

The Canadian Institute's 8th Annual National Forum
on Class Actions Litigation
September 17, 18, 2007

Costs in Class Actions

Is Where We Are Where We Want to Be?

Margaret L. Waddell, LLM
Paliare Roland Rosenberg Rothstein LLP
250 University Ave, Ste. 501
Toronto, ON
M5H 3E5
(t) 416-646-4329
(f) 416-646-4301
(e) marg.waddell@paliareroland.com

Cost Regimes in Canadian Jurisdictions – Where We Are

There is no consistency among the costs regimes currently in force in those provinces that have enacted class action legislation. In fact there are four different methods by which the provincial legislatures have chosen to address the issue of costs in class actions:

1. No costs, except in exceptional circumstances (the BC regime);
2. costs to follow the event (ordinary costs), subject to specified statutory considerations (the ON regime);
3. costs to follow the event (ordinary costs); and
4. minimal costs per court tariff (the PQ regime).

In each forum, on the plaintiff side, it is only the representative plaintiff(s) who are potentially liable for costs of the class proceeding, except with respect to the determination of individual issues, in which case each individual bears his or her own responsibility for costs, to the extent that there is any costs exposure.

Each of the different cost regimes seems to have been instituted with different overarching considerations in mind with respect to class actions. In those provinces where the ordinary costs regime has been left

to apply in class proceedings, it appears that the legislatures have concluded that there is sufficient discretion already accorded to the courts on the issue of litigation costs so that special rules are unnecessary. I would suggest that in Alberta, the Legislature remains particularly wary of class proceedings, and continues to view this form of representative action with outdated cynicism – seeing class actions as a vehicle through which cash hungry ambulance chasers will commence unmeritorious “greenmail” proceedings, even though there is no empirical evidence to support this prejudice¹. Maintaining the usual costs rules will have the effect of discouraging frivolous lawsuits, in its view.²

The BC approach takes a more progressive and open-minded approach to the issue. By removing costs as a consideration in class proceedings, it encourages individuals to bring actions that might otherwise not be brought forward. It discourages defendants from engaging in abusive tactics intended to drive up the costs of the litigation, that in turn could increase the risks of crippling adverse costs awards against the representative plaintiffs, (and possibly paid by their counsel if class counsel are underwriting the litigation). A “no cost” rule encourages access to justice by removing this significant deterrent to people who have

¹ *Report on Class Actions*, Ontario Law Reform Commission, Ministry of the Attorney General, 1982, vol. 3, p. 706

² Alberta Hansard, April 16, 2003, pp. 1081-1084

legitimate concerns or complaints that require adjudication for resolution. The BC approach accepts that the test for certification serves the necessary “gatekeeper” role to prevent frivolous lawsuits from being launched. It also tacitly recognizes the fact that competent and experienced class counsel, who will only be remunerated on a contingency basis in the event of success, are very unlikely to take on frivolous or unmeritorious cases. The BC rules still give the court the discretion to award costs in those unusual circumstances where the conduct of a party is deserving of sanction by the court.

The Ontario approach is a middle of the road approach. It accepts that class actions are a unique form of litigation, which is to be encouraged for all the well-known policy reasons. Class proceedings often fulfil the role of private attorney general or consumer watchdog, and compensation to the successful litigant by an award of costs, where appropriate, should help to encourage individuals to commence class proceedings. Hence costs are meant to follow the cause; but the court may take into consideration whether the class proceeding was:

- (i) a test case;
- (ii) raised a novel point of law; or
- (iii) involved a matter of public interest³,

³ *Class Proceedings Act, 1992*, S.O. 1992, c.6, (“CPA”). s. 31(1)

in exercising its discretion not to award costs against a losing party.

In practice, these three considerations have been applied as reasons against a costs award being made against an unsuccessful plaintiff who has failed to meet the test for certification; but who has asserted the type of claim which the courts do not wish to be seen as proactively discouraging. However, there is nothing in the language of the section that indicates that the section may not be used by a defendant, as well, if the right circumstances were presented, such as the defendant having raised a novel point of law in defence of the action.

In its *Report on Class Actions*, the Ontario Law Reform Commission acknowledged that the usual costs rules could serve as a barrier to the commencement of class proceedings. Why would an individual who has, personally, very little to gain from the proceeding, agree to act as a representative plaintiff when she or he could be exposed to an adverse cost award that could total hundreds of thousands of dollars? “If the anticipated gain of the class plaintiff does not exceed the costs for which he may be personally liable, there is little hope that a rational person will choose to be a representative plaintiff. In our view, to make the use of the class action procedure depend on the presence of such selfless zeal would cause it to be neglected.”⁴

⁴ *Report on Class Actions*, Ontario Law Reform Commission, Ministry of the Attorney General, 1982, vol. 3, p. 663, 704

The OLRC recommended, and the Ontario Legislature agreed that the normal cost rules should be varied for class proceedings, to eliminate the cost disincentives, while effecting “the least possible disruption to the principle of equality of treatment of parties that underlies the existing Ontario costs rules.”⁵ In other words, the objective was to facilitate meritorious class proceedings without prejudicing defendants through an imbalanced cost regime. However, the Legislature rejected the OLRC recommendation that there be no party and party costs to either party at the certification and common issues stages.

