Citation: Anderson et al v Manitoba et al, 2017 MBCA 14
Date: 20170125
Docket: AI15-30-08332

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Barbara M. Hamilton
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

***B E T W E E N :***

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| ***CLIFFORD J. ANDERSON, KURVIS ANDERSON, BERTHA TRAVERS, PRISCILLA ANDERSON, LILLIAN TRAVERSE, MATHEW TRAVERSE, MELLONEY FRANCOIS, MARY STAGG, NORMAN STAGG, DAUPHIN RIVER FISHERIES COMPANY LTD.*** | ) | ***D. M. Troniak****,* ***M. J. Peerless*** *and* ***J. A. Troniak*** *for the Appellants* |
| *(Plaintiffs) Appellants* | ) | |
| *- and -* | ) | |
| ***THE GOVERNMENT OF MANITOBA, THE ATTORNEY GENERAL FOR CANADA, and THE MANITOBA ASSOCIATION OF NATIVE FIREFIGHTERS INC.*** | ) | ***G. E. Hannon*** *and* ***J. R. Koch*** *for the Respondents* |
| *(Defendants) Respondents* | ) | |
| *- and -* | ) | |
| ***DAUPHIN RIVER FIRST NATION, LAKE ST. MARTIN FIRST NATION, LITTLE SASKATCHEWAN FIRST NATION and PINAYMOOTANG FIRST NATION*** | ) | *Appeal heard:* ***September 14, 2016*** *Judgment delivered:* ***January 25, 2017*** |
| *(Third Parties)* | ) | |

On appeal from 2014 MBQB 255, 312 ManR (2d) 259

**PFUETZNER JA**

[1] This appeal is about whether the plaintiffs can proceed with a class action against the defendant, the Government of Manitoba (Manitoba), for damages arising from flooding. At issue is whether the individual plaintiffs (the plaintiffs) raised a common issue in their claim in nuisance and whether a class proceeding would be the preferable procedure.

[2] For the reasons that follow, I am of the view that the certification judge failed to apply the correct legal test in determining whether there was a common issue in nuisance. This error affected his decision on preferability. I would allow the appeal and order that the matter be certified as a class proceeding.

Background and Issues

[3] In the spring and summer of 2011, severe flooding affected many parts of Manitoba. The plaintiffs are members of four First Nations that were affected by that flooding. Many were evacuated from their homes. Extensive property damage occurred.

[4] The plaintiffs claim that Manitoba caused the flooding, and its consequent damage, by its operation of the Shellmouth Dam, the Portage Diversion and the Fairford Water-Control Structure (collectively, the water-control structures), by diverting massive amounts of water through the Fairford River, Lake St. Martin and the Dauphin River (the waterway).

[5] The plaintiffs sought to have their claims against Manitoba and the other defendants certified as a class action under *The Class Proceedings Act*,

CCSM c C130 (the *Act*). The plaintiffs framed their claims in nuisance, negligence, breach of treaty rights and breach of fiduciary duty.

[6] Although the certification judge identified common issues disclosed in the plaintiffs' pleadings for some of the causes of action, he determined that other claims did not contain common issues. Ultimately, he concluded that a class proceeding was not the preferable procedure for the action and denied the plaintiffs' certification motion.

[7] The plaintiffs sought leave, pursuant to section 36(4) of the *Act*, to appeal the certification judge's refusal to certify their claims as a class proceeding.

[8] Steel JA granted leave to appeal in respect of one of the plaintiff's proposed common-issue questions and in respect of the certification judge's preferability analysis (see *Anderson et al v Manitoba et al*, 2015 MBCA 123, 326 ManR (2d) 1).

[9] Specifically, leave to appeal was granted on the following two questions:

> Did the certification judge apply the correct legal test to the question of common issue with respect to nuisance?
>
> If he did so err, did that impact his decision on the question of preferability?

[10] The plaintiffs' proposed common-issue question with respect to nuisance is:

> Did the Defendant, the Government of Manitoba, by its actions, cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?

