IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Chiasson v. Nalcor Energy*, 2019 NLSC 133
Date: July 11, 2019
Docket: 201701G7673

BETWEEN:

JOHN CYRILLE CHIASSON

PLAINTIFF

AND:

NALCOR ENERGY and HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR

DEFENDANTS

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

Before: Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: April 26, 2019

Summary:

Application for certification of common issues on a proposed class action associated with flooding of properties at Mud Lake, Labrador in May 2017, allowed.

Appearances:

Raymond F. Wagner, Q.C. and Madeleine Carter	Appearing on behalf of the Plaintiff
J. David B. Eaton, Q.C. and Rebecca M.C. Marshall	Appearing on behalf of Nalcor Energy
Donald E. Anthony and Nicholas A. Leamon	Appearing on behalf of Her Majesty the Queen

Authorities Cited:

CASES CONSIDERED: *Cloud v. Canada (Attorney General)* 2004, 135 A.C.W.S. (3d) 567, 192 O.A.C. 239 (Ont. C.A.); *Gay v. Regional Health Authority 7*, 2014 NBCA 10; *Anderson v. Canada (Attorney General)*, 2011 NLCA 82; *Ring v. Canada (Attorney General)*, 2010 NLCA 20; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57; *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375; *George v. Newfoundland and Labrador*, 2016 NLCA 24; *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143; *Anderson v. Manitoba*, 2017 MBCA 14; *Gautam v. Canada Line Rapid Transit Inc.*, 2010 BCSC 163, aff'd 2011 BCCA 275; *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69; *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68; *Berg et al. v. Canada Hockey League et al*, 2019 ONSC 2106

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Energy Corporation Act*, S.N.L. 2007, c. E-11.01; *Water Resources Act*, S.N.L. 2002, c. W-4.01; *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33; *Class Proceedings Act*, S.N.S. 2007, c. 28

TEXTS CONSIDERED: Philip H. Osborne, *The Law of Torts* (5th ed.) (Toronto: Irwin Law, 2015)

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REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] By Interlocutory Application for class certification filed on July 12, 2018, the Plaintiff seeks to be representative Plaintiff of a class of persons who suffered damage when the properties they owned or occupied at Mud Lake, Labrador were impacted by flooding on May 17, 2017.

[2] By Statement of Claim issued November 22, 2017, under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (the "*Act*"), the Plaintiff claims against Nalcor and the Province in nuisance and negligence. Neither Nalcor nor the Province have yet filed Statements of Defence but both Defendants deny the Plaintiff's entitlement to certification of any of the common issues identified by Plaintiff's counsel.

FACTS

[3] On May 17, 2017, the Plaintiff (together with his wife) were the occupants of 172 Mud Lake Road, Happy Valley-Goose Bay, Newfoundland and Labrador pursuant to a License to Occupy issued by the Province of Newfoundland and Labrador.

[4] Nalcor Energy is a corporate body created by the *Energy Corporation Act*, S.N.L. 2007, c. E-11.01 and is wholly owned by the Province of Newfoundland and Labrador.

[5] Section 5 of the *Energy Corporation Act* sets out the objects of Nalcor as follows:

> 5. (1) The objects of the corporation are to invest in, engage in, and carry out activities in all areas of the energy sector in the province and elsewhere, including,
>
> (a) the development, generation, production, transmission, distribution, delivery, supply, sale, export, purchase and use of power from wind, water, steam, gas, coal, oil, hydrogen or other products used or useful in the production of power;
>
> (b) the exploration for, development, production, refining, marketing and transportation of hydrocarbons and products from hydrocarbons;
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> (c) the manufacture, production, distribution and sale of energy related products and services; and
>
> (d) research and development.
>
> (2) Notwithstanding subsection (1), the corporation may engage in those other activities that the Lieutenant-Governor in Council may approve.

[6] The Province is responsible for approving water control structures, (including dams), and for regulating dam construction and safety pursuant to the *Water Resources Act*, S.N.L. 2002, c. W-4.01. Pursuant to section 17(1) of the *Energy Corporation Act*, Nalcor is subject to the *Water Resources Act*.

[7] The Muskrat Falls Project (the "Project") is defined in section 2.1(1) of the *Energy Corporation Act*, and is comprised of a hydroelectric plant on the Churchill River, a HVdc transmission line between the Churchill Falls plant and Soldier's Pond, transmission facilities between the Muskrat Falls plant and the generating plant at Churchill Falls, transmission facilities between the island portion of the Province and the Province of Nova Scotia, and upgrades to the bulk electrical system on the island portion of the Province.

[8] Nalcor commenced work on the Project in 2013 with the construction of a hydroelectric generating facility on the Lower Churchill River, approximately 30 km west of the town of Happy Valley-Goose Bay.

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[9] The Churchill River is approximately 856 km in length and flows east from the Smallwood Reservoir in Labrador into the Atlantic Ocean via Lake Melville. The community of Mud Lake is located on the south side of the Churchill River downstream of the Project and access is usually gained by means of boat or snowmobile. The area known as "Mud Lake Road" is on the opposite side of the Churchill River.

