Date: 20141203
Docket: 12/101
Citation: *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL**

**BETWEEN:**

NUNATUKAVUT COMMUNITY COUNCIL INC., TODD RUSSELL and PERSONS UNKNOWN — APPELLANTS

**AND:**

NALCOR ENERGY — RESPONDENT

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

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201208G0155
(2012 NLTD(G) 175)

Appeal Heard: September 11, 2013
Judgment Rendered: December 3, 2014

Reasons for Judgment by Green C.J.N.L.
Concurred in by White J.A.
Concurring reasons by Rowe J.A.

Counsel for the Appellants: Jason Cooke and Derek Simon
Counsel for the Respondent: Thomas Kendell Q.C. and Maureen Killoran

**Green C.J.N.L.:**

**Introduction**

[1] In this appeal, the parties raise, in the context of a protest involving aboriginal land claims and resource development, issues respecting the law relating to the granting of a perpetual injunction, the role of the Crown's duty to consult and accommodate, and the manner in which the scope of an injunction, if granted, should be determined.

[2] In brief, the appellants, NunatuKavut Community Council, Inc. (NCC), a body representing Labrador Metis, and Todd Russell, NCC's president, organized a gathering of NCC members at the intersection of the Trans Labrador Highway (TLH) and the Caroline Brook Forestry Access Road (access road) to protest lack of progress in resolution of NCC's aboriginal land claims. The access road leads from the TLH to the construction site of the Muskrat Falls hydro development. Preliminary work on the project has been underway for some time pursuant to permits granted by the Government of NL, even though the full project had not, as of the date of the protest, received full sanction.

[3] The gathering, which took place over an approximately twelve-hour period on one day in 2011, involved picketing on an eight-metre stretch of the access road leading from the TLH to a gate on the access road that is controlled by the respondent Nalcor Energy. Although the parties differ in their characterization of the effect of the activities undertaken by the picketers, the actions essentially consisted of maintaining for the duration of the protest a presence at and on the access road, approaching drivers of vehicles trying to access the construction site, explaining why they were there and attempting to persuade them from proceeding to the site. Five vehicles were persuaded or prevented (depending how one characterizes what happened) from proceeding to the site.

[4] The next day, Nalcor sought and obtained an *ex parte* interim injunction enjoining the picketing and related activities. Subsequently, on an *inter partes* hearing, the injunction was continued in a modified form.

[5] When the claims of Nalcor came on for final hearing by way of originating application, the applications judge granted a perpetual injunction in wide terms enjoining NCC, its servants, officials and agents as well as "any person having notice of this order" from interfering with access to the

access road and construction site, approaching within 50 metres of the road or entering on any of the land comprising the construction site. The order also provided for the setting aside of a "safety zone" nearby on the side of the TLH opposite the access road, where members of NCC could carry on information picketing activities.

[6] I have concluded that the applications judge erred in law in granting the injunction and that it should therefore be vacated. In the view I take of the matter, it is not technically necessary to address in detail many of the specific submissions made by the parties on the appeal. Nevertheless, because the issues engaged are of considerable importance, and because it appears that there were a number of misunderstandings throughout the process as to the applicable law and procedure, I have decided to comment on a number of these matters even though it may not be strictly necessary to do so.

**The Pleadings**

[7] The claim by Nalcor was commenced by way of Originating Application. This in itself is unusual. Rule 5 of the *Rules of the Supreme Court, 1986* contemplates that a proceeding will be commenced by way of statement of claim, leading to a trial on factual issues unless there is unlikely to be any substantial dispute of fact or only a question of law or construction of a statute is involved.

[8] In this case, there were factual questions to be resolved. The factual substratum of the case was provided by way of affidavit with some limited cross-examination. The parties appeared to be content with the chosen procedure and the trial judge did not question it.

[9] Even though the choice of procedure is not engaged as a ground of appeal, it is nevertheless worth mentioning because the impression that is left is that the choice of procedure may have shaped the approach of the parties and the court towards the analysis of the case; in particular, it seems to have deflected the parties from fully recognizing that the claim for a perpetual injunction in the enforcement of private rights is a claim that can only be considered, where the facts are in dispute, after a trial has been held on the issue of whether a cause of action has been proven. It is unlike an application for an interim or interlocutory injunction where the case is determined usually on an urgent basis where the underlying cause of action only has to be considered in a preliminary way for the purpose of

determining whether there is a serious issue to be tried. The focus in an application for an interim or interlocutory injunction is on issues relating to the appropriateness of granting the requested remedy. While matters relating to the appropriateness of granting the requested injunction must, of course, be considered in respect of a claim for a permanent injunction as well (though usually involving different considerations), the court cannot proceed to those issues until a decision is made on a balance of probabilities that a cause of action has been established.

[10] The pleadings in this case reflect this lack of focus. Nalcor's Originating Application hardly mentions the legal or equitable basis upon which it claimed that a perpetual injunction was the appropriate remedy. The application contained a description of actions taken by 'representatives of NCC, including its President, Todd Russell and other unidentified persons" which it alleged caused a "blockade" outside of a security gate, installed by the provincial Department of Natural Resources but maintained by Nalcor, on the Caroline Brook Forestry Access Road at the point of its intersection with the Trans Labrador Highway. Aside from asserting that Nalcor had been granted "all of the appropriate approvals and licences" from the provincial government to allow for the "use" of the road and to the exclusive possession and control of the work site to which the road provided access, the originating application made no assertion as to who owned the road, whether it was a public or private road or what was the nature of the proprietary or possessory interest, if any, Nalcor held in the road.

[11] The remainder of the Originating Application itemized in considerable detail the alleged harm suffered as a result of the blockade by Nalcor and third parties. In its amended pleading, Nalcor also asserted that the presence of the protesters close to the passage of large vehicles carrying fuel and explosives created an unsafe situation on the road, necessitating the creation of a "safety zone" on the other side of the TLH opposite the road for the protesters to carry on their activities. Nalcor also asserted that the Blockade posed "a severe and immediate threat" to the interests of Nalcor and "many stakeholders."

[12] On the basis of those assertions, Nalcor claimed an injunction enjoining NCC, 'its officers, members, servants or agents or any person acting under its instruction", Mr. Russell and "Persons Unknown" (defined as the persons involved in the blockade) as well as "any other person having notice of or affected" by the claimed order from:

(i) Blocking access to [the road] or the [TLH];

(ii) Approaching any vehicle which is accessing the site on or near [the road] whether it be a supplier or subcontractor or emergency vehicles;

(iii) Interfering in any manner whatsoever for an unlawful purpose with the performance of [Nalcor's] construction work on the road, or the site itself;

(iv) Approaching within 150 metres of [the road], its extension to the site, nor the site by foot or any motorized vehicle including a snow machine, a quad or other all-terrain vehicle, with the exception of having access to the safety zone;

(v) Ordering, aiding, abetting, counselling, procuring or encouraging in any manner whatsoever, whether directly or indirectly, any other persons to commit any of the foregoing acts.

[13] Nalcor requested, however, that the foregoing restrictions be subject to the proviso that "nothing herein prevents the respondents from engaging in lawful protest activities, including the dissemination of information by signage or in person, so long as it does not breach the terms" of the order requested. Effectively, what Nalcor was proposing was that peaceful picketing be allowed in the proposed "safety zone" constructed on the other side of the TLH.

[14] Nalcor had already obtained an *ex parte* interim injunction on broader terms without any provision for a safety zone. A subsequent interlocutory hearing continued the injunction but in a modified form. In particular, the interlocutory order required Nalcor to create and maintain the "safety zone" to which reference has previously been made.

[15] The protest had already concluded by the time the interim and interlocutory injunctions were granted. For the purpose of the application to make the injunction perpetual, Nalcor amended its pleadings to include assertions based on statements by Russell, that NCC "intends to establish a Blockade in the future at the Access Area" (paragraph 11A) and that NCC and Russell "have stated that they intend to continue their illegal action, including unspecified 'on the ground action'" (paragraph 41). Inasmuch as the blockade had ceased before, not as a result of, the granting of the interim

and interlocutory injunctions, it was necessary for Nalcor to establish that there was a sufficient risk that there would be a blockade *in future*, in order to ground the injunction.

[16] NCC and Russell resisted the application on a number of grounds, including the absence of a proven cause of action and the absence of proof that there was any risk of future action by the protesters. As well, they asserted that the protest was an expression of their constitutionally-protected right to be consulted and accommodated with respect to the development of the project based on a credible claim to aboriginal rights which, they argued, was recognized by this Court in *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 272 Nfld. & P.E.I.R. 178.

