

Form 23.03

2004

Hfx. No. 218010

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

NEILA CATHERINE MACQUEEN, JOSEPH M. PETITPAS,
ANN MARIE ROSS, and KATHLEEN IRIS CRAWFORD



- and -

SYDNEY STEEL CORPORATION, a body corporate; THE ATTORNEY
GENERAL OF NOVA SCOTIA representing Her Majesty the Queen in right of
the Province of Nova Scotia; ~~CANADIAN NATIONAL RAILWAY COMPANY, a~~
~~body corporate;~~ and
THE ATTORNEY GENERAL OF CANADA representing Her Majesty the Queen
in right of Canada.

Defendants

Proceeding under the *Class Proceedings Act*, S.N.S 2007, c. 28

**Amended Notice of Motion
(Interlocutory Notice – originally filed September 7, 2007)**

To: Sydney Steel Corporation and The Attorney General of Nova Scotia
c/o their Solicitor
Agnes MacNeil
Department of Justice (NS)
5151 Terminal Road
4th Floor, 5151 Terminal Road
Halifax, NS B3J 2L6

And To: The Attorney General of Canada
c/o its Solicitor
Angela Green
Department of Justice
Atlantic Regional Office
5251 Duke Street, Suite 1400, Duke Tower
Halifax, NS B3J 1P3

Motion

The Plaintiffs in this proceeding move for an order:

1) granting that the within action be certified as a class proceeding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28;

2) defining the Classes as:

(a) The Property Owner Class, defined as:

Persons other than the Defendants and their parent companies, affiliates or subsidiaries who are the beneficial owners of property within the Class Boundaries as of the date that notice of the order certifying this proceeding as a class proceeding is given.

(b) The Residential Class, defined as:

Persons who have lived within the Class Boundaries for a minimum of seven (7) continuous years during the Class Period.

3) that the within action be certified on the basis of the following common issues:

(a) Did the Defendants cause or permit the emission or escape of the Contaminants onto the properties and persons living within the Class Boundaries during the Class Period?

(b) If the answer to (a) is yes, do the Contaminants emitted pose a risk to the use, enjoyment and value of properties contaminated by them?

(i) Are Lead, PAHs and Arsenic appropriate proxies for the Contaminants?

(ii) If the answer to (i) is yes, what is the appropriate background rate for PAHs, Arsenic and Lead emitted from the Steel Works, above which, exposure is deemed harmful to property and to health?

(c) Are the Defendants or any of them strictly liable to Class Members for damages in tort pursuant to the principle in *Rylands v. Fletcher* for the emission or escape of the Contaminants from the properties of the Defendants?

(d) Did the Defendants know, should they have known, or were they reckless or wilfully blind when they were causing or permitting the emission or escape of the Contaminants that they created a risk to the use, enjoyment and value of properties contaminated by them? If so, when did they have or should they have had such knowledge?

(e) Did the discharge of the Contaminants onto the properties and persons, and the presence of the Contaminants on the lands and in the homes of persons living within the Class Boundaries during the Class Period constitute a nuisance?

(f) Did the Defendants owe the Class Members a duty of care to take steps to contain, reduce, minimize or eliminate the emission or escape of the Contaminants?

(g) Did the Defendants breach the duty of care owed to Class Members by failing to take available steps to contain, reduce, minimize or eliminate the emission or escape of Contaminants including but not limited to the implementation of emissions controls, the introduction of cleaner processes, and the use of cleaner raw materials?

(h) Did the Defendants or any of them intentionally cause the Contaminants to come into contact with Class Members so as to constitute a battery at law?

(i) Did the Defendants or any of them carelessly emit or permit the escape of the Contaminants when they knew or ought to have known that they would come into contact with the Class Members so as to constitute a negligent battery at law?

(j) Does the deposition of the Contaminants by the Defendants on the properties within the Class Boundaries constitute a trespass at law?

