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Highlights

EXPERT REPORTS

counsel input in expert reports restricted

Expert witnesses are often key participants in professional liability litigation. While experts are typically retained by the parties to the proceedings, court rules and the principles of the law of evidence make it clear that the expert's role is to assist the court. In doing so, the expert's independence and impartiality are paramount considerations. Frank Bowman, Christina Porretta and Ara Basmadjian discuss the recent Ontario decision in *Moore v. Getahun*, which has sent shockwaves through the litigation bar in Ontario and across the country. In *Moore v. Getahun*, Wilson, J. was very critical of the involvement of counsel in the preparation of expert reports, saying that discussions between "counsel and an expert to review and shape a draft expert report are no longer acceptable." 962

ERRORS AND OMISSIONS INSURANCE

insurer's breach of the duty of good faith

The claims considered in *Ernst & Young v. Chartis* involved the intersection of fiduciary, insurance and receivership law. The Court of Appeal for Ontario considered whether a receiver, Ernst & Young, could maintain an action against an insurer for the breach of the duty of good faith when it was not the insured but the assignee of the insured. The Court of Appeal held that the receiver could not maintain such an action. Belinda Bain and Emily Heersink discuss the Court of Appeal's conclusion that as the duty of good faith was separate from the duty to indemnify, an assignment of "proceeds of insurance" did not cover damages that may be awarded for breach of the independent contractual duty of good faith owed to the insured. 966

CLASS ACTIONS

changing cost trends in class actions

Recent years have seen an increasing number of professional liability class actions. The class action battle is first joined at the certification stage. Certification motions are hard fought and expensive. Consequently, costs in such motions are matters of great interest to the litigants. In the words of Justice Belobaba of the Ontario Superior Court of Justice, access to justice in class actions "is becoming too expensive." Justice Belobaba analyzed the tension between costs and access to justice in a series of five cases decided in 2013. Frank Bowman and Deepshikha Dutt review the guidance provided in these cases. 969

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EXPERT REPORTS

Court Restricts Counsel Input in Expert Reports

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Introduction

Professional liability cases often involve expert witnesses. Although most experts are retained by a specific party to the litigation, court rules make it clear that their role is to assist the court. The admissibility and weight of expert evidence is based, in large part, on an expert's independence and impartiality. The concern that many expert witnesses serve as "hired guns" who tailor their evidence to fit the needs of their party's case remains a long-standing criticism, which underscores the tension between the theory behind expert evidence and the reality of our adversarial system.

These concerns led to the amendment of certain provisions of the Ontario *Rules of Civil Procedure*[1] on January 1, 2010. The amendments were recommended by former Associate Chief Justice of Ontario, Coulter Osborne, at the conclusion of the 2007 *Civil Justice Reform Project*.[2] The amendments changed, in part, the Rules relating to the form, content and delivery of expert reports and reflected the conclusion that experts were too focused on advocacy rather than upholding their duty to the court of independence, fairness, and objectivity.

This article will focus on the recent decision by the Ontario Superior Court of Justice in *Moore v. Getahun*,[3] which could have significant implications on expert reports and evidence and on the practice of lawyers reviewing draft expert reports. In that case, Justice Wilson held that counsel is precluded from reviewing draft expert reports, as this practice does not accord with the purpose of the recently amended Rules. In Her Honour's view, "[d]iscussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable."[4] Justice Wilson's pronouncement is no doubt based on good intentions, demonstrating the court's commitment to ensuring that experts can freely voice their opinion in an independent and unbiased manner. However, in practice, this decision could create unworkable limitations when it comes to retaining experts and the drafting of the expert report.

The Osborne Report and Recent Amendments to the Rules

The mandate of the Osborne Report was to provide a comprehensive review of the civil justice system in Ontario and deliver recommendations that would improve access to justice. Among the issues canvassed by the Osborne Report was whether new procedures should be implemented to control expert bias, which he characterized as the issue of "hired guns" and "opinions for sale."[5]

The Osborne Report concluded that an overriding duty to the court would cause experts to reflect on the content of their reports and whether their opinions were subjected to pressure. Together with a certification requirement, this duty would clarify that expert evidence serves to assist the court with its objective assessment of the issues.[6] Such an express duty to the court would buttress existing professional obligations and provide a normative standard that would apply to all expert witnesses.[7] Indeed, the British Columbia Civil Justice Reform Working Group,[8] among other organizations, had already endorsed this approach.[9]

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("the Rules").

