CITATION: Durling v. Sunrise Propane Energy Group Inc, 2011 ONSC 266
COURT FILE NO.: CV-08-363271-00CP
DATE: 20110111

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	
JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO and CESARE MANCO Plaintiffs	*Harvin D. Pitch* and *Ted Charney,* for the plaintiffs
– and –	
SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1369630 ONTARIO INC., 1452049 ONTARIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD. and THE TECHNICAL STANDARDS AND SAFETY AUTHORITY Defendants	*Mirilyn R. Sharp,* for defendants Sunrise Propane Energy Group Inc., 136729 Ontario Inc., 1186728 Ontario Limited, Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov and Arie Belahov *John Campion* and *Antonio Di Domenico,* for defendants 2094528 Ontario Inc. HGT Holdings Ltd., Teskey Construction Company Ltd. and Teskey Concrete Co. Ltd. *Lisa La Horey,* for defendant Technical Standards and Safety Authority *Ward Branch,* for defendant 1452049 Ontario Inc. *Martin P. Forget,* for the plaintiffs in the *Vilarino* action *Tom Hanrahan* and *David Zarek,* the plaintiffs in *the ZTGH actions*

) **HEARD:** December 13, 2010

C. HORKINS J.

INTRODUCTION

[1] The plaintiffs in this class proceeding bring a motion for an order staying individual actions (the Stay Motion). The relevant background follows.

[2] On August 10, 2008, at approximately 4:00 a.m., a series of explosions occurred at the propane facility located at 54 and 62 Murray Road, Toronto, Ontario which operated under the names Sunrise Propane Industrial Gases and Sunrise Propane Industrial Cylinders.

[3] Class proceedings were initiated immediately and ultimately on September 26, 2008, a comprehensive statement of claim was issued by the plaintiffs in this action for damages sustained as a result of the explosions (the "Class Action").

[4] The Class Action claims damages based upon the torts of strict liability, nuisance and negligence on behalf of putative Class Members who resided in or owned property in an area located between Highway 400, Keele Street, Sheppard Avenue and Wilson Avenue in the City of Toronto.

[5] Following the explosions, numerous individual actions were issued in addition to this Class Action. There are 54 identified individual actions. The stay of these individual actions was discussed at the September 16, 2010 case conference. December 1 and 2, 2010 were scheduled to hear necessary motions including the Stay Motion. Counsel who attended the case conference anticipated that the individual actions would be stayed on consent. Class counsel were in the process of collecting consents for a stay order.

[6] On November 15, 2010, the plaintiffs filed their Stay Motion record with the court. The Notice of Motion requested a far reaching stay of the individual actions "until after resolution of the common issues trial (including all appeals) or until further order of this court."

[7] A further case conference was held on November 30, 2010. Class counsel reported that on November 29, 2010, the plaintiffs in individual action CV-10-408251(the Vilarino action) advised that they were opposing the Stay Motion and requesting an adjournment of the December 1 motion date. The firm of Forget Mathews represents the plaintiffs in the Vilarino action. This action was commenced on August 6, 2010.

[8] Concerns about the far reaching effect of the proposed stay order were discussed at the November 30 case conference. Whether the individual actions continued would obviously depend on the outcome of the certification motion. As a result, it was agreed that the stay, if issued, would be in effect until further order of the court. On November 30 2010, class counsel circulated to all counsel a copy of the revised draft stay order reflecting that the stay would be in effect until further order of the court.

[9] After the case conference concluded, the law firm of Zarek Taylor Grossman Hanrahan LLP (ZTGH firm) confirmed that their clients in 10 actions were opposing the Stay Motion and requesting an adjournment of the December 1 motion date. The ten actions are as follows: CV-09-384680; CV-09-384688; CV-09-384686; CV-09-384676; CV-09-384755; CV-10-408235; CV-10-408238; CV-10-408243; CV-10-408255; CV-10-408256 (the ZTGH actions).

[10] The Vilarino and the ZTGH actions are subrogated claims that various insurers have commenced.

[11] On December 1 2010, at the request of these opposing parties, the Stay Motion was adjourned to December 13, 2010.

[12] Following the adjournment, the opposing parties served their motion materials. This prompted reply materials from the plaintiffs in the class action and cross-examinations on affidavits took place.

[13] Late on Friday, December 10 2010, after considerable expense had been incurred, the individual plaintiffs in the ZTGH actions withdrew their objection to the Stay Motion. On Saturday, December 11 2010, the individual plaintiffs in the Vilarino action withdrew their objection to the Stay Motion.

