COURT FILE NO.: 95-CU-82186CA
DATE: 2005/03/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER HYDUK	*Kirk M. Baert and C. Poltak* for the Plaintiffs
	Brian J.E. Brock, Q.C., for the Plaintiffs' Counsel
Plaintiffs	
- and -	
IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.	*Lyndon A. J. Barnes* and *Deborah Glendinning*, for defendant Imperial Tobacco Canada Limited
	Susan Wortzman, for the defendant RJR-Macdonald Inc.
	Steven Sofer and *Marshall Reinhart*, for the defendant Rothmans, Benson & Hedges Inc.
Defendants	
	HEARD: March 2, 2005

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

WINKLER R.S.J.

Nature of the Proceeding

[1] This is the costs disposition flowing from an unsuccessful motion to certify the action as a class proceeding brought by the plaintiffs pursuant to the *Class Proceedings Act, 1992* [1] ("CPA"). The defendants seek to be awarded their costs on a partial indemnity basis in an amount in excess of $1.2 million. In this intended class proceeding, four proposed representative plaintiffs, including the estate of one individual who died after the action was commenced, sought to certify a globally defined class ranging between 2.4 and 15 million persons. The three named defendants in the action are multi-national corporations which control almost 100% of the Canadian cigarette products market. This "industry" class proceeding was the first piece of major tobacco litigation seeking damages for personal injuries in Canada.

[2] In Reasons released on February 5, 2004 [2] the motion for certification was dismissed on the grounds that the plaintiffs had failed to establish four of the five elements required for certification under the *CPA*.

[3] The defendants submit that they are entitled to a reasonable portion of their costs of the certification motion and all of the preliminary steps leading up to the certification motion, except those proceedings where there has already been a costs disposition. In addition, the defendants have chosen the unusual route of seeking costs not only from the plaintiffs but also from counsel for the plaintiffs. In their submissions, defendants' counsel framed this as a request for costs from the plaintiffs and plaintiffs' counsel "jointly and severally".

Background

[4] The action was commenced in 1995. The certification motion record was delivered in late 1996. The affidavit evidence supporting the certification motion was deposed by Andreas Seibert, then an articling student with the plaintiffs' law firm, Somers and Roth. Mr. Seibert deposed a supplementary affidavit in January 1997. The plaintiffs did not file any direct evidence in support of the motion. As a result, the defendants moved under r.39.03 to examine each of them. The court ordered that they attend for examinations and produce their medical records. The examinations took place over six days between June 1999 and January 2000.

[5] The defendants filed seven affidavits in opposition to certification, deposed respectively by five experts and two other witnesses. The plaintiffs cross-examined the defence witnesses for 12 days between March and October 2001. The cross-examinations were interrupted by a motion for directions. At that motion the plaintiffs brought a cross-motion seeking leave to deliver fresh evidence, including a further affidavit of Mr. Seibert. Leave was denied.

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[1] S.O. 1992,c.6

[2] (Reported at (2004), 44 CPC (5th) 350; (2004), 236 DLR (4th) 348)

[6] Cross-examinations of the defendants' witnesses were followed by a refusals motion brought by the plaintiffs before Master MacLeod. That motion took place over 5 1/2 days and concluded on June 21, 2002. The plaintiffs were marginally successful on the motion. Costs were dealt with on the motion and do not form part of this proceeding.

[7] In August 2002, prior to the release of Master MacLeod's Reasons, the plaintiffs served four affidavits of expert witnesses and a new affidavit of Mr. Seibert. In spite of having concluded cross-examinations of the defence deponents, the plaintiffs brought a second fresh evidence motion seeking leave to file the affidavits but withdrew it while it was being heard. A costs disposition was made on the motion and the defendants do not seek any further costs now.

[8] On November 20, 2002, the plaintiffs served a lengthy Request to Admit seeking to admit evidence which had been the subject of the earlier motions. On December 10, 2002 the court heard an appeal by the plaintiffs from the decision of Master MacLeod on the refusals motion. The result was mixed. The court advised that the propriety of the Request to Admit would be ruled on during the hearing of the next proposed fresh evidence motion.

