H

2011 CarswellNfld 184, 2011 NLCA 36

Best (Guardian ad litem of) v. Nunatsiavut Assembly

Tracey Best, Appellant and Nunatsiavut Government On behalf of the Nunatsiavut Assembly, Respondent

Emily Best, by her Guardian ad Litem Maurice Best, Appellant and Nunatsiavut Government On behalf of the Nunatsiavut Assembly, Respondent

Jillian Mugford, Appellant and Nunatsiavut Government On behalf of the Nunatsiavut Assembly, Respondent

Newfoundland and Labrador Court of Appeal

L.D. Barry J.A., M.F. Harrington J.A., M.H. Rowe J.A.

Heard: January 21, 2011
Judgment: June 7, 2011
Docket: 09/62, 09/63, 09/64

Proceedings: Reversed, (sub nom. Best v. Nunatsiavut Government) [2010] 2 C.N.L.R. 1, 2009 CarswellNfld 113, 73 C.P.C. (6th) 132, (sub nom. Best v. Nunatsiavut Government) 885 A.P.R. 88, (sub nom. Best v. Nunatsiavut Government) 287 Nfld. & P.E.I.R. 88, 2009 NLTD 70 (N.L. T.D.)

Counsel: Frank Layte, for Appellants

Randell Earle, Q.C., for Respondent

Subject: Public; Civil Practice and Procedure

Aboriginal law.

Civil practice and procedure.

Per curiam:

1 Three appeals come before this Court as a result of the setting aside of three statements of claim commenced in the Trial Division under the *Class Actions Act*, SNL 2001, c. C-18.1. The applications judge granted the respondent's application on the grounds that the Trial Division lacked jurisdiction to hear the matters arising under the statements of claim. The appellants seek to reverse the order of the applications judge or in the alternative request to have the statements of claim stayed pending certain determinations by the Federal Court of Canada.

Background

2 The respondent came into existence in 2006 as a result of the Labrador Inuit Land Claims Agreement ("the Agreement") negotiated and ratified between the Inuit of Labrador through the Labrador Inuit Association ("the LIA") and the federal and provincial governments. The appellants assert that the respondent is the successor in all respects to the LIA. In the cases of Tracey and Emily Best, the LIA declined to grant membership prior to the formation of the respondent. Jillian Mugford's claim arises from the financial consequences of her loss of LIA membership in 1997. She was granted beneficiary status on the Labrador Inuit Enrolment Register ("the Register") in 2006.

3 The applications judge made reference in his reasons to paras. 4 to 7 of the statement of claim of Emily Best as being representative of all three claims. Those paragraphs read as follows:

> 4. The LIA was formed in or about A.D. 1973 to represent the rights and interest of the Inuit of Labrador, specifically to pursue a Land Claim as against the Federal Government of Canada and the Provincial Government of Newfoundland and Labrador relating to traditional Inuit lands located in Labrador. In or about 1977 the LIA filed a Land Claim with the Federal and Provincial Government aforesaid. In or about the year 1999 the LIA ratified an Agreement in Principle with respect to this Land Claim. In or about 2004 the Labrador Inuit Land Claims Agreement Act, S.N.L. 2004, c. L-31, was passed in the Newfoundland and Labrador House of Assembly. And on or about the 22nd day of January, A.D. 2005, the Governments of Canada, Newfoundland and Labrador and the LIA signed the Land Transfer Agreement. The LIA held its last annual General Assembly on or about May 23-27, A.D. 2005. At this meeting the LIA approved a compensation payment of $5,000.00, payable out of the Inuit Capital Trust provided by the Federal Government, to each Inuit registered on the LIA voter list as of May 26, 2004. The Defendant is the successor in title to the LIA.
>
> 5. Pursuant to Part 3.2 of the Labrador Inuit Land Claims Agreement (hereinafter the "Land Claims Agreement"), the Defendant, or its predecessor in title the LIA, was made responsible for compiling a list of the eligible beneficiaries who were "Inuit" or "Kablunangajuk" as defined by the Land Claims Agreement (Part 3.1.1). These beneficiaries would, *inter alia*, be eligible for participation in the Nunatsiavut Government, have voting rights and also would be eligible to receive compensation and other benefits as members.
>
> 6. The Plaintiff states that, prior to the ratification of the Land Claims Agreement, the LIA, which is now represented by the Defendant, undertook to compile a Voters List of all eligible Labrador Inuit and Kablunangajuk (hereinafter "members"). The Plaintiff further states that all eligible members would receive, *inter alia*, monetary compensation in the amount of $5,000.00 per member (hereinafter referred to as the "monetary compensation") as outlined in paragraph 4 above. Pursuant to the Land Claims Agreement, the Defendant and/or the LIA prepared and maintained *The Labrador Inuit Enrolment Register* containing the names of each individual determined to be a beneficiary of the Land Claims Agreement.
>
> 7. The Plaintiff further states that the Defendant's actions are in violation of the fiduciary duties the Defendant owes to the members, including the Plaintiff herein.

