IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Dewey v. Corner Brook Pulp and Paper Limited*, 2025 NLCA 8
Date: March 6, 2025
Docket Number: 202101H0070

BETWEEN:

RICHARD DEWEY

APPELLANT

AND:

CORNER BROOK PULP AND PAPER LIMITED

FIRST RESPONDENT

AND:

THE TOWN OF DEER LAKE

SECOND RESPONDENT

Coram: F.P. O'Brien, W.H. Goodridge and F.J. Knickle JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division, Corner Brook 201504G0120 (2021 NLSC 118)
Appeal Heard:	January 16, 2024
Judgment Rendered:	March 6, 2025

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Reasons for Judgment by:	F.P. O'Brien J.A.
Concurred in by:	W.H. Goodridge and F.J. Knickle JJ.A.
Counsel for the Appellant:	Raymond F. Wagner K.C., Peter McVey K.C., Maddy Carter and Stephen E. Barnes
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Authorities Cited:

CASES CITED: *Dewey v. Kruger Inc.*, 2021 NLSC 118; *Anderson v. Canada (Attorney General)*, 2011 NLCA 82; *Ring v. Canada (Attorney General)*, 2010 NLCA 20, leave to appeal to SCC refused, 33711 (21 October 2010); *Newfoundland and Labrador v. Chiasson*, 2020 NLCA 28; *Thorne v. The College of the North Atlantic*, 2017 NLCA 30; *Davis v. Canada (Attorney General)*, 2008 NLCA 49; *Chiasson v. Nalcor Energy*, 2021 NLCA 34; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *755165 Ontario Inc. v. Parsons et al.*, 2006 NLTD 123, leave to appeal refused, 2006 NLCA 60; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855; *Condon v. Canada*, 2015 FCA 159; *Dewey v. Corner Brook Pulp and Paper Limited*, 2019 NLCA 14; *Edgecombe v. Nicholas*, 2023 NLCA 19; *Lynch v. St. John's (City)*, 2020 NLCA 31; *Matchim v. BGI Atlantic Inc.*, 2010 NLCA 9, leave to appeal to SCC refused, 33660 (22 July 2010); *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *George v. Newfoundland and Labrador*, 2016 NLCA 24; *George v. Newfoundland and Labrador*, 2014 NLTD(G) 106; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, 2002 CanLII 6199 (ONSC), aff'd 2004 CanLII 16620 (ONSCDC), leave to appeal refused; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949; *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916, leave to appeal to SCC refused, 37436 (8 June 2017); *Hollick v. Toronto*

(City), 2001 SCC 68, [2001] 3 S.C.R. 158; *The College of the North Atlantic v. Thorne*, 2015 NLCA 47; *Anderson et al v. Manitoba et al*, 2017 MBCA 14; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295; *Anderson et al v. Manitoba et al*, 2015 MBCA 123; *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ONCA), leave to appeal to SCC refused, 30759 (12 May 2005); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, leave to appeal to SCC refused, 38678 (17 October 2019).

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1, sections 5(1), 36(3), 8, 11, 13, 27, 5(2)(a), 37.

F.P. O'Brien J.A.:

INTRODUCTION

[1] The appellant, Richard Dewey, alleges that the respondents, Corner Brook Pulp and Paper Limited ("Corner Brook Paper") and the Town of Deer Lake (the "Town"), are responsible for damages resulting from groundwater flooding that impacted properties and residents in Deer Lake, Newfoundland and Labrador.

[2] Mr. Dewey made an application to the Supreme Court of Newfoundland and Labrador seeking to certify an action, which had been brought against Corner Brook Paper and the Town, as a class action pursuant to the *Class Actions Act*, SNL 2001, c. C-18.1 (the "*Act*"), and requested that he be appointed representative plaintiff for the class.

[3] The proposed class is comprised of persons in Deer Lake, impacted by the groundwater flooding, who own or owned property or who reside or resided within the defined class boundary.

[4] A Judge of the Supreme Court decided that the requirements for certification under the *Act* were not met and dismissed the application (*Dewey v. Kruger Inc.*, 2021 NLSC 118, the Decision).

[5] Mr. Dewey submits that the Judge erred. He seeks leave to appeal the Decision and, if leave to appeal is granted, requests that the appeal be allowed and that the action be certified as a class action.

[6] Corner Brook Paper and the Town submit that the Judge made no error in dismissing the certification application and request that the appeal be dismissed.

BACKGROUND

[7] In the Decision, the Judge described the background to the application for certification as a class action:

> [3] For almost a century, there has been a hydroelectric power generating system (the "Power System") located in the lower portion of the Humber River Basin, in the town of Deer Lake.
>
> [4] This Power System was constructed between 1922 and 1925 for the purpose of producing hydroelectric power to the Corner Brook Pulp and Paper Mill. It includes the Grand Lake Reservoir, a series of dams, dykes and the manmade Humber Canal (the "Water Control System"). The town of Deer Lake is situated downstream of the Humber Canal and immediately downhill from the Water Control System in an area known as the Western Canal.
>
> [5] The subject matter of the proceeding is the damage allegedly caused by the Water Control System to the properties of Dewey and the class members located within a provisionally identified area set out in Schedule "A" to the Amended Statement of Claim (the "Class Boundary"). Dewey claims water seepage from the Water Control System causes elevated groundwater levels leading to water damage to the properties within the Class Boundary. …

[8] In a statement of claim issued in the Supreme Court in 2015 (and amended in 2020), Mr. Dewey claimed both in nuisance and negligence against Corner Brook Paper, and in negligence against the Town and against Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province").

[9] Mr. Dewey applied to the Supreme Court in 2020 to have the action certified as a class action under the *Act*, and he sought to be appointed as the "representative Plaintiff of a class of persons who suffered damages when properties they owned or occupied in the Town of Deer Lake were affected by elevated groundwater levels" (Decision, at para. 1).

Requirements for certification under the *Act*

[10] The requirements for certification of a class action are set out in section 5(1) of the *Act*:

> When court shall certify class action in the *Act*
>
> 5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
>
> (d) a class action is the preferable procedure to resolve the common issues of the class; and
>
> (e) there is a person who
>
> (i) is able to fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[11] The Judge considered the requirements in section 5(1) in the context of Mr. Dewey's application for certification, as discussed next.

Section 5(1)(a) – The pleadings must disclose a cause of action

[12] Regarding the claim against Corner Brook Paper, the Judge determined that the pleadings disclosed a cause of action in both nuisance and negligence (Decision, at paras. 18-19, 25). There was no appeal of these determinations.

[13] Regarding the claim against the Town, the Judge found that the pleadings disclosed no cause of action in negligence. The claim against the Town was therefore dismissed (Decision, at paras. 38, 41). This finding has been appealed and will be considered below.

[14] The Judge also found that the pleadings disclosed no cause of action in negligence against the Province (Decision, at paras. 49-50). This finding has not been appealed. The Province is no longer a party to this litigation and did not participate in the appeal.

[15] Therefore, after the Judge's analysis of section 5(1)(a), only Corner Brook Paper remained as a defendant to the action.

Section 5(1)(b) – There must be an identifiable class of two or more persons

[16] The Judge determined that the requirement in section 5(1)(b) was satisfied.

[17] At paragraphs 51-58 of the Decision, the Judge found that there was some basis in fact to establish that there was an identifiable class of two or more persons. There was no appeal of this determination.

Section 5(1)(c) – The claims of the class members must raise a common issue

[18] Section 5(1)(c) requires that "the claims of the class members raise a common issue, whether or not the common issue is the dominant issue". The common issues proposed by the class were set out in Mr. Dewey's certification application.

[19] Because the Judge had previously determined there was no cause of action against the Province or the Town, the Judge did not consider any of the proposed common issues relating to these entities (Decision, at para. 60). Only the common issues regarding the claims against Corner Brook Paper in nuisance and negligence were considered.

[20] The Judge found that there was some basis in fact to conclude that the claims of the class members against Corner Brook Paper raised common issues in negligence (involving duty of care, breach of duty, foreseeability) and in nuisance (Decision, at paras. 65-73, 80).

[21] The Judge, at paragraph 74, found the following to be common issues in the claims against Corner Brook Paper. The first three common issues relate to the claim in negligence and the last issue relates to both negligence and nuisance:

> What duty of care does Corner Brook Paper owe with respect to the Class Members' interests as owners or occupiers of properties within the Class Boundary?
>
> Did Corner Brook Paper breach its duty of care?
>
> Was harm to the Class Members' properties within the Class Boundary a reasonably foreseeable consequence of Corner Brook Paper's breach of its duty of care?
>
> Did Corner Brook Paper cause or materially contribute to the flooding within the Class Boundary?

[22] In summary, with respect to Corner Brook Paper, the Judge concluded that the requirement of section 5(1)(c) was met, finding that the claims raised common issues in negligence and in nuisance. There was no appeal of these determinations.

Section 5(1)(d) – A class action is the preferable procedure to resolve the common issues of the class

[23] The Judge found that the requirement of section 5(1)(d) was not met, stating that Mr. Dewey "failed to establish some basis in fact for the proposed class action as the preferable procedure" to resolve the common issues of the class (Decision, at para. 100).

[24] As a result, the Judge determined that the application for certification was "denied because [Mr. Dewey] has not satisfied the requisite criterion under section 5(1)(d) that a class action is the preferable procedure for the remedies sought on behalf of the class" (Decision, at para. 103).

[25] This determination has been appealed and will be discussed below.

Section 5(1)(e) – Appointment of a class representative

[26] The final requirement for certification in section 5(1)(e) requires the appointment of a class representative. The certification application identified Mr. Dewey as the proposed class representative.

[27] As the application for certification was dismissed on other grounds, the Judge did not decide whether Mr. Dewey met the requirements of section 5(1)(e). The Judge observed at paragraph 101: "Given my findings concerning the preferability criteria in section 5(1)(d), there is no basis on which to conduct the requisite representative Plaintiff analysis under section 5(1)(e)".

[28] This requirement will be considered later in this decision.

ISSUES

[29] Mr. Dewey appeals the Judge's findings that there was no cause of action in negligence against the Town under section 5(1)(a) and that a class action was not the preferable procedure to resolve the common issues of the class under section 5(1)(d).

[30] The appeal concerns the following issues:

1. Should leave to appeal be granted?

If leave to appeal is granted:

2. (a) Did the Judge err in concluding, pursuant to section 5(1)(a), that there is no cause of action against the Town?

   (b) If the Judge erred, is it plain and obvious that there is no cause of action against the Town?

3. (a) Did the Judge err in concluding, pursuant to section 5(1)(d), that a class action is not the preferable procedure?

   (b) If the Judge erred, is there some basis in fact to conclude that a class action is the preferable procedure?

