Original

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Newfoundland and Labrador v. Chiasson*, 2020 NLCA 28
Date: August 24, 2020
Docket Number: 201901H0099 & 201901H0100

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR
APPLICANT/APPELLANT

AND:

JOHN CYRILLE CHIASSON FIRST RESPONDENT

AND:

NALCOR ENERGY SECOND RESPONDENT

AND

Docket Number: 201901H0100

BETWEEN:

NALCOR ENERGY APPLICANT/APPELLANT

AND:

JOHN CYRILLE CHIASSON FIRST RESPONDENT

AND:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR SECOND RESPONDENT

Filed Aug 24, 2020 JB

Coram: Fry C.J.N.L., Welsh and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G7673
(2019 NLSC 133)

Application Heard: June 11, 2020
Decision Rendered: August 24, 2020

Reasons for Decision by: Welsh and Goodridge JJ.A.
Concurred in by: Fry C.J.N.L.

Counsel for Her Majesty the Queen in Right of Newfoundland and Labrador: Donald Anthony Q.C.
Counsel for John Cyrille Chiasson: Raymond F. Wagner Q.C. and Kate Boyle
Counsel for Nalcor Energy: David Eaton Q.C. and Dana Martin

Welsh and Goodridge JJ.A.:

[1] An action which John Chiasson commenced on behalf of owners and occupiers of properties at Mud Lake, NL was certified by an applications judge in the Supreme Court, General Division as a class action as against Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province") and Nalcor Energy. The claims are in negligence and nuisance related to flooding of the properties on May 17, 2017.

[2] The Province and Nalcor apply for leave to appeal the order certifying the class action. The application is opposed by the members of the class. Leave to appeal is required pursuant to section 36(3) of the *Class Actions Act*, SNL 2001, c. C-18.1:

> A party may, with leave of a judge of the Court of Appeal, appeal to the Court of Appeal from
>
> > (a) an order certifying ... an action as a class action; ...

Background

[3] Mud Lake is located on the Churchill River, downstream from a hydro-electric dam being constructed by Nalcor, a corporate body established pursuant to the *Energy Corporation Act*, SNL 2007, c. E-11.01, and an agent of the Crown (section 3(5)).

[4] On May 16 and 17, 2017, the Churchill River waters rose, properties in Mud Lake experienced flooding, and residents were evacuated. The applications judge drew conclusions regarding the claims in nuisance and negligence (2019 NLSC 133):

> [24] I am satisfied that these paragraphs [in the statement of claim] reflect the essence of a claim in private nuisance against both Defendants. At paragraph 14, the Plaintiff specifies the flooding as the cause of the damage; paragraphs 42-46 allege that the acts or omissions of the Defendants caused the flooding and substantial and unreasonable interference is specifically pled at paragraph 46.
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> ...
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> [31] I am satisfied that the Statement of Claim meets the requirement of pleading for [the tort of negligence] against Nalcor through the combined reading of paragraphs 47 to 49 (duty of care), paragraph 50 (breach of the duty of care), paragraph 51 (foreseeability) and paragraph 42 (causation).
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> ...
>
> [38] I am satisfied that the Statement of Claim meets the onus of establishing the elements of the tort of negligence against the Province. Paragraphs 53 and 54 allege the private law duty of care owed; paragraph 56 identifies the breach of the duty of care of the Province as operational negligence; causation is addressed in paragraph 42 and damages are alleged as a result of the Province's acts and omissions at paragraph 57, which paragraph also addresses the foreseeability component.
>
> [39] I conclude that it is not plain and obvious that, as pleaded, the Plaintiff's claims in nuisance and negligence cannot succeed ... . I find therefore that the Plaintiff has met the onus of establishing the requirements of section 5(1)(a) [of the *Class Actions Act* which requires that, in order to be certified as a class action, the pleadings must disclose a cause of action].

The Action as Against the Province

[5] The basis for the Province's submission that leave to appeal should be granted may be summarized as follows:

1. No cause of action is disclosed against the Province:

    a. The Province could not be liable for acts or omissions of Nalcor;

    b. The pleadings do not otherwise establish liability against the Province;

    c. The Province is immune from an action in tort for core policy decisions, and a private law duty of care is not alleged;

    d. The elements of nuisance could not be established as against the Province.

2. The claims in negligence, nuisance and joint liability do not give rise to common issues.

3. A class action is not the preferable procedure because it is not a fair and manageable means of meaningfully advancing class members' claims.

4. Mr. Chiasson is not an appropriate representative of the class.

5. The applications judge erred by failing to address issues individually as was necessary.

[6] Principles that guide the discretionary decision to grant or refuse leave to appeal are discussed in *Thorne v. The College of the North Atlantic*, 2017 NLCA 30, 1 C.A.N.L.R. 707, at paragraphs 11 to 21. One of the factors engaged in this case is whether, at the outset, it is desirable to clarify the law or the application of legal principles by means of the appeal. Possible prejudice to a party and the effect of delay and disruption to the proceedings if the appeal proceeds would weigh in the balance.

