Litigation - Canada

Changing cost trends in class actions

Contributed by **Dentons**

March 18 2014

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Introduction

In 2013 Justice Belobaba released five decisions that addressed legal principles relating to awards of costs on class action certification motions. These cases sent a clear message to the class action bar: "Access to justice, even in the very area that was specifically designed to achieve this goal, is becoming too expensive."(1) Belobaba observed that in some cases, overzealous counsel may be partially responsible for this trend. Using similar reasoning and language in *Rosen v BMO Nesbitt Burns Inc*,(2) *Crisante v DePuy Orthopaedics*,(3) *Dugal v Manulife Financial*,(4) *Brown v Canada (Attorney General)*(5) and *Sankar v Bell Mobility Inc*(6) (collectively, the 'Pentalogy'), Belobaba recommended changes to the prevailing approach to cost awards on certification motions which, if followed, would turn Ontario into a 'no-costs regime'.

Background

In 1982 the province of Ontario sought recommendations from various legal organisations to consolidate all procedural and substantive matters relating to class actions into a single statute, which led to the enactment of the Class Proceedings Act, 1992.(7)

One of the recommendations that the provincial legislature received was from the Ontario Law Reform Commission (OLRC) – now the Law Commission of Ontario. The OLRC identified three major goals of a class action regime:

- judicial efficiency;
- increased access to courts; and
- behaviour modification.

In order to achieve these objectives, the OLRC recommended enactment of class action legislation with a 'no-costs regime' as a general rule, whereby costs would not be awarded to any party in a class action at any stage of the proceedings, including an appeal, in order to meet the goals of judicial efficiency and increased access to justice.(8)

Belobaba had these objectives in mind when he wrote his decisions in the Pentalogy. Belobaba wrote that over the years, he had spoken to many members of the class actions bar and had come to appreciate and endorse the implementation of a no-costs regime that had been supported by the OLRC. Belobada's reasons in *Rosen* included the following admission:

> *"I also wish that the recommendations on costs as set out in the Ontario Law Reform Commission's Report on Class Actions had been accepted. Instead, the provincial legislature decided to adopt the views of the Attorney-General's Advisory Committee and continue the 'costs follow the event' convention for the very different world of class actions as well. I was a member of that Advisory Committee. I now realize that I was wrong and that the OLRC was right. I understand that the provincial Law Commission is undertaking a review of the Class Proceedings Act, including the costs provisions. Hopefully, our mistake will be corrected."*(9)

Analysis

Belobaba provided the court with statistics and directions that the judges should follow as part of the determination of costs on class certification motions. The starting point of his analysis was Rule 57.01 of the Rules of Civil Procedure, which lists various factors that the court may consider in exercising its discretion to award costs. According to Belobaba, the biggest limitations in the current jurisprudence on costs are the absence of reliable metrics and unclear analysis of the principles relied upon by the court while awarding costs. In order to create a clear and complete regime for awarding costs on such motions, Belobaba:

- identified factors that the court should consider while deciding a costs award for a certification motion; and
- performed an analytical review of costs awards for certification motions over the past six years and developed a chart with various costs ranges for specific certification motions.(10)

In laying down his directions, Belobaba recognised that a certification motion is one of the most important steps in any class action litigation and requires a lot of preparation. Therefore, inevitably, the cost awards are higher in certification motions than in most other motions. Nonetheless, the costs must be reasonable. In order to determine whether costs are reasonable, Belobaba suggested that the courts should take into account the amount of costs that an unsuccessful party could reasonably expect to pay and also undertake a comparative analysis of costs awarded in closely comparable cases. Above all, the courts should keep in mind that a fundamental objective of the Class Proceedings Act is to provide enhanced access to justice.(11)

In order to ensure that access to justice is achieved, Belobaba also suggested that courts should rely less on the costs outlines submitted by counsel. Belobaba indicated that he would accept cost outlines, but would not ask the lawyers to submit their actual dockets. After ensuring that the cost outlines are not unreasonable, he stated that he would do a comparative historical review of costs in order to make the process more transparent. Belobaba collected data from the cost awards rendered in the past six years and summarised as follows:

- For the plaintiff's side, on average, if the costs award sought were less than C$500,000, the amount awarded would be 63% of the costs sought. However, if the costs sought were more than C$500,000, the costs awarded would be 62% of the costs sought.
- For the defendant's side, on average, if the costs award sought were less than C$500,000, the costs awarded would be 50% of the costs sought. However, if the costs sought were more than C$500,000, the costs awarded would be 39% of the costs sought.(12)

Applying the principles and the analysis of past costs awards described above, Belobaba assessed costs sought in each of the cases in the Pentalogy. Belobaba reviewed each case to determine whether the lawyers charged their time at rates consistent with the suggested hourly rates(13) or whether they sought excessive costs. He then compared the costs being sought with similar cases and reviewed each of the cases in the light of his chart of prior costs awards. Above all, in each of the decisions, he sought to ensure that the costs awarded were fair and reasonable and satisfied the objectives of the Class Proceedings Act.(14)