[2] The Honourable Coulter A. Osborne, QC, *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007), online: Ministry of the Attorney General, http://www.attorneygeneral. just.gov. on.ca/English/about/pubs/cjrp/CJRP-Report_EN.pdf (the "Osborne Report").

[3] *Moore v. Getahun*, 2014 ONSC 237 ("*Getahun*").

[4] Ibid. at paragraph 50.

[5] Osborne Report, supra note 2 at 75.

[6] Ibid. at 76.

[7] Ibid.

[8] Civil Justice Reform Working Group, British Columbia Justice Review Task Force, *Effective and Affordable*

Accordingly, on the issue of expert bias, the Osborne Report recommended that the Rules adopt a new provision to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Further, that the Rules should require the expert, in an expert report, to certify that he or she is aware of and understands this duty.[10]

Many of the Osborne Report's recommendations were codified in the 2010 amendments to the Rules. For example, Rule 4.1 established, among other things, that the duty of an expert is to the court rather than the parties. In addition, Rule 53.03(2.1) sets out certain mandatory requirements for expert reports, which includes a signed acknowledgment of an expert's duty.

In *Getahun*, Justice Wilson discussed the purpose of recently amended Rule 53.03. Her Honour reiterated the fact that the purpose of the new Rule is to ensure the independence and integrity of the expert witness and that the expert's primary duty is to the court. Justice Wilson went on to state, however, that in light of this change in the role of the expert witness, counsel should be precluded from meeting with the expert in relation to draft reports, as this can lead to a perception of bias, and counsel will now have to receive the expert's final report without having reviewed the draft.[11] Further, any request for clarification will have to be made in writing while disclosing any such correspondence to opposing counsel as an attachment to any supplementary report.

A discussion of Justice Wilson's decision in *Getahun* follows, along with a discussion of the implications resulting from this decision.

Moore v. Getahun

In *Getahun*, the plaintiff commenced a personal injury action against various medical staff at a hospital on the basis that they were negligent in treating an injury, leaving the plaintiff with permanent damage to his wrist. At trial, there were several evidentiary issues with respect to expert evidence, including whether it is appropriate for counsel to review draft expert reports and provide input.

It was agreed at trial that each expert was properly qualified to provide testimony. Justice Wilson, therefore, focused her analysis on issues surrounding the experts' credibility. In doing so, Her Honour posed the following questions to guide the assessment of expert evidence:

- Is the witness fair and impartial in the report presented and in the evidence given?
- Is the expert's report and oral evidence consistent?
- Is the expert's opinion clearly set out in the report, including the facts and documents underpinning the opinion?
- Do the conclusions logically flow from the facts?
- Are alternative theories canvassed?
- Does the expert make concessions in the report where appropriate that may not be helpful to the party who retains him or her?
- Are the facts relied upon by the expert confirmed in the evidence at trial?
- Does the expert make reasonable concessions in his or her *viva voce* evidence if the facts are not as he or she assumed them to be?
- Does the witness provide balanced evidence that is neutral, or is he or she dogmatic and fixed in his or her opinion?
- Does it appear that the witness aligned with one party's position, assuming the role of an advocate, rather than acting as a neutral witness with a duty to the court?
- Is there an appearance of bias, or is there evidence of actual bias?[12]

Dr. Ronald Taylor testified as an expert witness on behalf of the defendant. During

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Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force (November 2006), online: B.C. Justice Review Task Force, http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.

[9] Osborne Report, supra note 2 at 76.

[10] Ibid. at 83.

[11] *Getahun*, supra note 3 at paragraphs 50 and 298.

[12] Ibid. at paragraph 255.

the course of the trial, Dr. Taylor was asked questions about various draft reports he authored in addition to notes of a one-and-a-half-hour telephone conversation with defence counsel.

Dr. Taylor testified that defence counsel made "suggestions ... of what to put in" his expert report.[13] The doctor adjusted his report to include "the corrections over the phone."[14] Although Dr. Taylor sought to downplay the nature of counsel's "corrections," Justice Wilson found that some content, which was helpful to the plaintiff, was either deleted or modified.