[7] In undertaking the analysis, the nature and purpose of class action proceedings, as discussed in *Thorne*, provide context:

> [19] Accordingly, the balance may tip in favour of granting leave to appeal where certification has been refused while, by contrast, there may be some reticence to give leave where certification has been granted. In the latter situation, the ability to adjust the certification order to take account of a change or need to clarify the order may obviate the need to bring a challenge on appeal which would interfere with the efficient progression of the action through the court.
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> ...

> [21] The above criteria should be assessed in light of the objective of the *Act* to provide "the preferable procedure for the fair and efficient resolution of the common issues" engaged by the identified class (section 5(2) [of the *Class Actions Act*]).

[8] In this case, counsel submits that leave to appeal should be granted on the basis that the Province has raised questions of law which may be determined based on the facts as pleaded. Further, it is submitted, the analysis and determination should be made at the initial stage of the proceedings since the result may be de-certification of the class action, or a refinement of the issues.

[9] In *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v. Babstock*, 2018 NLCA 71, leave to appeal the certification of the class action was granted for the purpose of addressing a clarification of the law. The Court in that appeal decided questions regarding the application of statutory and common law, and set aside certain of the common issues (*Atlantic Lottery*, at paragraphs 76 and 80). The majority remitted the remaining common issues to the trial court. The effect of allowing the appeal was to narrow the issues, with the result that the class action could proceed more efficiently.

[10] On further appeal to the Supreme Court of Canada, the benefit or advantage in allowing the appeal to proceed at the initial stage of the proceedings is discussed. The Supreme Court of Canada allowed the appeal, with the majority striking the certification action in its entirety (2020 SCC 19):

> [72] Each claim that the plaintiffs have pleaded is bound to fail because it discloses no reasonable cause of action. I would allow the appeals, set aside the certification order, and strike the plaintiffs' statement of claim in its entirety. ...

[11] In reaching this conclusion, Brown J., for the majority, explained:

> [18] Secondly, and since *Microsoft* [2013 SCC 57, [2013] 3 S.C.R. 477] was decided, this Court has recognized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) the need for a culture shift to promote "timely and affordable access to the civil justice system" (para. 2). Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at pp. 351-52). Indeed, the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation" (*Imperial Tobacco*, [2011 SCC 42, [2011] 3 S.C.R. 45], at para. 19).

> [19] ... It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.) [hereinafter *Syl Apps*], at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy [citations omitted]. [Italics in original.]

[12] These comments are relevant in determining whether leave to appeal should be granted in this case. The applications judge applied a low threshold in determining that the pleadings disclosed a cause of action:

> [56] Respecting the Province's objections to issues 9 and 10, I have already indicated that the Statement of Claim specifically pleads operational negligence. At the certification hearing stage, the Court must avoid a merits assessment of the assertions and assess only whether the Applicant has established some basis in fact for characterizing the proposed questions as common issues.

[13] In our view, this is too narrow an approach. The judge did not turn her attention to the submissions of the Province that additional underlying legal issues are engaged which may alter the assessment of certain of the common issues, or, at a minimum, may affect the manner in which the issues are stated.

[14] While it is clear that the *Class Actions Act* provides for flexibility in adjusting the certification order as the matter proceeds in order to take account of a change or the need for clarification, that flexibility is circumscribed by the purposes of certification, including the efficient and cost effective progression of the action through the courts.

[15] In this case, the applications judge referred to the complexity of the issues and the likelihood that the proceedings will be interrupted by multiple pre-trial procedures:

> [106] As to complexity, the pleadings have not yet closed but discoveries have already been held. The documentation attached to the affidavits filed in support of the certification hearing are voluminous and in a case such as this, extensive document production and multiple pre-trial procedures can be expected. Mr. Boudreau's affidavit suggests the very real likelihood of expert evaluation including hydraulic modelling of the Churchill River and analyzing annual rainfalls.

A similar comment is made in the factum submitted by the members of the class with reference to the "expensive and complex scientific and engineering

evidence [that] would be needed to pursue" the claims against Nalcor and the Province.

[16] In such circumstances, there is substantial benefit to addressing questions of law that may determine whether certification of the class action should be authorized or limited. That is, it would be desirable from the perspective of judicial efficiency and cost effectiveness to eliminate or reduce to the extent possible the requirement for pre-trial procedures and for adjusting the nature and scope of the action on a continuing basis. That consideration applies particularly where decisions in determining and stating the common issues would engage questions of law or legal principles that could be decided at the initial stage on the basis of the facts pleaded.

[17] For example, in this case, one issue that would benefit from consideration prior to continuation of the proceedings is whether the Province would be immune from an action in tort because any actions taken or omitted by the Province in respect of the flooding are based on core governmental policy, and "core policy reasons of government are not justiciable and cannot give rise to tort liability" (*George v. Newfoundland and Labrador*, 2016 NLCA 24, 378 Nfld. & P.E.I.R. 46, at paragraph 153). That consideration is an important factor in determining whether there is a common issue that should be stated, and, if so, how it should be framed.

