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**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION (GENERAL)**

**Citation:** *Dewey v. Kruger Inc.*, 2016 NLTD(G) 113

**Date:** June 17, 2016

**Docket:** 201504G0120

**BETWEEN:**

**RICHARD DEWEY, WILLIAM  
PERRY, CHARLOTTE JACOBS  
AND WILLIAM TURNER**

**PLAINTIFFS**

**AND:**

**KRUGER INC., DEER LAKE POWER  
COMPANY LIMITED, CORNER  
BROOK PULP AND PAPER LIMITED  
AND THE TOWN OF DEER LAKE,  
HER MAJESTY THE QUEEN IN  
RIGHT OF NEWFOUNDLAND AND  
LABRADOR**

**DEFENDANTS**

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**Before:** Justice David F. Hurley

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**Place of Hearing:**

Corner Brook, Newfoundland and Labrador

**Date of Hearing:**

March 10, 2016



**Summary:**

The Plaintiffs seek to certify their action as a class proceeding pursuant to the *Class Actions Act*. Corner Brook Pulp and Paper Limited, one of the Defendants, stated its intention to make a jurisdictional application to stay the proceedings for the reason that the claims against it are limited to an arbitration process and requested to have the jurisdictional application heard and decided prior to the certification hearing. The Plaintiffs opposed the application.

The Court noted that the Plaintiffs have not filed their certification application and that one of the Defendants was raising the very jurisdiction of the Court to hear the matter.

Based on the overall circumstances of the case, it was decided that Corner Brook Pulp and Paper's application challenging the jurisdiction of the Court should be heard and decided prior to the certification hearing.

**Appearances:**

Bob Buckingham	Appearing on behalf of the Plaintiffs
Thomas O'Reilly, Q.C. & Sandra Chaytor, Q.C.	Appearing on behalf of Kruger Inc. and Corner Brook Pulp and Paper Limited
No Appearance	On behalf of Deer Lake Power Company Limited
Daniel Boone, Q.C.	Appearing on behalf of the Town of Deer Lake
Philip Osborne	Appearing on behalf of Her Majesty the Queen In Right of Newfoundland and Labrador

**Authorities Cited:**

**CASES CONSIDERED:** *Attis v. Canada (Minister of Health)* (2005), O.R. (3d) 302, 142 A.C.W.S. (3d) 927 (Sup. Ct. J.); *Stone v. Wellington County Board of Education* (1999), 120 O.A.C. 296, 29 C.P.C. (4th) 320; *Baxter v. Canada (Attorney General)*, [2005] O.T.C. 391, 139 A.C.W.S. (3d) 627 (Sup. Ct. J.); *Campbell v. Canada (Attorney General)* 2008 FC 353; *Rhodes v. Cie Amway Canada*, 2010 FC 498; *Medvid v. Saskatchewan (Minister of Health)*, 2009 SKQB 198; *Galarneau v. Canada (Attorney General)*, 2005 FC 39; *Société Asbestos Ltée v. Lacroix* (2004), 135 A.C.W.S. (3d) 252, 43 C.C.P.B. 267 (Qc. C.A.); *Merchant Law Group v. Canada (Revenue Agency)*, 2008 FC 1371; and *Baxter v. Canada (Attorney General)*, [2005] O.T.C. 391, 139 A.C.W.S. (3d) 627 (Sup. Ct. J.).

**STATUTES CONSIDERED:** *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35.

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

**REASONS FOR JUDGMENT**

**HURLEY, J.:**

**INTRODUCTION**

[1] This is an application by Corner Brook Pulp & Paper Limited (“CBPP”), one of the Defendants in a class proceeding under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (“the Act”), to determine the appropriate timing of a proposed application to stay proceedings and enforce statutory arbitration obligations. CBPP seeks to have its application respecting the jurisdictional challenge proceed prior to any other steps in the action. CBPP submits that the hearing of the application relating to jurisdiction in advance of the certification application is the most efficient and economical procedure for both the litigants and the Court. This method of scheduling has the potential to eliminate the need for CBPP to continue

to participate in the proceedings and thereby narrow the issues remaining at certification. As well, CBPP argues that it would be prejudiced if it was ordered to attend a certification hearing before its jurisdictional application.

[2] The Plaintiffs maintain that the jurisdiction application has significant potential to be lengthy and complicated and to divert attention and resources away from the certification application. As well, the Plaintiffs allege that this is not an example of a preliminary application that can be dealt with before certification while still advancing the objective of judicial efficiency.

