

CLASS ACTIONS: COSTS

MICHAEL A. EIZENGA
CHARLES M. WRIGHT

The issue of the costs which may be payable, both at the conclusion, and at various stages of a class action, is a factor which is of vital importance to plaintiffs, defendants, and, perhaps most particularly, the representative plaintiff. In recognition of the important role of costs in a class action, the *Class Proceedings Act, 1992* and the *Law Society Amendment Act (Class Proceedings Fund), 1992* include some specific provisions relating to costs. Some issues relating to costs have now been addressed by the Ontario Courts. It appears that the Courts are interpreting the cost rules in such a manner as to encourage legitimate class proceedings, while not unduly taxing a Defendant.

COSTS TO THE PLAINTIFF

It is clear that a plaintiff may obtain costs from a defendant in the event of success either on an interlocutory or final basis. The quantum of costs which is appropriate is still very much at issue. For example, costs of a contested certification in a complex products liability case have varied anywhere from \$5,000.00¹ to \$293,205.59². The costs of interlocutory motions may be payable to the plaintiff notwithstanding the fact that the solicitors for the plaintiff are pursuing the matter

¹ *Bendall et al v. McGhan Medical Corporation et al* (1993) 14 O.R. (ed) 734, with supplementary reasons [as yet unreported] released on October 22, 1993. It may be that the novelty of the proceeding (this was the very first class action certified) prompted Montgomery J. to award costs which were quite nominal.

² *Nantais et al v. Telectronics Proprietary (Canada) Limited et al* (1996) 28 O.R. (3d) 523

on an entirely contingent basis.³

In *Windisman v. Toronto College Park*⁴, His Honour Justice Sharpe clarified several issues relating to costs. His Honour made the following rulings:

- 1) As in an ordinary action, costs are generally payable to the plaintiff in event of success in the action.
- 2) Offers to settle made by a plaintiff should be considered in the usual manner. Note that the cost consequences of an offer to settle by a defendant do not apply in the class action context.⁵
- 3) Any cost award should reflect the Class Counsel's legal fee without considering the application of any multiplier or a contingency fee agreement. Mr. Justice Sharpe reasoned that if contingency arrangements are strictly between the plaintiff class and the solicitor, and "are intended to create the incentives necessary to facilitate access to the Courts, an attainment of that objective in no way depends upon holding the defendant liable for more than the usual measure of costs".

COSTS TO THE DEFENDANT

In the event that a plaintiff is unsuccessful at an interlocutory or final stage of a proceeding, a representative plaintiff must be concerned with respect to potential cost consequences for him or

³ Ibid

⁴ *Windisman v. Toronto College Park* (August 26, 1996) O.J. 2897 (unreported) Gen. Div., Mr. Justice Sharpe

⁵ *Courts of Justice Act*, Ont. Reg. 770/92, s. 12.04(4).

her personally. The Ontario Law Reform Commission did consider abrogating the ordinary party and party costs rule, and replacing the practice with a general rule that no party and party costs should be awarded to either party at the certification and common questions stages of a class action.⁶ This recommendation was rejected, as were other possibilities such as the establishment of limits and tariffs.⁷ As such, the quantum of costs which is appropriate is still very much in issue, as discussed earlier. However, the concern that cost consequences could discourage class actions is addressed to some extent both by the *Class Proceedings Act, 1992* and the *Law Society Amendment Act (Class Proceedings Funding), 1992*.

The Court is specifically provided with discretion regarding cost awards in a class action pursuant to the *Class Proceedings Act, 1992*: "(I)n 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."⁸ To date, the courts have widely supported the concept that in order to ensure access to the courts, costs should not be awarded against a representative plaintiff where a class action, although reasonably pursued, is unsuccessful.⁹

⁶ *Ontario Law Reform Commission Report on Class Actions* (1982).

⁷ The *Law Society Act*, s.59.5(d), authorizes the making of regulations establishing limits and tariffs for costs awards recoverable by defendants where a plaintiff has obtained funding from the Class Proceedings Fund.

