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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	JUDGMENT DELIVERED:
defendant.	)	APRIL 4, 2018

McKELVEY J.

I. INTRODUCTION

[1] The plaintiffs are seeking, on their own behalf and on behalf of members of classes of persons, an order certifying this action as a class proceeding and appointing them as the representative plaintiffs for the classes and any appropriate subclass, pursuant to ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). The court must determine on this motion for certification whether the criteria as set out in section 4(e) of the ***Act*** are satisfied.

II. BACKGROUND

[2] This motion concerns the flooding of Lake Manitoba in 2011 and its effects on individuals and businesses. The plaintiffs contend that property situated within 30 kilometers of Lake Manitoba was flooded due to the defendant's negligent operation of a designated water control work. Specifically, they allege that the defendant's operation of the Portage Diversion caused excessive water to be diverted from the Assiniboine River into Lake Manitoba. This action increased the water level in Lake Manitoba beyond its natural and/or operating limits resulting in severe flooding and causing damage to real and personal property. The defendant denies liability for the flooding, and consequent damage, based upon the premise that climatic and natural conditions resulted in the unprecedented water levels.

[3] The plaintiffs state the defendant owed a duty of care to the plaintiff classes, and the flooding caused by the defendant's operational decisions and conduct constituted a nuisance against them. As a result of the negligence and nuisance by the defendant, they state the plaintiff classes have suffered significant damages.

[4] It is noteworthy that the consequences of the 2011 flooding have also been the subject of a certification motion in ***Anderson v. Manitoba***, 2014 MBQB 255, [2014] M.J. No. 356 (QL), Dewar J.; 2015 MBCA 123, Steel J.A. (application for leave to appeal decision of certification judge refusing to certify a class action); 2017 MBCA 14, Hamilton, Mainella, Pfuetzner JJ.A. (appeal from dismissal of

motion for order to certify a class action). These decisions served to articulate much of the applicable background information, as well as a careful consideration of the appropriateness of certification in what are related circumstances. The ***Anderson*** matter involved four First Nations, while this motion involves individual land and business owners. Essentially, the present case and ***Anderson*** are parallel in terms of facts and allegations relating to causes of action. A class action was certified in ***Anderson***.

[5] A compensation package was made available by the defendant to those claimants who qualified. It is the plaintiffs' position that such compensation was inadequate, capped, and, in some cases, non-existent.

III. THE CERTIFICATION CRITERIA

[6] Section 4 of the ***Act*** states:

> **Certification of class proceeding**
> **4** The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of two or more persons;
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
> (e) there is a person who is prepared to act as the representative plaintiff who
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

> (iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

[7] Class proceedings should be generously construed to realize the goals of the ***Act***, which include judicial economy, access to justice, and behaviour modification: ***Hollick v. Toronto (City)***, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 27. Such proceedings are meant to provide a fair and efficient resolution of common issues. The legislation is to be interpreted liberally to give effect to its purposes and to provide access to those whose claims could not be pursued as being prohibitively uneconomical or inefficient. Fair compensation is enabled for all while avoiding a multiplicity of similar actions. There must be economies of time, effort and expense. Further, if many actions were brought with respect to a single event, it is possible that inconsistent court-based results could transpire.

[8] For an action to be certified as a class proceeding, it is necessary that there be a cause of action that is shared by an identifiable class from which common issues arise: ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 38-42. It is also important to remember that on a motion such as this, the question is not whether the plaintiffs' claims are likely to be successful on the merits. The important factor is whether the claims can appropriately be brought as a class proceeding. In essence, the purpose of a certification motion is to determine how the litigation will transpire. Indeed, the law does not impose an onerous burden on an applicant at the certification stage. There need only be the establishment of a "prima facie case" or "arguable case".

Class proceedings are essentially a screening mechanism aimed at a determination of whether an action should proceed as a class action. In those circumstances where the conditions for certification have been satisfied, the court retains the jurisdiction to decide whether the class action should be permitted. Chief Justice McLachlin indicated, in ***Western Canadian Shopping Centres Inc.*** at paras. 42, 44, it is necessary for the court to strike a balance between efficiency and fairness. Further, the court must take into account the benefits a class action may offer as well as any unfairness it may cause.

