C.A. No. 133130
C.A. No. 133131

NOVA SCOTIA COURT OF APPEAL

Roscoe, Matthews and Flinn, JJ.A.

Cite as: Global Petroleum Corp. v. CBI Industries Inc., 1997 NSCA 42

BETWEEN:

GLOBAL PETROLEUM CORP, a body corporate, TUPPER CORP., a body corporate as General Partner of Tupper Associates Limited Partnership, SCOTIA SYNFUELS LIMITED, a body corporate and POINT TUPPER VENTURES LIMITED, a body corporate	)	Robert W. Carmichael for the Appellants
	)	David P.S. Farrar for the Respondents
	)	Appeal Heard: January 30, 1997
Appellants	)	
- and -	)	Judgment Delivered: January 30, 1997
CBI INDUSTRIES INC., STATIA TERMINALS INC., STATIA POINT TUPPER CORPORATION and STATIA TERMINALS POINT TUPPER, INC. all bodies corporate	)	
Respondents	)	

AND BETWEEN:

C.A. No. 133132

GLOBAL PETROLEUM CORP.	
Appellant	)
- and -	)
POINT TUPPER TERMINALS COMPANY	)
Respondent	)

THE COURT: Appeals dismissed in C.A. Nos. 133130 and 133132 and appeal allowed in C.A. No. 133131 per oral reasons for judgment of Matthews, J.A.; Roscoe and Flinn, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

MATTHEWS, J.A:

This judgment concerns three of four interlocutory applications heard together by a chambers judge of the Supreme Court. The law respecting interlocutory appeals is set out by Flinn, J.A. in the first of the four, C.A. 133073, is adopted and will not be repeated here.

The three appeals are in respect to two actions: **Global Petroleum Corp. v. Point Tupper Terminals Company**, the so-called Terminal Storage action, and **Global Petroleum Corp. v. CBI Industries Inc**., the so-called fraud action. Briefly put, C.A. 133130 concerns an application to consolidate the two actions; C.A. 133131 concerns an order to stay the fraud action; and C.A. 133132 concerns an application to amend Global's defence to counterclaim in the Terminal Storage action. The chambers judge denied C.A. 133130, the application to consolidate and C.A. 133132, the application to amend and ordered a stay of C.A. 133131.

In all three applications the chambers judge's reasons are brief. He is the case management judge with knowledge of the two actions.

On denying the application to consolidate, C.A. 133130, the chambers judge said:

> ...The first view that I have, on reading everything, is that I would not order a consolidation of the two actions. It seems to me that the two actions are quite separate. There are different parties involved; different issues involved The first action, the '93 action, is really an action regarding fuel and storage. The second action of April of '96 is the very substantial fraud action, and the parties, as I say, are different; and the issues are

significantly different; and it would not be just, in my view, to consolidate those two actions at this time, and any discretion that I would have not to, I would exercise in that favour; I would not consolidate the actions.

It must be noted that the chambers judge said "at this time". Thus, clearly, an application may be made later, should the facts underlining such an application become more definitive than they are now.

Applying the reasoning of Flinn J.A. in C.A. 133073 this appeal from that interlocutory decision is dismissed.

As to C.A. 133132, the application to amend the defence to counterclaim, the chambers judge remarked:

> With regard to the amendment, again, I've read, as I say, everything that has been provided, and I realize what the law is on amendments. But I am of the view that granting the amendment to the first action very substantially changes the action from what it was by introducing the particular notion of fraud, which is the same issue that's raised in the other case. And, it seems to me, that that would not be an appropriate amendment at this stage of the proceeding. And my view would be that I would not grant that amendment to the first action, the 1993 action.

Here, it is noted that the chambers judge commented that the amendment would not be appropriate "at this stage of the proceeding". It appears to this Court that at some later date, an application to amend may be made, if appropriate, particularly if an application is then made to consolidate.

Again, applying the reasoning of Flinn, J.A. C.A. 133073, this appeal is dismissed.

C.A. 133131, the order to stay the fraud action, is another matter, The chambers judge ruled:

> ...The only problem I have is whether or not a stay should be granted in the second action (that is, the fraud action) until the first action is resolved. Because of the possibilities of conflict of interest of counsel which may be raised, it is my view that the second action really should be stayed until the first action is complete.

...

MR. RYAN

There is one matter which has been raised which you haven't dealt with, and that's the representation of Stewart MacKeen and Covert in the fraud action; that's the application which is before you, not the application in the terminal action.

