NOVA SCOTIA COURT OF APPEAL

Citation: *APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited v. Fares Construction Ltd.*, 2025 NSCA 42

Date: 20250610
Docket: CAC 538657
Registry: Halifax

Between:

APA Inc. Experts Conseils/Consultants

Appellant

v.

Fares Construction Limited, W.M. Fares Family Incorporated, Lead Structural Formwork Ltd., W.M. Fares Architects Inc., Grove US LLC, Rapicon Inc., Rapicon Tower Cranes West Ltd., BMR Structural Engineering Limited, Forgeron Engineering Limited, Passmore Inspection & Consulting Ltd., Cherubini Group of Companies, Cherubini Metal Works Limited, Olympus Properties Management Limited, Halifax County Condominium Corporation No. 340, Dunlop Law Incorporated carrying on business as Walker Dunlop, Manual Food and Drink Co. Ltd., W.M. Fares & Associates Incorporated, The Mantiwoc Company, Inc., R&D Crane Operators Limited, Thornbloom Boutique Limited, 3272422 Nova Scotia Ltd., Malcolm Norton Limited o/a Thumpers Salon, Twiggz Shoes Inc., Vafa Mirzaagha, Aaron Clarke, Dany Savickas, and Halifax Regional Municipality

Respondents

And Between:

Docket: CA 540834
Registry: Halifax

Forgeron Engineering Limited

Appellant

-and-

Fares Construction Limited, W.M. Fares Family Incorporated, Lead Structural Formwork Ltd., W.M. Fares Architects Inc., Grove US LLC, Rapicon Inc., Rapicon Tower Cranes West Ltd., BMR Structural Engineering Limited, Passmore Inspection & Consulting Limited, Cherubini Group of Companies, Cherubini Metal Works Limited, Sovereign General Insurance Company, Olympus Properties Management Limited, Halifax County Condominium Corporation No. 340, Dunlop Law Incorporated carrying on business as Walker Dunlop, Manual Food and Drink Co. Ltd., W.M. Fares & Associates Incorporated, The Mantiwoc Company, Inc., R&D Crane Operators Limited, Thornbloom Boutique Limited, 3272422 Nova Scotia Ltd., APA Inc. Experts Conseils/Consultants, Malcolm Norton Limited o/a Thumpers Salon, Twiggz Shoes Inc., Vafa Mirzaagha, Aaron Clarke, Dany Savickas, and Halifax Regional Municipality

Respondents

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	May 14, 2025, in Halifax, Nova Scotia.
Facts:	During Hurricane Dorian, a crane collapsed at a construction site in downtown Halifax, leading to extensive damage and subsequent litigation involving multiple contractors and parties. The Appellants, APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited, were sued by the project's developer and general contractor. They later discovered a builders' risk insurance policy that included them as insureds, which they sought to use in their defense (paras 1-4, 16-18).
Procedural History:	Supreme Court of Nova Scotia, November 5, 2024: Justice Scott Norton denied APA's and Forgeron's motions to amend their defenses to include claims related to the insurance policy, ruling the proposed amendments were not justiciable (paras 22-26).
Parties' Submissions:	Appellants (APA Inc. and Forgeron Engineering Limited): Argued that they should be allowed to amend their defenses to include claims that they are insured under the policy, and that the claims against them should

	be dismissed as they are pursued by a co-insured under the policy, which is barred by law (paras 4, 28). Respondent (Sovereign General Insurance Company): Opposed Forgeron's appeal and initially took no position on APA's appeal but later opposed it, arguing that the proposed amendments were not justiciable and that there was no evidence of a subrogated claim (paras 25, 30).
Legal Issues:	Are the proposed amendments to APA's and Forgeron's defenses justiciable? (para 28)
Disposition:	Leaves to appeal granted, appeals allowed, and amendments to defenses permitted, with costs to the Appellant Forgeron Engineering Limited.
Reasons:	Per Fichaud J.A. (Farrar and Bryson JJ.A. concurring): The Court found that the motions judge erred in law by ruling the proposed amendments were not justiciable. The judge failed to properly apply the principles governing amendments to pleadings, which require that an amendment be permissible if it is offered in good faith, would not cause serious prejudice, and raises a justiciable issue. The Court noted that the issues of subrogation and waiver under the insurance policy involve complex interpretations and disputed facts that cannot be summarily determined without evidence. The Court allowed the amendments, as they were not absolutely unsustainable on their face, and ordered Sovereign to pay costs to Forgeron (paras 32-50).

