CITATION: Smith v. Inco, 2012 ONSC 5094
COURT FILE NO.: 12023/01
DATE: 2012-09-10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Ellen Smith	K. Baert and C. Poltak, for the Plaintiff
Plaintiff	
- and -	
Inco Limited	A. Lenczner, L. Lowenstein and L. Fric, for the Defendant Inco Limited
Defendant	
- and -	
The Law Foundation of Ontario	S. Hutchison, A. Dantowitz and J. Safayeni, for the Law Foundation of Ontario
Respondent	
	HEARD at Welland: June 19, 2012

The Honourable Justice J. R. Henderson

COSTS DECISION

INTRODUCTION

[1] This is my decision with respect to the costs of this proceeding from January 19, 2006, the date of the certification of this action as a class proceeding, until July 6, 2010, the date of my decision after the trial of the common issues.

[2] On the appeal from the trial decision the Ontario Court of Appeal ("OCA") dismissed the claim of the plaintiff class against the defendant Inco. As the party that was ultimately successful, Inco requests its costs on a partial indemnity basis from the date of certification until the date of Inco's offer to settle, June 10, 2009, and on a substantial indemnity basis thereafter.

[3] However, Inco does not request its costs from the representative plaintiff or from the class members, but by payment out of the Class Proceedings Fund ("the Fund"), an account that is maintained and administered by the Law Foundation of Ontario ("LFO") pursuant to s.59.1 of the *Law Society Act*, R.S.O. 1990, c. L.8.

[4] Inco has delivered a Bill of Costs by which it claims costs on the above-mentioned scale in the total amount of approximately $5,340,000.00 including disbursements. For comparison purposes, if Inco's Bill of Costs were recalculated on a partial indemnity scale throughout the relevant period, the total costs claim would be approximately $4,603,000.00 including disbursements.

[5] LFO submits that s.31(1) of the *Class Proceedings Act,* S.O. 1992, c. 6 (hereinafter called the *CPA*) applies as this action raised novel points of law and involved matters of public interest. Therefore, LFO submits that Inco should receive no costs, or in the alternative that Inco's costs should be substantially discounted. LFO also submits that in any event the quantum of costs claimed is excessive and that the scale of costs should not be higher than partial indemnity.

BACKGROUND

[6] When this class action was commenced in 2001 the representative plaintiff was Wilfred Pearson. The motion for certification of the action was dismissed in the first instance by Nordheimer J. in a decision reported at [2002] O.J. No. 2764. That decision was upheld by the Divisional Court in a decision reported at [2004] O.J. No. 317.

[7] On appeal to the OCA, after the plaintiff limited the scope of the claim, the OCA certified this action as a class proceeding by way of its decision of January 19, 2006, reported as *Pearson v. Inco Ltd.* (2005) 78 O.R. (3d) 641 (hereinafter called the *Pearson* Certification decision). Subsequently, the OCA awarded costs of the certification motion and the appeals to the plaintiff in the total sum of $205,000.00, in a decision reported as *Pearson v. Inco Ltd.* (2006) 79 O.R. (3d) 427 (hereinafter called the *Pearson* Costs decision).

[8] The certified class in this proceeding consisted of approximately 7,000 property owners in the City of Port Colborne who collectively claimed that the value of their properties had been negatively affected by emissions from Inco's Port Colborne refinery. The certified action was restricted to a claim for the

diminution of property values, and was based in nuisance, trespass, and the doctrine in *Rylands v. Fletcher*.

[9] There was a significant issue with respect to the limitation period. The nickel emissions from the Inco refinery had commenced in 1918, but those emissions had regularly been reduced until approximately 1984 when the nickel refinery operations ceased. The class members relied upon the intense publicity as to the negative effect of Inco's nickel emissions that commenced in September 2000 as the starting point for the running of the limitation period.

[10] In early 2008 the plaintiff class applied to the Class Proceedings Committee ("the Committee"), a statutory committee created by s.59.2 of the *Law Society Act,* for financial support from the Fund. That request was granted in June 2008, and at all relevant times thereafter the plaintiff class received financial support from the Fund.

[11] The plaintiff class delivered an offer to settle to Inco, dated June 13, 2007, whereby the plaintiff class offered to settle for $37,500,000.00 plus costs and administration fees of $2,500,000.00. This offer was not accepted by Inco, and was later withdrawn. A subsequent offer to settle was delivered by the plaintiff class to Inco, dated September 25, 2009, whereby the plaintiff class offered to settle for $10,000,000.00 plus costs and administration fees of $3,000,000.00.

