

CITATION: Durling v. Sunrise Propane Energy Group Inc., 2011 ONSC 7506
COURT FILE NO.: CV-08-363271-00CP
DATE: 20111216

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992, S.O. 1992, C. 6*

BETWEEN:

JAMES DURLING, JAN ANTHONY)
THOMAS, JOHN SANTORO,) *Harvin Pitch, Ted Charney*
GIUSEPPINA SANTORO, ANNA MANCO,) *Michelle Kemper, Sharon Strosberg, for the*
FRANCESCO MANCO) *Plaintiffs*
AND CESARE MANCO)
Plaintiffs)

– and –

SUNRISE PROPANE ENERGY GROUP) *Robert J. Potts and Mirilyn R. Sharp,*
INC., 1367229 ONTARIO INC.,) *for the defendants, Sunrise Propane Energy*
1186728 ONTARIO LIMITED, 1369630) *Group Inc., 1367229 Ontario Inc., 1186728*
ONTARIO INC., 1452049 ONTARIO INC.,) *Ontario Limited, Valery Belahov, Shay*
VALERY BELAHOV, SHAY (SEAN) BEN-) *(Sean) Ben-Moshe, Leonid Belahov aka*
MOSHE, LEONID BELAHOV, ARIE) *Arie Belahov)*
BELAHOV, 2094528 ONTARIO INC., HGT)
HOLDINGS LTD., TESKEY) *Ward Branch, for the defendant, 1452049*
CONSTRUCTION CO. LTD. AND TESKEY) *Ontario Inc.*
CONCRETE CO. LTD., THE TECHNICAL)
STANDARDS AND SAFETY) *John A. Campion and Antonio DiDomenico,*
AUTHORITY, FELIPE DE LEON,) *for the defendants, 2094528 Ontario Inc.,*
ONTARIO HOSE SPECIALTIES LIMITED,) *HGT Holdings Ltd., Teskey Construction*
PERAFLEX HOSE INC., PERAFLEX HOSE) *Co. Ltd., and Teskey Concrete Co. Ltd*
INDUSTRIES INC., DOVER)
CORPORATION, DOVER CORPORATION) *Rory Barnable, for the defendant, The*
(CANADA) LIMITED SOCIETE DOVER) *Technical Standards and Safety Authority*
(CANADA) LIMITEE, WELDEX)
COMPANY LIMITED, KEDDCO MFG.) *Paul Belanger, for the defendants 1369630*
LTD., ROBERT PARSONS EQUIPMENT) *Ontario Inc. and Felipe De Leon*
TRADING INC. AND PRO-PAR (1978))
INC.)
Defendants) *John Lea, for the defendants, Ontario Hose*
Specialties Limited)

)
) *Stuart Ghan*, for the defendants, *Peraflex*
) *hose Inc. and Peraflex Hose Industries Inc.*
)
) *Linda Philips Smith*, for the defendants
) *Dover Corporation, Dover Corporation*
) *(Canada) Limited Societe Dover (Canada)*
) *Limitee*
)
) *Barry Yellin*, for the defendants *Weldex*
) *Company Limited*
)
) *Dana Eichler*, for the defendant *Keddco*
) *MFG. Ltd.*
)
) *Brent Vallis*, for the defendants *Robert*
) *Parsons Equipment Trading Inc. and Pro-*
) *Par (1978) Inc.*
)
) No one appearing for the Third Parties
) *Westside Services and Flagro*
)
) **HEARD:** October 27, 2011

C. HORKINS J.

THE CLAIMS BAR PROPOSAL

[1] This is a proceeding commenced under the *Class Proceedings Act* that arises out of explosions that occurred on August 10, 2008 at a propane facility located at 48 Murray Road and at 48, 54 and 62 Murray Road (“the propane facility”), in Toronto, Ontario.

[2] On October 24, 2011, the certification hearing in this action was set to proceed for five days. At the request of counsel, the commencement of the hearing was delayed until Thursday, October 27, 2011 because counsel were in the process of negotiating a consent certification order.

[3] On October 26, 2011, counsel provided the court with Minutes of Settlement. In essence, they agreed that the action should be certified subject to the court resolving two common issues that were in dispute and approving a claims bar.

