IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Cabana v. Newfoundland and Labrador*, 2016 NLCA 39
Date: 20160725
Docket: 201501H0084

BETWEEN:

BRAD CABANA — APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR
— FIRST RESPONDENT

AND:

NALCOR ENERGY — SECOND RESPONDENT

AND:

CHURCHILL FALLS (LABRADOR)
CORPORATION LIMITED — THIRD RESPONDENT

Coram: Welsh, Rowe and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401G8365
(2015 NLTD(G) 158)

Appeal Heard: May 19, 2016
Judgment Rendered: July 25, 2016

Reasons for judgment by Rowe J.A.
Concurred in by Welsh and Harrington JJ.A.

Counsel for the Appellant: Self Represented
Counsel for the First Respondent: Rolf Pritchard Q.C. and Justin S.C. Mellor
Counsel for the Second Respondent: Thomas R. Kendell Q.C. and Melissa L.H. Hill
Counsel for the Third Respondent: Jamie M. Smith Q.C.

Rowe J.A.:

INTRODUCTION

[1] Brad Cabana appeals a decision of a judge of the Trial Division denying Mr. Cabana's application for public interest standing in litigation that he commenced with respect to the Muskrat Falls hydroelectric project. The provincial government, Nalcor Energy ("Nalcor", owner of the Muskrat Falls project) and Churchill Falls (Labrador) Corporation ("CF(L)Co", owner of the Upper Churchill hydroelectric project), all defendants in Mr. Cabana's action, opposed his application for public interest standing.

FACTS

[2] Brad Cabana is retired from the Canadian Forces. He lives in a small community in Newfoundland. For several years, he has been active in public affairs, notably as a critic of the Muskrat Falls project, which is under construction on the Churchill River just west of Goose Bay in Labrador.

[3] In December 2014, Mr. Cabana commenced an action against the respondents seeking declaratory orders described further below.

[4] In addition to the claim for declaratory relief, Mr. Cabana made an Interlocutory Application seeking injunctive relief, as follows:

> That Nalcor Energy cease and desist any further development of and construction of the Lower Churchill hydroelectric development, including expenditure of funds thereon, until the proponents have achieved legal certainty in respect of the Aboriginal rights of the Nunatsiavut Government and the NunatuKavut Council, and Hydro-Quebec's right under the Power Contract, in respect of the Lower

> Churchill hydroelectric project, to the degree that ratepayers and taxpayers of the Province shall not be unduly and unjustly affected financially or otherwise.

[5] The Statement of Claim and the Interlocutory Application are linked in that pursuant to the latter Mr. Cabana sought to enjoin Nalcor from proceeding with the Muskrat Falls project (also referred to as the "Lower Churchill hydroelectric project") until he obtains a decision concerning the declaratory relief that he is seeking under the Statement of Claim.

[6] Mr. Cabana states there is a "fundamental principle of legal certainty". In his view, there is an absence of "legal certainty" with respect to possible:

(a) conflict between the rights conferred on Hydro Quebec by the 1969 Power Contract with CF(L)Co and arrangements for water management on the Churchill River which have been put in place for the efficient operation of the Muskrat Falls project;

(b) claims to aboriginal rights and title that might be asserted by the NunatuKavut Community Council Inc. ("NunatuKavut") and that would interfere with development of the Muskrat Falls project; and

(c) claims relating to the Nunatsiavut Land Claims Agreement that might be asserted by the Nunatsiavut government and that would interfere with the development of the Muskrat Falls project.

[7] Mr. Cabana asserts that the population of the province has a right to "legal certainty" concerning these potential legal disputes and the "breach" of "the fundamental principle of legal certainty" means that the "ratepayers and taxpayers of the Province have therefore had their s. 7 Charter Rights unjustly compromised".

[8] Section 7 of the *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] In summary, Mr. Cabana says Nalcor should be enjoined from further development of the Muskrat Falls project until he can carry forward litigation of what he sees as possible claims by Hydro Quebec, NunatuKavut and Nunatsiavut to the point of "legal certainty".

[10] In the Interlocutory Application, Mr. Cabana sought public interest standing to pursue his claims for both declaratory and injunctive relief.

