Case Name:

Smith v. Inco Ltd.

Between
Ellen Smith, Plaintiff (Respondent), and
Inco Limited, Defendant (Appellant)
Proceeding under the Class Proceedings Act, 1992

[2013] O.J. No. 5449

2013 ONCA 724

Docket: C57026

Ontario Court of Appeal
Toronto, Ontario

J.C. MacPherson, D. Watt and S.E. Pepall JJ.A.

Heard: October 10, 2013.
Judgment: November 29, 2013.

(67 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Class counsel -- Fees -- Costs -- Assessment or fixing of costs -- Appeal or review -- Considerations -- Whether amount fair and reasonable -- Particular orders -- Solicitor and client or substantial indemnity -- Particular items -- Counsel fees -- Particular circumstances -- Complex, novel or test case -- Offers to settle -- Amount of offer v. award -- Time of offer -- Appeal by defendant from order awarding it costs of $1,766,000 following a 45-day trial in a class action proceeding dismissed -- Respondents were partly successful at trial but trial decision was reversed on appeal -- Trial judge did not err in finding case came within middle ground of novelty, involved a matter of public interest and for structuring costs order accordingly -- Trial judge's analysis reducing appellant's legal fees from $2.9 million to $2 million was methodical, logical and reasonable -- There was no basis for ordering costs on a substantial indemnity basis for period after offer to settle.

Appeal by the defendant from an order awarding it costs of $1,766,000 following a 45-day trial in a class action proceeding. The appellant argued the costs award should have been $5,340,563. It

argued the trial judge improperly reduced the appellant's legal fees from $2.9 million to $2 million, erred by imposing a 50 per cent reduction on the legal fees and disbursements he found were reasonable, and erred by not awarding the appellant costs on a substantial indemnity basis for the period after a valid and reasonable offer to settle. The respondents sued the appellant for damages for diminution of property values and nuisance, negligence and trespass resulting from the appellant's operation of a nickel refinery that increased nickel levels in the soil. Prior to trial, the appellant offered to settle for $2 million plus costs, which were acknowledged to be about $2 million. At trial, the respondents were successful on some of the claims but the trial decision was set aside on appeal.

HELD: Appeal dismissed. The trial judge did not err in finding this case essentially came within a middle ground of novelty and involved a matter of public interest and for structuring his costs order accordingly. The public interest element was not undermined by the fact the class plaintiffs sought also to vindicate their own private property interests. Although the fact a matter caused widespread concern in the public was not tantamount to the matter being one of public interest under s. 31(1) of the Class Proceedings Act, this court's acceptance the facts underlying the case caused widespread concern among the public supported a determination this case involved some element of public interest. In light of the timing and amount of the plaintiff class's offer to settle and the agreed fees for the plaintiff class post-trial, the trial judge's analysis reducing its legal fees from the $2.9 million claimed in the bill of costs to $2 million was methodical, logical and reasonable. The trial judge did not err in reducing the costs claimed pursuant to s. 31(1) by 50 per cent after finding the appellant's reasonable fees were $2 million. There was no basis for ordering costs on a substantial indemnity basis as the Class Proceedings Committee did not conduct itself in a reprehensible manner so as to justify an enhanced costs award in the appellant's favour.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 31(1)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Appeal From:

On appeal from the order of Justice J.R. Henderson of the Superior Court of Justice dated September 10, 2012, with reasons reported at 2012 ONSC 4749.

Counsel:

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

Kirk M. Baert, Celeste Poltak and Eric K. Gillespie, for the respondent, Ellen Smith.

Scott Hutchison and Aaron Dantowitz, for the respondent, Law Foundation of Ontario.

The judgment of the Court was delivered by

J.C. MacPHERSON J.A.:--

A. INTRODUCTION

1 The appellant Inco Limited ("Inco") appeals from the order of Henderson J. of the Superior Court of Justice dated September 10, 2012, awarding Inco costs of $1,766,000 following a 45 day trial in a class action proceeding. The appellant contends that the costs award should have been $5,340,563, and that the $3.6 million shortfall flows from three principal errors made by the trial judge: (1) he improperly reduced the appellant's legal fees from $2.9 million to $2 million; (2) he erred by imposing a 50 per cent reduction on the legal fees and disbursements that he found were reasonable, pursuant to s. 31(1) of the *Class Proceedings Act*, S.O. 1992, c. 6 ("*CPA*"); and (3) he erred by not awarding Inco costs on a substantial indemnity basis for the period after Inco's valid and reasonable offer to settle.

