

Date: 20151021
Docket: 15/34 & 15/35
Citation: *The College of the North Atlantic v. Thorne*, 2015 NLCA 47

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

THE COLLEGE OF THE NORTH ATLANTIC APPELLANT

AND:

DEBORAH THORNE RESPONDENT

Coram: Rowe, Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
 Trial Division (G) 201306G0131
 2014 NLTD(G) 94 and 2014 NLTD(G) 63

Appeal Heard: September 18, 2015
Judgment Rendered: October 21, 2015

Reasons for Judgment by Rowe J.A.
Concurred in by Barry and Harrington JJ.A.

Counsel for the Appellant: J. David B. Eaton Q.C. and Jane Crosbie
Counsel for the Respondent: James D. Hughes Q.C. and Philip Whalen

Rowe J.A.:

FACTS

[1] This decision relates to two appeals arising from an intended class action. The first appeal relates to a decision to certify an action. The second appeal relates to a decision to strike out a counterclaim as disclosing no cause of action.

[2] The College of the North Atlantic (CONA) is a publicly-owned technical training institute in Newfoundland and Labrador. In 2001, CONA entered an agreement with the government of Qatar (the Comprehensive Agreement) to operate a technical training institute in Qatar.

[3] Instructors who teach in Qatar are largely Canadian, many of them from Newfoundland and Labrador.

[4] From 2007 to 2013, Deborah Thorne (a resident of St. John's) was employed by CONA as an instructor in Qatar.

[5] In September 2013, Ms. Thorne commenced an action for breach of contract against CONA. In her Statement of Claim, Ms. Thorne stated that in addition to the remuneration set out in her individual contract of employment with CONA, she should have been (but was not) paid a Cost of Living Allowance (COLA).

[6] Ms. Thorne commenced her action under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (the "Act"). She stated that during the relevant period other instructors employed by CONA in Qatar had signed employment contracts similar to hers and that they had also not been paid (or not paid in full) the COLA to which they were entitled. Ms. Thorne sought to sue as a representative of a class of such persons.

[7] A Certification Application was filed in December 2013. This included a proposed Litigation Plan. As well, it included two affidavits, one by Ms. Thorne, the other by Glenn Thorne (her husband), also employed by CONA in Qatar. In their affidavits, Ms. Thorne and Mr. Thorne stated that more than 500 persons were in a similar position to Ms. Thorne regarding non-payment (or partial payment) of the COLA.

[8] In April 2014, CONA filed a Reply to Certification Application in which it denied liability as regards the COLA. CONA also stated that some

of the instructors employed by it in Qatar had received pay in excess of that to which they were entitled.

[9] A certification hearing was held in May 2014. The trial judge gave his decision in August 2014: 2014 NLTD(G) 94. In it, he defined the class and the common issue as follows:

Instructors and instructional support staff who were employed by the College of the North Atlantic in Qatar between September 1, 2008 and November 22, 2011, who currently reside in the Province of Newfoundland and Labrador.

Were members of the class entitled by their contracts of employment to receive the full amount of the COLA for the period of September 1, 2008 and November 22, 2011?

[10] In January 2015, Ms. Thorne filed an application to expand the class definition to include persons not resident in Newfoundland and Labrador. This was supported by an affidavit by Allan Luyt, who sought to serve as representative for the non-resident sub-class.

[11] In February 2015, CONA filed a defence and counterclaim. In the defence, CONA denied liability relating to the COLA. In the counterclaim, CONA sought reimbursement from some members of the class for alleged overpayments.

[12] In March 2015, the application to expand the class definition to include non-residents was heard and granted.

[13] In April 2015, Ms. Thorne brought an application to strike the counterclaim pursuant to rule 14.24(1)(a) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c.42, Sch. D, on the basis that the counterclaim “discloses no reasonable cause of action”. In May 2015, the trial judge gave his decision striking out the counterclaim: 2015 NLTD(G) 63.

[14] Pursuant to section 36(3) of the *Act*, CONA is seeking leave to appeal the trial judge’s decision to certify the class action.

[15] In addition, CONA is appealing the order striking out the counterclaim. It can do so as of right, as the decision to strike out the counterclaim would be a final disposition. (In light of what is set out below, the counterclaim is not subject to section 36 of the *Act*, which governs appeals in class actions, as the counterclaim would only become a class action if it is certified as such.)

[16] The Court heard both matters together.

