

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF SAINT JOHN

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GREFFIERE SAINT-JEAN

**Frances Brownell and Cheryl Steadman v. City of Saint John,  
2022 NBQB 122**

**SJC-82-2018**

BETWEEN:

FRANCES BROWNELL and CHERYL  
STEADMAN,

Plaintiffs,

-and-

CITY OF SAINT JOHN,

Defendant

Before: Madam Chief Justice Tracey K. DeWare

Date of Hearing: November 23-25, 2021

Date of Decision: June 14<sup>th</sup>, 2022

At: Saint John, New Brunswick

Appearances: **Rodney Gillis, Celeste Poltak, and Adam Tanel**, for the  
Plaintiffs,

**Glenn M. Zakaib, and David Elman**, for the Defendant

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## DECISION

DeWare, C. J.

### INTRODUCTION

- [1] This decision responds to dueling motions for summary judgement in the context of a class action. While the facts and law are complex, all parties to these proceedings are of the view the issues may be resolved in summary fashion. The parties' agreements end there.
- [2] There is a frequently quoted concept in litigation that if the law is not on your side, pound the facts, if the facts are not on your side pound the law and if neither are on your side pound the table. In this matter, the Class Members have focused exhaustively on the facts while the City has focused heavily on the law. In arriving at an appreciation for these approaches' guidance is likely found in the concept just cited. While the theory of the case put forth by the Class Members in this matter is factually very persuasive, so is the analytical framework of the necessary negligence law concepts proposed by the City. Understandably, given the considerable efforts expended by both parties in advancing their position on these motions, there is no easy answer and regrettably no jurisprudence directly on point.

### FACTS

#### **Procedural history**

- [3] The class action in this matter was certified by Justice Debbie Hackett on May 29<sup>th</sup>, 2009. The class was defined in the certification order as follows:

All persons, including individuals, partnerships and corporations, who were the owner or occupant of an Affected Property from September 2017 to August 31, 2018.

**'Affected Property'** is defined as those commercial, residential, and other properties in West Saint John subject to a change in water source from the Spruce Lake Reservoir to a new well source under the Safe Clean Drinking Water Project.

[4] The common issues certified by the court were set out in paragraph 5 of the certification order as follows:

- (a) Did the Defendants owe a private law duty of care to the Class in respect of operational decisions relating to the Safe Clean Drinking Water Project?
- (b) If the answer to common issue (a) is 'yes', what was the applicable standard of care?
- (c) Did the Defendant breach the standard of care? If so, how?
- (d) If the answer to common issue (c) is 'yes', was the breach of the standard of care capable of causing damages to the Class?

[5] The class action in this matter seeks compensation for residents of West Saint John who allege they suffered damage to their premises' plumbing due to the City of Saint John's change in water source from surface water from Spruce Lake to groundwater from South Bay Wellfield during the period September 2017 through August 2018. The representative Plaintiffs, Frances Brownell and Cheryl Steadman, are two of the residents of West Saint John who experienced leaks in their premises plumbing during the relevant timeframe. For the purpose of the present decision, the Plaintiffs shall be referred to as the "Class Members", and the Defendant, the City of Saint John, shall be referred to as "the City".

[6] Following the certification of the class action, all parties filed motions with the Court seeking summary judgment. All parties frame the issues in the summary judgment motion within the confines of the common questions certified in the certification order. The motions were originally scheduled to be heard in May of 2020 but were adjourned until September 2020 as a result of the pandemic. In September 2020 Justice Christie adjourned the hearing of the motions following reservations expressed by counsel concerning the ongoing pandemic. Justice Christie explained his reasoning in adjourning the matter on September 3, 2020 as follows:

In the interest of ensuring that all counsel have an opportunity to 'put their best foot forward', in the way they see fit, and recognizing the legitimate concerns expressed by Plaintiff's counsel, I direct that the matter scheduled to be heard beginning September 9<sup>th</sup> be adjourned. Frankly,

this is a situation where counsel for one party was not comfortable with the covid plan that had been developed and other counsel did not want to present arguments by video. Both positions are, under the circumstances, reasonable but it leaves the court with little choice but to adjourn the matter. As I say, if this had not been such a critical set of motions heard over an extended period of time, I would not be as open to adjourning as I am. It may well be that at some point in the future video conferencing is the norm for all counsel. It is not yet.

- [7] The summary judgment motions were next scheduled for June of 2021 when, due to scheduling conflicts at the court, they were adjourned again. The motions were finally argued virtually on November 23-25, 2021.

**Project to improve water distribution system in the City of Saint John (SCDWP)**

- [8] The City of Saint John is the oldest incorporated City in Canada. It was incorporated by Royal Charter in 1785. Prior to 2010 the City encountered challenges assuring quality throughout its water distribution system for various reasons, including the dated nature of some of its infrastructure. In June of 2010 the City issued a report entitled “**A Challenge of Community and Essential Service: Report on the Action Plan for Safe, Clean, Drinking Water**” (SCDWP). The objective of the SCDWP was to ensure a reliable supply of safe, clean, drinking water for the City’s residents in compliance with the Guidelines for Canadian Drinking Water Quality (CGDWQ).
- [9] The City provides water services to its inhabitants and businesses pursuant to section 117 of the Local Governance Act, SNB 2017, c 18. In operating a water distribution system, the City must comply with the requirements of the Clean Water Act, SNB 1989, c C-6.1 and the Clean Environment Act, RSNB 1973, c. C-6. The statutory framework set out in the legislation provides the guidelines the City must meet to ensure the quality of the water is compliant with all health and safety requirements.
- [10] The City retained the services of CBCL Limited Consulting Engineers as early as 2008 to begin initial designs for the future water distribution system. Early plans envisioned the development of a single water treatment plant to provide water

distribution for both sides of the City, East and West Saint John. Under this early model water would have been transported across the Reversing Falls Bridge from a water treatment plant on the East side of the City to users on the West side of the City.

- [11] In January of 2008, the City of Saint John had received a technical memorandum from consultants Andrew Hofmann & Associates Inc. which addressed the potential problem of corrosion control. Corrosion control was one of the many issues the City needed to consider as planning was underway to design and implement a new water distribution system. The management and planning of potential corrosion control would become very important in the context of this class action. In the executive summary of this report, Andrew Hoffman and Associates describe the corrosion control concern as follows:

The optimum corrosion control strategy depends on the specific corrosion problems being targeted. Strategies to address one problem can sometimes make a different problem worse (e.g. orthophosphate to control red water can accelerate loss of pipe mass). It is therefore important to specify the corrosion control objectives prior to selecting a solution.

**In Saint John, there is the potential to experience all corrosion problems.** It is reported that there is significant tuberculation, loss of pipe mass, frequent red water (occasional green water, possibly from copper), and while most lead pipes have been replaced in the distribution system, individual dwellings may continue to have lead plumbing that can leach lead if the water chemistry remains aggressive. **As such, it would be prudent to design a new water treatment process with flexibility to address any corrosion problem experienced. Unfortunately, corrosion solutions are notoriously difficult to predict in advance,** or by using small-scale tests such as coupons or pipe loops. It is usually recommended that solutions be selected using good judgment and tried immediately at full-scale, with optimization occurring by trial and error.

[the emphasis is mine]

- [12] Water chemistry is an important consideration when planning for changes to a water distribution system and is a factor to consider when addressing corrosion control. The January 18, 2008 Andrew Hoffman report goes on to highlight the following steps to be followed when the new plant is brought online:

Bringing the new plant online. When the new plant(s) becomes operational, the new water may have significantly different chemical properties than the historical water. The introduction of this new water could destabilize the distribution system in a way that causes the release of accumulated minerals and particles. It is generally good practice to introduce changes slowly. The U.S. EPA Revised Guidance Manual for Selecting Lead and Copper Control Strategies (U.S. EPA, 2003) **recommends that when making changes to the water chemistry for corrosion control, the pH be raised weekly in 0.25-0.3 unit increments in order to avoid shocking the distribution system.** It is also usually best to introduce the new water in winter where most chemical reactions are slower and water demand is low. This will allow the distribution system to adjust to the new water before the more challenging conditions of the summer.

[the emphasis is mine]

- [13] On June 16, 2010, a comprehensive report was provided to the Common Council of the City of Saint John entitled “**A report on the Action Plan for Safe, Clean Drinking Water**”. The introduction of this report sets out the scope of concern regarding the quality of Saint John’s drinking water as follows:

People must have water to live; their personal good health, physical and mental, depends very much on consuming adequate quantities of water. This fundamental truth underlies the immeasurable importance of a drinking water system; a cornerstone for public health, quality of life and a sustainable economy.

The community expects its public water service to provide safe, clean drinking water for the people, homes, businesses and institutions it serves; the drinking water provider must assure that water is delivered in a state that is clear, colourless, odourless, and free of disease-causing micro-organisms (pathogens) or harmful chemicals. An October 2009 survey of citizens rated drinking water as the most important service priority of this community.

**Let there be no doubt; Saint John has to improve its ability to assure safe, clean drinking water.** Waterborne disease is a risk inherent to all surface water supplies; one that the current system of disinfection does not eliminate with the required degree of certainty.

[the emphasis is mine]

- [14] The June 2010 report goes on to highlight some of the challenges the City faced in the water distribution system as follows:

### Primary Issues in Transmission/Distribution

Issues concerning potable water systems usually involve three primary considerations:

1. Quality – maintaining quality as the water travels to the consumer's tap;
2. Lost Water – minimizing the loss of water during that passage; and
3. Fire Protection – providing quantities sufficient for fire protection.

Saint John's "water system" challenges are substantial; a difficult river divide, some very old infrastructure, internal corrosion (tuberculation) of kilometres of old cast iron mains, large amounts of unaccounted for or lost water, huge industrial water consumption, unmeasured residential usage, a costly accumulated infrastructure deficit and, frankly, an inertia concerning drinking water that has plagued the community for the good part of a century. Changing from these conditions to a first rate public water system that will serve Saint John for generations to come presents a service, engineering and leadership challenge of extraordinary scale.

[15] In August of 2011, R.V. Anderson Associates Limited prepared a Preliminary Design Report where several concerns were discussed that would need to be addressed when the water treatment plant was introduced. At this point in the project the plan remained the establishment of a single water distribution treatment plant which would cater to the needs of both East and West Saint John. Two of the issues identified in this report were the potential corrosive effect of the water in the new system to existing pipe walls and the potential for a change in pH to destabilize existing scale. The Class Members in particular point to the recommendation by Anderson Associates in this early report of the need to gradually change the pH of the water. The authors refer to this issue in first, their Technical Memorandum, and secondly, in the body of their report as follows:

**When the new plant(s) becomes operational, the new water may have significantly different chemical properties than the historical water which could destabilize the distribution system and release minerals and particles. It is recommended that when making changes, the pH be raised weekly in 0.25-0.3 unit increments.** It is also usually best to introduce the new water in winter where most chemical reactions are slower and water demand is low. This will allow the distribution system to adjust to the new water before the more challenging conditions of the summer.



[...]

**It is also recommended that when the facility is being commissioned, that the pH be raised weekly in 0.25-0.3 unit increments.** It is also usually best to introduce the new water in winter where most chemical reactions are slower and water demand is low. This will allow the distribution system to adjust to the new water before the more challenging conditions of the summer.

[the emphasis is mine]

- [16] Throughout 2011-2012, options were still being explored by the City for the most efficient water distribution system that would ensure high quality water in a cost-effective manner. The costs of water travelling across the Reversing Falls Bridge were significant and the City was actively exploring other alternatives. In a report from the City's consultants to the Mayor and Common Council on June 28, 2012, the possibility of using a groundwater source as an alternative was discussed as follows:

The program, as currently structured, includes a proposed 100 MLD (million liters per day) conventional water filtration treatment facility on City owned land south of the Little River Reservoir. This would treat our current water source, surface water, from the Loch Lomond Lakes system. The cost to build the plant is the single most expensive item in the program and ongoing maintenance would be a new perpetual cost.

Many households in Greater Saint John rely on wells to supply drinking water. Water drawn from the ground is generally of good quality, although some wells have issues with iron, manganese, arsenic and uranium. Saint John Water is considering groundwater options to augment and eventually replace its potable supply. **If there are well field sites east and west that can produce a sufficient quantity with a good quality, there is a possibility that we could deliver high quality water at a lower cost.**

[the emphasis is mine]

- [17] As the City continued to work with retained experts exploring the best option for a new water distribution system, the initial idea of one water treatment centre that would furnish water to the residents of both East and West Saint John was abandoned. The costs for water to travel across the Reversing Falls bridge would have been prohibitive and there were concerns over the viability of the necessary structural requirements of the bridge. The City was concerned the potential costs

of proceeding with a single water treatment plant would result in significant costs which would ultimately be passed on to the rate payers.

### **Experts engaged by the City**

- [18] As the City transitioned the project away from the one water treatment plant model, TerrAtlantic was hired to explore and advise on the feasibility of groundwater sources for the West side of the City. In a report dated October 10, 2013, Terr Atlantic reported their initial findings as follows:

The preliminary findings for both South Bay (Area A) and Little River (Area B) were described in TerrAtlantic's previous technical memo dated August 6, 2013. **At that time it was indicated that the South Bay target area looked quite productive and could likely support a viable groundwater supply to replace or augment a portion of the City's overall (or West Side) demand.** The Little River target area showed some promise and could likely support a wellfield to augment the East Side water supply, but from existing information it was thought to be unlikely that it could service the entire demand for East Saint John.

[the emphasis is mine]

- [19] On October 29<sup>th</sup>, 2013, the City and CBCL Limited executed a contract which confirms that CBCL would be the City's engineers for the purpose of implementing the **SCDWP**. The "Owners Engineer Contract" described the purpose of the contract as follows:

"... the purpose of this contract is for the owner's engineer consulting services in connection with the engineering design and construction of drinking water systems, business planning and procurement in a public-private partnership delivery model in order to help realize the potential of the safe, clean, drinking water program."

