

COURT FILE NOS. 178/04 and 520/04
DATE: 20060531

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
O'DRISCOLL, JARVIS AND MOLLOY JJ.

BETWEEN:

ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R.
FULLER, PAUL CARTER, R.A. VARNEY and BILL FITZ, being members of the DCA
EMPLOYEES PENSION COMMISSION representing certain of the members and
former member of the Pension Plan for the Employees of Kerry (Canada) Inc.

Appellants (Applicants in Appeal)

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent (Respondent)

- and -

KERRY (CANADA) INC.

Respondents (Respondents in Appeal)

ENDORSEMENT AS TO COSTS

[1] The Court's reasons, released on March 15, 2006, stated that if counsel were unable to agree as to costs, written submissions were to be filed and costs would be fixed. An agreement was not reached and submissions have now been filed.

Tribunal Hearing

[2] Counsel for the Appellants are seeking a total of \$44,917.57 in respect of a written reply and oral argument for one and a half days (1 ½) days before the Tribunal. The Appellants

were not represented at the seven (7) pre-hearing conferences and motions nor at the two (2) days of evidence and oral submissions before the Tribunal. If costs were allowed to Kerry, it would claim \$102,928.00, all-inclusive, for its costs of the Tribunal hearing. We agree with counsel for Kerry that \$20,000, all-inclusive, is a reasonable amount for the Appellants to be awarded and the Tribunal costs to the Appellants are fixed, on a partial indemnity basis, at \$20,000 plus disbursements of \$5,722.25 plus applicable G.S.T.

[3] We are of the view that counsel for the Appellants should accept that amount as its total fees and disbursements regarding its work for the Appellants before and at the Tribunal hearings.

[4] The oral argument of the two (2) appeals 178/04 and 520/04 took four (4) days. Counsel for the Appellants has submitted the following draft bill of costs on a partial indemnity basis:

A. Appeal 178/04 (Plan Expenses Appeal)

Fees: \$34,950.50

Disbursements: \$ 5,309.11

Plus G.S.T., where applicable.

B. Appeal 520/04 (Contribution Holiday Appeal)

Fees: \$54,315.00

Disbursements: \$ 3,006.33

Plus G.S.T., where applicable.

[5] Counsel for Kerry submitted a draft bill and, if awarded costs on a partial indemnity basis, would have claimed totals for the two (2) appeals as follows:

Fees: \$101,520.00

Disbursements: \$ 1,450.00

Plus G.S.T., where applicable.

[6] Although the Appellants did not succeed on every issue, overall, they were successful.

[7] We see no basis on this record to award costs on a substantial indemnity basis.

[8] Keeping in mind:

(a) Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43

(b) Rule 57.01, and

(c) *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 at para. [37]

the overriding principle is fairness and "reasonableness".

[9] Considering all the matters submitted as to costs, we fix the Appellants' costs of the two (2) appeals as follows:

(i) Fees: \$90,000.00

(ii) Disbursements: \$ 5,309.11

\$ 3,006.33

\$ 8,315.44

(iii) Plus G.S.T., where applicable.

[10] The reasons of the Court point out that the pension funds are trust money stamped with the restriction that they are only to be paid out to benefit the members. We do not see how paying the costs of an opposing litigant out of that fund would fit that definition, in our reasons, we held that the administrators' fees did not fit the definition of a "benefit to the members".

[11] We see no reason why the Appellants should not have their costs. Kerry shall pay the Appellants their fixed costs before the Tribunal and on the two (2) appeals within thirty (30) days of the date of this endorsement.

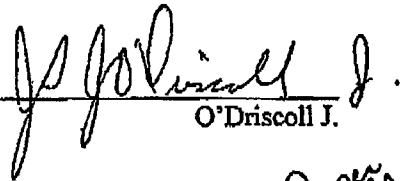
[12] The Appellants represent themselves and a total of eighty (80) plan beneficiaries. The Appellants brought these proceedings to compel the due administration of the fund, not for their own individual benefit. In view of the following decisions:

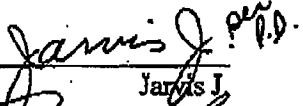
- (a) *Stairs v. Ontario Teachers' Pension Fund Pension Board*, [2003] O.J. No. 605, para. [14] (Div. Ct.)
- (b) *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 236 D.L.R. (4th) 514 at para. [133]
- (c) *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)*, [2002] O.J. No. 4953 (Div. Ct.)

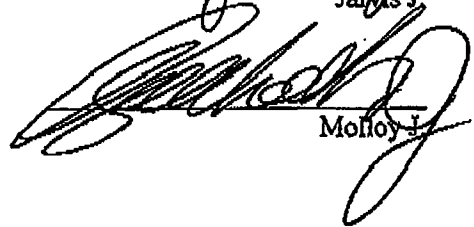
we are of the view that, on the appeals, the Appellants should, and it is so ordered, have the difference between the fixed costs and their solicitor/client costs, as set out in the bill of costs filed, be paid out of the trust fund.

[13] In *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (Ont. C.A.), the Court said:

"...the appeal is dismissed with costs on a solicitor-and-client basis payable jointly and severally by the appellant clubs. Any costs of the appeal not recoverable on this basis shall be paid by the pension society out of the funds which are the subject of this appeal, so that the respondents shall be fully indemnified for their costs."


O'Driscoll J.


Jarvis J.


Molloy J.

Released: MAY 3 1 2006