ISSUES

[17] For the certification appeal, the issues are:

- (1) should leave to appeal be granted, and, if so,
- (2) should the decision to certify be set aside.

[18] For the counterclaim, the issue is whether the decision to strike it out should be set aside. If the striking out is set aside, two further issues arise:

- (a) should another judge hear the case; and
- (b) does the counterclaim require certification pursuant to the *Act*.

Certification: Leave to Appeal

[19] Leave to appeal in the context of a decision to certify a class action was dealt with by this Court in *Canada (Attorney General) v. Anderson*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314:

[34] An appeal of a certification decision requires leave of this Court: the *Act*, s. 36(3)(a). In determining whether leave should be granted, this Court may look to, but is not restricted by, the factors set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*; see *Sparkes v. Imperial Tobacco Canada Limited*, 2010 NLCA 21 at para. 9; *Davis* at paras. 14 to 20; and *Bayer Inc. v. Pardy*, 2005 NLCA 20. That rule provides:

- (4) Leave to appeal an interlocutory order may be granted where
 - (a) there is a conflicting decision by another judge or court upon a question involved in the proposed appeal and, in the opinion of the Court, it is desirable that leave to appeal be granted,
 - (b) the Court doubts the correctness of the order in question,
 - (c) the Court considers that the appeal involves matters of such importance that leave to appeal should be granted,
 - (d) the Court considers that the nature of the issue is such that any appeal on that issue following final judgment would be of no practical effect, or

(e) the Court is of the view that the interests of justice require that leave be granted.

[35] While the general proposition is that leave to appeal should be sparingly granted where a party is appealing an interlocutory order on a procedural matter, this is particularly true where a certification order has been granted. On this point, Welsh J.A. had previously noted in *Davis*:

[19] As well, a distinction may be drawn between the circumstances when certification is granted and when it is refused. For example, when certification is granted, certain procedural protections are engaged which may, depending on all the circumstances, support refusal to grant leave to appeal. This point is referenced in the *Pardy* decision:

[12] A similar reticence to interfere has been expressed by the Ontario Court of Appeal. Carthy, J.A., in *Anderson et al. v. Wilson et al.* (1999), 1999 CanLII 3753 (ON CA), 122 O.A.C. 69; 175 D.L.R. (4th) 409, at para. 12 wrote:

“... I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.”

...

[14] ... There is no reason to doubt the correctness of the certification order, particularly having regard to s. 11(1) of the *Act* which allows for variation of the order, and even decertification, as the action progresses.

[36] It should be noted that “the granting of leave is, in the final analysis, discretionary, even if one or more of the criteria listed in rule 57.02(4) has been established”: see *Pardy* at para. 14 and *Davis* at para. 17.

[20] It is in “the interests of justice” (rule 57.02(4)(e)) that leave be granted on the basis that it is worthwhile to consider in general, as well as in the context of this case, the significance in deciding an application for certification whether “there is a real and subsisting group of persons who are desirous of having their common complaint ... determined through the [class action] process”. (See below, *Bellaire v. Independent Order of Foresters*, (2004), C.C.L.I. (4th) 35, 5 C.P.C. (6th) 68 (Ont. SC), at para. 33 and *Martin v. Astrzeneca Pharmaceuticals*, 2012 ONSC 2744, 27 C.P.C. (7th) 32, at

para. 206, affirmed 2013 ONSC 1169 (Div Ct)). As set out below, this is relevant under section 5(1) of the *Act* as to whether “a class action is the preferable procedure to resolve the common issues of the class”.

Certification: Analysis

[21] The criteria for certification of a class action were set out by the trial judge:

[6] Section 5(1) of the *Class Actions Act* says, “...the court shall certify an action as a class action...” if five criteria apply:

1. The pleadings disclose a cause of action.
2. There is an identifiable class of 2 or more persons.
3. The claims of the class members raise a common issue.
4. A class action is the preferable procedure to resolve the common issues of the class.
5. There is a person who ably and adequately represents the interests of the class, who has an appropriate litigation plan and who does not have a conflict with the other class members on the common issues.