B. FACTS

(1) The parties and events

2 The respondent Ellen Smith resides at 91 Rodney St. in Port Colborne. Her home is one block away from Inco's refinery. Inco opened the refinery in 1918 to refine nickel and other metals in response to increased demand for these metals during World War I. For most of the twentieth century, the refinery was one of the most important industries in the Port Colborne area, its largest employer, and a major contributor to its growth and development.

3 Inco ceased refining nickel at the refinery in 1984.

4 In 2000, it was disclosed that the Ministry of the Environment had found higher than expected nickel levels in a soil sample from a property adjacent to, and downwind of, the refinery in the Rodney St. area. In 2001, a person who lived in the Rodney St. area brought an environmental action against Inco and sought to have it certified as a class proceeding under the *CPA*. This court certified the action as a class proceeding in 2006: see *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641.

5 The certified class consisted of the owners of approximately 7,000 properties in and around Port Colborne, who collectively claimed that the value of their properties had been negatively affected by nickel emissions from Inco's refinery. The certified action was restricted to a claim of diminution of property values and sounded in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265 (Ex. Ct.), aff'd (1868), L.R. 3 H.L. 330 (H.L.).

6 In 2008, the plaintiff class applied to the Class Proceedings Committee, a statutory committee created by s. 59.2 of the *Law Society Act*, R.S.O. 1990, c. L. 8 ("*LSA*"), for funds from the Class Proceedings Fund (the "Fund"). The Fund is administered by the respondent Law Foundation of Ontario ("LFO") pursuant to s. 59.1 of the *LSA*. The plaintiff class was granted funds for its action.

7 As the trial approached, both parties made offers to settle. On June 13, 2007, the plaintiff class offered to settle for $37.5 million plus costs and administration fees of $2.5 million. On June 10, 2009, Inco offered to settle for $2 million plus costs which were acknowledged to be about $2 million. On September 25, 2009, the plaintiff class offered to settle for $10 million plus costs and administration fees of $3 million. None of these offers was accepted.

8 The trial on the common issues was held in Welland over 45 days between October 2009 and January 2010. On July 6, 2010, the trial judge delivered his decision. He found that Inco was liable to the class members in private nuisance and pursuant to the doctrine in *Rylands v. Fletcher*. He assessed the damages at $36 million.

9 On appeal, this court set aside the trial judge's decision: see *Smith v. Inco Limited*, 2011 ONCA 628, 107 O.R. (3d) 321. The appeal was allowed on the following bases:

(1) With respect to the nuisance claim, the plaintiffs failed to establish actual physical harm or damage to their properties as a result of the nickel particles becoming part of the soil;
(2) With respect to the *Rylands v. Fletcher* claim, Ontario law does not provide for strict liability based exclusively on the "abnormal risk" posed by a defendant's activity, and furthermore Inco's activities did not present an "abnormal risk" to nearby property owners because the nickel particles caused no damage and had no effect on the plaintiffs' ability to use their properties; and
(3) With respect to damages, the claimants had suffered no actual loss.

10 In an endorsement dated November 18, 2011, Doherty J.A. remitted the matter back to the trial judge to consider the costs issue, "having regard to the reasons of this court" in its decision allowing the appeal.

(2) The trial judge's costs decision

11 The trial judge began by setting out the positions of the parties, at paras. 2-5:

> 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.
>
> ...

> 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.
>
> LFO submits that s. 31(1) of the *Class Proceedings Act*... 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.

12 The trial judge fixed costs at $1,766,000. The central features of his award were the following: (1) he refused to award Inco fees on a substantial indemnity basis; (2) he accepted Inco's disbursements claim of $1,532,000; (3) he reduced Inco's claimed fees on a partial indemnity basis from $2.9 million to $2 million; (4) this left a starting point for fees and disbursements of $3,532,000; (5) taking into account s. 31(1) of the *CPA*, he reduced the starting point set out above by 50 per cent; and (6) this left a final costs award of $1,766,000.

