative Plaintiff Issue

94. For the above reasons, Ms. Belec is approved as the representative Plaintiff for the proposed class.

Proposed Litigation Plan

95. The parties are not in agreement concerning the terms of the proposed litigation plan. I make the following decisions and comments about the proposed litigation plan:

II. CLASS DEFINITION

The class definition is amended as set out in this decision.

III. COMMON ISSUES

The common issues are amended as set forth in this decision.

IV. DISCLOSURE REGARDING IDENTITY AND CONTACT INFORMATION OF THE CLASS

The Plaintiff seeks disclosure of the number of class members and all of their contact information. Sun Life objects on the grounds that the request is an overbroad intrusion on class member's privacy and exceeds what is necessary to give notice to the class.

The information sought to be disclosed as set out in the litigation plan IV. a), and b(i), (ii), (iii), (iv) and (v) is all relevant information to allow class counsel to give notice and communicate with class members. The information sought under the above subsections shall be provided to counsel for the class members, some of whom may decide to opt out. Sun Life has all of this information and providing the disclosure sought is not an unreasonable intrusion on the personal privacy of class members.

V. NOTICE OF CERTIFICATION

The Plaintiff's proposed method to establish the content of the Notice and the method to be used to give notice, namely by mail or e-mail as set out in V. (1-6) is approved.

VI. DOCUMENT PRODUCTION AND EXAMINATION FOR DISCOVERY

Sun Life objects to the Plaintiff's discovery proposals and submits that it is premature to include the extent of documentary productions and discovery at this time.

The parties shall attempt to agree on a discovery plan in accordance with the *Rules* within 60 days of the Plaintiff giving notice to the Defendant of the names

of the class members who have opted out. If the parties are unable to agree to a discovery plan then a case conference may be held to decide any unresolved issue.

VII. MEDIATION

Mediation is not mandatory in class proceedings but may be discussed by the parties.

VIII. DETERMINATION OF COMMON ISSUE

When discovery is completed either party may request a case conference to set a trial date to decide the common issue, to schedule a pre-trial conference, and to obtain direction directions regarding the trial or for any other matter.

IX. DETERMINATION OF INDIVIDUAL ISSUES

After a determination of the common issue, either party may request a case conference to determine how to decide any individual issues.

Disposition

96. The motion for certification is granted and the litigation plan is approved in accordance with this decision.

Costs

97. The Plaintiff may make submissions on cost within 20 days, the Defendant shall have 20 days to respond and the Plaintiff shall have 10 days to reply.



Mr. Justice Robert Smith

Date: June 13, 2022

Schedule "A"

CALCULATION REPORT OF 28 MAY 2019

EXAM KRCR LTD POLICY 012500 CERT CG3904876 NAME Belec Giulia
 CONTROL 261006-19946-00

BEFORE FIRST PAY: 21 DEC 2006 LAST PAY: 30 SEP 2020 LAST PAID: 31 MAY 2019
 AFTER : 21 DEC 2006 : 30 SEP 2020 : 31 MAY 2019

	EFF_DT	ST	SALARY	BENEFIT	ADD BEN	ADD TYP	PENSION	NET	MIN	OFFT	F/L	OFFT AMT
BEFORE	13SEP2006	1	5812.50	4068.75				4068.75				
	01JAN2007	3	5812.50	4162.33				4162.33				
	01AUG2007	3	5812.50	4162.33				3180.80	PC	1		981.53
	01JAN2008	3	5812.50	4237.25				3238.05	PC	1		999.20
	01JAN2009	3	5812.50	4343.18				3319.00	PC	1		1024.18
	01JAN2010	3	5812.50	4364.90				3335.60	PC	1		1029.30
	01JAN2011	3	5812.50	4426.01				3382.30	PC	1		1043.71
	20AUG2011	3	5812.50	4426.01				463.21	PC	1		1043.71
		3							RP	1		2919.09
	01JAN2012	3	5812.50	4549.94				476.19	PC	1		1072.93
		3							RP	1		3000.82
	01JAN2013	3	5812.50	4636.39				485.23	PC	1		1093.32
		3							RP	1		3057.84
	01JAN2014	3	5812.50	4678.12				489.60	PC	1		1103.16
		3							RP	1		3095.36
	01JAN2015	3	5812.50	4757.65				497.93	PC	1		1121.91
		3							RP	1		3137.81
	01JAN2016	3	5812.50	4819.50				504.41	PC	1		1136.49
		3							RP	1		3178.60
	01JAN2017	3	5812.50	4882.15				510.97	PC	1		1151.26
		3							RP	1		3219.92
	01JAN2018	3	5812.50	4960.26				519.14	PC	1		1169.68
		3							RP	1		3271.44
	01JAN2019	3	5812.50	5069.39				530.57	PC	1		1195.41
		3							RP	1		3343.41
AFTER	13SEP2006	1	5812.50	4068.75				4068.75				
	01JAN2007	3	5812.50	4162.33				4162.33				
	01AUG2007	3	5812.50	4162.33				3180.80	PC	1		981.53
	01JAN2008	3	5812.50	4237.25				3238.05	PC	1		999.20
	01JAN2009	3	5812.50	4343.18				3319.00	PC	1		1024.18
	01JAN2010	3	5812.50	4364.90				3335.60	PC	1		1029.30
	01JAN2011	3	5812.50	4426.01				3382.30	PC	1		1043.71
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	EFF_DT	ST	SALARY	BENEFIT	ADD BEN	ADD TYP	PENSION	NET	MIN	OFFT	F/L	OFFT AMT
AFTER		3								RP	1	2919.09
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		3								RP	1	3057.84
	01JAN2014	3	5812.50	4678.12				489.60		PC	1	1103.16
		3								RP	1	3085.36
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		3								RP	1	3271.44
	01JAN2019	3	5812.50	5069.39				530.57		PC	1	1195.41
		3								RP	1	3343.41

UNDER/OVER PAYMENT RESULT :

BENEFIT	GROSS PAYABLE :	237442.08	GROSS PAID :	242399.49	GROSS OVR PAYT :	4957.41	REC CDE :	1
	FEDERAL :		FEDERAL :		FEDERAL :		REC AMT :	78.70
	PROVINCIAL :		PROVINCIAL :		PROVINCIAL :			
	OASDI :		OASDI :		OASDI :			
	HI :		HI :		HI :			
	OTHER :		OTHER :		OTHER :			
	NET PAYABLE :	237442.08	NET PAID :	242399.49	NET OVR PAYT :	4957.41		
	OVERPAYMENT CAUSE CODE :	2						

PENSION	NET PAYABLE :		NET PAID :		OVR PAYT :		REC CDE :	
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CITATION: Belec v. Sun Life Assurance Company of Canada, 2022 ONSC 3522
COURT FILE NO.: CV-20-82562-00CP
DATE: 2022/06/13

ONTARIO

SUPERIOR COURT OF JUSTICE

Giulia Belec

Plaintiff/Moving Party

– **and** –

Sun Life Assurance Company of Canada

Defendant/Responding Party

REASONS ON MOTION FOR CERTIFICATION

Justice Robert Smith

Released: June 13, 2022