UNDERSTANDING COST IMPLICATIONS SHOULD YOU LOSE

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INTRODUCTION

Unfortunately, you can lose. You can lose preliminary motions; you can lose the certification motion; you can lose the trial, or you can lose the appeal. There can be serious cost implications at each stage and obviously they get worse the farther you go in the process. The fact that you are advancing a class action does not insulate you or your client from an adverse cost award, notwithstanding s. 31 of the *Class Proceedings Act 1992*, S.O. 1992, c.6 (the "CPA") which allows the court, in exercising its discretion with respect to costs, to take into account whether the case is a test case, involves novel points of law or matters of public interest.

Everyone should know that Ontario is a "cost jurisdiction". Costs generally follow the outcome of the event, whether the event is a motion, trial or appeal. The same general considerations that arise under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 and Rule 57 apply to class actions, albeit somewhat tempered by s. 31 of the CPA.

It should be noted that even the so-called "no costs" regimes, British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan, carry the risk of adverse costs awards in the event of an unsuccessful certification, on the basis that without a certified proceeding, it is not a class proceeding. This is discussed in more detail in Kirk Baert's paper *Costs in Class Proceedings: An Overview of the Statutory Regime in Canadian Common Law Provinces*[1].

In the early days of class actions (approximately 1992 to 2002), there was good reason to think that, if a significant motion was lost, the courts would either immunize unsuccessful plaintiffs from adverse costs using s. 31 of the CPA or at least that adverse costs awards would be relatively painless, e.g. $15,000.00 for an unsuccessful certification motion – see, for example, *Huras v. ComDev Ltd.*[2]

The sea change which resulted in significant adverse costs awards to unsuccessful parties is probably the Ontario cost regime which was introduced on January 1, 2002. While that "cost grid" was subsequently removed, its introduction greatly inflated costs awards in all actions. The later removal of the cost grid did not significantly ameliorate the new, more generous costs awards which had become the norm.

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[1] Osgoode's 6th Annual Symposium on Class Actions, April 2-3, 2009.

[2] [2000] O.J. No. 2124 (S.C.J.).

Thus, in 2002, Justice Nordheimer started making significant costs awards against unsuccessful plaintiffs in various cases including *Gariepy v. Shell Oil*[3] ($175,000.00), while giving even more to successful plaintiffs (e.g. *Hague v. Liberty Mutual*[4] $300,000.00). Other judges awarded more than $400,000.00 to a successful plaintiff on a certification and related motions in *Mandeville v. Manufacturers Life*[5], and more than $600,000.00 to the successful plaintiff (on certification) in *Andersen v. St. Jude Medical Inc.*[6]

S. 31 CONSIDERATIONS

S. 31 of the CPA expressly provides:

> **31.** (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).
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> (2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims. 1992, c. 6, s. 31 (2).
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> (3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court. 1992, c. 6, s. 31.

S. 31 still provides protection to the unsuccessful plaintiff in appropriate cases. The Court of Appeal applied it in 2008 when it reversed itself in *McNaughton Automotive Limited v. Co-Operators General Insurance Company*[7]. The court found that this decision involved a true test case and awarded no costs. That decision, however, should be contrasted sharply with the companion decision, *McNaughton Automotive Limited v. Co-Operators General Insurance Company*[8] in which the OCA confirmed the award of substantial indemnity costs against the unsuccessful plaintiff where unsubstantiated allegations of fraud were unreasonably maintained by the plaintiffs.

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[3] [2002] O.J. No. 3495.

[4] [2005] O.J. No. 1660.

[5] [2002] O.J. No. 5388.

[6] [2005] O.J. No. 269.

[7] (2008) 93 O.R. (3d) 257 (McNaughton No. 2).

[8] (2008) 298 D.L.R. (4th) 86 (O.C.A.).

The Supreme Court of Canada has made it clear that s. 31 will not be available for "Bay Street litigation;" which concept clearly includes general commercial disputes and not just claims under s. 130 of the *Securities Act,* R.S.O. 1990, c.S.5 and involving sophisticated investors. (See *Kerr v. Danier Leather*[9]).