**The Judgment** (2012), 330 Nfld. & P.E.I.R. 233

[17] The trial judge granted[1] the injunction essentially on the terms requested by Nalcor. It provided, in its amended form, in pertinent part:

> IT IS HEREBY ORDERED THAT:
>
> 1. For the purposes of this Order, the "Site" shall comprise those areas for which Nalcor has been given, or shall be given, authority to occupy by the Province of Newfoundland and Labrador in connection with the Muskrat Falls Generation project.
>
> 2. Nalcor is to construct a safety zone (the "Safety Zone") adjacent to the intersection of the Caroline Brook Forestry Access Road and the Trans Labrador Highway.
>
> 3. Nalcor is to maintain the Safety Zone, including providing snow clearing.
>
> 4. The respondents, and others, may use the Safety Zone to lawfully assemble and disseminate by sign or in person any information concerning a claim to aboriginal rights or a position as it relates to the Muskrat Falls Generation Project.
>
> 5. The individual respondents, including the officers, members, servants or agents, or any person acting under instruction, of the Respondent Nunatukavut Community Council Inc., or any other person having notice of this order are strictly enjoined from:

[1] The formal order was amended on December 13, 2012.

(a) blocking or impeding access to the Caroline Brook Forestry Access Road or the Trans Labrador Highway;

(b) approaching any vehicle attempting to access the Site on or near the Caroline Brook Forestry Access Road;

(c) unlawfully interfering with the performance of Nalcor's construction work or on the Caroline Brook Forestry Access Road or at the Site;

(d) with the exception of passing along the Trans Labrador Highway incidental to travel elsewhere, and for the purpose of accessing the Safety Zone, approaching within 50 meters of the Caroline Brook Access Road, its extension to the Site, or the Site, whether: on foot, by sled, komatik or other non-motorized conveyance, or by any motorized vehicle; and

(e) ordering, aiding, abetting, counselling, procuring or encouraging, in any manner whatsoever, whether directly or indirectly, any other person or persons to commit the above acts or any of them;

provided that nothing herein prevents the Respondents from engaging in lawful protest activities, including the dissemination of information by signage or in person, so long as they do not breach the terms of this Order.

6. This order will remain in force unless vacated by, or replaced in whole or in part by further order of this Court.

7. There is no order as to costs.

[18] In his reasons supporting the issuance of the order, the trial judge stated the issue before him to be "whether the injunction should be made permanent and, if so, on what terms" (paragraph 6; see also paragraph 65). I would observe at this point that this is not a proper or complete characterization of the issues facing the judge. What he had to determine was whether, on a balance of probabilities, Nalcor had established a cause of action against NCC and/or Russell; if so, determine what the appropriate remedy was; and if the appropriate remedy was to be an injunction, whether his discretion ought, on proper principles, to be exercised in favour of, or against, granting it. I will come back to these points later.

[19] After noting that the project had been "released" from further environmental assessment pursuant to provincial legislation, and noting that Nalcor "represents" that the release authorized it to undertake site clearing,

access road construction and provision of power to the construction site (none of which, it will be noted, relate to the area where the protest activities occurred), the judge found that the Department of Natural Resources had "assigned to Nalcor responsibility for controlling access to the Forestry Road, which is the only road access to the [construction site]" (paragraph 12).

[20] The judge then embarked on a detailed examination of the consultation process with NCC, both before and after the publication of the Joint Review Panel Report that resulted from the environmental assessment process required by the federal and provincial governments. Ultimately, he concluded that there had been no breach of the duty to consult (paragraph 99).

[21] The judge proceeded to examine the factual circumstances surrounding the events of the blockade. He concluded that NCC had, through its members' actions, created a "blockade" of the access road which interfered with and in some cases effectively prevented persons who intended to use the access road to visit the Muskrat Falls construction site from doing so. He further found that some of those persons felt "intimidated" by the way in which the protesters approached and spoke to them. The judge also referred to and apparently agreed with the evidence of a number of witnesses that the protesters were "unmasked, unarmed, non-threatening and non-violent." (Judgment, paragraph 49) No criminal or quasi-criminal charges were laid under the *Criminal Code* or the applicable forestry legislation.

[22] Noting that "the damage from the protest identified by Nalcor assumes a continuing blockade that prevents the Preliminary Construction (and perhaps even the Generation Project itself) from proceeding" (Judgment, paragraph 61), the judge then focused on the damage that Nalcor claimed it would suffer as a result of the blockade. He identified large direct financial costs as well as potential significant delays in the project leading to loss of key personnel and higher financing costs. He also noted safety concerns resulting from the presence of protesters near heavy equipment and blasting activities.

[23] In his analysis of the law, the judge appeared to accept statements in the British Columbia Court of Appeal decision in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 292 B.C.A.C 8 to the effect that before concluding that a permanent injunction

should be granted, the court should address two questions: (i) has the applicant established its legal rights; and (ii) if so, is an injunction the appropriate remedy?

[24] Although the judge acknowledged there was a difference between the test for claiming an interlocutory or interim injunction on the one hand, and a perpetual injunction on the other, and stated that "to make an injunction permanent … the applicant must prove its legal rights" (paragraph 68), he did not engage in any analysis in his judgment as to the nature of the cause of action on which Nalcor was relying and how, on the evidence, the elements of that cause of action were established. He simply concluded:

> [69] … The physical presence of the protesters coupled with a psychological refusal to allow access to the Preliminary Construction site amounts to a blockade and is sufficient to ground the relief sought by Nalcor.
>
> [70] I am satisfied that Nalcor has established legal rights to: (a) use and control over the Forestry Road; (b) access to the lands subject to the Approvals [to occupy Crown land]; and (c) the right to carry out the preliminary Construction in accordance with the Approvals.

[25] In response to NCC's submissions that whatever rights Nalcor had could not trump NCC's constitutionally protected right to freedom of expression, the judge concluded that "the limit [of free expression] is reached when a picket includes tortious or criminal conduct" (paragraph 71). In that regard, he relied on *St. John's International Airport Authority Inc. v. Public Service Alliance of Canada* (12 May 2003), St. John's 2003 01T2254 (NLTD), a Trial Division decision dealing with a claim to an interlocutory injunction, which held that an airport authority had established a *prima facie* basis for concluding that the activities of picketers in intentionally blocking public access roads to the airport would be contrary to statute and could constitute the tort of nuisance. The judge concluded:

> [72] … such interference with legal rights amounts to a breach of statute, including the *Criminal Code*, and the tort of nuisance, and its prohibition is consistent with the wrongful action model set out by the Supreme Court of Canada in [*R.W.D.S.U., Local 588 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156]

[26] In addressing the second question which the judge had identified as being applicable to determining whether a permanent injunction should be granted (whether an injunction is an appropriate remedy), the judge

advanced two considerations to be dealt with: (i) is there an effective alternative remedy? (ii) is an injunction as a remedy disproportionate to the extent of the enjoined activity? In this latter case, he concluded two sub-questions should be looked at: (a) whether the applicant will suffer irreparable harm if the injunction were not granted; and (b) where does the balance of convenience lie?

[27] He concluded that there was no effective alternative remedy because the police could not be expected to respond where the activity was merely tortious and not criminal. He further concluded that an injunctive remedy was a proportionate response to the harm potentially caused by continued protests because the harm was significant and irreparable and the balance of convenience favoured Nalcor. In his view, the considerable harm and safety concerns outweighed NCC's rights of free expression, by protest, over a duty to consult which the judge had already held had been satisfied.

[28] I pause at this point to note that the questions of irreparable harm and balance of convenience are central points to be dealt with when considering whether an interlocutory or interim injunction ought to be granted. To the extent that they may be proper considerations when determining whether to grant a perpetual injunction is a subject to which I shall later return.