The term of the contract between the City and CBCL was from the date of execution until December 31<sup>st</sup>, 2018.

- [20] The City retained the services of CBCL Limited for assistance with both the planning and implementation stages of the water project. In a technical proposal submitted by CBCL to the City on June 27, 2013 they described their expertise in the area of Distribution System Water Quality as follows:

**Our project team includes individuals with expertise in distribution system water quality and corrosion.** Experience of utilities such as CBRM (Sydney) demonstrates that switching water sources from

chlorinated surface water to treated groundwater can accelerate corrosion and cause rapid degradation of water mains and service connections. This will require assessment during the project and our methodology will evaluate projected differences in treated water quality and potential impacts on established biofilms. CBCL will be able to lend knowledge and experience gained from working with other municipalities facing similar issues **in order to ensure minimal impact on distribution system integrity and water quality resulting from the transition to a groundwater source.**

[the emphasis is mine]

- [21] CBCL went on to describe their experience in the field of water infrastructure as follows:

This project requires that the successful proponent have demonstrated experience in groundwater treatment. While the RFP specifically mentions iron and manganese treatment, there are a range of other water quality parameters relevant to groundwater treatment that may be relevant. These include constituents such as fluoride, arsenic, uranium, nitrate, and turbidity among others. CBCL has carried out pre-design, design, construction services, and various technical assessments for groundwater treatment systems related to each of these parameters. We are currently conducting several concurrent studies and upgrade projects related to iron and manganese removal in municipal groundwater systems.

- [22] On March 30, 2015 BGC Engineering Inc., formerly TerrAtlantic, submitted a report to the City describing the hydrogeological assessment of the South Bay Aquifer. This report and analysis was part of the City's determination as to the viability of drawing groundwater from South Bay for the water distribution in West Saint John. The report of BGC was positive confirming both the volume of available water as well as its quality – amongst the conclusions set out in the report were the following:

5. Provided groundwater levels under pumping conditions are maintained above sea level, **the South Bay aquifer is capable of providing water of high-quality for the long term.** From the numerical groundwater flow model, a total withdrawal of 12.5 ML/d, or possibly higher should be feasible. This is sufficient to meet the current ADD of 11.1 ML/d for west Saint John.

[...]

10. Water quality appears to be excellent and consistent throughout the aquifer. **In the short term at least, the only treatment requirement**

would likely be the minimum standard of chlorination. Eventually manganese treatment may be required.

[the emphasis is mine]

- [23] As of the summer of 2014 the City, in consultation with their experts, CBCL, had made the determination that there would be two different approaches to the provision of water to the City. East Saint John would have water supplied via a new water treatment plant. West Saint John would have water supplied via a groundwater source. Once this decision was made, the treatment of the water itself and any corrosion control considerations were handled differently for East Saint John and West Saint John.
- [24] The early stages of the project involved discussion of the management of corrosion control problems pertinent to both East and West Saint John. Initially, one water source was contemplated with one treatment plant so that all mitigation issues discussed prior to 2014 applied to both East and West Saint John. Following the decision to split the approach to the water distribution networks between East and West Saint John, the discussion of applicable mitigation or corrosion control measures were restricted to the area under review. In the context of West Saint John, little to no discussion took place concerning the need to implement corrosion control measures given the City's assessment of the water chemistry.
- [25] Mike Chaulk is an engineer with CBCL and has been working with the company since 2006. Mr. Chaulk has been working on the **SCDWP** with the City since the fall of 2013. Mr. Chaulk prepared various reports, both prior and subsequent to the transition of the West Saint John water distribution. In an affidavit dated October 30<sup>th</sup>, 2019, Mr. Chaulk confirms the testing and assessments completed in order to consider corrosion control in 2014 and 2015 at paragraphs 18 and 19 as follows:
18. A corrosion Control Update Memorandum was provided by myself to the City on July 15, 2015, a copy of which is attached as Exhibit "G". The completed testing included assessing the stability of existing corrosion deposits within water mains by collecting pipe samples from east and

west Saint John, and a multi-variable bench-scale testing program to assess the impact of various water quality parameters on the existing deposits. Further recommendations were provided in a subsequent memo of December 11, 2015, a copy of which is attached as Exhibit "H".

19. At several points throughout 2014 the City provided CBCL with water quality sampling data from test wells being developed in West Saint John by the City and the City's hydrogeologist, BGC Engineering. CBCL reviewed the water quality from the test wells and found no parameters outside the GCDWQ. **Furthermore, the test well data indicated that the pH, alkalinity, and overall mineral balance were favorable with respect to distribution system and premise plumbing corrosion. The test well water quality was assessed as low risk for corrosion potential based on industry practice, technical guidance, and peer-reviewed science.** Since the switch to groundwater has occurred, I am not aware of any observed occurrences of increased water main breaks or corrosion deposit breakdown within the City's water distribution mains.

[the emphasis is mine]

- [26] In its final design report of March 4, 2015, CBCL set out the requirements for treatment of the water in West Saint John in sections 7.4.3 and 7.4.4 as follows:

#### 7.4.3 Chlorination and Treatment

**The only form of treatment of the water from the wellfield or from the Spruce Lake (under emergency pumping conditions) shall be disinfection using sodium hypochlorite.** Project Co shall provide for a fully functional disinfection system which shall be capable of automatically dosing 0.5mg/L to 4.0mg/L of sodium hypochlorite to the water delivered from the wellfield and dosing 2.0mg/L to 6.0mg/L of sodium hypochlorite to the water from Spruce Lake under emergency conditions. The application point for the disinfectant agent shall be downstream of the pumps in the Spruce Lake PS. The existing Spruce Lake PS infrastructure presently in use by the City, for sodium hypochlorite storage, handling dosage and control, will be utilized where practical. The system shall provide for taps or draw-off locations, appropriately located downstream of the application point, for sampling of free chlorine residual.

#### 7.4.4 Provisional for Future Treatment at or Near Spruce Lake PS

Project Co will not be responsible for the water quality nor the rate of flow that can be safely extracted from the wellfield and underlying aquifer. **However, some form of treatment may be required for the water from the wellfield in the future.** It is presently contemplated that should such treatment be required it would be located downstream of the disinfectant application point at or near the Spruce Lake PS. It is further contemplated that the treatment would most likely be carried out in pressure vessels, without breaking pressure, and that the additional

pressure drop through the treatment would be between 10 and 20psi. This is provided for information purposes.

[the emphasis is mine]

[27] CBCL set out the requirements concerning corrosive control for East Saint John in a memorandum dated November 12, 2015 as follows:

A long term buried water infrastructure corrosion control program, that takes into account a future East Saint John water treatment plant, should be developed as a priority within Saint John Water. **For the foreseeable operating horizon the potential impacts of distribution and premise system corrosion present one of the largest water quality and asset preservation risks that will be retained by the City.** A corrosion program does not consist solely of chemical addition at a source or treatment plant. It is a dynamic program that includes continuous measurement, study, assessment, and performance improvement. The current outlook for Saint John Water, and particularly the East system, requires that definitive steps be taken in the short term to alleviate the potential for future adverse outcomes. To date some work has been done in this respect; water has been characterized, and existing distribution system corrosion deposits have been studied. There are, however, multiple parallel activities that are recommended to accompany this work. These activities include:

- Developing a residential lead and copper sampling program according to Health Canada guidelines;
- Advancing studies to further understand the impacts of future treated water on existing corrosion conditions; and
- **Initiating pH control and/or corrosion inhibitor addition within the existing infrastructure.**

[the emphasis is mine]

[28] Mr. Chaulk of CBCL testified at an examination for discovery in January of 2020. At that time Mr. Chaulk confirmed that despite the decision to have two different systems for water distribution there was still a need to address corrosion control in both East and West Saint John. The pertinent exchange at the discovery on this issue unfolded as follows:

Q. — Right. As — in relation to a change in water source for East Saint John?

A. It does not exclusively or inclusively limit the scope of those statements to East or West Saint John.

Q. — In other words, it's a statement of broad application for both sides?

A. It's — it's specific for the City in the need to have a corrosion control program which did not exist prior.

Q. — Okay.

A. But it applies to the entirety of the system and not specifically east or west.

Q. — And that recommendation to the City was made after the decision to change the water source to South Bay?

A. That particular reference is within the — yeah, is after groundwater came. The same language or similar language can be found in the documentation going back to 2014, including the design report from 2014 and the early — the earlier memos that suggest a need to do lead and copper sampling.

**Q. — And the scope change with respect to the decision to supply water from West Saing John — or to West Saint John from South Bay didn't impact those recommendations?**

**A. No. The recommendations being the need to consider corrosion risk. And then to break that out into the components of corrosion that need to be considered.**

Q. — Right. And CBCL tells that to the City and is there any evidence in the record of the City developing a corrosion control plan for the west side?

A. I am not aware of anything from the City that I have seen that speaks to a corrosion plan for the west side.

Q. — And to be clear when we are talking about corrosion — because it is important that we define it, when you are referring to corrosion, you are — that includes destabilization of existing scale?

A. That includes the — all aspects of corrosion.

Q. — And that includes —

**A. That includes the concept of destabilization of existing scale.**

[the emphasis is mine]

[29] The City implemented the changeover in water for West Saint John from Spruce Lake to South Bay Wellfield in September 2017. At the time of the transition in the water source, the City did not incorporate any corrosion control measures. The only treatment deemed necessary for the groundwater derived from South Bay Wellfield was chlorination.

### **Transition of West Saint John Water Source**

- [30] Commissioner of Saint John Water, Brent McGovern, in an affidavit sworn in this matter on September 3<sup>rd</sup>, 2019, commented upon the City's decision not to include enhanced corrosion controls in West Saint John in September of 2017 at paragraph 53 as follows:

Saint John relied upon the expertise of the engineers retained as part of the SCDWP to advise and provide direction on any known impacts which a change in water source from Spruce Lake to groundwater might have on distribution infrastructure prior to implementation of the changeover in September 2017 for West Saint John. Saint John Water implemented an enhanced program to monitor the quality of the water and integrity of distribution infrastructure in West Saint John arising from the proposed change in water source from lake to well water. **Based on the assessment of well water quality, enhanced corrosion control measures were deemed not to be required for West Saint John prior to the change in water source.**

[the emphasis is mine]

- [31] As the water to West Saint John was switched from Spruce Lake to South Bay Wellfield, the City began to receive complaints. Residents and businesses were experiencing leaks in their premises plumbing resulting in damages to their properties. These calls continued until the spring of 2018. The complaints were most frequent in early 2018. The City began to investigate these complaints immediately and the experts working with them since the outset of the project, CBCL, were asked to report on what was happening.
- [32] Once the City became aware of the occurrence of leaks in the premises' plumbing of residents and businesses in West Saint John they introduced orthophosphates into the water system on a temporary basis. The City added the orthophosphates given the information that these could assist in stabilizing the existing scale within private copper plumbing. This action was taken as one theory for the occurrence of the leaks in the premises plumbing of affected residents was due to the disruption of the existing scale on the inside of copper pipes caused by the change in water chemistry at the time the water was transitioned from Spruce Lake to South Bay Wellfield.



### Post Transition Investigation

- [33] The City asked CBCL to investigate the source of the leaks and to provide a report. In February 2019, CBCL authored a final Report titled “West Saint John – Corrosion Control Investigation” where the transition to the groundwater source and subsequent pinprick leaks of West side residents is succinctly explained as follows:

As part of the Safe Clean Drinking Water Project, the City committed to supplying all Saint John customers with water that meets or exceeds the Guidelines for Canadian Drinking Water Quality (GCDWQ). As such, the City decided to switch the West Saint John water source from Spruce Lake, to the South Bay Wellfield. The wellfield consists of 3 ground water wells which were commissioned in 2013-2014 and have water quality which meets or exceeds the GCDWQ. In September 2017, the switch from surface water to ground water supply was completed, and customers were provided with potable water which meets or exceeds the GCDWQ. From available practice and technical guidelines, the new ground water source is considered less corrosive than the previous Spruce Lake supply. The new source does have increased hardness, which is comparable to other municipalities using ground water sources.

From a treatment standpoint, the ground water source has a substantial decrease in color and organic matter compared to the Spruce Lake supply, and an increase in mineral content. **Based on the improved water quality, the only treatment process required to met the City’s Approval and GCDWQ is chlorine disinfection, with the amount of chlorine required being much less compared to what was historically used for Spruce Lake. The decrease in organic matter and chlorine dose also predicted a decrease in the formation of disinfection by-products, which are classified as “probable carcinogen” by Health Canada and regulated by NBDELG. Based on water quality parameters from the new wellfield, corrosion inhibitors and/or pH adjustment was not included in the new treatment system.**

In January 2018, the City of Saint John began to receive complaints of copper pipe leaks from West Saint John customers. Approximately 4% of the 5,400 West Saint John customers reported leaks within a 3-4 week period. The reports were not localized to specific neighbourhoods in West Saint John and there were no abnormal increases within City owned copper services. In February 2018, CBCL and Dalhousie University were tasked with leading an investigation into the source water switch and the reported copper leaks, including bench scale testing of copper piping from West Saint John and reviewing possible corrosion mechanisms.

