CITATION: Granger v. Her Majesty the Queen in Right of the Province of Ontario, 2020 ONSC 4101
COURT FILE NO.: CV-18-00605134-00CP
DATE: 20200708

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MICKY GRANGER, Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, Defendant

BEFORE: Justice Glustein

COUNSEL: *Jody Brown and Geetha Philipupillai*, for the plaintiff

Victoria Yankou, Daniel Guttman, and Joanna Chan, for the defendant

HEARD: June 24, 2020

REASONS FOR DECISION

Nature of issues and overview

[1] This proposed class action arises out of the alleged retention of DNA profiles by the defendant Her Majesty the Queen in Right of Ontario ("Ontario") after individuals voluntarily provide bodily samples for forensic DNA analysis and such samples do not match any bodily samples obtained under s. 487.05(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*").[1]

[2] The plaintiff, Micky Granger ("Granger"), submits that Ontario is in breach of s. 487.09(3) of the *Criminal Code*, which provides that "[b]odily substances that are provided voluntarily by a person and the results of forensic DNA analysis shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after the results of that analysis establish that the bodily substance referred to in paragraph 487.05(1)(b) was not from that person". Granger alleges that Ontario's conduct violates s. 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and constitutes an intrusion upon

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[1] Bodily samples obtained under s. 487.05(1)(b) are taken pursuant to a court order when the court is satisfied that there are reasonable grounds to believe that the bodily sample is related to an offence.

seclusion. Granger seeks damages under the tort of intrusion upon seclusion and under s. 24 of the *Charter*.

[3] Ontario submits that because it only retains anonymized data from the DNA samples, its practice does not violate s. 8 of the *Charter* or constitute an intrusion upon seclusion.

[4] Granger brought a motion for certification of the present action under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

[5] Following a case conference on January 24, 2020 (the "Case Conference"), held shortly before the scheduled certification hearing dates of February 5 and 6, 2020, Ontario obtained instructions to consent to certification.

[6] On consent, the parties seek an order certifying the action. I agree that this action should be certified as a class proceeding under s. 5 and set out brief reasons below.

[7] The parties do not agree on two issues arising out of the consent certification: (i) costs of the certification motion, and (ii) Granger's proposed term that the order is "without prejudice to the plaintiff bringing a future motion within this proceeding to certify an amended class".

[8] Granger submits that because of Ontario's late consent, the court should order Ontario to pay forthwith all partial indemnity costs of the certification motion up to the date of consent,[2] including those costs which Granger would have been required to incur in any event as mandatory costs of preparing the certification record and a factum, even if certification had proceeded on consent.

[9] Granger relies on an offer to settle he made on March 20, 2019 (the "Offer"), in which he offered to not seek costs of certification provided that Ontario consent to certification by "the date of the delivery of the responding record". Granger stated in the Offer that "[a]fter the responding record, we will begin to incur costs which should be recoverable on some basis in a consent certification".

[10] Granger seeks partial indemnity costs of $124,504.38 ($119,225.17 in fees plus $5,279.21 in disbursements), all amounts inclusive of taxes, payable forthwith.

[11] Ontario submits that because (i) the merits of the action have yet to be determined and (ii) it consented to certification, all costs of the certification motion up to the date of consent should be payable to Granger in the cause. In the alternative, Ontario submits that the court could make

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[2] All parties used the date of the Case Conference (January 24, 2020) as the date of consent, since Granger did not incur significant costs thereafter, as he was awaiting a decision from Ontario as to whether it would consent to certification.

a "hybrid" costs award, with one-third of the costs payable to Granger forthwith and two-thirds of the costs payable to Granger in the cause.

[12] Ontario also challenges the quantum of costs sought by Granger and submits that an appropriate amount is "in the range of $25,000 to $50,000 (fees plus disbursements)".

[13] For the reasons set out below, I follow the hybrid approach supported by the case law and order that Ontario pay half of the costs to Granger forthwith and the other half to Granger in the cause. The hybrid approach satisfies two important goals of costs in a consent certification.

[14] First, it reflects that additional costs are incurred as a result of late consent (outside the "mandatory" costs that the plaintiff would have to incur in any event) and provides that those costs be payable forthwith. Second, it provides incentive to a defendant to consent to certification by having the mandatory costs being paid to the plaintiff only if successful in the action.

[15] The hybrid approach is also consistent with the Offer, in which Granger stated that unless Ontario consented to certification no later than when it delivered its responding materials, Granger "will [then] *begin to incur costs which should be recoverable* on some basis in a consent certification". [Emphasis added.]

[16] As for the quantum of costs, I accept the amount of $124,504.38 proposed by Granger as it falls within the range an unsuccessful party would expect to pay for the motion and is consistent with costs ordered in other certification motions. Ontario filed no costs outline to support its submission that Granger's costs were excessive. Consequently, I order Ontario to pay costs of (i) $62,252.19 to Granger within 30 days of this order and (ii) $62,252.19 to Granger in the cause.

[17] The final issue before the court on this certification hearing relates to the temporal limit of the proposed class.

