

**CITATION:** *Brewers Retail v. Campbell*, 2024 ONSC 3496  
**COURT FILE NO.:** CV-21-658274  
**DATE:** 20240619

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Brewers Retail Inc., Applicant

– **AND** –

William Campbell, Georgina Higgs, Diana Humphreys, Thomas Martin Krueger,  
and David Ramsay, Respondents

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *Dana Peebles, Randy Bauslaugh, and Connor Campbell*, for the Applicant

*Ari Kaplan, David Rosenfeld, and Caitlin Leach*, for the Respondents

**HEARD:** June 17, 2024

**SETTLEMENT AND FEE APPROVAL**

**I. Background**

[1] Respondents, as representatives of the members of the Brewer’s Retail, Inc. (“BRI”) Pension Plan for Salaried Employees, Registration No. 0336099 (the “Plan”), move, with BRI’s consent, for approval of a settlement pursuant to section s. 27.1 of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”). They also move for approval of Class counsel’s fees and disbursements pursuant to s. 32 of the CPA.

[2] On February 10, 2022, I certified this claim as a class action for the purposes of a settlement proposed by the parties: *Brewers Retail v. Campbell*, 2022 ONSC 850. The Ontario pension regulator, the Financial Services Regulatory Authority (“FSRA”), intervened to oppose the certification and proposed settlement and to seek a stay of proceedings. I granted FSRA intervenor status but, in the result, I did not accept FSRA’s position and dismissed its motion for a stay and rejected its opposition to certification.

[3] On August 19, 2023, the Ontario Court of Appeal dismissed the FSRA’s appeal of the certification and stay motions. The FSRA has now withdrawn its opposition to the settlement and has advised the parties that it will accept for filing the agree-upon amendments to the pension plan

at issue here and necessitated by settlement arrangement should it be approved in the present motion.

[4] On November 17, 2023, I approved the notice of certification and notice of this hearing to be distributed to all class members. The deadline for opting out or opposing the proposed settlement was 30 days after distribution of the notice – i.e. May 3, 2024. Class counsel advise that one class member has opted out of the settlement and that two objections were received (one objecting to the settlement, the other to counsel fees). Neither of the objectors has appeared at the settlement approval hearing.

[5] The certified class is defined as follows:

All persons who were eligible to receive indexed pensions in respect of membership in the Plan at any time between January 1, 1974 and December 31, 2009 inclusive, or persons claiming through them (the “Class”).

## II. Settlement approval

[6] The dispute involves the provisions in the Plan that provide annual post-retirement increases to pension based on the Consumer Price Index. The Class claims that the Applicant should have, but failed to, pay indexing benefits to a group of beneficiaries of the Plan dating back to 1974. Their counsel argues that because indexing is a “pension benefit” the Applicant cannot limit the Class members’ entitlement by amending the Plan as the Applicant had attempted to do.

[7] It had been the Applicant’s interpretation that indexing was not a protected pension benefit under the *Pension Benefits Act*, RSO 1990, c. P.8 (the “PBA”) and could be limited in various ways – both prospectively and retroactively. The Applicant had also taken the view that only those employees who had actually “retired from service” – as opposed to all Plan beneficiaries, some of whom had ended their service with the Applicant other than by retiring.

[8] Given the nature of the disputed interpretation, the dispute has an “all or nothing” quality to it. If the Applicant were to prevail at trial, a significant number of Class members would get no Indexing at all in their pension payments.

[9] Since January 1, 2016, in contemplation of the present Settlement, BRI has been paying its Plan members an annual adjustment of 0.9% per year on pension benefits. The Settlement provides for Class members to now receive these adjusted amounts for service prior to 2010. All Class members that still receive payments from the Plan receive these settlement amounts automatically as part of their pension payments. There is therefore no need for a claims process for the majority of Class members. The exception is for Group 2 members, as described below.

<p><b>Group 1</b></p>	<p>All persons who were employed by BRI on January 1, 2016, who were not eligible to retire on January 1, 2013, and who are current members of the Plan.</p>	<p><b>For all Group 1 Members:</b> Fixed 0.9% adjustment to pension accrued in respect of pre-2010 service.</p> <p><b>For those with "90 points"</b> (those whose age in years plus credited years of pensionable services equals 90):</p> <p>Increase in the temporary supplement (bridging benefit) from \$24 to \$29 per month per pensionable year of service to a maximum of 30 years' service under the Plan, payable from the member's retirement or January 1, 2016 (whichever is later), until the member turns 65 or dies (whichever is earlier).</p> <p>Extended temporary supplement (bridge benefit) of \$14.50 per month per year of pensionable service, to a maximum of 30 years' service under the Plan, payable from the month the member turns 65 until the member turns age 68 or dies.</p>
<p><b>Group 2</b></p>	<p>All persons not in any other Group who at any time prior to 2013 participated in the Plan, including:</p> <ul style="list-style-type: none"> <li>a) People whose benefits under the Plan have been discharged in full, who "cashed out" their pension when leaving BRI or who otherwise had no pension entitlement remaining in the Plan;</li> <li>b) Beneficiaries of persons in (a);</li> <li>c) People who BRI has no record of entitlement or remaining entitlement for benefits under the Plan, who establish their entitlement to benefits under the Settlement on a balance of probabilities.</li> </ul>	<p>An amount equal to \$800,000 is included in the Settlement to satisfy all claims of Group 2 members who establish their entitlement to receive benefits under the Settlement.</p> <p>Group 2 members must establish on a balance of probabilities that they are a former member of the Plan and earned benefits in respect of pre-2010 service, or that they are a beneficiary of such a former member.</p> <p>Those who establish entitlement to Settlement benefits will receive a lump sum payment that will not exceed \$2,500.</p>