4. Have the remaining requirements for certification been met and, if so, should the action be certified as a class action?

STANDARD OF REVIEW

[31] In *Anderson v. Canada (Attorney General)*, 2011 NLCA 82, this Court, referencing its earlier decision in *Ring v. Canada (Attorney General)*, 2010 NLCA 20, leave to appeal to SCC refused, 33711 (21 October 2010), considered the applicable standard of review on an appeal from a decision concerning an application for certification:

> [38] The standard of review with respect to the first criterion for certification set out in s. 5(1) of the *Act*, whether the pleadings disclose a cause of action, "turns on determinations of law and, therefore, it is reviewed on the standard of correctness": see *Ring* at para. 34. All of the other criteria enumerated in section 5(1) are questions of mixed fact and law and the certification judge's determinations on these issues are owed considerable deference. They cannot be reversed absent a palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of a legal standard or its application, in which case the error may amount to an error in law and the applicable standard of review is correctness. See *Ring* at paras. 6-8.

[32] The standard of review to be applied then is correctness with respect to a determination made under section 5(1)(a) as to whether the pleadings disclose a cause of action. The standard is palpable and overriding error with respect to the remaining determinations made under sections 5(1)(b) to (e), provided there is no extricable error in principle, which would then attract a correctness standard of review.

ISSUE 1

Should leave to appeal be granted?

[33] Section 36(3) of the *Act* requires leave to appeal an order certifying or refusing to certify an action as a class action. Mr. Dewey sought leave to appeal the order refusing certification.

[34] In *Newfoundland and Labrador v. Chiasson*, 2020 NLCA 28, this Court discussed the analytical framework and considerations involved in deciding the issue of leave to appeal in the context of a class action certification decision. One of the contextual factors considered by this Court has been whether the application for leave arises from a decision to certify or not certify the action as a class action, as noted by the Court in *Chiasson*:

> [7] In undertaking the analysis, the nature and purpose of class action proceedings, as discussed in *Thorne*, provide context:
>
> > [19] Accordingly, the balance may tip in favour of granting leave to appeal where certification has been refused while, by contrast, there may be some reticence to give leave where certification has been granted. In the latter situation, the ability to adjust the certification order to take account of a change or need to clarify the order may obviate the need to bring a challenge on appeal which would interfere with the efficient progression of the action through the court. ...

[35] A similar observation was made by this Court in *Thorne v. The College of the North Atlantic*, 2017 NLCA 30:

> [18] ... in the context of an application for leave to appeal under section 36(3) of the *Class Actions Act*, a consideration that may be taken into account is the different effect resulting from granting or refusing a certification application. This issue is discussed in *Davis*, with reference to the decision in *Pardy v. Bayer*, *supra*: ...
>
> > [19] As well, a distinction may be drawn between the circumstances when certification is granted and when it is refused. For example, when certification is granted, certain procedural protections are engaged which may, depending on all the circumstances, support refusal to grant leave to appeal. [Section 11 of the *Act* allows for amendment of a certification order, decertification, or another order the court considers appropriate.] ...

[36] The Court in *Thorne* noted that "where a certification order is refused, the benefits of proceeding by way of a class action can be obtained only if leave is given and the appeal succeeds" and, "accordingly, the balance may tip in favour of granting leave to appeal where certification has been refused" (at paras. 18-19).

[37] An order denying certification was the subject of a leave application in *Davis v. Canada (Attorney General)*, 2008 NLCA 49, where this Court observed that, as a result, "the benefits of proceeding by way of class action will be precluded if leave to appeal is not granted. This factor, while supporting the granting of leave, is not determinative" (at paras. 19, 21).

[38] Factors to be considered on a leave application were outlined in paragraph 13 of *Thorne*. These include whether the correctness of the decision is in question, whether the nature of the issue is such that an appeal following final judgment would be of no practical effect, and whether the interests of justice require that leave be granted.

[39] The Town took no position regarding leave to appeal. Corner Brook Paper submitted that Mr. Dewey's delay in commencing and perfecting the appeal was a relevant factor to be considered in deciding whether leave should be granted. Delay may be a relevant consideration on a leave application (*Thorne*, at para. 20; *Chiasson*, at para. 6). In the present case, the record did not establish that Mr. Dewey was late in commencing the appeal and the delay alleged in perfecting the appeal was not such that it created prejudice. No application was brought to strike or dismiss the notice of appeal for failure to prosecute the matter or otherwise to seek directions regarding the appeal's prosecution and the filing of documents. In the circumstances, delay would not be a significant factor when determining the question of leave and would certainly not be determinative of the issue.

[40] In the application for leave to appeal, Mr. Dewey has raised several grounds of appeal regarding the Judge's analysis of the certification requirements and questioned the correctness of the decision. Specifically, he raised concerns with the Judge's consideration of section 5(1)(a) and the finding that it was plain and obvious that there was no cause of action against the Town in negligence, and the Judge's finding that there was no basis in fact that a class action was the preferable procedure under section 5(1)(d).

[41] Because leave is sought from a refusal to certify the class action, should leave to appeal be denied, there will be no further opportunity to consider whether the proposed class action meets the certification requirements of section 5, and no further opportunity to consider the parties' arguments either supporting or opposing the Judge's conclusions on the certification application (*Chiasson*, at para. 7).

[42] Having considered the record on appeal, the parties' submissions on the issue of leave, and their positions regarding the correctness of the decision and the alleged errors which would be the focus of consideration on an appeal, I would conclude that it would be appropriate, and in the interests of justice, to grant leave to appeal in these circumstances.

ISSUE 2(a)

Did the Judge err in concluding, pursuant to section 5(1)(a), that there is no cause of action against the Town?

[43] The test to be applied when considering whether there is a cause of action under section 5(1)(a) is the "plain and obvious test".

[44] That is, the question to be determined under section 5(1)(a) is, accepting the facts as pleaded to be true and without going beyond the pleadings or considering any evidence, whether it is "plain and obvious" that the claim as pleaded discloses no reasonable cause of action.

[45] This test was described by this Court in *Chiasson v. Nalcor Energy*, 2021 NLCA 34, at paragraph 8, citing the Supreme Court of Canada decisions in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45:

> [8] The analytical approach to determining whether a cause of action is disclosed is discussed in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19:
>
> > [14] ... The test to be applied ... is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action.
>
> And, in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45:
>
> > [22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. ... The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. ...

[46] In *755165 Ontario Inc. v. Parsons et al.*, 2006 NLTD 123, leave to appeal refused, 2006 NLCA 60, the Court described the test for finding that no cause of action exists as a "stringent one because it is based on the policy that, other things being equal, a case should be decided on its merits rather than be derailed on a technicality" (at para. 35).

[47] Mr. Dewey's claim against the Town is in negligence. In *Chiasson 2021*, this Court considered the two-stage analytical framework described by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, which is applied when considering a claim for negligence. The first stage concerns whether a *prima facie* duty of care has been established. If so, the second stage concerns whether the *prima facie* duty of care should be negated for policy reasons:

> [15] To succeed in a claim for negligence, the Class must first establish that a duty of care was owed. ... The applicable analytical framework is discussed in *Imperial Tobacco*:

> [39] At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

[48] In *Imperial Tobacco*, the Supreme Court of Canada noted that where a claim is against government, a duty of care in negligence could be established in two ways: by statute or through interactions between the claimant and government that demonstrate the requisite proximity and reasonable foreseeability required to create the duty:

> [43] ... The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

[49] The Supreme Court in *Imperial Tobacco* further described how a duty of care can be created through interactions with government, as follows:

> [45] ... The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care ... However, the factor that gives rise to a duty of care in these types of cases is the specific interaction between the government actor and the claimant.

[50] In *Chiasson 2021*, this Court noted the Supreme Court of Canada's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, concerning the first stage of the analysis, and how proximity and reasonable foreseeability can create a *prima facie* duty of care:

> [16] As discussed in *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, [2017] 2 S.C.R. 855, the first stage of the analysis has two components: proximity and reasonable foreseeability. Gascon and Brown JJ., for the majority, explained:
>
> > [25] Assessing proximity in the *prima facie* duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Cooper*, [2001 SCC 79], at paras. 32 and 34).

...

> [32] Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

[51] The second stage of the analytical framework recognizes that, even where a *prima facie* duty of care has been established through proximity and foreseeability, this duty can be negated for policy reasons.

[52] This was described by the Supreme Court of Canada in *Deloitte & Touche*:

> [37] Where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the analysis advances to stage two of the *Anns/Cooper* framework. Here, the question is whether there are "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care (*Cooper*, at para. 30; *Edwards*, at para. 10; *Odhavji*, at para. 51).

The Judge decided that it was plain and obvious there was no cause of action against the Town

[53] After considering the pleadings the Judge found that no duty of care existed, and therefore concluded that it was "plain and obvious" that the pleadings disclosed no cause of action against the Town. Accordingly, the Judge concluded that the requirement of section 5(1)(a) was not met, and dismissed the claim:

> [41] As a result, assuming the facts pleaded to be true, I conclude the claims in negligence as against the Town have no reasonable prospect of success. It is plain and obvious that the claims as pleaded by the class disclose no reasonable cause of action in negligence as against the Town.
>
> [42] Having determined that the pleadings do not disclose a duty of care owed by the Town to the class, it is unnecessary to consider the second stage of the inquiry regarding public policy considerations.

The pleadings

[54] The Judge's finding pursuant to section 5(1)(a), that it was plain and obvious that there was no cause of action against the Town, was required to be based solely on the pleadings. In this case, the only pleadings were those filed by Mr. Dewey.

[55] Only the pleadings are considered at this stage of the certification analysis under section 5(1)(a). Evidence is not considered.

[56] Mr. Dewey's claim in negligence against the Town was set out in paragraphs 36-42 of the amended statement of claim (Appeal Book, Volume 1, Tab 9, at pages 119-121).

[57] The amended statement of claim alleged that the Town's duty of care in negligence arose by two different means.

[58] First, Mr. Dewey pleaded that the Town was negligent in "putting into operation" the policies, measures, and decisions that the Town had adopted to deal with the water problems.

