

2009 CarswellNfld 113, 2009 NLTD 70, 885 A.P.R. 88, 287 Nfld. & P.E.I.R. 88, 73 C.P.C. (6th) 132, [2010] 2 C.N.L.R. 1



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Best (Guardian ad litem of) v. Nunatsiavut Assembly

EMILY BEST, by her Guardian ad Litem MAURICE BEST (Plaintiff) and NUNATSIAVUT GOVERNMENT  
On Behalf of the NUNATSIAVUT ASSEMBLY (Defendant)

TRACEY BEST (Plaintiff) and NUNATSIAVUT GOVERNMENT On Behalf of the NUNATSIAVUT AS-  
SEMBLY (Defendant)

GILLIAN MUGFORD (Plaintiff) and NUNATSIAVUT GOVERNMENT On Behalf of the NUNATSIAVUT  
ASSEMBLY (Defendant)

Newfoundland and Labrador Supreme Court (Trial Division)

J.P. Adams J.

Judgment: May 8, 2009

Docket: 2007 08T NO. 0075 CP, 2007 08 NO. T.0077, 2007 08 T NO. 0076

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Counsel: V. Randell J. Earle, Q.C. for Applicant

Franklin Layte for Respondents

Subject: Public; Civil Practice and Procedure

Aboriginal law --- Practice and procedure — Pleadings — Striking out

Plaintiffs brought actions against Aboriginal assembly claiming that they were deprived of certain monetary and other benefits under land claims agreement (agreement) because of denial of membership in Labrador Inuit Association — Actions were commenced under Class Actions Act but no defence was filed and no application for certification was brought — Defendant assembly brought application for setting aside actions due to lack of jurisdiction since federal court was fixed with jurisdiction to hear matters about beneficiary status — Plaintiffs claimed that court had concurrent jurisdiction and that claims lay in tort law — Application granted; actions set aside — Agreement was treaty which had force of law and constitutional implications, and it established detailed means for claiming beneficiary status and elaborate appeal procedure — Claims were for beneficiary status under agreement which granted federal court full appellate jurisdiction in respect of all benefits matters, including powers to correct decision about beneficiary status — Court did not have jurisdiction to adjudicate

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claims of plaintiffs since agreement provided constitutionally that application to challenge or change decision relating to beneficiary status must be made to federal court.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Lack of jurisdiction

Plaintiffs brought actions against Aboriginal assembly claiming that they were deprived of certain monetary and other benefits under land claims agreement (agreement) because of denial of membership in Labrador Inuit Association — Actions were commenced under Class Actions Act but no defence was filed and no application for certification was brought — Defendant assembly brought application for setting aside actions due to lack of jurisdiction since federal court was fixed with jurisdiction to hear matters about beneficiary status — Plaintiffs claimed that court had concurrent jurisdiction and that claims lay in tort law — Application granted; actions set aside — Agreement was treaty which had force of law and constitutional implications, and it established detailed means for claiming beneficiary status and elaborate appeal procedure — Claims were for beneficiary status under agreement which granted federal court full appellate jurisdiction in respect of all benefits matters, including powers to correct decision about beneficiary status — Court did not have jurisdiction to adjudicate claims of plaintiffs since agreement provided constitutionally that application to challenge or change decision relating to beneficiary status must be made to federal court.

**Cases considered by J.P. Adams J.:**

*Bellows v. Quik Cash Ltd.* (2004), 241 Nfld. & P.E.I.R. 224, 716 A.P.R. 224, 2004 NLSCTD 191, 2004 CarswellNfld 311, 49 B.L.R. (3d) 307, 4 C.P.C. (6th) 76 (N.L. T.D.) — distinguished

*J. (N.S.E.) v. Moravian Union (Inc.)* (2003), 226 Nfld. & P.E.I.R. 128, 673 A.P.R. 128, 2003 NLCA 28, 2003 CarswellNfld 150, 35 C.P.C. (5th) 283 (N.L. C.A.) — considered

**Statutes considered:**

*Class Actions Act*, S.N. 2001, c. C-18.1

Generally — referred to

s. 5 — referred to

*Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1

Generally — referred to

*Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29

s. 3(1) — referred to

s. 3(2) — referred to

**Rules considered:**

*Rules of the Supreme Court, 1986*, S.N. 1986, c. 42, Sched. D

R. 10.05 — considered

R. 14 — referred to

R. 14.24 — referred to

APPLICATION by defendant to set aside actions for lack of jurisdiction.

***J.P. Adams J.:***

### **Introduction**

1 This is an application by the defendant in each of the within actions to have all three statements of claim set aside pursuant to Rule 10.05 of the *Rules of Court* on the basis that this Court lacks jurisdiction to here the matters, or in the alternative, that the statements of claim do not disclose a cause of action pursuant to Rule 14 of the *Rules of Court*.

### **Background**

2 The within actions have been commenced under the *Class Actions Act*, S.N.L. 2001, c. C-18.1. No defence has been filed in either action and there has been no application for certification as a class action in either action.