[12] Inco delivered its own written offer to settle, dated June 10, 2009, whereby Inco offered to pay the sum of $2,000,000.00 plus costs.

[13] The trial of the common issues was held in Welland over 45 days of trial time between October 2009 and January 2010. That trial time included time in which several interlocutory motions were brought and decided.

[14] As the trial judge I delivered my written decision dated July 6, 2010, reported as *Smith v. Inco Ltd.* [2010] O.J. No. 2864. I found that Inco was liable to the class members in private nuisance and pursuant to the doctrine in *Rylands v. Fletcher*. I assessed total damages at $36,000,000.00, and divided those damages between three sub-classes.

[15] The OCA set aside my decision on the common issues by way of its written decision dated October 7, 2011, reported as *Smith v. Inco Ltd.* [2011] O.J. No. 4386. The OCA held that the plaintiff class was unable to prove liability in any of the alleged causes of action. Moreover, the OCA found that the plaintiff class was unable to adequately prove any damages. Thus, the claim by the class members was dismissed.

[16] By way of a written decision dated November 18, 2011, Doherty J.A. of the OCA referred this matter back to me, the trial judge, to deal with the costs issues from the date of the certification of the action until the date of my decision on the common issues.

[17] Of some significance is the fact that the plaintiff class applied for leave to appeal the OCA decision to the Supreme Court of Canada ("SCC"). On April 16, 2012 leave to appeal to the SCC was denied.

THE LEGAL FRAMEWORK

[18] The costs of any court proceeding are in the discretion of the court as set out in s.131(1) of the *Courts of Justice Act*, which reads as follows:

> **131(1)** Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[19] Rule 57.01(1) of the *Rules of Civil Procedure* sets out a list of factors that the court may consider in any assessment of costs, but it does not limit the broad discretion conferred on the court by s. 131(1) of the *Courts of Justice Act.* In fact, the final factor listed in rule 57.01(1) is "any other matter relevant to the question of costs".

[20] As to the role of the Fund, s. 59.1(2) of the *Law Society Act* reads as follows:

> **59.1(2)** The Class Proceedings Fund shall be used for the following purposes:
>
> 1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding.
>
> 2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.

[21] The *CPA* also specifically deals with the costs of a class proceeding. Section 31(1) of the *CPA* reads as follows:

> **31(1)** In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

[22] Lastly, it is acknowledged that a court must consider the goals of the *CPA* when it makes a costs award in a class proceeding. Those goals are summarized in the OCA decision in *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274 in which Blair J.A. wrote at para. 33 that: *"The trio of goals underpinning the CPA are now well established. They are: access to justice, behaviour modification and judicial economy."* Those three matters were described by Rosenberg J.A. as *"the three accepted goals of a class proceeding"* at para. 25 of the *Pearson* Certification decision.

THE ISSUES

[23] Inco's position is fairly straightforward. Inco submits that the plaintiff class sued Inco, and Inco successfully defended the claim. Ultimately, the OCA held that Inco owed nothing to the class members. Accordingly, Inco submits that it is entitled to its costs.

[24] Further, Inco submits that the Fund is the proper payor of Inco's costs. Inco submits that if financial support was provided to an unsuccessful plaintiff from the Fund, then it follows that the costs of the successful defendant should be paid from the Fund. Inco also claims that the Committee should not have authorized financial support for the plaintiff class in this action as the claim was non-meritorious from the start.

[25] Still further, because the ultimate result of this proceeding was more favourable to Inco than Inco's offer to settle, Inco also claims its costs on a substantial indemnity scale after the date of its offer to settle.

[26] LFO accepts that Inco was the successful party, and that if any costs are payable those costs should be paid from the Fund. However, LFO submits that the Committee did not act inappropriately in authorizing funding for this action; that Inco's offer to settle does not entitle Inco to its costs on a scale higher than partial indemnity; and that the quantum of costs claimed by Inco is excessive.

[27] Also, LFO submits that the provisions of s.31(1) of the *CPA* apply in that this action "raised a novel point of law" and "involved a matter of public interest". Therefore, LFO submits that Inco should receive no costs, or in the alternative that Inco's costs should be substantially discounted.

[28] I propose to analyze these issues by considering the following questions:

1) Is Inco entitled to a costs award prior to considering s.31(1) of the *CPA*?

2) If so, what is the appropriate scale of costs?

3) Assuming Inco is entitled to a costs award, at what amount does this court assess the quantum of Inco's costs, prior to considering s.31(1) of the *CPA*?

