*Case Name:*

# Durling v. Sunrise Propane Energy Group Inc.

**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 Constuction Co. Limited, and Teskey Concrete Co. Ltd., Defendants**

[2009] O.J. No. 5969

Court File No. CV-08-363271-00CP

Ontario Superior Court of Justice

**M.C. Cullity J.**

Heard: October 19, 2009.
Judgment: November 5, 2009.

(42 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Disposition without trial -- Discontinuance -- Applications and motions -- Application for directions -- Motion by plaintiffs for directions allowed -- Six actions were commenced as class proceedings following explosion that damaged property in vicinity -- Counsel consolidated actions into composite action that named additional defendants that were not party to initial actions -- s. 29(1) of Class Proceedings Act required approval of discontinuance of initial actions -- Plaintiffs sought directions pre-motion -- Court found that discontinuance required absence of prejudice to class members -- Defendants' interests irrelevant to discontinuance inquiry -- Defendants that were non-parties to initial actions did not have standing to oppose motions for discontinuance -- Class Proceedings Act, ss. 29, 35 -- Ontario Rules of Civil Procedure, Rules 23.01(1) (a), 23.01(1)(b).*

Motion by the plaintiffs for directions in advance of a motion to discontinue separate actions commenced as class proceedings in favour of one consolidated action. Following a series of explosions at a property, a number of actions were commenced in which different plaintiffs sought damages for personal injury and property damage against the operators of the facility and related persons (the "Sunrise defendants"). Six of the actions were commenced under the Class Proceedings Act, seeking to represent owners and residents in the vicinity of the explosion. The defendants were not identical, although each action claimed against one or more of the Sunrise defendants. The City of Toronto was a defendant in four cases. A public safety administrative authority was named as a defendant in one action. Two actions claimed against the numbered company that owned the property. Counsel decided to consolidate the six actions by replacing them with a single composite action that claimed for strict liability, negligence, nuisance and trespass. It was proposed that the six original actions would be discontinued. In addition to the Sunrise defendants, several defendants related to the corporate owner of the property were named (the "Teskey defendants") for the first time. Under s. 29(1) of the Class Proceedings Act, court approval was required for discontinuance of the original actions. The Teskey defendants opposed approval of the discontinuance of the actions against the City and the public safety authority. The plaintiffs sought directions on the legal test for approval of discontinuance, and whether the Teskey defendants had standing to oppose their motion.

HELD: Motion allowed. The motion for discontinuance required an absence of prejudice to the class. Any requirement of good faith or reasonable grounds was relevant to the inquiry into the prejudicial effect on the interests of class members. There was no need to give weight to the interests of the defendants. The Teskey defendants did not have standing to oppose the motion for discontinuance, as they were not parties to the actions that the plaintiffs sought to discontinue. The commencement of the composite action did not improve their position with respect to actions to which they were not a party. Any actual or presumed prejudice to the Teskey defendants was not relevant to the determination related to discontinuance, as the purpose of s. 29 of the Class Proceedings Act was to protect the interests of class members.

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12, s. 29, s. 29(1), s. 35

Environmental Protection Act, R.S.O. 1990, c. E.19,

Ontario Rules of Civil Procedure, Rule 23.01(1)(a), Rule 23.01(1)(b)

Technical Standards and Safety Act, 2000, S.0 2000, c. 16,

**Counsel:**

Harvin Pitch and Theodore P. Charney, for the Plaintiffs.

John A. Campion, Antonio Di Domenico and Ian Gold, for 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd.

Lisa D. La Horey, for the Technical Safety Standards Authority.

Ward Branch, for 1452049 Ontario Ltd.

Cheryl Woodin, for the City of Toronto.

Robert Potts and Mirilyn Sharp, for Sunrise Propane Energy Group Inc,, 1367229 Ontario Inc., 1186728 Ontario Ltd., Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov and Arie Belahov.

Paul Belanger, for 1369630 Ontario Inc.

Bill Evans, for Scottish and York Insurance Co.

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DIRECTIONS

**1** **M.C. CULLITY J.**:-- Following an explosion, or series of explosions, at a facility located at 54 Murray Road in Toronto on August 10, 2008, a number of actions were commenced in which different plaintiffs claimed damages for personal injury and property damage against the operators of the facility and persons related to them (the "Sunrise defendants"). Six of these actions were commenced on August 13, 2008 under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") in which the plaintiffs seek to represent residents and owners of businesses and property in the vicinity of the facility at the time of the explosion. Causes of action in negligence and for strict liability were pleaded in each of the proceedings. There were claims for nuisance in five of them and, in a few, there are additional claims for liability for trespass and occupiers liability and under the Environmental Protection Act.