[11] The applications judge described how matters progressed procedurally:

> 4. The Injunction Application was initially called on December 16, 2014 simply for the purpose of setting a hearing date. At that time, and based on submissions from counsel for the Respondents, the Court directed that the public interest standing issue be determined before hearing the merits of the Injunction Application and set a hearing date to deal with that issue.
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> 5. The hearing on the public interest standing issue did not proceed on the date for which it was initially scheduled. However, when it did proceed, a preliminary point was raised regarding whether the hearing was intended to deal with public interest standing only in relation to the Injunction Application or in relation to the Statement of Claim as well. The Applicant took the position that the Statement of Claim and the Injunction Application were one and the same and all parties agreed that the hearing on the public interest standing issue and the decision emanating therefrom would apply to both the Statement of Claim and the Injunction Application.

[12] In the result, the judge denied Mr. Cabana's application for public interest standing and struck out the Statement of Claim and the Interlocutory Application for want of standing. (It is clear that Mr. Cabana has no direct interest in the litigation, as he does not represent Hydro Quebec, nor NunatuKavut, nor Nunatsiavut. Thus, he does not have standing as of right. Therefore, unless he is granted public interest standing, he cannot maintain the action or the injunction application.)

[13] The judge awarded costs against Mr. Cabana on a party and party basis (Column Three) for two counsel for the provincial government and one counsel each for Nalcor and CF(L)Co.

ISSUES

[14] Mr. Cabana sets out 10 issues. Counsel for the province sets out three, as does counsel for CF(L)Co. Counsel for Nalcor sets out 11 issues. While the parties set out the issues differently, in their submissions they address the same range of legal questions.

[15] For convenience, I will state the issues as follows:

(1) What is the standard of review?

(2) Did the applications judge err in his decision denying public interest standing to Mr. Cabana?

(3) What award of costs should be made?

ANALYSIS

(1) Standard of Review

[16] The decision to grant public interest standing is discretionary. The standard of review for discretionary decisions was set out in *Langor v. Spurrell*, (1997) 157 Nfld. & P.E.I.R. 301, at para. 33:

> … The court will therefore only interfere with a discretionary order where the judge who made it has exceeded his or her jurisdiction or has failed to apply or has misapplied an applicable principle or made a palpable and overriding error in his or her appreciation of the facts, or the failure to interfere would otherwise cause a manifest injustice.

The foregoing statement of the law has been affirmed repeatedly by this Court, e.g. *Snook v. Canada Post Corporation*, 2015 NLCA 49, 371 Nfld. & P.E.I.R. 63, at para. 16.

(2) Standing

[17] Regarding public interest standing, all parties and the applications judge agreed that the test is set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, which states at paragraph 37:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

(a) Serious Justiciable Issue

[18] With respect to this factor the applications judge wrote:

> 22 … [T]he circumstances where a court may decline to deal with an issue in dispute in an adversarial proceeding on the basis that it is not justiciable includes [*sic*]the following:
>
> > 1) The questions being asked are hypothetical in nature such as where they are based on speculation or are contingent on future actions that may or may not occur;
> >
> > 2) The questions being asked are purely political in nature; and
> >
> > 3) The questions do not fall within the area of the court's expertise, namely the interpretation of law.
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> . . .
>
> 31 I have no doubt that some, and possibly all, of the so called legal uncertainties alleged by the Applicant might in fact be justiciable in the appropriate circumstances, however, I do not believe this case presents the appropriate circumstances. More importantly, it is my view that the focus of the justiciability analysis should not be on these legal uncertainties but instead on the ultimate issue which the Applicant wants the Court to decide, namely whether the development of the Muskrat Falls Project and the consequent expenditure of public funds, should be halted. This ultimate issue is, in my view, not justiciable. …

[19] Mr. Cabana takes issue with the foregoing on the basis that the applications judge mischaracterized his claims. In Mr. Cabana's submission the judge's error was in saying that the "ultimate issue" that Mr. Cabana is seeking to have the courts decide is whether or not the Muskrat Falls project should proceed. Mr. Cabana says that this misapprehends what his claim for declaratory relief is seeking to achieve, which is certainty as to three legal issues, i.e. concerning the 1969 Power Contract, aboriginal rights and title by NunatuKavut and the Nunatsiavut Land Claims Agreement.

