IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

2021 NLSC 118 (CanLII)

Citation: *Dewey v. Kruger Inc.*, 2021 NLSC 118
Date: September 20, 2021
Docket: 201504G0120 CP

Brought under the *Class Actions Act*, S.N.L. 2001, c. C-18.1

BETWEEN:

RICHARD DEWEY, WILLIAM PERRY, CHARLOTTE JACOBS AND WILLIAM TURNER

PLAINTIFFS

AND:

KRUGER INC., DEER LAKE POWER COMPANY LIMITED, CORNER BROOK PULP AND PAPER LIMITED, AND THE TOWN OF DEER LAKE, HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

DEFENDANTS

Before: Justice Peter N. Browne

Place of Hearing: Corner Brook, Newfoundland and Labrador

Dates of Hearing: May 26 – 27, 2021

Summary:

The Plaintiff, Richard Dewey, brought an Interlocutory Application seeking certification of a proceeding under the *Class Actions Act* in which he would be the representative Plaintiff for a class of persons who suffered damages from elevated groundwater levels in the town of Deer Lake, NL.

The Defendants, Kruger Inc., Deer Lake Power Company Limited, the Town of Deer Lake, and Her Majesty the Queen in Right of Newfoundland and Labrador, were struck as parties pursuant to the Court's analysis under section 5(1)(a). The Application for certification was denied pursuant to the Court's analysis under 5(1)(d) as not being a preferable procedure.

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Appearances:

Robert W. Buckingham, Raymond Wagner, Q.C. and Maddy Carter	Appearing on behalf of the Plaintiffs
F. Richard Gosse and Elliott M. Bursey	Appearing on behalf of Kruger Inc., Deer Lake Power Company Limited, and Corner Brook Pulp and Paper Limited
Stephen F. Penney and Koren A. Thomson	Appearing on behalf of the Town of Deer Lake
Donald E. Anthony, Q.C.	Appearing on behalf of Her Majesty the Queen in Right of Newfoundland and Labrador

Authorities Cited:

CASES CONSIDERED: *Davis v. Canada (Attorney General)*, 2008 NLCA 49; *Ring v. Canada (Attorney General)*, 2010 NLCA 20; *Hollick v. City of Toronto*, 2001 SCC 68; *Cloud v. Canada (Attorney General)* (2004), 135 A.C.W.S. (3d) 567, 192 O.A.C. 239 (Ont. C.A.); G*ay v. Regional Health Authority 7*, 2014 NBCA 10; *Anderson v. Canada (Attorney General)*, 2011

NLCA 82; *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19; *Shelley v. Noel*, 2020 NLSC 54; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 118; *Atrium Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79; *Chiasson v. Nalcor Energy*, 2021 NLCA 34; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63; *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689; *George v. Newfoundland and Labrador*, 2016 NLCA 24; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68; *Pisclevich et al. v. Government of Manitoba*, 2018 MBCA 127; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Anderson v. Manitoba*, 2017 MBCA 14; *Paron v. Alberta (Minister of Environment and Protection)*, 2006 ABQB 375; *The College of the North Atlantic v. Thorne*, 2015 NLCA 47; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; and *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Municipalities Act 1999*, S.N.L. 1999, c. M-24; and *Water Resources Act*, S.N.L. 2002, c. W-4.01

REASONS FOR JUDGMENT

BROWNE, J.:

INTRODUCTION

[1] By Interlocutory Application (Inter Partes) filed February 21, 2020, the Plaintiff, Richard Dewey ("Dewey"), seeks to be 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.

[2] In a Statement of Claim issued May 21, 2015 (subsequently amended May 28, 2020) under the *Class Actions Act*, S.N.L. 2001, c. C-18 (the "*Act*"), Dewey claims against Kruger Inc. ("Kruger"), Deer Lake Power Company Limited ("Deer Lake

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Power"), and Corner Brook Pulp and Paper Limited ("Corner Brook Paper") in nuisance and negligence whereas he only claims in negligence against the Town of Deer Lake (the "Town") and Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province"). None of the Defendants have filed Statements of Defence; however, each denies Dewey's entitlement to certification on any of the common issues identified in the pleadings.

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BACKGROUND

[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. He seeks an order requiring the Defendants to take reasonable steps to prevent future flooding within the Class Boundary and damages for the interference with their property rights.

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ANALYSIS

[6] The circumstances under which a class action may be certified are contained in section 5(1) of the *Act*, which states:

> 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.

[7] The onus is on the applicant for certification to establish the criteria for certification. All five criteria must be met (see *Davis v. Canada (Attorney General)*, 2008 NLCA 49, paragraph 23 and *Ring v. Canada (Attorney General)*, 2010 NLCA 20, paragraph 10).

[8] The standard of proof under section 5(1)(a) requires that the pleadings disclose a cause of action. The test applied in this province is “the plain and obvious test”. The onus is on the Plaintiff to show that the pleading is sufficient (see *Ring*, paragraph 11).

[9] As for the remaining criteria under 5(1)(b) – (e), the evidentiary threshold is “some basis in fact”. This is a lesser standard of proof than that required for the determination of the merits of the claim (see *Hollick v. City of Toronto*, 2001 SCC 68, paragraphs 16 – 25).

[10] This is consistent with the fact that the Court in the certification stage is dealing with procedural issues not substantive ones.

