CITATION: Stadnyk v. The Corporation of the City of Thunder Bay, 2023 ONSC 3920
COURT FILE NO.: CV-20-00651834-00CP
DATE: 20230706

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
PATRICIA JANET STADNYK	*David F. O'Connor, J. Adam Dewar* and *Erik S. Knutsen* for the Plaintiff
Plaintiff	
- and –	*Lawrence G. Theall, Jeffrey Brown*, and *Ibrahim Jamie Arabi* for the Defendant
THE CORPORATION OF THE CITY OF THUNDER BAY	
Defendant	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: June 14, 2023

PERELL, J.

REASONS FOR DECISION

Contents

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] Patricia Janet Stadnyk, who is a resident of the City of Thunder Bay, sues the City for negligence and for private nuisance. The misfeasance of the City is that it added high concentrations of sodium hydroxide to the soft water of the municipal water supply, and this caused pinhole leaks in copper plumbing pipes, which in turn led to the release of water and to damage to property in the homes and buildings throughout the City.

[2] Ms. Stadnyk's cause of action in negligence satisfies all of the certification criteria. Although it seeks some revisions to the class definition, the City does not oppose the certification of the negligence claim. However, for a variety of reasons, the City opposes the certification of Ms. Stadnyk's claim of private nuisance.

[3] Relying on s. 449 of the *Municipal Act, 2001*,[2] the City submits that it is immune from the nuisance claim and therefore that claim is not certifiable. The City moves to have the nuisance claim struck. Further, and in any event, the City also submits that the nuisance claim does not

[1] S.O. 1992, c. 6.
[2] S.O. 2001, c. 25.

satisfy the certification criteria. The City submits that the private nuisance claim does not satisfy the cause of action criterion, the common issues criterion, and the recently amended preferable procedure criterion, which adds a predominance requirement to the test for preferability.

[4] For the reasons that follow, I certify Ms. Stadnyk's negligence action. I do not certify the claim in nuisance. The claim in nuisance is within the coverage of s. 449 of the *Municipal Act, 2001*, and therefore the claim does not satisfy the cause of action criterion for certification. If the nuisance claim did satisfy the cause of action criterion, it would not satisfy the common issues or the preferable procedure criterion. Insofar as the preferable procedure criterion is concerned, the nuisance claim would not have satisfied this criterion under its former more liberal legal test. It is, therefore, not necessary in the immediate case to opine on the new predominance requirement.

[5] Insofar as the class definition is concerned, the proposed class definition is satisfactory without an end date as suggested by the City. The current definition is satisfactory for opt-out purposes. The definition may need to be amended subject to the outcome of the common issues trial.

B. Procedural and Evidentiary Background

[6] Ms. Stadnyk commenced her proposed class action on **November 20, 2020**. In her Statement of Claim, she pleaded causes of action of negligence and breach of contract. She did not plead a claim in private nuisance.

[7] Proposed Class Counsel are Roy O'Connor LLP.

[8] The proposed class definition is as follows:

> All persons (individuals, corporations, partnerships, and other entities) who owned, leased, rented or occupied properties that were serviced by water supplied by the Defendant which had been treated with or contained sodium hydroxide.

[9] The following common issues are not opposed:

> A. As it relates to the introduction and use of sodium hydroxide in the water supply, did the City owe the Class Members any duty (duties) of care (as alleged in the Statement of Claim)?
>
> 1. If the answer to Common Issue A is "yes", what is the relevant standard of care?
>
> 2. Did the City breach the standard of care? If so, how?
>
> 3. If the City breached the standard of care, did that breach or breaches cause or contribute to injury or compensable losses suffered by some or all of the Class members?
>
> B. If the Answer to A (3) is "yes", what types or heads of damages are potentially available to Class Members who suffer losses caused by such breaches, subject to the ordinary rules for proof of damages (including, for example, costs of repairing plumbing, damages to other property, relocation or temporary residency costs, City charges/fees for turning on/off the water supply or related municipal permits for purposes of remediation work)?
>
> B.1 Has the City established that it is immune from liability for a claim in negligence on the basis that all of its conduct was a good faith policy decision (as opposed to operational)?

