

COURT OF APPEAL FOR ONTARIO

CITATION: Green v. Canadian Imperial Bank of Commerce, 2014 ONCA 344

DATE: 20140501

DOCKET: C55832, C55982, C56252

Doherty, Feldman, Cronk, Blair and Juriansz JJ.A.

C55832

BETWEEN

Howard Green and Anne Bell

Plaintiffs (Appellants)

and

Canadian Imperial Bank of Commerce, Gerald McCaughey, Tom Woods, Brian  
G. Shaw, and Ken Kilgour

Defendants (Respondents)

C55982

BETWEEN

Marvin Neil Silver and Cliff Cohen

Plaintiffs (Respondents)

and

IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce,  
Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and  
Kathryn A. Gamble

Respondents (Appellants)

C56252

BETWEEN

Trustees of the Millwright Regional Council of Ontario Pension Trust Fund

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

AND BETWEEN

Nabil Berzi

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

AND BETWEEN

Huacheng Xing

Plaintiffs (Respondents)

and

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Defendants (Appellants)

R. Paul Steep and Dana M. Peebles, for the appellants IMAX Corporation,  
Richard L. Gelfond, Bradley J. Wechsler, Francis J. Joyce, Neil S. Braun,  
Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble

William V. Sasso, A. Dimitri Lascaris, Serge Kalloghlian and Daniel E. Bach, for the respondents Marvin Neil Silver and Cliff Cohen

Joel P. Rochon, Peter R. Jervis, Sakie Tambakos, John Archibald and Remissa Hirji, for the appellants Howard Green and Anne Bell

James C. Tory and Sheila Block, for the respondent Canadian Imperial Bank of Commerce

Benjamin Zarnett and David Conklin, for the respondents Gerald McCaughey, Tom Woods, Brian G. Shaw, and Ken Kilgour

Nigel Campbell and Ryan A. Morris, for the appellants Celestica Inc., Stephen W. Delaney and Anthony P. Puppi

Kirk M. Baert, Celeste Poltak, Michael Mazzuca, Peter Prozanski and Trent Morris, for the respondents Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Nabil Berzi, Huacheng Xing

Anna Perschy, for the intervenor Ontario Securities Commission

Alan L.W. D'Silva, Mark E. Walli and Lesley Mercer, for the intervenor Insurance Bureau of Canada

Margaret L. Waddell, for the intervenor Canadian Foundation for Advancement of Investor Rights

Jonathan Bida, for the intervenor Shareholder Association for Research and Education

Heard: May 13, 14, 15, 16, 2013

On appeal from the order of Justice G.R. Strathy of the Superior Court of Justice, dated July 3, 2010, with reasons reported at 2012 ONSC 3637 (C55832); and on appeal from the order of Justice K.M. van Rensburg of the Superior Court of Justice, dated August 27, 2012, with reasons reported at 2012 ONSC 4881 (C56252); and on appeal from the order of Justice P.M. Perell of the Superior Court of Justice, dated October 15, 2012, with reasons reported at 2012 ONSC 6083 (C56252).

## COSTS ENDORSEMENT

### **Feldman J.A.:**

[1] At the conclusion of the Reasons for Decision released February 3, 2014, *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 118 O.R. (3d) 641, the parties in each of the three appeals were given the opportunity to either agree on costs or to make brief written submissions with respect to the costs of their respective appeals. The court has received submissions on costs in two of the appeals.

### **Green and Bell v. CIBC et al**

[2] The successful appellants' bill of costs for this appeal sets out \$503,333.50 in fees (plus HST) on the partial indemnity scale, plus disbursements, inclusive of HST, of \$14,504.87. However, the appellants reduced their claim for costs to \$125,000 for fees (plus HST), and \$10,000 for disbursements, for a total costs award of \$151,250.

[3] The respondents do not oppose an award of costs of the appeal to the appellants on the partial indemnity scale. Their objection is to the amount claimed. They suggest an award of \$50,000, inclusive of disbursements and HST.

[4] The respondents make four submissions to support their position.

[5] The first is that the appellants' lawyers spent too much time on the appeal (1783.8 hours in total). In contrast, the respondents' lawyers spent 1097.40 total hours.

[6] It appears that appellants' counsel recognized that the number of hours actually spent could not reasonably be used as the basis for a costs award, because they reduced their fee claim by approximately 75%. They also reduced the amount claimed for disbursements, although the court was not given details of the disbursements.

