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Atlantic Canada Regional Overview

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The body of class action jurisprudence from Atlantic Canada continues to grow. Newfoundland and Labrador has had its class actions legislation since 2001, and, given its size, has a relatively large number of class action decisions. New Brunswick and Nova Scotia have had their class actions legislation since 2006 and 2007, respectively, while Prince Edward Island has not yet passed any legislation in respect of class proceedings.

The number of certified class actions continues to grow in Atlantic Canada, as does the number of actions with certification applications pending. It appears that the class action legislation is being generously applied in Atlantic Canada in almost every conceivable way, including in respect of the certification requirements, the admissibility of evidence on certification and the participation of third parties at certification.

In 2011, the Newfoundland and Labrador Court of Appeal in *Acreman & Lee v. Memorial University of Newfoundland* upheld a certification decision in an action commenced by University pensioners. The class alleged that the University had historically paid the full premium for their post-retirement health insurance and had wrongfully required them to begin contributing to same. Representations, in the form of retirement letters or retirement seminars, were made to some members of the class, although not all class members received a representation as to future entitlement and the representations varied. In upholding certification, the Court of Appeal appears to have based its decision on the common bond that all members of the class, at one time, did receive their post-retirement benefits at no cost and were now compelled to contribute and on the possible creation of subclasses or decertification in the future. The Court of Appeal was referred to *Nadolny v. Peel*, a 2009 decision in which the Ontario Superior Court of Justice had no hesitation in denying certification on almost identical facts, but did not refer to it in its decision.

Also in 2011, the Newfoundland and Labrador Supreme Court denied the plaintiff's application to stay third-party proceedings pending certification. In *Rice v. Atlantic Lottery Corp*., the plaintiffs alleged that video lottery machines provided for use by the defendant were inherently deceptive and rendered them addictive and dangerous when used as intended. The defendant brought third-party proceedings against the manufacturers, suppliers and designers of the machines. The Court placed particular emphasis upon the 2008 New Brunswick Queen's Bench decision in *Bryson v. Canada (Attorney General)*, and, in holding that the third-parties could participate at the certification hearing, noted that the third-party claims were not mere claims for indemnity, but instead involved the determination of many of the same issues at play in the main action.

In *Best v. Nunatsiavut Assembly*, three proposed class actions alleged that the class members had been denied membership in the Labrador Inuit Association and claimed monetary damages for the corresponding loss of benefits pursuant to the applicable land claims agreement. The Newfoundland and Labrador Trial Division set aside the actions for want of jurisdiction, holding that the land claims

agreement expressly provided for a right of judicial review on membership decisions to the Federal Court. On appeal in 2011, and in reliance upon the recent Supreme Court of Canada decision in *McArthur v. Canada*, the Court of Appeal allowed the appeal, finding that a distinction must be drawn between claims for damages which rely on the decision of a tribunal and cases which seek to impugn tribunal decisions through judicial review. The Court remitted the matter back to the Trial Division to permit the plaintiffs to apply to amend their pleadings, after which time it would be determined whether a valid cause of action had been pleaded within the jurisdiction of the Supreme Court.

In New Brunswick, the 2009 decision of the Court of Queen's Bench in *Gay v. Regional Health Authority 7* allowed an Inquiry Report conducted pursuant to the Provincial Government's Order-In-Council to be admitted into evidence at the certification hearing. In *Gay*, it was alleged that a pathologist had made numerous errors and the action involved allegations of negligence, breach of contract and breach of fiduciary duty. The Inquiry Report was prepared to investigate into the pathology services in question. In allowing the Inquiry Report to be introduced at the certification hearing, the Court distinguished the 1998 Ontario Court of Justice decision in *Robb Estate v. St. Joseph's Health Care Centre* and noted that the object of the Plaintiffs in introducing the Inquiry Report was not for the purpose of determination of liability but was instead principally relevant to a determination of the existence of common issues, to class definition and to the preferable procedure analysis.

The Nova Scotia Supreme Court certified a class action in 2011 in *Crooks v. CIBC World Markets*. In *Crooks*, approximately 100 people were involved in a particular series of option trades when a third party contractor of the defendant made a calculation error resulting in losses to a defined group. The defendant attempted to compensate the group by cancelling, at its expense, all trades from the date of the error, but this approach eradicated gains as well as losses. This method of compensation was unilaterally imposed by the defendant. The Court certified the action notwithstanding the defence's argument that damages would be the principal issue requiring determination and would necessarily involve an individual assessment. The Court noted that there were numerous common issues in respect of liability and that the defendant had not made an unequivocal admission of same.

In *MacQueen v. Canada and Nova Scotia*, a 2010 oral decision of the Nova Scotia Supreme Court, an environmental class action related to the Sydney Tar Ponds was certified. The claim was made on behalf of current property owners and former property owners within a prescribed boundary, and alleged various causes of action, including nuisance, breach of fiduciary duty and strict liability. The remedies sought included property remediation, identification of health risks and medical monitoring, and did not include any claims for personal injury. In allowing certification, the Court did not fully accept the Plaintiff's expert evidence concerning the proposed boundaries of property for the class. Written reasons have yet to be provided, although the oral decision can be reviewed at the Nova Scotia Courts website.

Going forward in Atlantic Canada, it will be interesting to review the findings in the first common issues trial in Newfoundland and Labrador in the case of *Sundance Saloon v. Newfoundland and Labrador Liquor Corporation et al*., in respect of which final arguments are expected to conclude in January, 2012.

Given the trend towards certification in Atlantic Canada, at least in respect of the actions brought to date, it will be interesting to see if additional common issue trials might be necessary or what pre-Trial applications might be brought after certification in an attempt to minimize exposure or otherwise limit the action.

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