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

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[11] When approaching the analysis of the 5(1)(a) standard, the Court must adhere to certain principles found in the jurisprudence:

a. A pleading is considered sufficient unless it is plain and obvious and beyond doubt that a plaintiff cannot succeed or if it is certain to fail because it contains a radical defect (see *Cloud v. Canada (Attorney General)* (2004), 135 A.C.W.S. (3d) 567, 192 O.A.C. 239 (Ont. C.A.) at paragraph 41);

b. It is sufficient if the pleadings disclose one valid cause of action (see G*ay v. Regional Health Authority 7*, 2014 NBCA 10 at paragraph 36);

c. The pleadings must be read as generously as possible with a view to accommodating any inadequacies in the form of the pleading (see *Anderson v. Canada (Attorney General)*, 2011 NLCA 82 at paragraph 31 and *Ring* at paragraph 53);

d. When considering whether a pleading discloses a valid cause of action, a court must start from the premise that it has an obligation to promote timely and affordable access to the civil justice system. Such an approach incorporates the concept that questions of law which have no reasonable chance of success should not be referred for a full trial but rather disposed of promptly by being struck at an early stage of the process (see *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19 at paragraphs 15-18); and

e. Novel claims that might represent an incremental development in the law should be allowed to proceed to trial. Conversely, simply because a matter is novel should not mean that it will be afforded less scrutiny than that would be applied to all claims that have no reasonable chance of success (see *Atlantic Lottery Corp Inc.* at paragraph 19).

The Kruger Defendants

[12] At paragraphs 9 – 15 of the Amended Statement of Claim, Dewey separately identifies Kruger, Deer Lake Power, and Corner Brook Paper and pleads "each Kruger company" is vicariously liable for the actions of the other.

[13] The Kruger Defendants argue the pleadings fail to disclose causes of action against Deer Lake Power and Kruger insofar as the Amended Statement of Claim fails to clearly articulate the necessary elements against both Defendants.

[14] Deer Lake Power argues that it has not existed as a legal entity since 1998 (see Affidavit of Larry Marks, Manager of Engineering and Energy for Corner Brook Paper). Dewey's legal counsel in the Plaintiff's Brief for Certification acknowledges that in 1998 Deer Lake Power was subsumed into Corner Brook Paper and that for the purposes of the class action the members are to be determined as of the date of the filing of the Statement of Claim (i.e. May 22, 2015).

[15] Kruger argues that it is a shareholder in Corner Brook Paper and, as such, there is no cause of action against the shareholder of a corporation for alleged wrongdoing of that corporation (see *BAE-Newplan Group Limited v. Dalton*, 2012 NLCA 21 at paragraphs 27 – 28).

[16] I accept the arguments of counsel for the Kruger Defendants that is plain and obvious the pleadings against these two parties cannot succeed and are struck. The pleadings as they relate to Corner Brook Paper will remain as it is not plain and obvious Dewey does not have a valid cause of action against them.

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Nuisance

[17] Nuisance is pled against Corner Brook Paper at paragraphs 25 – 31 of the Amended Statement of Claim:

> 25. The Kruger Defendants are liable to the Plaintiffs and Class Members for having committed the tort of nuisance. The Kruger Defendants have interfered with the property rights of the Plaintiffs and Class Members. The Kruger Defendants' activities have indirectly and unreasonably caused material physical damage to the properties of the Plaintiffs and Class Members.
>
> 26. Despite the reports and studies that have investigated the flooding problem and proposed solutions to it, no, or no adequate, measures have been taken by the Kruger Defendants to fix the flooding problem.
>
> 27. The harm caused by the Kruger Defendants' continued inaction is borne directly by the Plaintiff and other Class Members.
>
> 28. The continued flooding of the properties of the Plaintiffs and Class Members have caused and continues to cause water damage, in turn causing the presence of potentially hazardous mould particles. Exposure to mould represents a human health hazard. The hazards of mould growth in indoor environments are well know. Federal and provincial regulators recognize mould as a significant occupational health and safety issue, and a public health issue.
>
> 29. Exposure to mould in indoor environments commonly results in aggravation of asthma, respiratory infections, flu-like symptoms, skin rash, congestion and headache. These adverse health effects have been suffered by the Plaintiffs and Class Members.
>
> 30. A proactive response to potential, or continuing, mould exposure is recognized as an appropriate measure to protect health. Health Canada has concluded that exposure to indoor mould is associated with an increased prevalence of asthma-related symptoms such as chronic wheezing and irritation symptoms. Given that mould is a recognized risk factor for health problems, Health Canada recommends that humidity be controlled and diligent repair of residential water damage be undertaken to prevent mould growth, and that any visible or concealed mould growing in residential buildings be thoroughly cleaned.
>
> 31. The Water Control System has caused material physical damage, including extensive water damage to the interior and exterior of the properties. It has rendered the land unfit for residential habitation, the purpose for which the properties were purchased and developed by the Plaintiffs and Class Members. This material

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> physical damage has had a negative impact on the value of the Plaintiff's and Class Members' properties. The material physical damage caused by the Kruger Defendants poses a serious risk of actual harm to the health and wellbeing of the claimants. These detrimental effects are material, actual and readily ascertainable.

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[18] Paragraphs 13 - 19 and 21 specify Corner Brook Paper as the owner and operator of the Water Control System. Paragraphs 25 – 31 allege that its acts or omissions caused seepage and water to escape from the Water Control System. While the term "substantial and unreasonable interference" has not been explicitly pled, there are sufficient material facts to discern a causal link (see *Shelley v. Noel*, 2020 NLSC 54). Similarly, I am able to discern the reference to properties in paragraphs 25, 28, and 31 are intended to include those persons who either own/owned real property or reside or resided in real property within the Class Boundary depicted in Schedule "A" to the Amended Statement of Claim.

[19] Regarding Corner Brook Paper's argument that Dewey's claim for injunctive relief and/or specific performance is not supportable in law or by any material facts, I am satisfied the pleadings do disclose a cause of action. The question of whether these remedies should warrant certification will be dealt with under section 5(1)(d) – Preferable Procedure.

[20] At a trial of the common issues, a court will assess if the alleged interference as pled meets the ordinary comfort test as described by LaForest, J. in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 118 "only those inconveniences that materially interfere with the ordinary comfort as defined according to the standards held by those of plain and sober tastes" (see paragraph 63).

[21] Should a substantial inference be found at trial, a court will decide if the interference was unreasonable when assessed "in light of all the relevant circumstances" (*Atrium Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 at paragraphs 24 – 25).