[9] It is necessary for the plaintiffs to provide some factual basis upon which the court can be satisfied that there is an identifiable class of two or more persons. Further, it must be proven that the claims of the class members raise common issues and that a class proceeding would be the preferable procedure for the resolution of those common issues. As indicated, the evidentiary threshold for certification is not onerous, nor is it necessary to show that the action will probably or possibly succeed. In ***Hollick***, the Supreme Court of Canada established "some basis in fact" as the evidentiary threshold given that, at this juncture, the court is dealing with procedural and not substantive issues. However, it is necessary to remember that the court maintains a gatekeeper function and must consider the evidence adduced from both the party propounding certification and the party opposing, in light of the statutory criteria: ***Walls v. Bayer Inc.***, 2005 MBQB 3, 189 Man. R. (2d) 262 at paras. 19-22, aff'd 2005 MBCA 93, 195 Man. R. (2d) 293,

leave to appeal to S.C.C. refused, (2005), 212 Man. R. (2d) 318, [2005] S.C.C.A. No. 409 (QL).

A. Do the pleadings disclose a cause of action?

[10] I am satisfied that the amended statement of claim filed by the plaintiffs discloses a cause of action against the defendant. The plaintiffs are seeking general non-pecuniary damages; damages for: out-of-pocket expenses, evacuation and relocation expenses, loss of business and other income, temporary or permanent damage to farm/ranch lands and loss of business associated therewith including loss of crops, cost of repairs and/or replacement of personal property, cost of remediation of real property, diminution in value and/or loss of real property; punitive damages; and, pure economic loss. The plaintiffs are seeking many of the articulated damages pursuant to the torts of nuisance and negligence.

[11] In ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, 236 Man. R. (2d) 107, the Court of Appeal described the requirements of section 4(a) of the ***Act*** as follows:

> [42] All allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proved. The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting. Evidence is not admissible on the question of whether there is a cause of action aside from the pleadings themselves. . . . While that is a low standard, there must be some air of reality to the cause of action. It cannot be entirely speculative.

[12] The material facts, as pleaded in the amended statement of claim, are to be accepted as true unless patently ridiculous or incapable of proof. The pleading is to be read generously with no reference to the evidence. The plaintiffs who bring the certification action must have a cause of action against the defendant and can assert a cause against the defendant on behalf of other class members provided that all share a common issue of law or of fact.

[13] It must be determined that the plaintiffs have a claim in negligence. To do so, it must be established that there exists a duty of care owed by the defendant; a breach of the standard of care in connection with that duty; and damage resulting, which is consequential to the breach of the duty. In this matter, the plaintiffs allege that the defendant owed a duty of care to protect them from flooding; to properly design, construct, inspect, repair, maintain, operate and supervise the water control works which it owned, operated and controlled; and, to have in place adequate and appropriate flood control measures to prevent or otherwise minimize flooding. Other allegations of negligence and contentions of breaches are set out in paragraphs 22 to 24 of the amended statement of claim. The plaintiffs allege they have suffered significant damages, which are set out in paragraphs 27 to 31 of the amended statement of claim. In those circumstances, where it is assumed that the facts contained in the amended statement of claim are true, I am satisfied that the plaintiffs have met the section 4(a) criterion that requires that the amended statement of claim disclose a cause of action against the defendant pursuant to the tort of negligence.

[14] It is noteworthy that the determination made by Dewar J. in ***Anderson*** at para. 75, was that a cause of action existed with respect to negligence. Assuming the facts alleged in the amended statement of claim are true, I am satisfied that there is a prima facie case based on the duty of care, foreseeability and proximity.

[15] I am in agreement with the comments of Dewar J. in ***Anderson*** with respect to the negligence issue and whether a cause of action was demonstrated. He stated as follows:

> [73] . . . The assessment as to whether the conduct of Manitoba involves policy decisions or implementation decisions is better left to be made on an evidentiary record, or perhaps on a summary judgment motion when the lack of an evidentiary record could be a factor. There is enough pleaded in the Consolidated Statement of Claim to satisfy the plain and obvious test.