[4] The Minutes of Settlement set out the usual terms for certification. In addition, the Minutes of Settlement include a novel provision that requires each class member to register with class counsel’s on line registration system. Class members must register no later than six months from the date of the certification order. A class member who fails to register within the deadline

“will be forever barred from participating in any future settlement or judgment and will be forever barred from bringing or continuing any action against the defendants and third parties relating to the explosion” subject to further order of the court (“the claims bar”).

[5] A class member who fails to register within the six months may seek relief from the claims bar. The relief provision in paragraph 9 of the Minutes of Settlement states as follows:

[T]he Court, in its discretion, may permit a Class Member (who does not register within the 6 month claims bar period and who does not opt out of the class proceeding within the 60 day opt out period) to be eligible to participate in a future settlement or judgment. The Defendants and Third Parties shall be permitted to ask the Court to only exercise its discretion to allow a Class Member (who does not register within the 6 month claims bar period and who does not opt out of the class proceeding within the 60 day opt out period) to be eligible to participate in a future settlement or judgment only if such Class Member satisfies the Court that (a) he or she did not receive notice of and was otherwise unaware of the 6 month claims bar deadline, and (b) he or she failed to register within the 6 month claims bar period due to extraordinary circumstances that were not the result of any failing on his or her part.

[6] Upon receipt of the Minutes of Settlement, I advised counsel that I had questions and concerns about the concept of a claims bar, the jurisdiction under the *Class Proceedings Act* to impose a claims bar, the lack of precedent and the unfairness to those who are barred.

[7] As well, I raised numerous concerns and questions about the above “relief” provision. On its face, this relief provision contemplates a barred class member having to go through a mini trial or some form of a hearing and being faced with resistance from the defendants and third parties. It is unclear how this process would be managed. Would sworn evidence be required or would the barred person simply file a request for relief? Would the defendants be able to cross-examine the barred class member? Would the barred class member require a lawyer, and if so, who would represent the barred class member? Would the barred class member have to incur the legal fees to seek relief? If denied, was there a right of appeal? Today, thousands of class members have not registered. Potentially, thousands will fail to register within the six months and thousands may seek relief from the claims bar. How would so many requests be managed?

[8] The certification hearing commenced on October 27, 2011. Submissions focused solely on the issue of the claims bar. It became apparent that settlement of the certification motion was conditional upon the court approving the claims bar. Without approval of the claims bar, the defendants stated that they would contest certification of this action. (I note that the defendants 2094528 Ontario Inc, HGT Holdings Ltd., Teskey Construction Co. Ltd and Teskey Concrete Co. Ltd. take no position on the issue of the claims bar). Oral submissions concerning the claims bar were made on October 27. Counsel then filed written submissions addressing the claims bar issue.

[9] In an attempt to address the concerns about the above “relief” provision, counsel proposed the following alternative protocol. There will be a second notice delivered to all

residences in the affected area three months before the claims registration deadline. This notice will warn the recipient of the approaching deadline and invite them to attend a town hall meeting to have any questions answered.

[10] A class member who fails to register before the deadline expires is referred to as a “late filer”. At this point, the claims bar is in effect and the late filer is not eligible to participate in a future settlement or judgment. A late filer can request relief from the claims bar only if the late filer completes a one page Late Registration Request, faxes, emails or mails this request to class counsel and registers with the on line registration system within two months of filing the Late Registration Request. The Late Registration Request form will be available on class counsel’s website.

[11] Class counsel must deliver a copy of any Late Registration Request Form to the defendants. The defendants may deliver a one page Response Form if they object to the inclusion of the late filer but must do so within 2 months of the final order on the common issues trial or the final order on settlement approval. If the defendants do not file a Response Form within the required time, the request for relief will be granted.

[12] Decisions on late filing will be deferred until after the common issues trial, approval of any settlement, or further order of the court. By deferring consideration of the Late Registration Request until after settlement or judgment, counsel hope that the issue may become moot. Depending upon the number and type of claims made by late filers, they suggest that “the issue of the management of late filed claims can be subject to further consideration of the parties if the claim is successful or a settlement negotiated.”

[13] Lastly, it is proposed that a private referee be appointed to decide whether a Late Registration Request should be granted. The defendants will bear the cost of the referee and the referee will issue reasons for the decision, but these decisions will be one page or less. There will be no right of appeal from the referee’s decision.