Negligence

[22] The pleadings also contain a claim in negligence against Corner Brook Paper. For the purpose of the section 5(1)(a) assessment, I shall separate my analysis regarding the plain and obvious test between Corner Brook Paper and the remaining Defendants, the Town and the Province. My reasons for doing so are twofold.

[23] First, Dewey's legal counsel acknowledges that in instances where allegations of negligence are brought against a government entity, the Court must apply the test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 adapted by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 in paragraphs 30 – 31 (the "Anns/Cooper Test"):

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. 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. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> 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. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

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[24] Second, both the Town and the Province claim common law immunity based on the exercise of statutory discretion when making core policy decisions.

Corner Brook Paper

[25] Dewey pleads a duty of care in paragraphs 32 and 33, specific breaches of these duties at paragraph 34, and foreseeability and causation at paragraphs 32 and 35. I am, therefore, satisfied that the Amended Statement of Claim meets the requirement of pleading for the test of negligence.

The Town

[26] As referenced previously, Dewey acknowledges the pleadings against the Town are formed as a novel claim of negligence. Relying on the first step of the "Anns/Cooper" test, Dewey argues that paragraphs 36 – 40 of the Amended Statement of Claim disclose the requisite material facts of a reasonable foreseeability of harm and proximity. In effect, Dewey pleads that the Town owes a duty of care to give effect to policies which address the management of storm water and the flooding caused by the Water Control System.

[27] As to the second step of the test, Dewey argues the Town adopted and negligently implemented policies which were operational in nature and not true policy decisions (see paragraphs 39 and 41 of the Amended Statement of Claim).

[28] In response, the Town argues the pleadings fail to disclose a reasonable cause of action as they lack any identifiable statutory or common law duty of care and invoke the doctrine of policy decision immunity and legislative/quasi-judicial immunity.

[29] Analysis of the doctrine of policy decision immunity under the section 5(1)(a) criterion was recently considered by our Court of Appeal in *Chiasson v. Nalcor Energy*, 2021 NLCA 34 at paragraphs 13 and 14.

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[30] The Court of Appeal held that in class actions where questions of law or legal principle may be determined on the basis of the facts pleaded, such that there is no reasonable cause of action disclosed, then it is appropriate and valuable to strike the pleading. The Court referenced the following passage from *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paragraph 14 in support of such an approach:

> 14 The value of the procedure whereby claims having no reasonable prospect of success are struck is discussed in *Imperial Tobacco*:
>
> > [19] … It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
> >
> > [20] This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. …

Stage one – duty of care

[31] In order to prove a claim in negligence, the Class must first establish that a duty of care was owed by the Town. The applicable analytical framework was discussed in *Chiasson* at paragraph 15:

> Stage one of the analysis - duty of care
>
> [15] To succeed in a claim for negligence, the Class must first establish that a duty of care was owed by the Province. 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.

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[32] At the first stage of the analysis I am required to be satisfied that the two components, proximity and reasonable foreseeability, exist. The test for each was explained by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63 at paragraphs 25 and 32:

> 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*, 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).

[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*).

[35] In *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689, in the context of governmental liability for negligence, the Court drew a distinction between governmental policy and the operation of an undertaking. A policy decision would exempt a government from liability for negligence (see paragraphs 1236 – 1245).

[36] In *George v. Newfoundland and Labrador*, 2016 NLCA 24, a class action brought against the Provincial Government with respect to moose-vehicle collisions on provincial highways, the Court of Appeal held that no private law duty will be

found in the absence of a government policy which had been formulated previously (see paragraph 140).

[37] In the present case, paragraphs 36 – 41 of the Amended Statement of Claim set out the basis for pleading a private law duty of care:

> 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 caused 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.
>
> 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.
>
> 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 neighbourhood encompassed by the Class Boundaries to address the problem of elevated groundwater levels;

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(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 Umber 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 the Kruger Defendants, instead letting gaps in mandatory periodic reports go unaddressed; and

(f) Any other such negligence as may arise from the evidence.

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[38] Drawing from the Court's analysis in *George*, it is plain and obvious there is no reasonable cause of action against the Town. 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.

[39] While there was a policy by the Town to inspect the Humber Canal weekly, the purpose was to ensure there was no improper polluting, fishing or other activities that could impact the water supply. Such a policy could not be extended to imply a duty of care to regulate the Water Control System.

[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.

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[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 Province

[43] Like the Town, the Province argues the class has failed to plead a reasonable cause of action (see *AIC Limited v. Fischer*, 2013 SCC 69).

[44] The position advanced by the Province is also based on the grounds that the class's claim in negligence invokes the legal doctrine of policy decision immunity.

[45] The pleadings of negligence against the Province are set out in paragraphs 43 to 48 of the Amended Statement of Claim as follows:

> 43 The Province is responsible for approving water works (including dams, ditches and canals) in the Province, and for regulating the construction and safety of such works pursuant to the Act. This is done through the Department of Environment and Conservation ("ENVC").
>
> 44. The Province owes the Class Members a duty to use due care in giving effect to, and putting into operation, the policies it has adopted concerning structures such as the Water Control System. The Province has chosen to effect compliance under the Act by adopting policies that include: a) requesting and reviewing dam safety reports (which consider *inter alia* seepage issues); (b) reviewing and evaluating seepage flow data; (c) issuing recommendations to mitigate flooding risks; (d) maintaining dam inventory databases; and (e) directing owners or operators of dams and other water structures to arrange for safety inspections and to submit reports to the minister, and to take other necessary steps, including repairs or alterations to the structures to prevent damage to properties downstream.

45. Further, and in the alternative, the Province's duty of care to the Class arises explicitly from the Act itself. In particular, section 44 of the Act requires the Province to consider measures necessary to prevent damage to property caused by a dam or other structure upstream of that property. As owners of properties prone to flooding from an upstream dam or other structure, the Class is owed a duty of care arising from the Act. In the further alternative, the Province's duty of care arises from the Act by implication, due to its responsibility for supervising and regulating potential property damage caused by upstream dams and other structures.

