

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

BREWERS RETAIL INC.

Applicant

- and -

WILLIAM CAMPBELL, GEORGINA HIGGS, DIANA HUMPHRYS,
THOMAS MARTIN KRUEGER, and DAVID RAMSAY

Respondents

Proceeding under the *Class Proceedings Act, 1992*

(APPLICATION UNDER Rule 14.05(3)(d) of the Rules of Civil Procedure)

**FACTUM OF THE RESPONDENTS, WILLIAM CAMPBELL, GEORGINA HIGGS,
DIANA HUMPHRYS, THOMAS MARTIN KRUEGER and DAVID RAMSAY
(Motion for Fee and Settlement Approval returnable June 17, 2024)**

KAPLAN LAW
2000-393 University Avenue
Toronto, ON M5G 1E6

Ari Kaplan LSO #42042S
ari@kaplanlaw.ca
Tel: 416-565-4656

KOSKIE MINSKY LLP
900-20 Queen St. W.
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A
drosenfeld@kmlaw.ca
Tel: 416-595-2700

Caitlin Leach LSO #82774T
cleach@kmlaw.ca
Tel: 416-595-2124

**Lawyers for the Respondents, William
Campbell, et al.**

TO: MCCARTHY TETRAULT LLP
5300-66 Wellington Street
Toronto, ON M5K 1E6

Dana M. Peebles LSO #30820V
dpeebles@mccarthy.ca
Tel: 416-601-7839

Randy Bauslaugh LSO #22620K
rbauslaugh@mccarthy.ca
Tel: 416-601-8695

Leah Ostler LSO #73301C
lostler@mccarthy.ca
Tel: 416-601-8285

Lawyers for the Applicant, Brewers Retail Inc.

TABLE OF CONTENTS

PART I - OVERVIEW	1
PART II - THE FACTS	3
A. The Indexing Dispute.....	3
B. Resolution of the Indexing Dispute	5
C. Certification and FSRA's Intervention.....	8
D. Dissemination of Notice of Certification & Settlement.....	9
E. Key Terms of the Settlement	10
PART III - ISSUES AND THE LAW	14
A. SETTLEMENT APPROVAL.....	15
i. Likelihood of Success in Litigating the Indexing Dispute.....	16
ii. Amount and nature of discovery	18
iii. Proposed Settlement Terms	19
iv. Good Faith, Arm's Length Bargaining Occurred.....	20
v. Counsel Communicated Settlement Terms to the Class	21
vi. Recommendation and Experience of Class Counsel	22
vii. The Number of Objectors and Nature of Objections	23
viii. The Settlement is fair, reasonable and in the best interests of the Class.....	24
B. FEE APPROVAL	25
i. Fee arrangements and expectation of fees	25
ii. No premium for risk.....	27
iii. Complexity of dispute and skill and competence of Class Counsel	28
iv. Importance to the Class and ability to pay.....	29
v. Objection to fees	29
vi. Class Counsel fees and disbursements are fair and reasonable	30
PART IV - ORDER REQUESTED	30
SCHEDULE "A" - LIST OF AUTHORITIES	31
SCHEDULE "B" - RELEVANT STATUTES	32

PART I - OVERVIEW

1. The proposed settlement sought to be approved herein resolves a dispute impacting the indexing of pension benefits to a fixed group of current and former employees and their spouses dating back to 1974 and achieved over a decade of negotiation and litigation.
2. The Respondents and the Applicant, Brewers Retail Inc. ("BRI") reached an agreement to resolve the dispute impacting the Class, who are beneficiaries of the Brewers Retail Inc. Pension Plan for Salaried Employees, Registration No. 0336099 (the "Plan"). The representative Respondents seek approval of the proposed settlement and approval of Class Counsel's fees.
3. The dispute between BRI and the Class concerns the provisions in the Plan that provide annual post-retirement increases to pensions in pay based on the Consumer Price Index ("Indexing"). Pursuant to BRI's interpretation of the Plan, the Indexing was only paid to those who "retired from active service", and the Indexing established by the Plan is not a "pension benefit" protected by the *Pension Benefits Act* ("PBA").
4. Pursuant to the Respondents' interpretation, BRI should have, and failed to, pay Indexing benefits to a group of beneficiaries of the Plan going back to 1974, and because Indexing is a "pension benefit", BRI is not permitted to limit Class member's entitlement to Indexing by amending the Plan, as it attempted to do.
5. A litigated outcome to this dispute would necessarily produce a binary result posing great risk to both parties.
6. After being encouraged by the Financial Services Commission of Ontario ("FSCO") to do so, the parties spent almost five years – from 2013 to 2018 – negotiating a resolution to the

Indexing dispute that was approved by FSCO in December 2018 (“the Settlement”). If approved by the Court, the Settlement resolves all aspects of the Indexing dispute.

7. After an additional four years – from 2019 to 2023 – of unfortunate litigation with the new pension regulator, the Financial Services Regulatory Authority ("FSRA"), after it resiled from FSCO's approval of the settlement, the parties now seek the approval of the Settlement.¹

8. The terms of the Settlement, and all other relevant factors, weigh heavily in favour of approval. The Settlement is the result of good faith, long-term, arm's-length negotiations, which included the regulator who ultimately approved the Settlement. Class members were informed of the Settlement and were provided with multiple opportunities to ask questions or raise issues with it long before this proceeding was certified. The Settlement has provided, and will continue to provide, immediate and significant financial benefits to the Class.

9. The only alternative to the Settlement is an "all or nothing" contested proceeding that would delay the resolution of this dispute and could lead to the loss of all Indexing benefits or other annual adjustments for the Class. It is in the best interests of the Class that, instead, the Court approve the fair and reasonable Settlement reached between the parties.

10. Class Counsel exercised great skill and competence in negotiating the Settlement and navigating the unexpected jurisdictional objections raised by FSRA. Class Counsel also retained an independent actuary to value the claim and the Settlement benefits. In short, Class Counsel devoted a significant amount of time to the benefit of the Class for which it seeks fees that would

¹ While FSRA initially confirmed FSCO's approval, it ultimately resiled from FSCO's approval and instead sought to challenge both certification and the jurisdiction of this Court over the dispute. That challenge was unsuccessful, and FSRA has since withdrawn its objections to the Settlement and this class proceeding as a means of implementing it.

result in a multiplier of 0.62-0.68. Given the resources devoted, the importance to the Class and the success achieved, Class Counsel's fees and disbursements ought to be approved.

PART II - THE FACTS

A. The Indexing Dispute

11. The dispute in this case concerns the availability of Indexing for certain Plan members and beneficiaries, and BRI's ability to retroactively amend the Plan to remove Indexing for past service.

12. Indexing was introduced to the Plan by BRI in 1974 for non-bargaining unit employees, and in 1983 for management employees. When the Indexing dispute arose, the Committee took the position that the 1974/1983 Indexing provisions did not limit the provision of Indexing to Plan members who retired from active service, which is how BRI had administered the Plan since 1974.

13. The 1974 Indexing provision provided:

A Member retiring after January 1, 1974, shall have his basic pension benefit accrued at retirement subject to an annual escalation based on the increase in the Consumer Price Index. The adjustment will be made on January 1 each year, based on a 12 month percentage increase of the prior September 1 to a maximum of 2%.²

14. A restatement of the Plan from 1988 ("the 1988 Restatement") provided that Plan members who terminated their service prior to retirement, and any spouses or beneficiaries of Plan members, would not receive Indexing. BRI's position, in the Indexing dispute, is that the 1988 Restatement was not a change: its intention was only ever to provide Indexing to those retiring from active service. BRI claims that Indexing has only ever been provided, under the Plan, to Plan members retiring from active service.³

² Affidavit of William Campbell, sworn June 29, 2021 ("2021 Campbell Affidavit"), Exhibit "D", p. 2, Respondents' Motion Record ("RMR"), tab 2D, p. 52.

³ 2021 Campbell Affidavit, Exhibit "F", RMR, tab 2F, p. 91.

15. Effective January 1, 2010, the Plan was amended to restrict Indexing to benefits accrued with respect to pensionable service prior to 2010 ("the 2010 Amendment"). No Indexing would be paid on pension benefits accrued for service after the date of the 2010 Amendment.⁴

16. In 2013, BRI sought to amend the Plan to retroactively eliminate Indexing on pension benefits accrued with respect to service prior to December 31, 2009 ("the 2013 Amendment"). The effect of the 2013 Amendment varied based on a Plan member's status. It had no effect on Plan members who had already retired, Plan members who were eligible to retire as of January 1, 2013 (regardless of when they did retire), or Plan members who retired prior to January 1, 2015. The 2013 Amendment affected those who were not eligible to retire as of January 1, 2013, and did not retire before January 1, 2015.⁵

17. The Indexing dispute concerns both BRI's historical implementation and administration of the Plan in providing Indexing only to those who retired from active service, and the 2013 Amendment. Both parts of the dispute turn on the same underlying legal question: the Committee and BRI disagree on whether the Indexing provided by the Plan constitutes a "pension benefit," a defined term under the *PBA*.⁶ This question determines the validity of BRI's past administration of the Plan going back to 1974, and the validity of the 2013 Amendment.