After the reports of copper leaks, the City examined several available options for temporary corrosion control treatments including pH adjustment and the addition of a corrosion inhibitor. The City elected to install a temporary orthophosphate system in March 2018 to reduce the

apparent copper corrosion and to help promote scale stabilization. Corrosion inhibitors, including orthophosphates, are commonly used in Atlantic Canada to prevent corrosion of distribution systems. However, the systems in Atlantic Canada using corrosion inhibitors are surface water supplies with water quality similar to Spruce Lake rather than the South Bay ground water supply. **It is not common practice to add orthophosphates to drinking water supplied by ground water, but it was employed in this situation as a tool which could be implemented quickly in attempt to mitigate the copper leaks to the extent possible.**

[the emphasis is mine]

[34] CBCL summarized their analysis in the February 2019 report as follows:

A review of available literature and industry best practices was completed to compare the events that occurred in West Saint John to other water treatment systems within Atlantic Canada. The findings of the literature review are as follows:

- Historically, the Spruce Lake water had low alkalinity, low pH and moderate organics and was considered corrosive to distribution system piping. The South Bay Wellfield has a higher pH, moderate alkalinity and is considered a non-aggressive hard water.
- In Atlantic Canada, it is not common to switch from an untreated surface water to a ground water system as was completed in West Saint John. The communities that did switch from untreated surface water to ground water did not report having the same experience as West Saint John.
- Limited literature, research and guidance documents are available for utilities permanently switching from a surface water supply to ground water.
- South Bay Wellfield water quality is similar to other municipal ground water systems that do not use orthophosphates/corrosion control.
- Based on the water quality of the South Bay Wellfield and available information, the corrosion event that occurred was not expected.
- It is likely that the reported copper pipe leaks were the result the existing corrosion undergoing transitional effects as the water quality changed within the system.

**Experience of Representative Plaintiff**

[35] The Representative Plaintiff, Frances Brownell, filed an affidavit in support of the Class Members request for summary judgment. The Representative Plaintiff, Cheryl Steadman, did not file evidence on the summary judgment motions. Mrs. Brownell has owned her home in West Saint John since the summer of 1970. Mrs. Brownell and her husband were the original homeowners and the residence was built for them. The Brownells were the owners of the home at the time the original plumbing was installed. Over the years, Mrs. Brownell would have the premises plumbing inspected and pay necessary repairs. Mrs. Brownell explained her practice in maintaining her plumbing at paragraph 10 of her affidavit filed in support of the motion for summary judgment dated August 28<sup>th</sup>, 2019 as follows:

10. Since 1981 I have consistently maintained my home. It is and has been my practice to have professionals address any issues with my home. I have hired contractors to fix any problems that have happened. With respect to plumbing, I have used the same plumber for almost 40 years. I had this plumber perform annual inspections of my home's plumbing and always followed his advice.

[36] Mrs. Brownell explained the difficulties occasioned to her premises plumbing at paragraph 11 of her affidavit as follows:

11. On November 11, 2017, I first noticed flooding in the basement of my home. My laundry room floor was covered in water. I immediately called my plumber who arrived on same day. My plumber noticed the issue was serious and told me to call my insurance company. There were holes in my water pipes. I called my insurance company who referred me to ServiceMaster. ServiceMaster arrived on that same day and removed everything from the affected part of my basement.

**ISSUES**

[37] The issues to be resolved in this matter are as follows:

- (1) Is this an appropriate case to proceed by way of summary judgment?
- (2) Are the expert opinions of Dr. Bryan Karney and Mr. Kenneth Maltese admissible? What is the weight to be accorded to the expert opinion if they are found to be admissible?

- (3) Did the City owe a private law duty of care to the Class Members in respect of operational decisions relating to the Safe Clean Drinking Water Project?
- (4) If a duty of care was owed, what was the applicable standard of care of the City?
- (5) Did the City breach the standard of care? If so, how?
- (6) If the City breached the standard of care, did the breach of that standard cause damages to the Class Members?

### **Position of the parties**

[38] The Class Members suggest that the City is a supplier of a utility and in that capacity clearly owed a duty of care to the Class Members, its customers. The Class Members submit that in failing to take measures to ensure the transition from the surface water of Spruce Lake to the groundwater of South Bay Wellfield would not have a negative impact on the premises plumbing of the Class Members, the City breached the standard of care. The Class Members direct the Court to numerous references from the City's consultants confirming the need to have in place a corrosion control strategy whenever water is being transitioned from one source to another. The Class Members assert that it was reasonably foreseeable that by failing to implement corrosion control measures in West Saint John, the premises plumbing of the Class Members would be at risk. The Class Members argue that the City breached the standard of care required of them in failing to follow the advice of their experts and, as a direct result of this breach, the Class Members have suffered damages.

[39] The City argues that in September of 2017 they implemented a new water distribution system for the citizens of West Saint John which dramatically improved the quality of their drinking water. The City suggests that the pinhole leaks which occurred in some of the private copper plumbing of certain residents and businesses were unforeseeable. The City further notes that the provision of

water services does not result in the imposition of a private law duty of care. The City points out that its statutory duty to all the residents and businesses in Saint John is the provision of safe and healthy water. Further, the City maintains that even if a duty of care is found to exist, the standard of care would not have been breached in the manner the water source for West Saint John was changed. The City highlights that perfection is not the standard for the operator of a City's waterworks. Finally, the City asserts it acted reasonably at all times by engaging the services of and relying upon the recommendations of duly qualified experts.

## LAW AND ANALYSIS

### Summary Judgment

[40] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, set out the parameters for a court's consideration of a request for summary judgment. *Hryniak v. Mauldin* triggered a cultural shift in Canada confirming that a trial is not always the default procedure and confirmed that a summary judgment court can weigh evidence, evaluate credibility and draw inferences from the evidentiary motion record. The New Brunswick Court of Appeal acknowledged this shift in the approach to summary judgment in *O'Toole v. Peterson*, 2018 NBCA 8 (CanLII), where Chief Justice Drapeau, as he then was, stated at paragraph 4 as follows:

[4] However, our pre-2017 Rule 22 was aligned with the exceptionality of summary judgment and the conviction of its drafters that "except in clear cases, the best truth-finding device is a trial": *Cannon v. Lange et al. (1998)*, 1998 CanLII 12248 (NB CA), 203 N.B.R. (2d) 121, [1998] N.B.J. No. 313 (C.A.) (QL), para. 17. **Our new Rule 22, properly interpreted, embodies the sought-after "culture shift". Summary judgment is no longer an exceptional remedy**, the hearing and determination of any related motion now constituting "a significant alternative model of adjudication": *Hryniak v. Mauldin*, para. 45. As will be seen, this acknowledgement of **the transformative effect of our new summary judgment rule warrants jettisoning the "stringent test" required by the wording of its predecessor and the mindset of its drafters.**

[the emphasis is mine]

[41] Rule 22.04(1) and (2) of the New Brunswick Rules of Court provides as follows:

### 22.04 Disposition of Motion

#### General

- (1) The court shall grant summary judgment if
- (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence, or
  - (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied it is appropriate to grant summary judgment.

#### Powers

- (2) In determining whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and may exercise any of the following powers for the purpose, unless it is in the interests of justice for those powers to be exercised only at a trial:
- (a) weighing the evidence;
  - (b) evaluating the credibility of a deponent; and
  - (c) drawing a reasonable inference from the evidence.

[42] As set out in Rule 22.04(1)(a), a summary judgment court in New Brunswick shall grant summary judgment when there is no genuine issue requiring a trial. The court has no discretion in circumstances where the judge is able to fairly and justly adjudicate the dispute on the filed evidence. In *Russell et al. v. Northumberland Co-Operative Limited*, 2019 NBCA 70 (CanLII), the Court of Appeal described the two-step process to determine whether there is a genuine issue requiring a trial at paragraphs 21 and 23 as follows:

- [21] The Rule therefore provides a two-step process with specific reference to the central question: is there a genuine issue requiring a trial?
- [23] A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there may be a genuine issue requiring a trial. In that case, the judge then needs to determine if that trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3). The guiding principle is that it will always be in the interest of justice for the judge to make

use of these fact-finding powers if, applying the principles of timeliness, affordability and proportionality, the judge believes a trial can be avoided and a fair and just result can be obtained. The discretion vested in the judge under this second step will provide the flexibility required to fashion the appropriate course to follow.

- [43] In this particular matter, both parties are of the view that despite the voluminous nature of the evidence and the complexity of the questions, these issues can be resolved in the context of a summary judgment motion. The objective of the revised summary judgment rule is to allow for the early determination of issues for either a claim or a defence without the necessity of a trial. The Supreme Court of Canada confirms this goal at paragraphs 49 and 50 of *Hryniak* as follows:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. **This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.**

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. **It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.**

[the emphasis is mine]

- [44] In this particular matter the parties have both provided comprehensive evidentiary records including expert opinions in support of their requests for summary judgment. Further, extensive documentary records have been furnished to the Court which include contemporaneous reports, affidavits of central figures, expert reports and discovery transcripts. While the questions the court is asked to determine are not simple nor straight forward, the necessary evidence is before the court to allow for a full analysis to take place. A trial on these issues would be long and protracted. The facts in this matter are not in

dispute. It is the application of the facts to the appropriate principles of law that is contested. This exercise does not require a trial in order to fully address all questions before the court. I am satisfied that both parties have put their best foot forward in the records filed both in requesting and defending the summary judgment motions. It is appropriate to proceed pursuant to Rule 22.04 to resolve these issues given the circumstances of this case.

[45] As set out in *Hryniak*, the first thing a judge must be able to do in contemplating a motion for summary judgment is make the necessary findings of fact. The facts in this case, as in all, must be determined before they can be applied to the pertinent law. While the evidentiary records are exhaustive and the interpretation of the facts in the context of the law is hotly contested, there are several salient facts that are not in dispute. Following my review of the evidentiary records and upon consideration of counsel's oral submissions, I find as fact the following:

- Commencing in the late 1990's and proceeding until 2010, the City of Saint John was grappling with water quality issues which needed to be addressed.
- In 2010 the City of Saint John launched the **SCDWP** (Safe Clean Drinking Water Project) to address water quality issues in the City.
- The City engaged the services of experts to assist them in the planning, design and implementation of the **SCDWP**. These experts included Andrews Hoffman, R. v. Anderson Associated, TerrAtlantic/BGC and CBCL.
- Until approximately the spring of 2014 the City was contemplating a single water treatment plant to address the water distribution needs for both East and West Saint John. This initial model would have seen a water treatment plant constructed in East Saint John with water travelling to West Saint John via the Reversing Falls Bridge.



- Given the significant costs and infrastructure requirements to transport water across the Reversing Falls Bridge, alternative options were explored for water distribution to West Saint John.
- Once high quality groundwater sources were identified capable of meeting the needs of West Saint John, the City modified their original plan. The decision was made to furnish water to West Saint John from a groundwater source in South Bay Wellfield. This decision was finalized in July 2014. The water for East Saint John would continue to be furnished via the new treatment plant as originally anticipated.
- Prior to the summer of 2017, the water for West Saint John was furnished from surface water at Spruce Lake/Ludgate Lake. Prior to August 2018 the water for East Saint John was derived from Latimer Lake, Robertson Lake and Loch Lomond Lakes.
- There were differences in the water chemistry from the surface water of Spruce Lake and Ludgate Lake and that of South Bay Wellfield.
- The water from Spruce Lake had low alkalinity, low pH, moderate organics and was considered aggressive soft water.
- The water from South Bay Wellfield had higher pH, moderate alkalinity and was considered non-aggressive hard water.
- The only treatment of the West Saint John water at the time of the transition in September 2017 was chlorination. There were no corrosion control measures used in West Saint John at the time of the transition of the water source.
- At all pertinent times, in particular during the period of October 2015 – December 2018, the City relied upon recommendations of CBCL in the Management and implementation of the **SCDWP**.

- The City did not implement corrosion control measures in West Saint John in September 2017, such as changing the pH of the water gradually, applying phosphates or orthophosphates to the water or introducing new water into the system gradually.
- The only treatment recommendations made by CBCL for West Saint John in September of 2017 was chlorination.
- The City followed the specific treatment recommendations made for the West Saint John water supply made by CBLC in September.
- The Representative Plaintiff, Frances Brownell, experienced flooding in her basement on November 17<sup>th</sup>, 2017. Mrs. Brownell was informed there were holes in her water pipes which resulted in leaks.

#### **Admissibility of Expert Opinions**

[46] The Class Members rely upon the expert report of Mr. Kenneth Maltese in support of their position. The City relies upon the expert reports of Dr. Bryan Karney as well as the project engineer's, CBCL, in support of their position. Both parties dispute the qualifications of the experts hired by the other in response to this litigation.

[47] In considering the admissibility of expert evidence, the Court is guided by the test identified in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. The *Mohan* test sets out four requirements for the admissibility of expert evidence:

- (a) The evidence must be relevant;
- (b) The evidence must be necessary to assist the triers of fact;
- (c) The evidence must not be subject to an exclusionary rule; and
- (d) The expert must be properly qualified.

[48] In the present matter, I accept that the expert opinions of Mr. Maltese and Dr. Karney are relevant and necessary to the Court's evaluation of the appropriate standard of care in this case, and whether or not the City breached this standard of care. Further, the expert opinions of Mr. Maltese and Dr. Karney are not subject to any exclusionary rule. The consideration as to whether or not the expert opinions of Mr. Maltese and Dr. Karney are admissible turn on the issue as to whether or not they are properly qualified.

[49] The Class Members argue that the expert evidence of the City's expert witness, Dr. Bryan Karney, is inadmissible for the following reasons:

- (1) Dr. Karney is not a properly qualified expert because he does not have specialized knowledge acquired through study or experience on water chemistry;
- (2) On cross-examination at discovery Dr. Karney indicated another individual drafted or assisted with parts of his report; and
- (3) Dr. Karney conceded to Plaintiff's counsel that he did not have special expertise in water chemistry, scale decomposition, corrosion control or the use of orthophosphates.

[50] The City asserts that the Class Member's expert, Mr. Kenneth Maltese does not have the requisite qualifications to opine on the theorized mechanism by which scale removal may have resulted in leaks in the premises plumbing of certain West Saint John residents. The City launches its attack on Mr. Maltese's expertise on two fronts, first that Mr. Maltese lacked the requisite expertise and secondly that he was biased. The City argues that Mr. Maltese had acted simply as an advocate in this case.