[16] As indicated, I am satisfied that a prima facie case exists either statutorily (***The Water Resources Administration Act***, C.C.S.M. c. W70 ("***WRAA***")) or by virtue of the interactions between the plaintiffs and the defendant. These are matters that require evidence and cannot be the subject of a determination at this point.

[17] The plaintiffs also contend that the plaintiff classes have suffered pure economic loss as a result of the 2011 flooding: the property class who suffered damages, including loss of income, and the business class who was restricted from or otherwise unable to carry on business, including, but not limited to, farming or ranching. It is noteworthy that the plaintiff classes were not compensated through the defendant's compensation program (paragraph 33 of the amended statement

of claim). This matter was dealt with during the course of the cross-examination of Michael Lesiuk, Acting Assistant Deputy Minister of the Department of Agriculture, Food and Rural Initiatives of the Government of Manitoba, in 2013. Mr. Lesiuk acknowledged that there was no compensation for those whose properties were not damaged but whose businesses were affected by the flooding due to loss of demand/economic activities in the flooded areas (transcript of cross-examination held November 5, 2013, p. 36, line 5 to p. 37, line 19).

[18] I am satisfied that this matter may go forward either under this heading or as treated by Dewar J. in ***Anderson*** as one of the common issues.

[19] With respect to the cause of action in nuisance, the leading case is that of ***Antrim Truck Centre Ltd. v. Ontario (Transportation)***, 2013 SCC 13, [2013] 1 S.C.R. 594. The Supreme Court of Canada set out the law of nuisance, particularly in the context of where governmental actions are involved under the rubric of the public benefit. The elements for the establishment of a claim in nuisance are: (1) the conduct or acts complained of substantially interfered with the use of property and enjoyment of property, and (2) the interference was unreasonable in light of all the surrounding circumstances (paragraphs 25 to 26 of the amended statement of claim). The plaintiffs allege that the defendant's actions in terms of the Portage Diversion operation resulted in both a substantial and unreasonable interference with the use and enjoyment of their properties.

[20] Based upon the assumption that the facts as contained in the amended statement of claim are true, the plaintiffs have satisfied the section 4(a) criterion of the ***Act*** requiring that the statement of claim disclose a cause of action in nuisance against the defendant. In ***Kirk v. Executive Flight Centre Fuel Services***, 2017 BCSC 726, [2017] B.C.J. No. 836 (QL) at para. 135, the court held that "general causation questions are common to all class members and can be determined independently of the evidence of individual class members".

B. Is there an identifiable class of two or more persons?

[21] The plaintiff class definitions are set out in paragraph 10 of the amended statement of claim as follows:

> 10. The Plaintiffs propose that the Plaintiff Classes be defined as follows:
>
> i) The "**Property Class**" includes all individuals, corporations, partnerships or other legal entities that own real property and/or have an interest in real property situated within 30 kilometers of Lake Manitoba (the "Class Area"):
>
> a) whose property, real or personal, was flooded in 2011 by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding emanating from any of the above; and
>
> b) who suffered damages, including loss of income, as a result of the said flooding in 2011,
>
> including the estates of any persons who have died since March 1, 2011 who meet the preceding criteria;
>
> ii) The "**Business Class**" includes all individuals, corporations, partnerships or other legal entities situate, and carrying on business, within 30 kilometers of Lake Manitoba:
>
> a) whose business or farming property, real or personal, was flooded in 2011 by Lake Manitoba, its

> tributaries or distributaries, or surrounding bodies of water affected by overland flooding emanating from any of the above; or
>
> b) who were restricted from or otherwise unable to carry on business, including but not limited to, farming or ranching, as a result of said flooding in 2011.

[22] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and, (3) it describes who is entitled to notice. The scope of the class definition influences the commonality of proposed common issues, the manageability of procedures and whether a class action is preferable, which affects the ability of the plaintiffs to represent the class members without conflict and the appropriateness of the litigation plan. The class definition must state objective criteria by which members of the class can be identified. The individuals or businesses potentially involved must be capable of knowing whether they are members of the class. There must be some basis in fact that two or more persons will be able to determine that they are members of the class.