[18] The parties agreed that the ending temporal limit of class members in the proposed order would encompass those individuals who fall within the class definition as of the date of this order".[3] However, the parties could not agree on whether or how to address future class members in the proposed certification order.

[19] On the facts of this case, both parties agree that there may be other persons who could seek to be added to the class after certification, since Ontario continues to engage in the impugned conduct (which Ontario denies is improper).

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[3] The parties also agreed that the beginning of the temporal limit in the class definition would be June 30, 2000, the date when s. 487.09(3) of the *Criminal Code* took effect.

[20] Granger submits that the order should provide that the temporal limit in the class definition is "without prejudice to the plaintiff bringing a future motion within this proceeding to certify an amended class". Ontario submits that such a term is redundant and unnecessary, and does not consent to the term in the proposed order.

[21] For the reasons set out below, I agree with Granger and order that the temporal limit in the class definition of "the date of this order" is "without prejudice to the plaintiff bringing a future motion within this proceeding to certify an amended class". Such a term clarifies the temporal issue for any future motion to add new class members, even if not strictly required under the *CPA*.

Issue 1: Consent certification

[22] In *Cass v. WesternOne Inc.*, 2018 ONSC 4794, I reviewed the applicable legal principles governing the test for certification on consent of the parties. I rely on those principles in these Reasons.

[23] The test under s. 5 is met for the purposes of settlement. In particular:

(i) The pleadings disclose a cause of action under s. 5(1)(a). Granger pleads that all individuals subject to the impugned practice had a reasonable expectation of privacy in their DNA and that Ontario retained those DNA profiles without legal justification. It is not "beyond doubt" that Granger's claims, including those under section 8 of the *Charter* or for intrusion upon seclusion, cannot be maintained;

(ii) There is an identifiable class under s. 5(1)(b). The proposed class consists of "all persons who voluntarily provided a bodily substance sample, which was subject to forensic DNA analysis by the Ontario Centre of Forensic Sciences and for whom forensic analysis created results which established that the voluntarily given sample did not match any bodily samples obtained within the meaning of s. 487.05(1)(b) of the *Criminal Code*, for the time period June 30, 2000 to the date of this order".

The above class definition is set out in objective terms such that membership in the class proceeding is readily ascertainable, and rationally linked to the common issues asserted by class members. Inclusion in the class does not depend on the merits of the claim or the outcome of the litigation (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 ("*Dutton*"), at para. 38);

(iii) The claim raises common issues under s. 5(1)(c). The common issues are (a) whether a DNA profile is a "result" within the meaning of s. 487.09(3) of the *Criminal Code*, (b) whether the impugned conduct breached s. 8 of the *Charter* (and if so, whether those breaches are justified by section 1 of the *Charter*), (c) the availability of damages under s. 24 of the *Charter*, (d) whether the impugned conduct constitutes intrusion upon seclusion, (e) the availability of aggregate

damages, (f) the availability of punitive damages, and (g) the applicable limitation period.

These common issues avoid duplication of fact-finding or legal analysis (*Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29). The resolution of each issue will determine the claims of the class members, with individual damage assessments or individual issues of limitation periods being of a minor nature. The threshold issues in this action relating to the impugned Ontario practice would substantially advance the claims on the causes of action asserted. The resolution of the proposed common issues is necessary for each class member's claim (*Dutton*, at para. 39);

(iv) A class proceeding is the preferable procedure under s. 5(1)(d). The goals of access to justice, judicial economy, and behaviour modification are all enhanced by a class proceeding. By way of example, Granger is a migrant worker with no monetary ability to pursue an individual case. With thousands of potential class members, individual actions would be impractical, unmanageable, and prohibitively expensive; and

(v) Granger is an adequate representative plaintiff under s. 5(1)(e). Granger is prepared to act for the proposed class and would fairly and adequately represent the interests of the proposed class. He has no ulterior motives nor collateral purpose for his initiation of the lawsuit and does not have any interest in conflict on the common issues with those of the other class members.

While Granger acknowledged on cross-examination that he did not know of the litigation plan, he was able to articulate the nature of his alleged loss arising from his position that Ontario "took" his DNA but did not "destroy" it. Granger understands that he represents other similar class members, and recognizes his role as the client providing instructions. He has sufficient knowledge as a lay representative to represent the interests of class members.

[24] For the above reasons, I certify the action as a class proceeding under s. 5 of the *CPA*, on consent.

Issue 2: *Costs of the certification motion*

[25] There are two costs issues before the court.

[26] The first costs issue is whether partial indemnity costs up to the date of consent[4] (i) should be payable to Granger forthwith (as submitted by Granger), (ii) should be payable to

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[4] Granger does not seek any costs after the Case Conference (see footnote 2 above).

Granger in the cause (as submitted by Ontario), or (iii) should be paid under a hybrid approach that would have some portion of the costs payable to Granger forthwith and some portion payable to Granger in the cause (as submitted in the alternative by Ontario).

[27] The second costs issue is whether the court should accept the quantum of $124,504.38 proposed by Granger or fix a lower amount as submitted by Ontario, "in the range of $25,000 to $50,000 (fees plus disbursements)".

