Class Proceedings in the Maritimes

Is The Glass Half Full of Half Empty?

INTRODUCTION

In June 2008 Nova Scotia proclaimed the Class Proceedings Act. Nova Scotia became the third province in Atlantic Canada to enact class proceedings legislation, joining Newfoundland and Labrador (2001) and New Brunswick (2006).

Prince Edward Island still has no class proceedings legislation. Class Actions in that province are limited to representative proceedings under the provinces civil procedure rules and common law class actions under the principles enumerated by the Supreme Court of Canada in ***Dutton*** and ***Hollick.***

Newfoundland and Labrador continues to lead the Atlantic Provinces as the most active class proceeding jurisdiction with several certified class actions and a number of reported decisions on a variety of procedural issues.

In the last year, there has been one reported decision on certification in New Brunswick and one decision (currently unreported) in Nova Scotia.

The purpose of this paper is to review the two decisions to see if any lessons can be drawn from the approach taken by the courts in each jurisdiction.

***Bryson v. Canada (Attorney General*)**,** [2009] N.B.J. No. 237 is a decision of Justice S. McNally of the New Brunswick Court of Queen's Bench released July 23, 2009.

Martin v. Lahey et. al. is a currently unreported decision of Justice David MacAdam of the Nova Scotia Supreme Court. Justice MacAdam's oral decision on certification and settlement approval was issued on September 10, 2009.

BRYSON:

The plaintiff class members alleged they suffered injuries health risks and property damage as a result of the spraying of herbicides, defoliants and pesticides by the Canadian Armed Forces on and around Base Gagetown over a period of 53 years.

The plaintiffs sought damages for personal injury, diminution of property values and the future cost of medical monitoring to monitor the effects of the alleged toxic chemicals.

Cause of Action?

The Defendant Crown brought a concurrent motion to strike the plaintiffs' claim as disclosing no cause of action.

The court applied the *plain and obvious* test to the pleadings.

At paragraph 37 of his decision, Justice McNally stated:

> "At the certification stage, however, the court is concerned only with the determination of *"whether it is plain and obvious that the plaintiffs could not succeed in establishing the alleged causes of action that are said to arise from the facts pleaded"*. In my view it is not. That is not to say that following the presentation of a more fulsome, focused and complete evidentiary record on the issue of policy versus operational decisions and the further policy reasons advanced by the crown militating against the imposition of a duty of care, that the common issues or trial judge might not conclude otherwise. Ultimately in my opinion however, those determinations should only be made in the instant case with the advantage of viewing these issues in the light of a more complete and full evidentiary record."

Identifiable Class:

The plaintiffs proposed to certify two overlapping classes:

- "Direct class members" who suffered injury, death or property loss a result of exposure to allegedly toxic chemicals; and

- "Family class members" defined as all persons who had a derivative claim as a result of a family relationship to someone in the direct class.

The court was concerned with the size of the proposed class.

McNally J. stated:

> "As it stands, the proposed class has virtually no meaningful restriction and would potentially include hundreds of thousands of claimants including many who had no actual exposure to the chemicals …"

McNally J. found that the proposed class definition did not bear a rational relationship to the common issues asserted by the class members.

> "The potential class would be limitless with many potential members, in many respects, having no real interest in the determination of the proposed common issues."

McNally J. ruled that the proposed class definition failed to satisfy the requirements of the Class Proceedings Act.

Common Issues:

The plaintiffs proposed 17 common issues for certification. The common issues fell into 2 general categories:

- "Causation Issues" relating to a determination of whether exposure to the alleged toxic chemicals caused a risk of injury or property damage; and
- A second group relating to alleged tortious acts by the defendants.

In determining that the plaintiff's claim failed the common issues test, McNally J. stated at paragraph 73:

> "The plaintiffs have undertaken an ambitious claim to address all of the potential claims that might arise out of the effects of the spray program conducted at base Gagetown over the past 53 years. In doing so, they have over reached and framed an overly broad action defining the causation issues in very general terms…"

Preferable Procedure:

The New Brunswick class proceedings requires the court to consider whether the class proceeding would be the preferable procedure for the fair and efficient resolution of "the dispute" (as opposed to the common issues). The same reference to dispute is found in the Nova Scotia legislation.