[51] Dr. Karney describes his pertinent qualifications in his report dated January 21<sup>st</sup>, 2019 as follows:

Although the core of my research and work is related to hydraulic behaviour, I have been active in the area of water quality research and

specifically have developed a number of studies related to corrosion and water quality degradation. I have supervised two Ph.D and two masters students whose work was dominantly concerned with water quality transformations in water distributions systems, with some of this work specifically touching on metallic corrosion. These investigations have led to both published theses and a selection of journal and conference papers.

- [52] Mr. Maltese succinctly explains his experience in water chemistry at paragraph 3 of an affidavit sworn on August 28, 2019 as follows:

3. Through my practical hands on experience, I have been directly involved in issues related to water chemistry, and in particular, the impact of water chemistry on water distribution systems. In managing changes in water source, part of my job was to verify the need for corrosion protection and to work with the project team to identify and implement appropriate corrosion control systems. In so doing, I have often worked with phosphates as a means to control corrosion across a variety of water distribution systems.

- [53] In *R. v. Mills*, 2019 ONCA 940, 2019 ONCA 940 (CanLII), the Ontario Court of Appeal discussed the importance of acquiring knowledge through study or experience at paragraph 52 as follows:

[52] Expert evidence can be provided by a witness who has "acquired special or peculiar knowledge through study or [page156] experience in respect of the matters on which he or she undertakes to testify": Mohan, at p. 25 S.C.R. (emphasis added). Thus, a witness can be qualified by the court as an expert whether his or her expertise was acquired through on-the-job experience or through formal education (or a combination thereof). Just because that specialized knowledge is gained on the job, sometimes developed through the "accumulated wisdom" of a group of people, does not, on its own, diminish its value (assuming it otherwise meets the other criteria for admission): *R. v. Dominic*, [2016] A.J. No. 395, 2016 ABCA 114, 616 A.R. 356, at para. 22.

- [54] In *R. v. Rayner*, 2000 NSCA 143 (CanLII), the Nova Scotia Court of Appeal also took the opportunity to discuss the importance of practical experience on expert opinion commenting at paragraph 22 as follows:

[22] It is not a requirement that a person be formally educated in a particular area in order to be qualified as an expert. People who are qualified by some particular or special knowledge, skill or training can give an opinion on a matter in issue that falls outside common or popular understanding. This knowledge and expertise can be gained through either study or practical experience or observation. See for example, *R.*

*v. Mohan*, supra; *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223.

[55] In reviewing the curriculum vitae's, reports and discovery transcripts of both Mr. Maltese and Dr. Karney, it is clear that they are both well versed in the field of water distribution networks, including water chemistry and corrosion control issues. A great portion of the expert opinions expressed in this case involve the interpretation of industry standards, industry experiences and available literature. In my view, the combination of academic credentials as well as actual work experience in the field and associated fields are sufficient to find that both Mr. Maltese and Dr. Karney are qualified to provide expert opinion in this case. To the extent that an expert's opinion is challenged on the basis they are biased, this can be dealt with in the context of the weight to be given to that opinion. For these reasons, I accept as admissible the expert opinions of both Mr. Maltese and Dr. Karney.

**Did the City owe a private law duty of care to the Class Members in respect of operational decisions relating to the Safe Clean Drinking Water Project (SCDWP)?**

[56] As in all negligence cases, the Class Members must establish that the City owed them a duty of care, that the City breached the standard of care and that, as a result of that breach, the Class Members incurred damages. While this analysis as framed appears quite straightforward, the necessary conclusions that must be drawn to determine if there exists a private law duty of care in this case are anything but straightforward. In order to determine if the City owed the Class Members a private law duty of care the following questions must be considered:

- (1) Has a duty of care been recognized previously in a category of cases similar to this case?
- (2) Is there an analogous category of cases that could be applicable to this case where a duty of care has been recognized?

- (3) If there is not a recognized duty of care then is this a novel argument on duty of care that must be appropriately considered pursuant to the ***Anns/Cooper*** test?
- (4) Can the Class Members establish proximity? Was the City in a direct relationship with the Class Members such that it is just to impose a duty of care in the circumstances?
- (5) Was the harm the reasonably foreseeable consequences of the City's actions? What is the appropriate question to ask in determining whether or not the harm was reasonably foreseeable?
- (6) If a duty of care has been established, are there residual policy considerations that negate the imposition of a duty of care in the circumstances?
- (7) Conclusion – is it appropriate to impose a private law duty of care on the City in all the circumstances of this case?

[57] An excellent place to commence the analysis as to the viability of the Class Members claims in negligence against the City is the recent decision of the Supreme Court of Canada in ***Nelson (City) v. Marchi***, 2021 SCC 41. Justices Martin and Karakatsanis set out in ***Nelson*** the following overview of the analysis to be undertaken in cases where a private law duty of care is argued to be owed by a public authority:

[1] Under Canadian tort law, there is no doubt that governments may sometimes be held liable for damage caused by their negligence in the same way as private defendants. At the same time, the law of negligence must account for the unique role of public authorities in governing society in the public interest. Public bodies set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties. This is an inevitable aspect of the business of governing. Accountability for that harm is found in the ballot box, not the courts. Courts are not institutionally designed to review polycentric government decisions, and public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits.

[2] Accordingly, courts have recognized that a sphere of government decision-making should remain free from judicial supervision based on the standard of care in negligence. Defining the scope of this immunity has challenged courts for decades. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, this Court explained that “core policy” government decisions — defined as “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors” — must be shielded from liability in negligence (para. 90). In ascertaining whether a decision is one of core policy, the key focus is “social and political factors” — must be shielded from liability in negligence (para. 90). In ascertaining whether a decision is one of core policy, the key focus is always on the nature of the decision.

[3] In the decade since *Imperial Tobacco*, there has been continued confusion on when core policy immunity applies. This appeal requires the Court to clarify how to distinguish immune policy decisions from government activities that attract liability for negligence. We conclude that the rationale for core policy immunity serves as an overarching guiding principle. Core policy decisions are immune from negligence liability because each branch of government has a core institutional role and competency that must be protected from interference by the other branches. We identify four factors from this Court’s jurisprudence that help in assessing the nature of a government’s decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The separation of powers rationale animating the immunity guides how the factors weigh in the analysis.

[the emphasis is mine]

[58] The City maintains that the operative test for negligence of public authorities such as municipalities remains as set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), and *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 SCR 537. The now frequently captioned “*Anns/Cooper*” test was summarized by the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at paragraphs 9 and 10 as follows:

9 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the

**circumstances.** Mere foreseeability is not enough to establish a prima facie duty of care. The plaintiff must also show proximity — that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.

10 **If the plaintiff is successful at the first stage of Anns such that a prima facie duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the Anns test must be addressed. That question is whether there exist residual policy considerations which justify denying liability.** Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[the emphasis is mine]

[59] The Class Members suggest that a full **Anns/Cooper** analysis is not required in every case to establish the existence of a duty of care. The Class Members submit that a relationship that falls within a previously established category, or is analogous to an already established category, can be sufficient to ground a duty of care requirement. The Class Members refer the Court do the following decisions where New Brunswick courts have recognized public utilities owe a duty of care to their customers:

- (a) In *Anderson v. New Brunswick Electric Power Commission*, the New Brunswick Court of Appeal concluded that the New Brunswick Electric Power Commission was liable to a ratepayer for its negligence for the manner in which it placed its electrical wires.<sup>421</sup> In so doing, the Court of Appeal recognized that the Power Commission owed a common law duty of care “to take care which it owes to anyone whom it might reasonably foresee would suffer injury as a consequence of its failure to take reasonable care.”<sup>422</sup>

**[*Anderson v. New Brunswick Electric Power Commission*, [1982] N.B.J. 275 (C.A.)]**

- (b) In *Kettle v. Saint John Energy*, the Court of Queen’s Bench New Brunswick held that the power utility owed a duty of care to its customers;<sup>423</sup>

**[*Kettle v. Saint John Energy*, 2019 NBQB 92 (CanLII)]**



[60] The Class Members suggest that the analysis of a duty of care in this matter should be considered in the context of a supplier's requirement to guard against injury to a consumer's property for products when there is no reasonable possibility of intermediate examination. The Class Members refer the Court to Lord Atkin's familiar comments in *Donoghue v. Stevenson*, [1932] All ER Rep 1, p. 19:

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

[61] The City refutes the Class members suggestion that duty of care in the present matter is analogous to that imposed on manufacturers of consumer goods or providers of public utilities. The City points out that as a public authority, its duty in the delivery of water is to the public as a whole and there is no private law duty which exists regarding individual residents or businesses. The city refers the Court to the following statement of law by the Ontario Court of Appeal in *Wellington v. Ontario*, 2011 ONCA 274 at paragraph 44:

[44] There is now a well-established line of cases standing for the general proposition that public authorities, charged with making decisions in the general public interest, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public. **Discretionary public duties of this nature are "not aimed at or geared to the protection of the private interests of specific individuals" and do "not give rise to a private law duty sufficient to ground an action in negligence":** *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 2006 CanLII 37121 (ON CA), 82 O.R. (3d) 321, [2006] O.J. No. 4400 (C.A.), at para. 17; *Williams*, at paras. 29-30; *Attis*, at paras. 59-60; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)* (2009), 2009 ONCA 326 (CanLII), 95 O.R. (3d) 1, [2009] O.J. No. 1605 (C.A.), at paras. 41-42.

[the emphasis is mine]

[62] The City points out that it is providing healthy and safe water to the residents and businesses of Saint John. In doing this, the City maintains that its statutory obligations are to ensure the quality of the water to all of its users at the most cost effective price possible. In discharging these statutory obligations, the City's

obligations are to the general public, not the specific needs of individual users of the water distribution system. For these reasons, the City maintains that the existence of a duty of care is not analogous to the situations referred to by the Class Members where public utilities, such as power companies, have been found to have a duty of care to its customers where it is reasonably foreseeable that the user of the service could suffer injury.

[63] The Class Members suggest that a court has previously recognized a duty of care of a municipality in the operation of its water system. The Class Members refer the court to *Pettigrew v. Halifax Regional Water Commission*, 2019 NSSC 362 (CanLII) where it was argued the utility was negligent in the manner in which it upgraded its stormwater system. It was argued that this negligence caused sewage backups into the Plaintiff's premise's plumbing. In confirming the existence of a duty of care, Justice Norton in *Pettigrew* commented at paragraphs 23 and 24 as follows:

[23] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, the Supreme Court of Canada defined negligence as follows (para. 3):

A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. . . .

**[24] There is no dispute that Halifax Water owed the Plaintiffs a duty of care and that the Plaintiffs sustained damage.**

[the emphasis is mine]

[64] It is important to note that the Defendants did not dispute the existence of a duty of care in *Pettigrew*. In *Pettigrew*, the harm that was occasioned was the direct result of infrastructure work the municipality was performing in the area of the affected homeowners. I am not satisfied that *Pettigrew* is an appropriate case to establish a previously recognized duty of care in similar circumstances given the very different factual circumstances of this case.

[65] The City refutes the characterization of the duty of care suggested by the Class Members and directs the Court to a small claims decision from Newfoundland,

***Grondin v. Town of Red Harbour***, 2015 CanLII 37861 (NL PC) in support of their position that there is no duty of care in these circumstances. In ***Grondin***, the court considered whether a municipality owes a private law duty of care in relation to the sewage and water system. The Court in ***Grondin*** noted at paragraph 27 as follows:

[27] The first issue in an action for the tort of negligence is the question of whether there is a duty of care. The town has the authority to install sewer mains under the provisions of the Municipalities Act, 1999, SNL 1999 cM-24, s. 156. The evidence in the present matter is that the town has sewer mains and lift stations and pumps, all of which it maintains regularly. However, the town has never taken any responsibility for the lateral sewer lines which residents install to connect their homes to the town sewer mains.

- [66] The City highlights that in ***Grondin*** the sewage lateral in question had been owned, installed and maintained by the private property owner. The City compares this situation directly to the premise plumbing complaints advanced by the Class Members in this case. Further, the City notes that in ***Grondin***, as is the case here, the municipality had no way of inspecting the laterals. The City highlights the court's finding in ***Grondin*** that the municipality did not owe a duty of care to the Plaintiff.
- [67] The Class Members caution the Court on the applicability of ***Grondin*** to the current circumstances. The Class Members underscore the Court's finding in ***Grondin*** that the sewage backup was caused by someone in ***Grondin's*** household inappropriately flushing cloth wipes and/or rags down the toilet. The Class Members suggest that ***Grondin*** stands for the proposition that where a homeowner's acts or omissions cause premise plumbing to leak or backup, the municipality will not be held liable. The Class Members suggest that the Small Claims Court decision in ***Grondin*** is actually of no assistance to the Court in the context of this matter.
- [68] The authorities provided to the Court are insufficient to establish a previously recognized duty of care in a similar case. I am not satisfied that ***Pettigrew v. Halifax*** stands for the proposition that a duty of care has been previously

recognized in a comparable case. Likewise, the situation in *Grondin* is distinguishable, and in my view not determinative, that “no” duty of care exists in these circumstances. It would seem that the Court is left to consider the question as a “novel” category and undertake a full **Anns/Cooper** analysis.

[69] The Supreme Court of Canada in *Nelson* sets out the following guidelines for determining whether there is a novel category for the existence of a duty of care at paragraphs 16 through 19 as follows:

[16] In Canada, the Anns/Cooper test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. But as Cooper and subsequent cases make clear, the framework applies differently depending on whether the plaintiff’s claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before.

[17] In novel duty of care cases, the full two-stage Anns/Cooper framework applies. Under the first stage, the court asks whether a prima facie duty of care exists between the parties. **The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant’s conduct, and whether there is “a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff” (Rankin’s Garage, at para. 18).** Proximity arises in those relationships where 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 upon the defendant” (Cooper, at paras. 32 and 34).