18. If, as was the position of the Committee, Indexing is a "pension benefit":

- (a) Indexing cannot be restricted to those retiring from active service: s. 14.1 of the *PBA* provides that "pension benefits" must be accrued "in a gradual and uniform manner." If the right to an Indexed pension only vests on retirement from active service, Indexing is not accrued in a gradual and uniform manner;

⁴ 2021 Campbell Affidavit, para. 11, RMR, tab 2, p. 13.

⁵ 2021 Campbell Affidavit, para. 13 and Exhibit "A", RMR, tabs 2 and 2A, pp. 13 and 38.

⁶ *Pension Benefits Act*, R.S.O. 1990, c. P.8, s.1(1), meaning "the aggregate monthly, annual or other periodic amounts payable to a member, former member or retired member during his or her lifetime to which he or she will become entitled under the pension plan or to which, upon his or her death, any other person will become entitled".

- (b) As a result, BRI should have provided Indexing on pre-2010 service to past and current Plan Members who did not retire from active service (going back as far as 1974), and must continue to provide Indexing on pre-2010 service to Plan Members upon their retirement; and
- (c) The 2013 Amendment, which retroactively eliminated Indexing on accrued service for those yet to retire, is void, because under s. 14(1) of the *PBA*, an amendment to a pension plan that purports to reduce the amount or commuted value of an accrued "pension benefit" is void.

19. If the Committee's position prevailed, BRI would be liable to those who it did not previously provide Indexing to since 1974 and would have to continue Indexing going forward.

20. If BRI's position that Indexing is not a "pension benefit" prevailed, the opposite result would occur: BRI would not be required to provide Indexing to those who did not retire from active service; and would not be prevented from retroactively eliminating Indexing for service prior to 2010. As a result, Plan members affected by the dispute would receive no annual adjustments to their pensions.

B. Resolution of the Indexing Dispute

21. The shape of this dispute, set out above, emerged through a series of letters among FSCO, BRI and the Committee in 2013-2014,⁷ which resulted in FSCO inviting the Committee to see if a negotiated resolution to the Indexing dispute could be reached with BRI.⁸ The following chart describes the chronology of the unfolding negotiations, the reaching of the proposed Settlement, the explanation of that Settlement to Plan members, and the approval of that Settlement by FSCO:

February 25, 2013	Committee Counsel submits to FSCO that the 2013 Amendment is "void" under s. 14(1) of the <i>PBA</i> and asks FSCO to issue a Notice of Intended Decision proposing to revoke the 2013 Amendment. ⁹
--------------------------	--

⁷ 2021 Campbell Affidavit, Exhibits "B", "C", "D", "E" and "F", RMR, tabs 2B, 2C, 2D, 2E and 2F, pp. 41, 45, 50, 63 and 91.

⁸ 2021 Campbell Affidavit, para. 27, RMR, tab 2, p. 16.

⁹ 2021 Campbell Affidavit, para. 18, RMR, tab 2, p. 14.

June 5, 2013	FSCO writes to BRI identifying concerns with the 2013 Amendment and BRI's historical interpretation and application of Indexing in the Plan. ¹⁰
August 9, 2013	FSCO writes to Committee Counsel and invites the Committee to extend the scope of their submissions beyond the 2013 Amendment, including to past and former members, pensioners and their beneficiaries who were not provided Indexing under the Plan since 1974. ¹¹
April 1, 2014	Committee Counsel makes expanded submissions to FSCO as invited. ¹²
April 11, 2014	BRI's response to FSCO's 2013 letter, dated April 1, 2014, is provided to the Committee. ¹³
May 2, 2014	BRI makes reply submissions to the Committee's April 1 letter. ¹⁴
May 9, 2014	At a meeting between FSCO and the Committee and their counsel, FSCO suggested that the Committee could pursue a negotiated resolution with BRI subject to court approval binding affected Plan members. ¹⁵
May 16, 2014	Committee counsel meet with BRI counsel on a without prejudice basis to explore the possibility of a settled resolution to the Indexing dispute. Arm's length negotiations commence between BRI and the Committee, with active engagement by the Committee Members in the exchange of offers and counteroffers. Throughout the negotiations that followed, the parties update FSCO on their attempts to resolve the dispute, and FSCO refrains from issuing a Notice of Intended Decision regarding the amendments. ¹⁶
September 2, 2014	BRI and the Committee sign an agreement to enable the Committee to receive confidential Plan information on a without prejudice basis. The Committee retains the Eckler firm to advise the Committee based on the financial, actuarial and demographic information pertinent to settlement proposal. ¹⁷
September 29, 2015	A proposed Settlement, resolving all of the Indexing issues, is reached when the Committee's final counter-offer is accepted by BRI. ¹⁸

¹⁰ 2021 Campbell Affidavit, para. 22, RMR, tab 2, p. 15.

¹¹ 2021 Campbell Affidavit, para. 23, RMR, tab 2, p. 15.

¹² 2021 Campbell Affidavit, para. 24, RMR, tab 2, p. 15.

¹³ 2021 Campbell Affidavit, para. 25, RMR, tab 2, p. 16.

¹⁴ 2021 Campbell Affidavit, para. 26, RMR, tab 2, p. 16.

¹⁵ 2021 Campbell Affidavit, para. 27, RMR, tab 2, p. 16.

¹⁶ 2021 Campbell Affidavit, paras. 28 and 40-53, RMR, tab 2, pp. 16-17, 19-20.

¹⁷ 2021 Campbell Affidavit, para. 38, RMR, tab 2, p. 18.

¹⁸ 2021 Campbell Affidavit, para. 54, RMR, tab 2, pp. 20-21.

October 16, 2015	Committee Counsel, BRI's counsel and FSCO's counsel meet to discuss the proposed Settlement and a Court approval process for it. ¹⁹
November 24, 2015	Committee Counsel writes to affected Plan Members to explain the proposed Settlement and invites Plan Members to attend information meetings. ²⁰
December 8 and December 15, 2015	Information meetings regarding the proposed Settlement are held with Plan Members. ²¹
January 1, 2016	BRI begins implementing the proposed Settlements by paying agreed Settlement benefits to affected Plan members. ²²
February 25, 2016	FSCO further particularizes its expectations in order to approve the Settlement: FSCO must be satisfied that the Settlement is (1) a reasonable compromise from a monetary and legal perspective, (2) fair as between different "Groups" of beneficiaries, and (3) does not result in non-compliance issues under the PBA. ²³
December 9, 2016	After considering a draft copy of the Settlement, FSCO provides a letter stating that "the Superintendent is generally comfortable with the proposed settlement," subject to some conditions. ²⁴
2017 to 2018	FSCO reviews a draft report from Eckler regarding the value of the Settlement benefits in comparison to various litigation scenarios, according to the various groups of members eligible to receive Settlement benefits. An extensive back and forth among Eckler, FSCO, and FSCO's actuarial team culminates in FSCO's Chief Actuary confirming, in September 2018, that it is satisfied with the actuarial report. ²⁵
November 29, 2018	FSCO's counsel states that FSCO is content with the draft court order that will implement the Settlement. ²⁶
December 3, 2018	FSCO approves the proposed Settlement, and the process for implementing the Settlement through a class proceeding. ²⁷

¹⁹ 2021 Campbell Affidavit, para. 58, RMR, tab 2, p. 22.

²⁰ 2021 Campbell Affidavit, para. 60, RMR, tab 2, p. 23.

²¹ 2021 Campbell Affidavit, para. 61, RMR, tab 2, p. 23.

²² 2021 Campbell Affidavit, para. 62, RMR, tab 2, p. 23.

²³ 2021 Campbell Affidavit, para. 66, RMR, tab 2, p. 24.

²⁴ 2021 Campbell Affidavit, paras. 71 and 72, RMR, tab 2, pp. 24-25.

²⁵ 2021 Campbell Affidavit, para. 73 and 75(b), RMR, tab 2, p. 25, 26-28.

²⁶ 2021 Campbell Affidavit, para. 75(c), RMR, tab 2, pp. 28-29.

²⁷ 2021 Campbell Affidavit, para. 78 and Exhibit "U", RMR, tabs 2 and 2U, pp. 29-30 and 190.