[20] Mr. Cabana is seeking an injunction pending an adjudication of his claim for declaratory relief. But that is not the same as Mr. Cabana asking the courts to decide whether the Muskrat Falls project should proceed at all.

[21] Thus, I am inclined to agree with Mr. Cabana that in his "ultimate question" line of analysis the applications judge erred by misapprehending what it is that Mr. Cabana is asking the courts to decide.

[22] That said, I would agree with the trial judge that the decision to proceed with the Muskrat Falls project is not justiciable, as it relates to the

expenditure of public funds. In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 627-630, the Supreme Court made clear that while a taxpayer may challenge a public expenditure on the basis that it is made illegally, there is no basis to challenge a public expenditure otherwise.

[23] The trial judge wrote at paragraph 38:

> [T]he issue is purely political in nature and does not fall within the area of the court's expertise.

By "the issue", the judge meant the decision to proceed with the Muskrat Falls project.

[24] I would formulate the rationale differently. Rather than saying that decisions concerning public expenditures are "political" and "not within the area of the court's expertise", I would say simply that in accordance with settled constitutional principles such decisions are to be taken by the legislature and the executive and not by the courts.

[25] The applications judge also dealt with justicability in the context of "speculation and contingencies". He wrote as follows:

> 36 I believe it is also important to note that the Supreme Court of Canada in the *Operation Dismantle* decision in dealing with whether a pleading disclosed a reasonable cause of action made it very clear that a court is not required to accept that speculative or contingent allegations in a pleading are true. Dickson, C.J., at paragraph 27, said as follows:
>
> > 27 We are not, in my opinion, required by the principle enunciated in Inuit Tapirisat, supra, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.
>
> 37 While we are not dealing here with whether a pleading discloses a reasonable cause of action, the comments of Dickson, C.J., are equally applicable to a case such as this in my view. The nature of the allegations made by the Applicant is such that they cannot be proven to be true by the adduction of evidence. They are speculative and based on many contingencies. They are not

> required by a court to be taken as true. The Applicant is asking the Court to order the development of the Muskrat Falls Project and the consequent expenditure of funds stopped on the basis of speculation and contingencies which might never occur. This is not, in my view, a justiciable issue.

[26] Mr. Cabana has no good response to this line of reasoning. There is no basis to say that the applications judge erred in his conclusion that the claims being pursued by Mr. Cabana are not justiciable in that they are based on "speculation and contingencies".

[27] I would add the following concerning Mr. Cabana's statement that without "legal certainty" on the issues where he wishes to seek declaratory relief "the ratepayers [for electricity] and taxpayers of the Province [will have] their s. 7 *Charter* rights unjustly compromised." What Mr. Cabana is saying is that if litigation involving Hydro Quebec or NunatuKavut or Nunatsiavut were to occur and the provincial government, Nalcor and/or CF(L)Co were to suffer economic losses because of it, then the burden of those losses would be borne by ratepayers and/or taxpayers. He then asserts that the resulting higher electricity rates and/or higher taxes would constitute an infringement of the s. 7 *Charter* rights of persons in this province. I know of no authority for any such propositions. I also agree with the applications judge that all of this is "speculation and contingencies" and that it challenges governmental decisions on the basis of their political effect as opposed to their legality.

(b) Real Stake or Genuine Interest

[28] With respect to this factor, the applications judge wrote:

> 51 I have no doubt that the Applicant has a strong interest in the Muskrat Falls Project and has been engaged in issues surrounding it for a number of years. He is, by his own admission, a vocal opponent of the Project. However, this does not equate to him having a real stake or genuine interest in the litigation, within the meaning of those terms, in the context of case law dealing with the issue of public interest standing.
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> . . .
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> [53] As in *Shiell*, there is no evidence here that the Applicant has any direct, personal interest in the alleged unlawful actions of the Respondents. Being a taxpayer or a consumer of electricity is not enough nor is the fact that the Applicant is a vocal critic of the Project.

