In the Court of Appeal of Alberta

Citation: NOVA Chemicals v Dow Chemical Canada, 2024 ABCA 278

Date: 20240826
Docket: 2401-0075AC;
2401-0152AC;
2401-0191AC
Registry: Calgary

2024 ABCA 278 (CanLII)

And Between:

NOVA Chemicals Corporation

Applicant

- and –

Dow Chemical Canada ULC and Dow Europe GmbH

Respondents

Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio

Application for Permission to Appeal

Oral Reasons for Decision of
The Honourable Justice Jolaine Antonio

2024 ABCA 278 (CanLII)

Introduction

[1] The applicant, NOVA Chemicals Corporation, applies for numerous forms of relief, including a ruling on whether permission is required to pursue three proposed appeals. If so, it seeks permission. It also seeks a stay of the proceedings in the court below.

Background

[2] NOVA's requests arise against the backdrop of uniquely complex and long-lived litigation. The trial was initially intended to proceed in two phases. Since becoming seized with the matter, the trial judge has made countless rulings on all manner of subjects, rendered judgment on the first phase of trial, and heard evidence and arguments on the second phase. This Court has rendered various decisions by single justices in chambers as well as two judgments by appellate panels: *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2020 ABCA 320 and 2021 ABCA 153 [respectively, the First Appeal and the Second Appeal].

[3] As a result of the judgment in the First Appeal, two matters were referred back to the trial court for determination. The first, known as the Damages Remand, was heard during the second phase of the trial. The second, known as the Pool Remand, is scheduled to be heard in November 2024. The proposed appeals arise from orders made leading up to the Pool Remand.

1. Does NOVA require permission to appeal?

[4] The parties disagree about whether permission is required to appeal these orders. Rule 14.5(1)(c) provides that permission is required to appeal "any ruling during trial, where the appeal is brought before the trial is concluded." The respondent, Dow Chemical Canada ULC, submits this rule applies because the trial proceedings are underway and there has never been a formal bifurcation order. NOVA submits permission is not required because the Pool Remand trial has not yet begun. It relies on *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2006 ABCA 211.

[5] At paragraph 8 of *Freyberg*, a justice of this Court noted that the relevant section of the Rules "is aimed at providing a faster, more efficient procedure for appeals, for the purpose of avoiding delay in the trial process." This aim is strongly in play here, given the long history and the conduct of the trial and appellate proceedings, including the timing of the applications before me.

[6] The purpose of the permission requirement is further explained in *Freyburg* at paragraphs 11 to 14:

> In my view, the purpose of s. 3(a)(iii), regarding rulings made during trial, is aimed at avoiding interruption of a hearing once it has commenced – whether that hearing is called a trial, a second trial or a second phase of the first trial. The phrase "any ruling during trial" was never intended to apply to that time period between the hearing of different issues in a cause where those hearings are severed by agreement or order. Many of those time periods are lengthy, and frequently all of the preparation for the hearing of the new issue is done following conclusion of the hearing on the first issue. An interpretation that the words "during the trial" as they appear in s. 3(a)(iii) means all orders subsequent to the hearing of the first trial issue require leave would create an obvious unfairness.
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> The unfairness arises because the parties, in the second stage of the procedure, would have to seek leave to appeal on issues for which leave was not required for the purposes of the first hearing. This is best demonstrated by an example. Leave is not required where a party appeals a pre-trial ruling refusing to order the production of certain documents. Thus, if a trial on the issue of liability is to proceed before damages, a right of appeal would be available on document production questions without leave. If "any ruling during trial" means all steps from commencement of the trial on liability, then a party appealing orders relating to production of documents on damages would face the procedural barrier of requiring leave not faced when dealing with appeals relating to document production related to liability. Parties who are conducting discovery on the damage question are entitled to the same rights of appeal as they had when preparing for the liability issues. The words "any ruling during trial" were not, in my view, intended to deprive litigants of the same right to appeal, without leave, when preparing for the damage hearing.
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> In addition, when the calling of evidence in an action has been divided into two stages, the mischief s. 3(a)(iii) is designed to protect against – delay – is not usually present until the second hearing begins. Whether the procedure has been adopted by agreement, or judicial fiat, the parties will frequently be anticipating some pre-trial activity before the second hearing. One reason for severing a case into separate hearings for separate issues is to save costs of doing that preparation before the first issue is finally determined. The leave requirement set out in s. 3(a)(iii), for rulings during trial, is to avoid disturbing the flow of a hearing once it commences, not to disturb the parties' rights of appeal between hearings.
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> I conclude, therefore, that where triable issues have been divided for separate hearing, the words "any ruling during trial" in s. 3(a)(iii) do not apply to the period