22. On June 6, 2019, by Order of the Minister of Finance, the regulatory authority of FSCO was transferred to FSRA. FSRA initially confirmed that it would be bound by FSCO's approval of the Settlement and indicated that it would provide a letter to this effect for the purpose of this proceeding. Instead, on October 11, 2019, FSRA resiled from its support for the Settlement and provided a letter rejecting the Settlement and the process to implement it. In 2020, FSRA issued a Notice of Intended Decision ("NOID") against BRI proposing to reject various Plan amendments. BRI requested a hearing on the NOID at the Financial Services Tribunal ("FST"). The Committee was granted party status to that proceeding.²⁸

C. Certification and FSRA's Intervention

23. It was always contemplated, by the parties and FSCO, from the time that negotiations began, that a Settlement – if one was reached – would be made binding on BRI and Plan members through the vehicle of a class proceeding. This application was commenced by BRI in March 2021, with the co-operation of the Committee, for the purpose of implementing the Settlement. Shortly thereafter, BRI moved to certify the Application as a class proceeding on consent.²⁹

24. On August 16, 2021, FSRA brought two motions seeking: (i) leave to intervene as an added party pursuant to Rule 13.01, and (ii) an order dismissing or staying the proceeding for a lack of jurisdiction or because another proceeding (the FST proceeding on the NOID) was pending. In addition, FSRA opposed certification of the proceeding under the *Class Proceedings Act, 1992* ("CPA"). On the request of BRI and the Committee, the FST proceeding was adjourned pending FSRA's jurisdiction motion.³⁰

²⁸ 2021 Campbell Affidavit, paras. 79-87, RMR, tab 2, pp. 30-31.

²⁹ 2021 Campbell Affidavit, paras. 88 and 89, RMR, tab 2, p. 32.

³⁰ *Brewers Retail Inc. v. Ontario (CEO of FSRA)*, [2021 ONFST 15](#), at para. 69.

25. All three motions were heard together on November 29, 2021. On February 10, 2022, Morgan J.: (i) granted FSRA leave to intervene; but (ii) dismissed FSRA's motion for a stay of proceedings; and (iii) certified the action under s. 5(1) of the *CPA* for settlement purposes only. Koskie Minsky LLP and Kaplan Law were appointed Class Counsel and the respondent class was defined as:

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").³¹

26. On April 18, 2023, the Court of Appeal for Ontario heard FSRA's appeal of the two Orders dismissing their stay motion and granting BRI's certification motion and, on August 10, 2023, dismissed FSRA's appeal with Reasons.³²

27. FSRA has since withdrawn its opposition to the Settlement and has informed the parties that it does not intend to oppose settlement approval, or to appear on this motion. FSRA has also indicated that it will accept for filing the agreed-upon amendment to the Plan text implementing the Settlement, should the Settlement be approved by the Court.³³ The FST proceeding has since been withdrawn.³⁴

D. Dissemination of Notice of Certification & Settlement

28. On November 17, 2023, this Court approved the plan to provide notice of certification, the proposed Settlement, and the settlement approval hearing. Under that plan, notice was provided to the Class by way of:

- (a) Posting notice on Class Counsel's website, along with copies of the Settlement Agreement, the Conditional Certification Order, and opt-out and objection forms;

³¹ *Brewers Retail v. Campbell*, [2022 ONSC 850](#), at para. 24.

³² Affidavit of Ari Kaplan, affirmed June 4, 2024 ("Kaplan Affidavit"), para. 14, RMR, tab 3, p. 244.

³³ Kaplan Affidavit, para. 15 and Exhibit "B", RMR, tabs 3 and 3B, pp. 245 and 315.

³⁴ Kaplan Affidavit, para. 16 and Exhibit "C", RMR, tab 3 and 3C, p. 245 and 318.

- (b) The distribution of notice by email by Class Counsel to all persons identified as Class members for whom BRI or Class Counsel have a valid email address – resulting in 280 emails being delivered to email addresses provided;
- (c) The distribution of notice by mail by BRI to every Class Member for whom BRI has a mailing address, with notice mailed to 725 class member addresses; and
- (d) The publication of Notice in the Toronto Star and the Globe and Mail.³⁵

29. The deadline to opt out of the class proceeding, or to submit an objection to Settlement approval, was ordered to be 30 days after the distribution of Notice, being May 3, 2024. That date has now passed. One Class Member has opted out of the class proceeding. Two objections were received, as described below.³⁶ Neither objector intends to appear at the hearing of this motion according to the objection forms they submitted.

E. Key Terms of the Settlement

30. The Settlement provides benefits to those affected by the proposed 2013 Amendment, and those that did not receive Indexing on their pensions due to BRI's historical interpretation and application of the Indexing provisions.

31. In general, under the terms of the Settlement, Class members will receive a fixed annual adjustment of 0.9% per year on pension benefits for service prior to 2010. BRI began paying these amounts on January 1, 2016. Those still receiving payments from the Plan receive these settlement amounts automatically as part of their pension payments: there is no need for a claims process for the majority of Class members. The exception, as detailed below, is for Group 2 members.³⁷

³⁵ Kaplan Affidavit, paras. 17-20, RMR, tab 3, pp. 245-246; Affidavit of Parakram Thapa, sworn June 7, 2024, at paras. 21-22 ("Thapa Affidavit"), Responding Motion Record of the Applicant, BRI ("BRI MR"), tab 2, p. 88. The 280 emails sent is broken down as 139 emails to email addresses on BRI's list and 141 additional emails to email addresses of people who contacted Koskie Minsky LLP. Of the mail sent to 725 class member addresses, 16 were returned.

³⁶ Kaplan Affidavit, paras. 21 and 51-53, RMR, tab 3, pp. 246 and 253.

³⁷ Kaplan Affidavit, paras. 38-41, RMR, tab 3, pp. 249-250.

32. The precise benefits that the Settlement provides depend on the status of the Class member.³⁸ Under the Settlement, Class Members fall into one of 5 groups, which determines the benefits available to them under the Settlement, as follows:³⁹

<p>Group 1</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>For all Group 1 Members: Fixed 0.9% adjustment to pension accrued in respect of pre-2010 service.</p> <p>For those with "90 points" (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>Group 2</p>	<p>All persons not in any other Group who at any time prior to 2013 participated in the Plan, including:</p> <p>a) People whose benefits under the Plan have been discharged in full, who "cashed out" their pension when leaving BRI or who</p>	<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</p>

³⁸ Kaplan Affidavit, paras. 38-41 RMR, tab 3, p. 249-250. The parties agreed, in September 2015, that those who were eligible to retire before January 1, 2016 would have the option of retiring before January 1, 2016 and receiving CPI adjustments – see the definition of "Group 0" Member, s. 3.2.1 of the Settlement Agreement, Kaplan Affidavit, Exhibit "A", RMR, tab 3A, p. 272. Six individuals chose to do so and ceased to be affected by the Indexing dispute. All those who became eligible to retire after January 1, 2013 and did not retire before January 1, 2016 are part of Group 1.

³⁹ Kaplan Affidavit, para. 42, RMR, tab 3, pp. 250-251.

	<p>otherwise had no pension entitlement remaining in the Plan;</p> <p>b) Beneficiaries of persons in (a);</p> <p>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.</p>	<p>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>
Group 3	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.
Group 4	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.
Group 5	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.

33. 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 4.⁴⁰ There are 46 individuals

⁴⁰ Expert Report on the Financial Impact of the Pension Plan Settlement and Implementation Agreement Made Between Brewers Retail Inc. and Plan Member Representatives, prepared by Ian Edelist of Eckler Ltd, September 2018 ("**Eckler Report**"), pp. 4-5, 2021 Campbell Affidavit, Exhibit "S", RMR, tab 2S, pp. 162-163.

known to BRI that fall into Group 2.⁴¹ Group 2 also includes an unknown number of individuals for whom BRI has no remaining records.⁴²

34. Interim payments have been made to Class members in contemplation of the approval of the Settlement. BRI began making interim payments under the Settlement on January 1, 2016, to Class members with pensions in pay, equivalent to the 0.9% adjustments.⁴³ The Settlement provides that the interim payments will cease if the Settlement is not approved, and that BRI may terminate those interim payments at any time prior to approval. However, BRI will not seek reimbursement of interim payments already made if the Settlement is not approved.⁴⁴

35. Group 2 Class Members 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 the fixed fund of \$800,000 set aside for Group 2 Class Members, each Group 2 Member will receive a proportionate share of the Group 2 fund. The fund of \$800,000 allows for full payment (\$2,500) to be made to 320 individuals. Class Counsel has no reason to believe that this fund will be insufficient.⁴⁵

36. Only Group 2 Class Members must apply to receive the benefits that they are entitled to under the Settlement. A claim form has been created for that purpose.⁴⁶ Group 2 members must complete and submit that claim form within 90 days of the publication of notice regarding

⁴¹ Those persons include former members of the Plan who did not receive any Indexing under the Plan terms because they received a deferred pension, or took a commuted value upon terminating employment, and the spouses or beneficiaries of those persons who received survivor entitlements, over the past 50 years: Thapa Affidavit, at paras. 18(c), 19, BRI MR, Tab 2, pp. 87-88.

