NOVA SCOTIA COURT OF APPEAL
Citation: ***Canada (Attorney General) v. MacQueen***, 2014 NSCA 96

Date: 20141022
Docket: CA 392560
Registry: Halifax

Between:

The Attorney General of Canada, representing
Her Majesty the Queen in right of Canada

Appellant

v.

Neila Catherine MacQueen, Joseph M. Petitpas,
Ann Marie Ross, Kathleen Iris Crawford, Sydney Steel
Corporation, a body corporate, and The Attorney General of
Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondents

Docket: CA 393200
Registry: Halifax

Between:

Sydney Steel Corporation, a body corporate, and
The Attorney General of Nova Scotia, representing
Her Majesty the Queen in right of the Province of Nova Scotia

Appellants

v.

Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross,
and Kathleen Iris Crawford, and The Attorney General of
Canada representing Her Majesty the Queen in right of Canada

Respondents

Judges: Oland, Farrar and Bryson, JJ.A.

By Written Submissions Dated as Follows:

Canada	**January 17, 2014**
Nova Scotia	**January 17, 2014**
Respondents	**February 7, 2014**

Held: **Costs awarded by decision of Farrar, J.A.; Oland and Bryson, JJ.A. concurring.**

Counsel: Paul Evraire, Q.C., Angela Green and Melissa Chan, for the Attorney General of Canada

Agnes MacNeil and Alison Campbell, for the Attorney General of Nova Scotia and Sydney Steel Corporation

Raymond F. Wagner Q.C., C. Scott Ritchie, Q.C., Michael Robb and Michael Dull for Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross and Kathleen Iris Crawford

Decision:

Procedural History

[1] By decision (reported as 2013 NSCA 143) and Order dated December 4, 2013, this Court allowed the appeals of the Attorney General of Canada ("Canada") and the Attorney General of Nova Scotia ("Nova Scotia") and set aside the certification of the class action initiated by the respondents (in this decision when I refer to "respondents" I am referring to the individual representative respondents). The factual background to the certification is set out in detail in that decision and I will not repeat it here.

[2] In the decision, the Court requested submissions from the parties on costs. Those submissions were received in early 2014.

[3] In February, 2014, the respondents filed an Intended Motion for Reconsideration seeking a rehearing of the appeal in light of two recent decisions of the Supreme Court of Canada.

[4] The Court received written submissions on the Intended Motion for Reconsideration in April, 2014. On reviewing the written submissions, the Court did not consider it necessary to proceed with an oral hearing.

[5] By decision (reported as 2014 NSCA 73) and Order dated July 15, 2014, the respondents' Intended Motion for Reconsideration was dismissed. In that decision the Court directed that the costs of the Intended Motion for Reconsideration would be addressed in the decision on costs in the appeal proper.

[6] Therefore, this decision will address the following:

1. Costs and disbursements on the original motion for certification;
2. Costs and disbursements on the appeal; and
3. Costs on the Intended Motion for Reconsideration.

Costs on the Certification Motion

[7] Not surprisingly, the parties take divergent views with respect to the costs to be awarded on the motion for certification. The respondents submit that both

parties should bear their own costs at certification or, alternatively, it should be no more than 20% of the amount sought by Nova Scotia and Canada payable jointly.

[8] Canada asks that we award it costs of $400,000 on the certification motion. That was the amount of the award to the respondents on the certification motion by the certification judge and it says there is "no better gauge" than the costs awarded below.

[9] Nova Scotia, for its part, is seeking $300,000 for the costs of the certification motion. It, like Canada, says that there should be two bills of costs, one payable to it and one to Canada. They say that their interests, although similar to Canada's, are not identical and that both should have their costs.

[10] I will begin the analysis by referring to the costs provisions of the **Class Proceedings Act**, S.N.S. 2007, c. 28 (**CPA**):

> Costs
>
> 40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.
>
> (2) When awarding costs pursuant to subsection (1), the court may consider whether
>
> > (a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and
> >
> > (b) a cost award would further judicial economy, access to justice or behaviour modification.
>
> (3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.
>
> (4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims.

[11] By way of comparison, Ontario's parallel provision 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. 1992, c. 6, s. 31 (1).

[12] As pointed out in the submissions, Ontario is one of only three other provinces (along with New Brunswick and Alberta) which allow costs following motions for certification (in the absence of abusive or improper behaviour or

extraordinary circumstances) and the only other province which enumerates the factors used to determine costs awards.

Applicability of 'Loser Pays' Principle

[13] The respondents argue (at para. 8 of their factum) that Canadian Courts have regularly ordered parties to bear their own costs at certification out of a concern for access to justice. They go so far as to say that "The 'loser pays' principle generally does not apply in class proceedings w[h]ere certification costs are sought against unsuccessful plaintiffs. It is widely acknowledged that an adverse cost award against a plaintiff can forsake the important benefits of class proceedings."

[14] While it is true that Courts and commentators alike acknowledge the risks of adverse costs awards undermining the purpose of class proceedings legislation, the 'loser pays' principle continues to apply in the certification context. It is departed from only after consideration of the facts and conduct of the parties. More often consideration of these factors results in a reduction of quantum rather than an order requiring both parties to bear their own costs.

[15] The Ontario Court of Appeal has repeatedly confirmed that its s. 31 (1) does not displace the "normal rule that costs will ordinarily follow the event" (see **Pearson v. Inco** (2006), 79 O.R. (3d) 427 (C.A.) at ¶13).

[16] In **Ruffolo v. Sun Life Assurance Co. of Canada**, 2009 ONCA 274, leave to appeal refused, [2009] S.C.C.A. No. 226, the Court explicitly rejected the argument that there should be a presumption against adverse cost awards in the presence of s. 31(1) factors.

