IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *George v. Newfoundland and Labrador*, 2016 NLCA 24
Date: May 25, 2016
Docket: 201401H0080

BETWEEN:

HUGH GEORGE and BEN BELLOWS APPELLANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR RESPONDENT

Coram: Green C.J.N.L., Barry and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division Docket No. 201101G0013,
(2014 NLTD(G) 106)

Appeal Heard: January 21 and 23, 2015
Judgment Rendered: May 25, 2016

Reasons for Judgment by: Barry J.A.
Concurring Reasons by: Green C.J.N.L.
Concurring Reasons by: White J.A.

Counsel for Appellant: Chesley F. Crosbie Q.C. and Jessica Dellow
Counsel for Respondent: Peter Ralph Q.C. and David Rodgers

Barry J.A.:

[1] When a motor vehicle collides with a moose on a highway in Newfoundland and Labrador, there are often tragic consequences. Death and serious life-altering injuries are common results. The moose population on the island portion of the province has been described as "hyper-abundant." There is approximately one moose for every five persons living on the island. According to the most recently available information, three and a half percent of all vehicle accidents in the province are moose-vehicle collisions (MVCs). MVC frequency has risen from 386 in 2000 to 776 in 2010.

[2] The basic question underlying this appeal is whether the losses suffered as a result of MVCs should be borne by the persons involved in the accidents and their families (and possibly their insurers) or whether they should be spread among the public at large by holding the government of the Province liable to compensate the victims. This question cannot be answered in the abstract but only by determining whether on the facts as agreed or proven one or more causes of action against the Crown have been established.

[3] This proceeding was commenced as a class action on behalf of that class of Newfoundland residents who were killed or injured in an MVC during the period from April 2001 to November 2011. The claims were based on a variety of potential causes of action, including public nuisance and negligence. The claims were not founded on the introduction of moose, a non-native species, into the island by the colonial government in 1874-75 and 1904. The limitation period would have long expired to enable such a claim to be made. Instead, the representative plaintiffs alleged, amongst other things, that problems of MVCs arose subsequently as the population increased and roads and motor traffic mushroomed to the point where the presence of moose in their proximity became a nuisance and, to the knowledge of the authorities, an ever-present danger to highway users. The plaintiffs alleged that the government continued the nuisance and negligently failed, in the face of mounting evidence of the danger to the Province's citizens, to do anything constructive to mitigate the associated risks.

[4] The trial judge dismissed all of the claims. The appellants have appealed only the claims in public nuisance and negligence. They submit the trial judge erred in his formulation and application of the legal principles relating to these two torts.

[5] For the reasons that follow, I would dismiss the appeal and affirm the result reached by the trial judge. Following that decision, certain subsidiary issues raised by the appellants, all of which were dependent upon a finding of legal error respecting the nuisance and negligence claims, need not be addressed.

BACKGROUND

[6] Much of the factual background was placed before the trial court by way of an agreed statement of facts. I will briefly summarize only what is relevant for this appeal.

[7] The management of moose in the Province of Newfoundland and Labrador is a cross-departmental issue. The principal departments of government involved in the mitigation of MVCs are Transportation and Works, which is responsible for the construction and maintenance of provincial highways, including brush clearing, vegetation control and warning signage, and Environment and Conservation, which is responsible for managing the moose population.

[8] A document entitled "Moose Management Literature Review" was prepared within the Department of Environment and Conservation, Wildlife Division, in April 2010, marked "draft." It described the population of moose on the Island of Newfoundland as "hyper-abundant."

[9] On July 6, 2011, the Province announced that it would invest approximately $5 million in a series of initiatives which it hoped would reduce the number of MVCs. These included the launch of pilot projects involving wildlife fencing and wildlife detection systems, and the enhancement of ongoing brush clearing and public awareness efforts.

[10] According to a statement by the then Minister of Environment and Conservation, as part of these initiatives, the Province increased the number of moose-hunting licenses focused along the TransCanada Highway (TCH) and major trunk roads, in an attempt to counteract the number of MVC incidents that were occurring.

Mitigation Prior to the Pilot Projects

[11] A report prepared by a research assistant in December 1985 for the Department of Transportation, had stated that studies with fencings had been fairly consistent, and indicated they were the most effective method for the

prevention of collisions with wildlife. This report also noted that there was an "extremely high" cost associated with erecting fencing, but the report contained no costing and no cost/benefit analysis.

[12] An article entitled "Spatial and Temporal Distribution of Moose-Vehicle Collisions in Newfoundland," written in 2001 by two government employees working with the Department of Environment and Conservation at the time the article was published, has been often referred to in decision-making by the government and its departments over the class period in relation to the issue of MVCs.

[13] The 2001 article was published in the Wildlife Society Bulletin, was a peer-reviewed piece of research conducted in Newfoundland and Labrador concerning the issues of MVCs and was available to help inform government officials regarding issues surrounding MVCs.

[14] The article described the extent of the MVC problem and was utilized within government in studying the issue. The article was intended to describe and better understand the spatial and temporal distributions of MVCs in Newfoundland by using then more recent data. It included commentary on mitigative measures and whether or not they had worked.

[15] In a section of the article entitled Management Implications, the conclusion was made that "early detection of moose through increased driver vigilance may be the most important means to reduce MVCs." The article recommended driver awareness programs, observing that "with the high cost and low success of other measures, [those programs] may be the only viable option."

[16] In 2003, the Division of Strategic Planning and Policy and the Division of Inland Fish and Wildlife within the Department of Tourism, Culture and Recreation began work on a document entitled "Moose Vehicle Collisions: A Planning Review and Recommended Strategy."

[17] Preparation of the strategy document involved a review and comparison of MVC reduction strategies in this Province with those taken in other selected jurisdictions, a review of current and historic MVC reduction strategies, a review of key public issues and a review of interdepartmental consultation.

[18] This strategy document recommended six strategies for reducing the number of MVCs: (i) a public awareness campaign; (ii) driver education;

(iii) enhanced highway signage; (iv) brush clearing; (v) moose population manipulation; and (vi) improved reporting and evaluation. This strategy document went through several different drafts from 2003-2004, but these six recommended strategies remained consistent throughout each draft. The 2001 article was one of the sources used to help inform the recommendations in the strategy document.

[19] Although the strategy document remained only in draft form and there is no formal record of it being placed before Cabinet, it was used to inform decisions taken by the Province concerning the reduction of MVCs.

[20] Between the drafting of the strategy document and the 2011 pilot projects, government action to reduce MVCs was based on the recommendations which flowed from this document and emphasized (i) increasing public awareness and targeted prevention strategies, such as driver education; (ii) enhancing highway signage; and (iii) increasing brush clearing.

[21] Prior to the pilot projects, the greatest emphasis of the government's mitigation strategy was to rely on increasing public awareness. This public awareness campaign began in May of 2005, with an approximate annual budget of $90,000. In 2006, the cost associated with this campaign was $120,000, which included radio advertisements, a moose alert radio hotline, televised "be moose aware" advertisements, five billboards on secondary highways, placemats distributed throughout restaurants on the Trans-Canada Highway, and other print media advertisements.

[22] While the reduction of MVCs was one of the factors considered in allocating funds for brush clearing programs, other factors, such as improving the visibility of signage and improving drainage, influenced the brush cutting decisions. Prior to 2011, brush cutting was also used as a means to generate employment for individuals engaged in cutting and clearing brush by hand as opposed to by the utilization of mechanical brush cutting machines.

[23] Before the implementation of the 2011 pilot projects, fencing was discussed within the public service as a way of potentially reducing MVCs. For example, a briefing note from the Department of Environment and Conservation in September 2006, entitled "Fencing Highways to Prevent Moose-Vehicle Collisions," addressed this issue and gave an overview of

other jurisdictions' experience with fencing, noting some concerns about the costs associated with erection, repair and maintenance.

[24] This briefing note followed a discussion in August 2006 between the then Minister of Transportation and Works and his Deputy Minister. The Minister asked the Deputy to look into the impact of using moose fencing, by studying the experience of New Brunswick and other areas. In this exchange, the Minister indicated that he believed this was an issue that both the Departments of Transportation and Works and Environment and Conservation should investigate. The substance of this exchange was forwarded to an employee of the Department of Environment and Conservation.

[25] In September 2006, that employee authored the briefing note. Among other things, it outlined Quebec's three-year research project on the use of electric fencing to reduce MVCs. There is no evidence that any responsive action occurred in this Province concerning implementation of moose fencing until July 2011.

[26] There is no evidence of any discussion or decision at the Cabinet level on MVC mitigation issues during the class period.

[27] As of 2009, fencing was not being given serious consideration for moose mitigation in Newfoundland, and the philosophy was that moose awareness was the best method for mitigating.

[28] A letter around June 2009 from the then Premier to the widow of a man killed in a MVC expressed the belief that a broad approach to reducing MVCs involving a moose awareness campaign and brush cutting would be most effective.

[29] Of the budget for brush clearing, $1 million was used for job creation for individuals who cut and cleared brush by hand. This is not as efficient a method of brush cutting adjacent to a roadside as using mechanical brush cutters. Since 2011, brush clearing along roadsides is no longer used as a job creation project by the government.

[30] In 2009, the then Minister of Transportation and Works set out in writing the position that his department does not utilize fencing, and that their research has shown that fencing to prevent the movement of moose is ineffective.

Collision Data Management

[31] Conservation officers are required to fill out a one-page report, called a Wildlife Incident Report, whenever they pick up road-kill moose. Conservation officers began filing these reports after the advent of a collision data recording system. The reports are kept in-house.

[32] In 1983, there were 61 people injured and eight killed in MVCs.

[33] A 1985 report (the Miller Report) advised that a uniform system of recording moose accidents should be designed. It also stated that there was a large discrepancy between the moose accident statistics provided by Wildlife and by the police, and some better system of recording these accidents had to be developed.

[34] The old system of collecting data on MVCs was maintained on a computer system called FAS. All information was recorded on a system of segmented highway, in which all highways under provincial jurisdiction were assigned a three-letter code, and the codes distributed to policing agencies to be recorded on all accident reports.

[35] The primary function of the system was to report to the Federal Government on the National Collision Database, which recorded the number of accidents, number of injuries, and number of fatalities related to motor vehicle accidents on highways.

[36] One of the big issues with the old system was the segmented approach. Some segments were as short as two kilometers, while other segments were as long as 15 kilometers. When an accident was reported, no specific location within a segment was given.

[37] Another issue with the old system was that a number of incorrect coding errors were made by police. For example, one of the codes in the book of codes was TCH. This code actually referred to a section of highway next to Trepassey, but a lot of accidents were recorded by the police as just TCH (Trans-Canada Highway). The Trans-Canada Highway in this Province is 920 kilometers in length.

[38] The reporting from the old system was unreliable. There was no way of confirming or having confidence in the data recorded except that it could, however, accurately report the date and time a MVC took place and the weather conditions at the time.

[39] As of 2010, moose collision data did not have location data precise enough to allow for appropriate analysis of the data in the system with respect to MVCs. This severely limited any conclusions derived from the data.