⁴² Kaplan Affidavit, para. 43, RMR, tab 3, p. 251. To note, when this Indexing dispute arose in 2012, BRI no longer retained records of all persons fully paid out over the previous 40 years (from 1974 onward) – such records had either been routinely purged, or had been lost or damaged in an accident in a BRI storage facility containing many of its pre-2010 paper records: see para. 16 of the Affidavit of Parakram Thapa, sworn June 29, 2021, Exhibit "A" to the Thapa Affidavit, BRI MR, Tab 2, p. 126.

⁴³ Settlement Agreement Part 2.5, Kaplan Affidavit, Exhibit "A", RMR, tab 3A, p. 271.

⁴⁴ Settlement Agreement Part 2.5.4, Kaplan Affidavit, Exhibit "A", RMR, tab 3A, p. 271.

⁴⁵ Kaplan Affidavit, para. 45, RMR, tab 3, p. 252.

⁴⁶ See the Group 2 Class Member Claim Form, Schedule "F" to the Draft Settlement and Fee Approval Order.

settlement approval. BRI will determine, within 60 days, whether individuals who claim Group 2 benefits are eligible. A Group 2 applicant whose claim is rejected can object to 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 agreement.⁴⁷

37. Under the Settlement, all benefits and expenses under the Settlement are to be paid from assets held under the Plan. Any such costs that cannot be paid from the Plan will be paid by BRI.⁴⁸

38. The Settlement Agreement is conditional on both regulatory and court approval. Presuming that the Settlement is approved by this Court, Plan amendments implementing the Settlement will be filed with FSRA. The Settlement will then become effective on the registration of those amendments, which implement the annual adjustments and bridging benefits, described above. Those amendments will also repeal and replace prior Indexing amendments, such that BRI is only required to provide Indexing or annual adjustments on Pre-2010 Service as contemplated in the Settlement. FSRA has indicated that it will register these Amendments.⁴⁹

39. Through these terms, the Settlement Agreement fully resolves the Indexing dispute between BRI and the Class. As set out below, the Settlement is fair and reasonable to Class members and is preferable to the risks of "all or nothing" litigation of the Indexing dispute.

PART III - ISSUES AND THE LAW

40. Two issues are before the Court on this motion:

- (a) Whether to approve the Settlement; and
- (b) Whether to approve the payment of Class Counsel's fees and disbursements.

⁴⁷ Kaplan Affidavit, para. 46, RMR, tab 3, p. 252.

⁴⁸ Settlement Agreement, Part 6.3.2, Kaplan Affidavit, Exhibit "A", and see para. 49, RMR, tabs 3A and 3, pp. 278 and 252.

⁴⁹ Kaplan Affidavit, para. 48, RMR, tab 3, p. 252.

A. SETTLEMENT APPROVAL

41. Under s. 27.1 of the *Class Proceedings Act, 1992*, a class proceeding may only be settled with the approval of the court, which approval can only be given if the court determines that the settlement is fair, reasonable and in the best interests of the class as a whole.

42. A settlement is the product of a compromise and perfection is not the standard by which a settlement is to be measured.⁵⁰ The overarching question for the Court is whether the settlement falls within a range or zone of reasonableness.⁵¹ A settlement will not be fair and reasonable if it falls outside of a range of reasonable outcomes.⁵² However, various settlement possibilities may fall within the "range of reasonableness" and be in the best interests of the class, when compared to the unpredictable alternative of continued litigation.⁵³

43. "Considerable deference" is shown to "the process underlying the negotiated settlement."⁵⁴ The parties, and not the Court, are "best placed to assess the risks and costs (financial and human) associated with taking complex class action litigation to its conclusion."⁵⁵ Rejection of a settlement "carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost."⁵⁶

44. In this assessment, there is a strong presumption of fairness when a proposed settlement, which was negotiated at arm's-length, is presented for court approval on the recommendation of

⁵⁰ *Baxter v. Canada (Attorney General)*, [2006 CanLII 41673 \(ON SC\)](#), at [para. 21](#); *Patel v. Groupon Inc.*, [2013 ONSC 6679](#) at [para. 14](#).

⁵¹ *Yeo v. Ontario*, [2021 ONSC 4534](#) at [para. 13](#).

⁵² *Loewenthal v. Sirius XM Holdings, Inc. et al.*, [2021 ONSC 4482](#) at [para. 11](#).

⁵³ *Dabbs v. Sun Life Assurance Company of Canada*, [\[1998\] O.J. No. 2811 \(Gen. Div.\)](#), aff'd [\[1998\] O.J. No. 3622 \(C.A.\)](#) at p. 15; *Baxter v. Canada (Attorney General)*, [2006 CanLII 41673 \(ON SC\)](#), at [para. 21](#).

⁵⁴ *Fontaine v. Canada (Attorney General)*, [2006 NUCJ 24](#) at para. 38.

⁵⁵ *Manuge v. Canada*, [2013 FC 341](#) at para. 6.

⁵⁶ *Manuge v. Canada*, [2013 FC 341](#) at para. 6.

experienced counsel.⁵⁷ In that circumstance, the court can assume, "in the absence of evidence to the contrary, that it is being presented with the best reasonably available settlement and that class counsel is staking his or her reputation and experience on the recommendation."⁵⁸

45. The determination of whether a settlement is fair, reasonable, and in the best interests of the class is guided by the following factors:

- (a) the likelihood of recovery or likelihood of success;
- (b) the amount and nature of discovery, evidence or investigation;
- (c) the proposed settlement terms and conditions;
- (d) the recommendation and experience of counsel;
- (e) the future expense and likely duration of the litigation;
- (f) the number of objectors and nature of objections;
- (g) the presence of good faith, arm's length bargaining and the absence of collusion;
- (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and
- (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.⁵⁹

46. In this case, these factors favour the approval of the Settlement.

i. Likelihood of Success in Litigating the Indexing Dispute

47. The alternative to Settlement approval is a final determination of the Indexing dispute. As set out above, a determination of the Indexing dispute turns on whether the Indexing provided by the Plan constitutes a "pension benefit" under the *PBA*⁶⁰ and whether the Plan terms as interpreted comply with this requirement. Litigating this dispute can only have an "all or nothing" result. If

⁵⁷ *Loewenthal v. Sirius XM Holdings, Inc. et al.*, [2021 ONSC 4482](#) at [para. 11](#).

⁵⁸ *Serhan v. Johnson & Johnson*, [2011 ONSC 128](#) at para. 55.

⁵⁹ *Doucet v. The Royal Winnipeg Ballet*, [2022 ONSC 976](#) at [para. 48](#).

⁶⁰ Meaning "the aggregate monthly, annual or other periodic amounts payable to a member, former member or retired member during his or her lifetime to which he or she will become entitled under the pension plan or to which, upon his or her death, any other person will become entitled", *PBA*, s.1(1).

Indexing is a pension benefit, CPI adjustments must be provided to all Class members on pension benefits accrued prior to 2010 service. If Indexing is not a pension benefit: (a) those who did not receive Indexing previously are not entitled to it, and (b) those who would have received Indexing on pre-2010 service will not receive it, pursuant to the 2013 Amendment.

48. The parties entered negotiations, at FSCO's encouragement, to avoid the "all or nothing" nature of this dispute. The Committee may have succeeded in establishing that Indexing is a pension benefit and may have successfully defended such a finding at various levels of appeal. However, from the perspective of the Committee, the risk of loss in litigating the Indexing dispute, with the result of no ongoing adjustments to pension benefits, was significant. The Committee wanted to avoid the uncertainty of the Indexing dispute in favour of the certainty provided by the Settlement they negotiated with the benefit of Class Counsel and the actuarial advisor.⁶¹

49. There is limited jurisprudence on the issue of whether Indexing is a pension benefit. The outcome – were this issue litigated through the FST and various stages of appeal – is uncertain.

50. One Ontario authority, the FST decision rendered in *General Motors*, stated that the indexing in that case was a "pension benefit".⁶² There, the FST was guided by their interpretation of the pension plan at issue, the parties' arguments, and the employer's concession that indexation, if available to all plan members, was a pension benefit.⁶³

⁶¹ Affidavit of William Campbell, sworn June 6, 2024, para. 11, RMR, Tab 4, p.376; Affidavit of Diana Humphrys, sworn June 6, 2024, para. 15, RMR, Tab 5, p. 382; Affidavit of Thomas Martin Krueger, sworn June 6, 2024, para. 15, RMR, Tab 6, p. 388; Affidavit of Georgina Higgs, sworn June 6, 2024, para. 15, RMR, Tab 7, p. 394; and Affidavit of David Ramsay, sworn June 6, 2024, para. 15, RMR, Tab 8, p. 400.

⁶² *General Motors of Canada Limited v. Ontario*, [2014 ONFST 11](#), at para. 97 [*General Motors*].

⁶³ [General Motors](#), at para. 92.