There can be no doubt that one of the reasons that the Ontario Legislature has permitted the court to exercise its usual discretion with respect to costs (subject to the factors in s. 31(1) referenced above), is because of the creation of the Class Proceedings Fund⁶. Cases that obtain funding receive the protection of the Fund covering the amount of any adverse cost award made against a representative plaintiff, in exchange for 10% of the net recovery on success in the litigation.

In Quebec, class proceedings were originally subject to the usual costs rule, but that was subsequently amended. The certification procedure is streamlined, and the costs consequences of a class action have also been significantly reduced. Like Ontario, there is a class action

⁵ *ibid*, p. 703

⁶ *Law Society Amendment Act (Class Proceedings Fund), 1992, S.O. 1992, c. 7*

fund to which plaintiffs may apply for support and protection from adverse costs awards.

The following is a table of the different cost provisions in effect in those jurisdictions with class action legislation:

<i>Costs in Class Proceedings - Legislation</i>			
British Columbia	<i>Class Proceedings Act, R.S.B.C. 1996, c. 50</i>	<p>37(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.</p> <p>(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding</p> <p style="padding-left: 40px;">(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,</p> <p style="padding-left: 40px;">(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or</p> <p style="padding-left: 40px;">(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.</p> <p>(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.</p> <p>(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with</p>	No costs to any party, except for exceptional circumstances.

		respect to the determination of their own individual claims	
Alberta	<i>Class Proceedings Act</i> , S.A. 2003, c. C-16.5	37 With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.	Ordinary costs.
Saskatchewan	<i>Class Actions Act</i> , S.S. 2001, c. C-12.01	<p>40(1) Subject to subsection (2), neither the Court of Queen's Bench nor the Court of Appeal may award costs to any party to an application for certification pursuant to subsection 4(2) or section 5, to any party to a class action or to any party to an appeal arising from a class action at any stage of the application, action or appeal.</p> <p>(2) A court mentioned in subsection (1) may award costs to a party respecting an application for certification or respecting all or any part of a class action or an appeal from a class action if the court considers that:</p> <ul style="list-style-type: none"> (a) there has been vexatious, frivolous or abusive conduct on the part of any party; (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs. <p>(3) A court that orders costs may order that those costs be assessed in any manner that the court considers appropriate.</p> <p>(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.</p>	No costs to any party, except for exceptional circumstances.
Manitoba	<i>Class Proceedings Act</i> , S.M. 2002, c. 14	37(1) Subject to this section, no costs may be awarded against any party with respect to any stage of a class proceeding, including a motion for certification under subsection 2(2) or section 3, or any appeal arising from a class proceeding.	No costs to any party, except for exceptional circumstances.

		<p>37(2) The Court of Queen's Bench or The Court of Appeal may only award costs to a party in respect of a motion for certification or in respect of all or any part of a class proceeding or an appeal arising from a class proceeding if</p> <p>(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party;</p> <p>(b) at any time that the court considers that an improper or unnecessary motion or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or</p> <p>(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive another party of costs.</p> <p>Assessment of costs</p> <p>37(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.</p> <p>37(4) Class members, other than a person appointed as a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.</p>	
<p>Ontario</p>	<p><i>Class Proceedings Act, 1992, S.O. 1992, c. 6</i></p>	<p>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.</p> <p>(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.</p> <p>(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been</p>	<p>Ordinary costs, with special consideration for:</p> <ul style="list-style-type: none"> - novel points of law, test cases; and, - claims which individually would be in Small Claims Court.

		determined by the Small Claims Court.	
Quebec	<i>Code of Civil Procedure</i> , R.S.Q. c. C-25	<p>1050.1. In the case of a condemnation to pay the costs, the judicial fees are computed as in the case of an action of class II-A in the Tariff of judicial fees of advocates (R.R.Q., 1981, chapter B-1, r. 13) and, in the computation, section 42 of the tariff does not apply.</p> <p>The special fee provided for in the tariff for important cases may only be granted after the final judgment is rendered, on a motion served on the opposite party and on the Fonds d'aide aux recours collectifs if it has complied with the obligation provided in the first paragraph of section 32 of the Act respecting the class action (chapter R-2.1); the court shall not then take into account that the Fonds d'aide aux recours collectifs may have guaranteed the payment of all or part of the costs.</p>	Tariff costs, according to the Tariff for suits claiming \$1000.00 to \$2999.99.
New Brunswick	<i>Class Proceedings Act</i> , S.N.B. 2006, c. C-5.15	<p>39(1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Rules of Court.</p> <p>39(2) Class members, other than a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.</p>	Ordinary costs.
Newfoundland	<i>Class Actions Act</i> , S.N.L. 2001, c. C-18.1	<p>37(1) The Trial Division and the Court of Appeal shall not award costs to a party to an application for certification under subsection 3 (2) or section 4 , to a party to a class action or to a party to an appeal arising from a class action at any stage of the application, action or appeal.</p> <p>(2) Notwithstanding subsection (1), the Trial Division and the Court of Appeal may award costs to a party in respect of an application for certification or in respect of all or part of a class action or an appeal from a class action where the court considers that</p> <p>(a) there has been vexatious, frivolous or abusive conduct by a party;</p> <p>(b) an improper or unnecessary application or other step has been</p>	No costs to any party, except for exceptional circumstances.