3 The plaintiffs are persons who claim membership in the Labrador Inuit Association (LIA) through their Inuit heritage or their mixed European and Inuit ancestry. They claim they have been deprived of certain monetary and other benefits because of the denial of membership in the LIA. They claim that the defendant is the successor to the LIA.

4 While the circumstances of each of the plaintiffs is somewhat different, at bottom each of them is claiming to have been deprived of beneficiary status and I reproduce a portion of the statement of claim of Emily Best as representative of all of the claims. Ms. Best's statement of claim states in part:

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 Kabloanangajuk (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.

## Positions of the Parties

### *Applicant*

5 The applicant's position is quite straightforward. It submitted that the plaintiffs' claims are in essence for beneficiary status under the Agreement. It submitted that the Agreement fixes the Federal Court of Canada with jurisdiction to hear matters arising under the Agreement regarding beneficiary status. Because of the constitutional and treaty implications of the Agreement, the applicant submitted that that ought to be conclusive. In the result, the applicant submitted that this Court lacks jurisdiction to hear the matters. It submitted that Rule 10.05 has been appropriately invoked prior to the filing of a defence and without attorning to the jurisdiction of this Court to have the issue of jurisdiction decided without in any way deciding the merits of the claims.

6 In the alternative, should this Court find that it has jurisdiction to hear these matters, the applicant submitted that the statements of claim should be set aside as not disclosing a cause of action pursuant to Rule 14.24 of the *Rules of Court*. The applicant submitted that the law requires a defendant to take an application under Rule 14.24 at the earliest opportunity and before a defence has been filed. This, the applicant claims, it has done.

7 The applicant submitted that the plaintiffs' claim is that the defendant is the successor to the LIA and is therefore responsible for any wrongs committed by that corporation. The applicant submitted that, while this may be so in some corporate circumstances, this is not one of them. It submitted that the LIA continues to exist as is outlined in the Agreement and that many of the allegations made against the LIA relate to a time before the Nunatsiavut Government came into existence and that the plaintiffs have not pleaded factual circumstances which could give rise to a claim against the applicant as successor in any event, even if such a relationship was found to exist. The Agreement states that the applicant is the successor to the LIA for the purposes of the Agreement only.

### *Respondent*

8 The plaintiffs submitted that since this action has been commenced pursuant to the *Class Actions Act*, it really represents a far larger number of persons (numbering in the hundreds), than the actual named plaintiffs.

Each of these persons will have individual circumstances which may give rise to an action. In these circumstances, the plaintiffs submitted, the Court should not engage in "piecemeal" litigation and that the applicant's claim should be left to be determined as part of the application for certification as a class action, which has yet to be filed.

9 The plaintiffs also submitted that this Court has at least concurrent general jurisdiction with the Federal Court of Canada "to hear all matters" coming before it in this province. Since, the plaintiffs submit, these claims lie essentially in negligence and/or tort law, it is the Federal Court which has no jurisdiction and this Court which does.

10 As to the alternative argument of the applicant under Rule 14.24, the plaintiffs submitted that the Court should not entertain it as the applicant has not met the test that it is "plain and obvious" that the plaintiffs' claims cannot succeed. This, the plaintiffs submitted, is a matter to be determined as one of the essential criteria under Section 5 of the *Class Actions Act*.

### Issues

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1. Does this Court have the jurisdiction to adjudicate the plaintiffs' claims?
2. If so, should this Court entertain an application pursuant to Rule 14.24 that the statements of claim do not disclose a cause of action or should that matter be left for the application for certification under the *Class Actions Act*?

### Analysis

12 Rule 10.05 of the *Rules of Court* states:

10.05.(1) A defendant may, at any time before filing a defence or appearing on an application, apply to the Court for an order

- (a) setting aside the originating document or service thereof on the defendant;
  - (b) declaring that the originating document has not been duly served on the defendant;
  - (c) setting aside any order giving leave to serve the originating document on the defendant; or
  - (d) extending the time for filing a defence or appearing on an application.
- (2) The application to the Court for an order referred to in rule 10.05(1) shall not be deemed to be a submission to the jurisdiction of the Court.

13 In *J. (N.S.E.) v. Moravian Union (Inc.)*, 2003 NLCA 28 (N.L. C.A.), the Court of Appeal described the purpose of Rule 10.05 at paragraphs 25 to 26:

25 As is obvious from the content of Rule 10.05, it enables the court to take certain actions, at the request of the defendant, without the defendant submitting to the jurisdiction of the court. There are several other Rules (14.24, 17A, 37, 38 and perhaps 7.04 where more than one defendant is named) which

permit expeditious disposition of actions, on the merits of the action as pleaded, without a full scale trial, where the circumstances warrant. Rule 10.05, on the other hand, is clearly intended to enable a defendant to have an originating document or service of the document set aside where questions of jurisdiction, convenience of forum, or the propriety of procedural steps employed, warranted such setting aside, but leaving all aspects of the merits of the case undecided.

