IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bowman v. Kimberly-Clark Corporation,* 2024 BCSC 1975

Date: 20241028
Docket: S2010566
Registry: Vancouver

Between:

Linda Bowman

Plaintiff

And:

Kimberly-Clark Corporation, Kimberly-Clark Inc., and Kimberly-Clark Canada Inc.

Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

Re: Costs on the plaintiff's application for production of class member contact information from non party retailers

Counsel for the Plaintiff:	J. Giovannetti S. Jaworski
Counsel for the Defendants:	J.S. Yates A. Cocks
Counsel for non-party Respondents, Loblaws Inc. and Shoppers Drug Mart Inc.:	M.T. Maniago
Counsel for non-party Respondent, Pattison Food Group Ltd.:	M. Vesely, K.C. W. Clark, Articled Student
Counsel for non-party Respondent, Canadian Tire Corporation, Limited:	C. Muir E. Friedman
Counsel for non-party Respondent, London Drugs Limited:	E. Grant
Counsel for non-party Respondent, Giant Tiger Stores Limited:	M. O'Sullivan

Place and Dates of Hearing:	Vancouver, B.C. May 1-2, 2024
Written Submissions on Costs Received:	Vancouver, B.C. September 6 and 13, 2024
Place and Date of Judgment:	Vancouver, B.C. October 28, 2024

Overview

[1] This certified class action is about flushable wipes manufactured by the defendants, to whom I will refer as Kimberly-Clark, which the plaintiff alleges were contaminated with bacteria during a certain time frame. Ms. Bowman sought production of records from non-party retailers of the flushable wipes for the purpose of notifying the class members. The types of records sought include from loyalty programs used by the non-party retailers and which may have been triggered during purchase of flushable wipes, thereby identifying persons who bought the flushable wipes during the class period. After submissions had been heard on the application but a decision not yet rendered, Ms. Bowman abandoned it. Some of the application respondents now seeks costs measured by their reasonable legal expenses, which they all refer to as full indemnity costs, of the abandoned application. Ms. Bowman characterizes this as a request for full indemnity costs, a type of cost awarded in Ontario proceedings but not in British Columbia proceedings where the types of costs awarded are either party and party costs or special costs.

[2] The issues are whether the non party retailers are entitled to costs. If they are, the issue is whether they are seeking full indemnity costs and if so, whether that is an order that can be made. If it is an order that can be made, the issue is whether it is an order that ought to be made. If costs are not awarded to the non party retailers on the basis requested, the issue is what cost order should be made.

Whether Costs Ought to be Awarded in Favour of the Retailers

[3] Some but not all of the non-parties against whom the application was brought responded to the application and are now pursuing costs. For certainly, those are Loblaws Inc., Shoppers Drug Mart Inc., Pattison Food Group Ltd., Canadian Tire Corporation, Limited, Pattison Food Group Ltd. and London Drugs Limited. When I refer to the non-party retailers, it is these application respondents to whom I am referring.

[4] Ms. Bowman’s application was brought in conjunction with other applications solely involving Ms. Bowman and the defendants and while submissions had

concluded on application for production of the records from the retailers, the other matters had not been concluded. Before the other matters concluded, Ms. Bowman and Kimberly-Clark advised the Court that Ms. Bowman was no longer pursuing production from the non-party retailers because of an agreement they had reached as to how to address notice to class members. The non-party retailers seek to recover their reasonable legal expenses and disbursements of responding to the application.

[5] The non-party retailers argue that just because the application was abandoned, that does not mean that it ought not be awarded its costs of responding to the application. Indeed, the retailers point to law in which even where such applications are allowed, the non-parties may be awarded their reasonable expenses and disbursements on a R. 7-1 (18) production application: *Neural Capital GP, LLC v. 1156062 B.C. Ltd.*, 2022 BCSC 1228 at para. 99. Where a plaintiff abandons an application against the non-party under R. 7-1 (18) the non-party may still be entitled to costs: *McLeod Lake Indian Band v. British Columbia*, 2021 BCSC 2560.

[6] I do not read Ms. Bowman's submissions as arguing that the non-party retailers ought not have their costs of the abandoned application. Ms. Bowman does assert that the class action context is a relevant discretionary factor “applying downward pressure on any cost award”, but I do not consider that argument to amount to a position that the court may not or should not order costs.

