SUPREME COURT OF NOVA SCOTIA

Citation: Halifax Dartmouth Bridge Commission v. Walter Construction Corporation, 2009 NSSC 403

Date: 20091230
Docket: Hfx No. 227346
Registry: Halifax

Between:

HALIFAX DARTMOUTH BRIDGE COMMISSION

PLAINTIFF
(DEFENDANT BY COUNTERCLAIM)

-and-

WALTER CONSTRUCTION CORPORATION
CHERUBINI METAL WORKS LIMITED

DEFENDANT
(PLAINTIFFS BY COUNTERCLAIM)

-and-

SIKA CANADA, MAPEI INC. and O'HALLORAN CAMPBELL CONSULTANTS LIMITED

DEFENDANTS

-and-

PARKER BROTHERS CONSTRUCTION LIMITED, JACQUES WHITFORD MATERIAL LIMITED, O'HALLORAN CAMPBELL CONSULTANTS LIMITED, AMERCOAT CANADA LIMITED, ARGO PROTECTIVE COATINGS INC. and PINNACLE AGENCIES LIMITED, 2283051 CANADA INC. (formerly known as Sternson Limited) and TSG PARTNERSHIP, a Limited Partnership

THIRD PARTIES

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	December 22, 2009, in Halifax, Nova Scotia
Counsel:	Christopher C. Robinson, Q.C.,for the Plaintiff, (Defendant by Counterclaim) Halifax Dartmouth Bridge Commission Geoff Saunders, for the Defendant, Sika Canada Inc. Michael Dunphy , Q.C., for the Defendant and Third Party, O'Halloran Campbell Consultants Limited J. Brian Church, Q.C., for the Defendants, (Plaintiffs by Counterclaim) Walter Construction Corporation/Cherubini Metal Works Limited John P. Merrick, Q.C., for the Defendants, Mapei Inc. John P. Barry, Q.C., and Talia C. Profit, for the Third Parties, 2283051 Canada Inc. and TSG Partnership Gordon F. Proudfoot, Q.C. , for the Third Party, Jacques Whitford Materials Limited Phillip Chapman, for the Third Parties, Parker Brothers Contracting Limited and Argo Protective Coating Inc.

By the Court:

Introduction

[1] This is a motion by 2283051 Canada Inc. and TSG Partnership for an order pursuant to *Civil Procedure Rule* 15.02(1) directing the plaintiff to search for, acquire and disclose all relevant documents pertaining to the failure and repair of Transpo 48 wearing surface applied to the MacDonald Bridge, and all subsequent services supplied thereafter, until the present date, and to deliver such documents to the applicant and all other parties.

Background

[2] The plaintiff, the Halifax Dartmouth Bridge Commission, in its second amended statement of claim, alleges, *inter alia*, at paragraph 21 that Sternflex was developed as a seamless wearing surface designed to withstand mechanical and thermal movement; that it was waterproof; that the product had an excellent bond to concrete and steel deck; that it was flexible, with very high abrasion resistance; and that Sternflex had excellent water, salt, oil, gasoline, chemical and weather resistance. It is alleged that the product was designed to provide waterproofing

protection to bridge decks, that the product was a tough, durable coating designed to provide years of trouble-free service, and that the manufacturer warranted the product. After installation, the plaintiff alleges, the product failed, and it was necessary to replace the product referred to as Transpo 48. The plaintiff sued a number of defendants involved in the so-called “Third Lane Project”, on account of the failure of the Sternflex surface and other alleged deficiencies.

[3] The applicant and other parties were added as third parties. In its Statement of Defence and Crossclaim, the applicant states that it was not responsible for any loss. The Applicant claims in its pleadings that the plaintiff failed to advise the suppliers of Sternflex of the movement of the bridge. The other parties have joined in the application for disclosure, claiming, as does the Applicant, that the documents sought are relevant to the proceeding. The Plaintiff resists the application on the ground that the documents are irrelevant to its claims against the Applicant or any other party.