4 The plaintiffs allege that those Inuit who had been recognized for inclusion on the voters. list for the vote to ratify the Agreement were automatically recognized by the regional membership committees for beneficiary status under the Agreement.

5 The relief claimed in the two class action statements of claim filed on behalf of Tracey and Emily Best include orders for enrolment on the Register as well as monetary damages arising from the denial of membership during the period from the incorporation of LIA to the legislative creation of the respondent. In the statement of claim seeking certification of a class action in the name of Jillian Mugford, the relief claimed does not seek enrolment on the Register (this has already occurred) but rather seeks monetary compensation during the alleged period of deprivation of membership in the LIA prior to 2006 and any monetary losses arising from delay in the grant of membership.

6 The applications judge had before him the submission of the respondent that the LIA is a subsisting body corporate under the *Corporations Act*, RSNL 1990, c.C-36. It appears that its raison d.etre ceased with the ratification of the Agreement in 2005. The provisions of the Agreement called for the establishment of five regional enrolment committees, an Enrolment Appeal Commission, membership committees and a review board called the Labrador Inuit Membership Appeal Board, all ostensibly designed to deal with eligibility and membership issues with regard to status and benefits.

7 Part 3.12.1 of the Agreement provides that no order, decision or ruling of the Commission or the Board may be appealed and that every such order, decision or ruling is final and may not be reviewed by any court except as permitted by that part of the Agreement. However, Part 3.12.2 provides that an application for judicial review from an order, decision or ruling of the Commission or the Board may be made to the Federal Court by an individual directly affected by the order, decision or ruling, within 30 clear days from the date of such determination being received by the affected individual.

8 All three of the claims in this matter at least partially arise out of a denial of enrolment and beneficiary status on the Register established under the Agreement.

9 Tracey Best's class of claimants previously held LIA membership, which was subsequently revoked and never reinstated. She had not been enrolled prior to the date of the hearing before the applications judge in order to be eligible for benefits under the Agreement. In her statement of claim she requests that the court:

> (a) Certify the proceeding as a class proceeding;
>
> (b) Order the Nunatsiavut Government to immediately enroll the Plaintiff and all members of the class on the Labrador Inuit Enrolment Register ("LIER");
>
> (c) Order the Nunatsiavut Government to pay the monetary compensation owed to the plaintiff and the class;
>
> (d) Order the Nunatsiavut Government to reimburse the plaintiff and the class for all benefits owed to the plaintiff and the class for the period of time during which they had been arbitrarily removed from the LIA voters list and/or the LIER;

10 Emily Best, an infant plaintiff, represents claimants who never held LIA membership since birth. Membership was allegedly sought and rejected. In her statement of claim, she requests the same relief sought by the Tracey Best class. In both claims, punitive damages are sought.

11 Jillian Mugford represents claimants who previously held LIA membership, which was revoked[FN1] , but subsequently reinstated. In her statement of claim she requests that the Court:

(a) Certify the proceeding as a class proceeding;

(b) Order the Nunatsiavut Government to pay the monetary compensation owed to the plaintiff and the class;

(c) Order the Nunatsiavut Government to reimburse the plaintiff and the class for all benefits owed to the plaintiff and the class for the period of time during which they had been arbitrarily removed from the LIA voters list and/or the LIER.