**Issues**

[29] The appellants attack the granting of the injunction and its scope on a number of fronts in their notice of appeal alleging errors of law and insufficiency of evidence to support the conclusions reached. In their written and oral submissions, however, they acknowledged that most of the individual grounds of appeal could be subsumed under two broad submissions, which I have reorganized as follows:

1. The trial judge erred in granting the injunction because:

    (a) Nalcor was not "entitled" to an injunction (which I take to include the argument that the legal basis for a cause of action justifying the granting of an injunction as a remedy was not established);

    (b) An injunction was not an appropriate remedy for the claims being made by Nalcor;

    (c) An alternative remedy was available;

(d) Nalcor had a duty to consult and accommodate NCC regarding the aboriginal and treaty rights of its members and Nalcor had not exhausted its obligations in that regard;

(e) NCC was entitled to challenge a failure to consult and accommodate the aboriginal rights of its members as a ground for resisting the grant of an injunction without NCC having to seek a separate remedy in court;

(f) The judge should not have made a determination of the sufficiency and adequacy of consultation and accommodation of NCC's members' aboriginal rights by the government of Newfoundland and Labrador when issuing permits for use of the construction site where the issue had not been pleaded and the parties had submitted that the issue was not before the court;

2. Even if an injunction was available and an appropriate remedy, the trial judge erred in granting an injunction in terms that were too broad, in that:

(a) It covered any person having notice of the order;

(b) It applied not only to activity within 50 metres of the access road but also to the extension of the road to the construction site and to the site itself even though there was no activity by NCC members near the road or the site;

(c) It enjoined "approaching" any vehicle on the access road;

(d) It effectively permanently infringed NCC's members' *Charter* rights of freedom of speech and freedom of association.

[30] In the view I take of this case, it is not necessary to consider all of the individual arguments which have been advanced. It is sufficient to address the arguments that no legal basis had been established that would justify the granting of an injunction as a remedy and that NCC was entitled to argue that a failure by Nalcor and the Government of Newfoundland and Labrador and Nalcor to consult and accommodate NCC's members' aboriginal rights

constituted a justification for the court to refuse to grant an injunction. I will also make some *obiter* comments on the scope of the injunction that the trial judge granted.

**Analysis**

**(a) The duty to consult and accommodate**

[31] Citing this Court's decision in *Labrador Métis Nation* and the Trial Division decision in *NunatuKavut Community Council Inc. v. Newfoundland and Labrador Hydro-electric Corp.*, 2011 NLTD(G) 44, the appellants assert that NCC was and is owed a duty to consult and accommodate in good faith not only by the Crown but also by Nalcor with respect to NCC's members' aboriginal claims.

[32] The duty to consult and accommodate, based as it is on the honour of the Crown, is owed to the aboriginal group affected by the various manifestations of the Crown, the federal and provincial governments. It is not owed by a third party or even a delegate of the Crown: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 2 S.C.R. 511. In this case, Nalcor is a provincial Crown corporation and could be said to be acting as a Crown agent. Certainly, the decision in *Newfoundland and Labrador Hydro-electric Corp.* relied on Hydro's (now Nalcor's) mandated involvement in the consultation framework established by the province in concluding that the province and Nalcor owed a duty to consult and accommodate. Nalcor did not challenge NCC's assertion in this appeal that Nalcor was a Crown agent and subject to the duty to consult and accommodate. It is not necessary for the purposes of this appeal to decide whether Nalcor in fact or law is an agent of the Crown for the purposes of the duty to consult and accommodate or a commercially independent third party, where the duty would not apply. For the purpose of the following analysis I will assume that the duty does apply to Nalcor.

[33] NCC further says that the existence of the duty to consult and accommodate and whether or not it was observed was relevant to the determination of whether a perpetual injunction should have been granted by the trial judge. They rely on the Ontario Court of Appeal decision in *Frontenac Ventures Corp v. Ardoch*, 2008 ONCA 534, 91 O.R. (3d) 1 for the propositions that the use of injunctive relief is not available against an aboriginal group owed a duty to consult and accommodate "except in the

most limited of circumstances and only after clear evidence shows every effort has been exhausted to reach a non-injunctive solution."

[34] *Frontenac Ventures* dealt with the appeal of sentences for contempt imposed on certain members of the Ardoch Algonquin First Nations for failure to observe interim and interlocutory injunctions granted by the Ontario Superior Court of Justice relating to a blockade of a mining site. In *obiter dicta* MacPherson J.A. made the following comments concerning how the discretion to grant an interlocutory injunction should be exercised in situations where there is a potential clash between asserted aboriginal rights, private commercial interests relating to exploration plans in accordance with valid mining claims and respect for Crown property rights:

> [46] … where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests ... .
>
> …
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations … . The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process … .

[35] The appellants assert, in effect, that there is a different test, or at least a super-added requirement, for the granting of an injunction where issues involving the duty to consult and accommodate aboriginal claims are involved. They say that *Frontenac Ventures* requires the court to address three questions as a pre-condition to granting injunctive relief: (i) whether every effort has been made *by the court*, to encourage consultation, negotiation and accommodation; (ii) whether *the party with the duty to consult and accommodate* has fully and faithfully discharged its duty to consult; and (iii) whether *every effort has been exhausted* to obtain a negotiated or legislated solution to the dispute before it.

[36] In asserting this, the appellants are reaching too far. Their propositions are not supported by authority. The comments in *Frontenac Ventures* were made as observations in relation to matters that were not before the Court

and in any event were made in the context of the granting of an interim or interlocutory injunction where the test for granting an injunction is substantively different. The two trial level decisions where the appellants assert the *Frontenac* approach was applied (*Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 and *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676) were also cases involving applications for interlocutory injunctions and in any event did not purport to apply the comments of MacPherson J.A. in *Frontenac Ventures*, quoted above, as a separate precondition for the granting of an injunction. Rather, those comments were simply discussed in the context of whether the second (irreparable harm) and third (balance of convenience) parts of the test for granting an interlocutory injunction were met. They certainly do not stand for the appellants' three propositions outlined above.

[37] Furthermore, the import of the recent decision of the Supreme Court of Canada in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227 works against the appellants' propositions. In that case, the Supreme Court held, among other things, that it was an abuse of process for individual aboriginal litigants to plead, as a defence to a tort action by a logging company based on a blockade of the company's logging site, that certain authorizations which the Crown had issued to the company were void due to an alleged failure by the Crown to consult. The individual aboriginal litigants had decided not to contest, by way of legal challenge, the validity of the authorizations when they were issued but, instead, employed self-help by subsequently erecting a blockade of the site. That situation has affinities with the present case.

[38] LeBel J., writing for the Court, explained:

> [42] … [The individual aboriginal litigants] did not raise their concerns with [the company] after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to [the company]. By doing so, [they] put [the company] in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow [the individual aboriginal litigants] to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[39] Counsel for the appellants submits that *Behn* has no application to the current case because it dealt with individual aboriginal claims rather than ones by the community as a whole and that the company in question was a private entity, unconnected with the Crown, and therefore owed no duty to consult. They also submit that the fact that the company in *Behn* was claiming damages in tort rather than an injunction also distinguishes the case.

[40] I agree that *Behn* is not congruent with the instant case; however, its finding that it is an abuse of process to raise a duty to consult as a defence to a tort claim as a means of collaterally attacking Crown authorizations which could have been, but were not, attacked at the time of their issuance is inconsistent with the notion advanced by the appellants that an examination of whether every effort has been made to ensure the duty to consult has been complied with and satisfied must always be engaged in as a precondition to the granting of an injunction. In that sense, *Behn* is relevant to the current case.

[41] I conclude, therefore, that the principles applicable to the granting of an injunction are no different just because aboriginal claims for consultation and accommodation may be involved in the issues regarding the cause of action being asserted and the specific remedy being sought. There is no pre-condition to application of the general principles for granting or refusing an injunction that the claimant satisfy the court that the duty to consult and accommodate has been exhausted and that the court must take steps to facilitate such consultation and accommodation. If there were such pre-conditions, a defendant resisting a remedy for vindication of claimed rights would always be able to stymie, or at least significantly delay, an injunction by simply asserting that the duty to consult has not been exhausted. That result would run counter to reassertion in *Behn* that the duty to consult does not give aboriginal peoples “a veto” (paragraph 29).

[42] That is not to say, however, that claims concerning the duty to consult and accommodate are completely irrelevant to any claim for an injunction. If, indeed, the claimant asserting the cause of action on which the claim to an injunction is based, is the Crown or an agent of the Crown, the question of whether the Crown and the agent have made efforts to comply with their duty to consult and accommodate may be relevant to the exercise of the Court’s decision to deny an injunction on discretionary grounds.