51. If the Indexing dispute is to be determined, BRI does not concede that Indexing is a "pension benefit" – BRI argues that the Indexing is an "other benefit" under the *PBA* not a "pension benefit", among other related arguments. That question was not dealt with by the FST in the *General Motors* case. Upon judicial review or further appeal of an FST decision in this case, *General Motors* would not be binding and would arguably have limited precedential value. This results in uncertainty in the application of and persuasiveness of *General Motors* to support the Committee's position on the Indexing dispute.

52. The uncertainty around this issue creates acute risk for the Committee and beneficiaries. If, upon determination, Indexing is found to be a "pension benefit", all Plan members will receive Indexing on pre-2010 pensionable service, even if they had not received it previously. However, if Indexing is found not to be a pension benefit, most Plan members, including all of those who do not retire from active service, will receive no Indexing at all. That "all or nothing" proposition is what is avoided by the Settlement.

ii. Amount and nature of discovery

53. The Indexing dispute involved the assessment of Plan texts and amendments dating back to 1974, all of which were available to the parties in assessing the risks of proceeding with the Indexing dispute.

54. In addition, the confidential Plan data shared by BRI with the Committee enabled the parties, and their actuarial advisor, to be on a level playing field of information when assessing the terms of Settlement.

iii. Proposed Settlement Terms

55. Ongoing adjustments of 0.9% provided by the Settlement are clearly a far better outcome, for the Class, than no Indexing at all.

56. Had the Committee succeeded, Class members would have received annual Indexing based on the increase in the Consumer Price Index, up to a maximum of 2%. However, in some years, the increase in CPI has been lower than 0.9% and, at times, the CPI has not risen at all.⁶⁴ The guaranteed 0.9% adjustments made annually under the Settlement must therefore be compared to annual adjustments, in the case of complete success for the Committee, of between 0% and 2%.

57. Adjustments and indexing in pension payments allow retirees to adapt to the increasing cost of living. By reaching a settlement in which adjustments of 0.9% were made beginning in 2016, the Committee has ensured that retired Plan members receive adjustments to respond to the increased cost of living and can maintain quality of life in their retirement. Immediate access to adjustments was a key benefit for Plan members negotiated by the Committee. The litigation of the Indexing dispute, even if the Committee were successful, would certainly have delayed the payment of any Indexing for the life of the litigation (including likely appeals).

58. Eckler Ltd., the actuarial advisor, assessed the value of the Settlement in 2018 in the course of obtaining FSCO approval of the Settlement. Eckler assessed the present value of future and past Indexing for the various groups under BRI's interpretation, the Committee's interpretation, and the Settlement's benefits. Eckler determined that the value of the Settlement to be \$11.49m, which was approximately 43.8%- 55.6% (depending on the method of assessment)⁶⁵ of the value

⁶⁴ Eckler Report, p. 25, 2021 Campbell Affidavit, Exhibit "S", RMR, tab 2S, p. 183.

⁶⁵ For Group 4, comprised mainly of surviving spouses in receipt of a survivor pension, the relative value of the Settlement Benefits depends on whether to assess a retiree and their surviving spouse together (i.e. as a family unit –

of the Committee's interpretation had they been fully successful in their arguments. More specifically, the Settlement provides recovery for Groups 1, 3, and 5 of 52.1%-66.8% of the value of the Committee's interpretation had they been fully successful in their arguments.⁶⁶

59. The terms of Settlement are fair, reasonable, and in the best interests of the Class. The 0.9% adjustments, and their introduction from January 1, 2016, are and have been of significant benefit to the class, who rely on the certainty of their pension adjustments to meet their daily needs.

iv. Good Faith, Arm's Length Bargaining Occurred

60. The Settlement is the result of good faith, arm's-length bargaining by the Committee. The Committee initially retained counsel to represent them and make submissions to FSCO concerning the 2013 Amendment. Class Counsel did so and continued to represent the Committee in negotiations with BRI based on the decision of the Committee to pursue a negotiated resolution.

61. Committee members – some of whom are now representative respondents – were engaged throughout the negotiation process. As described by Mr. Campbell:

Between June 2014 and September 2015, BRI and the Committee explored the possibility and feasibility of a settlement-based resolution. I was actively engaged in this process with the other Committee members and participated in exchanging multiple drafts of offers and counteroffers with BRI, assessed the value of settlement benefits relative to litigation positions, and gave instructions to Counsel. This was an arm's length process and negotiations proceeded in good faith knowing that we were crafting a resolution affecting multiple classes of Plan member going back to 1974 and many of whom are no longer identifiable. We also knew that in order to act in the best interests of the affected group,

called the "Joint Lives Approach") or separately (called the "Survivor in Isolation Approach"). The difference impacts the valuation of Group 4 members (surviving spouses in receipt of benefits). Since the Settlement does not provide for payment of past Indexing benefits to Group 4 Members, the valuation of Group 4 members' recovery under the Survivor in Isolation Approach is approximately 12.8% whereas a valuation of Group 4 members' recovery under the Joint Lives Approach, which takes into account the Indexing received by the retiree and the spouse) is approximately 50.5%— see Table 3 and Appendix F of the Eckler Report, 2021 Campbell Affidavit, Exhibit "S", RMR, tab 2S, pp. 169 and 184.

⁶⁶ As BRI has limited to no information on the number of Class members in Group 2, a comparative valuation of benefits provided to them is not possible. The impact on the assessment method to Group 4 is addressed in the footnote above.

we had to try to fairly and reasonably allocate settlement benefits amongst the members and ensure that any resolution would be approved by both a court and the regulator.⁶⁷

62. As part of the settlement process, the Committee requested, and BRI shared, Plan data to assist the Committee in valuing various settlement scenarios. The Committee retained Eckler Ltd. to independently advise the Committee and counsel on the financial, actuarial and demographic aspects of possible settlements.

63. The negotiations with BRI, and FSCO, spanned almost 5 years.⁶⁸ These efforts led to the successful negotiation of the Settlement on September 29, 2015, which was then subject to the significant scrutiny, and eventually the approval, of FSCO.⁶⁹

v. Counsel Communicated Settlement Terms to the Class

64. Shortly after the Settlement was reached, and before this proceeding was commenced or certified, Class Counsel communicated the terms of the Settlement to the Class. Class Counsel sent a letter to all Group 1, 3, and 4 Members on November 24, 2015, explaining the proposed Settlement, why it was a compromise of rights, and how it would be implemented, and inviting them to attend one of two meetings in December 2015 where the Settlement would be discussed and explained.⁷⁰

65. The December 2015 meetings were attended by members of the Committee, Class Counsel, and Eckler Ltd. Representatives of BRI also attended the first part of both meetings to provide BRI's perspective on the Settlement, before leaving to allow confidential discussion of the

⁶⁷ 2021 Campbell Affidavit, para. 37, RMR, tab 2, p. 18.

⁶⁸ 2021 Campbell Affidavit, paras. 39-54, RMR, tab 2, pp. 18-21.

⁶⁹ 2021 Campbell Affidavit, paras. 38, 39-54, RMR, tab 2, pp. 18-21.

⁷⁰ 2021 Campbell Affidavit, paras. 59-61, RMR, tab 2, pp. 22-23.

Settlement with attendees. A PowerPoint presentation was delivered, at those meetings, to assist in explaining the Settlement to Plan Members.⁷¹

66. Following the certification of this proceeding, a Notice Plan was approved to provide Notice to the Class of certification, settlement, and the settlement approval hearing. Given that BRI has contact information for many Class members, direct Notice, explaining the terms of the Settlement, has been provided to all known Class members. The Settlement terms have been fully communicated to the Class.

vi. Recommendation and Experience of Class Counsel

67. Class Counsel consists of Ari Kaplan, of Kaplan Law, and Koskie Minsky LLP.

68. Ari Kaplan has represented the Committee for over 10 years, initially as part of Koskie Minsky LLP and later as Kaplan Law. He is recognized as a foremost expert in pension law and is the author of the authoritative text on pension law in Canada, which has been cited as authority in seven decisions of the Supreme Court of Canada and numerous other appellate and trial courts, tribunals and commissions.

69. Koskie Minsky LLP is a leader in both pension law and class action litigation in Canada.⁷² Koskie Minsky LLP are experienced class actions counsel and have been appointed class counsel in many class actions including consumer protection, *Charter*, crown liability, institutional abuse claims, systemic negligence claims, and employment and employee benefit claims.

⁷¹ 2021 Campbell Affidavit, para. 61, RMR, tab 2, p. 23.

⁷² Kaplan Affidavit, paras. 54-55, 59-61, RMR, tab 3, pp. 253-255.

