

Form 57.03A

File No.: 2021 01H 0070

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

RICHARD DEWEY, WILLIAM PERRY, CHARLOTTE JACOBS and
WILLIAM TURNER

APPELLANT

AND:

~~KRUGER INC., DEER LAKE POWER COMPANY LIMITED, CORNER
BROOK PULP AND PAPER LIMITED, and THE TOWN OF DEER
LAKE, HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND
AND LABRADOR~~

RESPONDENTS

Amended Notice of Appeal

TAKE NOTICE THAT the Appellant appeals from the decision of the Honourable Justice Peter N. Browne (the "Application Judge") dated the 20th day of September, 2021 and subsequent order filed November 1, 2021 in proceedings in the Supreme Court of Newfoundland and Labrador, Trial Division bearing court number 201504G0120;

AND THAT the grounds of the proposed appeal are:

- 1) That the Application Judge erred in law by ordering that the Appellant's claims do not disclose a reasonable cause of action as against the Town of Deer Lake;
- 2) That in concluding that the Appellant's claims do not disclose a reasonable cause of action as against the Town of Deer Lake, the Application Judge drew a definitive conclusion that the Town did not owe the Class a duty of care to implement a policy regarding: (a) the construction of a diversion or drainage ditch to address the elevated groundwater levels; (b) to create a storm water management plan to allow Town residents to mitigate or correct flooding; or (c) to oversee and monitor the



Water Control System's effects on class members' properties. The Application Judge concluded that these matters engaged the Town's legislative function. The Appellant's claim was not, however, that the Town had a duty of care **to implement** such policies; rather, the claim was that the Town, **having implemented** such policies, had a duty to take reasonable care in their implementation. The Application Judge answered an incorrect question. This was an error of law;

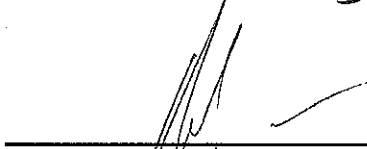
- 3) That the Application Judge concluded – without any evidence, and indeed evidence is not permitted to be considered in a section 5(1)(a) analysis – that the purpose of the policy of the Town to inspect the Humber Canal weekly was to ensure there was no improper polluting, fishing or other activities that could impact the water supply. In so concluding, the Application Judge dismissed the Appellant's claim that the Town owed a duty of care in its implementation of the inspection policy. This was an error of law, as the Application Judge went beyond the pleadings test to which he was to limit himself in a section 5(1)(a) analysis;
- 4) That the Application Judge erred in law and fact by concluding that a class action was not the preferable procedure as against Corner Brook Pulp and Paper Limited on the basis that potential members of the class could face the same costs to litigate their claims in a class action as if brought as individuals, despite his earlier conclusion acknowledging the benefits of having the "general causation" question – addressing the amount of seepage flowing into the class boundary - answered once, in common;
- 5) That the Application Learned Judge erred in law and fact by basing his conclusion that the proposed class proceeding was not preferable to the alternatives on one portion of the evidence – "upwards of 20 homes" having "actually suffered floods on their properties" – disregarding other, higher figures available elsewhere in the evidence and presented by the Plaintiff at the hearing;
- 6) That the Application Learned Judge erred in law and fact by citing joinder as a preferable procedure in the comparative analysis under s. 5(1)(d), without any evidence provided by the Defendants as to the actual purported savings in court resources and expenses if proceeding by way of joinder, and in relying on outdated

jurisprudence superseded by *AIC Limited v. Fischer*, 2013 SCC 69, in which the Supreme Court of Canada states at paragraph 49: "Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. As Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.): ". . . the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis It must be supported by some evidence" (para. 67)." No such evidence was led by the Defendants nor cited by the Learned Judge; and

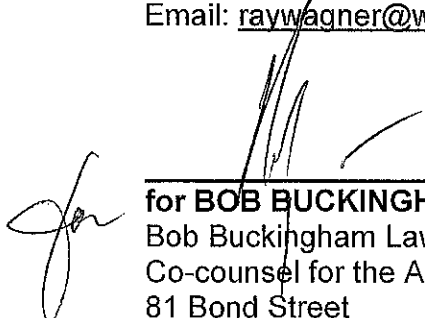
- 7) Such other grounds of appeal as counsel may advise and this Honourable Court may permit on or before the hearing of the intended appeal.

AND THAT the Appellant will request that the decision appealed from be reversed.

DATED at Halifax, Nova Scotia, this 8th ~~15th~~ day of ~~November~~ February, 2024~~2~~.



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