Date: 20140527
Docket: 14/08
Citation: *Anderson v. Canada (Attorney General)*, 2014 NLCA 24

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

CAROL ANDERSON, ALLEN WEBBER, JOYCE WEBBER, TOBY OBED, WILLIAM ADAMS, MARTHA BLAKE, ROSINA HOWELL, REX HOWELL, SARAH ASIVAK, JAMES ASIVAK, EDGAR LUCY, DOMINIC DICKMAN — APPELLANTS

AND:

ATTORNEY GENERAL OF CANADA — FIRST RESPONDENT

AND:

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

AND:

THE INTERNATIONAL GRENFELL ASSOCIATION — THIRD RESPONDENT

AND:

THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR — FOURTH RESPONDENT

AND:

THE MORAVIAN UNION (INCORPORATED) — FIFTH RESPONDENT

Coram: Rowe, Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200701T4955CP,
200701T0845CP, 200701T0844CP,
200701T0846CP & 200701T5423CP
(2014 NLTD(G) 16)

Appeal Heard: May 14, 2014
Judgment Rendered: May 27, 2014

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

Counsel for the Appellants: Kirk Baert and Celeste Poltak
Counsel for the Respondents: Jonathan Tarlton, Mark Freeman and Melissa Grant

Rowe J.A.:

INTRODUCTION

[1] This case is about whether the Government of Canada ("Canada") bears liability for abuse of aboriginal children at residential schools in Labrador. As many of those involved in the class action are elderly, an expeditious disposition of the case is important.

[2] This appeal is not about the merits. Rather, it is about procedure, specifically whether or not the legal effect of a limitation period should be dealt with as a preliminary question of law or at trial. In procedural questions, it is important to apply legal rules so as to achieve a fair and practical result, and to maintain a sense of proportion.

BACKGROUND

[3] The plaintiffs issued a statement of claim in November 2007; they issued an amended statement of claim in April 2012. Canada issued its statement of defence in November 2012.

[4] In October 2008, Justice Fowler of the Trial Division (in 2008 NLTD 166, 280 Nfld. & P.E.I.R. 67) decided that two motions by Canada (one demanding particulars, the other to compel the plaintiffs to add certain parties) should not be dealt with before certification. His reasons are instructive:

> [38] I agree with the position that where a preliminary application has the potential to dispose of the litigation or more efficiently address the objectives of the *Class Actions Act*, then it should be heard prior to the certification hearing.
>
> [39] This is not the case in the present matter and I am convinced that to permit these two applications to proceed prior to the certification hearing will cause this certification hearing stage of the intended class action to spiral down a timeless rabbit hole wherein one particular application begets another ...
>
> (Emphasis added.)

[5] In March 2013, Justice Butler of the Trial Division (in 2013 NLTD (G) 46, 335 Nfld. & P.E.I.R. 46) decided that three questions that the plaintiffs sought to have dealt with as preliminary questions of law (relating to the duty, if any, owed by Canada to the plaintiffs) should instead be dealt with at trial. Her reasons (in paragraph 69) included that:

> An appeal by either party from the determination of the preliminary questions of law posed would seriously derail the Court's litigation timetable, which is already at considerable risk.
>
> (Emphasis added.)

THE DECISION UNDER APPEAL

[6] In January 2014, Canada applied under Rule 38 to have a question relating to a limitation period heard as a preliminary question of law. The question was "whether the ultimate 30-year limitation period applies to allegations of non-sexual misconduct" so as to bar such claims. The case management judge (in 2014 NLTD (G) 16) decided that the trial judge should hear and decide this as a preliminary question of law.

[7] In deciding Canada's application, the case management judge applied the test formulated by this Court in *Miawpukek Band v. Ind-Rec Highway Services Ltd.* (1999), 172 Nfld. & P.E.I.R. 245 and itemized by the case management judge at paragraph 6 of the prior Rule 38 decision from March 2013, referenced above.

[8] The case management judge applied the test under six headings:

(1) Is there a discernable advantage to proceed in the manner proposed?

(2) Is a hearing under Rule 38 a suitable vehicle to determine the question?

(3) [The need for] receipt of evidence

(4) Trial in another form versus resolving or simplifying the trial

(5) Necessity for further directions

(6) Status of a party

For the purposes of this appeal, I will deal only with (2) and (3) above.