12 The plaintiffs. claims against the Nunatsiavut Government appear to be based at least in part on the acts or omissions of the LIA, which the plaintiffs claim to be the predecessor of the respondent. Section 2.2.2 of the Agreement provides:

2.2.2 On the Effective Date, the Nunatsiavut Government becomes the successor of Labrador Inuit Association for purposes of the Agreement.[FN2]

13 The respondent, however, argues that neither this clause nor any other in the Agreement imposes liability on the respondent for acts or omissions of the LIA. The applications judge did not deal with this argument.

14 The respondent's jurisdictional argument is based on its interpretation of section 3.12 of the Agreement. This section, which established rights of judicial review from Commission and Board decisions regarding the enrolment of beneficiaries, reads:

3.12.1. No order, decision or ruling of the Commission or the Board may be appealed. Every order, decision or ruling of the Commission or the Board is final and may not be reviewed in any court except as permitted by this part.

3.12.2 Notwithstanding sections 3.5.8 and 3.10.6, an application for judicial review of an order, decision or ruling of the Commission or Board may be made to the Federal Court by the individual directly affected by the order, decision or ruling within 30 clear days from the date on which the order, decision or ruling was received by that individual, or within any additional time that a judge of the Federal Court may allow.

3.12.3 After hearing an application under section 3.12.2 the Federal Court may:

(a) order the Commission or the Board to do anything it has unlawfully failed or refused to do or has unreasonably delayed in doing;

(b) decide a decision, order, act or proceeding of the Commission or the Board to be invalid or unlawful;

(c) quash, set aside or set aside and refer back for determination in accordance with any directions it considers to be appropriate a decision, order, act or proceeding of the Commission or the Board; or

(d) prohibit or restrain a decision, order, act or proceeding of the Commission or the Board.

3.12.4 The Federal Court may grant a remedy referred to in section 3.12.3 if it is satisfied that the Commission or the Board:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by Law to observe;

(c) erred in Law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an error of fact made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, as a result of fraud or perjured evidence; or

(f) acted in any other way contrary to Law.

3.12.5 Subject to sections 3.12.2, 3.12.3 and 3.12.4 the *Federal Court Act* applies to an application for judicial review under this part as if the Commission or the Board were a federal board, commission or other tribunal under the *Federal Court Act*, except that subsections 18.1(1), 18.1(2) and 18.3(2) of the *Federal Court Act* do not apply.

Decision of the Applications Judge

15 In para. 23 of his reasons, the applications judge noted that "while couched in terms of powers of judicial review, the Agreement grants to the Federal Court of Canada a virtually full appellate jurisdiction in respect of all benefits matters." He further wrote at para. 28 "...[it] provides constitutionally that an application to challenge or change a decision relating to beneficiary status must be made to the Federal Court of Canada".

16 The applications judge also stated:

[20] The plaintiffs. claims are for beneficiary status under the Agreement giving rise to a claim for benefits established under it. The means to attain beneficiary status is clearly set out in the Agreement.

[21] In Chapter 3, the Agreement sets up detailed eligibility criteria in Part 3.3. In Part 3.4, the Agreement establishes an enrollment committee for the various regions set up under the Agreement to consider applications for enrollment for benefits. Part 3.5 establishes an enrollment appeal commission to hear appeals from decisions of an enrollment committee. The appeals are to be by way of rehearing at which an appellant may introduce additional evidence. Part 3.9 establishes membership committees to consider applications for enrollment on the register relevant to each region. Part 3.10 establishes a membership appeal board to hear appeals from a decision of a membership committee. Part 3.12 establishes the rights of judicial review of commission and board decisions.

17 The applications judge held that the Supreme Court of Newfoundland and Labrador had no jurisdiction to hear the three class actions commenced pursuant to the *Class Actions Act* and set aside the statements of claim pursuant to Rule 10.05 of the *Rules of the Supreme Court, 1986*.

Issues

18 Three issues arise on appeal:

(i) What is the standard of review applicable to the decision regarding jurisdiction by the applications

judge?

(ii) Did the applications judge err in determining that all three statements of claim sought remedies directly connected to eligibility under the Agreement and were subject to the exclusive jurisdiction of the Federal Court?

(iii) Did the applications judge err in failing to stay proceedings rather than setting aside the statements of claim?

