

*Case Name:*

**Abdijama (Litigation guardian of) v. McDonald's  
Restaurants of Canada Ltd.**

**Between**

**Ayan Abdijama (by her Litigation Guardian Noora  
Mohamad), Noora Mohamad and Laila Abdijama (by her  
Litigation Guardian Noora Mohamad), and  
McDonald's Restaurants of Canada Limited, McDonald's  
Corporation, George A. Cohon, Ronald Cohen, Jack M.  
Greenberg, James Cantalupo, Heath Miller**

[2004] O.J. No. 4312

134 A.C.W.S. (3d) 564

Court File No. 00-CV-198953CM

Ontario Superior Court of Justice

**Wilton-Siegel J.**

Heard: January 8, 2003.

Judgment: October 25, 2004.

(38 paras.)

*Civil procedure -- Costs -- Party and party or partial indemnity -- Taxation or assessment --  
Considerations.*

Motion by the defendants for costs. The defendants successfully applied to have portions of the plaintiff's amended pleadings struck for failure to disclose a reasonable cause of action. The plaintiff sued the American and Canadian entities of McDonald's Restaurants. The action against the American entity was summarily dismissed. The pleadings with respect to the Canadian entity were struck with leave granted to the plaintiff to further amend. The defendants sought their costs of the motion on a substantial indemnity basis. They further sought costs on a substantial indemnity basis for the examination of a witness that they submitted was unnecessary and abusive.

HELD: Motion allowed in part. The defendants were entitled to costs on a partial indemnity scale. The plaintiff's conduct was not reprehensible, scandalous or outrageous, so as to justify an award of costs on a substantial indemnity basis. Nor were such costs merited merely because the cross-examination proved to be of little utility. The bill of costs was adjusted to exclude excessive time spent by counsel discussing strategic considerations with counsel for McDonald's Canada. The plaintiffs chose to assert claims against McDonald's US and must therefore pay the reasonable disbursements of that party, including reasonable costs which arose from the location of their headquarters. The cost of transmission of documentation by Canadian counsel was a reasonable charge in such circumstances. The award of costs in favour of McDonald's US was payable upon the determination by the trial judge of the plaintiffs' claim against the remaining defendants, so as not to jeopardize the continuation of the action.

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 57.01(1).

**Counsel:**

Theodore Charney, for the Plaintiffs.

Mark Veneziano, for the Defendant, McDonald's Corporation.

Christopher Dunn, for the Defendants McDonald's Restaurants of Canada Limited and Heath Miller.

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ENDORSEMENT ON COSTS

**1 WILTON-SIEGEL J.** (endorsement):-- On this motion, the defendant McDonald's Corporation ("McDonald's U.S.") sought an order striking the pleadings in paragraphs 27(A) to 27(E) and the pleadings in paragraphs 27(F) to 27(J) of the Amended Amended Statement of Claim, in each case for failing to disclose a reasonable cause of action. In addition, the defendants McDonald's Restaurants of Canada Limited ("McDonald's Canada") and Heath Miller sought an order that the pleadings in paragraph 29 of the Amended Amended Statement of Claim also be struck as failing to disclose a reasonable cause of action.

**2** The relief sought by McDonald's U.S. was granted without further leave in favour of the plaintiffs to amend the Statement of Claim in respect of the claim against McDonald's U.S. The relief sought by the defendants McDonald's Canada and Heath Miller was also granted but the plaintiffs were granted leave to amend further the Amended Amended Statement of Claim in respect of the pleading in paragraph 29 only.

## Cost Submissions of McDonald's U.S.

### Scale

**3** McDonald's U.S. seeks costs on a substantial indemnity scale. Alternatively, if costs are awarded on a partial indemnity basis, it seeks costs of the cross-examination of Mr. Marshall on a substantial indemnity basis.

**4** McDonald's U.S. argues that costs on a substantial indemnity basis are appropriate in reliance on *Bothwell v. Price-Waterhouse Ltd.*, [1991] O.J. No. 1872 in which a Statement of Claim was struck for the second time (the first time being on consent). McDonald's U.S. also argues that the cross-examination of Mr. Marshall was unnecessary and abusive constituting, in essence, an examination for discovery.

**5** The plaintiff argues that lack of merit in the pleadings being struck is not a basis for costs on the substantial indemnity scale. It argues that conduct such as fraud, deceit or proffering false testimony is required to justify such an award.

**6** It cannot be said that the plaintiff's conduct was so reprehensible, scandalous or outrageous as to justify an award of costs on a substantial indemnity basis. I agree with Lane J. in *Albert Bloom Ltd. v. Bentinck (Township) Chief Building Official* (1996), 29 O.R. (3d) 681, [1996] O.J. No. 1393 at 22, *aff'd* (1996), 31 O.R. (3d) 317 that "counsel must be given the right to be wrong without suffering a special sanction."