[23] The class definition must be connected to the common issues raised by the causes of action as asserted, without a determination of the merits of the claims. The plaintiff may define the class by using geographical boundaries despite the fact that such an approach will always embrace an element of arbitrariness. However, it is clear that as a matter proceeds forward, the boundaries may be amended as appropriate if evidence becomes available that necessitates such a

course of action. The class must not be unnecessarily broad or overly inclusive. Instead, there must be a rational relationship between the class, the causes of action, and the common issues. In saying that, however, a proposed class will not be considered overly broad because it may include persons or businesses that ultimately will not be found to have a claim against a defendant. In the circumstances of a case such as this, certification may be allowed on condition that the definition of the class be amended: ***Hollick*** at para. 21.

[24] Section 7(d) of the ***Act*** states the court must not refuse to certify a proceeding as a class proceeding by reason of the number of class members or the identity of each class member is not ascertained or may not be ascertainable. Chief Justice McLachlin in ***Hollick*** stated:

> [21] The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended . . .. [Emphasis in original.]

[25] In this case, the property class includes all individuals, corporations, partnerships or other legal entities that own real property and/or have an interest in real property situated within 30 kilometers of Lake Manitoba, whose property, real or personal, was flooded by Lake Manitoba, its tributaries or distributaries, or surrounding bodies of water affected by overland flooding. This could cover a very

significant area and, arguably, could result in some uncertainty as to who is a member of the class.

[26] The class has been defined by reference to objective criteria being whether the individual, corporation, partnership or other legal entity owned real property and/or had an interest in real property situated within 30 kilometers of Lake Manitoba at the material time. It is clear that potential members of the class can be determined without reference to the merits of the action and that the class is bound by geographical limits. That being said, is a 30-kilometer radius of Lake Manitoba a viable boundary along with the possibility of inclusion of tributaries, distributaries, or surrounding bodies of water affected by overland flooding? As previously indicated, these are low threshold determinations and ones that can, and perhaps should be amended as further information and evidence becomes available. It is important to remember that a class definition is flexible, and an entity or individual will not be paid if no viable claim exists.

[27] The alleged damages to the putative representative plaintiffs are set out in paragraphs 28 to 31 of the amended statement of claim as follows:

1. Fred Pisclevich and his family had been residents of the community of Twin Lakes Beach for 45 years. As a result of the 2011 flooding, their family home was completely destroyed and had to be demolished. They were displaced and required to live in rented accommodations in Winnipeg. They will not be able to return to their

community. They have suffered significant financial damages and severe emotional distress, trauma and harm, including loss of community.

2. John Howden had been a seasonal resident of the community of Twin Lakes Beach for his entire life and had owned his residence for 20 years prior to the flooding. The family cottage was destroyed by the flooding and he will not be able to return to his property. He claims he has incurred substantial financial losses, and has suffered severe emotional distress, trauma and harm, including loss of community.

3. Stephen and Shaun Moran and their family have farmed properties in the area for approximately one hundred years through their farming corporations, one of which is 5904511 Manitoba Ltd. Those properties suffered loss of crops and long-term losses stemming from soil damage and saturation. Stephen and Shaun Moran and their family have suffered severe emotional distress, trauma and harm, including loss of community.

4. Alex and Keith McDermid owned and operated Sunshine Resort Ltd. at Twin Lakes Beach for 42 years. Sunshine Resort Ltd., which carried on business as a campground and boat launch, was destroyed because of the flooding. The flooding caused the entire

campground site to be eradicated. The area is now devoid of vegetation and stripped of electrical and sewer connections. Alex and Keith McDermid and family members lost personal residences and cottage properties. They have suffered severe emotional distress, trauma and harm, including loss of community.

[28] The plaintiffs allege that while all class members are not yet known, their identification may not be difficult. This identification may be accomplished by virtue of the knowledge achieved through the claims process undertaken by the Lake Manitoba Financial Assistance Program ("LMFAP"). There were 6,535 applications for compensation filed with payments made to 4,067 of those applicants. The average payment was $16,652. (See affidavit of Michael Lesiuk affirmed September 23, 2013, Exhibit "H".)