[10] As reported by the hydrometric station at English Point, water levels started increasing in the Churchill River on May 11, 2017. By 3:00 p.m. in May 16, 2017, one half a kilometer of Mud Lake Road was under water and the Province closed the road. By 4:00 p.m., the Province was aware of flooding in the lower elevation area of the community of Mud Lake and that some residents had left their homes. There was also extensive flooding in the vicinity of D's Landing, being a beach outcropping area of where Hamilton River Road becomes Mud Lake Road.

[11] Around this time the Province received its first request for evacuation. Power was disconnected to impacted homes on May 16 and 17, 2017, and by 4:00 p.m. on May 17, 2017, residents of the community of Mud Lake were evacuated by either helicopter or hovercraft to Happy Valley-Goose Bay where a Reception Centre was established and remained open until May 29, 2017.

[12] On June 14, 2017, the Province announced its appointment of Dr. Karl-Enrich Lindenschmidt to lead an assessment of the cause of the flooding.

[13] All parties acknowledge that the flooding that occurred on the Churchill River on May 16 and 17, 2017, impacted properties in these three distinct areas, identified in red on a map entered as a consent exhibit, and which will be Schedule 'A' to the Order to be filed. Those properties on Mud Lake Road are identified as "Impacted Properties Map North"; those on Mud Lake itself (an island to the southeast) are identified as "Impacted Properties Map South" and those in the vicinity of D's Landing are identified as "Impacted Properties D's Landing".

ANALYSIS

The Test for Certification

[14] In order to qualify for certification, the onus lies on the Plaintiff to establish each of the components listed in section 5(1) of the *Act*. When considering section 5(1)(d) (whether a class action is the preferable procedure), the court may consider the factors stated in section 5(2). I cite the provisions below:

> **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.
>
> (2) 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
>
> (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
>
> (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[15] To assist in the application of these criteria, I reference the definition of common issues in section 2(b) of the *Act* as follows:

(b) "common issues" means

(i) common but not necessarily identical issues of fact, or
(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[16] Section 8 is also relevant to the certification application. It states:

8. The court shall not refuse to certify an action as a class action solely for one or more of the following grounds:

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

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

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

(d) the number of class members or the identity of each class member is not determined or may not be determined; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Section 5.1(a) - The Pleadings Disclose a Cause of Action

General

[17] Jurisprudence establishes that when assessing whether the pleadings disclose a cause of action, the Court must confine its enquiry to the allegations of fact as pled, which should be accepted for the purposes of the Application. While the onus remains on the Plaintiff, it is a low bar.

[18] I note three principles before proceeding. Firstly, a pleading is considered sufficient unless it is plain, obvious and beyond doubt that the plaintiff cannot succeed or if it is certain to fail because it contains a radical defect (*Cloud v. Canada (Attorney General)* 2004, 135 A.C.W.S. (3d) 567, 192 O.A.C. 239 (Ont. C.A.), at para. 41).

[19] Secondly, it is sufficient if the pleadings disclose one valid cause of action (*Gay v. Regional Health Authority 7*, 2014 NBCA 10, at paragraph 36).

[20] Finally, the statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the form of pleading (*Anderson v. Canada (Attorney General)*, 2011 NLCA 82, at para. 31; and *Ring v. Canada (Attorney General)*, 2010 NLCA 20, at para. 53).

Nuisance

[21] Nuisance is pled at paragraphs 24 to 42 and 47 to 58 of the Statement of Claim.

[22] The parties acknowledge that the tort of nuisance requires proof that the acts or omissions of the Defendants caused or contributed to an interference that is both substantial and unreasonable. Unless each of these is pled, the Defendants asserts that the Statement of Claim is deficient and the action cannot succeed.

[23] The Plaintiff claims that both Defendants are liable for the damage caused by the tort of nuisance (paragraph 42) which counsel clarified in argument is the tort of private nuisance. The Plaintiff does not differentiate between Nalcor and the Province in his assertions respecting the tort of private nuisance at paragraphs 42 to 46 of the Statement of Claim which I repeat below:

> 42. The Plaintiff alleges that the actions and omissions of the Defendants, which are more fully detailed below, caused or contributed to the losses, injuries and damage alleged herein and include: choosing not to install or employ control measures on the Project; adding sandbars at the mouth of the Churchill River; manipulating the Churchill River; increasing the water levels above 21.5 meters in the dam's reservoir; choosing not to install a safety boom; choosing not to measure ice thickness on a regular basis or at all; and choosing not to construct a diversion or drainage ditch between the Churchill River and/or Mud Lake and the Properties to address the significant potential for flooding.
>
> 43. The flooding in May of 2017 caused material physical damage, including extensive water damage, to the interior and exterior of the Properties, as well as the loss of personal property on and in the Properties. It has rendered the land unfit for residential habitation or development. This material physical damage has had a negative impact on the value of the Properties. The material physical damage caused by the Defendants poses a serious risk of actual harm to the health and wellbeing of the Class Members. These detrimental effects are material, actual and readily ascertainable.
>
> 44. The Defendants are liable to the Plaintiff and Class Members for having committed the tort of nuisance.
>
> 45. No or no adequate measures or safeguards were taken by the Defendants to implement any effective or appropriate methods to prevent the potential of flooding. The Defendants chose not to measure ice thickness on a regular basis or at all. The Defendants chose not to implement groundwater monitoring wells anywhere in the area. They chose not to implement control measures such as foundation cut-offs. The Defendants further chose not to monitor weir flow data to evaluate any significant changes in quantity or quality of overflow from the Project.
>
> 46. The material harm caused by the Defendants' actions and omissions is borne directly by the Plaintiff and other Class Members. The actions and omissions of the Defendants caused the Plaintiff and Class Members to suffer a substantial and unreasonable interference with the Properties, including their use, safe habitation, resale, development, and enjoyment.