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R&D Crane Operators Limited, Thornbloom Boutique Limited, 3272422 Nova Scotia Ltd., APA Inc. Experts Conseils/Consultants, Malcolm Norton Limited o/a Thumpers Salon, Twiggz Shoes Inc., Vafa Mirzaagha, Aaron Clarke, Dany Savickas, and Halifax Regional Municipality

Respondents

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	May 14, 2025, in Halifax, Nova Scotia.
Held:	Leaves to appeal granted, appeals allowed and amendments to defences permitted, with costs to the Appellant Forgeron Engineering Limited, per reasons for judgment of Fichaud J.A., Farrar and Bryson JJ.A. concurring
Counsel:	Michael Blades and Grace Levy for the Appellant APA Inc. Experts Conseils/Consultants Richard MacGregor and Izabella Chamberland for the Appellant Forgeron Engineering Limited Matthew McEwen and Sarah Dobson for the Respondent Sovereign General Insurance Company The other Respondents not participating in the appeal

Reasons for judgment:

[1] During a hurricane, a crane collapsed at a construction site in downtown Halifax. The event generated litigation with many contractors sued as direct or crossclaim defendants, third, fourth and fifth parties. They include the Appellants APA Inc. Experts Conseils/Consultants ("APA") and Forgeron Engineering Limited ("Forgeron"). APA and Forgeron were sued by the project's developer, the Respondent W.M. Fares Family Incorporated, and its related companies (together - "Fares") and by a general contractor Lead Structural Formwork Ltd. ("Lead").

[2] Near the outset of construction, Fares obtained from Sovereign General Insurance Company ("Sovereign") a builders' risk insurance policy for the project ("Policy"). The Policy provided "wrap up" liability coverage by including "all contractors, subcontractors, project and construction managers, architects, engineers and consultants" in the definition of "insured". The Policy's term included the date of the crane's collapse.

[3] APA and Forgeron were unaware of the Policy until it appeared during the production of documents from Fares, after they had filed their initial defences to the claims of Fares and Lead. Consequently, their defences did not cite the Policy.

[4] Having seen the Policy, APA and Forgeron decided to amend their defences to plead: (1) they are "insureds" under the Policy, (2) the claims against them are pursued by Sovereign in the names of Fares and Lead, who are co-insureds under the Policy, (3) an insurer is "barred as a matter of law" from pursuing a claim against its "insured" in the name of a co-insured and (4) consequently, the claims by Fares and Lead should be dismissed. In the Supreme Court of Nova Scotia, APA and Forgeron each moved for this amendment. Neither Fares nor Lead objected to the amendments being made.

[5] The motions judge denied the amendments and dismissed APA's and Forgeron's motions. APA and Forgeron apply for leave and seek to appeal.

[6] Under Nova Scotia's practice, an amendment to a pleading is permitted if it raises a "justiciable issue", is proposed in good faith and would not cause to the other party serious prejudice that is non-compensable in costs. The motions judge said the proposed amendments were not justiciable.

[7] In the Court of Appeal, the only issue is whether the proposed amendments to APA's and Forgeron's defences are justiciable.

Background

[8] As is normal on a motion to amend, I assume the pleaded allegations.

[9] In 2018, Fares began the erection of an apartment building on Brenton Street in downtown Halifax ("Brenton Project"). Fares hired Lead as a general contractor. The multi-story project required the use of a tower crane. Lead hired Forgeron for services related to the tower crane and APA to design the crane's concrete base and deal with aspects of the crane's functions.