4) Do the factors set out in s.31(1) of the *CPA* apply in this case, and if so how should those factors be applied?

INCO'S ENTITLEMENT TO COSTS

[29] I start my analysis by determining whether Inco is entitled to its costs, prior to a consideration of s.31(1) of the *CPA*.

[30] The general rule in any litigation is that costs should follow the event. That is, the successful party in any proceeding is normally entitled to a costs award payable by the unsuccessful party.

[31] A class proceeding is simply a procedural vehicle for the conduct of litigation. In respect of costs, the same rules that apply to all other civil proceedings apply to class proceedings. See the OCA decision in *Ruffolo* at para. 34.

[32] Inco was ultimately successful in this action. Therefore, the general rule applies. Thus, I find that Inco is *prima facie* entitled to its costs, prior to a consideration of s.31(1) of the *CPA*.

THE SCALE OF COSTS

[33] Having found that Inco is entitled to a costs award, the court must determine the appropriate scale of costs.

[34] Inco submits that the final result of this action is more favourable to Inco than the terms of its offer to settle dated June 10, 2009. Inco also submits that the Committee should not have funded what Inco alleges was a non-meritorious claim. For these reasons, Inco requests an enhanced costs award. In my view, both aspects of Inco's submissions on this point are flawed.

[35] Regarding Inco's offer to settle, Inco relies in part on Rule 49.10(2) of the *Rules of Civil Procedure*, which reads as follows:

> **49.10(2)** Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

[36] It is now clear that Rule 49.10(2) does not apply in a case in which the plaintiff's claim is dismissed at trial. In that respect see the case of *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (OCA), as discussed in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 737 (OCA) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (OCA).

[37] Furthermore, Rule 12.04(4) ends any debate as to whether Rule 49.10(2) applies, as it specifically states that Rule 49.10(2) does not apply to class proceedings. Therefore, I find that Rule 49.10(2) has no application to the present case.

[38] Inco also submits that even if Rule 49.10(2) does not apply, Inco's offer to settle is still a factor for me to consider pursuant to Rule 49.13 and Rule 57.01(1). I agree. Given the ultimate result, Inco made a sensible offer to settle. Had it been

accepted, the costs of the entire trial and much of the preparation would have been avoided.

[39] In the *Strasser* case the defendant made an offer to settle and the plaintiff's claim was dismissed at trial. The trial judge had awarded solicitor/client costs throughout to the defendant, but the OCA held that costs should be awarded to the defendant on a party/party basis to the date of the defendant's offer and on a solicitor/client basis thereafter.

[40] Subsequently, in circumstances similar to those in *Strasser*, the OCA in both the *Scapillati* case and the *Davies* case found that the *Strasser* decision must be interpreted narrowly, and awarded to the defendant the approximate equivalent of party/party costs for the entire period of the litigation. Therefore, I conclude that the usual practice in a case in which the plaintiff's claim is dismissed is to award costs to the defendant on a party/party basis (i.e. a partial indemnity basis) throughout.

[41] I accept that an order for enhanced costs may be appropriate in certain situations. The current test for enhanced costs is set out in the *Davies* case in which Epstein J.A. wrote at para. 40:

> In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made.

[42] Therefore, the remaining question with respect to the scale of costs is whether Inco is entitled to enhanced costs over and above partial indemnity costs because of its claim that the Committee should never have funded a non-meritorious action. That is, has there been such reprehensible conduct on the part of the Committee that would justify an order for enhanced costs?

[43] To answer that question, one must consider the role of the Committee as defined by the *Law Society Act.* The Committee is a creature of statute whose role is to determine whether the Fund should be used to provide financial support to plaintiffs in a current or proposed class proceeding. The Committee has a discretion as to whether or not to authorize funding and that discretion must be exercised in a reasonable manner.

[44] In deciding whether or not to authorize funding, the Committee is directed by the *Law Society Act* at s. 59.3 (4) to consider the merits of any class action, the plaintiff's efforts to raise funds from other sources, the plaintiff's proposal for use of the funds, and the financial controls that the plaintiff has in place. Furthermore, in making its decision the Committee is directed by the Regulations under the *Law Society Act* to consider "the extent to which the issues in the proceeding affect the public interest" See the *Class Proceeding Regulations*, O.Reg. 771/92 s.5.