**7** In this action, the plaintiffs were entitled to reformulate their pleading on a basis that proposed a possible cause of action for determination by the Court. The vitality of our common law principles, and their responsiveness to changing circumstances, requires that innovation and flexibility in pleadings, even if unsuccessful, not be stifled by the threat of penal cost awards. In the present matter, it also cannot be said that the Amended Amended Statement of Claim exhibited the offensive drafting skills apparently present in the *Bothwell* decision.

**8** I would add that, while the defendants may be correct in saying that the evidence on the cross-examination of Mr. Marshall received minimal reference in the Endorsement, I do not believe that is sufficient reason to award costs in respect of the cross-examination on a substantial indemnity basis. In particular, the Court should be reluctant to award costs on such scale merely because the cross-examination proved to be of little utility. Similarly, the fact that the plaintiff's conduct at the cross-examination resulted in a large number of refusals is not the type of improper behaviour that attracts costs on a substantial indemnity basis in circumstances where the deponent has the benefit of his own skilled counsel.

**9** Accordingly, I see no reason to depart from the partial indemnity scale in awarding costs in favour of McDonald's U.S. as the successful party.

## Quantum

**10** In considering the quantum of costs in favour of each of the defendants in this award, I have had regard to the factors enumerated in Rule 57.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

**11** McDonald's U.S. seeks costs of \$16,348.50, plus disbursements.

**12** The plaintiffs argue with respect to the submissions of both McDonald's U.S. and McDonald's Canada that costs should be modest because most of the work product was the subject of a previous motion before Nordheimer J., the issues on the present motions were less complicated because the issues had been narrowed by the decision of Nordheimer J. and the action against the senior executives has been settled.

**13** The plaintiffs also say the bulk of the time reflected in the bill of costs of McDonald's U.S. relates to matters which should not be recoverable, including preparation and attendance at a "without prejudice" settlement meeting, strategic discussions with counsel for the other defendants, communications with the office of Nordheimer J. regarding the hearing of this motion, and consideration of a sealing order.

**14** The plaintiffs also object to the rates charged for Mr. Veneziano, who undertook most of the work on behalf of McDonald's U.S., as well as for Ms. Bowker, who they say should have been charged at the rate for a student. In addition, they suggest the appropriate counsel fee for appearance on the motion should be \$700.

**15** On the basis of these considerations, the plaintiffs argue costs should be awarded in an amount not exceeding \$2,000.

## Conclusions

**16** As summary judgment has been granted in favour of McDonald's U.S., the Court is obligated to address all reasonable costs of this defendant to date. However, I agree with the plaintiffs that such costs do not extend to fees related to the communications with the office of Nordheimer J. or the claims against the executives as these latter costs were dealt with in the settlement of those claims. As well, the bill of costs should be adjusted to exclude excessive time spent discussing strategic considerations with counsel for McDonald's Canada and the possibility of a sealing order, as the record does not indicate any reasonable basis for any such order. It is impossible, however, to engage in the detailed analysis of particular docket entries suggested by the plaintiffs' in their submissions.

**17** With respect to the rates charged by counsel for these defendants, I do not believe the rates charged on a partial indemnity basis are unreasonable, apart from Ms. Bowker whose rate should be adjusted to that of a student for her time in 2001. In addition, I would reduce the appearance fee

from the maximum permissible to \$1,000 to reflect the actual time spent by Mr. Veneziano on the motion at his partial indemnity rate.

**18** Taking into consideration the factors set out above, I believe an appropriate cost award is \$7,000.

#### Disbursements

**19** With respect to disbursements, the plaintiffs object to the fax transmission costs as excessive and possibly unrecoverable on a partial indemnity basis. They also say the actual cost of Mr. Marshall's airfare for the cross-examination on his affidavit was excessive. Finally, they suggest that photocopying should be reduced to exclude the cost of copying related to the claim against the executives.

**20** The plaintiffs have chosen to assert claims against McDonald's U.S. and must therefore pay the reasonable disbursements of that party including reasonable costs which arise from the location of their headquarters. The costs of transmission of documentation to that defendant by its Canadian counsel is a reasonable charge in these circumstances. In the absence of any breakdown for these purposes, however, the costs of telephone charges and copying should be reduced by approximately one-half to exclude costs associated with the claims against the executives.

**21** On the basis of the foregoing, disbursements are awarded in favour of McDonald's U.S. of \$1,950, including a provision for the airfare of Mr. Marshall not included in the original bill of costs.

#### Payment

**22** The plaintiffs argue that their appeal of the Endorsement in respect of the motion may be in jeopardy if a sizeable cost award is granted, given the financial circumstances of Ms. Mohamad. They argue that, on the other hand, the defendants do not require being made whole to continue with this litigation.

**23** While I believe that McDonald's U.S. is entitled to all of its reasonable costs as the successful party on a motion which terminates its involvement in the litigation, I am sensitive to the plaintiffs' submission that the cost award should not have the indirect effect of preventing the plaintiffs from pursuing their claim against the remaining defendants.

**24** Accordingly, the award of costs in favour of McDonald's U.S. is to be payable upon determination by the trial judge of the plaintiffs' claim against the remaining defendants.