		<p>made or taken for the purpose of delay or increasing costs or for another improper purpose; or (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.</p> <p>(3) A court that orders costs under subsection (2) may order that those costs be assessed in a manner that the court considers appropriate.</p> <p>(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.</p>	
--	--	---	--

As can be seen from the forgoing, most of the newcomers to class action legislation have followed the BC example, while New Brunswick has maintained its usual costs rules, along with Alberta. At this stage it is too early to tell whether the differences in costs regimes will have a significant impact on the choice of venue for those class proceedings which could be commenced in more than one forum. A review of the CBA National Class Action database shows that the vast majority of new cases registered on the site continue to be launched in BC, ON or PQ.

Certainly, based upon the existing ON/BC experience, there have been a number of proceedings that have capitalized on the differences between the costs rules in these jurisdictions, and an action has been commenced in BC for the BC class, as well as an ON national class proceeding that has then been held in abeyance pending the “testing of the

waters” through the no-cost BC certification motion. While this has occurred in a few cases, it cannot be said that this has become a standard or the norm for national class proceedings. However, with other jurisdictions such as Manitoba⁷ implementing a “no costs” system in conjunction with the ability to commence a national class proceeding, we may see a trend away from ON for national class proceedings to those jurisdictions that are more plaintiff friendly.

Recent Costs Awards in Class Proceedings

What are costs awards looking like in Ontario? Is there a tendency towards treating unsuccessful plaintiffs more leniently than defendants? The following chart summarizes some of the decisions where costs have been fixed by the court since January 1, 2006:

Summary of Costs in Class Actions - Ontario - Since January 1, 2006

Pre-certification and certification proceedings

**Successful
Party
Plaintiff**

	S.C.J.	Div. Ct.	C.A.
<i>Andersen v. St. Jude Medical, Inc</i>	\$610,000	not mentioned	
<i>Boulanger v. Johnson & Johnson Corp.</i>	\$125,000		
<i>Hickey-Button v. Loyalist College of Applied Arts & Technology</i>	\$40,500	\$22,500	\$22,500
<i>Lewis v. Cantertrot Investments Ltd.</i>	\$47,406.51		
<i>Pearson v. Inco Ltd.</i>	\$90,000	\$65,000	\$50,000
<i>Potter v. Bank of Canada</i>	\$15,000		\$15,000

⁷ *The Class Proceedings Act, C.C.S.M. c. C130*

	<i>Punit v. Wawanesa Mutual Insurance Co.</i>	\$12,000		
	<i>Smith v. National Money Mart Co.</i>	not mentioned	not mentioned	\$27,180.50
	<i>Sutherland v. Hudson's Bay Co. Ltd.</i>	\$67,625		
Defendant				
	<i>Attis v. Canada (Minister of Health)</i>	\$125,000		
	<i>DeFazio v. Ontario (Ministry of Labour)</i>	\$40,000		
	<i>MacDougall v. Ontario Northland Transportation Commission</i>	not mentioned	\$49,197.84	
	<i>Potter v. Bank of Canada</i>	\$15,000		\$15,000
	<i>Punit v. Wawanesa Mutual Insurance Co.</i>	\$20,000		
	<i>Sutherland v. Hudson's Bay Co. Ltd.</i>	\$17,500		
	<i>Yordanes v. Bank of Nova Scotia</i>	\$29,500		

From the chart, it can be seen that the Ontario courts have been relatively even-handed in respect of costs orders, when they have fixed costs. There are however some notable cases where the court has exercised its discretion against making any costs award.

Two such cases are the *Markson v. MBNA* case, and more recently, *Arabi v. Toronto Dominion Bank*. In *Markson*, Justice Cullity denied certification, but found that the factors in s. 31(1) CPA weighed against any award of costs⁸. In his analysis of the costs issue, Cullity J. provided a helpful summary of the considerations to be weighed by the court in respect of costs on an unsuccessful certification motion:

5 I have considered the purpose and effect of section 31 previously in *Joanisse and Egglestone v. Barker et al*, [\[2003\] O.J. No. 4081](#) and *Vennells v. Barnardo's* [\[2004\] O.J. No. 4171](#) and I adhere to the opinions I stated in those cases. I do not, however, accept that the matters of "public

⁸ *Markson v. MBNA Canada Bank*, [2004] O.J. No. 5310

interest" that fall within the provision are confined to those affecting historically-disadvantaged members of the community, or that the public interest does not extend to the enforcement of the criminal law in the circumstances of this case.

