IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Chiasson v. Nalcor Energy*, 2021 NLCA 34
Date: June 15, 2021
Docket Number: 201901H0099 and 201901H0100

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR — APPELLANT

AND:

JOHN CYRILLE CHIASSON — FIRST RESPONDENT

AND:

NALCOR ENERGY — SECOND RESPONDENT

AND

BETWEEN:

NALCOR ENERGY — APPELLANT

AND:

JOHN CYRILLE CHIASSON — FIRST RESPONDENT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR — SECOND RESPONDENT

Coram: Fry C.J.N.L., Welsh and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G7673
(2019 NLSC 133)

Appeal Heard: March 30 and 31, 2021
Judgment Rendered: June 15, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant, the Queen in Right of Newfoundland and Labrador: Donald E. Anthony Q.C.
Counsel for the Appellant, Nalcor Energy: J. David B. Eaton Q.C. and Mark Lewis
Counsel for the Respondent: Raymond F. Wagner Q.C. and Maddy Carter

Authorities Cited:

CASES CITED: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, [2017] 2 S.C.R. 855; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *George v. Newfoundland and Labrador*, 2016 NLCA 24, 378 Nfld. & P.E.I.R. 46; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594; *St. Pierre v. Ontario (Minister of Transportation and Communications*, [1987] 1 S.C.R. 906, at pages 914 to 915).

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1, sections 5(1)(a), 11(1), 37; *Energy Corporation Act*, SNL 2007, c. E-11.01, sections 3, 3.1(1), 34; *Proceedings Against the Crown Act*, RNSL 1990, c. P-26, section 3(2); *Water Resources Act*, SNL 2002, c. W-4.01, sections 38(1), 41(1), 41(3), 43, 44, 45.

Welsh J.A.:

[1] In May 2017, residents of Mud Lake in Labrador were evacuated from their properties as a result of flooding on the Churchill River. An application

was made on behalf of affected residents for certification of a class action alleging negligence and nuisance against the Queen in Right of Newfoundland and Labrador (the Province) and Nalcor Energy. The application was granted and Mr. Chiasson was named as a representative plaintiff for the Class.

[2] Both the Province and Nalcor sought leave to appeal the certification. The Province was granted leave to appeal on the question of whether the statement of claim discloses a cause of action in negligence or nuisance as against the Province. Nalcor was granted leave on a more restrictive basis, that is, whether the statement of claim discloses a cause of action against it in nuisance. The certification with respect to negligence was not appealed by Nalcor.

BACKGROUND

[3] The factual basis for this appeal is summarized in the decision granting the applications for leave (2020 NLCA 28):

> [3] Mud Lake is located on the Churchill River, downstream from a hydroelectric dam being constructed by Nalcor, a corporate body established pursuant to the *Energy Corporation Act*, SNL 2007, c. E-11.01, and an agent of the Crown (section 3(5)).
>
> [4] On May 16 and 17, 2017, the Churchill River waters rose, properties in Mud Lake experienced flooding, and residents were evacuated. The applications judge drew conclusions regarding the claims in nuisance and negligence (2019 NLSC 133):
>
> > [24] I am satisfied that these paragraphs [in the statement of claim] reflect the essence of a claim in private nuisance against both Defendants. At paragraph 14, the Plaintiff specified the flooding as the cause of the damage; paragraphs 42-46 allege that the acts or omissions of the Defendants caused the flooding and substantial and unreasonable interference is specifically pled at paragraph 46.
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> > ...
> >
> > [31] I am satisfied that the Statement of Claim meets the requirement of pleading for [the tort of negligence] against Nalcor through the combined reading of paragraphs 47 to 49 (duty of care), paragraph 50 (breach of the duty of care), paragraph 51 (foreseeability) and paragraph 42 (causation).
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> > ...
> >
> > [38] I am satisfied that the Statement of Claim meets the onus of establishing the elements of the tort of negligence against the Province.