[7] I have taken s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 into account. Section 37 provides that on the certification hearing or at on any proceeding after certification order has been made, the court may not order costs in favour of a party unless there is misconduct on the party against whom the award is made or special circumstances justifying a costs order. This is not an application for an award of costs in favour of a party; it is an application for an award of costs in favour of a non-party against a party. I am of the view that s. 37 does not preclude the order sought by the non-party retailers.

[8] I acknowledge that this is a class action and therefore costs awards must be made only after taking to account the access to justice objective of class actions and the chilling effect that a cost award can have on access to justice. This concern is ameliorated by the legislature's decision to generally preclude costs in favour of a party but not preclude them in favour of a non-party.

[9] While Ms. Bowman abandoned the application before I decided it, it was abandoned after the non-party retailers were put the expense and inconvenience of responding to it.

[10] I conclude that the non-party retailers are entitled to their costs of the abandoned application.

Whether The Non Party Retailers Seek Full Indemnity Costs And Whether they are Available

[11] The non-party retailers describe what they are seeking as "reasonable legal expenses and disbursements" and as "full indemnity recovery of their reasonable expenses". I conclude they are seeking to recover their costs of legal representation and/or in house counsel costs, as well as disbursements.

[12] Ms. Bowman submits that in British Columbia there are special costs and there are party and party costs, relying on *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 in which the Court of Appeal held that special indemnity costs are neither party and party costs nor special costs, the two types of costs available. However, the Court of Appeal made reference to Rule 14-1 (party and party costs) and the common law pertaining to special costs. The discussion did not include applications made under Rule 7-1(18). The party and party costs rule does not directly translate to applications for orders pertaining to non-parties.

[13] I pause to note that the non-party retailers have not sought full indemnity costs on the basis of the arguments that support special costs.

[14] The retailers argue that the costs award made in favour of non-parties who are the object of applications made under R. 7-1 (18) takes an "expense recovery"

approach to costs and have awarded indemnification of legal costs including internal and external legal costs even if the word indemnification is not used: *Wong et al v. Wong et al*, 2005 BCSC 823 at paras. 5, 8–10; and *Neural Capital GP, LLC* at para. 99.

[15] I do not agree with the non-party retailers' characterization of these cases.

[16] In *Neural Capital GP*, *Wong* and *Texada Land Corp. v. Texada Logging Ltd.*, 2003 BCSC 486, the courts ordered that the non-parties recover "reasonable fees and disbursements", "expenses" and "reasonable expenses that it occurred for the production of documents" for compliance with the courts' orders, not for responding to the application.

[17] In *Novak v. Seemann*, 2024 BCSC 9 the Associate Judge Bilawich awarded reasonable costs of the non-parties participation to be paid at Scale B. In *McLeod Lake Indian Band v. British Columbia*, 2021 BCSC 2560 the Court ordered costs in favour of the non-party at Scale B in circumstances where the application for production from that non-party was abandoned because the parties reached a settlement.

[18] In *A.L. Sott Financial (Newton) Ltd. v. Bauman*, 51 B.C.L.R. (3d) 317, 1998 CanLII 3853 (S.C.), Master Bolton canvassed the jurisprudence pertaining to costs orders where applications involve non-parties. Master Bolton acknowledged the special circumstances of non-parties to litigation but held that despite them being non-parties they are "participants in democracies governed by the rule of law" having a duty to "cooperate in the effective resolution of legal disputes between other citizens." Master Bolton held that, generally, non-parties who are subject to such applications are not entitled to full indemnification and the usual rule should be tariff costs. Master Bolton awarded some costs pertaining to initial legal advice about making the production, but awarded costs for the normal tariff for the work to resist disclosure.

[19] I agree with the reasons that Master Bolton gave about the distinction between the types of costs awarded for responding to Rule 7-1(18) applications as opposed to complying with orders made pursuant to Rule 7-1(18) and the rationale Master Bolton gave for the distinction.

[20] I see no reason to depart from the jurisprudence.

The Appropriate Costs Award

[21] In my view, costs on Scale B are appropriate.

[22] I am of the view that the non-party retailers who responded to Ms. Bowman's application for production of records for the purpose of notice are entitled to their costs of responding payable at Scale B by Ms. Bowman. Since there is no cause that can affect this order costs in favour of the non-party retailers, they are payable forthwith.

"Matthews J."