

COURT OF APPEAL FOR ONTARIO

CITATION: Amyotrophic Lateral Sclerosis Society of Essex  
v. Windsor (City), 2013 ONCA 254  
DATE: 20130425  
DOCKET: C56337 and C56338

Winkler C.J.O., Weiler and Laskin JJ.A.

BETWEEN

Amyotrophic Lateral Sclerosis Society of Essex County

Plaintiff (Appellant)

and

The Corporation of the City of Windsor

Defendant (Respondent)

BETWEEN

Belle River District Minor Hockey Association Inc., and Essex County Dancers  
Incorporated

Plaintiffs (Appellants)

and

The Corporation of the Town of Tecumseh

Defendant (Respondent)

Earl A. Cherniak, Q.C. and Peter W. Kryworuk, for the appellants

Scott C. Hutchison and Brendan Van Niejenhuis, for the respondents

Heard: April 3, 2013

On appeal from the order of the Divisional Court (Reilly, Aston and Ray JJ.), dated August 23, 2012.

**Weiler J.A.:**

[1] The issue on these appeals is whether the Divisional Court erred in principle in refusing to award costs in two class action proceedings despite the appellants' success on the substantive issue they appealed. Instead, the court ordered that the costs of the appeals and of the motions for leave to appeal were to be determined by the motion judge as part of the overall costs of the certification motions.

[2] For the reasons that follow, I am of the opinion that the Divisional Court did err in principle and that its refusal to award costs was plainly wrong.

#### **A. BACKGROUND**

[3] In the two class proceedings, the appellants are three charitable organizations that engage in fundraising activities such as lotteries and bingo. The appellants claim that the respondent municipalities charged licensing and administration fees that greatly exceeded their associated costs of regulation. They allege that the fees are in effect a tax imposed without legislative authority and thus are *ultra vires* the municipalities. They seek restitution.

[4] The proposed class consists of all those persons who paid such fees to the municipalities from 1990 to the present. At the certification motion, the motion

judge certified the proceedings as class actions but, based on his interpretation of the existing jurisprudence – namely, that the cause of action was complete at the moment the payments were made – held that time started to run from the date the licencing fees were paid. Accordingly, he limited the scope of the respective classes to those persons whose claims were not *prima facie* time-barred by the *Limitations Act, 2002*, S.O. 2002, c.24, Sched. B.

[5] On appeal, the Divisional Court held that the motion judge erred in law in limiting the size of the respective classes for this reason. The statements of claim in the actions pleaded a discoverability/concealment issue that could extend the time frame for any claim. However, this issue would only be determined based on evidence. Because the determination of whether a class should be certified under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992 c. 6 (*CPA*), is made by reference only to the pleadings and any documents identified in the pleadings, the limitations issue ought not to have been decided on the motion for certification.

[6] In addition to the limitations issue, the respondents raised a number of alternative arguments concerning certification both before the motion judge and the Divisional Court. In view of his decision with respect to the limitations issue, the motion judge was not required to deal with these arguments. The appellants asked the Divisional Court to do so and to render a decision on the certification

motion. The Divisional Court decided that the preferable course was to refer the other arguments back to the motion judge for reconsideration.

[7] When approaching the issue of costs, the Divisional Court appears to have been of the opinion that success on appeal was divided. It stated, at para. 2: “The plaintiffs were successful in having the decision of the Motion Judge set aside but unsuccessful in obtaining an order certifying the class proceeding. That issue was remitted to the Motions Judge and the outcome on the original certification motion remains uncertain.”

[8] The Divisional Court then gave five inter-related reasons for its decision to remit the costs back to the motion judge. As set out in para. 4 of the court’s endorsement on costs, they are as follows:

- (i) This procedure almost certainly forecloses the possibility that the costs issue might follow a different appeal route from the certification motion itself;
- (ii) The Motions Judge is in a better position to understand the reasonableness of the very substantial costs that are claimed because of his close familiarity with the case from case managing the matter;
- (iii) If, at the end of the day, the only impact of this appeal is that the original order is not changed in any substantial way, or simply granted for different reason, or the certification motion fails altogether, it may be that neither side should be awarded costs, or that the plaintiffs ought to pay costs;

- (iv) In these circumstances, the appeal and motion to leave for appeal, are a component of the costs of the certification motion and not capable of being fairly resolved in a discrete or isolated fashion;
- (v) Patterson J. originally decided that the costs of certification ought to be reserved to trial. He gave no reasons for that conclusion but it ought to be left open to him to make the same order on the reconsideration. A separate order for costs by this panel would undermine his discretion.

## **B. ANALYSIS**

[9] Before turning to the law, I must first resolve the question of whether success on the appeal was divided. In my opinion, it was not. The appellants were entirely successful on the issue they appealed. It was the appellants' success on the limitations issue that opened up the necessity to deal with the additional issues raised by the respondents. Although the Divisional Court could have decided these issues, it exercised its discretion to refer them back to the motion judge. Having exercised its discretion as it did, the Divisional Court refused to give the appellants the ultimate remedy of certification. In these circumstances, the fact that the appellants did not obtain the remedy they sought did not detract from their significant success on the appeal. The respondents are not entitled to rely on "the general rule that where success on appeal is substantially divided...an award of costs of the appeal will not be made": *Lowndes v. Summit Ford Sales Ltd.*, [2006] O.J. No. 1438 (C.A.), at para. 3.