[43] For example, an injunction may be denied on the ground that a claimant has not come to court with "clean hands". Consultation must be meaningful and done in good faith with the intention of substantially addressing the concerns of the affected aboriginal group: *Haida Nation*. Where it is established that the Crown has a clear duty to consult and has patently failed to observe that duty, the conscience of the Crown as injunction-claimant may be regarded as being affected, thereby entitling the court to consider that fact in exercising its discretion to grant or deny the requested injunction. However, it is not just any misconduct on the part of the claimant that may be relied on as a ground for invoking the "clean hands" maxim; it must have a direct relation to the very transaction or event concerning which the complaint is made: *City of Toronto v. Polani* (1968), 3 D.L.R. (3d) 498 (Ont. C.A.); *Dering v. Earl of Winchelsea* (1787), 1 Cox 318; 29 E.R. 1184.

[44] That said, the court must be careful not to allow the raising of this issue in this way to result in a full trial within a trial, so to speak, of whether the duty to consult and accommodate, in all of its nuances, had been fully satisfied (unless, of course, the issue is independently raised by the defendant by way of counterclaim for declaratory or other relief). That could probably lead to the issue being raised in all cases, which would effectively result in accomplishing indirectly what is not available directly as an addition to the test for an injunction. It must be remembered that a failure to consult fully would not automatically equate to a lack of clean hands. The clean hands maxim focuses on the conscience and good faith of the party claiming the injunction. Nevertheless, in an egregious case, where there is a clear duty to consult and accommodate and an obvious failure to comply with that duty, it should, in principle be possible for the party resisting the imposition of a perpetual injunction to raise the "clean hands" doctrine in this context and to request the court to take account of that fact, along with all other discretionary considerations, in determining whether to exercise the discretion to grant or refuse the injunction. The impact of a clear failure to observe the duty to consult and accommodate in an egregious case would, of course, have to be considered as well against the underlying rationale for the duty which is to encourage dialogue, discussion and negotiation as a means of resolving differences, rather than using self-help confrontation or legal adjudication.

[45] Such an approach does not encourage self-help with a view to advancing duty-to-consult claims. The clean hands doctrine only arises as a

consideration after a cause of action has already been established. The claimant is therefore entitled to a remedy of some kind, including damages, if the claimant chooses to pursue any such remedy. The only issue is whether the extraordinary remedy of injunction should also be granted. In any event, it must be remembered that this is not a situation like an application for an interlocutory injunction, where the focus is only on whether a temporary injunction should be granted. In a case such as the current one, where the issue arises after trial of whatever causes of action are pleaded, the issues cannot be so segregated. The issue of alleged failure to consult and accommodate need not be raised only in a separate proceeding because the defendant would, in principle, have the option to counterclaim for declaratory or other relief relating to the duty to consult and accommodate (subject to procedural severance considerations). Then, the issues would be fully conjoined in the one proceeding in any event.

[44] In this case, I note that the judge engaged in an extensive analysis of the history of the relationships and negotiations between NCC and the provincial Crown relative to the duty to consult and accommodate. While he did not expressly say so, it is a fair inference from his analysis that he did not conclude that the Crown had acted in bad faith in its dealings with NCC.

[45] NCC submits, however, that because in its view Nalcor is an emanation of the Crown and owes its own duty to consult and accommodate, it was necessary for the judge to have addressed whether Nalcor, as well as the provincial Crown, had complied with its duty in that regard. NCC submits that in fact "there is no discussion in the decision that every effort had been exhausted to obtain a solution to NCC complaints about the inadequacy of consultation [between Nalcor and NCC]". For the reasons I have given earlier, it would not be necessary, as a pre-condition to granting an injunction, for Nalcor to establish that its duty to consult and accommodate had been "exhausted", as submitted by the appellants. Nevertheless, whether Nalcor, (if it were a Crown agent and had a clear duty to consult and accommodate) demonstrated bad faith in addressing its duty, would in principle be a relevant consideration as a factor to be taken into account in the discretionary decision as to whether an injunction should be denied on the basis of the "clean hands" doctrine. It would not be up to Nalcor to establish good faith in that regard; rather, it would be up to NCC to show that by Nalcor's inaction, intransigence or otherwise, bad faith affecting the conscience of Nalcor, as the injunction-claimant, justified the invocation of the maxim. In the absence of evidence and full argument on

the point, the issue does not arise with respect to the exercise of discretion in this case. In any event, in light of the conclusions I have reached on other issues, it is not necessary to address this point further.

### (a) Perpetual Injunction: Analytical Approach

#### (i) Cause of Action

[46] A perpetual injunction is one of a number of possible remedies that may be chosen by the court to vindicate the legal or equitable right that has been infringed. It is no less regarded as "perpetual" just because the court always retains a jurisdiction to vary its terms or to dissolve it should it subsequently become appropriate to do so.

[47] Section 105 of the *Judicature Act*, RSNL 1990, c. J-4 provides in relevant part:

> (1) … an injunction may be granted … by an order of the court, in all cases in which it appears to the court to be just and convenient that the order should be made.

This provision "does not constitute a mandate to award injunctions in the absence of a substantive right, however appealing the plaintiff's case may seem or however 'just and convenient' an injunction may be": Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (as of November 2013) (Toronto: Canada Law Book, 1992), pp. 1-57. See also *Day v. Brownrigg* (1878), 10 Ch.D. 294, per James L.J. at p. 307.

[48] Putting aside from consideration such special cases as *Mareva* injunctions, *Anton Pillar* orders, and injunctions in aid of enforcement of a statutory obligation, it can be said that a perpetual injunction is a private law remedy that is only granted following a determination that some cause of action has been proven or threatened. In *Day v. Brownrigg,* Jessel M. R. put it this way at page 304:

> … an allegation of damage alone will not do. You must have in our law, injury as well as damage. The act of the defendant, if lawful, may still cause a great deal of damage to the Plaintiff. If a man erect a wall on his own property and thereby destroys the view from the house of the Plaintiff, he may damage him to an enormous extent. He may destroy three-fourths of the value of the house, but still, if he has the right to erect the wall, the mere fact of causing damage to the Plaintiff does not give the Plaintiff a right of action.

[49] In like manner, James L.J. said at page 305: "This Court can only interfere where there is an invasion of a legal or equitable right." See also R. P. Meagher, W.M.C. Gummow and T.R.F. Lehane, *Equity: Doctrines and Remedies*, 3d ed. (Sydney: Butterworths, 1992), p. 536.

[50] The question of remedy does not even arise until a cause of action has been proven. As Sopinka J. observed in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897 at p. 930, "[I]n general, an injunction is a remedy ancillary to a cause of action." Furthermore, even when a cause of action has been proven, it does not follow that an injunction will be the automatic or appropriate remedy. As an equitable remedy, its granting is always discretionary and is subject in its application to normal equitable considerations that govern the exercise of that discretion.

[51] A court faced with a claim in which the remedy sought is an injunction must therefore be careful to ensure that it does not lose sight of the fact that the pre-condition to even embarking on a consideration of whether an injunctive remedy should be granted is whether a cause of action has been established on the evidence according to the applicable standard of proof. For example, the Supreme Court of Canada in *Pepsi-Cola* stressed that to obtain an injunction (in that case an interlocutory injunction) restraining picketing, the claimant must "base its claim on a specific tort" (paragraph 113).

[52] In the current case, the trial judge expressed the inquiry somewhat differently: he asked the question, "has the applicant established its legal rights?" (paragraph 67). In stating the question this way, he purported to rely on *Cambie* (paragraph 28). That case involved the attempted use of an injunction to assist a statutory body to carry out and effectuate certain audit authorities conferred by statute. It did not involve a situation where, as here, an injunction is being sought as a remedy for an alleged private law wrong. The situation in *Cambie* was therefore to enforce a statutory right directly and was not, as in the instant case, a claim for a remedy as part of the court's ancillary jurisdiction. Whatever may be the appropriateness of the principles as stated in *Cambie* to the circumstances dealt with in that case, I do not believe, with respect, that they accurately set out the approach to be taken in a case such as the present one.

[53] In a claim for a private law remedy, it is not sufficient simply to acknowledge that the claimant has to "establish its legal rights". Rather, the

claimant has to show, on a balance of probabilities, that those legal rights, once proven to exist, were interfered with in a manner that the law recognizes constitutes a cause of action. Just because one's legal rights are affected by the actions of another does not mean that a cause of action necessarily exists to vindicate and protect those rights. I may have a legal right, in the sense of a licence or permission, to walk in a park or use a road but that does not mean I automatically have a legal right, in the sense of a claim-right, to sue for interference of that right (and obtain an injunction restraining someone other than the licensor from blocking my way) unless I can show that the facts fit within an established cause of action.

