

COURT FILE NO.: 06-CV-307624CP
DATE: June 18, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**DEREK ASHLEY WAMBOLDT, CRAIG DENBY, ASSAD KAMAL,
MARK PHELAN and LINDA WATSON**

Plaintiffs

- and -

**NORTHSTAR AEROSPACE (CANADA) INC. and
NORTHSTAR AEROSPACE, INC.**

Defendants

Proceeding under the Class Proceedings Act, 1992

COUNSEL:

Michael Eizenga and Matthew Baer for the Plaintiffs, Derek Ashley Wamboldt, Craig Denby and Assad Kamal
David Thompson for the Plaintiffs, Mark Phelan and Linda Watson
Kathryn Chalmers and Doug Harrison for the Defendants, Northstar Aerospace (Canada) Inc. and Northstar Aerospace Inc.

HEARING DATE: June 18, 2009

REASONS FOR DECISION

PERELL, J.

Introduction

[1] In this proposed class action, the plaintiffs Derek Ashley Wamboldt, Craig Denby, Assad Kamal, Mark Phelan, and Linda Watson sue the defendants Northstar Aerospace (Canada) Inc. ("Northstar Canada") and Northstar Aerospace, Inc. ("Northstar Aerospace"), collectively referred to as "Northstar." The parties have reached a settlement and now move for an order certifying for settlement purposes the action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6. They also seek orders approving the settlement and approving Class Counsel's fees.

[2] At the hearing of the motion, I made the following endorsement:

For written reasons to follow, I grant the motion: to certify this action as a class proceeding for settlement purposes; to approve the settlement; and to approve the fee of Class Counsel. Order to go accordingly. I have signed the Order, which, among other things, approves the notice plan.

[3] What follows are my written reasons.

Factual Background

[4] In August 2005, Northstar Canada publicly advised that testing on its property on Bishop Street in Cambridge, Ontario, had revealed that Trichloroethylene ("TCE"), a pollutant, had seeped into the groundwater and had migrated in the groundwater to properties in the neighbourhood.

[5] In the action, the Plaintiffs allege that the Defendants were negligent in the use, handling, application, storage, and disposal of TCE and Chromium at the Bishop Street property. The Plaintiffs allege that TCE and Chromium escaped the Bishop Street Property and migrated into the groundwater beneath the Class Area, causing a build-up of TCE gases. The Plaintiffs also rely on the tort of nuisance and the doctrine of strict liability from *Rylands v. Fletcher*. The Class Members seek compensation to remove the TCE and Chromium and for the reduction in the value of their properties.

[6] Northstar denies the allegations and that any damages are payable. It has not conceded or admitted any civil liability.

[7] The proposed representative plaintiffs – Derek Ashley Wamboldt, Craig Denby, Assad Kamal, Mark Phelan and Linda Watson - are class members within the proposed Class.

[8] Class Counsel for the plaintiffs is a collective of Siskinds LLP, Scarfone Hawkins LLP, and Gowling Lafleur Henderson LLP.

[9] There are approximately 721 properties in the Class Area, the vast majority of which are residential dwellings valued from \$200,000 to \$300,000.

[10] In February 2008, the Plaintiffs delivered the material for the motion for certification, and settlement negotiations followed shortly.

[11] On May 22, 2009, the parties executed the Settlement Agreement. The pertinent terms of the Settlement Agreement may be summarized as follows:

- A Property Damage Fund and an Extraordinary Damage Fund will be established.
- Upon approval of the settlement, Northstar will pay \$1 million to a Property Damage Fund.
- Northstar Canada will execute a promissory note in the amount of \$3 million to be paid to the Property Damage Fund within 3 years following its issuance after court approval. The promissory note will bear simple interest at 3.3%.
- Northstar will pay \$500,000.00 to an Extraordinary Damage Fund which will be used for purposes of Extraordinary Damage claims over and above the base amounts to be paid from the Property Damage Fund.

- Northstar will make a legal costs contribution in the amount of \$550,000.00.
- The Settlement Amount shall be held by the Claims Administrator in trust for the benefit of Class Members and shall be paid in accordance with the Plan of Distribution.
- The Property Damage Fund will be distributed in accordance with a Plan of Distribution under which Class Members will receive a pro-rata share of the monies in the Fund based on their approved points total determined by reference to (i) the levels of TCE in the Class Member's property; (ii) the extent of remediation required to bring the Class Member's property into conformity with the Ministry of Environment (MOE) standards; and, (iii) the length of time a Class Member was required to evacuate his or her property for health and safety and/or remediation.
- There is a deadline for making claims that is 90 days from the date notice of settlement approval is first disseminated.
- If after submitting a Property Damage Claim Form, but before disbursement of the Property Damage Fund, a Class Member's status under the point system has changed (i.e. a higher TCE reading or more remediation is required), the Class Member can submit an amended Property Damage Claim Form to the Claims Administrator asking that the point value of his or her claim be recalculated.
- The Extraordinary Damage Fund will be used to compensate Class Members for quantifiable damages not covered by compensation received from the Property Damage Fund, such as an extraordinary diminution claim, extra out-of-pocket expenses or loss of income (rental or sales).
- The Extraordinary Damage Fund will be paid out through a one-time distribution. If there is not enough money in the Extraordinary Fund to pay the full amount of the claims of each Class Member as approved by the Claims Administrator, Extraordinary Damage claims will be paid out on a pro-rata basis.
- Any excess funds in the Extraordinary Damage Fund after distribution will be reallocated to the Property Damage Fund.
- Should the Claims Administrator deem necessary, it may seek expert advice or appoint an arbitrator to assist in determining the proper value of the Extraordinary Damage claims.
- Class Members will be paid from the Property Damage Fund in two stages, now and upon maturity of the promissory note.
- Northstar will be under a reporting obligation with respect to remediation efforts and the Court will retain supervisory jurisdiction. Northstar shall submit Periodic Reports to the Court, on at least an annual basis, until such time as the Ontario