46. The Province has displayed complete disregard for the adverse effects on the Plaintiff's and Class Members' properties, in breach of the standard of care applicable to it.

47. Particulars of the negligence of the Province include the following:

(a) Inadequate, incomplete and delayed oversight of compliance of the Water Control System with the Act, as a result of which seepage has gone unmonitored and unmitigated and has caused damage to Class Members' properties downstream, a consequence which is intended to be avoided under the Act;

(b) Choosing not to systematically or thoroughly request and review dam safety review reports from the Kruger Defendants, instead letting gaps in mandatory periodic reports go unaddressed;

(c) Failing to take reasonable steps to ensure compliance with the Canadian Dam Association Dam Safety Guidelines;

(d) Inadequate and incomplete maintenance of its dam inventory database;

(e) Choosing not to upgrade instrumentation on water monitoring stations, the partial cost of which is a responsibility of the Province, resulting in an inability to properly monitor and respond to flooding risks; and

(f) Any other such negligence as may arise from the evidence.

48. The Plaintiffs and Class Members have suffered damages as a result of the Province's acts and omissions, which fell below the standard of care applicable to it. The damages the Plaintiffs and Class Members have suffered area a foreseeable consequence of the Province's acts and omissions.

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[46] The class relies on the *Water Resources Act*, S.N.L. 2002, c. W-4.01 ("*WRA*") to ground a duty of care. Again, this raises the first scenario in *Chiasson* as to whether there is an explicit or implicit duty of care arising from the statutory scheme. Specific reference is made to section 44 and the existence of a duty to consider measures to prevent damage to property owners downstream of a dam. This would include the property downhill of the Water Control System.

[47] In *Chiasson*, the Court of Appeal examined the *WRA* in the context of a class action brought by residents of Mud Lake who were evacuated from their properties as a result of flooding on the Churchill River. As part of its analysis, the Court examined the interplay of the legislative scheme under section 44 in relation to the responsibility of dam owners for maintaining and inspecting waterworks and the powers of the minister to regulate the waterworks for the public good. It concluded the minister's regulatory authority under the *Act* involved the exercise of residual or core policy considerations that would negate the imposition of a duty of care. At paragraphs 33 – 36, it held the following:

> [33] With respect to dams, the owner, operator or licensee "shall, at all times, maintain the dam or other structure in good repair" and, in accordance with the regulations, "conduct periodic inspections of the dam or other structure to ensure structural stability", and "submit a report to the minister on the results of the inspections" (section 43 of the *Act*). Pursuant to section 44:
>
>> (1) Where conditions exist that may reasonably be anticipated to be hazardous to a dam or other similar structure, or to property down-stream, an owner, operator or licensee shall immediately notify the minister and take all necessary actions to minimize or eliminate those hazardous conditions.
>>
>> (2) Where the minister considers it necessary for public safety, to prevent injury or damage to persons or property ..., the minister may direct the owner or operator of a dam or other structure to
>> (a) arrange a safety inspection ...; and
>> (b) submit the inspection report to the minister ... .
>>
>> (3) The minister may, ..., direct the owner or operator of a dam or other structure to repair, improve, change, alter, replace or remove all or part of a dam or other structure as he or she considers necessary for the safety of the dam or other structure, for public safety or to prevent injury or damage to persons or property.

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...

> [34] It follows from these provisions that government has imposed on Nalcor the responsibility for maintaining and inspecting the waterworks associated with the Muskrat Falls Hydroelectric Project. The Class has not pleaded that the Province has no authority to adopt the above scheme, which places responsibility for the maintenance and operation of waterworks on the operator or owner or other person responsible for the undertaking, in this case, Nalcor.
>
> [35] Insofar as the Class alleges that the Province is liable to it in negligence, the Class relies on what it refers to as the Province's "oversight mandate". While the *Act* gives the minister authority to direct an owner or operator of waterworks to take action such as make an inspection, submit a report, or make changes to the undertaking, this does not amount to the imposition of a duty of care on the minister to take actions that have been imposed on Nalcor and for which Nalcor is responsible. Rather, the legislation is intended to provide the minister with the tools to facilitate the regulation of waterworks for the public good. In this respect, the legislative provisions are comparable to the regulation, for the public good, of any number of activities, including a multitude of waterworks, that individuals and corporations undertake in the Province.
>
> [36] The claims alleging liability of the Province in negligence must be read and construed in light of the above legislative scheme. The result is that the facts as pleaded do not disclose the necessary relationship of proximity between the Province and the Class in order to establish a *prima facie* duty of care. There is no close and direct relationship that would support a conclusion that it would be just and fair to impose a duty of care on the Province in the circumstances.

[48] As in *Chiasson*, the class relies on the "oversight mandate" of the Province to ground its claim in negligence (see paragraph 47(a) of the Amended Statement of Claim). Section 44 of the *Act* specifically imposes responsibility on Corner Brook Paper for the maintenance and operation of the Water Control System. This stands in contrast to the Minister's regulatory authority to make policies for the societal or public good and for which a duty of care is not properly imposed given "public policy considerations such as economic, societal and political factors (see paragraph 37 of *Chiasson*).

[49] As a result, assuming the facts pleaded to be true, I conclude the claims in negligence as against the Province have no reasonable prospect of success as there is no explicit or implicit duty of care arising from the statutory scheme set out in the *Act*, including the Minister's regulatory authority to make policies. Therefore, it is

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plain and obvious that the claims as pleaded by the class disclose no reasonable cause of action in negligence against the Province.

[50] Having determined the pleadings do not disclose a duty of care owed by the Province to the class, it is unnecessary to consider the second stage of the inquiry regarding public policy considerations.

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Section 5(1)(b) –Identifiable class of two or more persons

[51] To establish an identifiable class, membership should be determined by objective criteria that do not depend on the outcome of any substantive issue in the litigation. It is not necessary that every class member be known but it is necessary that any particular person's claim to membership in the class be determinable by stated objective criteria.

