

**CITATION:** National Steel Car Limited v. City of Hamilton, 2024 ONSC 5418  
**COURT FILE NO.:** 12-36015 (Hamilton)  
**DATE:** 2024/10/01

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
NATIONAL STEEL CAR LIMITED )  
 )  
 )  
Plaintiff ) Jerome Morse and David Trafford, Counsel  
 ) for the Plaintiff, National Steel Car Limited  
- and - )  
 )  
THE CORPORATION OF THE CITY )  
OF HAMILTON, ARCELORMITTAL )  
DOFASCO INC. and HAMILTON )  
PORT AUTHORITY )  
Defendants ) Adam Bucci and Nicole Pelaia, Counsel for  
 ) The Defendant, The Corporation of the City  
 ) Of Hamilton  
 )  
 ) Jordan Diacur, Counsel for the Defendant,  
 ) ArcelorMittal Dofasco Inc.  
 )  
 ) Mark Abradjian and Greta Ladanyi, Counsel  
 ) For the Defendant, Hamilton Port Authority  
 )  
 )  
 ) HEARD: March 20, 21, 22, 23, 24, 27, 28  
 ) and 29, April 11, 12, 13, 14, 17, 18, 19, 20,  
 ) 21, 24, 25, 26, and 27, May 1, and  
 ) November 23, 2023

**GIBSON J.**

**REASONS FOR DECISION REGARDING PREJUDGMENT INTEREST**

*Overview*

[1] This case concerns the flooding of the lands of the Plaintiff National Steel Car Limited (“National”) in Hamilton over the course of many years. In my reasons for decision on the trial of this complicated matter (*National Steel Car Limited v. City of Hamilton*, 2024 ONSC 4120), I found the Defendants the City of Hamilton (“the City”) and ArcelorMittal Dofasco Inc. (“AMD”) liable in nuisance, in negligence, and pursuant to the Rule in *Rylands v. Fletcher*, and awarded both special and punitive damages. The facts are set out in detail in that decision, and it is not necessary to repeat them in significant detail here. In my decision, I encouraged the parties to agree upon appropriate costs, but directed that, if they could not, they might make written submissions to me.

[2] The parties have now indeed agreed on most aspects of costs, but disagree on the issue of prejudgment interest. They have made supplementary written submissions to me in this regard.

[3] The Statement of Claim in this case was issued on August 16, 2012. The Plaintiff National seeks prejudgment interest (“PJI”) on the court’s award of special damages in the sum of \$936,094.29. National submits that the court should exercise its discretion pursuant to s.130 of the *Courts of Justice Act* (“CJA”) and grant National’s claim to PJI. To do otherwise, National submits, would be to grant the Defendants the City and AMD, an unnecessary and unwarranted financial benefit whilst depriving National compensation for the cost of incurring its special damages since 2010.

[4] National calculates its claim to PJI based on the Canadian bank prime rate for the quarter in which a particular special damage was incurred (whether due to a flood event or due to a specified invoice cost for flood abatement and prevention measures), calculated from the date that loss was incurred to the date of judgment, July 24, 2024, and compounded annually. The Canadian bank prime rate is the lowest available commercial rate of credit. National submits that its claim to PJI is necessary to partially compensate it for its costs of capital to incur the special damages it was awarded at trial (for which the City and AMD were each found to be 50% liable).

[5] The City takes no position on the issue of PJI.

[6] AMD does not dispute that this is a case where PJI should be awarded to the Plaintiff National. Rather, it submits that applying the PJI calculation as established by ss. 127 - 128 of the *CJA* is appropriate, supplemented by an annual compounding, given the nature of the damages awarded. The factors to be applied when the court is asked to use its discretion to increase an award of PJI beyond the usual calculation are set out in s.130(2) of the *CJA*. AMD submits that when the relevant factors are considered, it is clear that an award of PJI calculated using the usual rule and supplemented by an annual compounding would be the appropriate award. AMD proposes that PJI in the amount of \$375,848.11 be awarded, to be paid in equal 50% shares by the City and AMD.

*Law*

[7] The relevant statutory provisions are found at ss.127-128 and s.130 of the *CJA*, which provide:

**Prejudgment and postjudgment interest rates**

**Definitions**

127 (1) In this section and in sections 128 and 129,

“bank rate” means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the *Bank Act* (Canada); (“taux d’escompte”)

“date of the order” means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed; (“date de l’ordonnance”)

“postjudgment interest rate” means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent; (“taux d’intérêt postérieur au jugement”)

“prejudgment interest rate” means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point; (“taux d’intérêt antérieur au jugement”)

“quarter” means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December. (“trimestre”) R.S.O. 1990, c. C.43, s. 127 (1).

