

SUPREME COURT OF NOVA SCOTIA

Citation: *Walsh Estate v. Coady Estate*, 2017 NSSC 162

Date: 2017-06-09

Docket: *Pictou*, No. 353685

Halifax, No. 370332

Pictou, No. 390342

Registry: Pictou

Between:

Tammy Walsh as Executor for the **Estate of Christopher Walsh**; **Tammy Walsh** in her own right;
Tammy Walsh as Litigation Guardian for **Shamya Walsh** (an infant); and
Tammy Walsh as Litigation Guardian for Savanna Walsh (an infant)

Plaintiffs

v.

The Estate of Ralph Michael Coady, Jr. and
Coast Tire & Auto Services Ltd., a body corporate;
Attorney General of Canada; **RCMP Cst Katie Greene**; and
Unidentified RCMP Members

Defendants

AND IN THE MATTER OF:

Hfx No 370332

Between:

Newalta Corporation, a body corporate

Plaintiff

And

The Estate of Ralph Michael Coady, Jr. and
Coast Tire & Auto Services Ltd., a body corporate;
Attorney General of Canada; **RCMP Cst Katie Greene**; and
Unidentified RCMP Members

Defendants

AND IN THE MATTER OF:

Pic No. 390342

Between:

Barneys River Fish Farm Ltd., a body corporate

Plaintiff

And

**The Estate of Ralph Michael Coady, Jr. and
Coast Tire & Auto Services Ltd.,** a body corporate;
**Attorney General of Canada; RCMP Cst Katie Greene; and
Unidentified RCMP Members**

Defendants

And

**Attorney General of Canada; RCMP Cst Katie Greene; and
Unidentified RCMP Members**

Third Parties

DECISION

Judge: **The Honourable Justice N. M. (Nick) Scaravelli**

Heard: May 18, 2017, in Pictou, Nova Scotia

Counsel: **Donn Fraser** for Barney's River Fish Farm

Michael Brooker, QC for Coady Estate

Sandra Arab Clarke for Newalta Corporation

Angela Green for Attorney General of Canada and RCMP
Cst. Katie Greene and Unidentified RCMP Members

J. Christopher Nagle, QC for Tammy Walsh, Shamyia Walsh
and Savanna Walsh

Gregory D. Hardy for Coast Tire & Auto Services Ltd.

[1] This is a consolidated proceeding involving multiple claims and crossclaims by multiple plaintiffs and defendants. It arises out of a two-vehicle collision. One of the vehicles was an oil tanker, and the oil spill resulting from the collision allegedly caused damage to the plaintiff parties Barneys River Fish Farm (BRFF).

[2] In the BRFF action, BRFF claimed against various Crown defendants for negligence, but later withdrew those claims pursuant to Civil Procedure Rule 9.05. The Crown defendants maintain that the plaintiff's withdrawal of a claim against them has the effect of removing them as parties to the action, despite the existence of crossclaims against them by other defendants. Other defendants in that action, Coast Tire & Auto Services Limited (Coast Tire) and Newalta Corporation (Newalta) seek declarations, *inter alia*, that the Crown defendants remain defendants in the proceeding and that their crossclaims survive the withdrawal of the plaintiff's claims against the Crown defendants.

Position of the Parties

[3] The Crown's position is that the Crown defendants are no longer alleged concurrent Tortfeasors, due to the withdrawal of the claims against them by BRFF. Therefore, the Crown submits, they are no longer required to defend the claim, and

accordingly are no longer defendants. According to the Crown, they can now only be liable to the other defendants by way of third party claim. The Crown adds that this leads to no prejudice, since the consolidation order ties the BRFF action to the other actions, in which the Crown defendants remain defendants, as well as providing for common disclosure and discovery.