[54] Accordingly, I would reformulate the first step in the analysis of a private law claim seeking an injunction as follows: before addressing any remedial issues, has the claimant proven, on a balance of probabilities, each of the elements of the cause(s) of action that the claimant asserts the proven facts disclose? This should not be described as part of a "test" for the granting of a perpetual injunction; it is simply a requirement for any private law litigation, whether seeking an injunction or some other remedy, before the question of remedy even arises. If the claimant cannot pass this hurdle, no injunctive, or any, remedy can be granted no matter how serious the disruptive behavior or financial losses suffered by the claimant may be. Level of inconvenience does not weigh in the balance. See e.g. *Lewvest Ltd. v. Scotia Towers Ltd. et al* (1981), 126 D.L.R. (3d) 239 (Nfld. T.D.) at paragraph 12. To the extent that *Cambie* can be said to indicate a different approach or analysis, I would respectfully disagree with it and decline to follow it on this point.

[55] Similarly, the comments of Cunningham A.C.J. in a trial judgment in *Frontenac* (2008), 165 A.C.W.S. (3d) 155, which were cited by Fry J. in the Trial Division decision in *55104 Newfoundland and Labrador Inc. v. Stockley*, 2012 NLTD(G) 56 at paragraph 62, cannot be interpreted as setting the standard at merely a generalized establishment of legal rights rather than a specific cause of action. Both *Frontenac* and *Stockley* dealt with interlocutory injunctions and the comments in question were made in the context of discussion of the third prong of the interlocutory injunction test (balance of convenience). To the extent to which those comments could be said to differ from the conclusions I have reached, I decline to follow them.

### (ii) Sufficient Risk of Future Harm

[56] A second aspect of the requirement for proof of a cause of action must also be addressed. An injunction by its nature is prospective in its reach. A wrong committed in the past that has little or no chance of continuing does not need to be remedied by an order enjoining future behavior. In many cases, such as continuing trespasses or nuisances, this issue does not arise. In some cases, however – and this is one – an event that allegedly constitutes the cause of action has ceased and is not continuing at the time of trial. In such cases, it is necessary to address whether there is anything likely to occur in the future that would need a future prohibitory order. Clearly, one can never know with certainty what will happen. The injunction-claimant should not have to face an impossibly high bar of convincing the court of the degree of risk of future occurrence. He or she must, however, satisfy the court that there is a sufficient risk that the acts complained of will continue and that it is just in all the circumstances that an injunctive remedy be imposed.

[57] Considerations that would be relevant in deciding this question would include whether it can be said that the only reason why the acts have not continued is because they were already enjoined by an interim or interlocutory injunction; whether in the circumstances it is reasonable, in terms of timing, expense and opportunity, to leave the claimant to having to renew his or her application every time it becomes clear that another event will occur; the seriousness and extent of the consequences of the acts if they occurred again; the nature of the earlier actions; and whether the defendant has admitted intending, or threatened, to continue the acts again.

[58] This question is not susceptible of being reduced to a specific standard of proof, like a balance of probabilities, in favour of future occurrence. The court must, however, be satisfied that there is a sufficient risk that the proven wrong (in the sense of all of the elements of the cause of action having been established) will occur again to make it just and equitable in all the circumstances to grant a prohibitory order with all the potential consequences to the defendant that that entails.

[59] In this case, therefore, it was incumbent on Nalcor to assert, and prove, one or more causes of action for which an injunction was an appropriate remedy. Furthermore, inasmuch as the actions complained of had ceased by the time Nalcor had taken legal action, Nalcor, additionally,

had to show that there was a sufficient risk that one or more of those causes of action, or another cause of action, was going to occur in the future.

### (iii) General Irrelevancy of Irreparable Harm and Balance of Convenience

[60] It is equally important to remember that the test for determining whether an interim or interlocutory injunction should be granted has no place in the analysis of whether a perpetual injunctive remedy should be granted. As has already been noted, the notion of serious issue to be tried has no place because the claimant, instead, must prove an actual cause of action. Similarly, the other two branches of the test do not factor in the analytical approach either. In *Cambie,* Groberman J.A. explained the difference between the three-part test for granting an interlocutory injunction and the test for granting a perpetual (referred to by him as a "final" injunction) as follows:

> [27] Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.
>
> [28] In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[61] The trial judge recognized that there was a distinction between the interlocutory and perpetual injunction tests (Judgment, paragraphs 66-68); however, he nevertheless incorporated the second (irreparable harm) and third (balance of convenience) parts of the interlocutory test into his analysis of whether he should grant a perpetual injunction. As noted earlier, the judge expressed his "decision tree" as follows:

> (i) Has the applicant for the injunction established its legal rights?

(ii) If so, is an injunction the appropriate remedy?

(iii) If so, is the remedy of an injunction proportionate to the behavior being enjoined, i.e. (a) will the applicant suffer irreparable harm if the injunction is not granted; and (b) where does the balance of convenience lie?

[62] In expressing the test in this way, the trial judge was effectively engrafting the second and third prongs of the interlocutory injunction test onto the analytical approach for determining the availability of a perpetual injunction. In doing so, the judge again purported to rely on the analysis in *Cambie*. He asserted at paragraph 82 of his judgment that "*Cambie* also recognized that both irreparable harm and the balance of convenience may be 'considered in evaluating whether the court ought to exercise its jurisdiction to grant final injunctive relief'". This constituted error on the part of the judge. In fact, *Cambie* made it clear, from paragraph 28 quoted above, that "[i]rreparable harm and balance of convenience are not *per se* relevant to the granting of a final injunction." Groberman J.A. went on to say, however, that "some of the *evidence* that the court would use to evaluate those issues might also be considered in evaluating whether the court ought to exercise its discretion to grant injunctive relief" (my emphasis). Saying that some of the *evidence* that might be relevant to issues of irreparable harm and balance of convenience might also be relevant to issues on the perpetual injunction claim is not the same thing as saying that the *issues and considerations* of irreparable harm and balance of convenience themselves remain relevant as analytical tools for deciding whether or not to grant a perpetual injunction.

[63] *Cambie* in any event did not apply considerations of irreparable harm and balance of convenience in its analysis of whether a "final" injunction should have been awarded in that case. The Court set aside the injunction granted at first instance on the basis that the statutory remedies that were available were entirely adequate. *Cambie* does not therefore stand for the proposition advanced by the trial judge in this case that in considering whether an injunction should be granted on the basis of proportionality, an inquiry should be made into questions of irreparable harm and balance of convenience.

[64] In fact, while balancing of competing interests (proportionality) is vital when considering the appropriateness of an interlocutory injunction, this sort of analysis is generally foreign to the awarding of an injunction as a

final remedy. Once a claimant establishes that he or she has suffered a recognized civil wrong, he or she is entitled to remedial relief (subject to the limited considerations of *de minimis*) regardless of the impact on the wrongdoer and regardless of whether the wrongdoer will suffer a greater inconvenience as a result of having to provide a remedy than the claimant will suffer from leaving the wrong unremedied. See *Lewvest.* At law, where the primary remedy is damages, the remedy follows as of course. In equity, where all equitable relief, including an injunction, is discretionary, the court may deny such relief but must do so according to well-recognized equitable principles that have been developed as guidelines for the exercise of that discretion. Whether at law or in equity, the impact on the defendant of granting a remedy generally only becomes relevant again at the point where a temporary stay of judgment may be granted.

### (iv) Availability of an Effective Alternative Remedy

[65] Chief among the discretionary considerations that must be addressed is whether there is an effective alternative remedy available. This is because equitable remedies are generally regarded as supplementary to other available remedies. It is only where such supplementation is needed that the appropriateness of an injunction enters the picture. In most cases, this will involve a consideration of whether the claim can be properly remedied by an award of damages. Usually, damages will not be adequate where what is at issue is threatened future harm that is not an extension of existing harm. In addition, questions as to whether effective protection of the rights that have been or are threatened to be interfered with can be achieved either directly or indirectly by other mechanisms such as by the invoking of some other sort of statutory remedial process, such as in *Cambie*, or by the enforcement of the criminal or quasi-criminal law (and whether it would be more appropriate for the Attorney General to seek an injunction in aid of preventing threatened continuing breaches of the criminal or quasi-criminal law rather than leaving it to private claimants).

