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June 25, 2011

Homeowners in Cartier deserve better treatment

The town of Port Hope, featured two weeks ago in a *Saturday Star* story on the impact of low-level nuclear contamination affecting local homeowners, is not the only Ontario municipality saddled with the burden of widespread soil contamination.

The community of Cartier is located about 20 kilometres north of Sudbury. Its population, according to the 2006 census, was 302, but as a result of extensive soil contamination, it's probably somewhat less than that today.

Cartier has no medical services, no shopping, no pharmacy and no schools. It is a company town, appealing to residents because of jobs with the railway.

A parcel of land in Cartier is owned by the Canadian Pacific Railway Company. It was used as a railroad and a locomotive fuelling and maintenance facility from 1950 until 1981. Back in 1943, CPR built a water treatment system to service its own property and several residential properties, as well as the local fire station.

As a result of unintended leaks and spills of diesel fuel on the CPR property, there was soil contamination on a part of the CPR property and on surrounding property.

In 1999, CPR discovered that groundwater outside of the CPR property had been affected by the contamination. At the end of 2001, CPR closed its water treatment and distribution system and stopped delivering water to 31 homes, two businesses, the fire hall, the community centre and the railway building.

The railway eventually bought 19 local properties and demolished them, since there was no available source of drinking water for those homes. Today, there is a large tract of vacant brownfield land where those houses once stood. A few houses remain close to the demolished ones, although they may well be within or close to the plume of underground diesel fuel.

In 2004 and 2005, 55 individual court actions against CPR were started by Timmins lawyer Erin Cullin on behalf of local residents. Each related to a separate piece of property and sought damages for environmental contamination. CPR filed statements of defence in each case.

In 2008, James and Lillian Bellefeuille asked the court to convert their claim to a class action on behalf of all past and present Cartier property owners and businesses. This has the potential to result in about 95 additional properties becoming the subject of litigation.

Approval for the class action was granted last November and an appeal to the divisional court was dismissed in April.

Barry Lebow, a Toronto-based valuation expert on real estate stigma, was retained by the law firm handling the class action to prepare a report on the diminution of values.

He has visited the community several times and has personally smelled diesel oil in the tap water. Many local wells are contaminated by diesel fuel.

Lebow tells me that there is virtually no resale market for homes in Cartier. Real estate agents who take listings of property for sale are obligated to disclose to potential buyers the contamination issues in the community.

Property values have dropped, finding a buyer for a local home is difficult, and obtaining traditional mortgage financing for a buyer ranges from very difficult to impossible.

Some homeowners say they can only obtain property insurance for fire and theft. One resident reports an unusually high percentage of cancers and stomach disorders compared to the general population.

Homeowners also complain about a perceived lack of action by the federal and provincial governments. Comprehensive remediation efforts seem a long way off.

At press time, no response to a request for comment had been received from the lawyers for CPR.

Unfortunately, contaminated areas in larger communities — such as Lynnview Ridge in Calgary, Love Canal in Niagara Falls, N.Y., McClure Cres. in Scarborough, the Inco refinery in Port Colborne, and the Sydney tar ponds in Cape Breton Island — command more public and government attention and action than the tiny hamlet of Cartier.

If a similar oil spill happened in Toronto, it would have been cleaned up years ago. Cartier's residents deserve better treatment.

Bellefeuille v. CPR, 2011 ONSC 2648 (CanLII)

Print:	PDF Format
Date:	2011-04-29

Docket:	19/11
URL:	http://www.canlii.org/en/on/onsc/doc/2011/2011onsc2648/2011onsc2648.html
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CITATION: Bellefeuille v. CPR, 2011 ONSC 2648
DIVISIONAL COURT FILE NO.: 19/11
DATE: 2011/04/29

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: James Bellefeuille and Lillian Bellefeuille, Plaintiffs (Respondents)

AND:

Canadian Pacific Railway Limited and Canadian Pacific Railway Company, Defendants (Moving Parties)

BEFORE: Herman J.