**Calculation and publication of interest rates**

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

- (a) determine the prejudgment and postjudgment interest rate for the next quarter; and
- (b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years. 2006, c. 21, Sched. A, s. 18.

### **Regulations**

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published. 2006, c. 21, Sched. A, s. 18.

### **Prejudgment interest**

**128** (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. R.S.O. 1990, c. C.43, s. 128 (1).

### **Exception for non-pecuniary loss on personal injury**

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w). R.S.O. 1990, c. C.43, s. 128 (2); 1994, c. 12, s. 44.

### **Special damages**

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

### **Exclusion**

- (4) Interest shall not be awarded under subsection (1),
- (a) on exemplary or punitive damages;
  - (b) on interest accruing under this section;
  - (c) on an award of costs in the proceeding;
  - (d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;
  - (e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;
  - (f) where the order is made on consent, except by consent of the debtor; or
  - (g) where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 128 (3, 4).

### **Discretion of court**

**130** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

- (a) disallow interest under either section;
- (b) allow interest at a rate higher or lower than that provided in either section;
- (c) allow interest for a period other than that provided in either section.

### **Same**

- (2) For the purpose of subsection (1), the court shall take into account,
- (a) changes in market interest rates;
  - (b) the circumstances of the case;
  - (c) the fact that an advance payment was made;
  - (d) the circumstances of medical disclosure by the plaintiff;
  - (e) the amount claimed and the amount recovered in the proceeding;

- (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
- (g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.

[8] Costs and punitive damages are excluded from the PJI calculation, and interest is not payable upon interest, pursuant to s.128(4) of the *CJA*.

*Assessment*

[9] I agree with the submission of the Plaintiff National that AMD's proposed calculation of PJI, or a calculation of PJI pursuant to s.128 of the *CJA*, would under-compensate National for its costs of capital to fund the special damages awarded. Simple interest or interest calculated in accordance with the interest rates and method of calculation pursuant to s. 128 of the *CJA* will deprive National indemnification and unnecessarily affords the Defendants a financial benefit, as they had the benefit of avoiding the costs of maintaining the Channel for over two decades.

[10] Section 128 of the *CJA* sets out one approach to the calculation of PJI, but the court has discretion under s.130 to deviate from this method. Section 128(1) provides that PJI is calculated from the date the cause of action arose (September 28, 2010) to the date of the order, July 24, 2024. The "prejudgment interest rate" is defined in s. 127(1) of the *CJA* as "the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point". "Bank rate" is defined as "the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the Bank Act (Canada)". These rates are promulgated by the Attorney General.

[11] This is not the Canadian bank prime rate, which is the rate offered for credit by conventional banks to commercial customers. In this case, since the claim was issued July 18, 2012, the PJI rate under s. 128 is 1.3%, far less than National's actual cost of capital and lower than the lowest commercial lending rate available.

[12] Section 128(4)(b) provides that interest does not accrue on PJI calculated pursuant to s. 128 of the *CJA*. Section 128(3) provides that PJI calculated on special damages for past pecuniary

loss is calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order (the “Six-Month Rule”). The Six-Month Rule in s. 128(3) is meant to reflect the fact that special damages are (usually) not incurred all at once. In the past, courts have endorsed a shorthand to avoid the cumbersome nature of the Six-Month Rule by reducing the statutory PJI rate by one-half and applying it to the entire award for special damages: *Dorion v. Ecodevelopments Windsor Inc.*, 2012 ONSC 80, at para. 70.

[13] Reducing the PJI rate under s.128 by one-half to avoid the cumbersome Six-Month Rule, results in an interest rate of 0.65%, which is significantly less than National’s cost of capital incurred to pay its special damages.

[14] Section 130 of the *CJA* is clear that the court has the discretion not to follow the method of calculating PJI provided by s. 128. The relevant parts of s. 130 provide:

130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

- (a) disallow interest under either section;
- (b) allow interest at a rate higher or lower than that provided in either section;
- (c) allow interest for a period other than that provided in either section.

(2) For the purpose of subsection (1), the court shall take into account,

- (a) changes in market interest rates;
- (b) the circumstances of the case; [...]
- (e) the amount claimed and the amount recovered in the proceeding;
- (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and [...]
- (g) any other relevant consideration.

[15] In *Bank of America v. Mutual Trust Co.*, 2022 SCC 43, at para. 36, the Supreme Court of Canada addressed the interplay between ss. 127, 128 and 130 of the *CJA* and adopted the following statement from *The Law of Interest in Canada* with approval as to the purpose of an award of PJI:

Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process.