6 Independently of the undisputed evidence that millions of transactions - and not merely those of clients of the defendant - would be affected by the resolution of Mr. Markson's claims for declaratory and injunctive relief, all Canadians have an interest in the clarification, and enforcement of the provisions of the public law of this country - of which the Criminal Code forms an essential and important part. The scope of section 347 - and the extent to which it may interfere with standard commercial practices that affect millions of Canadians - is, in my opinion, a matter of sufficient public importance to qualify as one of public interest for the purposes of section 31(1). This conclusion is, I believe, consistent with the reasoning of Winkler J. in *Garland v. Consumers Gas Company Limited* (1995), 22 O.R. (3d) 767 (G.D.) - the validity of which was not affected by the subsequent history of the case.

7 I am, also, satisfied that, as in *Garland*, the substantive issues involved in the plaintiff's claims raised a novel question of law within the meaning of section 31(1). Essentially, they involve the interpretation of section 347 and of the decisions that bear on it. In this connection, I do not find helpful a distinction between interpretation of the section - which defendant's counsel submitted was clear - and its application to the facts of this case, which, counsel submitted, was not. Apart from the absence of any disputed issues of fact the substantive issues relate principally to the concept of voluntary payments that will prevent the section from applying. The relevance of this concept was strongly affirmed by the Supreme Court of Canada in *Delgader Construction Co. v. Dancorp Developments Limited*, [1998] 3 S.C.R. 90 and *Garland v. Consumers Gas Company Limited*, [1998] 3 S.C.R. 112 and a determination of the implications to be found in the reasoning of the court is as much a question of law within the meaning of section 31(1) as the question

whether an exception for voluntary acts is to be read into the provisions of section 347.

8 Finally, I note also that the action might be considered to be a test case in the broad sense that success for the plaintiff is likely to affect the banking practices of other financial institutions.

9 A finding that one or more of the three factors referred to in section 31(1) is present does not require a conclusion that no costs are to be awarded against an unsuccessful plaintiff. They are matters to be taken into consideration together with those that are relevant to the exercise of the judicial discretion conferred by section 131(1) of the Courts of Justice Act. One of these, of course, is that a successful party will, as a general rule, receive an award of costs. This is not a case where I would attribute great weight to any of the matters referred to in rule 57.01(1) other than the importance of the issues. There was nothing in the conduct of a party that unduly delayed the proceedings and no improper conduct on behalf of either party. I note, however, that, as the provisions of the cardholders' agreement indicate, this is not a case like *Transport North American Express Inc. v. New Solutions Financial Corporation*, [\[2004\] 1 S.C.R. 249](#) in which the defendant was oblivious to the existence, and a possible breach, of section 347. In my opinion, it is not unreasonable to infer that a party, that knowingly takes the risk that it is acting illegally, has also accepted a risk that it will become involved with proceedings instituted by persons affected by its conduct.

10 Other considerations that have been regarded as relevant are the objectives of the C.P.A., including, in particular, that of access to justice where individual proceedings would be prohibitively uneconomic or inefficient: *Robertson v. Thomson Corporation*, [\[1999\] O.J. No. 908](#) (G.D.), page 2, citing *Gagne v. Silicorp Ltd.* [\(1998\), 41 O.R. \(3d\) 417](#) (C.A.) in which Goudge J.A. referred to the significance of economic interests of the legal profession to the achievement of the objective. Given my finding that a sufficient commonality of interest between Mr. Markson and the other class members had not been demonstrated, I did

not find that the goal of access to justice would justify certification of the proceedings. This does not exclude, as a legitimate costs consideration, the possible "chilling effect" on access to justice in other cases of a costs order against a plaintiff who did not succeed in obtaining an order for certification that was probably essential to the initiation of any proceeding to obtain even the declaratory and injunctive relief that the plaintiff sought. Such relief was aimed at behavioral modification in an important respect - observance of, and compliance with, the criminal law. To the extent that awards of costs may act as a deterrent to proceedings brought to achieve this objective they will tend to defeat two of the objectives of the legislation.

11 In the light of the above considerations, the findings I have made and all the circumstances of this case, I believe that the appropriate exercise of my discretion is that there should be no order for costs.

The Divisional Court agreed on the unsuccessful appeal to that court, and it also awarded no costs, quoting from Winkler J. (as he then was), in *Caputo*, at para. 29:

...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.⁹

⁹ *Markson v. MBNA Canada Bank*, 2005 CanLII 45967 (ON Div. Ct.), at para. 14, 15

In respect of the successful appeal to the Court of Appeal, the parties have reached an agreement on the amount of costs to be paid by the Defendant for all three levels, in the event that its application for leave to appeal to the SCC is denied. In sum, the lower court decisions in the *Markson* case can be seen as examples of the court exercising its discretion against the award of costs where the underlying objective of the proceeding – to enforce compliance with the *Criminal Code* – is laudatory, and the case had failed on the preferability analysis. It is debatable whether the same result would have followed if the court had found that the claim was unmeritorious.