[59] This was pleaded in paragraphs 36-39 of the amended statement of claim:

> 36. The Town owes the Class Members a duty to use due care in giving effect to, and in putting into operation, its policies concerning the flooding problem posed by Water Control System.
>
> 37. The Town became engaged in the flooding problem as early as the 1970s. For decades the Town has known about the flooding problems posed by the Water Control System and the damage being caused to the Class Members' properties.
>
> 38. Yet the measures and decisions adopted by the Town, and discussed by Town officials with the Class Members, have been negligently implemented at the operational level.
>
> 39. In 1976 a letter was written on behalf of the Town to the Bowater Power Company Limited ("Bowater") seeking an easement from Bowater to the Town for the purpose of constructing a proposed diversion ditch from Main Dam Road to Glide Brook. Bowater agreed to grant the easement but recommended the Town Council conduct a survey for the proposed ditch. The Town Council moved to get the survey done "as soon as possible". Capital works funding for the diversion was approved by 1977-1978. The Town received "stamp money" from the Federal Government to pay for the construction of the diversion ditch, and it hired individuals to implement the approved plan. Although the line for construction of the diversion ditch was cut, no further steps were taken by the Town.

[60] Second, and in the alternative, Mr. Dewey pleaded that the many years of interactions between class members and the Town, and the Town's assurances that

it would find a solution to the ongoing problems, created the requisite proximity and reasonable foreseeability to give rise to the Town's duty of care. This was pleaded in paragraph 40:

> 40. Further, and in the alternative, a duty of care arises from the interactions between the Class and the Town, bringing them into a close and direct relationship. For decades, Town officials have engaged in discussions with Class Members about the flooding issue and given assurances that the Town will take necessary steps to address it, albeit with unsatisfactory results.

[61] Mr. Dewey pleaded the particulars of the alleged negligence in paragraph 41:

> 41. The Town's acts and omissions have breached the standard of care applicable to it. Particulars of the negligence of the Town include the following:
>
> (a) Aborting construction of a diversion or drainage ditch between the Humber Canal and the neighborhood encompassed by the Class Boundaries to address the problem of elevated groundwater levels;
>
> (b) Taking inadequate or incomplete steps to prevent, mitigate or correct the flooding issue caused by the Water Control System;
>
> (c) Failing to conduct thorough and regular inspections of the Humber Canal, despite undertaking to do so.
>
> (d) Despite assumption of an oversight role, inadequately and incompletely monitoring the effect of the Water Control System on properties downstream, including the Class Members' properties;
>
> (e) Choosing not to systematically and regularly request and review dam safety review reports from [Corner Brook Paper], instead letting gaps in mandatory periodic reports go unaddressed; and
>
> (f) Any other such negligence as may arise from the evidence.

[62] In summary, Mr. Dewey pleaded that: the Town knew for decades, from as early as the 1970s, about the water seepage and flooding problems and the resulting damage; the Town adopted policies, took measures and made decisions regarding how to deal with the water problems; the Town was negligent in carrying out the measures it took to respond to these problems; there were interactions between the Town and class members over several decades regarding the flooding issues, which

brought the class members and the Town into a close and direct relationship; and the Town provided assurances that it would address the flooding problems.

The alleged errors

[63] As noted, Mr. Dewey's amended statement of claim alleged that the Town's duty of care in negligence arose by two different circumstances.

[64] First, he pleaded that the Town had created policies and made decisions to deal with the flooding and that it was negligent in carrying out these policies and decisions. Second, he pleaded that the interactions between the class members and the Town, over many years, with respect to the flooding problems provided the necessary proximity to create a duty of care.

[65] Regarding the first argument, Mr. Dewey submits that the Judge erred in misapprehending his pleadings.

[66] The Judge concluded that the Town "did not owe the class a duty of care to implement a policy" to deal with the water problems:

> [38] ... As a question of law, I find the Town did not owe the class a duty of care to implement a policy regarding: (a) the construction of a diversion or drainage ditch to address the elevated groundwater levels; (b) to create a storm water management plan to allow Town residents to mitigate or correct flooding by connecting their private drainage systems to the public municipal storm water system; and (c) to oversee and monitor the Water Control System's effects on class members' properties. These are matters which involve decisions that engage the Town's legislative function.
>
> (Emphasis added.)

[67] Mr. Dewey argues on appeal that the Judge mischaracterized what was pleaded by concluding that "the Town did not owe the class a duty of care to implement a policy" to address the water problems.

[68] Mr. Dewey submits that the pleadings alleged that the Town already had policies in place and had adopted measures and taken decisions to deal with the water problems. He submits that what was pleaded was that the Town was negligent in *carrying out* their policies in responding to the flooding problem. This, he argues, is different than pleading that the Town had a duty to implement or create such a policy.

[69] Mr. Dewey submits that the pleadings never alleged that the Town had a duty to create or formulate a policy to deal with the water problems. Rather, Mr. Dewey states that he pleaded the Town, in the various responses and measures taken to address the flooding issues, had a duty to use care in "giving effect to, and putting into operation" its policies concerning the flooding problem, and a duty to do so in a non-negligent manner (Amended statement of claim, at paras. 36, 38, 41).

[70] The Town's "putting into effect" the policies, measures and responses that had already been adopted, Mr. Dewey submits, is an operational activity.

[71] In a reply to the Town's demand for particulars, Mr. Dewey provided further information about the Town's policies and alleged negligent actions, including the types of policies alleged to have been enacted, how these policies were negligently put into operation, what measures and decisions were discussed between the Town and class members, what assurances were given to the class members and by whom and when, and what steps the Town indicated it would take to deal with the water problems (Reply to Demand for Particulars, Appeal Book, Volume 1, Tab 7, at pages 90-92). Although Mr. Dewey's reply to the demand for particulars could be considered in a section 5(1)(a) analysis, it is not referenced in the Decision.

[72] Mr. Dewey argues that he pleaded that the Town owed a duty of care to put into operation the measures and decisions that had already been adopted by the Town, without acting negligently, and that he further pleaded that these measures and decisions "have been negligently implemented at the operational level" (Amended statement of claim, at para. 38). Having adopted policies and taken measures to address the water problems, Mr. Dewey argues that there was a duty of care on the Town to use due care in "giving effect to", or "putting into operation", these policies, measures and decisions (Amended statement of claim, at para. 36).

[73] On a review of the pleadings, I would respectfully conclude that the Judge mischaracterized what Mr. Dewey had pleaded regarding the Town's duty of care. The Judge, in finding that the Town "did not owe the class a duty of care to implement a policy" to deal with the water problems, did not properly characterize what Mr. Dewey pleaded, namely that the Town owed a duty of care in "putting into operation its policies concerning the flooding problem", without negligence (Amended statement of claim, at para. 36).

[74] I would conclude that this misapprehension of the pleadings, and the resultant finding that it was plain and obvious from the pleadings that there was no duty of care, constituted an error in principle.

[75] Mr. Dewey's second, and alternative, argument on appeal is that the Judge erred in not considering the pleading that a duty of care arose from the interactions between the class members and the Town.

[76] Mr. Dewey pleaded that there were interactions between the Town and the class members over many decades and that, throughout this period, the Town gave assurances about finding a solution to the flooding problems, with unsatisfactory results. These interactions between the Town and class members over a prolonged period, Mr. Dewey argues, created the requisite proximity and reasonable foreseeability to give rise to a duty of care.

[77] The pleadings in this regard are set out generally in paragraph 37 and, more specifically, in paragraph 40 of the amended statement of claim, and in Mr. Dewey's reply to the Town's demand for particulars:

> 37. The Town became engaged in the flooding problem as early as the 1970s. For decades the Town has known about the flooding problems posed by the Water Control System and the damage being caused to the Class Members' properties.
>
> ...
>
> 40. Further, and in the alternative, a duty of care arises from the interactions between the Class and the Town, bringing them into a close and direct relationship. For decades, Town officials have engaged in discussions with Class Members about the flooding issue and given assurances that the Town will take necessary steps to address it, albeit with unsatisfactory results.

[78] The Judge, citing *Chiasson*, notes that a duty of care may be created in two circumstances: by statute or by common law (which the Judge refers to as a "private law duty of care"), which requires consideration of proximity and reasonable foreseeability:

> [33] At paragraph 17, *Chiasson* identified two scenarios where a duty of care could arise in a claim against government:
>
> > [17] Where a claim is made against government, two scenarios are identified in *Imperial Tobacco*:

> [43] ... The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

> [34] The second scenario is sometimes referred to as a private law duty of care and arises where there is specific interaction between the claimant and government (see paragraph 45 of *Imperial Oil*).

[79] The Judge concluded that there was no statutory duty of care. However, the Judge does not appear to have considered Mr. Dewey's alternative argument that a common law or "private law duty of care" arose from the circumstances and interactions pleaded:

> [40] In *Chiasson*, the first scenario identified by the Court of Appeal is the situation where a duty of care arises explicitly or by implication from the statutory scheme. Under the *Municipalities Act 1999*, S.N.L. 1999, c. M-24, there is no regulatory control over dams or canals, and no statutory or regulatory requirement to maintain a storm water management plan.
>
> [41] As a result, assuming the facts pleaded to be true, I conclude the claims in negligence as against the Town have no reasonable prospect of success. It is plain and obvious that the claims as pleaded by the class disclose no reasonable cause of action in negligence as against the Town.

[80] Mr. Dewey submits that the Judge erred in the section 5(1)(a) analysis by not properly considering the pleadings in respect of this argument that the requisite proximity existed to create a duty of care.

[81] On review, the Decision does not consider this alternative pleading that the interactions and assurances brought class members into a close relationship with the Town, such that the requirements respecting proximity and reasonable foreseeability were met, resulting in the creation of a duty of care.

[82] Accordingly, I would respectfully conclude that the Judge erred by not applying the test in section 5(1)(a) in the context of this alternative argument that the requisite proximity and reasonable foreseeability existed to create a duty of care in negligence.

[83] Finally, Mr. Dewey argued on appeal that the Judge erred in applying the test in section 5(1)(a) by going beyond the pleadings and considering evidence, which is not permitted.

[84] Mr. Dewey pleaded in paragraph 41(c) of the amended statement of claim that the Town was negligent in "[f]ailing to conduct thorough and regular inspections of the Humber Canal, despite undertaking to do so".

[85] In the Decision, the Judge acknowledged that "there was a policy by the Town to inspect the Humber Canal weekly" and stated that the purpose of the inspections was to "ensure there was no improper polluting, fishing or other activities that could impact the water supply" (Decision, at para. 39). The Judge's statement appears to preclude other possible purposes of the inspections, including the possibility of inspecting for leaks or flooding concerns.

[86] Mr. Dewey's pleadings do not identify the purpose of the Town's policy to inspect the Humber Canal. It was simply pleaded that the Town failed to "conduct thorough and regular inspections of the Humber Canal, despite undertaking to do so." On appeal, Mr. Dewey submitted that the Judge's conclusions about the purpose of these inspections came directly from affidavit evidence filed on behalf of the Town, which provided the Town's perspective on the purpose of these inspections.