**(1) The General Rule When a New Trial is Ordered**

[10] The mischaracterization of the appellants' success on appeal led the Divisional Court to consider only two possible dispositions: that the costs should be conditional on the plaintiffs' success at the re-hearing or that costs should be remitted to the motion judge to be considered as a component of the overall costs of the certification motion. It failed to consider the "general rule" and the rationale underlying it, that where an appeal is allowed and results in a re-hearing, the costs of the appeal should be awarded to the successful appellant and should not depend on the outcome of the re-hearing: see Donald J. M. Brown, *Civil Appeals*, vol. 2, looseleaf (Toronto: Canvasback publishing, 2008), at para. 6:3250.

[11] Decisions in which this general rule has been applied include: *Mak v. TD Waterhouse Canada* (2005), 198 O.A.C. 92 (Div. Ct.), at para 25; *King's Bay Development Corp. v. Cornerstone Custom Homes Ltd.*, 2009 ONCA 611, 82 C.L.R. (3d) 1, at paras. 2 and 37; *Rowlands v. Wright*, 2009 ONCA 492, at paras. 29-31; *Oz Optics Ltd. v. Timbercon, Inc.*, 2011 ONCA 714, 343 D.L.R. (4th) 443, at paras. 75-78; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 499, at paras. 1-2; *Tucker v. Cadillac Fairview Corp.* (2005), 200 O.A.C. 140, at paras. 16 and 25-30; and *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 638, at paras. 6-8.

[12] Applying this jurisprudence to these class proceedings, it is important to separate the appeal from the forthcoming certification motion. The appeal from the motion judge was a discrete procedural step; its costs should not be treated as merely a component of the costs of the certification motion. The outstanding issues to be determined on the certification motion were not determined on the appellants' appeal to the Divisional Court. The costs of the appeal and the related motion for leave to appeal are stand-alone costs incurred by a group of litigants who want their day in court.

[13] The delayed recovery of costs until the outcome of the certification motion and potentially of the case itself does not promote access to justice, a goal of the *CPA*. This court has held that this principle should be taken into account in making awards in class actions: see *Sharma v. Timminco Ltd.*, 2012 ONCA 322, 19 C.P.C. (7th) 271, at para. 5. The respondents were entitled to advance their argument concerning the limitation period on the certification motion. However, it is not generally appropriate that the appellants carry the financial burden of their successful appeal from the motion judge's decision until the conclusion of the certification motion and potentially until the trial itself.

**(2) Remitting Costs back to the Motion Judge**

[14] The Divisional Court further erred in principle in remitting the costs of the appeal to the motion judge whose error necessitated the appeal. The parties

could reasonably have expected the court to make an order as to costs, even if it was only an order for costs that depended on the result at the certification hearing or the trial. If the court was going to depart from that expectation and remit the costs of the appeal back to the motion judge, it ought to have given the parties an opportunity to make submissions on this proposed procedure. The appellants assert it did not do so.

[15] In addition, the authority of the Divisional Court to remit the costs of the *appeal* back to the motion judge is not immediately apparent to me. Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[16] The implication of s. 131(1) is that the court hearing a proceeding or a step in a proceeding will fix those costs. The use of the definite article “the” before the word “court” as opposed to the indefinite article “a” reinforces that implication. This implies that the court hearing the appeal should decide the costs of the appeal. Nothing in the *CPA* suggests the contrary.

[17] Even assuming that the Divisional Court had the authority to make the order it did, it should not have done so in this case. The Divisional Court was in the best position to make an award as to costs; it had a full appreciation of the factors to be considered in making an award as to costs. Further, as I noted



above, the appellants enjoyed significant success on their appeal to the Divisional Court and should have received their costs on the appeal.

**(3) This Court's Decision in *Sharma***

[18] During argument of the appeal, the Court's attention was drawn to its decision in *Sharma* where, as in this case, the sole issue on the appeal was a limitation issue on a certification motion for a class proceeding. The Court of Appeal reversed the motion judge on the limitation issue. The balance of the issues respecting certification was remitted to the motion judge for determination.

[19] With respect to the costs of the appeal, the court commented that access to justice and the appellants' success on the appeal were important considerations. However, considering the novel issue of law raised in the pleadings, the court ordered costs in the cause. It held, at para. 5, that, "[s]uccess in the ultimate proceedings should in this circumstance serve as the ultimate determining factor for the payment of costs."

[20] The decision of this court respecting costs illustrates that the general rule – that the costs of an appeal are a separate discrete step and should not be treated as merely a component of the costs of the certification motion – is not an inflexible one. Costs remain in the discretion of the court. However, the court must correctly characterize the success of the parties on an appeal and weigh the importance of the various factors, including access to justice, in the balance.

In addition, it is generally not appropriate for the appellate court to ask the motion judge to determine the costs of an appeal from an order made by that same judge. In *Sharma*, the Court of Appeal fixed the costs of the appeal.

**C. CONCLUSION**

[21] For the reasons given, I would allow the appeal as to costs and order that the costs of the appeals and of the motions for leave to appeal to the Divisional Court be awarded to the appellants on a partial indemnity basis.

[22] Bearing in mind the submissions of the respondents' counsel that fees for three senior counsel was excessive and that there was some overlap in the costs due to different senior counsel within the same firm dealing with this file, I would reduce the costs sought and award costs inclusive of any applicable taxes and disbursements as follows:

- (i) Windsor action - \$65,000
- (ii) Tecumseh action - \$67,000

[23] Costs of the leave motion for the appeal to this court and of the appeal are to the appellants and are fixed in the amount of \$16,500 inclusive of any applicable taxes and disbursements.

Released: **APR 25 2013**

*Karen M. Worley, A.*

*Daguer*

*I agree DR had RA*