## **BACKGROUND**

[3] The Statement of Claim recites that for nearly a century there has been a hydroelectric power generating system in the lower portion of the Humber River Basin in the Town of Deer Lake, Newfoundland and Labrador which provides power to the Corner Brook Pulp and Paper mill. The production of hydroelectric power is generated by a system of man-made water control structures, including a reservoir (Grand Lake Reservoir), the man-made Humber Canal and a series of dams and dykes.

[4] The Plaintiffs state that the Defendants (Kruger Inc., Deer Lake Power Company Limited and CBPP) control the flow of water through their system of canals, dams and dykes. The basis of the claim, as alleged, relates to the escape of water from the Humber Canal and from other sources causing damages to the properties of the Plaintiffs within the Town of Deer Lake, as well as creating human health concerns in the nature of mould growth, rendering these properties unfit for habitation.

[5] The Town of Deer Lake and the Province of Newfoundland and Labrador are joined as Defendants relating to allegations which need not be reviewed for the purposes of this application.

[6] Although a Defence has not been filed by CBPP, the present application says that there is a legislative obligation to arbitrate claims against this Company pursuant to various statutes of the Province of Newfoundland and Labrador, including the *International Paper Co. Ltd. Act*, Cap. IV, 18 Geo. V. (1927) which incorporates, by reference, various related statutes and agreements between CBPP and the Province. The application further states that disputes arising from CBPP's use and operation of the water control system, including the resolution of any alleged injurious impact upon private rights as alleged by the Plaintiffs, be resolved by arbitration.

## PROCEDURAL HISTORY

[7] The Plaintiffs commenced the proposed class action against the five-named Defendants on May 22, 2015.

[8] On May 29, 2015 a case management judge was appointed to oversee the proposed class action.

[9] On June 5, 2015 counsel for CBPP, as well as for the Defendants Kruger Inc. and Deer Lake Power Company Limited, wrote counsel for the Plaintiffs requesting reasonable time to consult with their clients and receive instructions prior to filing a Defence.

[10] On February 3, 2016 a case management meeting was held. Prior to the meeting, counsel for CBPP advised the Court of his intention to bring an application contesting the jurisdiction of the Court to hear the matter as against CBPP.

[11] The application to have the jurisdictional matter heard prior to the certification application is the subject of these proceedings.

[12] No defences have been filed. As well, the Plaintiffs have not filed their certification application.

## ANALYSIS

[13] There are no specific class proceeding rules in Newfoundland and Labrador regulating the order in which certifications or other applications including those that challenge jurisdiction must be heard and determined within a class proceeding. Rule 7A.01(3) of the *Rules of the Supreme Court, 1986* provides that unless inconsistent with the *Class Actions Act*, the rules of court and the general practice and procedure of the court applies to class proceedings.

[14] Rule 7A.01(4) of the *Rules*, state:

(4) The rules of court, including Rule 7A, and the procedures to be followed with respect to class proceedings shall be interpreted and applied to achieve the objects of the Act, and in particular

- (a) to promote the effective and economical use of the judicial system;
- (b) to make the court system more accessible to the public; and
- (c) to ensure that parties responding to a class proceeding are able to present their case fairly to the court.

[15] Courts have accepted that certification applications are generally heard at an early stage of the class proceeding. The certification application should be the first procedural matter to be heard and determined and, therefore, should take priority over other preliminary applications. (*Attis v. Canada (Minister of Health)* (2005), O.R. (3d) 302, 142 A.C.W.S. (3d) 927 (Sup. Ct. J.)) By this approach, what otherwise may be framed as a preliminary matter should be decided at the same time as the certification of the class action. This procedure, it is maintained, is to ensure a more effective and economical use of judicial resources by avoiding a multiplicity of hearings and reducing the number of appeals.

[16] However, there are situations where it is appropriate to make exceptions to the rule that the certification application ought to be the first matter to be heard and decided. The Ontario Court of Appeal in **Stone v. Wellington County Board of Education** (1999), 120 O.A.C. 296, 29 C.P.C. (4th) 320 approved the hearing of a pre-certification summary judgment application to determine the merits of the claim. In instances where a preliminary application would benefit all parties or would further the aim of judicial efficiency by narrowing and focusing the issues, the application may be heard and determined prior to certification. (**Baxter v. Canada (Attorney General)**, [2005] O.T.C. 391, 139 A.C.W.S. (3d) 627 (Sup. Ct. J.))