**2** The defendants in the six actions are not identical although in each of them claims are made against one or more of the Sunrise defendants. The City of Toronto (the "City") is a defendant in four of the cases, and, in one of them, there are claims against the Technical Standards and Safety Authority ("TSSA") - a non-profit organization which is a designated administrative authority with responsibilities for public safety under the Technical Standards and Safety Act, 2000, S.0 2000, c. 16.

**3** In two of the actions, claims against 2094528 Ontario Inc ("209") that is the owner of 54 Murray are made. Neither the City nor TSSA is a defendant in those actions.

**4** After consultation among lawyers acting for the plaintiffs in the six cases it was decided to "consolidate" them by replacing them with a single composite action in which claims for strict liability, negligence, nuisance and trespass are pleaded by Mr. James Durling and six individuals who were plaintiffs in three of the original actions. It was proposed to discontinue the original six actions.

**5** The composite action - the present proceeding - was commenced by statement of claim issued on September 28, 2008 and subsequently amended on May 1, 2009. In addition to the Sunrise defendants, the defendants include 209 and a number of corporations related to 209. These (with 209, the "Teskey defendants") are HGT Holdings Ltd., the owner of a property adjoining 54 Murray; Teskey Construction Co Ltd, the lessee of 54 Murray from 209 and the sublessor to one of the Sunrise defendants; and Teskey Concrete Co Ltd, the lessee of the adjoining property from HGT Holdings Ltd. Neither the City nor TSSA is named as a defendant.

**6** Section 29 (1) of the CPA reads as follows:

> 29(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

**7** In consequence, although they are not certified under the statute, the court's approval to discontinue the original six actions is required and motions for this purpose by the plaintiffs in the present proceeding are now pending. This motion in the composite action is for directions on certain specific issues that are relevant to the pending motions and the question whether approval under section 29 should be granted is not now before the court.

**8** On its face, this method of proceeding appears to be - at best - an irregularity as the moving parties are not the plaintiffs in the actions to be discontinued. The general principle under the Rules of Civil Procedure is that proceedings can be discontinued only by their plaintiffs and, when it is required, leave can be granted only on their motion. Section 35 of the CPA provides that the Rules apply to class proceedings and I do not believe the principle that a discontinuance of an action is essentially an act of a plaintiff was intended to be abolished by the provisions of section 29. Plaintiffs' counsel indicated that, on the motions for approval, they will submit that they are acting as agents for the lawyers of record for the plaintiffs in each of the six actions.

**9** None of the parties represented at the hearing challenged the standing of the plaintiffs to seek the court's approval of the discontinuance of the six other actions, and counsel for the Sunrise defendants submitted that standing could be granted to the plaintiffs by an exercise of the court's authority under section 12 of the CPA to make orders for the fair and expeditious determination of the proceeding.

**10** Although I intend to leave the question of the plaintiffs' standing to the hearing of the motion to approve the discontinuances, I am satisfied that the existence of the issues to be addressed on this

motion for directions is to a large extent a consequence of the procedure that has been adopted for the purpose of seeking approval.

**11** The issues have arisen in connection with the intention of the Teskey defendants to oppose approval of the discontinuances of the actions against the City of Toronto and TSSA. For this purpose, their counsel submitted that they are entitled to examine representatives of these defendants, and summonses to witnesses have been served accordingly. As the motion to discontinue was made in the present composite action to which the Teskey defendants are parties, it must, in their counsel's submission, he presumed to affect their rights and interests as well as those of all the party litigants. In consequence, so the argument goes, there can be no question that the Teskey defendants have standing to oppose a motion to approve the discontinuance of the claims against the City and TSSA.

**12** After counsel for the City and TSSA indicated that their clients would move to strike the summonses to witnesses as an abuse of process - and after a case conference and a subsequent exchange of correspondence - I agreed to hear a motion for directions with respect to the following questions:

1. what is the legal test that the court is to apply in determining whether to grant the plaintiffs' motion to approve the discontinuance;
2. do the Teskey defendants have standing on the plaintiffs' motion; and
3. are the summonses to witnesses otherwise an abuse of process?

**13** At the hearing, the submissions of counsel on the allegations of abuse of process were effectively restricted to the question of standing. In consequence, only the first two of the questions need to be considered. I did, however, permit counsel for TSSA and the City to reserve their clients' rights to raise other issues relating to abuse of process in the event that I found that the Teskey defendants had standing.