<b>Group 3</b>	All persons entitled to a deferred pension from the plan and their surviving spouses.	Annual Fixed 0.9% adjustment to the pension due to be paid in respect of pre-2010 service under the Plan.
<b>Group 4</b>	All persons in receipt of a deferred pension or survivor benefit from the Plan.	Annual Fixed 0.9% adjustment to the pension due to be paid in respect of pre-2010 service under the Plan.
<b>Group 5</b>	Beneficiaries of Group 1, 3 or 4 Members, or other persons whose entitlements have not been fully discharged, who are not entitled to receive payment of pension benefits on pre-2010 service until 2016 or later, or received all pensions payments in respect of pre-2010 service without Indexing.	Annual Fixed 0.9% adjustment to the pension due to be paid in respect of pre-2010 service under the Plan.

[10] An expert report prepared on behalf of the Class shows that as of September 2018, it was estimated that 181 Plan members fell into Group 1, 46 Plan members fell into Group 3, and 131 Plan members fell into Group 4. BRI is aware of 46 individuals that fall into Group 2. This latter group also includes individuals for whom BRI has no remaining records, the number of which remains unknown.

[11] Group 2 Class members, who have not been receiving interim payments since 2016 like the rest of the Class, are entitled to receive a lump sum payment of up to \$2,500. However, if the value of all valid Group 2 Class Member Applications exceeds \$800,000, which is the total amount of a fixed fund set aside for Group 2 Class members, each Group 2 member will receive a proportionate share of the fund. The \$800,000 fund allows for the full \$2,500 to be made to 320 individuals. Class counsel have no reason to believe that this fund will be insufficient.

[12] Since they do not otherwise receive payments out of the Plan, Group 2 Class members must apply to receive the funds they are entitled to under the Settlement. A claim form has been created which Group 2 members must complete and submit within 90 days of the publication of notice of settlement approval. Within 60 days thereafter, BRI will determine whether individuals who claim Group 2 benefits are eligible. A Group 2 applicant whose claim is rejected can challenge that decision to BRI and can thereafter appeal to an arbitrator and then seek leave to appeal to the Court, under the processes set out in Part 9.3 of the Settlement.

[13] The Settlement also provides that all benefits and expenses referenced within it are to be paid from assets held under the Plan. Further, any costs or amounts paid in satisfaction of the Settlement that cannot be paid from the Plan will be paid by BRI.

[14] As Class counsel point out in their factum, the Settlement, like all settlements, is the product of a compromise. Perfection is not the standard by which it is to be measured: *Patel v. Groupon Inc.*, 2013 ONSC 6679, at para. 14. The question for the Court is whether the Settlement falls within a zone of reasonableness: *Yeo v. Ontario*, 2021 ONSC 4534, at para. 13.

[15] A settlement will not be considered fair and reasonable if it does not fall within a range of reasonable outcomes: *Loewenthal v. Sirius XM Holdings, Inc. et al.*, 2021 ONSC 4482 at para. 11. However, there is no one magic formula; various settlement possibilities may fall within the zone of reasonableness and be in the best interests of the class, especially when compared to the unpredictable outcome of ongoing litigation: *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen Div), aff'd [1998] O.J. No. 3622 (CA).

[16] There is a presumption of fairness when a proposed settlement, which was negotiated at arm's-length, is presented for approval on the recommendation of experienced counsel: *Serhan v. Johnson & Johnson*, 2011 ONSC 128, at para. 55. Absent evidence to the contrary, the Court can assume that counsel is presenting the Court the best reasonably available Settlement terms, and that, moreover, class counsel is “staking his or her reputation and experience on the recommendation.”: *Ibid.*

[17] As described above, litigating this dispute would necessarily give rise to an “all or nothing” result. That is to say, if Indexing is a pension benefit, CPI adjustments must be provided to all Class members on pension benefits accrued prior to 2010 service; and if Indexing is not a pension benefit, those who did not receive Indexing previously are not entitled to it, and those who would have received Indexing on pre-2010 service will not receive it. The risk of failure in litigating the Indexing dispute, which would result in no ongoing adjustments to pension benefits, was significant enough that it could not be ignored.