Ministry of the Environment no longer requires them to perform active remediation associated with the Bishop Street Property or the Court orders otherwise.

- Both the Plaintiffs and Northstar have a right to terminate on account of Opt-Outs. Northstar can elect to terminate the settlement, if five or more Class Members elect to opt-out. The Plaintiffs can elect to terminate the settlement if ten or more Class Members opt-out.
- Northstar will receive an Opt-Out Credit in the amount of \$35,000 for each Class Member who opt-outs of the settlement and commences or continues litigation against Northstar with respect to the alleged unlawful escape of TCE and Chromium from the Bishop Street Property.
- The proposed Settlement Agreement does not impact: (i) personal injury claims relating to the alleged unlawful escape of TCE and Chromium into the Class Area; (ii) the active remediation associated with the Bishop Street Property required by the MOE; and, (iii) Northstar Canada's payment to Class Members of increased charges on their hydro bills due to the remediation.

[12] On May 27, 2009, pursuant to a court order, the Notice of the Certification and Settlement Approval Hearing was published.

[13] On June 3, 2009, a Town Hall meeting was held at a location near the Class Area. The meeting was attended by 125 to 150 people, and the response to the proposed settlement was positive.

[14] The deadline for making an objection to the settlement was June 12, 2009, and no objections have been received.

Certification

[15] The criteria for certification are set out in s. 5 (1) of the *Class Proceedings Act, 1992*, which states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[16] Where certification is sought for the purposes of settlement, all the criteria for certification still must be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22.

[17] In the action, the plaintiffs advance claims for negligence, nuisance, and strict liability.

[18] The class definition is as follows:

All persons, except Excluded Persons, owning real property in the Class Area as of August 23, 2005.

[19] The proposed common issue for the certification for settlement purposes is as follows:

Did the Defendants unlawfully allow the escape of TCE and Chromium from the Bishop Street Property?

[20] In the case at bar, I am satisfied that for settlement purposes, the criterion for certification have been satisfied. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative plaintiffs; (c) the claims of the class raise common issues of fact or law; (d) a class proceeding is the preferable procedure; and (e) Derek Ashley Wamboldt, Craig Denby, Assad Kamal, Mark Phelan, and Linda Watson are suitable Representative Plaintiffs with adequate Class Counsel.

[21] Put simply, it is desirable to employ the mechanism of a class proceeding to resolve the claims advanced in this action. The certification for settlement purposes of this class action provides prompt and efficient access to justice for the claimants who do not opt out.

Settlement Approval

[22] I turn now to the matter of settlement approval. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*,

[1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[23] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[24] When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expenses and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[25] In the case, it appears that the Settlement Agreement is the product of hard bargaining between competent and experienced counsel for more than a year. The benefits of the settlement to class members are set out above in the summary of the terms of the settlement.

[26] Class Counsel believe that the settlement is the best that can be achieved on behalf of the class and that the settlement is fair, reasonable, and in the best interests of the class members. Class Counsel recommends that the settlement be approved.

[27] In coming to its recommendation, Class Counsel have considered procedural and litigation risks including: (a) the possible existence of second or multiple sources of contamination; (b) the possible assertion of certification defences and the risk that certification would be refused; (c) the risk that the court would require individual damage assessments making the proof of damages onerous or virtually impossible; (d) the risk that the current economic downturn and its impact on real estate prices would make it difficult to establish the impact of contamination on property values in the Class Area; (e) the risk that the court would find that losses due to environmental stigma were not compensable; and (f) the risk associated with appeals.

[28] Representative plaintiffs support the Settlement Agreement and have instructed Class Counsel to seek settlement approval.

[29] As noted earlier, no objections to the settlement were received.

[30] Having regard to the evidence before the court and having regard to the list of criteria that the court may consider when assessing the fairness of a settlement, the Settlement Agreement does appear to be a reasonable result and fair settlement. Based on the record that I have reviewed, I find that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the class.

[31] In accordance with the *Class Proceedings Act, 1992*, I approve the settlement.

Approval of Counsel Fees

[32] I turn now to the matter of the approval of the counsel fees as requested by Class Counsel.