Justice McNally noted that the legislation:

> "Specifically directs the court to consider the greater context of the over all "dispute" and not merely the "common issues" in determining a preferable procedure criteria."

However, Justice McNally went on to state that the distinction and the wording did not appear to provide for any significant difference in the analysis to be undertaken as outlined in ***Hollick.***

New Brunswick's **Class Proceedings Act**, sets out 6 factors for the court to consider when determining the issue of preferable procedure. The factors are not included in the Ontario legislation. The factors are similar to those found in British Columbia legislation and are identical to those found in the Nova Scotia legislation.

Canada submitted that the administrative regimes available to members of the military, veterans and federal employees were preferable methods for resolving class members' claims.

Justice McNally stated that the proposed class definition was so broad that it would include many claimants that would not be military personnel, veterans or federal employees. Furthermore, the federal compensation regimes would not provide the means to resolve all of the claims pleaded by the class members.

Justice McNally was not convinced that the potential availability of *some* form of administrative benefits to *some* class members would constitute a preferable procedure for the fair and efficient resolution of the class members' claims.

However, Justice McNally was not persuaded that the plaintiffs had established that the class proceeding, as proposed, would provide for an efficient and manageable method for the resolution of the dispute. His Lordship was of the opinion that because of the overly broad nature of the class definition, the trial of the proposed common issues would likely become overwhelmed and bogged down by an avalanche of individual issues.

> "…they have not demonstrated that the proposed common issues could be resolved in a practical or manageable fashion or would advance the resolution of the claims in a fair, efficient, and manageable way."

Proposed Representative Plaintiff:

There was no objection to the appropriateness of the proposed representative plaintiff. However, McNally J. found that the Act also required the representative plaintiff to have a plan for the class proceeding that sets out a "workable method of advancing the class proceeding on behalf of the class".

Justice McNally stated:

> "In my view, and for the reasons already stated and relating to the commonality and preferred procedure criteria, the plaintiffs have not established that they have a workable method for advancing the proposed class proceeding in a fair, efficient and manageable way. In fact, I am satisfied that the evidence tendered on this issue establishes that the plan they had proposed is indeed unworkable."

Motion for Certification Denied:

"I have not failed. I've just found 10,000 ways that won't work."
~ Thomas Edison

Certification was denied on the basis that the plaintiff's failed to establish that there was a common class; failed to prove that the class members shared common issues; failed to establish that a class action was the preferable procedure for resolving the dispute; and that the representative plaintiff had not produced a workable plan to advance the proceeding.

MARTIN:

Ronald Martin is the representative plaintiff for a class defined as all individuals who were sexually assaulted by priests who were members of the Roman Catholic Diocese of Antigonish between 1950 and September 10, 2009.

In 2002 Ronald Martin received a telephone call that his brother David Martin had been missing in the woods of British Columbia for two weeks. Ron flew to British Columbia to join the search for his brother. Sixteen days later David's body was found, along with a suicide note indicating that he had taken his life because he could no longer endure the pain caused by the sexual abuse he had suffered as a child at the hands of Father Hugh Vincent MacDonald, a priest of the Roman Catholic Diocese of Antigonish.

Ron Martin had also been sexually abused by Hugh Vincent MacDonald but neither brother was aware of the abuse that the other brother had suffered. On the day that he was forced to identify his brother's body on behalf of the family, Ron Martin made a promise to David that his death would not be in vain and that someone would be held accountable for the abuse that they had both suffered.

A criminal investigation was launched after David's death which eventually resulted in Hugh Vincent MacDonald being charged with rape, buggery and assault against more than 16 former members of various parishes from the Antigonish Diocese.

Three priests from the Antigonish Diocese had already been convicted of sexually abusing more than 22 former parishioners from the Antigonish Diocese.