1. The test for court approval under section 29 of the CPA

**14** Counsel were in agreement that, in order to give approval of a discontinuance against a defendant, the court must be satisfied that the interests of the class will not be prejudiced. The requirement of approval in section 29 of the CPA follows closely the recommendations of the Ontario Law Reform Commission in its Report on Class Actions (Ministry of the Attorney-General, 1982) at pages 786-789 and 806-808. The principal focus of the Commission's discussion was on the possibility of collusive or inadequate and unfair settlements. At page 806, the report states:

> ... there is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement. For example, the representative plaintiff might use the class action to enhance his individual bargaining position, or class members interests could be sacrificed for lawyers fees. Furthermore, class members who

> rely upon a class action could be prejudiced if they are not advised of the suit's discontinuance. Moreover, in the context of a settlement negotiated on behalf of the entire class, the agreement reached could be inadequate or unfair to a class members.

**15** Apart from the situation in which a discontinuance was part of a settlement, the potential prejudice identified in respect of a discontinuance was the possibility that the members of the putative class would not receive notice.

**16** That the absence of prejudice to the class is a prerequisite to the court's approval is consistent with the decisions, and the reasoning, of this court in Rose v. Pettle (2004), 43 C.P.C. (5th) 183 (S.C.J.); Vennell v. Barnado's (2004), 73 O.R. (3d) 13 (S.C.J.); and Sollen v. Pfizer (2008), 290 D.L.R. (4th) 603 (S.C.J.). Likewise, on the appeal in Sollen, [2008] O.J. No. 4787 (C.A.), the Court of Appeal stated (at para 3):

> The motion judge approved the discontinuance under s. 29 of the Class Proceedings Act, S.O. 1992, c. 6, s. 29. The requirement for approval is intended for the protection of the interests of the absent class members. The motion judge determined that those interests would not be prejudiced by the discontinuance. We are not persuaded of any error in the motion judge's reasons for the approval of the discontinuance.

**17** The same emphasis on the absence of prejudice to the interests of a class, appears in Campbell v. Canada (Attorney General), [2009] F.C.J. No. 50 (T.D.) in which Sollen was followed.

**18** In addition to the absence of prejudice to the class, counsel for the Teskey defendants submitted that it must be demonstrated that the decision to discontinue was made reasonably and in good faith. While I accept that the existence of reasonable grounds for discontinuing, and the requirement of good faith, can be relevant, they should, in my opinion, be viewed in relation to - and as part of - the inquiry into the prejudicial effect, if any, on the interests of class members. If plaintiffs' counsel cannot establish that the decision to discontinue was made in good faith and on reasonable grounds, there is likely to be prejudice to those interests in discontinuing the action against the defendants in question.

**19** The question whether prejudice to defendants could be a relevant consideration was considered in Campbell where the proposed discontinuance of the proceeding against the defendants was opposed by them on a number of grounds including the prejudice they would suffer by reason of the plaintiffs intention to commence proceedings against them in another jurisdiction. Hansen J. held that prejudice to the defendants was not a relevant consideration and that, in the absence of prejudice to the class, approval to discontinue would be granted. The learned judge's acceptance that potential prejudice to the class was the "central consideration" is obviously consistent with the recommendations of the Law Reform Commission and the statement of the Court of Appeal in Sollen that the requirement of court approval is intended for the protection of

class members.

**20** The refusal to give weight to the interests of the defendants in Campbell is also consistent with cases in which courts have considered their authority to set aside notices of discontinuance delivered under the Rules of Civil Procedure before the close of pleadings. In the seminal case of Magee v. Canada Coach Lines Ltd, [1946] O.W.N. 73 (H.C.) it was held by Master Conant K.C. that the court had no power to set aside a notice of discontinuance against one defendant under the Rules of Practice even where the result of the discontinuance would be to destroy the right of a co-defendant to contribution or indemnity from the former defendant. The provisions of section 8 of the Negligence Act, R.S.O. 1990, c. N. 1 that permitted a non-party to be sued outside the ordinary limitation period were enacted subsequently and, possibly, as a result of the decision: see HSBC Securities v. Davies, Ward & Beck (2003), 68 O.R. (3d) 289 (S.C.J.), at para 40.

**21** The absolute rule of non-intervention in Magee has undergone only limited erosion in the more recent authorities under the present provisions of rule 23.01(1)(a). The rule reads, in part, as follows:

> 23.01(1). The plaintiff may discontinue all or part of an action against any defendant,
>
> (a) before the close of pleadings, by serving all parties who have been served with the statement of claim a notice of discontinuance ... and filing the notice with proof of service;
> (b) after the close of pleadings, with leave of the court; ...