[45] As to the public interest, the Committee plays an important role in advancing the goal of enhanced access to justice. In 1990 the Attorney General's Advisory Committee on Class Action Reform had a concern that even if a class proceeding procedure was available, private individuals would still face significant problems financing class actions. In response to this concern, the Fund and the Committee were created by statute to alleviate the problem. In that respect, I adopt

the remarks of Cullity J. in *Martin v. Barrett*, [2008] O.J. No. 3813, at para. 6 as follows:

> Accordingly, in the opinion of the Advisory Committee, the objective of increasing access to justice could be undermined without the existence of a costs assistance fund which would provide disbursements and provide an indemnification in respect of costs.

[46] In the present case, at the time the Committee was approached for funding the Committee was aware that the initial motion for certification had been dismissed, but that on appeal the plaintiff had refined and limited the scope of the claim and the OCA had certified the action on that basis.

[47] Moreover, at that time class counsel had an expert report that concluded that approximately 7,000 property owners in the City of Port Colborne had been affected by emissions from the Inco refinery, and that the total amount of the property damage was in excess of $200,000,000.00.

[48] Given that information, in my view it would be reasonable for the Committee to consider that there was some merit to the class members' claim, that some damages had been suffered, that a significant number of people had been affected, that individual property owners may not have access to justice if the class action did not proceed, and that judicial economy could be achieved by way of a class proceeding. The Committee also invited and received submissions from Inco prior to the Committee making a determination as to funding. Under those circumstances this court cannot be critical of the Committee's decision to fund this class action.

[49] Moreover, the common issues in fact proceeded to a trial, and despite some problems with the claim (in particular regarding the quantification of damages and the limitation period), the class members were successful at the trial level. Given the success of the class members at trial, it is difficult even in hindsight to find that the Committee did not exercise its discretion in a reasonable manner when it decided to authorize funding for the plaintiff class.

[50] For all of these reasons, I find that the Committee did not conduct itself in a reprehensible manner so as to justify an enhanced costs award in Inco's favour. Rather, the Committee acted in a fair and reasonable manner in the exercise of its discretion.

[51] Therefore, on the assumption that Inco is entitled to its costs, the scale of costs should be on a partial indemnity basis from the date of the certification of the action until the date of the trial decision.

THE QUANTUM OF INCO'S COSTS

[52] I will next consider the quantum of Inco's costs prior to a consideration of s.31(1) of the *CPA*. In this part of the decision I will analyze the precise figures used by Inco and the Rule 57.01(1) factors.

[53] In its Bill of Costs Inco claims costs on a partial indemnity basis of approximately $4,603,000.00, broken down approximately as follows: $2,900,000.00 for fees; $1,257,000.00 for expert disbursements; $275,000.00 for other disbursements; plus the applicable GST/HST.

[54] LFO does not dispute that the above-mentioned fees were incurred, the hours that generated the fees were worked, and the above-mentioned

disbursements were paid. However, LFO submits that both the fees and the expert disbursements are excessive and should be reduced for the purposes of any costs award.

[55] Regarding the expert disbursements, LFO points out that approximately $612,000.00, inclusive of taxes, was paid to Altus Group for work regarding the quantification of the plaintiffs' damages. However, no expert from Altus Group testified at the trial, and therefore LFO submits that this disbursement should not form part of the costs award.

[56] I accept that the most time consuming evidentiary issue at trial related to the quantification of the damages. Thus, it was very important for Inco to retain highly qualified experts on the issue of damages even if those experts did not testify. The original claim was in the amount of $700,000,000.00, and the Fresh as Amended Statement of Claim reduced the claim to approximately $400,000,000.00. In any case, the claim against Inco was massive. The plaintiff class had retained several experts to testify as to the nature of the damage and as to the quantum of the damages, and it was mandatory for Inco to retain experts to consider and respond to the plaintiffs' experts.

[57] Moreover, it must also be recognized that the primary damages expert for the plaintiff class, Robert Maughan ("Maughan"), changed his calculations and his methods of calculating the damages at least twice in the months leading up to the trial, the last change occurring approximately two weeks prior to the start of the trial. Further, Maughan routinely changed his calculations during his testimony at trial, thereby requiring Inco and its experts to reconsider Maughan's

evidence, critique Maughan's evidence, and deliver a responding analysis for cross-examination, often literally overnight.

[58] Considering the size of the claim and the fluctuations in the plaintiffs' expert evidence, I accept that a significant amount of work had to be done by Inco's experts to allow Inco's counsel to properly defend the claim. The fact that some of Inco's experts did not actually testify at the trial is not a significant factor.