2024 ABCA 278 (CanLII)

> between the hearings, whether that second hearing is called a second trial or a second phase of the original trial. Applying this interpretation to the present situation, I find it unnecessary to decide whether the upcoming hearing is a second trial or a continuation of the first. Nor need I decide whether the agreement between the parties was properly interpreted by the trial judge who refused to recuse herself, in part on the basis of her interpretation of the letter agreement. For the purposes of this application there is no dispute that the issue of liability was divided from the accounting trial and counterclaim issues. The second hearing has not commenced and discoveries have not yet taken place with respect to the accounting and the counterclaims. Section 3(a)(iii) has no application and the present appeal does not require leave.

[7] The Pool Remand is a new phase of trial. Preparations for it began in earnest after the last phase of trial was completed, but for the judgment, which remains under reserve. I conclude Rule 14.5(1)(c) does not apply and permission to appeal is not required on that basis. I note that the Second Appeal, which arose between the first and second trial phases, proceeded without a grant of permission.

[8] Dow further argues that permission is required insofar as NOVA seeks to appeal pre-trial decisions "respecting adjournments, time periods or time limits": Rule 14.5(1)(b). In its application, NOVA asks me to "avert a significant injustice" which, it says, is "unfolding in three ways":

A. The trial judge has misinterpreted the terms of the Pool Remand from the First Appeal;

B. The document production and discovery processes the trial judge has imposed are unfair and one-sided in Dow's favour; and

C. Exacerbating this unfairness, "the trial court has set, and has refused to consider resetting, arbitrary deadlines and a hearing date which in of themselves will deny NOVA a meaningful opportunity to respond, including with responding expert evidence."

[9] In oral argument NOVA confirmed these are its proposed grounds of appeal, though Ground C is "much more an argument for the stay" application and will inform the argument on Grounds A and B. Since Ground C has not been formally withdrawn, I will consider whether leave is required to appeal on Ground C.

[10] Having found that the orders in question were not made during a trial for purposes of Rule 14.5(1)(c), I must conclude that the timing orders were made pre-trial for purposes of Rule 14.5(1)(b). Taking Ground C as an appeal from pre-trial timing orders, permission is required. The other grounds may proceed as of right: *Ozark Resources Ltd v TERIC Power Ltd*, 2020 ABCA 51 at para 22.

2024 ABCA 278 (CanLII)

2024 ABCA 278 (CanLII)

2. Should leave be granted on Ground C?

[11] To obtain permission to appeal under Rule 14.5(1)(b), an applicant must establish:

i. A serious question of general importance;

ii. A reasonable chance of success on appeal; and

iii. That the appeal will not unduly hinder the progress of the action or cause undue prejudice, without any proportionate benefit.

See, for example, *Carbone v Dawes,* 2024 ABCA 13 and sources cited therein.

[12] A serious question of general importance "involves a matter of policy, principle or law that might have precedential value. It requires more than a disagreement with a factual interpretation or quarrel with an exercise of discretion": *Schulte v Alberta (Appeals Commission for Workers Compensation Board),* 2015 ABCA 268 at para 7; see also *AE v Alberta (Child Welfare),* 2019 ABCA 478 at para 6; *Vysek v NOVA Gas International Ltd*, 2002 ABCA 112 at para 34.

[13] Ground C does not raise such an issue. NOVA's complaints about timing are entirely fact- and context-specific. The context of this case is so unusual that it would be virtually impossible to apply any timing decisions to any other case or context, such that precedential value is not a realistic concern.

