**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***MacQueen v. Canada (Attorney General)***, 2008 NSCA 117

**Date:** 20081216
**Docket:** CA 298520
**Registry:** Halifax

**Between:**

Neila Catherine MacQueen, Joseph M. Pettipas, Ann Marie Ross, Kathleen Iris Crawford, and The Estate of Carl Anthony Crawford by his executor or representative Kathleen Iris Crawford

Appellants

v.

The Attorney General of Canada, representing Her Majesty the Queen in right of Canada; The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia; Sydney Steel Corporation, a body corporate; and Canadian National Railway Company, a body corporate,

Respondents

- and -

CA 301824

Neila Catherine MacQueen, Joseph M. Pettipas, Ann Marie Ross, Kathleen Iris Crawford, and The Estate of Carl Anthony Crawford by his executor or representative Kathleen Iris Crawford

Appellants

v.

Canadian National Railway Company, a body corporate; The Attorney General of Canada, representing Her Majesty the Queen in right of Canada; The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia; and Sydney Steel Corporation, a body corporate,

Respondents

**Judge(s):** Saunders, Fichaud, JJ.A. & Murphy, J. (ad hoc)

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| **Appeal Heard:** | December 8, 2008, in Halifax, Nova Scotia |
| **Held:** | Each of these companion appeals is dismissed, per reasons for judgment of Saunders, J.A.; Fichaud, J.A. and Murphy, J. concurring |
| **Counsel:** | C. Scott Ritchie, Q.C. & Raymond F. Wagner, for the appellants<br>Agnes E. MacNeil & Alison W. Campbell, for the respondents, Attorney General of Nova Scotia & Sydney Steel Corporation<br>Michael F. Donovan, Q.C., Angela Green and Melissa Cameron, for the respondent, Attorney General of Canada<br>Dennis James & Cathy L. Dalziel, for the respondent, Canadian National Railway Company |

**Reasons for judgment**:

[1] After hearing the appellants' submissions we recessed and then returned to announce our unanimous view that while leave to appeal was granted, the two appeals ought to be dismissed with reasons to follow. These are our reasons.

[2] We were asked to consider two separate applications. The first involved an application for leave to appeal from an interlocutory decision and order of Mr. Justice A. David MacAdam, in Chambers, where he granted a motion brought by the Attorney General of Canada, pursuant to **Civil Procedure Rule** 18, and required the representative plaintiffs to attend for discovery prior to their application for class action certification. I will refer to this matter as the "AG Canada appeal."

[3] The companion proceeding was an application for leave to appeal from an interlocutory decision and order of MacAdam, J., in Chambers where he granted a motion brought by the Canadian National Railway Company, thereby confirming that the provisions of **CPR** 31 would apply to the evidence and reports of experts whose reports and affidavit evidence have been or will be filed in support of a party at the certification hearing, and granting all parties the right to examine for discovery all other parties' experts in advance of the certification application, notwithstanding that such discoveries may take place after January 1, 2009, being the inception date of the revised **Civil Procedure Rules**. I will refer to this matter as the "CNR appeal." In both orders, Justice MacAdam restricted the discovery examinations to matters relevant to the certification application.

[4] On October 9, 2008 this Court directed that the AG Canada appeal and the CNR appeal should be heard together.

[5] The background to this complicated litigation may be briefly stated. In 2004 the appellants commenced each of the actions to which the present appeals relate as a representative common law action under **Civil Procedure Rule** 5.09. Owing to the similarities in these two claims I will use the singular to generally describe both proceedings. The action seeks redress for environmental harm to persons and property said to have been sustained by the residents of Sydney, Nova Scotia, arising from decades of uncontrolled industrial pollution. The appellants' statement of claim, in its current third amended form, comprises 150 paragraphs. There are multiple defendants, two of whom have been removed by way of

discontinuance or striking of the action against them. There is a proposed class period from the year 1957 onward. There is a proposed class of Plaintiffs comprising the whole, or the better part of, the entire geographical area of the Municipality of the Town of Sydney, Nova Scotia. By previous order of the Supreme Court, no defences are required to be filed until the outcome of the class certification application is known. Justice MacAdam has been the case management judge from the very beginning.

[6] Detailed minutes of case management conferences presided over by Justice MacAdam make it clear that on the hearing of the class certification application there will be numerous issues for determination. Apparently three weeks of hearing time have been set aside. In support of their application for certification the appellants have filed affidavits of the four representative plaintiffs, three scientific experts, and one other person concerning the proposed litigation plan. Each of the remaining defendants has filed affidavits of experts in response. The parties have made known their respective intentions to conduct cross-examination of affiants at the hearing.

[7] These two appeals deal with the right to conduct discovery of the deponents of affidavits filed in a class action certification application. In the AG Canada appeal the deponents are the representative plaintiffs. In the CNR appeal the deponents whose discovery obligations are at issue are expert witnesses.

[8] Within this complicated setting and as the judge in charge of case managing the file MacAdam, J. decided that limited pre-certification hearing discoveries ought to be permitted in a case he described with considerable understatement as being “unusual.”

[9] Neither impugned order makes any reference to the **Class Proceedings Act**, S.N.S. 2007, c. 28. For the purposes of this decision we need not pronounce on the interpretation or application of that statute to this or future cases. The two orders under appeal confirm directions given by Justice MacAdam pursuant to his discretionary authority under the **Nova Scotia Civil Procedure Rules**, particularly **CPR** 18 and **CPR** 31, respectively. Thus, each of these matters is an interlocutory application for leave to appeal, involving a discretionary order. This court has stated repeatedly that it will not interfere with such an order unless wrong principles of law have been applied or a patent injustice would result. See, for example, **Exco Corporation Limited v. NS Savings & Loan et al** (1983), 59

N.S.R. (2d) 331 (N.S.C.A.); and **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 243 (N.S.C.A.). Absent an error in law, we will only interfere if serious or substantial injustice, material injury or very great prejudice would result if we did not. See **Coughlan v. Westminer Canada Holdings Ltd.**, (1989), 91 N.S.R. (2d) 214.

[10] While prepared to grant leave I have dismissed both the AG Canada appeal and the CNR appeal as I am not persuaded that MacAdam, J. either erred in law or that the directives he issued will clearly result in an obvious and substantial injustice.

[11] Here costs should follow the event. The appellants shall pay to each of the respondents who filed written submissions and appeared on the hearing, they being the Attorney General of Canada, the Attorney General of Nova Scotia, and the Canadian National Railway Company, costs of $1,000.00 (intended to cover both applications) inclusive of disbursements.

Saunders, J. A.

Concurred in:

Fichaud, J. A.

Murphy, J.