[10] On March 26, 2019, Sovereign issued the Policy: *i.e.* builders risk insurance policy no. SOV79551487 to W.M. Fares Inc. covering the Brenton Project for a term of August 20, 2018 through December 20, 2020.

[11] For the motion to amend, the Policy was exhibited to an affidavit without objection and was cited by all the parties.

[12] The Policy provides wrap up liability coverage for the Brenton Project. To that end, it defines "insured" as follows

> Manuscript wording for: SM502.1 - **Who is An Insured Amendment**
>
> Applicable to Form: S70050 - **Wrap-Up Liability Insurance**
>
> Words and phrases in quotation marks have special meaning as defined in this endorsement, or if not defined in this endorsement, as defined in the form to which this endorsement is attached.
>
> Section II - **Who Is An Insured** is amended to add the following:
>
> 1.(e) **All contractors, subcontractors, project and construction managers, architects, engineers and consultants.**
>
> This endorsement modifies the insurance provided under the form(s) to which the endorsement is attached and is subject to the terms, limitations, exclusions, provisions and other conditions of the policy.
>
> [bolding added]

[13] Under "Additional Conditions", the Policy says:

> VII. SUBROGATION
>
> The Insurer, **upon making any payment or assuming liability** therefore [*sic* - therefor] under this Policy, **shall be subrogated** to all rights of recovery of the Insured against others and may bring action to enforce such rights.
> **Notwithstanding the foregoing, all rights of subrogation are hereby waived**

> **against any corporation, firm, individual or other interest with respect to which insurance is provided by this Policy. …**
>
> [bolding added]

[14] The Wrap-Up Liability Insurance Conditions contain a "No-action" Condition:

> 8. Legal Action Against the Insurer
>
> **No person or organization has a right under this policy**:
>
> (a) **To join the Insurer as a party** or otherwise bring the Insurer into an "action" asking for compensatory damages from an Insured; or
>
> (b) To sue the Insurer on this policy unless all of its terms have been fully complied with.
>
> **A person or organization may sue the Insurer to recover on an agreed settlement or on a final judgement against an Insured** obtained after an actual trial; but the Insurer will not be liable for compensatory damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by the Insurer, the Insured and then claimant or the claimant's legal representative. Every "action" or proceeding against the Insurer shall be commenced within one year next after the date of such judgement or agreed settlement and not afterwards. …
>
> [bolding added]

[15] The Wrap-Up Liability Insurance Conditions treat the insureds as several rather than joint:

> 14. Separation of Insureds, Cross Liability
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned to the first Named Insured [*i.e.* Fares], **this insurance applies**:
>
> (a) **As if each Named Insured were the only Named Insured**; and
>
> (b) **Separately to each Insured** against whom claim is made or "action" is brought.
>
> [bolding added]

[16] On September 7, 2019, during Hurricane Dorian, the tower crane collapsed in the high winds, damaging both the work underway at the Brenton Project and neighbouring buildings owned by others.

[17] The collapse precipitated this complex litigation, now engaging 28 parties with lawyers, and some 200 pleadings to date. The litigation comprises four actions: (1) Hfx. No. 503819 (Fares Action); (2) Hfx. No. 506527 (Olympus Action); Hfx. 508997 (Thornbloom Action); (4) Hfx. No. 508902 (HRM Action). The actions are partly consolidated and jointly case managed.

[18] The pleadings include direct claims, crossclaims, third-party and fourth-party claims against APA and Forgeron. The claims against APA and Forgeron involved in this appeal are brought by Fares and Lead. They allege (1) APA improperly designed the crane and its concrete base and failed to warn of foreseeable risks from the approaching hurricane, and (2) Forgeron improperly inspected, used inadequate testing equipment, employed workers with insufficient training, failed to properly account for wind conditions and erroneously certified the crane tower.

