

**COURT FILE NO.:** 07-CV-335404CP [Toronto]  
**DATE:** 20090114

*ONTARIO*  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**ROBERT G. SMITH, ERNEST HEINEMANN and JOHN NOTHER**

Plaintiffs

- and -

**LABATT BREWING COMPANY LIMITED and  
COMPANHIA de BEBIDAS das AMERICAS (also known as AmBev)**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**COUNSEL:**

Mark Zigler and Clio M. Godkewitsch, for the Plaintiffs

Julie A. O'Donnell, for the Defendants

**HEARING DATES:** January 13, 2009

**ENDORSEMENT**

**LAX J.**

[1] In 2006, rising health care costs prompted Labatt Brewing Company Limited (“Labatt”) to formally review its health benefits program for employees and retirees. Following an analysis of nine years of claims data and benchmarking in similar industries, Labatt decided to make changes to its health benefits program for salaried employees and retirees effective March 1, 2007 and communicated this to them. Almost

immediately, a group of retirees organized and soon after, they retained Koskie Minsky LLP.

[2] The informal committee of retirees was formalized as the "HELP ME! Committee" which includes a national steering committee composed of representatives from every region in Canada. By word of mouth, its members were able to reach out to over 700 people and to raise \$240,000 to support a legal proceeding. It established a database of retirees who would be adversely affected by the impending changes and launched a website to share information.

[3] When preliminary discussions with Labatt did not produce a resolution, a class action was commenced with a view to compelling Labatt to provide to retirees and their eligible dependants the health benefits that had existed before March 1, 2007. After the plaintiffs served their certification record in October 2007, the parties agreed to proceed to a two-day mediation before The Honourable George Adams. Although the mediation did not succeed, it was a catalyst for continuing the negotiations that has resulted in the settlement agreement that is now before the court for approval.

[4] As a result of the settlement, the parties jointly seek certification for the purposes of settlement, settlement approval and approval of legal fees, disbursements and costs on behalf of a class defined as:

All former, salaried, non-unionized employees of Labatt, its predecessor, John Labatt Limited, and their respective subsidiaries (collectively "Labatt"), residing in Canada with a date of retirement from their employment with Labatt before January 1, 2009 and who were eligible to be or are participants in the LBCL retiree benefit plan and such retirees' eligible dependants.

#### Certification

[5] Numerous cases hold that where certification is sought for the purposes of settlement, the certification requirements must be met, but are not applied as stringently. Perell J. has helpfully gathered the authorities together and they can be found in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 30.

[6] For settlement purposes, I am satisfied that each of the criteria for certification is satisfied. The pleadings disclose a cause of action against Labatt for breach of contract and unjust enrichment. There is an identifiable class defined by objective criteria with a closing date of January 1, 2009 for class membership. The claims of the class raise common issues as to the alleged duties said to be owed by Labatt to class members and the breach of those duties. Undoubtedly, a single trial of the common issues will achieve judicial economy for a class estimated to include about 900 members. The proposed representative plaintiffs have the same interests as class members and would fairly and adequately represent their interests.

#### Settlement Approval

[7] In *Kranjcec v. Ontario*, [2006] O.J. No. 3671 (S.C.J.), Cullity J. certified a class proceeding that is similar to this case. In later approving a settlement of the action, he commented on the litigation risks that arose from the lack of Canadian legal precedents to address the issues in that action. These issues also arise here, namely: (1) whether or not class members have vested rights to the benefits that were in force before March 1, 2007 and, (2) whether or not a court would grant an order for specific performance to enforce those rights.

[8] The health benefits plan that was in force before March 2007 provided unlimited lifetime coverage for drugs (with a modest annual deductible) and for most other medical benefits. Under the March 1, 2007 plan, Labatt proposed to impose a cumulative lifetime cap of \$50,000 per person on health protection benefits. It also proposed to reduce the lifetime maximum for out of country emergency coverage from \$1 million to \$50,000, as well as make changes to the dental plan that were less favourable than before.

[9] The settlement contemplates a modified plan that will have the same terms as the benefit plan that existed before March 1, 2007 with these changes:

- (a) there will be an annual deductible of \$350.00 for a single person and \$750.00 for a family;
- (b) hospital coverage will be at 50% for a semi-private room;

- (c) Emergency out-of-country coverage claims will be 100% to a lifetime maximum of \$200,000 per person based on a maximum of 90 consecutive days per out-of-country occurrence;
- (d) Retirees and their dependent are to use generic drug substitutes unless a physician does not permit this.

[10] Other features of the settlement agreement are that Labatt may not make any changes to this plan in the future; that it will reimburse any costs incurred to the date of settlement approval that would be covered under this plan, but are not covered under the plan of March 2007; and it will pay up to \$420,000 to the plaintiffs on account of legal and actuarial fees and the expenses of the HELP ME! Committee.