[28] I address each costs issue below.

Costs Issue 1: Payment of costs

[29] I first review the facts relevant to the timing of the consent in this matter. I then consider the applicable law. Finally, I apply the law to the present case.

1. Timing of consent

[30] The facts relevant to the timing of consent in this matter are as follows:

(i) Granger made an offer to settle costs on March 20, 2019 (previously defined as the "Offer"). Granger advised that he "would agree to certification on a no costs basis based on the presently proposed common issues, class and pleading, subject to an agreement on notice". That offer was open "up until the date of the delivery of the responding record".

In the Offer, Granger advised Ontario that if it still opposed certification after delivering its responding materials, "we [Granger] will begin to incur costs which should be recoverable on some basis in a consent certification";

(ii) Ontario prepared its responding record, but did not consent to certification;

(iii) The certification hearing was scheduled for February 5 and 6, 2020;

(iv) Cross-examinations were conducted;

(v) Granger and Ontario exchanged factums. Granger prepared his factum on the basis that certification would be opposed, and Ontario responded with its factum that challenged each of the five requirements for certification under s. 5(1) of the *CPA*;

(vi) The deadline for Granger to deliver his reply factum was January 31, 2020;

(vii) The Case Conference was held on January 24, 2020. At that time, following discussions between the parties and the court, Ontario agreed to seek instructions as to whether it would consent to certification and then later seek summary

judgment.[5] The certification hearing was rescheduled to April 8 and 9, 2020 so that Ontario could obtain instructions;

(viii) Due to the COVID-19 pandemic, the parties understood that the opposed certification hearing would not likely proceed on the scheduled April 8 and 9, 2020 dates. In any event, Ontario confirmed as of April 2, 2020 that it would consent to certification, although the parties did not agree on terms related to costs and the temporal limit issue; and

(ix) The parties then prepared their written and oral submissions to address costs and the temporal limit issue, and those matters were heard (along with the consent to certification) on June 24, 2020.

2. The applicable law

[31] I first review the general principles governing costs of a certification motion and then consider how those principles have been applied to costs orders for consent certification.

i. General principles

[32] The general principles governing costs of an opposed certification motion are set out in *Pearson v. Inco* (2006), 79 O.R. (3d) 427 (C.A.) ("*Pearson*"), at para. 13. I summarize those principles as follows:

(i) the normal rule is that costs follow the event;

(ii) the costs must reflect what is fair and reasonable;

(iii) the costs, if possible, should reflect costs awards made in closely comparable cases;

(iv) a motion for certification is a vital step in the proceeding and the parties are expected to devote substantial resources to prosecuting and defending the motion;

(v) the costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay; and

(vi) a fundamental object of the *CPA* is to provide enhanced access to justice.

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[5] (with Granger also considering whether he would seek summary judgment)

[33] There is no requirement that a plaintiff demonstrate success on the merits in order to obtain costs on certification. In *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2015 ONSC 6354 ("*Sino-Forest*"), Perell J. held (at para. 137):

> [C]ertification is a contest in and of itself that does not go to the merits of the plaintiff's claim. In still other words, the outcome of the common issues trial does not mean that the action should not have been certified.

[34] However, a successful plaintiff on certification cannot seek costs for matters that go beyond what is required to obtain certification. Perell J. held in *Sino-Forest* (at para. 138):

> Thus, I conclude that the Plaintiffs should recover costs for their success on the leave and certification motions for the actions including the actions that required leave. However, those costs should not go beyond what is necessary for obtaining leave and certification having regard to the genuine legal risks associated with those motions. And a defendant should not have to pay for legal services tacked on to the certification and leave motion that should more properly be paid for if the plaintiff is successful in the litigation. Costs in the cause has the virtue that sometimes it is fair that a party should recover costs for an interlocutory motion only if that party ultimately succeeds in the action: *Smith (Estate) v. National Money Mart Co.* (2008), 92 O.R. (3d) 224 (S.C.J.) at para. 13.

[35] Also, if certification is not "controversial" and costs of that motion would be minimal, the court can exercise its discretion not to award costs for the certification motion if the action is decided against the plaintiff on the merits.

[36] In *Austin v. Bell Canada*, 2019 ONSC 6310, 51 C.C.P.B. (2nd) 156 ("*Austin*"),[6] Morgan J. addressed the costs arising upon his dismissal of the plaintiff's claim on a summary judgment motion brought by the defendants. That motion was heard concurrently with the certification motion. The defendants did not oppose certification except for some minor issues which Morgan J. held (in his costs decision) "were never going to stop the action from being certified" (at para. 9). Morgan J. held (at para. 10):

> The Defendants' approach to the double motion was to end this potential class action. They did not aim to achieve summary judgment against the named Plaintiff, leaving the pension payments open to challenge by another pensioner perhaps with a slightly different take on the same issue. They benefitted by having

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[6] The merits of the summary judgment motion before Morgan J. were addressed in his reasons at 2019 ONSC 4757, 147 O.R. (3d) 198, and in supplementary reasons at 2019 ONSC 5961, 51 C.C.P.B. (2nd) 154. The plaintiff successfully appealed that decision (reported at 2020 ONCA 142, 150 O.R. (3d) 21), but the Court of Appeal did not address Morgan J.'s costs reasons reported at 2019 ONSC 6310.