[17] The difficulty with awarding costs against unsuccessful plaintiffs is discussed by Jamie Cassels & Craig E. Jones in their text, **The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada** (Toronto: Irwin Law, 2005) as follows :

> One of the most difficult questions in Canadian class action law involves whether to award costs against unsuccessful plaintiffs. In the United States, Rule 23 has no cost-shifting provisions, adopting the *de facto* "own costs" rule that prevails in that country's courts generally. However, the rules for individual suits in Canada are patterned on England's "loser pays" system.
>
> Awards of costs against unsuccessful representative plaintiffs in class proceedings are necessarily problematic, because the economy of scale is grotesquely reversed. The costs of the defendant's litigation of all classable (i.e.

> similar) claims can be exacted from a single representative plaintiff whose own interest in the claim might be minimal. Such cost-shifting will presumably deter valid claims from proceeding, routinely permitting defendants to escape the costs of their wrongdoing. While it is conceivable, on the other hand, that "own costs" regimes will encourage illegitimate litigation, the parallel experiences of Ontario and British Columbia (in the latter, an "own costs" presumption applies) do not seem to bear out such concerns, and we are unaware of any suggestion that the rate of frivolous litigation is higher in British Columbia than Ontario.
>
> […]
>
> The difficulty with cost-shifting rules is that they tend not to consider that the class action is lawyer-driven, not plaintiff-driven. In most class actions, the expenditures by plaintiffs' counsel in simply getting to certification (where cost-shifting is available) will heavily outweigh the expected recovery of the representative plaintiff alone. [pp.370-73] [footnotes omitted]

[18] In another text, **Theory of Class Actions** (Toronto: Irwin Law, 2003), Craig Jones expands on these themes:

> In the "traditional" or individualistic legal regime, a tort action may be viewed as connecting the tortfeasor on one hand and its victim on the other. In a mass tort, by comparison, the tortfeasor lies at the hub of the actions which might be seen to radiate from the decisions made at the centre. Viewed in this way, it is not difficult to see how the economy of scale in a dispute resolution process will naturally favour the defendant who can reuse the work product involved in the defence of issues common to all claims. Not so the numerous plaintiffs, who must begin anew with each new case, even on the common issues. This dichotomy is at the heart of mass tort -- the defendant has mass-produced the wrong; the plaintiffs suffer the harm and bear the costs individually. This "structural asymmetry" has been called a systemic bias in favour of defendants [...]
>
> It is not difficult to foresee the results of structural asymmetry in the individual litigation of mass torts. Mass tort defendants will tend to overspend on litigation in individual suits because their economy of scale permits them to invest in each initial claim an amount far greater than the claim is worth; this strategy makes success more likely in the early suits, compounding the advantage in the aggregate. Faced with such unequal litigation power, suits are discouraged or settled for too little, and confidentiality agreements extracted by defendants at the time of settlement may preclude "free riders" from taking full advantage of the work that has been done before, while the defendant is free to do so.
>
> […]
>
> For these reasons, mass tort theorists increasingly accept that a fundamental – some would say the *only* fundamental – reason for aggregating litigation is to redress the imbalance between mass tort defendants and plaintiffs,

> to "level the playing field" so that plaintiffs can enjoy the economies of scale that defendants have always exploited, and thereby increase their recovery. [pp.22-25][Emphasis in original]

[19] In the first Nova Scotian case to address s. 40 of the **CPA** (**Morris Estate v. Nova Scotia (Attorney General)**, 2012 NSSC 386), MacAdam J. emphasized that the **CPA** does not differentiate between plaintiffs and defendants in the award of costs:

> [25] All litigants, whether participating in class proceedings or pursuing relief individually, would certainly be well advised to consider the potential financial implications. Costs are part of the judicial process in this country. Access to justice by way of a class proceeding makes it possible for persons who feel aggrieved to come together and seek relief when the amounts involved make it otherwise financially unjustifiable. However, the matter of costs is still part of the equation whether it is a class or individual proceeding.
>
> [26] Nevertheless, whether it be costs against a plaintiff or defendant, access to justice and the public interest will not be served by awarding costs that have a chilling effect on seeking redress in the courts.

[20] Building on this call for balance, the following summary by Perell J. in **McCracken v. Canadian National Railway Co.**, 2012 ONSC 6838, is helpful in articulating the principles and considerations applicable to costs awards following certification motions:

> 70 […U]nder the scheme developed in Ontario for class proceedings, subject to the court's discretion and the directive of s. 31 of the Act, discussed below, the plaintiff remains liable for costs. See *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.) at para. 13; *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 2990 (S.C.J.), aff'd [2008] O.J. No. 3766 (C.A.), leave to appeal ref'd, [2008] S.C.C.A. No. 491; *Smith v. The Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433 (Gen. Div.) at 449, aff'd (1995), 26 O.R. (3d) 94 (C.A.), leave to appeal to S.C.C. ref'd [1996] S.C.C.A. No. 12; *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495 (S.C.J.); *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paras. 60-71.
>
> 71 The *Class Proceedings Act, 1992* was never intended to insulate representative plaintiffs, or class members, from the possible costs consequences of unsuccessful litigation, and its goal is not to encourage the promotion of litigation; rather, it is designed to provide a procedure whereby courts will be more readily accessible to groups of plaintiffs: S*mith v. Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433 at p. 449 (Gen. Div.); aff'd (1995), 26 O.R. (3d) 94 (C.A.); *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, [2008] O.J. No. 3997 (C.A) at paras. 28-31.

[...]

74 A class proceeding should not become a means for either defendants or plaintiffs to overspend on legal expenses simply because the economies of scale of a class proceeding makes it worthwhile to enlarge the investment in the defence or prosecution of the case: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONSC 5390 at para. 19. In anticipating costs, a defendant should rein in any tendency to commit more resources than are necessary to fairly test and challenge the propriety of certifying the class proceedings: *Lavier v. MyTravel Canada Holidays Inc.*, [2008] O.J. No. 3377 at paras. 31 and 32; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 1243 (S.C.J.).

