

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Taylor v. Wright Medical Technology Canada Ltd.*, 2014 NSSC 349

**Date:** 20140922

**Docket:** *Hfx*, No. 355381

**Registry:** Halifax

**Between:**

Ken Taylor

*Plaintiff*

v.

Wright Medical Technology Canada Ltd., Wright Medical Technology, Inc., and  
Wright Medical Group, Inc.

*Defendant*

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**DECISION ON COSTS**

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**Judge:** The Honourable Justice Michael J. Wood

**Heard:** By Written Submission

**Final Written  
Submissions:** August 11, 2014

**Counsel:** Raymond F. Wagner, Q. C. and Michael Dull, for the Plaintiff  
Scott Norton, Q.C. and Scott Campbell, for the Defendants

**By the Court:**

[1] On March 7, 2014 I issued a decision (2014 NSSC 89) certifying this proceeding under the *Class Proceedings Act*. I invited the parties to make written submissions on costs and they have now done so. This is my decision on that issue.

[2] Counsel for the Plaintiff filed affidavits of Richard Crossman and Raymond Wagner, Q.C. in support of the motion for costs. Mr. Crossman is a paralegal with the Plaintiff's law firm and provided particulars of disbursements incurred. Included were the following items:

1. \$2,122.32 for airfare for Raymond Wagner to consult with the Plaintiff's experts in Phoenix, Arizona on October 15, 2012.
2. \$236.06 for a hotel for Mr. Wagner in Phoenix on October 15, 2012.
3. \$426.48 for a hotel for Mr. Wagner to attend a consultation with the Plaintiff's expert, Dr. David Zukor in Montreal on September 11, 2012.
4. \$46,860.18 for fees paid to the Plaintiff's expert Augspurger Komm.
5. \$4,150.00 paid to the Plaintiff's expert, Dr. David Zukor.
6. Postage and courier expenses of \$377.54.

[3] Mr. Wagner's affidavit indicated that he was senior counsel for the Plaintiff and on October 15, 2012 travelled to Phoenix for purposes of consulting with the Plaintiff's experts at Augspurger Komm. He confirmed the disbursement amount for airfare and accommodations. Mr. Wagner also confirmed the travel and accommodation expenses for meeting with Dr. Zukor in Montreal on September 11, 2012. Mr. Wagner expressed the opinion that the consultations were necessary for purposes of properly understanding the science, biomechanics and material composition of the Defendant's hip implant device and the reasons for its failure. He also said that the consultations were necessary in order to determine the validity of the Plaintiff's claim.

[4] The Plaintiff seeks a lump sum award of \$40,000.00 together with disbursements of \$54,170.58. The Defendants argue that the amount should be no

more than \$10,000.00 and that none of the expert related costs should be recoverable as disbursements.

[5] The Plaintiff says the Court should exercise its discretion and award a lump sum rather than apply the Tariff calculations found in *Civil Procedure Rule 77*. His rationale is that costs should represent a substantial contribution to a party's actual legal expenses, and in this case, those amount to \$150,000.00.

[6] I have two difficulties with the Plaintiff's position. The first is that there was no evidence of the actual legal expenses of the Plaintiff. Neither of the affidavits filed indicate the fee agreement between Plaintiff's counsel and the Plaintiff, the hours spent or the applicable hourly rates. Without this information the Court has no basis on which to assess the Plaintiff's actual expenses or their reasonableness. The reply brief includes a statement that the Plaintiff has incurred costs in the approximate amount of \$150,000.00 to "secure the ability to launch his class proceeding". This statement is not evidence and is of no assistance to the Court in assessing costs.

[7] The other difficulty I have with the Plaintiff's submission is the assumption that the substantial indemnity principle applies to interim cost awards. Amounts awarded for chambers motions are almost never determined by a comparison with the party's actual expenses. The Tariff amount for costs of a half day motion is \$750.00 to \$1,000.00 which could hardly be considered a substantial contribution to a party's actual expenses in most cases.

[8] Tariff C governs chambers applications and motions and does not refer to substantial indemnity. Paragraph (3) of the applicable guidelines provides for the court's discretion to depart from the Tariff calculation where it would be "just and appropriate in the circumstances".

[9] The substantial indemnity principle has more relevance once the ultimate outcome of the proceeding has been determined. Awarding costs on this basis for interim motions could result in very substantial cost orders being made prior to the final hearing. This could impact on the hearing judge's ability to provide substantial cost indemnity to the litigant who is ultimately successful on the merits.