The plaintiff argued that it was inappropriate for defence counsel to make suggestions to the expert concerning his report. Defence counsel took the position that experts are entitled to prepare draft reports to be shared with counsel for comment.

Counsel's Practice of Reviewing Draft Reports Should Stop – Not an Issue of Weight

Counsel for the defendant relied on *Flinn v. McFarland*,[15] a decision of the Nova Scotia Supreme Court, to support its position that it is appropriate for counsel to review a draft expert report, and that it is merely a matter of weight to be accorded to the expert's opinion. In that case, the plaintiff's counsel received a draft expert report and returned it to the expert with his comments. In response to counsel's comments, the expert prepared a final report that may have incorporated counsel's suggestions. Plaintiff's counsel refused to disclose the comments made on the draft report to the defendants and maintained that communications to the expert involved discussions of "tactics and strategy."[16] The Supreme Court of Nova Scotia reiterated the independence of experts' opinions and ordered disclosure of the comments made by counsel on the draft report.

According to Justice Wilson, the decision in *Flinn* did not assist the defendant. First, she noted that in *Flinn*, the Court did not endorse "the propriety of discussing with such an independent expert questions of 'tactics and strategy.'"[17] Rather, the Court ruled that the defendants were entitled to know whether the expert's report was influenced by opposing counsel, as that would affect the weight to be given to the expert's opinion. Second, Justice Wilson observed that *Flinn* was determined in 2002 when the Nova Scotia *Civil Procedure Rules (1972)* were not as rigorous as the current regime in Ontario with respect to the independence of expert evidence.[18] In her view, Rule 53.03 eliminated any opportunity for counsel to meet with experts to review and shape expert reports and opinions. The amendments sought to avoid perceptions of bias or actual bias.[19]

Accordingly, Justice Wilson adopted a purposive approach to expert witnesses under the Rules:

> [...] the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, *I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.*[20]
>
> [...]
>
> [...] I do not accept the suggestion in the 2002 Nova Scotia decision, *Flinn v. McFarland*, [...] that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.[21]

Therefore, Justice Wilson was of the view that comments made by counsel should not merely go to the weight accorded to expert evidence but should stop altogether, which supports the gatekeeper function of the trial judge. As a result, *Getahun* may provide a basis for other judges to reject the admissibility of expert evidence at the outset under

[13] Ibid. at paragraph 289.
[14] Ibid.
[15] *Flinn v. McFarland*, 2002 NSSC 272 ("*Flinn*").
[16] Ibid. at paragraph 25.
[17] *Getahun*, supra note 3 at paragraph 296, citing *Flinn*, supra note 15 at paragraph 29.
[18] *Getahun*, supra note 3 at paragraph 297.
[19] Ibid.
[20] Ibid. at paragraph 50 (emphasis added).
[21] Ibid. at paragraph 52.

the *R. v. Mohan*[22] test in situations where an expert's independence and impartiality are seemingly compromised.

Ultimately, Justice Wilson concluded that Dr. Taylor's credibility was impugned as he obviously viewed his obligations as being to the defence rather than to the Court.[23] In the result, she preferred the evidence of the plaintiff's expert who she found provided a fair and unbiased opinion. Justice Wilson emphasized the plaintiff's expert's independence and neutrality, as he made concessions where appropriate and offered non-partisan testimony.[24]

Changes in Draft Expert Reports

Justice Wilson further held that if there are changes to an expert report, there should be disclosure to the other party:

> [...] There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral.[25]

Indeed, full disclosure of counsel's comments would provide the opposing side with an opportunity to consider whether any corrections or suggestions were substantive or stylistic.

Conclusion

It is common practice for experts to provide counsel with draft copies of their reports for review and comment. Consultation between counsel and an expert witness does not necessarily undermine the independence of the expert. The decision in *Getahun* creates practical challenges as counsel will struggle to determine whether certain edits are substantive or stylistic. Moreover, in situations where a finalized expert report is not responsive or contains sections beyond the expert's purported expertise, counsel is tasked with disclosing any input or request for clarification in writing to the opposing party, thereby exposing their concerns to the other side.