[...]

77 Under the Ontario class action legislation, the effect of s. 31(1) is to encourage the court to recognize that class actions tend toward being test cases, the determination of a novel point of law, or the adjudication of matters of public interest and courts therefore should be alert to and respond to these tendencies when making decisions about costs: *Ruffolo v. Sun Life Assurance Co. of Canada*, [2008] O.J. No. 599 (S.C.J.) at para. 51, aff'd [2009] O.J. No. 1322 (C.A.), leave to appeal to the S.C.C. ref'd [2009] S.C.C.A. No. 226.

[...]

81 Yet another important factor in awarding costs in class actions is the principle that in exercising its discretion with respect to costs in the context of a class proceeding, the court should have regard to the underlying goals of the *Class Proceedings Act, 1992*; namely: (a) access to justice; (2) behaviour modification; and (3) judicial economy. See: *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2007] O.J. No. 1453 (Div. Ct.); *KRP Enterprises Inc. v. Haldimand (County)*, [2008] O.J. No. 3021 (S.C.J.); *Smith v. Inco Ltd.*, 2012 ONSC 5094 at paras. 74-109.

82 With respect to access to justice, defendants, just as much as plaintiffs, are entitled to access to justice, and the court in exercising its discretion must be aware of the access to justice implications of its award to both plaintiffs and defendants: *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 at para. 17; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036 at para. 18.

[...]

86 Applying the above principles, costs awarded against unsuccessful plaintiffs in certification motions have typically been more modest, relative to the actual costs incurred by the successful defendants, reflecting the concern that cost awards not be inconsistent with the objective of access to justice: *DeFazio v. Ontario (Ministry of Labour)*, [2007] O.J. No. 1975 (S.C.J.) at para. 49; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (S.C.J.) at para. 49, leave to appeal ref'd [2007] O.J. No. 2404 (S.C.J.).

> 87 However, notwithstanding that a certification motion is a mandatory-procedural-interlocutory-non-dispositive motion that does not decide the merits of the case, in absolute terms, very substantial costs awards have been made to successful defendants on certification motions. [Emphasis added]

[21] In terms of how these principles have played out in Ontario's jurisprudence, Belobaba J. provided a chart of recent certification costs awards in **Rosen v. BMO Nesbitt Burns Inc.**, 2013 ONSC 6356 :

Costs Awards Over the Last Six Years		
I. Where the costs sought were under $500,000		
	Average Award (including fees and disbursements)	Percentage amount awarded / amount sought
For Plaintiff	$169,250	63%
For Defendant	$148,870	50%
Overall	$163,000	59%
II. Where the costs sought were over $500,000		
	Average Award (including fees and disbursements)	Percentage amount awarded / amount sought
For Plaintiff	$496,118	62%
For Defendant	$341,000	39%
Overall	$388,728	46%

[22] This chart does not report on all certification decisions from 2007-2013, and reflects a small sample of decisions (in total 36). However, it does provide some insight into the scale of awards in recent case law and the general treatment of plaintiffs versus defendants, which is neither as asymmetrical as that argued for by the respondents in this case, nor supportive of the appellants' argument that the amount granted below should remain intact following a reversal on the merits.

[23] Another significant comment on the latter position is the response of Perell J. to the identical argument in **McCracken**. As a part of his initial certification, Justice Perell awarded $740,650.55 in costs to the plaintiffs. After his decision was reversed on appeal, he was tasked with crafting a costs award in favour of the defendants. While he acknowledged that, in hindsight, the original award was "too generous" in any event, he went on to say:

> 107 ...[E]ven if I was not mistaken in awarding him this large costs award, it does not follow that CN should recover the same amount. As noted above, there [are] some asymmetries in costs awards in class proceedings because of access to justice concerns and to further the policies of the legislation. As a result, costs awarded against unsuccessful plaintiffs in certification motions have typically been more modest than the awards against unsuccessful defendants. [Emphasis added]

[24] A review of the Ontario case law indicates that the threshold for a denial of costs or a nominal award in the low thousands of dollars has risen significantly in recent years. This is due in large part to Binnie J.'s reasons in **Kerr v. Danier Leather Inc.**, 2007 SCC 44, which, although in the context of a decision on the merits, warned against assuming "that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party" (¶69).

[25] This shift is also attributable to the Ontario Court of Appeal's decision in **Ruffolo, supra**, where Blair J.A. held that:

> [35] Even if the presence of one or more of the s. 31(1) criteria is found to exist, a court need not refrain from awarding costs to a successful defendant in a class action. Otherwise, the continuing application of the "costs follow the event" regime to class proceedings would be rendered meaningless. Whether a "no costs" order, or some adjustment to the costs as claimed, is appropriate to reflect the s. 31(1) factors will depend on the circumstances of each case.

[26] Thus, this section can be accurately described as "catalytic but not determinative of the exercise of the court's discretion" (**Ruffalo et al. v. Sun Life Assurance Co. of Canada** (2008), 90 O.R. (3d) 59, ¶52) to depart from ordinary costs principles.

[27] **Ruffalo**, **supra** (long-term disability benefits), is a typical example of a decision resulting in a reduction of a partial indemnity award. After an analysis of the meaning attributed to s. 31(1) factors, Perell J. held that, despite the presence of a novel issue, some public interest factors and access to justice concerns, the defendant was deserving of costs on a partial indemnity basis because of its success, the principle of indemnity and "its appropriate carriage and conduct of its own defence" (¶80-82).

[28] In this case, access to justice considerations and public interest provide a basis for reducing the award but do not go so far as to merit no award or a nominal one.