(k) Did Canada and/or Nova Scotia either or both Defendants owe the Class Members a fiduciary duty to act in the best interests of Class Members in dealing with the dissemination of information concerning the existence of contamination within the Class Boundaries and the remediation of the contamination within the Class Boundaries? If so, did they breach that duty by:

(i) Concealing the known nature and effects of the Contaminants;

(ii) Concealing the health risks associated with exposure to the Contaminants from the Plaintiffs and Class Members

by, among other things, advising them that the Contaminants did not represent a risk to property and persons;

(iii) Continuing to spread the Contaminants within the Class Boundaries in spite of that knowledge; and

(iv) Declining to remediate the contamination now present on the lands in the within the Class Boundaries?

(l) Is the definitive epidemiological study, proposed by the Plaintiffs, an appropriate remedy?

(m) Are the Defendants required to ameliorate the ongoing exposure of Property Owner Class Members to Contaminants they emitted or permitted to escape onto the properties of Class Members within the Class Boundaries either by remediating those properties, or where not possible to effectively do so, by bearing the cost of relocating such Class Members to reasonably equivalent property that does not present such a risk?

(n) Are the Defendants liable to compensate members of the Residential Class for their exposure to the Contaminants on the basis of location and duration of residence?

(o) Are the Defendants jointly and severally liable for the remedies set out in issues (m) and (n) or otherwise for the conduct set out in the Statement of Claim?

(p) Is this an appropriate case for assessing some or all damages in the aggregate, pursuant to ss. 32-33 of the *Class Proceedings Act*, S.N.S. 2007, c. 28?

(q) Should the Defendants or any of them be liable to pay punitive damages in the aggregate and, if so, what is an appropriate amount of such aggregate damages?

4) that Neila Catherine MacQueen, Ann Marie Ross, Kathleen Iris Crawford be appointed as Representative Plaintiffs for the Classes.

5) that Joseph M. Petitpas be appointed as a Representative Plaintiff for the Residential Class.

6) that the Notice of Certification to the Class Members be given pursuant to the Litigation Plan attached hereto as Schedule "A".

7) that the Defendants shall be responsible for all costs associated with the Notice of Certification.

8) that the Class Members who elect to opt-out of the class proceeding must do so in a manner and within a period of time to be fixed by the Court.

9) for costs of this motion on a full indemnity basis, including taxes.

10) and such further and other relief as the Court may seem just.

Time and place

The motion, which is a continuation of the motion heard on the 21st day of June to the 24th day of June, 2010 inclusive, is to be heard by The Honourable Justice John D. Murphy on the 15th day of December, 2010 at 9:30a.m. in the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia. The motion will require one full day in chambers, pursuant to the direction of The Honourable Justice John D. Murphy. The moving party says that the motion will not require more time.

References

The moving party relies on the following legislation, Rules, or points of law:

- (a) The pleadings herein disclose a cause of action against the Defendants;
- (b) There are identifiable classes of persons who share a common interest in the common issues raised by the pleadings;
- (c) The claims of the Class Members raise common issues respecting the within litigation;
- (d) The proposed Representative Plaintiffs will adequately represent the interests of the Classes;
- (e) A class proceeding is the preferable procedure for the resolution of the common issues;
- (f) *Class Proceedings Act*, S.N.S. 2007, c. 28; and
- (g) Such further and other grounds as counsel may advise.

Evidence

The evidence in support of the motion is as follows:

- (a) Affidavit of Neila Catherine MacQueen;
- (b) Affidavit of Joseph M. Petitpas;
- (c) Affidavit of Ann Marie Ross;
- (d) Affidavit of Kathleen Iris Crawford;
- (e) Affidavits of Timothy Lambert;
- (f) Affidavit of Michael Dull;
- (g) Affidavit of Tee L. Guidotti;
- (h) Affidavit of Colin Soskolne; and
- (i) Affidavit of Michael J. Peerless.

Possible order against you

You may file an affidavit and a brief, attend the hearing of the motion, and state your position on whether the proposed order should be made. If you do not attend, the judge may grant an order without further notice to you.

