NOVA SCOTIA COURT OF APPEAL
Citation: ***Sydney Steel Corporation v. MacQueen***, 2013 NSCA 5

Date: 20130102
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

Applicants/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

Docket: CA 392560
Registry: Halifax

Between:

The Attorney General of Canada, representing Her
Majesty the Queen in right of Canada

Applicant/Appellant

v.

Neila Catherine MacQueen, Joeph M. Petitpas,
Ann Marie Ross, Kathleen Iris Crawford,
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

Respondents

Judge:	The Honourable Justice David P.S. Farrar
Motion Heard:	November 5, 2012, in Halifax, Nova Scotia in Chambers
Held:	Leave to appeal granted.
Counsel:	Agnes E. MacNeil and Alison Campbell for Sydney Steele Corporation and The Attorney General of Nova Scotia C. Scott Ritchie, Q.C., Raymond F. Wagner and Michael Dull for Neila Catherin MacQueen, Joseph M. Petitpas, Ann Marie Ross and Kathleen Iris Crawford Paul Evraire, Q.C., Melissa Chan and Angela Green for the Attorney General of Canada

Decision:

[1] The appellants, the Attorney General of Canada ("Canada"), the Attorney General of Nova Scotia and Sydney Steel Corporation (collectively "Nova Scotia") seek leave of this Court to appeal the Certification Order of Supreme Court Justice John D. Murphy dated May 1, 2012 in a class action relating to steel works facilities in Cape Breton.

[2] Leave to appeal is sought pursuant to s. 39(3)(a) of the **Class Proceedings Act**, S.N.S. 2007, c. 28 ("**CPA**"). Although Canada and Nova Scotia have filed separate appeals, the applications for leave to appeal in both appeals were heard together on November 5, 2012. The issues relating to both leave applications are identical. At the conclusion of the hearing I reserved judgment. On November 23, 2012, I granted leave to appeal in both appeals with written reasons to follow. These are those reasons.

Background

[3] I take the background facts from Murphy, J.'s decision (2011 NSSC 484).

[4] The respondents' claims arise from a steel works plant in Sydney, Nova Scotia, which commenced operations in 1903. It comprised coke ovens which ceased operation in 1988 and a steel mill which closed in 2000. The respondents owned land or lived near the steel works and claimed that the facilities emitted products, including lead, arsenic and PAH's, which contaminated their properties and posed a risk to their health.

[5] They commenced a law suit in 2004 against a number of parties, however, as a result of settlements and abandonment the only remaining defendants are Canada and Nova Scotia.

[6] The allegations now being advanced relate to the period between 1967 and 2000. From 1968 to 1974 Canada operated the coke ovens part of the Steel Works and Nova Scotia operated the steel plant.

[7] From 1974 to 1988 Nova Scotia operated both the coke ovens and the steel plant. As noted earlier, in 1988 the coke ovens closed. The steel plant closed in 2000.

[8] In an order granted in September, 2008 the actions were continued under the, then, new legislation, the **CPA**.

[9] The respondents sought certification of their claims as a class proceeding. The motion was heard in two stages. At the conclusion of the first stage, Justice Murphy found that a class action was the preferable procedure for at least some aspects of the claim, subject to the respondents' amending their motion to reduce the sizes of the proposed classes and modify the litigation plan.

[10] Following the continuation hearing for the amended motion, certification of a class proceeding was ordered with the classes defined as "a property owner class" and a "residential class".

[11] Canada and Nova Scotia appealed from the Certification Order. Nova Scotia raises the following grounds for appeal if leave is granted:

> 1. THAT the Learned Chambers Judge erred in law in determining the scope of his jurisdiction by finding that s. 15 of the *Class Proceedings Act*, S.N.S. 2007, c. 28 ("*Act*") allowed him to amend the class definition on his own motion;
>
> 2. THAT the Learned Chambers Judge erred in law in finding that the causes of action in trespass, battery, negligent battery, negligence, and strict liability were viable causes of action under s. 7(1)(a) of the *Act*;
>
> 3. THAT the Learned Chambers Judge erred in law in relying on the evidence in determining whether there was a viable cause of action under s. 7(1)(a) of the *Act*;
>
> 4. THAT the Learned Chambers Judge erred in fact and in law by certifying individual issues as common issues and by certifying common issues not supported by the minimum threshold of evidence required by s. 7(1)(c) of the *Act* and at law;

5. THAT the Learned Chambers Judge erred in law in finding that it is preferable procedure to certify this action as a class proceeding;

6. These Appellants rely on sections 7, 8(1), 15 and 39(3)(a) of the *Act*; and

7. Such other grounds of appeal as counsel may advise and this Honourable Court may permit on or before the hearing of this appeal.