[87] The Town's mayor stated in his affidavit, at paragraph 75: "The canal was designated as a protected water supply area pursuant to section 39 of the *Water Resources Act*, SNL 2002, c. W-4.01 in 2004. As a result, weather permitting, a Town employee inspects the canal every day, for unauthorized camping, fishing, and other activities that could pollute or otherwise compromise the quality of the water". (Appeal Book, Volume 3, Tab 24, at page 761). The Judge accepted this evidence in the Decision.

[88] A determination as to whether a cause of action exists under section 5(1)(a) must be made with reference to the pleadings only, and not to evidence. Going beyond the pleadings, and relying on affidavit evidence in determining this aspect of the certification application, constituted an error (*Thorne*, at para. 52; *Condon v. Canada*, 2015 FCA 159, at paras. 13, 15, 18).

[89] I would respectfully conclude, for the reasons provided, that the Judge erred in the analysis of section 5(1)(a). Accordingly, I would allow the appeal on this issue.

ISSUE 2(b)

If the Judge erred, is it plain and obvious that there is no cause of action against the Town?

[90] Having concluded that there were errors in the analysis in considering section 5(1)(a), this Court may choose to remit the matter to the Supreme Court of Newfoundland and Labrador or undertake its own analysis of whether there is a cause of action against the Town.

[91] These options were discussed with the parties on appeal. It was noted that the matter commenced in 2015, that this Court has already heard a previous appeal in this matter and rendered a decision in 2019 (*Dewey v. Corner Brook Pulp and Paper Limited*, 2019 NLCA 14), and that the issue of certification, arising from the application for certification brought in 2020, remains unresolved.

[92] It is further noted that remitting the matter to the Supreme Court would appear to be unnecessary in this circumstance given that the complete record has been provided to this Court (*Edgecombe v. Nicholas*, 2023 NLCA 19, at para. 66).

[93] Additionally, this Court has the full benefit of the parties' oral and written submissions on appeal on this and other certification issues, as well as the submissions on the application for certification in the Supreme Court. The Court also appreciates that remitting the matter would likely precipitate further delay in resolving the issue of certification (*Lynch v. St. John's (City)*, 2020 NLCA 31, at para. 107).

[94] Therefore, and in these specific circumstances, it is considered appropriate and in the best interests of the parties that this Court undertake its own analysis rather than remit the matter to the Supreme Court (*Matchim v. BGI Atlantic Inc.*, 2010 NLCA 9, at paras. 93-109, leave to appeal to SCC refused, 33660 (22 July 2010)).

[95] To establish a cause of action in negligence against the Town, Mr. Dewey must establish a duty of care.

[96] As noted above, in *Cooper* the Supreme Court of Canada described the two-stage test to be met in this regard, the "*Anns/Cooper*" test. First, Mr. Dewey must establish a *prima facie* duty of care, which requires consideration of reasonable foreseeability and proximity. If a *prima facie* duty of care is established, the analysis in the second stage concerns whether there are policy considerations that would otherwise justify negating the *prima facie* duty of care.

[97] In *Cooper*, the Supreme Court referenced the decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and described the test for determining the existence of a duty of care in the following manner:

> [30] ... At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. ...

[98] The Supreme Court highlighted the importance of proximity in the stage one analysis:

> [31] On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. ...

[99] The Supreme Court further described the analysis required to determine whether a legal relationship has the requisite proximity or closeness, such that it would be "just and fair" to impose a duty of care:

> [32] ... "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson* ...
>
> ...

> [34] Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.
>
> [35] The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. ...

[100] Applying the above, to satisfy section 5(1)(a) this Court must determine whether it is plain and obvious that the pleadings disclose no duty of care. This engages a consideration of whether the facts in the pleadings, which are to be accepted as true, allege a relationship between the class members and the Town that is sufficiently proximate, and the harm caused reasonably foreseeable, to ground a duty of care.

[101] As set out above, the pleadings allege a proximate relationship between the Town and the class members, going back decades to the 1970s, concerning the ongoing flooding problems and the alleged damages resulting to class members:

> 37. The Town became engaged in the flooding problem as early as the 1970's. For decades the Town has known about the flooding problems posed by the Water Control System and the damage being caused to the Class Members' properties.

[102] Mr. Dewey pleaded that the Town adopted policies and took steps to address the flooding, and was negligent in doing so:

> 36. The Town owes the Class Members a duty to use due care in giving effect to, and in putting into operation, its policies concerning the flooding problem posed by Water Control System.
>
> 38. Yet the measures and decisions adopted by the Town, and discussed by Town officials with the Class Members, have been negligently implemented at the operational level.

[103] Mr. Dewey further pleads that the nature of the ongoing interactions and discussions between the Town and class members about the flooding problem created a close and direct relationship that grounded a duty of care:

> 40. Further, and in the alternative, a duty of care arises from the interactions between the Class and the Town, bringing them into a close and direct relationship. ...

The pleadings also allege that the Town provided assurances that it would address the flooding problems:

> 40. For decades, Town officials have engaged in discussions with Class Members about the flooding issue and given assurances that the Town will take necessary steps to address it, albeit with unsatisfactory results.

[104] Finally, in paragraph 41, the pleadings allege that the "Town's acts and omissions have breached the standard of care applicable to it", and outline particulars of the negligence.

[105] Mr. Dewey's allegations are that the Town knew about the flooding problem and the damages that resulted to class members from the flooding, that the Town made assurances that it would deal with this flooding problem, that the Town was negligent in actions it took or failed to take with respect to the flooding, and that the class members suffered damages because of the Town's alleged negligence.

[106] The question at the certification stage analysis, under section 5(1)(a), is not whether Mr. Dewey will or might be successful in proving this claim against the Town in negligence. That would be an issue for a trial on the merits, should such a trial occur. Rather, at this stage, the question is whether it is plain and obvious that Mr. Dewey's pleadings disclose no duty of care (and, therefore, no reasonable cause of action) against the Town.

[107] In my view, for the reasons that follow, it is not plain and obvious that no reasonable cause of action is disclosed in the pleadings.

[108] The facts pleaded describe a "close and direct relationship" based on the "expectations, representations, reliance, and the property or other interests involved" (*Cooper*, at paras. 32, 34). In my view, the pleadings respecting the proximate nature of the relationship between the Town and the class members satisfy the section 5(1)(a) requirement. That is, it is not plain and obvious from these pleadings that they cannot succeed because no duty of care is disclosed. Further, given the nature of the proximate relationship that has been pleaded, it is not plain and obvious from the pleadings that the damages alleged were not a "reasonably foreseeable consequence of [the Town's] act" or omissions (*Cooper*, at para. 30).

[109] Accordingly, accepting the facts in the pleadings as true, if "foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises" (*Cooper*, at para. 30). Given the "close and direct" relationship pleaded, it is not plain and obvious that it would not be "just and fair having regard to that relationship to impose a duty of care in law" (*Cooper*, at paras. 32, 34).

[110] The *Anns/Cooper* analysis also considers whether the *prima facie* duty of care might be negated for policy reasons; that is, "whether there exist policy considerations apart from those considered in determining a relationship of proximity, which would negative a *prima facie* duty of care" (*Cooper*, at para. 51).

[111] The type of government decision that may negate a *prima facie* duty of care was described in *Imperial Tobacco*, at paragraph 90, as a decision "based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith".

[112] In the context of applying the "plain and obvious test" under section 5(1)(a), the Supreme Court of Canada in *Imperial Tobacco* noted that "where it is 'plain and obvious' that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial" (at para. 91).

[113] In my view, there are no policy considerations that would negate the *prima facie* duty of care in this instance. As discussed above, Mr. Dewey is not alleging that the Town had a duty to enact or create policies to deal with the water damage. Such an allegation might rightly engage closer consideration of whether the circumstances constitute a policy decision by the Town that attracts immunity, as described in *Imperial Tobacco*. Rather, Mr. Dewey alleges that the Town enacted policies and took certain actions to deal with the flooding issue, but did so negligently.

[114] The policy versus operational considerations that may arise when alleging negligence against government entities, as considered in such cases as *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; and *George v. Newfoundland and Labrador*, 2016 NLCA 24, do not, in my view, arise in this context. In the present case, the pleadings allege negligent actions or

omissions. The pleadings do not seek to impugn policy decisions that attract immunity from liability in negligence.

[115] The Judge cited the decision of this Court in *George* as support for his finding that the Town had no duty of care. *George* involved a class action brought against the Province regarding moose-vehicle collisions on provincial highways (Decision, at para. 36). The Judge noted that, in *George*, this Court "held that no private law duty will be found in the absence of a government policy which had been formulated previously" (Decision, at para. 36). The Judge concluded that "[d]rawing from the Court's analysis in *George*, it is plain and obvious there is no reasonable cause of action against the Town" (Decision, at para. 38).

[116] With respect, I would conclude that *George* does not support this conclusion in this context. First, the action in *George* was certified as a class action by consent (*George v. Newfoundland and Labrador*, 2014 NLTD(G) 106, at paras. 10-11). There was no contested certification application. This Court's appeal decision in *George*, cited by the Judge, was an appeal from the trial on the merits, where evidence was considered by the trial judge on the common issues, including whether there was a *prima facie* duty of care and whether any duty of care should be negated for policy reasons. The context and the test to succeed at trial is markedly different than the current application for certification, where no evidence is considered and the test is whether it is plain and obvious that the pleadings disclose no cause of action.

[117] Moreover, *George* involved whether a duty of care arose in the absence of government policy regarding the protection of individuals against moose-vehicle collisions on highways. *George* clearly involved considerations of government policy decisions. Both the trial judge and this Court found that the activities and decisions in question were clearly within the policy realm of the policy/operational analysis. That is, it was found that the issues in question regarding moose population management and risk mitigation for motor vehicle accidents involved pure policy decisions. This was the basis on which the government action was immune. This is a very different context than the present certification application.

[118] As the Judge correctly noted, *George* was decided on the basis that "no private law duty will be found in the absence of a government policy which had been formulated previously" (Decision, at para. 36). However, the pleadings in the present certification application, along with the reply to the demand for particulars, state that the respective policies and actions had, in fact, been formulated previously,

but were carried out negligently. This would engage operational activities, distinct from the policy considerations at issue in *George*.

[119] Accordingly, I would conclude that the *prima facie* duty of care would not be negated due to government policy considerations.

[120] Further, and based on the factual context at issue, I would also conclude that there is no concern about the possible negation of a *prima facie* duty of care based on any other policy concerns, such as indeterminate liability. The Judge made no mention of indeterminate liability in the Decision and in my view it is not an issue of concern here, nor a reason to negate a *prima face* duty of care.

[121] In summary, in considering the pleadings and applying the test in section 5(1)(a), I would conclude that the requirement that the pleadings disclose a cause of action has been satisfied with respect to the claim in negligence against the Town.