[10] Certification hearings are different than other interim motions. They frequently involve expert evidence and can be very complex. In some cases the hearing will extend over many days. The successful party should be entitled to costs and sometimes these will be significant. A lump sum amount will frequently

be appropriate. For example, in *Morrison Estate v. Nova Scotia (Attorney General)* 2012 NSSC 386 the Court awarded lump sum costs of \$40,000.00 on a successful certification motion. The Plaintiff said that the hearing spanned six days over a period of two years and the value of their docketed time was \$478,000.00 with over half of that time devoted to certification. In *MacQueen v. Sydney Steel Corp.* 2012 NSSC 461 the Court awarded lump sum costs on the certification motion of \$400,000.00. That motion involved 13 days of discovery examinations prior to the hearing and 19 court days.

[11] In this proceeding the certification hearing lasted one day. In addition Dr. Zukor was cross-examined out of court and his examination was completed in a half day. The Tariff C calculation would fix costs at a maximum of \$3000.00. Given the complexity of the issues and the length of the hearing I am satisfied that a lump sum award of \$9,000.00 is appropriate. This is three times the amount which would be calculated under the Tariff.

[12] With respect to the issue of disbursements I disallow any costs associated with counsel travelling to consult with experts. Telephone and, if desired, video conferences should be sufficient in order to allow counsel to discuss the case and the potential expert opinion. In addition, I note that Mr. Wagner's affidavit says that the purpose of the consultation was to "determine the validity of the claim" which goes beyond the requirements for certification and deals with the ultimate merits of the Plaintiff's action.

[13] According to the materials filed by the Plaintiff, Dr. Zukor spent approximately four hours reviewing literature with respect to failure of hip replacement devices as well as the Plaintiff's medical records and preparation of his expert report. His invoice for that work was \$2,200.00 and his hourly rate was \$600.00. There was an additional invoice of \$1,950.00 for the cost of preparing for and participating in his out-of-court examination. The total time spent was three hours and 15 minutes. Although some portion of Dr. Zukor's work undoubtedly related to the substantive merits of the Plaintiff's claim against the Defendants, I am satisfied that most of it was reasonable and related directly to the certification motion.

[14] The work encompassed in the invoices of Augspurger Komm was done primarily by David S. Komm and Kerry Knapp. Both of these individuals worked at an hourly rate of \$275.00. Although I do not have details of all of the time spent, it is clear that the vast majority of their work related to a literature review,

some of which included the articles read by Dr. Zukor. They examined the failed hip replacement device which had been implanted in the Plaintiff but carried out no testing on it. If the work of Messrs. Komm and Knapp was limited to the literature review outlined in their report the fee of \$46,000.00 seems excessive. Dr. Zukor reviewed some of the same materials as well as the medical records for the Plaintiff and prepared his report in less than four hours. There may well have been portions of the work carried out by Messrs. Komm and Knapp which related to the merits of the Plaintiff's action. In fact, the affidavit filed by Mr. Wagner indicates that he was consulting with them in order to determine the validity of the Plaintiff's claim and to understand the science and mechanics involved in the failure of hip transplants. This work relates to the substantive merits of the Plaintiff's action and is not specific to the certification motion.

[15] If a Plaintiff is successful in having a class proceeding certified I believe it is appropriate for them to receive a cost award and that it be payable forthwith. These costs have to be limited to those expenses directly related to the certification application and should not include general preparation for the substantive merits of the action. If the Plaintiff is ultimately successful, costs related to those issues will usually be awarded.

[16] In this case I believe that much of the work done by Messrs. Komm and Knapp related to the merits of the Plaintiff's action and went beyond the strict requirements for the certification motion. I see nothing in the materials that delineates the dividing line between those categories of work. Even if I am wrong, and most of the work was for the certification, I do not believe that it is reasonable for the Defendants to pay \$46,000.00 for a report which simply summarizes existing literature and data. I am prepared to award the Plaintiff a portion of the expenses of Augspurgen Komm which I would fix at \$10,000.00.

[17] In summary the Plaintiff is entitled to his costs of the certification motion in the amount of \$9,000.00 together with the following disbursements:

1.	Courier	\$291.54
2.	Postage	\$86.00
3.	Dr. David Zukor	\$4,150.00
4.	Augspurgen Komm	\$10,000.00
	Totalling	\$14,527.54

[18] These costs will be payable forthwith. This decision does not preclude the Plaintiff from seeking the balance of the Augspurger Komm expenses as part of the ultimate cost award should the claim succeed at trial.

Wood, J.