Signature

Signed the 5th day of October, 2010



RAYMOND F. WAGNER
Solicitor for the Plaintiffs

SCHEDULE “A”

PLAINTIFFS’ LITIGATION PLAN

DEFINED TERMS

1. Capitalized terms that are not defined in this litigation plan (“Plan”) have the meanings as particularized in the statement of claim.

CLASS COUNSEL

2. The Plaintiffs have retained Wagners Law Firm and Siskinds LLP as Class Counsel to prosecute this class action. Class Counsel have the requisite knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution.

THE COMPOSITION OF THE CLASS

3. The Plaintiffs seek to represent the following Classes:
 - (a) The Property Owner Class, defined as:

Persons other than the Defendants and their parent companies, affiliates or subsidiaries who are the beneficial owners of property within the Class Boundaries as of the date that notice of the order certifying this proceeding as a class proceeding is given.
 - (b) The Residential Class, defined as:

Living Persons who have lived within the Class Boundaries for a minimum of seven (7) continuous years during the Class Period.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

4. Notice of certification is intended to inform Class Members of what has happened, of the effect on their individual rights, and what steps they can take and the consequences of doing so. Notice of certification therefore generally contains the following:
 - (a) A description of the Classes that have been certified;
 - (b) A description of the nature of the claims asserted by the representative plaintiffs for which the action has been certified;
 - (c) An explanation of the significance of the certification to the action for Class Members;
 - (d) An explanation of Class Members' right to "opt-out" or exclude themselves from the litigation (i.e. to pursue individual personal injury claims), and the significance of doing so; and
 - (e) Contact information for Class Counsel to allow Class Members to appropriately direct their inquiries;

5. The Plaintiffs propose that a notice of the certification of the action be circulated to advise Class Members, among other things, that:
 - (a) the Court has certified the action as a class proceeding;
 - (b) the claims being advanced by the representative plaintiffs relate to property damage from the contamination emitted from the Steel Works and By-Products Operations;
 - (c) persons falling within the definition of the Classes will be bound by the determination of the common issues unless they opt out;
 - (d) a person may only opt out of the class proceeding by sending a written election to opt out to the recipient designated by the Court before a date fixed by the Court;
 - (e) no person may opt out of the class proceeding after the date fixed by the Court;
 - (f) further notice will be provided following judgment on the common issues; and
 - (g) if the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and prove additional facts in order to obtain compensation.

6. The Plaintiffs propose that the notice advising of certification, in a form approved by the Court, be disseminated to Class Members in the following manner:
 - (a) posted by Class Counsel on its websites;
 - (b) appended to a press release circulated by wire service;
 - (c) delivered door-to-door to residential properties within the Class Boundaries;
 - (d) provided by Class Counsel to any person who requests it;
 - (e) published on three consecutive days in the Cape Breton Post;
 - (f) published once in The Chronicle Herald;
 - (g) published once in the national edition of The Globe and Mail; and
 - (h) available orally by recorded message at Class Counsel's toll-free line.

7. Once the order certifying the proceeding becomes final, Class Counsel will seek a case conference before the case management judge to finalize the terms of the certification order and of the notice of certification. Input will be solicited from the Court and the Defendants.

8. The Plaintiffs will ask the Court to order that the costs of disseminating the notice in the above manner be paid by the Defendants or equally with the Plaintiffs. If such order regarding the cost of Notice is not made, the costs will be borne by the Plaintiffs in the

first instance, reserving their right to seek the recovery of these costs, in whole or in part, from the Defendants by order of the judge presiding at the trial of the common issues.

9. The Plaintiffs propose that opt out notices be directed to Class Counsel, who will report to the Court and to the Defendants the names and addresses of the persons who opt-out by the date fixed by the Court.

REPORTING AND COMMUNICATION

10. Current information on the status of the action is posted and will be updated regularly on Class Counsel's website at www.wagnerslawfirm.com. Copies of some of the publicly filed court documents, court decisions, notices, documentation and other information relating to the action are and will be accessible from the website.
11. The website also provides direct dial contact information for a member of Class Counsel's staff who can provide further information should a Class Member request or require it.