[9] On September 23, 2003, the plaintiffs brought a third motion to admit fresh evidence. The motion was unsuccessful as was the attempt to deliver the Request to Admit. There was no disposition as to costs on that motion. The certification hearing was scheduled in consultation with counsel and set for two full weeks in January 2004.

[10] On January 12, 2004, the certification motion was heard for six days. As stated, the motion for certification was dismissed in Reasons released February 5, 2004, and the disposition as to costs reserved. Because the defendants had notified the court of their intention to seek costs personally against plaintiffs' counsel, a hearing, as required under r. 57.07(2) was held on March 2, 2005.

Positions of the Parties

[11] The defendants seek their costs on a partial indemnity basis in the cumulative amount of over $1.2 million including GST and expert fees, apportioned as follows:

Imperial Tobacco Limited – (Oslers)	$490,817.91
Rothmans, Benson &Hedges Inc. – (Gowlings)	$184,850.01
JTI-Macdonald Corp. – (Lerners)	$347,532.97
Experts (All defendants, collectively)	$255,655.22.

[12] The defendants submit that there is no reason to depart from the general rule that costs should follow the result on a partial indemnity basis. In the defendants' collective

view, none of the factors in s. 31(1) of the *CPA* are present. They argue that it is not a test case, there is no novel point of law involved, nor does the proceeding raise a matter of public interest. In other words, the defendants contend that the proceeding is just a straightforward claim for damages for personal injuries, albeit a complex one of great magnitude.

[13] The defendants also point a finger at the plaintiffs for the high costs, contending that the manner in which the plaintiffs chose to prosecute the action drove the fees and disbursements required to defend the proceeding. As examples, they cite the fact that the scope of the class definition constantly shifted, right up to the certification motion; the number of causes of action asserted (9); excessive cross-examinations; excessive motions seeking to file fresh evidence or expand on cross-examinations; the large number of common issues advanced, which were in a state of flux throughout the proceeding as well. More damning, from the defendants' point of view, is that the costs incurred were necessitated in large part by the defective affidavits originally filed in support of the motion for certification. The defendants contend that the plaintiffs' strategy of repeated attempts to seek to introduce new evidence was driven because of the errors made at the outset.

[14] Finally, the defendants unique approach to claiming costs on a "joint and several" basis from counsel as well as the plaintiffs is based on an underlying submission that counsel were the "real plaintiffs" because of the prospect of a large contingent fee. This they contend is underscored by an inference they would have the court draw, namely, that the proposed representative plaintiffs would not have contested this lawsuit, given the prospect of potentially small personal benefit weighed against large cost exposure.

[15] The plaintiffs' primary response is that this is a case that clearly invokes s. 31 of the *CPA* and, when the enumerated factors are considered properly, it necessarily follows that there should be no costs awarded. In the plaintiffs' view, the proceeding was a "test case", raising "novel" issues and had a strong "public interest" component.

[16] The plaintiffs did not, however, limit their submissions to the invocation of s. 31 of the *CPA*. They also advanced the argument that there was "ample blame to go around" for the fact that it took eight years to amass the 68 volume certification record. In addition, the plaintiffs attribute the costs incurred in the proceeding, in part, to the defendants "overloading" of the motion record with evidence going to the merits of the case, contrary to the express admonition of the motions judge on the defendants' motion to examine under r. 39(03) and notwithstanding the procedural nature of a certification motion.

[17] Finally, the plaintiffs contend that excessive costs are being sought as a result of "over-lawyering" the case by the defendants.

[18] The fact that costs were being sought personally against the plaintiffs' counsel on the motion caused plaintiffs' counsel to retain separate counsel on their own behalf. Counsel for the plaintiffs' counsel argued that the case was properly prosecuted with due diligence, for legitimate plaintiffs. He also contended that r. 57.07(2) had no application in the present circumstances because the defendants admit that there was no bad faith or improper conduct on the part of plaintiffs' counsel. In other words, counsel for the plaintiffs' counsel contends that in the absence of impropriety, the tactical decisions of a solicitor, regardless of the result or the costs expended in reaching the result, cannot serve as a basis for an award of costs against him or her personally.