[4] There is no dispute that the Sternflex surface was replaced with Transpo 48 surface. There is also no dispute for the purposes of this application that the Transpo 48 surface also failed. I understand that Sternflex is a thin surface, as is

Transpo 48. It is also undisputed that the Transpo 48 surface was replaced with a standard asphalt surface. The Applicant and the other parties argue that the question of whether the movement of the bridge caused the failure of the Transpo 48 is relevant to the determination of whether the Sternflex failed because of the movement of the bridge. According to the Applicant it is important to understand whether the failure was caused only by the manufacture or the application of the surface, or whether there were additional reasons for the failure, namely, that the movement in the bridge caused the product to collapse.

[5] In supporting the motion, Mapie referred the Court to an excerpt of the plaintiff's expert report (Section 2.4) suggesting that the use of thin paving for orthotropic steel bridge deck is uncommon, as well as to an excerpt of a discovery transcript where Mr. Buckland, the Plaintiff's expert, addressed concern about thin surfaces and stated that its performance over subsequent years would be relevant to an understanding of performance of thin surfaces.

[6] O'Halloran and Campbell’s position is that the Plaintiff did not object to the expert being discovered on the issues and the plaintiff has provided extensive documents arising from the discovery and that the plaintiff has altered its position.

Sika Canada says the Transpo 48 failure is relevant because parties are being asked to pay for the replacement an allegedly inadequate product with a product that also failed.

[7] The respondent/plaintiff refers to para. 21 of the Second Amended Statement of Claim, where it is alleged that, in choosing to apply the Sternflex surface, the Plaintiff relied on representations made by Sternflex. The plaintiff claims that this product was chosen following extensive testing by Sternflex. Mr. Robinson also refers to para. 14 of the amended Third Party Defence of 2283051 Canada Inc. and TSG Partnership, where the third party denies liability, claiming that the Plaintiff failed to perform adequate or sufficient inspections and supervision during the application of the Sternflex closing to ensure it was applied in suitable weather and in accordance with the project specifications and product instructions. It is also alleged that the applicators applying the Sternflex surface did so in a manner that was inappropriate and inconsistent with the product requirements, failed to ensure proper preparation of the Bridge deck and application of the Sternflex coating; and failed to advise the suppliers of Sternflex of the movement of the bridge.

[8] The Plaintiff says relevance is based on the pleadings, and should not extend to documents or information relating to any malfunction of the Transpo 48 surface, because this is not referred to in the pleadings or expert reports. The Plaintiff also alleges that movement of the bridge is not a sufficient basis upon which to find that the failure of Transpo 48 is relevant to the issues in the proceedings. Given that there has been no amendment to the pleadings to include a reference to Transpo, nor has there been any expert report to that effect, the Plaintiff submits that any such document is irrelevant. In the final analysis, the Plaintiff says, it is only seeking for the cost of replacement of Sternflex and related expenses. The Plaintiff acknowledges that it delivered some documents at the request of the other parties, but maintains that the additional documents requested are irrelevant to the claim.

[9] In reply, Mr. Barry, on behalf of the Applicant, says the Transpo 48 surface failed after the close of pleadings, that the movement of the bridge was not disclosed, that the Applicant and the other parties are entitled to rely on further occurrences of negligence arising before trial, and that the failure of the Transpo 48 may indicate a further act of negligence.

[10] Several of the other defendants and third parties have advanced arguments in support of the application. Mr. Merrick argues that, in order to establish that the Sternflex product was not defective, it is relevant to consider how subsequent products performed. Mr. Dunphy claims a major issue is causation, and specifically, what caused the failure of the Sternflex surface. If in fact the failure was caused by the movement of the bridge, and the failure of Transpo 48 sheds light on this issue, he submits, such documents are relevant. He adds that there is no need to refer to the Transpo 48 failure in the pleadings, because it is clear that causation will be an issue at the trial. Furthermore, in response to Mr. Robinson's observation that there is no expert's report in respect of the Transpo 48 failure, he says this is because the Applicant and the other parties do not have the information that would allow an expert to assess the significance of the Transpo failure. Mr. Proudfoot claims that the additional evidence from the Transpo 48 failure is similar fact evidence. Mr. Proudfoot maintains that material relating to the Transpo failure would constitute similar fact evidence that would be relevant to the Sternflex failure. Mr. Chapman says the method of application is relevant, and that if the Transpo was properly applied, there is an issue as to the failure of surface.