LITIGATION SCHEDULE

12. After final disposition of the motion for certification, absent agreement among counsel, the plaintiffs will ask the Court to set a litigation schedule for the remaining steps in the action as follows:
 - (a) 2 months following the date of the certification Order, the Defendants shall deliver their Statements of Defence;
 - (b) 2 months following the delivery of the Statement of Defence, the parties will exchange their Affidavit of Documents;
 - (c) 6 months following the exchange of the Affidavit of Documents, the parties will complete their examinations for discovery;
 - (d) 6 months following the completion of examinations for discovery, the parties will exchange expert reports;
 - (e) 9 months following the exchange of expert reports, the Common Issues Trial shall commence;

DOCUMENT MANAGEMENT

13. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendants and all relevant documents in the Plaintiffs' possession. By agreement, the parties have negotiated a protocol for the coding of documents produced in the lawsuits, so that all parties will provide their documents in compatible electronic formats, and disclose uniform categories of information about each.

MEDIATION

14. The Plaintiffs are prepared to participate in mediation before The Honourable Justice John D. Murphy or any mutually acceptable mediator to settle the action or narrow the issues for trial.

TRIAL OF THE COMMON ISSUES

15. The Plaintiffs will ask the Court to hold the trial of the common issues within fifteen months after the completion of the examinations for discovery and production.

MANNER OF PROOF AT TRIAL

16. At trial, the Plaintiffs expect to rely on the following to prove the facts underlying their causes of action:
 - (a) admissions made in the pleadings;
 - (b) admissions made in discovery;
 - (c) admissions made through Notices to Admit Facts;
 - (d) admissions contained in documents proven through Notices to Admit Documents;
 - (e) witness accounts of the pollution emanating from the Steel Works from the Plaintiffs, Class Members, and other witnesses; and
 - (f) expert evidence.

THE PLAINTIFFS' EXPERTS

17. The Plaintiffs have retained or may retain experts to assist at trial by:
 - (a) identifying the Contaminants emitted from the Steel Works during the Class Period;
 - (b) identifying the area over which the Contaminants were distributed by the Defendants;
 - (c) establishing that Residential Class Members came into contact with the Contaminants in the course of their lives in Sydney;
 - (d) describing operating standards in the industries in which the Defendants were operating in Sydney during the Class Period;
 - (e) describing the physical and financial impact of the emission of the Contaminants on Property Owner Class Members' property; and
 - (f) describing the benefits, structure, and likely results of implementing a definitive epidemiological study in Sydney to identify the health risks of the Contaminants and to inform the Class Members and local medical professionals about those risks and the study results;

ISSUES TO BE RESOLVED AT THE TRIAL OF THE COMMON ISSUES

18. The Plaintiffs propose that the following common issues be resolved at the trial of the common issues:
- (a) Did the Defendants cause or permit the emission or escape of the Contaminants onto the properties and persons living within the Class Boundaries during the Class Period?
 - (b) If the answer to (a) is yes, do the Contaminants emitted pose a risk to the use, enjoyment and value of properties contaminated by them?
 - (i) Are Lead, PAHs and Arsenic appropriate proxies for the Contaminants?
 - (ii) If the answer to (i) is yes, what is the appropriate background rate for PAHs, Arsenic and Lead emitted from the Steel Works, above which, exposure is deemed harmful to property and to health?
 - (c) Are the Defendants or any of them strictly liable to Class Members for damages in tort pursuant to the principle in *Rylands v. Fletcher* for the emission or escape of the Contaminants from the properties of the Defendants?
 - (d) Did the Defendants know, should they have known, or were they reckless or wilfully blind when they were causing or permitting the emission or escape of the Contaminants that they created a risk to the use, enjoyment and value of properties contaminated by them? If so, when did they have or should they have had such knowledge?
 - (e) Did the discharge of the Contaminants onto the properties and persons, and the presence of the Contaminants on the lands and in the homes of persons living within the Class Boundaries during the Class Period constitute a nuisance?
 - (f) Did the Defendants owe the Class Members a duty of care to take steps to contain, reduce, minimize or eliminate the emission or escape of the Contaminants?
 - (g) Did the Defendants breach the duty of care owed to Class Members by failing to take available steps to contain, reduce, minimize or eliminate the emission or escape of Contaminants including but not limited to the implementation of emissions controls, the introduction of cleaner processes, and the use of cleaner raw materials?
 - (h) Did the Defendants or any of them intentionally cause the Contaminants to come into contact with Class Members so as to constitute a battery at law?
 - (i) Did the Defendants or any of them carelessly emit or permit the escape of the Contaminants when they knew or ought to have known that they would come into contact with the Class Members so as to constitute a negligent battery at law?
 - (j) Does the deposition of the Contaminants by the Defendants on the properties within the Class Boundaries constitute a trespass at law?