[19] As a result of the documentary production, various parties have amended their pleadings without opposition. At the date of the motions under appeal, there had been no examinations for discovery respecting liability and no production of expert reports on causation or damages.

[20] When APA and Forgeron filed their defences to the claims by Fares and Lead, they were unaware of the Policy. They learned of it with Fares' production of documents.

[21] Having learned of the Policy, on April 15 and September 6, 2024, respectively, APA and Forgeron filed motions in the Supreme Court of Nova Scotia to amend their pleadings in three respects:

> 1. They sought to add Sovereign as a named party and claim indemnity from Sovereign under the Policy.
>
> 2. They sought to add Sovereign as a named party and claim that Sovereign owed APA and Forgeron a duty to defend under the Policy.
>
> 3. They sought to amend their defences to the claims by Lead and Fares. The proposed amendments alleged: those claims were being pursued by Sovereign in the "name" of Lead and Fares; each of APA and Forgeron was an "insured" under the Policy; and Sovereign was "barred as a matter of law" from pursuing a claim against its insured.

[22] Justice Scott Norton heard the motions on May 2, 2024 (APA motion) and October 28, 2024 (Forgeron motion). Only APA, Forgeron and Sovereign participated. On November 5, 2024, Justice Norton issued a Decision for both motions (2024 NSSC 332). The Decision dismissed APA's and Forgeron's motions and denied the three proposed amendments.

[23] To dispose of the first and second proposed amendments, Justice Norton relied on the Policy's No-action Condition 8, quoted above. The judge held that any action for indemnity naming Sovereign must await either a settlement or a judgment, as prescribed by the condition (Decision, paras. 12-34). Similarly, the No-action Condition precluded adding Sovereign as a party in the existing proceeding for an interlocutory motion that Sovereign had a duty to defend. Rather, according to the judge, APA and Forgeron must start a new and separate proceeding to request a declaration that Sovereign has a duty to defend in the existing proceeding (Decision, paras. 35-58).

[24] Neither APA nor Forgeron appeals the judge's denials of the amendments to add Sovereign as a party for either indemnity or a duty to defend. I will not comment further on those points.

[25] APA's and Forgeron's third proposed amendments would supplement their defences to the claims brought by Fares and Lead. As these amendments would not join Sovereign as a party, they would not offend the No-action Condition 8. In the Supreme Court, neither Fares nor Lead opposed the proposed amendments. Though Sovereign was a party to the motion and the appeal, it was not a named party in the underlying litigation, to which the amendments pertain. Nonetheless, Sovereign opposed Forgeron's proposed amendment. As to APA's proposed amendment, Sovereign initially took no position but later opposed it at the second hearing before Justice Norton.

[26] The motions judge denied the amendments as not justiciable. Later, I will discuss the judge's reasoning. The Supreme Court issued an Order dated January 30, 2025 to this effect, with costs payable by APA and Forgeron to Sovereign, in each of actions Hfx No. 503819, 506527, 508997 and 508902.

The Appeal, Issue, Leave and Standard of Review

[27] APA and Forgeron filed separate applications for leave to appeal that raise the same issue. This Court heard the appeals together. APA's and Forgeron's

submissions overlap. I will treat the appeals as consolidated, and these reasons govern both.

[28] The only issue is whether the motions judge erred in law by ruling the proposed amendments to APA's and Forgeron's defences are not justiciable.

[29] Whether the Policy covers or excludes the risks represented by the claims against Fares and Forgeron was not an issue in the Supreme Court or the Court of Appeal. My reasons offer no view on that point.

[30] As was the case in the Supreme Court, neither Fares nor Lead appeared or opposed the proposed amendments. Sovereign did not file a factum respecting APA's appeal. At the appeal hearing, Sovereign's counsel confirmed Sovereign does not oppose APA's appeal. However, Sovereign opposed Forgeron's appeal by a factum and orally at the appeal hearing.

