



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

Citation: *Thorne v. The College of the North Atlantic*, 2017 NLCA 30

Date: May 2, 2017

Docket: 201601H0105

BETWEEN:

DEBORAH THORNE

INTENDED APPELLANT

AND:

THE COLLEGE OF THE NORTH ATLANTIC

INTENDED RESPONDENT

Coram: Green C.J.N.L., Welsh and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (2016 NLTD(G) 165)

Application Heard: April 12, 2017

Decision Rendered: May 2, 2017

Reasons for Decision by Welsh J.A.

Concurred in by Green C.J.N.L. and Hoegg J.A.

Counsel for the Appellant: Philip C. Whalen

Counsel for the Respondent: David Eaton Q.C.

Welsh J.A.:

[1] This is an application for leave to appeal the certification of a counterclaim as a class action.

BACKGROUND

[2] In August 2014, Deborah Thorne's application for certification of her claim against the College of the North Atlantic as a class action was granted pursuant to the *Class Actions Act*, SNL 2001, c. C-18.1. The applications judge defined the class and the common issues (2014 NLTD(G) 94, 355 Nfld. & P.E.I.R. 63):

[50] Deborah Thorne sued the College of the North Atlantic for breaching an employment contract, in failing to pay her the full amount of a cost of living allowance for part of the time she worked for the College at its Qatar campus. She also claimed that many other employees of the College at its Qatar campus have similar claims. She applied to have her claim certified as a class action. ...

[52] In the result, I order that:

1. Deborah Thorne's claim against the College of the North Atlantic is certified as a class action.

2. I define the class as: *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.*

3. The common issue among class members, and the issue to be tried in the common issues trial, is: *Were members of the class entitled by their contracts of employment to receive the full amount of the [cost of living allowance] for the period of September 1, 2008 and November 22, 2011?*

[3] In March 2015, the class was expanded to include, as a sub-class, non-residents of Newfoundland and Labrador, with the identification of Allan Lyut as the class representative.

[4] In February 2015, the College filed a defence and counterclaim denying liability relating to the cost of living allowance and counterclaiming for reimbursement from some class members for overpayments. The College takes the position that a set-off of overpayments that it claims are

owed by some class members is not a sufficient remedy since the overpayment may exceed the amount claimed in relation to the cost of living allowance.

[5] In May 2015, following an application by Ms. Thorne, the counterclaim was struck out (2015 NLTD(G) 63). The College appealed that decision and also sought leave to appeal the order certifying the class action. In a decision of this Court, leave to appeal the certification order was granted, but the appeal against the certification order was dismissed (2015 NLCA 47, 371 Nfld. & P.E.I.R. 31). In the same decision, the order striking the counterclaim was set aside with the direction:

[56] ... [T]he 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 subclass will not be affected by the appointment of a new judge to hear the case. ...

[6] On the re-hearing, Stack J. certified the counterclaim as a class action and ordered (2016 NLTD(G) 165):

[83] For the purposes of the counterclaim I am satisfied that the classes remain the same as were ordered by the trial judge 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; and

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 elsewhere in Canada than in the Province of Newfoundland and Labrador, but not outside Canada.

[84] It is ordered that the certification order be amended. The common issues will now be:

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

Are members of the class who received compensation greater than the amount provided for in the annual budget pursuant to the Comprehensive Agreement (amounts in excess of the Salary Cap), during the period of

September 1, 2008 and November 22, 2011 required to repay the excess amounts to [the College of the North Atlantic]?

[7] Ms. Thorne seeks leave to appeal the order certifying the counterclaim as a class action.

ANALYSIS

Rule 33 of the *Court of Appeal Rules*

[8] Pursuant to section 36(3) of the *Class Actions Act*, leave of the Court is required to appeal an order certifying an action as a class action:

A party may, with leave of a judge of the Court of Appeal, appeal to the Court of Appeal from

(a) an order certifying or refusing to certify an action as a class action; or

...

[9] Rule 33 of the *Court of Appeal Rules*, NLR 38/16, provides for the procedure where leave to appeal is required by statute:

(1) Where a statute requires leave to appeal, the appellant shall file with the notice of appeal, an application for leave to appeal.

(2) An application for leave to appeal under subsection (1) shall be heard separately from the appeal unless, upon application or of its own motion, the Court orders that leave to appeal be heard at the same time as the appeal.

...

[10] In this case, in accordance with the request of counsel, the application for leave was heard separately from the appeal. I would note in passing that, in the interests of ensuring the most efficient and cost-effective procedure, careful consideration should be given to whether the leave application should be heard separately from or at the same time as the appeal, as is permitted under rule 33. See, for example, *Davis v. Canada (Attorney General)*, 2008 NLCA 49, 279 Nfld. & P.E.I.R. 1; *Anderson v. Canada (Attorney General)*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314, where leave and the appeal were heard together; and *Pardy v. Bayer*, 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157, where leave was heard separately. For example, where leave is sought based on a challenge to the correctness of the decision

to certify or refuse certification, it may be more efficient to hear the leave and appeal at the same time.

Factors to be Considered in Granting Leave to Appeal under Rule 33

[11] I begin by reiterating that the granting of leave is a discretionary decision which will be based on an analysis of the particular circumstances (*Davis v. Canada (Attorney General)*, *supra*, at paragraph 17). That said, the judicial exercise of discretion is aided by the development of criteria on which a decision will be based.