Analysis and Disposition

[19] Under s. 131(1) of the *Courts of Justice Act* [3], the costs of a proceeding or a step in a proceeding are in the discretion of the court. It reads:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[20] The reference to "the provisions of an Act" as a potential modifier of the court's discretion clearly applies here, in that s. 31 of the *CPA* provides as follows:

> 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.

[21] In my view, both parties ignored the procedural nature of the certification motion in favour of providing material and evidence going directly to the merits of the case. It cannot be entirely a coincidence that the legislature chose to insert a requirement, in s. 2 of the *CPA*, that the certification motion be brought within 90 days of the filing of the last statement of defence. Nor can it be ignored that s. 5(5) of the *CPA* specifically states that an "order certifying a class proceeding is not a determination of the merits of the proceeding". Both of these provisions are indicative that it is not expected that the parties will develop either merits based records or arguments in support or defence of the certification motion. Any doubt in this regard left by the legislation was removed when the Supreme Court of Canada held in *Hollick v. Toronto (City)* [4] that the cause of action was the only element of the test for certification under s. 5 for which evidence is not required on a certification motion. Further, in this case, specific direction in this regard was given to the parties in the Reasons of this court permitting the examinations of the plaintiffs under r. 39.03.

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[3] R.S.O. 1990,c.C.43
[4] [2001] 3 S.C.R. 158

[22] There is no doubt that the inclusion of merits-based evidence in the record, and the resulting need to cross-examine on that evidence, dramatically increased the costs to both sides in this proceeding. Such decisions are within the purview of counsel. It is not the role of the court to dictate to the parties how their resources should be expended in litigation. However, the court is required to observe the principles of reasonableness and fairness when determining what portion, if any, of the expended costs should be recoverable from the losing party.

[23] The principles to be observed in assessing costs are set out in two recent Court of Appeal for Ontario decisions. As stated by Cronk J.A. in *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*[5]:

> …a critical controlling principle for the fixing of costs …is to ascertain an amount that is a fair and reasonable sum to be paid by the unsuccessful litigant, rather than any exact measure of the actual costs to the successful litigant…

[24] Similarly, Armstrong J.A., writing for the court in *Boucher v. Public Accountants Council for the Province of Ontario*[6], states that:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

[25] Armstrong J.A.'s reference to the "fair and reasonable expectation of the parties" provides useful guidance in assessing costs related to a certification motion under the *CPA*. When considered in conjunction with the legislative provisions, and the Supreme Court affirmation of the procedural nature of the certification motion in *Hollick*, the logical conclusion is that the fair and reasonable expectation of the parties to a certification motion is that costs, if awarded, will be discounted for time and effort expended on developing evidence going to the merits of the case. This applies equally whether the successful party is a plaintiff or a defendant. The procedural nature of the

[5](2004), 71 O.R. (3d) 63 at para. 97
[6](2004), 71 O.R. (3d) 291 at para. 37

certification motion advocates against any award of costs for effort related to the merits of the case.

[26] Accordingly, the costs claimed by the defendants would in all likelihood be dramatically reduced if the record were to be parsed of all merits-based evidence, and the corresponding fees and disbursements related thereto were deducted from the bills of costs. In this case, the nature and extent of the record could serve to render this task insurmountable. I note as well that, here as in other cases, the analysis will be complicated by the fact there will undoubtedly be an overlap between evidence going to the procedural elements and the merits of the proceeding.

[27] However, when dealing with a costs application under the *CPA*, the inquiry does not end with an analysis of the fees and disbursements incurred with respect to only the procedural aspects of the certification motion. The factors under s. 31 of the *CPA* must be considered to determine if they apply and to what extent, if any, their application will affect the disposition as to costs. Since I have concluded, for the reasons that follow, that a consideration of the factors under s. 31 militates against an award of costs in this proceeding, I need not pursue the analysis of the bills of costs presented by the defendants any further.