[14] It is now agreed that all individual actions will be stayed pending the outcome of the Certification hearing and pending further order of this court. The Certification hearing will proceed the week of October 24, 2011.

[15] The Stay Motion proceeded on the issue of costs only. Counsel for the plaintiffs in the Vilarino and ZTGH actions take the position that no costs should be awarded on the Stay Motion.

[16] Before turning to consider costs, it is helpful to review the relationship between a class proceeding and an individual action and the legal framework that governs costs.

INDIVIDUAL ACTIONS AND CLASS PROCEEDINGS

[17] Class proceedings often exist alongside individual actions. One does not automatically preclude the other from proceeding.

[18] Section 13 of the *Class Proceedings Act, 1992*, S.O. 1992, C. 6 permits the court, on its own initiative or on a motion by a party or class member, to stay a proceeding related to a class proceeding before it. Typically, the individual actions are stayed pending the outcome of a certification hearing, but this is not mandated by the *Class Proceedings Act, 1992.*

[19] If the class proceeding is certified, the individual plaintiff must decide whether to opt out or participate as a member of the certified class. There is an absolute right to opt out of a class under s. 9 of the *Class Proceedings Act, 1992*. Existing case law suggests that individual

plaintiffs who opt out of a certified class can move forward with their individual actions. However, the individual action commenced by a plaintiff who does not opt out, will be stayed: see *Cheung et al. v. King's Land Development Inc. et al*. (2001), 55 O.R. (3d) 747 (S.C.J.), at para. 12.

[20] The *Class Proceedings Act, 1992* permits "freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the Class Proceedings Act clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction": See *Abdulrahim v. Nav Canada*, [2010] O.J. No. 4660 at para. 66.

LEGAL FRAMEWORK

[21] The source of judicial discretion to award costs is set out in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that states:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[22] In addition to this general discretion, an award of costs is governed by Rule 49 (in the event of an offer to settle) and the factors set out in rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 49 is not engaged on this motion.

[23] Fixing an amount for costs is not driven solely by a mathematical calculation. The Court of Appeal made it clear in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 that the hours spent and the rates claimed by the successful party are only one consideration in determining a costs award. Ultimately, the judge must "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable" (at paras. 24). This principle is now set out explicitly in rule 57.01(1)(b): the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

[24] The Court of Appeal in *Boucher* spoke of the "chilling effect of a costs award of the magnitude of the award in this case" in determining whether the costs exceeded the fair and reasonable expectations of the losing party (at para. 37).

[25] Finally, when costs are being considered in a class proceeding, s. 31 (1) of *Class Proceedings Act, 1992* states that 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." On this consent motion, s. 31(1) is not engaged.

COSTS REQUESTED

[26] Partial indemnity costs are requested by three groups:

- the plaintiffs in the class proceeding,
- the defendants Sunrise Propane Energy Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc, Valery Belahov, Shay (Sean) Ben-Moshe and Arie (Leon) Belahov (the "Sunrise defendants") and
- 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Company Limited and Teskey Concrete Co. Ltd. (the "Teskey defendants").

Each group submitted a Costs Outline.

The Plaintiffs' Costs

[27] The plaintiffs request costs as follows :

Fees:	$41,802.00
HST on fees:	$5434.26
Disbursements:	$5414.66
Total:	$52,650.92

The fees represent the work of five lawyers, an articling student, a law clerk and a legal assistant. It covers 175.15 hours of work.

[28] There is no doubt that the plaintiffs invested a considerable amount of time on their Stay Motion. Of the 175.15 hours of work all but 8.9 hours were incurred after the two groups of individual plaintiffs notified class counsel that they were objecting to the stay order. Was this a reasonable amount of time to invest in the circumstances? Did the objectors take an unreasonable position on the Stay Motion and therefore cause unnecessary fees to be incurred?

The Sunrise Defendants' Costs

[29] The Sunrise defendants request costs as follows:

Fees:	$17,910.00
HST on fees:	$2,328.30
Disbursements:	$420.00
Total:	$20,658.30

The fees represent the work of two lawyers and 51 hours of work.

The Teskey Defendant' Costs

[30] The Teskey defendants request costs as follows:

Fees:	$5,300.00
HST on fees:	$689.00
Disbursements:	$18.36
Total:	$6,007.36

The fees represent the work of two lawyers and 22 hours of work.