[29] In **Ruffolo**, Perell J. summarized factors tending to establish a public interest as follows:

> 73 The approach of the case law appears to be to identify or list types of cases that are in the public interest without pretending that the identification is a definition or comprehensive of the concept. Thus, without being a comprehensive definition, a case involves a matter of public interest if it has some specific, special significance for, or interest to, the community at large beyond the members of the proposed class: *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.); *Williams v. Mutual Life Insurance Co. of Canada*, [2001] O.J. No. 445 (S.C.J.) at para. 24; *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4298 (S.C.J.) at para. 6.
>
> 74 A case that raises issues of broad public importance or which is directed towards improving the situation of persons or groups who or are historically disadvantaged in our society including cases about the rights, privileges, obligations or welfare of the public at large may involve matters of public interest: *Edwards v. Law Society of Upper Canada* (1998), 39 O.R. (3d) 10 (Gen. Div.) at para. 13; *Vennell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.J.) at para. 31.
>
> 75 A case concerning a regulated industry tends to raise matters that have a strong public interest component: *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (S.C.J.) at para. 36; *Cassano v. The Toronto Dominion Bank*, [2005] O.J. No. 6332 (S.C.J.) at para. 10.
>
> 76 A matter of public interest can extend to but is not confined to matters that advance the goals of the *Class Proceedings Act, 1992*; namely, access to justice, judicial economy, and behaviour modification: *Vennell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.J.) at paras. 32-36. [Emphasis added]

[30] This case, much like the nickel refinery contamination in **Pearson**, engages the public interest in terms of the environmental and health concerns raised by emissions from the steel works over an extended period of time. The question of liability for these emissions has significance for the community beyond the proposed class, as it may potentially be of interest to others who may seek similar remedies for pollution in other contexts.

[31] Furthermore, the small value of individual claims in this case, as argued by the respondents, has ramifications for access to justice in light of the finding that a

class action was not the preferable procedure. In **Markson v. MBNA Canada Bank**, [2004] O.J. No. 5310 (Sup. C.J.)**,** Cullity J. discussed the concern for access to justice "where individual proceedings would be prohibitively uneconomic or inefficient." He held that, even though there was insufficient commonality of interest between class members for access to justice concerns to justify certification:

> 10 ... This does not exclude, as a legitimate costs consideration, the possible "chilling effect" on access to justice in other cases of a costs order against a plaintiff who did not succeed in obtaining an order for certification that was probably essential to the initiation of any proceeding to obtain even the declaratory and injunctive relief that the plaintiff sought. Such relief was aimed at behavioral modification in an important respect - observance of, and compliance with, the criminal law. To the extent that awards of costs may act as a deterrent to proceedings brought to achieve this objective they will tend to defeat two of the objectives of the legislation. [Emphasis added]

[32] Although in the present case, the intended behaviour modification was neither urgent nor a matter of criminal law, access to justice is still a legitimate costs consideration.

Existence of Indemnity Agreement

[33] In this case, it is a matter of public record that the respondents have an indemnity agreement insuring them against an adverse costs award. The respondents say that the indemnity agreement should not be taken as neutralizing the access to justice consideration or the "chilling effect" that a large costs award would have. Nova Scotia, although not expressly stating it in these words, implies that access to justice considerations are not engaged or should be given lesser significance in light of the indemnity agreement. It relies on the trial decision in **McCracken v. Canadian National Railway Company**, 2010 ONSC 6026 where Perell, J. said:

> 9 In my opinion, pretending that plaintiffs in class proceedings actually pay their lawyers or that plaintiffs are actually exposed to the risks of paying costs is unnecessary and actually gets in the way of the court using costs awards for their multifarious purposes. Practically speaking, in class actions, the influence of costs awards is visited on class counsel and on defendants but not on the plaintiffs who are only fictionally affected by costs awards.

[34] Nova Scotia goes on to say in its factum:

> 48 ... Although the decision to certify was overturned by the Court of Appeal, which in turn resulted in the costs award being set aside, the Court of Appeal did not comment on Justice Perell's statements regarding indemnity agreements.

[35] With respect, this statement is not entirely accurate. As in this proceeding, following the overturning of the certification order, the Ontario Court of Appeal issued a separate decision on costs (**McCracken v. Canadian National Railway Co.**, 2012 ONCA 797). In that decision, the Court specifically commented on this issue:

> 10 I reject CN's argument that access to justice considerations are not involved because the Class Proceedings Fund will indemnify the representative plaintiff for any costs award. The Fund was created to facilitate access to justice. If the Fund were required to absorb steep cost 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.
>
> 11 On the other hand, it must be recognized that class actions come at a cost to defendants. Indemnifying parties - such as class counsel or the Law Foundation - must assess the risks of an unsuccessful litigation strategy and balance them against the possible rewards: see *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737, 87 C.P.C. (6th) 345, at para. 20. The risk of adverse cost awards must factor into the decision to fund and indemnify a proceeding. The *CPA* was never intended to insulate representative plaintiffs from the possible costs consequences of unsuccessful litigation: *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2008), 93 O.R. (3d) 257 (C.A.), at para. 29.

[36] I interpret these comments to suggest that the existence of indemnity for an adverse costs award is a neutral factor in the analysis.

[37] I also refer to the Alberta Court of Appeal decision in **Pauli v. ACE INA Insurance Co.**, 2004 ABCA 253, leave to appeal ref'd [2004] S.C.C.A. No. 169:

> 33 The chambers judge considered the access to justice issue only in respect of the financial circumstances of the appellants, concluding that because funding was available their access to justice was not compromised. However, access to justice must be viewed in the broader context of the effect of a costs award against citizens who seek to resolve matters affecting society generally. In this case, the chambers judge awarded costs, estimated to be $115,000.00 to $125,000.00, jointly and severally against the appellants, none of whom, individually, would stand to gain more than $1,000.00 compensatory damages in the event of success.

