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Are substantial interlocutory costs awards an access to justice tool?

Costs awards are a key element to the litigation process, rewarding successful parties and dissuading underserving would-be litigants. The goals of costs awards are relatively static in Ontario and should reflect the fair and reasonable expectations of the unsuccessful party, and be consistent with comparable cases. In class proceedings, the goal of access to justice is an additional criterion.

In *Green v Canadian Imperial Bank of Commerce*, the Ontario Superior Court of Justice took a robust view of the latter element, awarding the plaintiffs in a class proceeding the full amount of the costs they claimed. In doing so, the Court observed that “[a] failure to award fair costs to the plaintiffs will encourage and reward a defence strategy of wearing down the plaintiffs by wearing down their lawyers.”

The Court’s decision on the issue of costs follows the Court of Appeal’s reversal of its decision dismissing the action as time-barred and holding that the statutory cause of action could not be certified. The Supreme Court of Canada upheld the Court of Appeal’s decision, with the result that the plaintiffs were permitted to pursue the action as a certified class proceeding.

In their costs submissions, the successful plaintiffs requested a total of \$2,679,277.82, representing partial indemnity rates and reflecting four years of legal work. The defendants countered with \$800,000, arguing that the plaintiffs’ costs claim was well beyond what they could have reasonably expected to pay in the circumstances.

The Court took the view that compensating successful plaintiffs in the class proceedings context is an access to justice question. It accepted the plaintiffs’ claim for \$2,679,277.82 in costs. In doing so, the Court rejected the arguments and positions raised by the defendants, including that much of the work carried out by the plaintiffs will be useful for trial.

The size, stage, and justification of the costs award are notable.

The decision demonstrates the Court’s willingness to provide substantial costs awards in class proceedings—even prior to trial. An award of \$2,679,277.82 on a partial indemnity scale, and where opposing counsel made significant arguments to the contrary, is a clear sign that the Court is willing to acknowledge the realities of funding class proceedings. The Court noted that

plaintiffs' counsel in class proceedings takes a risk that defence counsel does not. It highlighted that plaintiffs' counsel assumes "substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case", whereas defence counsel are paid regardless of the outcome.

The specifics and importance of class proceedings were also considered by the Court, which commented: "I also recognize the public interest in ensuring that parties pursuing secondary market misrepresentation claims" have their claims "fairly compensated by realistic costs awards".

Despite the seemingly unequivocal message, would-be class claimants should remain cautious. The Court characterized this case as "an extraordinary case by any standard". In particular, it highlighted a series of factors that made this case unique, including the size of the class (over 100,000 Canadian shareholders), the size of the claim (\$2-4 billion), the fact that it was a landmark case under the *Securities Act*, the complexity of the facts, which required sophisticated expert evidence, the massive size of the record, the skill and experience of counsel, and the substantial success of the plaintiffs. The Court also emphasized the fact that the proceeding was "vigorously" contested by the defendants. As a result, the overarching costs principle of consistency with comparable cases may make such an award difficult to replicate in the future.

While this decision may encourage plaintiffs to advance significant costs claims following successful certification and leave motions, it remains to be seen whether it truly offers plaintiffs any precedential value. With that said, one thing is clear: the Court has made a strong statement that access to justice is an important consideration and, where successful, the plaintiffs are entitled to be fairly compensated by realistic costs awards. As stated by the Court: "The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards."

With Notes from Sean Lewis