**22** In Daniele v. Johnson (1999), 45 O.R. (3d) 498 (Div. Ct.), Then J. stated (at para 21):

> I agree with the appellants that in certain circumstances the court can set aside a notice of discontinuance. The case law has set out that in circumstances where the notice of discontinuance is not properly filed or served or where there has been inadvertence or misapprehension the notice of discontinuance can be set aside. ... However, the case law is also clear that where the notice of discontinuance has been properly and validly served and filed the court does not have authority to set aside the notice of discontinuance. See: Magee v. Canada Coach Lines Limited, [1946] O.W.N. 73 (Master); Pacific Centre Ltd. v. Micro Base Development Corporation (1990), 49 B.C.L.R. (2d) 218 (C.A.). This case was not a proper one in which to exercise discretion, since there was no inadvertence, mistake or misapprehension of the client's instructions, and no exceptional circumstance.

**23** In the Pacific Centre case cited by the learned judge, the Court of Appeal of British Columbia accepted that in the absence of mistake, misapprehension or inadvertence, a discontinuance might

be set aside on other grounds of a "compelling nature".

**24** Finally, in Angelopoulos v. Angelopoulos (1986), 55 O.R. (2d) 101 (H.C.), the court exercised its inherent jurisdiction in cases of abuse of process and set aside a notice of discontinuance. De Shazo v. Nations Energy Co., [2006] A.J. No. 1616 (CA.) was a similar decision.

**25** The requirement of court approval in section 29 of the CPA was designed to protect the interests of the class members. It was not intended to alter the respective rights of plaintiffs and defendants inter se. By virtue of section 35 of the CPA, the Rules of Civil Procedure apply to class proceedings to the extent that they are not inconsistent with other provisions of the Act Whether or not motions under section 29 may be treated as supplanting the procedure under rule 23.01(1)(a), it is my opinion that the principles in the cases I have cited continue to apply as between plaintiffs and defendants in class actions and that their authority is not diminished, or affected, by the jurisdiction of the court under the section.

**26** It is true that, if pleadings have closed and leave to discontinue is required under rule 23.01(1)(b), the interests of the defendants may become relevant As Low J. stated in Simonic Ross (2004), 71 O.R. (3d) 161 (at para 25);

> It is ... common ground that on a motion for leave to discontinue the court is to balance and weigh the rights and interests a the parties. It is to consider the prejudice that would befall the plaintiff in not being permitted to discontinue against the prejudice to the defendant if leave were granted, taking into account in each case the court's ability to neutralize prejudice through the imposition of terms.

**27** Motions for leave pursuant to rule 23.01(1)(b) must still, in my opinion, be distinguished from those under section 29 of the CPA. Whether, in class proceedings, motions for leave under the rule are in practice coupled with, or combined under, motions for approval under section 29, it is, I believe, necessary to distinguish and keep separate the different considerations relevant to the court's discretion in respect of each of them. The interests of defendants are relevant for purposes of the rule, but not under the section. It may be that no question of approval under section 29 should arise if the court would refuse leave under the rule. If, however, the court would grant leave, an enquiry under section 29 would then be required and for that purpose the interests of the defendants should be irrelevant.

2. Standing of the Teskey Defendants

**28** While references to a person's "standing" in a court of law are sometimes to be understood in the general sense of a right to appear and to be heard, the term is often used more narrowly to refer to a right to have an issue adjudicated and to seek a remedy from the court. Historically, the requirements for standing - as well as the intended sense in which the term is used - have varied according to the context. For example, rules of standing have, in the past, differed for particular

prerogative writs and equitable or statutory remedies, as well as when private or public interests are involved. In some cases, it is held that standing exists as of right; in others, leave of the court is required.

**29** In this case, the Teskey defendants submit that they have standing as of right to be heard in opposition to the plaintiffs' motion to discontinue against TSSA and the City, together with the right to examine their representatives for the purpose of the motion. In effect, their counsel submit that they have the same procedural rights as any party to a civil action whose interests are directly engaged.

**30** Earlier in these reasons I referred to the unusual procedure under which the motions for court approval to discontinue have been brought by the plaintiffs in this composite proceeding that is intended to replace - and not strictly to consolidate - the six original actions. I left the question whether the plaintiffs have standing to seek such approval to be dealt with at the hearing of the motions. However, if the plaintiffs have standing on the motions for approval to discontinue pursuant to section 29, I am satisfied that the Teskey defendants do not have standing to oppose the motions.