> Paragraphs 53 and 54 allege the private law duty of care owed; paragraph 56 identifies the breach of the duty of care of the Province as operational negligence; causation is addressed in paragraph 42 and damages are alleged as a result of the Province's acts and omissions at paragraph 57, which paragraph also addresses the foreseeability component.
>
> [39] I conclude that it is not plain and obvious that, as pleaded, the Plaintiff's claims in nuisance and negligence cannot succeed ... . I find therefore that the Plaintiff has met the onus of establishing the requirements of section 5(1)(a) [of the *Class Actions Act* which requires that, in order to be certified as a class action, the pleadings must disclose a cause of action].

(Emphasis added.)

[4] In the statement of claim, at paragraphs 34 to 36, the Class identifies wholly owned subsidiary companies of Nalcor that have responsibility for the Muskrat Falls Hydroelectric undertaking. In summary:

> 37. These companies were established to carry on the business of designing, engineering, constructing, owning, financing, operating and maintaining the assets and property of various of Nalcor's projects, including the Project [the "Muskrat Falls Generating Project"].

ISSUES

[5] The Province submits that the applications judge erred in concluding that a reasonable cause of action was pleaded against it because: (1) the Province could not be liable in negligence or nuisance for acts or omissions of Nalcor; and (2) the pleadings do not provide a foundation for liability in negligence or nuisance as against the Province.

[6] Regarding Nalcor, the issue is whether the statement of claim discloses a cause of action as against it in nuisance, based on the application of the law and legal principles to the facts pleaded.

ANALYSIS

[7] Section 5(1)(a) of the *Class Actions Act*, SNL 2001, c. C-18.1, provides for certification of a class action:

> On an application made under section 3 or 4 [application by a plaintiff or defendant to certify a class action], the court shall certify an action as a class action where
>
> (a) the pleadings disclose a cause of action;

[8] The analytical approach to determining whether a cause of action is disclosed is discussed in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19:

> [14] ... The test to be applied ... is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action. Simply stated, if a claim has no reasonable prospect of success it should not be allowed to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 17).

And, in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45:

> [22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. ... The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. ...

Claims as Against the Province

Liability for Acts or Omissions of Nalcor

[9] The Province submits that it is not liable for the acts or omissions of Nalcor which is a Crown corporation and an agent of the Crown (*Energy Corporation Act*, SNL 2007, c. E-11.01, section 3). Section 3(2) of the *Proceedings Against the Crown Act*, RNSL 1990, c. P-26, provides:

> Except as otherwise provided in this Act, nothing in this Act
>
> ...
>
> (d) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable against a corporation or other agency owned or controlled by the Crown; ...

[10] Further, section 3.1(1) of the *Energy Corporation Act*, addresses the separate liability of Nalcor relating to contracts and ancillary arrangements:

> ... where the corporation enters into contracts and ancillary arrangements relating to the Muskrat Falls Project, the corporation 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 the corporation created directly or indirectly by those contracts or arrangements.

[11] Finally, section 34 of the *Energy Corporation Act* provides that "legal proceedings in respect of a right or obligation acquired or incurred by the

corporation may be brought by or against the corporation in the name of the corporation in a court".

[12] In light of these provisions, the Class submits that, in making its claim against the Province, it is not relying on liability of the Province for the acts or omissions of Nalcor. Given that position, it was inappropriate for the Class to comingle allegations against the Province with claims against Nalcor.

Independent Liability of the Province

Negligence - The Law

[13] As discussed in the decision granting the Province leave to appeal, this Court may strike all or part of the statement of claim in a class action where questions of law or legal principle may be determined on the basis of the facts pleaded, with the result that no reasonable cause of action is disclosed (2020 NLCA 28, at paragraphs 16 to 23).