13 Inco appeals from this costs order and seeks an order awarding costs of $5,340,563.

C. ISSUES

14 It is possible, at a level of generality, to view this as a single issue appeal - does the trial judge's costs decision reflect an error in principle, or is it plainly wrong, such that this court should interfere?

15 However, the appellant, in its factum and in oral argument, identified eight alleged errors in the costs decision. I find it useful to set these out as the issues to be determined on this appeal:

(1) Did the trial judge err by failing to properly take account of this court's reasons in allowing the appeal from the trial decision when he addressed the matter of costs?
(2) Did the trial judge err by failing to accord weight to the denial by the Supreme Court of Canada of the plaintiffs' motion for leave to appeal this court's decision allowing the appeal from the trial judge's decision?
(3) Did the trial judge err in determining that the case raised novel points of law pursuant to s. 31(1) of the *CPA*?
(4) Did the trial judge err in determining that the case involved a matter of public interest pursuant to s. 31(1) of the *CPA*?
(5) Did the trial judge err in lowering Inco's fees from $2.9 million to $2

million?

(6) Did the trial judge err by applying the s. 31(1) discount to Inco's disbursements?

(7) Did the trial judge err by failing to take into account Inco's offer to settle?

(8) Did the trial judge err by taking into consideration the impact of a costs award on the LFO?

D. ANALYSIS

16 I propose to discuss the issues in the order raised by the appellant. However, before doing so, I will discuss a preliminary issue - the standard of review.

17 This was a long (several years, including a 45 day trial) and complicated class action proceeding involving a great deal of evidence, several significant legal doctrines, and many millions of dollars.

18 However, this appeal is much narrower than the original action. The subject matter of this appeal is the prosaic question of costs. On this issue, the standard of review is crystal clear. As expressed by a unanimous court in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27, "[a] court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong". See also: *McDowell v. Barker*, 2012 ONCA 827, at para. 17.

19 Moreover, the standard of "considerable deference" to a trial judge's costs award has been explicitly applied by this court to such awards in class proceedings cases: see *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597, O.R. (3d) 365, at para. 27.

20 Under this umbrella of deference, I turn to the arguments raised by the appellant.

(1) Taking account of this court's reasons in allowing the appeal

21 The appellant asserts that the trial judge ignored Doherty J.A.'s instruction that the trial judge was to determine the trial costs "having regard to the reasons of this court". Specifically, the appellant contends that the trial judge failed to assess costs on the basis that the plaintiffs' case had no merit in law and did not establish damages; instead, he sought to justify what he had done previously, namely, decide in favour of the plaintiff class.

22 I do not accept this submission. In my view, the trial judge was scrupulously faithful to the language in Doherty J.A.'s endorsement returning the costs issue to him. He carefully and comprehensively reviewed the relevant factors in his costs decision. There is nothing in the wording of this decision to suggest that he was trying to retroactively justify his previous trial decision or do anything other than arrive at a fair costs award after a long and complex class action proceeding.

(2) Supreme Court of Canada's denial of leave to appeal

23 The appellant submits that the trial judge erred in his treatment of the Supreme Court of Canada's refusal to grant leave to appeal in the main action.

24 The trial judge addressed this issue in this fashion, at para. 79 of his reasons:

> 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.

25 The appellant submits that this reasoning is flawed; it implicitly asserts that when the Supreme Court of Canada denies leave, *ipso facto* the appeal does not raise a question of public importance or a question involving an important issue of law *per* s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 ("*SCA*").

26 I disagree. Against the backdrop of several hundred applications for leave to appeal each year, the Supreme Court of Canada's long-standing practice has been to dispose of these applications without providing reasons. The Court obviously does this under the umbrella of the statutory mandate in s. 40(1) of the *SCA*. However, I would not stretch this reality to encompass the broad proposition implicitly advanced by the appellant, namely, that if the Court refuses leave, the appeal must not raise a question of public importance or an important issue of law. In deciding whether a particular appeal deserves to be included on the limited docket of Canada's highest court, the Court may well consider a broad range of factors in addition to those set out in s. 40(1) of the *SCA*. Accordingly, I agree with the trial judge that the Court's denial of leave is not determinative of the question of public importance.