[17] The determination of the order in which applications are heard within class proceedings is not done according to predetermined or preordained legal principles, but on a case by case basis taking into consideration the issues in each situation. As was stated in **Campbell v. Canada (Attorney General)**, 2008 FC 353 at paragraph 23: "It is evident from the jurisprudence that although, in principle, a certification motion ought to take precedence over other preliminary motions, in the end, the order of the proceedings will be determined on the basis of the circumstances of the particular case."

[18] In these proceedings, the jurisdictional application may involve only the Plaintiffs and CBPP. Hearing and determining the matter prior to certification could potentially resolve and dispose of the case against CBPP and, in any event, narrow the issues remaining at certification. Disposing of this matter prior to certification would reduce costs for the non-participating defendants and avoid CBPP of having to expend additional costs should the matter not be allowed to proceed prior to certification.

[19] The Plaintiffs filed their Statement of claim as a proposed class action on May 22, 2015 but have not acted upon that claim since that time. CBPP should not therefore be prevented from having its jurisdictional application heard by the Court, when the Plaintiffs have not yet submitted its application for certification. (**Rhodes v. Cie Amway Canada**, 2010 FC 498 at paragraph 25)



[20] CBPP has put forward authority to argue that applications challenging the very jurisdiction of the court to hear a claim, including that of a proposed class action, should be heard and decided before any other matter in the proceedings. In **Medvid v. Saskatchewan (Minister of Health)**, 2009 SKQB 198, a class proceeding was initiated against a number of defendants including against the Province of Alberta, which brought an application to challenge the jurisdiction of the Saskatchewan Court to hear the claim against that Province. In allowing the jurisdictional issue to be resolved prior to the certification hearing, the court stated at paragraph 13: "In the particular circumstances of this case the defendant Alberta has brought a motion to challenge the jurisdiction that is consistent with the general rules of this Court. This motion may resolve or dispose of the case against Alberta and may narrow the issues remaining at certification."

[21] The issue of whether a jurisdictional challenge should be heard prior to the certification hearing and determination was also reviewed by the Federal Court in **Galarneau v. Canada (Attorney General)**, 2005 FC 39, in which the defendant argued that the court did not have jurisdiction because the subject matter of the claim was one for which a collective agreement and the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 provided an exclusive dispute settlement procedure. In confirming that the jurisdiction issue be decided prior to certification, the court referred to and agreed with a decision of the Quebec Court of Appeal in **Société Asbestos Ltée v. Lacroix** (2004), 135 A.C.W.S. (3d) 252, 43 C.C.P.B. 267 (Qc. C.A.) which also, in the context of a class proceeding, dealt with a jurisdictional challenge on the basis that the proceedings be dismissed because the case involved the question of the interpretation of a collective agreement for which the plaintiff could use the arbitration procedure provided in that agreement. The Federal Court Judge made the following comments concerning **Société Asbestos Ltée** at paragraph 26:

The Quebec Court of Appeal therefore had to determine whether this motion filed prior to the hearing on the motion for authorization was premature. After analyzing the various trends in the cases, including the authorities cited by the plaintiff, it held that jurisdiction *ratione materiae* is a question of public order and that it is in the interest of the sound administration of justice if lack of jurisdiction *ratione materiae* can be raised at the first opportunity.



(These decisions were followed in **Merchant Law Group v. Canada (Revenue Agency)**, 2008 FC 1371)

## DISPOSITION

[22] Based on the stage at which these proceedings are at the present time and in the particular circumstances of this case, I am satisfied that CBPP's application to challenge the jurisdiction is consistent with the rules and the general procedure and practice of the court as stated in Rule 7A.01(3) of the *Rules of the Supreme Court, 1986*. As well, the jurisdictional application may resolve the claim as against CBPP and otherwise focus the main issues at the certification hearing, especially those relating to the other defendants. Overall, the parties may have to expend additional costs in having to wait until the certification hearing to have the jurisdictional issue settled.

[23] I am therefore satisfied that CBPP's application to stay proceedings based on a jurisdictional challenge should be heard and decided prior to hearing the certification application. A case management order will be issued regarding the schedule relating to the jurisdictional application by Corner Brook Pulp and Paper Limited.

[24] The issue of costs will be considered at the conclusion of the jurisdictional application.

  
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**DAVID F. HURLEY**  
Justice

