

**ONTARIO  
 SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
SHIREEN SONDHI	)	<i>Andrew H. Monkhouse and Samuel S. Marr,</i>
	)	for the Plaintiff
Plaintiff	)	
<b>- and -</b>	)	
	)	
DELOITTE MANAGEMENT SERVICES LP, DELOITTE & TOUCHE LLP, and PROCOM CONSULTANTS GROUP LIMITED	)	<i>Patricia D.S. Jackson, Rebecca Wise, and Davida Shiff,</i> for the Defendants Deloitte Management Services LP and Deloitte & Touche LLP
	)	
Defendants	)	
	)	
	)	
Proceeding under the <i>Class Proceedings Act, 1992</i>	)	<b>HEARD:</b> In writing

**PERELL, J.**

**REASONS FOR DECISION - COSTS**

- [1] This is a costs decision for a certification motion that proceeded in two stages. The action was brought by Shireen Sondhi against Deloitte Management Services LP and Deloitte & Touche LLP (collectively “Deloitte”) and Procom Consultants Group Limited.
- [2] By decision released on April 13, 2017,<sup>1</sup> Justice Belobaba determined, among other things, what issues were certifiable as common issues, but he ruled that Ms. Sondhi was not suitable to be the Representative Plaintiff.
- [3] Justice Belobaba’s decision left the core allegation against Deloitte intact - albeit significantly narrowed - and took Procom Consultants out of the action. Justice Belobaba conditionally certified the narrower action against Deloitte.
- [4] The certification motion resumed when Class Counsel returned to have Tarrie Phillip substituted as Representative Plaintiff. However, Deloitte submitted that Mr. Phillip was also unsuitable, and Deloitte asked that the certification motion be dismissed.

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<sup>1</sup> *Sondhi v. Deloitte*, 2017 ONSC 2122.

[5] Justice Belobaba was on medical leave for the resumption of the certification motion, and I held that: (a) Mr. Phillip was qualified to be Representative Plaintiff; and (b) all the certification criteria had been satisfied. I certified the action as a class proceeding.<sup>2</sup>

[6] Mr. Phillip now seeks costs of **\$480,170.08** on a partial indemnity basis for the certification motion.

[7] The costs are calculated at 60% of the reduced-docketed time expended on the certification motion. The reductions were for: (a) approximately 114 hours docketed by non-lawyer support staff and paralegals; (b) time for the claims advanced against Procom Consultants, which were not certified; (c) time for the drafting of the factum insofar as it related to Ms. Sondhi's suitability as Representative Plaintiff; and (d) some time attributable to duplication of work by junior and senior lawyers or by lawyers and paralegals.

[8] Class Counsel did not provide its dockets.

[9] Mr. Phillip blames Deloitte for unnecessarily driving up the costs and for complicating "what ought to have been a relatively straightforward certification motion." He submits that Deloitte drove up costs by: delivering a lengthy motion record; delivering a lengthy supplementary motion record for the resumed hearing; and leaving the Plaintiff with no choice but to cross-examine each of the Deloitte affiants to rebut Deloitte's attempt to challenge the common issues criterion and the representative plaintiff criterion. Further, Mr. Phillip submits that the costs were driven up by Deloitte's hyper-vigorous opposition to Mr. Phillip's substitution and continuous and repeated arguments about the irreconcilable conflicts of interest between the Representative Plaintiff and putative Class Members.

[10] I do not agree that Deloitte drove up the costs. The certification motion was straightforward only in the sense that there were no complex factual and legal issues and no expert evidence filed. Deloitte was entitled to resist certification, and while that resistance was unsuccessful, it was not frivolous or vexatious, as Mr. Phillip would have it. I appreciate that the conflict of interest argument that Deloitte made before Justice Belobaba and before me was very similar to the argument I rejected in *Berg v. Canadian Hockey League*,<sup>3</sup> but it was never a frivolous argument and the *Berg* decision is under appeal.

[11] There were two affidavits from the respective candidates for Representative Plaintiff, and Deloitte was entitled to cross-examine them. Deloitte submitted one affidavit from a corporate affiant and six affidavits from former document reviewers and putative Class Members. The cross-examinations of the document reviewers were approximately one to two hours each in length. The cross-examinations of Ms. Sondhi and Mr. Phillip were considerably longer. Deloitte was being sued for approximately \$20 million, and it was entitled to marshal a defence to the certification motion.

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<sup>2</sup> *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271.

<sup>3</sup> 2017 ONSC 2608.