[4] Coast Tire and Newalta say that because BRFF only withdrew the claims against the Crown defendants under *Civil Procedure Rule 9.05* – rather than discontinuing the proceeding under Rule 9.0 – the crossclaims remain in place, and the Crown defendants remain parties to the proceeding. Had BRFF intended to discontinue against them, it would have been required to follow the notice requirements as to crossclaims, third party claims, etc., under Rules 9.02(5) and 9.03.

Analysis

[5] *Civil Procedure Rule 35.08(2)* presumes that “the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing”. Meagher and Meagher, in *Parties to an Action*, Butterworths, 1988 at 5 note that:

The Primary purpose of procedure is to ensure that all necessary parties to an action are before the court.

[6] Meagher and Meagher add the following remarks on proper, necessary, or improper parties, at paragraphs 4-5:

Parties to an action are classified as proper, necessary, or improper parties, in practice, most parties named by the plaintiff are proper parties for the courts are reluctant to strike off parties against the wishes of the plaintiff, or to add other persons as parties without their consent. There are also parties whose presence before the court is necessary, as well as improper parties who should not be parties. The court on application will determine whether a person is a necessary or improper party. The court on its own motion may also add a party to ensure the effectual and complete determination of the matters in dispute. The discretion of the court is involved in the joinder of a person as a party, so a variety of decisions have resulted. [emphasis added]

[7] On this motion the parties have not referenced Rule 35, respecting parties.

Among the motions enabled by Rule 35 is a motion by a party “to be removed, or to remove another party”. Rule 35.07(1)(d) permits a judge to remove a party where “the person has ceased to be in circumstances that justify being joined as a party” or as per Rule 35.07(1)(e) “an injustice would result if the person continues to be a party”. This suggests that the withdrawal of the plaintiff’s claim against a defendant does not automatically render that defendant a non-party. This could be done by a motion under Rule 35, on the basis that the person is no longer in circumstances that justify being a party, or that it would be an injustice for the person to remain a party.

[8] As a result, I find the defendants are still parties to the proceeding.

However, they have procedural steps available to them that could allow them to be removed. Neither the Civil Procedure Rules nor the authorities on parties to proceedings suggest that party status is lost automatically, even in circumstances where the party in question is no longer a necessary or proper party. As Rule 35 provides, a court will determine whether a person is a necessary or improper party.

[9] A potential pitfall arising from removing a defendant under Rule 35 on the assumption that crossclaims against it would subsequently be revived as third party claims, is that an attempt to commence a third party proceeding might be limitation-barred. This would presumably be a relevant consideration under Rule 35.07. It would be open to the judge, for instance, to require the defendant to remain as a “peripheral” party under Rule 35.09, purely for the purpose of crossclaim. It would not be the intention of the *Civil Procedure Rules* to deprive a defendant of the substance of a crossclaim merely because a plaintiff has withdrawn a claim against another defendant.

[10] As an observation I note that pursuant to Rule 37.06, “a judge who orders consolidation of proceedings, trials, or hearings or separates parts of a proceeding may give directions for the course of a proceeding in which the order is made, including directions on . . . “(b) in an action, the status of each claim as main

claim, counterclaim, crossclaim or third party claim” Although there appear to be no decisions on this Rule, it appears that a judge ordering consolidation (as was previously done here) could declare that a claim heretofore pleaded as a crossclaim should be regarded as a third party claim going forward. Rule 35, however, does not address the fate of a crossclaim that may be orphaned when a defendant is removed. Arguably this could be a matter for inherent jurisdiction in service of the objective of the *Rules* as per Rule 1.01 “the just, speedy, and inexpensive determination of every proceeding.”

[11] In summary, the Crown offers no authority for the proposition that withdrawal of a claim leads automatically to removal of party status. The Crown’s request to be removed as parties under Rule 9.05 ignores the existence of specific rules governing party status, particularly Rule 35. It would be open to the Crown defendants to seek removal under that Rule; but they remain parties to the action in the meantime and are required to respond accordingly.

[12] Costs in the amount of \$750 awarded to each defendant applicant

Scaravelli, J.