[7] Section 5(2) of the *Act* offers five further criteria the court may consider “...in determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues”, including whether:

1. Questions of fact or law common to the members of the class predominate over questions affecting only individual members.
2. A significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions.
3. The class action would involve claims that are or have been the subject of another action.
4. Other means of resolving the claims are less practical or less efficient.
5. The administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[22] In *Canada (Attorney General) v. Anderson, supra*, this Court dealt with the standard of review regarding certification:

[38] The standard of review with respect to the first criterion for certification set out in s. 5(1) of the *Act*, whether the pleadings disclose a cause of action, “turns on determinations of law and, therefore, it is reviewed on the standard of correctness”: see *Ring* at para. 34. All of the other criteria enumerated in section 5(1) are questions of mixed fact and law and the certification judge’s determinations on these issues are owed considerable deference. They cannot be reversed absent a palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error may amount to an error in law and the applicable standard of review is correctness. See *Ring* at paras. 6-8.

[23] The main issue with respect to certification was set out by CONA in its Factum as follows:

80. Section 5 of the **Class Actions Act** sets out the statutory criteria for certification. Specifically, there must be:
 - 1) a class of 2 or more persons (ss.(1)(b));
 - 2) the claims of the class members must raise a common issue (ss.(1)(c)); and
 - 3) a class action must be the preferable procedure to resolve the common issues (ss. (1)(d)).
81. The combined effect of these 3 criteria suggests that there must, in fact, not simply be a definable class of 2 or more persons, but that there be a class of 2 or more persons **who want to pursue the same claim** or a claim that shares at least one common issue, and that certification is the most reasonable and efficient manner in which to do so; i.e. the preferable procedure.
82. The evidence presented by the Plaintiff did not provide a basis in fact to support these criteria. In effect, the applications judge did not apply the burden of proof and did not apply any standard of proof on these fundamental criteria. Instead the applications judge only considered whether a class should be defined by objective criteria. [See generally paragraphs 21-32 of the certification decision]
83. It is quite common in class actions that the existence of a class of people who are similarly situated and want to pursue the same claim is obvious.

That is not the case in this matter. Here the only evidence is about the potential size of the proposed class.

84. The requirement to have evidence that there are not only two or more people who fall within a class definition but people who wish to actually pursue the same claim has been addressed in many cases. Some cases have addressed this purely as a requirement of the existence of the class and other parts of the preferable procedure requirement.

(Emphasis in the original.)

[24] In support of the foregoing, CONA argued in its Factum as follows:

87. In **Bellaire v. Independent Order of Foresters**, Nordheimer J stated (referring to the similar requirement in the Ontario legislation):

27. ... Section 5(1)(b) requires an identifiable class of two or more persons. In my view, that entails **placing evidence before the court** that there are other individuals who both share **the same complaint as that of the plaintiff and wish to have the complaint litigated through the mechanism of a class proceeding** save and except for those factual situations where the existence of such other individuals is obvious ...

...

29. ... **The other is that this evidence does not establish that, even if there are common interests, these other complainants wish to have the issue litigated. Unlike the plaintiff, these other complainants may well be content with the status quo** or with the relief that they received from the defendant through the MVP.

...

32. This concern was repeated in a case similar to the one that is before me here, namely, *Zicherman v. Equitable Life Insurance Co. of Canada*, [2000] O.J. No. 5144 (S.C.J.) where Mr. Justice Ferrier said, at para. 7:

However, s. 5(1)(b) requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. **There is no evidence that anyone other than Mr. Zicherman has raised a cause of action. There is no evidence of anyone other than Mr. Zicherman being willing to engage the courts or assert a cause of action.**

33. I respectfully agree with the observations made in these cases. In my view, **before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.**

[Emphasis added]

88. In **Chartrand v. General Motors Corp.** [2008 BCSC 1781, [2008] B.C.J. No. 2520, paras. 39-68] the plaintiff presented some evidence to define a class but did not establish that there was in fact a class who wanted to pursue the action. In **Chartrand**, the plaintiff presented evidence that there were 16, 405 vehicles and therefore owners who fell within the class definition. However, the court rejected the application for certification as there was no evidence that there were class members who actually wished to pursue a similar claim (the proposed common issue).

89. In **Singer v. Schering-Plough Canada Inc.** [2010 ONSC 42, [2010] O.J. No. 113] Strathy J. (as he then was) addressed the need to have two or more people who wanted to pursue a claim or seek access to justice. In that case, the plaintiff had produced no evidence that anyone other than the plaintiff actually wanted to assert a claim for the alleged wrongs (which related to claims about sun screen products). While plaintiff's counsel provided some information to the court about people who had made contact with his office there was no evidence that they had actually purchased the product or wanted to pursue a claim.

