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DATE: 20111118
DOCKET: C52491

COURT OF APPEAL FOR ONTARIO

Doherty J.A.

BETWEEN

Ellen Smith

Plaintiff (Respondent)

and

Inco Limited

Defendant (Appellant)

Proceedings under the *Class Proceedings Act, 1992*

Alan J. Lenczner, Q.C., Larry P. Lowenstein, Laura K. Fric and Lauren Tomasich, for the defendant (appellant)

Scott Hutchison, for the Law Foundation of Ontario, plaintiff (respondent), and for the purposes of this motion.

TELECONFERENCE ENDORSEMENT

[1] In the reasons for judgment in this matter, the court directed the parties to make arrangements to speak to me to determine the procedure to be followed in determining the order to be made as to the costs of the trial. A conference call was held on November 10, 2011. Mr. Hutchison represented the Law Foundation of Ontario, and also spoke on behalf of Mr. Baert, who represents the plaintiff/respondent. Mr. Lenczner and Ms. Fric represented Inco.

[2] Mr. Hutchison, for the Foundation, takes the position that the assessment of the trial costs should be remitted to the trial judge. Mr. Lenczner, for Inco, argues that the panel can determine the costs at trial. Both counsel agree that I can determine the appropriate forum in which the costs question should be decided.

[3] There are benefits to having the trial judge deal with the question of costs. The trial judge is in a better position to deal with costs submissions that relate to the conduct of the trial. That advantage cannot, however, be overstated. The trial occurred years ago. No doubt, the trial judge will have little, if any, recollection of many of the details.

[4] Both counsel are satisfied that appropriate procedures could be worked out to allow both sides to fully and fairly present its case on costs if I were to order the matter determined by the panel.

[5] I was initially inclined to order that the trial costs be determined by the panel. However, I have concluded that the matter should be remitted to the trial judge. In many ways, this is like a separate piece of litigation in which a wide variety of factual and legal issues may arise. There is a great deal of money at stake. The parties may want to lead evidence on various issues. There is a very real potential that legal issues of considerable public importance may be raised in the course of the costs proceedings. I think it is best to follow the usual litigation format. All relevant matters can be fully vetted before the trial judge in the trial forum with ready access to a full appeal to this court if either party is so inclined. This court will have the benefit of a full record and the reasons of the trial judge.

[6] This matter is remitted to the trial judge to determine, having regard to the reasons of this court, the costs at trial.

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