[28] The defendants submit that a costs disposition in a class proceeding is no different from that in any other proceeding. I disagree. In no other court proceeding is it necessary for a plaintiff to obtain the sanction of the court in the form of certification of the proceeding in order to go forward with the action. A class proceeding is not merely a normal action up to the time of certification. Rather, it is an intended class proceeding and subject to the full range of the *CPA*.

[29] A class proceeding is different in another respect. A certification motion turns on the court being satisfied as to the presence of the five factors set out in s. 5 of the *CPA*. All but one of these elements is objective and lends itself to an analytical approach. The element of preferable procedure is another matter entirely, however. A consideration of whether a class proceeding is the preferable procedure for determining the common issues is a matter of broad discretion. Thus counsel to the proposed representative plaintiffs can do everything right and still be unable to predict with certainty the outcome when it comes to this criterion. Surely if a class were not certified on this ground a court would be justified in the exercise of its discretion to consider this in deciding whether to award costs against the plaintiff.

[30] The other side of the coin is where plaintiffs' counsel bring a class proceeding to obtain settlement leverage and the action has little or no merit. In such an instance a court could also consider this fact in arriving at its costs disposition.

[31] In summary, it is difficult to conceive of how a class proceeding with its ever-present dynamic, statutory framework and potential size does not bring special considerations to bear on a costs disposition, especially in respect of a certification motion. Indeed the defendants advert to the special nature of a class proceeding when it

comes to the their assertion that costs ought to be payable by the plaintiffs' counsel personally by reason of their alleged role in advancing the litigation in hopes of personal gain by reaping a handsome contingent fee.

[32] More importantly, as stated above, the legislature has specifically identified three factors in s. 31(1) of the *CPA*. To be consistent with the goals of the Act, special weight must be given to them in assessing costs in a class proceeding. In other words, while a proper exercise of discretion must always be based on the facts before the court, significance must be also given to the existence or absence of the factors in s. 31(1). In that regard, the proper approach is to consider whether any of the factors in s.31(1) are present as seen through the lens of the goals of the Act in the factual context of the case.

[33] In my view, two of the three factors set out in s. 31 of the *CPA* have application here, namely, that the proceeding raised a novel point of law and that it had a strong public interest component. On the other hand, I do not accede to the argument of the plaintiffs and their counsel that the proceeding was brought as a test case. A test case involves a resolution of a legal principle. It is not a mere application of principles of law to a given fact situation. This proceeding was not brought to ascertain the state of the law on a particular issue in order that the principle would govern a number of similar actions.[7] The present proceeding is not a test case within the meaning of s. 31(1).

[34] The proceeding does raise novel points of law. Firstly, it must be remembered that this proceeding was commenced when jurisprudence interpreting the *CPA* was relatively sparse. In 1995 the *CPA* was in its infancy. Indeed there was very little appellate jurisprudence interpreting the Act and no case had reached the Supreme Court of Canada. In fact, because it has been hard fought throughout its 9-year history, Reasons issued from time to time by the various judges and masters overseeing this proceeding have helped flesh out the legislative framework of the *CPA*. As one example, and in a touch of irony given these Reasons, the decision on the r. 39.03 motion in this proceeding was cited by the Supreme Court in *Hollick* as support for the proposition that an inquiry into the merits of the proceeding is not relevant on the certification motion. It would do an injustice to the plaintiffs to view this case based on class proceedings law as it exists today in determining whether there was any novelty present in the proceeding at its inception in 1995.

[35] Secondly, while the case is essentially a products liability case seeking damages for personal injuries, the cause of action sounding in breach of implied warranty is novel, as is the claim of conspiracy.[8] From that perspective, the case involves novel points of law in that it deals principally with broad legal issues and not merely the identity of the actors. The novelty does not arise simply because it involves a suit against tobacco companies as such but because of the nature of certain of the claims advanced.[9]

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[7] See: *Williams v. Mutual Life Assurance Co.*, [2001] O.J. No. 445 (SCJ); *Edwards v. Law Society of Upper Canada*, [1998] O.J. No. 6192 (SCJ).
[8] See: Reasons for decision supra Fn.2 paras. 20-27.
[9] See: *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4298 (SCJ).