[40] The old FAS system was replaced by a Collision Data Management System, or “CDMS,” on January 1, 2012, when the first data was entered. It is based on police reporting only. Police officers use a Global Positioning System (GPS) to determine the location of an accident. This system enables officers to locate any accident to within five meters. This information is entered into a database known as the Geographical Information Systems (GIS) that is used for storing the GPS spatial information.

[41] The GPS and GIS technology related to and used in this CDMS system was not in existence 10 years ago.

[42] The GIS is used as an inventory system for all of the Department of Transportation and Works’ assets, including asphalt, guide rail, shoulders, ditches, rights-of-way, etcetera, and creates a geo-spatial linear picture of assets such as those related to roads that the Department owns and of the conditions related to the same.

[43] The new GIS system will enable the identification of areas where a high number of MVCs occur relative to other areas, and will inform the Department of Transportation and Works, with a high degree of reliability, where these areas are located.

[44] The new CDMS records all collisions by GPS coordinates. Data is inputted into it by RNC or the RCMP officers at the initial accident investigation on electronic forms on laptops they possess. These forms are sent to the Department of Transportation and Works and are added into the CDMS, which Transportation owns and manages.

[45] There are no extra costs associated with the use of the CDMS beyond the method that was in place before. There was, however, a cost to government to procure the CDMS.

Relationship of Moose Density to MVCs

[46] In general terms, the 2001 article concluded that there was no established connection between moose densities and the MVC rate.

[47] On October 31, 2002, in a briefing note, one of the authors stated that research was required on the interaction between moose densities and habitat variables near roadways to determine why areas of both low and high moose densities appear to have experienced increased MVCs. As of 2011, research being undertaken by the Wildlife Division was still looking at moose crossings on certain sections of roadway and looking at the landscape and vegetation cover where those crossings occur.

[48] On February 4, 2004, a briefing note from the Department of Tourism, Culture and Recreation, entitled *Moose-Vehicle Collision Strategy*, stated that “new research by the Science Division shows that there seems to be a clearer relationship between MVCs and moose harvest, i.e. quotas, island-wide than previously suggested.”

[49] The “new research” referred to by the briefing note may refer to a document drafted by the authors of the 2001 article, which re-examined the relationship between moose density and MVCs, based on a longer data set, and included data from an earlier paper by two other researchers.

[50] The analysis showed a slightly more consistent or stronger relationship between moose density and MVCs.

[51] The Science Division was eliminated before further work could be done.

[52] In 2009, Government still maintained that there was no clear relationship between moose population estimates and MVC numbers.

Pilot Projects

[53] The fencing pilot project of 2011 cost $2.1 million to construct, and the related inspection systems cost $1.6 million.

[54] In July 2011, an extra $1 million was applied to brush clearing, in addition to the funding of $2 million already in place. This made for a total of $3 million allocated for clearing of brush.

[55] The cost per kilometer for the 16 and one-half kilometer fencing pilot project was approximately $140,000 per kilometer, for a total cost of $2.1 million. The specifications used for this project were those developed and applied in New Brunswick.

[56] The fencing in the pilot project was eight feet in height, the same as that in New Brunswick.

[57] The placement of the pilot project fencing was decided by Transportation and Works based on a number of factors. Transportation and Works did not put a lot of faith in the database that it then possessed in relation to locations of incidents.

Oral Testimony

[58] Other evidence in this matter came from 10 witnesses. The Province correctly summarized this evidence and findings of the trial judge as follows (to avoid repetition, I have excluded reference to some of the evidence, which has earlier been noted to have gone in by consent):

> …
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> 2. The trial judge found that the Province (or more precisely the predecessor colonial government of the Province) introduced a small number of moose to the island of Newfoundland in 1874-75 in Gander Bay and in 1904 at Grand Lake Station. These introductions were done for two main purposes: to provide food for the residents and sport for the hunters. At the time of the second (more successful) introduction many Newfoundlanders were suffering from food-related illness due to poor diet. There was a lack of fresh meat on the island ….
>
> 3. The Province is responsible for the management of the moose population on the island. Since the 1950's, the Province has operated under the policy of maximum-sustainable yield, which permits the highest possible harvest while maintaining the population ….
>
> 4. The Province is the owner of the highway system on the island. The evidence established that the Province adopted mitigation strategies concerning the reduction of moose-vehicle collisions (MVCs) on the highways of the province primarily based on a three part strategy consisting of road-side brush clearing, enhanced highway signage and public awareness. Although it was unclear exactly when this came into effect, it was clear that it was a strategy of long standing ….
>
> 5. In 1990, Cabinet met and the Ministers of Transportation and Environment advised of recent initiatives taken by the Province to deal with moose on the highway. Strategies such as brush clearing, signage, and public awareness existed prior to this meeting ….
>
> 6. In 2001, an article was written by Tammy Joyce and Shane Mahoney (two government employees at the time) entitled "Spatial and Temporal Distributions

of Moose-Vehicle Collisions in Newfoundland" (the "Joyce and Mahoney Paper"). This paper, described at paragraphs 13-16 of the Consent Statement of Facts, was often referred to by officials of the Province tasked with researching MVC mitigation issues ….

7. In 2003, two relevant developments were occurring at the same time. In October of 2003, the Progressive Conservatives won the general election. Earlier in 2003, a draft Strategy Document concerning potential options to reduce MVCs was being written by the Inland Fish and Wildlife Division of the Department of Tourism, Culture and Recreation at the request of the Minister and overseen by the Deputy Minister ….

8. Justice Stack found that as part of the transition into government for a new administration, a Briefing Book was compiled for the new Premier, outlining the various issues of importance to the various government Departments. One such issue for the Department of Tourism was MVCs and a note was included in the Briefing Book discussing the draft Strategy Documents being prepared. It was stated in this note that direction would be sought as to whether this Strategy would be put before the Cabinet. This Briefing Book was sent directly to the Premier for his review ….

9. The Strategy Document, Justice Stack found, in all its drafts, had six recommendations for the mitigation of MVCs, including 1) a high impact public awareness campaign, 2) brush clearing and 3) enhanced highway signage ….

10. The trial judge also found that there is no record of the Strategy ever going before Cabinet. However, in the subsequent months after the Conservative government took office, it is clear that the Province began to implement the suggested initiatives which flowed from the Strategy Document ….

11. Justice Stack [noted] that all three initiatives (public awareness, enhanced highway signage and brush clearing) were, at various times throughout the class period, announced by Ministers through news releases.… Evidence was heard from several witnesses (including the Appellants' expert Mr. Ron Penney) concerning the process as to how news releases come to be released. All news releases are signed off by the appropriate departmental Minister and then sent to Cabinet Secretariat and the Premier's office for approval. The Premier's office reviews all news releases to confirm that they are consistent with government policy and approves them for release ….

12. The financial situation of the Province throughout much of the class period was dire. As outlined at paragraph 31 of Justice Stack's decision, during the fiscal year of 2002-2003 there was a budget deficit of $600 million. This deficit increased to $900 million in 2003-2004. There was a directive to civil servants not to look for money for new initiatives from Treasury Board during the budgetary process.

> 13. Justice Stack understood, from documents and testimony, that Officials of the Province were focused on playing catch-up to maintain the safety and integrity of bridges, crossing structures, guard rails, asphalt repair and other general road conditions. The Trans-Canada Highway ("TCH") is 920 kms. The Province is responsible for over 9,000 kms of provincial roadway. The trial judge accepted that the estimated cost of erecting moose fencing is approximately $150,000 per kilometer. To fence even a small portion of this provincial roadway (500 kms), therefore, would cost in excess of $75 million dollars. This would not include the costs of underpasses or overpasses which are estimated to cost as much as $1 million to $3 million each. Maintenance and repairs would also be required. Former and current members of the executive of the Department of Transportation and Works would not support reallocating money from the roads budget for moose fencing ….

The Parties' Positions

[59] The appellants allege that the provincial government, as manager of wildlife and as developer and maintainer of highways, is liable in public nuisance and negligence for personal injuries and loss of human life caused by MVCs between April 2001 and November 2011. The appellants say the Province has not discharged the burden in public nuisance of showing it met the high standard of "all possible precaution" to avoid significant damage to individual users of the highways nor has it met the duty of care in negligence to avoid injury to motorists.

[60] The Province says it is not liable in public nuisance as the presence of moose on the highway did not result from an "activity" of the Province. Also, it submits that the Province did not owe a *prima facie* duty of care to motorists in negligence to prevent injury by adopting specific policies for moose population management or collision risk mitigation. Further, says the Province, even if such a duty of care were found, it would be negated because the population management and risk mitigation strategies were core policy decisions and immune from suit unless irrational or made in bad faith.

THE ISSUES

[61] Four issues arise:

a. What is the appropriate standard of review?

b. Did the trial judge err in law by finding that the Province is not liable to the appellants for the tort of public nuisance?

c. Did the trial judge err in law by finding that the Province did not owe a duty of care in negligence to the owners and operators of motor vehicles to mitigate the risk of MVCs?

d. Did the trial judge err in law by omitting to make findings regarding the standard of care, possible breach, and necessity for mitigation?

THE APPROPRIATE STANDARD OF REVIEW

[62] The parties agree that the appropriate standard of review of an appellate court for questions of law is correctness, for findings and inferences of fact the question is whether the trial judge has made a palpable and overriding error, and for questions of mixed fact and law a standard of palpable and overriding error applies unless it is clear that the trial judge made some extricable error in principle with respect to the formulation of a legal principle or its application, in which case the error may amount to an error of law. See *Housen v. Nikolaisen*, 2002 SCC 33[2002] 2 S.C.R. 235.

THE TORT OF PUBLIC NUISANCE

(a) Crown immunity

[63] The trial judge correctly held that the Province is immune from liability for all parts of the appellant's claim which are based upon the Province's conduct prior to 1973, the date of proclamation of the *Proceedings Against the Crown Act*, RSNL 1990, c. P-26 ("PATCA"). Until this statute established Crown liability in tort, the Crown was immune from suit. The trial judge correctly noted that the PATCA was not retroactive, adopting the view of Hogg, Monahan & Wright, *Liability of the Crown*, 4th ed. (Carswell 2011), at pp. 158-159:

> The imposition of tortious liability on the Crown in all Canadian jurisdictions … was not retroactive. The Crown therefore remains immune from tortious liability in respect of acts or omissions occurring before the in-force date of the original applicable Crown proceedings statute.

The trial judge did not err in concluding the Province is immune from suit for claims based on the decision of the colonial governor of Newfoundland to introduce moose to the island in 1874-75 and 1904. The trial judge properly went on to consider whether present liability could be found because of torts arising (or continuing) after enactment of the PATCA.

(b) The Control of Moose

[64] The *scienter* doctrine imposes strict liability on the keeper of a wild animal for damages caused by the animal, regardless of fault: (See, *Cowles v. Balac* (2005), 29 C.C.L.T. (3d) 284 (Ont. Sup. Ct.), aff'd. 216 O.A.C. 268 (C.A.)). The appellants have not appealed the trial judge's decision that the *scienter* doctrine does not apply in the present case as a Province is not the "owner" or "keeper" of moose and has no duty to confine or control the movement of all wild animals. Some comment on this is helpful now, however, as the issue of responsibility for wild animals has relevance in determining whether a nuisance has been created or continued.