[122] In reaching this conclusion, it is useful to recall that the test in section 5(1)(a) is whether, based on a consideration of the pleadings and without considering evidence, it is plain and obvious that no reasonable cause of action exists. This has been expressed in various ways. For example, "it is plain and obvious that the … claim cannot succeed" or that the claim is "fatally and irremediably flawed" (*Parsons*, at para. 35); or it "is certain to fail because it contains a radical defect" (*Condon*, at para. 11, citing the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959).

[123] The Supreme Court of Canada in *Atlantic Lottery Corp. Inc.* noted that the test as to whether a cause of action exists, in the context of an application for certification, is the same test used on an application to strike a portion of a statement of claim on the basis that it discloses no cause of action. That is, whether it is "plain and obvious, assuming the facts pleaded to be true, that … the claims disclose no reasonable cause of action" (at para. 14). The Supreme Court added in *Atlantic Lottery Corp. Inc.* that "claims that do not contain a "radical defect" (*Hunt*, at p. 980) should nevertheless proceed to trial" (at para. 89); that the "threshold to strike a claim is therefore high" and that the "correct posture for the Court to adopt is to consider whether the pleadings … disclose a question that is not doomed to fail" (at para. 90).

[124] In my view there is no "radical defect" in the pleadings to yield the conclusion that it is plain and obvious that the pleadings disclose no reasonable cause of action in negligence against the Town (see also *1176560 Ontario Ltd. v. Great Atlantic &*

Pacific Co. of Canada Ltd., 2002 CanLII 6199 (ONSC), at para. 19, aff'd 2004 CanLII 16620 (ONSCDC), leave to appeal refused).

[125] In the result, I would conclude that the requirement of section 5(1)(a) has been satisfied with respect to the claim in negligence against the Town.

ISSUE 3(a)

Did the Judge err in concluding, pursuant to section 5(1)(d), that a class action is not the preferable procedure?

[126] Under the section 5(1)(d) analysis, the test is whether there is "some basis in fact" to find that "a class action is the preferable procedure to resolve the common issues of the class." This determination is not based solely on the pleadings. Evidence may also be considered.

[127] The Judge denied certification on the basis that a class action was not the preferable procedure under section 5(1)(d). Respectfully, I would conclude that the Judge erred in this regard for the reasons that follow.

1. The required comparative analysis respecting preferable procedure, as directed by the Supreme Court of Canada, was not undertaken.

[128] Pursuant to the Supreme Court of Canada's direction in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, a comparative analysis must be completed when assessing whether a class action is the preferable procedure. This comparative analysis was not undertaken in this case.

[129] The Supreme Court described the comparative analysis in *Fischer*:

> [37] Once the alternative or alternatives to class proceedings have been identified, the court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The court should consider both the substantive and procedural aspects of access to justice recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. This comparison, of course, must take place within the proper evidentiary framework that applies at the certification stage.
> ...

[130] In the present case, the required comparative analysis between the proposed class action and other alternative procedures was not done. The Judge accepted that an alternative procedure, namely joinder, was preferable to a class action without engaging in the comparative analysis mandated by the Supreme Court. This constituted an error in principle (*Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916, at paras. 18, 47, leave to appeal to SCC refused, 37436 (8 June 2017)).

[131] As noted in *1176560 Ontario Ltd.*, at paragraph 27 (citing the Supreme Court of Canada's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158), it is not sufficient to make "bald assertions" that some other procedure (for example, joinder) is preferable to a class action:

> [27] However, despite the considerations that are engaged in determining whether a class proceeding is a preferrable procedure ... it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test case or similar procedures are preferrable to a class proceeding. This is a simple shopping list that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred.

2. *The Judge's preferable procedure analysis under section 5(1)(d) was premised on the fact that the class size had been determined, when it had not.*

[132] The Judge's decision that a class action was not the preferable procedure, and that joinder would be preferable, was based on the Judge's misapprehension that the class size had been determined and that it would be small, with approximately 20 class members having claims for damages (Decision, at para. 94).

[133] However, the class size had not been determined or agreed upon, and there was conflicting evidence in the record on this point. There was evidence that the class size could be significantly higher than the 20 class members identified by the Judge. For example, the record indicated that Mr. Dewey estimated that 150 people expressed interest in joining the class (Transcript of Cross-Examination, Appeal Book, Volume 3, Tab 29, at page 128, line 10), that occupiers of 43 properties had expressed interest in the action (Lewin Affidavit, Appeal Book, Volume 2, Tab 18, at page 622, paras. 6-7), and that 69 out of 89 respondents to a survey had reported having experienced water issues, flooding, and seepage (SNC-Lavalin Report, Appeal Book, Volume 2, Tab 16, at page 510).

[134] The Decision reveals that the Judge's misapprehension about the class size was significant to his finding that a class action would not be a fair, efficient, and manageable method of proceeding with the litigation, and that joinder was the preferable procedure (Decision, at paras. 94, 96-97).

[135] For example, the Judge noted the defendants' suggestion that "given the small number of claims, joinder would be a more preferable form of resolution" (at para. 84). The Judge stated that "only a small number of people were affected by the flooding at issue" (at para. 96), and referenced class size as a reason why resolution of the common issues would not significantly advance the action (at para. 93).

[136] The Decision also suggests that a class action is the preferable procedure when there is a substantial class, but perhaps not when there is a small one. This appears to result from the interpretation of this Court's decision in *The College of the North Atlantic v. Thorne*, 2015 NLCA 47 (Decision, at para. 96). However, that decision did not establish that any minimum number of class members was required before a class action would be considered the preferable procedure, and did not conclude that a class that is not substantial would be inappropriate for certification as a class action.

[137] The Judge's error in finding that the class size had been determined appears, to use the language of the Ontario Court of Appeal in *Excalibur*, to have "tainted his analysis of the preferable procedure" (at para. 54).

[138] The Judge determined the issue of preferable procedure based on a misapprehension that the class size had been determined (and was "small"), when the class size had yet to be determined and there was conflicting evidence on this point indicating that the class may be significantly larger than the number referenced by the Judge. This was a palpable and overriding error (see *Fischer*, at para. 42, citing *1176560 Ontario Ltd.*). As *Fischer* notes, it is inappropriate to weigh evidence or determine an issue at the certification stage based on evidence that is in issue (at para. 40).

3. *The section 5(1)(d) analysis did not focus on determining preferable procedure by considering how the proposed procedures might address obstacles to access to justice and other issues.*

[139] The Supreme Court of Canada in *Fischer* stressed that the analytical approach under section 5(1)(d) must be undertaken through the lens of promoting the goals of access to justice, judicial economy, and behavior modification. While these goals

were identified by the Judge, the Decision does not evince that an analysis was undertaken to determine which procedure would be preferable in terms of addressing potential barriers to access to justice, judicial economy, and behavioural modification (*Fischer*, at para. 16).

[140] In summary, I would respectfully conclude that the Judge erred in the analysis under section 5(1)(d), and I would allow the appeal on this issue.

ISSUE 3(b)

If the Judge erred, is there some basis in fact to conclude that a class action is the preferable procedure?

[141] For the reasons provided above, in paragraphs 90-94, I would also conclude that it is appropriate, and in the parties' best interests that this Court undertake the preferable procedure analysis under section 5(1)(d), rather than remitting the issue to the Supreme Court of Newfoundland and Labrador.

[142] The Supreme Court of Canada has indicated that preferable procedure involves two aspects. These involve whether prosecuting the litigation as a class action would be a fair, efficient, and manageable method of proceeding, and whether using the procedure of a class action would be preferable to other procedures (e.g. joinder) (*Fischer*, at para. 48; *Hollick,* at para. 28).

[143] In *Fischer,* the Supreme Court stated that preferable procedure involves a comparative analysis, comparing possible alternatives that have been identified with the proposed class proceeding:

> [23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the [*Act*], but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. …

[144] This comparative analysis must be conducted through the lens of the three principal goals of class actions, namely access to justice, judicial economy, and behaviour modification (*Fischer*, at para. 16). In *Fischer,* the Court confirmed that what must be determined under a preferable procedure analysis is "whether the proposed action would be the preferable procedure to resolve the common issues

having regard to the purposes of class proceedings: judicial economy, behaviour modification and access to justice" (at para. 8).

[145] As the Supreme Court observed in *Hollick*, "the *Act* should be construed generously" to achieve the purposes of the legislation relating to access to justice, judicial economy, and behaviour modification (at para. 14). The Court in *Hollick* endorsed the approach that "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court" (at para. 29).

[146] While the preferable procedure analysis is undertaken through the lens of promoting these objectives, the Supreme Court in *Fischer* also cautioned that this "should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case", and that courts must "not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized" (at para. 22).

[147] The Court in *Fischer* added that access to justice in this context has both a procedural and a substantive focus, stating that it has "two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established" (at para. 24).

[148] Per *Fischer*, the comparative analysis under section 5(1)(d) of the *Act* must address access to justice in terms of both fair process and substance (i.e., results):

> [25] ... The correct approach, however, must include both substantive and procedural aspects in assessing whether a class action is the preferable procedure. The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of the losses suffered. In other words, in some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done. ...

[149] *Fischer* outlined the following questions to be considered to "inform the overall comparative analysis" (at para. 26):

> (1) What Are the Barriers to Access to Justice?

(2) What Is the Potential of the Class Proceedings to Address Those Barriers?

(3) What Are the Alternatives to Class Proceedings?

(4) To What Extent Do the Alternatives Address the Relevant Barriers?

(5) How Do the Two Proceedings Compare?

[150] These questions will be considered in the context of the present preferable procedure analysis.

1. What Are the Barriers to Access to Justice?

[151] *Fischer* notes that the "most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim" (at para. 27).

[152] In the present case, this economic barrier appears to exist. Absent a class proceeding, litigants would need to prosecute claims individually, absorbing the substantial costs of the litigation, including the costs of expert and technical evidence required to prove the claim. The cost of prosecuting the litigation on an individual basis would likely be an economic barrier to access to justice and would factor against the commencement of individual actions.

[153] Further, *Fischer* notes that "barriers are not limited to economic ones: they can also be psychological or social in nature ... [and] may arise from such factors as the ignorance of the availability of substantive legal rights" or "fear of reprisals by the defendant" (at para. 27).

[154] In the present case there are potential social barriers to access. Mr. Dewey, on cross-examination on his affidavit, described Deer Lake as a small-town setting, where everyone knows pretty much everyone else (Transcript of Cross-Examination, Appeal Book, Volume 3, Tab 29, at pages 66, 126). In such a context it is not difficult to imagine that there may be some reluctance about commencing a legal action, on an individual basis and in one's own name, against the Town or against Corner Brook Paper, a prominent corporate employer in the region. A class action, with a representative plaintiff, may address this concern. Notably, despite flooding concerns over a long period, the record discloses no individual claims commenced through the courts. While there may be various reasons for this apparent absence of

individual litigation, to some degree this might be attributable to existing barriers to access to justice, as described in *Fisher*.