Most professional liability cases are often won and lost on the relative strength of the parties' expert witnesses. *Getahun* is a warning for counsel that it is not appropriate to review and edit draft expert reports in a substantive way. The case indicates that after submission of an expert's final report, any corrections, suggestions, or clarifications requested by counsel should be disclosed to the opposing party in writing.

In the future, counsel should make a concerted effort to minimize their communications with expert witnesses during the drafting of their reports. This would protect experts from allegations of bias. Furthermore, after receipt of an expert report, counsel should consider which corrections, suggestions or clarifications are truly necessary since, if *Getahun* is a governing precedent, they are now to be disclosed to the other party.

Getahun has been appealed and litigation lawyers will eagerly anticipate the appellate decision. In the meantime, it remains open for other trial judges in Ontario to disagree with the analysis of Justice Wilson and confirm the acceptability of the common practice of communication between counsel and experts. It is expected that the Court of Appeal will take the opportunity to clarify this issue and lay down guidance on what input and communication is permitted on the part of counsel who retained the expert.

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[22] *R. v. Mohan*, [1994] 2 S.C.R. 9 ("*Mohan*"). See, also, *R. v. Abbey*, 2009 ONCA 624 ("*Abbey*").

[23] *Getahun*, supra note 3 at paragraph 300.

[24] Ibid. at paragraph 325.

[25] Ibid. at paragraph 520.

ERRORS AND OMISSIONS INSURANCE

Ernst & Young v. Chartis: Claim for an Insurer's Breach of Duty of Good Faith Does Not Constitute "Proceeds From Insurance"

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In the recent case of *Ernst & Young v. Chartis*,[1] the Ontario Court of Appeal considered claims for indemnity and bad faith under a trustee's errors and omissions insurance policy. The Court of Appeal upheld the application of a dishonest acts exclusion, and held that the appellant could not bring an action for an alleged breach of the insurer's duty of good faith. The Court of Appeal found that the insurer's duty of good faith was owed exclusively to the insured, and not to the appellant, the assignee of the proceeds of insurance. The Court of Appeal did, however, state that the appellant may have a remedy against the insurer, if it could prove that the insurer had deliberately attempted to "subvert the course of justice" in its defence of the underlying liability action.

Facts

The Parties

The appellant, Ernst & Young ("E&Y"), acted as receiver of International Warranty Company Ltd. ("IWC"), which sold extended warranties to car buyers. The premiums paid by the car buyers were placed in trusts to secure the funds for future warranty payments by IWC. The trust agreements contemplated that IWC would only draw on the trust funds as needed to reimburse itself as warranty work was undertaken. At the end of five years, any balance in the applicable trust was to be turned over to IWC. Central Guarantee Trust Company ("CGT") became the trustee of the trusts.

In 1987, IWC stopped depositing some of the warranty premiums into the trusts. CGT withdrew money from the trusts and paid it to IWC for its own use. Then, CGT made a $1.5 million loan to IWC, which was promptly repaid out of trust funds paid to IWC. IWC went out of business in December 1987 and was placed in receivership. At that time, there was about $18 million in the trusts. This amount was insufficient to fund IWC's warranty obligations.

The trust instruments did not permit CGT as trustee to withdraw money from the trusts and pay it to IWC for purposes other than the payment of warranty claims. The withdrawals were justified by IWC to CGT on the basis that there was an "actuarially projected surplus" in the trusts. That is, it was anticipated that after the withdrawals, there would be sufficient funds remaining in the trusts to honour all future warranty payments

The respondent Chartis was CGT's insurer. In particular, Chartis had issued a D&O policy to CGT (the "Policy"), including a specific Trust Department Errors and Omissions endorsement.

The Breach of Trust Action (Alberta)

E&Y was authorized to bring a claim against CGT (the "Alberta Action"). In 1993, E&Y obtained a Court Order in Ontario (the "Houlden Order"), which provided that "any proceeds from insurance coverage arising out of a judgment or a settlement of the [Alberta] Action belong to [E&Y] ..."[2]

Chartis defended the Alberta Action on behalf of CGT. An initial decision[3] was set aside and a new trial was ordered in 2006.[4] In 2010, the Court of Queen's Bench of Alberta

[1] 2014 ONCA 78.