COUNSEL: *Kathleen Erin Cullin*, for the Plaintiffs/Respondents

Steven F. Rosenhek, Rosalind H. Cooper, for the Defendants/Moving Parties

HEARD: March 9, 2011

ENDORSEMENT

[1] The defendants, Canadian Pacific Railway Limited and Canadian Pacific Railway company (collectively, "CPR"), seek leave to appeal the decision of Hennessy J., dated November 5, 2010, in which she granted the motion of James Bellefeuille and Lillian Bellefeuille to amend their statement of claim, converting their action to a class proceeding.

[2] In seeking leave to appeal, CPR raises the following three issues:

1. Does the court have jurisdiction to convert an individual action to a class proceeding?
2. What is the test to be applied in deciding to grant leave to amend?
3. Should amendments be allowed which may have the effect of adding claims for property owners whose claims would otherwise be statute-barred?

[3] CPR contends that there is reason to doubt the correctness of the motion judge's decision on all three issues and there are conflicting decisions with respect to the third issue. Furthermore, CPR submits that these are important issues of first instance and, as such, merit consideration by an appellate court.

Background

[4] The plaintiffs, James Bellefeuille and Liliane Bellefuille ("the Bellefeuilles"), own property in Cartier, Ontario.

[5] CPR also owns property in Cartier. The land was used as a railroad and a locomotive fuelling and maintenance facility from 1950 until 1981.

[6] CPR built a water treatment system in 1943. That water system serviced not only the CPR property but several residential properties and the municipal fire station as well.

[7] As a result of unintended leaks and spills of diesel fuel on the CPR property, there was soil contamination on part of the CPR property and on surrounding property.

[8] In 1999, CPR discovered that groundwater outside of the CPR property had been affected by the contamination. On October 20, 2000, CPR issued a press release announcing its decision to decommission the water treatment and distribution system. A community meeting was held a few days later during which the contamination, the decommissioning of the water system, the installation of wells and the purchase of properties in the affected area were discussed.

[9] According to the motion judge's reasons, the Bellefeuilles concede that the limitation period with respect to the claim for diminution of property values began to run on October 26, 2000 and therefore ended on October 26, 2006 (see *Limitations Act*, R.S.O. 1990, c.L.15).

[10] The Bellefeuilles initiated their action against CPR on September 20, 2004. Between September 2004 and March 2005, 54 other individual actions were commenced against CPR. Each action related to a separate piece of property and sought damages for environmental contamination.

[11] All the plaintiffs in the 55 individual actions were represented by the same lawyer. The Bellefuilles say that prior to issuing their claims, the plaintiffs considered the possibility of proceeding as a class action, but decided against the class action route because of the Superior Court decision in *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.). In that case, the court had refused to certify an environmental damage claim as a class action. The decision was upheld by the Divisional Court (*Pearson v. Inco. Ltd.* (2004), C.P.C. (5h) 276), but was subsequently overturned, and the action certified, by the Court of Appeal (*Pearson v. Inco Ltd.* (2005), 18 C.P.C. (6th) 77).

[12] In February 2006, CPR served statements of defence in each of the 55 actions.

[13] In 2008, the Bellefeuilles brought a motion to amend their claim, seeking to convert it to a class proceeding under the *Class Proceedings Act,*S.O. 1992, c.6 ("CPA").

[14] The amended claim is brought on behalf of the following proposed classes of claimants: Cartier property owners, previous property owners and business owners. This has the potential to result in approximately 95 additional properties becoming the subject of a claim.

[15] The parties agreed that the motion to amend would be heard first and the motion for certification would be heard separately in the event the motion to amend was successful.

[16] The motion judge granted the Bellefeuilles' amendment and also ordered that CPR be compensated for their costs thrown away for defending the individual plaintiffs' actions.

Does the court have jurisdiction to convert an individual action to a class proceeding?