[31] Before fixing an amount for costs, it is of assistance to review the activity that led to the plaintiffs in the Vilarino and ZTGH actions eventually consenting to the Stay Motion.

STEPS TAKEN PRIOR TO CONSENT

[32] Although the court directed counsel to file a factum, one was not filed in the Vilarino action. As a result, the court cannot review a factum to understand why these plaintiffs were objecting to the Stay Motion. One responding affidavit from a lawyer in the Forget Mathews firm was filed. This brief affidavit confirms that the Vilarino action is a subrogated claim started by the Wawanesa Insurance Company (Wawanesa) in August 2010, in the names of numerous insureds. Wawanesa seeks recovery of approximately $1,600,000 paid to various insureds as a result of insured losses they sustained during the explosion. The damages claimed in this action are pecuniary in nature. Although the pleading states that the plaintiffs suffered damages as a result of the explosion, the particulars that are pleaded refer to pecuniary losses. There is no specific reference to non-pecuniary damages. The affidavit does not explain why Wawanesa was resisting the Stay Motion. There was no cross-examination on this affidavit.

[33] Class counsel served the Stay Motion early in November, but received no response from Mr. Forget until the afternoon of November 20, 2010, when he faxed a letter simply stating that he had instructions to oppose the motion with no reasons given. Class counsel tried but was unable to reach Mr. Forget to discuss his position. Class counsel were left in the dark as to why Mr. Forget's client was continuing to object to the Stay Motion.

[34] According to Mr. Forget's submissions in court on December 13 2010, Wawanesa initially resisted the stay order because the plaintiffs were seeking a stay until completion of the individual common issue trials and any appeals arising therefrom. If this was the concern driving Wawanesa's decision to object to the stay motion, I would have expected their counsel to discuss the concern with class counsel. In any event, the draft stay order was amended at the case conference on November 30, 2010 to limit the far reaching effect of the initial request and a copy of the new draft was sent to Mr. Forget.

[35] On Saturday December 12, 2010, when the Forget Mathews firm advised that they were no longer objecting to the stay order, no explanation for the change of position was given.

[36] Similarly, when the ZTGH firm e-mailed class counsel on November 30, 2010 to advise that they were objecting to the stay motion, no reasons were given. Five of the ten actions issued by the ZTGH firm were commenced in August 2009. The other five were commenced in August 2010. The plaintiffs are the named insureds in the various insurance policies. These individual actions have not progressed beyond the pleadings stage. Service of the statements of claim issued in August 2010 has not been completed.

[37] The ZTGH firm served two affidavits in support of their position: one from Rory Thain a manager at Economical Insurance Company ("Economical") and a second from MaryRose Ebos a lawyer at the ZTGH firm. Economical commenced four of the ten ZTGH actions. Although there is no affidavit evidence from the insurers who started the other ZTGH actions, the affidavits filed made representations about all of the ZTGH actions.

[38] The affidavits of Mr. Thain and Ms. Ebos represented that:

- The Zarek firm issued ten actions seeking to recover amounts that five insurance companies paid to their insureds. The insurers are Economical, Coseco, Unifund, Intact and Belair.

- The Vilarino and ZTGH actions represent claims by seven insurance companies “on behalf of 188 homeowners and 39 commercial businesses”.

- The plaintiffs in the ZTGH actions and the Vilarino action intend to opt out of the class action if certified.

- The insurers have “investigated, adjusted and paid” their insureds’ claims. These claims include damage to buildings contents and expenses for alternative living accommodations. These damages are easily quantified and already documented.

- The estimated value of claims advanced in the eleven actions is $16 million. This includes subrogated claims, insureds’ deductibles and uninsured losses.

- The insurers “will be carrying on these actions for the subrogated claims plus any Insured’s deductibles and any uninsured losses.” [Emphasis added.] The insureds will not be charged legal fees.

- Counsel are considering a request that the individual claims be case managed.

- The “clients instructing Plaintiffs’ counsel in the individual actions are large insurance companies with the knowledge and financial resources to ensure the individual actions are governed in a timely manner”.

- The individual actions seek “tangible pecuniary damages” whereas the class action seeks “intangible, non-pecuniary and difficult to quantify damages for personal injuries”.

- The class action claims for “non-pecuniary damages will slow down the Class action process as compared to the progress of the individual actions and the expeditious resolution” of the “tangible pecuniary” individual claims.