[66] Where another remedy is adequate, the discretion to deny an injunction should ordinarily be exercised. Generally, it will be for the party resisting the injunction to show that other remedies are adequate.

### (v) Other Discretionary Considerations

[67] Assuming, however, other potential remedies are not adequate, the court must move on to a consideration of whether other equitable

considerations might work against the equity of granting an injunction. I have already referred earlier to one such notion, the "clean hands" doctrine. Other matters include considerations of laches and acquiescence.

[68] Hardship to the parties may also be a consideration. This is not to say that there should be a balancing of convenience to the respective parties as there would be when deciding whether an interlocutory injunction should be granted. At the "final" stage it has already been determined that the plaintiff's rights have been breached and that there is sufficient reason to believe that apprehended acts will occur in the future. The plaintiff is therefore *prima facie* entitled to a remedy. As noted, considerations of hardship on the part of the defendant are therefore ordinarily of little or no consequence. There may be an exception in a case of extreme hardship suffered by the defendant with relatively no hardship to the plaintiff and where the plaintiff is seeking merely to vindicate his rights in a declaratory sense. But where, as will be the situation in most cases, the plaintiff is threatened with substantial detriment or inconvenience, hardship to the defendant will be irrelevant. However, hardship to the plaintiff if an injunction is not granted may be relevant to questions of whether alternative remedies are adequate. Further, hardship to third parties if the injunction were to be granted to enjoin other persons having notice of the order may in some cases be a relevant consideration.

[69] Other discretionary considerations, flowing from the general equitable maxims that are discussed in the standard legal texts, may also be relevant but it is not necessary for the purpose of this case to itemize them all. See, e.g. Robert J. Sharpe, *Injunctions and Specific Performance*, pages 1-3 to 1-12; 1-38 to 1-54; I.C.F. Spry, *The Principles of Equitable Remedies* (Australia: Law Book Co, 2007), pp. 392-440; R.P. Meagher, W.M.C. Gummow and L.R.F. Lehane, *Equity: Doctrines and Remedies*, pages 71-100; 531-627.

**(vi) Imposition of Terms**

[70] It should also be noted that the approach to granting an injunction also involves a consideration as to whether the court should exercise its discretion to impose terms on the injunction-claimant as a condition of granting the injunction. This flows from the equitable maxim that "he who seeks equity must do equity." The imposition of a "safety zone" to be constructed and maintained at the expense of Nalcor so as to allow for the

continued lawful exercise of NCC members' rights of freedom expression may be considered as an example of this.

**(vii) Scope of Injunction**

[71] Finally, having decided that an injunction should be granted, the court must consider very carefully what the scope of the injunction should be. My observation is that it is common practice to seek injunctions in very broad terms, anticipating incidental events that might occur. An injunction-claimant should only be entitled to an injunction that is reasonably necessary to remedy the specific wrong that has been committed or threatened and to effect compliance with its intent - and no further. Thus, the wording of the injunction should be tailored to the specifics of the individual case, rather than relying on standard boilerplate. Otherwise, there will be a real risk that its remedial sweep will be overly broad. It is worth stressing again that an injunction is an extraordinary remedy with potentially serious consequences, in the form of a contempt order, for its non-observance.

**(viii) Summary of Approach**

[72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:

(i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);

(ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);

(iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);

(iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an

injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);

(v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?

(vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

**(b) Necessity for a proven cause of action**

[73] Having stated the first consideration to be whether Nalcor had established its legal rights, the trial judge concluded that Nalcor had in fact "established its legal rights to: (a) use and control of the Forestry Road; (b) access to the lands subject to the Approvals; and (c) the right to carry out the Preliminary Construction in accordance with the Approvals" (Judgment, paragraph 70).

[74] The judge found that "the presence of the protesters coupled with the psychological refusal to allow access to the Preliminary Construction site amount to a blockade and is sufficient to ground the relief sought by Nalcor" (Judgment, paragraph 69). In so concluding, the judge did not identify the legal cause of action that had been established on a balance of probabilities that justified Nalcor's claim to relief. The closest he came to doing so involved his citation of *St. John's International Airport Authority Inc.* which involved obstruction of free passage on a road leading to an airport over a prolonged period of time. He stated: "According to Orsborn J., such interference with legal rights amounts to a breach of statute, including the *Criminal Code*, and the tort of nuisance".

[75] The *St. John's International Airport* case is a shaky foundation for this conclusion in the context of the current case. That case involved an application for an interlocutory injunction after six weeks of obstructive

behavior with no sign of cessation and after police intervention to facilitate passage of vehicles on twenty-three occasions had not resulted in any change in activity.

[76] Orsborn J. concluded that "without intervention of the Court, the wrongful activity will continue in a pattern of periodic but repeated obstruction that lasts until the intervention by the police." Referring to specific provisions of the provincial *Highway Traffic Act*, RSNL 1990, c. H-3 dealing with parking on a roadway and obstruction of traffic and to sections 423 (intimidation) and 430 (mischief) of the *Criminal Code*, Orsborn J. found on the facts of that case that the plaintiff had "established at least on a *prima facie* basis" that activities of the picketers in intentionally placing themselves on public access roads to the airport thereby delaying and blocking traffic was contrary to statute. He also addressed whether there was a potential tort claim. While saying that he did not propose to enter into a detailed discussion of the elements of specific potentially applicable torts, he did generally "suggest" that the tort of nuisance, with its emphasis on interference with enjoyment and use of property, would be applicable. He concluded that the plaintiff had "established at least a *prima facie* case of wrongful action."

[77] Inasmuch as the case was an application for an interlocutory injunction, Orsborn J. did not have to make any definitive findings as to whether there had been, on the facts of that case, a breach of a provincial or federal statute or a tort committed or threatened. Nor did he do so. Nevertheless he identified specific statutory provisions which he felt would be potentially applicable on the facts with which he was presented. In like manner he identified a potentially applicable tort but without considering whether all of the specific elements had been established. He did not have to do more for the issues with which he was dealing.

[78] Just because Orsborn J would have concluded, on the low standard applicable on an interlocutory injunction application, that there may have been a breach of statute or a tort committed on the very different facts he was facing does not mean that that would always be the case in different factual circumstances. The trial judge in this case was required to address whether on a balance of probabilities on the facts with which he was presented there was a breach of statute or a specific tort proven.

[79] Can it be said, for example, that there was obstruction of traffic or parking on a *public* highway to which the *Highway Traffic Act* applied?

What was the status of the access road? Was it a public highway? If not, did specific provisions of the applicable forestry legislation apply? Was the action on the road sufficiently continuous and pressing that it required civil action to be taken as opposed to allowing the Attorney General to take appropriate steps either by way of statutory enforcement or applying for an injunction in enforcement of the quasi-criminal law? Can it be said that the actions of the protesters constituted criminal intimidation within the meaning of the *Criminal Code?* Did they constitute mischief? The answers to these questions would require a careful analysis of the specific statutory provisions and their application to the specific facts as found by the judge. It is not sufficient for a judge on a case involving a claim for a permanent injunction to simply assert in effect that the actions could in the abstract constitute a breach of statute.

[80] In like manner, a specific cause of action in tort had to be identified and a finding made that the facts fit that cause of action. The only tort referred to by the trial judge was nuisance. (It cannot be said that the judge's reference to the fact that at least one of the drivers of approaching vehicles felt "intimidated" by the actions of the protesters amounted to a conclusion that the technical tort of intimidation had been established.). It is not enough for it to be potentially applicable. Nuisance involves the unreasonable interference with the use or enjoyment of land: *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at paragraphs 15 and 45. Was all or some of the interference here "unreasonable"? What land was interfered with? Was it only the land in front of the gate or also behind the gate and the construction site? What interest did Nalcor have in the land that would be sufficient to support an action in nuisance? To what specific areas of land did the government approvals relate? What specific proprietary, possessory or other rights did the government approvals give to Nalcor? Is the claim based on public or private nuisance (depending on whether there was a public character to the road)? If the tort alleged is that of public nuisance, should the action have been brought by the Attorney General or should the action have been a relator action brought on the request of Nalcor? If the tort is private nuisance, was the picketing necessarily unreasonable given the other constitutional issues of freedom of expression at stake?