[52] The class definition set out in paragraph 7 of the Amended Statement of Claim relies on geographical and temporal limits and is divided into two proposed subclasses:

> 7 The Plaintiff seeks to certify this action as a class proceeding pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18, on behalf of all persons (other than the Defendants and their parent companies, affiliates or subsidiaries) who are either Owner or Non-Owner Class Members, such subclasses defined as:
>
> a) Owner Class Members: all person who own or owned real property within the Class Boundary depicted in Schedule "A", attached to this Amended Statement of Claim; and
>
> b) Non-Owner Members: all persons who reside or have resided in, but did not own, real property within the Class Boundary depicted in Schedule "A", attached to this Amended Statement of Claim.

[53] In *Hollick v. Toronto (City)*, 2001 SCC 68, Chief Justice McLachlin held that defining a class by geographic and temporal boundaries was a sufficiently objective basis upon which to create an identifiable class (see paragraph 17).

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[54] The Defendants argue the class definition is overly broad and includes properties that have experienced little or no damage compared to others within the class. They make specific reference to a small 54 hectare area of concern which has been identified in the Affidavit of Andrew Peach ("Peach Affidavit") and the engineering report from SNC Lavalin ("SNC Lavalin Report") as having substantive water issues, flooding, and seepage. I find that even if the proposed Class Boundary does encompass properties that have experienced little or minimal damage as compared to those that are within the area of concern, this does not detract from the appropriateness of the proposed boundary.

[55] A class definition is not intended to be limited to those who will be ultimately successful (see *Ring* at paragraph 62). Likewise, it is permissible for a class to be defined according to arbitrary boundaries as long as they are reasonable and justifiable and, if need be, can be restricted or enlarged as the case proceeds (see *Pisclevich et al. v. Government of Manitoba*, 2018 MBCA 127 at paragraph 16).

[56] As to the existence of some basis in fact that there is an identifiable class of two or more persons who would fall within the proposed class definition, I find the Affidavits of Mr. Richard Dewey and Ms. Charlotte Feltham demonstrate evidence from owners and former owners of a common experience with water issues and flooding and their associated damages. This is further supplemented by the Peach Affidavit as well as the SNC Lavalin Report which references a survey of the Area of Concern with 77.5 percent of respondents indicating problems with water issues, flooding, and seepage.

[57] According to section 8 of the *Act*, at the certification stage, a court shall not refuse to certify an action if the number of class members or the identity of each class member is not determined or may not be determined.

[58] I find, therefore, the criterion of section 5(1)(b) of the *Class Actions Act* has been established.

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

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[59] The common issues proposed by the class are set out in the Application for Certification at paragraph 196 as follows:

> 196 The proposed common issues are outlined in the Application for Class Certification as the following:
>
> (1) What duty of care do the Kruger Defendants owe with respect to the Class Members' interests as owners or occupiers of properties within the Class Boundary?
>
> (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?
>
> (3) What duty of care does the Province owe with respect to the Class Members' interests as owners or occupiers of properties within the Class Boundary?
>
> (4) Did the Kruger Defendants breach the duty of care?
>
> (5) Did the Town breach the duty of care?
>
> (6) Did the Province breach the duty of care?
>
> (7) Was harm to the Class Members' properties within the Class Boundary a reasonably foreseeable consequence:
>
> (a) of the Kruger Defendants' breach of the duty of care?
>
> (b) of the Town's breach of the duty of care?
>
> (c) of the Province's breach of the duty of care?
>
> (8) Did the Kruger Defendants cause or materially contribute to the flooding within the Class Boundary?

(9) Did the Town cause or materially contribute to the flooding within the Class Boundary?

(10) Did the Province cause or materially contribute to the flooding within the Class Boundary?

(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 degree of fault between the Defendants?

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[60] Given my previous conclusion relating to Deer Lake Power and Kruger and that the claims against the Town and the Province have no reasonable prospect of success under section 5(1)(a), the only remaining common issues are 1, 4, 7(a), and 8 in relation to Corner Brook Paper.

[61] Section 2(b) of the *Act* defines "common issues" as: (a) common but not necessarily identical issues of fact; or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[62] The principles to be applied to determine if an issue qualifies as common were outlined in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paragraph 108:

> (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.

[63] Common issues 1, 4 and 7(a) apply only to Dewey's allegations of negligence whereas common issue 8 applies to the claims of both negligence and nuisance.

[64] Dewey maintains there is a sufficient basis in fact from the evidentiary record to establish liability on the part of Corner Brook Paper. Specifically, a duty of care, breaches of that duty, foreseeability of harm, and damages to the class members' properties within the Class Boundary.

(a) Duty of care/breach of duty/foreseeability

[65] Dewey's claim on his own behalf and that of the class against Corner Brook Paper arises from the common law and statutory duty to monitor and maintain the Water Control System for the safety of class members who own or reside in properties in close proximity and downhill from the Water Control System. It is the singular and unifying issue that impacts the Class Boundary. No class member can prevail without proving a duty, breach and foreseeability. At trial, there would be numerous expert reports and fact witnesses that would address the standard of care owed to the proposed class. This information will be key to the Court's assessment of the questions of breach of duty and foreseeability of general harm.

[66] In cross-examination of his Affidavit, Jaimie Park, the Maintenance Superintendent of Deer Lake Hydro Power, acknowledged that Corner Brook Paper had a responsibility to both their employees and the broader community to monitor and maintain the Water Control System for safety. Apart from this responsibility, Corner Brook Paper has statutory obligations to the class under sections 43 and 44(1) of the *WRA*, which read as follows:

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Maintenance and inspection of dams

43. (1) The owner, operator or licensee of a dam or other structure shall, at all times, maintain the dam or other structure in good repair.

(2) The owner, operator or licensee with respect to a dam or other similar structure impounding or conveying water shall, in accordance with the regulations,

(a) conduct periodic inspections of the dam or other structure to ensure structural stability;

(b) submit a report to the minister on the results of the inspections; and

(c) comply with the recommendations contained in the inspection report.