[14] The value of the procedure whereby claims having no reasonable prospect of success are struck is discussed in *Imperial Tobacco*:

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

Stage one of the analysis - duty of care

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

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

[16] As discussed in *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, [2017] 2 S.C.R. 855, the first stage of the analysis has two components: proximity and reasonable foreseeability. Gascon and Brown JJ., for the majority, explained:

> [25] Assessing proximity in the *prima facie* duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Cooper* [2001 SCC 79], at paras. 32 and 34).
>
> ...
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> [32] Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Cooper*, at para. 30).

[17] Where a claim is made against government, two scenarios are identified in *Imperial Tobacco*:

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

The second scenario is sometimes referred to as a private law duty of care.

[18] Legislation may be relevant to the analysis in either situation:

> [44] ... Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). ...

[19] Where there is specific interaction between the claimant and government:

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

[20] In the context of governmental liability for negligence, the decision in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, provides an example of proximity and reasonable foreseeability. At issue was the maintenance and

inspection of highways. Cory J., for the majority, at page 1236, concluded that the Province owed a duty of care to users of its highways:

> ... The appellant [Mr. Just] as a user of the highway was certainly in sufficient proximity to the respondent [government] to come within the purview of that duty of care. In this case it can be said that it would be eminently reasonable for the appellant as a user of the highway to expect that it would be reasonably maintained. For the Department of Highways it would be a readily foreseeable risk that harm might befall users of a highway if it were not reasonably maintained. That maintenance could, on the basis of the evidence put forward by the appellant, be found to extend to the prevention of injury from falling rock.

[21] Cory J. then considered the relevant legislation, at page 1237:

> The *Highway Traffic Act*, R.S.B.C. 1979, c. 167, s. 8, provides for construction and maintenance of highways in these words:
>
> > 8. The minister may ... maintain a highway across any land taken under the powers conferred by this Act ... .
> >
> > ...
> >
> > 14. The minister has the management, charge and direction of all matters relating to the acquisition, construction, repair, maintenance, alteration, improvement and operation of ... highways.
> >
> > ...
>
> On their face these statutory provisions do not appear to absolve the respondent from its duty of care to maintain the highways reasonably. Rather, by inference they appear to place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads.

[22] Having found a duty of care, Cory J. considered the question of whether "the system of inspections, including their quantity and quality, constituted a "policy" decision of a government agency" that exempted the province from liability for negligence (at page 1236).

[23] In conducting the analysis, Cory J. drew a distinction between governmental policy and the operation of an undertaking, and referred to considerations that may apply "where governmental inspections may be expected" (at page 1239). In the case of inspections (at page 1245):

> The manner and quality of an inspection system is clearly part of the operational aspect of a governmental activity and falls to be assessed in the

> consideration of the standard of care issue. At this stage, the requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment.

[24] Examples when government was found to owe a duty of care are referenced in *George v. Newfoundland and Labrador*, 2016 NLCA 24, 378 Nfld. & P.E.I.R. 46:

> [128] ... *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). ...

[25] On the other hand, as determined in *George* with respect to moose-vehicle collisions on provincial 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 [motor vehicle collision] 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.
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> ...
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> [144] ... The trial judge applied [*Imperial Tobacco*] 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. <u>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 [motor vehicle collisions] and nothing in the relevant statutes to create sufficient proximity to give rise to a duty of care</u>.

(Emphasis added.)

Stage two of the analysis - policy considerations

[26] Regarding stage two of the analysis which engages public policy considerations, in *Deloitte & Touche*, Gascon and Brown JJ., explained:

> [37] Where a *prima facie* duty of care is recognized on the basis of proximity and reasonable foreseeability, the analysis advances to stage two of the *Anns/Cooper* framework. Here, the question is whether there are "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care (*Cooper*, at para. 30; *Edwards* [2001 SCC 80], at para. 10; *Odhavji* [2003 SCC 69], at para. 51).
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> [38] By "residual", we mean that such considerations "are not concerned with the relationship between the parties [already considered at stage one], but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper*, at para. 37; see also *Edwards*, at para. 10). ...
>
> ...
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> [40] ... In *Cooper*, this Court identified factors which are external to the relationship between the parties, including (1) whether the law already provides a remedy; (2) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class" and (3) whether there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In this way, the residual policy inquiry is a normative inquiry. It asks whether it would be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case.