> [54] Relevant as well to the issue of whether the Applicant has a real stake or genuine interest in the litigation is the fact that there is no evidence that the Applicant has any connection whatsoever to the two aboriginal groups or the corporation whose rights he alleges have been violated. It is the violation of these rights that the Applicant claims gives rise to the legal uncertainties which will ultimately impose a financial burden on the taxpayers and ratepayers of this Province.
>
> [55] If the Applicant's claim as presently made was to be adjudicated, then the Court would have to determine various factual and legal issues relating to the rights of these aboriginal groups and Hydro Quebec. Not only is there no evidence that the Applicant has any connection to either of these aboriginal groups or Hydro Quebec but as well, there is no evidence that he has any genuine interest in the issues giving rise to what he calls the legal uncertainties relating to these parties. Instead, it seems that he is using the rights of these other parties merely as a means to further his opposition to the Muskrat Falls Project and to try and have the development of that Project stopped.
>
> [56] Given all of the foregoing, I am not persuaded in these circumstances that the Applicant has a real stake or genuine interest in the litigation.

[29] Mr. Cabana has no good answer to this line of reasoning. There is no basis to say that the applications judge erred in his conclusion that Mr. Cabana lacks a real stake or genuine interest in the claims, which (if it had been shown) would support the exercise of discretion to grant him public interest standing.

(c) Reasonable and Effective Way to Bring the Issue Before the Courts

[30] With respect to this factor the applications judge focused on "two matters which I believe are particularly relevant in this situation", capacity and impact on the rights of others.

[31] Concerning capacity, the applications judge wrote at paragraph 65:

> Overall, I am not persuaded that the Applicant has the capacity to undertake this litigation. I am not satisfied that he has either the resources or the expertise to do so. I am also not satisfied that the Applicant has the capacity to present the issues in a sufficiently concrete and well-developed factual setting.

[32] Mr. Cabana has no good answer to this conclusion. Where public interest standing is being sought, effective presentation of the evidence and arguments is a relevant consideration. In this case, Hydro Quebec's rights under the 1969 Power Contract or a claim by NunatuKavut as to aboriginal

rights or concerning Nunasiavut's rights under its Land Claims Agreement would involve considerable resources and specialized legal expertise which Mr. Cabana does not have.

[33] Concerning impact on the rights of others, the applications judge wrote:

> 67 … [T] he claim of the Applicant is based on alleged violations of the rights of three parties who are not involved in this litigation. The Applicant has no connection to either of these other parties. As well, neither of the parties has attempted to intervene in this action, notwithstanding that all of them were made aware of it.
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> 68 The potential impact on the rights of others with whom the Applicant has no connection, combined with the fact that those parties, (all of whom have a more direct and personal stake in the legal issues raised than the Applicant), seemingly have no interest in this litigation, strongly militates against a finding that the Applicant's claim is a reasonable and effective way of bringing the issues before this Court.

[34] Mr. Cabana has no good answer to this line of reasoning. It would be a serious infringement of the rights of Hydro Quebec, NunatuKavut and the Nunatsiavut government if Mr. Cabana were permitted to maintain claims involving their interests.

[35] There is no basis to say that the applications judge erred in concluding that Mr. Cabana's claims are not a reasonable and effective way to bring the issues before the courts.

Conclusion on Public Interest Standing

[36] As noted, the standard of review for the applications judge's decision denying public interest standing is one of deference, given that it is a discretionary decision. The applications judge identified the relevant legal test and methodically applied it in the circumstances of this case. No basis has been shown that he erred in doing so.

[37] I would dismiss the appeal against the decision on standing.

COSTS

[38] I turn now to costs, concerning which the Court requested additional submissions from the parties.

[39] The applications judge wrote as follows:

> 73 Costs are generally awarded to a successful party and I see no reason to depart from that general rule in this case. The fact that the Applicant is self-represented does not change the considerations to be made by a court in deciding whether to award costs. Any litigant whether self-represented or represented by counsel should understand that there is likely to be cost consequences if the litigation is unsuccessful. Each of the Respondents has been required to retain and instruct counsel on this matter which was far from straightforward and this has undoubtedly involved considerable time and expense.
>
> 74 The First Respondent shall have its costs to be taxed on a party and party basis at Column Three, two counsel. The Second and Third Respondents shall have their costs to be taxed on a party and party basis at Column Three, one counsel.