- There is no need to delay litigation of the individual actions.

- These individual actions “primarily seek resolution of the liability issues”. Therefore it makes sense that the individual actions “litigate the liability issues” and the class action abides by the result.

- There is no prejudice to the class action defendants since they can file one affidavit of documents and use it for all actions that they are defending.

[39] When Class Counsel read these affidavits they were surprised to learn that the insurers were advancing the claims for both subrogated and uninsured losses and that all of the plaintiffs named in the actions intended to opt out of the class if certified. As Mr. Charney explained, Class Counsel believed that these affidavits shifted the “procedural terrain” and they were no longer dealing with a simple stay motion. Instead, the insurers were representing that they had control of the subrogated and uninsured claims, that they intended to proceed ahead with these claims without delay and all of the named plaintiffs would be opting out of the class if certified.

[40] I pause to note that the representation in these affidavits that the insurers would be carrying on the actions for both insured and “any uninsured” claims seems to be at odds with the insurers desire not to be slowed down by the non-pecuniary claims of their insureds. If, as the affidavits stated, any uninsured claim was covered then this had to include the non-pecuniary claims as well.

[41] Class counsel decided that they had to respond with additional affidavit evidence and cross-examine on the affidavits. The responding affidavit evidence in large part discusses the considerable work that has been undertaken by class counsel to advance the claims of the putative class members and reviews the liability and damage experts that have been retained. The affidavit evidence also refers to the case conference before Justice Cullity on April 21 2009, when directions were given including confirmation that the representative plaintiffs were advancing all claims including subrogation claims and, if certified, that class definition would include all claims of class members who did not opt out.

[42] In the limited time available, class counsel decided to investigate the evidence that some putative class members had already decided to opt out of the Class Action if certified and that the individual actions advanced uninsured claims on their behalf.

[43] As of December 2010, 890 households and 1531 individuals had registered with class counsel. This represented about 33% of the putative class member households. They reported claims for damage to their homes, injuries, loss of income. Class counsel contacted a sampling of the plaintiffs named in the ZTGH actions. Of the 22 households reached, no one was aware that the insurers had commenced actions on their behalf and no one had authorized the insurers to start the actions.

[44] Individuals named in the action started by the Economical were particularly outraged to learn that an action had been commenced in their names because some of them reported that Economical had denied their claims.

[45] When Rory Thain and MaryRose Ebos were cross-examined on December 6 2010, class counsel learned that representations in the Thain and Ebos affidavits about the ZTGH actions were not as stated. In particular, class counsel learned that:

- Economical has not contacted the insureds that they named as plaintiffs in the individual actions to ascertain if they want Economical to include their uninsured losses in these individual actions.

- Economical recognizes that its insureds may have uninsured losses for pain and suffering, loss of income, medical expenses, diminution in the value of their property and claims in excess of the policy limits.

- The "personal" losses of the individual insureds are not included in the relief the Insurers are seeking in the ZTGH actions and there is no plan to include these "personal" claims in the ZTGH actions.

- Although Mr. Thain's affidavit states that the "all" of the "188 homeowners, 39 commercial businesses … intend to opt out of the class if certified", Economical never asked the insureds who are named as plaintiffs if they intend to opt out as stated in his affidavit.

[46] In summary, while the affidavits represented that the ZTGH actions covered insured and uninsured losses and that all plaintiffs named in these actions intended to opt out of the class action, cross-examinations revealed that this was not accurate. Interestingly, the factum that the ZTGH firm filed on December 8, 2010, continued to represent that the "insurance companies in the individual action will be carrying on [the actions] for the subrogated claims plus each insured's deductibles and any uninsured losses." [Emphasis added.]

[47] Class counsel's need to cross-examine on the Thain and Ebos affidavits was obvious given the surprising representations made in these affidavits. While cross-examination shed some light on the insurers' intentions, it also revealed a serious legal problem with allowing these individual actions to proceed. In particular, case law confirms that a plaintiff has a single cause of action for claims arising from a loss: See *Cahoon v. Franks*, [1967] S.C.R. 455; and *Mayer v*

1314312 Ontario Inc. (c.o.b. Aba RickMoving & Storage), [2002] O.J. No.457. In this case the claims are either advanced within a certified class action or in an individual action, not both.

[48] The day after the cross-examinations were completed, the plaintiffs in the ZTGH actions withdrew their objection to the Stay Motion and the plaintiffs in the Vilarino action did the same the next day. No explanation was given until counsel appeared in court to argue costs.