[24] I am satisfied that these paragraphs reflect the essence of a claim in private nuisance against both Defendants. At paragraph 14, the Plaintiff specifies the flooding as the cause of the damage; paragraphs 42-46 allege that the acts or omissions of the Defendants caused the flooding and substantial and unreasonable interference is specifically pled at paragraph 46.

[25] The Court will determine if the alleged interference was substantial based upon the "material interference with ordinary comfort test" (*Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, at para. 16).

[26] Should a substantial interference be found at trial, the Court will decide if the interference was unreasonable with reference to all the circumstances (*Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13).

[27] On the facts pleaded, which must be taken to be true, it is not plain and obvious that a claim in private nuisance would fail.

Negligence

[28] Since the pleadings disclose one valid cause of action, it is strictly speaking unnecessary for me to assess whether the Plaintiff's claim in negligence meets the requirements of section 5(1)(a). On a practical basis however, I shall do so for the benefit of the parties.

[29] Negligence is pleaded in the Statement of Claim at paragraphs 42 and 47 to 58. Paragraphs 47 to 51 are specific to Nalcor and paragraphs 52 to 58 are specific to the Province.

[30] A claim in negligence requires a plaintiff to allege and establish a duty of care, a breach of the duty owed, causation and damages.

[31] I am satisfied that the Statement of Claim meets the requirement of pleading for this tort in its assertions against Nalcor through the combined reading of paragraphs 47 to 49 (duty of care), paragraph 50 (breach of the duty of care), paragraph 51 (foreseeability) and paragraph 42 (causation).

[32] The Province however raises two additional concerns.

[33] First, it asserts that it is settled law that Her Majesty cannot be liable for acts or omissions of Nalcor; and secondly, that the Plaintiff relies on core policy decisions of the Province for its negligence claim for which the Province is immune.

[34] On the first of these, I note that the Plaintiff's claims against the Province are not restricted to acts or omissions of Nalcor. At paragraph 54 of the Statement of Claim it asserts that the duty of care owed is to "use due care in giving effect to, or putting into operation, its policies respecting the Project". Paragraph 56 provides six particulars of the operational negligence alleged of the Province, most of which I would characterize as arising under the *Water Resources Act*.

[35] A concern similar to the Province's second issue was addressed in the moose-vehicle class action, *George v. Newfoundland and Labrador*, 2016 NLCA 24. The questions of duty of care and breach had been certified as common issues. The trial judge determined that, assuming a *prima facie* duty of care was owed by the Province, it would be negated because core policy decisions of government cannot give rise to tort liability (at paragraph 153).

[36] Ultimately the trial judge in *George* concluded that the Province's decision in issue qualified as policy and the Court of Appeal agreed (at paragraphs 158-163). However, both the difficulties associated with the characterization of decisions as "policy" or "operational" and the careful analysis required were recognized at paragraphs 154 and 158.

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[37] Such careful analysis is inappropriate at the certification stage where I am restricted to the pleadings.

[38] I am satisfied that the Statement of Claim meets the onus of establishing the elements of the tort of negligence against the Province. Paragraphs 53 and 54 allege the private law duty of care owed; paragraph 56 identifies the breach of the duty of care of the Province as operational negligence; causation is addressed in paragraph 42 and damages are alleged as a result of the Province's acts and omissions at paragraph 57, which paragraph also addresses the foreseeability component.

Conclusion – Section 5(1)(a)

[39] I conclude that it is not plain and obvious that, as pleaded, the Plaintiff's claims in nuisance and negligence cannot succeed (*Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, at para. 25). I find therefore that the Plaintiff has met the onus of establishing the requirements of section 5(1)(a).

The Evidentiary Basis for Consideration of Factors in Sections 5(1)(b)–(e)

[40] For these factors, it is well established that the Court may rely upon the evidence presented in addition to the pleadings. Provided that there is "some basis in fact" for each of the factors, the onus is met (*Anderson*, at para. 32).

[41] The Plaintiff filed his own affidavit and affidavits from Vyann Kerby and James Purdy, each of whom occupied properties in one of the three impacted areas at the relevant time.

[42] The Plaintiff also relied upon an affidavit from Chris Boudreau, an engineer with Strum Consulting who had prepared a report based on his review of several records. These included Independent Review Reports of Dr. Lindenschmidt (May

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17, 2017) and KGS Group ("KGS") (September 2017) as well as S.N.C. Lavalin's risk assessment report of April 2015. Mr. Boudreau's affidavit and report also referenced minutes of project meetings held in 2016 and 2017.