[40] While the award of costs is discretionary, that discretion must be exercised in accordance with law. The applications judge erred in principle by failing to consider the issue of costs from the perspective of public interest litigation.

[41] In *Friends of Ragged Beach Inc. v. Witless Bay (Town)*, 2013 NLCA 25, 336 Nfld. & P.E.I.R. 184 the Court ordered no costs even though the would-be public interest litigant's case did not raise a serious issue to be tried. Chief Justice Green wrote as follows:

> 24. Regarding costs, I would reiterate the comments of the applications judge:
>
> > [55] I am satisfied that the application of the Plaintiffs in this matter, while unfounded, is well intended. Vigilant supervision of the actions of elected representatives is one of the ways to guarantee that the collective interests of the community are neither ignored nor trampled. …
>
> 25. In the circumstances, given the public interest foundation for Mr. Vickers' application and appeal, the parties should bear their own costs both in this Court and in the Court below.

[42] In *Coombs v. Moss*, 2010 NLTD 38, 294 Nfld. & P.E.I.R. 293 the petitioner lost an election and challenged the results. Hall J. concluded at paragraph 51 that "it would be unreasonable on the part of this Court to impose a penalty of costs upon the Petitioner in these circumstances who has proceeded generally on a question of general public interest". See also *Penney v. Avalon West School Board*, 2004 NLSCTD 182, 241 Nfld. & P.E.I.R. 262 at paras. 12 – 13 and *Benoit et al. v. School Board for District*

No. 5 (1999) Baie Verte (Central) Connaigre, 182 Nfld. & P.E.I.R. 183, at para. 76.

[43] M.H. Orkin, *The Law of Costs*, 2d ed., loose-leaf, (Toronto: Carswell, 1987), at 2-275 – 277) dealt with Public Interest Litigation as follows (footnotes are omitted):

> The Supreme Court has said that bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs. Equally, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs.
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> . . .
>
> While there appears to be no general principle that public interest litigants should be immune from costs, the following criteria have been propounded to determine the circumstances where costs should not be awarded against a person who commences public interest litigation.
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> (1) The proceedings involve issues the importance of which extend beyond the immediate interests of the parties involved.
>
> (2) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> (3) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> (4) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> (5) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[44] Having regard to the first four factors identified by Orkin:

(1) The proceedings involved issues the importance of which extended beyond the immediate interest of the parties, notably Mr. Cabana;

(2) Mr. Cabana had no personal, proprietory or pecuniary interest in the outcome;

(3) The issues had not been previously determined by a court proceeding against the same parties; and

(4) The provincial government, Nalcor and CF(L)Co each have a clearly superior capacity to bear the costs of the proceeding than does Mr. Cabana.

[45] Orkin's fifth factor is whether the plaintiff engaged in vexatious, frivolous or abusive conduct. I see no basis to say that Mr. Cabana engaged in abusive conduct. Nor do I see any basis to say that his claims are vexatious. However, were they frivolous?

[46] It is not sufficient to say that this could not have been public interest litigation as Mr. Cabana was denied public interest standing. That misses the point, which is that courts should not stifle *bona fide* public interest litigation by awarding costs against unsuccessful litigants. On the other hand, an award of costs is warranted against a purported public interest litigant who acted for an ulterior motive (e.g. mere self-promotion) or who commenced litigation that was so utterly devoid of merit that it would inevitably result in failure and a complete waste of resources.

[47] Mr. Cabana has come very close to the line in these claims. They were based on concepts unknown to the law (notably the "fundamental principle of certainty"), on entirely misplaced statements as to legal rights (notably that the rights of provincial citizens under s. 7 of the *Charter* were being infringed) and on an unwarranted intrusion into the affairs of Hydro Quebec, NunatuKavut and Nunatsiavut. Nonetheless, I am inclined to conclude that Mr. Cabana undertook the litigation for *bona fide* motives and without understanding how lacking in merit were his claims.

[48] Accordingly, I would set aside the applications judge's award of costs, and make no award of costs against Mr. Cabana. In effect, each party will bear their own costs, before the applications judge and in this appeal.

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M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.