[14] For the reasons that follow, the claims bar is not approved.

BACKGROUND EVIDENCE

[15] This decision reviews some of the evidence that was filed on the certification motion. The purpose of this review is to give context to my consideration of the claims bar.

[16] On August 10, 2008, at approximately 3:50 a.m., a series of explosions occurred at the propane facility. The explosions caused several massive fireballs to be released into the air from the propane facility and over the surrounding neighbourhood.

[17] Many of the representative plaintiffs and other class members reported that in the immediate aftermath of the explosions, they were exposed to scenes of a massive fireball, subsequent mushroom cloud, and utter chaos.

[18] The Toronto Police Department ordered a non-compulsory evacuation of everyone within 1.6 km of the propane facility. The evidence indicates that 6,386 people lived in the affected area.

[19] As a result of the explosions, it is alleged that the class members suffered damages. They were displaced from their homes, inhaled smoke and noxious substances, feared for their lives, sustained damage to their homes and contents, suffered business losses, suffered from personal injury, post-traumatic stress disorders and other mental illnesses, were absent from work and lost income, and incurred the out-of-pocket costs of replacing clothing and hotel/food expenses while they were displaced.

[20] Class counsel retained Dr. Brian Hoffman to provide an opinion on the effects of the explosions on the class members. Dr. Hoffman examined two proposed representative plaintiffs in the action and delivered reports that were specific to them. Dr. Hoffman also delivered a report which applied to all persons who may have been affected by the explosions, which is summarized as follows:

- (a) the explosions occurred in the middle of the night when most people would be asleep in the safety of their homes;
- (b) any person in the vicinity of the explosion would likely have suffered significant emotional symptoms of fear and anxiety in reaction to the explosions;
- (c) the stressors experienced by people affected by the explosions were severe, multiple and prolonged;
- (d) 100% of the people who lived near the propane facility and heard the explosions or saw the subsequent fires would have experienced significant anxiety, fearfulness, sleeplessness, bad dreams and ruminative thoughts that would interfere with their functioning in everyday living for some period of time after the event; and
- (e) among other disorders described, individuals may develop an Adjustment Disorder within three months of a traumatic event with clinically significant symptoms of distress and significant impairment in social or occupational functioning. These symptoms typically last up to six months.

[21] Dr. Hoffman is of the opinion that the range of the severity of the psychiatric reactions to the explosions would be dependent on a number of factors. More severe reactions would likely depend on an accumulation of risk factors including the proximity to the explosions, the threat of personal and family harm, actual physical destruction of property and personal injury, displacement from the home, loss of personal possessions, actual or perceived financial loss and compromise, and duration and severity of individual emotional vulnerability whether identified or latent before the traumatic event. In addition, vulnerable residents with pre-existing psychiatric/emotional problems would be at a higher risk for severe response.

[22] Dr. Hoffman notes that similar serious traumatic events have yielded rates of Post-Traumatic Stress Disorder between 30% and 50% for persons exposed and Acute Stress Disorder is estimated to be at even higher rates.

[23] Dr. Hoffman is of the opinion that the common specific psychiatric disorders in such a traumatic event, among others are:

- (1) Acute Stress Reaction (lasting 2 days to less than 4 weeks);
- (2) Post Traumatic Stress Disorder (lasting more 4 weeks or more);
- (3) Phobic Disorder;
- (4) Adjustment Disorder with depression and/or anxiety; and
- (5) Aggravation of a pre-existing psychiatric disorder;

[24] Dr. Hoffman notes that Acute Stress Disorder can be a diagnosable disorder, after a minimum of symptoms lasting at least two days and resolving within four weeks. He states that if the symptoms have not resolved, the patient goes on to meet criteria for Post-Traumatic Stress Disorder.

[25] He states that many of the people who lived near the explosions would have experienced significant anxiety, fearfulness, sleeplessness, bad dreams and nightmares and ruminative thoughts to a degree that would interfere with their functioning in everyday living and in other areas of their life for some days after this event.

[26] Counsel state that the inability to determine how many people suffered a recognized psychiatric illness and obtain evidence to quantify their damages, is hindering their ability to consider settlement. A claims bar will allow counsel to determine the exact number of class members and it will provide evidence about their losses.