[18] If there is sufficient proximity to ground a prima facie duty of care, it is necessary to proceed to the second stage of the Anns/Cooper test, which asks **whether there are residual policy concerns outside the parties’ relationship that should negate the prima facie duty of care** (Cooper, at para. 30). As stated in Cooper, at para. 37, the residual policy stage of the Anns/Cooper test raises questions relating to “the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally”, such as:

**Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?**

[19] When the duty of care at issue is not novel, there is generally no need to proceed through the full two-stage Anns/Cooper framework. Over the years, courts in Canada have developed a body of negligence law recognizing categories of cases in which a duty of care has previously

been established (Cooper, at para. 41; Childs v. Desormeaux, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15; Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 5). In such cases, “the requisite close and direct relationship is shown” and the first stage of the Anns/Cooper framework will be complete, as long as the risk of injury was reasonably foreseeable (Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 26). The second stage of the Anns/Cooper test will rarely be necessary because residual policy concerns will have already been taken into account when the duty was first established (Cooper, at paras. 36 and 39; Livent, at paras. 26 and 28; see also Edwards v. Law Society of Upper Canada, 2001 SCC 80, [2001] 3 S.C.R. 562, at paras. 9-10).

[the emphasis is mine]

[70] As explained by the Supreme Court of Canada in *Nelson*, it is first necessary to determine if the facts confirm a relationship of proximity between the City and the Class Members in which failure to take reasonable care might foreseeably cause loss or harm. The Supreme Court of Canada recently described the burden a plaintiff must meet in order to demonstrate foreseeability and proximity in *Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19 (CanLII) at paragraphs 19, 21 and 22 as follows:

[19] Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O’Donnell*, 1994 CanLII 128 (SCC), [1994] 1 S.C.R. 670, at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a *prima facie* duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant’s conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.

[...]

[21] Since Donoghue, the “neighbour principle” has been the cornerstone of the law of negligence. Lord Atkin’s famous quote respecting how far a legal neighbourhood extends incorporates the dual concerns of reasonable foreseeability of harm and proximity:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought

reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. [p. 580]

**Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered.**

[22] The rationale underlying this approach is self-evident. It would simply not be just to impose liability in cases where there was no reason for defendants to have contemplated that their conduct could result in the harm complained of. Through the neighbour principle, the defendant, as creator of an unreasonable risk, is connected to the plaintiff, the party whose endangerment made the risk unreasonable: E. J. Weinrib, "The Disintegration of Duty", in M. S. Madden, ed., *Exploring Tort Law* (2005), 143, at p. 151. The wrongdoing relates to the harm caused. Thus, **foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability**: D. G. Owen, "Figuring Foreseeability" (2009), 44 *Wake Forest L. Rev.* 1277, at p. 1278.

[the emphasis is mine]

[71] The Class Members argue strenuously that they have met both the threshold of proximity and foreseeability in the circumstances of this case. The Class Members remind the Court of the Supreme Court of Canada's directives in ***Cooper v. Hobart***, that proximity factors are "diverse" and "case specific". In the circumstances of this case, the Class Members argue the City is providing them with water. The provision of this service by the City to the Class Members establishes they have both a close and direct relationship. The Supreme Court of Canada's discussion on the issue of proximity in ***Cooper v. Hobart*** is quite helpful to the current analysis at paragraphs 32 to 34:

32 On the first point, it seems clear that **the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed.** "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson*, *supra*, at pp. 580-81:

Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so

affected when I am directing my mind to the acts or omissions which are called in question.

...

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]

33 As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165, at para. 24, per La Forest J.:

The label “proximity”, as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff’s legitimate interests in conducting his or her affairs. [Emphasis added.]

34 Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[the emphasis is mine]

[72] The City reminds the Court of the importance of the legislative scheme in the consideration of the proximity analysis in this case. The City refers the Court to the comments of the Ontario Court of Appeal in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at paragraph 76 as follows:

[76] The legislative scheme looms large in the proximity inquiry for two reasons. First, the question of whether a regulator should owe a private law duty of care to those individuals affected by its actions is largely a policy decision that falls squarely within the legislative bailiwick. The legislature announces that policy decision through the terms of its legislation. Second, even where the legislation is not determinative and the court must look to the interaction between the regulator and the plaintiff, the terms of the legislation describing the powers and duties of the regulator may to some extent shape the relationship between the regulator and the regulated. That relationship will be relevant in deciding whether the specific interactions between the regulator and

**the plaintiff are sufficient to create the degree of proximity required to establish a prima facie duty of care.**

[the emphasis is mine]

- [73] All parties agree that the legislative scheme governing the City's obligation to provide water is centered around the requirement to provide safe, healthy water to the users of the City's water distribution network. The Class Members point out that *Taylor* also stands for the proposition that public health duties can co-exist with a private law duty of care. The Class Members suggest that in these circumstances there is no conflict between the City's statutory duty to provide safe drinking water under the legislative scheme and a private law duty to prevent property damage. The Class Members are all individuals or businesses who derive their water from the water distribution system operated by the City. The Class Members argue that there is no conflict in these circumstances between the City's statutory obligation to provide safe drinking water and a private law duty of care to avoid property damage to users of the water distribution system.
- [74] The City maintains that there is a potential conflict between its statutory obligation to provide safe drinking water to the residents of Saint John and a potential private law duty of care to individual users of the water distribution system in relation to their private plumbing. The City suggests that the imposition of a private law duty of care in such circumstances may impede the City's ability to discharge its statutory duty to provide safe, clean drinking water to all users of the water system. The City argues that the health of the public as a whole is the competing interest which must be weighed against the rights of individual residents and potential damages to their private plumbing.
- [75] The City refers the Court to *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (CanLII), [2007] 3 SCR 83 at paragraph 28 in support of their position:

28 **Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (Cooper, at para. 44; Edwards, at para. 6). Such a conflict exists where the**



imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties. In *Cooper*, for example, a duty to individual investors on the part of the Registrar of Mortgage Brokers was rejected because it was found to “potentially conflict with the Registrar’s overarching duty to the public” (para. 44). Similarly, in *Edwards* a private law duty of care on the part of the Law Society to the victim of a dishonest lawyer was rejected at the proximity stage since “[d]ecisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties” (para. 14). In both cases, the serious negative policy consequences of these conflicting duties were found to justify denying a finding of proximity.

[the emphasis is mine]

- [76] The Class Members point out that in *Syl Apps Treatment Centre*, the statutory duty which existed was to protect children from suspected abuse while the proposed private law duty would have been owed to those suspected of perpetuating the abuse. Such a situation creates an obvious conflict between the existing statutory duty and the proposed private law duty of care. The current situation before the Court is quite distinguishable. In the current matter, the Class Members argue the City has not set out the factors that would result in a conflict between the statutory duty to provide safe, clean drinking water and a private law duty to prevent reasonably foreseeable harm to the private plumbing of users of the system. The Class Members suggest that these two potential duties in fact go “*hand in glove*” and I am inclined to agree.
- [77] The Class Members were all users of the water distribution system operated by the City. In my view, this fact is sufficient to establish a relationship of proximity. Had the Class Members become ill as a result of problems with the quality of the water in the distribution system there would be no suggestion but that there was not a proximate relationship between them and the City responsible for the water distribution. In these circumstances, it is reasonable to expect that the City would be mindful of the legitimate interests of the Class Members that any potential impact on their property by the City’s implementation of a new water distribution be addressed and mitigated to the extent possible. I accept that the Class

Members have established a relationship of proximity subject to the consideration of the existence of a potential immunity at law.

[78] While the court is satisfied that a proximate relationship is made out in these circumstances, the establishment of a reasonable foreseeability of harm is more difficult to answer. As noted by the Supreme Court of Canada in *Rankin*, it is necessary to approach the question of foreseeability with analytical vigour and to avoid considering the question in retrospect.

[79] The parties diverge on the nature of the “harm” the court must conclude was reasonably foreseeable. The parties disagree on the nature of the question the court must answer in determining if the harm was reasonably foreseeable. The Class Members refer the Court to the characterization of foreseeability of harm in *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Company Limited*, 1971 CanLII 959 (MB CA) at paragraph 13 which was upheld by the Supreme Court:

These words would suggest that recovery may be had, provided the event giving rise to the damage is not regarded as "impossible", and even though it "very rarely happened", "only in very exceptional circumstances". **The test of foreseeability of damage becomes a question of what is possible rather than what is probable.**

[the emphasis is mine]

Considering the foreseeability analysis as set out in *School Division Assiniboine South*, the Class Members argue that it was reasonably foreseeable that a change in water source could cause harm to property owners in West Saint John.

[80] The Supreme Court of Canada in *Rankin* stressed the importance of framing the question of foreseeability with sufficient analytical vigour. The City suggests that following the directives of the Supreme Court of Canada in *Rankin*, it will not be sufficient for the Class Members to simply demonstrate it was reasonably foreseeable that users could generally suffer damage as a result of the change in water supply. The City disputes the Class Members approach to the

characterization of foreseeability in this case and relies upon the more stringent analysis suggested by the Supreme Court of Canada in *Rankin*. The City maintains that the Class Members analysis of foreseeability is overly broad and fails to take into consideration the requirement of “analytical vigour” required set out in the more recent decision of *Rankin* in 2018 as opposed to the approach in *School Division Assiniboine South* dating back to the 1970’s. The City argues it is now not sufficient for the Class Members to establish that it was reasonably foreseeable that they could generally suffer damage as a result of a change in water supply. Rather, pursuant to *Rankin*, they must establish that a change in water supply could result in a pinhole leaks in private plumbing as a reasonably foreseeable consequence of the City’s action or omission.

- [81] The Class Members suggest that in their suggested approach the City has conflated the concept of foreseeability with certainty. The Class Members point out that foreseeability is not to be confused with foresight. It is not necessary for a defendant to have foreseen the precise manner the injury occurred. The Class Members direct the Court to the Supreme Court of Canada’s comments in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII), at paragraph 13:

[13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is probable or merely possible. In my view, these terms are misleading. Any harm which has actually occurred is “possible”; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. **The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a “real risk”, i.e. “one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched”** (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

- [82] The City also highlights the Supreme Court of Canada’s confirmation in *Rankin* that foreseeability must not be considered in retrospect. The City directs the Court to the Supreme Court of Canada’s comment on the issue at paragraph 53 of *Rankin* as follows:

[53] Whether or not something is “reasonably foreseeable” is an objective test. The analysis is focussed on whether someone in the defendant’s position ought reasonably to have foreseen the harm rather than whether the specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. **The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight**: L. N. Klar and C.S.G. Jefferies, Tort Law (6th ed. 2017), at p. 212.

[the emphasis is mine]

[83] In their brief on law in support of their request for summary judgment, the Class Members set out the following factors in support of the assertion that the harm sustained was reasonably foreseeable:

- (1) the City was repeatedly warned that a change in water chemistry can cause adverse impacts in the pipes in which the water flows, including leaks;
- (2) the City was repeatedly warned that a change in water chemistry would impact premise plumbing;
- (3) the City was repeatedly advised to develop a plan to transition the system from the existing water quality to the eventual water chemistry;
- (4) all of the applicable standards warn that a change in water source can cause adverse impacts in the pipes in which the water flows; and
- (5) the City admitted on cross-examination that:
  - (a) before the change in water source and chemistry for West Saint John, the City knew that a change in water source could impact premise plumbing; and
  - (b) before the change in water source and chemistry for West Saint John, the City knew that a change in water source can destabilize existing scales.

[84] The City refutes the Class members’ arguments on foreseeability, contending that the copper pipe leaks were not expected and were in fact unprecedented. The City sets out their assessment of the evidence which supports the unforeseeable nature of the problem at paragraphs 165 and 166 of their brief on law as follows:

165. As set out in Mr. Chaulk's affidavit and the appended CBCL Corrosion Control Investigation Report: (1) based on available industry practice, technical guidance and peer-reviewed science, the ground water supply from the South Bay Wellfield was assessed as low risk for corrosion potential; (2) other municipalities in Atlantic Canada that had switched water supplies similar to West Saint John did not experience reports of copper leaks within private copper plumbing; (3) limited literature, research and guidance was available for utilities permanently switching a water source and even less information for switching from surface water to ground water; (4) South Bay Wellfield water quality was similar to other ground water systems that do not use orthophosphates/corrosion control; and (5) the mechanism for the reported copper pipe leaks remains unclear and would require further testing to determine.

166. Furthermore, as noted during the cross-examination of Brent McGovern, Commissioner of Saint John Water, the City also had the experience of the Town of Rothesay (consisting of a couple of hundred homes or more) having switched from untreated surface water (from Loch Lomond) to ground water, with no reported issues with private copper plumbing.

- [85] What is the harm that had to have been reasonably foreseeable to the City to ground the existence of a private law duty of care between these parties? Was it the general possibility of harm to the Class Members' premises' plumbing as a result of a change in the water distribution system? Was it the possibility of the development of pinprick leaks in the Class Members premises plumbing as a result of the change in the water distribution system? While *Rankin* requires the Court to approach the framing of this question with "analytical vigour", it does not require a specific contemplation of the precise harm encountered. In my view, the question to be framed in terms of foreseeability in these circumstances lies somewhere in between the two options suggested by the parties.
- [86] *Rankin* dealt with a fact situation where minors stole a vehicle from a garage and then were subsequently involved in a motor vehicle accident sustaining personal injuries. The Supreme Court of Canada in *Rankin* concluded that it was not reasonably foreseeable that theft of a vehicle would result in bodily harm so as to have been in the contemplation of the garage when considering its security practices. While the fact situation is distinguishable, the court's discussion of the process to frame the question in order to determine reasonable foreseeability is nonetheless quite helpful. The Court states at paragraph 46, 55 and 56 as follows:

[46] The fact that something is possible does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. **Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met:** Childs, at para. 29. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by minors. Otherwise theft by a minor would always be foreseeable — even without any evidence to suggest that this risk was more than a mere possibility. This would fundamentally change tort law and could result in a significant expansion of liability.

[...]