[11] The plaintiffs put before the certification judge two other proposed common-issue questions in respect of the nuisance claim. The certification judge determined that these questions failed to disclose common issues. These questions are not at issue on the appeal. As stated by Steel JA (at para 90):

> There is no issue being taken with the conclusion of the certification judge that the remaining two questions–whether Manitoba substantially interfered with the use and enjoyment of the land occupied by the plaintiffs, and whether the flooding or interference was unreasonable–were not common questions.

[12] Sections 1, 4 and 7 of the *Act* are relevant to the issues on this appeal. Section 4 of the *Act* states:

> **Certification of class proceeding**
>
> 4 The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a person who is prepared to act as the representative plaintiff who

(i) would fairly and adequately represent the interests of the class,
(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

[13] The term "common issues" is defined in section 1 of the *Act*:

"**common issues**" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[14] Section 7 of the *Act* states:

**Certain matters not bar to certification**

7 The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.



Decision of the Certification Judge

[15] In his extensive written reasons, the certification judge reviewed the background facts, many of which were not at issue, and the law. He separated his analysis into three parts that he described as the flooding claims, the business claims and the evacuation claims.

[16] In respect of the flooding claims, the certification judge concluded that the first two criteria for certification were satisfied. First, he determined that the plaintiffs' pleadings disclosed causes of action in nuisance, negligence and breach of treaty but not in breach of fiduciary duty. As for the second criterion, the certification judge determined that there were four identifiable classes of two or more persons. He stated (at para 105):

> I have concluded that in the event of certification there would be four classes, one for each First Nation, and the identifiable class would be:
>
> … all members of the First Nation:
>
> i. whose property on Reserve, real or personal, was flooded in 2011; or
>
> ii. who were evacuated, displaced or were unable to reside on Reserve because of the flooding on Reserve in 2011; or,
>
> iii. who were unable to work and thereby earn income because of the flooding on Reserve in 2011,

[17] The third criterion is that the claims of the class members raise a common issue. In respect of the flooding claims, the certification judge reviewed the claims in nuisance, negligence and breach of treaty, as well as the claim for punitive damages.

[18] He identified four common issues in the negligence claim against Manitoba. They are whether Manitoba:

> (1) owed a duty of care to the plaintiffs in the management and operation of the water-control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011;
>
> (2) owed a duty of care to the plaintiffs in the design, selection and implementation of flood-control measures taken in 2011;
>
> (3) breached the duty of care owed to the plaintiffs in the management and operation of the water-control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011;
>
> (4) breached the duty of care owed to the plaintiffs in the design, selection and implementation of flood-control measures taken in 2011 (see para 124).

[19] The certification judge identified a common issue in the flooding claim for breach of treaty rights (at para 129): "Did [Manitoba] interfere with the treaty rights of the members of the [First Nations] classes by the flooding and flood-control measures which were taken in 2011?"

[20] As for the claim for punitive damages, the certification judge accepted that claims for punitive damages could raise common issues, but concluded that was not the case here. He determined that there was nothing in the evidence on the certification motion that showed an award of punitive damages to be likely enough to make it a common issue.

[21] The certification judge concluded that there was no common issue in nuisance. He stated (at paras 112 and 113):

> But it does not follow that even if Manitoba is found to have caused the flooding in some areas along the waterway between Lake Manitoba and Lake Winnipeg, that all properties of every plaintiff in the proposed classes were impacted either in the same way, or at all, even within the same First Nation. In the request for a class action, that must be shown to be the case. It has not been shown in this case.
>
> The test is not whether some of the class members would be affected – the test is whether all other members would be affected in some material way.
>
> [emphasis in original]

[22] The certification judge analyzed whether a class proceeding would be the preferable procedure for the common issues that he had identified in negligence and breach of treaty. His conclusion that the plaintiffs had not demonstrated a common issue in nuisance was central to his analysis. He stated (at para 140):