THE COURT

That's why I -- that's the problem I have with that particular action. And so here we have one action going ahead with Global and -- the 1993 action -- Global and Point Tupper Terminals. And they would be acting on that one. If the other one is going ahead, then there's the question of whether or not they should be acting on that one. And that's why I would prefer to stay that action, so that it not be activated until such time as the first action is resolved.

MR. RYAN

Well, what's your disposition, then, on the application to disqualify this firm on the fraud action?

THE COURT

I would not decide that issue at the present time. If I'm correct in staying it, I think that would be a matter to be dealt with later.

Counsel for the appellant, Scotia Synfuels Limited, applied for an order declaring that respondent's counsel, Stewart McKelvey Stirling Scales, had a conflict of interest in the fraud action. Scotia Synfuels is not a party to the Terminal Storage action and thus the alleged conflict does not arise in that action. The chambers judge did not rule on this application but, on his own motion ordered a stay of the fraud action.

The chambers judge came to his conclusion to stay without hearing argument from counsel and when questioned, foreclosed the matter, stating he did not invite counsel "to make any more oral submissions" and "It makes another ground for appeal, but you'll have to deal with that".

It is of importance that neither party requested that stay. No application for that stay was made. The power to order such a stay in the manner done, is not contained in the **Civil Procedure Rules** or the **Judicature Act**. We can find no precedent, nor were we informed of any by counsel, where a stay in similar circumstances was granted.

With respect to the chambers judge, we cannot agree that the parties concerned should be prevented from proceeding with the fraud action until the first action is "resolved" or "complete", even though it may well mean that, in the fraud action, or in any other action, certain solicitors would be prohibited from acting, a proposition yet to be determined.

Here, we repeat, the chambers judge stayed the action on his own motion. He did not give the parties an opportunity to be heard prior to ordering the stay. The words quoted by Cullen, J. in **Mon-Oil Limited v. Canada** (1989), 27 F.T. R. 50 at p. 51 are apt:

> The law is quite clear and best stated by Muldoon, J., in **Fruit of the Loom Inc. v. Chateau Lingerie Mfg. Co. Ltd.** (1984), 79 C.P.R. (2d) 274, at page 278:
>
> > "a genuine onus rests on the applicant seeking to interfere with a plaintiff's right to pursue a lawful cause of action. Such applicant must persuade the court that continuing the action would be an abuse of process in which the applicant would somehow be prejudiced and not merely inconvenienced."
>
> Reed, J., in action No. T-266-88 writes:
>
> > "The applicant must also demonstrate that the respondent would suffer no appreciable prejudice or injustice if the stay is granted. As the applicable law points out it is not merely a balance of convenience test which is applied. The burden on the applicant is heavier than that."

Although the situations including the duration of the stays may differ, in this case we adopt the principle that the power to order a stay of proceedings is an exceptional power which should only be exercised in the clearest of cases as expressed in several cases including **R. v. MacDonnell** (1996); **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341; **R. v. Jewitt** (1985), 6 W.W.R. 127 (S.C.C.) and **Halsbury's Laws of England** (4th) Vol. 37 at p. 330.

Although this is an appeal from an interlocutory decision and the order is discretionary, the decision must be exercised on the proper legal principles, after careful consideration of all of the evidence, hearing counsel and ensuring that injustice must not be done to the party whose action will be stayed. Those circumstances do not exist here.

We allow this appeal and set aside the order granting a stay in this action.

As success in the four appeals is evenly divided there shall be no order as to costs.

Matthews, J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.

C.A. No.133130
C.A. No. 133131

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GLOBAL PETROLEUM CORP., a body corporate, TUPPER, CORP. a body corporate as General Partner of Tupper Associates Limited Partnership, SCOTIA SYNFUELS LIMITED, a body corporate and POINT TUPPER VENTURES LIMITED, a body corporate		
	Appellants	
- and -		REASONS FOR JUDGMENT BY:
CBI INDUSTRIES INC., STATIA TERMINALS INC. STATIA POINT TUPPER CORPORATION and STATIA TERMINALS POINT TUPPER INC., a body corporate		
		MATTHEWS, J.A.
	Respondents	

S.C.A. No. 133132

BETWEEN:

GLOBAL PETROLEUM CORP.		
- and -	Appellant	
POINT TUPPER TERMINALS COMPANY		
	Respondent	