WEBSITE REGISTRATION

[27] The purpose of class counsel's website is to collect and record information from the class members about the damages that they suffered as a result of the explosions. The website is an interactive and intuitive registration system that records all aspects of the damages of the class members. For example, the website records the following information about the class members:

- (1) particulars about physical and psychological injuries, including anecdotal evidence about how their everyday lives were impacted by the explosions;
- (2) particulars about evacuation and displacement from homes;
- (3) pecuniary losses, both insured and uninsured, including but not limited to property losses, income losses and other losses;

- (4) non-pecuniary losses; and
- (5) the class members' anecdotal evidence about any other aspect of the explosions and its effect upon them, including but not limited to the number of hours people put towards putting their lives back in order in lieu of hiring contractors or the number of days they spent living friends or relatives while they were displaced from their homes.

[28] To date, there has been considerable effort on the part of class counsel to notify class members about the website and encourage them to register. Class counsel have held town hall meetings and questionnaires have been sent to people living in the affected area. As a result, over 1,750 class members have registered their claims on the website. Based on the estimate of 6,386 people living in the affected area, approximately 73% of the class has not registered their claims on the website.

[29] The website reveals that among the people who have registered, 307 have consulted a doctor about physical and emotional injuries they suffered as a result of the explosions. The website database also contains information concerning property claims paid by some of their property insurers.

[30] It is impossible to know why some putative class members have registered and others have not. Arguably, different factors motivate people to take action and register. Some may wish to wait and see what happens in the class action. Some may want to see if the case is going to settle before sharing personal information. Some of those who have not registered may be keeping track of details of their claims. Some may be unaware of the request to register despite efforts of class counsel to notify them. Some may have language difficulties and may not understand the print information that has been circulated.

[31] Class counsel are concerned that the passage of time is working against the class members. For example, they argue that memories will fade as time passes and crucial information about the psychological damage may be lost forever if it is not recorded. However, this is not a concern unique to this action. Class counsel submit that many class members suffered psychological symptoms but may not have visited a doctor and therefore lack medical records.

[32] If this crucial information is not recorded now, some three years after the explosions, class counsel fear that it may be lost forever. This is because the trial of the common issues may not take place for years and the trial of any individual issues will be delayed even longer. They argue that it is unlikely that class members will have a clear memory of their symptoms when the trial is finally reached. Class counsel submit that a claims bar will help to motivate the rest of the class to register on the website and preserve particulars about their claims.

[33] In an effort to collect more evidence about class members who claim emotional injury, the Minutes of Settlement state that class counsel will add the following three questions to the website registration:

- (1) Did you or any person for whom you are registering, consult a health professional for the emotional injury?
- (2) If the answer to question 11(a) is “yes”, did you (or any person for whom you are registering) receive a diagnosis of the emotional injury?
- (3) If the answer to question 11(b) is “yes”, what was that diagnosis?

[34] The Minutes of Settlement require class counsel to report the answers provided by the class member. Class counsel are under no obligation to verify the information provided.

ANALYSIS

Why is a Claims Bar Requested?

[35] Class Counsel proposed the concept of the claims. All counsel argue that a claims bar is in the best interests of the class and will satisfy one of the goals of the *Class Proceedings Act*, namely, access to justice. This is because the claims bar will motivate class members to register their claims and this will assist in preserving evidence. Further, the claims bar will provide certainty about how many are in the class and the type of damages suffered. All counsel say this will foster settlement.

[36] Class counsel submit that in this case there are two complicating factors that increase the need for the claims bar. First, according to class counsel some of the defendants “may not have sufficient insurance coverage”. Class counsel state that it is difficult to recommend a settlement within policy limits without knowing the aggregate value of the claims. Second, there are subrogated claims with a value of approximately \$20 million that will be competing for their share of any settlement monies (subject to which has the priority in the event of insufficient monies). Class counsel state that they need to know the value of the uninsured claims when negotiating with the defendants.

[37] Not surprisingly the defendants support the claims bar. Each time a class member is barred, the defendants’ exposure drops. Further, before pleadings are delivered, discovery of the representative plaintiffs is conducted and a settlement is ever reached, the claims bar allows the defendants to know exactly how many class members there are and offers them a form of discovery about each registered class member. They will have access to the information that the class member is required to register on line. It is hard to imagine a defendant in a class action that would not support a claims bar.