Issue

[11] The issue is whether documents pertaining to the failure of the Transpo 48 surface on the MacDonald Bridge are relevant to the defences advanced by the Applicant and the other parties?

Case Management status

[12] This proceeding is under case management. At the first meeting, I confirmed that the discovery rule (Rule 18) of the *Civil Procedure Rules (1972)* continued to apply. However, there was no determination as to whether issue of relevancy would be determined in accordance with the *Civil Procedure Rules (1972)* or the 2009 *Civil Procedure Rules*.

Law and Analysis

[13] The Nova Scotia Court of Appeal has established that the threshold of relevancy in the examination for discovery and production of documents in support of discovery under the *Civil Procedure Rules (1972)* is a "semblance of relevancy", resulting in a wide and liberal interpretation of the rules of disclosure and

discovery. Documents produced at discovery or at the pretrial stage on a standard of "semblance of relevancy" are not necessarily admissible on a more stringent test of relevancy at trial. The 2009 *Civil Procedure Rules*, however, impose a more stringent test of "relevancy" at the pre-trial stage.

[14] The position of the Applicant and certain other parties is that documents relating to the Transpo 48 surface have a semblance of relevancy, and therefore must be produced in order to permit the third parties and the defendants to properly defend the claim. I have decided, however, to apply the 2009 *Civil Procedure Rules*, which involve a more stringent threshold. Rule 14.01 provides as follows:

> **Meaning of "relevant" in Part 5**
> 14.01 (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> > (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
> >
> > (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[15] This rule provides that relevancy is to be determined on the threshold of relevancy at trial. Rules 15.02(1) and 18.13 of the 2009 *Civil Procedure Rules* are also relevant here. They provide:

> **Duty to make disclosure of documents**
> 15.02 (1) A party to a defended action or a contested application must do each of the following:
>
> (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
>
> (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
>
> (c) acquire and disclose relevant documents the party controls but does not actually possess.
> ....
>
> **Scope of discovery**
> 18.13 (1) A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> (2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence....

Therefore, under Rule 15, parties have to search for, acquire and disclose relevant documents. Rule 18.13 requires a discovery witness to answer questions seeking "relevant evidence or information that is likely to lead to relevant evidence," or "produce or provides access to documents... that is relevant or provides information that is likely to lead to relevant evidence." The Rule does not specify

the meaning of "likely to lead to relevant evidence" and whether this is a different threshold than "semblance of relevancy".

[16] I am of the view that the object of the rule is to make available information and documents that are likely to lead to relevant evidence at trial, which I take to mean that the information will probably lead to relevant evidence at trial. The key feature of the current rule is that the evidence has to be relevant to an issue at trial. It is important, however, to be mindful that at the pre-trial stage, the parties are still investigating the claim to determine whether there is a basis to defend. Consequently, at discovery, witnesses can be examined both as to relevant evidence and also for information that is likely to lead to relevant evidence. Similarly, witnesses could be examined on documents that are relevant and also on documents that are likely to lead to relevant evidence.

[17] To determine what is meant by “likely to lead to relevant evidence”, I have considered the meaning of “likely” as found in various dictionaries:

> *Blacks Law Dictionary*, Rev. 4th edn. (1968): “Probable.... In all probability.”
>
> *Merriam–Webster Online Dictionary*: “1. Having a high probability of occurring or being true: very probable <rain is likely today>” [...]

[18] The Respondent/Plaintiff's position is that whether the standard is "semblance of relevance" or "likely relevant" is immaterial because, regardless of the standard of relevancy, documents relating to the Transpo 48 are irrelevant and are not likely to lead to any relevant evidence. As to what is meant by relevancy, in *Sydney Steel v. Mannesmann Pipe* (1985), 69 N.S.R. (2d) 389 (S.C.T.D.), Hallett, J. (as he then was) stated, at paras. 14-18:

