

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General), 2006 NSSC 239

Date: 20060802

Docket: SH 184701

Registry: Halifax

Between:

Cherubini Metal Works Limited, a body corporate

Plaintiff

v.

The Attorney General of Nova Scotia representing her
Majesty the Queen in Right of the Province of Nova Scotia,
The United Steel Workers of America and The United Steel
Workers of America, Local 4122

Defendants

Judge: The Honourable Justice C. Richard Coughlan

Heard: May 16, 2006, in Halifax, Nova Scotia

Decision: August 2, 2006 (Re: Issue Estoppel)

Counsel: George W. MacDonald, Q.C. and Michelle C. Awad, for
the plaintiff, Cherubini Metal Works Limited
Michael T. Pugsley, for the defendant, Attorney General
of Nova Scotia
Raymond F. Larkin, Q.C. and Bettina Quistgaard, for the
defendants, United Steel Workers of America and the
United Steel Workers of America, Local 4122

Coughlan, J.:

[1] The Attorney General of Nova Scotia applies for an order that Cherubini Metal Works Limited is, by reason of issue estoppel, estopped from re-litigating matters and issues already determined or decided by various orders or decisions issued by the Department of Environment and Labour or the Minister of that Department.

[2] The orders and decisions the Attorney General says the plaintiff cannot re-litigate are set out in the affidavit of Jim P. LeBlanc dated April 19, 2006, which has been filed.

[3] The defendants, the United Steel Workers of America and Local 4122 of the Union, support the application.

[4] Cheribuni Metal Works Limited says, first, this being an application pursuant to Civil Procedure Rule 25.01 and there being a dispute of material facts, it is not open to the Court to make a determination of law as requested. It also takes the position the test for issue estoppel was not met as the issue in the action is different from the orders and/or decisions set forth by the Attorney General.

Finally, even if the preconditions for issue estoppel apply, the Court should exercise its discretion and not apply issue estoppel.

[5] The test for issue estoppel is well established. In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, Binnie, J., in giving the Court's judgment, stated at p. 481:

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion issue estoppel ought to be applied. ...

[6] In dealing with the preconditions to the operation of issue estoppel, Binnie, J. stated in *Danyluk, supra* at p. 477:

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,

- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[7] Is the question to be decided in this proceeding the same question decided in the various orders and decisions?

[8] Orders pursuant to the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 and the *Stationary Engineers Act*, R.S.N.S. 1989, c. 440 were issued to the plaintiff. The orders were subject to challenge by way of appeal or judicial review. Some of the orders were appealed. It is now not open to the plaintiff to attack the orders.

[9] However, the plaintiff's position is the first requirement for issue estoppel, that is, "that the same question has been decided" is not present here. The plaintiff says it is not questioning the validity of the orders. The orders cannot now be questioned, but its claim is based on various torts which arise out of a series of facts, including the issuance of the orders. In his brief, the Attorney General admitted the causes of action were not raised in the earlier proceedings, nor did the earlier proceedings have a compensatory element. The question in this proceeding

is whether the defendants committed the torts alleged. The validity of the orders cannot be challenged, they are part of the facts to be considered in determining whether the plaintiff has proved its claim.

[10] It is not the same question being decided in this proceeding as was decided in the proceedings dealing with the orders and, therefore, the first precondition for issue estoppel is not present.

[11] If I am in error in determining the first precondition for issue estoppel has not been met, I am still not prepared to determine whether issue estoppel applies. If the preconditions to issue estoppel exist, that is not the end of the matter. The Court must still determine whether as a matter of discretion issue estoppel ought to be applied. In dealing with the factors to be considered by a judge in exercising the discretion, Fichaud, J.A., in giving the Court of Appeal's decision in *Copage et al. v. Annapolis Valley Indian Band* (2005), 228 N.S.R. (2d) 284 stated at p. 290:

Justice Binnie stated that the list of factors governing the exercise of discretion is open. The common denominator is to ensure an orderly administration of justice, without causing real injustice in a particular case (*Danyluk* at para. 67). The discretion is a case specific response to the reality of each situation (*Danyluk* at para. 63).

[12] In the second amended statement of claim, allegations of material facts of the Attorney General's conduct have been made. These allegations have been denied by the Attorney General. The facts will have to be determined at trial, and that determination may have an impact on the determination on the exercise of discretion concerning whether issue estoppel ought to be applied.

[13] I dismiss the application.

Coughlan, J.