NOVA SCOTIA COURT OF APPEAL

Citation: *Sydney Steel Corporation v. MacQueen*, 2012 NSCA 78

Date: 20120719
Docket: CA 393200
Registry: Halifax

Between:

Sydney Steel Corporation, a body corporate and
The Attorney General of Nova Scotia representing
Her Majesty the Queen in right of the Province of Nova Scotia

Appellants

v.

Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross,
and Kathleen Iris Crawford, and The Attorney General of Canada
representing Her Majesty the Queen in right of Canada

Respondents

Judge:	The Honourable Justice Joel Fichaud
Motion Heard:	July 12, 2012, in Halifax, Nova Scotia, in Chambers
Held:	Motion for stay dismissed with costs of $1,000 in the cause of the appeal
Counsel:	Agnes E. MacNeil and Alison W. Campbell for the applicants (Appellants) Sydney Steel Corporation and the Attorney General of Nova Scotia Raymond F. Wagner, Michael Dull and Meaghan Gair (student) for the respondents Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross and Kathleen Iris Crawford Melissa Chan for the Attorney General of Canada

Reasons for judgment:

[1] The Attorney General of Nova Scotia moves for a stay pending the Attorney General's appeal of a certification order in a class action.

Background

[2] I take the background facts from Justice John Murphy's decision that is under appeal (2011 NSSC 484).

[3] The Sydney Steel Works opened in 1903 and operated coke ovens and a steel plant. Ms. MacQueen, Mr. Petitpas, Ms. Ross and Ms. Crawford ("plaintiffs") owned land and lived near the Steel Works. They claim that the Steel Works' facilities emitted lead, arsenic, PAH's and other toxins. They sue in tort and for breach of fiduciary duty, and seek damages for their own exposure and for injury to their property and its value. The lawsuit began in 2004. Some claims against private entities were settled or abandoned. The remaining claims are against the Governments of Nova Scotia and Canada, and relate to the period between 1967 and 2000. From 1968 to 1974, Canada operated the coke ovens and Nova Scotia operated the steel plant. From 1974, Nova Scotia operated both the coke ovens and the steel plant until those facilities closed in 1988 and 2000 respectively.

[4] In September 2007, the plaintiffs filed a notice seeking certification as a common law class proceeding. After the *Class Proceedings Act*, S.N.S. 2007, c. 28 (*Act)*, came into force, the matter was continued under that *Act*.

[5] Justice Murphy's decision summarizes the tenor of this lawsuit:

> [5] During the more than seven years since this proceeding commenced, including while the certification issue has been pending, the scope of the plaintiffs' claim has been substantially reduced. The defendants have not filed a notice of defence; pursuant to section 4(6) of the Act they are not required to do so until 45 days after certification order is issued, and the court dismissed a plaintiffs' motion seeking earlier filing. Nevertheless, the defendants have demonstrated the intention to dispute all aspects of the claim. A motion brought during 2006 to strike claims was considered by this court and by the Court of Appeal, and in written and oral submissions throughout the certification process the defendants repeatedly signalled that every cause of action advanced and remedy sought would be contested. The court has struck out claims for negligence and breach of

fiduciary duty in relation to regulation of the Steel Works, and the plaintiffs have decided to narrow the claims, including by reducing the scope of negligence alleged and abandoning pursuit of some remedies, such as compensation for diminution of property value and for personal injuries. The plaintiffs continue to seek a medical-monitoring program to identify and provide information about health risks resulting from defendants' conduct, but they no longer seek damages for individual health problems.

[6] Despite the statement of claim being amended approximately nine times, usually to reduce rather than expand the causes of action and remedies sought, the proceeding remains complex, with the most recent consolidated amended statement comprising more than 100 paragraphs, containing allegations of battery, strict liability and nuisance, trespass, negligence and breach of fiduciary duty.

[7] The process seeking certification as a class action has been complex, vigorously contested, and prolonged. The parties attended case management meetings and brought procedural motions, including a defence motion concerning conducting both cross examinations and discovery of affiants, which was ultimately resolved by the Court of Appeal.

[6] Section 7(1) of the *Act* states:

Certification by the court

7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

(a) the pleadings disclose or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by a representative party;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and

(e) there is a representative party who

(i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[7] In June 2010, the plaintiffs sought certification of the class proceeding under s. 7(1), naming of two classes: (1) persons who owned property within a stated radius ("Property Owner Class") and (2) persons who resided within that radius for a minimum period after January 5, 1968 ("Residential Class"). Justice Murphy dealt with the motion through case management conferences and hearings, as discussed in his decision (paras 8-73). The judge described the outcome of that initial motion:

> [74] The parties were advised following the Original Motion hearing that a class action would be the preferable procedure for the representative plaintiffs to advance this litigation. For the reasons which I have outlined, causes of action and common issues were approved for certification, subject to suitable definition of property owner and residential classes.