[29] I have some concerns as to the parameters of the class. I am prepared to acknowledge the appropriateness of a possible amendment to the geographical boundaries, which may be too broad. Further, the definitions of the property class and business class may require a stipulation that an individual, corporation, partnership or other legal entity can only claim in one capacity.

C. Do the claims of the class members raise a common issue?

[30] The case law stipulates for an issue to be a common one, it must be a substantial ingredient of each of the class members' claims and its resolution must be necessary to the resolution of each class member's claim: ***Hollick*** at para. 18.

Effectively, success for one member must mean success for all. That being said, all members of the class will not necessarily benefit to the same extent. As was said in ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1, [2014] 1 S.C.R. 3:

> [45] . . . A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

In essence, there may be different results for different class members.

[31] The common issue should not be framed in overly broad terms. There must be commonality in the actual wrong that is alleged against the defendant and some evidence in support: ***Frohlinger v. Nortel Networks Corp.*** (2007), 40 C.P.C. (6th) 62 at para. 25 (Ont. Sup. Ct. J.).

[32] A common issue need not be dispositive of the litigation. It is enough if an issue of fact or law common to all claims and its resolution will advance the litigation for the class members. As was said in ***Western Canadian Shopping Centres Inc.*** at para. 39, the underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis.

[33] Common issues can include whether a defendant had a duty of care, and whether the defendant breached the standard of care in connection with that duty. Further, common issues may include whether the conduct of the defendant substantially interfered with the use and enjoyment of property and whether such

interference was unreasonable. Claims in both negligence and nuisance may constitute common issues.

[34] The term "common issues" is defined in the ***Act*** as follows:

> **"common issues"** means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[35] This matter was well outlined in ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, [2013] 3 S.C.R. 477:

> [108] In ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> > (1) The commonality question should be approached purposively.
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
> > (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
> > (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[36] The plaintiffs initially outlined a number of common issues in the litigation plan filed August 15, 2013. They will be filing an amended litigation plan in short

order. Their new proposed common issues are now virtually identical to those in ***Anderson*** with the exception of issues unique to Indigenous peoples. They are as follows:

NUISANCE

- "Did the Defendant, Government of Manitoba, by its actions cause flooding to occur on off-reserve areas surrounding Lake Manitoba?"

NEGLIGENCE

- "Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?"

- "Did the Defendant, Government of Manitoba, owe a duty of care to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?"

- "Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, construction, management and operation of the water control structures at the Shellmouth Dam, Portage Diversion and Fairford Dam between September 1, 2010 and December 31, 2011?"

- "Did the Defendant, Government of Manitoba, breach the duty of care owed to the Plaintiffs in the design, selection and implementation of flood control measures taken in 2011?"

PUNITIVE DAMAGES

- "Did the Defendant 'artificially flood' the area surrounding Lake Manitoba within the meaning of *The Water Resources Administration Act*, C.C.S.M. c. W70 (Manitoba)?"

- "Does the conduct of the Defendant merit an award of punitive damages?"

[37] It is apparent that many of the common issues raised in ***Anderson*** with respect to the nuisance and negligence claims are identical or very close with respect to those outlined in the plaintiffs' action in this matter. The plaintiffs propose some revisions such as the inclusion of design and construction of the water control works as is pleaded in the amended statement of claim as regards the negligence claim, as well as the duty of care owed by the defendant. I am satisfied that those alterations to the common issues are appropriate and constitute viable causes of action.

[38] It is important to remember that with actionable torts such as negligence and nuisance, the necessity of determining individual damages for each class member does not preclude the court from determining whether a duty of care is owed, whether breaches of that duty occurred, and whether there is a causal connection to flooding allegedly caused by the defendant and interference with the plaintiffs' exercise of their rights of use and occupation of their properties and/or businesses. This is well set out in section 7(a) of the ***Act***:

> **Certain matters not bar to certification**
> **7** The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> . . .
>
> (c) different remedies are sought for different class members;

[39] As previously indicated, the common issues raised are virtually identical to those certified in the ***Anderson*** proceeding. While the common issues as outlined in ***Anderson*** related to the flooding of reserve lands and not to individual/business properties as occurred in this instance, I am satisfied that such a distinction does not serve to differentiate the common issues as raised in the two cases. I am not satisfied as to whether the question, "Does the conduct of the Defendant merit an award of punitive damages?", should be permitted to go forward.

