

**CITATION:** *Lysko v. Maxbeau Company et al.*, 2010 ONSC 6523

**COURT FILE NOS.:** 02-CV-230896 CM4; 02-CV-230897 CM4; 03-CV-254691 CM3;  
05-CV-298199 PD2

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Michael Lysko v. Maxbeau Company, Bob McCown and Damien Cox (02-CV-230896 CM4)

Michael Lysko v. Rogers Sportsnet Inc. and Marty York (02-CV-230897 CM4)

Michael Lysko v. David Braley, David Asper, Sherwood Schwarz, Lyle Bauer, John Tory, David MacDonald, Hugh Campbell, Robert Ellard, Sig Gutsche, B.C. Lions Football Club Inc., Vancouver Football Club Ltd., 431966 B.C. Ltd., Calgary Stampeder Football Club Ltd., Edmonton Eskimo Football Club, 1097694 Ontario Limited, carrying on business as the Hamilton Tiger-Cats Football Club, Montreal Alouettes (1997) Limited Partnership, 9032-9756 Quebec Inc., 1493044 Ontario Limited, carrying on business as the Ottawa Renegades, Saskatchewan Roughriders Football Club, Argos N.S. Corporation, Toronto Argonauts Holding Inc. and Winnipeg Blue Bombers Football Club (03-CV-254691 CM3)

Michael Lysko v. Bob McCown, Rogers Broadcasting Limited, Rogers, Communications Inc. and Rogers Sportsnet Inc. (05-CV-298199 PD2)

**BEFORE:** Master Graham

**COUNSEL:** Brian MacLeod Rogers, for the defendants Maxbeau Company, McCown and Cox (moving parties)

Matthew Gottlieb and James Bunting, for the defendants Rogers Sportsnet and Marty York (action no. 02-CV-230897 CM4) and Bob McCown, Rogers Broadcasting Limited, Rogers Communications Inc. and Rogers Sportsnet Inc. (action no. 05-CV-298199 PD2) (moving parties)

Geoffrey Shaw and Christopher Bartlett, for the defendants David Braley and Hugh Campbell (moving parties)

Christine Lonsdale and Elder Marques, for the defendants David Asper and Lyle Bauer (moving parties)

John Field and Jason Green, for the defendants Sherwood Schwarz, John Tory, David MacDonald, Robert Ellard, Sig Gutsche, B.C. Lions Football Club Inc., Vancouver Football Club Ltd., 431966 B.C. Ltd., Calgary Stampeder Football Club Ltd., Edmonton Eskimo Football Club, 1097694 Ontario Limited, carrying on business as the Hamilton Tiger-Cats Football Club, Montreal Alouettes (1997) Limited Partnership, 9032-9756 Quebec Inc., 1493044 Ontario Limited, carrying

on business as the Ottawa Renegades, Saskatchewan Roughriders Football Club, Argos N.S. Corporation, Toronto Argonauts Holding Inc. and Winnipeg Blue Bombers Football Club (moving parties)