Costs Submissions of McDonald's Canada and Heath Miller

#### Scale

**25** These defendants seek costs on a substantial indemnity basis totalling \$12,005.00, plus disbursements. They argue that the motion was "effectively a violation of the prior order of Nordheimer J. dated March 26, 2001" saying the Amended Amended Statement of Claim was not a realistic attempt to amend the paragraph ordered struck by Nordheimer J. and did not heed or address the comments in his Endorsement.

**26** As set out above, the plaintiffs argue that conduct such as fraud, deceit or proffering false testimony, all of which are absent on this motion, are required to justify an award on a substantial indemnity scale. They say they did not intentionally disregard the ruling of Nordheimer J. and believed that the pleadings in the Amended Amended Statement of Claim complied with his order even though they continued to address negligent as well as intentional acts.

**27** While I agree with these defendants that the changes made to the relevant paragraph of the Amended Amended Statement of Claim appear to have been modest, for the reasons set out above in addressing the claim by McDonald's U.S. for costs on a substantial indemnity basis, the plaintiffs' actions also do not justify an award on that scale in favour of these defendants. I would also add that there is no direct evidence before the Court of bad faith on the part of the plaintiffs in the re-drafting of the pleadings involving McDonald's Canada and Heath Miller even though they were unsuccessful on the motion.

#### Quantum

**28** The plaintiffs make four arguments in support of a significantly smaller cost award. First, they say that approximately one-half of any time spent on the motion related to the claim against the senior executives of McDonald's Canada that was settled prior to the hearing of this motion. Second, they argue success was divided. Third, they say that time not related directly to the motion, including time for preparation and attendance at the settlement meeting, on strategic discussions with counsel for the other defendants, on communications with the office of Nordheimer J. and in relation to the cross-examination of Mr. Marshall in which these defendants did not participate, should not be recoverable. Lastly, they argue the award should be consistent with past awards including, in particular, the cost award of Nordheimer J.

**29** The plaintiffs also object to the rates charged by Mr. Dunn, which they say should be \$150 to reflect the combined effect of his year of call and the degree of complexity of this motion. They further object to Mr. Brock's involvement, arguing the motion did not require the involvement of a second highly experienced counsel, and to the appearance fee of Mr. Dunn, which they argue should be set at \$700.

**30** On the basis of these considerations, the plaintiffs argue that costs of approximately \$1,000 are appropriate.

#### Conclusions

**31** Given that the Amended Amended Statement of Claim was also struck, I do not agree with the plaintiffs that success was divided. I note that Nordheimer J. reached the same conclusion in similar circumstances in the cost award in respect of the motion heard by him. The defendants are therefore entitled to costs on a partial indemnity scale.

**32** As the plaintiffs have indicated an intention to amend the Statement of Claim in respect of the claims against these defendants, I have restricted the cost award in respect of the motion before this Court to matters relating directly to the motion. In particular, I have expressly not dealt with costs associated with the settlement meeting, strategic conversations with counsel for McDonald's U.S., communications with the office of Nordheimer J., and the cross-examination of Mr. Marshall. These costs are reserved for the trial judge.

**33** In fixing costs, I have adjusted for an estimate of the costs associated with the claims against the executives. I also agree with the plaintiffs that consistency with the prior award of Nordheimer J. should be taken into consideration although it is not determinative. Finally, I do not believe the rate charged by Mr. Dunn is unreasonable nor do I think Mr. Brock's involvement should be the subject of an adjustment of this Court as there is no evidence that it was unreasonable.

**34** Taking into consideration the factors set out above, I believe an appropriate cost award is \$2,500. The defendants are also entitled to their disbursements of \$254.45. As the amount of this award should not affect the plaintiffs' ability to continue this litigation, based on the experience of the cost award of Nordheimer J., these costs are to be payable within thirty days of the date of this Endorsement.

#### Additional Matters

**35** Two additional matters remain.

**36** First, McDonald's Canada has submitted that this cost award should include an award of \$500 in favour of each of the executives of McDonald's U.S. and of McDonald's Canada in accordance with the correspondence of counsel for these parties to counsel for the plaintiffs. In each case, the correspondence contemplates payment of these costs against delivery of a release but there is no indication as to whether the releases have been delivered. In any event, it would appear that this correspondence evidences an enforceable agreement between the parties subject to performance. In these circumstances, I do not believe it is necessary to incorporate the agreement into this cost award. If, however, the parties intend this cost award to include the award of costs in respect of the discontinuance of the action against these defendants, I would be prepared to vary the order accordingly on consent.

**37** Second, the plaintiffs seek an award of costs in their favour in the amount of \$1,500 related to the preparation of their written cost submissions. They argue they have been required to prepare lengthy submissions because of the defendants' request for substantial indemnity costs, the size of the cost award sought and the difficulty of separating those dockets which the plaintiffs say are

eligible from those they say are ineligible.

**38** The plaintiffs' cost submissions in this matter have been unusually detailed and are, to a certain extent, reflected in this award. Nevertheless, I do not believe there are any special factors present in this motion which support a departure from the customary practice of limiting the cost award to the awarding of costs incurred by the successful parties.

WILTON-SIEGEL J.

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