[17] CPR submits that the court has no jurisdiction to convert a civil claim to a class proceeding. In the alternative, CPS maintains that the issue of jurisdiction is open to serious debate.

[18] One of the arguments put forward by CPR is that the result of converting this action to a class proceeding was to add statute-barred claims. However, at this stage of my reasons, I limit my consideration to whether the court has jurisdiction to convert a regular civil claim to a class proceeding. I will consider the issue of the addition of otherwise statute-barred claims separately.

Motion judge's decision

[19] The motion judge reviewed various cases, noting that there was little reported case law. She also reviewed provisions of the *CPA* and the Rules.

[20] The motion judge noted that there was no explicit prohibition against converting a single action to a class proceeding by way of an amendment, nor was there a policy reason for such a prohibition. She stated:

> Taking into account that the *Rules* are to be interpreted in harmony with the purposes of class proceedings, I am not convinced that there is any bar to amending an individual action so that it may become a proceeding under the *CPA*. Therefore the court may allow plaintiffs to amend their pleadings in order to bring a class proceeding, where on a threshold analysis, the purposes of a class proceeding will be fulfilled by such amendment.

[21] The motion judge indicated further that, on a threshold analysis, the claim appeared to have the essential elements of a class action: there was more than one person with a claim for damages arising from environmental contamination; the claim was made by a geographically defined group of property owners, occupiers and business owners allegedly affected by the acts of the descendants; and the plaintiffs claimed the same causal link between their damages and the alleged conduct of CPR.

[22] The motion judge concluded that the court had jurisdiction to make the requested amendments.

Analysis

[23] There is no specific provision that addresses the conversion of an individual action to a class action.

[24] Section 2(1) of the *CPA* states that "one or more members of a class of persons may commence a proceeding in the on behalf of the members of the class". CPR submits that the import of this provision is that class actions must be initiated under the Act by commencing a proceeding, not by converting an individual action to a class action.

[25] Section 35 of the *CPA* provides that "the rules of court apply to class proceedings". In *Boulanger v. Johnson & Johnson Corp.*2003 CanLII 45096 (ON S.C.D.C.), (2003), 64 O.R. (3d) 208 (Div. Ct.) at para. 38, the Court considered the application of the *Rules of Civil Procedure* to class actions. Macdonald J. stated:

> In my view, having considered s. 35 of the *CPA* and s. 66(3) of the *CJA* [*Court of Justice Act*, R.S.O. 1990, c. 43] together, the legislature intended that the rules of court (known as the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as amended), should "supplement" the provisions of the *CPA* "in respect of practice and procedure", but without conflicting with the purpose for which the *CPA* was enacted.

[26] The motion judge referred to the following Rules: Rule 1.04, which requires that the rules be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits; and Rule 26.01, which states that the court should grant lead to amend a pleading unless there would be non-compensable prejudice.

[27] The motion judge also referred to s. 7 of the *CPA* as an indication of the flexibility to move between class proceedings and individual actions. That provision allows the court to permit a class proceeding that fails certification to continue as one or more proceedings between different parties.

[28] There are few cases that deal with the conversion of a civil action to a class proceeding and none that directly address the question of whether the court has the requisite jurisdiction. There are no Ontario cases.

[29] In a few cases, the court appears to have assumed it had the jurisdiction to grant such an amendment but it denied the amendment on the basis that, in the circumstances of the particular case, there would be prejudice or it would be unfair to the defendant were the amendment granted: *Stevenson Estate v. Bank of Montreal*, [2009] S.J. No. 597 (Sask. Q.B.); *Maurice v. Canada (Minister of Indian Affairs and Northern Development*, [2004] F.C.J. No. 670 (Fed. Ct.); *Dorus v. Teck Corp.*, [2005] B.C.J. No. 1339 (B.C.S.C.).