[59] Therefore, I would allow, in fixing the quantum of Inco's costs award, the full amount of Inco's expert disbursements shown in the Bill of Costs. Because the GST/HST calculation on the other disbursements is relatively small, I would allow Inco's total disbursements at $1,532,000.00 inclusive of all taxes.

[60] Regarding the fees claimed by Inco in its Bill of Costs, LFO points out that Inco's fees are calculated by simply multiplying the number of hours worked by the hourly rates to arrive at a fees figure. LFO submits that such an approach is not valid in light of the principles set out in the OCA decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291. At para. 24 of that decision Armstrong J.A. wrote:

> While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.

[61] In response, Inco relies upon the costs principles set out in the case of *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135, in which Winkler J. wrote at para. 9:

> Further, courts have repeatedly stated that the role of the court on a costs disposition is not to second-guess successful counsel on the

> amount of time spent on the case or the allocation of counsel to the tasks at hand.

[62] This raises the question as to whether the abovementioned costs principles set out in *Boucher* and in *Risorto* can both stand. Upon careful consideration, in my view, both principles are valid.

[63] In my opinion, the *Risorto* case refers to the method of deploying legal resources, whereas the *Boucher* case refers to a consideration of the overall or total costs award. That is, pursuant to the *Risorto* principles a court should not be too critical of whether legal work was delegated to a junior lawyer, whether each lawyer spent too much time on the file, whether potential witnesses were interviewed, whether certain witnesses were called to the stand, whether a second opinion had been obtained, and generally whether legal resources were appropriately deployed. In my view, it was important for Inco in this case to fully defend itself as it saw fit against a sizeable claim. Therefore, following the *Risorto* principles, I do not criticize Inco for the amount of legal resources that were used, or the way in which those resources were deployed.

[64] The *Boucher* case however expresses the over-arching principle that any award of costs must be fair and reasonable in the circumstances. Some of the circumstances that must be taken into consideration are in fact listed in Rule 57.01(1) of the *Rules of Civil Procedure*. If a court were simply to multiply the number of hours worked by the hourly rates to arrive at a fees figure for a costs award, there would be no need to consider the factors listed in Rule 57.01(1). Thus, the *Boucher* case stands for the principle that in making a costs award a court must step back and determine what is fair and reasonable in all the circumstances.

[65] In addition to the result in the proceeding and the offers to settle, I have taken several other factors listed in Rule 57.01(1) into account. In particular, I accept that the trial of this action was extremely complex as it involved several difficult causes of action that had rarely, if ever, been applied in the context of an environmental class proceeding.

[66] Further, I accept that the trial of this action was important to all of the parties. This was a large environmental tort claim. It was important to the 7,000 members in the class; it was important to environmental activists; it was important to Inco; and it was perhaps important to other industrial corporations.

[67] Still further, I have already acknowledged that the amount claimed by the plaintiff class was massive. As the trial approached the total claim was in the range of $400,000,000.00.

[68] Finally, I have considered the amount of costs that the unsuccessful party, the plaintiff class, could reasonably have expected to pay. This factor is specifically listed in Rule 57.01(1)(0.b) and is referenced in the *Boucher* case at para. 38.

[69] On this point a court often hears submissions that are abstract and hypothetical, but in this case there is some solid evidence as to the expectations of the unsuccessful party. Specifically, after the plaintiff class was successful at trial, and prior to the appeal, there was an agreement between the parties that the costs of the plaintiff class would be fixed at a total of $4,300,000.00, including all disbursements and taxes.

[70] If I back out the plaintiffs' disbursements, the agreement between the parties represents an agreement that if the plaintiff class had been successful, their costs would have been approximately $3,150,000.00 for fees, and $1,150,000.00 for disbursements, inclusive of all taxes. This agreement is some evidence that may be useful in determining the reasonable expectations of the plaintiff class as to Inco's costs if Inco were to be ultimately successful.

[71] However, I must also consider that the agreement as to the fees of the plaintiff class (i.e. $3,150,000.00) must have taken into account the fact that the class members beat their outstanding offer of $10,000,000.00 plus costs by a large margin. Therefore, the class members would have had the benefit of Rule 49.10(1), and thus a large portion of the agreed fees of the plaintiff class would have been on a substantial indemnity scale. In addition, because of their extreme success at trial there was an argument open to the class members that they would be entitled to enhanced costs. For these reasons, I find that the agreed fees of the plaintiff class in the amount of $3,150,000.00 would have included a significant premium.

