IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

FRED PISCLEVICH, JOHN HOWDEN, STEPHEN MORAN, SHAUN MORAN, 5904511 MANITOBA LTD., ALEX MCDERMID, KEITH MCDERMID and SUNSHINE RESORT LTD.	)	***A. J. Ladyka*** *and* ***J. R. Koch*** *for the Applicant*
(Plaintiffs) Respondents	)	***B. J. Meronek, Q.C.*** *and* ***W. S. Klym*** *for the Respondents*
- and -	)	*Chambers motion heard:* ***September 13, 2018***
THE GOVERNMENT OF MANITOBA	)	
(Defendant) Applicant	)	*Decision pronounced:* ***November 29, 2018***

MICHEL A. MONNIN JA

[1] The defendant seeks leave to appeal an order certifying the action initiated by the plaintiffs as a class proceeding pursuant to section 4 of *The Class Proceedings Act*, CCSM c C130 (the *Act*).

[2] The background to the action brought by the plaintiffs is set out in the certification judge's reasons in *Pisclevich v Manitoba*, 2018 MBQB 52 (at paras 1-4):

> The plaintiffs are seeking, on their own behalf and on behalf of members of classes of persons, an order certifying this action as a class proceeding and appointing them as the representative plaintiffs for the classes and any appropriate subclass, pursuant to ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). The court

must determine on this motion for certification whether the criteria as set out in section 4(e) of the ***Act*** are satisfied.

This motion concerns the flooding of Lake Manitoba in 2011 and its effects on individuals and businesses. The plaintiffs contend that property situated within 30 kilometers of Lake Manitoba was flooded due to the defendant's negligent operation of a designated water control work. Specifically, they allege that the defendant's operation of the Portage Diversion caused excessive water to be diverted from the Assiniboine River into Lake Manitoba. This action increased the water level in Lake Manitoba beyond its natural and/or operating limits resulting in severe flooding and causing damage to real and personal property. The defendant denies liability for the flooding, and consequent damage, based upon the premise that climatic and natural conditions resulted in the unprecedented water levels.

The plaintiffs state the defendant owed a duty of care to the plaintiff classes, and the flooding caused by the defendant's operational decisions and conduct constituted a nuisance against them. As a result of the negligence and nuisance by the defendant, they state the plaintiff classes have suffered significant damages.

It is noteworthy that the consequences of the 2011 flooding have also been the subject of a certification motion in ***Anderson v. Manitoba***, 2014 MBQB 255, [2014] M.J. No. 356 (QL), Dewar J.; 2015 MBCA 123, Steel J.A. (application for leave to appeal decision of certification judge refusing to certify a class action); 2017 MBCA 14, Hamilton, Mainella, Pfuetzner JJ.A. (appeal from dismissal of motion for order to certify a class action). These decisions served to articulate much of the applicable background information, as well as a careful consideration of the appropriateness of certification in what are related circumstances. The ***Anderson*** matter involved four First Nations, while this motion involves individual land and business owners. Essentially, the present case and ***Anderson*** are parallel in terms of facts and allegations relating to causes of action. A class action was certified in ***Anderson***.

[emphasis added]

[3] Section 4 of the *Act* sets out the criteria that must be met by an applicant in order to have an action classified as a class proceeding:

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

[4] The certification judge found that the plaintiffs' amended statement of claim disclosed a cause of action in negligence and nuisance (see *Pisclevich* at paras 13, 20).

[5] The plaintiffs proposed definitions for two classes and the certification judge approved the classes as follows:

> a) The "**Property Class**" includes all individuals, corporations, partnerships or other legal entities that own real property and/or have an interest in real property situated within 30 kilometers of Lake Manitoba:
>
> > i) whose property, real or personal, was flooded in 2011 by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding emanating from any of the above; and
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> > ii) who suffered damages, including loss of income, as a result of the said flooding in 2011,
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> > including the estates of any persons who have died since March 1, 2011 who meet the preceding criteria.
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> b) The "**Business Class**" includes all individuals, corporations, partnerships or other legal entities situate, and carrying on business, within 30 kilometers of Lake Manitoba:
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> > i) whose business or farming property, real or personal, was flooded in 2011 by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding emanating from any of the above; or
> >
> > ii) who were restricted from or otherwise unable to carry on business, including but not limited to, farming or ranching, as a result of said flooding in 2011.

[6] The certification judge also stated the following with respect to the classes which she certified (at para 29):

> I have some concerns as to the parameters of the class. I am prepared to acknowledge the appropriateness of a possible amendment to the geographical boundaries, which may be too broad. Further, the definitions of the property class and business

> class may require a stipulation that an individual, corporation, partnership or other legal entity can only claim in one capacity.

[7] With respect to the requirement of section 4(c) of the *Act*, the certification judge found as follows (at para 36):

> The plaintiffs initially outlined a number of common issues in the litigation plan filed August 15, 2013. They will be filing an amended litigation plan in short order. Their new proposed common issues are now virtually identical to those in ***Anderson*** with the exception of issues unique to Indigenous peoples. They are as follows:
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> NUISANCE
>
> - "Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on off-reserve areas surrounding Lake Manitoba?"
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> NEGLIGENCE
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> - "Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, construction, 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?"
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> - "Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?"
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> - "Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, construction, 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?"
>
> - "Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?"

