CITATION: 863880 Ontario v. CPR, 2025 ONSC 3155
COURT FILE NO.: CV-04-262689-CM2
DATE: 20250527

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: 863880 ONTARIO LIMITED

Plaintiff

AND:

CANADIAN PACIFIC RAILWAY COMPANY
and OXFORD PROPERTIES GROUP INC.

Defendants

AND:

CANADA COLORS AND CHEMICALS LIMITED

Third Party

BEFORE: Parghi J.

COUNSEL: *John M. Buhlman, Michael Statham* and *Lia Boritz,* for the Plaintiff, 863880 Ontario Limited

Rosalind H. Cooper and *Nicholas R. Carmichael,* for the Defendant Canadian Pacific Railway Company

Caitlin R. Sainsbury, Laura M. Wagner and *Alicia Krausewitz,* for the Third Party, Canada Colors and Chemicals Limited

HEARD: May 23, 2025 (in writing)

ENDORSEMENT

[1] By Reasons for Decision dated December 6, 2024, I granted summary judgment in favour of the Defendant Canadian Pacific Railway Company ("CPR"), on the basis that the action against it was commenced past the applicable six-year limitation period. I instructed the parties to work together to resolve the issue of costs. CPR and the Plaintiff resolved costs between them in respect of both the motion and the action. The parties requested that I consider the request for costs by the third party, Canada Colors and Chemicals Limited ("CCCL"), which seeks its costs from the Plaintiff, or, in the alternative, from CPR. I agreed to do so. The parties provided costs submissions, which I have now reviewed. I now issue this Endorsement on the costs claim by CCCL.

[2] For the reasons below, I order the Plaintiff to pay CCCL's costs on a partial indemnity basis. However, I do not order payment of the full quantum of costs sought by CCCL. I am unable to accept CCCL's position that the Plaintiff should pay 100% of its costs. I am also of the respectful view that the amount of costs CCCL seeks is excessive and not within the reasonable expectations of the other parties. I direct CCCL to provide a revised costs breakdown and calculation in accordance with the findings and requirements set forth in this Endorsement. I will then issue a final endorsement on costs accordingly.

The Court's Discretion in Fixing Costs

[3] In exercising my discretion to fix costs under section 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, I may consider the factors enumerated in Rule 57.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Those factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.

[4] In *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, at para. 60, the Court of Appeal for Ontario restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable".

Liability for CCCL's Costs

[5] Generally, a plaintiff who is unsuccessful against the defendant will not be charged with the third party's costs, because the plaintiff did not sue the third party, did not want them in the case, and was not responsible for bringing them into the litigation; it would therefore be unfair to visit the third party's costs on the plaintiff (*Sanofi Pasteur Limited v. UPS SCS, Inc*., 2015 ONCA 88, 124 O.R. (3d) 81, at para. 77; *Milina v. Bartsch* (1985), 63 B.C.L.R. 122 (S.C.), at para. 4; *Gesualdi v. Conti*, 2025 ONSC 2169, at para. 36).

[6] However, there may be situations in which fairness dictates that an unsuccessful plaintiff bear a successful third party's costs. This will depend on the circumstances of the case (*Milina*, at para. 5, aff'd in *Sanofi Pasteur*, at para. 84). It may, for example, be appropriate to award costs for the third party claim against the plaintiff where the main issue litigated was between the plaintiff and the third party, the third party was brought in or kept in the litigation by reason of the act or neglect of the plaintiff, or the third party proceeding "naturally and inevitably" follows upon the institution of the action, in the sense that the defendant had no real alternative but to join the third party (*Milina*, at para. 5; *Sanofi Pasteur*, at para. 84).

[7] In my view, such exceptional circumstances exist here, and warrant a departure from the general rule. I accordingly exercise my discretion to order the Plaintiff to pay CCCL's costs.

[8] My analysis is rooted in the fact that, in January 2013, the Plaintiff amended its claim to plead that the source of the contamination on the lands owned by CPR was land on which CCCL had operated from 1924 to 1971 (the "CCCL Lands"). This pleading made CCCL a necessary party to the action. Notably, however, the Plaintiff did not add CCCL as a defendant to the action when it amended its pleading to state that the CCCL lands were the source of the contamination. In my view, CPR had no real alternative, in these circumstances, but to commence a third party claim against CCCL. It did so in May 2013, roughly four months later.

[9] CPR's co-defendant, Oxford Properties Group Inc. ("Oxford"), likewise commenced a third party claim against CCCL in April 2013. This fact underscores that CCCL was a necessary party to these proceedings.

[10] In 2021, eight years after it delivered its amended claim identifying the CCCL Lands as the source of contamination, the Plaintiff brought a motion to add CCCL as a defendant. The Plaintiff's motion was dismissed on the basis that its purported claim against CCCL was statute-barred, the two-year limitation period having long lapsed. That the Plaintiff sought to add CCCL as a defendant further underscores that CCCL was a necessary party. That the Plaintiff was unsuccessful in doing so means that CPR had no real alternative but to join CCCL as a third party. Put simply, the Plaintiff's inaction, in not naming CCCL as a defendant in time after identifying the CCCL Lands as the contamination source, made it necessary for CPR to pursue CCCL.

[11] Drawing on the language of the Court of Appeal in *Sanofi Pasteur*, the Plaintiff did try to sue CCCL and did want CCCL in the case. It was unsuccessful, which necessitated CPR bringing CCCL in as a third party.

[12] This is accordingly not the type of case in which fairness dictates that the plaintiff not be responsible for the third party's costs. Indeed, here, fairness demands the opposite result.