[81] It was not sufficient simply to note that Nalcor had received valid approvals to use and control the access road and construction site. As noted, having a right to occupy does not *ipso facto* entitle one to a remedy against

otherwise lawful activities of the rest of the world for interference with those rights. The trial judge did not analyze the evidence to determine whether the tort of nuisance in one or more of its forms was established. Nor did counsel for Nalcor make specific submissions either on the original hearing or on appeal.

[82] While it is possible that other tort claims (e.g. trespass, intimidation, inducing breach of contract) might in principle be applicable in the type of factual matrix presented by this case, it is not for this Court, in the absence of substantive argument, to supply the missing analysis. Suffice it to say that no cause of action having been substantively argued by Nalcor or identified by the judge, the claim must fail because no cause of action was established.

[83] I agree with the assertion in the appellants' supplementary factum, at paragraph 17 that:

> … this failure [of Nalcor to identify what cause of action is grounding its claim] is fatal to Nalcor's claim, as a court should not grant a remedy – and particularly one as drastic as the sweeping permanent injunction here – until a party chooses a cause of action and then meets whatever legal and evidentiary tests necessary for that particular cause.

[84] I would also observe that there was very little basis for the judge to conclude that there was a sufficient risk that the activities of NCC, no matter how characterized, were likely to continue. The activities complained of were voluntarily stopped before Nalcor even obtained its *ex parte* injunction. They had not been ongoing for more than a day, certainly not long enough to draw an inference from that fact alone that the participants intended to continue with any obstructive behavior. Furthermore, the evidence was that only a limited number of vehicles did not, mostly of the drivers' own choice, pass through the protest line. The work site on the day in question was not shut down. More than fifty vehicles that had entered the site in the morning left at the end of the day.

[85] There was also evidence of a CBC news report dated October 2, 2012 in which the president of NCC said that NCC would soon be taking action 'both in the courts and on the land" to block the project. On the day of the protest, another press release indicated that the protest was "just another action of many to come from NCC." During the events of the 10th the President of NCC was quoted by one deponent to the effect that "no one would be accessing the site today". These statements are at best equivocal

as evincing an intention *to continue the blockade of the road* beyond the one day protest. Even the press release on the 10th which talked of "another action of many to come" cannot be said to refer necessarily to future obstructive action on the access road as opposed to other potential action, including, as indicated in the press release on October 2nd, possible legal action instead of protest.

[86] In addressing future harm, the judge wrote:

> [100] The protest interfered with Nalcor's rights to use the Forestry Road, access the Preliminary Construction site, and to carry out the Preliminary Construction. That interference was unlawful and did not fall within the protection of freedom of expression. Future protests of a similar nature would have the same effect. That the protest did not resume on October 11 and has been enjoined by an injunction ever since does not detract from the real possibility of future irreparable harm being suffered by Nalcor in respect of which it may now seek the protection of an injunction.
>
> (Emphasis added.)

[87] It is apparent that the judge focused on the *effect* on Nalcor that future action might have. That may have influenced his perception that there was a "real possibility" of that harm *occurring.* There was no basis in the evidence justifying that conclusion.

[88] Accordingly, if I had not been prepared to allow the appeal on the basis that no cause of action had been proven, I would have been prepared to conclude that the judge had made a palpable and overriding error in focusing too much on the events of October 10th and not on whether there was a sufficient risk that the activity would recur, thereby justifying the injunctive remedy.

### (c) Discretionary considerations

[89] In light of the foregoing conclusions, it is not necessary to address the exercise of discretion by the trial judge in this case except to record that his approach to the exercise of his equitable discretion, with its emphasis on irreparable harm and balance of convenience, was an error. It is not necessary to comment on whether a consideration of the proper principles for the exercise of discretion would have led to a different result.

### (d) Terms

[90] As noted previously, the imposition of a Safety Zone to be constructed and maintained by Nalcor is one example of imposing conditions as a term of the granting of the injunction.

### (e) The scope of the injunction

[91] Given the "final" nature of the injunction imposed here, it was certainly incumbent on the trial judge to consider how broadly the terms of the order needed to be drawn to achieve its objectives.

[92] The trial judge agreed with the observation in *Cambie*:

> [40] An injunction should be tailored to an individual case. It is an extraordinary remedy, and anyone who infringes an injunction is subject to the possibility of being found in contempt of court. Injunctions must, of course, be drawn broadly enough to ensure that they will be effective. They should not, however, go beyond what is reasonably necessary to effect compliance.

[93] He interpreted that to mean that the injunction should only be broad enough "to protect Nalcor's core rights, obviate any irreparable harm and maintain the balance of convenience, including the safety concern" (paragraph 103). With respect, that is not the same as what was stated in *Cambie*.

[94] The purpose of an injunction is not to protect a claimant's core rights but to enjoin only the *behavior* which has led to the breach of those rights. It was not appropriate to provide a blanket protection to all of the rights of Nalcor flowing from the authorizations and permits it received, only those portions of those rights that had been wrongfully interfered with.

[95] Furthermore, it is not correct to say that the scope should be limited so as to "maintain the balance of convenience". This language should be avoided so as to avoid improperly applying the interlocutory injunction test. There has to be a greater emphasis on the interests of the defendant than that. The court has to be cautious that, in drawing the terms of the order, it does not unnecessarily interfere with the rights and interests of the defendant in circumstances that are not necessary to enjoin the defendant's wrongful behavior.

[96] In approaching the matter, the judge focused on the need for a "safety zone" to allow for NCC's continued freedom of expression. He balanced

that against the need for a "protest-free zone" around the access road, including a 50 metre buffer. He was right to do so. However, he did not consider whether there was a need to enjoin NCC – and others having notice of the order - from "unlawfully interfering with the performance of Nalcor's construction work on the Caroline Brook Forestry Access Road or at the site." It must be remembered that except for an incident of several NCC members attempting to walk down the access road behind the gate, all the offending events occurred on the eight-metre portion of the road between the TLH and the gate. While those actions may have had the *effect* of impeding access to the rest of the road and to the construction site and construction work thereon, there was no direct attempt to interfere with that work by means of activity other than on the eight metres of access road. Other types of actions that were not engaged in on the day might also interfere with that work but they were not the subject of the action. The actions complained of may have justified being enjoined (if a cause of action had been established) but to enjoin all actions of any kind that might interfere with access and construction – when they had not occurred and were not threatened – was too broad, in the absence of sufficiently cogent evidence that the protest was likely to mushroom into such behavior. It is not an answer to this conclusion to say that the only type of actions that are being enjoined are those that amounted to "unlawfully" interfering. That is tautologous. An injunction should enjoin specific behavior and not leave it to the person being enjoined to engage in legal speculation as to whether the specific activity contemplated falls within generic descriptions.

[97] In like manner, to prohibit an approach to the access road outside of the 50-metre buffer, as well as access to the construction site itself "on foot, by sled, komatik or other non-motorized conveyance, or by any motorized vehicle" effectively removes from all NCC members the right to engage in normal aboriginal activities on the land in a wide area of wilderness that was not involved in any of the protest activities on October 10th. If in the future, the presence of NCC members in this area could be characterized as an attempt to interfere in a tortious way with the rest of the access road or the construction site itself, it can be addressed by subsequent litigation. It was not appropriate to include that type of prohibition in the current order when the actions complained of were not of that character.

