

COURT FILE NO.: 02-CL-4825
DATE: 2003/11/28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SUBASH CHANDARANA (Applicant) v. CENTRUM
BIOTECHNOLOGIES INC. and PANKAJ MODI (Respondent)

BEFORE: Justice Sachs

COUNSEL: Ryan M. Naimark, for the Applicant

Richard E. Anka, for the Respondent

ENDORSEMENT RE COSTS - ENTITLEMENT

[1] The Applicant was successful on his application for leave to commence a derivative action in the name and on behalf of Centrum Biotechnologies Inc. against the proposed defendants, Pankaj Modi and GenereX Biotechnology Corporation pursuant to section 246 of the Ontario Business Corporations Act.

[2] The Applicant requested his costs fixed on a substantial indemnity basis in the amount of \$70,962.33 payable forthwith. The Respondent submitted that either the costs of the application should be reserved to the trial judge or, alternatively, that the costs should be in the cause.

[3] At the Respondent's request, I am ruling on the question of entitlement before ruling on the question of quantum.

[4] I agree with the Respondent that the results of the action are far from certain. However, even if the action is unsuccessful that does not mean that the order for leave should not have been made. While the merits of the case were an issue on the application for leave, the threshold was a much lower one than the one that will be used at trial. I agree with the reasoning of Whitten J. in Jennings v. Bernstein [2001] O.J. No. 831 and find that the Applicant is entitled to his costs of this application and that that entitlement should not depend upon the ultimate resolution of the action.

[5] I do not accept the Applicant's submission that costs should be fixed on a substantial indemnity basis. Nothing about the Respondent's conduct was sufficiently egregious so as to attract an award of substantial indemnity costs. Further, I note that one of the cases relied upon by the Applicant in support of its request [Toronto Harbour Commissioners v. T.H.C. Parking

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Inc.] is a decision where the Court of Appeal overturned the application judge's award of solicitor and client costs. Thus, I propose to fix costs on a partial indemnity basis.

[6] The Respondent will have 10 days to make his submissions in writing on quantum and the Applicant will have 5 days to reply.


SACHS J.

DATE:

Nov. 28/03