[38] Defence counsel state that the claims bar will encourage prompt consideration of settlement because it will remove the uncertainty about the nature and scope of the claims that often plagues a class proceeding. It will provide firm and objective details about the quantification of the claims particularly those involving personal and psychological injury.

[39] Defence counsel also state the claims bar is justified because of special circumstances that they say exist in this case. These special circumstances are summarized as follows:

- The case involves a clear recognizable one day event in a confined area.
- There has been extensive media attention about the explosions and the class action.
- There have been numerous efforts to notify putative class members to register their claims and many have done so including insurers who seek to recover subrogated losses.
- Putative class members have already had almost four years to register.
- The Minutes of Settlement provide for additional notice about the need to register and the resulting claims bar for those who do not. They are given a generous amount of time (6 months) to register and it is easy to do so.

[40] In my view, there is nothing special or unique about this case that justifies imposing a claims bar. Counsel seem to be suggesting that the circumstances of this case justify the claims bar despite prejudice to those who are barred, because this case is about an explosion that all putative class members know about and extensive efforts have been made to tell all putative class members to register their claims. In other words, if they do not register, it is safe to assume that they do not wish to be involved. I appreciate that this case is different from other class actions where the putative class member may not even know that a claim exists. However, the issue is not whether special circumstances exist to justify a claims bar. The issue is whether the *Class Proceedings Act* supports this bar. As explained below it does not.

The Claims Bar is a form of Opting In

[41] The *Class Proceedings Act* is not an “opt in” system and yet this is the practical effect of the claims bar. Upon certification, the *Class Proceedings Act* gives class members a choice: they opt out and can pursue individual claims or they pursue their claims as class members. Those who do not opt out are protected by the class action. The effect of the claims bar is to introduce a further step after the opt out period. Class members who have not registered must do so failing which they will be barred from pursuing any claim. In other words, even though they decided not to opt out and are class members, they must now elect to stay in the class action. In my view, this is a requirement that they “opt in” and is contrary to how the *Class Proceedings Act* works.

[42] The claims bar would fundamentally change the structure of the *Class Proceedings Act*. It takes away the class member’s rights simply because he does not register on the website. As the proposed claims bar states, the barred class member is “forever barred from participating in any future settlement or judgment and will be forever barred from bringing or continuing any action against the Defendants and Third Parties relating to the explosion”.

The Class Proceedings Act and the Rules do not support a Claims Bar

- (i) *The Class Proceedings Act*

[43] Counsel argue that there is support in the *Class Proceedings Act* for a claims bar because various sections require class members to act within a specified time frame, failing which some or all of their rights will be lost. There is simply no section in the *Class Proceedings Act* that contemplates a claims bar.

[44] Section 9 allows a time to be specified to opt out of a class. It does not extinguish the ability to pursue a claim.

[45] Counsel also point to the time limits for making claims under ss. 24 and 25, as support for the claims bar. For example, s. 24(7) of the *Class Proceedings Act* is titled “Time limits for making claims”, and provides that “...the court shall set a reasonable time within which individual class members may make a claim under this section.” Section 24(8) provides that “A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.”

[46] Section 25 of the *Class Proceedings Act* deals with the processing of individual issues after the court has determined the common issues in favour of the class. Section 25(4) states that “[t]he court shall set a reasonable time within which individual class members may make claims under this section” and s. 25(5) provides that “A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.”

[47] Counsel argue that requiring class members to register with class counsel’s on line system before the 6 month claims registration deadline, is no different than the provisions in ss. 24 and 25 of the *Class Proceedings Act* except with respect to the timing. Under the *Class Proceedings Act*, class members must register their claims “after” the common issues are determined, whereas the Minutes of Settlement require Class Members to register their claims “before” the common issues are determined.

[48] The time limits in ss. 24 and 25 are distinguishable. They are time limits imposed at a point in the class proceeding when the actual relief of the class member is being adjudicated. Common issues have been adjudicated and a class member is required to participate in individual issues. It is reasonable and necessary at this end point in the class action to impose a time limit. In contrast, counsel seek to impose a claims bar at the beginning of the class action, before pleadings are closed and any discovery has taken place.