90. Referring to **Lau, Bellaire, Chartrand** and other cases Strathy J. [in para. 13] concluded:

This requires not simply that there be a theoretical link between the claim, the class and the common issues, but that there be a demonstrated link in fact to two or more *bona fide* claimants.

91. Strathy J then [paras. 133-136] went on to discuss whether the need for other class members who wanted to pursue a claim should be dealt with as part of the preferable procedure requirement. He then concluded that there was no evidence that there were two or more people seeking access to justice and therefore the class requirement was not met. He acknowledged that there may be cases when it is best to consider this under preferable procedure, but this was not one of them.

92. In **Lee v. Georgia Properties Partnership** [[2012] B.C.J. No. 2055, 2012 BCSC 1484, paras. 41-44] the British Columbia Superior Court followed

Chartrand and Martin v. AstraZeneca Pharmaceuticals (among other cases) and concluded:

41 In the instant case the evidence of there being claims by other class members is problematic, despite evidence that the matter has received some attention in the local press.

42 **There is evidence only that some purchasers have spoken to the plaintiff and plaintiff's counsel. There is no evidence that such persons have a complaint that they intend to pursue, that they intend to seek an opinion of the court, or that they would find resolution of the common issue of utility in their considerations.** In *Martin v. AstraZeneca Pharmaceuticals*, [2012 O.J. No. 2023, 2012 ONSC 2744, paras. 203-206, affd. [2013] O.J. No. 1182, 2013 ONSC 1169 (Div Ct.)] the Court said:

[206] It is not enough to say that more than thirty potential class members, who consumed Seroquel for both on and off-label uses, have been in contact with class counsel. There is no evidence about the nature of the contact. More importantly, there is no evidence to show that any of these people are desirous of having their common complaint (assuming there to be a common complaint) determined through the class action process. This cannot be assumed from the mere fact that a person contacted counsel. ...

(Emphasis by counsel for CONA.)

[25] I find the jurisprudence referred to above persuasive that a relevant factor for section 5(1)(d) (“preferable procedure”) is whether there is a substantial group of persons within the class who are desirous of pursuing their claim through the means of a class action. This is distinct from the requirement in section 5(1)(b) of the *Act* which is met if there is “an identifiable class of 2 or more persons”.

[26] Counsel for CONA argued that even if the requirement in section 5(1)(b) of the *Act* that “there is an identifiable class of two or more persons” was met, those being Ms. Thorne and Mr. Luyt, nonetheless, no evidence had been put before the trial judge that anyone else within the class was desirous of pursuing the class action against CONA.

[27] In reply, counsel for Ms. Thorne referred to paragraph 28 of the certification decision, which reads:

In paragraph 27 of her interlocutory application, Ms. Thorne claimed that “... there is an identifiable class of two or more individuals and to the best

of ... [my] understanding, knowledge and belief there could be in excess of 200, noting that to date, approximately 200 individuals have expressed interest in the matter, and further noting that a review of the 2008/2009 Annual Plan of the ...[College] approved December 2007, anticipated 538 Canadian hires contracted in an instructional position for the 2008/2009 academic year.”

(Emphasis added by counsel for Ms. Thorne.)

[28] Counsel for Ms. Thorne argued that in the foregoing passage the trial judge turned his mind to the issue of whether a substantial number of class members were desirous of pursuing the class action and, based on the evidence before him, the trial judge had concluded that there were.

[29] Counsel for CONA disputed this. In his submission, the fact that “200 individuals have expressed an interest in the matter” does not mean that they are desirous of pursuing the matter through a class action.

[30] What was the nature of the “interest” expressed by the 200 members of the class referred to by Ms. Thorne in her application? Was it mere curiosity? Was it a settled desire to pursue the class action? The trial judge heard no evidence as to what this meant. It would have been better for more detail to have been set out in Ms. Thorne’s application. It would be prudent for plaintiff’s counsel in a class action to present to the judge hearing the certification application clear evidence that a substantial number of the members of the proposed class wish to pursue a claim via the proposed class action.

[31] That said, this Court has to consider whether it was open to the trial judge in this case to accept the evidence referred to in paragraph 28 of his decision as sufficient to deal with whether a substantial number of persons in the class were desirous of pursuing the class action.