[30] In *Stevenson*, the action had already proceeded through pleadings, discovery, numerous applications and an appeal to the Court of Appeal and was ready for the pre-trial conference, the last step prior to trial. The court refused to allow the amendment to convert the action to a class proceeding on the basis that it would be inequitable to the defendants and it would delay and complicate the trial. However, Currie J. suggested at para. 57 that such an amendment would be legally possible:

> The Act [*The Class Actions Act*, S.S. 2001, c.C-12.01] does not address the amendment of an existing action to plead the Act, but in the Act the legislature has made the commencement of an action under the Act as accessible as possible. A plaintiff need only state in the statement of claim that the action is so commenced. From this ease of accessibility I infer that the legislature did not intend a barrier between a plaintiff and the opportunity to apply for certification of an action as a class action.

[31] The one case in which the court granted conversion from an individual action to a class action is *Gaudet v. Sister Servants of Mary Immaculate*, [2007] S.J. No. 115 (Sask. Q.B.). The plaintiffs in the *Gaudet* action and the plaintiffs in other actions sought leave to amend their statements of claim "to facilitate the presentation of an application for certification pursuant to *The Class Actions Act*, S.S. 2001, c.C.-12.01".

[32] Again, the judge in *Gaudet* did not directly address the question of jurisdiction. However, the judge granted the amendment based on a variety of factors including: the plaintiffs said they would have difficulty pursuing their individual actions due to lack of financial resources and uncertain emotional capacity to testify repeatedly; there would be a risk of inconsistent verdicts without a class action or consolidation of the actions; and proceeding with numerous cases would increase the cost to all the parties, including the defendants.

[33] CPR submits that *Gaudet* is distinguishable from the case at hand because the proposed class in *Gaudet* did not include any plaintiffs who had not already commenced an action, while the Bellefeuilles' proposed class includes a significant number of new plaintiffs.

[34] However, in all the cases cited by the motion judge and the parties, the court assumed it had jurisdiction to convert the action to a class proceeding. The motion judge in this case considered the relevant cases and the relevant provisions of the *CPA* and the Rules, as well as the policies underlying the *CPA*. In my opinion, there is no reason to doubt the correctness of her decision.

What is the test to be applied in deciding to grant leave to amend?

[35] Having determined that the court had jurisdiction to grant the amendment, the motion judge then considered whether she should grant the amendment. In deciding that she would, the motion judge relied on the test in Rule 26.01, that is, the court should grant an amendment on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[36] It should be noted that the motion judge also conducted a threshold analysis, that is, whether the claim appeared to have the essential elements of a class action. She conducted this analysis in the context of determining whether she had the requisite jurisdiction to convert the action to a class proceeding.

[37] CPR submits that the test the judge applied was inadequate. Given the unique nature of an amendment converting an individual action into a class action, it is CPR's contention that the court should have imposed additional requirements before granting the amendment. In particular, CPR submits that the would-be representative plaintiffs should be required to explain and justify the failure to initiate the action as a class proceeding at the outset.

[38] In support of its position, CPR cites two cases: *M.J. Dixon Construction limited v. Hakim Optical Laboratory Limited*,2009 CanLII 14046 (ON S.C.), 2009 CanLII 14046 (Ont. S.C.J.) at para 47; and *Canadian Imperial bank of Commerce v. Petten*,2010 ONSC 6726 (CanLII), 2010 ONSC 6726 at para. 6 (Ont. S.C.J.). Both of these cases involved a motion to set aside a default judgment and in both cases, the court considered the effect on the integrity of the justice system under the rubric of prejudice.

[39] There is nothing in any of the decisions cited by the parties which deal with conversion that would indicate the court should consider matters beyond prejudice to the defendant, other than a statement in *Dorus v. Teck Corp.* at para. 7, in which the court indicated that converting the matter to a class action would complicate and delay matters, "aside from the concern of unfairness to the defendants". In *Stevenson*, Currie J. also considered the fact that the conversion of the action would delay and complicate the trial.