(3) Novel point of law

27 Section 31(1) of the *CPA* provides:

> 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. [Emphasis added.]

28 The trial judge found that the class action proceeding raised a novel point of law. He reasoned,

in part, at paras. 94-97:

> 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.
>
> 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.
>
> 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.
>
> 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.

29 Like the trial judge, I do not think that there is always a bright line between old or settled and novel points of law. Novelty exists on a continuum, and s. 31(1) of the *CPA* permits costs awards to be made on a continuum, from full costs to reduced costs to no costs for the successful party: see *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274, 95 O.R. (3d) 709, at para. 35 ("*Ruffolo*").

30 I do not fault the trial judge for finding that this case essentially came within a middle ground of novelty and for structuring his costs order accordingly. The appellant emphasizes, and the trial judge recognized, 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."

31 However, the fact that a claim is grounded in a well-established cause of action does not remove the possibility that the claim raises a novel point of law. In *Ruffolo*, at paras. 34-44, this court upheld a trial judge's determination that a breach of contract case could be novel for s. 31(1) *CPA* purposes, notwithstanding that breach of contract is a traditional cause of action. This court

also upheld the trial judge's determination that this novelty was not sufficient to justify a total denial of the successful defendant's costs.

32 The appellant asserts that the trial judge erred by saying that 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 agree with the appellant that one other mass environmental damage action has been certified and proceeded to trial: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392 ("*Barrette*"). However, *Barrette* was resolved under the framework of the *Civil Code of Quebec*, S.Q. 1991, c. 64, which provides for an entirely different liability regime than the common law that governs in Ontario. Thus the issues raised by this case, which largely pertain to nuisance law and the doctrine of *Rylands v. Fletcher* in the context of a mass environmental tort, were not present in *Barrette*. Similarly, while *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, made clear that environmental torts can be certified under the *CPA*, that case was not certified and did not proceed to trial. Consequently, neither case raised the issues that were raised in this case during the trial.

33 Moreover, a review of this court's merits decision in *Smith v. Inco* further suggests that this case involved a moderate degree of novelty, at least with respect to the *Rylands v. Fletcher* claim. While this court ultimately determined that strict liability based exclusively on "extra hazardous" activity should not be part of the law of Ontario, at least some leading authorities had previously endorsed this possibility: see *Smith v. Inco*, at para. 77.

34 As the LFO notes, at least one trial court decision has characterized this court's decision in *Smith v. Inco* as having "clarified the nature and scope of strict liability in this province": see *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 6570, at para. 68. While this is not determinative of the novelty issue, it does support the trial judge's finding that this case raised an issue that was not previously adequately addressed by Ontario jurisprudence.

35 For these reasons, the trial judge's conclusion that this case raised novel issues within the meaning of s. 31(1) of the *CPA* cannot be faulted.

(4) Matter of public interest

36 I set out again s. 31(1) of the *CPA*:

> 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*. [Emphasis added.]

37 The trial judge found that the class action proceeding involved a matter of public interest. He reasoned in part, at paras. 80-88:

> [T]his case was an important one for the enhancement of access to justice, one of the goals of the *CPA* or any class proceeding.
>
> 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 ...
>
> 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* ...
>
> ...
>
> [M]any 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 the class proceeding was a vehicle that provided access to justice for class members who had unresolved claims.
>
> ...
>
> 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 goals of the *CPA* were advanced in this case, and all three of those goals are matters of public interest.

38 The appellant's core submission on this issue is that this class proceeding was all about private citizens seeking financial compensation from a corporation. As expressed bluntly in its factum:

> 43. In this case, single family dwelling property owners wanted personal recompense for perceived diminution to their property values. Monetary gain, not public interest, was the motivation.
> 44. There is no public interest component to this claim as it was framed and presented.
> 45. This case was purely and simply a claim by Port Colborne residential land owners to obtain monies for some notional diminution in the value of their property.