[32] I would note what Cameron J.A. wrote in *Dow Chemical v. Ring*, 2010 NLCA 20, 297 Nfld. & P.E.I.R. 96, at paras. 10-14 concerning “standard of proof on a certification application”. The essence of her decision was that “some basis in fact” (being less than the balance of probabilities) is the evidentiary threshold for determining whether certification criteria are met.

[33] Applying this standard, it is clear that the trial judge had “some basis in fact” to conclude as he did that the evidentiary basis was sufficient to

certify the claim, including on the issue of the level of interest by members of the class to pursue the class action. Accordingly, CONA has provided no basis in law for this Court to interfere with the trial judge's decision to certify the class action.

[34] Counsel for CONA raised a second issue with respect to certification, that some members of the class (about one-third) had received full payment of the COLA and, therefore, the class definition was overly broad.

[35] However, by CONA's own admission, about two-thirds of the class did not receive full payment of the COLA.

[36] Two options follow from this. First, CONA could apply to amend the class definition to add the qualifier that it include only persons who had not received payment in full of the COLA in the relevant period. Second, the class definition could go forward as it is to determination of the common issue (was CONA liable to pay in full the COLA to members of the class during the relevant period); if the claim succeeds, then there would have to be an accounting with respect to each member of the class to determine how much each is owed. Where a member of the class was in fact paid the COLA in full, then the amount they would be owed would be zero.

[37] This objection by CONA is not one that could constitute a basis for setting aside the certification decision.

[38] A third issue raised by CONA with respect to certification relates to an appropriate litigation plan (as per section 5(1)(e) of the *Act*).

[39] Counsel for CONA refers to paragraphs 47-48 of the trial judge's decision, which read:

[47] It is well accepted that the litigation plan, at certification, need only provide a reasonable framework for the issues, which are reasonably expected to arise as the case proceeds. Ms. Thorne offered a tentative litigation plan with her interlocutory application. Clearly the relevance of that plan depends largely on the outcome of the certification application. Now that Ms. Thorne knows the class she will represent and the common issue to be tried with the College, I am confident that she will regroup and formulate a more realistic strategy for future proceedings.

[48] The College's main criticism of her plan is that it does not address "...individual issues in a meaningful manner". There is truth in the College's claim but without knowing common issues to be tried between the parties it

would be difficult to devise a plan to deal with any outstanding individual issues. I do note, however, that Ms. Thorne has engaged an accounting firm to “...aid in the calculation of monies owed to Class members and/or management of the accounting aspects of Class proceedings” [quoted from paragraph 28 of the certification application]

[40] Counsel for CONA wrote in his factum:

121. It is a statutory requirement that the Plaintiff provide a workable litigation plan. At paragraphs 47-48 of the certification decision the application judge addressed the need for such a plan. In doing so he recognized that the proposed plan was deficient and then stated that he was confident that plaintiff’s counsel would regroup and formulate a strategy. ...
122. As a workable litigation plan is a prerequisite for certification, it is submitted that the failure to require a workable litigation plan before certification was a reversible error.

[41] In the passage quoted above, the trial judge essentially said that while there are elements of the litigation plan to be worked through, for this stage of the proceedings the litigation plan submitted by Ms. Thorne is appropriate and, thus, this criterion for certification was met. For an example of this, see *Keatley Surveying v. Teranet*, 2015 ONCA 248, 125 O.R. (3d) 447, at para. 75.

[42] CONA has shown no basis to set aside the certification decision based on the trial judge’s assessment of the appropriateness of the litigation plan.

CONCLUSION: CERTIFICATION

[43] For the reasons set out above, leave to appeal the certification decision is granted, but the appeal is dismissed.

COUNTERCLAIM: THE TEST TO STRIKE

[44] Rule 14.24 governs applications to strike pleadings. The rule states:

14.24. (1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that

- (a) it discloses no reasonable cause of action or defence;
- (b) it is false, scandalous, frivolous or vexatious;

- (c) it may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) it is otherwise an abuse of the process of the Court,

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

- (2) Unless the Court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under rule 14.24(1)(a).

[45] Ms. Thorne’s application to strike was made on the basis that the counterclaim disclosed no cause of action. (I would note as well that section 5(1)(a) of the *Act* requires that for the counterclaim to be certified “the pleadings [must] disclose a cause of action”.)

[46] The test for whether the pleadings disclose a cause of action has been dealt with on a number of occasions by this Court.