[72] Therefore, in order to determine the reasonable expectations of the plaintiff class on a partial indemnity basis in the present case, this agreed figure of $3,150,000.00 for fees should be reduced. If I accept that this figure represents substantial indemnity fees for the entire trial and for most of the preparation for the trial, I can estimate that the fees of the plaintiff class on a partial indemnity scale would have amounted to approximately $2,000,000.00. That is, the $3,150,000.00 agreed upon for the fees of the plaintiff class, on a mostly substantial indemnity scale, represents approximately $2,000,000.00 on a partial indemnity scale. This I

find to be the amount of fees that the plaintiff class could reasonably have expected to pay on a partial indemnity scale if Inco were ultimately successful.

[73] Therefore, prior to considering s.31(1) of the *CPA*, I find that Inco would be entitled to its costs, on a partial indemnity scale, in the amount of $2,000,000.00 for fees, plus $1,532,000.00 for disbursements, for a total of $3,532,000.00, inclusive of all taxes.

DOES SECTION 31(1) OF THE CPA APPLY?

[74] For ease of reference I reproduce below a copy of s.31(1) of the *CPA*, with emphasis on the three factors set out therein:

> **31(1)** In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

[75] LFO submits that the present case raised novel points of law and involved matters of public interest. Thus, Inco's costs should be reduced or eliminated. LFO did not argue that this was a test case.

[76] Inco submits that the present case did not raise any novel point of law and did not involve a matter of public interest. Rather, Inco submits that this case was simply a large monetary claim based on traditional causes of action made on behalf of many private persons.

[77] In the case of *Caputo v. Imperial Tobacco*, [2005] O.J. No. 842 at para. 32 Winkler J. found that the proper approach was to "*consider whether any of the factors in s.31(1) are present as seen through the lens of the goals of the Act in the factual context of the case*". That approach was specifically approved by the OCA

in the *Ruffolo* decision at para. 33. Therefore, in applying s. 31(1) of the *CPA* the court must consider the three factors set out therein in light of the three goals of the *CPA,* access to justice, behaviour modification and judicial economy, within the factual context of the case.

[78] Regarding the question of whether this case involved a matter of public interest, Inco relies upon the fact that leave to appeal the OCA decision to the SCC was denied. Section 40(1) of the *Supreme Court Act*, R.S.C. 1985 c.S-26, reads in part "... an appeal lies to the Supreme Court from ... the highest court of final resort in a province ... where ... the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law ... one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it ...". [Emphasis added]

[79] I disagree with Inco's submission that by dismissing the request for leave to appeal, the SCC has already determined that this case does not involve a matter of public importance. If the Court had granted leave, then it would be clear that the SCC felt that this case involved a matter of public importance or an important issue of law. However, I cannot assume that in dismissing the application for leave the SCC found that this case did not involve a matter of public importance. The leave application could have been dismissed for any number of reasons, and unfortunately no reasons were provided. Therefore, the SCC decision to deny leave is not determinative of this issue.

[80] On the public interest issue, LFO makes a strong point that this case was an important one for the enhancement of access to justice, one of the goals of the *CPA* or any class proceeding.

[81] It has been recognized that access to justice is often difficult for individual claimants who each may have relatively small claims. And, the problem is more acute if those individuals are vulnerable or disadvantaged. See the case of *Re*Collections Inc. v. Toronto-Dominion Bank*, 2011 ONSC 3477 at para. 22. Further, access to justice has been said to be a "*fundamental objective*" of the *CPA*. See *Gagne v. Silcorp Ltd.*, 41 O.R. (3d) 417 (OCA) at para. 14, and *Robertson v. Thompson Corp.*, 43 O.R. (3d) 389 at para. 5.

[82] The class members in the present case fall squarely within the segment of society that was intended to benefit from the enhanced access to justice provided by the *CPA*. In the *Pearson* Certification decision, Rosenberg J.A. wrote, about the class members in this case, at para 84. "*On the other hand, it may well be the case that many of the people whose property values were most seriously impacted, such as the Rodney Street owners, are also the most vulnerable and least able to prosecute their individual claims. Many of them are 'elderly persons and others on fixed incomes, as well as partially employed or unemployed persons, persons with disabilities and recipients of social assistance' (reasons of motion judge, at para. 22). Obviously, not all of these people would be property owners and would therefore not fall within the class in any event. However, those who do would find it extremely difficult to mount an action against Inco ...*".

[83] The abovementioned statement is indicative of the fact that many members of the class in this case were vulnerable members of society with limited incomes

whose conditions may have been made worse by the alleged wrongs of Inco. Individually, this group would have had a very difficult time mounting any litigation against Inco, and thus this class proceeding was a vehicle that provided access to justice for class members who had unresolved claims.