Law and Analysis

(i) Standard of Review

19 In *Oppenheim v. Midnight Marine Limited*, 2010 NLCA 64, this Court recently reviewed the applicable standards of review in the context of an appeal arising from a decision affecting jurisdiction. The appeal arose from the denial by an applications judge of a request for a stay of an action commenced in the Trial Division involving a claim under a marine insurance policy. A vessel owner was seeking reimbursement from its insurer of a settlement made with a cargo owner while claiming the right to litigate the matter in the Trial Division. The insurer sought a stay, relying on an arbitration clause in the policy providing for the exclusive jurisdiction of an arbitration process in London.

20 In his reasons, Barry J.A. examined the general law on applicable standards of review:

> [26] The appropriate standard of review to be applied by an appellate court was set out in **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235. Iacobucci and Major JJ. stated for the majority, at paras. 8 and 10:
>
> > On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness...
> >
> > . . .
> >
> > The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error' ...
>
> [27] At paras. 19-25, they concluded the same standard of palpable and overriding error should be applied to inferences of fact.
>
> [28] Finally, at paras. 26-37, they considered the standard of review for questions of mixed fact and law involving the application of a legal standard to a set of facts, and concluded the standard of review was "palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the [legal] standard [being applied] or its application, in which case the error may amount to an error of law" (para. 37).

21 In *Oppenheim*, Barry J.A. described how a question of law might be extricable from an issue of mixed fact and law:

> [29] ... At para. 27, they referred to **Canada (Director of Investigation and Research) v. Southam Inc.**,

[1997] 1 S.C.R. 748, at para. 39, for an illustration of how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required considerations of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[30] The majority in **Housen**, at para. 28, noted the difficulty of drawing the line. They pointed out how matters of mixed law and facts "fall along a spectrum of particularity" and, as stressed in **Southam**, whether a purely legal question may be extricated from what appears to be a question of mixed fact and law often comes down to "whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future".

22 The assessment of jurisdiction in this case involves the application of the law to the facts as pleaded. This requires consideration of the scope of the respective jurisdictions of the Federal Court and the Supreme Court of Newfoundland and Labrador, as defined in the Agreement and the case law.

23 As noted above, in discussing the scope of the Federal Court's exclusive jurisdiction, the applications judge wrote: "While couched in terms of powers of judicial review, the Agreement grants to the Federal Court of Canada a virtually full appellate jurisdiction in respect of all benefits matters." Binnie J., however, in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, released after the decision below in the present matter, emphasized that a distinction must be drawn between claims for damages which rely on the decision of a tribunal as the basis for the damages claim and cases which seek to impugn tribunal decisions by seeking a judicial review remedy. The application judge's failure to draw such a distinction would constitute an error of law which would be extricable from the jurisdictional mixed law and fact analysis. In this context, the standard of review is correctness.

(ii) Court Jurisdiction

24 In dealing with the application of Rule 10.05 the court is to accept the facts pleaded in the statement of claim as true. This would include the plea that the respondent is the successor to the LIA. However, the significance of this plea depends upon the meaning given to the qualification in the Agreement that the successorship is for "purposes of the Agreement" (see s. 2.2.2.). The pleadings in the two Best statements of claim allege that two appellant classes have suffered loss of membership status in the LIA, and ultimately in the respondent, due to the arbitrary actions of the LIA. In the case of the Jillian Mugford class, the plaintiffs allege that the revocation of membership in the mid-1990s and later restoration coincidental with the election of the respondent assembly resulted from actions by the LIA over a ten year period for which the plaintiffs seek lost financial benefits from the respondent as the successor to the LIA.

25 The LIA is not named as a defendant. Whether s. 2.2.2 of the Agreement makes the respondent liable, as successor to the LIA, for the alleged wrongful acts or omissions of the LIA, or whether the LIA must be named specifically as a defendant and whether the plaintiffs should be permitted to add the LIA as a defendant was not decided by the applications judge. He granted the application to dismiss on the basis that the plaintiffs. claims are for beneficiary status under the Agreement, the review of which claim he concluded fell exclusively under the jurisdiction of the Agreement review process and the Federal Court.