39 In my view, the public interest element of this case is not undermined by the fact that the class plaintiffs sought, *inter alia*, to vindicate their own private property interests. In many cases, there is a mix of private interest and public interest. This court has consistently recognized the importance of the public interest factor and the availability of reduced costs awards to successful defendants because of this factor in cases where plaintiffs sought to vindicate their individual pecuniary interests; see, for example, *Ruffolo*, and *McCracken v. Canadian National Railway Co.*, 2012 ONCA 797.

40 The appellant further contends that the trial judge erred by finding that the goal of behaviour modification was advanced because "behaviour modification ... is one aspect of any tort claim." The appellant submits that behaviour modification does not apply to this case because there were no actual damages and thus no need for behaviour modification.

41 This is too narrow a view of the role of behaviour modification in class action proceedings. This court examined the scope of behaviour modification in its certification decision in this case, *Pearson v. Inco Ltd*. Rosenberg J.A. said, at para. 88:

> [M]odification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well suited to class proceedings. To repeat what McLachlin C.J.C. said in *Western Canadian Shopping Centres*, *supra*, at para. 26 "Environmental pollution may have consequences for citizens all over the country."

42 I have addressed the appellant's specific arguments about the public/private dichotomy and behaviour modification because they were made and deserve a response. However, in my view, a simple fact stands as a complete answer to the appellant's position on this issue. The problem with the appellant's position is that this court has already said - three times - that this case involves the public interest.

43 The whole tenor of Rosenberg J.A.'s reasons in the original certification appeal, *Pearson v. Inco Ltd.*, suggests that this class action proceeding is almost a paradigmatic example of a case that reflects the three goals of the *CPA* - access to justice, judicial economy and behaviour modification. To cite but one example, Rosenberg J.A. said this about the access to justice factor, at para. 84:

> [I]t 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.

44 Similarly, Rosenberg J.A. found, in the context of the *Pearson v. Inco* costs decision, that "this case involved a matter of public interest within the meaning of s. 31(1) of the [*CPA*]": *Pearson v. Inco Ltd.*, (2006), 79 O.R. (3d) 427, at para. 8. He stated the following on the issue of public interest:

> [9] 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". Also see *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4298, [2002] O.T.C. 883 (S.C.J.), at para. 6.
>
> [10] So far as I am aware, this is the first environmental claim to be certified as a class proceeding in Ontario since the decision of the Supreme Court of Canada in *Hollick, supra*, upholding this court's decision refusing certification of the environmental claim in that case. The case is of significance to the community at large beyond the members of the proposed class since it concerns the important issue of whether claims alleging widespread pollution can be suitable for certification.

45 I agree with Rosenberg J.A.'s reasoning; in my view, it applies with equal force to the merits adjudication of these same claims.

46 Finally, in the merits appeal, *Smith v. Inco*, this court recorded, at para. 28, that "[t]he trial judge accepted that widespread public concerns about the potential adverse health effects associated with the level of nickel particles in the soil developed in early 2000 and continued thereafter. He did so after a thorough review of the evidence ..."

47 Later in the judgment, this court said, at para. 29:

> We are not persuaded we should interfere with the trial judge's findings of fact. On those findings, the reaction to the higher nickel levels by various governmental agencies and Inco itself, as extensively reported in the media, caused widespread concern in the public about the potential adverse health effects of the nickel levels in the soil on their properties.

48 The fact that a matter caused widespread concern in the public is not tantamount to the matter being one of public interest under s. 31(1) of the *CPA*. Nonetheless, this court's acceptance that the

facts underlying this case caused widespread concern among the public supports a determination that this case involved some element of public interest.

49 For these reasons, the appellant cannot demonstrate that this case does not involve a matter of public interest within the accepted meaning of those words in s. 31(1) of the *CPA*.

(5) Lowering Inco's legal fees

50 The appellant submits that the trial judge erred by reducing its legal fees from the $2.9 million claimed in the Bill of Costs to $2 million.

51 The appellant submitted a Bill of Costs claiming costs on a partial indemnity scale of $4,603,000, including $2.9 million for fees, $1,257,000 for expert disbursements, and $275,000 for other disbursements, plus GST/HST.

52 The trial judge observed that after the trial, where the plaintiffs succeeded to the tune of $36 million, the parties agreed that the costs of the plaintiff class should be fixed at $4.3 million, including $3,150,000 for legal fees.