[55] To summarize, the evidence did not provide specific circumstances to make it reasonably foreseeable that the stolen car might be driven in a way that would cause personal injury. The evidence did not, for example, establish that the risk of theft included the risk of theft by minors. While in this case, it was argued that it was the risk of theft by minors that could make the risk of the unsafe operation of the stolen vehicle foreseeable, had there been other evidence or circumstances making the risk of personal injury reasonably foreseeable, a duty of care would exist.

[56] As was the case in many similar decisions by trial courts, I am not satisfied that the evidence here demonstrates that bodily harm resulting from the theft of the vehicle was reasonably foreseeable. I conclude that **the plaintiff did not satisfy the onus to establish that the defendant ought to have contemplated the risk of personal injury when considering its security practices. The inferential chain of reasoning was too weak to support the establishment of reasonable foreseeability:** see Childs, at para. 29. For these reasons, the plaintiff has not met his burden of establishing a prima facie duty of care owed by Rankin's Garage to him. Reasonable foreseeability could not be established on this record.

[the emphasis is mine]

[87] In the present matter I accept the City's submission that in this case, pursuant to the guidance provided in *Rankin*, it is necessary to determine if the harm experienced by the Class Members was reasonably foreseeable with specificity. However, the level of specificity, as argued by the Class Members, cannot rise to level of certainty. It is not enough to suggest that a change in the water distribution network could have an impact on the premise's plumbing of the Class Members. In my view, the appropriate question is whether or not it was reasonably foreseeable to the City that their acts or omissions in implementing corrosion control measures when transitioning the water distribution in West

Saint John could cause leaks to premises plumbing of the Class Members. In order to answer this question, it then becomes necessary to examine the information available to the City prior to the switch over of water sources in 2017, not the information available to the City subsequent thereto.

[88] The Class Members point to the following pieces of evidence found in the record in support of their assertion that the City had ample knowledge prior to August of 2017 that their management and implementation of the switch over of the West Saint John water distribution system could result in leaks to the Class Members:

**R.V. Anderson Associates Limited, August 2011**, section 7, page 16, East and West Saint John

Changes in the source water quality, treatment, or distribution system operations and maintenance can adversely impact corrosion control efforts (AwwaRF, 1996; AWWA, 2005):

- **Source water changes can affect pH and alkalinity and render corrosion control efforts ineffective by changing buffering capacity and impacting the solubility of protective films;**
- Treatment changes such as changes in oxidants, disinfectants, or coagulants can impact metal oxidation rates and the nature of scale deposits;
- The addition of hydrofluorosilicic acid or chlorine gas can reduce pH levels, increasing the corrosivity of the water;
- Enhanced coagulation for reduction of total organic carbon may involve pH depression, potentially increasing lead and copper corrosion and release;
- **Operational changes resulting in increased water age, blending of water, or increased water flow can impact the formation and dissolution of films and scale deposits.**
- Maintenance efforts such as flushing the system (which can scour the pipe) and service line/meter replacement can increase the release of contaminants into the water.

**CBCL Memorandum dated June 27, 2013**, East and West Saint John

The potential for a groundwater derived water source to cause unintended distribution system water quality issues once implemented is a significant risk identified for this project. One of the most widely-known

incidents to have occurred was in Washington, D.C. between 2001-2004. A change from chlorine disinfectant to chloramines caused widespread lead release in the distribution system which persisted for several years before the problem was mitigated through the addition of orthophosphate corrosion inhibitor. Although the blending analyses highlighted in the RFP focuses on treatment blending, we believe effort is also required to assess the potential consequences of either blending water sources in the distribution system or completely switching a given area of the system from surface to groundwater source. Our project team includes individuals with expertise in distribution system water quality and corrosion. Experience of utilities such as CBRM (Sydney) demonstrates that **switching water sources from chlorinated surface water to treated groundwater can accelerate corrosion and cause rapid degradation of water mains and service connections.** This will require assessment during the project and our methodology will evaluate projected differences in treated water quality and potential impacts on established biofilms. CBCL will be able to lend knowledge and experience gained from working with other municipalities facing similar issues in order to ensure minimal impact on distribution system integrity and water quality resulting from the transition to a groundwater source.

**CBCL memorandum dated January 27, 2014 - East Saint John water treatment plant**

The primary objective of this corrosion study is to determine the impacts on existing scales. Corrosion of new pipes is not a major concern, as there is a vast amount of research related to the subject and once the system is operational, the corrosion control can be optimized by iteratively adjusting treated water quality.

[...]

**In the case of Saint John, where corrosion scales are well established, changes arising from the implementation of treatment could have a significant impact on stability of tubercles.** We are proposing a detailed corrosion study to minimize risks of unintended outcomes following the implementation of a new treatment system.

**CBCL Report, June 2014, section 4.5.1 - East Saint John**

Latimer Lake, like many surface water sources in Atlantic Canada, is relatively aggressive towards corrosion in water distribution pipes and premise plumbing systems. The water has naturally low pH, alkalinity, and hardness. Common distribution system concerns related to corrosion include: coloured water complaints, reduced pipe capacity caused by the build-up of corrosion scale (tuberculation), premature pipe failure through loss of pipe material or pinhole leaks, degradation of chlorine residual through reactions with corrosion scale, excessive biofilm growth resulting from favourable growth conditions in tubercles, and potential health concerns resulting from increased metals concentrations (particularly with high lead levels).



Corrosion control will form a critical component of the new water treatment plant- particularly during the transition period when treated water is first introduced to the system. The Saint John distribution system includes old pipes with well-established corrosion scales. These scales are sensitive to subtle changes in water quality, which can cause them to break down and release large quantities of metals. Resulting problems could include coloured water complaints, taste and odour issues, and high concentrations of toxic metals. **Excessive corrosion can also lead to pipe failures, which can be costly, waste a lot of water and money, and may require boil water advisories.** Furthermore, corrosion scales may shelter biofilm from chlorine; breakdown of the scales can lead to presence of coliform bacteria in the water. The release of this bacteria and metal particles causes an increase in chlorine demand, and as a result areas of the system can lose free chlorine residual. Problems such as these would have drastic impacts on consumer confidence in the Saint John water supply and should be avoided.

**CBCL report dated March 2015, East Saint John, section 4.5**

While proponents will not be responsible for the condition of the distribution system, the water quality leaving the facility will impact the mains and premise plumbing. The optimum approach (chemicals, dosages, pH, alkalinity, etc.) to corrosion control in the distribution system is not yet known. Some work is underway and more is recommended to evaluate options and determine the preferred approach. In terms of the DBFOM work, the preferred approach is to identify which chemical storage and feed features must be included in the plant to address corrosion issues and to include relevant treated water quality parameters as part of the performance specifications. We anticipate that ongoing work on the City's part will be required to develop a system-wide corrosion control program. We have included elements of that program in this section for information and discussion purposes. The responsibilities of the Proponent will be limited to providing the chemical storage and feed capabilities within the plant and to meeting the treated water quality requirements.

**CBCL Memorandum dated December 11, 2015 - East Saint John**

**In developing a corrosion control program, both distribution system pipe corrosion and premise plumbing pipe corrosion must be considered.** These systems present different challenges and control measures are not necessarily the same for each.

[...]

**Corrosion related issues are of particular concern when water quality in the distribution system changes,** as it can destabilize existing corrosion scales and cause aesthetic, regulatory, and economic issues.

[the emphasis is mine]

- [89] The City refutes the Class Members assertion that the risk of leaks were within the knowledge of the City as a result of the planed switch over of the water distribution system in West Saint John. The City relies upon the recommendations of their experts engaged at the time in asserting such leaks were not reasonably foreseeable in the context of West Saint John.
- [90] There is no doubt but that the City's approach to corrosion control changed significantly for West Saint John once the decision was made to switch to the groundwater of South Bay Wellfield. The appropriateness of the measures taken by the City once that decision was made is, in my view, properly considered within the analysis of the standard of care. However, the City had knowledge throughout the life of the **SCDWP** that changes in the water distribution network required consideration of corrosion control measures because of the potential impact of a change in water on the infrastructure including private plumbing. Given this knowledge, I conclude that it was reasonably foreseeable that the City's acts or omissions in implementing corrosion control measures when transitioning the water distribution in West Saint John could cause leaks to the premise's plumbing of the Class Members.
- [91] Although the Court has determined that there was a relationship of proximity between the parties and the loss was a reasonably foreseeable consequence of the City's actions or omissions, the Court must consider whether a duty of care is nonetheless not made out as it arises out of a core policy decision. Again, the court has the benefit of the Supreme Court of Canada's direction on how such an analysis is to be undertaken from ***Nelson v. Marchi***. At paragraphs 40 and 41 Justices Martin and Karakatsanis discuss the concept of immunity for core policy decisions of government agencies in the law of negligence as follows:

[40] Although there is consensus "that the law of negligence must account for the unique role of government agencies", there is disagreement on how this should be done (Imperial Tobacco, at para. 76). Some even argue that private law principles of negligence are wholly incompatible with the role and nature of public authorities. Echoing the obiter in *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446, at paras. 130 and 139, for example, the City of Abbotsford intervened to propose that only public law principles should

govern public authority liability. Instead of examining how core policy immunity operates within negligence law, it suggests that courts should focus on indefensibility in the administrative law sense and exercise remedial discretion where appropriate to grant monetary relief.

[41] Such an approach has no basis in this Court's jurisprudence. It also runs counter to Crown proceedings legislation in Canada, which subjects the Crown to liability as if it were a private person. **This Court's approach has been to accept that, "[a]s a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual" (Just, at p. 1244). However, to resolve the tension arising from the application of private law negligence principles to public authorities, the Court has adopted the principle from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), that certain policy decisions should be shielded from liability for negligence, as long as they are not irrational or made in bad faith.** This approach accounts for the unique nature of public authority defendants and is firmly grounded in both the legislation and this Court's jurisprudence dating back to *Barratt v. Corporation of North Vancouver*, 1980 CanLII 219 (SCC), [1980] 2 S.C.R. 418, and *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2.

[the emphasis is mine]

[92] In *Nelson v. Marchi*, the Supreme Court of Canada goes on to provide an analytical framework to determine whether a public authority's actions or omissions relate to core policy decisions as opposed to operations decisions setting out at paragraphs 61-66 as follows:

[61] The rationale for core policy immunity should also serve as an overarching guiding principle for how to assess and weigh the factors this Court has developed for identifying core policy decisions. We will elaborate.

[62] **First: the level and responsibilities of the decision-maker.** With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (Just, at pp. 1242 and 1245; *Imperial Tobacco*, at para. 87).

[63] **Second: the process by which the decision was made.** The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

[64] **Third: the nature and extent of budgetary considerations.** A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions “concerning budgetary allotments for departments or government agencies will be classified as policy decisions” because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., Criminal Lawyers’ Association, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.

[65] **Fourth: the extent to which the decision was based on objective criteria.** The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment (Makuch, at pp. 234-36 and 238). Conversely, the more a decision is based on “technical standards or general standards of reasonableness”, the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

[66] Thus, in the course of weighing these factors, the key focus must always be on the underlying purpose of the immunity and the nature of the decision. None of the factors is necessarily determinative alone and more factors and hallmarks of core policy decisions may be developed; courts must assess all the circumstances.

[the emphasis is mine]

[93] It is necessary to consider these questions of core policy decisions through the framework as set out in *Nelson v. Marchi*. The Class Members acknowledged during the course of oral arguments that the City’s decision to implement the new water distributions system along with the determination that west Saint John would be furnished water from a groundwater source were core policy decisions that would attract immunity protection. However, the Class Members suggest that the claims in negligence in this matter relate to the operational decisions

taken by various actors in the implementation of the water distribution system, in particular, whether or not to proceed with specific corrosion control measures in West Saint John. The Class Members maintain that the actions or omissions of the City which form the basis of the claims in negligence are all operational as opposed to core policy decisions. The Certification Order itself refers to the operational nature of the decisions in framing the common questions, “*did the Defendants owe a private law duty of care to the Class in respect of operational decisions relating to the Safe Clean Drinking Water Project?*”

- [94] Clearly all decisions relating to the City’s determination that they would transition the water distribution for West Saint John to the groundwater source from South-Bay Wellfield would fall under the “core policy” criteria as is conceded by the Class Members. However, the question in this case is whether or not the decisions relating to corrosion control measures when transitioning the West Saint John water supply are a different consideration. It is helpful to consider these decisions in light of the ***Nelson v. Marchi*** criteria to determine if they are solely “*operational*” or “*core*” policy decisions.
- [95] The decision makers responsible for deciding what, if any, corrosion control measures would be added to the water were not members of council or senior city officials. These types of decisions would be made by the appropriate technical employees with the guidance of experts. These decisions are operational. Similarly, these decisions would be made amongst the technical staff with the assistance of the experts. Decisions concerning water chemistry would not be made by senior city officials outside those with the specialized skill working for the water department.
- [96] The City’s decision to implement a new water distribution system in order to provide high quality water to its residents was a core policy decision. The manner in which the **SCDWP** was designed, funded and rolled out were all core policy decisions taken by city council and its senior advisers. However, the decision on whether or not to treat the water in East or West Saint John with

whatever chemical or other additives recommended or not recommended would have been highly technical decisions. Those are clearly not policy decisions that are made after a deliberative process, nor would they appear to have been particularly subject to budgetary considerations given the comparative costs within the overall costs of the project. Considering the criteria as established by the Supreme Court of Canada in *Nelson*, the decision as to whether or not treatment for potential corrosion control was necessary in West Saint John would have been operational in nature.