[43] On September 14, 2018, Plaintiff's counsel filed a comprehensive affidavit of Victor Lewin who is a paralegal with the law firm of Wagner's in Halifax, Nova Scotia. Attached were copies of documents he obtained from Nalcor's website, being studies on flood and ice conditions of the Churchill River related to the Muskrat Falls Project. Mr. Lewin's affidavit confirmed at paragraph 12 that counsel for the Plaintiff had been contacted as of September 12, 2018 by forty-four (44) individuals expressing interest in the proposed Class action.

[44] Finally, the Plaintiff filed a book of cross-examination transcripts.

[45] On behalf of the Province, Jamie Chippett, Deputy Minister of the Department of Municipal Affairs and Environment, filed two affidavits on November 21, 2018, and March 7, 2019. Nalcor did not file evidence.

Section 5.1(b) – Identifiable Class of 2 or More Persons

[46] During the hearing, Plaintiff's counsel proposed an order respecting the class definition as follows:

> An order certifying a class of all persons who were Owner or Non-Owner class members as of May 17, 2017, such sub-classes defined as:
>
> a) Owner class members: an individual (other than the Defendants and their parent companies, affiliates or subsidiaries) who owned or co-owned real property within the three areas identified in red on Schedule A and which areas were affected by the Churchill River flooding on May 16 and 17, 2017 (the "Properties"); and
>
> b) Non-owner class members: an individual (other than the Defendants and their parent companies, affiliates or subsidiaries) who resided in either of

> the three areas identified in red on Schedule A but did not own real property located within the three areas and which areas were affected by the Churchill River flooding on May 16 and 17, 2017.

[47] The Plaintiff's affidavit of September 14, 2018, described the events of May 16 and 17, 2017, the damages sustained to the property he occupied and the settlement proposal he received from the Province (but did not accept). His affidavit also confirmed his willingness to act as Representative Plaintiff should the Class Action be certified.

[48] The first of Mr. Chippett's affidavits detailed the Province's response to the Churchill River flood and confirmed that as of May 20, 2017, a total of seventy-four (74) people had registered at the Reception Centre.

[49] I have already referenced that Mr. Lewin's affidavit confirmed that Plaintiff's counsel has been contacted by forty-four (44) individuals.

[50] In combination, I find this evidence provides some basis in fact that there is an identifiable class of two or more persons who would fall within the proposed Class definition. As section 8 confirms, at the certification stage it is not fatal either that different remedies may be sought by various members, that the number and identity of members is not yet determined or that the class includes a subclass. I find that element (b) of section 5(1) of the *Class Actions Act* has been established.

Section 5(1)(c) – Claims of Class Members Raise a Common Issue

[51] During the course of the hearing, Plaintiff's counsel revised their initial position on the proposed common issues as follows:

Causation/Material Contribution

1. Did the Province cause or materially contribute to the Churchill River flood which impacted properties within the three zones identified on Schedule 'A'?
2. Did Nalcor cause or materially contribute to the Churchill River flood which impacted properties within the three zones identified on Schedule 'A'?

Nuisance

3. Did the Province interfere with the use or enjoyment of the properties?
4. If so, was the Province's interference substantial?
5. If so, was the Province's interference unreasonable?
6. Did Nalcor interfere with the use or enjoyment of the properties?
7. If so, was Nalcor's interference substantial?
8. If so, was Nalcor's interference unreasonable?

Negligence

9. Did the Province owe a duty of care to Class members?
10. Did the Province breach the standard of care?
11. If so, did the breach cause reasonably foreseeable harm to Class members?
12. Did Nalcor owe a duty of care care to Class members?
13. Did Nalcor breach the standard of care?
14. If so, did Nalcor's breach cause reasonably foreseeable harm to Class members?

Joint and Several Liability

15. Are the Defendants jointly and severally liable to the Class for the requested relief?

[52] As a result of some concessions made during the hearing, I will address these proposed common issues out of order.

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Negligence

[53] Counsel for the Province denies that either the existence of the duty of care, (issue 9), breach of the standard of care, (issue 10), or foreseeability of harm (issue 11), are common issues. He relies primarily on the fact that the Province cannot be liable to the Plaintiff for policy decisions and, as to foreseeability, he agrees with Nalcor's position addressed below.

[54] For its part, Nalcor concedes that questions 12 and 13 (duty and breach) would qualify as common issues but suggests that question 14 (foreseeable harm) would require individual assessment of both the harm and whether the specific harm was reasonably foreseeable. Thus, counsel asserts it is not a common issue.

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

> (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.

[56] Respecting the Province's objections to issues 9 and 10, I have already indicated that the Statement of Claim specifically pleads operational negligence. At

the certification hearing stage, the Court must avoid a merits assessment of the assertions and assess only whether the Applicant has established some basis in fact for characterizing the proposed questions as common issues.