> 34 Such an award curtails access to justice because it has a chilling affect on future potential litigants. Lawyers and other third parties, who might be willing to underwrite the costs of a potentially meritorious representative action, would be unwilling to do so if they knew they would face crippling costs merely because they offered this financial assistance. Individual litigants, whose stake in the litigation is relatively small, would then be unwilling to pursue the action. [Emphasis added]

[38] I agree. The access to justice issue is much broader than the individual circumstances of the respondents. As noted by the Alberta Court of Appeal, third parties who might be willing to undertake the costs of a potentially meritorious represented action, would be unwilling to do so if they ran the risk of crippling costs awarded against them.

[39] In practice, representative plaintiffs are almost invariably funded by some outside party with an ability to absorb the costs. If such arrangements were to alleviate the access to justice concern, this factor in the analysis would, in effect, become illusionary. I do not see it as such. It remains an appropriate and relevant factor in determining a costs award.

[40] I will take access to justice concerns and public interest into consideration in determining the final award of costs.

Should the costs award be reduced because of the respondents' conduct in the litigation?

[41] Although he made a lump sum award, Murphy J. referred to Tariff C amounts in support of the figure he arrived at. In their submissions, both appellants refer to his award. Canada does so by simply importing the $400,000 costs award in its entirety as a reflection of its reasonable expectations. Nova Scotia applies a multiplier of $8000 ($2000 x 4, to account for complexity) to 32 days (19 hearing days and 13 discovery days) for the motion. It then applies a 20% increase to the resulting amount to arrive at $300,000.

[42] The potential problems with both approaches are discussed above in terms of asymmetry of awards to plaintiffs and defendants and the potential for public interest and access to justice concerns to affect the award.

[43] The respondents argue that there is a further concern with Nova Scotia's approach because of Murphy J's finding that Canada and Nova Scotia increased

the complexity of the certification hearing as a result of their merit-based approach. This was largely reflected in the increased discovery and court time for which he allowed a daily credit. Thus, even if it were wholly appropriate to use Murphy J.'s analysis as a starting point, including all 32 days would not be justified by the reasons he provided.

[44] There is some merit to the respondents' argument.

[45] However, the extent of the reduction is a more difficult matter to appreciate. Murphy J. did not indicate how many days should be attributed to inappropriate lines of inquiry by Canada and Nova Scotia and did not hold that their efforts were entirely fruitless. In fact, Murphy J. objected to the level of criticism displayed by both parties in his costs decision as follows:

> 29 The submissions of the parties about costs in this case tend to be critical of opposing counsel, perhaps more strident than the way the rest of the litigation has been conducted and particularly more strident than what I've seen this morning. I am not going to revisit and evaluate the defendants' allegations of over-lawyering by the plaintiffs or to dwell on the plaintiffs' position that the defendants' persistence addressing the merits at the certification stage unduly complicated the motion. I am not here to pick up on criticisms of counsel because in the big picture, and I've said this before, counsel have done a great job on this case, and I don't mind saying that.
>
> 30 The plaintiffs clearly devoted extensive resources to the file. I know how many lawyers were in court, I was here too; and the defendants did have difficulty sticking to the narrow issues. But rather than get hung up on those criticisms, I am going to comment only by saying that my cost assessment significantly discounts the plaintiffs' claim to reflect a more economical allocation of resources and it also recognizes ... I've tried to recognize that the time required to address the motion was expanded by the defendants' effort to impugn the merits of the plaintiffs' claim.

[46] Canada and Nova Scotia point out the inherent complexity of the claim, dating back to the 1960s, and the numerous amendments made. In his certification decision (reported as 2011 NSSC 484), Murphy J. stated that:

> 6 Despite the statement of claim being amended approximately nine times, usually to reduce rather than expand the causes of action and remedies sought, the proceeding remains complex, with the most recent consolidated amended statement comprising more than 100 paragraphs, containing allegations of battery, strict liability and nuisance, trespass, negligence and breach of fiduciary duty.

[47] The occurrence of such amendments also lends credence to Canada and Nova Scotia's assertion that their opposition was productive, "resulting in a more focused and manageable claim, a more workable class definition and the removal of claims for personal injuries and property devaluation." (Canada's factum, ¶18)

[48] Similarly, in terms of the evidence brought forth by Canada and Nova Scotia, while it is impossible to gauge the precise use that was made of evidence arising from discovery and cross-examinations, it is clear that expert evidence was crucial to the assessment of the common issues at trial.

[49] Although this question is primarily one based on the facts between these parties, it is useful to briefly examine the approach of other courts to similar arguments.

[50] The respondents reference **Caputo v. Imperial Tobacco Ltd.** (2005), 74 O.R. (3d) 728 (S.C.J.) for the following statements:

> [22] There is no doubt that the inclusion of merits-based evidence in the record, and the resulting need to cross-examine on that evidence, dramatically increased the costs to both sides in this proceeding. Such decisions are within the purview of counsel. It is not the role of the court to dictate to the parties how their resources should be expended in litigation. However, the court is required to observe the principles of reasonableness and fairness when determining what portion, if any, of the expended costs should be recoverable from the losing party.
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> […]
>
> [25] Armstrong J.A.'s reference to the "fair and reasonable expectation of the parties" provides useful guidance in assessing costs related to a certification motion under the *CPA*. When considered in conjunction with the legislative provisions, and the Supreme Court affirmation of the procedural nature of the certification motion in *Hollick*, the logical conclusion is that the fair and reasonable expectation of the parties to a certification motion is that costs, if awarded, will be discounted for time and effort expended on developing evidence going to the merits of the case. This applies equally whether the successful party is a plaintiff or a defendant. The procedural nature of the certification motion advocates against any award of costs for effort related to the merits of the case.
>
> [26] Accordingly, the costs claimed by the defendants would in all likelihood be dramatically reduced if the record were to be parsed of all merits-based evidence, and the corresponding fees and disbursements related thereto were deducted from the bills of costs. In this case, the nature and extent of the record could serve to render this task insurmountable. I note as well that, here as in other cases, the analysis will be complicated by the fact there will undoubtedly be an overlap

> between evidence going to the procedural elements and the merits of the proceeding. [Emphasis added]

[51] In the end result, Winkler J. (as he then was) was not required to undergo further analysis because he found that it was appropriate to make no award as to costs at all because of the presence of other factors.