[155] As will be discussed below, there may also be procedural barriers to access to justice related to the rigidity of litigating an individual claim as compared to a class action proceeding. That is, the *Act* provides increased flexibility that may not exist in conventional civil litigation.

2. *What Is the Potential of the Class Proceedings to Address Those Barriers?*

[156] As observed in *Fischer*, a class action may overcome the economic barrier associated with an individual litigating in their own right:

> [29] A class action may allow class members to overcome economic barriers "by distributing fixed litigation costs amongst a large number of class members . . . [and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own": *Hollick*, at para. 15. ...

[157] A class action in this instance may address this economic barrier by allowing for the distribution of the litigation costs (including the cost of expert reports) among the class members, rather than having individual litigants bear these costs.

[158] Further, *Fischer* notes that a class action may also address non-economic access to justice barriers:

> [29] ... It may also allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf.

[159] In the present claim, a potential social barrier may arise with an individual being reluctant to personally commence legal action directly against the Town where that person resides, or against a prominent corporate regional employer (Corner Brook Paper) that may employ family members, neighbours or friends in the community. This barrier might also be addressed through a class action.

[160] *Fischer* adds that a class procedure may provide procedural mechanisms that promote access to justice:

> [30] Through these procedural mechanisms, a class action provides access to the courts for class members. Thus, it is a "procedural tool" (*Hollick*, at para. 15): it does not guaranty results for class members.

[161] In the present case, Mr. Dewey submits that there are examples of these procedural mechanisms within the class proceeding context that may provide increased flexibility and procedural efficiencies that might not otherwise be available outside a class action.

[162] Many of these procedural advantages flow directly from the *Act*. For example:

- The identity of all class members need not be known before the action is commenced (s. 8 of the *Act*). In contrast, in joinder, all litigants would need to be known parties to the litigation.

- A class action, once certified, presumes class members to be in the class (within the Province, or they can opt-in from outside the Province). However, to be involved in litigation outside the class action procedure, an individual would need to commence an action. There is no automatic opt-in. This may constitute a barrier to participation.

- Class members are bound by a court's decision unless they take measures to opt-out within a court-defined timeline. In contrast, joinder would not be binding on unnamed plaintiffs. This may lead to conflicting results and a lack of finality, as claims can be brought and litigated individually over a protracted period.

- There is availability for amendment or decertification should new evidence arise later in the proceeding (s. 11 of the *Act*).

- The *Act* provides authority to the court to move the litigation forward in a manner that is expeditious and fair. That is, the judge may determine the conduct of the class action to ensure a fair and expeditious determination and may impose terms on the parties as deemed appropriate (s. 13 of the *Act*).

- The *Act* provides the court with a great deal of flexibility to resolve individual issues efficiently, while not derogating from or supplementing the substantive rights of the parties (s. 27 of the *Act*).

- A class proceeding involves court oversight in various aspects of the proceeding, including the filing of a litigation plan, notice requirements, settlements, and class counsel fees. These may facilitate participation in the class proceeding and promote access to justice.

[163] Additionally, while some of the above advantages of class proceedings are procedural in nature, they may also promote access to a substantive outcome or result, as noted in *Fischer*:

> [31] That being said, class proceedings exist not only to provide access to a procedure, but also to substantive results. ...
>
> ...
>
> [34] Thus, class actions overcome barriers to litigation by providing a procedural means to a substantive end. ... Even though a class action is a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice.

3. What Are the Alternatives to Class Proceedings?

[164] At the certification application in Supreme Court, Corner Brook Paper raised arbitration as a possible alternative procedure and the Province raised the possibility of joinder as an alternative to a class action.

4. To What Extent Do the Alternatives Address the Relevant Barriers?

[165] *Fischer* noted that possible alternatives to a class proceeding may include procedures within the court litigation system or those outside the litigation sphere (i.e., non-litigation alternatives).

> [36] The motions court must look at all the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim: *Hollick*, at para. 30. In some cases, non-litigation means of redress will be considered in

> conjunction with individual actions: see e.g. *Hollick*, *Cloud* and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.). ...

[166] The preferable procedure analysis considers how proposed alternatives address both the procedural and substantive aspects of access to justice:

> [37] ... The court should consider both the substantive and procedural aspects of access to justice recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. ...

[167] In the present context, Corner Brook Paper suggested arbitration as a preferable procedure. Corner Brook Paper had previously made a separate application to the Supreme Court of Newfoundland and Labrador, seeking an order that these claims could not be litigated through the court system as a class action, but must be resolved through arbitration.

[168] Corner Brook Paper's application was allowed at first instance in the Supreme Court. On appeal, this Court reversed the Supreme Court decision and concluded that arbitration was not mandatory, and that Mr. Dewey's court action could proceed. Mr. Dewey's 2020 certification application followed shortly after this Court's decision on the arbitration issue.

[169] At the certification application, Corner Brook Paper submitted that arbitration was a preferable procedure. The Judge did not reference arbitration in the Decision.

[170] The burden to provide details and evidence respecting alternative procedures that operate outside the court litigation sphere (i.e. non-litigation alternatives) rests with the party proposing that alternative. No details were provided by Corner Brook Paper as to how arbitration would be a preferable procedure in terms of promoting access to justice, judicial economy or behaviour modification. No evidence was provided by Corner Brook Paper or the other parties as to how arbitration, as a procedure external to the litigation system, could address the barriers to access to justice as discussed in *Fischer*. No rationale was provided by Corner Brook Paper or the other defendants to explain how arbitration might be the preferable procedure under section 5(1)(d). It was simply suggested. As noted, this Court had already rejected that arbitration was compulsory to address the claims. Under the *Fischer* analysis, more is required than to simply mention that arbitration exists as a possible alternative procedure.

[171] Another procedural alternative proposed at the certification application was joinder. Joinder was mentioned by the Province, again without particulars or rationale as to why it was the preferable procedure.

[172] In oral submissions at the certification hearing in the Supreme Court, at pages 233-234 of the transcript, the Province suggested joinder as an alternative, as follows:

> The Province submits that the proposed class proceeding is not preferable to other alternatives. There's been some significant investigation that has gone on. There is evidence of only a small number of members of the proposed class who actually suffered flooding on their properties. The record demonstrates that these people seek significant damages such that individual actions, as alluded to yesterday, perhaps advanced by joinder, might be preferable to a class proceeding ....

[173] No argument was advanced as to how joinder had the "potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights" (*Fischer*, at para 37). Joinder was simply posited as a possible alternate route by which the litigation could proceed without using a class action, and the Judge agreed and found that joinder was preferable to a class action.

[174] Notably, the Province's submission that joinder was the preferable procedure was made on the basis that "only a small number of members of the proposed class suffered flooding on their properties" (Certification Hearing Transcript, at page 234). As discussed previously, the class size and number of claims had not been determined, and the Judge erred in finding otherwise.

[175] Both arbitration and joinder were mere suggestions made to the Judge without any substantial rationale to support a conclusion that they were preferable procedures. In this context, these suggestions may be considered "bald assertions". As observed by Justice Winkler in *1176560 Ontario Ltd.*, at paragraph 27 (citing *Hollick*), "it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test case or similar procedures are preferable to a class proceeding. This is a simple shopping list that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred".

[176] In a *Fischer* analysis, more is required than simply outlining a "shopping list" of litigation or non-litigation alternatives, invoked without meaningful analysis of

their comparable merit as a preferable procedure. In the present context, no meaningful rationale was offered as to how the alternatives might address the barriers identified in *Fischer*.

5. How Do the Two Proceedings Compare?

[177] The comparative analysis in *Fischer* involves determining "whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place: *Hollick*, at para. 33." On the understanding that barriers to access to justice exist, an assessment is done to determine whether "the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case" (*Fischer*, at para. 38).

[178] To this end, the comparison involves a costs-benefits analysis whereby a court on certification must "consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure" (*Fischer*, at para. 38).

[179] As noted, there was a dearth of argument, analysis or reasoning to support how barriers to access to justice could be addressed through either joinder or arbitration.

[180] As discussed above, a class proceeding may address the economic, non-economic and procedural barriers to access to justice.

[181] In contrast to a proposed class action, with respect to arbitration there were no details on how the claims in negligence and nuisance against Corner Brook Paper, or the claim in negligence against the Town, could be efficiently prosecuted by arbitration, or how proceeding by way of arbitration might address access to justice barriers.

[182] With respect to joinder, similarly there was no meaningful analysis provided regarding how the barrier of economic costs of the traditional litigation procedure, as discussed in *Fischer*, could be addressed by having serial claims commenced by individuals, which might subsequently be joined.

[183] There was also no rationale provided as to how the non-economic barriers to access to justice, discussed above, could be addressed by either alternative. Nor

were there details provided to support how the alternatives might offer any of the procedural advantages of a class action proceeding, as outlined above. This absence of meaningful analysis as to how the proposed alternatives might address access to justice concerns is significant in the *Fischer* comparative analysis.

[184] Based on the above, in comparing the class action to the other suggested alternatives, I would conclude with respect to access to justice that a class action would be the preferable procedure.

[185] Similarly, regarding the purposes of promoting judicial efficiency and behavioural modification, I would also conclude on a comparative analysis that there is "some basis in fact" that a class proceeding is preferable to the alternatives. Again, there was no meaningful analysis as to how the alternatives of joinder or arbitration might be preferable procedures in respect of these purposes.

[186] Regarding judicial economy, the class action in this circumstance would involve one trial of the common issues as opposed to serial, individual trials. Judicial economy can be achieved in having a single trial in these circumstances, as observed in *1176560 Ontario Ltd.*:

> [51] The judicial economy to be gained by having the common issues determined in a single trial is patently obvious. [Numerous] potential trials will, for all intents and purposes, be reduced to one because of the overwhelming commonality. This is a desirable result for the court and the parties. From the court's perspective, it does not tie up judicial resources and eliminates the risk of inconsistent results. From the plaintiffs' perspective, the costs and time expenditures are kept to a minimum and [numerous] actions are determined at once. With respect to the defendant, a meritorious defence will terminate the litigation once and for all. This economy can only be achieved through a class proceeding. ...