[57] Here I find it helpful to return to basic principles in negligence and cite Osborne, "The Law of Torts" (5th ed.), at 25, as follows:

> There are three core elements: the negligent act, causation, and damage. ...The negligent act is determined by identifying the appropriate standard of care and applying it to the facts of the case. Causation is established by showing a link between the defendant's negligent act and the plaintiff's damage. Damage is the vital element that triggers the claim and launches the litigation process.

[58] To summarize, assessment of duty, breach and foreseeability of harm equate to liability. The link between the negligent act and damage is causation.

[59] I find the affidavit of Chris Boudreau of assistance to the assessment of duty, breach and foreseeability of harm as common issues. As noted previously, he conducted a review of existing independent studies on the Mud Lake flood and prepared an opinion.

[60] Mr. Boudreau acknowledges that the reports prepared by Dr. Lindenschmidt and KGS "generally concluded that there were several unfortunate factors that combined throughout the year..." (that) "there was no evidence of any factors that were significantly influenced by any construction or operation of Muskrat Falls in 2016 and 2017 and that Muskrat Falls did not worsen the flood conditions experienced at Mud Lake."

[61] However, Mr. Boudreau expressed several concerns. At section 3.1 of his report, he addressed his uncertainty on several conditions and events that he would seek to have clarified or investigated. He confirmed his belief that "...these items may be significant and when further investigated will indicate that the construction

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and operation of the new Nalcor facility at Muskrat Falls did, indeed, have a contributory impact on the spring 2017 flooding at Mud Lake."

[62] At section 3.1.1, Mr. Boudreau provided particulars of his concern. One was Dr. Lindenschmidt's conclusion that "the Muskrat Falls forebay water elevation was increased to 21.7 m ... This would have provided a stabilized ice cover in the forebay to reduce frazil ice formation and hem the progression of hanging ice dam downstream of Muskrat Falls". However, Mr. Boudreau referenced records which confirmed a leaking cofferdam, which required the forebay levels to be quickly lowered in November by means of the spillway gates and suggested that the water level of 21.7 metres was not present in November 2016 as suggested. He expressed the view that this, coupled with the lack of ice boom, meant that the suggested forebay water level was not present and could not provide stabilized ice cover in the forebay to reduce frazil ice and hanging ice dams.

[63] At page 8 of his report, Mr. Boudreau addressed other concerns. Under the category of 'Ice Boom Installation', Mr. Boudreau suggested that the KGS report "does not provide a detailed investigation of the impact of the presence of a construction site in the river, and the impact of the presence or absence of the ice boom may have made a difference in the quantity and severity of ice travelling through the spillway".

[64] The Plaintiff's claim, and that which he proposes on behalf of a class, arises from a single, common flooding event on May 16 and 17, 2017 that admittedly impacted three distinct areas. No class member can prevail without proving a duty, breach and foreseeability of general harm. Complex relationships between the Defendants, Crown agencies, contractors and Nalcor subsidiaries must be reviewed at trial to assess the standard of care owed to the proposed class (if any). Historical records such as those reviewed by Mr. Boudreau will be key to the court's assessment of the questions of breach of duty and foreseeability of general harm.

[65] The evidence which will be relied upon to support each of these three elements will be the same for all proposed class members. The Act does not require a common answer to each component; it requires only a common question that can advance the

resolution of the litigation with respect to all class members. I accept that the degree of harm actually suffered would be the subject of individual assessments at a later date.

[66] The Plaintiff has therefore established some basis in fact to suggest that resolution of questions respecting liability and causation in negligence are necessary to the determination of each class member's claim.

[67] I am satisfied that the Plaintiff has established some basis in fact for the following questions as common issues in negligence:

Liability in Negligence

1. What duty of care (if any) was owed by the Province with respect to the class members' interests as owners or occupiers of properties impacted by the Flood?

2. What duty of care (if any) was owed by Nalcor with respect to the class members' interests as owners or occupiers of properties impacted by the Flood?

3. If a duty of care was owed, did the Province breach the duty of care?

4. If a duty of care was owed, did Nalcor breach the duty of care?

5. Was general harm to the class members a reasonably foreseeable consequence:

    a) of the Province's breach of duty?

    b) of Nalcor's breach of duty?

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Causation in Negligence

6. Did Nalcor cause or materially contribute to the flood which impacted Properties within the three zones identified on Schedule 'A'?

7. Did the Province cause or materially contribute to the flood which impacted Properties within the three zones identified on Schedule 'A'?

Joint and Several Liability

[68] The Plaintiff seeks to certify the issue of whether the Defendants are jointly and severally liable to the class as a common issue, but the Defendants claim that determination of liability stems from the question of causation which they assert can only be resolved on an individual basis.

[69] Reduced to its simplest terms, this proposed question seeks to determine if multiple tortfeasors caused the same (in this case "general") damage. As Osborne explains at page 67, the importance of the distinction between several concurrent tortfeasors and joint and several tortfeasors has been "minimized by legislative reform that now controls the responsibility of multiple tortfeasors". In this jurisdiction, that is the *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33.

[70] At trial, if liability is established for both Defendants, the Court will be asked whether it is possible to establish the respective degrees of fault between the Province and Nalcor and, if not, liability shall be apportioned equally pursuant to section 2(2)(a) of the *Contributory Negligence Act*.