[49] Counsel argue that the *Class Proceedings Act* gives the court tremendous flexibility to ensure that the purposes of the Act are met. Section 12 states:

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[50] Counsel urge me to use the power under s. 12 to impose the claims bar which they characterize as a “procedural mechanism that will ensure the fair and expeditious determination of this proceeding”.

[51] Further, defence counsel argue that the benefit of a consent certification motion cannot be understated. In particular, counsel state that the consent to certification conserves judicial resources, improves the speed of justice and encourages the reasonable behavior of defendants on the certification motion. The Minutes of Settlement were the subject of intense negotiations among respected counsel and unless there is a substantive reason to reject the claims bar, counsel say that this approach to settlement of a certification motion should be encouraged.

[52] In my view, none of the above justifies the claims bar. First, I have identified in these reasons many substantive reasons to reject the claims bar. Second, reasonable behaviour of the defence should not have to be encouraged and certainly not at the expense of absent class members. Third, conserving judicial resources and speeding up justice, should not be at the expense of the absent class members.

[53] Counsel defend the fairness of the claims bar. They point to the fact that class counsel have already reached out to the class to explain the on line registration and have urged them to register. Further, additional notice will be given to the class members after certification clearly explaining the registration requirement and the claims bar for those who fail to comply. There will be another mail drop at each residence and place of business in the affected area, advertisements in English and Italian newspapers and a notice will be posted on class counsel's website. A claims bar may help to expedite the determination of the class proceeding because the defendants will know how many class members exist and will have details about their claims. This, they argue, may encourage settlement. Of course defendants in most, if not all class actions, would be interested in having this degree of certainty.

[54] However a claims bar in my view, will not “ensure the fair and expeditious determination of this proceeding.” [Emphasis added.] It is not fair to bar a class member simply because they do not register their claims. This is a draconian penalty that finds no support in the *Class Proceedings Act*.

[55] A central goal of the *Class Proceedings Act* is to improve access to justice. Counsel argue that access to justice for those who register is improved because details of their claims will be documented. As well, counsel argue that certainty in class numbers and disclosure of evidence about the nature of their injuries will assist in promoting settlement. But this ignores the fact that the claims bar eliminates access to justice for any class member who does not register. While the proposal allows the barred class member to request relief from the bar, it is far from certain how this will be managed, what arguments the barred class members will face from the defendants, whether they will need legal representation and who will represent them. Counsel seek to place all of this on the “back burner” by delaying consideration of any Late Registration Requests. Even if a request for relief is successful, a class member should not have to go through the process of trying to get back into the class.

[56] If as suggested there is insufficient insurance monies to satisfy all claims, it is easy to see how this will become an issue if barred class members are seeking relief. If settlement monies have to be shared between class members who did register and those who seek to be let back in, tension and conflict between the two groups may develop.

[57] Section 12 of the CPA provides the court with broad discretion. As noted in *Bodnar v. Cash Store Inc.* 2011 BCCA 384 at para. 39, "[t]he objectives of that broad discretion lie in the court's obligation to protect the interests of absent class members, and the potential complexities of managing class actions." In *Fantl v. Transamerica Life Canada*, 2009 ONCA 377 at para. 39, Winkler C.J.O. affirmed that "[t]he existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues."

[58] The exercise of the court's discretion under s. 12 of the *Class Proceedings Act* must be fair to the class members. A claims bar will not ensure the "fair" determination of the class proceeding.

(ii) *The Rules of Civil Procedure*

[59] It is important to remember that the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 apply to class actions. As stated in *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235 (S.C.J.), at para. 27, "the discretion conferred by s. 12 of the CPA is intended to supplement the Rules by accommodating the special nature of class proceedings. However, s. 12 is not designed to circumvent the normative Rules."

[60] Requiring registration and collecting evidence that will be shared with the defence, all before the close of pleadings is a form of pre-discovery production. There is no such requirement in the *Rules*. Unless there is evidence "to suggest that the alleged 'class' nature of the claim calls for any departure from the discovery procedures set out in the Rules ... [a party] is not entitled to additional or accelerated rights of discovery under s. 12 of the CPA." (*Stern v. Imasco Ltd* at para. 29). No evidence exists in this case that justifies using such an extreme penalty that is a significant departure from the *Rules*.