⁸ *Class Proceedings Act, 1992*, s. 31(1)

⁹ *Abdool v. Anaheim Management Ltd.* (1995) 21 O.R.(3d) 453;

Smith v. Canadian Tire Acceptance Ltd. (1994) 19 O.R.(3d) 610;

Garland v. The Consumer's Gas Co. (1995) 22 O.R.(3d) 767.

In *Garland*, Winkler J. states:

The case law reflects the court's inclination to refrain from awarding costs against unsuccessful plaintiffs in class proceedings where some or all of the criteria in s. 31(1) are present. In *Abdool*...the court held that because the case involved the interpretation of recent legislation no costs should be awarded. In *Smith v. Canadian Tire Acceptance Ltd.*..., in the exercise of my discretion, I made no order as to costs, in part because the matter raised a novel point of law. In *Smith v. Canadian Tire Acceptance Ltd.*...interpreting s.31(1), I stated that in a case of a novel nature and absent any circumstances which would militate to the contrary, the court may exercise its discretion and decline to award costs to the successful party.

On the contrary, in *Elliott v. Canadian Broadcasting Corp.* (1993) 16 O.R.(3d)677 (Gen. Div.)...in the absence of any of the factors enumerated in s.31(1) or any other special circumstances, Mr. Justice Montgomery applied the customary rule that party-and-party costs follow the event of the disposition...

Having stated that all three factors are present here, the exercise of discretion by the court in a procedure of this nature involves a careful balancing of the plaintiff's right to access to the justice system where the case is a novel one, a test case or one that raises an issue of public interest, with the defendant's customary right to its costs as the successful party to the litigation.

In the exercise of my discretion, for all of the above reasons, I make no award as to costs.

The other sources of legislative protection for a representative plaintiff is found in the Class Proceedings Fund, established by the *Law Society Amendment Act (Class Proceedings Funding)*, 1992. The Fund provides financial support for disbursement funding and also provides protection for the representative plaintiff against adverse cost awards. If the representative plaintiff has received disbursement funding from the class proceedings fund, the fund will be liable to pay any costs award made in favour of the defendant.¹⁰

¹⁰ *Law Society Act*, s. 59.4

Despite the protection against adverse cost awards which the Class Proceedings Fund provides, obtaining funding does have a potentially negative impact on the Class as well. A successful plaintiff Class must pay a levy to the Fund which is the sum of any financial support paid to the plaintiff by the Fund plus 10 percent of the amount of any award or settlement.¹¹ In other words, if a plaintiff receives financial support in the amount of \$50,000.00 and obtains a judgment in the amount of \$2,000,000.00, a \$250,000.00 levy must be paid to the Fund (\$50,000.00 + \$200,000.00). Two hundred thousand dollars of potential compensation is lost to the Class. This is a significant cost to the Class if the disbursements and/or potential cost consequences are not such that funding is deemed necessary. The Fund is discussed at greater length in a presentation to follow.

As discussed, where a plaintiff receives funding from the Class Proceedings Fund, the representative plaintiff will not be responsible for costs. In *Garland*, the successful defendant argued that costs ought to be payable from the Fund. The Fund, which has a statutory right to make representations¹² regarding costs which may be awarded against it, argued that in addition to the factors outlined in section 31(1) of the *Class Proceedings Act, 1992*, the Court ought to consider the Fund's limited financial resources in arriving at its determination. Winkler J. concluded that, "the impact of a costs award on the Class Proceedings Fund is not an appropriate consideration for the court in determining whether to award costs to a worthy party in an

¹¹ O. Reg. 771/92 *Class Proceedings* s.10

¹² *Rules of Civil Procedure*, R. 12.04(2)

appropriate case."¹³ Interestingly, Winkler, J. nonetheless came to the conclusion at the above motion that no costs should be awarded.

