

CITATION: Singh v. RBC Insurance Agency Ltd., 2024 ONSC 2653
COURT FILE NO.: CV-19-00618043-00CP
DATE: 20240506

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KABIR SINGH, Plaintiff

AND:

RBC INSURANCE AGENCY LTD. and AVIVA GENERAL INSURANCE COMPANY, Defendants

BEFORE: Justice Glustein

COUNSEL: *Andrew Monkhouse and Alexandra Monkhouse*, for the plaintiff

Jeremy Devereux and Ted Brook, for the defendant RBC Insurance Agency Ltd.

Paul J. Martin and Pavel Sergeyev, for the defendant Aviva General Insurance Company

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The defendants RBC Insurance Agency Ltd. (“RBC IA”) and Aviva General Insurance Company (“Aviva General”) bring this motion for production of class counsel’s dockets, redacted for privilege, in support of the plaintiffs’ request for costs arising from the certification and “replacement plaintiff” motions in this action.

[2] The plaintiffs¹ delivered a Costs Outline dated March 11, 2024 (the “Costs Outline”) in support of their costs submissions. At a case conference on April 5, 2024, the defendants sought production of the dockets in relation to the Costs Outline. The plaintiffs opposed production of the dockets. By endorsement dated April 5, 2024, I ordered a timetable for the parties to deliver written submissions on the issue of production of the dockets.

¹ I refer to the plaintiffs Singh and Saroop collectively, although the current style of cause refers only to the plaintiff Singh.

[3] I have reviewed the written submissions delivered by the parties.² For the reasons that follow, I do not order production of the dockets.

FACTS AND BACKGROUND

[4] By reasons dated March 2, 2023 in *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 1439 (the “Certification Decision”), I granted certification against RBC IA, subject to modifications to the common issues and class definition as set out in the Certification Decision.

[5] In the Certification Decision, I also certified the class action against Aviva General, subject to modifications to the common issues and class definition as set out in the Certification Decision. However, I held that such certification was conditional upon Class Counsel bringing a motion within 100 days for the appointment of a representative plaintiff who could plead and provide a basis in fact for a claim which was not statute-barred against Aviva General.

[6] By reasons dated November 29, 2023 in *Singh v. RBC Insurance Agency Ltd.*, 2023 ONSC 6721, I found that (i) the claim of the proposed additional representative plaintiff Saroop disclosed a cause of action against Aviva General under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) and (ii) Saroop met the requirements under s. 5(1)(e) of the CPA. Consequently, I certified the class action against Aviva General which had been conditionally certified in the Certification Decision.

[7] The parties could not agree on costs of the two motions. At a case conference, I set a schedule for the delivery of written costs submissions. On March 11, 2024, the plaintiffs delivered their written costs submissions which included the Costs Outline. The plaintiffs seek \$623,341.78 in costs on a partial indemnity scale, inclusive of HST and disbursements.

[8] The defendants then asked the plaintiffs to produce the class counsel dockets in support of the Costs Outline. The plaintiffs refused to produce the dockets. I held a case conference on April 5, 2024 at which I ordered production of brief written submissions on the issue of the production of the dockets.

ANALYSIS

[9] I first review the applicable law and then apply the law to the present case.

The applicable law

[10] Both parties agree that it is only in exceptional cases that the court will require dockets in order to determine costs.

² Aviva General relied on the submissions delivered by RBC IA.

[11] In *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), the court held that the purpose of determining costs is not a mechanical exercise. Rather, the court is to determine an amount that is fair and reasonable for the unsuccessful litigant to pay: at para. 26.

[12] The court in *Boucher*, at para. 15, adopted the reasons of the motions judge who held that “[t]he judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket.”

[13] The court in *Boucher*, at para. 15, also adopted the motions judge’s conclusion that “[n]either complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional.”

[14] A similar approach is taken under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under r. 57.01(5), a bill of costs is required after a trial. Form 57A provides that a party attach “dockets or other evidence” in support of a claim for trial costs.

[15] However, on a motion, the parties are not expected to provide dockets. Instead, under r. 57.01(6), each party is to bring a costs outline to the hearing if the party intends to seek costs. Under Form 57B, the costs outline is to set out matters such as the hours spent, the persons who worked on the file, the hours claimed for each person, the partial indemnity rate sought, and the actual rate. No dockets are required.

[16] Consequently, while the language of Form 57B does not preclude the production of dockets, the procedure under the *Rules* for the costs of motions does not require production of dockets.

[17] Such an approach is consistent with the protection of solicitor and client privilege. A motion is an interim step in an action. Requiring production of dockets risks disclosure of solicitor and client privilege, even if redacted dockets are ordered by the court. As the court held in *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, at para. 33, “a presumption that such information [in bills of account] falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved”: at para. 33.

[18] Dockets are not subject to a blanket privilege. However, they *prima facie* contain privileged information. Consequently, the court should not order production of dockets to support costs submissions, even in redacted form, unless exceptional circumstances apply (and only then if privilege is protected).

[19] The above principles have been adopted in class action motions. The defendants provided no case law in which the court on a class action motion (or any other motion) reviewed the dockets to determine costs, even though costs under certification and other class action motions generally arise out of “complex litigation” and constitute “significant amounts in legal fees”: *Boucher*, at para. 15.

[20] To the contrary, in *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356, 56 C.P.C. (7th) 182, the court set out the following principles, at para. 5:

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.