> the action dismissed on a class basis, which meant that it first had to be certified before summary judgment was granted dismissing the entire matter as against the class. To award the Plaintiff over $100,000 for "winning" the certification motion would be a misreading of the result of the double motion argued before me.

[37] Consequently, if an action is certified as a class proceeding after a contested motion, the plaintiff is generally entitled to costs forthwith, unless (by way of example) (i) there is divided success on the various issues before the court[7] (*e.g.* issues such as the nature and extent of proposed common issues, class definitions, or whether some issues disclose a cause of action); (ii) the costs sought go beyond what is necessary for obtaining certification (under the principles in *Sino Forest*); or (iii) the certification is not truly opposed and is part of a concurrent summary judgment motion to address the merits of the case.

[38] A successful plaintiff on an opposed certification motion generally obtains all reasonably incurred costs on a partial indemnity basis. The court does not (i) carve out costs associated with the mandatory nature of certification or (ii) defer payment of such mandatory costs to be paid to the plaintiff in the cause. The defendant, having unsuccessfully opposed certification, does not get the benefit of having payment of a portion of the costs deferred until determination on the merits.

ii. Costs on consent certification motions

[39] When a defendant consents to certification, the process for determining costs reflects both the mandatory nature of the certification motion and the timing of the defendant's consent.

[40] Both parties rely on the decision of Perell J. in *Frank v. Farlie, Turner & Co., LLC*, 2013 ONSC 4364 ("*Frank*"). The defendants in *Frank* consented to certification after the court struck common law claims in a securities misrepresentation case.

[41] Perell J. held that (i) the plaintiffs incurred additional costs on the certification motion because of the defendants' late consent to certification, and (ii) those additional costs should be paid forthwith to the plaintiffs. Perell J. further ordered that the "mandatory" costs, which the plaintiffs would have incurred in any event to obtain certification, should be payable to the plaintiffs in the cause as a result of the defendants' consent.

[42] Perell J. stated (*Frank*, at para. 37):

> [...] there was reason to think that the certification and leave motions would be resisted [...] [I]n my opinion, in the case at bar, it is appropriate to make a hybrid

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[7] For example, in *Stewart v. Demme*, 2020 ONSC 1335, 63 C.C.L.T. (4th) 127 ("*Stewart*"), relied upon by Ontario, Justice Morgan heard a series of motions with divided success between the parties (at paras. 1 and 9) – see my additional comments on *Stewart* at paragraph 62 below.

award which recognizes that the Plaintiffs incurred expenses for a mandatory motion that they reasonably anticipated would be vigorously opposed but which apprehension turned out to be incorrect because the Defendants, whose liability and the extent of it remains to be determined, ultimately did not oppose the motions.

[43] In *Frank*, Perell J. set out the following general principles (quoted *verbatim*):

(i) The normative role and operation of a cost award as a regulator of interlocutory activity by awarding costs to the successful party, however, may need to be adjusted when: (1) the responding party does not oppose or consents to the motion; and (2) the interlocutory motion is mandatory, as is the case for the motion for certification under the *Class Proceedings Act, 1992* and as is the motion for leave under the *Securities Act* (at para. 27);

(ii) In my opinion, there are good policy reasons for awarding costs in the cause in appropriate cases where a responding party does not oppose a mandatory interlocutory motion, and there are good policy reasons for making a hybrid award, as I propose to do in the case at bar, where a portion of costs are payable forthwith and a portion of costs is payable in the cause when a responding party consents or does not oppose a mandatory motion (at para. 29);

(iii) If a plaintiff's mandatory motion is resisted by the defendant and the plaintiff is successful, then no adjustment is necessary and the plaintiff as the successful party on a contested motion is normally entitled to costs, but if a plaintiff's mandatory motion goes unopposed or if it goes on consent, and thus the defendant is not getting in the way of the plaintiff's access to justice, then depending upon when and how the defendant's resistance vanished, it may be fair and appropriate to give some credit to the defendant for not opposing the mandatory motion by awarding all or part of the costs in the cause (at para. 30);

(iv) From a policy perspective, costs in the cause or a hybrid award is salutary because it will encourage defendants to consent to certification and to leave under the *Securities Act* and thereby by their consent provide a route to justice for both the plaintiff and the defendant (at para. 31);

(v) In appropriate cases, if the courts do not give some recognition for the fact that the defendant did not oppose or the defendant consented to the mandatory motion, then defendants will be encouraged to oppose mandatory motions based on the practical reality that they will have to pay costs anyway so why not resist and take a shot at winning the mandatory motion because the costs will be payable whether one resists or whether one consents to the motion (at para. 32);

(vi) [I]t does not seem fair to have the defendant, who is entitled to contest its liability, be obliged to finance the plaintiff's litigation before the defendant has been found

liable and when it is not contesting certification or leave under the *Securities Act* (at para. 33); and

(vii) In circumstances when liability is yet to be determined and the defendant does not resist having that liability determined, there is a natural justice in making costs of a mandatory motion to the plaintiff in the cause (at para. 34).