> In my view, what is fatal to the certification of this case is the fact that one of the main causes of action is not certifiable. The conventional cause of action for the plaintiffs to advance in a claim of this nature is a claim in nuisance. I have concluded that there is no common issue in this case respecting nuisance within

> the meaning of the [Act]. Certifying only parts of other causes of actions in breach of treaty or negligence means that there would still need to be issues in nuisance as well as causation in the certified causes of action to be decided, issues of contributory negligence to be addressed and assessments of damages to be made. In the overall scheme of things a class action which addresses only part of two causes of action does not save much time or expense. A class proceeding that does not encompass all critical causes of action would not normally be a preferable procedure.

[23] He summarized his conclusion (at para 210):

> I have also concluded that the lack of any common issue respecting nuisance as well as the individualistic nature of each of the claims prevent a class proceeding from being a preferable procedure.

[24] Rather, the certification judge concluded that the preferable procedure would be for some of the class members to pursue individual claims as representative cases, which would then have a "persuasive, if not binding, effect upon a subsequent case involving the same or similar issue" (at para 145). He suggested that "tolling agreements" could be entered into pending the outcome of the representative cases in order to preserve limitation periods and he provided further direction as to how these representative cases could proceed. The idea of representative cases was not raised or argued by the parties.

[25] The certification judge went on to determine that the final criterion for the flooding claims was satisfied. He concluded that the suggested individuals were appropriate representative plaintiffs if any part of the action was certified.

[26] In respect of the business claims brought by the corporate plaintiff, alleging negligence and nuisance, the certification judge concluded that those claims were not certifiable for the same reasons expressed in his analysis of the flooding claims.

[27] The evacuation claims relate to the plaintiffs' assertion that there is a separate cause of action in respect of evacuation services and post-flood care, which is independent from any damages that would flow from a finding that Manitoba caused the flooding. The certification judge concluded that no cause of action exists against Manitoba or the Attorney General for Canada and that the negligence claim against the Manitoba Association of Native Firefighters Inc. did not raise common issues.



First Ground of Appeal—Common Issue in Nuisance

*Standard of Review*

[28] The issue of whether the certification judge applied the correct legal test to the question of common issue with respect to nuisance is a question of law and the standard of review is correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 37, [2002] 2 SCR 235; and *Soldier v Canada (Attorney General)*, 2009 MBCA 12 at para 24, 236 ManR (2d) 107).

*Positions of the Parties*

[29] The plaintiffs' position is that the certification judge erred in not applying the correct legal test to the proposed common-issue question. The plaintiffs argue that the proposed question raises a common issue, as the

determination of whether Manitoba caused the flooding on the reserve lands is a question that is a necessary ingredient in each class member's claim and raises similar, if not identical, factual issues.

[30] Manitoba's position is that the certification judge applied the correct legal test to the proposed common-issue question with respect to nuisance and applied that legal test reasonably to the facts. Manitoba argues that the certification judge was correct to consider that it would not be possible for every single class member to prove that his or her property was affected, either equally or at all, by the actions of Manitoba. Manitoba also asserts that the proposed common-issue question is overly broad and relies on *Rumley v British Columbia*, 2001 SCC 69 at para 29, [2001] 3 SCR 184.

*Discussion*

[31] Section 4 of the *Act* makes certification of a class proceeding mandatory if certain criteria are met on a certification motion. Relevant to this appeal is section 4(c), the criterion that the claims of the class members must raise a common issue whether or not the common issue predominates over issues affecting only individual members.

[32] As stated in section 1 of the *Act*, common issues are common, but not necessarily identical issues of fact, or common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.

[33] Importantly, in my view, section 7(a) of the *Act* provides that the court must not refuse to certify a proceeding by reason only that "the relief claimed includes a claim for damages that would require individual

assessment after determination of the common issues".