[8] She then went on to find that there would be judicial economy in proceeding by way of a class proceeding and that access to justice would better be served through the vehicle of certification. In finding in favour of the plaintiffs with respect to the matter of behaviour modification, she adopted what McLachlin CJC wrote in *Western Canadian Shopping Centers Inc v Dutton*, 2001 SCC 46 (at para 29):

> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation [citations omitted].

[9] With respect to the criteria of section 4(e)(iii) of the *Act*, again relying on *Western Canadian Shopping Centers*, the certification judge wrote (at para 63):

> I am satisfied that the plaintiffs are prepared to pursue this claim and have interests in common with the proposed class members. There is no indication at this point that the plaintiffs have an interest that conflicts with the interests of other class members on the common issues.

[10] The defendant now seeks leave to appeal the order of certification alleging five errors committed by the certification judge. The errors are as follows:

1. That the certification judge erred in accepting a geographic limit of 30 kilometers from Lake Manitoba in the definitions of the property

class and the business class.

2. That the certification judge erred in finding that the pleadings disclosed a cause of action in negligence causing pure economic loss.

3. That the certification judge erred in finding that negligence causing pure economic loss constituted a common issue.

4. That the certification judge erred in finding a common issue in nuisance.

5. That the certification judge erred in finding that a class proceeding was the preferable procedure.

[11] The test for leave to appeal a certification order was set out by Steel JA in *Anderson et al v Manitoba et al*, 2015 MBCA 123 (*Anderson #1*), where she stated (at para 24):

> The test for leave to appeal a certification decision in Manitoba has recently been discussed in the case of *Meeking v Cash Store Inc et al*, 2014 MBCA 69, 306 ManR (2d) 261. In that case, I adopted the test set out earlier in *Pelchat v Manitoba Public Insurance Corp*, 2006 MBCA 90, 40 CCLI (4th) 46; and *Soldier v Canada (Attorney General)*, 2007 MBCA 153, 225 ManR (2d) 101, which set out three factors to be considered by the chambers judge:
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> 1) Whether the appeal raises a question of law;
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> 2) Does the case warrant the attention of the full court, being a case of importance not just in the present case, but also in future cases; and
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> 3) There must be an arguable case of substance.

[12] While accepting that the test to be met by the defendant is as stated above, the plaintiffs argue that the following applies to the general statement of the test:

1. The question must truly be one of jurisdiction or of law, and not one which involves the Court in an assessment or analysis of conflicting factual issues (see *Anderson #1* at paras 28, 51; and *Canada (Attorney General) v MacQueen*, 2013 NSCA 143 at para 111).

2. The issues that the defendant wishes to raise on appeal have basically already been dealt with by this Court in *Anderson #1* and therefore, there is a lesser need to warrant the Courts attention. The plaintiffs also argue that the test on this point is not one of correctness, but reasonableness.

3. Based on *Anderson #1*, there is no arguable case of substance.

[13] I do not propose to deal with each proposed ground of appeal extensively, because save for one of those grounds, I have not been persuaded that the certification judge erred. In arriving at this conclusion, I place a lot of emphasis on this Court's decision in *Anderson et al v Manitoba et al*, 2017 MBCA 14 (*Anderson #2*), where a class proceeding was certified basically on the same fact situation as found in this case.

[14] In my view, the only ground of appeal that deserves further scrutiny is the allegation that the certification judge erred in finding that the pleadings disclosed a cause of action in negligence causing pure economic loss. This also brings into question the finding that negligence causing pure economic loss constituted a common issue. This is so because if there is no cause of

action causing pure economic loss, it stands to reason that there will be no common issue.

[15] Dealing firstly with the alleged error in accepting a geographic limit of 30 kilometers from Lake Manitoba, I refer to what the certification judge stated (at paras 23, 25-26, 28-29):

> The class definition must be connected to the common issues raised by the causes of action as asserted, without a determination of the merits of the claims. The plaintiff may define the class by using geographical boundaries despite the fact that such an approach will always embrace an element of arbitrariness. However, it is clear that as a matter proceeds forward, the boundaries may be amended as appropriate if evidence becomes available that necessitates such a course of action. The class must not be unnecessarily broad or overly inclusive. Instead, there must be a rational relationship between the class, the causes of action, and the common issues. In saying that, however, a proposed class will not be considered overly broad because it may include persons or businesses that ultimately will not be found to have a claim against a defendant. In the circumstances of a case such as this, certification may be allowed on condition that the definition of the class be amended: ***Hollick*** [*Hollick v Toronto (City)*, 2001 SCC 68] at para. 21.
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> In this case, the property class includes all individuals, corporations, partnerships or other legal entities that own real property and/or have an interest in real property situated within 30 kilometers of Lake Manitoba, whose property, real or personal, was flooded by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding. This could cover a very significant area and, arguably, could result in some uncertainty as to who is a member of the class.
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> The class has been defined by reference to objective criteria being whether the individual, corporation, partnership or other legal entity owned real property and/or had an interest in real property situated within 30 kilometers of Lake Manitoba at the material time. It is clear that potential members of the class can be determined without reference to the merits of the action and that