[11] The actuarial estimate of the savings Labatt could expect to achieve under the March 2007 plan was approximately \$8.2 million. Obviously, if this was a savings to Labatt, the cost was being transferred to class members. The actuarial estimate of the values of the benefits achieved by the settlement is from \$2.3 million to \$4.0 million. In other words, the settlement achieves a savings for class members of between 25% and 50% of the costs that they would otherwise have borne under the March 2007 plan.

[12] The proposed settlement will close the class effective January 1, 2009 and persons retiring after this date will not be entitled to participate, but nothing will preclude those persons from pursuing an individual or group claim after this date.

[13] Members of the class were given notice of the proposed settlement by letter in the form that I approved. Subsequently, information sessions were held jointly by HELP ME! and Koskie Minsky at locations across Canada. Mr. Zigler or Ms Godkewitsch or both, were present for each of the nine sessions and available to provide legal advice. More than 300 class members attended these meetings and the terms of the settlement were explained in a powerpoint slide presentation. Also, members of HELP ME! made themselves available to answer telephone and email enquiries.

[14] The test for settlement approval is whether the settlement is fair, reasonable and in the best interests of the class as a whole; *Dabbs v. Sun Life Assurance Company of*

*Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998 (see also, cases cited in *Corless* at para. 38.)

[15] There are a number of factors that commend this settlement. First, the retirees' greatest concern was that they not be left exposed to the risk of future catastrophic health care costs. The effect of the proposed settlement is to protect the most vulnerable members of the class who might have extensive claims for benefits that would exceed the \$50,000 cap under the March 2007 plan.

[16] Second, it avoids the uncertainty, delay and expense of litigation. This is of particular importance to those class members who are elderly or have health problems. It is not in the interests of a class composed of retirees to engage in prolonged litigation. Pressing on with litigation that could continue for several years would mean that some class members could exceed the lifetime cap of \$50,000 and face risky financial exposure with no promise of success.

[17] Third, the settlement not only provides certainty for the future, but it achieves the important goal of substantially restoring the benefits that previously existed. The most significant change for class members is the increase in the deductible from the modest amounts of \$25 for a single person and \$50 for a family to \$350.00 and \$750.00 respectively. However, the documents that are alleged to form the contract between Labatt and class members and give them vested rights do not contain language that would prevent Labatt from increasing the deductible at any time. This would have been a difficult point to win in the litigation and represents a reasonable and rational compromise.

[18] The negotiations resulting in this settlement were at arm's length. The mediation was not successful, but it enabled the parties to identify the gap that divided them so that counsel could attempt to close it. Labatt did not wish to leave the retirees without adequate coverage, but it had to address escalating costs. The essence of this litigation was to determine whether or not the retirees had vested rights in the previous benefit plan. Under the settlement, they have achieved vested rights in the modified plan that will bind Labatt, its successors and assigns.

[19] It should be apparent that the communication with class members was exemplary. This may explain why there are no objectors. The settlement is recommended by experienced counsel who have specialized knowledge in the area of employment benefits.

[20] I am satisfied that the test for settlement approval is met.

Approval of Fees and Costs

[21] This litigation was funded by voluntary contributions from HELPME! members from across the country. There is no contingency arrangement with Koskie Minsky who have billed on a straight time basis. Labatt has agreed to pay the plaintiffs the maximum amount of \$420,000 for all legal and actuarial fees including costs incurred by the HELPME! Committee. As well as obtaining court approval, reimbursement is subject to Labatt's review of the accounts and being satisfied that all fees incurred were reasonable.

[22] I have been provided with the detailed dockets of Koskie Minsky as well as the accounts delivered to Mr. Innanen who is the "legal liaison" between HELPME!'s steering committee and Koskie Minsky and who entered into the fee agreement with it. The accounts are in the amount of \$260,549.41 inclusive of disbursements and GST. Other expenses include fees paid to The Segal Company for actuarial advice, fees paid to Quebec counsel and HELPME! Committee expenses. Total fees, disbursements and expenses are in the amount of \$356,954.46 and additional costs to complete the matter are estimated to be no more than \$50,000 and will likely be less. The members of HELPME! who have funded this litigation will be fully reimbursed.

[23] This is not the usual fee approval hearing for a class proceeding as risk is not a factor. As well, the court has the protection of the parties' scrutiny of the legal accounts and expenses which it does not normally have. I am satisfied that the fees are fair and reasonable and the plaintiffs' legal fees, disbursements and costs should be approved in an amount up to \$400,000, including disbursements and GST.

[24] I wish to commend the parties and counsel for the settlement that was achieved in this action. It represents a fair and reasonable compromise of the claims that were advanced and meets the objectives of Labatt and of class members.

  
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LAXJ.

**Released:** January 14, 2009