The exception to the developing rule that costs will generally not be awarded against a representative plaintiff would seem to be where one of the section 31(1) factors does not exist or, more likely, where the Court is not convinced that the class proceeding was conducted in an appropriate manner or for an appropriate purpose. For example, in *Smith v. Canadian Tire Acceptance Corp.*¹⁴, His Honour Justice Winkler awarded costs in favour of the defendant against an individual and a Society whom he felt were "the real plaintiffs", and who sought to improperly benefit from the litigation. The Court reviewed the actions of the Society and the individual who was described as acting as the Society's representative, and concluded that, "This scheme was ill-founded and flawed both conceptually and in law. The promises of financial gain for registrants were irresponsible, and the conduct of the Society and Mr. Whaley in attempting to gain financially from the action was akin to maintenance and champerty."¹⁵

THE REPRESENTATIVE PLAINTIFF AND COST CONSIDERATIONS

Despite the fact that the Courts have to date been extremely reluctant to award costs against a plaintiff in a class proceeding, a representative plaintiff should be concerned to a certain extent

¹³ *Windisman v. Toronto College Park* (August 26, 1996) O.J. 2897 (unreported as yet) Gen. Div, Mr. Justice Sharpe.

¹⁴ (1995) 22 O.R.(3d) 433

¹⁵ *Smith et al. v. Canadian Tire Acceptance Limited* (1995) 22 O.R.(3d) 433, appeal dismissed 26 O.R.(3d) 94 (C.A.).

of the potential for a cost award in the event that the action is unsuccessful. Where the action involves relatively minor compensation to each class member, a plaintiff, without appropriate assurances, would be reluctant to act as the class representative. Applications to the Fund ought to receive a solicitor's consideration.

In addition to the potential cost consequences, a representative plaintiff must consider the time commitment which may be required. A representative plaintiff will tend to invest considerable time in a action as compared to the "absent" members of the class. One Court has found that it was reasonable in particular situations to award compensation to the representative plaintiff based on the time spent on the file for the benefit of the class. In *Windisman*, the Court awarded \$4000.00 to the representative plaintiff based on 100 hours spent advancing the litigation; an hourly rate of \$40.00 per hour was paid. The court reasoned:

Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent.¹⁶

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Windisman v. Toronto College Park (August 26, 1996) O.J. 2897 (unreported) Gen. Div. Mr. Justice Sharpe

NOTICE TO THE CLASS

Notice will generally take one of two forms. The class may be readily identifiable by either the plaintiff or defendant, in which case actual notice may take place by mail and will be relatively inexpensive. Alternatively, some or most class members may be unidentified, and general notice, including newspaper publication or other public notice, will be necessary. This notice, particularly where the class members may be spread over a large geographic area, can be very expensive.

While one Court theorized that "having the defendant pay the cost of having themselves sued" seems inappropriate¹⁷, other courts have been of the opinion that an appropriate division of notice costs is that both the plaintiff and defendant contribute, often in an equal manner.¹⁸ This approach is supported by the reasoning that notice is in effect to the benefit of both the plaintiff and the defendant. The Defendant has already been sued. The proceeding has been certified. At this juncture, it is in the interest of the defendant to ensure that notice is complete and adequate, in order that those individuals who do not choose to opt out, or do not take the steps necessary to secure compensation, cannot later argue that notice was inadequate.

With the advent of the *Class Proceedings Act*, 1992, both plaintiffs and defendants have somewhat

¹⁷ *Nantais et al v. Telectronics Proprietary (Canada) Limited et al* (1996) 28 O.R. (3d) 532

¹⁸ *Bendall and Wise v. McGhan et al* (1993) 14 O.R. (ed) 734, with supplementary reasons [as yet unreported] released on October 22, 1993.

Campbell and Pryce v. W.C.I. Canada Inc. (unreported)

Bisignano v. La Corporation Instrumentarium (unreported)

operated in a vacuum with respect to costs. Recent decisions from the courts have clarified the ground rules regarding cost awards in class actions. However, the law in this area still has many developments which must take place before a solicitor can provide his or her client with a firm opinion regarding possible cost consequences of a class action. Given the considerable time and expense involved in any class action, both plaintiff and defendant must consider, early in the proceeding, what costs are likely to result, what impact this will have on the client, and how their strategy regarding the action might accommodate such cost awards.