[8] In October 2010, the plaintiffs filed an amended motion for certification, that proposed class boundaries with a reduced area but extended seven year habitation requirement for the residential class. Justice Murphy heard that motion in December 2010. His decision comments on the amended motion:

> [76] The parties and the court approached the December 2010 hearing as addressing an amendment to the Original Motion, not a replacement for the motion which had been presented at the earlier sessions. It was, in effect, a "continuation." Accordingly, the evidence from the Original Motion and the June 2010 submissions, as well as documentation filed and submissions made after that hearing, were part of the record for deliberation in December 2010. Consistent with that approach, previous evidence and submissions did not have to be repeated, and, indeed, defence counsel sometimes referred to the evidence and the plaintiffs' argument from the initial hearing to dispute the boundaries proposed in the Amended Motion.
>
> [77] The defendants continue to maintain that no aspect of the plaintiffs' claim should be certified as a class action and forcefully challenge the revised class definitions and boundaries proposed in the Amended Motion. Although nothing was conceded, and they object to certification on behalf of both potential property

> owner and residential claimants, the defendants did not appear to seriously dispute that if, despite their objection, the proceeding on behalf of the potential claimants on whose behalf the representative plaintiffs commenced the action were to be certified, it would be appropriate to have two plaintiff classes – property owner and residential.
>
> [78] It is apparent from the statement of claim and representative plaintiffs' evidence that there are differences between the causes of action and common issues advanced and the remedies sought on behalf of plaintiffs who owned property and those who did not. Subject to satisfactory definitions, the plaintiffs' proposal to establish two classes of claimants – property owner and residential – is reasonable and logical and will facilitate the management and advancement of the case.
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> [79] It is also sensible, as plaintiffs propose, that the geographic boundaries for both classes be the same. There is no evidence to suggest that locations in which residents would be affected by defendants' impugned activity would differ from areas where real property would be contaminated. The defendants (while maintaining full opposition to proposed boundaries) did not specifically challenge having common boundaries for both classes, if certification were ordered. In my view, defining the same geographic boundary for each class, as plaintiffs have done in the statement of claim and motion, is necessary to facilitate introduction of evidence and administration of the proceeding.

[9] The judge's decision (paras 80-124) then discussed the evidence and the parties' positions and reached conclusions on the area boundaries of both the Property Owner and Residential Classes, and the temporal limit of the Residential Class.

[10] The judge (paras 125-27) approved "in principle" the proposed litigation plan for the class proceeding, but suggested that the case management process be used to fine tune its procedural, scheduling and logistical features.

[11] The judge concluded:

> [129] The plaintiffs' amended motion for certification is accordingly granted, with the revisions reflected in these reasons.

[12] Justice Murphy's Order, embodying his decision, was issued on May 1, 2012.

[13] On May 15, 2012, the Attorney General of Nova Scotia ("Province") appealed. The Province challenges the judge's finding that some causes of action were viable, his definition of the classes and conclusions as to commonality. The Province requests the Court of Appeal to deny any certification of a class proceeding.

[14] By a separate notice of appeal (CA 392560), the Attorney General of Canada also appealed, and requested that certification of the class proceeding be denied. The Attorney General of Canada made no motion for a stay, and observed but did not actively participate in the Province's motion for a stay.

[15] The appeals are scheduled for hearing in March 2013.

[16] On June 8, 2012, the Province moved for a stay of Justice Murphy's certification order. That stay effectively would suspend the class proceedings in the Supreme Court of Nova Scotia, pending the outcome of the Province's appeal. I heard that motion on July 12, 2012.

The Test for a Stay

[17] Rules 90.41(1) and (2) say:

> **90.41** (1) The filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from.
>
> (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[18] The tests under Rule 90.41(2) remains those stated by Justice Hallett in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341, paras 28-30, under the former Rule 62.10(2). The applicant for a stay must show that either: (1) there is an arguable appeal, and denial of the stay would cause him irreparable harm and the balance of convenience favours a stay, or (2) there are exceptional circumstances making it just that a stay be granted: *Molloy v. Molloy*, 2012 NSCA 28, para 11, and cases there cited.

Fulton's Primary Test

[19] Much of counsel's effort on the motion related to the merits of the Province's challenge to the denominators of commonality for the definition of the classes. On a stay motion, there is a low bar for arguability. I accept that the Province's grounds of appeal are arguable on their face. I will not analyse the fine points of the Province's submissions or the respondents' reply. Those are merits issues for the panel on the appeal proper.

