



Can You Recover Your Costs?

by Ralph Cuervo-Lorens

Originally published in *Blaneys on Class Actions* (November 2010) - [Read the entire newsletter](#)



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If you've been involved in a class action, you'll know that it can be very expensive, not only in terms of time and effort but also in terms of legal costs.

Can you recover those costs if you are successful? The answer depends, in part, on where you were sued.

In a number of provinces (British Columbia, Saskatchewan, and Manitoba), costs are *not* recoverable unless you can demonstrate that there was vexatious, frivolous, or abusive conduct, or that an improper or unnecessary application or step was taken for the purpose of delay or increasing costs or other improper purpose, or if you can demonstrate that there are "exceptional circumstances" making it unjust to deprive you of costs. A very difficult test to meet.

In Ontario, however, costs can be recovered in the normal course (just as in any other action) unless the court considers that the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.

In Alberta, costs can be recovered just as in any other action commenced there.

As a result of a number of recent decisions released in Ontario, the different costs regimes can have a major influence on where a plaintiff and his or her counsel will choose to commence their class action. Specifically, a number of recent decisions from the Ontario courts have made it clear that an unsuccessful proposed representative plaintiff can be hit with with an adverse costs award, even if the potential upside for that plaintiff was minimal.

As an example, in a proposed class action commenced against the Federal Government by two women who received silicone gel breast implants, the Ontario Court awarded costs of \$125,000 against these two unsuccessful plaintiffs. These two women had sought certification of the action against the Federal Government on behalf of all women in Canada who had received silicone gel breast implants, arguing that the products were dangerous and ought not to have been approved by the Federal Government for sale in Canada. Blaney McMurtry represented one of the third party manufacturers of breast implants in this action and we succeeded in having our client removed from the action on a preliminary motion to dismiss.

At the Court of Appeal, a further costs award in the amount of \$40,000 was made against the two unsuccessful plaintiffs and on an unsuccessful application for Leave to Appeal to the Supreme Court of Canada, a further adverse costs award of \$1,086 was made against these two plaintiffs.

In a surprising turn of events, the Ontario Court of Justice ruled a few weeks ago that because these two plaintiffs had little or no money, and because their lawyer had allegedly failed to properly advise them that they could face an adverse costs award, the costs had to be paid by their lawyer. The lawyer is appealing this extraordinary ruling and we will report again once a decision has been rendered.

While it is highly unusual for a plaintiffs' class action lawyer to be held liable for an adverse costs award, it is now not unusual in Ontario for a proposed representative plaintiff to be held liable for costs following an adverse ruling at the certification hearing or following an adverse ruling on a preliminary motion. In one recent case, the plaintiff was ordered to pay \$525,000 in costs, a decision that was upheld at the appeal level.

This is good news for defendants (assuming the plaintiff has the financial wherewithal to pay the costs) but it is not good news for plaintiffs or their lawyers (if the breast implant decision is upheld on appeal).

How this issue plays out in the future remains to be seen. One possible result is that plaintiffs' class action lawyers will choose in future to commence their class actions in provinces other than Ontario, such as British Columbia or Saskatchewan, in order to avoid the harsh costs consequences of litigating in Ontario. (This assumes the issue is one that is capable of being brought in another province and that there are not other factors militating against bringing the action outside Ontario).

Defendants will be well served to ensure that they have lawyers who can litigate in these other provinces if and when such out-of-province class actions are commenced. ■