[9] The case management judge wrote:

> **(2) Is a hearing under Rule 38 a suitable vehicle to determine the question?**
>
> [20] Central to this determination is whether a sufficient evidentiary record can be provided and if the evidentiary background can either be established by an agreed statement of facts or is a matter of public record.
>
> [21] Canada asserts that the only record needed on the threshold question is the proof of the issuance of the first Statement of Claim acknowledged to be November 23, 2007.
>
> . . .
>
> [28] I agree with Canada that in determining this discrete issue, the court needs only the law and the date of issuance of the earliest Statement of Claim, which is a matter of public record. I conclude therefore that there is a sufficient evidentiary record and a hearing under Rule 38 is a suitable vehicle to determine the question.
>
> **(3) Receipt of Evidence**
>
> . . .
>
> [30] For the reasons already stated, I conclude that the determination of whether an ultimate limitation period applies to the non-sexual misconduct claims would not necessitate the receipt of further evidence. ...

[10] With respect, the problem with the foregoing is that it flies in the face of reality. Counsel for the plaintiffs said to the case management judge and

to this Court that in order to determine the effect of the limitation period, it will be necessary to determine the nature of the duty (if any) owed by Canada to the plaintiffs. And, in order to show the nature of that duty, plaintiffs' counsel says he will have to lead extensive evidence. By contrast, Canada says no such evidence is necessary.

[11] The point of difference arises from the wording of section 22 of the *Limitations Act*, SNL 1995, c. L-16.1, the "ultimate limitation". Section 22 reads in part:

> ... no action to which this Act applies shall be brought after the expiration of 30 years ...
>
> (Emphasis added.)

Canada says it is clear on the face of the statute and having regard to relevant jurisprudence that the action in this case is one "to which this Act applies". The plaintiffs say the action is not one "to which this Act applies" because of certain aboriginal and constitutional aspects. To demonstrate this they indicate they must show the nature of the duty owed by Canada to the plaintiffs, and to show the nature of that duty the plaintiffs need to lead substantial evidence.

[12] This may have certain novel features, but it is the plaintiffs' position. And, they have every right to present their position as they see fit, subject to considerations of proportionality. It may be that at the end of the day the trial judge will decide that the evidence presented by the plaintiffs is for naught and that a literal reading of section 22 is all that is required. But, that can be determined only after argument of the issue, not before.

[13] As such, the case management judge erred at paragraph 28 of her decision where she wrote that:

> ... the court needs only the law and the date of issuance of the earliest Statement of Claim ... .

That will be true only if Canada's position prevails on the applicability of the *Limitations Act*. The statement presumes that Canada's position will prevail, which presumption should not be made.

[14] As a related matter, there is the problem of delay. This the case management judge failed to deal with. Implicit in her decision is the

assumption that the "ultimate limitation" question can be dealt with quickly, so as not to delay proceedings. But, this assumption fails on two counts.

[15] First, hearings on the issue will be extensive because that is what plaintiffs' counsel say will be needed in order to allow plaintiffs' counsel to present their position in the manner that they see fit in the service of their clients.

[16] Second, whichever party loses on the limitations issue is almost certain to seek leave to appeal to this Court. Very likely, the losing party in this Court would seek leave to appeal to the Supreme Court of Canada. (Plaintiffs' counsel stated that would be their course of action if they were to lose on the limitations issue.)

[17] On either of the two foregoing bases, the trial which is scheduled for November 2014 would be delayed, probably quite substantially. I note the concern expressed by Justice Butler in her March 2013 decision that:

> ... An appeal by either party from the determination of the preliminary questions of law posed [in this instance one question] would seriously derail the Court's litigation timetable ... .

[18] I also note Justice Fowler's October 2008 reference to a "spiral down a timeless rabbit hole wherein one particular application begets another".

[19] There is a virtue in simplicity. In this case, that means getting to trial where all issues will be dealt with.

[20] This Court should not lightly interfere with the exercise of discretion by a case management judge in the application of Rule 38. However, in this instance it is warranted.

[21] The judge erred in principle by concluding that the plaintiffs' presentation of evidence was not required, as explained above. Thus, I would set aside her decision.

[22] In its place, I would exercise the discretion under Rule 38 and deny Canada's application. I do so applying the *Miawpukek* test, on the basis that the hearing sought is <u>not</u> a suitable vehicle to determine the question as it would unduly delay the trial and thereby seriously prejudice the plaintiffs, many of whom are elderly.

[23] Given the foregoing, I need not deal with the arguments relating to the *Class Actions Act*, SNL 2001, c. C-18.1.

CONCLUSION

[24] At the hearing, the Court granted leave to appeal pursuant to Rule 57.02(4) on the basis that the appeal involves matters of such importance that leave should be granted and that it is in the interests of justice to do so.

[25] The appeal is allowed. The case management judge's decision is set aside. The Respondent's application under Rule 38 for the hearing of a preliminary question of law is denied. This case should proceed to trial as scheduled.

Malcolm Rowe

M. H. Rowe J.A.

I Concur: Leo Barry

L. D. Barry J.A.

I Concur: Michael F. Harrington

M. F. Harrington J.A.