- (k) Did Canada and/or Nova Scotia either or both Defendants owe the Class Members a fiduciary duty to act in the best interests of Class Members in dealing with the dissemination of information concerning the existence of contamination within the Class Boundaries and the remediation of the contamination within the Class Boundaries? If so, did they breach that duty by:
- (i) Concealing the known nature and effects of the Contaminants;
 - (ii) Concealing the health risks associated with exposure to the Contaminants from the Plaintiffs and Class Members by, among other things, advising them that the Contaminants did not represent a risk to property and persons;
 - (iii) Continuing to spread the Contaminants within the Class Boundaries in spite of that knowledge; and
 - (iv) Declining to remediate the contamination now present on the lands in the within the Class Boundaries?
- (l) Is the definitive epidemiological study, proposed by the Plaintiffs, an appropriate remedy?
- (m) Are the Defendants required to ameliorate the ongoing exposure of Property Owner Class Members to Contaminants they emitted or permitted to escape onto the properties of Class Members within the Class Boundaries either by remediating those properties, or where not possible to effectively do so, by bearing the cost of relocating such Class Members to reasonably equivalent property that does not present such a risk?
- (n) Are the Defendants liable to compensate members of the Residential Class for their exposure to the Contaminants on the basis of location and duration of residence?
- (o) Are the Defendants jointly and severally liable for the remedies set out in issues (m) and (n) or otherwise for the conduct set out in the Statement of Claim?
- (p) Is this an appropriate case for assessing some or all damages in the aggregate, pursuant to ss. 32-33 of the *Class Proceedings Act*, S.N.S. 2007, c. 28 ?
- (q) Should the Defendants or any of them liable to pay punitive damages in the aggregate and, if so, what is an appropriate amount of such aggregate damages?

NOTICE OF THE RESOLUTION OF THE COMMON ISSUES

19. Assuming that the common issues are resolved in favour of the Plaintiffs, the Court will be asked:
- (a) to settle the form and content of the notice of resolution of the common issues;

- (b) to prescribe the information required from Class Members in order to make an individual claim based on the judgment on the common issues, if necessary;
 - (c) to declare the facts it will be necessary for Class Members to establish to succeed in individual claims, if any; and
 - (d) to set a date by which Class Members will be required to file an individual claim.
20. The Plaintiffs propose that the notice of judgment on the common issues include the following information:
- (a) A description of the Classes;
 - (b) A description of the common issues and the nature of the claims asserted;
 - (c) That the Plaintiffs were successful on the common issues;
 - (d) The nature of any class-wide remedies granted in the judgment on the common issues, and what steps, if any, it is necessary for Class Members to claim the benefit of those remedies;
 - (e) What steps a Class Member must take to assert a property damage claim, or to participate in Residential Class Compensation Program, and what facts a Class Member must prove to succeed on such a claim;
 - (f) That no person will be entitled to any compensation unless he/she/it complies with the instructions contained therein;
 - (g) How to obtain further information; and
 - (h) That their claims in relation to the matters raised in the pleadings will be deemed to have been finally adjudicated whether or not they participate in the individual stage of the proceeding.
21. The Plaintiffs will ask the Court to order that the notice of resolution of the common issues be distributed substantially in accordance with the procedure set out in paragraph 6 above.