In the *Arabi* case, Justice Macdonald found that there was no “legitimate” cause of action, but did not apply the *Hunt v. Carey* test. She, nonetheless, declined to award costs against the individual representative plaintiffs. In her view, the plaintiffs should not be visited with the harsh consequences of an adverse cost award, when they had been unsuccessful in large measure due to the improper conduct of former class counsel.

The *Arabi* case is of particularly limited precedential value due to the unique circumstances in which it was rendered. In particular, it should not be taken as any indication that the Ontario courts are moving away from awarding costs to defendants who successfully defeat a certification motion in the absence of unusual facts.

In *Arabi*, the plaintiffs lost the certification motion. The motions judge found that each element of the s. 5(1) CPA test had not been met, including the

cause of action criteria. The reasons on the denial of certification show that the motion judge was substantially influenced in her decision on certification due to her negative view of the conduct of the original class counsel¹⁰. However, when the defendants then sought their costs of the motions following the event, each in the range of approximately \$170,000 to \$250,000 on a partial indemnity basis, Macdonald J. did not award any costs at all¹¹. Her reasons follow:

[5] The Defendant financial institutions make 2 points. The first is that they, being the successful parties, should be awarded their costs. Underlying this submission, they say that the fact that this is a class proceeding should not alter the fact that costs should follow the event. Second, they say that the findings in the judgment about Mr. Farah's conduct trigger the award of costs on a substantial indemnity scale.

[6] I have decided that this is a case for no order as to costs. This decision is not influenced by the fact that all of the defendant financial institutions have paid the accounts for fees and disbursements that have been rendered to them. Nor is it influenced by the reality that it may be said that they have "deep pockets". Their defenses to the claims in this action were vigorous, as they should be considering the obligations that they have to their shareholders. The accounts rendered by them are not excessive nor are they in the category of overkill.

[7] There are two other factors that I must consider. The plaintiffs were, in large part, innocent of the ramifications of an exposure to costs. Mr. Farah solicited them and to visit upon them the costs of this enormously expensive litigation would be unjust. Second, it is now settled that a class proceeding is different from other proceedings and it brings special considerations that influence the disposition of costs. See

¹⁰ *Arabi v. Toronto Dominion Bank, and 7 other actions*, 2006 CanLII 17330 (S.C.J.)

¹¹ *Arabi v. Toronto Dominion Bank, and 7 other actions*, 2006 CanLII 42059 (S.C.J.)

for example *Caputo v. Imperial Tobacco Ltd.*, 74 O.R. (3d) 728 per Winkler J.

[8] Mr. Hutchison, who asked that there are no costs, pointed out that the presence or absence of the Law Foundation should not influence this disposition of costs.

[9] In their factum Mr. Baert and Ms. Waddell have reviewed the jurisprudence on costs in class proceedings in detail. There are considerations of the chilling effect that would occur to otherwise deserving litigants if an award of costs was made against the plaintiffs.

[10] For all of the above reasons, there shall be no order of costs.

What can be taken from the decision is that the motion judge was as influenced by her adverse opinion of former class counsel on the issue costs as she had been on the certification motion. There should be no doubt that this was a misplaced consideration on the certification motion and also infected her decision on costs.

A better analysis of when the court should decline to award costs because of the “public interest” and consumer advocacy aspects of the underlying cause of action arises in the Alberta case of *Ayrton v. PRL Financial (Alta) Ltd.*¹² In this case, on appeal, the plaintiff asked that a “no costs regime” be ordered for the action. The motion judge had deferred the issue. The Court of Appeal confirmed that a purposive approach should be taken in addressing the issue of costs of class actions and gave a strong indicator that the nature of the case was one in which it would be appropriate for the court to decline to award costs against an

¹² *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296 (C.A.)

unsuccessful plaintiff. While the court did not allow the plaintiff's appeal on the request for a "no costs regime", it is probably fair to say that it did so in large measure because the plaintiff upheld the certification order on appeal. The analysis of the Court of Appeal follows:

[27] In British Columbia and most provinces with class proceedings legislation, the general rule is that no costs will be awarded to either party if an action is certified as a class action.

[28] The policy behind such a rule is to increase access to justice. Class actions are a procedure intended to redress the problem of the expense of conducting litigation when the amount of money recovered by an individual, if successful, is small. In this case, for example, Mr. Ayrton could potentially recover only the amount he paid to Payroll and PRL Financial, \$606.32. Such a potentially small recovery is vastly outweighed by the expenses incurred in taking a claim to court. Through a class action, the expense of conducting an action is spread over the many members of the class. But class action plaintiffs face an additional risk to a class action should they lose. A normal costs regime requires an unsuccessful party to pay the successful party's costs. In a class action, it would be ordered against the representative plaintiff alone. Any costs order would be significantly higher than the individual's claim and thus, the risk of a costs order also discourages litigation of class actions. A no costs regime avoids the chilling effect of a traditional costs order by providing that neither party will be required to pay the other's costs.

