

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 Application for Leave to Appeal**

1. This is notice that the Appellant/Plaintiff (hereinafter the "Appellant") applies pursuant to s. 36 of the *Class Actions Act*, SNL 2001, c C-18.1, as amended (the "CAA") for leave to appeal from the September 20, 2021 decision and subsequent order of Justice Peter N. Browne (the "Application Judge"), filed on November 1, 2021, in cause number 2015 04G 0120 CP of the Supreme Court, General Division, denying certification of the proceeding as a class action.
2. The Appellant has filed his Notice of Appeal concurrently with this Application.

**SUBJECT MATTER OF THE APPLICATION:**

**The Appellant's Claim**

3. The Appellant's claim against the Defendants/Respondents (hereinafter the "Respondents") is outlined in the Amended Statement of Claim filed on May 28, 2020. The proposed class action arises from damage alleged to have been caused to downstream properties by a system of man-made water control structures (the "Water Control System") constructed for the production of hydroelectric power for the Corner Brook Pulp and Paper

Mill.

4. The Appellant brings this action on behalf of a proposed class of property owners and residents of a geographically defined area of the Town of Deer Lake (the "Class Boundary" depicted in Schedule "A" to the Amended Statement of Claim) (the "Class") whose properties have experienced sustained flooding allegedly caused by the Water Control System. It is alleged that water seeps from the Water Control System, causing overall elevated groundwater levels, and that the water resulting from the seepage is not adequately managed by the Respondents, resulting in extensive, sustained water damage to Class Members' properties, which are all located downhill of the Water Control System.
5. There are two proposed subclasses: Owner Class Members, who are all persons who own or owned real property within the Class Boundary, and Non-Owner Class Members, who are all persons who reside or have resided in, but do not own, real property within the Class Boundary.
6. The Appellant alleges that the Respondents are liable to the Plaintiff and proposed Class in tort for the alleged damage. The causes of action advanced in the Amended Statement of Claim are nuisance, as against the Kruger Defendants (collectively, Kruger Inc., Deer Lake Power Company Limited and Corner Brook Pulp and Paper Limited), and negligence as against the Kruger Defendants, The Town of Deer Lake, and Her Majesty the Queen in right of Newfoundland and Labrador (the "Province"). In their materials and at the hearing of the application for certification, counsel for the Kruger Defendants advised the Plaintiff that Corner Brook Pulp and Paper Limited would be the only appropriate Kruger Defendant to be named in the action, as a result of corporate structures and histories, and this was accepted.
7. The relief sought by the Appellant includes general damages (including damages for interference with property rights resulting from the material physical damage alleged to be caused by the Respondents), damages for the costs associated with remediating the properties, special damages, aggravated damages and pre-judgment interest.

## Procedural History

8. This action has a procedural history preceding the certification application.
9. After the proposed class action was filed in 2015, Corner Brook Pulp and Paper Limited stated its intention to apply for a stay of the proceeding on the basis that legislation first enacted in 1915 required that the claims be adjudicated by arbitration.
10. Corner Brook Pulp and Paper Limited requested that this jurisdictional issue be decided prior to the certification hearing. The Plaintiff opposed this timing, taking the position that the jurisdictional issue should be determined at the hearing of the certification application. The matter of timing had to be determined by the Court.
11. By way of a decision dated June 17, 2016, *Dewey v. Kruger Inc.*, 2016 NLTD (G) 113, Justice David F. Hurley decided that Corner Brook Pulp and Paper Limited's application challenging the jurisdiction of the Court should be heard and decided prior to the hearing of the certification application.
12. The parties then proceeded to a hearing to determine the jurisdictional issue on its merits. By way of a decision dated December 15, 2017, *Dewey v. Kruger Inc.*, 2017 NLTD(G) 203, Justice Hurley granted Corner Brook Pulp and Paper Limited a stay of the proceeding. The Town and the Province had opposed Corner Brook Pulp and Paper Limited's application to stay the proceeding. Kruger Inc. and Deer Lake Power Company Limited did not participate in the application.
13. The Plaintiff appealed this decision to stay the proceeding.
14. By way of a decision of the Court of Appeal of Newfoundland and Labrador dated March 19, 2019, *Dewey v. Corner Brook Pulp and Paper Limited*, 2019 NLCA 14, the Plaintiff's appeal was granted. The proceeding was not to be stayed. The application for certification could finally advance to a hearing.
15. The Plaintiff's application for certification was heard by Justice Peter N. Browne on May 26 and 27, 2021 and a decision was rendered on September 20, 2021, with a subsequent order filed on November 1, 2021.

16. The Application Judge concluded that there was no reasonable cause of action pleaded against the Town, the Province, Kruger Inc. or Deer Lake Company Limited, and that as against the remaining defendant, Corner Brook Pulp and Paper Limited, a class action was not the preferable procedure.

### **This Application**

17. The Appellant is seeking leave to appeal the decision of the Application Judge pursuant to s. 36(3) of the CAA.

18. The proposed issues to be raised in the appeal from the Application Judge's decision are:

- i. 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;
- ii. 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;
- iii. 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;

- iv. 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;
- v. That the Application 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 Appellant at the hearing;
- vi. That the Application 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 Respondents-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 the need for evidence 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 Respondents Defendants nor cited by the Application Judge; and

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

19. The Appellant requests that leave be granted to appeal the order of the Application Judge.

20. The affidavit that is necessary to support or provide the foundation for the Application is attached.

DATED at Halifax, Nova Scotia, this 8<sup>th</sup> 15<sup>th</sup> day of November February, 20242.

  
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**RAYMOND F. WAGNER, Q.C.**  
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\_\_\_\_\_  
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To: **F. Richard Gosse / Elliott Burse**  
**Counsel for Kruger Inc., Deer**  
**Lake Power Company Limited, and**  
**Corner Brook Pulp and Paper Limited**  
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~~And To: Donald Anthony, Q.C.  
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The application is set to be heard on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, at 10:00 a.m.

\_\_\_\_\_  
Court Officer

**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


**AFFIDAVIT IN SUPPORT OF AN APPLICATION**

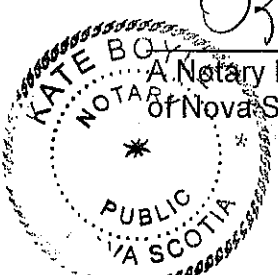
I, \_\_\_\_\_, of Halifax, Nova Scotia, Solicitor for the Appellant, swear that:

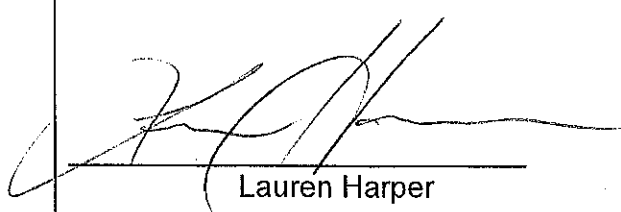
1. I am the solicitor for the Appellant and as such have knowledge of the facts set out in the Amended Application for Leave to Appeal, and that the alleged facts are true to the best of my knowledge, information and belief.

I make this affidavit in support of the Appellant's Amended Application for Leave to Appeal.

**SWORN BEFORE ME** at the City of  
Halifax, Province of Nova Scotia, on this  
8<sup>th</sup> 15<sup>th</sup> day of November February, 20242.

  
\_\_\_\_\_  
A Notary Public in and for the Province  
of Nova Scotia

  
KATE BOYLE  
A Barrister of the Supreme  
Court of Nova Scotia

  
\_\_\_\_\_  
Lauren Harper