53 The trial judge referred to the leading cases dealing with costs, especially *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), *per* Armstrong J.A., at para. 24:

> 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.

54 The trial judge then reasoned, at paras. 71-72:

> However, I must also consider that the agreement as to the fees of the plaintiff class (i.e. $3,150,000) 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.
>
> 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 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.

55 The appellant asserts that there was no evidence to support the trial judge's conclusion that "I can estimate that the fees of the plaintiff class on a partial indemnity scale would have amounted to approximately $2,000,000"; the appellant labels this conclusion "speculation".

56 I disagree. In light of the timing and amount of the plaintiff class's offer to settle and the agreed fees for the plaintiff class post-trial, the trial judge's analysis strikes me as methodical, logical and reasonable.

(6) The 50 per cent discount to claimed disbursements

57 In a very brief submission, the appellant asserts that the trial judge erred in applying a 50 per cent reduction to disbursements claimed by the appellant. Its entire argument is set out in paragraphs 48 and 49 of its factum:

> 48. The Trial Judge allowed Inco's total disbursements as submitted at $1,532,000 inclusive of all taxes.
> 49. It is illogical to apply any discount under section 31(1) of the *CPA* to disbursements for experts which the Trial Judge has deemed necessary and relevant.

58 The proposition in paragraph 49 misconceives what the trial judge did. Having found that the appellant's reasonable fees were $2 million and that all of its disbursements of $1,532,000 were reasonable, for a total of $3,532,000, he reduced this total amount by 50 per cent. He concluded:

> 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.

59 This is precisely the type of costs analysis that has been undertaken in several of the leading cases; s. 31(1) discounts are typically applied to the total amount of costs claimed by the successful party, including disbursements: see e.g., *Ruffolo* and *McCracken*.

(7) Inco's offer to settle

60 The appellant contends that the trial judge erred by not awarding costs on a substantial indemnity basis for fees and disbursements incurred after its offer to settle. The appellant concedes that rule 49.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, does not apply in this case. However, it argues that the trial judge retains the discretion to order substantial indemnity costs in appropriate cases and that he erred by refusing to do so in this case.

61 The trial judge agreed that Inco's offer to settle was a factor he could consider in awarding costs. However, he recognized this court's decisions in *Scapillati v. A. Potvin Construction Ltd.* (1999), 44 O.R. (3d) 737, and, especially, *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, which held that, absent a rule 49.10 offer to settle, enhanced costs should be awarded only on a clear finding of reprehensible conduct on the part of the party against which the costs award is being made. Applying these decisions, the trial judge found that the Class Proceedings Committee "did not conduct itself in a reprehensible manner so as to justify an enhanced costs award in Inco's favour." Accordingly, the trial judge did not award costs to the appellant on a substantial indemnity basis.

62 The appellant does not contest this finding. Instead, it invites this court to "revisit and reformulate" the law enunciated in *Scapillati* and *Davies*. We decline the invitation. The law as set out in *Scapillati* and *Davies* is clear and settled, and was applied appropriately by the trial judge in this case.

(8) The impact of a costs award on the LFO

63 The appellant contends that the trial judge erred by speculating about the impact that a costs award might have on LFO's financial resources, at para. 107 of his reasons:

> 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.

64 I do not accept this submission. In the very next paragraph, the trial judge said:

> 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.

65 These two paragraphs strike me as a balanced, even-handed treatment of considerations a trial judge may address when making a costs analysis and award.

66 Furthermore, this court has previously acknowledged that "[i]f the Fund were required to absorb steep costs awards imposed on litigants even though the proposed action displays the factors in s. 31(1) of the *CPA*, this would have an undesirable chilling effect on class proceedings": *McCracken*, at para. 10. The trial judge cannot be faulted for making a similar observation in this case.

E. DISPOSITION

67 The appeal is dismissed. The respondents are entitled to their costs of the appeal fixed as follows: the plaintiff class - $5,000; LFO - $5,000; inclusive of disbursements and HST.

J.C. MacPHERSON J.A.
D. WATT J.A.:-- I agree.
S.E. PEPALL J.A.:-- I agree.

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