Note also that specific statutory provisions occasionally mandate adverse costs awards, e.g. *Securities Act,* s. 138.11 which applies to unsuccessful allegations of misrepresentation in the secondary market.

COSTS AFTER TRIAL

The worst case scenario is a case such as *Danier Leather* where the plaintiff successfully certified the case and won at trial, only to lose at the Court of Appeal and the Supreme Court of Canada.

The Supreme Court awarded costs throughout in favour of the successful defendant, Danier Leather, against the representative plaintiffs. It is anticipated that the costs, after assessment, will be in the seven figure range.

Recently, Justice Perell awarded $215,000.00 to the successful defendant after trial in *Ruffalo v. Sun Life Assurance Company of Canada*[10].

POTENTIAL LIABILITY OF COUNSEL

Justice MacKenzie (whose decision was affirmed by the Divisional Court) in *Poulin v. Ford Motor Company*[11], awarded costs on a substantial indemnity basis against both local counsel and their consulting U.S. counsel. Justice MacKenzie was perturbed by the fact that the plaintiff was misinformed and uninformed and had not been protected in the form of an agreement by counsel to indemnity the plaintiff.

Notwithstanding Justice MacKenzie's view, it is neither necessary nor ethically required that counsel indemnity a representative plaintiff. The plaintiff must, however, be properly informed and understand their exposure or you will be at risk of a personal adverse costs award.

In *Attis v. Her Majesty the Queen in Right of Canada*[12] costs of the unsuccessful certification motion in the amount of $125,000.00 were awarded against the representative plaintiffs. The plaintiffs subsequently advised that they were impecunious. Certainly, the costs were not paid.

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[9] [2007] S.C.C. 44.

[10] [2008] CanLII 5962.

[11] [2007] O.J. No. 4988.

[12] (2008), 93 O.R. (3d) 35 (Ont. S.C.J.).

The Crown attempted to enforce the costs award against plaintiffs' counsel. Justice Cullity, on December 7, 2009, rejected the initial attempt, although he left open the opportunity for further proceedings on the point. If the issue of counsel's liability had been raised before the order had been issued and entered, the implication is that, like Poulin, counsel may have suffered.

Note that in *Caputo v. Imperial Tobacco*[13] Justice Winkler applied the factors in s. 31 to deny the successful defendant, Imperial Tobacco's request for an enormous cost award. In doing so, he also rejected the attempt to have such costs award paid by plaintiffs' counsel.

CLASS PROCEEDINGS FUND

The safest course for counsel and the representative plaintiff will often be to apply to the class proceedings fund. A successful application will not only provide disbursement funding but also an indemnity with respect to adverse costs awards. The relevant statutory provisions are ss. 59.1–59.5 of the *Law Society Act* and the *Law Society Amendment Act (Class Proceeding Funding) 1992*, S.O. 1992, c.7.

The relevant forms and information can be accessed at http://www.lawfoundation.on.ca/howtoapply.php.

The downside with such an application is that it takes a considerable amount of time and effort and may be unsuccessful for reasons unrelated to the merits, such as the current size of the Fund's bank account. Furthermore, if granted, the Fund then becomes entitled, upon a successful result, to reimbursement of the monies advanced, as well as 10 % of the proceeds of the action.

Funding may also be advanced by private funders such as LexFund, although private funders are likely to be more expensive. No track record has yet been established in Ontario for third party funding. But see the following cases which are relevant to funding from independent sources; *Nantais v. Telectronics*[14] and *Smith v. Canadian Tire Acceptance Ltd.*[15]

For further information on costs awards in class actions, also see the following articles:

> *Costs Outcomes in Class Actions in Ontario: A Pragmatic Review of Costs Analysis in Recent Years*, by S. Bjorkquist, G. Scott and M. Thompson, December 1, 2009 OBA Class Action Colloquium
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> *Class Action Costs Regimes Across Canada*, D. Klein and D. Lennox, Osgoode 5th Annual Symposium on Class Actions, April 2008

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[13] [2005] CanLII 63806 (Ont. S.C.J.).

[14] (1996), 28 O.R. (3d) 523.

[15] (1995), 22 O.R. (3d) 433.