CLAIMS PROCESS APPOINTMENTS

22. The Plaintiffs may ask the Court to appoint one or more referees with such rights, powers and duties as the Court directs, to conduct hearings with respect to any individual issues that remain outstanding in order for individual Class Members to obtain relief, pursuant to rule 35 of the Rules of Practice. Those references will be conducted in accordance with the directions of the trial judge in the order appointing the referee(s).

CLAIMS ASSESSMENTS

23. The Court will be asked to set a deadline (the “Claims Deadline”) by which Class Members must file their claims with a designated person or the Court. Class Members will be entitled to register for two aspects of the claims administration:

- (a) To have their property damage claim assessed by a referee; and
 - (b) To participate in the Residential Class Compensation Program.
24. Any person who does not file a claim in accordance with the orders of the Court before the Claims Deadline will not be eligible to assert an individual property damage claim in accordance with the process described below.
25. The evidence necessary to succeed on an individual claim will substantially depend on the extent of the Plaintiffs' success on the common issues. The process proposed for determining such claims is outlined below, subject to the input of the Defendants and the direction of the Court.
26. Class Members will be required to give notice of their intention to proceed with a claim at common law within 90 days by providing a statement of the facts (limited to those facts relating solely to the individual issues specified by the Court) on which they rely.

AGGREGATE AND/OR EXPEDITED INDIVIDUAL ASSESSMENT

27. Class Members asserting a property claim will be required to provide a soil sample, the results from which will be evaluated against the accepted background rate (as established at the trial of the common issues). If a claimant's soil sample exceeds the background rate, causation is established, leaving only the quantum of damages to be determined.
28. Damages may be assessed in one of 2 ways:
- (a) In the aggregate:
 - (i) by establishing damage amounts for remediation costs for various categories of above-background test results;
 - (ii) to finance a definitive epidemiological study in Sydney to identify the health risks of the Contaminants and to inform the Class Members and local medical professionals about those risks and the study results; and,
 - (iii) establishing damage amounts within the class boundary in relation to the number of years of residence at a minimum of 7 continuous years and location of residence in accordance with the principles in *St. Lawrence Cement Inc. v. Barrette*, [2008] S.C.J. No. 65; or,
 - (b) Individually, by a referee or special master, as follows:

Small Claims (Under \$25,000)

- (i) Class Members willing to cap their individual claims at \$25,000 should be required to file only affidavit evidence with a referee setting out their evidence relating to the individual issues remaining to be proven. Any Defendant who wishes may cross examine an affiant on his/her affidavit out of court should it wish to challenge the evidence. The referee will then make a report and recommendation with respect to the Class Member's

claim on the basis of the affidavit and transcript evidence, which recommendation will be made accessible to the Class Member. The Court will be asked by way of application to incorporate the report and recommendation of the referee into a judgment.

Full Claims (Over \$25,000)

- (ii) Class Members with claims in excess of \$25,000 wishing to proceed with such claims will be required to:
 - (A) Serve on the Defendants a list of documents prepared in accordance with rule 20; and
 - (B) Attend for an oral examination for discovery (in accordance with rule 18), or provide answers to written interrogatories (in accordance with rule 19), as any Defendant wishing to examine them may elect.
- (iii) The referee may, in his or her discretion, make a report and recommendation as to the Class Member's entitlement, if any, based on the documentary and transcript evidence, or conduct a trial of such claims. The Court will be asked by way of application to incorporate the report and recommendation into a judgment.

FURTHER ORDERS CONCERNING THIS PLAN

- 29. This Plan may be amended from time-to-time by directions given at case conferences or by further order of the Court.

EFFECT OF THIS PLAN

- 30. This Plan, as it may be revised by order of the Court from time to time, shall be binding on all Class Members whether or not they make a claim under the Plan.