[49] During the hearing of this motion counsel for the insurers in the ZTGH actions explained that their clients (the insurance companies) have already decided to opt out (assuming certification) and do not want to hold their claims in abeyance under a stay order pending the certification hearing. They want to move ahead immediately with their individual actions so that liability for the explosion can be decided quickly. They do not want resolution of the liability issue delayed by a class action.

[50] Further, counsel for the insurers in the ZTGH and Vilarino actions submit that class counsel is responsible for the fees incurred and there should be no order requiring the insurers to pay costs. They explained the basis for their position as follows. Class Counsel's supplementary factum raised new grounds for the motion. New grounds should only be permitted in an amended Notice of Motion and one was not served. They have not had enough time to consider and respond to these new grounds. Rather than asking for an adjournment, the insurers decided to consent to the stay order and argue the issues raised in the supplementary factum later.

[51] The new grounds counsel allegedly raised in this supplementary factum are:

- There can only be one action for a single cause of action; and
- The insured has the right to control the litigation until he is fully indemnified

ANALYSIS

[52] With this background, I return to the questions raised above. Was the amount of time incurred by class counsel reasonable in the circumstances? Did the objectors' actions cause unnecessary fees to be incurred?

[53] First, I reject the notion that class counsel raised new grounds for the Stay Motion in the supplementary factum. This factum was responding to the evidence of Mr. Thain and Ms. Ebos. It is this evidence that caused the above legal issues to surface. Class counsel was not asking this court to decide these issues on the Stay Motion. Rather, class counsel was properly putting the new evidence and legal issues before the court. It was important for the court to have this information when considering the Stay Motion.

[54] I reject the suggestion of counsel for the insurers that they were surprised to see these legal issues develop and had no time to respond. The very evidence that they presented triggered the need to discuss these points in the supplementary factum. How could they not have realized in advance that their own evidence would bring these legal issues to the center of this motion?

[55] They served affidavits that incorrectly left class counsel with the belief that all uninsured claims were included in the individual actions and that the plaintiffs named in the statements of claim had already decided to opt out of the class action if certified. The affidavits sent a clear message to class counsel: we are going ahead with these individual actions now and we intend to have liability decided in these individual actions.

[56] While I am not suggesting that these affidavits were intentionally misleading, it is hard to understand how these affidavits were sworn when counsel and the insurers had never spoken to the named plaintiffs and did not intend to protect all uninsured losses. Whether this was a mistake or carelessness does not change the fact that these affidavits triggered significant legal expense.

[57] By presenting this evidence, a flurry of unnecessary legal work was triggered. Eventually through investigation and cross-examination, class counsel came to realize (what the insurers and their counsel knew or ought to have known from the outset) that the individual actions did not include a claim for uninsured losses and the named plaintiffs had not already decided to opt out of the class if certified.

[58] Since it is now clear that the ZTGH and Vilarino actions do not seek recovery of all uninsured losses, it follows that the insureds must rely on a second action to claim these losses. Counsel for the objectors never explained how two actions arising from the same explosion can co-exist in the face of authority from the Supreme Court of Canada stating that there can only be one proceeding.

[59] As well, counsel for the objectors did not respond to the following passage quoted in class counsel's supplementary factum. This quote from Nicholas Legh-Jones, Q.C., Professor John Birds, David Owen, *McGillivary on Insurance Law*, 11th ed. (U.K.: Sweet & Maxwell, 2008) states that the insured, not the insurer, controls the litigation until the insured has been indemnified in full for all insured and uninsured losses:

> The assured is entitled to control any proceedings brought in his name until he has received complete indemnity, that is to say, if the insurer has not paid what is in fact a complete indemnity for all damage insured or uninsured arising from the same cause of action as the damage in respect of which payment has been paid, the assured remains *dominus litis* until he has recovered a complete indemnity and if he undertakes to prosecute his claim for the whole damage, the insurers cannot interfere. The assured must conduct the litigation with the proper regard for the insurer's interest and will be liable in damages for any misconduct for any abandonment of rights.

[60] It was wholly unrealistic for the objectors to assume that in these circumstances the court was not going to stay the ZTGH and Vilarino actions pending the outcome of the certification hearing.

[61] Counsel for the Teskey defendants remarked during argument that the Stay Motion was "out of control" and far too much time was being invested in what was a simple stay motion. I agree that too much time was invested in what should have been a simple stay motion, but the objectors' actions are to blame.