[34] The general goals of class-action legislation are to improve access to justice for plaintiffs, to provide for more efficient use of judicial resources and to provide a mechanism for accountability of actual or potential wrongdoers (see *Hollick v Toronto (City)*, 2001 SCC 68 at para 15, [2001] 3 SCR 158). The *Act*, like similar class-action legislation in Canada, is remedial in nature. At the certification stage, the commonality question should be approached purposively (see *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39, [2001] 2 SCR 534).

[35] In *Hollick*, the Supreme Court of Canada addressed what constitutes a common issue in the context of a nuisance claim for damages as a result of pollution emitted from a landfill site. McLachlin CJ wrote (at para 18):

> As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial … ingredient" of each of the class members' claims.

[36] A claim in private nuisance consists of an interference with the claimant's use or enjoyment of land that is both: (1) *substantial*; and (2) *unreasonable (*see *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at paras 18-19, [2013] 1 SCR 594). Inherent in the resolution of a nuisance claim is the determination of the cause of the interference which, in this case, is the flooding.

[37] The certification judge analogized the flooding in this case to the circumstances in *MacQueen v Sydney Steel Corp*, 2013 NSCA 143, 369 DLR (4th) 1. In *MacQueen*, landowners brought, amongst other claims, a nuisance claim against the operators of a steel works. The claim was that, over several decades, the steel works emitted pollutants onto the landowners' properties which substantially and unreasonably interfered with their use of their land. The Court, in *MacQueen*, considered several proposed common-issue questions relating to the nuisance claim, including the following (at paras 128-29):

> (a)(i) Did the appellants emit contaminants during the period they operated the steel works?
>
> (a)(ii) Did the contaminants go on to class members' properties?
>
> . . .
>
> (e) Did the discharge of the Contaminants onto the properties . . . constitute a nuisance?

[38] The Court concluded that the only common issue was whether the appellants emitted contaminants during the period they operated the steel works. The second question was not a common issue as it required participation from the individual landowners to be answered (paras 130-131).

[39] As for the final question, whether the appellants' conduct constituted a nuisance, the Court, in *MacQueen*, extensively analyzed the law of nuisance, including the principles from *Antrim*. The Court held (at para 143) that it is not possible to determine whether the conduct constituted a nuisance at law without inquiring how each class member used his or her

property and the extent to which the contaminants interfered with that use and enjoyment. Ultimately, the Court concluded (at para 148):

> The nuisance common issues ought not to have been certified as common issues. The only potential exception is whether the appellants emitted contaminants which, like *Hollick*, would be common to all class members.



[40] The plaintiffs' claim is that their use and enjoyment of their properties was affected by a sudden flooding event in the waterway. The proposed common-issue question seeks to determine whether Manitoba caused the flooding. The focus of the question is to identify any causal connection between the actions of Manitoba regarding the water-control structures and the flooding rather than to determine the impact of the flooding on any particular plaintiff's property.

[41] In my view, the certification judge did not apply the correct test for determining the existence of a common issue. He failed to consider the actual question posed, which is focused on the actions of Manitoba, and whether those actions caused the flooding event in the waterway. Instead, he considered whether there was sufficient commonality in the effects of the flooding on each member of the proposed class of plaintiffs. Those considerations are relevant to the other two questions in nuisance, which relate to interference with each plaintiff's individual use and enjoyment of property and whether it was unreasonable (see para 11 above). However, they are not relevant to the proposed question at issue in this appeal.

[42] As a result, the certification judge failed to address whether the resolution of the proposed common-issue question was necessary to the

resolution of each class member's claim (see *Western Canadian Shopping Centres* at para 39).

[43] The certification judge's failure to properly consider the proposed question is illustrated by his comment (at para 113):

> It simply does not follow that even if a representative plaintiff could prove that Manitoba caused the flooding *on his property* that Manitoba caused the flooding, whether by water overtopping banks or groundwater, *to every other class member's residence*. The test is not whether some of the class members would be affected — the test is whether <u>all</u> other members would be affected in some material way.
>
> [Italics added; underlining indicates certification judge's emphasis]

[44] Similarly, the certification judge characterized the issue as being "whether the regulation [of water levels by Manitoba] <u>caused</u> damage to <u>every</u> plaintiff in the class" (at para 121) [emphasis in original].