[65] The trial judge correctly held that the Province does not own, keep or control moose on the island, and has not since the first few were introduced more than 100 years ago. The *Wild Life Act*, RSNL 1990, c. W-8, with its authority to manage, protect, preserve and propagate moose, does not put them under the control of the Province so as to impose strict liability for any damage they cause. Control is essential for strict liability under the *scienter* doctrine. Once the colonial government released the moose into the wild, it relinquished any title it may have had to moose and their progeny. The permissive provisions of the *Wildlife Act* do not impose any duty on Government to confine or control the movement of wild animals on the island. The trial judge correctly found that moose are wild animals, *ferae naturae*, and roam where they may. This Court in *Baker v. Russell*, 2008 NLCA 51, 281 Nfld. & P.E.I.R. 247 described them as "wild animals of unpredictable behaviour."

[66] The trial judge also correctly rejected the two other strict liability torts alleged by the appellants, under the *Rylands v. Fletcher* doctrine, where liability arises from a non-natural use of land and an escape from the land which causes damages (see *William L. Chafe & Son Ltd. v. Murphy*, 2009 NLTD 134, 287 Nfld. & P.E.I.R. 248, at para. 33, aff'd. 2011 NLCA 18, 304 Nfld. & P.E.I.R. 329), and under the emerging principle of strict liability for abnormally dangerous activity. The trial judge correctly found that the introduction and continued adoption of moose did not involve a non-natural use of forest land and was not inherently dangerous. As noted above, the appellants did not appeal these findings. I mention them here because they also have significance in determining whether roaming moose constitute a public nuisance.

(c) The Elements of the Tort of Public Nuisance

[67] The nuisance claim was based on the principles relating to public nuisance. Much of the argument as to whether the trial judge properly applied the relevant principles drew upon case law describing the parameters of private nuisance. It is important, therefore, to delineate the differences and similarities between these two species of tort.

[68] Public and private nuisance have very different origins. For a detailed tracing of their historical development, see J.R. Spencer, *Public Nuisance – A Critical Examination* (1989), 48 Camb. L.J. 55.

[69] Public (sometimes called "common") nuisance has criminal origins. At common law in England, a person was guilty of an offence when he or she "does an act not warranted by law, or omits to discharge a legal duty, if the effect of the act or omissions is to endanger the life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects" (*Archbold's Criminal Pleading and Practice*, 42nd ed., (1985), para. 27-44). The blocking of public highways was often the basis of complaint. This offence has found its way in substantially similar terminology into Canadian criminal law through section 180 of the *Criminal Code*. It has been applied in the criminal context by this Court as recently as 2001: *R. v. Williams*, 2001 NFCA 1, 158 C.C.C. (3d) 523. Today the tort of public nuisance has been effectively severed from its criminal origins and is developing according to its own principles as set out in the case law.

[70] A private right to sue for public nuisance was first recognized in the 16th century. Today, this tort plays "a peripheral and increasingly insignificant role" (Klar, *Tort Law*, 5th ed.(Toronto, ON: Carswell, 2012), at p. 748), but it is still available to ground a private action where a defendant's conduct unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience, and where the claimant has suffered "special damage." The tort covers situations where no duty of care is owed because of a lack of proximity, but where it would be unfair to require an individual to bear the full cost of special or unique damages resulting from conduct which is of a high social utility.

[71] Private nuisance developed separately from the old assize of nuisance, also a criminal writ, designed to provide remedies when a defendant, by the use of his or her land, interfered with the use and enjoyment of the

claimant's land or the claimant's rights over or in connection with it. The action on the case for nuisance eventually replaced these remedies. See Linden, *Canadian Tort Law*, 9th ed. (2011), at p. 570.

[72] A public nuisance involves an attack on the public generally. It must materially affect the reasonable comfort and convenience of a substantial number of the public. As discussed below, the cases are not consistent regarding the question of what is an adequate number to make it "public" and what constitutes "special damage."

[73] The Supreme Court of Canada explained public nuisance in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 52-53, noting that it was "a poorly understood area of the law":

> 52. … "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar, supra* , at p. 525. Essentially, "[t]he conduct complained of must amount to ... an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference": See G.H.L. Fridman, *The Law of Torts in Canada* , Vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J.D. Irving Ltd.* (1982), 22 C.C.L.T. 89 (N.B. C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. ...
>
> 53 Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood. See *Chessie*, *supra* , at p. 94 ….

(In *Chessie*, a wharf stretching 30 feet into the St. John River was found not to be a nuisance where the plaintiff had collided with it in the dark on a snowmobile.)

[74] The Supreme Court adopted the *Ryan* definition of public nuisance in *British Columbia v. Canadian Forest Products*, 2004 SCC 38, [2004] 2 S.C.R. 74 at paragraph 66. In that case, where the Court concluded that the act of Canfor in burning down a public forest was capable of constituting a public nuisance as well as being negligence, the Court pointed out that as the private tort developed, it was still regarded as a wrong to the public generally, and the primary right to sue lay with the Attorney-General, who

either sued for an injunction to restrain the public nuisance or possibly for damages, or who allowed his name to be used as a nominal plaintiff in a relator action at the instance of a private claimant. Private individuals only had a right to sue if they could claim they suffered special damage to them over and above that suffered by the public generally.

[75] The Supreme Court of Canada, at paragraphs 53 and 56 in *Ryan*, noted the Court of Appeal had not disputed the trial judge's finding that there had been an unreasonable interference with the public's right of access, where the defendant railways installed a particular flange-rail system without regard to vehicular traffic, choosing it because it cost less, and it was longer lasting and better suited to the needs of rail traffic. But the choice of flange-rail left an almost four-inch gap and effectively increased the risks to vehicular traffic. (The plaintiff's motorcycle front tire had become trapped in the flangeway gap while he attempted to cross railway tracks running down the centre of a street in downtown Victoria.)

[76] The Supreme Court concluded the costs of the increased risk to others should fall on the defendant railways as a "cost of running the system." The Court refused to allow the defence of statutory authority where it found that the railways' decision to exceed by more than one inch the minimum width of 2.5 inches for the flangeways set out in the regulations was a matter of discretion and not an "inevitable result" or "inseparable consequence" of complying with the regulations. The same was true of the railways' decision not to reinstall flange fillers.

[77] The Court in *Ryan* pointed to the unsuccessful attempt by members of the Court in the nuisance case of *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181, to depart from the traditional rule expressed by Sopinka J. in *Tock*, at page 1226:

> The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defence must negate that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

In *Tock*, a storm sewer system became obstructed and caused flooding of the plaintiffs' basement. The Supreme Court of Canada held there should be compensation allowed but the reasoning of members of the Court varied. The decision did not expressly say whether the matter was being treated as a private or public nuisance, the discussion revolving mainly around the defence of statutory authority.

[78] The Court in *Ryan* found that the flangeways created a considerably greater risk than was absolutely necessary and concluded the Court of Appeal had erred in permitting the railways to assert the defence of statutory authority against the claim for nuisance.

[79] *Ryan* makes it clear that to have a public nuisance there must be "unreasonable" interference with the public's interest in questions of health, safety and so forth. Private actions in public nuisance often arise from unreasonable interference with a public right-of-way, such as a street or highway.

[80] The trial judge in the present case did not fully analyze the Province's moose management and MVC risk management strategies because he concluded there could be no liability on the part of the Province unless the presence of moose on the highway resulted from some "activity" of provincial officials. At paragraph 80 of his decision, the trial judge stated:

> 80 The Plaintiffs submit that the Defendant's ineffective control over the danger of moose to highway users has interfered with a public right. The Plaintiffs pose the following question: is the interference with this public right unreasonable? With respect, this is the wrong question. The threshold question is: has a public nuisance been caused by an activity of the Defendant?

With respect, this was not correct. To establish liability in public nuisance, one need not point to an "activity". Liability may be grounded in nonfeasance as well as in active conduct. A nuisance may be caused by an omission, as well as by positive conduct. For example, in *Tock*, at page 1190, LaForest J. adopted the statement from *Salmond on Torts* (17th ed.; 1977), at page 50:

> [N]uisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land.

[81] The case law also confirms that a defendant may be liable not only for creating a nuisance but also for continuing or adopting a nuisance which the

defendant did not create, by failing to remedy the nuisance upon becoming aware of it. In other words, by nonfeasance. This principle from the House of Lords case of *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, was adopted by Rinfret C.J. and Locke J. in their concurring judgments in *Goodwin Johnston Ltd. v. A.T. & B. No. 28 (The)*, [1954] S.C.R. 513, at para. 9, (dealing with liability for a scow adrift in a harbor) and by this Court in *Wm. Chafe and Sons Limited v. Murphy*, at para. 43 (fire in electrical system spreading to adjoining building), where this Court noted that "a pattern of misfeasance or nonfeasance should be required." See also the quote from *Archbold*, which confirms that a person could be criminally liable for public nuisance by omitting to discharge a public duty, and section 180 of our *Criminal Code*, which continues liability for one who "does an illegal act or *fails* to discharge a legal duty." Further, in *Hickey v. Electric Reduction Co. of Canada Ltd.* (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.), at page 369, Furlong C.J. accepts that a public nuisance may arise from an act or omission. *Hickey* arose from the polluting of Placentia Bay and is discussed below.

[82] Although one need not show an "activity" to establish liability in public nuisance, and liability may be grounded in nonfeasance as well as in active conduct, I believe that in any event a proper view of the Province's conduct is that it engaged in "activity" in the circumstances alleged by the appellant. The undisputed evidence establishes that the Province had adopted a "maximum sustainable yield" policy regarding moose management, which probably led to maintenance of or an increase in the moose population, since it preempted adoption and implementation of a policy which could have resulted in a major reduction in the moose population and a significant reduction in MVCs. This could properly be regarded as "activity" on the Province's part. Also, for purposes of the nuisance analysis, if "activity" were necessary, the Province would properly be regarded as having engaged in the activity of MVC mitigation by brush clearing, use of signage and public education.

[83] It follows that the trial judge should have continued his analysis of whether there was unreasonable interference by the Province with the public's right of access to highways. With little if any dispute on the facts in this case, and an adequate evidentiary basis from the agreed statement of facts and transcript of testimony, this Court is in a position to perform the analysis now. Before proceeding with this, however, some further comment on the line of cases applying *Sedleigh-Denfield* will be informative.

[84] In the present case, the Province finds itself in a position analogous to a landowner who occupies property on which a nuisance or potential nuisance, created by a previous owner, a trespasser, an act of nature or a latent defect in the property, is discovered. See Klar, at pp. 656 ff. Because the PATCA is not retroactive (see the discussion above on this point), the Province is immune from claims based upon the Province's conduct prior to 1973, the date of proclamation of the PATCA. The evidence establishes that MVCs have been a risk on the highways of the Province since before this time. Any duty to act imposed upon the Province would have to arise from some responsibility of the Province as owner of our highways, which may have arisen when the Province inherited a dangerous situation created by its predecessors prior to 1973 and permitted to continue. As noted in Linden & Feldthusen, at p. 592:

> If people permit a nuisance, which they did not create, to continue, they may be required to answer for it because they have "adopted" it as their own.