> the class is bound by geographical limits. That being said, is a 30-kilometer radius of Lake Manitoba a viable boundary along with the possibility of inclusion of tributaries, distributaries, or surrounding bodies of water affected by overland flooding? As previously indicated, these are low threshold determinations and ones that can, and perhaps should be amended as further information and evidence becomes available. It is important to remember that a class definition is flexible, and an entity or individual will not be paid if no viable claim exists.
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> The plaintiffs allege that while all class members are not yet known, their identification may not be difficult. This identification may be accomplished by virtue of the knowledge achieved through the claims process undertaken by the Lake Manitoba Financial Assistance Program ("LMFAP"). There were 6,535 applications for compensation filed with payments made to 4,067 of those applicants. The average payment was $16,652. (See affidavit of Michael Lesiuk affirmed September 23, 2013, Exhibit "H".)
>
> I have some concerns as to the parameters of the class. I am prepared to acknowledge the appropriateness of a possible amendment to the geographical boundaries, which may be too broad. Further, the definitions of the property class and business class may require a stipulation that an individual, corporation, partnership or other legal entity can only claim in one capacity.

[16] I am satisfied that although arbitrary to a degree, the 30-kilometer boundary is reasonable and justifiable and if need be, can be restricted or enlarged as the case proceeds. There was no error committed by the certification judge and therefore, I would dismiss the application for leave to appeal on this ground.

[17] As to the question of common issue in nuisance, I am again not persuaded that the certification judge erred in arriving at her conclusion that there was a common issue. In so stating, I again rely on what this Court previously stated in *Anderson #2* (at paras 40-41, 45, 48):

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.

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.

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.

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.

[18] Moving on to the issue of preferability of procedure, I refer again to what this Court stated in *Anderson #2* (at para 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* [*Soldier v Canada (Attorney General)*, 2009 MBCA 12] at paras 22, 25; and *AIC Limited v Fischer*, 2013 SCC 69 at para 65, [2013] 3 SCR 949).

[19] And further stated (at paras 57-62):

> 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.
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> 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.

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.

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.

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.

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.

[20] On the basis of what I have just quoted, I find no error in the certification judge's decision.

[21] This now brings me to the allegation that the certification judge erred in finding that the pleadings disclosed a cause of action in negligence for pure economic loss and her finding that such loss constituted a common issue. As explained earlier in these reasons, I deal with those two issues as one because how I decide the matter of pure economic loss will have a bearing on whether there exists a common issue with respect to that claim.

[22] Relying on the original decision in *Anderson et al v Manitoba et al*, 2014 MBQB 255, the defendant argues firstly, that the pleadings do not disclose a basis for a pure economic loss claim and secondly, that even if they did, there was a lack of common issues within the class. It argues that the certification judge erred when she wrote that the claim for economic loss "may go forward either under this heading or as treated by Dewar J. in ***Anderson*** as one of the common issues" (at para 18). It further argues that to the contrary, Dewar J did not certify an action in pure economic loss and further found that if allowed, that claim did not constitute a common issue.

[23] The defendant further points out that although leave to appeal on this issue was sought in *Anderson #1*, it was in due course abandoned and therefore not considered by this Court in its decision in *Andersen #2*.

[24] The defendant also argues that the categories in which a claim for pure economic loss may be advanced are limited and that in order to do so, each claim would have to be determined on its own facts, which is the antithesis of a common issue.

[25] The plaintiffs take the position that the pleadings did disclose a cause of action for pure economic loss, that it was in the discretion of the certification judge to so find and that her finding is not in error. The plaintiffs rely on the Supreme Court of Canada decision in *Design Services Ltd v Canada*, 2008 SCC 22 to confirm their position that the test of relational economic loss has been met.

[26] The plaintiffs further argue that the threshold needed to establish a cause of action is low and that a flexible approach to pure economic loss does not make it plain and obvious that their action is bound to fail and therefore, leave should not be granted on this issue.

[27] As to the defendant's argument with respect to common issues regarding this tort, the plaintiffs argue that this Court dealt with that issue in *Anderson #2* and rejected what Dewar J had decided.

[28] The defendant has satisfied me that on this issue, it raises a question of law and that it has an arguable case of substance. I am also satisfied that the issue to be advanced is one of importance not only to this case, but also to future cases.

[29] What moves me to this conclusion is the fact that the issue of recovery for pure economic loss remains an unsettled area of law which was not addressed by this Court in *Anderson #2*, as the issue was not raised. I am

of the view that the issue should be addressed at this stage, before a possible lengthy and costly trial proceeds.

[30] Therefore, in the result, because I view the issues of pure economic loss and common issue as intertwined, I grant the defendant leave to appeal on the following two questions:

1. Did the certification judge err in finding that the pleadings disclosed a cause of action in negligence causing pure economic loss?

2. Did the certification judge err in finding that negligence causing pure economic loss constituted a common issue?

Monnin JA