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Lower Cost Awards in Class Actions: What Does it Mean for Access to Justice?

by Alexandra Teodorescu
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Alexandra Teodorescu is an associate in the Commercial Litigation Group at Blaney McMurtry.

Alexandra received her J.D. from the University of Western Ontario. Prior to law school, She received a Bachelor of Arts from the University of Western Ontario with a major in Political Science.

Alexandra may be reached directly at 416.596.4279 or ateodorescu@blaney.com.

The general rule in civil cases is that "costs follow the event." In other words, the losing party pays a portion of the legal costs of the successful party. This rule also applies to class actions and is codified in section 31 of the *Class Proceedings Act, 1992*.

Despite parallel rules regarding costs, ordinary civil actions are quite different from class actions. A fundamental objective of class actions is to provide enhanced access to justice. One way class proceedings achieve this goal is by eliminating legal costs for representative plaintiffs and class members. Generally, class counsel act on a contingency fee basis and indemnify plaintiffs against adverse cost orders. In class actions, the risks of litigation are transferred from the client to the lawyer, making it easier and more affordable for individuals to access the legal system.

However, access to justice is undermined when class counsel are deterred from bringing meritorious actions by the risk of extremely high adverse cost awards. For example, in *Martin v. AstraZeneca Pharmaceuticals PLC*, plaintiff's counsel was on the hook for a $700,000 costs award after an unsuccessful motion to certify a claim as a class action. The costs order in *Martin* is particularly significant given the fact that the goal of certification is to determine if, procedurally, the case should be brought as a class action; the merits of the claim are not seriously considered on a motion for certification.

Justice Belobaba on Costs

In 2013, Justice Belobaba of the Ontario Superior Court of Justice released five costs decisions in which he criticized lawyers for filing voluminous materials, over-litigating issues and unnecessarily lengthening proceedings (*Brown v. Canada (Attorney General)*, *Sankar v. Bell Mobility*, *Crisante v. DePuy Orthopaedics*, *Dugal v. Manulife* and *Rosen v. BMO Nesbitt Burns*). The result, he states, is clear: "access to justice, even in an area that was specifically designed to achieve this goal, is becoming too expensive."

In an effort to enhance access to justice and ascribe transparency to the decision-making process, Justice Belobaba developed a procedure for determining the costs of a certification motion. Justice Belobaba stated that he would generally accept costs outlines at face value, apart from obvious excesses in fees or disbursements, and would not require either side to submit actual dockets, time entries or disbursement receipts. He further stated that should the unsuccessful party want to argue that the successful party's cost submissions are unreasonable, it should submit its own costs outline. Finally, Justice Belobaba stated that he would consider historical costs awards in similar cases.

Justice Belobaba's procedure for calculating costs will likely lead to more modest cost orders. Justice Belobaba stated that he hopes his guidelines will result "in leaner and more focused certification motions, a greater measure of predictability for the participants, and in the overall, the continuing viability of the class action vehicle."

Practical Implications

The effect of Justice Belobaba's decisions on access to justice has yet to be seen. On the one hand, lower cost awards may have the desired effect of enhancing access to justice. The prospect of lower adverse cost orders could mean less risk for lawyers pursuing class action claims on behalf of their clients. Furthermore, third party investors may be more willing to help class counsel finance prospective class actions.

On the other hand, some members of the class actions bar have suggested that decreased costs could have a detrimental effect on access to justice. The certification motion, they argue, is a significant hurdle that, in practice, requires class counsel to invest considerable time and money to prove that the action is best prosecuted as a class proceeding. Well-resourced defendants often engage in "kitchen sink" tactics when opposing certification, and it is unclear whether a lower costs regime will curtail this practice. Without the possibility of recuperating at least a modest amount of their costs, plaintiffs' counsel may be more cautious in bringing class action law suits and agreeing to indemnify plaintiffs against adverse costs awards.

Defendants say that a more streamlined and conservative costs regime will increase the financial risks of litigation. Lower cost awards may mean that defendants will have to deal with more unmeritorious claims. Furthermore, defendants who are forced to litigate potentially questionable actions will recover less of their costs if they are successful in defending the certification motion. Without financial consequences for unsuccessful plaintiffs, defendants may be held captive by protracted litigation.

Towards a "No Costs" Rule?

In the five costs decisions outlined above, Justice Belobaba advocates against awarding costs in class proceedings all together. Similarly, in *Bayens v. Kinross Gold Corporation*, Justice Perell of the Ontario Superior Court of Justice questioned whether the loser-pays regime is applicable to class actions. In contrast to Ontario, there is a "no costs" rule in British Columbia, Saskatchewan, Manitoba and Newfoundland.

The Law Commission of Ontario is currently reevaluating the traditional cost rules as they apply to class actions. The Commission is particularly alive to concerns that adverse cost awards may frustrate access to justice. Whether the Legislature will adopt Justice Belobaba's cost guidelines or elect to implement a "no costs" regime remains to be seen. What is clear is that the Commission's recommendations on adverse costs will shape litigation strategies and equally impact plaintiffs, defendants and third party funders. ■