[40] It is difficult to award punitive damages until such time as individual/business assessments of compensatory losses have been completed. Further, there must be a consideration as to whether the defendant's conduct was sufficiently reprehensible so as to warrant such punishment and whether that matter constitutes a common issue. There must be an evidentiary basis to suggest that an award of punitive damages is likely in order to make it a common issue. As was stated by Dewar J. in ***Anderson***:

> [136] . . . I am not prepared to say that punitive damages will be a common issue *in this case*. The evidence indicates that whether or not Manitoba caused the flooding, the spring of 2011 was an unusual year. If any flooding caused by Manitoba was the result of a conscious decision to divert water into Lake Manitoba in order to prevent flooding downstream and protect a larger population of people, that is hardly the kind of decision which would attract punitive damages. That is the kind of decision which governments are sometimes forced by circumstances to make. No doubt such a decision could well cause suffering by people north and east of the Portage Diversion, but that does not make it a decision which attracts punitive, *as distinct from compensatory*, damages. Alternatively, if the governments have misestimated the situation in an abnormal flood year, significant leeway would be given for such an error so as to make the notion of punitive damages unrealistic. There is nothing in the evidence before me which supports the notion that I should consider that an award

> of punitive damages in this case is likely enough to make it a common issue. [Emphasis in original.]

[41] This position expressed by Dewar J. was accepted by the Manitoba Court of Appeal in ***Anderson*** at para. 20.

[42] The plaintiffs rely upon the provisions of the ***WRAA*** as regards the concept of artificial flooding which is contended triggers a statutory compensation process that would have been fair to those affected by the flooding. It is true that there is a compensatory scheme contemplated by section 12.7(1) of the ***WRAA***; however, that compensatory scheme relates only to flooding caused by the operation of the Shellmouth Dam. The flooding of Lake Manitoba could well be "artificial flooding" as defined in the ***WRAA***; however, to be compensable under the ***WRAA***, the flooding must have been caused solely by the operation of that particular water control work. Such a finding is not pled in the amended statement of claim as the allegations primarily relate to the operation of the Portage Diversion. Consequently, the compensatory scheme for artificial flooding under the ***WRAA*** is restricted to Assiniboine River flooding caused by the operation of the Shellmouth Dam.

[43] The allegations in the amended statement of claim with respect to punitive damages are set out in paragraph 36 and relate to what is alleged to be inadequate compensation for damages (paragraphs 32 to 35). There is no indication that the alleged flooding related to the operation of the Shellmouth Dam or that its operation caused and/or effected the flooding. Instead, it is directed towards the

inadequacy of compensation. In these circumstances, the defendant established the LMFAP in order to provide a compensatory scheme, without an admission of liability, to persons and businesses affected by the flooding. As previously indicated, at the present time, over 4,000 payments have been made totalling approximately $100,000,000. The adequacy of the payments is individualistic in nature and could be overly broad in this case.

[44] I am not prepared to permit punitive damages be claimed as a common issue.

D. Would a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues?

[45] It is necessary for a class proceeding to be the preferable process for the resolution of the plaintiffs' claims. It must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims, such as would be the case with individual actions. As was indicated in ***Hollick*** at paras. 28-31, the two core elements of the preferable procedure inquiry include (1) whether the class action would be a fair, efficient and manageable method of advancing the claim; and (2) whether a class action would be preferable to other reasonably available means of resolving the class members' claims. These elements include the policy objectives of access to justice, judicial economy, and the modification of the behaviour of the wrongdoers. It is necessary to look at possible alternatives and adopt a practical cost-benefit approach to this procedural issue.

[46] The decision in ***Western Canadian Shopping Centres Inc.*** sets out the three issues with respect to this area as follows:

> [27] Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times) . . ..
>
> [28] Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied . . ..
>
> [29] Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation . . ..