[40] In the case at hand, while the Bellefeuilles did not proceed with the motion expeditiously, the motion judge noted that the defendants did not take any steps to push the matter along and did not identify any prejudice arising from the delay. Furthermore, the Bellefeuilles provided a reason why they did not initiate their claim as a class action: they understood that a class action was not advisable in view of the state of the law at the time.

[41] The motion judge considered CPR's submission that there was prejudice based on the fact that they had already filed statements of defence in the individual actions, while they would not have been required to file a statement of defence in a class action claim prior to the certification motion. The motion judge reviewed the statement of defence and determined that there was nothing in it that would prejudice CPR. To the extent that there was prejudice, it was compensable, in that CPR had been put to the expense of preparing fifty-five statements of defence. The motion judge addressed this by ordering that CPR be compensated for their costs thrown away for defending the individual actions.

[42] In addition to possible prejudice to CPR, the motion judge also considered the alternative, that is, fifty-five actions against CPR for the same damages arising from the same set of facts. She concluded that continuing with the separate actions did not make legal or common sense.

[43] The motion judge gave thorough consideration to the circumstances of the case. In particular, she consider whether the claim met the threshold for a class proceeding and whether there was any non-compensable prejudice to CPR. She also considered the relative benefits of proceeding by way of a class action as compared to proceeding with fifty-five individual actions. There is, in my opinion, no reason to doubt the correctness of her decision.

Should amendments be allowed which may have the effect of adding claims for property owners whose claims would otherwise be statute-barred?

[44] CPR submits that the motion judge erred in allowing amendments which have the effect of commencing new, statute-barred claims in respect of approximately 95 additional properties.

[45] In her decision, the motion judge noted that the limitation period was six years and the Bellefeuilles agreed that the limitation period with respect to the claim for diminution of property values ended on October 26, 2006.

[46] The motion judge stated that there was no *Limitations Act* issue with respect to the proposed amendment to convert the action to a class proceeding because such an amendment only involved a procedural change. Rather, any limitations issues arose in the context of the definition of the class and the possible addition of a new claim and would best be dealt with in the certification process. She noted that CPR was free to argue all issues with respect to the definition of the class or classes, including *Limitations Act* issues, in the certification motion.

[47] CPR submits that the motion judge's approach is contrary to that adopted by the Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*,2008 ONCA 3 (CanLII), (2008) 88 O.R. (3d) 401 (C.A.). *Frohlick* was an appeal from a motion judge's refusal to allow amendments to a statement of claim on the basis that the proposed amendments advanced a new and unrelated claim and this new claim was statute-barred. In dismissing the

appeal, Rouleau J.A. indicated that: "[R]ule 26.01 does not contemplate the addition of unrelated statute-barred claims by way of amendment to an existing statement of claim."

[48] *Frohlick* is, in my opinion, distinguishable in that it was not a class action. The *CPA* provides a specialized process including a certification proceeding at which the definition of the class will be addressed.

[49] CPR suggests that the motion judge implied at paragraph 57 of her reasons that otherwise statute-barred claims were preserved by the timely commencement of the Bellefeuilles' action. I do not read her reasons in that way. Rather, she indicated that the motion to convert the action to a class proceeding was procedural, not substantive, and limitations issues would be dealt with in the certification process.

[50] I conclude that there is no reason to doubt the correctness of the motion judge's decision with respect to her treatment of claims which may be statute-barred, nor are there conflicting decisions. Furthermore, as long as CPR's rights are preserved with respect to raising limitations issues, there is no prejudice to them.

Conclusion

[51] For the reasons set out above, I conclude that there is no reason to doubt the correctness of the motion judge's decision with respect to the three issues raised by CPR, nor are there conflicting decisions. The motion for leave to appeal is therefore dismissed.

[52] I would encourage the parties to come to an agreement with respect to costs. If they are unable to do so, the Bellefeuilles may deliver written submissions within 14 days of the release of this decision. CPR has a further 14 days within which to deliver a written response. Submissions should be no more than 5 pages each, plus a bill of costs.

Herman J.

Date: April 29, 2011