[45] These statements illustrate that the certification judge did not correctly apply the test for a common issue. The certification judge should have considered whether resolution of the proposed question is necessary to the resolution of each class member's claim and, in addition, whether the issue is a substantial ingredient of each class member's claim (see *Hollick* at para 18). Instead, the certification judge was concerned primarily with the specific effect of the flooding on each individual plaintiff's property or residence. This is not relevant to the proposed common-issue question. The proposed question is directed at the cause of the flooding in a general sense; that is, whether Manitoba, by its actions, caused flooding to occur on the reserves.

[46] In effect, the certification judge refused to certify the action on the basis that individual assessments of damages would be required. This is contrary to section 7(a) of the *Act*.

[47] In my view, if the certification judge had turned his mind to the correct test, he would have had to conclude that resolution of the proposed common-issue question is necessary to the resolution of each class member's claim and, in addition, the issue is a substantial ingredient of each of the class member's claims.

[48] It is a fundamental question of fact in the litigation to determine whether the actions of Manitoba in operating the water-control structures caused the flooding. These are general causation issues that are common to each individual class member's claim and can be determined independently of the evidence of individual class members. The evidence relevant to this issue will likely entail the opinions of experts and the evidence of decisions made and actions taken by Manitoba in the operation of the water-control structures. In order to be successful in nuisance, each of the class members would need to prove this basic fact–that the actions of Manitoba caused the flooding on their reserve. It is an issue that is common to each class member and its resolution will move the litigation forward for each class member or, if causation cannot be established, end the litigation for each class member.

[49] In *MacQueen*, the Nova Scotia Court of Appeal accepted that the question of whether the appellants emitted contaminants during the period they operated the steel works was a common issue. The proposed common-issue question in this case is similar to the common issue accepted by the Court in *MacQueen*, in that it is focused on the actions of the defendant

rather than the effect of those actions on the plaintiffs.

[50] For these reasons, my view is that the proposed common-issue question raises a common issue.



Second Ground of Appeal—Preferable Procedure

*Standard of Review*

[51] A judge's decision on preferability is discretionary and is entitled to considerable deference. An appeal court may only intervene if there has been a palpable and overriding error of fact or an error in principle (see *Soldier* at paras 22, 25; and *AIC Limited v Fischer*, 2013 SCC 69 at para 65, [2013] 3 SCR 949).

*Positions of the Parties*

[52] The plaintiffs argue that a class proceeding is the preferable procedure in this case because it provides a fair, efficient and manageable method of determining the common issues and because it will significantly advance the proceeding in accordance with the three principal advantages of class actions: judicial economy, access to justice and behaviour modification. The plaintiffs submit that it was not open to the certification judge to determine that representative or "test" cases are the preferable procedure when this point was not raised or argued by the parties.

[53] Manitoba submits that, even if the certification judge erred in finding no common issue in nuisance, the preferability analysis will nonetheless yield the same result, taking into account the additional common issue. Manitoba's position is that there are still too few common issues to

justify certifying the common issues identified in the action as a class proceeding.

*Discussion*

[54] Section 4 of the *Act* requires a judge to certify a proceeding as a class proceeding when all the criteria in that section are met. This includes that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues" (see section 4(d)).

[55] The *Act* does not provide specific guidance as to how a judge is to conduct the preferability analysis. However, that guidance has been provided by the Supreme Court of Canada in *Hollick*, *Rumley* and, more recently, in *AIC*; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477; and *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, [2015] 3 SCR 801. McLachlin CJ wrote at para 27 of *Hollick*:

> [I]n the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification.

[56] In addition, the Court has stated that the preferability analysis is directed at two questions (see *Rumley* at para 35):

> [F]irst, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (*Hollick*, at para. 28).