[27] In *Imperial Tobacco*, McLachlin C.J.C. explained:

> [90] I conclude that "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. ...

(Emphasis added.)

[28] This approach "emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational"" (*Imperial Tobacco*, at paragraph 90). Finally:

> [91] Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

Negligence - The Statement of Claim

[29] In concluding that the pleaded claims disclose a cause of action in negligence as against the Province, the applications judge relied on the following paragraphs from the statement of claim:

> 53. The Province has chosen to effect compliance with the *Water Resources Act* by adopting policies that include: (a) requesting and reviewing dam safety reports; (b) reviewing and evaluating seepage flow data; (c) issuing recommendations to mitigate flooding risks; (d) maintaining dam inventory databases; and (e) directing owners or operators of dams or other structures to arrange for safety inspections and to submit reports to the minister and take other necessary steps, including repairs or alterations to the dam or other structures to prevent damage to properties.
>
> 54. The Province owes the Class Members a duty to use due care in giving effect to, or putting into operation, its policies concerning the Project. The Province has breached the applicable standard of care.
>
> 56. Particulars of the operational negligence of the Province include the following:
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> > (a) inadequate, incomplete and delayed oversight of the Defendants' compliance with the *Water Resources Act*, a result of which the flooding was unmonitored and unmitigated and caused damage to the Properties;
> >
> > (b) inattention to the Project's flooding issue and its foreseeable effect on properties downstream, despite its oversight mandate;
> >
> > (c) choosing not to systematically or thoroughly request and review dam safety review reports from the Defendants, instead letting gaps in mandatory periodic reports go unaddressed;
> >
> > (d) inadequate and incomplete maintenance of its dam inventory database;
> >
> > (e) choosing not to upgrade instrumentation on water monitoring stations, the cost of which is a shared responsibility with the other Defendants; and
> >
> > (f) any other such negligence as may arise from the evidence.

Negligence - Application of the Law

[30] The claim of the Class is based on the Province's "policies concerning the [Muskrat Falls] Project", and on the statutory scheme regarding the use and protection of natural waters in the Province (statement of claim, at paragraph 54). The Class has not pleaded interactions between the members of the Class and the Province, or a special relationship of the members with the Province that

would establish proximity on which to ground a private law duty of care (*Imperial Tobacco*, at paragraphs 43 and 45).

[31] In particular, the Class relies on the *Water Resources Act*, SNL 2002, c. W-4.01, to ground a duty of care owed to it by the Province. The *Act* addresses requirements for permits and licences related to the construction and operation of waterworks, such as dams, as well as general oversight over water rights and the protection of water in the Province.

[32] Regarding the construction and operation of waterworks, the *Act* establishes a scheme of permits that may be issued by the minister, and which place the obligation for carrying out duties under the *Act* on the owner, operator or other person responsible for the undertaking; in particular, (i) to maintain, keep in repair and operate all waterworks "in a manner and with those facilities that the minister may direct" (section 38(1)); (ii) as required by the minister, to carry out tests that the minister considers necessary (section 41(1)); (iii) to submit reports and take any remedial action the minister considers necessary (section 41(3)); (iv) where property is detrimentally affected, to compensate the owner; and (v) with respect to a dam or other structure, where the minister considers it necessary, to direct an owner or operator "to take those steps that are necessary to raise or lower the level or maintain the flow or level of the water in a body of water" (section 45).