[18] Class counsel point out that there is limited jurisprudence on the issue of whether Indexing is a pension benefit. The outcome of the litigation was therefore always uncertain. One relevant Ontario authority, *General Motors of Canada Limited v. Ontario*, 2014 ONFST 11, at para. 97, found that the Indexing was a “pension benefit”, but that finding was specific to the plan and the dispute at issue there.

[19] For its part, BRI was willing to negotiate a resolution with the Class. But outside of a Settlement, it was not prepared to concede that Indexing is a “pension benefit”. Rather, it argues, *inter alia*, that the Indexing is an “other benefit” under the *PBA* and not a “pension benefit”.

[20] This legal uncertainty created substantial risk for the Class. The parties therefore entered negotiations in order to avoid the “all or nothing” nature of this dispute. It is self-evident that ongoing adjustments of 0.9% as provided by the Settlement is a better outcome for the Class than no Indexing at all.

[21] By allowing Indexing adjustments of 0.9% to be made beginning in 2016, the Settlement ensured that retired Plan members receive adjustments to respond to the increased cost of living,

a necessary improvement to the quality of life that their pension provides for in their retirement. In fact, immediate access to these adjustments was a key benefit for Plan members. It avoided not only the risk of a negative outcome but the inherent delays involved in the litigation process. For many Plan members, time in this respect is of the essence.

[22] Eckler Ltd., the actuarial advisor, assessed the value of the Settlement in 2018 in the course of obtaining regulatory approval of the Settlement. Eckler assessed the present value of future and past Indexing to be \$11.49m, which was approximately 43.8%- 55.6% (depending on the method of assessment) of the value of the Indexing had the Class been fully successful in its arguments.

[23] The Settlement is the result of good faith, arm's length bargaining, with the advice of experienced counsel. It has been approved by the pension regulator for Ontario. As indicated earlier in these reasons, there was only one opt-out and two objectors among the entire Class, none of whom actually appeared at the Settlement approval hearing. Overall, the 0.9% adjustments, having commenced on January 1, 2016, have been and will continue to be of significant benefit to the Class.

[24] I conclude that the Settlement is fair, reasonable, and in the best interests of the Class.

### **III. Fee approval**

[25] The negotiation of the Settlement took five years. Class counsel represented the Class with no guarantee that a settlement could be reached or that BRI would pay enough to cover the time devoted to the matter. As part of the Settlement, BRI initially agreed to pay \$450,000 plus taxes on account of Class counsel's fees and disbursements. In negotiating that amount, Class counsel estimated the value of its time through to the approval and implementation of the Settlement. That amount was also premised on regulatory approval of the Settlement, which was initially provided but then resiled from by the regulator.

[26] Once the regulator resiled from approval of the Settlement and sought to oppose it, it became apparent that it would not be possible to raise sufficient funds from the Class to cover the legal fees of Class counsel. However, with the Settlement, BRI has agreed to contribute an additional amount from the Plan, bringing the total available to Class counsel to \$908,500 on account of fees, disbursements and taxes. In total, Class counsel has devoted approximately 1,960 hours of lawyer, student and clerk time with an approximate value of \$1,183,400 up to May 15, 2024, and estimates that it will incur an additional \$100,000 in lawyer, student and clerk time in the course of obtaining Settlement approval and in implementing the Settlement.

[27] In this motion, Class counsel seeks approval for payment of \$801,804.91 in fees. That works out to a multiplier on the time devoted by Class counsel of between 0.68 and 0.62. Class counsel will therefore not receive a premium for any risk they incurred in taking this matter on a contingent basis. In fact, the requested fee approval reflects a significant reduction in what Class counsel would otherwise expect to be paid for hours they devoted to this matter.

[28] The fees represent 2/3 of the time spent on the case by Class counsel, and 7% of the total value of the Settlement. That is by any measure a modest amount of legal fees for a file of this magnitude, duration, and complexity.

[29] The one objector to Class counsel's fee request does not oppose the quantum of fees but rather opposes the payment of these fees from the Plan. That objector is of the view that the legal fees should be paid by BRI shareholders, and not from the Plan.

[30] Class counsel submits that its fees are expenses incurred for the benefit of the Class – i.e. for Plan members – and accordingly are properly paid by the Plan. The arrangement provides, however, that if Class counsel fees are determined to not be properly paid by the Plan, BRI will pay them. That strikes me as an eminently responsible arrangement.

[31] Based on all these factors – the value of time devoted and lack of premium, the importance of the issues to the Class, and the success achieved in concluding the Settlement – Class counsel's fees and disbursements are fair and reasonable.

#### **IV. Disposition**

[32] Settlement and fee approval is granted.

[33] The Respondents shall have an Order in the form provided by the parties approving the Settlement, approving Class counsel's fees, and dismissing the class proceeding.

**Date:** June 19, 2024

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**Morgan J.**