AUGUST 20, 2018

Ontario Court Awards $2.35 Million in Costs to Successful Defendants in Proposed Antitrust Class Proceeding

Authors: Matthew Milne-Smith and John Bodrug

Justice Perell, of the Ontario Superior Court of Justice, has rendered his costs award in respect of his earlier decision granting summary judgment (see our March 23, 2018 bulletin) in favour of the defendants in *Hughes v Liquor Control Board of Ontario*. The case was a proposed class proceeding against the Liquor Control Board of Ontario (LCBO), Brewers' Retail Inc. (BRI), and three brewers (Molson, Labatt and Sleeman), alleging a conspiracy to allocate markets for the distribution of beer in Ontario. Justice Perell granted the defendants' motions for summary judgment and dismissed the case in its entirety on the basis that the practices complained of were the result of well-considered, long-standing and recently affirmed provincial government policy, and therefore immune from suit under the "regulated conduct defence" that has been enshrined in Canadian law for close to a hundred years.

Unlike various Canadian provinces that have implemented a "no costs" regime for class proceedings, Ontario applies the ordinary costs rules. Absent unusual circumstances, successful parties are typically entitled to receive a portion of their costs from the unsuccessful party. The defendant Sleeman settled its claims for costs on a confidential basis, but the other defendants requested costs awards totalling almost $2.5 million.

The costs motion was disputed on behalf of the plaintiffs by the Class Proceedings Fund (Fund). The Fund was created by the *Law Society Amendment Act (Class Proceedings Funding)* with the mandate of encouraging access to justice by providing financial support to plaintiffs' counsel in selected cases in exchange for 10% of any settlement or judgment proceeds. The Fund is not required to support any case, but rather selects which cases to support on the basis of applications made by plaintiffs' counsel. The Fund agreed to support the plaintiffs in this case, and thereby agreed to pay for counsel's disbursements and any adverse costs awards. On the costs motion, the Fund argued that the defendants in *Hughes* collectively were not entitled to more than $600,000 in costs.

In his decision on August 14, 2018, Justice Perell entirely accepted the defendants' position, with the exception of a reduction in claimed fees for an expert economist whose evidence turned out not to be essential to the result. Among other things, Justice Perell noted that the plaintiffs had claimed damages of $2 billion and pre-judgment interest that would have amounted to almost another $1 billion. The case was therefore "profoundly important," and posed "a threat to the long-established regime for the distribution of beer in the Province of Ontario." It was therefore entirely reasonable for the defendants to mount a vigorous defence.

Justice Perell's award is an excellent summary of costs principles applicable to class proceedings. The result in this case is a good reminder that, while there can be significant economic incentives for defendants to settle even unmeritorious class actions, the courts will also recognize the need to compensate defendants that confront that risk and successfully defend a case in a vigorous but responsible manner. Conversely, while class actions offer significant financial rewards to entrepreneurial class counsel (or the Fund, where it participates), there are also significant risks associated with unmeritorious claims.

Davies represented the LCBO in defending the proposed class action in the *Hughes* case.

Key Contacts: Kent E. Thomson, John Bodrug and Matthew Milne-Smith