[187] With respect to behavioural modification, the observations of Justice Winkler in *1176560 Ontario Ltd.* are apposite to the present matter. Behavioural modification is considered in the procedural context, providing an efficient means by which the class can prosecute the litigation and, if successful, have the defendants account for their conduct:

> [57] Similarly, the goal of behavioural modification must be considered in the procedural context. In that respect, the consideration becomes one of whether certifying a particular class proceeding can provide a means by which, the defendants, if proven liable to the class members, will have to take full account of the cost of their

> conduct. (See *Hollick*, at para. 34; *Western Canadian Shopping Centres*, at para. 29.)
> ...

[188] Returning to the other aspect of preferable procedure identified by the Supreme Court of Canada, it must also be considered whether a class action in this instance would be a fair, efficient, and manageable method of proceeding with the litigation (*Fischer*, at para. 48; *Hollick*, at para. 28). In this regard, section 5(2)(a) of the *Act* states that "in determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether questions of fact or law common to the members of the class predominate over questions affecting only individual members".

[189] For the reasons that follow, I would conclude that there is some basis in fact to conclude that a class action in the present context would be a fair, efficient and manageable manner of proceeding that would significantly advance the litigation.

[190] In certain circumstances, a certification application will raise obvious and significant concerns regarding a proposed class action's efficiency, manageability or fairness that would make the action inappropriate for certification (see, for example, *Davis*). No such obvious concerns relating to fairness, manageability or efficiency are evident in the record and evidence in the present circumstance.

[191] Efficiency concerns may also entail consideration as to whether it is more efficient to have the litigation proceed as a class proceeding or to have the issues litigated individually, for example by using an alternative procedure such as joinder.

[192] Joinder was discussed above in the context of the comparative analysis in determining preferable procedure. The conclusion above, in comparing joinder with the proposed class action, was that the class action would be the preferred procedure in terms of advancing the goals of access to justice, judicial economy and behaviour modification.

[193] In the present case, the Judge considered efficiency with respect to the extent a common issues trial could advance the litigation. That is, if the common issues were litigated through a class action procedure, to what extent would this advance the litigation?

[194] Citing the conclusion in *Hollick*, the Judge indicated that it would be "difficult to say that the resolution of the common issues will significantly advance the action" (Decision, at para. 88).

[195] In *Hollick*, the Supreme Court of Canada indicated that whether an environmental tort claim is certified as a class action depends on the circumstances of the claim and is fact-specific. The Court stated: "The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts" (at para. 37).

[196] The present claim is very different from *Hollick* on its facts and on the factors relevant to a preferable procedure analysis.

[197] For example, in the particular circumstances of *Hollick*, the Court found that "access to justice is not a serious concern" (at para. 33). This finding was based in part on the existence of an alternative procedure available to claimants in *Hollick*, allowing them to recover damages. That alternative procedure involved making a claim to a Small Claims Trust Fund, a no-fault scheme, which the Court stated would "provide an ideal avenue of redress", and which would be "likely to provide redress far more quickly than would the judicial system". Unlike *Hollick*, in the present case there is no fund against which claimants can recover. Unlike *Hollick*, access to justice remains a significant concern in the present application and, as directed by *Fischer*, it provides the lens through which the preferred procedure analysis is to be undertaken.

[198] Additionally, the factual context of *Hollick* is markedly different than the present claim. *Hollick* involved a claim by 30,000 people, spread over a 16 square mile area, claiming damages for noise and physical pollution allegedly arising from a landfill. Liability was contested, even regarding whether there was any impact on the claimants at all, because air emissions from the site confirmed that "none of the air levels exceed Ministry of Environment trigger levels" (at para. 6). Causation was a significant and complicated issue. There were disparate and unrelated possible sources of the pollution quite apart from the landfill, including "an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations" (at para. 6).

[199] In contrast, the evidence and expert reports in the present claim generally acknowledge the presence of elevated groundwater that has impacted the area in question. Unlike the situation in *Hollick*, this area is relatively small, with the class boundary encompassing 300 hectares (which is approximately 1.2 square miles) (Strum Report, Appeal Book, Volume 2, Tab 16, at page 437).

[200] As well, again unlike *Hollick*, there is no allegation that the elevated groundwater flooding in the present claim was caused by activities of external industrial entities other than the named parties. In *Hollick,* the Court noted that "some class members are close to other possible sources of pollution". This would occasion a more complicated causation assessment on a common issues trial than in Mr. Dewey's situation (para. 32). In the present case there appears to be general acceptance among the expert reports in the record that the groundwater is elevated within the approximately 1.2 square mile class boundary area.

[201] Further, a common issues trial will significantly advance the litigation by determining the common issues relating to the alleged liability of the defendants (in negligence for the Town, and in nuisance and negligence for Corner Brook Paper), by determining whether the defendants caused or materially contributed to the flooding and, if so, whether it is possible to establish their respective percentage or degree of fault.

[202] Both Corner Brook Paper and the Town vigorously contest liability. Therefore, a trial will likely be required to determine liability and causation, regardless of whether the form and procedure of that trial occurs through a class action or by serial, individual actions (whether joined or not). Whatever the procedural format, there will need to be a trial on these issues. The trial process becomes no more cumbersome, inefficient, unmanageable or unfair simply because it occurs in a class proceeding. As discussed above, there are more flexible rules that apply to a class proceeding by virtue of the *Act* that would be otherwise unavailable, which might ultimately make a class action a comparatively more efficient vehicle to determine the claims (*Anderson et al v. Manitoba et al*, 2017 MBCA 14, at paras. 60-63).

[203] Further, as noted by the Supreme Court in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, "[w]hen thinking about whether a proposed common question would "advance *the litigation*", it is the perspective of *the litigation*, not the plaintiff, that matters. A common issues trial has the potential to *either* determine liability *or* terminate the litigation..." (at para. 109). In the present case, if no

liability is found after a common issues trial, the litigation will likely end. As a class proceeding, this will provide Corner Brook Paper and the Town with greater finality, as a judgment (except for possible opt-outs) will bind the class. In that respect, it affords greater efficiency from "the perspective of the litigation". Likewise, a finding of liability and causation after a common trial would also advance the litigation, notwithstanding that further matters of causation or individual damages may remain (*Anderson et al v. Manitoba et al*, 2015 MBCA 123, at para. 105; *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ONCA), at paras. 77-88, leave to appeal to SCC refused, 30759 (12 May 2005)).

[204] Additionally, there will likely be conflicting evidence on whether, and to what extent, the defendants are responsible for the elevated groundwater. The Judge, in the Decision, attempts to identify potential causes at the certification stage, some of which appear to impugn the defendants (e.g. "seepage through the dyke", "movement of groundwater from the canal", "the lack of an effective storm sewer system") and others that might suggest natural causes (e.g. "overland flow associated with a rainfall event and/or snowmelt", "geology of the area") (Decision, at para. 90).

[205] However, care must be taken at the certification stage regarding evidence. First, the Judge's summary of potential causes was based on evidence and a report provided by just one of the parties (the Khan Report provided by the Province), which the Judge described as "a review of all three expert reports relied upon by the parties", notwithstanding that the other reports contained conflicting evidence and conclusions. Moreover, as stated in *Fischer*, a court at the certification stage "is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (at para. 40).

[206] As noted in *Fischer*, the "some basis in fact standard does not require that the court resolve conflicting facts and evidence at the certification stage" (at para. 40). Therefore, at the certification stage, "the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements" (at para. 43). In my view, in the present case, Mr. Dewey has demonstrated some basis in fact to satisfy the preferable procedure requirement.

[207] In the result, and having considered the evidence in the record, I would conclude that there is some basis in fact to conclude that a class action in this instance would be a fair, efficient, and manageable method of proceeding with the litigation

and, in comparison to the proposed alternatives, that a class action is the preferable procedure.

[208] Accordingly, I would conclude that Mr. Dewey has met the requirement of section 5(1)(d) to show "some basis in fact" that a class action would be the preferable procedure.

ISSUE 4

Have the remaining requirements for certification been met and, if so, should the action be certified as a class action?

[209] Setting aside for the moment the requirements of section 5(1)(e), which will be considered below, the certification requirements for the remaining sections, 5(1)(a) to (d), are as follows:

> 5. (1) On an application made under section 3 or 4, the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
>
> (d) a class action is the preferable procedure to resolve the common issues of the class;

The requirements of sections 5(1)(a), (b) and (d) have been established

[210] Regarding section 5(1)(a), as discussed above the Judge found that the pleadings disclosed a cause of action in both negligence and nuisance against Corner Brook Paper and this has not been appealed (Decision, at paras. 18-19, 25). I would agree with the Judge's determinations in this respect. Further, as discussed above, I would conclude that the pleadings also disclosed a cause of action against the Town in negligence. Therefore, I would conclude that the requirements of section 5(1)(a) have been met.

[211] Regarding section 5(1)(b), there is a requirement that there be a class of two or more persons. The Judge found that this requirement was met (Decision, at paras. 51-58) and this has not been appealed. I would agree with the Judge's conclusion that there is some basis in fact establishing an identifiable class of two or more persons. I would therefore conclude that this requirement has been satisfied.

[212] Regarding section 5(1)(d), for the reasons provided above I would conclude that there is some basis in fact that a class action is the preferable procedure to resolve the common issues of the class respecting the claims against Corner Brook Paper and the Town. Accordingly, I would conclude that this requirement has been met.

Section 5(1)(c) – Claims of the class members must raise a common issue

[213] Regarding section 5(1)(c), the Judge found that the claims of the class members raised common issues in negligence and nuisance against Corner Brook Paper, and no appeal was taken from this finding (Decision, at paras. 65-73, 80).

[214] I would agree with the Judge's conclusion that there is some basis in fact to establish that the claims of the class members raise the following common issues against Corner Brook Paper in negligence and nuisance. The numbers below correspond to the numbers in paragraph 6 of Mr. Dewey's certification application:

> 1. What duty of care does [Corner Brook Paper] owe with respect to the Class Members' interests as owners or occupiers of properties within the Class Boundary?
>
> 4. Did [Corner Brook Paper] breach the duty of care?
>
> 7. Was harm to the Class Members' properties within the Class Boundary a reasonably foreseeable consequence: of [Corner Brook Paper's] breach of the duty of care?
>
> 8. Did [Corner Brook Paper] cause or materially contribute to the flooding within the Class Boundary?
>
> (Certification Application, Appeal Book, Volume 1, Tab 8 at page 96)

[215] In addition, because I have concluded above that the pleadings disclose a cause of action in negligence against the Town, it must also be considered whether the claims of the class members raise common issues in this respect.

[216] Again, for reasons stated above in paragraphs 90-94, this Court has a proper record on which to consider the proposed common issues relating to the claim against the Town and has the benefit of the submissions of the parties in this Court and in the Supreme Court of Newfoundland and Labrador. As such, and cognizant that the matter remains at the certification stage notwithstanding that the litigation began in 2015, it is considered to be in the parties' interests for this Court to consider the common issues, rather than remitting the matter to the Supreme Court.