[85] Klar, at pages 656-57, notes that "the law's treatment of an occupier who in some way inherits a nuisance is considerably more sympathetic" than it is towards an individual who deliberately engages in an activity which constitutes a nuisance. Klar cites the *Sedleigh-Denfield* series of cases as establishing that an occupier has a duty only to take reasonable steps to abate what might otherwise be a nuisance, or a potential nuisance, discovered on the occupied land, where the occupier did not create the interference or continue it by use. Klar, at page 657, noted: "a more lenient duty of care than that ordinarily imposed by negligence law has been laid down." Klar also pointed to cases supporting his opinion that "a defendant's particular circumstances, including the financial and physical capacity to abate the nuisance, will be considered." These comments were in the context of a discussion of private nuisance but are appropriately applied to the Province in the present case, where the hazardous condition was thrust upon it by the inadvertent confluence of a successful moose management policy and an expanded and improved highway system. The Province is closer to the case of an innocent occupier inheriting what might be a nuisance than it is to the case of a defendant who has deliberately taken positive action, which could be foreseen to lead to a hazardous situation. In the circumstances of the present case, based on the *Sedleigh-Denfield* line of cases, I conclude the Province's duty, if any, was at most to take reasonable steps to abate a potential nuisance.

[86] In asserting that it is insufficient for the Province to negate negligence, the appellants rely strongly on the quote in *Ryan*, at paragraph 55, from *Tock*, at page 1226:

> The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. <u>It is insufficient for the defendant to negative negligence. The standard is a higher one.</u> While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

(Emphasis added.)

Ryan was a case where the defence of statutory authority had been raised, as may be seen from the discussion at paragraphs 53-54. Earlier, at paragraph 52, the Court had accepted that the test for public nuisance is whether the interference experienced by the claimant was an unreasonable one.

[87] Klar, at page 752, suggests that the role which negligence plays in the private action for public nuisance is unclear. He concludes: "in general, it appears that the courts are not prepared to impose liability in public nuisance for the inadvertent results of an activity, unless the defendant's conduct was negligent," citing *Wagon Mound (No. 2)*, [1966] 2 All E.R. 709 (P.C.), which held that "although negligence may not be necessary, fault of some kind is almost always necessary for recovery in nuisance." Klar also notes *Ross v. Wall* (1980), 14 C.C.L.T. 243 (B.C.C.A.), where a defendant avoided liability for public nuisance when a canvas awning on a tabular metal frame, erected over a public sidewalk, collapsed and injured the plaintiff. A jury found the defendant had not been negligent in the sense that he had neither created the dangerous condition nor failed to take reasonable steps to abate it. Klar also points to *Assie v. Saskatchewan Telecommunications* (1978), 7 C.C.L.T. 39 (Sask. C.A.), where guy wires over the highway had sagged six feet and become entangled with the plaintiff's cultivator. On appeal, the Court rejected the strict liability approach.

[88] I read *Ryan* as saying that the burden is on the plaintiff to show circumstances to support the view that it would be unfair for him or her to have to bear the full burden of loss caused by an activity conveying benefit to the public generally. A defendant may have an evidentiary burden to show the interference with the public right is not unreasonable. This will

entail the balancing of factors such as the gravity of the harm caused versus the social utility of the activity causing the loss.

[89] The appellants' interpretation of the reference in *Ryan* about it being insufficient to negate negligence runs contrary to the comments in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, that the nature of the defendant's conduct is not irrelevant in the balancing process which the court must carry out. It also runs contrary to the *Sedleigh-Denfield* line of cases, which hold that in the case of an inherited nuisance, a defendant need only show reasonable steps were taken to abate a potential nuisance.

[90] The factors to be considered in this balancing exercise were noted in *Ryan*, at paragraph 53. See also *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 77:

> 77 At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct …. Nuisance is defined as unreasonable interference with the use of land .... Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance …. The interference must be intolerable to an ordinary person …. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity…. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances ….

(Citations omitted.)

That case arose from the operation of a cement plant and involved consideration of liability under the Civil Code of Quebec for abnormal neighbourhood disturbances. The comments on nuisance at common law arose in a comparative review of Canadian common law and Quebec civil law. Although the Court referred simply to "nuisance" and did not distinguish between public and private nuisance, the claim in *St. Lawrence Cement* was based on dust, odors and noise created by the cement plant, which might well have formed the basis for a common law claim in public nuisance on the basis of *Ryan*.

[91] *Antrim*, while a private nuisance case arising from rerouting the Trans-Canada Highway, has relevance for public nuisance in its discussion, at paragraphs 25 ff., of how reasonableness is assessed in the context of

interference caused by projects that further the public good. The Court held that all relevant circumstances must be considered, with a balancing exercise focused on determining whether the interference is such that it would be unreasonable in all the circumstances to require the claimant to suffer it without compensation. To do this, the court in private nuisance balances the gravity of the harm against the utility of the defendant's conduct, considering factors such as the severity of the interference, the character of the neighbourhood, the sensitivity of the claimant and the frequency and duration of the interference. Liability for the conduct is determined by focusing on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant's conduct is unreasonable.

[92] The Court in *Antrim*, at paragraph 29, accepted that the defendant's conduct is not, however, an irrelevant consideration. The reasonableness analysis will look, for example, at whether the conduct is either malicious or careless. The court adopted the following from *Fleming's The Law of Torts*, at s. 21.20:

> ... unreasonableness in nuisance relates primarily to the character and extent of the harm caused rather than that threatened.... [T]he "duty" not to expose one's neighbours to a nuisance is not necessarily discharged by exercising reasonable care or even all possible care. In that sense, therefore, liability is strict. At the same time, evidence that the defendant has taken <u>all possible precaution</u> to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority …. [I]n nuisance it is up to the defendant to exculpate himself, once a prima facie infringement has been established, for example, by proving that his own use was "natural" and not unreasonable.

(Emphasis added in *Antrim*.)

[93] The evidentiary burden on the defendant amounts to establishing it would be fair in the circumstances for the individual to bear the full loss. The defendant may not necessarily meet that burden just by showing that he or she has not been negligent, in the sense of not creating the dangerous situation nor failing to take reasonable steps to abate it. But the conduct of the defendant will be a relevant factor in the balancing exercise.

[94] The Province in the present case questioned whether the burden of proof should be the same in a case of a private claim based upon a public

nuisance as it is in a private nuisance case, such as *Antrim*. While nothing hinges here upon where the burden falls, I believe that *Ryan's* support for the traditional view expressed by Sopinka J. in *Tock*, at page 1226, makes clear that at least an evidentiary burden rests with the defendant in a public nuisance case as in a case of private nuisance.

[95] *Antrim* involved a property owner having access to a truck stop blocked by the highway rerouting. The Court, at paragraph 33, referred to the decision of this Court in *Newfoundland (Minister of Works Services & Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45, 205 Nfld. & P.E.I.R. 95, where it rejected a simple balancing of the utility of a public work against the severity of the harm, since a high degree of public utility would always trump even very extensive interference. At paragraphs 34-35 in *Antrim*, the Court noted authorities confirming that "private rights cannot be trampled upon in the name of the public good," the question being "not simply whether the broader public good outweighs the individual interference when the two are assigned equal weight" but rather "whether the interference is greater than the individual should be expected to bear in the public interest without compensation." This introduces the test of what would be fair in all the circumstances.

[96] The Court in *Antrim* concluded that the claimant should recover so as to avoid having the claimant bear a disproportionate burden of damages flowing from interference with the use and enjoyment of land caused by the construction of a public work. At paragraph 39, the Court referred with approval to *Schenck v. Ontario* (1981), 34 O.R. (2d) 591, (H.C.), affirmed (1984) 40 O.R. (2d) 410(C.A.) and [1987] 2 S.C.R. 289, which had been approved by La Forest J. A. in *Tock.* In *Schenck* (involving damage to orchards from applying salt for deicing highways), at paragraph 27, Robins J. stated:

> … their injury is a cost of highway maintenance <u>and the harm suffered by them is greater than they should be required to bear in the circumstances, at least without compensation</u>. Fairness between the citizen and the state demands that the burden imposed be borne by the public generally and not by the plaintiff fruit farmers alone. (Emphasis added in *Antrim*.)

This approach links the concepts of fairness and reasonableness. In assessing whether interference with a citizen's use of land is unreasonable, a court must consider whether it would be fair in the circumstances to require the citizen to absorb the loss, without compensation.

(d) Application of the law of public nuisance

[97] In the present case, the appellants argued that the magnitude of the problem of encroaching moose on provincial highways constitutes a *prima facie* violation of the public right of safe passage, and that this should result in a shift in the burden of proof to the Province to prove that an actionable nuisance has not occurred. For the following reasons, I am satisfied that the Province has met the burden and established that fairness between the citizen and the state as discussed in *Antrim* and *Schenck* does not require that the cost of promoting the public good should be borne by the public generally.

[98] The factors to be considered in determining whether the Province's actions or failures to act constitute a public nuisance are identified in *Ryan* and *St. Lawrence Cement*, although these should not be regarded as a checklist. The factors are "simply examples of the sorts of criteria that the courts have articulated as being potentially of assistance in weighing the gravity of the harm with the utility of the defendant's conduct": *Antrim*, at paragraph 54. The evidence establishes without doubt the gravity of the problem. Hundreds of MVCs occur in this Province each year (386 in 2000 and 776 in 2010). The collisions result in death or serious life-altering injuries to many individuals involved. For example, in 1983 there were 61 people injured and eight killed in MVCs (more recent figures were not provided, I assume because of problems with the way MVC incidents were recorded). In 2001, MVCs comprised 3.5 percent of all motor vehicle accidents recorded by the RCMP. Increasing the risk of colliding with a moose has a significant effect upon the public's right of access to public highways and results in considerable inconvenience to the travelling public.

[99] Balanced against this is the high social utility of having moose available as a source of food and as the basis for a hunting, outfitting and tourism industry (800-900 jobs). The predecessor colonial government of the Province introduced a small number of moose in 1874-75 and in 1904 to provide food for residents and sport for hunters. At that time, many Newfoundlanders were suffering from food-related illness due to poor diet and a lack of fresh meat. Over time, with the increase in the moose population, development of modern highways and an increase in motor vehicles, more and more moose came into contact with more and more vehicles on more and more highways.

[100] *Ryan* identifies the difficulty involved in lessening or avoiding the risk as one of the factors to be considered in determining whether a particular

interference with access to a public highway is an unreasonable interference. The Province by 2004 had identified six strategies for reducing the number of MVCs: a public awareness campaign; driver education; enhanced highway signage; brush clearing; moose population manipulation; and improved reporting and evaluation. In 2011, the Province announced that it would invest approximately $5 million in a series of initiatives to reduce the number of MVCs. These included the launch of pilot projects involving wildlife fencing and wildlife detection systems, and the enhancement of ongoing brush clearing and public awareness efforts. An additional $1 million was applied to brush cutting, beyond the $2 million already available.

[101] The fencing pilot project cost $2.1 million, and the inspection system cost $1.6 million. This amounted to approximately $140,000 per kilometer for the 16 and one-half kilometer fence, eight feet in height. The Province is responsible for over 9,000 kilometers of provincial roadway. To fence even 500 kilometers of this would cost in excess of $75 million, plus underpasses and overpasses at a cost of $1-$3 million each. That is before maintenance and repairs. The enormity of the task facing the Province if fencing is adopted is apparent.