[7] The respondents' second submission is that they should not be expected to bear the extra costs incurred because on the court's own motion, the appeal was adjourned to be argued with the two other appeals before the five-judge panel. I do not accept this submission. Any additional costs incurred were part of the process necessary to address the important legal issue regarding the tolling of the limitation period for class action plaintiffs under s. 28 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. As discussed in the Reasons for Decision, that issue has a direct impact on access to justice for class members, particularly in the context of class actions under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5. In any event, the appellants' reduction in the amount claimed for costs essentially removes the effect on costs of the additional procedure.

[8] The respondents' third submission is that because the appeal involved matters of public interest, a costs factor under s. 31(1) of the *Class Proceedings Act*, the amount of costs to the successful party should be reduced. The respondents cite this court's decision in *McCracken v. Canadian National Railway Company*, 2012 ONCA 797, where the court reduced the costs of the successful defendant, Canadian National Railway, because the appeal raised novel issues and engaged the access to justice rationale of the *Class Proceedings Act*.

[9] In my view, *McCracken* is distinguishable from the present appeal. In *McCracken*, because the defendant was successful, the costs were to be paid by the class action representative plaintiff and the Class Proceedings Fund of the Law Foundation of Ontario. In *McCracken*, the court determined that access to justice considerations were implicated when either a class plaintiff or the Law Foundation of Ontario is required to pay costs awards imposed on these litigants. The amount of the award was moderated as part of those considerations. By contrast, in *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.), at para. 8, the court found that the fact that the issue on the appeal was a matter of public interest and engaged s. 31(1) of the *Class Proceedings Act* was a factor that favoured a more significant costs award to the successful class plaintiffs.

[10] The fourth submission is that because this court overruled its own prior holding, there should be no costs award. That was the result in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, 2008 ONCA 703, 93 O.R. (3d) 257. In that case, the unsuccessful plaintiffs argued that because they had brought class actions in reliance on an earlier ruling of the court that was later overruled after their actions had commenced, they should therefore receive an award of costs. The court declined to do so. It then considered whether the successful insurers should receive their costs from the unsuccessful plaintiffs and the Law Foundation of Ontario in accordance with the normal rule, and concluded that in the circumstances where the class actions had been instituted based on the court's prior ruling, and because the appeal was a test case that settled the law for everyone, it was appropriate to make no costs order.

[11] The factors that applied in *Polowin* are not applicable in this case. There were no steps taken by any of the parties to these appeals in detrimental reliance on this court's decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569. As the respondents have properly acknowledged, the successful appellants are entitled to their costs here. The issue is what constitutes a fair and reasonable award: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).

[12] In my view, the appellants have acted reasonably in significantly reducing their claim for fees and disbursements, to reflect the fact that the number of hours spent by the number of lawyers involved does not represent a reasonable amount to be paid by the respondents. The amount claimed by the appellants is fair and reasonable in light of the costs factors set out in rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The proceedings were complex, and the issue on the appeal was a matter of public interest that affects access to justice for class action plaintiffs, particularly for claims under s. 138.3 of the *Securities Act*. I would award the amount claimed: \$151,250.00, inclusive of disbursements and HST.

**Silver and Cohen v. Imax et al.**

[13] The successful respondents claim costs of the appeal of \$100,000.00, inclusive of disbursements and HST. This represents a significant reduction of the actual partial indemnity bill of \$329,702.39.

[14] The appellants submit that there should either be no costs of the appeal, or if costs are awarded to the successful party, then a fair and reasonable amount is \$55,000, inclusive of disbursements and HST.

[15] The appellants' main submission is that the respondents "over-lawyered" the case. They spent over 1100 hours, while the appellants spent only 259.9 hours.



[16] On the motion, the motion judge accepted the law as set out in *Sharma v. Timminco Ltd.* and extended the limitation period by applying the doctrine of *nunc pro tunc*. It was this latter finding that the appellants appealed. However, in this court, the appeal turned on the reconsideration of *Sharma v. Timminco* only. The appellants point to the significance of the case for them. It was clearly significant for all parties and for securities class action practice generally. The respondents and all parties had to address not only the issue raised by the decision of the motion judge but also the issue raised by the court.

[17] In my view, in these unusual circumstances, the amount claimed by the respondents is fair and reasonable. It is also comparable to the amount set out in the appellants' own bill of costs for the appeal, which indicates that the appellants incurred fees on a partial indemnity basis in the amount of \$98,007.16, inclusive of HST.

[18] I would award the amount claimed for costs of \$100,000, inclusive of disbursements and HST.

"Kathryn Feldman J.A."

"I agree. Doherty J.A."

"I agree. E.A. Cronk J.A."

"I agree. R.A. Blair J.A."

"I agree. R.G. Juriansz J.A."