[31] An interlocutory appeal needs leave. Leave is granted where the appellant raises an arguable issue, meaning a submission that could, if accepted, result in the appeal being allowed: *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, at para. 18; *Automattic Inc. v. Trout Point Lodge Limited*, 2017 NSCA 52, at para. 23. As I will discuss later, the issue raised by APA and Forgeron satisfies this standard. I would grant leave to appeal to both APA and Forgeron.

[32] Whether the judge erred in law is reviewed for correctness.

Analysis

[33] *Civil Procedure Rules* 83.01, 83.02 and 83.11 permit an amendment with the permission of a judge.

[34] A series of rulings by this Court has established the principles that govern the judge's discretion whether to permit an amendment of pleadings: *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182 (S.C.A.D.), at pp. 182-3, per Clarke, C.J.N.S; *Point Tupper Terminals Company v. Global Petroleum Corporation*, 1998 NSCA 174, per Bateman J.A.; *Lamey v. Wentworth Valley Developments Ltd.*, 1999 NSCA 69, at paras. 12-23, per Glube, C.J.N.S.; *Garth v. Halifax (Regional Municipality)*, 2006 NSCA 89, at para. 30, per Cromwell J.A. (as he then was); *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20, at para. 26, per Wood, C.J.N.S.

[35] From these authorities, the following principles emerge:

- An amendment is permissible if it (1) is offered in good faith, (2) would not occasion to the opposing party serious prejudice that is non-compensable in costs, and (3) raises a justiciable issue.
- Justiciability is assessed by a standard like that on a motion for summary judgment on the pleadings under Rule 13.03, *i.e.* whether the proposed pleading is absolutely unsustainable on its face.
- "On its face" means the judge on an amendment motion neither hears evidence on the underlying merits, nor decides a contested fact pertaining to the merits, nor forecasts merits-related evidence and potential findings. Rather, the motions judge assumes the facts as pleaded or agreed.
- A contested allegation of material fact or mixed fact and law, or a debatable submission on an issue of law or contractual interpretation is not absolutely unsustainable on its face for an amendment motion.

[36] I will apply these principles to the motions judge's reasons.

[37] The Policy's Condition 14, quoted above, says the insurance applies "as if each Named Insured were the only Named Insured" and "Separately to each Insured against whom claim is made or 'action' is brought". Referring to Condition 14, the motions judge said:

> [62] With respect, the moving parties appear to be conflating a subrogation claim with the claims for [*sic*] by the Plaintiffs and crossclaims for contribution or indemnity by the co-defendants, some of whom may be co-insureds under the Policy.

[38] APA and Forgeron disagree that they conflated the claims. They take the position that Condition 14 governs a claim brought by an insured party, such as Fares or Lead, against another insured party, such as APA or Forgeron, without any subrogated direction by the insurer, *i.e.* Sovereign. Such a claim, they agree, would be uninhibited by the Policy. APA and Forgeron say their proposed amendments operate from the different premise that Sovereign is the real claimant by subrogation, for which the governing provision is Article VII, quoted above. If APA's and Forgeron's view prevails, a pivotal issue would be whether Sovereign is subrogated to Fares' or Lead's position.

[39] Justice Norton addressed subrogation. He said subrogation may arise by common law, statute or contract, *i.e.* the Policy (Decision, at para. 65). He concluded there was no subrogation at common law because Sovereign had not made full payment to Fares or Lead (paras. 64-65) and there was no statutory subrogation (para. 66).

[40] The motions judge turned to contractual subrogation under the Policy (Decision, paras. 68 ff.). He cited Article VII which provides that, upon "making any payment or assuming liability therefore [*sic*] under this Policy", Sovereign "shall be subrogated …", and "all rights of subrogation are hereby waived" against others covered by the Policy.

[41] Justice Norton said "[t]here is no evidence that there is any subrogated claim being made in these proceedings" (Decision, at para. 74). I assume this means there was no evidence of "any payment or assuming liability" under Article VII. Consequently, the judge concluded: "[t]he proposed amendments to the defences of APA and Forgeron are denied" (para. 77).