[12] At the oral hearing in this matter, the solicitor for Nova Scotia withdrew "strict liability" from the list contained in Ground #2 above. However, this is subject to Ground #3. Counsel explained that if Nova Scotia is successful on Ground #3, all of the actions certified by the trial judge would fail, including strict liability.

[13] Canada raises the following grounds for appeal if leave is granted:

1. The Chambers Judge committed an error in fact and law in finding the pleadings disclosed a cause of action, pursuant to subsection7(1)(a) of the *Class Proceedings Act*, 2007, c. 28.

2. The Chambers Judge committed an error in fact and law in finding the claims of proposed class members raised a common issue, pursuant to subsection 7(1)(c) of the *Class Proceedings Act*, 2007, c. 28;

3. The Chambers Judge committed an error in fact and law in finding a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, pursuant to subsection 7(1)(d) of the *Class Proceedings Act*, 2007, c. 28;

4. Subsection (7)(1) and 39(3)(a) of the *Class Proceedings Act*, 2007, c. 28; and

5. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Although the wording of the grounds of appeal may be somewhat different, the common grounds of appeal raised by both Canada and Nova Scotia may be summarized as follows:

1. The certification judge erred in finding the pleadings disclosed a cause of action;

2. The certification judge erred in finding a common issue was raised by the claims of the proposed class members; and

3. The certification judge erred in finding a class proceeding would be the preferable procedure for the fair and effective resolution of the actions as class proceedings.

[14] In addition to the common grounds of appeal, Nova Scotia has an additional ground of appeal not raised by Canada. It argues that the certification judge erred in determining that he had jurisdiction to amend the class definition on his own motion.

[15] The issue on this application is whether Canada and Nova Scotia should be granted leave pursuant to the **CPA**.

Analysis

[16] Section 39 of the **CPA** provides, in part:

> **39** (1) Any party may appeal, without leave, to the Nova Scotia Court of Appeal from
>
> (a) a judgment on common issues; or
>
> (b) an order under Sections 32 to 37, other than an order that determines individual claims made by class or subclass members.
>
> (2) With leave of a judge of the Nova Scotia Court of Appeal, a class or subclass member or any party may appeal to that court any order
>
> (a) determining an individual claim made by a class or subclass member; or
>
> (b) dismissing an individual claim for monetary relief made by a class or subclass member.

> (3) With leave of a judge of the Nova Scotia Court of Appeal, any party may appeal to that court from
>
> (a) a certification order or an order refusing to certify a proceeding as a class proceeding; or
>
> (b) a decertification order.
>
> ...
>
> (7) For greater certainty, an application for leave to appeal pursuant to this Section must be made before a single judge of the Nova Scotia Court of Appeal.

[17] The parties took two very divergent views as to the test to be applied on this application for leave.

[18] The Canada and Nova Scotia say that the test on a leave application such as this is whether they have raised an arguable issue in their grounds of appeal (**Pearce v. Nova Scotia (Workers' Compensation Board**, [1996] N.S.J. No. 433 (Q.L.)(C.A. in Chambers). An arguable issue being one that could result in the appeal being allowed (**Westminer Canada Ltd. v. Amirault** (1993), 125 N.S.R. (2d) 171, ¶11 (C.A. in Chambers) . The respondents disagree. They argue that the **CPA** evinces an intention that applications for leave to appeal from certification orders would be treated differently than leave to appeal in the context of a typical interlocutory orders. In their factum at ¶27 they suggest the test for leave on an application such as this should be:

> (a) The order from which leave to appeal is sought conflicts with other decisions; or
>
> (b) There is good reason to doubt the correctness of the order; and
>
> (c) The granting of leave would accord with the objects of the *CPA* and the interests of justice.

[19] I decline to accept the respondents' invitation to change the standard for obtaining leave to appeal to this Court. I find that the "arguable issue" test is the appropriate test on this leave application. I will explain why.

1. Section 39(2)

[20] Section 39(2) simply states that "With leave of a judge of the Nova Scotia Court of Appeal" any party may appeal to the Court.