[61] Under the *Rules of Civil Procedure*, if a plaintiff fails to serve an affidavit of documents, comply with a production request, attend a discovery and/or answer undertakings, there is no automatic penalty imposed that dismisses or bars the claim. To the contrary, the *Rules* are replete with examples of discretionary relief that the court typically offers a plaintiff.

There is No Precedent for the Claims Bar

[62] The cases that counsel rely on as support for the claims bar do not assist. I will deal with each one separately.

[63] In *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245, the parties brought a motion to approve a class action settlement with some but not all of the defendants. The plaintiffs and the settling defendants agreed that the settling defendants' proportionate liability would be fixed at 65%. The plaintiffs' action would continue against the non-settling defendants. The settling defendants agreed to abandon any claim for contribution and indemnity against the non-settling defendants. The plaintiffs agreed to seek damages against

the non-settling defendants in the amount for which the non-settling defendants are severally liable.

[64] As a term of the settlement, the non-settling defendants were barred from making any further claims for contribution and indemnity against the settling defendants in respect of any damages awarded to the plaintiffs at trial. The non-settling defendants disputed the bar and argued that the court had no jurisdiction to bar their rights under the *Negligence Act*, R.S.O. 1990, c. N.1 to seek contribution and indemnity. In the end, the court accepted the bar and concluded that the rights of the non-settling defendants were not prejudiced.

[65] *Ontario New Home Warranty Program v. Chevron Chemical Co., supra*, is an example of the court utilizing the concept of a bar to assist in effecting a partial settlement. The bar that was imposed in this case did not bar a right of action and did not prejudice the rights of the non-settling defendants under the *Negligence Act*.

[66] As Winkler J. stated at para. 50 of this decision the “court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.”

[67] In *Politzer v. 170498 Canada Inc.*, [2005] O.J. No. 5224 (S.C.J.) tenants in a residential building suffered damage when a water pipe in the building burst. An action under the *Class Proceedings Act* was commenced. Tenants whose damages were \$10,000 or less had claims that fell within the exclusive jurisdiction of the Ontario Rental Housing Tribunal. At the certification hearing, Cullity J. limited the class membership to those who indicated their desire to participate in the proceeding to claim damage in excess of \$10,000. He explained his reasons for doing so at para. 25 as follows:

25 Although, as far as tenants are concerned, this definition of the primary class would, in effect, substitute an opting-in process for the opting-out procedure contemplated by the CPA, I believe it is justified in the special circumstances of this case where, by statute, the court's jurisdiction depends on an exercise of choice, or judgment, by each tenant. ... however, a different interpretation of the decision was suggested.

[68] *Politzer v. 170498 Canada Inc., supra*, does not justify imposing a claims bar in this case. In *Politzer*, it was necessary to impose what Cullity J. called an opt in provision because the court's jurisdiction depended on the individual electing to sue for more than \$10,000. Unlike the proposed claims bar in this case, the opt in requirement in *Politzer* did not prejudice the rights of the tenants.

[69] Two final cases that counsel rely on are of no assistance. Both are brief decisions early in the development of class action law and neither considers the numerous questions and issues that are raised by the concept of a claims bar. In each case, the court allowed early registration or what was an opt in approach.

[70] *Campbell v. Flexwatt Corp.*, (1998) 62 B.C.L.R. (3d) 11 (B.C.S.C.) does not deal with the *Class Proceedings Act* in issue. In that case, a consent order required class members to register their claims and, if they failed to do so by the deadline, they were precluded from participating in the action. If the court issued reasons for agreeing to impose this consent bar, they were not provided by counsel in this case and there is no record of such a decision that I can locate. I was provided with brief reasons of the British Columbia court dealing with a motion to extend the registration deadline. The deadline was extended but the case offers no assistance in understanding the statutory authority and reasons for the initial consent order.

[71] In *Denis v. Bertrand & Frere Construction Co.*, [2002] O.J. No. 3419, a motion was brought on consent to add “additional class members”. The judge had previously granted certification and had ordered that class members “join” the class action by a certain date. (The decision granting certification was not provided.) Four people who failed to “join” the class brought a motion to be allowed to “join” late. In brief reasons the court granted the relief. The case offers no assistance in understanding the statutory authority and reasons for the initial order directing that class members “join” the class.