- [97] In conclusion, I find that the Class Members in these circumstances have established a novel duty of care pursuant to the **Anns/Cooper** test. The Class Members have satisfied the Court that, in these specific circumstances, there existed a relationship of proximity between themselves and the City. Further, I accept that it was reasonably foreseeable that the City's acts or omissions in implementing corrosion control measures when transitioning the water distribution in West Saint John could cause leaks to the premise's plumbing of the Class Members. Finally, I conclude that the decisions taken by the City were operational in nature and therefore, the duty of care is not negated on the basis of an immunity for core policy decisions. In all of the circumstances, I conclude that it is appropriate to recognize a private law duty of care in this case.
- [98] In my view, the conclusion that in the circumstances of this case, the City owed the Class Members a private law duty of care requires further commentary given the novel nature of this determination. The City's obligation in the design, construction and provision of water to residents and businesses centers on the requirement to provide safe, healthy water pursuant to the applicable statutory requirements. A private law duty of care cannot be found to exist if the existence of such a duty of care would impede the public body from discharging its statutory duties.
- [99] In the present matter, the City's adoption and implementation of the **SCDWP** required an analysis of multiple factors which included the impact of any transition in water on existing plumbing infrastructure, including premises

plumbing. While the City did not, nor would they be expected to prioritize the impact on any individual resident or business's plumbing in making decisions concerning the implementation of the **SCDWP**, this was a consideration in the determination of what measures were appropriate during the water transition. It is not onerous to impose a private law duty of care in these circumstances as the City was in the process of implementing a new water distribution system, and it was feasible in the context of this new project to be mindful of and mitigate potential impacts on residents and businesses. The requirement to do this in no way jeopardized the City's overarching duty of providing safe and healthy water.

[100] For all the reasons previously cited, I accept in these circumstances that there was a relationship of proximity between the City of the Class Members and the potential harm was reasonably foreseeable. Further, I accept that the decision taken regarding corrosion control measures for West Saint John were operational as opposed to core policy decisions. Finally, I conclude that the existence of a private law duty of care can co-exist in these circumstances with the City's public law duties. I find the City did owe the Class Members a private law duty of care.

### **STANDARD OF CARE**

[101] The Supreme Court of Canada set out the factors to be considered in the identification of the particular standard of care in *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC) at paragraphs 28 and 29 as follows:

28 Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. **The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.**

29 Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See R. in right of *Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205.

Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, 1995 CanLII 147 (SCC), [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See *Linden*, supra, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

[the emphasis is mine]

[102] The Class members describe the City's standard of care in this case as follows:

- (a) ensure that it collected relevant information to determine how to properly manage the change in water source for West Saint John and to take care to make reasonable and appropriate decisions based on that information, including by the City's advisors and consultants; and
- (b) consider the impact of a change in water source on property owners in West Saint John.

[103] The City's expert, Dr. Bryan Karney, described the City's standard of care in his report of January 21<sup>st</sup>, 2019 as follows:

#### City's Standard of Care

For purposes of this opinion, the standard of care to be applied is defined as "the level of care, diligence and skill with regard to a municipal drinking water system that a reasonably prudent person would be expected to exercise in a similar situation". It is also expected that they exercise this due diligence honestly, competently and with integrity". Further, we have considered this definition to be inclusive of the City of Saint John as an organization, being an extension of the concept above which appears to specifically apply to individuals.

[the emphasis is mine]

[104] The Class Members explain the breach of the standard of care by the City at paragraph 8 of their pre-hearing brief as follows:



8. In changing the water source for West Saint John, the City of Saint John breached its standard of care:

- (a) First, before the change in water source, the City's engineering consultant CBCL and other advisors specifically advised the City that a change in water chemistry can destabilize existing scale, and that the City should undertake more work to understand the issue and to develop a Corrosion Control Program.
- (b) Despite these specific warnings, the City took no steps to:
  - (i) undertake, or even consider, this additional work that CBCL recommended to understand the extent of the corrosion issue;
  - (ii) develop an effective, or any, Corrosion Control Program that CBCL recommended for the West side; and
  - (iii) protect the West Side against descaling arising from the new water chemistry.
- (c) Second, the City was repeatedly advised that:
  - (i) the change in water source for West Saint John would create a change in pH; and
  - (ii) a change in pH requires careful management, including by gradually and incrementally changing the pH rather than implementing a rapid, destabilizing change, and through the application of orthophosphates that act as an inhibitor to slow the breakdown of scale and stabilize existing pipe materials.
- (d) Despite these warnings, the City did not take these steps, and instead proceeded with a rapid, destabilizing change in water pH in West Saint John.
- (e) Third, contrary to industry standards and its experts' advice, the City's evaluation of a new water source (improperly) did not focus on the effect of a change in water quality on plumbing in residences (premise plumbing).
- (f) Fourth, the City negligently relied on a Water Treatment Assessment conducted by CBCL on the mistaken and improper belief that it encompassed all treatment aspects, including corrosion and descaling, when the scope of the report, as defined by the City, was limited and did not

include an evaluation of these issues. The City negligently relied on this report in support of its decision not to develop a plan to transition the West Side from Spruce Lake to South Bay and its failure not to take any steps to prevent descaling.

- (g) Fifth, if this Court concludes that the City reasonably relied on its advisors and did not independently breach the standard of care, the City is still liable for the negligence of its consultants under its non-delegable duty to take reasonable care.

[105] The City maintains that it did not breach the standard of care and points to the following factors in support of this assertion at paragraph 137 of their responding brief:

137. In contrast, the City's evidence, including the evidence of CBCL, referable to these factors indicates:

- (a) the low likelihood of a known or foreseeable issue with private plumbing leaks;
- (b) the minimal gravity of any such leaks (no negative health impact and small number of complaints);
- (c) the need to change the water source in a timely and fiscally manageable way;
- (d) the unfeasibility of Mr. Maltese's suggested preventative steps;
- (e) the uncertainty (at best) as to whether Mr. Maltese's suggested preventative steps would have prevented the harm;
- (f) the possibility that Mr. Maltese's suggested preventative steps would have caused other issues;
- (g) the City's adherence to applicable regulatory standards; and
- (h) the absence of industry guidance applicable to the type of transition undertaken in West Saint John.

[106] The City submits that it must not be held to a standard of care of perfection, nor can the standard of care be assessed solely with the benefit of hindsight. The City accepts the Class members' submission that it was required to follow the advice and recommendations of the experts engaged to advise them on all requirements related to the water transition. The City maintains that it did follow all of the advice and recommendations of the experts, none of which included the steps recommended by Mr. Maltese in his expert report.

[107] In his report, Mr. Maltese concludes that the City had access to sufficient information to have reasonably anticipated difficulties such as leaks in the water distribution system in West Saint John as a result of switching the water source. Further, Mr. Maltese suggests that there were a number of options available to the City to mitigate the risk of difficulties for West Saint John residents such as a corrosion control plan as was done for East Saint John. In setting out his conclusions at the outset of his report Mr. Maltese notes as follows:

11. The corrosion protection system should have been populated with adequate chemicals to control the pH change from the existing system running at 6.0 – 7.0 (Spruce Lake) to gradually reach the 8.0 found in the South Bay Well Field. This process includes increasing the alkalinity ahead of, or at least concurrently with, the pH change as this will also slow down the net pH rate of change. As noted in several reports listed above as well as industry guidance and standards, care must be taken to transition from one water quality to another water quality by gradual steps.

12. The West Side Corrosion Protection Plan should have included the use of phosphates / orthophosphates. It was known to the City of Saint John that the West Side distribution system had a serious corrosion problem. For example, various consultants advised the City of Saint John to be concerned about corrosion in the water distribution network and premise piping, and the City was advised that after many years of exposure the corrosive water, the existing system had a deposit of copper salts (scaling) that acted as a barrier to further corrosion. The City was further advised that a change in water quality could change the type of barrier salts that had formed. In consequence, it was important to take steps to mitigate this loss of scaling by transitioning the change in water slowly and gradually to allow the deposition of a new critical protective barrier to form. A rapid change was likely to cause the existing scale layer to be removed, subjecting the pipe to accelerated additional corrosion (and leaks) until a new layer of scale could be formed.

13. A change in water source chemistry in a water distribution system is capable of causing leaks in the water distribution system. Based on my review of documents, my education and my professional experience, my conclusion is that the change in water source caused leaks in the West Saint John water distribution system premise piping.

14. In my opinion, based on my experience and industry standards, the introduction of the South Bay Well Field water with its high pH and alkalinity into the existing West Saint John distribution system should have been gradual, with pH control limiting the change in pH in the system and adding buffering capacity to further minimize the potential for shocking the existing copper scales and risking pipe failure, as recommended by the documents referenced above. This conclusion is

consistent with information known to the City. Based on the documents produced by the City that I have reviewed, this was not done.

[108] Mr. Maltese goes on to comment in his report on the need to mitigate the consequences of expected corrosion at paragraphs 95 and 96 as follows:

95. In my opinion, it was appropriate to implement the recommendation to mitigate the consequences of expected corrosion, especially if so advised by these same experts over the almost 18 years of project development and study (from 1999 to date of switchover, the Corrosion Protection Plan recommendations are inconsistent).

96. The City of Saint John should have required the implementation of a comprehensive Corrosion Protection Plan as recommended by its facility design engineer. The original plan was one plant in East Saint John – which met the definition of a change in source identified as a potential issue – with Spruce Lake as a backup. When the source water changed from the East Side plant to the South Bay Well Field, this nevertheless was a change in source – nothing ought to have changed in the recommendations concerning corrosion control. The City should have followed the advice and guidance of their experts as well as AWWA, AWWARF and USEPA guidance and industry practice regarding care in maintaining infrastructure when changing water sources. This was not done.

[109] Mr. Maltese suggests in his expert report that the City ought to have taken the following steps in order to mitigate or prevent leaks in private copper plumbing and in failing to take these steps, they breached the standard of care:

A) changing the pH from the water from Spruce Lake of 6.0 to 7.0 gradually in order to reach the 8.0 pH of the water in the South Bay Wellfield;

B) applying phosphates or orthophosphates for the new water supply; and

C) introducing the new water from South Bay Wellfield gradually.

[110] Mr. Chaulk explained in his affidavit of October 30<sup>th</sup>, 2019 that CBCL did not recommend to the City any of the measures set out by Mr. Maltese in his expert report. Mr. Chaulk explains the reasoning behind CBCL's decision not to implement measures such as those suggested by Mr. Maltese at paragraphs 22, 23 and 24 as follows:

22. In relation to bullet “A” above, the primary goal of the SCDWP was to provide safe drinking water that meets all GCDWQ requirements, not pH correction of the existing high risk source water. The introduction of early pH correction of Spruce Lake, given the source quality, could have led to other unforeseen water quality and/or corrosion issues throughout the distribution system. Alternatively, the acidification of groundwater to a value approximating Spruce Lake would move the corrosion risk profile of the groundwater from non-corrosive to corrosive.

23. In relation to bullet “B” above, the South Bay Wellfield is similar to other municipal groundwater systems that do not use orthophosphates. The addition of orthophosphates to groundwater of the quality in West Saint John is not recommended based on corrosion control guidance and as such was not initially included in the project.

24. In relation to bullet “C” above, blending water from groundwater wells and Spruce Lake would create an undefined risk profile capable of causing an array of negative water quality outcomes, is generally unacceptable to regulatory authorities and was not expected to receive regulatory approval.

[111] Following his review of the use of orthophosphates in other water networks and considering characteristics of ground water from South Bay, Dr. Karney also commented on the use of orthophosphates in these circumstances as follows:

In summary, although the exact concentration of copper at the tap in West Saint John is not reported in the documentation I have received, I do not believe that copper in the drinking water is an acute, or potential, health problem there. Moreover, lead (or any other metal in high concentration) does not appear to be a specific concern in West Saint John, which would be a situation where orthophosphate has often been used. Nonetheless, there is ample evidence from the U.S. that suggests that orthophosphate can reduce the release of copper associated with well waters with high alkalinity (e.g., 250 mg/L). It is possible that orthophosphate addition could slow the rate of copper release, and maybe affect pitting corrosion and pipe leaks. However, the high pH (~8) and relatively low alkalinity (~100mg/L) of the water in West Saint John suggests it may not be overly effective. Overall, adding orthophosphate to high DIC groundwater can be justified to a degree based on earlier research (although it is reiterated that the West Saint John water does not have a high DIC content). There is insufficient data available to understand whether such treatment may have had any material impact on the outcome in West Saint John, noting the rather small fraction (i.e., 3%<sup>xviii</sup>) of customers affected.

Accordingly, I am of the opinion that the City (including its advisors) would not have had access to any definitive knowledge not ought to have been able to reasonably predict the outcome that occurred. Even the recent publication referenced above<sup>xvii</sup> — published after the events affecting

West Saint John — speaks to the general lack of knowledge and degree of uncertainty in the industry associated with this topic. Further, the results of that work would suggest that the chemical characteristics of the West Saint John water would not merit such (orthophosphate) treatment. Although unfortunate, this may serve to assist in the industry's normal evolutionary process.

[112] Following his assessment of the available literature and specific information concerning West Saint John, Dr. Karney concluded his first expert report with the following explanation of why he felt the City had met the standard of care:

It is my professional opinion that the City met its standard of care based on the following:

- Corrosion processes are complex and that there was no clear, current experiential evidence in the industry literature that would have given rise to concerns associated with the change in drinking water supply from an acidic surface water source to an alkaline groundwater source for which all indicators suggest that corrosion would be less of an issue. Corrosion problems in systems supplied from groundwater sources, or the use of corrosion inhibitors, are rare and would not be expected on the basis of published reports. Certainly the cluster of pipe failures that appear associated with the change in water source are unfortunate, but I believe these circumstances could not reasonably have been predicted and only became apparent in retrospect after the change in water source had been implemented.
- Based on the chemical characteristics of the groundwater supply and available information relating to industry practices, the City would not have had any access to any definitive knowledge prior to the switch to a ground water source that it ought it to have been able to reasonably predict the outcome that occurred. Following the same reasoning, nor should the City had reasons to consider the application of orthophosphate treatment to the supply system immediately prior to the switch in source water. Thus, this conclusion applies both at the time of planning, as well as during implementation. Although unfortunate, this may serve to assist in the industry's normal evolutionary process.
- There is likely no meaningful connection with the decision to stop fluoridating the water and any change in water corrosivity, and if there were any such connection, it would have at the very least been very difficult to predict and mitigate against given the industry's state of knowledge on this matter.
- The governing hydraulics of the supply system affecting water flow, velocity or pressures characteristics in the distribution

system and, in turn, the premise plumbing, were not changed as a result in the change in water supply source and, as such, there would be no impacts from this perspective.