Safety of works

44. (1) Where conditions exist that may reasonably be anticipated to be hazardous to a dam or other similar structure, or to property down-stream, an owner, operator or licensee shall immediately notify the minister and take all necessary actions to minimize or eliminate those hazardous conditions.

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[67] Based on the cross-examination evidence from the Affidavit of Larry Marks, there is some basis in fact that Corner Brook Paper has not complied with Canadian Dam Association Guidelines recommendation that they conduct independent annual dam safety inspections.

[68] Dewey has retained a hydrogeologist, Bruce Strong of Strum Consulting in Halifax, Nova Scotia to provide expert evidence in relation to the motion to certify the action as a class proceeding. Mr. Strum filed an Affidavit dated February 14, 2020 (the “Strum Affidavit”).

[69] The Strum Affidavit posits that Corner Brook Paper’s Preventative Maintenance Program for weir inspection and the recording of seepage demonstrates that there is evidence of inadequate maintenance and monitoring of the weirs and seepage over the significant life of the Water Control System. This is further supported by evidence that there is a disregard of the growth of vegetation around the West Brook Dyke leading to impeding of seepage inspection and maintenance (see Affidavit of Jaimie Park, Exhibit 2, pages 38 – 42). Corner Brook Paper has not

implemented groundwater monitoring wells to assess the seepage from the Water Control System to the residential area. This has been particularized at pages 22 - 23 of the SNC Lavalin Report :

> RECOMMENDATIONS
>
> With respect to the issue of seepage from the dike and its effect on the residential area of concern, it is recommended that a subsurface seepage monitoring program be implemented so that future comment can be made on this issue and to ensure that there is no increase is seepage due to deterioration of the dike and/or the foundation. This could be accomplished by installing monitoring wells between the West Bank Dike and the residential area, data loggers could be used to measure and record fluctuations in the groundwater table, and the results could be compared to precipitation events. The use of data loggers would ensure that measurements are collected on a regular basis and the data would be directly available for use in Microsoft Excel. Environment Canada records could also be easily obtained and it would be very easy to incorporate these records into any future analysis. Using the information, fluctuations in the groundwater table that are associated with precipitation events could be filtered out and the remaining data could then be used to try and identify subsurface seepage.
>
> It is recommended that slope stability analyses be performed on the dike to ensure that the upstream and downstream slopes meet Canadian Dam Association criteria under applicable loadings. As part of the slope stability assessment, detailed seepage analyses using a finite element mesh could also be performed. Comment on internal erosion could also be provided as part of the seepage assessment.
>
> The following are additional recommendations and are presented in no particular order:
>
> - Continue to clear and/or remove all vegetation from the upstream and downstream slopes of the dike to enable regular inspections of these areas.
> - Continue to implement a program of vegetation control to maintain the dike slopes and toe areas free of vegetation.
> - Improve drainage of water away from the toe of the dike so that seepage flows and precipitation runoff are efficiently conducted away from the toe of the dike and appropriately monitored.
> - Implement a program of regular weir flow monitoring and maintenance; however, winter conditions may make regular monitoring and collection of accurate measurements impractical due to accessibility and snow covering the weirs.
> - Re-establish Weir #1 further downstream to collect all flow from this area. Channel the flows to the weir as necessary.

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- Recheck the area between Weirs #1 and #2 during a dry period to determine if there is continuing flowing water. If so, establish a new weir(s) and continue to monitor the flow.
- Recheck the areas near Weirs #2 and #3 during a dry period to determine if there is water continuing to bypass the weirs. If so, channel the flows to Weirs #2 and #3 or establish new weirs and continue to monitor the flow.

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[70] I accept Dewey's position that certification is not the time to resolve the cause of the flooding and associated water issues. This would be a merits issue to be determined at trial with the benefit of a full evidentiary record and the assistance of expert evidence. The *Act* only requires a common question that can result in the resolution of the litigation with respect to all class members. The degree of harm actually suffered will be the subject of individual assessment at a later date.

Causation

[71] As for the question of whether Corner Brook Paper's conduct caused or contributed to the flooding, I find this to be an appropriate common issue.

[72] In *Anderson v. Manitoba*, 2017 MBCA 14, the Manitoba Court of Appeal reversed the certification judge's finding that the plaintiffs were required to show that all of the properties of every member in the proposed class were impacted the same way. The Court of Appeal identified the judge had erroneously focused on whether the properties were affected in a consistent way by the flooding rather than whether the resolution of the proposed common issue would affect each class member's claim in a consistent way:

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

> 46 In effect, the certification judge refused to certify the action on the basis that individual assessments of damages would be required. This is contrary to section 7(a) of the *Act*.
>
> 47 In my view, if the certification judge had turned his mind to the correct test, he would have had to conclude that resolution of the proposed common-issue question is necessary to the resolution of each class member's claim and, in addition, the issue is a substantial ingredient of each of the class member's claims.
>
> . . .
>
> 49 In *MacQueen*, the Nova Scotia Court of Appeal accepted that the question of whether the appellants emitted contaminants during the period they operated the steel works was a common issue. The proposed common-issue question in this case is similar to the common issue accepted by the Court in *MacQueen*, in that it is focused on the actions of the defendant rather than the effect of those actions on the plaintiffs.

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[73] I am satisfied that Dewey has established some basis in fact that the conduct of Corner Brook Paper is a substantial ingredient of each of the class member's claim.

[74] The resolution of questions respecting liability and causation in negligence are necessary to the determination of each class member's claims: Accordingly, I find Dewey has established the following questions as common issues in negligence:

> (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 its duty of care?
>
> (7) Was harm to the class members' properties within the Class Boundary a reasonably foreseeable consequence:

(a) of Corner Brook Paper's breach of its duty of care?

(8) Did Corner Brook Paper cause or materially contribute to the flooding within the Class Boundary?