[29] In Alberta, there is no general rule for a no costs regime. Section 37 of the Alberta Class Proceedings Act reads:

With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.

[30] Section 37 must be seen as a policy choice by the Alberta Legislature. In Ontario, a normal costs regime applies, but where the

matter is a test case, raises a novel point of law or involves matters of public interest, then, the general rule that costs follow the event may not apply. However, in Ontario, there is also a fund to assist prospective class action litigants. There is no such fund in Alberta.

[31] As a result, in Alberta, class action litigants can only avoid the risk of costs to be paid by a representative plaintiff by applying for an order for no costs in the proceedings and relying upon common law principles for public interest litigation. There is nothing in the Class Proceedings Act that expressly prohibits such an order.

[32] Mr. Ayrton submits that a no costs order is required in this class action to encourage access to justice through class actions and to promote public interest by protecting the public from abusive loan practices. He concedes he cannot demonstrate that the certification judge erred in exercising his discretion to decline to make such an order at this time, but he invited this Court to apply the reasons in *Pauli v. Ace INA Insurance Co.*, 2004 ABCA 253 (CanLII), 2004 ABCA 253, and order no costs for these proceedings.

[33] *Pauli* was a proposed class action. It involved interpretation of a section of the Alberta Insurance Act that could have potentially affected the many owners of vehicles who make insurance claims for damages to their vehicles. The action was dismissed prior to certification proceedings and the chambers judge imposed party and party costs against the plaintiffs.

[34] On appeal, the award of costs for the chambers application determining the merits was overturned and no costs were ordered. This Court discussed the four criteria to be considered when departing from the normal rule that costs follow the event: public interest, novel point of law, test case and access to justice. This Court found that the proposed class action matter was one of public interest, raised a novel point of law, was a test case, and that access to justice was a live concern, stating at para. 17:

As noted by the chambers judge, the general principles of costs under the ARC apply to class actions both before and after the proclamation of the Class Proceedings Act, which provides in s. 37 that the court “may award costs as provided for under the Rules of Court”.

And continuing at para. 19:

A judge exercising discretion must give some weight to all legally relevant factors: Metz at para 15. It is not disputed that the four criteria considered by the chambers judge are legally relevant factors in the exercise of discretion...

[35] The reasons in Pauli set out the basis for a court to order no costs in any event for a class action. In *Vriend v. Alberta* (1996), 184 A.R. 351, cited in Pauli, this Court also observed that the discretion to depart from the normal rule that costs follow the event may be exercised when the case is one of public interest. Similarly, in *Friends of the Calgary General Hospital Society v. Canada et al* 2001 ABCA 162 (CanLII), (2001), 286 A.R. 128, where the plaintiff had unsuccessfully challenged the demolition of the Calgary General Hospital, this Court set aside a costs award on the basis of public interest.

[36] A purposive treatment of s. 37 of the Class Proceedings Act is in keeping with the Supreme Court of Canada’s pronouncements on class proceedings. In *Western Canadian Shopping Centres, Rumley v. British Columbia*, 2001 SCC 69 (CanLII), 2001 SCC 69, and *Hollick*, the Court stated that class proceedings statutes shall be construed generously to give full effect to the objectives of judicial economy, access to justice and behaviour modification.

[37] The four criteria are engaged in this appeal. This action involves the public interest in protecting the public against criminal rates of interest and breaches of consumer protection legislation. While the plaintiff has a pecuniary interest, the interest is modest in comparison with the costs of the proceedings. Whether brokerage fees constitute interest for the

purposes of s. 347 of the Criminal Code has not been considered by a superior court in this Province. It would establish a legal principle that would determine other actions in Alberta. Class actions, by their very nature raise access to justice issues.

[38] A judge is given broad discretionary powers when awarding costs; thus, this Court will not interfere with an exercise of discretion unless there is a clear, palpable, and overriding error: *Westersund v. Westersund* (1993), 157 A.R. 276 at para. 11 (C.A.).

[39] The certification judge made no error in deferring a costs decision; therefore, this Court has no basis to order a no costs regime in this action. But should Mr. Ayrton seek a no costs order in the future, we urge serious consideration be given to the criteria for departing from the normal costs rule in light of the nature of this action and the objectives of the Class Proceeding Act.

From this brief review, it can be seen that, if the case is a meritorious one that is being advanced for any of the special considerations set out in s. 31(1) CPA, there is a very strong probability that the courts will exercise their discretion to avoid imposing on the representative plaintiff the burden of an adverse costs award. High among the court's considerations are the chilling effect that significant adverse costs awards may have in dissuading plaintiffs (or class counsel) from otherwise proceeding with cases that are deserving of a hearing, and thereby defeating the one of the primary goals of the act – access to justice.