[33] With respect to dams, the owner, operator or licensee "shall, at all times, maintain the dam or other structure in good repair" and, in accordance with the regulations, "conduct periodic inspections of the dam or other structure to ensure structural stability", and "submit a report to the minister on the results of the inspections" (section 43 of the *Act*). Pursuant to section 44:

> (1) Where conditions exist that may reasonably be anticipated to be hazardous to a dam or other similar structure, or to property down-stream, an owner, operator or licensee shall immediately notify the minister and take all necessary actions to minimize or eliminate those hazardous conditions.
>
> (2) Where the minister considers it necessary for public safety, to prevent injury or damage to persons or property ..., the minister may direct the owner or operator of a dam or other structure to
>
> > (a) arrange a safety inspection ...; and
> >
> > (b) submit the inspection report to the minister ... .

> (3) The minister may, ..., direct the owner or operator of a dam or other structure to repair, improve, change, alter, replace or remove all or part of a dam or other structure as he or she considers necessary for the safety of the dam or other structure, for public safety or to prevent injury or damage to persons or property.
>
> ...

[34] It follows from these provisions that government has imposed on Nalcor the responsibility for maintaining and inspecting the waterworks associated with the Muskrat Falls Hydroelectric Project. The Class has not pleaded that the Province has no authority to adopt the above scheme, which places responsibility for the maintenance and operation of waterworks on the operator or owner or other person responsible for the undertaking, in this case, Nalcor.

[35] Insofar as the Class alleges that the Province is liable to it in negligence, the Class relies on what it refers to as the Province's "oversight mandate". While the *Act* gives the minister authority to direct an owner or operator of waterworks to take action such as make an inspection, submit a report, or make changes to the undertaking, this does not amount to the imposition of a duty of care on the minister to take actions that have been imposed on Nalcor and for which Nalcor is responsible. Rather, the legislation is intended to provide the minister with the tools to facilitate the regulation of waterworks for the public good. In this respect, the legislative provisions are comparable to the regulation, for the public good, of any number of activities, including a multitude of waterworks, that individuals and corporations undertake in the Province.

[36] The claims alleging liability of the Province in negligence must be read and construed in light of the above legislative scheme. The result is that the facts as pleaded do not disclose the necessary relationship of proximity between the Province and the Class in order to establish a *prima facie* duty of care. There is no close and direct relationship that would support a conclusion that it would be just and fair to impose a duty of care on the Province in the circumstances.

[37] Having determined that the pleadings do not disclose a duty of care owed by the Province to the Class, it is unnecessary to consider the second stage of the inquiry regarding public policy considerations. However, in light of the above discussion, even assuming the Province had a duty of care, I would conclude that the minister's regulatory authority involves the exercise of residual or core policy considerations that would negate the imposition of a duty of care. Government is involved in a myriad of regulatory policies for the societal or

public good and for which a duty of care is not properly imposed given "public policy considerations, such as economic, social and political factors" (*Imperial Tobacco,* at paragraph 90).

[38] In this case, the legislation specifically imposes responsibility on the owner, operator or person responsible for the construction, maintenance and operation of waterworks for which a permit has been granted. This approach stands in contrast to the responsibility government retained over highways in *Just,* and engages considerations that led to dismissal of the class action in *George*.

[39] In the result, assuming the facts pleaded to be true, I conclude that the claims in negligence as against the Province have no reasonable prospect of success; it is plain and obvious that the claims as pleaded by the Class disclose no reasonable cause of action in negligence as against the Province.

Nuisance

[40] The elements necessary for a claim in nuisance are discussed in *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13, [2013] 1 S.C.R. 594. Cromwell J., for the Court, wrote:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. ...
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> (Italics in the original.)

[41] As a pre-condition to liability in nuisance, the party alleged to have committed the nuisance must be responsible for undertaking or omitting some action or conduct that caused or would have prevented the nuisance. That is, there must be a causal connection between having responsibility and the alleged nuisance. (See *St. Pierre v. Ontario (Minister of Transportation and Communications*, [1987] 1 S.C.R. 906, at pages 914 to 915.) That requirement is not satisfied in respect of the allegations in nuisance as against the Province.