[102] All of this must be placed in the context of the dire financial position of the Province during the relevant period. In the fiscal year 2002-2003, there was a budget deficit of $600 million, and this increased to $900 million for 2003-2004. Meanwhile, the Province was playing catch-up to maintain the safety and integrity of bridges, crossing structures, guard rails and so forth.

[103] The appellants submit the Province must prove it took “all possible precautions” to exculpate itself. They submit more had to be done by the Province than the road-side brush clearing, enhanced signage and other attempts to improve public awareness. They argue the Province was negligent in not ensuring adequate input into policy decisions relating to appropriate MVC risk mitigation measures.

[104] I do not accept these submissions of the appellants regarding the Province’s obligations. In *Antrim*, at paragraph 29, the last sentence quoted from Fleming states:

> In nuisance it is up to the defendant to exculpate himself, once a prima facie infringement has been established, for example, by proving that his own use was "natural" and not unreasonable.

The cases referring to the need to prove "all possible precautions" have been taken are cases where the defendant has attempted to immunize itself from liability by asserting a statutory authority to perform the acts complained of. See, for example, *Ryan*, at paragraphs 44-45, where the railway pointed to their compliance with a statutory standard of care.

[105] In the present case, the Province is not asserting a statutory authority to do or refrain from doing anything directly relating to MVCs. It merely points out that the encroachment of moose onto highways filled with speeding motor vehicles is the inadvertent result of a successful moose management policy of maximum sustainable yield combined with improved highways and increased numbers of motorists. The Province says it has neither done nor omitted anything which has resulted in what might be considered an unreasonable interference with public access to highways. At worst, its moose population management and highway maintenance policies have resulted inadvertently in an increased risk for motorists of MVCs. But this is an increased risk shared by the entire motoring public. The appellants were not asked to bear a disproportionate share of the increased risk. I believe that, while not determinative, it is relevant to consider when determining whether it is fair not to have compensation for injury, that any harm suffered has been the indirect result of a policy adopted by the Province rather than a harm directly imposed (see *Hickey*, at paragraph 16, where Furlong C.J. accepted that to sustain a claim in public nuisance, the damage asserted must be direct and not merely consequential damage). The Province has established that it neither omitted nor did anything which resulted in unreasonable interference with the public's access to highways. It has shown that it adopted reasonable risk mitigation policies to reduce MVCs by road-side brush clearing, enhanced highway signage and promoting public awareness. It has also established that it does not have control of roaming moose.

[106] The Province has been dealing in a reasonable fashion with the inadvertent consequences of a decision by its colonial predecessor to introduce moose to the Province, a decision of high social utility at the time, considering the need then for fresh meat on the island.

[107] To those who would have this Court direct government to expend more money on moose fencing, it should be noted that money spent on further risk mitigation will be money not available for health care, education and other areas of governmental responsibility. The comments of the Ontario Court of Appeal, in *Smith v. Inco Ltd.*, 2011 ONCA 628,107 O.R. (3d) 321at para. 93, noted by the trial judge, are appropriate here:

> 93 There are no doubt strong arguments for imposing strict liability on certain inherently dangerous activities. In our view, however, that is fundamentally a policy decision that is best introduced by legislative action and not judicial fiat.

[108] As discussed below under the tort of negligence, *Smith* recognizes as do courts generally that certain policy decisions, particularly involving the expenditure of public funds, are better left to the legislature rather than the courts.

[109] The Court in *Smith* did acknowledge the availability of nuisance actions as well as negligence actions to deal with abnormally dangerous activities.

[110] The trial judge's correct findings in the present case that moose are not abnormally dangerous and that permitting moose to roam is not an unnatural or unreasonable use of land, both support the conclusion that in the present case, the Province, by its policies, is not unreasonably interfering with the public's access to the highways of the Province. Balancing the serious adverse consequences of MVCs against having moose available for food and hunting, the difficulty and cost of implementing other risk mitigation projects, and the reasonableness of brush clearing and public awareness projects, I am satisfied, despite my great sympathy for those adversely affected, that it would be fair, considering all the circumstances, to relieve the tax paying public from the burden of acting as insurer for the indeterminate and unlimited losses which arise from MVCs. There being no unreasonable interference with public access to highways, there is no liability for the tort of public nuisance.

[111] I should comment on two further arguments raised by the Province, first that the appellants have not proven special damage and, second, that the Province has statutory immunity. A private cause of action for a public nuisance will only be sustainable where claimants prove 'special damage' beyond that suffered by the public at large. *Spencer*, at p. 74, states "few points in civil law are more obscure than the meaning of "special damage" in

the context of public nuisance." He goes on to discuss how it may refer to the kind of damage suffered (which he says clearly includes personal injury) or damage which is something worse in degree than the general public has suffered (again, which, in his opinion, would include personal injury). Questions of entitlement to sue arise if many other people have suffered the same or worse damage.

[112] Klar, at pages 526-27, discusses the "numbers issue" in relation to the tort of public nuisance and points out what he sees as the "schizophrenic nature" of the tort in that, while interference with rights must be sufficiently wide spread to constitute an interference with the public interest, the claimant must be able to prove unique interference with a private interest.

[113] Linden submits that "special damage" means "particular damage; a special loss suffered by an individual which is not shared by the rest of the community." Linden suggests that while at one time the courts required a difference in kind and degree, "the more modern view is that recovery is permitted in either case, as long as the damage to the plaintiff is 'more than mere infringement of a theoretical right which the plaintiff shares with everyone else.'" Proof of personal injury, he says, has been considered sufficient in this regard.

[114] Spencer notes the case of *Hickey*, where the Court, in a case involving fishers suing a company which had polluted part of Placentia Bay, destroyed fish and deprived the fishers of their livelihood, held they could not sue because others had suffered the same type of loss as they had. The *Hickey* approach is questioned by Linden, at pages 575-76.

[115] Linden points to *Gagnier v. Canadian Forest Products Ltd.* (1990), 51 B.C.L.R. (2d.) 218 (S.C.), when the Court, relying on three Ontario cases, concluded that *Hickey* was far too narrow and that all that should need to be proved is a difference in the degree of damage between the plaintiff and members of the public generally. Linden also touches upon distinguishing between direct and indirect loss, the remoteness test and exposing defendants to possible indeterminate liability. I agree with *Gagnier* that a difference in the degree of damage should be a sufficient basis for recognizing the right of an individual to sue in public nuisance. I would not follow *Hickey* and I would adopt "the more modern view" discussed by Linden.

[116] The second argument raised by the Province is that there is a statutory bar to any claim against it as a highway authority in nuisance (whether private or public) that arises because of the provisions of the PATCA, section 3(2)(b), and the *Municipalities Act*, *1999*, SNL 1999, c. M-24, s. 411(2). Section 3(2)(b) of the PATCA limits Crown liability as a highway authority to that of a municipality. Section 411(2) of the *Municipalities Act* simply states a municipality is "not liable for a nuisance." The appellants submit that their claims arise out of the Province's conduct as manager of the moose population rather than as a highway authority, and also that any immunity should be restricted as a matter of statutory interpretation to private nuisance.

[117] I believe it is appropriate to note that superior courts have adjudicated nuisance claims since ancient times, and courts will normally be attentive to the principle of statutory construction, which says that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect. See *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 136, and *T. (J.) v. Newfoundland and Labrador (Manager of Child, Youth and Family Services)*, 2015 NLCA 55, which relied on Forbes C.J. in *Clift v. Holdsworth* (1819), 1 Nfld. L.R. 167. Also, the cases establish that the public right of access to highways is rigidly protected and to confer an immunity from suit on a statutory highway authority would require the wording of the statute to be "clear and precise." See *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, at pages 459 and 461. It remains to be seen whether the word "nuisance" in the *Municipalities Act*, which arguably may refer to either a private or public nuisance, or both, will be found to meet this test. For now I note merely that the Supreme Court of Canada normally resolves ambiguities in favour of the person whose right of action is at risk of being limited. See *Ordon*, at paragraph 136, and *Tock*, at paragraph 95, where Sopinka J. stated:

> The courts strain against a conclusion that private rights are intended to be sacrificed for the common good.

LIABILITY IN NEGLIGENCE

(a) General Principles

[118] In determining whether the trial judge erred in finding that the Crown was not liable in negligence to the owners and occupiers of motor vehicles for failure to better control the moose population in the Province and to

better mitigate the risk of MVCs, the decisions of the Supreme Court of Canada in *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Ryan*; at paras. 21-29; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 37-50; and *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 applying *Anns v. Merton London Borough Council*, [1978] A.C. 728 (HL), are instructive. From those cases, the following conclusions may be drawn:

> (a) Courts must first determine whether a duty of care exists and then establish whether the defendant exercised the standard of care required to avoid breaching that duty.
>
> (b) Judges determine whether any duty of care is imposed by law and define the measure of its proper performance, and as triers-of-fact determine by reference to the criterion judicially declared whether the defendant has failed to meet the legal duty.
>
> (c) The first question is whether the facts, as pleaded, bring the government's relationship with the claimants within a settled category that gives rise to a duty of care.
>
> (d) If there is no such settled category, the Court must apply the two-stage *Anns/Cooper* test for determining the existence of a duty of care:
>
>> A court must be satisfied:
>>
>> (i) that a *prima facie* duty of care exists as between the plaintiff and the defendant based on proximity and foreseeability; and
>>
>> (ii) that no policy reasons exist to negate or limit the *prima facie* duty of care.
>
> (e) Policy considerations may eliminate or limit a duty which might otherwise exist and policy considerations may also serve to limit the scope of a duty, in the sense of defining the conduct required to meet an existing duty, but it must be recognized that, as a practical matter, the distinction between limiting the scope of a legal duty and limiting the requisite standard of care to discharge that duty may be an elusive one.
>
> (f) To meet the relatively low threshold of the first step of the *Anns/Cooper* test, establishing a *prima facie* duty of care, it must be

shown that a relationship of proximity existed between the parties such that it was reasonably foreseeable that a careless act by the defendant could result in injury to the claimant.

(g) Proximity may arise because of interactions between the parties or because of statutory provisions, or both.

(h) Courts must determine under the second step of the *Anns/Cooper* test whether any factors exist which should eliminate or limit any duty found under the first.

(i) The test of proximity may be met yet liability need not necessarily follow; duties of care may be negated or limited for policy reasons applied through legislative or regulatory provision or by immunities created by the courts.

(j) The term common law immunity is employed to distinguish immunity created by the courts on their own initiative from legislatively mandated tort immunity arising from express statutory language or by necessary implication and from the sovereign immunity of government.

(k) Immunity may be imposed from a wish to shield specific activities from judicial control or may reflect other broad policy considerations such as efficiency and economic fairness. Justification for public authority immunity includes judicial deference to the legislature and institutional competence.