Unfortunately, Hugh Vincent MacDonald died before his trial.

In 2004 Ron Martin hired our firm to pursue an individual claim for compensation against the Diocese of Antigonish. Over time, more than two dozen individuals who alleged they had been sexually abused by Hugh Vincent MacDonald filed similar claims.

Mr. Martin agreed to act as a spokesperson for all the Hugh Vincent MacDonald claimants and participated in settlement discussions with the Diocese aimed in resolving the claims of the Hugh Vincent MacDonald victims.

The investigation, litigation and negotiations pertaining to the Hugh Vincent MacDonald claims extended over several years. As a result of information gathered during the investigation of the Hugh Vincent MacDonald claims, it became apparent that there were many more claimants who had been sexually abused by other priests of the Antigonish Diocese.

The Hugh Vincent MacDonald Negotiations:

In January 2008 Ron Martin retained our firm to file a class action against the Catholic Episcopal Corporation of Antigonish (commonly known as the Diocese of Antigonish) and Bishop Raymond Lahey, in his capacity as corporate sole of the Diocese. The claim was the first lawsuit filed under Nova Scotia's newly proclaimed ***Class Proceedings Act***.

In December 2008 Ron Martin filed his application for Certification.

Shortly after delivery of the defendants' responding materials opposing certification, the parties entered into parallel negotiations to try to resolve the claims.

On August 4, 2009 the parties signed an agreement settling the class action.

On September 10, 2009, Justice David MacAdam certified the class action and approved the settlement agreement.

Terms of the Settlement:

A copy of the settlement agreement is attached as schedule "A" to this paper.

Certification of the action is conditional:

- If there are any opt outs the defendants have the right within 70 business days of the conditional certification order to elect not to proceed with the settlement; and

- If more than 70 class members identify themselves to class counsel, who class counsel believes are bona-fide class members, class counsel has the right within 70 business days of conditional certification to elect not to proceed with the settlement;

- If the conditions are not met or are waived the certification and settlement become final and binding.

The settlement agreement requires the defendants to:

- Pay up to 12 million dollars into a Damages Fund;

- Pay into a Costs Fund to reimburse individual claimants who are successful in the settlement process;

- Pay up to $400,000.00 for future psychological counseling for successful claimants;

- Pay all expenses associated with the claims process established under the settlement agreement;

- As security to ensure the performance of their financial obligations under the agreement, the defendants are required to provide a floating charge debenture against the real property of the Diocese.

Claims Process:

The settlement agreement establishes a claims process by which members of the class can have their entitlement to compensation and the amount of compensation payable determined on an expedited and confidential basis.

It may be stating the obvious to say that confidentiality is especially important to victims of sexual abuse.

The claims process can be summarized as follows:

- **Submit a claim:** A claimant must complete a claim form which must be delivered to defence counsel within 6 months of settlement approval. The claims period can be extended up to a further 6 months with leave of the court.

- **Document Disclosure:** The defendants can request the claimant to provide copies of relevant documentation. The defendants are required to pay for the production of all documents.

- **Discovery Examinations:** The claimant may be examined under oath by defence counsel for up to 2 hours. The settlement agreement specifically states that the examinations must be conducted in a respectful manner.

- **Psychological Examination:** The parties have retained a joint psychological expert. The expert's report forms his evidence in chief. The expert may be subject to cross examination.

- **Economic Expert:** The parties have retained a joint economic expert to quantify a claimant's economic losses. The settlement agreement acknowledges that economic losses of up to $100,000.00 can be awarded without the necessity of an economic expert report.

- **Settlement Negotiations:** The settlement agreement calls for mandatory settlement negotiations. If the claim can not be settled by agreement a validation hearing will be conducted by a retired judge of the Nova Scotia Supreme Court, Justice Walter Goodfellow.