Cost Regimes in Canadian Jurisdictions – Where Are We Going?

The differing manner in which different Provinces have approached the issue of costs of class proceedings is one of many factors that lie in favour of the enactment of uniform class proceedings legislation. Consistency in the manner

in which representative plaintiffs will be treated, and the ability of classes to effectively and equally access the courts in each jurisdiction should be a paramount concern for the legislators across the country. The Uniform Law Conference of Canada has recommended the enactment in each Province of a Uniform Class Proceedings Act. In the draft act, the ULCC has not made a definitive recommendation as to which cost regime it is recommending. It proposes that the Act include a provision either like that in effect in the ON CPA, or alternatively like that in the BC CPA. In its commentary on the alternatives, the ULCC suggested that the alternative that is chosen may be influenced by the existence of a fund such as the ON Class Proceedings Fund.

In my view, the existence of a fund should be an irrelevant consideration, unless the fund is available to all proposed class proceedings, equally. In practice, the ON Fund tends to only provide funding to cases that it views as being likely to succeed. It is therefore irrelevant to the more unique or challenging, yet meritorious claims that might otherwise be argued, but that never see the light of day due to the substantial risks that flow from adverse costs awards. Rather, the correct approach should be that which was recommended by the OLRC and the Alberta Law Reform Institute¹³, and implemented in BC and elsewhere – no costs should be awarded in class proceedings except in particularly unusual or egregious situations. The “no costs” regime ensures that both parties are playing on a level field. It provides enhanced access to justice, and prevents abusive defendants from erecting additional barriers to the courts

¹³ Alberta Law Reform Institute, *Class Actions, Final Report No 85*, (Edmonton: ALRI, 2000) at Executive Summary Recommendations, p. xxxiii

through the threat of massive costs awards following from a “no holds barred” “all guns blazing” approach to the certification motion.

Post Script: The Lesson from Residential Schools: Time doesn't Necessarily = Money

As everyone knows, the pan-Canadian settlement of the residential school claims was a feat of perseverance and intensive negotiation. The litigation had been outstanding and growing for in excess of a decade, and included the contested certification motions and the appeals therefrom in *Cloud* and *Baxter*, among others. Following the ON CA decision in *Cloud*, the Federal Government began a process of negotiation with a view to reaching a global settlement of all the outstanding residential school litigation, and appointed former SCC judge Iacobucci Q.C. as its lead negotiator. The negotiations were protracted and complicated, with multiple interest groups needing to come together to reach a consensus. Although at times it may have appeared that a settlement could not be achieved, ultimately an agreement was reached on May 6, 2006. One of the many contentious issues was the question of counsel fees.

Article 13 of the Settlement Agreement addressed the issue of counsel fees and costs. When the parties sought approval of the Settlement Agreement, they sought, as part of the overall approval, approval of the negotiated fees. Atypical of the usual position of the courts that fees should not be tied into the settlement¹⁴, there was, at the end of the day, no real push back from the courts with respect to the fees being included as a term of the settlement rather than

¹⁴ See, for example, Cullity J. re the settlement approval in *Garland v. Consumers' Gas*, [2006] O.J. No. 4273

remaining as a separate item to be approved by the court. Apparently, the usual rules and concerns about conflict of interest did not apply, given the extensive negotiation of the settlement under the leadership of retired SCC justice, Iacobucci Q.C. on behalf of the payor, the Government of Canada. The remaining contentious part regarding legal fees issue was referred to the Saskatchewan court for resolution. The total fees to be paid to the various factions of class counsel had been a difficult issue, which was ultimately addressed in the Settlement Agreement. Not unexpectedly, there had been a divergence of opinion with respect to the work performed by the various class counsel groups, and the value of that work in contributing to the global settlement.

The Settlement Agreement provided that the Federal Crown would pay the National Consortium \$40 million plus taxes and disbursements, other counsel would be paid on an hourly basis, with a \$4,000 cap per action. The Merchant Law Group would be paid in accordance with an Agreement in Principle, after providing proof to verify its time and disbursements, with the issue to be finally determined by the Saskatchewan Court if no agreement could be reached. The Agreement in Principle recognizes and permits the parties and the court to take into consideration that other counsel are receiving fees based upon a 3 to 3.5 multiplier, and it also provides that the Merchant Law Group fees will be no less than \$25 million, and no more than \$40 million.

Ultimately, the provincial courts approved the class counsel fees in the following amounts:

1. National Consortium \$40 million + GST, and provincial taxes where applicable, + disbursements
2. Merchant Law Group not less than \$25 million, and not more than \$40 million – subject to *meaningful* verification of time expended, and
3. Individual Counsel \$20 million (approximately).