[12] Neither the *Act* nor rule 33 specifies factors to be considered in determining whether leave to appeal should be granted. In *Davis*, in the context of an application for leave to appeal the certification of a class action, under the former *Rules*, the Court applied the criteria set out in rule 57.02(4) of the *Rules of the Supreme Court, 1986*. (See also *Anderson v. Canada (Attorney General)*, *supra*.) The underlying rationale was that an appeal of a certification order is an interlocutory order which, under rule 57, required leave of the Court.

[13] The criteria enumerated in the former rule are not included in the new *Court of Appeal Rules*, which came into force on October 17, 2016, because those *Rules* do not require leave to appeal an interlocutory order. Nonetheless, the criteria enumerated in rule 57.02(4) of the former *Rules* provide a useful starting place, though not a rigid template, for assessing the question of leave to appeal under the *Class Actions Act*. The factors listed under rule 57.02(4) were:

- (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.

[14] The relevance of paragraph (d) is discussed in *Davis*:

[18] The nature of an application for certification as a class action will colour the assessment of the factors enumerated in rule 57.02(4). For example, either the granting or refusal of certification will generally result in an issue on appeal having no practical effect following final judgment (rule 57.02(4)(d)). Therefore, while paragraph (d) is a relevant factor, it should be assessed in light of other relevant considerations.

[15] Regarding the importance of the issues and the interests of justice under paragraphs (c) and (e) of rule 57.02, considerations such as the novelty of the issue would be relevant. For example, in this case, the question of certifying a counterclaim as a class action engages issues not previously addressed by the courts of this Province.

[16] The issues of conflicting decisions or the correctness of the decision under paragraphs (a) and (b) of rule 57.02, may be engaged, for example, where there is a question as to the application of a relevant principle of law, or where clarification of the law or a principle is desirable.

[17] In applying the criteria enumerated in rule 57.02(4), reference may be made to case law developed under that rule. Care should be taken to avoid unnecessarily interfering with the flow of the litigation process. This issue is discussed in *Young v. Noble*, 2016 NLCA 58, at paragraphs 17 to 20.

[18] In addition to the above criteria, in the context of an application for leave to appeal under section 36(3) of the *Class Actions Act*, a consideration that may be taken into account is the different effect resulting from granting or refusing a certification application. This issue is discussed in *Davis*, with reference to the decision in *Pardy v. Bayer, supra*:

[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. [Section 11 of the *Act* allows for amendment of a certification order, decertification, or another order the court considers appropriate.] ...

By contrast, where a certification order is refused, the benefits of proceeding by way of a class action can be obtained only if leave is given and the appeal succeeds.

[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.

[20] On this point, it is helpful to consider the criteria for challenging an appeal taken in an uncompleted matter under rule 35 of the *Court of Appeal Rules*. An uncompleted matter is “a matter where the issues between the parties have not been determined by a final decision or order in the court appealed from” (rule 7(n)). In the context of a class action certification, consideration may be given to prejudice to a party, the effect of delay, inconvenience, efficient use of judicial resources, or other good reason.

[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)).

Leave to Appeal - Application of the Principles

[22] Where certification has been granted, the general reticence to grant leave to appeal must be assessed taking account of all the other relevant factors. The most significant factor in this case is the novelty of the issue of certification of a counterclaim as a class action, particularly where the legislation does not directly address the question. This case provides the Court with the opportunity not only to review the applications judge’s basis and reasons for certifying the counterclaim, but also to address relevant principles of law together with statutory interpretation. This is a sufficient foundation on which to grant leave to appeal. Some of the questions to be addressed by way of an appeal include:

- (1) The effect of sections 4, 5(1) and 19 and any other relevant provisions of the Act, read in conjunction with rule 11 of the *Rules of the Supreme Court, 1986*, regarding counterclaims;
- (2) Issues surrounding the identification of a representative of the class for purposes of the counterclaim;
- (3) Alternative procedures to a counterclaim that may assist in the efficient and fair resolution of issues as between the parties;

- (4) Issues, if any, surrounding the conditional nature of the counterclaim certified as a class action;
- (5) The relevance of section 11 of the *Act* regarding amendment of a certification order during the proceedings; and
- (6) Issues surrounding the possible settlement of the class action.

[23] The College submitted at the hearing of the application for leave to appeal that, if leave is granted, the question of whether the counterclaim discloses a cause of action has been decided and is not before the Court for purposes of the appeal. I do not accept this submission because that conclusion is not clearly stated in, and does not necessarily follow from, the earlier decision of this Court (2015 NLCA 47).

[24] The College also made reference to restrictions imposed by the notice of appeal. I would reiterate the new approach to establishing the issues on appeal in the *Court of Appeal Rules*. A notice of appeal now requires a statement of the subject matter of the appeal and the request being made by the appellant (rule 8(1) and form 1). The grounds of appeal are defined in the factum. In this way, all the issues are identified, with notice to the respondent who is then in a position to respond by way of its factum. The objective is to ensure a fair and complete canvassing of all the relevant issues.

Costs

[25] Section 37(1) of the *Act* provides:

The Trial Division and the Court of Appeal shall not award costs to a party to an application for certification under subsection 3(2) or section 4, to a party to a class action or to a party to an appeal arising from a class action at any stage of the application, action or appeal.

[26] Applying this provision, the parties will bear their own costs of this application.

SUMMARY AND DISPOSITION

[27] In summary, I would grant leave to appeal the decision of Stack J. on the basis that the appeal raises a novel issue, that is, certification of a counterclaim as a class action, and provides this Court with the opportunity not only to review the applications judge's basis and reasons for certifying

the counterclaim, but also to address relevant principles of law together with statutory interpretation.

B. G. Welsh J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

L. R. Hoegg J.A.