26 While the claims by the Tracey Best and Emily Best classes seek as a remedy enrolment on the Register in order to be a beneficiary of the Agreement, they also seek damages for the alleged arbitrary actions or omissions of the LIA in failing to register them or to maintain their membership. The measure of damages may involve losses from a failure to obtain enrolment under the Agreement. The Agreement is explicitly clear that the processes to determine eligibility for membership and benefits before the committees, Commission and Appeal Board are the exclusive routes agreed upon by the LIA and two levels of government. Any final recourse on the issue of eligibility is by way of judicial review which exclusively resides in the Federal Court of Canada. It does not necessarily follow, however, that the two Best claims for damages and for using the Agreement as a measure of damages falls outside the jurisdiction of the provincial superior court under the *TeleZone* approach.

27 The Mugford proceeding does not expressly seek enrolment on the Register because it has been obtained. The claim seeks monetary damages for lost medical and other benefits allegedly lost while excluded from membership in the LIA. The claim also alleges a loss of entitlement to a land compensation payment of $5,000.00 under the Agreement which may have been linked to their omission from the voters. list for the ratification process prescribed under the Agreement. In light of *TeleZone* and its companion cases, we do not believe it necessarily follows that the exclusive jurisdiction of the Federal Court set out in the Agreement regarding judicial review ousts the possible consideration by the Trial Division of a monetary claim resulting from alleged arbitrary or discriminatory activities of the LIA in the formulation of the voters. list for the ratification process.

28 In *TeleZone* and its companion decisions, the Supreme Court focused its analysis of jurisdiction between the Federal Court and the provincial superior courts in the context of access to justice. At para. 18, it asserted the need to permit people injured by government action to have the right to seek redress from the legal system through procedures that "minimize unnecessary costs and complexity" and stressed that the courts. approach "should be practical and pragmatic with that objective in mind".

29 The Supreme Court held at para. 42 that "any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language". The Court decided that the language of s. 17 of the *Federal Court Act*, R.S.C. 1985, c. F-7 did not satisfy the test, particularly in the context of s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

30 The provisions of the Agreement differ significantly from s. 17 of the *Federal Court Act* in the specific language used. The provision respecting the absence of any right of appeal beyond the Inuit-based enrolment committees, the Enrolment Commission and the Inuit Membership Appeal Board with recourse by way of judicial review only to the Federal Court adopts a careful and detailed set of procedures created to deal exclusively with claims of any particular individual to Inuit status and beneficiary status under the Agreement. The provision is bound up in a lengthy tri-partite Agreement between the Inuit and federal and provincial governments which has been enshrined in legislation passed by the Parliament of Canada and the legislature of this Province following a ratification vote by Inuit who were declared eligible to vote. We are satisfied that, on matters relating to eligibility and membership issues with regard to status and benefits, the language of the Agreement in Part 3.12 is sufficiently specific to meet the threshold test prescribed in *TeleZone* for derogation from the jurisdiction of the superior court of this Province. A question remains, however, whether a claim in damages, which measures monetary loss by reference to the Agreement, falls outside superior court jurisdiction.

31 The plaintiffs obviously rely on the successorship theory for naming the respondent as the sole defendant. The LIA remains in existence as a legal entity. On the question of who should be named as defendants, Rule 7.04(1) of the *Rules of Court, 1986*, provides:

> No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person...

In addition Rule 7.04(2)(b) provides that:

> At any stage of a proceeding the Court may, ... of its own motion ... order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceedings may be effectively adjudicated upon, be added as a party.

32 In *Seadane International Inc. v. Morgan International Marketing Co.* (1999), 180 Nfld. & P.E.I.R. 97 (Nfld. C.A.) Green J.A. (as he then was) wrote:

> [29] ... The court has broad powers under rule 7.04(2) to ensure that proper parties are before the court to enable a justiciable claim to be properly adjudicated by the right parties, rather than requiring a new and separate action be started from scratch.
>
> [30] The court will therefore be reluctant to allow a party to avoid litigating a claim by taking advantage of a misjoinder of an improper party or the nonjoinder of any proper one, but will, instead, attempt to refashion the litigation by deleting, substituting or adding parties so as to ensure that the real matters in dispute are effectually dealt with ...

33 The present case appears to be one where the interests of justice weigh in favour of permitting the plaintiffs to seek amendment of the pleadings to join the LIA as a defendant, should the court conclude the successorship provision of the Agreement does not impose liability upon the respondent for alleged acts or omissions of the LIA.