[52] Winkler J. completed the analysis on this basis, however, in **Attis v. Canada (Minister of Health)**, [2007] O.J. No. 2990 (S.C.J.), aff'd 2008 ONCA 660, leave to appeal ref'd, [2008] S.C.C.A. No. 491, where he held as follows:

> 11 In my view, there were strategic decisions made by both parties that increased the costs incurred prior to the certification motion. In the exercise of fixing costs, rather than assessing them, it serves no useful purpose to attempt to allocate responsibility for the added costs that adhered as a result. […] (Emphasis added)

In the final analysis, costs were fixed at $125,000, inclusive of fees, disbursements and taxes, which represented a reduction of more than 88% from the $1,074,448.20 award sought.

[53] A reduction of 90% was also sought by plaintiffs in **DeFazio v. Ontario (Ministry of Labour)**, [2007] O.J. No. 1975 (Sup. C.J.), but not granted. Hoy J.'s (as he then was) statements regarding the use of expert evidence is informative:

> 46 The plaintiffs correctly assert that much of the defendants' evidence goes to the merit of the plaintiffs' claim. However, much of the evidence also provided necessary background and the evidence of Mr. Nolan, Dr. Gibbs and Mr. Pinchin was relevant to the question of whether or not proposed common issue (a), namely, "Were the plaintiffs and Class Members exposed to airborne asbestos during the class period at the Sheppard subway station?", was a common issue, and to the preferable procedure analysis. (I concluded, at para. 102 of my reasons, it was not: "Proposed common issue (a) is not a common issue. There is no evidence that "exposure" was distributed evenly across the class members or over time. The activities alleged to have given rise to the exposure were not constant, and occurred in only part of the Sheppard Station. Whether a proposed class member was exposed to air borne asbestos is an individual issue.")
>
> 47 Hence, while some discounting of the fees sought is appropriate, the discount of 90% sought by the plaintiffs is not. A discount of 25% is more appropriate.

[54] Similarly, this Court relied on evidence before the motions judge to the effect that the steel works were not the only source of contaminants and, as a result, whether Canada and Nova Scotia permitted contaminants to go on to class members' properties did not qualify as a common issue (¶132).

[55] Murphy J.'s comments in both the certification and costs decisions indicate, perhaps, that some form of reduction is warranted for evidence going to the merits, but his more favourable statements and the apparent value of at least some of the resulting evidence mitigates against this. In the end, I agree with Winkler, J. that it serves no useful purpose to precisely attempt to allocate responsibility for the added cost that may have been incurred as a result of the parties' approach to the certification application. However, it is a factor which I will take into consideration when determining the appropriate amount to award for disbursements. This will be discussed in more detail below.

What costs should be awarded to Canada and AGNS?

[56] I have found that this case engages access to justice, and public interest issues. However, I would not go so far as to give effect to the respondents' submission that there be no order for costs or, in the alternative, a nominal award of costs. In my view, that would not be fair and reasonable in this case given the complexity of the certification hearing, the amount at stake in the litigation and the success of Canada and Nova Scotia.

[57] The amounts being claimed by Canada and Nova Scotia are reasonable as a starting point. But that does not end the analysis. I then must take into account any reduction for access to justice and public interest issues. In my view, the appropriate approach is that taken by the Ontario Court of Appeal in **Smith v. Inco Ltd.**, 2013 ONCA 724, leave to appeal ref'd [2014] S.C.C.A. No. 36 where the Court of Appeal endorsed the trial judge's approach of, essentially, discounting the successful defendant's bill of costs by a percentage to take into account the public interest element of the litigation. In that case, the court applied a 50% discount.

[58] I am not satisfied that such a discount is warranted in this case, particularly because I consider the starting point for both Canada and Nova Scotia to be reasonable. I would reduce the costs award by 25% which would result in costs to Canada in the amount of $300,000 and to Nova Scotia in the amount of $225,000. This provides a partial indemnity award to the successful parties taking into

account the access to justice and public interest factors. Further, the award is not so great as to have a chilling effect on class action litigation.

[59] In **Inco**, the Court also applied the discount to the disbursements claimed by the parties. Again, I agree with that approach but in that case the trial judge determined the appropriate amount of the disbursements and then reduced it by 50%. In this case, the reasonable disbursements of the parties on the certification hearing have yet to be determined. Therefore, I will make that determination and then apply the percentage discount.

Disbursements on the Certification Motion

Experts' Fees

[60] I am met with the same concerns expressed by Murphy, J. when he was determining the plaintiffs' disbursements at the certification hearing. He had this to say about the lack of information supplied in support of the disbursements:

> ... The Defendants say there's insufficient information provided, the Plaintiffs say that the information the Defendants are seeking is protected by litigation privilege. In my view there's merit to both positions, with respect to the Defendants' position I agree that insufficient information has been provided to assess the reasonableness of the disbursements. Absence agreement or at least absent opposition this Court doesn't allow disbursements, travel disbursements, without being advised who travelled, where they went, why and when. Similarly the Court doesn't award substantial expert fees, very substantial fees, in this case almost $229,000, without substantial amount of backup information usually to include some or all of the experts' invoices, not redacted but in full, a detailed, at least with some detail a description of the services the experts performed, the amount of time the expert worked, the expert's hourly rate; and with respect to expert travel, a breakdown of airfare and hotels and an indication when meetings were held and where and with whom.
>
> There's two reasons for that sort of detail, so the opposing party can assess and react to the claim and so the Court can make a determination whether they are reasonable. ...