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Nuisance

[75] Dewey and Corner Brook Paper agree that a claim in private nuisance requires proof of an interference with a claimant's use or enjoyment of land that is both "substantial" and "unreasonable" (see *Antrim* at paragraphs 18 – 19). However, Corner Brook Paper asserts that interference, substantiality, and unreasonableness are individual questions which are not capable of being answered on a class-wide basis. Dewey, on the other hand, asserts the common issues trial must address the question of whether Corner Brook Paper caused or materially contributed to the flooding and, once determined, the issues of interference, substantiality, and reasonableness are to be evaluated on an individual basis.

[76] In the certification decision in *Chiasson*, Butler, J. (as she then was) offered the following analysis on the tort of private nuisance:

> 75 The tort of private nuisance is alleged notwithstanding that "negligence is available in respect of all physical damage to land caused by a failure to take care". (Osborne, at page 297). Presumably this relates to the fact that private nuisance is "a tort of strict liability (which) does not depend upon the nature of the defendant's conduct or on any proof of intention or negligence. It depends, primarily, upon the nature and extent of the interference caused to the plaintiff" (Osborne, at 397).
>
> 76 As Osborne explains, this tort is most frequently "used to deal with noise, odour, fumes, duty, and smoke that emanate from the defendant's land and interfere with the plaintiff's use, enjoyment and comfort of land". But it is not actionable unless the interference is both substantial and unreasonable and the plaintiff has suffered some damage (Osborne, at 397).
>
> 77 The recognized purpose of the 'substantial' requirement is to screen out weak and unmeritorious claims described alternatively as "minor, trifling, transitory or trivial" and "insufficient to warrant liability" (Osborne, at 398).

> 78 Further, Osborne explains, the "unreasonable" component requires a "scrupulous examination of all the surrounding circumstances including the character of the harm, the character of the neighbourhood, the intensity of the interference, the duration of the interference, the time of day and the day of the week... the nature of the defendant's conduct" and the sensitivity of the plaintiff (at 398 and 403).

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[77] She concluded by noting that nuisance is problematic for certification of a common issue because liability is dependent on the impact of the nuisance on each individual and his or her property (see *Paron v. Alberta (Minister of Environment and Protection)*, 2006 ABQB 375) at paragraph 116. However, she went on to find that while liability in nuisance is an individual issue, it does not preclude certification of a component of the tort as a common issue in the right circumstances (see *Cloud* at paragraph 53).

[78] The expert report of Bruce Strum identifies several potential causative factors to the flooding issues within the Class Boundary that are not unique to the individual circumstances of each class member, namely:

a. The Canal is constructed with materials that were not compacted, there is no clay or impermeable core trench and there is fractured bedrock underlying the Canal likely leading to seepage and groundwater mounding;

b. The Water Control System's modification of surface water flow in the Class Boundary results in more water migrating downhill into the Class Boundary;

c. The construction of the Water Control System resulted in:

    i. The interruption of historical drainage channels conveying water downhill; and

ii. The addition of a six-meter deep water column created new sources of water entering the soil and bedrock (see Strum Affidavit, Exhibit B, pages 3 – 12).

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[79] Insofar as these issues address the amount of seepage that currently flows into the Class Boundary, success for one class member will likely mean success for al. At worse, it will likely mean indifference for some.

[80] Dewey has established some basis in fact and law that the following question is a common issue in nuisance which must be addressed for all potential class members:

(8) Did Corner Brook Paper cause or materially contribute to the flooding within the Cross Boundary?

5.1(d) A class action is the preferable procedure

[81] Section 5(1)(d) directs the Court to certify a class proceeding when it is preferable for the fair and efficient resolution of the dispute. In *AIC Limited* at paragraphs 22 – 23, the Supreme Court cited three primary advantages of class actions when considering other procedural options:

a. judicial economy;

b. access to justice; and

c. behavior modification.

[82] The preferability analysis requires a determination as to whether a class action is preferable to all reasonably available means of resolving class members' claims compared to other forms of resolution (court and non-court alternatives) (see *AIC Limited*, paragraph 19).

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[83] Dewey suggests the complexity and expense of the litigation would prohibit the pursuit of individual actions especially when considering the extensive investigations and expert evaluation which are still necessary for the purpose of conducting the common issues trial. Such a consideration would clearly point to the preference of the class action procedure over other alternatives.

[84] The Defendants assert that common issues are analogous to the factual matrix in *Hollick* as the proposed common issues are "negligible" compared to the individual issues relative to the class members' alleged issues. They suggest, given the small number of claims, joinder would be a more preferable form of resolution. In support of this position, they cited *The College of the North Atlantic v. Thorne*, 2015 NLCA 47 where the Court of Appeal held that a relevant factor for section 5(1)(d) analysis is whether there is a substantial group of persons within the class who are desirous of pursuing their claim through the means of a class action (see paragraphs 24 – 25).

[85] Section 5(2)(a) of the *Act* provides guidance to the Court on what may be considered as part of the preferable procedure analysis. As noted by Butler, J. in *Chiasson* at paragraph 96, the legislature chose to give a court discretion on what it could consider.

[86] In *Hollick* at paragraph 28, the Court accepted that the term "preferable" is meant to be construed broadly and to capture two ideas:

a. first, the question of whether or not the class proceeding would be a fair, efficient, and manageable method of advancing the claim; and

b. second, the question of whether a class proceeding would be preferable to other procedures such as joinder, test cases, and consolidation.

a. Is the class proceeding a fair, efficient, and manageable method of advancing the claim?

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[87] With respect to the fair, efficient, and manageable method of advancing the claim, the Court in *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at paragraph 62 held that it is not enough for plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The Court must be satisfied that a class proceeding would be fair, efficient, and manageable.

[88] While I have found Dewey's claims disclose a reasonable cause of action and common issues, I am satisfied, to use the words of Chief Justice McLachlin in *Hollick* at paragraph 32, "[that] once the common issues are seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issues will significantly advance the action".