[20] I will turn to irreparable harm. As stated in *Halifax (Regional Municipality) v. Casey*, 2011 NSCA 69:

> [41] An applicant for a stay must prove irreparable harm by evidence. General conclusory statements are insufficient: *Myatt v. Myatt*, 2004 NSCA 124, para 10, and cases there cited; *Gill v. Hurst*, 2010 NSCA 104, para 12.

To similar effect *C.B. v. T.M.*, 2012 NSCA 75, para 13.

[21] The Province's brief for this motion submits that denial of a stay would cause two categories of irreparable harm:

> 71. ... In this instance, the AGNS submits there are two elements which raise the issue of irreparable harm. One is the likelihood that the plaintiffs would not be in a position to pay for the costs of the litigation leading up to the common issues trial in circumstances where the common issues set for trial may change significantly. The second is the confusion that the public might feel if the litigation of the common issues as currently stated proceeds to the common issues trial, should the appeal change the issues set for trial or significantly reduce the scope of the litigation.

[22] The hearing of the appeal is scheduled for March 2013, meaning that, in the normal course, a decision from the Court would be expected by mid to late spring of 2013.

[23] The question for me is - If there is no stay and if the Province's appeal succeeds, would the course of the class proceedings in the Supreme Court, between today and late spring of 2013, cause irreparable harm in one of the two manners identified in the Province's brief?

[24] In my respectful view, the answer is No. I will address the Province's two categories of irreparable harm.

[25] The Province's first suggested category of irreparable harm is that "the plaintiffs would not be in a position to pay for the costs of the litigation". The Province's submission assumes that: (1) the Province would succeed on the appeal; (2) between today and the release of the Court of Appeal's decision, the Province would incur expense to defend the class proceeding additional to those expenses that the Province would have to pay anyway to respond to whatever claims would survive or emanate from the Court of Appeal's decision; (3) the plaintiffs would be ordered to pay the Province's additional costs; and (4) the plaintiffs would be unable to satisfy that judgment.

[26] I will discuss those assumptions. My concerns are with the second and fourth.

[27] I said earlier that, for the purpose of this motion, the Province has an arguable appeal. On that basis, I accept the Province's first assumption.

[28] It is premature to comment on the merits of the third assumption. The point is not capable of proof by the Province at this stage. For the purpose of this motion, I will assume that, if the class proceeding fails, the Province will be entitled to an award of costs.

[29] I have two concerns with the Province's second assumption.

(a) This appeal does not involve a summary judgment motion that would dismiss the claims outright, in any form, against the Province. Rather, the appeal seeks to strike the Certification Order for a common issues trial in a class proceeding. The Province's Notice of Appeal requests that "certification be denied". If the Certification Order is struck, the Province will still face individual claims, first filed in 2004, involving similar issues. The expense of defending individual claims, whether litigated serially or jointly, might exceed the expense of defending a common issues trial in a class proceeding. One purpose of a class proceeding is to try common issues once, instead of repeatedly, which delivers an expense efficiency to both sides.

If the class certification is struck, that efficiency may be sacrificed. On the other hand, that efficiency may be inapplicable to these claims. I am in no position to assess whether it is one or the other. The Province has offered no evidence on the point that establishes how defending individual actions would cost the Province less than defending one common issues trial.

(b) I am not satisfied that the Province will incur any substantially higher expenses between today and the release of the Court of Appeal's decision. Under the litigation plan that Justice Murphy's decision approved in principle, the next ten months would involve the completion of the pleadings, the exchange of documents and (after documents are exchanged) the discovery of the parties. There is no evidence to estimate, in any quantum I can grapple with, how the Province would incur expenses for its pleading or document disclosure that would be significantly higher because of points that are in issue on the appeal.

The initial claim was filed in 2004. It is reasonable to assume that, over the ensuing eight years up to today, the Province has made significant progress toward drafting its Defence and accumulating its documents. If that assumption is accurate, then there may not remain a significant level of marginal expense for pleading and accumulation of documents. If that assumption is mistaken, then the Province's recourse is to seek permission to revise the milestones in the litigation plan, regardless of this appeal. That permission should be addressed directly with Justice Murphy in the case management of the Supreme Court litigation, not as a side effect of a stay from the Court of Appeal.

The parties would be discovered whether there is a common issues trial, under a certification, or individual claims by those parties. It is true that the outcome of the appeal may affect lines of questioning. But I have no evidence how that factor affects the Province's marginal expense of conducting discoveries.