[61] In their submissions, the positions of the parties are reversed. The respondents say there is insufficient information provided by Canada and Nova Scotia to allow this Court to award disbursements. While I agree that the information provided by Canada and Nova Scotia is lacking in certain respects, that does not totally preclude an award.

Canada's Disbursements

[62] The evidence in support of Canada's disbursements is by way of affidavit of Catherine M. Hicks, a paralegal with the Department of Justice Canada. Although Ms. Hicks provides some evidence of the work completed by the experts, it is more of a narrative of the services provided by Dr. David Savitz and Dr. Richard Lewis.

[63] The chart provided as an exhibit to her affidavit simply gives a total for both experts: $74,458.31 for Dr. Lewis and $38,279.15 for Dr. Savitz. Although Ms. Hicks provides the hourly rates for the two experts, there is no detailed breakdown of the services which the experts provided, when they provided them, nor the amount of time expended in providing the services. The experts' invoices are not included. Nor is there any explanation for why it was necessary to incur these substantial fees in relation to the certification motion.

[64] There is also Murphy, J.'s comment, which I referred to earlier, that the certification proceeding was more complex as a result of Canada and Nova Scotia's merit-based approach. Although I did not reduce the fees portion of the costs as a result of this comment, I consider it an appropriate consideration when addressing the disbursements for experts. Particularly so where there is a dearth of information relating to the work performed.

[65] In the end result, I am not satisfied Canada has proven that all of the experts' fees were necessary for the certification hearing.

[66] In light of the lack of detail relating to the experts' fees, I am going to reduce them substantially. I will allow $50,000 in total for the experts' fees claimed in recognition that the evidence would have been of some benefit in determining the issues on certification as I noted earlier.

Travel

[67] Canada claims $22,925.72 for travel relating to the certification hearing. Although there is some information provided with respect to the individuals travelling and their destination, there is a lack of particularity regarding why the travel was necessary. For example, there is no explanation given for why it was necessary for three counsel to travel to New York in April, 2009 to prepare Dr. Savitz for his discovery examination. Nor is there any explanation given for why it was necessary to have two trips, one to New York and one to Florida, by two counsel for Canada to instruct Dr. Savitz.

[68] I accept that some travel was necessary in order to obtain and instruct experts. However, the lack of detail makes it difficult for me to determine what is reasonable.

[69] I am prepared to allow the amount of $12,500 for travel expenses.

Courier Service

[70] Canada claims $1,778.84 for courier service, but there is no evidence as to why it was necessary to use courier services as opposed to some other less expensive mode of delivery. I am prepared to accept, simply by the nature of the proceedings, that some courier service would be necessary. I will allow the amount of $500 for this disbursement.

Printing

[71] Canada also claims $7,649.83 for printing. Ms. Hicks' affidavit does not set out whether these costs were incurred internally or whether they were paid to outside sources. Although I appreciate that she says in her affidavit "All the disbursements on the chart were incurred and paid by Canada" I am left to ponder who they were paid to, at what rate, and why the expense was necessary. It is patently obvious that some printing expense would be necessary. I would allow $3,500 for this disbursement.

Pre-recording Videos

[72] The appellants also claim $547.53 for pre-recording videos relating to the webcasting of the proceeding. I am not satisfied that this was necessary or reasonable in these circumstances. I would not allow anything for that disbursement.

Transcripts

[73] Canada claims $22,586.93 for transcripts of the proceedings. In light of the length and complexity of the certification motion I find that it was reasonable and necessary for counsel to obtain transcripts. This is an appropriate disbursement.

Court and Filing Fees

[74] I also find that the Court and Filing Fees are reasonable and necessary and I would allow them in the amount claimed of $1,091.84.

Summary of Disbursements Allowed

[75] In summary, I am prepared to allow the following disbursements to Canada:

Expert Witness Fees	$50,000.00
Travel	$12,500.00
Courier Service	$500.00
Printing	$ 3,500.00
Pre-recording videos	0
Transcript	$22,586.93
Court & Filing Fees	$1,091.84
Total Disbursements allowed on certification:	$90,178.77
Less 25 % Discount	$67,634.08

[76] In keeping with the approach of **Inco**, which I accepted as appropriate and adopted, I would apply the 25% discount to the allowed disbursements to arrive at the figure of $67,634.08.

Nova Scotia's Certification Disbursements

[77] I will now turn to the certification disbursements claimed by Nova Scotia. In support of its claim, they filed the affidavit of Alison Campbell.

[78] As pointed out by the respondents, Ms. Campbell's affidavit in support of the disbursements says the following:

> 5. As a result of my work, I am familiar with many of the expenses incurred in the course of litigating the certification motion and appeal in this case.

[79] Unfortunately, Ms. Campbell does not say which expenses she is familiar with and which she is not.

Experts' Fees – GlobalTox

[80] Nova Scotia provides more detail with respect to its experts' reports. However, again, its material does not provide a fulsome explanation. For example, it has provided the invoices associated with their experts. However, there is no time breakdown with respect to the particular services that were provided nor is there any evidence as to why it was necessary to incur this level of fees at the certification hearing. I will illustrate by way of example. The first four invoices relate to document review, attending meetings, participating in telephone conferences and project management. The invoices total almost $30,000. There is no indication of what documents were reviewed, why they were necessary to be reviewed for the certification hearing and how much time was spent on project management as opposed to review of documents.

[81] While I am satisfied that a portion of the amount being claimed on these invoices is a proper disbursement, it is very difficult to come to any detailed consideration in light of the generality of the invoices.