[119] Some commentators have suggested courts should never immunize public authority decisions. See for example, Bruce Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified", (2013) 92 Can Bar Rev. 211. Professor Feldthusen suggests that between *Just* (government liable if negligent in road maintenance) and *Cooper* (registrar of mortgage brokers not liable in negligence), the "dominant issue" in public authority negligence law was common law immunity for policy decisions, while since *Cooper* and its companion case, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 [2001] 3 S.C.R. 562 (no liability for governing body's failure to monitor trust accounts), "proximity replaced immunity as the key concept in public authority negligence law." (Feldthusen, at p. 212.)

[120] Distinguishing between a public authority's policy functions and its operational functions has been the basis for finding common law immunity. Professor Feldthusen and others argue that this distinction is inherently uncertain and unworkable, being "notoriously difficult, if not impossible, to draw" in difficult cases (See Feldthusen, at p. 215, and the concurring decision of Sopinka J. in *Brown v. British Columbia (Minister of Transportation and Highways)*) [1994] 1 S.C.R. 420, at para. 4 (no liability for delay in sanding icy road). It is difficult to reconcile the Supreme Court of Canada's decision in *Just* with *Brown* and *Swinamer* (no liability for decision regarding inspection and identification of dead trees prior to policy decision on allocation of funds to remove them).

[121] In *Brown* the majority of the Court set out portions of the majority reasons in *Just*, which it believed might be applied in what it acknowledged to be the difficult task of differentiating between policy and operations. At paragraph 22, Cory J. for the majority quoted paragraph 18 from *Just*:

> The need for distinguishing between a governmental policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort. What guidelines are there to assist courts in differentiating between policy and operation?

[122] Cory J. went on to find these guidelines in the comments of Mason J. of the Australian High Court in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1:

> *Anns* decided that a duty of care cannot arise in relation to acts and omissions which reflect the policy-making and discretionary elements involved in the exercise of statutory discretions. It has been said that it is for the authority to strike that balance between the claims of efficiency and thrift to which du Parcq LJ referred in *Kent v. East Suffolk Rivers Catchment Board* [1940] 1 KP 319 at 338 and that it is not for the court to substitute its decision for the authority's decision on those matters when they were committed by the legislature to the authority for decision (*Dorset Yacht Co. v. Home Office*, [1970] AC 1004 at 1031, 1067-8; *Anns*, at p. 754; *Barratt v. District of North Vancouver* (1980) 114 D.L.R. (3d) 577). Although these injunctions have compelling force in their application to policy-making decisions, their cogency is less obvious when applied to other discretionary matters. The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions. Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on

the one hand and operational factors on the other. This classification has evolved in the judicial interpretation of the "discretionary function" exception in the United States *Federal Tort Claims Act* -- see *Dalehite v. United States* (1953) 346 US 15; ... *United States v. Varig Airlines*, *supra*. The object of the *Federal Tort Claims Act* in displacing government immunity and subjecting the United States Government to liability in tort in the same manner and to the same extent as a private individual under like circumstances, subject to the "discretionary function" exception, is similar to that of s. 64 of the *Judiciary Act*, 1903 (Cth).

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

(Emphasis added in *Brown*.)

[123] Cory J. further explained the policy-operations distinction at pages 1244-1245 of *Just*:

It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the *bona fide* exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and

> no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

[124] I note also the comments of Cory J. in *Just*, at pp. 1239 and 1243, reaffirmed in *Brown*, at paragraph 24, when discussing how "particularly difficult decisions" will arise where governmental inspection may be expected:

> Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of *bona fide* discretion based, for example, upon the availability of funds. …
>
> At a lower level, government aircraft inspectors checking on the quality of manufactured aircraft parts at a factory may make a policy decision to make a spot check of manufactured items throughout the day as opposed to checking every item manufactured in the course of one hour of the day. *Such a choice as to how the inspection was to be undertaken could well be necessitated by the lack of both trained personnel and funds to provide such inspection personnel. In those circumstances the policy decision that a spot check inspection would be made could not be attacked.* [Emphasis added in *Brown*.]

[125] The Supreme Court in *Imperial*, at paragraphs 72 ff, made clear that the preferable approach for determining whether government decisions are "true" or "core" policy decisions immune from suit is to define them positively, instead of negatively as "not operational." The definition adopted by the Court, at paragraph 90, was "core policy" government decisions protected from suit are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."

(b) Duty of Care

[126] Applying the above negligence principles to the present case, for the following reasons I conclude the trial judge did not err by finding that the Crown does not owe a duty of care to the owners and occupiers of motor vehicles to erect fences or take other remedial measures not presently employed in controlling moose populations or mitigating the risk of MVCs.

(i) The Common Law Duty

[127] The appellants sought to establish proximity between the appellants and government by reference to statutory provisions as well as to an alleged common law duty of care arising from the bureaucratic processes by which government formulated its moose population management and MVC risk mitigation strategies.

[128] The appellants argue that the Province's duty of care to reasonably maintain the highway is an established category of proximity as between users of the highway and government, citing *Just* (failure to properly inspect rock slopes), *Ploughman v. Newfoundland* (1992), 101 Nfld. & P.E.I.R. 8 (Nfld. S.C.) (failure to remedy damage to a culvert) and *Balan v. Newfoundland* (1994), 128 Nfld. & P.E.I.R. 99 (Nfld. S.C.) (failure to build a sufficiently long guardrail alongside a highway). The trial judge correctly concluded those cases involved a common law duty to use due care in giving effect to a policy previously adopted. The trial judge correctly noted that the appellants are not saying that the Province's programs were not properly implemented, for example by not sufficiently reducing moose population or not cutting brush as often or as thoroughly as it should have been, or by putting signs in wrong place, or by inadequately educating the public. He correctly summarized the appellants' arguments as being based upon an alleged responsibility of public officials "to conduct a reasonable level of evidence-based research on the available MVC risk mitigation measures and their effectiveness, to give advice to Ministers and Cabinet accordingly, and to question previous advice as indicated" (decision, at paragraph 92). The appellants are saying that, because the public officials did not do so, government has breached a duty of care owed to them at the "input" stage of policy decisions instead of the usual "output" stage.

[129] I agree with the Province that in the present case, the claims are novel and require the full two-part duty of care analysis set out in *Imperial*. The appellants are not relying simply on the proposition that the Province owes a duty of care to reasonably maintain highways. The Province agrees this duty exists. The present case is based, in the words of counsel for the Province, "on a more specific and very different question: whether the Province owes a duty of care to motorists to mitigate the risk of MVCs." This common issue has been further refined and clarified by the appellants in their submissions to mean whether public employees owe a duty of care to the travelling public to exercise a reasonable level of research when formulating policy advice to the executive on the issue of MVC mitigation. This is not

an established category of proximity giving rise to a duty of care. The trial judge correctly concluded he had to proceed with the two part analysis.

[130] Looking at the first step, whether a *prima facie* duty of care exists as between the appellants and the Province based on proximity and foreseeability, no particular interactions have been alleged by the appellants as giving rise to such duty, other than being a motorist on the highway. The trial judge correctly found that the appellants' claim arose out of policy formulation by government, and the only duties at common law were owed to the public as a whole.

[131] The appellants submit that proximity exists between them and the Province because it has a responsibility to maintain a safe highway system. The trial judge correctly noted that the duty which they allege in the present case relates to the bureaucratic processes by which the Province formulated its moose population management and the MVC risk mitigation policies. The negligence complained of by the appellants is not "the output as implementation of a policy decision once made," but instead "the input to policy decisions."

[132] The trial judge did not err in his analysis of the appellants' argument or in his application of the law to the facts of this case. He properly distinguished the three cases relied on by the appellants (*Just*, *Ploughman*, and *Balan*), where a private law duty of care to make highways safe for motor traffic had been found, pointing out that the private law duty of care found in those cases arose after government adopted a policy with respect to highway construction or maintenance, while here no negligence has been alleged with respect to the implementation of a policy. No *prima facie* duty of care arises based on proximity and foreseeability because of the interactions of the parties, so the trial judge properly moved on to consider the Province's statutory duties, as directed in *Imperial*.

(ii) The Statutory Duty

[133] Paragraph 1 of the agreed statement of facts in this case reads:

> The government of Newfoundland and Labrador is the owner of the highway system and is responsible for the reasonable safety of the highway system in the province and regulating the safe operation of the highway and those who use it.

On this appeal, the Province acknowledges that it has a statutory duty to the public to maintain the highways reasonably. But it correctly points out that

the question to be answered is whether any private law duty arises. It also correctly notes that the appellants' basis for appealing the trial judge's decision on Common Issue 3, whether the Crown owed a duty of care to better control moose populations and to better mitigate the risk of MVCs, has been refined and clarified by the appellants in argument to mean: whether public employees owe a duty of care to the travelling public to exercise a reasonable level of research when formulating policy advice to the executive on the issue of mitigation of MVCs. The Crown submits the issue is not about the negligent implementation of a highway maintenance practice (which by *Just* is an established category of negligence) but about the process of formulating policy at the public employee level. I agree with this characterization of the appellants' claim.

[134] The appellants rely upon Regulation 91/03, promulgated pursuant to the *Executive Council Act*, SNL 1995, c. E-16.1, which provides in section 4:

> The process, functions and **duties** of the minister include the administration, supervision, control, regulation, management and direction of all matters relating to transportation and public works, services and supplies generally, including all matters relating to (a) construction, improvement, repair and maintenance of highways … . (Emphasis added.)

The appellants in their factum submit that the express reference to "duties" imposes a statutory duty upon the Crown to maintain the highways reasonably. The appellants also point to the acceptance on cross-examination by the Assistant Deputy Minister of the Department that government had accepted responsibility for mitigation of MVCs and agreed the responsibility should be exercised in a reasonable fashion.

[135] As a matter of pure statutory interpretation language, imposing upon the Minister of Transportation and Highways a duty to maintain highways cannot be interpreted as imposing a duty to expend unlimited funds upon eliminating any possibility of moose getting upon highways and creating risks to the travelling public. The reference to "duty" must be interpreted in the context of the *Executive Council Act*, which assigns responsibility requiring the expenditure of funds to other departments of government as well as Transportation and Highways. The process of interpretation also proceeds in the context of other financial responsibilities of the Department of Transportation and Highways flowing from other duties of the Department, such as maintaining guardrails and bridges, sanding highways,

and preventing deterioration of the highway surface, for example, all of which have safety implications. I note the cautionary words in *Cooper* at paras. 54-55, against imposing indeterminate liability and creating an insurance scheme not contemplated by the legislature.

[136] The trial judge had evidence of financial constraints. These were accurately summarized by Crown counsel:

> Justice Stack understood, from documents and testimony, that Officials of the Province were focused on playing catch-up to maintain the safety and integrity of bridges, crossing structures, guard rails, asphalt repair and other general road conditions. The Trans-Canada Highway ("TCH") is 920kms. The Province is responsible for over 9,000kms of provincial roadway. The trial judge accepted that the estimated cost of erecting moose fencing is approximately $150,000 per kilometer. To fence even a small portion of this provincial roadway (500kms), therefore, would cost in excess of $75 million dollars. This would not include the costs of underpasses or overpasses which are estimated to cost as much as $1 million to $3 million each. Maintenance and repairs would also be required. Former and current members of the executive of the Department of Transportation and Works would not support reallocating money from the roads budget for moose fencing (paragraphs 32, 37, 38 and 39 of the decision).