[36] The third criterion in s. 31(1) is whether the class action involves a matter of public interest. In my view it does. Several definitions of the "public interest" element under s. 31 have been enunciated by Ontario courts. For example, "the class action must have some specific, special significance for, or interest to, the community at large beyond the members of the proposed class…"[10] or " the action therefore [must] raise issues that are of interest well beyond the specific interests of the members of the proposed class."[11] Although I would hesitate to conclude that those definitions are exhaustive, it is my view that a class proceeding against the tobacco industry is captured by them. The defendants assert that the tobacco industry is the most regulated industry in Canada. This augurs for a finding in favour of a strong public interest component when it comes to dealing with tobacco products rather than a conclusion to the contrary.

[37] A proceeding such as the present one can also be said to be designed to advance one of the goals of the *CPA*, behavioral modification. In *Edwards v. Law Society of Upper Canada*[12], Sharpe J. stated that he would be "reluctant to award costs against an individual having a modest individual stake who brings a proceeding, either for the benefit of a much larger group which has been similarly wronged … *or where the proceeding has been launched in order to achieve behavioral modification by the wrongdoer.*"(emphasis added)

[38] Although the plaintiffs may not have succeeded in obtaining certification, the action clearly had at its core the health issues related to smoking. Having no regard whatsoever to the motion record, the court would still be entitled, based on the test set out in *R. v. Williams*[13], to take judicial notice of the fact that use of tobacco products is considered to constitute a serious risk to the health of the public in this province and elsewhere in Canada. It logically follows that any proceeding that might have the effect of either curtailing the use of those products or visiting the health costs of their use on the defendants rather than the public at large clearly raises issues that go beyond the interests of the proposed class, and is of some specific societal significance to residents of Ontario and the rest of Canada.

[39] Accordingly, I make no order as to costs.

[40] Given my finding that a consideration of s. 31 in the context of the factual matrix of the proceeding precludes an award of costs, it follows that the assertion by the defendants that costs should be jointly and severally payable by the plaintiffs and their counsel is moot. In any event, I do not find the defendants contention in this respect to be compelling.

[41] The provision in the *CPA* specifically permitting contingent fee arrangements is intended to enable plaintiffs of modest means, or with modest claims, to access the justice system. The simple fact that counsel may be more heavily involved in a class proceeding

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[10] *Williams*, supra, Fn 4.
[11] *Moyes*, supra, Fn 6 para. 7.
[12] Supra, Fn 4 para. 14.
[13] [1998] 1 S.C.R. 1128

is neither surprising nor a valid reason to elevate them to the status of party to the proceeding for costs purposes. Counsel, although taking instructions from the representative plaintiffs, must also ensure that those plaintiffs are properly advised, both as to their duty to the class as a whole and that the prosecution of the action must be carried out in a manner that advances the interests of the class.

[42] Here, while the defendants take pains to point out that they do not allege any bad faith or improper conduct on the part of plaintiffs' counsel, they allege at the same time that the plaintiffs' counsel were the *de facto* plaintiffs by their conduct. There is no evidence to support that assertion and I reject it. Access to justice and the other laudable goals of the *CPA* will only be served as long as there are counsel willing to take risks in order to advance the cause of plaintiffs of modest means or modest claims. The fact that counsel stand to be rewarded for successfully taking the risk does not make them a *de facto* party but rather is entirely consistent with the scheme of the *CPA.* To apply the reasoning of Armstrong J.A. to the *CPA*, costs awards remain a potential "reality check" to deter frivolous litigation and abuses of the justice system, but we must remain vigilant to ensure that they do not become more than that. The "chilling effect" of inordinate or improperly founded costs awards against plaintiffs or their counsel will likely have the effect of rendering the goals underlying the *CPA* unachievable.

[43] In all the circumstances, I find no basis for an award of costs against the plaintiffs' counsel, either in the arguments advanced by the defendants with respect to class proceedings in general or under r. 57.07 in particular.

[44] Order to go accordingly.

WINKLER R.S.J.

Released: March 8, 2005

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