[21] There is nothing to distinguish the leave requirement in s. 39(2) from leave requirements on interlocutory appeals (**Rule** 90.09) or as required by other statutes. To illustrate by way of example, s. 256(2) of the **Workers' Compensation Act**, S.N.S. 1994-95, c. 10 requires leave be granted prior to an appellant appealing a decision of the Workers' Compensation Appeals Tribunal. In the workers' compensation context the leave application process is a bifurcated process (as it is here), however, is heard before a panel of three judges of this Court. In that context the threshold is an "arguable issue". (See for example, **Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2008 NSCA 11, ¶12) The wording of s. 39(2) does not suggest a different standard should be applied to **CPA** leave applications. It is indistinguishable from the wording for leave applications under the Rules or other statutes.

2. Prior Case Law

[22] This Court has been asked to apply a more rigorous standard in the past and has declined to do so. In **Hogeterp v. Huntley**, 2007 NSCA 75, counsel for the respondent was suggesting a higher threshold for leave. Roscoe, J.A. set out their argument as follows:

> 16 Counsel for the Larkins urged us to deny leave to appeal and although it is not the court's usual practice, to state reasons for denying leave. She refers to cases from Saskatchewan and British Columbia where the courts of appeal require a party appealing from an interlocutory order to establish, for example, that the issues are important or significant, have *prima facie* merit and that the appeal will not unduly delay the progress of the action. See: **Schroeder v. Korf**, [1996] S.J. No. 388 (C.A.) and **Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.**., [1988] B.C.J. No. 1403 (C.A.). These are both decisions of one judge sitting in chambers.

[23] After discussing the Nova Scotian requirements for leave to appeal an interlocutory order, Justice Roscoe concluded:

> 21 In the limited number of cases where the court or a judge has given reasons for granting leave to appeal, the threshold is usually whether the appellant has raised an arguable issue. See, for example: **Michelin North America (Canada) Inc. v. Richard Ross**, 2002 NSCA 87; 207 N.S.R. (2d) 292.
>
> 22 Despite the able argument of counsel for the Larkins, I am not persuaded that the court should follow the example of other jurisdictions and add to the requirements or increase its usual standard for granting leave to appeal an interlocutory order. In this case, I am satisfied that the appellant has raised an arguable issue and would grant leave to appeal.

[24] The argument in this case is virtually the same that was made before the panel in **Hogeterp**. Like Roscoe, J.A. I would decline to add to the requirements or increase the standard for granting leave in this Court.

[25] In my view, if a change is going to be made to the usual standard for granting leave it would require a hearing before a full court and not a single judge sitting in Chambers.

3. Standards in Other Provinces

[26] The respondents' referenced the standards in other Canadian jurisdictions on leave applications in relation to class actions as authority for applying a higher threshold in a class action context. In particular, they cite five provinces in which the class proceedings legislation has a provision requiring leave to appeal from a certification order: Saskatchewan, Manitoba, Ontario, New Brunswick and Newfoundland and Labrador. Reference is made to case law from four of these provinces (New Brunswick does not have any decisions for the standard for leave to appeal from a certification under its legislation). In their factum they say the following:

16. In those jurisdictions, leave to appeal from an order certifying an action is not granted merely because a prospective appellant can raise an "arguable issue". The interests of justice require something more.

Saskatchewan

17. In Saskatchewan, leave to appeal certification is granted on considerations of merit and importance. The Court must be satisfied that the proposed appeal is of sufficient merit to warrant the attention of the appellate court and further that it is of sufficient importance to the proceedings, or to the practice or state of law, or administration of justice generally, to justify the intervention of the appellant court. (**Hoffman v. Monsanto Canada Inc.**, 2005 SKCA 105, ¶2)

Manitoba

18. In Manitoba, leave to appeal is granted only where the appeal raises a point of law that is important beyond the immediate case. Where the appeal involves a question of law that is mixed with fact, "leave to appeal should be refused no matter how important the point of law is." (**Curtis v. Manitoba (Securities Commission)**, 2006 MBCA 1, ¶11)

Ontario

19. In Ontario, the leave to appeal test has been described as "rigorous". Leave to appeal shall not be granted unless:

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. (**Courts of Justice Act**, R.S.O. 1990, c. C-43, s. 19(1)(b); **Ontario Rules of Civil Procedure**, R.R.O. 1990, Reg. 194, R.