[72] Two decisions of this court support my decision to reject the claims bar. In *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411, the defendant asked the court on a certification motion to bifurcate the proceedings in the event the action was certified. Specifically, the defendant wanted discovery and the trial of the individual issues to take place before the trial of the common issues. Strathy J. rejected this request and stated at para. 150 that the defendant was “really trying to turn this action into an opt-in class action by requiring each Class Member to come forward and establish his or her entitlement to claim prior to the resolution of the common issues.” As Strathy J. so aptly noted at para. 150, this “proposal stands class actions on their head”.

[73] The defendants seek to argue that *Ramdath* leaves the door open because Strathy J. states at para. 150 that “[i]t may be the case that, in exceptional circumstances, the court’s jurisdiction under s. 12 of the C.P.A. would permit the determination of some or all individual issues before the common issues, but I have some difficulty in contemplating what those circumstances might be.” This does not help counsel in this case. *Ramdath* deals with the ordering of the trial of the issues and not the barring of the right to claim.

[74] In *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910, on a motion for certification, the defendants asked the court for an order directing members of the class who wished to make claims, to identify themselves prior to a trial of the common issues. Cullity J. rejected the request because it would “in effect, convert the opting-out procedure under the CPA into an opting-in process” and he did not believe that the court had “the jurisdiction to make such an order under s. 12 of the CPA, or otherwise.” (at para. 117). Counsel argue that there are three reasons why *Lambert v. Guidant Corp.*, *supra*, is distinguishable.

[75] First, counsel state that the plaintiff in *Lambert* did not consent to the proposal whereas the plaintiffs in this action introduced the concept of the claims bar and continue to support it along with defence counsel. The consent of counsel does not eliminate the supervisory role of this court to protect absent class members. In fact, the consent of all counsel makes the issue

more challenging because there is no one in the adversarial process speaking for the rights of those whose claims will be barred if they fail to register on time.

[76] Second, counsel state that there was no mention in *Lambert* of trying to facilitate an efficient and early resolution of the case (which is what they say the claims bar facilitates). Instead, it appeared that the primary motivation for the early registration scheme that the defendant proposed was to reduce the size of the class. While this may be a difference between the two cases, it is irrelevant to my consideration of whether s. 12 should be utilized to approve a tool that is unfair to those who are barred and fundamentally changes the structure of the *Class Proceedings Act*.

[77] Third, counsel argue that unlike this case, there were no special circumstances in the *Lambert* to justify the proposal. As I have already stated, there is nothing special or unique about this case that justifies imposing the claims bar.

CONCLUSION

[78] In summary, the request to approve the claims bar is denied. The certification motion will proceed on May 14 to 18, 2012. Counsel will attend a case conference on January 13, 2012 at 10 a.m.

C. Horkins J.

Released: December 16, 2011

CITATION: Durling v. Sunrise Propane Energy Group Inc., 2011 ONSC 7506
COURT FILE NO.: CV-08-363271-00CP
DATE: 20111216

ONTARIO

SUPERIOR COURT OF JUSTICE

**PROCEEDING UNDER the *Class Action Proceedings Act, 1992,*
S.O. 1992, C. 6**

BETWEEN:

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO,
GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO
MANCO
AND CESARE MANCO

Plaintiffs

– and –

SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO
INC.,
1186728 ONTARIO LIMITED, 1369630 ONTARIO INC., 1452049
ONTARIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-
MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528
ONTARIO INC., HGT HOLDINGS LTD., TESKEY
CONSTRUCTION CO. LTD. AND TESKEY CONCRETE CO.
LTD., THE TECHNICAL STANDARDS AND SAFETY
AUTHORITY, FELIPE DE LEON, ONTARIO HOSE
SPECIALTIES LIMITED, PERAFLEX HOSE INC., PERAFLEX
HOSE INDUSTRIES INC., DOVER CORPORATION, DOVER
CORPORATION (CANADA) LIMITED SOCIETE DOVER
(CANADA) LIMITEE, WELDEX COMPANY LIMITED, KEDDCO
MFG. LTD., ROBERT PARSONS EQUIPMENT TRADING INC.
AND PRO-PAR (1978) INC.

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: December 16, 2011