**31** Approval to discontinue is sought only in respect of the actions in which the City and TSSA are parties. The Teskey defendants are not defendants in any of these four actions. If a separate motion for approval to discontinue had been brought in respect of each of the four actions prior to the commencement of this composite proceeding, the Teskey defendants would have had no right to intervene in opposition to the motions. In my opinion, they did not obtain any rights as parties to them by the procedure adopted here for the purpose of seeking approval.

**32** In short, the motions to discontinue against the City and TSSA relate to proceedings in which the Teskey defendants have no standing and the commencement of the composite action did not improve their position and enable them to argue that they have the status of parties for the purpose of the motions.

**33** In the course of the hearing, Mr. Potts - counsel for the Sunrise defendants - informed the court that his clients support the submissions of the Teskey defendants. Unlike the Teskey defendants, the Sunrise defendants are co-defendants with the City and TSSA in four of the actions in which approval to discontinue is requested.

**34** Obviously, the support of Mr. Potts' clients is not sufficient to confer standing on the Teskey defendants and Mr. Potts did not suggest that his clients intended to move to examine representatives of the City and TSSA for the purpose of the motions to discontinue. Just as obviously, it would not be appropriate for me to speculate on the grounds on which Mr. Potts might rely and I do not intend to do this.

**35** However, in view of the novelty of the question of standing as it relates to the Teskey defendants, I will provide my views on the basis of what I consider to be the assumption, albeit

erroneous in my opinion, that underlay the submissions of their counsel - namely, that I should consider the issue of their standing as if the plaintiffs' motions relate to a discontinuance of claims against co-defendants in this composite proceeding.

**36** For the purpose of their submissions on standing, defendants' counsel did not identify and purport to rely on any particular respect in which their clients' interests will be affected by a decision to grant, or withhold, approval. They relied principally on their status as parties to the composite action but also, it seems, on a presumption of prejudice. The motion for approval, their counsel submitted, is "squarely a motion within the action and must be presumed to affect the rights and interests of all party litigants". It is submitted further that, as the plaintiffs affiant has stated that the ability of the Teskey defendants to make third party claims against TSSA and the City excludes the possibility of prejudice to such defendants, they must, as a matter of natural justice, be given an opportunity to respond.

**37** For the reasons I have given under the previous heading, I am satisfied that neither actual nor any presumed prejudice of the Teskey defendants is relevant to a decision to approve or refuse approval under section 29 for the purpose of protecting the interests of class members.

**38** In any event, it was quite clear at the hearing that the purpose for which the Teskey defendants claimed standing was not to protect their own substantive, or procedural, rights or interests. They seek an opportunity to persuade the court that the plaintiffs have a much stronger case against TSSA and the City than their counsel have foreshadowed, and to conduct the examinations for that purpose. While he stopped short of attributing motives of undiluted altruism to his clients, Mr. Campion accepted that he would, in effect, be performing the task of plaintiffs' counsel and attempting to protect the class against what he considered to be such counsel's errors of law and judgment. He stated, also, that he wished to examine the representatives of the City and TSSA on the question of good faith.

**39** In response, plaintiffs' counsel submitted that the Teskey defendants were attempting to obtain pre-discovery discovery, to undertake a fishing expedition on the question of good faith in the absence of any foundation or reason for suspecting its absence, and to delay the proceeding.

**40** I consider that the submissions of plaintiffs' counsel have considerable weight. More fundamentally, as persons whose legitimate interests will not be affected by a decision under section 29 of the CPA, the Teskey defendants are, in my opinion, in the position of officious bystanders seeking to intervene in a matter that does not concern them.

**41** In these circumstances - and in addition to the other reasons I have given - am satisfied that the Teskey defendants do not have standing as of right to oppose the motion in this case and to conduct the examinations of representatives of the City and TSSA. Nor would I exercise in their favour any discretion I might have to grant them standing for that purpose. It at the hearing of the motions to discontinue, I am satisfied that counsel for the Teskey defendants could assist the court on the question of the reasonableness of the plaintiffs decision to seek approval, I may permit them

to address the court for that purpose. Their counsel's participation will extend no further.

**42** Any submissions of counsel for the plaintiffs, or counsel for TSSA and the City, on the costs of this motion may be made in writing within 14 days of the release of these reasons. Counsel for the Teskey defendants will have a farther 10 days in which to respond.

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