[10] The following common issues about the nuisance claim are opposed:

C. Did the conduct or omissions of the City in relation to introduction and use of sodium hydroxide amount to a nuisance? More particularly:

i. Did the City's introduction and particular use of sodium hydroxide cause pinholes in the copper pipes of the Class Members, or some of them?

ii. Was the damage to the class or some of them a non-trivial (substantial) interference?

iii. Was the damage to the class or some of them an unreasonable interference?

iv. Does s. 449 of the *Municipal Act* prohibit the claim in nuisance?

v. If the answer to i, ii and iii is "yes" and the answer to iv is "no", what types or heads of damages are available to the Class Members or some of them?

[11] On **February 25, 2022**, Ms. Stadnyk delivered her motion record (461 pages) for certification.

[12] The motion for certification was supported by the following evidentiary record:

a. Affidavit dated February 23, 2022 of **Zoë Coull**. Dr. Coull is a professional engineer with a specialization in corrosion. Her academic background is a B. Eng. from Imperial College in the U.K. (1999), a MSc. from the University of Manchester (2000), and a Ph.D. in Chemical Engineering and Applied Chemistry from the University of Toronto (2010). She worked as a corrosion engineer and consultant throughout her professional career. She founded ICE Dragon Corrosion Inc. in Toronto in 2015.

b. Affidavit dated February 22, 2022 of **Derek Fox**. Mr. Fox is a forty-year-old lawyer and resident of Thunder Bay, where he is a homeowner. He is the Grand Chief of Nishnawbe Aski Nation, which represents forty-nine First Nation communities across Treaty 9 and Treaty 5 areas of Northern Ontario.

c. Affidavit dated February 18, 2022 of **Lawrence Grace**. Mr. Grace is a resident of the City of Thunder Bay. He is a retired public school principal and university instructor. His wife of over fifty years is a retired public school teacher. They have had a home in the City for over fifty years.

d. Affidavit dated February 18, 2022 of **Susan Mendes**. Mrs. Mendes is a resident of the City of Thunder Bay. She is sixty-five years old. In 2017, she retired as a purchasing officer at Confederation College. In 1988, she and her husband Carlos purchased a home in the City, which was constructed in 1974. They have lived in the home since 1988.

e. Affidavit dated February 18, 2022 of **Sean Miller**. Mr. Miller is a resident of Thunder Bay. He is a carpenter, and through his holding company, he owns and operates an apartment building and several rental properties in the City of Thunder Bay.

f. Affidavit dated February 22, 2022 of **Patricia Stadnyk**. Ms. Stadnyk, age 72, and her husband John, age 78, have lived in Thunder Bay through the 51 years of their marriage. Ms. Stadnyk is the plaintiff and the proposed representative plaintiff. Before her retirement, she was a clerk at Confederation College.

[13] The City responded with a Responding Motion Record (64 pages) comprised of the following evidence:

a. Affidavit dated August 11, 2022 of **Ashley Eager**. Ms. Eager is a law clerk and litigation support specialist in the Legal Services Department of the City of Thunder Bay.

b. Affidavit dated December 15, 2022 of **Lou Pedron**. Mr. Pedron is an insurance adjuster with SCS Insurance Adjusters Ltd. He has over forty years of experience in the insurance industry. On December 6, 2019, he was hired to investigate the copper pipe leaks that are the subject matter of this proposed class action. He investigated over 700 claims.

[14] On **November 23, 2022**, Ms. Stadnyk amended her Statement of Claim to add a cause of action in private nuisance.

[15] On **January 11, 2023**, relying on s. 449 of the *Municipal Act, 2001*, the City brought a motion to have the pleading in nuisance struck from Ms. Stadnyk's claim. Section 449 states:

> 449 (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,
>
> (a) a municipality or local board;
>
> (b) a member of a municipal council or of a local board; or
>
> (c) an officer, employee or agent of a municipality or local board.
>
> (2) In this section,
>
> "sewage works" means all or any part of facilities for the collection, storage transmission, treatment or disposal of sewage, including a sewage system to which the *Building Code Act, 1992* applies;
>
> "water works" means all or any part of facilities for the collection, production, treatment, storage, supply or distribution of water, or any part of the facilities.
>
> (3) Subsection (1) does not exempt a municipality or local board from liability arising from a cause of action that is created by a statute or from an obligation to pay compensation that is created by a statute.
>
> (4) Subsection (1) does not apply if the cause of action arose before December 19, 1996.