26 Rule 10.05 was never intended to be a substitute for an application under Rule 14.24 to have the statement of claim struck because it discloses no reasonable cause of action, or a substitute for an expedited or summary trial under Rule 17A, or a substitute for a preliminary determination of a discrete but critical issue under Rules 37 or 38. Still less is there any justification for concluding that it enables expeditious determination of issues as to merit, binding on the plaintiff, while retaining the option in a defendant to subsequently contest the jurisdiction of the very court from which that defendant sought a determination as to the legal merit of the plaintiff's allegations.

(Emphasis added.)

14 Thus, the applicant seeks to set aside the statements of claim on the basis that this Court lacks jurisdiction without a determination of the merits in either case.

15 The plaintiffs relied on *Bellows v. Quik Cash Ltd.*, 2004 NLSCTD 191 (N.L. T.D.), a decision of Madam Justice Goulding of this Court. In that case, Goulding J. followed the well-accepted position that "litigation by installment", particularly in the class actions context, should be avoided. I take no issue with her reasoning in that case or the outcome of the application before her. However, I find that that case is distinguishable from the case before me.

16 Here, the applicant takes the position that this Court has *no jurisdiction* to entertain the action at all. The *Class Actions Act* presupposes jurisdiction in this Court to adjudicate the merits of the claim as pleaded. Where the defendant asserts that the Court lacks that jurisdiction, this is a preliminary matter which is properly brought at the earliest opportunity and before a defence is filed and a defendant can be said to have attorned to the jurisdiction of the Court.

17 Jurisdiction to hear a matter is surely *sine qua non* to the Court entering into any adjudicative function regarding a claim brought before it. I reject the notion that to hear an application challenging the jurisdiction of the Court to adjudicate a plaintiff's claim constitutes litigation by installment. Indeed, a defendant would be seriously remiss to fail to take such an application in the proper circumstances.

18 In each case, the plaintiff is claiming to have been deprived of benefits to which she is entitled pursuant to the Labrador Inuit Land Claims Agreement (the "Agreement"). The Agreement was established pursuant to the *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1.

19 The Agreement recognizes a land base for the Inuit. It also establishes a government and a self-governing entity within Canada, the defendant, the Nunatsiavut Government. The *Land Claims Agreement Act* declares in Section 3(1) that the Agreement is a treaty and in subsection (2) that the Agreement has the force of law. The Agreement also sets out who is covered by it and is therefore entitled to the benefits established pursuant to it. The Agreement is the law in respect of the matters covered in it and it has constitutional implications as it deals with aboriginal rights.

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.

22 Part 3.12 states:

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 3.5.11 and 3.10.9, an application for judicial review of an order, decision or ruling of the Commission or the 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.

23 As can be seen, 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. It may order the Commission or Board to do anything it has unlawfully failed or refused to do or has unreasonably delayed in doing [3.12.3(a)]. It may strike down a decision of a Commission or Board as valid [3.12.3(b)] or it may quash, set aside, prohibit or restrain a "decision, order, act or proceeding" of the Commission or the Board [3.12.3(c) and (d)].

24 The Federal Court is also given the jurisdiction to grant any of the remedies referred to in Section 3.12.3 if the Commission or the Board acted without jurisdiction [3.12.4(a)], failed to observe a principle of natural justice [3.12.4(b)], *erred in Law* [3.12.4(c)], *made an error of fact* [3.12.4(d)] or, significantly, acted in *any other way contrary to Law* [3.12.4(f)].

## Conclusion

25 The Agreement establishes the Nunatsiavut Government as the lawful authority for that territory. The Agreement has the force of law. It is a treaty between Canada and an aboriginal people. It has constitutional implications.

26 The Agreement establishes a detailed means by which an individual may claim beneficiary status under the Agreement and an elaborate appeal procedure by which a person aggrieved by a decision regarding beneficiary status may seek redress.

27 The Agreement further provides that the Federal Court of Canada may hear applications for judicial review of decisions regarding beneficiary status. It grants the Federal Court arguably full, plenary appellate powers to correct a decision regarding beneficiary status.

28 The plaintiffs' claims in essence are for beneficiary status under the Agreement. Such claims must be pursued pursuant to the provisions established in that regard in the Agreement. The Agreement provides constitutionally that an application to challenge or change a decision relating to beneficiary status must be made to the Federal Court of Canada. The parties to the Agreement were entitled to choose the method of judicial determination which best suited them and they did so.

29 In conclusion, therefore, I find that this Court does not have jurisdiction to adjudicate the claims of the plaintiffs. The application is therefore allowed and the statements of claim are set aside pursuant to Rule 10.05 of the *Rules of Court*. In light of this ruling, it is unnecessary for me to deal with the applicants' alternate argu-



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C.N.L.R. 1

ment under Rule 14.

30 There is no order as to costs.

*Application granted; actions set aside.*

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