70. Class Counsel have been involved in the litigation and settlement of a number of pension-related matters, many of which have led to access to justice and compensation for thousands of class members, including the following, among many others: *Austin v Bell*; *Dominguez v. Northland Properties Corporation*; *Caponi v The Canada Life Assurance Co*; *Martin v Barrett*; *Sutherland v Hudson's Bay*; *Kidd v Canada Life*; and *Re Montreal Trust Company of Canada*.⁷³

71. Class Counsel believes that the Settlement is fair, reasonable and in the best interest of the Class, given Class Counsel's combined experience in pensions and class actions and taking into account:

- (a) The value of the benefits obtained for Class Members under the Settlement;
- (b) The risk, in litigating the Indexing dispute, that BRI's position would have prevailed, and Plan members would have received no Indexing;
- (c) The delay Plan members would have experienced in receiving Indexing benefits, even if the litigation of the Indexing dispute were ultimately successful;
- (d) Committee members' role in negotiating the Settlement and continued support of the Settlement;
- (e) The very small number of Objectors to the Settlement after thorough, and mostly direct, Notice was provided to the Class; and
- (f) FSCO's approval of the Settlement, which came after lengthy and detailed scrutiny.

vii. The Number of Objectors and Nature of Objections

72. Despite the particularly high proportion of direct notice in this case, Class Counsel has received only one Opt Out Form, from a Group 5 member. The sole opt out is from a retiree who is already receiving his pension and fully benefiting from the CPI Indexing because he “retired from active service”. As a result, he is not impacted by the Settlement. However, his spouse,

⁷³ Kaplan Affidavit, para. 55, RMR, tab 3, pp. 253-254.

should she survive him (the retiree), will benefit from the Settlement because she would receive guaranteed annual 0.9% indexing on the survivor pension.

73. Class Counsel received two objections, one of which, as described below, pertains only to the source of payment of Class Counsel's fees. Neither objector intends to appear at the hearing of this motion.

74. The only objection received to the Settlement itself is from an objector (PD) who suggests that he should have remained eligible for the benefits under the Plan offered when he chose to become a manager in the 1990's, and that any changes should have been grandfathered in for new employees. He states that "the court must prove [BRI] wrong." His objection appears to be an objection not to the terms or quantum of benefits in the Settlement, but to the decision to pursue any negotiated compromise in the Indexing dispute at all.⁷⁴ It does not appear that any other Class members share this view. This objector does not appear to accept any risk in the Indexing dispute. This all-or-nothing approach is the exact approach that was avoided by the Settlement.

viii. The Settlement is fair, reasonable and in the best interests of the Class

75. In this case, the relevant factors heavily favour the approval of the Settlement. The terms of the Settlement were achieved through hard-fought, arm's-length negotiations in which Plan members were represented by counsel experienced in pension disputes and class proceedings. The Settlement was approved by the pension regulator, FSCO, after a lengthy process. It secures ongoing adjustments to pension payments for pre-2010 service. This outcome can only be compared to the "all or nothing" nature of a hearing of the dispute, the result of which may have

⁷⁴ Kaplan Affidavit, Exhibit "F", RMR, tab 3F, p. 365.

been the loss of any Indexing or adjustments to pension payments. The settlement is fair, reasonable and in the best interests of the class and should be approved.

B. FEE APPROVAL

76. The Court, on this motion, is also asked to approve Class Counsel's fees and disbursements pursuant to s. 32 of the *CPA*. In doing so, this Court must determine whether the fees to be paid to Class Counsel are fair and reasonable in all of the circumstances, considering the results achieved for Class Members and the risks undertaken by Class Counsel.⁷⁵ Other relevant factors include the legal complexity of the action, the importance of the issue to class members, the skill and competence demonstrated by class counsel, the ability of the class to pay, and the class's expectation of legal fees.⁷⁶

i. Fee arrangements and expectation of fees

77. Class Counsel was initially retained by the Committee to represent them in making submissions to FSCO on the 2013 Amendment only. The Committee initially paid fees using resources gathered from voluntary member donations. In 2014, at the request of FSCO, Class Counsel's retainer was broadened to reflect the Committee's expanded mandate to represent all members affected by the Indexing dispute, and to account for the Committee's directions to pursue a negotiated resolution to the Indexing dispute. At that time, Class Counsel agreed not to seek payment for its services from the Committee, but instead to seek recovery of fees and

⁷⁵ *Lavier v MyTravel Canada Holidays Inc.*, [2013 ONCA 92](#) (CanLII) at [para. 27](#); *Baxter v. Canada (Attorney General)* [2006 CanLII 41673 \(ON SC\)](#), at [para. 61](#); and *MacDonald et al v. BMO Trust Company et al.*, [2021 ONSC 3726](#) at [para. 26](#).

⁷⁶ *Smith Estate v. National Money Mart Co.*, [2011 ONCA 233](#) at [para. 80](#).

disbursements from BRI through a negotiated resolution or otherwise – such that the Committee (and the Class) would not have to pay such fees and disbursements.⁷⁷

78. The negotiation of the Settlement, including with FSCO, took five years. Throughout that time, Class Counsel acted on behalf of the Committee and the Class with no guarantee that a settlement could be reached or that BRI would agree to pay sufficient funds to satisfy the time devoted by Class Counsel. There was no guarantee of payment of Class Counsel's fees. Class Counsel agreed to forgo steady and certain remuneration for fee-for-service work over this timeframe and did not seek payment by the Committee or the Class.

79. As part of the Settlement, BRI agreed to pay \$450,000 plus taxes on account of fees and disbursements incurred by Class Counsel ("**Contingency Fee Agreement**").⁷⁸ In negotiating that amount, Class Counsel estimated the value of lawyer, student and clerk time that Class Counsel devoted and would have to devote in this matter through to the approval and implementation of the Settlement. That amount was also premised on FSCO's approval of the Settlement, which was provided.⁷⁹

80. However, as noted above, in 2019, FSCO was replaced by FSRA and FSRA eventually resiled from FSCO's approval of the Settlement. This put the Settlement in jeopardy. The risk that the Settlement would not be approved (and therefore that Class Counsel's fees pursuant to the Contingency Fee Agreement would not be paid) significantly increased.

⁷⁷ Kaplan Affidavit, para. 71, RMR, tab 3, p. 257. During the negotiations, BRI agreed to pay for the actuarial advice and services provided by Eckler to help frame and support the Settlement. BRI paid most of Eckler's accounts for this purpose.

⁷⁸ Section 10 of the Settlement Agreement, Kaplan Affidavit, Exhibit "A", RMR, tab 3A, p. 285.

⁷⁹ Kaplan Affidavit, para. 74, RMR, tab 3, p. 258.

81. After several communications with FSRA, the NOID issued by FSRA, BRI's appeal to the FST, and the inception of the FST Proceeding, it became apparent that the \$450,000 plus taxes negotiated in the Contingency Fee Agreement would not be sufficient to cover the legal fees and disbursements Class Counsel would have to devote in providing advice and representation to the Committee in a contested FST proceeding and a contested court proceeding seeking to approve and enforce the Settlement. As a result, BRI agreed to pay Class Counsel an additional \$400,000 (inclusive of taxes) for legal fees and disbursements for Class Counsel's continued representation of the Committee and the Class in this proceeding and before the FST, in addition to the fees provided for in the Contingency Fee Agreement ("**Unexpected Fees Funding Agreement**").⁸⁰

82. It became apparent early on that it would not be possible to raise sufficient funds from the Class to cover the legal fees of Class Counsel to negotiate and implement the Settlement on behalf of the Class – especially later with FSRA resiling from FSCO's approval of the Settlement and seeking to oppose it.⁸¹ Class Counsel is not aware of any other Class member who has commenced litigation against BRI with respect to the Indexing dispute.

ii. No premium for risk

83. The total available to Class Counsel under the Contingency Fee Agreement and Unexpected Fees Funding Agreement⁸² is \$908,500 on account of fees, disbursements and taxes. Of that, Class Counsel incurred \$2,460.45 (inclusive of taxes) in disbursements. Therefore, accounting for taxes, Class Counsel would be paid \$801,804.91 in fees, if approved.

⁸⁰ Kaplan Affidavit, paras. 76-78, RMR, tab 3, pp. 258-259. In 2021 BRI initially agreed to provide \$350,000 pursuant to the Unexpected Fees Funding Agreement, and then later increased that amount by an additional \$50,000.

⁸¹ Kaplan Affidavit, paras. 71 and 88, RMR, tab 3, pp. 257 and 260.

⁸² As the Unexpected Fees Funding Agreement is not a contingency fee arrangement and is not to be paid by the Class, it is not clear that such fees need to be approved by the Court pursuant to s. 32 of the CPA. Class Counsel seek approval regardless.

84. 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. Class Counsel estimates it will incur an additional \$100,000 in lawyer, student and clerk time in seeking approval of the Settlement and in its implementation.⁸³

85. As a result, the fees sought herein would result in a multiplier on the time devoted by Class Counsel of between **0.68 and 0.62**, if one includes the estimated time necessary for settlement approval and implementation. Class Counsel will therefore not receive any premium of any risk they may have incurred in representing the Committee and the Class on a contingent basis, and instead are accepting a drastic reduction in what they would otherwise expect to be paid for hours they devoted for the Committee and the Class.

iii. Complexity of dispute and skill and competence of Class Counsel

86. The Indexing dispute is highly complex. Through negotiating a Settlement that satisfies the Committee and Class members, Class Counsel secured ongoing increases to the actual value of Class members' pensions, a matter of clear and high importance to Class Members. After securing that Settlement, Class Counsel worked diligently to secure regulatory approval from FSCO in order to implement the Settlement to the benefit of the Class. Class Counsel has since worked alongside counsel for BRI to resist FSRA's attempts to prevent the Settlement from being implemented, including representing the Committee at the FST and the Court of Appeal.