[57] Considerable deference is owed to a judge's decision on preferability. The certification judge identified the correct legal test to be applied in the preferability analysis. However, in this case, his decision was based primarily on his erroneous finding that there were no common issues in nuisance, which he characterized as "fatal to the certification of this case" (at para 140). As a result, this error significantly influenced his decision on preferability. The effect of this conclusion was much more extensive than the effect of the judge's error in *Soldier*, which only "coloured [the judge's] decision to some extent" (at para 74). Here, it was the foundation of the decision on preferability and, as such, amounts to an error in principle. This error is sufficient to require this Court to perform the preferability analysis afresh. Accordingly, it is not necessary for me to deal with the certification judge's conclusion on his own motion that representative cases are the preferable procedure.

[58] As previously indicated, the decision on preferability is discretionary and involves: first, an assessment of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim"; and, second, whether the class proceeding would be preferable "in the sense of preferable to other procedures". In addition, the stated goals of class proceedings, being judicial economy, access to justice and behaviour modification, must be considered. The parties concede, and I agree, that the goal of behaviour modification is not relevant in the circumstances of this appeal.

[59] In my view, the addition of the nuisance common issue to the other common issues identified by the certification judge tilts the balance in favour of certification on the basis of the stated goal of judicial economy.

[60] The nuisance common issue and the other common issues identified by the certification judge are fundamental to each class member's claim. The certification judge identified the nuisance claim as "the conventional cause of action for the plaintiffs to advance in a claim of this nature" (at para 140) and expressed his view that "the tort of nuisance may well be the strongest of the causes of actions available to the plaintiffs" (at para 141). In order for any of the plaintiffs to be successful in a nuisance claim against Manitoba, they would each need to prove that Manitoba caused the flooding that affected the reserves. Having this issue (as well as the other common issues) determined in one trial for all members of the class would be a more efficient use of judicial resources as compared to a multitude of individual suits making identical or nearly identical claims.

[61] Individual issues, such as how the flooding affected the individual plaintiffs' use and enjoyment of their properties and the assessment of damages, would remain and section 7(a) of the *Act* directs that these are not a bar to certification. However, these issues would become entirely irrelevant in the event that the trial judge in the common-issues trial finds that Manitoba's actions did not cause the flooding (see *Boulanger v Johnson & Johnson Corporation*, 2007 CanLII 735 (Ont Sup Ct) at para 53). This reality is, in fact, acknowledged by the plaintiffs in their Litigation Plan filed at the certification hearing. This fundamental causation issue would not need to be litigated multiple times with the inherent risk of inconsistent findings.

[62] The goal of access to justice also favours certification in this case. A proceeding that allows the class of plaintiffs, many of whom have lost their homes due to flooding and have been displaced for a lengthy period of

time, to share the costs of one common-issues lawsuit will help improve access to justice for them. The alternative would be for each plaintiff to bear the significant cost of an individual proceeding or, more realistically, be unable to bring a proceeding at all.

[63] It must be emphasized that a decision in favour of certification does not involve an assessment of the individual merits of the plaintiffs' claims. This decision is purely to determine how, procedurally, the common issues of the plaintiffs' claims will be adjudicated.

[64] It is for all of the above reasons that I am of the view that certification of the common issues as a class proceeding would be the preferable procedure in this case as it is a fair, efficient and manageable method of advancing the claims.

Conclusion

[65] I would allow the appeal and order that the five common issues relating to negligence and breach of treaty rights identified by the certification judge in his reasons, together with the following common issue relating to nuisance: "Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on the Pinaymootang (Fairford), Little Saskatchewan, Lake St. Martin and Dauphin River Reserves?" be certified as a class proceeding.

[66] There are no exceptional circumstances justifying an order for costs (see section 37 of the *Act*).

[67] The matter shall be returned to the trial court for the issuance of a certification order in accordance with these reasons.

_____ JA

I agree: _____ JA

I agree: _____ JA