[47] In *Walsh v. TRA*, 2007 NLCA 50, 268 Nfld. & P.E.I.R. 111, Wells C.J.N.L. wrote, at paragraph 16:

I conclude, therefore, that if there is **any possible basis whatsoever on which a plaintiff might successfully argue entitlement at law**, it is inappropriate to anticipate any defence a defendant may plead, even though it may be a very strong one, and, on the basis of evaluating that defence, strike the Statement of Claim as having no chance of success. That issue can only be determined at trial after hearing all of the evidence relevant to the matters pleaded by all parties, and the legal arguments of the parties. On an application under rule 14.24(1)(a), it is not appropriate to make a preliminary determination of the success of any defence the defendant might plead. **If a plaintiff has pleaded facts on which a cause of action can reasonably be argued, a plaintiff is not to be “driven from the judgment seat” by anticipating defences that might be successful.**

(Emphasis added.)

[48] In *Fiander v. Mills et al.*, 2015 NLCA 31, at para. 17, Green C.J.N.L., relying, *inter alia*, on *Walsh v. TRA*, *supra*, wrote:

The test for striking out a pleading on the basis that it discloses no reasonable cause of action is a stringent one: whether it is plain and obvious that the pleader cannot succeed in his or her plea.

See also *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20 and *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 65, at para. 17.

[49] Rule 14.24(2) provides that the court may order that evidence be admitted by affidavit or otherwise on an application under rule 14.24(1)(a). However, orders to admit such evidence are uncommon and, in this case, no such order was sought or made. Accordingly, the trial judge should have had regard only to the facts as pleaded and not to evidence in deciding the application to strike.

[50] Counsel for CONA submitted that the trial judge in deciding the application to strike had regard to evidence, that being the contract of employment between Ms. Thorne and CONA and the Comprehensive Agreement (between CONA and Qatar).

[51] These two agreements were appended to affidavits filed in support of the certification application. Thus, while they were before the trial judge, they were not relevant to the application to strike.

[52] It is plain from his reasons for decision that the trial judge did have regard to these two agreements (and interpreted their legal effect) in deciding to strike CONA's counterclaim. This was an error in law. Accordingly, the order to strike is set aside.

[53] I would note an unusual aspect of the counterclaim. Ms. Thorne's claim rests in part on an interaction between her contract of employment with CONA and the Comprehensive Agreement, the effect of which was (she alleges) to make CONA liable to pay her the COLA. In its defence, CONA denies that the agreements interact to give rise to this result. In the alternative, CONA counterclaims that, if the two agreements interact as Ms. Thorne alleges so as to make her eligible to be paid the COLA, then (in CONA's submission) the agreements interact in a further way so as to give rise to an additional result, i.e. to cap the amount payable to instructors employed by CONA in Qatar, which cap would give rise to a situation of overpayment to some members of the certified class. I note this by way of explanation and not as the basis for setting aside the order to strike.

[54] The setting aside of that order gives rise to two issues. The first relates to certification. If CONA wishes to assert its counterclaim against members of the certified class then it would need to seek and obtain

certification of its counterclaim under the *Class Actions Act*. In short, it would have to meet the (relevant) criteria under the *Act*. This follows from the overall scheme of the *Act* for the trial of common issues, the result of which will bind members of the class (unless they have opted out). See section 26 of the *Act*.

[55] The second issue relates to whether the trial judge can continue to hear this case. In my view, he cannot. The reason is simple. In his decision to strike the counterclaim the trial judge took the view that the counterclaim could not succeed. In short, he expressed a final and settled view on an issue that (with the setting aside of the order to strike) must now be considered vis-à-vis Ms. Thorne's claim and, quite possibly, must be considered vis-à-vis the claim by other members of the certified class. This would give rise to a reasonable apprehension of bias. See *R. v. S. (R. D.)*, [1997] 3 S.C.R. 484, at paras. 106-107.

CONCLUSION: COUNTERCLAIM

[56] For the foregoing reasons, the order to strike the counterclaim is set aside. As well, the case should now be heard by a member of the Trial Division other than the judge who made the order to strike the counterclaim. For greater certainty, the certification decision and the decision to add the non-resident sub-class will not be affected by the appointment of a new judge to hear the case. In light of section 37 of the *Act*, there is no order for costs.

M. H. Rowe J.A.

I Concur: _____

L. D. Barry J.A.

I Concur: _____

M. F. Harrington J.A.