⁸³ Kaplan Affidavit, paras. 64-67, RMR, tab 3, p. 255-256.

87. In its work on this matter, Class Counsel has employed significant expertise in both pension law and class proceedings, and has shown its commitment, over many years, to the interests of the Class, and to ensuring the successful implementation of the Settlement.

iv. Importance to the Class and ability to pay

88. Indexing is vital to the otherwise fixed income that the Class relies upon in their retirement. The matter relates to approximately 450 known employees, former employees and their spouses. The issues span some 5 decades of employees and years of service. It involves Plan members who are deceased and their surviving spouses who continue to receive the pension the members earned – as well as those who passed away without a spouse survivor or whose spouse also passed away. The Indexing dispute and the Settlement providing benefits where none were previously provided and protecting Indexing benefits that would have been removed from others, is of significant importance to the Class.

v. Objection to fees

89. One objection has been received in relation to Class Counsel's fees. The objector objects not to the quantum of Class Counsel's fee, but to the payment of these fees from the Plan. He states that the legal fees should be paid by BRI shareholders, and not from the Plan.⁸⁴ The fees of Class Counsel are expenses incurred for the benefit of the Class, Plan members, and are properly paid by the Plan. If they are determined to not be properly paid by the Plan, BRI will pay them.⁸⁵

⁸⁴ Kaplan Affidavit, Exhibit "G", RMR, tab 3G, p. 368.

⁸⁵ Settlement Agreement, Part 6.3.2, Kaplan Affidavit, Exhibit "A", RMR, tab 3A, p. 278.

vi. Class Counsel fees and disbursements are fair and reasonable

90. Based on all of the factors above, including the value of time devoted and lack of premium, the importance of the issues to the Class and the success achieved, Class Counsel fees and disbursements are fair and reasonable and ought to be approved by the Court.

PART IV - ORDER REQUESTED

91. The representative Respondents request an order approving the Settlement, approving Class Counsel's fees, and dismissing the class proceeding in the form provided by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2024.



KOSKIE MINSKY LLP

900-20 Queen St. W.
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A

drosenfeld@kmlaw.ca

Tel: 416-595-2700

Caitlin Leach LSO #82774T

cleach@kmlaw.ca

Tel: 416-595-2124

KAPLAN LAW

2000-393 University Avenue
Toronto, ON M5G 1E6

Ari Kaplan LSO #42042S

ari@kaplanlaw.ca

Tel: 416-565-4656

Lawyers for the Respondents

SCHEDULE "A" - LIST OF AUTHORITIES

CASELAW:

1. *Brewers Retail Inc. v. Ontario (CEO of FSRA)*, [2021 ONFST 15](#)
2. *Brewers Retail v. Campbell*, [2022 ONSC 850](#)
3. *Baxter v. Canada (Attorney General)*, [2006 CanLII 41673 \(ON SC\)](#)
4. *Patel v. Groupon Inc.*, [2013 ONSC 6679](#)
5. *Yeo v. Ontario*, [2021 ONSC 4534](#)
6. *Loewenthal v. Sirius XM Holdings, Inc. et al.*, [2021 ONSC 4482](#)
7. *Dabbs v. Sun Life Assurance Company of Canada*, [\[1998\] O.J. No. 2811 \(Gen. Div.\)](#),
aff'd [\[1998\] O.J. No. 3622 \(C.A.\)](#)
8. *Fontaine v. Canada (Attorney General)*, [2006 NUCJ 24](#) at para. 38
9. *Manuge v. Canada*, [2013 FC 341](#) at para. 6
10. *Serhan v. Johnson & Johnson*, [2011 ONSC 128](#) at para. 55
11. *Doucet v. The Royal Winnipeg Ballet*, [2022 ONSC 976](#) at [para. 48](#)
12. *General Motors of Canada Limited v. Ontario*, [2014 ONFST 11](#)
13. *Lavier v MyTravel Canada Holidays Inc.*, [2013 ONCA 92](#) (CanLII) at [para. 27](#)
14. *MacDonald et al v. BMO Trust Company et al.*, [2021 ONSC 3726](#) at [para. 26](#)
15. *Smith Estate v. National Money Mart Co.*, [2011 ONCA 233](#)

SCHEDULE "B" - RELEVANT STATUTES

[Pension Benefits Act](#), R.S.O. 1990, c. P.8, s.1(1)

Interpretation

Definitions

1 (1) In this Act,

“additional voluntary contribution” means a contribution to the pension fund by a member of the pension plan beyond any amount that the member is required to contribute, but does not include a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund; (“cotisation facultative supplémentaire”)

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of “additional voluntary contribution” in subsection 1 (1) of the Act is repealed and the following substituted: (See: 2020, c. 36, Sched. 37, s. 1 (1))

“additional voluntary contribution” means a contribution to the pension fund by a member of the pension plan beyond any amount that the member is required to contribute, but does not include,

(a) an optional contribution, or

(b) a contribution in relation to which the employer is required to make a concurrent additional contribution to the pension fund; (“cotisation facultative supplémentaire”)

“administrator” means the person or persons that administer the pension plan; (“administrateur”)

“assets”, in relation to an employer, means assets that in the ordinary course of business would be entered in books of account, whether or not a particular asset is entered in the books of account of the employer; (“actif”)

“Authority” means the Financial Services Regulatory Authority of Ontario continued under subsection 2 (1) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; (“Autorité”)

“Authority rule” means a rule made under subsection 115.1 (1); (“règle de l’Autorité”)

“bridging benefit” means a periodic payment provided under a pension plan to a retired member of the pension plan for a temporary period of time for the purpose of supplementing his or her pension benefit until he or she is eligible to receive benefits under the *Old Age Security Act* (Canada) or is either eligible for or begins to receive retirement benefits under the *Canada Pension Plan* or the *Quebec Pension Plan*; (“prestation de raccordement”)

“certified copy” means a copy certified to be a true copy; (“copie certifiée conforme”)

“Chief Executive Officer” means the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; (“directeur général”)

“collective agreement” has the same meaning as in the *Labour Relations Act, 1995*; (“convention collective”)

“Commission” means the former Financial Services Commission of Ontario that was established under the repealed *Financial Services Commission of Ontario Act, 1997*; (“Commission”)

“commuted value” means the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit; (“valeur de rachat”)

“continuous”, in relation to employment, membership or service, means without regard to periods of temporary suspension of the employment, membership or service and without regard to periods of lay-off from employment; (“continu”)

“contributory benefit” means a pension benefit or part of a pension benefit to which a member is required to make contributions under the terms of the pension plan; (“prestation contributive”)

“deferred pension” means a pension benefit, payment of which is deferred until the person entitled to the pension benefit reaches the normal retirement date under the pension plan; (“pension différée”)

“defined benefit” means a pension benefit other than a defined contribution benefit; (“prestation déterminée”)

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of “defined benefit” in subsection 1 (1) of the Act is repealed and the following substituted: (See: 2020, c. 36, Sched. 37, s. 1 (2))

“defined benefit” means a pension benefit other than a defined contribution benefit or a target benefit; (“prestation déterminée”)

“defined contribution benefit” means a pension benefit determined with reference to and provided by contributions, and the interest on the contributions, paid by or for the credit of a member and determined on an individual account basis; (“prestation à cotisation déterminée”)

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of “defined contribution benefit” in subsection 1 (1) of the Act is repealed and the following substituted: (See: 2020, c. 36, Sched. 37, s. 1 (3))

“defined contribution benefit” means a pension benefit determined with reference to and provided by contributions paid by or for the credit of a member, and the interest on the contributions, and determined on an individual account basis, but does not include an optional benefit; (“prestation à cotisation déterminée”)

“designated jurisdiction” means any jurisdiction in Canada, including Canada itself, that is prescribed as a jurisdiction in which there is in force legislation substantially similar to this Act; (“autorité législative désignée”)

“designated multi-jurisdictional pension plan” means a pension plan to which this Act applies and to which the pension benefits legislation of one or more designated jurisdictions also applies; (“régime de retraite à lois d’application multiples désigné”)

“domestic contract” means a domestic contract as defined in Part IV of the *Family Law Act*; (“contrat familial”)

“employee” means a natural person who is employed by an employer; (“employé”)

“employer” means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and “employed” and “employment” have a corresponding meaning; (“employeur”, “employé”, “emploi”)

“family arbitration award” means a family arbitration award made under the *Arbitration Act, 1991*; (“sentence d’arbitrage familial”)