[42] At paragraphs 43 to 45 of the statement of claim, the Class members allege that the damage to their property was caused by flooding because the Province (and Nalcor since the allegations are comingled) did not take adequate

measures or safeguards "to prevent the potential of flooding" (statement of claim, at paragraph 46). As discussed above, pursuant to legislation, Nalcor was made responsible for the maintenance and operation of the Muskrat Falls Hydroelectric Project. That responsibility includes identifying and addressing situations that may result in damage to property located downstream from the Project (section 44 of the *Water Resources Act*, cited at paragraph 33, above). Also, as referenced above, section 3(2) of the *Proceedings Against the Crown Act* provides that the Crown is not subject to proceedings where a cause of action is enforceable against a Crown corporation such as Nalcor.

[43] It follows that there is no possibility of success in a claim in nuisance as against the Province.

Claim in Nuisance as Against Nalcor

[44] A claim in nuisance requires both substantial and unreasonable interference with the use or enjoyment of property (paragraph 40, above). In addition, there must be a causal connection; that is, responsibility for undertaking or omitting some action or conduct that caused or would have prevented the nuisance.

[45] The following paragraphs in the statement of claim are relevant (references to [Nalcor] are for the purpose of removing comingling with the Province):

> 42. The [Class] alleges that the actions and omissions of [Nalcor], which are more fully detailed below, caused or contributed to the losses, injuries and damage alleged herein and include: choosing not to install or employ control measures on the Project; adding sandbars at the mouth of the Churchill River; manipulating the Churchill River; increasing the water levels above 21.5 meters in the dam's reservoir; choosing not to install a safety boom; choosing not to measure ice thickness on a regular basis or at all; and choosing not to construct a diversion or drainage ditch between the Churchill River and/or Mud Lake and the Properties to address the significant potential for flooding.
>
> 43. The flooding in May of 2017 caused material physical damage ...
>
> 44. [Nalcor is] liable to the [Class] for having committed the tort of nuisance.
>
> 45. No or no adequate measures or safeguards were taken by [Nalcor] to implement any effective or appropriate methods to prevent the potential of flooding. [Nalcor] chose not to measure ice thickness on a regular basis or at all. [Nalcor] chose not to implement groundwater monitoring wells anywhere in the area. [Nalcor] chose not to implement control measures such as foundation cut-offs. [Nalcor] further chose not to

> monitor weir flow data to evaluate any significant changes in quantity or quality of overflow from the Project.

[46] These paragraphs, which inform Nalcor that the Class is pleading a claim against it in nuisance, set out facts on which the Class proposes to rely for purposes of that claim. Applying the test set out in *Atlantic Lottery*, it cannot be said at this stage of the proceedings that the claim has no reasonable prospect of success.

[47] The Class is claiming that Nalcor's actions or failure to take preventive actions caused them substantial and unreasonable interference with the use and enjoyment of their property. Whether the claim can be proven, including the question of causation, is a matter for trial. If there is some deficiency in the pleading, it is open to the court to amend the certification order as the matter proceeds (*Class Actions Act*, section 11(1)).

SUMMARY AND DISPOSITION

[48] In summary, I am satisfied that there is no reasonable prospect of success in respect of claims in negligence and nuisance as against the Province. In the result, I would set aside the certification of the class action as against the Province.

[49] Regarding the action in nuisance as against Nalcor, I am satisfied that, at this stage of the proceedings, it cannot be said that the claim has no reasonable prospect of success.

[50] Accordingly, I would allow the appeal by the Province, and set aside the certification order with respect to all claims against the Province.

[51] I would dismiss the appeal by Nalcor.

[52] There is no order as to costs (*Class Actions Act*, section 37).

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B. G. Welsh J.A.

I concur: _____

D. E. Fry C.J.N.L.

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