[44] Perell J. also relied on the decision of Cullity J. in *Sutherland v. Hudson's Bay Co.* (2006), 24 E.T.R. (3d) 253 (Ont. S.C.) ("*Sutherland*"), in which the court held (at para. 16) that "consent only at the last moment" would not protect a defendant against a cost order (see *Frank*, at para. 28).

[45] On the basis of the late consent, Perell J. ordered the defendants to pay costs of $199,506.43 on a hybrid basis, with $100,000 payable to the plaintiffs forthwith and the balance of $99,506.43 payable to the plaintiffs in the cause, with interest (at para. 38).

[46] Both parties also rely on the decision of Belobaba J. in *Locking v. McCowan*, 2016 ONSC 7854 ("*Locking*"), which also addressed the process to determine costs on a consent certification motion.

[47] In *Locking*, Belobaba J. held that "the plaintiff reasonably expected that the certification motion would be opposed until about a month or so before the scheduled motion date" (*Locking*, at para. 8).

[48] Belobaba J. relied on *Frank* and set out the general principle as follows (*Locking*, at para. 7, footnotes omitted):

> As a general rule, where the defendant consents to the certification motion in a timely fashion, the costs incurred by the plaintiff in persuading the court that the requirements for certification under s. 5(1) of the CPA have been satisfied cannot be foisted on the defendant. However, 'depending upon when and how the defendant's resistance vanished, it may be fair and appropriate to give some credit to the defendant for not opposing the mandatory [certification] motion by awarding all or part of the costs in the cause.'

[49] Belobaba J. ordered costs on a hybrid basis, with one-third payable to the plaintiff forthwith and two-thirds payable to the plaintiff in the cause (*Locking*, at paras. 9-11).

[50] In *Frank*, Belobaba J. relied on his earlier reasons in *Quinte v. Eastern Mall Inc.*, 2014 ONSC 1661, 59 C.P.C. (7th) 321 ("*Quinte*"), in which he ordered "additional costs" of $140,000 payable forthwith, since they arose "because of the [contested] positions taken by certain opposing defendants" (*Quinte*, at para. 13).

[51] In *Quinte*, Belobaba J. set out an approach under which he would (i) "determine the costs that would have been incurred by the plaintiffs in any event, even with consenting defendants"

and then (ii) "determine the additional costs that were incurred because certain issues had to be litigated with the opposing defendants" (*Quinte*, at para. 8).

[52] I now apply the above principles to the present case.

3. Application of the law to the present case

i. Overview

[53] Granger seeks all costs for the certification motion up to the Case Conference on a partial indemnity basis, payable forthwith. Ontario submits that all costs of the certification motion should be payable to Granger in the cause, on a partial indemnity basis.

[54] For the reasons that follow, I do not accept that either position is consistent with the above law, based on the facts of this case. Instead, like Perell J. in *Frank* and Belobaba J. in *Locking*, I order partial indemnity costs paid to Granger on a hybrid basis.

[55] On the facts of this case, I find that the appropriate allocation is half of the costs payable to Granger forthwith, and half of the costs payable to Granger in the cause.

ii. The position taken by Ontario

[56] Ontario relies on two factors to support its claim that costs be made payable to Granger in the cause. Ontario submits that such an order is appropriate because (i) the merits of the claim have yet to be determined and (ii) it consented to certification.

a. The "merits" submission

[57] With respect to the "merits" submission, Ontario submits that because it is likely to bring a summary judgment motion addressing the merits of the claim (which Granger may bring as well), costs should be payable in the cause. I do not agree.

[58] Ontario did not submit that any of the certification material filed by Granger addressed a matter outside the scope of the certification motion, such that those costs would be payable in the cause under the principles set out in *Sino-Forest*. A review of the factum and case law filed by Granger for the certification motion demonstrates that the issues addressed therein were based on the test under s. 5(1) of the *CPA*.

[59] While it is possible that some of the legal research conducted to establish the existence of causes of action under s. 5(1)(a) or other requirements under section 5 could be relevant to the merits of the claim (as would likely be the case on any certification motion), it is settled law from *Pearson* and *Sino-Forest* that certification, while a "vital step in the proceeding", is "a

contest in and of itself that does not go to the merits of the plaintiff's claim". Certification does not depend on the outcome of the case.[8]

[60] Consequently, the fact that the merits remain to be decided either at summary judgment or at trial is not a basis to make costs payable to Granger in the cause. Otherwise, such a position would apply to every certification motion and would be contrary to the settled law discussed in *Sino-Forest*.

[61] The cases relied upon by Ontario do not support its submission.