C. Facts

[16] Pursuant to the *Municipal Act, 2001*, The Corporation of the City of Thunder Bay, which has a population of approximately 107,000 residents, is a single-tier municipality. Pursuant to the *Safe Drinking Water Act, 2002*,[3] it is responsible for the water supply to the residents of the City.

[17] The City operates a water treatment plant, test area, storage facilities, pumping stations, pressure zones, and 719 km of water mains.

[18] Beginning in 1996, in an effort to ameliorate the presence of metals in the municipal water supply, particularly the lead from lead plumbing pipes, the City and the Government of Ontario's Ministry of Environment ("MOE") conducted a two-year corrosion study. This study tested the addition of sodium silicate, polyphosphates, zinc orthophosphate, and sodium hydroxide in an area of the City containing approximately 600 households. The results of the 1996 study indicated that

[3] S.O. 2002, c. 32.

adding sodium hydroxide, which changes the pH levels (acidity or basicity levels) of the water showed the greatest promise of corrosion control.

[19] In the years following the 1996 study, the Government of Ontario introduced changes to municipal water treatment and supply standards following the outbreak of E. coli in Walkerton, Ontario. Those changes included the introduction of the *Safe Drinking Water Act, 2002* and a stringent lead monitoring program administered through the MOE to protect human health. In light of those changes, the City was statutorily required to develop a Corrosion Control Plan to reduce the lead content in its water supply caused by a small proportion (approximately 12%) of homes and buildings having lead plumbing pipes.

[20] In 2011, the MOE approved the City's Corrosion Control Plan, which included corrosion control through the addition of sodium hydroxide to the municipal water supply. The Province approved a revised Corrosion Control Plan in 2014, which incorporated an additional pilot study (the "Hodder Pilot Study") to measure the efficacy of sodium hydroxide in reducing lead levels in the water.

[21] The Hodder Pilot Study took place between January 28, 2016 and January 17, 2017 and involved isolating a portion of the City's water works from the rest of the system to test the efficacy and safety of adding sodium hydroxide to the water supply. The results of the Hodder Pilot Study informed City staff's recommendation to City Council to implement the Corrosion Control Plan throughout the City.

[22] In September 2017, the City's municipal council passed a resolution directing the City's staff to implement the chemical addition portion of the Corrosion Control Plan, which prescribed the addition of sodium hydroxide to the municipal water supply. The City began introducing sodium hydroxide into the water supply in March 2018.

[23] Ratepayer groups opposed the introduction of sodium hydroxide. Water industry professionals knew as far back as 1994 that raising the pH with sodium hydroxide can corrode copper pipes, cause pitting, and lead to pinhole leaks. The advice from the Federal Government's Health Canada was that raising water pH can result in corrosion and the pitting of copper.

[24] In October 2019, the City began receiving reports of pipe leaks occurring in properties throughout the City. The majority of complaints received by the City involved residential properties, and the minority involved commercial properties such as rental properties, multi-unit residential buildings, and buildings from which businesses operate. The commercial property complaints tended to involve significant losses and larger claims for compensation, including claims for loss of income. Some claims for compensation are less than $100, while other claims are greater than $100,000. All claims for compensation exceeding $80,000 involve commercial properties. There is at least one independent individual plaintiff action for damages against the City.

[25] On December 6, 2019, the City retained Lou Pedron, a Senior Adjuster at SCS Insurance Adjusters Ltd., to investigate the claims of copper pipe leaks by residents and businesses in the City.

[26] Mr. Pedron investigated approximately 700 claims of copper pipe leaks since December 2019. Of the 700 claims, there was information available regarding the distance of the leaks to the water meter in 265 of those cases. Of those cases, some 45% of leaks were reported to be within 10 feet of the water meters on the respective properties. Mr. Pedron's assessment was that most

claimants experienced minor inconvenience due to the leaks while a smaller number experienced significant disruption.