Quantum of Costs

[13] CCCL seeks to recover $810,861.36 in costs on a partial indemnity basis, inclusive of disbursements and HST.

[14] It appears that CCCL seeks its costs in respect of the third party claims against it by both Oxford and CPR. CCCL's costs outline refers to the third party "claims" in the plural and does not attempt to tease out which of its costs pertain to each third party claim. The third party claim by Oxford was discontinued without costs in February 2024, six months before the summary judgment motion was argued before me in September 2024. CCCL takes the position that it cannot disentangle its costs in respect of the two third party claims and that CPR or the Plaintiff should in any event bear all its costs.

[15] I am unable to agree.

[16] In my view, it is fair and reasonable that the costs that CCCL incurred after Oxford discontinued its claim in February 2024 be allocated to the CPR third party claim, and therefore

borne by the Plaintiff. Once Oxford exited the litigation, all of CCCL's costs were associated with defending CPR's claim.

[17] However, a different approach should be taken to CCCL's costs prior to the Oxford discontinuance. Both the CPR and Oxford third party claims were commenced around the same time (April and May 2013). Both claims were for contribution and indemnity. It is therefore likely that many, if not all, of the steps CCCL took in responding to the two claims proceeded in lockstep; certainly, CCCL's costs outline supports this understanding, and no evidence is provided to the contrary. Given that the two third party claims were commenced around the same time, similar in nature, and litigated in parallel, it is also likely that the costs to CCCL of defending the two claims were roughly evenly split. While CCCL describes Oxford as a "minor" party in the action, this claim is not explained or supported by any evidence. I am therefore of the view that the costs to CCCL of defending the two third party claims should be divided between the two claims on a 50-50 basis, up to the date of the Oxford discontinuance.

[18] In my view, stepping back and considering all the circumstances, this approach, of holding the Plaintiff responsible for half of CCCL's reasonable costs up to the date when Oxford discontinued is claim, and all of CCCL's reasonable costs thereafter, achieves a result that is fair and reasonable.

[19] The Plaintiff's share of responsibility for CCCL's disbursements should likewise not be 100%. In my view, CCCL should calculate the blended overall percentage of legal fees for which the Plaintiff's is responsible based on what I have set forth above (50% responsibility for fees up to the Oxford discontinuance and 100% thereafter), and recover from the Plaintiff that same percentage of its disbursements.

[20] I now turn to consider whether the fees and disbursements sought by CCCL are reasonable.

[21] CCCL's actual fees (not including disbursements and taxes) are $949,164.00. The costs outline shows that at most stages of the litigation, CCCL's counsel team had four partners, two of them quite senior, billing time, in addition to junior colleagues and non-lawyer colleagues. To some extent, this may have been appropriate given the quantum of the Plaintiff's damages claim and the complexity of some of the underlying issues. Nonetheless, I am not persuaded, based on the materials before me, that it was necessary for so many senior partners and partners to be consistently and intensively involved in each stage of the litigation. The result of this approach was that the total number of hours and billed fees was overall quite high.

[22] My view that these fees are high is underscored by the fact that CCCL's and CPR's actual costs (not including disbursements and taxes) are almost the same, at $949,164.00 and $947,659.95, respectively. This is so even though CCCL was involved in the action for only 12 years, while CPR has been in the action for 20 years, and even though CPR had to address several litigation steps that CCCL did not, including additional discoveries, pleadings, a mediation, proceedings brought by 863 seeking access to the CCCL Lands, an action against another party, and 863's motion to amend its claim. This comparison is striking.

[23] I do not suggest that assessing costs is an arithmetical exercise, such that CCCL should only receive 60% of CPR's costs because it has been involved in the litigation for 60% of the time CPR has. Such an approach would be too mechanical and inconsistent with the principles guiding my discretion to fix costs. Nonetheless, the fact that CCCL's costs are as high as CPR's, despite having been involved in the litigation for far less time and having taken far fewer litigation steps, supports my view that CCCL's costs are not reasonable or within the expectation of the party paying those costs. It is fair and reasonable in these circumstances to discount CCCL's fees by 20%.

[24] I also find that some of the specific costs claimed by CCCL are not reasonable and are not properly charged to the Plaintiff in full. These include the following:

a. a disbursement account of $108.234.59 for an expert who never delivered an expert report and did not testify;

b. a costs claim of $14,849.90 for the summary judgment motion before me, to which CCCL was not a party; and

c. a costs claim of $34,515.60 to prepare CCCL's bill of costs, which is plainly excessive. (It appears that the $34,515.60 amount may be a mathematical error and that the intended number, at 60% of full costs, is $23,805.60, but in my view even that corrected amount is still excessive.)

[25] In my view, these costs are neither reasonable nor within the reasonable expectation of the other parties. The claim for fees associated with the expert who did not deliver a report or testify is denied. I award $1,500.00 in costs in respect of the summary judgment motion, reflecting the reasonable costs associated with reviewing materials in a motion to which CCCL was not a party. I award $1,000.00 in costs in respect of preparing the bill of costs.

[26] CCCL is directed to prepare a revised costs breakdown and calculation that reflects the findings of this Endorsement (including those in paragraphs 18-19 and 23-25). The revised calculation is to be circulated among counsel. Once all parties agree that the revised calculation reflects the requirements of this Endorsement, it may be provided via email to my judicial assistant along with a form of order, and I will issue a further endorsement and an order accordingly. The parties are to provide the revised calculation to me by no later than June 27, 2025. If this date is not workable, counsel may advise.

Date: May 27, 2025 Parghi J.