Rule 57.01 Factors

[62] To decide on the amount of costs that should be awarded, the relevant factors under r. 57.01 must be considered.

[63] The plaintiffs' costs outline confirms that the work was appropriately shared among lawyers with different levels of experience. The partial indemnity rates range from a low of $90 for a student to a high of $350 for senior counsel. These billing rates are similar to the partial indemnity rates used by the other parties requesting costs. This reinforces my view that the rates are reasonable.

[64] Counsel for the objectors did not provide the court with any information about the costs they incurred. Often this is a useful tool to determine what an "unsuccessful party could reasonably expect to pay" for the costs that are being fixed.

[65] The Stay Motion was important to class counsel and those defendants who consented to the order. Class counsel have invested considerable time and expense in moving the class action ahead and, in particular, dealing with liability and damage issues. It is clearly important to them that they not lose control of these issues with individual actions moving ahead. A stay order is beneficial to the defendants because it allows them to focus on the upcoming certification hearing and avoid (at least for now) having to defend individual actions as well.

[66] I have already commented on the conduct of the objectors and how it unnecessarily caused class counsel to incur significant costs. In my view, this factor is significant in my decision to hold the objectors responsible for costs.

[67] Another factor that I take into account is the fact that there are six insurance companies to share the burden of a cost award. While I do not see the cost award in this case having a "chilling effect", the fact that the costs will be shared by six insurers eliminates any chilling effect that one might say exists. The objectors knew or ought to have known the costs they were exposing themselves to and could have easily avoided such costs.

[68] Counsel for the objectors submits that the legal issues raised on this Stay Motion will have to be decided at some point in the future and therefore the research work done by class counsel is not wasted. To a certain extent this is accurate, assuming the following occurs: the class proceeding is certified, the insurers in the ZTGH and Vilarino actions seek to lift the stay, the ZTGH and Vilarino actions do not claim uninsured damages and their insureds do not opt out of the class. If these events materialize then these legal issues will likely be considered on a motion to lift the stay.

[69] However, the same analysis does not apply to the rest of the work done by class counsel. The objectors should have known that they had a problem and were not going to avoid a stay order. The costly exchange of affidavits, cross-examination on affidavits and related work could have been avoided.

[70] Lastly, in arriving at an appropriate amount for costs, I must step back and consider what amount, in all the circumstances, is fair and reasonable.

Costs Awards

[71] Taking all of these factors into consideration and stepping back to consider what is fair and reasonable, I make the following orders.

[72] I reduce the fees of Class Counsel by 15%. This fairly reflects that some of the work may be of use later in this proceeding.

[73] I fix the costs of class counsel at $35,531.70 plus HST of $4,619.12 and disbursements of $5,414.66. The total is $45,565.48. I order the six insurance companies to pay $45,565.48 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

[74] The Teskey defendants supported the Stay Motion. Junior counsel on the file attended the cross-examinations on the affidavits and did most of the work for their clients on this motion leading up to the hearing of the motion. Obtaining the stay pending certification was important to these defendants. They did not want to bear the expense of defending individual actions while proceeding with the certification hearing.

[75] The partial indemnity costs of the Teskey defendants are fair and reasonable and I allow them. I fix the costs of the Teskey defendants at $5,300 plus HST of $689 plus disbursements of $18.36 for a total of $6,007.36. I order the six insurance companies to pay $6,007.36 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

[76] Lastly, there is the request of the Sunrise defendants for costs. Sunrise initially supported the Stay Motion. Counsel attended the cross-examinations on the affidavits, filed a factum and made submissions. In the factum they state a “stay may no longer make sense” and that they will support the most cost effective way of resolving all claims.

[77] The objectors submit that no costs should be awarded to the Sunrise defendants since in effect they withdrew their support for the motion. It is perhaps more accurate to say that they are “sitting on the fence” waiting to see what happens.

[78] I appreciate that they had an interest in this Stay Motion and had reason to attend the cross-examinations on the affidavits. However their role should not in the end be more costly than the role of the Teskey defendants. For this reason, I fix the costs of the Sunrise defendants at $5,300 plus HST of $689 and disbursements of $420 for a total of $6,409. I order the six

insurance companies to pay $6,409 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

C. Horkins J.

Released: January 11, 2011

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and THE TECHNICAL STANDARDS AND SAFETY AUTHORITY

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: January 11, 2011