[14] As has been explained at greater length in other judgments, timing decisions arise in the trial court's broad discretion to control its own proceedings. As such, they attract a highly deferential standard of review. Appeals from such orders are to be discouraged as they are likely to be counter-productive. Similarly, litigation by instalment is to be discouraged: *Ozark* at paras 28, 29, 46.

[15] From the record before me, I find NOVA's description of timing decisions is incomplete and overstated. Given the high standard of review, I am not satisfied Ground C has a reasonable chance of success on appeal. I am satisfied that proceeding with an appeal of the timing orders would cause undue prejudice without any proportionate benefit.

[16] It follows that permission to appeal on Ground C is denied. This decision does not prevent NOVA from referring to the timing of events when arguing its other grounds of appeal.

3. Should the Pool Remand proceedings be stayed pending the outcome of the appeals?

[17] Rule 14.48 provides:

> An application to stay proceedings or enforcement of a decision pending appeal may be made

> (a) to the judge who made that decision, or
>
> (b) to a single appeal judge, whether or not the application was made to the judge who made the decision, and whether or not that application was granted or dismissed.

[18] The application to this Court to stay proceedings in the Court of King's Bench is an unusual one. Neither party has provided an authority in which such an application was made, much less granted.

[19] The British Columbia Court of Appeal considered a similar application, under a rule that is similar but not identical to the Alberta rule, in *Mayer v Mayer*, 2011 BCCA 290. As is the case here, the trial in question was "complex, prolonged and fractious": at para 1. The applicant sought a stay of trial proceedings on the basis that if his appeals were successful, "the further proceedings will have been for naught with the attendant waste of time, money and judicial resources": at para 11. NOVA makes similar arguments and asks me to "prevent an erroneous and unjust execution of the Pool Remand".

[20] The British Columbia Court of Appeal held it must respect the right of trial judges "to manage their business and, except perhaps in highly unusual circumstances, should confine our intervention to review of past errors rather than attempt to prevent possible future errors": at para 12.

[21] This court has found wisdom in this approach and, notably, has done so in dismissing a prior appeal by NOVA. In the Second Appeal, NOVA alleged the trial judge had misinterpreted the Damages Remand from the First Appeal and erred by making unfair rulings on document production and discovery. At paragraph 104 of the Second Appeal judgment, this Court made the following compelling statement:

> [104] ... fully dispositive of this ground of appeal is our refusal to intervene in the trial judge's directions relating to a proceeding not yet heard, but which seem to be, on their face, entirely reasonable. The trial judge is entitled to adopt a process she considers fair and appropriate, according to her broad discretion: ***O'Reilly v IMAX Corporation***, 2019 ONCA 991 at paras 60-61, 59 CCEL (4th) 175. As this Court has previously observed, "it is much better to deal with these procedural matters in the context of actual trial evidence and an actual trial decision, rather than a nest of speculations about the future": ***Durish v White Resource Management Ltd***, 1997 ABCA 111 at para 21, [1997] AJ No 291.

[22] The parties agree that in considering NOVA's stay application I should apply the test from *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 332-333. I have been provided with no precedent stating a test particular to the rule 14.48 stay power. Since the *RJR* test generally governs stay applications, including procedural stays, I will apply it as the parties have suggested. I note, however, that the *RJR* test can adapt to particular contexts. For example, the test

2024 ABCA 278 (CanLII)

"is modified in family law cases to reflect the paramount importance of the best interests of the child:" *CL. v BRS*, 2013 ABCA 349 at para 10 and sources cited therein. Here, in applying the *RJR* test, I will bear in mind the principles articulated in *Mayer* and the Second Appeal.

[23] Under the *RJR* test, the applicant has the burden of showing that: (i) there is a serious question to be tried, meaning there is an arguable issue that is neither frivolous nor vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

[24] I begin with criterion (ii). Irreparable harm is "harm that cannot be remedied if the appeal were to succeed. This includes harm that cannot be quantified in monetary terms and compensated in damages": *Prosper Petroleum Ltd v Alberta*, 2020 ABCA 85 at para 21. Irreparable harm may be found where an appeal would be rendered nugatory or moot in the absence of a stay: *LC v Alberta (Child Welfare)*, 2023 ABCA 290 at para 12.