[137] As a matter of common sense, the courts do not have the authority to require government to reduce annual expenditures for education or health or social services or to transfer funds away from maintenance of bridges and guardrails in order to meet the cost of moose fences. Annual budgeting is a discretionary authority assigned under a parliamentary democracy to the legislature and the executive, not to the courts. The court normally may only intervene if the legislative or executive decision was not *bona fide* or was so irrational that it could not constitute a proper exercise of discretion. See *Brown*, at paragraph 38. I say "normally" because there may be circumstances where judicial intervention may be required to limit legislative or executive decisions which depart from the constitutional obligation to support and maintain, to a minimal standard, the three branches of government.

[138] It, therefore, should be clear that the trial judge did not err in rejecting the appellant's primary argument that the *Executive Council Act* and Regulations imposed a statutory duty upon government to erect moose fencing. The correct interpretation of the statutory framework is that it assigned a discretion to be reasonably exercised not by the courts but by the legislature and executive. A decision to adopt a policy of brush clearing,

highway signage and public education instead of fencing is the type of decision which falls within the discretionary function exemption discussed by Mason J. and adopted by the majority in *Brown*. This sort of decision is one of policy on which the courts must defer to the legislature.

[139] The appellants incorrectly assert that the trial judge in the present case did not refer to the statutory duty. At paragraph 90 he noted the Province's acknowledgement in the agreed statement of facts that it has a statutory duty to maintain highways reasonably. Also, beginning at paragraph 103 of his decision the trial judge correctly noted that in fact two statutory regimes are at play, not just the one setting out responsibility for highway maintenance but also the statutory regime of the *Wild Life Act*, providing for the protection, preservation and propagation of wild life. He also noted at paragraphs 107 to 109 of his decision the appellants' submission, that the Province does have a statutory responsibility for highways.

[140] The trial judge properly disposed of the appellants' reliance upon *Just* and other cases as being cases where a private law duty of care arose out of the alleged negligence of governmental actors in the implementation of an adopted policy. The trial judge correctly held that where, as here, the private law duty of care does not arise from the statute directly or from the implementation of a policy, no private law duty will be found in the absence of a government policy which has been formulated previously. As previously noted, although one piece of subordinate legislation here in question expressly refers to the "duty" of government to maintain highways, as a matter of common sense and proper statutory interpretation this cannot be interpreted as creating a duty to implement moose population controls or MVC risk mitigation measures at any particular scale, but rather as a duty to make reasonable decisions in the exercise of a discretion as to the manner of maintenance of highways generally.

[141] As decided by the majority in *Swinamer*, at page 460, if legislation does not impose a specific legal duty to exercise statutory powers conferred, once the powers are exercised a duty is created to exercise them with due care.

[142] The trial judge correctly noted that the *Anns/Cooper* test, adopted from *Anns* and applied by McLachlin J. (as she then was) in *Swinamer* and by the Court in *Imperial*, emphasized that whether a private law duty may be imposed upon public authorities may depend on their statutory powers.

[143] The appellants are highly critical of the acceptance by the trial judge of the concurring judgment of McLachlin J. (as she then was) in *Swinamer*, which in the appellants' view was a minority decision. The appellants argue that the majority decision was that of Cory J., which held that there is a general private law *prima facie* duty of care to maintain highways instead of McLachlin J.'s position that a highway authority could be liable only for defective implementation of a policy once adopted.

[144] I do not accept the appellants' submissions on this point. Whether or not McLachlin J.'s was only a minority view in *Swinamer*, the trial judge correctly noted that the significance of statutory powers for establishing the existence of a private law *prima facie* duty of care has been adopted in *Imperial*. The trial judge applied *Imperial* and accepted that a private law duty of care may arise either explicitly or by implication from a statutory scheme or from interactions between the claimant and public authority which are not negated by the statute. The trial judge correctly concluded there were no direct interactions between the parties to give rise to a private law duty of care to mitigate the risk of MVCs and nothing in the relevant statutes to create sufficient proximity to give rise to a duty of care.

[145] The trial judge properly relied upon the conclusions of McLachlin C.J.C. in *Imperial*, at paragraph 44, concerning the difficulties that may arise when a plaintiff attempts to use a statute as a source of proximity. She noted how certain statutes may impose duties regarding state actions with respect to particular claimants while, more often, statutes are aimed at "public goods." In the latter case, it may be difficult to infer that the legislature intended to create private law tort duties to claimants, particularly where, as in the present case, recognition of a private law duty (to reduce the number of moose so as to reduce the risk of MVCs) would conflict with the public authority's overarching duty to the public (to comply with wildlife legislation requiring encouraging the propagation of moose or to refrain from spending so much on moose fencing as to adversely impact duties regarding education, health and so forth). I see no error in the trial judge's analysis and conclusion, applying the law set out in *Imperial*, that the relevant statutes establish only general duties to the public and impose no *prima facie* private law duty to the appellants when developing moose population or MVC risk mitigation strategies. I am also satisfied, for reasons set out below, that in any event there are policy reasons to negate any *prima facie* duty of care which might arise.

[146] I should further note that the appellants' objections to the trial judge's references to McLachlin J.'s comments in *Swinamer* instead of those of Cory J. are particularly surprising given that Cory J. in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, expressly adopted the same characterization of statutes and noted, at paragraph 14, that "[the] private law duty imposed by the *Anns* test effectively stands alongside a public authority's legitimate exercise of statutory discretion." Cory J. held in *Lewis*, at paragraph 15, that a statute granting a measure of discretion over the maintenance of highways gives rise to a private law duty at the "operational" stage and is only applicable once the authority has made the necessary "policy" decision.

[147] The trial judge, at paragraph 97 of this decision, considered the analysis in *Swinamer* and *Anns* and the categorization of various types of legislation as:

> (1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but had done it negligently;
>
> (2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.
>
> [Emphasis added by trial judge.]

[148] The trial judge had correctly concluded, at paragraph 46, on the basis of the *Swinamer* analysis, that because the decision to adopt the MVC risk mitigation strategy was a rational policy decision taken in good faith and did not involve errors of implementation, it did not fall within an established category of proximity as between users of the highway and government. I see no reason to interfere with this reasoning. The present case is clearly one where the scale and manner in which the mitigation measures were to be exercised was left for the discretion of government. The circumstances must be distinguished from those cases where statutory provisions give rise to a duty of care to individuals in the course of exercising statutory powers for the common good. In other words, no proximity has been shown to arise between government and individuals from the statutes in question.

[149] As for the governing statutes, the trial judge noted two statutory regimes are at play. I earlier discussed the Department of Works, Services and Transportation Notice (passed under the authority of the *Executive Council Act*, where section 4 sets out the "powers, functions and duties" of the Minister regarding transportation matters and the "repair and maintenance of highways." The appellants say the Province is required by this *Act* to take measures to make the highways of the Province safer by mitigating the risk of MVCs, and that the statutory requirements create a proximate relationship between those who have suffered damages from MVCs and the Province, giving rise to a private law duty of care. The Province replies that the statute merely creates a general public authority to maintain the highways as a public good and does not impose on the appellants specific private law duties.

[150] The second relevant statutory regime is the *Wildlife Act*, where by s. 5(1) the Minister of Environment and Conservation is given statutory authority for the "protection, preservation and propagation" of wildlife. The appellants submit the Province has negligently permitted its policy of maintaining high populations of moose for the purpose of achieving maximum sustainable yield to interfere with its responsibility to control the moose population to lessen the risk of MVCs. The Province argues the *Wild Life Act* creates no relationship between it and individual highway users, does not give rise to a duty to lessen the risk of MVCs and to hold otherwise would be to create a conflict with the duty to preserve and protect the moose population.

[151] I agree with the trial judge's conclusion that the statutory provisions do not give rise to a private law duty to better mitigate the risk of MVCs, and that to find otherwise would create conflicts with the Province's other public duties. I agree also with the following conclusion of the trial judge set out in paragraph 115 of his reasons:

> 115 The authority granted to the Defendant by the legislature requires it to balance its obligations to the general public, not only as a highway authority and as manager of the wildlife of the Province, but also in other respects. For example, the Defendant may make a policy decision to allocate resources that could be used for MVC risk mitigation to health care, education or some other area of governmental responsibility.

[152] Part of the appellants' claim is that the Province allowed wildlife officials to take responsibility for MVC risk mitigation instead of having

officials of the Transportation Division take responsibility. The trial judge correctly held that no private law duty of care arose to require allocation of such responsibility to one department rather than another.

(c) Policy Reasons to Negate any Duty of Care

[153] I agree the relevant statutes establish only general duties to the public and no *prima facie* duty of care to the appellants arose by operation of statute when developing moose population or MVC risk mitigation strategies. But assuming there is a *prima facie* duty of care owed, the trial judge correctly held it would be negated because core policy reasons of government are not justiciable and cannot give rise to tort liability: *Imperial*, at paragraph 72.

[154] The question of what constitutes a policy decision protected from negligence liability is a difficult one. Governmental policy decisions are not justiciable and cannot give rise to tort liability. But governments may attract liability in tort where government agents are negligent in carrying out prescribed duties or policies. Two approaches have been taken to resolve how to distinguish these two situations. One approach emphasizes the discretionary nature of the impugned conduct and holds that public authorities should be exempt from liability if they are acting within their discretion. The other more dominant approach exempts "policy" decisions from liability, where social, economic and political considerations are involved (*Imperial*, at paragraph 117).

[155] The trial judge properly rejected the appellants' argument that bad research and advice by public employees were operational in nature and could give rise to liability. He held that no tort of "bad public policy-making" is known in our jurisprudence. I agree. If the Province's moose population management and MVC risk mitigation strategies are "core policy" decisions, they are protected from suit, unless irrational or taken in bad faith, neither of which has been established here, as explained by the trial judge. I have been given no reason to reject the trial judge's characterization of the appellants' expert on MVC risk mitigation as biased. I agree with the trial judge that the appellants have not proven that the Province was so careless or reckless that bad faith has been shown, even if serious carelessness or recklessness could amount to bad faith.

[156] The appellants' submissions are similar to those of the plaintiffs in *Attis v. Canada (Health)*, 2008 ONCA 660, 93 O.R. (3d) 37 (application for

leave to the Supreme Court of Canada denied, [2008] S.C.C.A. 491), where the plaintiff's proposed class proceeding, alleging breach of a duty by the Crown's ministers or senior public servants to properly regulate silicone breast implants and act on the warnings of screen tests, was dismissed as disclosing no cause of action. The Court held that the case did not fall within a recognized or analogous category of proximate relationships and, applying the *Anns/Cooper* test, the language of the particular statute signaled that government's duty was to the public as a whole, not to individual customers. No private law duty of care could be inferred. No alleged representations by government or knowledge of officials were capable of supporting a relationship of proximity. Even if a proximate relationship was present, the imposition of a duty of care would be negated by policy considerations such as the spectre of indeterminate liability. The concerns expressed by the court in *Cooper*, at paragraphs 54-55 are applicable here.

> 54 The spectre of indeterminate liability would loom large if a duty of care was recognized …
>
> 55 Finally, we must consider the impact of a duty of care on the tax payer who did not agree to assume the risk of private loss to persons in the situation of the investor. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the tax paying public. There is no indication that the legislature intended this result.