[47] In ***Soldier***, it was stated:

> [69] In the absence of legislative guidance, this analysis must keep in mind the three principal advantages of class actions, namely, judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.

1. Judicial Economy

[48] Would resolution of the common issues significantly advance the action and claims of the class members? Again, as previously indicated, the issue of having to prove individual damage claims after the resolution of common issues is not a

consideration at this point in the certification determination (section 7(a) of the ***Act***). It is necessary to review common issues as opposed to individual issues with the substantial distinction for many of these relating to the compensatory damage claim for each. As Steel J.A. stated in the leave application on the ***Anderson*** matter, the real issue is the cause of the flooding. The determination of that issue requires that a significant amount of expert evidence be adduced in order to determine the cause, with a consideration to natural/climatic factors as opposed to just the described allegations of the defendant's negligent operation or determinations with respect to flood control measures. Additionally, issues relating to policy decisions would also be considered. Clearly, every class member need not be affected in an identical way; however, the clear and important area for consideration is whether resolution of such common issues would significantly advance the action.

[49] There are common issues in both nuisance and negligence that may well be proceeded with. The fact that the flooding may have affected landowners or businesses in different ways will require separate inquiries in terms of damages; however, that does not outweigh the advantage of proceeding with a class action. Nor does the fact that a compensatory scheme is available. There have been submissions with respect to the adequacy and inclusiveness of that program. There will be significant judicial economy in proceeding as a class action particularly with respect to the accumulation of expert evidence and determinations as regards the cause or causes of the flooding in and around Lake

Manitoba and with respect to operational issues. Further, conclusions involving duty of care, possible breaches of that duty, substantial interference with the enjoyment of property, and other common issues would enhance judicial economy for the class.

2. Access to Justice

[50] As was indicated in ***AIC Limited v. Fischer***, 2013 SCC 69, [2013] 3 S.C.R. 949, Cromwell J., speaking for the court, stated:

> [27] . . . The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature.

[51] It is the submission of the defendant that the claims being sought by the plaintiffs are substantial, with some in the hundreds of thousands of dollars. Many claims have been accommodated under the LMFAP with an average settlement of under $17,000. It is true that the LMFAP does not require that causation be proved to facilitate compensation; however, it was argued by the plaintiffs that the program was inadequate, did not recognize pure economic loss, was capped, and had a deadline. The plaintiffs indicated that while the defendant recognized 4,067 payments pursuant to the application process, there were in excess of 6,500 applications. It is possible that those individuals/businesses who were not compensated could arguably have claims submitted to the court process as the alternative procedure of LMFAP compensation.

[52] This type of litigation is difficult to fund on an individual basis as it is expensive and time-consuming. The existence of a compensation plan was a considered factor in ***Blair v. Toronto Community Housing Corp.***, 2011 ONSC 4395, [2011] O.J. No. 3347 (QL). The court held that the compensatory scheme proffered in that case was insufficient to satisfy the access to justice analysis: see paras. 63-68. Therefore, the existence of a compensatory scheme is not necessarily a preferable methodology of resolving common issues in a class action.

[53] The defendant has also submitted that the plaintiffs are of sufficient means to pursue their own claims. There has been no evidence presented to support that contention. The cross-examinations and affidavits of Alex McDermid and Keith McDermid, as well as certain of the plaintiffs, well set out aspects of the losses suffered by them. The issue remains causation. Further, there may well be class members who do not have the same level of financial security as that alleged to exist with respect to the plaintiffs who are prepared to act as representatives.

[54] There is no preferable or alternative procedure on a go-forward basis other than the compensatory scheme which, at this juncture, has expired. Further, the LMFAP did not compensate all of the types of damages alleged to have been suffered by the plaintiffs and others, particularly as regards pure economic loss. That compensation package has been terminated, was capped and reflected strict parameters as to the losses available for compensation. Those parameters included no compensation for those not subject to actual flooding. This is similar to what transpired in ***Cloud v. Canada (A.G.)*** (2004), 73 O.R. (3d) 401 (C.A.).