In the decision of the Saskatchewan Court¹⁵, Justice Ball, took into consideration the terms of the Agreement in Principle, and used the amount paid to the National Consortium as a yardstick measure of reasonableness. The court rejected Mr. Merchant's submissions that he, personally, had worked 5,000 billable hours in each of 2000, 2001 and 2003 (equating to 13.7 hours x 365 days), and required Merchant Law Group to properly verify the time spent and disbursements incurred in prosecuting the class actions and individual claims in which they were counsel. He said:

[55] The Outerbridge submission also asserts at para. 327 that "MLG lawyers did 193,000 hours of work." At paragraph 494 it states that Mr. Merchant himself worked close to 5,000 billable hours annually in the years 2000, 2001 and 2003. Simple arithmetic says that equals 13.7 hours everyday for 365 consecutive days. The implication is that a significant portion of these hours were spent on residential school files.

[56] Although a lawyer may arbitrarily assign time to files in a way that adds up to 5,000 hours each year, I do not accept that any lawyer, no matter how driven, actually works 5,000 meaningful hours each year. Taxing officers do not approve fees based on recorded hours multiplied

¹⁵ *Sparvier v. The Attorney General of Canada*, 2006 SKQB 533, aff'd 2007 SKCA 37 (CanLII)

by a claimed hourly rate (MLG's counsel on this motion, Mr. Meehan, is said to have an hourly rate of \$750.00) without considering the nature of the problem and reasonable value to the client. Similarly, fees for counsel in class actions cannot be calculated using a multiplier of 3 to 3.5 times recorded hours without regard to whether the recorded time was actually worked and, more importantly, whether it represented value to the client.

[57] Since time spent is relevant to approving legal fees in class actions, satisfactory verification of time actually worked by MLG on residential schools' litigation will be required if the parties are unable to reach agreement on fees without a trial. It will be incumbent on MLG to provide that verification in a reliable format that does not breach solicitor/client confidentiality. Although that verification has not yet been provided, for reasons to be explained below I accept that the time spent by MLG on residential schools' litigation has been substantial.¹⁶

In his decision on the settlement, Justice Ball reminded the parties that the court must determine if the overall settlement, including the provisions with respect to legal fees are fair and reasonable. This is important, particularly when the fees are being paid by the defendant as a separate component of the settlement, due to the inherent conflict of interest in which class counsel find themselves at this stage, and in particular, to ensure that class counsel are not selling the plaintiff class short, in favour of payment of their legal fees:

[43] I now turn to the question of whether the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG warrant court approval. All parties urge the Court to approve the entire Settlement Agreement, including those portions relating to MLG. They point out that the fees and disbursements will not be paid from the amounts available to the members of the class, but over and above those

¹⁶ *ibid*, para. 55 - 57

amounts. Although one party suggested that the fees and disbursements payable to all of the lawyers should be approved because they are not being paid by class members and because Canada has “unlimited resources,” I do not agree. The Court must decide whether the fee arrangements, which are part of the overall settlement, are “fair and reasonable.” This means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved. It also means however, that the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole.¹⁷ [emphasis added]

There is an important message in the Residential Schools experience on the issue of fees payable to class counsel about the importance of keeping an accurate and detailed account of the time spent in prosecuting a class action, regardless of the fact that the client has entered into a contingency fee agreement. A contingency fee agreement is not binding on anyone except the signatories thereto, and even so, it remains subject to approval by the court. The fairness of the fee sought is subject to even greater scrutiny in the class action context, as the court is charged with protecting the interests of the absent class members, not only with respect to the terms of the settlement, but also that portion of the overall settlement that is to be paid to class counsel. Even when counsel will be seeking approval of their fees on the basis of a percentage of the overall recovery for the class, the court will look at the time expended by class counsel in prosecuting the claim as a measure of reasonableness of the fees sought. If class counsel have not kept a meaningful record of the time they have expended, or their records are inaccurate or appear inflated, or leave the

¹⁷ *ibid*, SKQB, para. 43

impression of being created ex post facto, then counsel will lose credibility with the court, and this will undoubtedly have a deleterious effect on the fees that are ultimately approved by the court. The case of Merchant Law Group in Residential Schools is a case in point. While Merchant argued that it has expended in excess of millions of dollars in time in prosecuting the claims on behalf of their clients, they were unable to convince Mr. Iacobucci that the time claimed had in fact been spent. Even by the time the certification and settlement approval motions were heard, Merchant had been unable to present records in a form satisfactory to the court. While the courts approved the payment to the National Consortium within 60 days of the Implementation Date (September 19, 2007), i.e. by the end of November 2007, as of the date hereof, there has been (to the writer's knowledge) no resolution of the Merchant Law Group fee issue, and the question of how much, if any, in excess of \$25 million it might receive remains unresolved. While Merchant Law Group may well be able to justify fees of \$40 million, it seems at this stage that it is very unlikely that they will receive more than \$25 million within 60 days of the Implementation Date. In the interim, the firm is being put to substantially more time, effort and expense, including the AG's appeal from Justice Ball's fee approval decision, in order to justify the fee it is seeking.

I would recommend that class counsel ensure that their time keeping on class actions be kept in meticulous order so that the issue of fees can be addressed with the court with a minimum of difficulty at the end of the proceeding.