[16] With respect to the application of s. 130 of the *CJA*, the Court said at paras. 39-40:

Sections 128 to 130 [the] *CJA* entitle a person with an award for damages to interest on the damages for the period between the date that the cause of action arose and the judgment ("pre-judgment interest"), as well as for the period between the judgment and the time when payment is made in full ("post-judgment interest"). The legislation recognizes the unfairness of awarding a plaintiff damages, at trial, in the amount to which he or she was entitled as of the date that the cause of action arose, and no more for the period in between, which is frequently years. Sections 128 and 129 *CJA*, therefore, contain interest rates and methods of calculation to serve for prejudgment and post-judgment interest, respectively, in those cases for which there is no evidence of a more appropriate interest rate and/or method of calculation.

Sections 128(4)(g), 129(5) and 130 *CJA*, each of which allows the judge to award interest other than as specifically set out in ss. 128 and 129, clearly indicate that the rates and calculation methods of interest provided in ss. 128 and 129 are applicable in the absence of more appropriate rates and methods of calculation. Section 130 allows a court, where it considers it just, to vary the interest rate or the time for which interest may be awarded.

[17] I agree with National's submission that the court should exercise its discretion and award PJI to National based on the Canadian prime bank rate in the financial quarter in which the specific special damage was incurred, compounded annually, to the date of judgment. There is evidence on a more appropriate rate of interest and method of calculation that would achieve the underlying objective of an award of PJI, which is to compensate National for the costs of borrowing to pay the loss incurred. In the circumstances of this case, I find that to accede to AMD's position on PJI would provide it with an unwarranted economic windfall.

[18] The s. 130 factors that are relevant to the court's discretion favour the approach proposed by National: the calculation of PJI under s. 128 of the *CJA* disregards changes in market interest rates over a period of 13 years and the actual interest rates incurred by National that are significantly in excess of the s.128 PJI rates (s.130(2)(a)); the circumstances of the case, for example the City's denial of ownership until the week prior to trial when it knew since October 2000 that it was the owner and nonetheless contended that National, as an adjacent landowner, should maintain the City's Channel (s.130(2)(b)); the Plaintiff was completely successful in recovering the amount claimed (s.130(2)(e)); the conduct of the parties that unnecessarily lengthened the proceeding, (s.130(2)(f)); and not awarding National's proposed calculation will result in significantly under-compensating National (s.130(2)(g)).

[19] The Defendants purposefully avoided their responsibilities to maintain their own properties knowing that this decision would cause National to continually incur significant damages. In particular, the City denied ownership of the Channel to avoid the expense of maintaining the natural water course on its property, and both Defendants chose to intentionally disregard what they knew were their legal duties to their neighbours in order to avoid the costs of maintaining their properties.

[20] The Defendants have had the benefit of not having to pay the costs associated with the usual and routine preventative maintenance that all experts agreed was required to maintain and remediate the Channel.

[21] The length of this proceeding was needlessly extended by the Defendants who refused to admit obvious facts such as the ownership of the Channel, and the causes of the flooding to the National property.

[22] As a result of these findings of fact, it follows that the s.128 approach to the calculation of PJI is insufficient to indemnify National for its special damages, and, in fact, could result in a financial benefit to the Defendants who avoided their routine maintenance expenses for over 24 years.



[23] In *Bank of America v. Mutual Trust Co.*, *supra*, at para. 43, the Supreme Court of Canada was clear that the court has discretion to award compound interest for PJI and held:

To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff.

[24] While *Bank of America* was a case concerning a breach of contract, the Supreme Court of Canada's decision is premised on the doctrine of *restitutio in integrum*, that is, to restore the Plaintiff to the position it would have been but-for the Defendants' wrong. For example, the Court noted that "compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid".

[25] Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it: *Enbridge Gas v. Marinaccio*, 2011 ONSC 4962, at para. 17.

[26] The Defendants received a significant financial benefit by refusing to incur the costs to maintain their properties for decades. Meanwhile, National incurred significant costs that it would have otherwise avoided but-for the negligence and nuisance of the Defendants. The Defendants are sophisticated entities who are presumed to have made the most beneficial use of the funds that would have been spent on property maintenance.

#### *Order*

[27] The Defendants shall pay PJI in the sum of \$936,094.29, for which the City and AMD shall each be 50% liable.

[28] The parties may revise their previously agreed draft Order to reflect this decision and present it to me for signature through my Judicial Assistant at [mona.goodwin@ontario.ca](mailto:mona.goodwin@ontario.ca).

*Costs*

[29] It is assumed that the costs of preparation of the supplementary written submissions regarding PJI as between National and AMD will be subsumed within the parties' agreement as to costs generally.

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M.R. Gibson J.

**DATE: October 1, 2024**

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Plaintiff

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THE CORPORATION OF THE CITY  
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**REASONS FOR DECISION REGARDING  
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M.R. Gibson J.

**Released: October 1, 2024**