“file” means file with the Chief Executive Officer; (“déposer”)

“former member” means an individual who satisfies the criteria set out in section 1.1 to be a former member; (“ancien participant”)

“going concern unfunded liability” means, with respect to a pension plan, a going concern unfunded liability as determined in accordance with the prescribed requirements; (“passif à long terme non capitalisé”)

“Guarantee Fund” means the Pension Benefits Guarantee Fund continued by this Act; (“Fonds de garantie”)

“insurance company” means a corporation authorized to undertake life insurance in Canada; (“compagnie d’assurance”)

“joint and survivor pension” means a pension payable during the joint lives of the person entitled to the pension and his or her spouse and thereafter during the life of the survivor of them; (“pension réversible”)

“jointly sponsored pension plan” means a pension plan described in subsection (2) and includes such other pension plans as may be prescribed; (“régime de retraite conjoint”)

“member” means a member of the pension plan; (“participant”)

“Minister” means the member of the Executive Council designated by the Lieutenant Governor in Council for the purposes of this Act; (“ministre”)

“multi-employer pension plan” means a pension plan described in subsection (3); (“régime de retraite interentreprises”)

“normal cost” means, with respect to a pension plan, the normal cost as determined in accordance with the regulations; (“coût normal”)

“normal retirement date” means the date or age specified in the pension plan as the normal retirement date of members; (“date normale de retraite”)

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 1 (1) of the Act is amended by adding the following definitions: (See: 2020, c. 36, Sched. 37, s. 1 (4))

“optional benefit” means a benefit that is prescribed for the purposes of subsection 40.1 (1) as an optional benefit; (“prestation optionnelle”)

“optional contribution” means a contribution to the pension fund that is made to obtain an optional benefit under the pension plan and that is made by a member of the pension plan beyond any amount that the member is required to make; (“cotisation optionnelle”)

“partial wind up” means the termination of part of a pension plan and the distribution of the assets of the pension fund related to that part of the pension plan; (“liquidation partielle”)

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of “partial wind up” in subsection 1 (1) of the Act is repealed. (See: 2020, c. 36, Sched. 37, s. 1 (5))

“participating employer”, in relation to a jointly sponsored pension plan or a multi-employer pension plan, means an employer required to make contributions to the pension fund; (“employeur participant”)

“pension” means a pension benefit that is in payment; (“pension”)

“pension benefit” means the aggregate monthly, annual or other periodic amounts payable to a member, former member or retired member during his or her lifetime to which he or she will become entitled under the pension plan or to which, upon his or her death, any other person will become entitled; (“prestation de retraite”)

“pension committee” means a committee that is the administrator of a pension plan; (“comité de retraite”)

“pension fund” means the fund maintained to provide benefits under or related to the pension plan; (“caisse de retraite”)

“pension plan” means a plan organized and administered to provide pensions for employees, but does not include,

(a) an employees’ profit sharing plan or a deferred profit sharing plan as defined in sections 144 and 147 of the *Income Tax Act* (Canada),

(a.1) a pooled registered pension plan registered under the *Pooled Registered Pension Plans Act, 2015*,

(b) a plan to provide a retiring allowance as defined in subsection 248 (1) of the *Income Tax Act* (Canada),

(c) a plan under which all pension benefits are provided by contributions made by members, or

(d) any other prescribed type of plan; (“régime de retraite”)

“prescribed” means,

(a) prescribed by the regulations, or

(b) subject to section 115.2, in respect of matters listed in subsection 115.1 (1), prescribed by the Authority rules; (“prescrit”)

“provision for adverse deviations” means, with respect to a pension plan, the provision for adverse deviations as determined in accordance with the regulations; (“provision pour écarts défavorables”)

“public sector pension plan” means a pension plan described in subsection (5) and includes such other pension plans as may be prescribed; (“régime de retraite du secteur public”)

“qualification date” means,

(a) in respect of Ontario, January 1, 1965, and

(b) in respect of a designated jurisdiction, the date on which, under the pension benefits legislation of that jurisdiction, a pension plan must be registered by the proper authority in that jurisdiction; (“date d’habilitation”)

“reciprocal transfer agreement” means an agreement related to two or more pension plans that provides for the transfer of money or credits for employment or both in respect of individual members; (“accord réciproque de transfert”)

“reduced solvency deficiency” means, with respect to a pension plan, a reduced solvency deficiency as determined in accordance with the prescribed requirements; (“déficit de solvabilité réduit”)

“registered retirement savings arrangement” means a registered retirement savings plan established in accordance with the *Income Tax Act* (Canada) or a registered retirement income fund established in accordance with that Act; (“arrangement enregistré d’épargne-retraite”)

“registration” means registration under this Act; (“enregistrement”)

“regulations” means regulations made under this Act; (“règlements”)

“retired member” means an individual who satisfies the criteria set out in section 1.1 to be a retired member; (“participant retraité”)

“solvency deficiency” means, with respect to a pension plan, a solvency deficiency as determined in accordance with the prescribed requirements; (“déficit de solvabilité”)

“solvency liabilities” means, with respect to a pension plan, solvency liabilities as determined in accordance with the regulations; (“passif de solvabilité”)

“specified beneficiary” means a spouse of a retired member who is designated as a specified beneficiary for the purposes of subsection 8506 (8) of the *Income Tax Regulations* (Canada); (“bénéficiaire déterminé”)

“spouse” means, except where otherwise indicated in this Act, either of two persons who,

(a) are married to each other, or

(b) are not married to each other and are living together in a conjugal relationship,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children’s Law Reform Act*; (“conjoint”)

“Superintendent” means the former position of Superintendent of Financial Services under the repealed *Financial Services Commission of Ontario Act, 1997*; (“surintendant”)

“surplus” means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner; (“excédent”)

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 1 (1) of the Act is amended by adding the following definition: (See: 2020, c. 36, Sched. 37, s. 1 (6))

“target benefit” means a pension benefit or ancillary benefit that is a target benefit as determined under section 39.2; (“prestation cible”)

“termination”, in relation to employment, includes retirement and death; (“cessation”)

“trade union” has the same meaning as in the *Labour Relations Act, 1995*; (“syndicat”)

“Tribunal” means the Financial Services Tribunal continued under the *Financial Services Tribunal Act, 2017*; (“Tribunal”)

“variable benefit account” means an account under the defined contribution provision of a pension plan that is used, or is to be used, for the payment of variable benefits to a retired member or a specified beneficiary of a retired member; (“compte de prestations variables”)

“variable benefits” means variable benefits for the purposes of the *Income Tax Act* (Canada);
 (“prestations variables”)

“wind up” means the termination of a pension plan and the distribution of the assets of the pension fund; (“liquidation”)

“Year’s Maximum Pensionable Earnings” has the same meaning as in the *Canada Pension Plan*.
 (“maximum des gains annuels ouvrant droit à pension”) R.S.O. 1990, c. P.8, s. 1; 1997, c. 28, s. 190; 1999, c. 6, s. 53 (1, 2); 2004, c. 31, Sched. 31, s. 1; 2005, c. 5, s. 56 (1-6); 2005, c. 31, Sched. 18, s. 1 (1); 2007, c. 7, Sched. 31, s. 1 (1); 2009, c. 11, s. 41; 2010, c. 1, Sched. 23, s. 1; 2010, c. 9, s. 1 (1-3, 5-7); 2010, c. 24, s. 1 (4, 6, 7); 2012, c. 8, Sched. 44, s. 1; 2014, c. 7, Sched. 26, s. 1 (1); 2015, c. 9, s. 31 (1); 2016, c. 23, s. 63; 2017, c. 8, Sched. 27, s. 1; 2017, c. 34, Sched. 17, s. 25; 2017, c. 34, Sched. 33, s. 1 (2-4); 2018, c. 8, Sched. 23, s. 1, 23, 26; 2018, c. 17, Sched. 33, s. 1; 2020, c. 36, Sched. 14, s. 12 (1).

BREWERS RETAIL INC.
Applicant

and
WILLIAM
CAMPBELL, ET AL.
Respondents

Court File No.: CV-21-658274-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

**FACTUM OF THE RESPONDENTS, WILLIAM CAMPBELL,
GEORGINA HIGGS, DIANA HUMPHRYS, THOMAS MARTIN
KRUEGER AND DAVID RAMSAY**
**(Motion for Settlement and Fee Approval
returnable June 17, 2024)**

KOSKIE MINSKY LLP
900 – 20 Queen Street West
Toronto, ON M5H 3R3

David Rosenfeld LSO #51143A
drosenfeld@kmlaw.ca
Tel: 416-595-2700

Caitlin Leach LSO #82774T
cleach@kmlaw.ca
Tel: 416-595-2124

KAPLAN LAW
2000-393 University Avenue
Toronto, ON M5G 1E6

Ari Kaplan LSO #42042S
ari@kaplanlaw.ca
Tel: 416-565-4656

Lawyers for the Respondents