[98] Finally, I would also observe that it is questionable whether it is appropriate to prohibit in a blanket way "approaching any vehicle attempting to access the site on or near" the access road. While safety may obviously

have been a concern, it has to be recognized that simply approaching a vehicle in a responsible way and attempting, without obstruction, to engage the occupant in dialogue is an aspect of free expression. While it might be an inconvenience to the driver to have to slow down and pay attention to the approach, that may be regarded as a small price to pay for fostering an important societal value like free expression. In *Toromont Cat v. International Union of Operating Engineers, Local* 904, 2008 NLTD 22, 224 Nfld. & P.E.I.R. 136, a decision involving an interlocutory injunction against picketing in a labour dispute, the need to reconcile the scope of the injunction with the right of free expression was put this way:

> [38] The reference to the ordinary and reasonable person's sensibilities [in *Tock*, a nuisance case] should include the knowledge and acceptance of the values of the *Canadian Charter of Rights and Freedoms,* particularly its guarantee of freedom of expression under s.2(b). Thus the reasonable well-informed person would recognize that the fundamental value of permitting reasonable expressive behavior by others may necessarily involve some interference with one's own activities. That is the price we pay for living in a community rather than as hermits. Thus, we tolerate, and do not regard as criminal or tortious, temporary interferences with our movement when, for example, we are accosted by persons on the street who wish to hand out literature to persuade us to a social cause they are espousing or to explain and ask us to sign a petition. Nor would we regard it, in the absence of an express admonition against trespassing, as unreasonable for persons to interfere with our use of our property by attending on it to express political or religious points of view (with which we may strongly disagree) or to solicit for charities, and thereby interfere with our other activities for the duration of the engagement. Obviously, once it is made known to the person proposing to intrude on our activities that the intrusion is not wanted, then continued intrusion or interference may, after a reasonable time allowed for the intruder to disengage, be regarded as unreasonable.
>
> [39] The point, however, is that there is a degree of interference with the activities of others that we should be prepared to tolerate to allow important values such as free expression to flourish. Such an approach can and should operate within the tort of nuisance …

[99] It would have been important for the trial judge to have considered whether, taking into account potential safety concerns, all "approaching" of vehicles would necessarily be regarded as "unreasonable" for the purposes of the tort of nuisance and therefore be required to be enjoined: see *Toromont Cat*, paragraphs 48-52; 56; 60-61. It is not sufficient to simply assert, as did the trial judge, that a general prohibition against approaching vehicles is "reasonable." In light of the disposition in this case it is not

necessary to address with any specificity how an injunctive order dealing with this issue ought to be crafted in the circumstances that presented themselves.

**Conclusion and Disposition**

[100] For the reasons given, I would allow the appeal and dissolve the injunction without prejudice to the ability of Nalcor to commence fresh litigation based on further events that they allege constitute a recognized cause of action or breach of statute. I would award costs, based on two counsel, to the appellants both here and in the Trial Division, to be calculated on a party-and-party basis using Column 3 of the Schedule in Rule 55.

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

I concur: _____

C. W. White J.A.

**Rowe J.A.:**

[101] I agree in the result and, generally, the reasons set out by the Chief Justice, save as noted. I would underline that the ratio in this case is that Nalcor failed to establish a cause of action (even though it might have, e.g. the tort of interference with economic relations). No remedy can follow without that. As the Chief Justice has explained in some detail, showing that NunatuKavut's conduct was tortious would be a necessary but not sufficient condition for injunctive relief. I would also reinforce what the Chief Justice has said in other words concerning the terms of the injunction. These were grossly disproportionate with the tortious acts committed or indicated by NunatuKavut. Only in far more serious circumstances should courts contemplate granting a type of "cordon sanitaire" around a project that this injunction amounted to.

[102] Where the Chief Justice and I differ relates to part of what he has written concerning the Crown's duty to consult and accommodate the

interests of groups who are claiming aboriginal title (but whose title has not been settled through litigation or by treaty). In *Labrador Metis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, *supra*, this Court held that the NunatuKuvut claim engages the Crown's duty to consult and accommodate. The Chief Justice correctly points out that such duty is borne by governments and arises from the honour of the Crown. *Haida Nation v BC Minister of Forests*, *supra.*

[103] In his reasons (notably para. 32), the Chief Justice indicates he will not decide "whether Nalcor in fact or law is an agent of the Crown for the purposes of the duty to consult and accommodate or a commercially independent third party, where the duty would not apply". I would be content to leave things as the Chief Justice has stated them, save that a judge of the Trial Division has stated a settled view that Nalcor does have such a duty; to remain silent on the issue could be misread as an implicit affirmation of that decision, when there are opposing arguments.

[104] I refer to *NunatuKavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Company, supra*. At para. 13 of that case, the Trial Division judge noted that pursuant to the environmental assessment guidelines Nalcor was required to consult with aboriginal groups for specified purposes. At para 17-18, the judge noted that Nalcor entered two agreements to consult with NunatuKavut as part of the environmental assessment process. In para. 34-35, the judge refers to the *Haida Nation* case; then, in para. 36 he states:

> Thus, Nalcor and the federal and provincial governments owe Nunatukavut a duty to consult in good faith, and accommodate where necessary.

[105] In my view, this is simply a conclusionary statement, one made without reference to the principles underlying *Haida Nation*. Nalcor does not wield governmental authority. It has been delegated no power to decide matters that governments do. It implements policy, rather than making it. It operates under ministerial discretion, rather than itself exercising such discretion. It is the regulated, not the regulator.

[106] While Nalcor is expressly made "an agent of the Crown" by s.3(5) of the *Energy Corporation Act*, SNL 2007, c. E-11.01, s.3.1(1) is also relevant. It reads:

> Notwithstanding subsections 3(5), (6), (7), where [Nalcor] enters into contracts and ancillary arrangements relating to the Muskrat Falls Project, [Nalcor] shall be considered to have entered into those contracts and ancillary arrangements in its own capacity and not as an agent of the Crown, and the Crown shall not be liable as principal in contract, tort or otherwise at law or equity for the liabilities of [Nalcor] created directly or indirectly by those contracts or arrangements.

[107] Is Nalcor an agent of the Crown such that it bears the duty to consult and accommodate by virtue of s. 3(5)? Is it shown not to be, but rather to be a commercial enterprise vis-a-vis the development of Muskrat Falls by virtue of s.3.1(1)? In my view, the *Energy Corporation Act* provides no clear answer.

[108] For many purposes, Nalcor, while owned by government, operates as a commercial enterprise. Like a private sector proponent, Nalcor had to undergo environmental assessment, seek permits and be subject to conditions for such permits when received. Given that Nalcor does not exercise *governmental* control over lands claimed by NunatuKavut, can it properly be said that Nalcor bears a duty to consult and accommodate?

[109] Returning to the facts in *NunatuKavut v. Newfoundland and Labrador Hydro*, I do not see how the fact that Nalcor, like a private sector proponent, was *directed* to consult with NunatuKavut by the environmental assessment panel could change Nalcor's status vis-a-vis the duty to consult and accommodate. That duty does not arise from being directed by governmental authorities to consult the relevant aboriginal group. If the duty to consult and accommodate were to flow from such a direction, then every proponent that is subject to such a direction (e.g. Fortis Corporation, if it were developing Muskrat Falls) would bear the duty, which clearly they do not, given the absence of the necessary link to the honour of the Crown.

[110] In the end, like the Chief Justice, I do not seek to answer the question whether Nalcor has a duty to consult and accommodate. I say only that the question has not yet been definitively answered.

[111] I turn now to two related points on which the Chief Justice and I disagree. In paragraph 42 *et seq*., he sets out the view that, in exercising discretion whether to grant an injunction, one factor that could be taken into account is the degree to which the Crown has met the duty to consult and accommodate. In his view, the Crown could be seen as coming to the court without "clean hands" had it failed to meet this duty. I understand this line of reasoning, but with respect, for reasons of judicial policy, I must differ.

[112] If an aboriginal group can plead that a failure by the Crown adequately to consult and accommodate is the basis for denying an injunction, then we can expect that almost every application for such an injunction will be engulfed by evidence and hearings not on the tortious conduct, but rather on the process of consultation and accommodation. This could consume vast resources and lead to considerable uncertainty, as essentially the two matters would be litigated together.

[113] I am not saying that aboriginal groups are unable to come to court and seek relief when, in their view, the Crown has failed to discharge its duty to consult and accommodate. Rather, I am saying that such matters should be dealt with in a proceeding for that purpose, where a successful result for the aboriginal group might be declaratory relief or the setting aside of some authorization granted by government.

[114] On the facts of this case, if NunatuKavut wishes to assert that the provincial Crown has failed properly to consult and accommodate its claim to aboriginal title, then it can bring a proceeding to that effect. To litigate whether the duty to consult and accommodate has been met within a proceeding for an injunction is to unduly complicate and lengthen injunction proceedings and to deflect those proceedings from their principal purpose.

[115] I appreciate that in para. 44 the Chief Justice has sought to limit the prospect of such a "trial within a trial" to "egregious cases". I fear his words of caution will be fruitless. The diligent advocate avails of any and all (ethical) means to advance their client's interests. Even if counsel see the consultation and accommodation issue as the equivalent of a "hail Mary" pass in football, he or she will "put the ball in the air" hoping that it will give them the touchdown needed to win the contest. As a practical matter, if there can be trials within trials, then there will be. It is better to handle the two matters separately, rather than having them dealt with in a single proceeding. Justice could be achieved thereby with less expense and delay and with greater certainty and simplicity, in my respectful view.

M. H. Rowe J.A.