J. Gardner Hodder, for the plaintiff

**HEARD:** March 3 and 4 and June 28 and 29, 2010

**ENDORSEMENT RE: COSTS**

**(Motions for security for costs argued March 3 and 4 and June 28 and 29, 2010)**

- [1] Subsequent to my Reasons for Decision released November 26, 2010, I have received and reviewed written costs submissions from all counsel.
- [2] The defendants all submit that they won the motion, having obtained an order that the plaintiff post a total of \$150,000.00 in security, being \$90,000.00 more than the \$60,000.00 that the plaintiff had offered. However, the main issue was whether the plaintiff had to demonstrate a good case on the merits or post \$2.8 million that he clearly did not have, and the result was that he had to post \$150,000.00 in three \$50,000.00 instalments. The fact is that the plaintiff did not dispute that he had to post security in some amount and the \$60,000.00 that he offered to post before the motion was based on the "pay what you can" approach that was vigorously opposed by the defendants in argument but ultimately accepted by the court in its Reasons. The plaintiff therefore enjoyed a significantly greater degree of success on the motion than did the defendants.
- [3] The defendants spent the better part of four days arguing for \$2.8 million in security for costs and the court ordered that the plaintiff post less than 6% of that amount. Although the motion itself was warranted, given that the court ordered that some security for costs be posted, the bulk of the motion focussed on whether the plaintiff was required to demonstrate a good case on the merits and the merits of the actions themselves. I accept the plaintiff's submission that the argument should have been limited to the appropriate quantum of security. If the motion had been limited to the quantum of security, it would have taken one day at the very most, instead of four days, and the parties would have been required to prepare considerably less material.
- [4] A further point that supports the plaintiff's claim for costs is that the defendants' objective, over the four days of argument, was to bring the action to an end by arguing, unsuccessfully, that the plaintiff could not demonstrate a good chance of success on the merits, contrary to the principle stated by Nordheimer J. in *Intellibox, v. Intermec* (2005), 14 C.P.C. (6<sup>th</sup>) 339 at paragraph 6, as follows:

"A motion for security for costs ought not to be turned into a substitute for a motion for summary judgment nor should it be used to indirectly accomplish the same result".

[5] The defendants also submit that the court, in ruling on the costs of the motion, should consider the following conduct on the part of the plaintiff:

1. His failure to acknowledge formally that he was no longer resident in Ontario until the commencement of the hearing of the motion.
2. The adjournment of the motion in March, 2009 as a result of Master Birnbaum recusing herself following receipt of the plaintiff's affidavit containing statements challenging her impartiality. It should be noted that the adjournment had already been requested, prior to the recusal, by counsel for one of the defendants owing to the fact that Mr. Lysko had again moved.
3. His affidavit evidence about legal opinions that he had received which the defendants first challenged as improper and which cross-examination revealed to be misleading.
4. He gave affidavit evidence about his reason for leaving his job at the University of Western Ontario and then equivocated during the cross-examination on that evidence, ultimately admitting that his original evidence was inaccurate.

[6] Although the plaintiff's evidence impugning the impartiality of Master Birnbaum was unwarranted, it does not appear that Master Birnbaum's voluntary recusal significantly added to the costs of the motion, given that the Sportsnet defendants had stated their intention to seek an adjournment of the motion shortly before her recusal. However, the plaintiff's conduct as described in all four items militates against the award of substantial indemnity costs requested by the plaintiff.

[7] I also accept that the plaintiff's conduct described at items 1, 3 and 4 of paragraph [5] above did unnecessarily increase the costs of the motion, and the costs awarded to the plaintiff should be reduced accordingly.

[8] The plaintiff seeks substantial indemnity costs of \$208,164.27 and in the alternative, partial indemnity costs of \$138,975.89. By reason of the plaintiff's conduct as described above, and the fact that the court did order the plaintiff to pay more security than he had offered before the motion, substantial indemnity costs are not appropriate.

[9] The partial indemnity costs figure of \$138,975.89 should be compared to the \$100,000.00 sought by the Sportsnet defendants, who took the lead on the motion, and the \$78,500.00 sought by the CFL defendants. It is reasonable that the plaintiff's figure is higher than the Sportsnet defendants' figure because the plaintiff was required to respond to the submissions on the merits made by all of the defendants in all of the actions while the Sportsnet defendants were concerned only with the merits of their own action.

[10] Allowing for the fact that the amount of security ultimately ordered was more than the amount offered, the plaintiff should be awarded the partial indemnity costs of the motion based on total partial indemnity fees and disbursements of \$120,000.00. This figure should in turn be reduced by one third to \$80,000.00 to take into account the conduct of the plaintiff that unnecessarily increased the time spent on the motion.

[1] The defendants collectively shall therefore pay the costs of the motion, inclusive of all fees, disbursements and taxes, fixed at \$80,000.00 payable within thirty days. If the defendants cannot agree to an apportionment of the \$80,000.00 among them, they may contact my registrar to arrange to address the issue before me.



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MASTER GRAHAM

**D. te: February 3, 2011**