[18] The fact that the pleadings circumscribe the factual basis on which a certification decision may be made does not preclude the judge, at the certification stage, from considering legal issues engaged on those facts. Indeed, judicial efficiency and cost effectiveness may be achieved by an early determination. (See the decision of the Supreme Court of Canada in *Atlantic Lottery*, cited at paragraph 11, above.)

[19] An analogy may be drawn to an application to strike all or a portion of a statement of claim. In that context, in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, the Court discussed legal principles regarding the immunity of government policy decisions from an action in tort. McLachlin C.J.C., for the Court, explained:

> [70] ... The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

[20] In our view, the applications judge misdirected herself when, after referencing the effect of government policy on potential liability in tort, she concluded:

> [37] Such careful analysis is inappropriate at the certification stage where I am restricted to the pleadings.

Restriction to the pleadings would not preclude a legal analysis based on the pleadings to determine whether the Province is immune from liability in tort based on the *George* and *Imperial Tobacco* authorities.

[21] Similarly, the fact that the analysis is circumscribed by the pleadings would not have precluded the applications judge from considering legal principles regarding the Province's liability based on a private law duty of care. (See: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paragraph 20.)

[22] Regarding the claim of the members of the class in nuisance, the Province submits that leave to appeal should be granted because the pleadings fail, among other things, to allege a relevant duty by the Province, or the source of such a duty. Insofar as the questions of a duty and its source engage the application and interpretation of the *Water Resources Act*, SNL 2002, c. W-4.01, or other legal principles, that would be a question of law which may be assessed based on the facts as pleaded. An early determination of that issue, prior to certification of a common issue, may result in termination of the class action against the Province, or set the parameters under which the action could proceed.

[23] Despite the submissions of counsel for the Province, the applications judge declined to consider these issues, which were fundamental to whether common issues could properly be stated as against the Province. Determination of such issues at the certification stage of the proceedings would serve to move the matter forward in a manner consistent with judicial efficiency and cost effectiveness.

[24] In the result, we would grant the Province leave to appeal. However, we would limit the scope of the appeal to the grounds of appeal in respect of the Province's submission that no cause of action is disclosed as against the Province (paragraph 5, above, item 1). If, on appeal, it is determined that no cause of action is disclosed as against the Province, the Province would be

removed as a respondent to the class action resulting in de-certification of the class action as against the Province.

The Action as Against Nalcor

[25] In seeking leave to appeal, Nalcor's position is somewhat different from that of the Province. Rather, Nalcor submits in its factum:

> [29] Nalcor's position at the certification hearing with respect to the five certification criteria can be summarized as follows:
>
> 1) *Pleadings*: did not challenge the Statement of Claim with respect to negligence but argued that it did not plead a claim under nuisance;
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> 2) *Class definition*: no challenge once the proposed definition was revised;
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> 3) *Common issues*: did not challenge common issues with respect to whether duty of care was owed and if so, whether it was breached (negligence), but challenged all other proposed common issues;
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> 4) *Preferable procedure*: argued that a class action was not appropriate ...; and
>
> 5) *Representative Plaintiff*: argued that Mr. Chiasson had not demonstrated sufficient knowledge to act as representative plaintiff.

[26] In response, the members of the class submit that the goal sought to be achieved by proceeding by way of class action is a determination of the causes of the damage to the relevant properties and whether Nalcor or the Province have legal responsibility in tort or nuisance for all or part of the damage. The value to the classes of that determination is that the decision can be made once and applied to each property as the circumstances warrant. On that view, the uniqueness of each class member's claim would be engaged only for purposes of applying a determination on causation; that is, common question 7:

> Did Nalcor cause or materially contribute to the Flood which impacted Properties within the three zones identified on Schedule "A"?

[27] Before reaching that stage of the inquiry, it would be necessary to answer common issues 2, 4 and 5:

> 2. What duty of care (if any) was owed by Nalcor with respect to the class members' interests as owners or occupiers of properties impacted by the Flood?
>
> ...

4. If a duty of care was owed, did Nalcor breach the duty of care?

5. Was general harm to the class members a reasonably foreseeable consequence:

...

b) of Nalcor's breach of duty?

[28] Nalcor submits that those questions cannot be characterized as common issues because of the individual nature of the damage to each property. We do not accept that rationale as a foundation for granting leave to appeal the certification order. As submitted by the members of the class, the questions are such that answers determined at trial, having general application to the properties, would provide the basis on which to assess the claim for each class member's property.

[29] However, we would grant Nalcor leave to appeal to the extent that its grounds of appeal are directed to whether a cause of action is disclosed based on the application of the law and legal principles to the facts as pleaded.

[30] There should be no order as to costs (*Class Actions Act*, section 37).

B. G. Welsh J.A.

W. H. Goodridge J.A.

D. E. Fry C.J.N.L.