> 62.02(4); **Class Proceedings Act**, 1992, S.O. 1992, c. 6, s. 30(1); **Griffin v. Dell Canada Inc.**, 2009 CarswellOnt 4742 (Div. Ct.), ¶35)
>
> **Newfoundland**
>
> 20. In Newfoundland, leave to appeal a certification order will only be granted if: (1) there is a conflicting decision and the motions judge feels it is desirable for leave to be granted (**Canada (Attorney General) v. Anderson**, 2010 NSLA 82, ¶34); (2) the Court doubts the correctness of the certification order; (3) the appeal involves matters of such importance that leave to appeal should be granted; (4) the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect; or (5) the interests of justice require that leave be granted. (**Bayer Inc. v. Pardy**, 2005 NLCA 20, ¶5) (My emphasis)

(The references are footnoted in the respondents' factum. I have inserted the references where the footnotes appear in the respondents' factum.)

[27] The respondents suggest that there is a more stringent standard in those provinces when considering leave applications in certification proceedings. As I will illustrate, that argument is without merit. I will address each of the provinces referred to by the respondents individually.

[28] In Saskatchewan, although the case cited by the respondents is a leave to appeal application in a class action proceeding, the authority cited by the Saskatchewan Court of Appeal in that case for the leave requirements is **Rothmans, Benson & Hedges Inc. v. Saskatchewan,** 2002 SKCA 119. **Rothmans** was not a class action lawsuit but rather it was an application for leave to appeal a decision that s. 6 of Saskatchewan's **Tobacco Control Act**, S,S. 201, c. T-14.1 was not in conflict with the **Tobacco Act of Canada**, S.C. 1997, c. 13. Leave to appeal was required by the provisions of the **Tobacco Control Act**. This tells us that the test in Saskatchewan for leave to appeal certification orders is not more stringent in leave applications in a class action; it is the same as any other leave application.

[29] The respondents have referred to **Curtis v. Manitoba (Securities Commission)**, **supra**, from Manitoba. That decision is not a class action proceeding but is rather an appeal from a decision of the Manitoba Securities

Commission declining to adjourn a hearing. That case does not further the respondents' argument that leave to appeal from certification orders should be subject to a higher threshold.

[30] The cases referred to by the respondents from Ontario are class action proceedings. However, **Rule** 62.02(4) of the Ontario **Rules of Civil Procedure** sets out the criteria for granting leave. The criteria are as the respondents have set them out in their factum. However, the criteria are not limited to class actions but, like Saskatchewan, apply to all leave applications.

[31] Finally, the respondents reference Newfoundland and Labrador. Again, the case which is cited is a class action proceeding. However, the Rules of the Newfoundland and Labrador Supreme Court, like Ontario, set out the criteria for granting leave to appeal. **Rule** 57.02(1) provides:

> Leave to Appeal
>
> 57.02(1) Leave to appeal shall be obtained by application to the Court where
>
> (a) during the course of a proceeding or prior to a final order, a party seeks to appeal from an interlocutory order, or ...
>
> .....
>
> (4) Leave to appeal an interlocutory order may be granted where
>
> (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
>
> (b) the Court doubts the correctness of the order in question,
>
> (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
>
> (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or

> (e) the Court is of the view that the interests of justice require that leave be granted.

[32] Again, the threshold for a leave application in Newfoundland as set out in the **Rules of Court** is no different for class proceedings than they are for any other proceeding.

[33] The authorities cited by the respondents do not support its argument that when it comes to certification orders a higher threshold for leave is warranted. The standards in the provinces do not differentiate between leave in class action proceedings and other leave applications. To the contrary, class actions are subject to the same threshold as any other leave application. The difference between those provinces and Nova Scotia is simply that our standard is different. To accept the respondents' position, I would be creating two separate standards for leave applications; one for class actions and one for other types of leave applications. I see no justification for doing so. The respondents have not shown any basis for me to deviate from the often applied and long established standard for granting leave in this province.

[34] In conclusion, I am satisfied that Canada and Nova Scotia need only establish that there is an arguable issue for leave to be granted in these circumstances.

Arguable Issue

[35] Fichaud, J.A. heard a stay motion from Murphy, J.'s order in this proceeding (**Sydney Steel Corporation v. MacQueen**, 2012 NSCA 78, ¶19). He held:

> [19] ... 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.

[36] I agree, both Canada and Nova Scotia's grounds of appeal are arguable on their face. It is not necessary to address the grounds of appeal further; the merits are for the panel hearing the appeal.

Conclusion

[37] For these reasons, I granted leave to appeal and issued the order dated November 23, 2012.

Farrar, J.A.