[82] Again, by way of example, there are charges for arranging travel for December meetings. Although it is necessary to arrange for travel if you are going to attend a meeting, there is no indication of the purpose of the meetings. Further, one would think that the administrative functions of arranging for travel would be included in the hourly rate for the experts, i.e., overhead. Similarly, whatever "project management" may be, that ought to be included in the overhead.

[83] The preparation of the experts' reports and the attendance at the discovery are properly claimed disbursements. However, it is difficult to determine how much time was actually spent on these activities.

[84] For the GlobalTox expert fees I am prepared to allow $65,000 which is approximately 50% of what is being claimed.

Groundwater Insight

[85] Similar concerns arise with respect to the Groundwater Insight invoices. Although there is some detail about the services provided, there is no detailed breakdown of the hours spent in doing so.

[86] Again, I will allow $30,000 of the Groundwater Insight expert fees, which is approximately 50% of what is being claimed.

ESRI Canada

[87] Finally, with respect to experts' fees, Nova Scotia claims experts' fees for ESRI Canada. ESRI Canada provided an invoice for its services detailing 32 hours at $120 per hour for map production consulting services.

[88] I am left to guess about what this service consists of and why it was necessary. I am not prepared to do so and I would not allow this disbursement.

Chris Cuthbertson Video Production

[89] Nova Scotia claims $400.03 relating to the webcast of the certification hearing. As I said earlier with respect to Canada's similar claim, I am not satisfied that this is an appropriate disbursement. I would not allow it.

Other Disbursements

[90] The remainder of the disbursements claimed by Nova Scotia for exhibit production, discovery expense, transcript of the certification hearing and discoveries and travel to Sydney for discoveries are supported by the evidence. I would allow them.

[91] Therefore, in summary, the disbursements allowed for Nova Scotia are as follows:

GlobalTox	$65,000.00
Groundwater Insight	$30,000.00
ESRI Canada	0
Wade Atlantic – Large Map	$49.15
Transcript Certification Hearing & Discoveries	$9,457.89
Discovery Expenses – Cambridge Suites	$117.35
Queen's Printer – Colored Maps for Joint Exhibit Book	$486.80

Chris Cuthbertson Video Production	0
Travel – expenses for travel to Sydney for discovery of representative plaintiffs	$1,878.86
Total of Certification Disbursements:	$106,990.05
Less 25% discount:	$80,242.54

[92] As I did with Canada, I would reduce this amount by 25% to arrive at a final figure of $80,242.54 for Nova Scotia.

Costs and Disbursements on Appeal

[93] Both Canada and Nova Scotia, appropriately, submit that applying the 40% Tariff to the trial costs would result in an excessive costs award on appeal. I agree.

[94] Canada and Nova Scotia seek $50,000 each as a costs award on the appeal. Canada requests this amount inclusive of disbursements. Nova Scotia seeks its disbursements on top of the $50,000. The total appeal disbursements for Nova Scotia was $1,107.26.

[95] In **Armoyan v. Armoyan**, 2013 NSCA 136, Fichaud, J.A. discussed the role of the Court in crafting an appropriate costs award where the Tariff amount is not fair and reasonable (¶18). It involves an exercise of discretion directed to a principled calculation of a lump sum.

[96] What then is the appropriate lump sum award?

[97] There is no doubt that this was a complex appeal. Submissions were heard over three days. A tremendous amount of material was filed. The Appeal Book contained affidavits, the many experts' reports filed at the certification hearing as well as transcripts from 19 hearing days which included both in court cross-examination and lengthy oral submissions. Preparation of oral argument would have required many hours of reviewing the transcripts, previous submissions and jurisprudence. Unlike **Arymoyan**, I do not have the actual time spent in preparation for the appeal hearing. However, I am prepared to accept it was substantial.

[98] Both parties refer to **Pearson v. Inco Ltd.**, **supra**. In that case, the opposite occurred from this case. The certification judge refused to certify the case as a class action. The case was appealed to the Court of Appeal which certified a much narrower claim. The Ontario Court of Appeal awarded $50,000 in appeal costs inclusive of disbursements and GST.

[99] The appeal hearing in **Pearson** was argued over two days but later required further appearances.

[100] I agree with Canada and Nova Scotia that the **Pearson** case has many similarities to this case. However, I am also cognizant that on the hearing of this appeal there was considerable overlap in the grounds of appeal argued by Canada and Nova Scotia which resulted in economies to the parties.

[101] In my view, it would be unfair to saddle the plaintiffs with $100,000 in appeal costs as requested by the appellants, particularly where the submissions and arguments of the parties were very similar. In my view, the appropriate amount is to award $30,000 each to Canada and Nova Scotia inclusive of disbursements.

Costs on the Intended Motion for Reconsideration

[102] As set out above, following the release of the decision in this matter, the respondents brought an Intended Motion for Reconsideration. The parties provided written submissions on the Intended Motion which was dismissed without oral hearing.

[103] The proceedings with respect to the Intended Motion were relatively straightforward and involved only legal issues. It was heard by written submissions and it was not necessary for the parties to attend to make oral submissions.

[104] In these circumstances, I consider the appropriate award of costs for Canada and Nova Scotia to be $2,500 each inclusive of disbursements.

Conclusion and Summary

[105] In summary Canada is entitled to:

1. On the Certification Hearing - $300,000.00
   Disbursements $67,634.08

2.	On the appeal -	$30,000.00 inclusive of disbursements
3.	On the Motion for Reconsideration	$2,500.00 inclusive of disbursements
	Total:	**$400,134.08**

[106] Nova Scotia is entitled to the following:

1.	On the Certification Hearing	$225,000.00
	Disbursement	$80,242.54
2.	On the appeal	$30,000.00 inclusive of disbursements
3.	On the Motion for Reconsideration	$2,500.00 inclusive of disbursements
	Total:	**$337,742.54**

[107] Any amounts paid by Canada and Nova Scotia to the respondents as a result of Murphy, J.'s decision shall be repaid.

Farrar, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.