Further, the court determined, in ***Fischer v. IG Investment Management Ltd.***, 2012 ONCA 47, 109 O.R. (3d) 498 at paras. 76-79, and specifically at paras. 78-79:

> [78] . . . An evaluation of the adequacy of a prior settlement as a basis for reaching a decision on preferability would require a determination that is tantamount to making a finding on the merits of the dispute. An evaluation of this sort would be a marked departure from the stipulation in ***Hollick*** that there need only be "some basis in fact" to ground the conclusion that a class proceeding is the preferable procedure. Indeed, as McLachlin C.J.C. stated in ***Hollick***, at para 16: "the certification stage is decidedly not meant to be a test of the merits of the action".
>
> [79] In my view, as stated above, the preferable procedure inquiry must instead focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding. The court must assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members. The *CPA* mandates that this must be a procedural discussion. Hence the wording of s. 5(1)(*d*), which provides "a class proceeding would be the preferable procedure for the resolution of the common issues".

[55] In these circumstances, access to justice would be served through the vehicle of certification.

3. <u>Behaviour Modification</u>

[56] In ***Western Canadian Shopping Centres Inc.***, McLachlin C.J. described behaviour modification as follows:

> [29] Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation . . ..

[57] This area must consider, in part, whether the defendant should be found accountable for the cause of the 2011 flooding of Lake Manitoba. As previously indicated, the cost of pursuing a single claim against the defendant is prohibitive given the necessary costs, particularly involving expert evidence.

[58] I am satisfied that a determination of the common issues will significantly advance the litigation. There are significant monies involved in pursuing such litigation, as well as the complexity of same. It is unlikely that a substantive number of the members of the proposed class have the means to pursue individual actions.

E. Are the plaintiffs suitable persons to act as representative plaintiffs?

[59] Section 4(e) of the ***Act*** requires that the representative plaintiffs be individuals who would fairly and adequately represent the interests of the class, have produced a plan for the class proceeding that is workable, and do not have, on the common issues, an interest that conflicts with the interests of other class members. There are eight proposed representative plaintiffs, with two representing the property class, and the balance representing the business class. It is noted that Fred Pisclevich will be removed as a representative plaintiff because of health reasons with either a family member or another individual to serve as a substitute. Further, Alex McDermid has passed away since the commencement of this litigation. All of the continuing plaintiffs are long-term homeowners, are cottage owners, have agricultural interests, or operate a tourist-sensitive business.

[60] The decision in ***Western Canadian Shopping Centres Inc.*** sets out the factors to be considered in evaluating whether the plaintiffs are appropriate with respect to the interests of the class:

> [41] Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class . . ..

[61] Case law subsequent to ***Western Canadian Shopping Centres Inc.*** has served to lessen the importance of the ability of the plaintiffs to bear the costs. This is reflected in ***Pearson v. Inco Ltd.*** (2006), 78 O.R. (3d) 641 at paras. 94-96 (C.A.). Further, the issue of costs has been dealt with in the ***Act*** at sections 37(1) and 37(2), which serves to restrict the ability of the court to award costs in class proceedings.

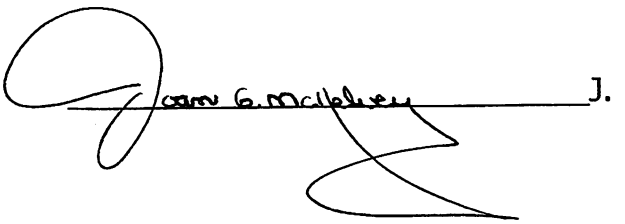
[62] The continuing plaintiffs have all affirmed they are willing to participate in all necessary court procedures, they understand their obligations to assist and instruct counsel, and they recognize their duties of fairness towards members of the class.

[63] I am satisfied that the plaintiffs are prepared to pursue this claim and have interests in common with the proposed class members. There is no indication at this point that the plaintiffs have an interest that conflicts with the interests of

other class members on the common issues. Further, the litigation plan as previously filed will require amendment, as will the substitution of Fred Pisclevich and perhaps Alex McDermid.

IV. CONCLUSION

[64] I am satisfied that the plaintiffs have satisfied the requirements of certification of a class action. A prima facie or arguable case has been established. I am granting the application for certification of the action as a class proceeding.



J.