[84] Inco submits that this action did not in fact enhance access to justice because the plaintiff class was ultimately unsuccessful. That is, if the plaintiff class was not successful, then Inco submits it cannot be said that the plaintiff class achieved enhanced access to justice.

[85] In my view, the fact that the plaintiff class was ultimately unsuccessful has little weight in this court's overall decision as to whether this action involved a matter of public interest. Although the class members did not win their lawsuit, it was necessary for them to have access to justice in order to resolve their dispute with Inco.

[86] Moreover, one of the issues in this case was whether access to justice could be achieved through a class proceeding in the circumstances of this case. Regardless of the end result, this case assisted in defining the boundaries of access to justice for environmental claims through a class proceeding. The definition of those boundaries is an important matter in the public interest that would not have been achieved in the absence of this action.

[87] Thus, I conclude that this case involved a matter of public interest because it allowed access to justice by many people who would not have otherwise been able to prosecute their claims, and because it assisted in defining when and under what circumstances a person or persons may have access to justice by way of a class proceeding.

[88] In addition to the *CPA* goal of enhanced access to justice, I accept that the other two goals of the *CPA*, judicial economy and behaviour modification, were also objectives that were advanced by this class action. The judicial economy factor is obvious where approximately 7,000 separate claims were heard in the context of one class action. Further, behaviour modification, in my view, is one aspect of any tort claim. Thus, I find that all three of the goals of the *CPA* were advanced in this case, and all three of those goals are matters of public interest.

[89] Furthermore, I find that this case was also a matter of public interest because it was important to more than the class members; it was also important to the community at large. In the *Pearson* Costs decision at para. 9 Rosenberg J.A. wrote that, "*I agree with Cullity J. in Williams v. Mutual Life Assurance Co. of Canada, [2001] O.J. No. 445, 6 C.P.C. (5th) 194 (S.C.J.), at para. 24 that a case involves a matter of public interest within the meaning of s.31(1) if the class proceeding has 'some specific, special significance for, or interest to, the community at large beyond the members of the proposed class'.*"

[90] At the heart of the present case was the allegation that Inco had caused environmental damage because emissions from the Inco refinery had contaminated the surrounding lands. Environmental issues are often held to be matters of public interest, even if only some members of the public are directly affected by the damage. In that respect see the case of *Williams v. Mutual Life Assurance Co. of Canada*, [2001] O.J. No. 445 at para. 24.

[91] Even though this action was comprised of class members who claimed damage to private property, I find that the alleged environmental damage was one of general concern to the public. In support of that finding, I accept the affidavit

evidence of Richard Lindgren, Beatrice Olivastri, and Chris Tollefson. Each of these witnesses worked with or for environmental groups that were concerned about environmental legal issues. Each of the witnesses deposed that this case was closely monitored by environmental groups because the case dealt with the issue of whether access to justice could be achieved by way of a class proceeding in an environmental mass tort claim.

[92] In my view, the fact that this action involved environmental issues in the context of a class proceeding makes the argument that this case involved a matter of public interest even more compelling as it combined two important public interest issues, access to justice and environmental concerns, in one proceeding.

[93] For these reasons, I find that this class action had "specific, special significance for, or interest to, the community at large beyond the members of the proposed class". Thus, I find that this action involved a matter of broad public interest within the meaning discussed in the *Williams* decision.

[94] Regarding the question of whether this case raised a novel point of law, Inco correctly submits that this case was grounded in nuisance, trespass and the doctrine in *Rylands v. Fletcher*, all of which are old, if not ancient, causes of action. There is nothing novel about any of these causes of action.

[95] However, even though this case was grounded in traditional causes of action, I find that this action was novel in two general ways. First, this was one of the first cases to attempt to apply these traditional causes of action to modern environmental concerns. I accept LFO's submission that this claim could be described as an "environmental tort", which may be a way of describing the

collective use of several traditional causes of action for the purpose of advancing environmental claims.

[96] To my knowledge, this case was the first to attempt to deal with alleged physical environmental damage caused to a large number of properties by emissions from a refinery or industrial operation. In that sense, this case was novel.

[97] The second general way in which this case was novel is the fact that this claim for environmental damage was advanced through the vehicle of a class proceeding. This case was the first mass environmental damage action to be certified as a class proceeding, and the first such action to proceed to trial. I find that this case was also novel in that sense.