- The change in water supply source did not create, but rather appears to have exposed existing weaknesses in premise plumbing systems.
- The situation experienced in West Saint John is rather unique and it would not normally have been expected beforehand given the state of industry knowledge and understanding of matters.
- The decision taken by the City to convert to a groundwater supply was sensible in the circumstances and motivated by concerns for public health and fiscal responsibility.
- The approaches taken for water quality, including corrosion assessment, for each of the East Saint John and West Saint John systems was also sensible in the circumstances. More specifically, the more corrosive surface water source supplying the East Saint John system appeared to present an obvious threat while the groundwater source supplying the West Saint John system did not based on industry knowledge and practices.
- In retrospect, the City's initial communications could have more specifically discussed the implications of using hard water and its impact on washing and scale build-up on appliances. Nevertheless, given the measured and reported ground water characteristics, there initially would have been no obvious reason to consider corrosion impacts in any such communications. The City's response to customer feedback provides the necessary information and I do not expect that there would have been any material differences in impacts associated with premise plumbing issues had this information been communicated earlier in the process.
- Overall, I find that the approach taken by the City in respect of its conversion to a groundwater supply was generally in line with typical industry practices, and it exercised the level of care, diligence and skill that a reasonably prudent municipality would be expected to exercise in a similar situation.

[113] Dr. Karney prepared a second expert report on behalf of the City dated August 27<sup>th</sup>, 2019. In this second report, Dr. Karney confirms his earlier findings that what transpired in West Saint John was unprecedented in the sense that a similar occurrence had never been identified in the published literature. On this point, Dr. Karney states as follows:

As noted in the 21 January 2019 report, a review of available literature was conducted in relation to identifying experiences in other jurisdictions which similarly converted from a surface water source to a groundwater source, with no cases of such having been discovered. Further research conducted following the issuance of that report has reinforced this finding, and this is consistent with, and independent of, the findings of the Post-Changeover Investigation. Stated starkly, based on my quite extensive review of the published literature, the West Saint John experience with a rash of leaks associated with a transition to a less corrosive water source in historically unprecedented.

[114] Dr. Karney goes on to comment upon other water changeovers in Atlantic Canada where surface water was changed to groundwater without the implementation of corrosion control measures. Dr. Karney notes as follows:

The Post-Changeover Investigation identifies three relevant cases in Atlantic Canada where conversions from surface water to groundwater sources occurred, none of which experienced “report of major copper pipe leaks within premise plumbing systems as experienced in West Saint John.” It is noted, moreover, that none of these other conversions in Atlantic Canada made use of corrosion control inhibitors. This relevant local experience would have been instructive in Saint John’s water conversion from Spruce Lake to the South Bay Wellfield. Thus, in my opinion the City acted reasonably in being consistent with its peers who converted from surface water to groundwater in not implementing corrosion control measures at the time of conversion, and had no objective basis for anticipating the leakage-related impact of this change in water source on the existing premise plumbing during the transition. This impact upon the existing scale in private infrastructure came to light only in retrospect and only following considerable study and investigation. Conventional wisdom suggests that the changes in pH and alkalinity which occurred in West Saint John in the conversion from surface to groundwater would reduce susceptibility to corrosion. Indeed, such a conclusion is clearly indicated in Figure 3-1 of the Corrosion Control Investigation.

[115] In concluding his second report, Dr. Karney explained that the City, in his expert report opinion, did not breach its standard of care for the following additional reasons:

To summarize, it is my professional opinion that the City met its standard of care based on the following:

- That the groundwater source was less corrosive to pipe materials than the previous surface water source is not under debate and, accordingly, corrosion protection such as orthophosphates would



not normally be required and which is consistent with other similar water source conversions in Atlantic Canada.

- That the change in water supply source did not create, but rather appears to have exposed existing weaknesses in a small percentage of the premise plumbing systems through the dissolution of previously deposited scale. Further, such dissolution was found to not be in accordance with industry-standard cuprosolvency models and, as such, could not be reasonably predicted beforehand, emphasizing the important distinction to be made between well-established corrosion control practices for pipe materials, and the lack of such in relation to scale decomposition leading to leakage for which there no references or experiences have been identified.
- That there is no readily apparent industry literature dealing with issues associated with the conversion of surface water supplies to groundwater supplies, nor have any recent and geographically relevant cases where this has occurred resulted in premise plumbing leakage or the application of corrosion inhibitors such as orthophosphate. Further, following a review of the City's peers, there are no examples in Atlantic Canada, and only a single example in all of Canada (among hundreds of systems), where groundwater systems employ an orthophosphate blend for corrosion control.

Accordingly, it is my opinion that the approach and actions taken by the City in respect of its conversion to a groundwater supply was in line with typical practices, and it exercised the level of care, diligence and skill that a reasonably prudent municipality would be expected to exercise in a similar situation, thereby meeting the standard of care expected of it.

[116] The Court has quoted extensively from the expert reports of Mr. Maltese and Dr. Karney as their evidence is essential to a determination as to whether or not the standard of care was breached in this case. The City accepts, as does the Court, the articulation of the standard of care suggested by the Class Members. The standard of care bares repeating. The City was required to do the following:

- (a) ensure that it collected relevant information to determine how to properly manage the change in water source for West Saint John and to take care to make reasonable and appropriate decisions based on that information, including by the City's advisors and consultants; and
- (b) consider the impact of a change in water source on property owners in West Saint John.

- [117] I am satisfied based on the evidence before this Court that the City did engage the necessary experts and collected all relevant information in order to properly manage the change in water source for West Saint John. The Class Members' expert, Mr. Maltese, sets out in his report how the City fell short in meeting the standard of care. However, all of the measures Mr. Maltese suggests should have been taken were not recommended to the City by CBCL, the City's project engineers. Further, Mr. Chaulk of CBCL has explained why the measures suggested by Mr. Maltese were not taken in these circumstances.
- [118] The opinions of Dr. Karney are unequivocal in this case. Dr. Karney undertook an exhaustive review of available industry literature and could not identify any situations where what transpired in West Saint John had occurred. To the contrary, available industry information indicated that corrosion control measures were not necessary or typically adopted when transitioning from surface water with characteristics similar to Spruce Lake to groundwater with characteristics similar to South Bay Wellfield.
- [119] There is no doubt that prior to September 2017, the City had been informed as a result of the many reports of experts engaged in the **SCDWP** that corrosion control was an important consideration when transitioning a water distribution system. It is for that reason that the Court accepts potential harm to the Class Members was "reasonable foreseeable". However, the City cannot be found to be negligent if they have engaged the necessary experts and followed the informed advice of these experts throughout the process.
- [120] It is trite law that the standard of care is not one of perfection. In this particular matter, I cannot conclude that the City breached its standard of care. I accept the expert opinion of Dr. Karney that the City did not breach the standard of care in these circumstances. Further, I accept the position of the City that the mitigation measures suggested by Mr. Maltese in his report of August 2019 were not appropriate in September 2017 for the reasons explained by Mr. Chaulk in his affidavit of October 30<sup>th</sup>, 2019. Again, it is important to look at the information

available to the City in September 2017 when assessing if their actions breached the standard of care.

[121] In all of the circumstances, I am persuaded that the best information available to the City in September 2017 was that the only treatment necessary for the water coming from South Bay Wellfield was chlorination. I further accept that, while the City was alive to the issue of corrosion control when any water transition is taking place, the advice provided which was gleaned from industry practice and experience was that no corrosion control measures were necessary. The City did not breach the standard of care owed to the Class Members by failing to implement corrosion control measures at the time of the transition of the water in West Saint John from Spruce Lake to South Bay Wellfield.

### **CAUSATION**

[122] Although I have determined that the City did not breach the standard of care and the action in negligence must therefore be dismissed, I will nonetheless deal briefly with the issue of causation. As all in negligence cases, the burden remains on the plaintiff to establish on a balance of probabilities all components of negligence, including causation. The Supreme Court of Canada confirmed this principle in *Clements v. Clements*, 2012 SCC 31 at paragraphs 8 and 11 as follows:

[8] The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant’s negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[...]

[11] Where “but for” causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant’s negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some

evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).

- [123] Despite the voluminous nature of the materials before the Court, there remains no definitive opinion on the exact cause of the leaks experienced in the premise's plumbing of the Class Members. Likely the most instructive, albeit succinct, comment on the cause of the leaks is as set out in the CBCL report of February 2019 where they note as follows:

"It is likely that the reported copper pipe leaks were the result of the existing corrosion undergoing transitioned effects as the water quality changed within the system."

- [124] Curiously, the Class Members have provided no expert evidence setting out the exact mechanism identified in the affected pipes experiencing the leaks. While Ms. Brownell describes being informed by her plumber that there were leaks in the pipes there is no suggestion that Mrs. Brownell's pipes, nor any other Class Members pipes, were examined to identify the corrosive process causing the leak.

- [125] The Class Members rely on Mr. Maltese's opinion that "*if appropriate corrosion control was put in place, existing scale would not have been disrupted before a new scale formed thereby preventing leaks.*" The Class Members further rely on the theories suggested by CBCL in support of their assertion that the leaks were caused by the water transition in the absence of corrosion control measures.

- [126] The Class members refer the Court to the "material contribution" test in the consideration of causation as set out in *Athey v. Leonati*, [1996] 2 S.C.R. 458 at paragraphs 12, 19 and 20 as follows:

12 The respondents' position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the

injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability.

[...]

19 The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: *Fleming*, supra, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, 1971 CanLII 959 (MB CA), [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff'd 1973 CanLII 1313 (SCC), [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2nd ed. 1996), at p. 748.

20 This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[127] There are difficulties with the causation analysis in this matter regardless of whether the issue is approached through the lens of the “but for” test or the “material contribution” test. While the theory of CBCL certainly appears reasonable, there remains no firm conclusions as to the mechanism of the leaks in this case. Neither Ms. Brownell, Ms. Steadman, nor any other Class Members appears to have had their impacted plumbing examined to determine the precise cause of their failures. Further, there is no evidence in this matter that confirms the measures proposed by Mr. Maltese would not have had other nefarious impacts on premises' plumbing. One of the features of corrosion control measures is the need to be mindful that in implementing measures to address one potential problem, you don't create other problems. The Court is unable to point to any expert evidence that would confirm that the implementation of Mr. Maltese's recommendations would have prevented the leaks. While the City did introduce orthophosphates in 2018 after the leaks had been reported, the incidences of leaks were already declining when the treatment of orthophosphates began. It remains uncertain if the introduction of

orthophosphates precipitated the end of the leaks or that this would have happened in any event.

[128] In all of the circumstances, while I would be prepared to accept that on a balance of probabilities, the mechanism of the leaks was as suggested by CBCL in February 2019, I am unable to conclude that “but for” the City’s failure to implement corrosion control measures in West Saint John, the leaks would not have occurred. Further, well arguably a less arduous task, I struggle to see how the Class Members could establish that the City “materially contributed” to the leaks in failing to adopt corrosion control measures in the absence of determinative evidence that, if there had been in place corrosion control measures, the leaks would not have occurred. In my view causation remains at best a live issue based on the evidence currently before this Court.

### **COSTS**

[129] There is no question but that all parties before the Court in this matter have put an enormous amount of effort into the preparation of both written and oral submissions. The parties’ agreement to proceed by way of summary judgment has saved the time and costs that would have been required to hear a trial on the merits. That said, the City has been successful and is entitled to costs. Pursuant to section 39(1) of the *Class Proceedings Act*, RSNB 2011, C 125, costs in this proceeding are to be awarded in accordance with the Rules of Court and are therefore discretionary. In all of the circumstances, I award the City costs on the summary judgment motions of **\$25,000.00** plus taxable disbursements.

### **CONCLUSION AND DISPOSITION**

[130] In order to provide clarity in the context of this class action, the common issues as set out in the certification order are answered as follows:

- (a) The City owed the Class Members a private law duty of care in respect of operational decisions relating to the **SCDWP**;

(b) The applicable standard of care owed to the Class Members was as follows:

(i) ensure the City collected relevant information to determine how to properly manage the change in water source for West Saint John and to take care to make reasonable and appropriate decisions based on that information, including by the City's advisers and consultants; and

(ii) consider the impact of a change in water source on property owners in West Saint John.

(c) The City did not breach the Standard of care.

(d) A breach of the standard of care as framed could be capable of causing damages to the class; however, no breach of the standard of care has been proven in this case.

[131] While the Court accepts the Class Members submission that the City owed them a private law duty of care in this case, the City did not breach the standard of care and therefore, the claims in negligence cannot proceed. The Class Members' Motion for Summary Judgment is denied. The City's Motion for Summary Judgment is granted, and the Class Action is therefore dismissed. Pursuant to section 37(5) of the *Class Proceedings Act*, publication, on Class Counsel's website, and distribution, by Class Counsel to recognized Class Members via email, of this decision shall be sufficient to satisfy the notice requirements to Class Members.

[132] The order of the Court is as follows:

(i) Pursuant to Rule 22.01(1)(a), the Class Members Motion for Summary Judgment is denied;

(ii) Pursuant to Rule 22.01(3)(b), the City's Motion for Summary Judgment is granted;

(iii) Pursuant to Rule 22.04(1)(a) the Court is satisfied that there is no genuine issue requiring a trial, the Class Members' action is dismissed; and

(iv) The City is entitled to costs of \$25,000.00 plus taxable disbursements.

DATED at Saint John, N.B., this 14<sup>th</sup> day of June 2022.



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**Tracey K. DeWare**  
Chief Justice of the Court of Queen's Bench  
of New Brunswick