[89] The Affidavit of Susan Squires, the Assistant Deputy Minister of Environment, attaches a technical report prepared by the Director of the Water Resource Management Division, Haseen Khan, entitled the Humber Canal Seepage Issue (the "Khan Report").

[90] The Khan Report is significant for two reasons: (1) It is a technical review of all three expert reports relied upon by the parties (i.e. the Water Resources Management Technical Memo (the Province), the SNC Report (the Kruger Defendants), and the Strum Affidavit (the Plaintiff); and (2) It, more importantly, summarizes the factors that have been identified as possibly contributing to the issue of the wet conditions experienced by the class members. These include the following:

. . .

(a) Seepage through the dike;
(b) Movement of groundwater from the canal;
(c) Overland flow associated with a rainfall event and/or snowmelt;
(d) Baseflow from original stream channels in the area;
(e) The lack of an effective stormwater system;
(f) Surficial geology of the area which results in poor drainage;
(g) Geology of the area;
(h) The disruption of natural steam channels in the area;
(i) Development and the density of development in the area of interest.

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[91] No conclusion was provided to the level that each of these factors may contribute to the wet conditions, due to lack of monitoring of the available data.

[92] Class counsel has filed an Affidavit from Victor Lewin, a paralegal employed by Plaintiff's counsel that as of April 2021 they have been contacted by occupants of 43 properties, 42 of which are within the Class Boundary. Like in *Hollick*, defining a class by using geographic and temporal boundaries was acceptable, but it also raises the same analogous concerns about the preferability of the procedure. In the current proceeding, for example, there is no reason to think that the seepage was distributed evenly across the geographical boundary or over the entire time period specified in the class definition. Firstly, there is evidence the groundwater overland flow was associated with rainfall events and/or snowmelts. Secondly, there is evidence the geology of the area results in poor drainage. Thirdly, some class members may be affected by the location or construction of their home whereas others are affected by baseflow from original stream channels in the area.

[93] When analyzing the common issue of flooding in the context of the entire claim, given the possibility of multiple contributing factors and the size of the potential class, I cannot say that the resolution of the common issue will significantly advance the action. In fact, I find the potential members of the class could face the same costs to litigate their claims as if they were bringing their claims as individuals rather than class members by advancing claims on behalf of class members who were not affected by the flooding or because their properties were affected by the topography or the construction of their home.

b. Is the proposed class proceeding preferable to the alternatives?

[94] Based on the Affidavit and cross-examination evidence that has been filed, there is only a small number of members of the proposed class that actually suffered floods on their properties and these individuals seek significant damages. According to Dewey, this could be upwards of 20 homes (see Dewey cross-examination, Book of Cross-Examination Transcripts, page 102).

Judicial economy

[95] Given the significant individual issues in comparison to the common issues, a class proceeding offers no material savings of court resources relative to alternatives such as joinder.

Access to justice

[96] As noted by the Court in *Thorne*, the size of the affected group is a relevant factor for section 5(1)(d) analysis (see paragraph 25). The Lewin Affidavit suggests that only a small number of people were affected by the flooding at issue.

[97] In *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273, Hinkson, J. (as he then was) at paragraphs 69 – 70 held that where the class is small, a conventional joinder action would accomplish the same result:

> [69] . . . I am not persuaded that there will be savings to the proposed class members from certification of the proceedings under the *Act* that cannot be realized if those individuals are simply joined as co-plaintiffs in this action, and the action proceeds as a conventional joint action by the proposed class members. Such a proceeding would avoid the potential for inconsistent findings and the need for individual applications for preservation orders for the fund that exists as a result of the injunction that was granted earlier in this action by me.
>
> [70] The scheme set up under the *Act* requires that before any individual issues are argued or determined, the common issues are to be resolved. I have concluded that

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> it is unnecessary to certify this action as a class proceeding in order to permit the resolution of what the plaintiff asserts to be threshold issues, before proceeding to individual issues. The same result can be accomplished in a conventional multi-plaintiff action, or in a hearing of consolidated claims, or a hearing of several claims at the same time. . . .

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[98] I am of the opinion it is unnecessary to certify this proceeding as a class action in order to permit the resolution of the threshold issue of whether the conduct of Corner Brook Paper in relation to the maintenance of the Water Control System caused or materially contributed to the flooding. Rather, I am of the view the same result can be accomplished in a conventional multi-plaintiff action or in a hearing of consolidated claims or a hearing of several claims at the same time.

Promote behaviour modification

[99] As suggested above, the objective of behaviour modification can be achieved through a joinder proceeding. This would include whether it is appropriate for the Court to consider the Plaintiff's claim for injunctive relief and/or specific performance.

Conclusion on preferable procedure

[100] I conclude that the Plaintiff has failed to establish some basis in fact for the proposed class action as the preferable procedure.

Section 5(1)(e)

[101] Given my findings concerning the preferability criteria in 5(1)(d), there is no basis on which to conduct the requisite representative Plaintiff analysis under section 5(1)(e).

CONCLUSION AND DISPOSITION

[102] I find there is no reasonable cause of action as against: (a) Deer Lake Power; (b) Kruger; (c) the Town; and (d) the Province. As such, the action cannot continue as against these Defendants and they are to be struck as parties.

[103] Dewey's Application for Certification of his motion as a class action is denied because he 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.

[104] Under section 10 of the *Act*, the Court has the discretion to permit the action to continue in other forms. Section 10 reads as follows:

> 10**.** Where the court refuses to certify an action as a class action, the court may permit the action to continue as one or more non-class actions and, for that purpose, the court may
>
> (a) order the addition, deletion or substitution of parties;
> (b) order the amendment of the pleadings; and
> (c) make another order that it considers appropriate.

[105] As the parties did not address this section of the *Act* in their argument, I grant leave to address the application of section 10 in light of the fact that certification has been denied.

[106] No order as to costs in accordance with the *Class Actions Act*.

PETER N. BROWNE
Justice

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