[71] Relying again on the affidavit of Chris Boudreau, the reports he referenced reflect a "complex relationship of corporate partners, subsidiary companies and affiliates responsible for the legal, administrative, management and operational

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functions of the Project." These are detailed in paragraphs 25 to 38 of the Statement of Claim.

[72] Assessing liability of multiple tortfeasors in this case will require the Court to consider evidence of the role played by each Defendant in the management and control of water in the Churchill River (whether related or unrelated to the Project) and if such roles ultimately caused the class members to suffer the same general damage. The same evidence respecting the complex relationships, roles played, and responsibilities assumed by the Defendants will apply to determination of the question of the respective degrees of fault of the Defendants to each class member.

[73] I am satisfied that the Plaintiff has established some basis in fact that joint and several liability to the Class is a question that must be resolved for each class member's claim and therefore the following are common issues:

Joint and Several Liability

8. Did the fault of both Defendants cause the Flood that impacted the properties?

9. If so, is it possible to establish the respective degrees of fault between the Defendants?

Nuisance

[74] The parties agree that interference with use or enjoyment of land, which was both substantial and unreasonable are the three elements of nuisance. The Defendants assert that neither of these elements is common to the proposed class and that interference, substantiality and reasonableness are individual questions.

[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).

[79] In *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375, the court concluded that "nuisance cases are 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" (at para. 116).

[80] I admit that assessment of the proposed questions in nuisance has been the most challenging part of this decision.

[81] I accept that liability in nuisance is an individual issue. However, this general statement does not preclude certification of a component of the tort as a common issue in a class action in the right circumstances (*Cloud*, at para. 53).

[82] I do not have the benefit of jurisprudence from this Province certifying questions in private nuisance as common issues. However, the moose-vehicle class action suit in *George* was a public nuisance claim in which the trial judge had certified the common question of "whether the Defendant is liable in tort of public nuisance" and I note that the Court of Appeal did not disturb the characterization of this as a common issue.

[83] In *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143, the only common issue question in nuisance that the court concluded would qualify as a common issue was "whether the appellants emitted contaminants" (at para. 148). However, overall the court was satisfied that the proceeding should not have been certified as a class proceeding (at paras. 180 and 187).

[84] In *Anderson v. Manitoba*, 2017 MBCA 14, several First Nations Reserves were the subject of a flood which was alleged to be the "interference" element of the private nuisance claim in the proposed class proceeding.

[85] At paragraph 40 of *Manitoba*, the court characterized the focus of the plaintiff's proposed question as identifying any causal connection between the actions of *Manitoba* regarding the water controlled structures and the flooding. It certified a common issue question on the basis that it did not address the impact of the flooding on any particular plaintiff's property. The specific question certified was:

> Did the Defendant, Government of Manitoba, by its actions, cause flooding to occur on the .... Reserves?

[86] The question of whether construction of a rapid transit tunnel in Vancouver between 2005 and 2009 "substantially interfered" with the use and enjoyment of

business or property owners on the route was upheld as a common question in the class action in *Gautam v. Canada Line Rapid Transit Inc.*, 2010 BCSC 163, aff'd 2011 BCCA 275.

[87] It is apparent in the trial judge's reasons in *Gautam* that the nature, extent, and severity of the four-year disruption led him to characterize the assessment of the question of "substantial interference" as objective rather than unique to the circumstances of any particular owner (para. 27).

[88] With the benefit of these authorities to guide me in the application of a common sense approach to the task, I conclude that it is inherent in the facts and the Defendants' admission (that properties in three distinct zones were "impacted by the Flood") that the question of "substantial interference" is an objective question not unique to the circumstances of each class member in these three impacted zones. All three areas were under the watchful eye and management of the Province's Fire and Emergency Services in the same relevant period. Evacuation, road closures, termination of electrical services and the establishment of a Reception Centre for evacuees were responses to the one event that would be considered by the court in assessing whether the interference was "minor, trifling, transitory or trivial" (Osborne, at 398).

[89] On the facts of the case before me, I would therefore characterize the question of whether the Flood "substantively interfered" with the use and enjoyment of the Properties as objective and that it would qualify as a common issue.

[90] As to reasonableness, while the facts of the within case are distinguishable from the more frequent type of private nuisance claims (because there is here only one isolated event as compared to a sustained or prolonged activity), I am nevertheless satisfied that the question of reasonableness is a subjective individual question. This component of the tort of private nuisance will require evidence on things such as whether the residents used it full time or seasonally, what was constructed on, the intensity of the flood on the property, the duration of the floodwater on the property and how each property was affected by the flood. I agree

with the Defendants that proposed issues 5 and 8 cannot be certified as common issues.

[91] The Plaintiff has established some basis in fact and law that the following questions are common issues in nuisance which must be addressed for all potential class members:

10. Did the Province cause or materially contribute to the Flood which impacted Properties within the three zones identified on Schedule 'A'?

11. Did Nalcor cause or materially contribute to the Flood which impacted Properties within the three zones identified on Schedule 'A'?

