Paul-Erik Veel
416-865-2842
pveel@litigate.com

November 28, 2014

When are costs awarded for travel disbursements for out-of-town lawyers?

Its trite law that an unsuccessful litigant generally pays the successful partys costs. But what happens when the winner hired lawyers from out-of-town who had to travel regularly for the case?

It's trite law that an unsuccessful litigant generally pays the successful party's costs. But what happens when the winner hired lawyers from out-of-town who had to travel regularly for the case? Does the losing party have to pay the travel costs incurred by the winner because they chose to hire out-of-town lawyers? In *Matheson v. CIBC Woody Gundy*, the Nova Scotia Supreme Court held that the answer is yes, at least in some cases.

The Mathesons were applicants in a matter against CIBC alleging errors in calculating the margin available in the Matheson's investment account. The application was heard in Sydney, Nova Scotia, but the Mathesons had hired lawyers from McInnes Cooper in Halifax to represent them. The Mathesons were ultimately successful in their application.

In their cost submissions, the Mathesons sought to recover costs associated with the travel costs incurred by their legal counsel as disbursements. CIBC opposed travel costs being awarded.

The Court noted that the basic rule is that "[g]enerally, a successful party will not be entitled to recover travel expenses incurred by out-of-town counsel as disbursements." However, the Court then noted that such costs may be awarded "where the party is able to establish, either from the nature of the case, or the parties involved, or for some other good and valid reason, that the retention of local counsel would not be appropriate".

In this case, the lawyers at McInnes Cooper that the Mathesons retained were also involved in a class action against CIBC involving the very same kind of error. The Mathesons did not want to be part of that class action. However, they retained those same lawyers for their individual claims, on the basis that they had knowledge of the circumstances of the case and experience with the issues raised.

The Court held that the fact the Matheson's lawyers had familiarity with the case was a good reason for the retention of out-of-town counsel and consequently awarded costs in respect of the lawyers' travel.

Matheson does not articulate a bright-line rule; the question of whether travel costs will be awarded is ultimately discretionary. However, *Matheson* does signal that courts will be willing to award costs for the travel costs of a successful party's lawyer where that lawyer has familiarity with the issues in the case. This reflects the Court's underlying policy rationale of trying to minimize parties' overall legal costs, as those costs may be lower where an out-of-town lawyer is familiar with the case and need not start from square one.

Matheson v. CIBC Wood Gundy, 2014 NSSC 340

Court of Appeal makes certification of overtime misclassification cases more difficult

Canadian Courts have been faced in recent years with a number of class actions where employees allege that their employer improperly misclassified them as ineligible for overtime pay. The Ontario Court of Appeal's recent decision in *Brown v. Canadian Imperial Bank of Commerce* makes it more difficult for such claims to proceed as class actions.

At issue in *Brown* was a claim by investment advisors and associate investment advisors at CIBC Wood Gundy for overtime pay. Under CIBC's overtime policy, investment advisors and associate investment advisors were generally categorized as managerial and therefore ineligible for overtime pay. The Plaintiff contended that all investment advisors and associate investment advisors had common job duties and were commonly categorized as ineligible for overtime pay. Consequently, the Plaintiff contended that eligibility for overtime pay could be determined as a common issue.

For its part, CIBC contended that its policy provided discretion to determine eligibility for overtime pay on a case-by-case basis. While investment advisors and associate investments advisors were generally classified as ineligible, CIBC led evidence that, in appropriate cases, individual employees' circumstances (including their actual responsibilities and their degree of managerial responsibility and oversight) would be taken into account in determining eligibility for overtime pay.

The Court of Appeal emphasized that the question of whether eligibility for overtime pay could be determined as a common issue depends on the circumstances of this case. In the circumstances of this case, given the potential for case-by-case assessment of employees' responsibilities, the Court of Appeal

held that eligibility for overtime could not be determined as a common issue. Consequently, the Court of Appeal upheld the decisions of lower courts refusing to certify the proceeding as a class action.

Inherent in the Court of Appeal's decision is that the mere fact that employees share job titles and have broadly similar job functions does not by itself mean that their eligibility for overtime can be determined on a common basis in a class proceeding. This remains the case even where the employer classifies those employees as generally ineligible for overtime. Evidence that an employer will occasionally make exceptions to its general policy by assessing its employees' eligibility for overtime on a case-by-case basis will pose a significant impediment to the certification of these claims as class proceedings.

- *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677