

COURT FILE NO.: 114/2006/CP
DATE: 20080730

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KRP ENTERPRISES INC., 1643078 ONTARIO INC., KEVIN CLARK, ESTA CLARK, CHRISTINA ACCIACCAFERRO, JEFFREY ACCIACCAFERRO, STEVE TONG, LORI TONG, RUSSELL KAVANAGH, MICHELLE KAVANAGH, PAUL DURCEK, STEFANY DURCEK, QUINTIN, CHAUSSE, DONNA CHAUSSE, ANNE MARIE VANSICKLE, JAMES PAUL VANSICKLE, J.P. WOOLLEY SURVEYING LTD. and MARGARET COOK v. CORPORATION OF HALDIMAND COUNTY, ONTARIO PROVINCIAL POLICE COMMISSIONER GWEN M. BONIFACE, ONTARIO PROVINCIAL POLICE INSPECTOR BRIAN HAGGITH and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

BEFORE: The Honourable Mr. Justice W.T. Stayshyn

COUNSEL: John W. Findlay and Margaret McCarthy, for the Plaintiffs

Leonard Marsello and Christopher P. Thompson, for the Defendants

ENDORSEMENT ON COSTS

[1] The above matter was argued on April 30 and May 21, 2008 and judgment reserved. On May 29, 2008 the application for leave to appeal was dismissed and written submissions for cost requested.

[2] I have carefully reviewed the written submissions, and authorities in support of both the Appellant and Respondent to the action and, in particular, note the Crown position in respect of costs, namely,

(a) Costs should be reserved to the certification motion;

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(b) Alternatively, the costs claimed on a partial indemnity basis should be reduced because:

- (i) the hourly rate claimed is too high for a partial indemnity award;
- (ii) two senior counsel were not required for the motion;
- (iii) the hours claimed are greater than set out in the dockets;
- (iv) there was a significant overlap of issues from the Pleadings Motion;
- (v) comparable cost awards suggest a more moderate award is appropriate; and
- (vi) the Crown is exempt from an award of GST.

[3] I have carefully considered the submission that costs be reserved to the certification motion and have reflected upon the comments of Crane J. Such Position was in effect and was to be the result prior to these proceedings; which again dealt with, in part, the many complicated matters referred to by Crane J. In my view costs should follow the event in the leave application and I so exercise my discretion in that regard leaving in question only the amount to be assessed and (b)(vi), above re the exemption in respect of G.S.T.

[4] I note that one of the fundamental goals and objectives of class proceedings is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient.

Hollick v. Toronto (City) [2001] S.C. J. No 67 at para. 15, McLachlin, C.J.

[5] I am aware that in assessing cost orders, the court should have reference to the fundamental goals and objectives of the *Class Proceedings Act, 1992*.

Gagne v. Silcorp. Ltd. [1998] O.J. 4182 (C.A.) per Goudge, J.A.

[6] In *Robertson v. Thompson Corp.* [1999] O.J. No. 908, Justice Sharpe recognized the financial burden that is borne by plaintiffs who act for a class against a wealthy and determined

opponent. He held that ordering that costs be payable forthwith was appropriate based upon the general guidelines applicable to class proceedings, as articulated by the Court of Appeal and the Supreme Court of Canada.

Robertson v. Thompson Corp. [1999] O.J. No. 908 (Gen. Div.) per Sharpe J.

[7] In my view it is clear that in class proceedings costs that are payable to a plaintiff will ordinarily be ordered to be payable forthwith. Any cost award should reflect the class counsel's legal fee without considering the application of any multiplier or a contingency fee agreement.

Windisman v. Toronto College Park Ltd. [1996] O.J. 2897 (Gen. Div.) per Sharpe J.

[8] The authorities are also clear that class proceedings, particularly proceedings involving complex factual and legal issues, justify a team approach to the prosecution or defence of a class action. Therefore, seeking costs for more than one solicitor is entirely justified. Further, courts have repeatedly stated that the role of the court on a costs disposition in class proceedings is not to second-guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand.

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 64 O.R. (3d) 135 (Sup.Ct.) per Winkler J.

Tri-S Investments v. Vong. [1991] O.J. No. 2292 (Gen. Div.)

Lawyers' Professional Indemnity Co. v. Geto Investments Ltd. [2002] O.J. No. 921 (Sup. Ct.)

[9] The factors to be considered in fixing costs are set out in Rule 57.01 of the Rules of Civil Procedure. In assessing the costs of this motion it is noted that the following should be considered:

- a. the issues were very complex;
- b. the issues were of very great importance and public interest;

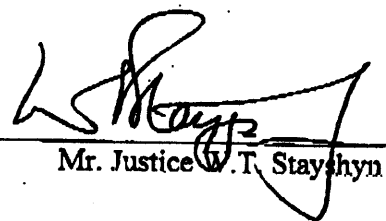
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- c. the motion for leave was unnecessary and resulted in a 6 month delay of the class proceeding.

[10] In considering the liability of the Provincial Crown to pay the G.S.T., I have reviewed the authorities referred to by the Crown. I exercise my discretion and direct that such costs be paid. There is no evidence before this Court, save the two conflicting decisions, and in my view it would be grossly unjust to put the Respondents in a position of difficulty with the Federal Tax Authorities, over a relatively small amount, when the applicants herein showed no conclusive evidence such G.S.T. is not payable by the Provincial Crown.

[11] I note the Bill of Costs submitted by the successful Respondent on the leave application was processed on a partial indemnity scale. I have reviewed that Bill with care and caution and have no criticism in respect of the work completed or the amounts claimed.

[12] As a consequence there will be costs to the Plaintiffs, Respondents on the leave to appeal application, fixed in the amount of \$20,532.50 plus G.S.T. of \$1,026.62, together with disbursements of \$425.91 and G.S.T. of \$21.30 making a total of \$22,006.32 payable within 30 days.


Mr. Justice W. T. Stayhyn

DATE: July 30, 2008