[2] Dated October 6, 1993 by Houlden J.A. of the Ontario Court, General Division.

[3] *Ernst & Young v. Central Guaranty Trust Co.*, 2004 ABQB 389, 29 Alta L.R. (4th) 269.

[4] 2006 ABCA 337, 66 Alta L.R. (4th) 231, leave to appeal to SCC refused, [2007] SCCA No. 9.

held that CGT had breached the trusts, and granted judgment in favour of E&Y against CGT for a total award of over $10 million.[5]

The Ontario Summary Judgment Motions

Chartis refused to pay the judgment arising from the Alberta Action, taking the position that the claim was excluded by the terms of the Policy. Coverage litigation in Ontario resulted, giving rise to summary judgment motions considered by the Court of Appeal. Of a number of issues raised on the motions, the Court of Appeal considered two main issues: the application of Policy Exclusions relating to "dishonesty," and whether the Houlden Order entitled E&Y to sue Chartis for breach of its duty of good faith.

Result

The Court of Appeal upheld the application of the dishonesty Exclusions on the facts of the case. However, it overturned the motion judge's finding on the issue of the breach of good faith, and found that the Houlden Order did not assign to E&Y a cause of action for breach of the duty of good faith.

Reasoning

The Policy Exclusions

The Policy had Exclusions, which limited the insurer's liability to make payments for any claim "for or arising out of" dishonest acts or bad faith.[6] In considering these Exclusions, the Court of Appeal referred to the general principles of interpretation of insurance policies as set out in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*[7] and reviewed case law considering the meaning of the word "dishonest" when applied to a trustee.[8]

The Court concluded that, *inter alia*, CGT had committed deliberate breaches of trust and had misappropriated funds for its own benefit. These findings of fact amply supported the conclusion that the acts were dishonest and fell within the dishonesty Exclusion. The Court did not agree with E&Y's suggestion that the words "for or arising out of" in the Exclusion required a "continuous chain of causation," which was not met when the misappropriation occurred after the withdrawals.

Breach of the Duty of Good Faith[9]

E&Y submitted that the grant of CGT's "proceeds from insurance coverage" in the Houlden Order had the effect of assigning to E&Y CGT's claim against Chartis for breach of the duty of good faith. The motions judge agreed.[10] The Court of Appeal, however, did not agree, concluding that while Chartis owed CGT a duty of good faith in the defence of the Alberta Action, the Houlden Order did not assign the right to sue for a breach of that duty to E&Y, as the right to sue for a breach of the duty of good faith did not fall within the "proceeds of insurance" assigned under the Houlden Order.

The Duty of Good Faith Is Separate From the Duty to Compensate

A liability insurer owes a duty of good faith to its insured in the defence of a claim. Chartis owed this duty to CGT. However, the duty to act in good faith is separate from the duty to compensate for the loss covered by the policy. The duty to act in good faith gives rise to a separate and independent cause of action.[11] This is well-supported in the case law.[12]

Assignment of "Proceeds of Insurance" Is Not Assignment of the Insurance Contract

An assignment of the "proceeds of insurance" refers to a particular type of assignment, which is distinguished from an assignment of the insurance contract itself. The Court wrote: "Assignment of the contract substitutes the assignee as the party to the contract. In contrast, assigning the 'proceeds of insurance' merely assigns the right to the monies payable under an insurance policy to

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[5] 2010 ABQB 26, 479 A.R. 202.

[6] The exclusions are set out in 2014 ONCA 78, at paragraph 22.

[7] [1993] 1 S.C.R. 252 at 269 per McLachlin J.

[8] 2014 ONCA 78 at paragraphs 57-63.

[9] At paragraphs 69-87.

[10] At paragraphs 73-75.

[11] See *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (C.A.) reversed, 2002 SCC 18.