- **Validation Hearings:** Hearings will be conducted in an inquisitorial fashion. The claimant will only be questioned by the judge. There is no cross examination. Each side may call two witnesses without leave, provided that a written statement is provided in advance of the hearing. After the validation hearing Justice Goodfellow will render a written decision which may be appealed by either party to the Nova Scotia Supreme Court.

Benefits:

Under the settlement agreement the defendants waive a number of defences which they would normally be expected to plead in an individual or group action including, among others, limitation periods, latches, and denial of vicarious liability.

The standard proof is relaxed for claimants where there is a criminal conviction and for cases where charges were laid but did not proceed because of the intervening death of the abuser.

The process, including the validation hearing, is private and confidential.

The process is far less adversarial than traditional litigation as evidenced by the expedited discovery process, the use of joint experts, and the inquisitorial nature of the validation hearing.

Non Catholic Class Members:

Under the settlement agreement, non-catholic victims receive 75% of their compensation awards. The rational for the reduction is that based on the Supreme Court of Canada's decision in ***Doe v. Bennett***, [2004] 1 S.C.R. 436 the defendants had a legitimate defence to the claims for vicarious liability of non catholic class members.

In ***Bennett,*** the Supreme Court of Canada held that the Roman Catholic Episcopal Corporation of St. Georges was vicariously liable for sexual abuse by a former priest of the St. Georges Diocese, Father Bennett.

McLachlin C.J. in writing the courts unanimous decision stated that:

> "The relationship between the bishop and a priest in a Diocese is not only spiritual, but temporal. … The bishop exercised extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline.
>
> First, the bishop provided Bennett with the opportunity to abuse his power. …
>
> Second, Bennett's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest …
>
> Third, the bishop conferred an enormous degree of power on Bennett relative to his victims."

Certification:

Justice MacAdam was satisfied that the proposed claim met the test for certification.

a) The pleadings disclosed a cause of action;
b) There was an identifiable class;
c) The claims of the class members raised a common issue;
d) The validation and compensation process outlined in the settlement agreement was the preferable procedure for the resolution of the dispute;
e) Ronald Martin as representative plaintiff would fairly and adequately represent the interest of the class and had no conflict with the interest of other class members.

The Martin motion was brought by the consent of the parties for certification and approval of a settlement agreement.

Lessons Learned:

The ***Bryson*** and ***Martin*** claims involved could not have been more different. So can any common lessons be taken from examination of the two decisions?

Cause of Action:

In ***Bryson***, McNally had concerns about the novel nature of the plaintiff's claim for medical monitoring expenses. However, he ruled that it was not the plain and obvious that the plaintiff's claim could not succeed.

In ***Martin***, the court had questions about the plaintiff's claim for breach of a non-delegable duty. However, the court was satisfied that the pleadings disclosed a cause of action including breach of fiduciary duty as enumerated by the Supreme Court of Canada in ***Doe v. Bennett***.

Identifiable Class:

In ***Bryson***, the court found that the proposed class definition was too broad, was not capable of objective determination, and would be limitless with potential members that had no interest in the determination of the common issues.

In ***Martin***, the definition of the class members was objectively defined (victims of sexual assault by priests) and temporally defined (January 1, 1950 to September 10, 2009). The court had questions about the temporal restrictions but was satisfied that if there were class members that we left out of the class as a result of the proposed time frame the court had the jurisdiction to deal with the issue upon application by the parties.

Preferable Procedure:

In ***Bryson***, the court felt that resolution of the common issues would not significantly advance the litigation because resolution of the individual issues was going to be a herculean task.

In ***Martin*** the settlement agreement avoided a contested certification hearing, a contested common issues trials and resulting appeals. Furthermore, the confidentiality of the validation process was found to be the preferred means of resolving the claims of victims of sexual abuse.

Lessons Learned:

Class actions, given their inherent complexity, may not be the appropriate vehicle for novel causes of action.

When defining the class, keep it simple. Do not try to be all things to all people.

Just because you may be able to resolve the common issues by way of a class proceeding does not mean you will be successful unless you have a workable plan for managing the remaining individual issues.