12. Did the Flood substantially interfere with the class members' use and enjoyment of the Properties?

[92] I recognize that the first two questions are identical to the causation questions I have determined to be common issues in negligence.

5.1(d) – A Class Action is the Preferable Procedure

The Test

[93] While the onus remains on the Plaintiff, in *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, the court established that where a defendant relies upon a specific alternative procedure, he bears the evidentiary burden of establishing its preferability.

[94] The test to be applied under this element requires comparison of the Class Action proceeding to all reasonably available means of resolution. The Plaintiff suggests that the complexity and expense associated with the investigations recommended by Mr. Boudreau speak to the preference of the Class Action procedure and that all policy objectives of Class Action litigation are achieved in the within case.

[95] The Defendants oppose the Plaintiff's position in this respect and assert that the common issues would not predominate in a Class Action suit. They suggest that the evidence supports the requirement of individual assessments of the questions of unreasonable interference, substantial interference and damages suffered which issues would ultimately outweigh the common issues. They propose joinder of individual claims as a preferable means of achieving the same result.

[96] Section 5(2) provides guidance to the assessment of the 'preferable procedure' factor. In this regard, I note that in determining whether a class action would be the preferable procedure, the legislature chose to give the Court discretion on what it could consider. This contrasts with the legislation in other jurisdictions where the court is required to consider certain factors. Compare for example section 7(2) *Class Proceedings Act*, S.N.S. 2007, c. 28 and the discussion at paragraph 50 of *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68.

[97] In *Hollick*, the Court addressed certification of a class action for noise and physical pollution from the Keele Valley landfill owned by the City. At paragraph 27, the court addressed whether a class proceeding was the preferable procedure and agreed that the three principal advantages of class actions (judicial economy, access to justice and behaviour modification) should guide the enquiry

[98] Referencing the report of the Attorney General for Ontario's Advisory Committee on Class Action Reform, the court, at paragraph 28, accepted that "preferable" is meant to be construed broadly and meant to capture two ideas:

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

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

[99] The court concluded that the question of preferability must take into account the importance of the common issues in relation to the claims as a whole and in context to the circumstances of the particular claim which would include both the common and individual issues raised by the case (at paras. 27 and 31).

[100] Before I address broad considerations of judicial economy, access to justice and behaviour modifications, I note two specific facts. Firstly, there was no evidence that any proposed class members have a valid interest in individually controlling the prosecution of separate actions or that the class action would involve claims that are or have been the subject of another action. Secondly, the size of the potential class appears to this stage to be relatively small (less than 100 members).

Judicial Economy

[101] I have earlier concluded that of the fifteen questions proposed, only two are individual issues. In addition to these two issues, I acknowledge that (if liability is established) the question of damage will require individual assessment. On this basis, it cannot be said that the individual issues would predominate over common issues.

[102] Returning again to context, unlike the facts in *Hollick*, the event here was confined to a two-day period. It cannot be compared to noise or physical pollution that allegedly distributed unevenly across a geographic area over a significant period of time with some areas affected at one time and others at other times.

[103] In the within case, occupiers of all impacted properties would rely upon the same evidence to establish liability in negligence, substantial interference in nuisance and causation in both torts.

[104] Attached as Exhibits A to F to Mr. Lewin's affidavit are the following documents obtained from the Nalcor Energy Muskrat Falls Project website:

- The Lower Churchill Project: GI 1140 – PMF and Construction Design Flood study authored by Hatch Ltd. in December 2007;

- The Lower Churchill Project: EIS 0017 – Further clarification and updating of the 2007 Ice Dynamics Report authored by Hatch Ltd. in November 2008;

- The Lower Churchill Project: MF 1330 – Hydraulic Modelling and Studies 2010 Update authored by Hatch Ltd. in March 2011;

- Muskrat Falls Ice Study – 2013 Update Final Report authored by Hatch Ltd. in June 2013;

- Lower Churchill Project: Log Boom for Ice Control During Impoundment authored by SNC Lavalin in October 2013; and

- Muskrat Falls: Winter Headpond Freeze-up authored by Hatch Ltd. in November 2016.

[105] Mr. Lewin's affidavit identifies the issues addressed by each report and I accept that some basis in fact has been established for their relevance to the proposed action.

[106] As to complexity, the pleadings have not yet closed but discoveries have already been held. The documentation attached to the affidavits filed in support of the certification hearing are voluminous and in a case such as this, extensive document production and multiple pre-trial procedures can be expected. Mr. Boudreau's affidavit suggests the very real likelihood of expert evaluation including hydraulic modelling of the Churchill River and analyzing annual rainfalls.

[107] Outside of a class action, I accept that it would be prohibitively expensive for any individual plaintiff to cover such expenses. In addition, individual actions with separate experts engaged could result in conflicting evidence with conflicting results.

[108] Sharing resources and risk is a significant advantage to the proposed class members and I am not satisfied that the Defendants' proposed alternative means of resolving the claims (individual actions consolidated or heard together) would be more practical or more efficient. It has not been established that the administration of the proposed class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[109] The principle of judicial economy strongly supports a class action proceeding as the preferable procedure.