[42] In my respectful view, the judge erred in law in the application of the principles that govern amendments to pleadings.

[43] Whether there has been subrogation involves the analysis of the Policy's terms (*i.e.* Article VII) whose disputed interpretation is not self-evident, and the consideration of evidence as to whether the Policy's conditions precedent for subrogation and its waiver have occurred.

[44] The existence and effect of subrogation in a multi-party context is not always straight-forward.

[45] In *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.*, [1978] 1 S.C.R. 317 ("*Commonwealth*"), pages 321-31, Justice de Grandpré for the Court agreed with the submission that the "starting point" is "the basic principle that subrogation cannot be obtained against the insured himself", subject to exceptions. Justice de Grandpré analyzed the terms of the insurance policy and the facts to determine whether there had been subrogation. He noted that subrogation can be "renounced" (or waived). Renunciation depends on the policy's interpretation and whether the policy's trigger for renunciation has occurred.

[46] See also *Condominium Corporation No. 9813678 v. Statesman Corporation*, 2007 ABCA 216 ("*Statesman*"), per Côté J.A. for the Court, leave to appeal denied January 31, 2008 (SCC, #32254) where the matter is discussed at length.

[47] Whether Sovereign has been subrogated and, if so, whether subrogation has been waived, turn on the Policy's interpretation and disputed facts. Depending on how the evidence presents, these arguable points may include: (1) the interpretation and interplay of Article VII (Subrogation) and Condition 14 (Separation of Insureds, Cross Liability), (2) the impact of several, rather than joint liability among insureds, if severalty is the consequence of Condition 14, (3) the meaning of "any payment or assuming liability" in Article VII as a trigger for subrogation, (4) whether there has been "any payment or assuming liability" by Sovereign, (5) whether there has been waiver of any subrogation, and (6) if there was a waiver, to what extent the waiver may be limited. There may be other points that are not predictable at this stage.

[48] The analysis will require submissions on the interpretation of the Policy and evidence as to the dealings between Sovereign, on the one hand, and either Fares or Lead. Basic principles, such as those cited in *Commonwealth*, *Statesman* and like authorities, may apply and may be affected by the interpretation of the Policy or the findings.

[49] These issues cannot be determined summarily and in the abstract, without evidence or context, on a motion to amend the pleadings.

[50] With respect, the motions judge's finding – "[t]here is no evidence that there is any subrogated claim being made in these proceedings" – is unhelpful. This is not a motion for summary judgment on the evidence under Rule 13.04, where the parties are expected to "put their best foot forward" with evidence or risk an adverse ruling. Whether a proposed amendment is absolutely unsustainable is decided on the face of the pleadings, meaning the party moving for an amendment has no evidentiary onus to prove the merits of its proposed pleading. This is particularly so where, as here, any evidence is possessed by opposing parties (Fares, Lead or Sovereign) and is inaccessible to APA or Forgeron until production and discoveries.

Conclusion

[51] I would grant leave, allow the appeals and overturn the motions judge's rulings in the four Orders dated January 30, 2025, that the defences may not be

amended. I would allow APA and Forgeron to amend their defences, in the form proposed by the four motions, to the claims by Fares and Lead.

[52] I would overturn Justice Norton's rulings in the four Orders dated January 30, 2025, that APA and Forgeron pay to Sovereign costs for the motions in the Supreme Court. As matters stand after the appeal, success was divided for the three initially proposed amendments. Consequently, the parties should bear their own costs in the Supreme Court. Sovereign shall refund to APA and Forgeron any costs paid to date.

[53] I would order Sovereign to pay forthwith to Forgeron appeal costs of $1,500, all inclusive. As Sovereign did not oppose APA's appeal, I would not order appeal costs to APA.

Fichaud J.A.

Concurred:

Farrar J.A.

Bryson J.A.