[21] In *Markowich v. Lundin Mining Corporation*, 2022 ONSC 1233, at para. 12, the court followed the *Rosen* principles.

[22] Consequently, I find that the production of dockets to support costs submissions for a class action motion should only be ordered in exceptional cases, where required to ensure a just resolution of the costs issues before the court.

Application of the law to the present case

[23] The defendants have not established the exceptional circumstances required to order production of class counsel's dockets.

[24] The defendants submit that dockets should be produced for the following reasons (quoted *verbatim* from the defendants' submissions): (i) "substantial costs claimed justifies production of dockets", (ii) "disparity between the parties supports production of dockets", and (iii) "incongruities in the plaintiffs' costs outline." I address each of these issues below.

(i) The substantial amount of costs claimed

[25] The defendants submit that “the sheer quantum of the Costs Outline [...] warrants a thorough review that includes the supporting dockets.” I do not agree.

[26] The defendants rely on two cases in which the court held that substantial costs justified the production of dockets: *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited et al.*, 2020 ONSC 1621, at para. 89, and *Fernandes v. Peel Educational & Tutorial Services Ltd.*, 2015 ONSC 3753, at paras. 41-43. However, both of those cases arise out of trial costs sought by the successful party and do not apply to the costs principles for motions set out in *Boucher*, which apply even when “significant amounts in legal fees” are sought.

[27] As noted above, the defendants provided no authority for the production of dockets to support costs submissions for any motion, let alone a motion in a class action where significant amounts in legal fees are frequently sought and ordered.

[28] Consequently, I reject the defendants’ submission that the substantial amount of costs claimed supports an order requiring production of class counsel’s dockets.

(ii) The disparity between the costs claimed by the parties

[29] RBC IA submits that because (i) its partial indemnity costs for the certification and replacement plaintiff motions combined totalled \$254,251.93 (approximately \$370,000 less than class counsel), and (ii) class counsel seeks costs for “more than three times the hours worked by RBC IA’s counsel for the same matters”, then “the disparity between the parties’ costs warrants closer investigation”. I do not agree.

[30] While the court will be required to consider the disparity in determining costs of the motions, such disparity does not warrant production of class counsel’s dockets.

[31] In particular, the defendants are able to challenge the disparities by comparing the hours claimed under the costs outlines filed by the plaintiffs and the defendants. As noted in RBC IA’s submissions seeking production of the dockets, there appear to be significant discrepancies on the quantum claimed (a difference of approximately \$370,000) and the time spent on the motions (a difference of 1,500 hours). However, the court will be able to consider those differences without the production of dockets, particularly as the parties will be able to rely on historical costs awards as an important part of their costs submissions (under the principles in *Rosen*).

[32] Further, the production of dockets would do little to assist the court in considering the discrepancies. The dockets would need to be heavily redacted in order to protect privilege. Producing dockets that only indicate generic terms such as “research” (without disclosing the issues considered), or “meetings” (without disclosing the nature of those meetings), would not necessarily explain any discrepancy. If the defendants have incurred considerably less time and fees in preparing for all aspects of the motions, those discrepancies will be considered when the court applies the *Boucher* principles to determine what an unsuccessful party would reasonably expect to pay.

[33] The court frequently addresses discrepancies between costs outlines under the *Boucher* test, and particularly does so when the discrepancies are significant. Such discrepancies are not a basis to order production of dockets.

(iii) Alleged incongruities in the plaintiffs' Cost Outline

[34] The defendants raise several "material anomalies" which the defendants submit "taken together, warrant a higher degree of scrutiny than generally required on review of cost submissions."

[35] Again, while the court will consider the alleged incongruities when determining costs, such incongruities do not warrant the production of dockets.

[36] The defendants rely on alleged inconsistencies based on (i) a prior costs outline of class counsel, (ii) the alleged limited volume of material filed by the plaintiffs, and (iii) time spent on case conferences, reviewing responding motion records and conducting research, cross-examination, and preparation of factums and books of authorities. All of those issues can be addressed in the costs submissions, with the court reviewing the alleged incongruities both on a stand-alone basis and in comparison to the time spent by the defendants on those matters.

[37] Further, as I discuss above, the production of heavily-redacted dockets would not necessarily explain any incongruity. If the costs claimed by the plaintiffs are excessive, the court will address such issues under the *Boucher* analysis both by considering the time spent and comparing such time to the defendants' time incurred and historical costs awards.

[38] The defendants also submit that "the quantum of costs claimed by class counsel for these interlocutory steps far exceed what would be expected for many civil actions in Ontario that proceed through trial." However, that issue can be considered by the court when determining costs, taking into account the r. 57.01 factors, the principles in *Boucher*, and historical costs awards on certification motions. Production of dockets is not required to address this alleged incongruity.

[39] Consequently, the existence of any alleged incongruities does not support the production of dockets.

ORDER AND COSTS

[40] For the reasons above, I dismiss the request for production of dockets. As agreed by the parties and as set out in my April 5, 2024 endorsement, the costs associated with this motion are to be addressed as part of the costs submissions of the parties.

[41] Further to my April 5, 2024 endorsement, the deadline for the defendants to deliver their costs submissions had been suspended until the court addressed the issue of production of dockets. The defendants shall now deliver responding costs submissions by May 17, 2024 and the plaintiffs shall deliver reply costs submissions by May 27, 2024.

GLUSTEIN J.

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Glustein J.

Released: May 6, 2024