[62] In *Stewart*, the court relied on "the mixed results of this set of motions" as a factor to order costs in the cause.[9] While Morgan J. did note (as relied upon by Ontario) "the fact that the value of the Plaintiff's success in the certification motion is still very much up in the air" as a factor in his costs order (at para. 9), I do not find (given the divided success of the various motions before the court in *Stewart*) that the case stands for the proposition that costs will be deferred to the cause only because the merits remain to be determined after certification.

[63] In *Topacio v. Batac*, 2011 ONSC 2155, 14 C.P.C. (7th) 100 ("*Topacio*"), Perell J. noted that there were "odd circumstances" in that case (at para. 6). Perell J. ordered that certain certification costs be awarded to the plaintiff in the cause because the merits would be determined later on motions for default judgment or summary judgment, or at a common issues trial (at para. 7).

[64] However, unlike Perell J.'s subsequent decision in *Frank*, there is no discussion in *Topacio* as to whether the representative plaintiff was seeking costs payable forthwith or not opposing a costs order to the plaintiff in the cause.

[65] Consequently, I do not find that *Topacio* stands for the proposition that certification costs will always be payable in the cause when the merits have yet to be determined. Such a finding would be contrary to the principles set out in *Pearson*, as well as the thorough analysis of Perell J. in both *Sino-Forest* (which affirmed the independence of the certification motion from the merits) and in *Frank*, in which a hybrid costs order was made when the merits (as in every certification motion) had yet to be determined.

[66] Similarly, *Austin* does not support Ontario's submission. As Morgan J. noted in *Austin*, the defendants wanted the action to be certified so that they could address the pension payments for all potential class members (at para. 10). Consequently, there was no basis to award

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[8] (unless it is beyond doubt that the claim does not disclose a cause of action, in which case the s. 5(1)(a) test would not be met)

[9] (Given the divided success, costs in *Stewart* were awarded "in the cause" (at para. 10) and not to the plaintiff in the cause.)

certification costs to the plaintiff. Morgan J. held that "[t]o award the Plaintiff over $100,000 for 'winning' the certification motion would be a misreading of the result of the double motion argued before me" (at para. 10).

[67] Consequently, I do not agree with Ontario's submission that *Austin* stands for the principle that costs should be payable in the cause when there will be a summary judgment or other later determination on the merits.

[68] In the present case, I apply the test in *Sino-Forest* and find that the costs sought by Granger do not "go beyond what is necessary for obtaining [...] certification having regard to the genuine legal risks associated with [this] motion". Granger is not asking Ontario "to pay for legal services tacked on to the certification [...] motion that should more properly be paid for if the plaintiff is successful in the litigation".

[69] For the above reasons, I reject Ontario's submission that the subsequent determination on the merits (by summary judgment or otherwise) is sufficient to order costs payable to Granger in the cause.

b. The "consent" submission

[70] Relying on *Frank* and *Locking*, Ontario submits that since it consented to certification, all costs should be payable to Granger in the cause.

[71] I do not agree.

[72] A court assessing the payment of costs for a consent certification motion must review "when and how the defendant's resistance vanished", in order to decide whether it is "fair and appropriate to give some credit to the defendant for not opposing the mandatory motion by awarding all or part of the costs in the cause" (*Frank*, at para. 30).

[73] Defendants should be encouraged to consent to certification rather than resist it solely because "they will have to pay costs anyway" (*Frank*, at para. 32). However, a defendant cannot wait until the "last moment" (*Frank*, at para. 28) and then not pay the additional costs incurred as a result of the late consent.

[74] In both *Frank* and *Locking*, the court applied a hybrid approach when the defendant did not consent to certification at the outset, and instead consented only after the plaintiff incurred additional costs.

[75] Consequently, since Ontario filed its responding material and opposed certification until the Case Conference, it is liable to pay any additional costs arising out of that decision, payable forthwith to Granger.

iii. The position taken by Granger

[76] Granger seeks partial indemnity costs up to January 24, 2020, on the basis that he incurred costs of an opposed certification motion until Ontario's consent. However, for similar reasons as I discuss above with respect to Ontario's "consent" submission, Granger's position is not supported by the case law.

[77] In both *Frank* and *Locking*, the court found that there were additional costs incurred because of the late consent.

[78] In *Locking*, the plaintiff "reasonably expected that the certification motion would be opposed until about a month or so before the scheduled motion date" (at para. 8), similar to the facts in the present case.

[79] In *Frank*, Perell J. noted that the defendants had not "immediately consented to certification" (at para. 35), but instead gave the plaintiff "reason to think that the certification and leave motions would be resisted" (at para. 37).

[80] In both *Locking* and *Frank*, the court adopted a hybrid approach to allocate costs that would have been incurred for the mandatory motion (which were payable to the plaintiff in the cause) and additional costs incurred by the maintained opposition until the date of consent (which were payable forthwith). As Perell J. held in *Frank* (at para. 37):

> [I]n the case at bar, it is appropriate to make a hybrid award which recognizes that the Plaintiffs incurred expenses for a mandatory motion that they reasonably anticipated would be vigorously opposed but which apprehension turned out to be incorrect because the Defendants, whose liability and the extent of it remains to be determined, ultimately did not oppose the motions.