Access to Justice

[110] As to access to justice, the reports previously referenced support the benefit of class actions in the distribution of litigation costs over the entire class, making it economically feasible to prosecute claims that might not otherwise be brought.

[111] As the court indicated in *Hollick*, at paragraph 33, the existence of a compensatory scheme such as the Province's Disaster Relief fund is not itself grounds to deny the class action but it is a consideration. In the within case, the

evidence suggests that the fund did not provide what the Plaintiff considered to be sufficient coverage for his losses.

[112] In addition, through class action litigation, everyone affected would have notice of the proceeding even if they are not able to participate. This furthers the access to justice requirement of class actions.

Behaviour Modification

[113] Class action proceedings attract public and media attention in general but it is perhaps even more likely in this case because the Muskrat Falls Project is currently the subject of a Judicial Inquiry ("the Inquiry"), addressing multiple questions associated with Nalcor's decision to recommend that the Province sanction the Project and whether the Province was fully informed of risks or problems anticipated with the Project.

[114] Through a class action proceeding the public may learn whether the Project had any relationship to the May 16-17, 2017, flooding. There is therefore the potential that a class action proceeding may have a beneficial effect on the manner in which water control systems are managed, at least in this Province (*Gay* at paragraph 23).

Conclusion on Preferred Procedure

[115] I conclude that the Plaintiff has established some basis in fact for the proposed class action as the preferable procedure.

Section 5.1(e) - The Plaintiff is a Person Able to Fairly and Adequately Represent the Interests of the Class

[116] Little time will be spent on this element. Mr. Chiasson has accepted in his affidavit the responsibility of acting as representative to the Class. No conflict is alleged in his representation of other individuals impacted by the flood. His suitability is not demeaned merely because his individual claim may be lesser or greater than other individuals impacted (*Berg et al. v. Canada Hockey League et al*, 2019 ONSC 2106). In terms of his competence, during the course of the hearing, Plaintiff's counsel had cause to seek instructions from Mr. Chiasson (who was not present in Court) with respect to some modifications required to Schedule 'A'. Mr. Chiasson was able to identify an error in the D's Landing proposed zone which caused Plaintiff's counsel to seek further modifications to this area of the map.

[117] I am satisfied that some basis in fact has been established for the appointment of Mr. Chiasson as a person who is able to fairly and adequately represent the interests of the Class. The plan for the action has been attached to pleadings filed subsequent to the application for certification and no conflict of interest has been established.

Conclusion on Factors 5(1)(a) – (e)

[118] I am satisfied that the Plaintiff/Applicant has met the requisite burden of establishing each of the criteria listed in section 5(1) of the *Act* albeit for a modified form of questions to be certified as common issues.

CONCLUSION

[119] The Plaintiff shall prepare an Order certifying this action as a class action with a formal Notice of Certification and the Litigation Plan attached. The Order shall confirm that the Plaintiff is a person able to fairly and adequately represent the

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interests of the following class of persons who were owner and non-owner class members as of May 17, 2017, such sub-classes defined as:

a) Owner class members: An individual (other than the Defendants and their parent companies, affiliates or subsidiaries) who owned or co-owned real property within the three areas identified in red on Schedule 'A' to this order, which areas were affected by flooding on May 16 and 17, 2017.

b) Non-Owner class members: An individual (other than the Defendants and their parent companies, affiliates or subsidiaries) who resided in either of the three areas identified in red on Schedule 'A' to this order but who did not own property located within either area and which areas were affected by flooding on May 16 and 17, 2017.

[120] The Order to be prepared shall have the following heading and confirmation that the questions below are certified as common issues:

> Relative to the Churchill River Flood of May 16 – 17, 2017, (the "Flood"), which impacted properties (the "Properties") in the three areas identified in Schedule 'A' to this Order, the following questions are certified as common issues:
>
> Liability in Negligence
>
> 1. What duty of care (if any) was owed by the Province with respect to the class members' interests as owners or occupiers of properties impacted by the Flood?
>
> 2. What duty of care (if any) was owed by Nalcor with respect to the class members' interests as owners or occupiers of properties impacted by the Flood?

3. If a duty of care was owed, did the Province breach the duty of care?

4. If a duty of care was owed, did Nalcor breach the duty of care?

5. Was general harm to the class members a reasonably foreseeable consequence:

    a) of the Province's breach of duty?
    b) of Nalcor's breach of duty?

Liability in Nuisance

6. Did the Flood substantially interfere with the class members' use and enjoyment of the Properties?

Causation in Negligence and Nuisance

7. Did Nalcor cause or materially contribute to the Flood which impacted Properties within the three zones identified on Schedule 'A'?

8. Did the Province cause or materially contribute to the Flood which impacted Properties within the three zones identified in Schedule 'A'?

Joint and Several Liability

9. Did the fault of both Defendants cause the Flood, which impacted the properties?

10. If so, is it possible to establish the respective degrees of fault between the Defendants?

[121] The Order shall also contain provisions for the form of notice to members, costs of advertising and opting out. Should the parties be unable to agree on these terms, the Case Management Judge shall assist.

[122] In light of section 37(1) of the *Act*, no costs order is permitted.

GILLIAN D. BUTLER
Justice