[12] See *Ferme Gerald Laplante & Fils Ltee v. Grenville Patron Mutual Fire Insurance Co.* (2002), 61 O.R. (3d) 481 (C.A.), leave to appeal to SCC refused, [2002] SCCA No. 488 at paragraph 78; and *Whiten*, ibid. at 650.

the assignee."[13] The Court therefore concluded that because "proceeds of insurance" did not include damages for breach of the independent contractual duty of good faith owed to an insured, E&Y did not obtain a cause of action for any breach of the duty of good faith Chartis owed to CGT.[14]

There Is No Independent Duty of Good Faith to Third Party Assignees

The Court adopted the motion judge's rationale as to why Chartis did not owe a separate duty of good faith to E&Y in either action. It quoted:

> An insurer owes no duty to a person asserting a claim against its insured. The claimant is a stranger to the relationship between the insurer and the insured and is not in privity of contract with them ... Recognizing such a duty would be completely unworkable in the context of an adversarial relationship, would create irreconcilable conflicts of interest and lead to a breakdown of the indemnity system.[15]

Alternative Routes to Recovery

The Court of Appeal was careful to state that its finding should not prevent E&Y from some form of recovery if Chartis had in fact "steered" the defence so as to avoid its insurance obligations, as suggested by E&Y. The Court of Appeal suggested some potential forms of relief, such as variation of the Houlden Order to include assignment of CGT's cause of action for breach of the duty of good faith, a claim for abuse of process on the basis of collateral attack of a court order, abuse of the court's process as actionable in tort, or an action for civil contempt for breach of the strict terms of a court order.[16]

Ultimately, the Court of Appeal ordered that E&Y should be given the opportunity to make submissions on the availability of alternative remedies.

Conclusion

The dispute between these two parties is far from over. However, some clarity has now been provided with respect to how the issues between them may be dealt with moving forward. More importantly, in the *Ernst & Young v. Chartis* decision, the Ontario Court of Appeal has set some rational limits on the issue of to whom an insurer's duty of good faith is owed, while at the same time noting that some form of remedy may be available to address situations in which insurers may inappropriately attempt to influence outcomes of underlying litigation in which they are contractually bound to provide a defence.

[13] 2014 ONCA 78 at paragraph 78.

[14] At paragraph 81.

[15] At paragraph 88, quoting paragraphs 143 of the motion judge's decision.

[16] At paragraph 83.

CLASS ACTIONS

Changing Cost Trends in Class Actions

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Introduction

With the increasing number of professional liability class actions, Justice Belobaba's decisions in a series of recent Ontario cases addressing the legal principles for costs awards in class action certification motions has once again drawn attention to the tension between costs and access to justice. The five decisions by Justice Belobaba 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] Keeping this theme in mind, the costs awarded by Justice Belobaba in each of the five cases discussed below, was less than 50% of the costs sought.

Justice Belobaba certified five class actions: *Rosen v. BMO Nesbitt Burns Inc.*,[2] a class action against BMO Nesbitt Burns alleging non-payment of overtime to BMO Investment Advisors in accordance with the *Employment Standards Act*; *Crisante v. DePuy Orthopaedics*,[3] a class action alleging faulty hip implants; *Dugal v. Manulife Financial*,[4] a class action alleging professional negligence and misrepresentation against Manulife for inadequate risk assessment practices; *Brown v. Canada (Attorney General)*,[5] a class action by the aboriginal communities against the government alleging that the Ontario government wrongfully placed aboriginal children with non-aboriginal foster parents; and *Sankar v. Bell Mobility Inc.*,[6] a class action against Bell for alleged breach of service agreement for wrongfully seizing balances of pre-paid customers (collectively, the "Pentalogy"). After certifying these class actions, Justice Belobaba recommended changes to the prevailing approach to cost awards on certification motions, which if followed, would turn Ontario into a "no cost regime" in class actions. This is contrary to the current costs rule in Ontario, which states that, except in certain circumstances, the losing party bears his or her own costs of litigation plus a percentage of the costs of the winning side.

Background

In 1982, the province of Ontario sought recommendations from various legal organizations on consolidating all procedural and substantive matters relating to class actions into a single statute. These consultations were followed by 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]

Justice Belobaba had these objectives in mind when he wrote his decisions in the Pentalogy. Justice Belobaba wrote that over the years, he had spoken to many members of the class actions bar, and had come to