34 On the question of jurisdiction, in *TeleZone*, Binnie J. stated at paras. 75 and 76:

> [75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damage claims. On this view the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients. interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.
>
> [76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.
>
> (Emphasis added.)

35 From *TeleZone* it is clear that three possibilities arise in the present case. First, to the extent the plaintiffs seek beneficiary status under the Agreement, jurisdiction lies with the Federal Court and not this Court. Second, to the extent the plaintiffs can lay a foundation for a claim against the LIA for acts or omissions occurring before the Agreement, jurisdiction lies with this Court. Third, where the measure of damages may be affected by lost entitlement to benefits under the Agreement the matter is less clear and requires determination pursuant to the *TeleZone* jurisprudence.

36 The two Best class actions constitute collateral attacks on the key underpinnings of the Agreement to the extent that they seek from the Trial Division an order for enrolment on the Register. But on the *TeleZone* approach it does not necessarily follow that their claims for damages should be viewed as collateral attacks merely because the benefits lost by missed enrolment must be determined by reference to the Agreement. The court must determine the essential nature of the claims and, as noted in *TeleZone*, decide whether the pleadings set out a valid cause of action for damages. If they do, the case falls within the jurisdiction of the superior court. In the present case, some amendment of the pleadings may be needed before the Trial Division adjudicates upon this issue. The pleadings are vague regarding the particulars of negligence, arbitrary action, and breach of fiduciary duty.

37 The Mugford class of proposed claimants asserts that they have a potential right to damages for alleged arbitrary actions by the LIA in revoking membership from 1997 to 2005. They allege this deprived them of eligibility to be placed on the ratification voters. list and resulted in certain lost benefits. It is not clear that pursuit of such a theory of the claim would be at odds with the eligibility regime established by the Agreement, especially at the early stage of this class action proceeding where there is only a statement of claim and no certification application with accompanying affidavits to flesh out the substance of the plaintiffs. allegations. The Mugford class does not explicitly or implicitly seek enrolment in the Register. They have achieved this. They claim compensation for the period from 1997 to 2005 when they allege they were improperly refused LIA membership.

38 Although the Mugford class seek monetary benefits that can only arise by virtue of the Agreement itself, such as a land claim settlement amount, which is tied to enrolment on the Register, their claim appears to be based on alleged improper acts of the LIA in revoking membership during the ratification process supervised by the LIA. The question of the Trial Division will be whether the pleadings, as amended if necessary, set out a valid cause of action for damages.

(iii) A stay of proceedings

39 From the above discussion it should be clear that issues arise from the statements of claim as presently drafted, regarding whether the LIA should be added as a defendant or co-defendant and whether the plaintiffs should be permitted to amend the pleadings to properly flesh out their allegations. There may also be limitation of action issues that will arise. Further particulars may be required in addition to those filed by the plaintiffs. counsel in May, 2008. These are matters which should be considered by an applications judge before a final decision is made, pursuant to the recent *TeleZone* jurisprudence, regarding whether the plaintiffs have a valid cause of action in damages which falls within the jurisdiction of the superior court. The applications judge did not have the benefit of the *TeleZone* decision and his analysis for that reason did not focus on whether the plaintiffs might have such a valid cause of action. Instead of striking the statement of claim, the appropriate approach now should be to stay the matter for a reasonable time to permit the plaintiffs to apply to amend the pleadings and to have the proper defendants determined.

Summary and Disposition

40 The order of the applications judge is set aside and the matter remitted to the Trial Division to permit applications by the plaintiffs within a reasonable time for amendment of the pleadings, a determination of the effect of the successorship provision and whether the LIA should be added as a defendant, and a decision as to whether the plaintiffs on the amended pleadings have set out a valid cause of action in damages within the juris-

diction of this superior court. Costs shall be in the cause.

***M.H. Rowe J.A.*:**

I concur:

FN1 In the case of Ms. Mugford it appears that the revocation may have coincided with the negotiation of the agreement in principle between the LIA and the two governments during the period 1997-1999.

FN2 Under Part 2.2 of the Agreement the Effective Date is stated to be the date of ratification by all Parties. The Agreement was signed by all Parties on January 22, 2005 and came into effect on December 1, 2005.

END OF DOCUMENT