[81] Granger also seeks to rely on his Offer. However, in the Offer, Granger advises Ontario that it is only "[a]fter the responding record" is delivered that "we will begin to incur costs which should be recoverable on some basis in a consent certification". In effect, the Offer raises a different version of a hybrid approach, by seeking no costs for all work until the motion is opposed, but then seeking all costs after opposition (including additional mandatory costs that would have been incurred regardless of opposition to the certification motion).

[82] Granger's position is inconsistent with the principle that defendants who want to consent to certification should not be required to oppose certification only for the purpose of trying to avoid paying all costs up to the date of a potential consent. Under the principles in *Frank* and *Locking*, a defendant who delays acceptance will face the risk of additional costs being incurred by the plaintiff for the certification motion. However, converting all mandatory costs into forthwith payment upon a late consent is a punitive approach which does not support the goals of access to justice or judicial economy.

[83] Consequently, I find that the approach in *Frank* and *Locking* should be followed in the present case, and I reject the submissions of Granger.

iv. Conclusion

[84] Based on the above reasons, I adopt the hybrid approach. I order half of the costs to be paid to Granger forthwith, and half of the costs payable to Granger in the cause.

[85] The costs outline provided by Granger does not permit the court to determine any breakdown of "additional" costs incurred because of Ontario's initial opposition to certification, or the mandatory costs that would have been required to obtain certification.

[86] On the basis of the material filed for the certification motion, I note that the motion record was part of the mandatory work required, as acknowledged by Granger in the Offer. That motion record contained two affidavits with numerous exhibits. There was no reply affidavit filed. Also, much of Granger's factum was devoted to issues which he would have been required to address on a consent certification, albeit likely in greater detail since Ontario opposed certification. Consequently, much of the work (and cost) can be attributed to the mandatory nature of the certification motion.

[87] On the other hand, there were three brief cross-examinations required as a result of Ontario's opposition to the motion. The Granger factum was more complex in order to address the anticipated opposition of Ontario. Additional work was necessary for Granger to prepare a reply factum[10] which was due one week after the Case Conference. The certification hearing was scheduled for two weeks after the Case Conference, so additional preparation work would likely have been required given the anticipated opposition of Ontario.

[88] On the above evidence, and without any further assistance from the costs outline,[11] I order half of the costs to be paid to Granger forthwith, and half of the costs payable to Granger in the cause.

Costs Issue 2: Quantum of costs

[89] On this issue, I agree with Granger's submission that he is entitled to the quantum of costs he seeks.

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[10] A reply factum was particularly important in the present case, given the need for Granger to address the numerous challenges to certification raised in Ontario's responding factum.

[11] It may be a time-consuming and costly endeavour for a plaintiff to attempt to break down any "additional" costs as compared to "mandatory" costs. I do not fault Granger for not providing such a breakdown in the present case, but the court is then left to its own discretion to make the most appropriate allocation possible given the evidence available.

[90] The general principles governing the determination of costs in certification motions were reviewed by Justice Belobaba in *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356, 56 C.P.C. (7th) 182 ("*Rosen*"). He set out the principles as follows (at para. 5, footnotes omitted):

> I will generally be content with costs outlines certified by counsel. I will not require either side to submit actual dockets. If they wish to do so, that is up to them.
>
> I will (briefly) review the certified costs outlines to ensure that the hourly rates being charged by counsel fall within the range set out by the Rules Committee in its Information to the Profession.
>
> I will also review the costs outline for any obvious excesses in fees or disbursements. Apart from any obvious excesses, I will accept the costs outline as is. I will not drill down into any of the detail.
>
> If the unsuccessful party wants to argue unreasonableness (beyond hourly-rate compliance or obvious excesses) it should submit its own certified costs outline showing what it actually spent (on a partial indemnity scale) on the certification motion. If a parallel costs outline is not submitted by the unsuccessful party (and none is required) I will probably conclude that the amount being requested by the successful party is not unreasonable.
>
> I will consider seriously historical costs awards in similar cases. Such comparisons can never be determinative but, as I have already noted, they provide useful guideline as to what amounts or percentages have been awarded in the past.

[91] In *Rosen*, Belobaba J. analyzed six years of cost awards on certification motions. Belobaba J. found that when the plaintiff sought less than $500,000 in costs, the average cost award was $169,250 (including fees and disbursements) (at para. 5).

[92] In the present case, Granger provided the court with a certified costs outline. Ontario provided no costs outline (let alone a certified costs outline). Consequently, Ontario cannot rely on cases where the defendant successfully challenged the quantum sought by providing its own dockets (see *Bakshi v. Global Credit & Collection Inc.*, 2015 ONSC 6842 at para. 10; and *McGee v. London Life Insurance Co.* (2008), 72 C.C.P.B. 302 (Ont. S.C.), at para. 8).

[93] However, even with Ontario not filing a costs outline, a plaintiff does not have *carte blanche* for any quantum of costs it proposes. The court always retains a discretion to fix costs in the amount an unsuccessful party would reasonably expect to pay.