[12] I do agree with Deloitte's submission that Mr. Phillip's costs claim for the certification motion should be reduced, but for my own reasons and not for the reasons advanced by Deloitte.

[13] Deloitte's objections to Mr. Phillip's costs claim were very-substantially weakened because Deloitte did not disclose how much time its lawyers expended on the run-up to and completion of the certification motion. As I noted in *Das v. George Weston Limited*<sup>4</sup>:

67. Although the unsuccessful party is not obliged to disclose what he or she expended on costs, where the unsuccessful party submits that the costs claimed by the successful party are excessive, evidence of what he or she expended is relevant to the determination of what is reasonable and of what the unsuccessful party might reasonably have expected to pay and the failure to proffer this evidence tempers and diminishes the unsuccessful party's criticism of the excessiveness of the costs claim: *Hague v. Liberty Mutual Insurance Co.* (2005), 13 C.P.C. (6th) 37 at para. 15 (S.C.J.) at para. 15; *MacDonald v. BMO Trust Co.*, 2012 ONSC 2654 at para. 27.

[14] In my opinion, although there were some bumps and potholes on the road to certification, as there almost always will be, if the defendant, as it is entitled to do, resists in whole or in part, the motion, Mr. Phillip is entitled to the costs that follow the outcome of the motion.

[15] Deloitte submits that the appropriate award is \$90,000 less its costs of Ms. Sondhi's cross-examination in the amount of \$18,363.44, *i.e.*, an award of approximately \$72,000 payable in the cause.

[16] Deloitte submits that the \$480,000 claim for costs should be reduced to reflect the fact that: (a) the court disqualified the first proposed Representative Plaintiff; (b) the claim ultimately certified by the court was considerably narrowed from the claim originally put forward by the plaintiff; (c) the plaintiff's conduct and disorganization throughout the initial certification hearing unreasonably lengthened the proceeding; (d) there was significant overstaffing by Class Counsel and excessive hours and hourly rates; and (e) the costs claimed exceed costs awarded by the court in comparable cases such that Deloitte could not reasonably have expected to pay the costs claimed. Further, Deloitte submits that in light of its successful argument that Ms. Sondhi was not a suitable Representative Plaintiff, it should be awarded its costs in the amount of \$18,363.44 associated with its cross-examination of Ms. Sondhi (including travel costs).

[17] There is no reason to depart from the normal rules and normative principles that govern costs on a certification motion in the immediate case. All else being equal, for a certification motion, the successful party can expect to be indemnified for its reasonable costs that in the particular circumstances of the particular action reflect what the unsuccessful party could reasonably have expected to pay.

[18] In the case at bar, I do not agree that there was divided success on the certification motion. Mr. Phillip's action was certified. That the action that was certified was narrower than the action that was initially proposed and that it took two rounds to find a suitable Representative Plaintiff is not cause for a distributive costs award. The case at bar is not like *Fantl v. Transamerica Life Canada*<sup>5</sup> or *Bernstein v. Peoples Trust Company*<sup>6</sup>, where it was appropriate

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<sup>4</sup> 2017 ONSC 5583 at para. 67.

<sup>5</sup> 2013 ONSC 5198.

<sup>6</sup> 2017 ONSC 2189.

to award costs in the cause.

[19] The case at bar, however, is an appropriate case to take into account the traditional discretionary principles developed for costs awards for certification motions that are described in part in the case law that are codified in rule 57.01 (1), which states:

*Factors in Discretion*


57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
  - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
  - (iii) any other matter relevant to the question of costs.

[20] In the immediate case, although there was no divided success, the amount of costs being claimed is excessive and the indemnity should be reduced having regard to what was achieved; what was not achieved; whether there was conduct that lengthened the proceedings; the reasonableness or unreasonableness of the positions taken; whether any step was wasteful or taken out of excessive caution, some over-lawyering particularly at the senior level, and the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being claimed.

[21] Having regard to these various factors and having reviewed Mr. Phillip's Bill of Costs and the costs submissions of both parties, I reduce the counsel fee from \$411,840 to \$300,000 which, with HST and disbursements of \$14,790.88, produces an award of \$353,790.88, all inclusive.

[22] Order accordingly.

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Perelli, J.

Released: March 7, 2018

**CITATION:** Sondhi v. Deloitte Management Services LP, 2018 ONSC 1504  
**COURT FILE NO.:** CV-15-523524CP  
**DATE:** 20180307

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SHIREEN SONDHI

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- and -

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CONSULTANTS GROUP LIMITED

Defendants

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PERELL J.

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