[217] The proposed common issues in the claim against the Town are the same as the common issues considered by the Judge in the claim against Corner Brook Paper. Again, the numbers below correspond with the numbers in paragraph 6 of the certification application:

> 2. What duty of care does the Town owe with respect to the Class Members' interests as owners or occupiers of properties within the Class Boundary?
>
> 5. Did the Town breach the duty of care?
>
> 7. Was harm to the Class Members' properties within the Class Boundary a reasonably foreseeable consequence: of the Town's breach of the duty of care?
>
> 9. Did the Town cause or materially contribute to the flooding within the Class Boundary?

[218] Because there are two defendants to the action, the Town and Corner Brook Paper, an additional common issue arises concerning the "percentage or respective degrees of fault between the Defendants". This issue is stated in the certification application as common issue 11, as follows:

> 11. If the answers to Common Issues 8, 9, or 10 is "Yes", and it is determined that one or more of the Defendants caused or materially contributed to the flooding within the Class Boundary, is it possible to establish the percentage or respective degrees of fault between the Defendants?

[219] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court of Canada observed that the common issues or

"commonality requirement" is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings" (at para. 106).

[220] In *Pro-Sys Consultants Ltd.*, at paragraph 108, the Supreme Court noted its prior decision in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, wherein the Court stated that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (at para. 39).

[221] The Court in *Pro-Sys Consultants Ltd.*, further noted the directions provided in *Dutton*, at paragraphs 39-40, when assessing whether a proposed issue meets the requirements of a common issue. These are:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[222] Similar observations were made by the Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, in paragraphs 45-46, wherein the Court stated:

> [45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for

> one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[223] Common issues are appropriate for certification where the resolution of the proposed issues will advance the litigation. Issues are common when they do not solely concern the particular circumstances of individual class members. Rather, they relate to issues that are common to the class, and the answers to the issues do not raise conflicting interests among the class.

[224] In Mr. Dewey's certification application, the proposed common issues concern the existence of the Town's duty of care, whether a duty of care has been breached, causation, as well as the potential apportionment of liability or fault between the defendants. In my view, the proposed issues meet the commonality requirements as described in *Dutton* and *Vivendi*.

[225] No individual claim can be successful against the Town without proving the common issues relating to whether the Town owes a duty of care, whether the Town breached the duty of care, whether the harm was reasonably foreseeable, and whether causation has been established.

[226] As referenced above, in the discussion of preferable procedure, the determination of the common issues through a collective claim of the class, as opposed to serial individual claims, avoids the prohibitive expense, complexity and duplication of legal analysis in proving or disproving liability.

[227] Regarding the proposed common questions in the claim against the Town in negligence, as noted by this Court in *Anderson*, at paragraph 112, citing the Supreme Court of Canada's decision in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, "all class members share an interest in the question of whether the appellant breached a duty of care, on claims of negligence … no class member can prevail without showing duty and breach".

[228] Accordingly, the resolution of common issues relating to duty of care, breach of duty, and causation with respect to the claim in negligence against the Town will significantly advance the litigation. Individual issues will remain after the resolution of the common issues. If the common issues are resolved in favour of the class members, the litigation can then move on to consider any remaining individual issues and damages. Should the common issues be resolved in the Town's favour, this will also advance the litigation as, in that case, liability will not have been established and the litigation may come to an end.

[229] The Judge found that there was evidence in the record to support the proposed common issues relating to the claims in negligence and nuisance against Corner Brook Paper (Decision, at paras. 68-70). Much of the same evidence also supports the common issues relating to the claims in negligence against the Town.

[230] For example, the Decision cites the affidavit evidence and expert report of Bruce Strum, a hydrogeologist (the "Strum report"), and a report from SNC Lavalin (the "SNC Lavalin report") with respect to the particulars of the alleged flooding and recommendations to address ongoing problems associated with elevated groundwater levels (at para. 69). These reports, along with other evidence in the record, are relevant to the proposed common issues (including establishing the requisite proximity to create a duty of care, particulars of the alleged breach of duty, reasonable foreseeability, and causation) relating to the claim against the Town and satisfy the requirement of section 5(1)(c) to show "some basis in fact" that the claims of the class members raise a common issue.

[231] I would agree with the Judge's statement that "certification is not the time to resolve the cause of the flooding and associated water issues", and that the "*Act* only requires a common question that can result in the resolution of the litigation with respect to all class members" (Decision, at para. 70). In my view, the evidentiary record filed on the certification application provides some basis in fact to conclude that the proposed common issues meet the *Act*'s requirement regarding the claim in negligence against the Town.

[232] Similarly, with respect to causation, I would conclude that Mr. Dewey has established some basis in fact that there is a common issue relating to the cause of the flooding. In this regard, the focus is on whether the alleged actions or omissions of the Town caused flooding "in a general sense" and not the "specific effect of the flooding on each individual … property or residence" (*Anderson et al. 2017*, at para. 45).

[233] While individual circumstances and claims may need to be considered after the common issues, this would not pose a barrier to certification (*Vivendi,* at para. 42). This is consistent with section 8(a) of the *Act*, which states that a "court shall not refuse to certify an action as a class action" simply because "the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues".

[234] Finally, regarding the proposed common issue concerning the apportionment of fault or liability between the defendants, I would conclude that there is some basis in fact that this would raise a common issue, appropriate for a common issues trial. Again, this proposed common issue is focused on apportioning fault or liability between the defendants with respect to the general cause of the flooding. Determination of this issue would not engage circumstances or evidence relating to individual claimants (*Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111, at paras. 143-147, leave to appeal to SCC refused, 38678 (17 October 2019)).

[235] For the reasons provided above, I would conclude that the requirements of section 5(1)(c) have been met regarding proposed common issues 2, 5, 7, 9, and 11, set out above, which concern the claim in negligence against the Town and consideration of whether it is possible to establish the percentage or respective degrees of fault between the defendants.

Section 5(1)(e) – The requirement for a class representative

[236] The remaining requirement, in section 5(1)(e), concerns the appointment of a class representative. In the certification application, Mr. Dewey was named as the proposed class representative.

[237] As noted earlier, the Judge did not consider this requirement because he found that other requirements in section 5 had not been met, stating: "Given my findings concerning the preferability criteria in section 5(1)(d), there is no basis on which to conduct the requisite representative Plaintiff analysis under section 5(1)(e)" (at para. 101).

[238] Again, for the reasons provided above in paragraphs 90-94, in the circumstances of this matter it is considered appropriate and in the parties' interests for this Court to assess whether the requirements of section 5(1)(e) have been satisfied, rather than remitting the matter to the Supreme Court of Newfoundland

and Labrador. This Court has the record on which this determination can be made as well as the parties' submissions on section 5(1)(e) made in this Court and in the Supreme Court.

[239] Section 5(1)(e) states that a class representative is a person who:

> (i) is able to fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[240] The first stated requirement is that the representative "is able to fairly and adequately represent the interests of the class". Mr. Dewey's affidavit evidence states he is prepared to act as representative plaintiff and accept the responsibilities associated with that role.

[241] The record indicates that Mr. Dewey has been involved in the litigation as a plaintiff since the claim was originally commenced in 2015 and has remained actively engaged in the litigation since that time. For example, the record reflects that he has been present for the cross-examination of experts and other witnesses, as part of the ongoing litigation.

[242] Mr. Dewey was also cross-examined on his own affidavit evidence in 2020 by counsel on behalf of the defendants and a copy of this cross-examination was included in the record on appeal. It indicates that he was questioned about the claim, including living in Deer Lake, the problems that he alleges to have been occasioned by the flooding, steps taken to deal with the flooding, and health issues that are alleged to have resulted from the flooding.

[243] Mr. Dewey, on cross-examination, also answered questions of counsel relating to his interaction with other class members, his understanding of the certification process and the trial process, his understanding of common issues versus individual issues in class actions, and about the fact that he had been active for many years in using social media, the traditional news media, and other means to provide information to persons potentially impacted by the water issues, and to raise awareness and make himself available to speak with interested persons and respond to queries relating to the claim.

[244] In this respect, I would conclude from the record that Mr. Dewey has met the first requirement, and that he "is able to fairly and adequately represent the interests of the class".

[245] The second stated requirement in section 5(1)(e) is that the class representative "has produced a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action". Mr. Dewey has filed a plan setting out how the action will be advanced, if certified, and how class members would be notified. The proposed litigation plan was part of the record, being an exhibit to the certification order, and has been reviewed. It describes the plan to distribute the notice of certification, the steps to be taken following certification and before a common issues trial, and it contemplates individual assessments after the common issues have been decided. Accordingly, I would conclude that this requirement is satisfied.

[246] Third, the *Act* states that the representative must "not have, on the common issues, an interest that is in conflict with the interests of the other class members".

[247] Mr. Dewey was specifically questioned about any potential conflicts when cross-examined by counsel on his affidavit. In answering questions about conflicts, Mr. Dewey confirmed that he was unaware of any potential conflict of interest between himself and any members of the proposed class. When asked by counsel how he would define a conflict of interest, and to provide the basis for attesting that there was no conflict, Mr. Dewey answered: "I have no ties to [Corner Brook Paper], to [the Province], to the Town. I don't work for them. They don't shop at my store. I have no ties. That's my feeling on conflict of interest with the parties ... I don't have any dealings with them" (Transcript of Cross-Examination, Appeal Book, Volume 3, Tab 29, at pages 126-127).

[248] On a fair review of the record, there is nothing to indicate the existence of a conflict of interest respecting Mr. Dewey's interests, as compared to the interests of other class members, which would disqualify him from being appointed class representative.

[249] As there is some basis in fact to conclude that the requirements of section 5(1)(e) have been satisfied, I would conclude that the requirements of that section have been met.

CONCLUSION AND DISPOSITION

[250] For the reasons provided, I would conclude that the Judge erred in finding that the requirements of section 5(1)(a) and section 5(1)(d) were not satisfied.

[251] I would further conclude that all requirements for certification pursuant to section 5(1) of the *Act* have been met with respect to the claims in negligence and nuisance against Corner Brook Paper and the claim in negligence against the Town, and that the action should be certified as a class action. The common issues relating to the respective claims are those indicated above.

[252] Accordingly, I would allow the appeal and certify the action as a class action pursuant to the *Act*, with Mr. Dewey appointed as representative plaintiff for the class.

[253] In accordance with section 37 of the *Act*, there shall be no order as to costs.

F.P. O'Brien J.A.

I concur: W.H. Goodridge J.A.

I concur: F.J. Knickle J.A.