[157] The trial judge adopted the definition of "pure" policy decision set out in *Imperial*. He rightly concluded that the MVC risk mitigation decisions and the moose management decisions fell within this definition and must be considered nonjusticiable.

[158] The trial judge's careful analysis of *Imperial*, *Attis* and Hogg, *Liability of the Crown*, at pp. 225-26, regarding the institutional competence of the courts compared to that of the legislature or executive, supports his conclusion that the Province's decision at issue here properly qualified as policy and should be left to elected officials for evaluation rather than courts, which are not as well equipped to deal with the balancing of economic, social and political factors.

[159] In *Reference re Secession of Quebec*, at paragraph 102, the Court expressly accepted that "the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts." See also, *Canada (Auditor General.) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, at para. 69, where the Supreme Court

concluded "… in the circumstances, a political remedy … is an adequate alternative remedy." The Ontario Court of Appeal makes the same point in *Attis* (application for leave to the Supreme Court of Canada denied) to which I referred:

> …The job of the government is to govern and, in the course of doing so, to make broad-based policy decisions for the benefit of the public collectively, even if those decisions may not have positive implications for all individuals. It would severely curtail the government's ability to govern if it were found to have the necessary direct and close relationship to an individual member of the public to support a claim in tort for bad government policy decisions. It is accepted that, if the government fails to make good decisions in these areas, the public will demonstrate its displeasure at election time. Thus, the law is clear that the government does not have a proximate relationship to an individual Canadian when it makes decisions of a political, social or economic nature.

[160] The Supreme Court of Canada also recognized the need for courts to respect the constitutional framework and defer to elected members of the legislature to determine what funds are expended in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3.

[161] The claim for damages because of negligent research and advice must fail because in effect this would create a new tort of negligent public policy-making, which for a variety of reasons cannot be recognized:

- It ignores the fact that governments need not give reasons for their decisions.
- It ignores the fact that government ministers need not accept the advice of public employees nor act upon their research findings.
- It ignores the deference which unelected courts, in recognition of the division of powers and the supremacy of Parliament in a democracy, must show to policy decisions of elected legislators.
- It ignores the fact that governmental institutions have more competence and better technological resources than do courts for making policy decisions based on social, economic and political factors.

OMISSION TO MAKE FINDINGS REGARDING THE STANDARD OF CARE, POSSIBLE BREACH AND NECESSITY FOR MITIGATION

[162] The appellants submit that section 12(1) of the *Class Actions Act*, SNL 2001, c. C-18.1 required the trial judge to decide common issues 4 (standard of care), 5 (breach) and 6 (mitigation). The trial judge declined to do so in light of his conclusions that there had been no public nuisance created and no negligence. Section 12 of that *Act* reads:

> 12(1) In a class action,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and
>
> (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 27 and 28.
>
> 12(2) The court may give a common judgment respecting the common issues and separate judgments respecting another issue.

When the trial judge concluded there was no public nuisance and no duty of care for the tort of negligence, common issues 4, 5 and 6 were made moot. In that sense, they were "determined together."

SUMMARY AND DISPOSITION

[163] In summary:

a. Nothing hinges on the standard of review.

b. The trial judge did not err in law by finding that the Province is not liable to the appellants for the tort of public nuisance because there was no unreasonable interference with the public's access to highways.

c. The trial judge did not err in law by finding that the Province did not owe a duty of care to the owners and operators of motor vehicles to mitigate the risk of MVCs because there was insufficient proximity between the parties and, in any event, the decisions complained of were core policy decisions immune from suit.

d. The trial judge did not err in law by omitting to make findings regarding the standard of care, possible breach and necessity for mitigation, since these were made moot once the trial judge found there was no public nuisance created and no duty of care owed.

e. I would dismiss the appeal with no order as to costs.

L.D. Barry J.A.

Green C.J.N.L. Concurring in the Result:

[164] It is no doubt highly unusual for a judge to write a concurring opinion agreeing with the result proposed by the writer of the primary judgment but disagreeing solely with the use of two words, in this case, “elected” and “unelected”. This is especially so when the result does not turn on whether those two words are used or not. Nevertheless, my colleague, Barry J.A. insists upon employing those two words in his reasoning and I am resistant to including them because of the importance of certain implications I see flowing from them. Accordingly, while agreeing with my colleague’s proposed disposition, I offer the following observations by way of qualification.

[165] The issue arises in the context of my colleague’s discussion of the existence of policy reasons for negating a duty of care in negligence as discussed in paragraphs 153-157 of his judgment. I take no issue with his conclusion that if there were a *prima facie* duty of care in this case, that duty would be negated “because core policy reasons of government are not justiciable and cannot give rise to tort liability” (paragraph 153), and that a tort of “bad public policy-making” does not exist (paragraph 155). My colleague agrees with the trial judge’s analysis of this issue and, in particular, with his discussion of “the institutional competence of the courts compared with that of the executive or executive.” He then agrees with the assertion that “the Province’s decision at issue here properly qualified as policy and should be left to *elected* officials for evaluation rather than courts” (paragraph 158; italics added). The import of this assertion is that it is the fact that the decision-makers in this instance are elected that provides the legitimacy for assigning the issue to the executive and the legislature, rather than to the “unelected” courts.

[166] A similar point is again made in paragraph 161 when itemizing reasons why there should not be a tort of negligent policy-making. Amongst other reasons (such as the fact that "governmental institutions have more competence and better technological resources than do courts for making policy decisions based on social, economic and political factors"), he adds the following:

> It ignores the deference which *unelected* courts, in recognition of the division or powers and the supremacy of Parliament in a democracy, must show to policy decisions of *elected* legislators.

(My emphasis.)

[167] I start by saying that I prefer (and agree with) my colleague's statement of the principle in his summary of approach to determining negligence issues in paragraph 118(k) of his reasons for decision where he states:

> Justification for public authority immunity includes judicial deference to the legislature and institutional competence.

[168] This statement rightly emphasizes that the reason for deference for judicial deference on policy issues is based on the different functions that each of the branches of government are intended to perform in our constitutional structure and the institutional competencies of each.

[169] My concern with my colleague's subsequent references to "unelected" courts and "elected" legislators, in my respectful view, unnecessarily and unduly emphasizes the *status* of our different governmental institutions in terms of one dimension – their electability – and that this may be taken as the *primary justification* for the deference that courts show in this area. This, in turn, could then be used inappropriately in support of stand-alone arguments criticizing or curtailing the judicial role because the judiciary somehow suffers from the deficit of lack of popular support. One need think only of criticisms by some of "activist" judges, stressing their unelected status; or submissions made by obstructionist OPCA-like litigants (after "Organized Pseudolegal Commercial Argument litigants" per Rooke, A.C.J. in *Meads v. Meads*, 2012 ABQB 571, 74 Alta L.R. (5th) 1, at paragraph 1) that they do not have to recognize the authority of the court because the judge is unelected.

[170] It is, of course, a fact that in our constitutional structure, legislators are elected and judges are not. Insofar as those terms are used merely as

descriptors of a characteristic of the two governmental organs, their use can hardly be said to be objectionable. For example, in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, Karakatsanis, J., writing for the majority discussed the jurisdiction of the courts to set rates for counsel appointed by the courts and stated: "it is for the duly *elected* members of the legislature to determine what funds are expended on the administration of justice, not the judges [emphasis added.]". The rest of her judgment, however, makes clear that the justification for judicial deference to the legislature is not *the fact* of election but because of the differing institutional competencies of the two branches and the differing roles assigned to them under our constitutional structure:

> [18] The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the "core or inherent jurisdiction which is integral to their operations … cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd. v. Simpson,*1995 CanLii 57 (SCC), [1995] 4 S.C.R. 724, at para. 15) …
>
> [27] This Court has long recognized that our judicial framework prescribes different roles for the executive, legislative and judicial branches. …
>
> [28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> [29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLii 153, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding the "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is

> equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate activity of the other" (p. 389).
>
> [41] The proper constitutional role of s. 96 courts does not permit judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a *Charter* challenge or concern for judicial independence.

[171] It is just as illegitimate for a court to abdicate its proper role as to overreach it. The danger of capitulating to submissions purporting to define the role of the counts in terms of unelected status is that such an approach offers an overbroad critique of judicial action; it applies in an indiscriminate way to both legitimate and illegitimate judicial action as defined by their accepted constitutional roles.

[172] An overemphasis on elected or unelected status of governmental organs as a justification for judicial deference could be taken as suggesting that if judges were somehow elected (as they are in some countries) they would have greater legitimacy and would be more entitled to second-guess executive or legislative decisions. It does not follow that elected judge are better, *as judges*, than appointed ones with respect to their ability or expertise to determine broad political, social and economic policy questions. In like manner, if the legislative branch of government were to cease to be formed by election – such as happened in this province during the commission of government in the 1930's and 1940's following the province's financial collapse – that in itself would not be a justification for showing less deference to the legislative branch of government on broad policy questions. That branch, however created, still has a specific constitutional function to perform.

[173] While the elected status of the legislative branch – and, by extension, the executive who are responsible to it – no doubt is an important factor that has historically shaped our thinking about the differing roles that our recognized governmental organs play in our constitutional structure, it is their respective places in that constitutional structure which now determines the roles they play. We have evolved to the point that electoral results are not the only source of political legitimacy. In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the Supreme Court observed:

> [67] … A political system must also possess legitimacy, and in our political culture, that requires interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral

> values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.
>
> …
>
> [76] Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles …, is richer.
>
> …
>
> [78] It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates – indeed, makes possible – a democratic political system by creating an orderly framework within which people may make political decisions.

(Emphasis added.)

[174] The courts' roles are broadly defined by our constitutional structure and they derive their legitimacy from that structure and the fundamental constitutional principles that underlie it. True, much of that structure can be explained, in part, by the historical development of elected institutions, but that is not all. The notion of constitutionalism determines the way in which the persons occupying constitutional offices, whether they be elected or non-elected, come to exercise their authority. They perform their separate functions in accordance with the accepted constitutional structure of the state regardless of whether they are elected or not elected. They have legitimacy because they act within their constitutionally accepted sphere of action. In exercising their authority judges achieve legitimacy, not on the basis of election results, but on things like adherence to precedent and the incremental development of a principled body of law (*David Polowin Real Estate Ltd. v. Dominion of Canada Insurance Co* (2005), 76 O.R. (3d) 161 (CA) at paragraph 120), articulating cogent reasons for their decisions (*R. v. R.E.M.*, [2008 SCC 51 at paragraph 12) and promoting the fairness of judicial processes (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at paragraph 50). Their legitimacy is not impaired because they are not elected.

[175] My concern with referring to the elected or unelected status of the various branches of government in discussions of the boundaries of the proper roles of the various organs of the state is that it may place an overemphasis on that aspect as a justification for legitimacy, whereas the

three branches of government all have their proper role that, today, is based on our constitutional structure. Legitimacy exists within a constitutionally recognized sphere of action.

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J.D. Green C.J.N.L.

White J.A. Concurring in the Result:

[176] I agree with my colleagues Barry J.A. and the Chief Justice that the appeal should be dismissed and, I also agree with the separate comments of the Chief Justice.

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C. W. White J.A.