[98] Moreover, as a consequence of the aforementioned two general ways in which this case was novel, this court was faced with several specific novel points of law, both substantive and procedural, throughout the trial. Those specific novel points of law included questions as to how the court should apply a limitation period to a class of 7,000 members; as to the effect of the defendant's motion for a non-suit on the defendant's ability to call evidence; and as to whether the common issues could be amended after the evidence had been presented at trial.

[99] In summary, although this case was grounded in traditional causes of action, this case was novel in both a specific and general sense. In my view, overall this case is one that qualifies as one that "raised a novel point of law".

[100] For all of these reasons, I find that two of the factors in s.31(1) of the *CPA* are present as this case "involved a matter of public interest" and "raised a novel point of law".

FINAL ANALYSIS

[101] In a class proceeding the court continues to maintain a broad discretion regarding costs. In the exercise of that discretion the factors set out in s. 31(1) of the *CPA*, where they apply, should be given significance or special weight. See the *Pearson* Costs decision at para. 11, the *Caputo* decision at para. 32, and the OCA decision in *Ruffolo* at paras. 25 to 29.

[102] I have found that, but for s.31(1) of the *CPA*, Inco would be entitled to its costs of $3,532,000.00. However, merely because some of the factors in s.31(1) are present does not mean that Inco's costs should be automatically reduced. See the SCC decision in *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, at paras. 60 to 71, the Endorsement of Cullity J. in *Cassano v. Toronto-Dominion Bank*, [2005] O.J. No. 6332, at para. 10, and the Costs Endorsement of Perell J. in *Ruffolo v. Sun Life Assurance Co. of Canada*, [2008] O.J. No. 599, at paras. 51 to 57.

[103] In general the courts have had a tendency to award costs against an unsuccessful plaintiff in a class proceeding in inverse proportion to the strength of the public interest factor in the case. Where the public interest factor was very high as in the *Caputo* case (injuries arising from cigarette consumption) and in *Dennis v. Ontario Lottery and Gaming Corporation,* 2011 ONSC 7024 (government agency profits from problem gamblers) the courts have awarded no costs against the unsuccessful plaintiff.

[104] On the other end of the spectrum, where the case was essentially a private complaint to recover financial losses and the public interest factor was low the costs awarded against the unsuccessful plaintiff were not significantly different from the costs that would have otherwise been awarded. See the SCC decision in *Kerr* at paras. 60 to 71, and the case of *1654776 Ontario Ltd. v. Stewart,* 2012 ONSC 2902 at para. 8.

[105] In this case, there are both private and public interest factors present. I accept that this proceeding was based on the tort claims of 7,000 private property owners for damage occasioned to their properties. Inco can correctly submit that it has been monetarily damaged by the unsuccessful claims of these private individuals, and therefore that Inco is entitled to some reparation.

[106] On the other hand, this action involved matters of public interest and was novel in many respects, as discussed earlier in this decision. It is important in our society to ensure that those who have a public interest and/or a novel claim have access to the courts for the purpose of resolving the claim. This is one of the objectives of the *CPA*.

[107] Further, in any costs award the court must balance the chilling effect of a large costs award against the need to discourage frivolous and unnecessary litigation, as discussed by Armstrong J.A. in the *Boucher* case at para. 37. The Fund is available for the purpose of facilitating access to justice for large groups of the population who may wish to pursue a class proceeding. However, the Fund is not bottomless and a costs order that would cripple the Fund should not be made as it could unduly stifle subsequent claims.

[108] In that respect, I must also consider that Inco does not have a bottomless supply of money with which to defend claims. Inco is clearly out-of-pocket for its legal fees and for its legal disbursements. Inco should not be made to suffer the consequences of an inadequate costs order.

[109] For these reasons, the award of costs to Inco should be reduced, but should not be eliminated. In my view a fair approach is for Inco to have 50% of the costs that would have been awarded but for the application of s.31(1) of the *CPA*. Therefore, the costs awarded to Inco will be 50% of $3,532,000.00, for a total award of $1,766,000.00.

CONCLUSION

[110] For the above-mentioned reasons Inco is awarded its costs in the total amount of $1,766,000.00, inclusive of disbursements and GST/HST. These costs are payable by LFO out of the Fund within 30 days.

Henderson J.

Released: September 10, 2012

CITATION: Smith v. Inco, 2012 ONSC 5094
COURT FILE NO.: 12023/01
DATE: 2012-09-10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Ellen Smith

Plaintiff

- and –

Inco Limited

Defendant

- and –

The Law Foundation of Ontario

Respondent

COSTS DECISION

Henderson J.

Released: September 10, 2012