[25] Here, NOVA asserts that allowing the trial to proceed in the face of allegedly unfair discovery procedures will deny it the ability to make full answer and defence, which presumptively causes irreparable harm. The cases NOVA cites for this assertion do not support it. While appeals from pre-trial rulings are permissible, allegations of pre-trial error should not presumptively lead to appellate stays of trial proceedings. I decline to establish a principle that could have radical implications for the role of appellate courts and the timely and cost-effective resolution of trials.

[26] This is, of course, not to say that irreparable harm may never be found on an appeal from a pre-trial ruling. Each case will turn on its facts.

[27] On the unique facts before me, I am not satisfied NOVA will suffer irreparable harm absent a stay of the trial proceedings. If errors were made, they may be corrected on appeal, even if the remedy involves a further remand to the trial court. Any resulting expense to NOVA would be monetary and compensable.

[28] I turn to criterion (iii) of the *RJR* test. NOVA submits the balance of convenience favours a stay because it would suffer irreparable harm while Dow will experience "no meaningful prejudice", and streamlining the trial will save time for the parties and the Court. As noted, I have rejected NOVA's position on irreparable harm.

[29] It is appropriate, in assessing the balance of convenience, to consider the administration of justice, the efficient use of judicial resources and the aim of discouraging litigation by installments: *Denis v Sauvageau*, 2022 ABCA 166 at paras 35-37. Granting a stay of the Pool Remand proceedings would have a negative impact on all these factors. I reiterate the message of *Mayer* and the Second Appeal: appellate courts should respect the right of trial courts to manage their own business, including by exercising their considerable discretion in crafting procedures suited to the cases before them.

2024 ABCA 278 (CanLII)

[30] To be clear, I am not saying that discretionary decisions, pre-trial or otherwise, are immune from review. My comments go only to the question of whether this Court should exercise its discretion to stay trial proceedings.

[31] Here, a stay of the trial proceedings would serve no positive purpose that I am prepared to recognize. The balance of convenience favours denying the stay.

[32] My conclusions on these two criteria mean NOVA has not met the *RJR* test. It is therefore not necessary for me to comment on the merits of the grounds of appeal. Given the number of outstanding proceedings in which the same or similar issues may arise, I decline to do so.

4. Should the appeals be expedited and consolidated with the Rule 14.38 application?

[33] NOVA asks me to direct these appeals be heard on an expedited basis. Since a stay of the trial proceedings has been denied, expedited dates are not necessary. Running simultaneous proceedings in the trial and appellate courts would unduly burden the parties while risking conflicting judgments. The request for expedited dates is denied.

[34] As discussed during the oral hearing, NOVA's other procedural requests are premature. I adjourn them *sine die,* to be brought before me for argument should the need arise.

Conclusion

[35] NOVA does not require permission to appeal on its Grounds A and B as identified in the applications before me.

[36] NOVA does require permission to appeal on its Ground C. Permission is denied.

[37] NOVA's application to stay the Pool Remand trial proceedings is denied.

[38] NOVA's request to have these appeals heard on an expedited basis is denied.

[39] NOVA's other procedural requests are adjourned *sine die.*

[40] Dow has largely been the successful party today and is awarded costs of the applications in any event of the cause.

2024 ABCA 278 (CanLII)

[41] If the parties encounter any procedural issues that cannot be resolved by the Case Management Office, they may approach me.

Application heard on August 22, 2024

Reasons filed at Calgary, Alberta
this 26th day of August, 2024

Antonio J.A.

2024 ABCA 278 (CanLII)

Appearances:

S.H. Leitl, KC
A.E. Bernstein
T. Gelbman (No Appearance)
O.C. Dixon
B.H. Walker
L. L'Hirondelle
G. Benediktsson (No Appearance)
for the Applicant

B.C. Yorke-Slader, KC
E.B. Mellett, KC
R.J. Hofley (No Appearance)
K. MacDonald (No Appearance)
C.J. Mackey
D. Brunsdon (No Appearance)
D.J. Wahl
A.J. Williams
for the Respondents

2024 ABCA 278 (CanLII)