[33] Factors relevant in assessing the reasonableness of the fees of any class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1751 (S.C.); *Lam v. Ajinomoto U.S.A., Inc.*, [2004] B.C.J. No. 985 (S.C.); *Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (S.C.).

[34] Class Counsel seeks total legal fees of 25% of the Property Damage and Extraordinary Damage Funds, plus disbursements and applicable taxes. The counsel fee equals \$1,125,000. Once the Costs Fund from the settlement funds has been applied to fees and disbursements of \$90,520.02, the balance of the fee is \$575,000 plus disbursements and taxes.

[35] The counsel fee is consistent with Class Counsel's retainer agreement, and the Representative Plaintiffs support payment of the fee.

[36] For the balance of counsel fees outstanding, Class Counsel propose that it be paid in two stages, similar to how payments to Class Members will be made. Thus, Class Counsel propose that \$160,393.34, which is inclusive of GST be payable now and that \$80,196.67 be payable in three years' time, upon the maturity of the promissory note (the "Maturity Date"). Upon the Maturity Date, Class Counsel proposes to bring another motion seeking payment of the remainder of Class Counsel's fees and any future disbursements (expected to be nominal), plus applicable taxes, from the Property Damage

Fund. This is estimated to be \$458,266.68 plus GST, subject to adjustment for interest or opt-out credit.

[37] As of June 8, 2009, Class Counsel has docketed time of \$887,066.90 plus G.S.T. and incurred disbursements of \$86,239.72 plus applicable G.S.T. There will be post-settlement work including the settlement approval hearing and communications with the Administrator about the implementation of the settlement.

[38] Class Counsel has funded all of the disbursements associated with this file and did not apply to the Class Proceedings Fund for assistance.

[39] I am satisfied that it is appropriate to approve Class Counsel's fee as follows:

- Class Counsel be paid \$1,125,000 plus taxes for legal fees and \$90,520.02 for disbursements inclusive of taxes.
- \$90,520.02 in disbursements is payable from the monies paid as Costs following Deposit Date One.
- \$437,599.98 of the legal fees plus G.S.T. of \$21,880.00 for a total of \$459,479.98 is payable from the monies paid as Costs following Deposit Date One.
- \$152,755.56 of the legal fees plus G.S.T. of \$7,637.78 for a total of \$160,393.34 is payable from the Property Damage Fund following Deposit Date One.
- \$76,377.78 of the legal fees plus G.S.T. of \$3,818.89 for a total of \$80,196.67 is payable from the Extraordinary Damage Fund following Deposit Date Two.
- Class Counsel may re-attend before this Court to make an application for payment of the remaining legal fees.
- Class Counsel may also make an application for recovery of disbursements plus taxes not accounted for in this application.
- All future payments of legal fees and disbursements, inclusive of applicable taxes, shall be paid to Class Counsel from the Property Damage Fund following payment.

Incidental Matters

[40] There are several incidental matters that require attention.

[41] I order that the Settlement Agreement is binding upon each Class Member, other than those who opt-out in accordance with the Settlement Agreement, including those persons who are minors or mentally incapable.

[42] I order that each Class Member, other than those who opt-out in accordance with the Settlement Agreement, personally and on behalf of their respective heirs, successors,

executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor and related companies, shall be deemed to have released and forever to have discharged the Releasees of the Released Claims.

[43] I order that in the event that litigation is commenced or continued by any Class Member against another person, or by another person against a Class Member, arising out of or in any way relating to the Released Claims, which results in a claim over or judgment against one or both of the Defendants and/or any other Releasee, the Class Member shall fully hold harmless, reimburse and indemnify the Defendant or Defendants and/or such other Releasee for such amount.

[44] I approve the Settlement Agreement on behalf of parties under a disability.

[45] I order that the deadline for Class Members to opt-out of the Settlement Agreement shall be sixty (60) days from the date notice of settlement approval is first disseminated ("Opt-Out Deadline").

[46] I order that a Class Member may only opt-out by sending to the Claims Administrator, on or before the Opt-Out Deadline, a request for exclusion from the Class, signed by the Class Member, or his/her/its authorized representative, stating that the Class Member opts-out of this Proceeding and also stating the Class Member's full name, address, telephone number, and reason for opting-out.

[47] I approve the opt-out form.

[48] I order that BDO Dunwoody LLP be appointed as the Claims Administrator and that it execute its obligations as set out in the Settlement Agreement.

[49] I order that the Honourable Coulter A. Osborne, Q.C. be appointed as arbitrator, to be used in that capacity as necessary.

[50] I order that the Plan of Distribution be approved and that it be implemented in accordance with its terms.

[51] I order that the claims form be approved.


[52] I order that the notice of certification and settlement approval be approved.

[53] I order that that the Plan of Distribution and notice of certification and settlement approval be disseminated in accordance with the notice plan.

[54] I order that this Proceeding be dismissed against the Defendants without costs and with prejudice.

Conclusion

[55] Orders accordingly.



Perrell, J.

Released: June 18, 2009

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