[94] In the present case, there is no basis to reduce the quantum of costs sought by Granger. The costs are certified as being associated with the certification motion. Those costs are consistent with the costs awards in the cases reviewed by Belobaba J. in *Rosen*, and reflect the extensive work required for Granger's certification motion.

[95] It is unclear whether many (if not all) of the costs cases considered by Belobaba J. in *Rosen* were opposed certification motions. However, the present motion was opposed until a few weeks before the scheduled hearing, and costs would be comparable to opposed matters. Despite the fact that attendance at the certification hearing was not required and some preparation costs would thus be reduced in the present case, it would not have been unreasonable for Granger's counsel to have started preparing well before the hearing given its importance.

[96] This matter was complex. Counsel advised the court that this case is the first section 8 class action to be certified in Ontario. The case raises issues which transcend the individual interests of the class members and are of public importance. It was appropriate for Granger to devote the resources he did, particularly given Ontario's vigorous defence of all aspects of certification.

[97] As noted in *Pearson*, certification is a vital step and the parties are expected to devote substantial resources to the motion (at para. 13). The cross-examinations indicate that Granger conducted the present certification motion in an efficient manner. At the cross-examination of Granger, only one counsel for Granger attended compared to two counsel and an articling student for Ontario. Of the three cross-examinations conducted by Granger, one was conducted by a senior associate and one by a junior associate. The third cross-examination proceeded in writing. On the other hand, Ontario had two senior lawyers, one junior lawyer and an articling student attend at the cross-examinations of Ontario's affiants.

[98] I do not suggest that the expense incurred by Ontario was excessive. However, the above facts demonstrate that any suggestion by Ontario of over-lawyering by Granger is not supported by the evidence, particularly as Ontario provided no certified costs outline establishing its costs in responding to the certification motion.

[99] For the above reasons, I fix costs in the amount of $124,504.38 ($119,225.17 in fees plus $5,279.21 in disbursements, all amounts inclusive of taxes). As per my reasons above, I order that half of those costs ($62,252.19) be payable forthwith to Granger and the other half ($62,252.19) be payable to Granger in the cause.

Issue 3: The temporal limit of the proposed class

[100] The parties could not agree on a proposed term in the certification order addressing potential additional class members.

[101] Both parties agreed to the temporal limit on class members, restricting the class definition to those individuals subject to the impugned practice from June 30, 2000 to the date of the certification order. However, both parties acknowledge that there may be other persons who could be added to the class after certification, since Ontario continues to engage in the impugned conduct.

[102] Granger submits that a further term of the order should be that the temporal limit is "without prejudice to the plaintiff bringing a future motion within this proceeding to certify an

amended class". Ontario submits that such a term is redundant and unnecessary, and it does not consent to the term in the proposed order.

[103] For the reasons set out below, I agree with Granger and order that the temporal limit of the class definition is "without prejudice to the plaintiff bringing a future motion within this proceeding to certify an amended class". Such a term clarifies the temporal issue for any future motion to add new class members, even if not strictly required under the *CPA*.

[104] I adopt the approach of Perell J. in *Berg v. Canadian Hockey League*, 2017 ONSC 2608 ("*Berg*"), in which the impugned practices were expected to continue after the date of the certification order. Perell J. held:

> (i) An open-ended class definition is potentially improper because it would deny class members their right to opt-out and, in general, it also makes for an unmanageable proceeding (at para. 155); and
>
> (ii) Having a rolling period with class membership open until the last notice of certification is issued, with notices of certification given on a running basis, i.e. two or more occasions after the order certifying the action as a class proceeding, is not appropriate since there is no "certainty that the predicament of the new class members is common with those Class Members at the time of certification". Further, there "has been no adjudication to determine whether the circumstances of the new class members … are such that the criteria for certification continue to be satisfied for them", with no certainty to say that "the evidentiary record has not changed between the date of certification and the next notice of certification" (at paras. 155, 158 and 160).

[105] In *Berg*, Perell J. ensured that there would be no prejudice to future class membership by providing that his order was made "without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program" (at para. 162).

[106] I do not dispute Ontario's assertion that Granger's proposed term may be superfluous, as Granger has the right under the *CPA* to seek an amended class at any subsequent point. However, for purposes of clarity and certainty, and to protect future rights of new class members from a technical finding of *res judicata*, I follow the approach of Perell J. in *Berg* and adopt Granger's proposed "without prejudice" language into temporal limit to the class definition.

Order and costs

[107] Counsel shall provide me with a revised draft order that incorporates these Reasons.

[108] Neither party sought costs associated with the preparation for or attendance at this hearing, so I order no costs in this matter.

[109] I thank counsel for their superb oral and written submissions, which were of great assistance to the court.

GLUSTEIN J.

Date: 20200708

CITATION: Granger v. Her Majesty The Queen In Right of Ontario, 2020 ONSC 4101
COURT FILE NO.: CV-18-00605134-00CP
DATE: 20200708

ONTARIO

SUPERIOR COURT OF JUSTICE

MICKY GRANGER

Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

Glustein J.

Released: July 8, 2020