Comment

Whether Belobaba's suggestions and directions usher in a no-costs regime remains to be seen. Another decision, released soon after the Pentalogy, signals that the courts may be adopting a more conservative approach towards awarding costs.(15) In *Drywall Acoustic*, Justice Perell echoed the concerns raised by Belobaba and stated:

> *"[16] While I would not express the point the same way as do the Plaintiffs, the Plaintiffs make a pertinent point in their observation that the costs in class proceedings raise access to justice concerns for plaintiffs. I agree, but I would add that access to justice is an entitlement of defendants just as much as it is for plaintiffs and the spiralling costs in class proceedings have become a threat to the viability of the class action regime…*
>
> *[18] The assessment of costs (and of lawyer's fees) must adapt to a changing and evolving class action regime and every case requires individual treatment."* (16)

By tightening the costs strings, courts potentially reduce the risk for plaintiffs in class actions to bring forward their claims and for plaintiffs' counsel to pursue these claims. Further, a more restrictive approach to cost awards for certification motions may also make investing in plaintiffs' class action litigation more attractive to third-party investors and funders. However, some members of the plaintiffs' class action bar have argued that by reducing costs awards, access to justice may actually be further reduced.(17) Some plaintiffs' counsel have also suggested that, in fact, plaintiffs' counsel principally

bear the costs of class action litigation, and Belobaba's costs regime could result in plaintiffs' counsel making a much greater investment in time and disbursements on certification motions than they could ever recover from the defendants.(18) Therefore, a more restrictive approach to awards of costs may increase the risk borne by plaintiffs' counsel and force them to be more cautious before accepting the professional obligations associated with representation of the representative plaintiff in a class action.

On the other hand, in Belobaba's analysis of past costs awards, there is a greater disparity between the costs sought and those awarded to a successful defendant on a certification motion than between amounts sought and awarded to a successful plaintiff. For the defendants which are forced to litigate a class claim which has yet to be tested on its merits, the prospect of a reduced recovery of costs would increase the financial risks that defendants' lawyers or third-party investors have to bear. Further, the risk of high costs awards has always acted as a reminder to plaintiffs of the penalty they may face for bringing an unmeritorious action. Therefore, reducing costs consequences could leave defendants more vulnerable to unmeritorious lawsuits, and possibly hold them hostage to legal proceedings without the plaintiffs risking significant financial consequences if they are unsuccessful.

How the costs regime for certification motions develops, and whether Belobaba's Pentalogy will affect the checks and balances for parties in class action litigation, can be ascertained only once other judges have had the opportunity to consider and apply – or choose not to apply – the principles laid down in the Pentalogy. However, Belobaba's Pentalogy has certainly succeeded in bringing back attention to one of the core objectives of class actions: providing access to justice at reasonable cost.

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Endnotes

(1) *Rosen v BMO Nesbitt Burns Inc*, 2013 ONSC 6356 at para 1.

(2) *Ibid.*

(3) *Crisante v DePuy Orthopaedics*, 2013 ONSC 6351.

(4) *Dugal v Manulife Financial*, 2013 ONSC 6354.

(5) *Brown v Canada (Attorney General)*, 2013 ONSC 6887.

(6) *Sankar v Bell Mobility Inc*, 2013 ONSC 6886.

(7) Class Action Proceedings Act, SO 1992, Chapter 6.

(8) Ontario Law Reform Commission, *Report on Class Actions,* Ministry of the Attorney General Volume 1, 1982. The OLRC recommendations stated:

> *"s. 2(1) party and party costs should not be awarded to a party at the certification hearing or at the common questions stage of a class action, except*
>
> *(a) at the certification hearing, where it would be unjust to deprive the successful party of costs, or*
>
> *(b) in the event of vexatious, frivolous, or abusive conduct on the part of any party. Nonetheless, the legislature did not adopt the OLRC's recommendations in this regard."*

(9) *Rosen*, *Supra* note 1 at para 2.

(10) *Rosen*, *Supra* note 1 at paras 4-5.

(11) *Ibid* at para 4.

(12) *Ibid* at para 5.

(13) The suggested guidelines for determining hourly rates for lawyers depending on their years of experience can be found in the Information for the Profession released by the Costs Subcommittee of the Rules of Civil Procedure.

(14) *Ibid* at paras 8-17.

(15) *The Trustees of the Drywall Acoustic Lathing v SNC Group Inc,* 2013 ONSC 7122.

(16) *Ibid* at para 16 and 18.

(17) *Kristen A Thoreson,*

"Class Action Costs Orders Aim to Provide Greater Access to Justice", The Advocates Society.

(18) Julius Melnitzer quoting Kim Orr, "Judge takes aim at class counsel in lowering costs", *The Law Times*, November 18 2013.