[1] *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356 ("*Rosen*") at paragraph 1.
[2] Ibid.
[3] *Crisante v. DePuy Orthopaedics*, 2013 ONSC 6351 ("*Crisante*").
[4] *Dugal v. Manulife Financial*, 2013 ONSC 6354 ("*Dugal*").
[5] *Brown v. Canada (Attorney General)*, 2013 ONSC 6887 ("*Brown*").
[6] *Sankar v. Bell Mobility Inc.*, 2013 ONSC 6886 ("*Sankar*").
[7] *Class Action Proceedings Act*, S.O. 1992, c. 6 (the "CPA").
[8] Ontario Law Reform Commission, *Report on Class Actions*, Ministry of the Attorney General, Volume 1, 1982. Available online at https://archive.org/stream/reportonclassact01onta#page/n11/mode/2up.

appreciate and endorse the implementation of a "no-costs" regime that had been supported by the OLRC. Justice Belobaba'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

Justice Belobaba referred to statistics and directions that 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*,[10] which lists various factors that the court may consider in exercising its discretion to award costs. According to Justice 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 in awarding costs. In order to create a clear and complete regime for awarding costs on such motions, Justice Belobaba:

1. identified factors that the court should consider while deciding a costs award for a certification motion; and
2. 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.[11]

Justice Belobaba recognized that a certification motion is one of the most important steps in any class action litigation and it 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, Justice 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 the costs awarded in closely comparable cases. Above all, the courts should keep in mind that a fundamental objective of the CPA is to provide enhanced access to justice.[12]

In order to ensure that access to justice is achieved, Justice Belobaba also suggested that the courts should rely less on the costs outlines submitted by counsel. Once they have satisfied themselves that the cost outlines are not unreasonable, the courts should do a comparative historical review of costs in order to make the process more transparent. Justice Belobaba collected and summarized data from the cost awards rendered in the past six years. This analysis revealed that the costs awarded to the plaintiffs were about 62.5% of the costs sought by them, whereas the costs awarded to the defendants ranged between 39%-50% of the costs sought by them.[13] There is thus a greater variability in the costs awarded to the defendants, and this should be kept in mind when awarding costs to the defendants.

Applying the principles and the analysis of past costs awards described above, Justice Belobaba reviewed each of the cases to determine whether the lawyers charged their time at rates consistent with the suggested hourly rates or whether they sought excessive costs. He then compared the costs being sought to the costs historically allotted in similar cases. For example, in *Rosen*, after reviewing historical costs awarded in similar cases, Justice Belobaba awarded costs of $290,000, where the plaintiff had requested $575,000 and the defendant argued that the award should not exceed $315,000. The common theme in each of the decisions was to ensure that the costs awarded were fair and reasonable and satisfied the objectives of the CPA.[14]

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[9] *Rosen*, supra note 1 at paragraph 2.

[10] Rule 57.01, *Rules of Civil Procedure*, *Courts of Justice Act*, R.R.O. 1990, Regulation 194.

[11] *Rosen*, supra note 1 at paragraphs 4-5.

[12] Ibid. at paragraph 4.

[13] Ibid. at paragraph 5.

[14] Ibid. at paragraphs 8-17.

Conclusion

Whether Justice Belobaba's suggestions and directions usher in a new "no costs" regime remains to be seen. In *Drywall Acoustic*,[15] Justice Perell echoed the concerns raised by Justice Belobaba, and addressed the issue of discrepancy between plaintiff and defence costs. He stated:

> [16] 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 [...].[16]

Some members of the plaintiffs' class action bar argue that by tightening the costs strings, access to justice may actually be further reduced. Some plaintiffs' counsel have also suggested that in fact, plaintiffs' counsel principally bear the costs of class action litigation and Justice 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. A more restrictive approach to awards of costs may therefore increase the risk borne by plaintiffs' counsel instead of the plaintiff.

On the other hand, the defendants' class bar argues that, the greater disparity between the costs sought and those awarded to successful defendants demonstrates the existence of a plaintiff-friendly class action costs regime. For defendants who 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. Reducing costs consequences could, therefore, 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 Justice Belobaba's Pentalogy will affect the checks and balances for parties in class action litigation, can be ascertained only after other judges have had the opportunity to consider those principles. Nevertheless, Justice Belobaba's Pentalogy has certainly succeeded in bringing back attention to one of the core objectives of class actions: providing access to justice at a reasonable cost.

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[15] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC Group Inc.*, 2013 ONSC 7122 ("*Drywall Acoustic*").

[16] Ibid. at paragraphs 16 and 18.

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