



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

Citation: *Newfoundland and Labrador v. Chiasson*,
2020 NLCA 8

Date: February 26, 2020

Docket Number: 201901H0099 and 201901H0100

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF NEWFOUNDLAND AND LABRADOR APPELLANT

AND:

JOHN CYRILLE CHIASSON FIRST RESPONDENT

AND:

NALCOR ENERGY SECOND RESPONDENT

- AND -

BETWEEN:

NALCOR ENERGY APPELLENT

AND:

JOHN CYRILLE CHIASSON FIRST RESPONDENT

AND:

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

Coram: Goodridge J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G7673

Application Heard: February 18, 2020

Judgment Rendered (Orally): February 18, 2020

Written Reasons Filed: February 26, 2020

Counsel for the Appellant: Donald E. Anthony Q.C. and Nick Leamon

Counsel for the First Respondent: Raymond F. Wagner Q.C. and Kate Boyle

Counsel for the Second Respondent: David B. Eaton Q.C. and Dana Martin

Goodridge J.A.:

[1] John Chiasson applied for directions, and an Order, regarding the procedural management of a pending application for leave to appeal. He wants the leave application heard in advance of the potential appeal, instead of the more common procedure of hearing the leave application with the appeal. Nalcor and the Province want the leave application heard with the appeal.

[2] Mr. Chiasson is a member of the class of persons claiming to have suffered flood related damages due to the actions of Nalcor and the Province in managing a hydro project on the Churchill River in Labrador. The claim was certified as a class action under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 on July 11, 2019. Nalcor and the Province have sought leave to appeal the decision allowing that certification.

[3] Following a hearing on February 18, 2020, this Court provided directions and issued the following Orders:

- the leave application shall be heard in advance (hearing date June 11, 2020);
- the written submissions (maximum 25 pages of argument) and authorities of Nalcor and the Province shall be filed by April 30, 2020;
- the written submissions (maximum 25 pages of argument) and authorities of Mr. Chiasson shall be filed by May 29, 2020; and
- the leave application shall be heard by a panel of three judges.

[4] I provided oral reasons at the time that these orders were made, and this brief memorandum reflects those reasons.

[5] There is a concern with duplication of effort, added costs to litigants, and inefficient use of judicial resources, when a leave application is heard separately from the appeal proper. In *Thorne v. College of the North Atlantic*, 2017 NLCA 30, 1 C.A.N.L.R. 707, at paragraph 10, Welsh J.A. (for the Court) raised concern about the efficiency and cost-effectiveness of the separate procedure and suggested “careful consideration should be given to whether the leave application should be heard separately from or at the same time as the appeal”. Submissions on leave applications invariably engage argument on the merits, duplicating, to some extent, arguments raised during the appeal proper. At the same time, the leave application does not delve deeply into the merits, is less time consuming, and is clearly the more efficient route when leave is ultimately denied.

[6] There have been several applications before this Court seeking leave to appeal the certification of class actions. In *Wheadon v. Bayer Inc.*, 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157, and *Thorne v. College of the North Atlantic*, the leave applications were heard separately from the appeal. In other cases, the leave applications were heard contemporaneously with the appeals. See for example *Davis v. Canada (Attorney General)*, 2008 NLCA 49, 279 Nfld. & P.E.I.R. 1; *Sparkes v. Imperial Tobacco Canada Ltd.*, 2010 NLCA 21, 295 Nfld. & P.E.I.R. 267; *Acreman v. Memorial University of Newfoundland*, 2011 NLCA 55, 310 Nfld. & P.E.I.R. 61; *Anderson v. Canada (Attorney General)*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314; *College of the North Atlantic v. Thorne*, 2015 NLCA 47, 371 Nfld. & P.E.I.R. 31; and *Atlantic Lottery v. Babstock*, 2018 NLCA 71.

[7] Mr. Chiasson argued that there is a reasonable prospect that the leave application here will be denied, and this factor, on its own, justifies a separate hearing. He pointed out that this is an appeal of an interlocutory order on a procedural matter, and that the grounds of appeal engage highly discretionary matters for which considerable deference is owed to the chambers judge who certified the class action.

[8] There has been a general sentiment expressed by this Court that leave to appeal an order certifying a class action should be granted sparingly. At paragraph 35 of *Anderson* the Court (*per curiam*) stated: “[L]eave to appeal should be sparingly granted where a party is appealing an interlocutory order on a procedural matter, [and] this is particularly true where a certification order has been granted”. At paragraph 19 of *Thorne v. College of the North Atlantic*,

Welsh J.A. (for the Court) stated: “[T]here may be some reticence to give leave where certification has been granted”. Similar comments appear *Wheadon, Davis, College of the North Atlantic v. Thorne*, and *Atlantic Lottery*.

[9] Mr. Chiasson also referenced s. 36(3) of the *Class Actions Act* and rule 33(2) of the *Court of Appeal Rules*, NLR 38/16, to support his argument for a separate hearing. The combined effect of the two provisions, in his view, creates a presumption in favour of a separate hearing for the leave application.

[10] Section 36(3) of the *Class Actions Act* states:

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

[11] Rule 33(2) of the *Court of Appeal Rules* states:

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.

[12] I do not agree that there is a presumption in favour of a separate hearing. The *Court of Appeal Rules* clearly reserve discretion with the Court to order that leave to appeal be heard at the same time as the appeal.

[13] I do agree that the nature of the grounds of appeal in this instance, and the general reticence to permit appeals of certification orders (absent an error of law or principle), justify a separate hearing.

[14] The parties agreed in advance that, if there was going to be separate hearing for the leave application, it be heard by a panel of the Court instead of by a single judge.

W. H. Goodridge J.A.