

CITATION: Ontario Hospital Association v. Summers, 2010 ONSC 4497
COURT FILE NO.: 10-CV-397538CP
DATE: 20100817

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**Ontario Hospital Association on its own behalf and on behalf of the employers listed
in Schedule A attached to the Notice of Application**

Applicant

- and -

**Andy Summers, Lee Rogano, Yyes Shank, Mike Tracey, Carol McDowell, Katha
Fortier, Todd Hutchings, Connie Demedeiros, and Neil Cabral**

Respondents

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Alan Freedman and Rachel Arbour for the Ontario Hospital Association
Susan Philpott and Clio Godkewitsch for the non-union employees
Shaun O'Brien for the unionized employees

HEARING DATE: August 17, 2010

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] The applicant, Ontario Hospital Association (OHA) and the respondents, Andy Summers, Lee Rogano, Yyes Shank, Mike Tracey, Carol McDowell, Katha Fortier, Todd Hutchings, Connie Demedeiros, and Neil Cabral, bring an application for an order certifying this application as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 for settlement purposes and for approval of the settlement.

[2] The OHA does not seek to be a representative applicant. Rather, it seeks that the Respondents be appointed as representative respondents for the respondent class for the purposes of the class proceeding. The respondents wish to be appointed.

[3] The proceedings arise from a dispute about the ownership of \$16,962,643 (the "Proceeds") received by the Ontario Hospital Association from the demutualization of the Mutual Life Assurance Company of Canada ("Mutual Life") effective December 29, 1997. The Proceeds have grown to around \$22.5 million.

Factual Background

[4] The Ontario Hospital Association ("OHA") is an association of hospitals and at the moment represents 154 hospital corporations and a number of associate and affiliated members of the OHA.

[5] Over 12 years ago, on December 29, 1997, the OHA was the policyholder of record under two Mutual Life group insurance policies, Group Policy 2100 and Group Policy 14000. As of that date, Mutual Life demutualized, and as a result, as policyholder of record, OHA became entitled to Mutual Life shares based on the premium payments made in the previous 10 years.

[6] No premium payments, however, had been made under Group Policy 14000 since 1983, and so nothing was due with respect to that policy.

[7] At demutualization, approximately 41,000 employees, both unionized and non-unionized, were insured under the Policy for which shares were to be allocated.

[8] The Unionized Employees paid 25% of the LTD premiums under the Policy at demutualization. A similar premium sharing arrangement applied to the Non-Union Employees except that, in some cases, the portion paid by the employer may have exceeded 75%.

[9] As a result of the demutualization, the OHA was allocated 819,218 shares in its capacity as policyholder of record. In lieu of shares, it elected to receive a cash payment, and on July 21, 1999, it received \$16,962,643 (the "Proceeds").

[10] The Proceeds were deposited into a money market fund and have accumulated interest. The Proceeds have been used to pay for expenses related to the management and administration, including each party's reasonable legal and consulting fees and out-of-pocket expenses, including those related to the negotiation and implementation of the settlement agreement, which I will describe below. As of June 30, 2010, the balance in the money market fund was \$22,462,550.

[11] Almost immediately after the demutualization, the OHA began negotiations with the four labour unions that represented the majority of employees about the division of the Proceeds. The negotiations, which were hard and prolonged, continued for many years and included an unsuccessful mediation in September 2005. Each side claimed an absolute entitlement to the Proceeds.

[12] The Unionized Employees are currently represented by the Ontario Nurses' Association ("ONA"), the Ontario Public Service Employees' Union ("OPSEU"), the Canadian Union of Public Employees ("CUPE"), the Service Employees International

Union (“SEIU”), and the National Automobile, Aerospace Transportation and General Workers Union of Canada (“CAW Canada”) (collectively, the “Unions”).

[13] The Unions retained Cavalluzzo Hayes Shilton McIntyre Cornish LLP, jointly, to represent the Union Employees in the negotiations and in these proceedings. The representatives of the Non-Unionized Employees retained Koskie Minsky LLP to represent them in the negotiations and in these proceedings.

[14] In negotiating towards an agreement, the parties were aware of the decision of the Alberta Court of Appeal in *Academic Staff Association v. N.A.I.T.*, 2004 ABCA 42, which provides that the employer is entitled to the proceeds of demutualization, as well as, the decision of the New Brunswick Court of Appeal in *International Union of Operating Engineers, Local 894 v. Smurfit-Stone Container (Canada) Inc.*, [2005] N.B.J. No. 153 (C.A.), in which employees’ entitlement to a portion of the demutualization proceeds was limited to the extent of the premiums paid by those employees.