If I am to issue a stay based on the Province's costs as irreparable harm, I need a reliable indication of what remains to be done during the stay period, what component of that residue would be wasted if the Province's

> appeal is allowed, and some estimate of that cost. There is no evidence on these points. Vague and conclusory statements of counsel, without evidence, do not establish the prerequisites for a stay of an enforceable Order of the Supreme Court.

[30] Neither has the Province established its fourth assumption - that the Plaintiffs would be unable to satisfy a costs award for any such additional expenses. The Province tendered, as evidence of the Plaintiffs' financial condition, an affidavit of Ms. Laverne Gleeson, a paralegal with the Provincial Department of Justice. Ms. Gleeson performed online searches of the realty owned by the named representative plaintiffs, and summarized the result in Exhibit A to Ms. Gleeson's affidavit. Exhibit A lists nine properties, with columns entitled "Appraised Value (2012 Residential Taxable)" and "Mortgage Amount". Ms. Gleeson's affidavit says that the "Appraised Value" is the municipal assessment. The last six properties on the List in Exhibit A show a cumulative "Appraised Value", or assessment, of $373,400, with no unreleased mortgages. I take this as evidence of equity totalling $373,400 that is available for execution to satisfy a hypothetical judgment to the Province for the Province's litigation expenses. This amount does not include any other assets of the Plaintiffs, or their employment income, that would be available to satisfy a judgment.

[31] There is nothing in the evidence for this motion to suggest that, if the stay is denied and the Province later succeeds on the appeal, the Province would have incurred additional, wasted and taxable litigation expense that exceeds the plaintiffs' proven equity $373,400. The Province has not met its onus to establish the first category of its suggested irreparable harm.

[32] The Province's second suggested category or irreparable harm (above para 21) is that the public would "feel confusion" if the Certification Order's premise for the pre-trial procedures is changed by the Court of Appeal.

[33] Section 22 of the *Act* says:

> (1) Subject to subsection (2), notice that a proceeding has been certified as a class proceeding must be given by the representative party for the class to the class members in accordance with this Section.
>
> ...

> (3) Subject to subsection (2), the court shall make an order setting out when and by what means notice is to be given under this Section ...

[34] Justice Murphy's Certification Order of May 1, 2012, paras 12-13, provides for publication of the Notice of Certification. The form of Notice, in Schedule "C" to the Order, describes the Property Owner and Residential Classes and states:

> Members of the Property Owner and Residential Classes who want to participate in the class action are automatically included and need not do anything at this time.
>
> Each Class Member will be bound by the terms of any judgment or settlement and will not be allowed to prosecute an independent action. If the class action is successful, he or she may be entitled to share in the amount of any award or remedy recovered. If unsuccessful, claims of all Class Members will be barred.
>
> **You must opt out if you do not want to participate in the class action.** Class Members who do not want to participate in the class action must opt out. If you want to opt out of the class action, you must send a written, signed election, including your name, address, telephone number to: WAGNERS. **No Class Member will be permitted to opt out of the class action unless the election to opt out is received by WAGNERS before [DATE].**
>
> [emphasis in the Notice]

[35] The Certification Order states:

> 15. The Notice Program shall be implemented on a date to be fixed by the Court upon the approval of the Notice.

[36] I understand from counsel that Justice Murphy has not yet fixed a date for implementation of the Notice Program under para 15 of the Order, and that likely the date will not be fixed until after the Court of Appeal has issued its decision on these appeals.

[37] If the Notice was published now, then there would be a potential for prejudicial confusion. For instance, the Court of Appeal might change the class definitions, which might necessitate a second correcting Notice. But, as I understand it, the judge sensibly intends that there will be only one Notice, published after the Court of Appeal's decision. Given that premise, there is no evidence of any confusion that would irreparably affect the progress of the litigation.

[38] If the Province succeeds in its appeal, the public would observe a decision of a lower court altered by an appeal court. That is par for the course of appellate litigation, not irreparable harm.

[39] The Province has not proven irreparable harm. It is unnecessary to consider the balance of convenience. There is no basis for a stay under *Fulton*'s primary test.

Fulton's Secondary Test

[40] There is no exceptional circumstance making it just that a stay be granted, under *Fulton*'s secondary test.

[41] The litigation began in 2004, before its conversion to a class proceeding several years later. There is no imperative of justice that, eight years onward, would further defer the progress of pretrial disclosure and discovery. Civil Procedure Rule 1.01 says that the "Object of these Rules" is for "the just, speedy, and inexpensive determination of every proceeding". The *Rules* assume that at some opportune moment - in my view, before the passage of eight years - the tale should mature from plot development to climax, and the preparation should culminate in a trial.

Conclusion

[42] I dismiss the motion for a stay. I quantify the costs of the motion at $1,000, to be payable in the cause of the appeal.

Fichaud, J.A.