> [14] As stated earlier, relevancy, not legal privilege, is in issue in this application. The foregoing is merely intended to illustrate the trend of legal thinking with respect to the production of documents.
>
> [15] As relevancy is the issue on this application, it would not be inappropriate to consider what constitutes relevancy. The most accepted meaning of the word relevancy seems to be that made by Stephen in his *Digest of the Law of Evidence* and referred to by *Cross on Evidence*, Fourth Edition, at p. 16 where Sir Rupert Cross states:
>
> > "It is difficult to improve upon Stephen's definition of relevance when he said that the word 'relevant' means that:
> >
> > > 'any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.'"
>
> [16] P.K. McWilliams, Q.C., in *Canadian Criminal Evidence*, Second Edition, at p. 35, in a section dealing with the meaning of relevance, makes reference to this quotation from *Stephen's Digest* and goes on to state:
> "Relevancy is also defined simply as whatever is logically probative or whatever accords with common sense." McWilliams goes on to state that one must keep in mind that the decisions on issues of fact are left to the common sense of the jury and therefore it is pointless to attempt to arrive at a precise or philosophical definition of relevancy.
>
> [17] In the *Law of Evidence in Civil Cases* by Sopinka and Lederman, at p. 14 the authors also make reference to the quotation from Stephen's Digest as to the meaning of relevance and make the following statement that is applicable and

worthy of consideration when assessing the relevancy of the documents that are before me on this application:

> "The facts in issue are those facts which the plaintiff must establish in order to succeed together with any fact that the defendant must prove in order to make out his defence. It is seldom possible to prove a case or establish a defence solely by direct evidence as to the facts in issue and, therefore, the law admits evidence of facts, which, although not themselves in issue, are relevant in the sense that they prove or render probable the past, present or future existence (or non-existence) of any fact in issue.
>
> "The facts in issue are controlled by the date of the commencement of the action. All facts essential to the accrual of a cause of action must have occurred prior to commencement of the action but evidence may be tendered as to facts occurring after the commencement of the action if they merely tend to prove or disprove the existence of the facts in issue. On the other hand any fact giving rise to a defence need not have occurred before the commencement of the action. An admission after the issue of the writ by one of the parties is admissible and conduct which is tantamount to an admission is equally admissible.
>
> "The state of mind of a party may be proved as a fact in issue or as tending to prove or disprove a fact in issue. Thus the knowledge of a party may be directly in issue or relate to a matter directly in issue." [emphasis by Hallett J.]

[18] The significance of this passage is twofold: (1) while facts essential to the accrual of the cause of action must have occurred prior to the commencement of the action, evidence may be tendered as to facts occurring even after the commencement of the action, let alone facts occurring within a few months of the essential facts that give rise to the alleged claim if they tend to prove or render probable a fact in issue; (2) in addition, the state of mind of a party may tend to prove or make probable or disprove a fact in issue; the main fact in issue in this case being whether a contract had been made between the plaintiff and the defendant, evidence is relevant that tends to prove or make probable that fact.

[19] The question to be determined is not what the plaintiff seeks by way of damages, but whether the documents relating to the Transpo failure would in any way assist the defendants and the third parties in defending the plaintiff's claim.

The fact that it is not pleaded is not necessarily the controlling factor. One has to look the pleadings and determine whether there is information or documents which would support the defence that the failure was not attributable to the product or its installation, but rather to the particular physical characteristics of the bridge.

[20] The fact in issue is the failure of the Sternflex surface to meet its objective or purpose. The Defendants allege, among other things, that the plaintiff failed to advise the suppliers of products of the movement of the bridge. Should the failure of the Transpo 48 surface have resulted not from the product itself, or its application, also from the movement of the bridge, then I would agree that such information and documents are relevant. It must be remembered that under Rule 18.13, the applicant must satisfy the Court that the Transpo 48 documents are likely to lead to relevant evidence.

[21] To quote Justice Hallett, “there are very narrow limits within which a document will not be ordered to be produced”. I believe that in fairness and in view of the above principles, it is appropriate to require the plaintiff to produce the

documents relating to the failure and repair of Transpo 48 surface. At the hearing the arguments focused entirely on the Transpo 48 surface, therefore, I have not dealt with the release of any documents relating to any subsequent surface.

[22] Counsel are invited to submit their positions in writing on costs within three weeks of the release of this decision.

J.