[15] Over the course of a decade of negotiations, many options were discussed, including the establishment of a new benefits plan and the direct payment of proceeds to each class member. Ultimately, the only approach that was acceptable to both sides was to divide up the Proceeds and to provide for premium holidays.

[16] The Parties ultimately entered into an Agreement Regarding Mutual Life Demutualization Proceeds, which was formally executed in early 2010. Subsequently, the Agreement was amended and re-executed in June 2010.

[17] Highlights of the settlement are as follows:

- \$17.2 million of the Proceeds are to be used to fund a premium holiday under the Participating Employers’ current LTD policies, in proportion to the premiums that the employer and employees respectively pay under the current policies (the “Premium Holiday”)
- Next, the legal fees of the parties and other expenses of the proceeding and related to the administration of the Proceeds and settlement are to be paid from the Proceeds. The legal and other expenses are anticipated to be approximately 6% of the Proceeds.
- After the payment of legal fees and other expenses, a Cash Recipients Fund is established so that members of the proposed Class who are ineligible for the premium holiday can apply to receive a cash payment of \$100 or less in the event there are insufficient funds available in the Cash Recipients Fund.
- The Cash Recipients Fund provides a share of the Proceeds to those class members who cannot otherwise be identified and who are not eligible for the Premium Holiday.

- Any remaining Proceeds following the distribution from the Cash Recipients Fund will be divided so that 50% is returned to the OHA and 50% will be used to provide an additional premium holiday.
- The Agreement is conditional upon the approval of the Court and can be voided by any party if more than 25 Employees opt-out of the proposed class.

[18] The affidavit evidence in support of the settlement approval indicated that in providing a premium holiday for the current LTD program, in proportion to the current premium sharing arrangement between the Participating Employer and eligible Class Member, the settlement would be efficient to administer and would ensure that the majority of Class Members will receive a direct benefit without having to take any action and without the expense and administration of individual payments.

[19] The evidence was that mode of distributing the Proceeds was chosen over a cash benefit because it was the most efficient, least costly and most tax effective way of delivering the Proceeds.

[20] Class counsel have recommend the settlement.

[21] Only one objection was received. Ms. Willits submits that if there are any remaining funds after payments from the Cash Recipients Funds, these funds should be distributed to all class members, not just those who qualify for the second premium holiday under the Agreement.

Certification

[22] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[23] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellair v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[24] I am satisfied that for settlement purposes, the criterion for certification have been satisfied in the case at bar. In particular: (a) the affidavits disclose a cause of action or justiciable issue (in this case the entitlement to a share in the Proceeds from the demutualization); (b) there is an identifiable class of two or more persons who will be represented by the representative respondents; (c) the claims of the class raise common issues of fact or law, which are set out below; (d) a class proceeding is the preferable

procedure; and (e) Andy Summers, Lee Rogano, Yves Shank, Mike Tracey, Carol McDowell, Katha Fortier and Nelia Cabral are suitable representative respondents with adequate class counsel.

[25] For the purposes of certification, the class membership is defined as follows:

All current and former employees of the Participating Employers who have paid a share of premiums for life insurance coverage and/or disability insurance coverage under one or more of Mutual Life Assurance Company of Canada Group Insurance Policy Numbers 2100 and 16000 and who were employed with a Participating Employer and covered under Policy Number 2100 as of December 29, 1997.

[26] The application raises the following common issue:

(a) who is entitled to the demutualization proceeds arising under Mutual Assurance Company of Canada Group Insurance Policies Numbers 2100 and 14000; and

(b) how the Proceeds shall be distributed or otherwise dealt with.

[27] I, therefore, certify this application as a class proceeding pursuant to the *Class Proceedings Act, 1992*.

Settlement Approval

[28] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[29] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[30] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429

(Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998, [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[31] In my opinion, the settlement in this case is fair, reasonable, and in the best interests of the Class Members.

[32] The terms of the settlement provide an equitable distribution of the Proceeds and the distribution is consistent with the benefits plans concerning which the Proceeds arose.

[33] The settlement avoids the possibility of each of the OHA and its Participating Employers having to address any issues surrounding entitlement to the Proceeds through assorted grievances or civil litigation with various employee groups.

[34] The settlement achieves certainty for both participating employers and the Class Members and avoids further delay, expense and the risk for the Class of unsuccessful litigation.

[35] The settlement is the result of lengthy settlement discussions, which were conducted in good faith and at arm's length with all parties represented by experienced legal counsel.

[36] Each of the Representative Respondents approves the Agreement and believe that it is fair and reasonable.

[37] Accordingly, I approve the settlement.

[38] The motion is granted and an order should issue accordingly.



Perell, J.

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REASONS FOR DECISION

Perell, J.

Released: August 17, 2010