[27] The evidence for the certification motion revealed that: (a) a majority of the claims allege interior damage (i.e., beyond the damage to the copper pipe itself), including claims for compensation for drywall repairs, flooring, paint and wallpaper, repair and/or replacement of ceiling tiles, concrete drilling and pouring, and other repairs; and (b) slightly less than 25% of the complaints involve exterior damages (i.e. damage beyond the damage to the exterior copper service pipe itself) including excavation costs, landscaping, and driveway and parking lot repairs.

[28] In early 2020, the City discontinued the use of sodium hydroxide. The explanation for this change in the City's water system is found in the City's *2020 Drinking Water Quality Annual Report*, which stated:

> *Changes to the Drinking Water System:*
>
> In 2018, sodium hydroxide was introduced city wide as a corrosion inhibitor as part of the City's approved Corrosion Control Plan (CCP) to reduce lead levels at the tap for customers with lead service pipes or internal lead plumbing. Although the use of sodium hydroxide for pH adjustment is safe and effective at reducing lead levels, increased reports of pinhole leaks in pipes were received, which required further review – therefore the use of sodium hydroxide was phased out in early 2020.

[29] However, notwithstanding the discontinuance of the use of sodium hydroxide, pinhole leaks continue to occur because the corrosion or pitting of pipes caused by the use of sodium hydroxide can continue even after it is no longer added to the water.

[30] There is evidence that the plumbing of thousands of putative Class Members has experienced pitting leading to pinholes and leaks. Dr. Coull's uncontested evidence is that there is a common cause for the corrosion, pitting, and pinholes. Her opinion was that the addition of sodium hydroxide in the manner adopted by the City was the cause of the problems. She deposed that methodologies exist to confirm the cause of the pinhole leaks.

[31] Turning to the evidence of the Class Members, Ms. Stadnyk's evidence was that on August 29, 2020, she was told that the backyard and basement of a rental property that she owned was undergoing flooding. She called the City's water department to report the problem. City workers attended at her property, and they twice turned off the water, for which the Plaintiff was charged a service fee. City workers told Ms. Stadnyk that there was a pinhole leak problem across the City. Ms. Stadnyk retained Superior Water Solutions Inc., which is owned by Ernie Rollason, to fix the problem, which was identified as a leak in the main service line. To fix the leak, it was necessary to excavate the basement floor of Ms. Stadnyk's rental property and a section of the front lawn and to replace the main service line. Superior Water Solutions discovered and repaired a visible pinhole leak on an interior copper pipe. Ms. Stadnyk paid $7,684 for the repairs.

[32] Experiences similar to those described by Ms. Stadnyk were happening around the City. Mr. Grace deposed that there was a break in the main copper water service line to his property which led to damage to the front lawn, the basement carpet and personal property. Mr. Grace spent $11,020.00 to repair the damage, some of which was covered by insurance but for which he was required to pay a $1,000.00 deductible. Grand Chief Derek Fox had damage to his home's basement, front lawn and paving stones in August 2020 due to a pinhole under the floor of his basement. He spent $8,079.50 on repairs, and approximately $5,000 to stay at a hotel for three weeks during the repair process. Mr. Miller's several rental properties experienced damage due to

pinholes in the copper pipes and supply lines. He estimated that he repaired approximately 60 pinholes in his six rental properties. He spent $19,538.73 to repair the pinholes and related damage from leaks, in addition to between approximately $5,000.00 to $10,000.00 to repair drywall, paint and fixtures. Mrs. Mendes's home was damaged due to pinhole leaks in her basement pipes and to the main water copper supply line between November 2019 and February 2021. Repairing the damage required, among other things, breaking through the concrete basement floor, replacing the damaged pipe and the entire main water supply line, replacing all the remaining copper pipe with PEX (plastic pipe), cutting holes in the drywall, replacing the basement carpet with ceramic tile, digging up the front yard and part of the basement, renting a dumpster to dispose of the construction debris, and switching the water off and then back on again. Mrs. Mendes spent $18,749.50 to repair the damage.

D. The Plaintiff's Experts

[33] Ms. Stadnyk filed an expert report from Dr. Coull, a certified corrosion engineer, and Daniel Patrick Couture, a metallurgical and mechanical engineer. Dr. Coull and Mr. Couture opined that:

> a. The significant occurrence of pinhole leaks after the City added sodium hydroxide to the water supply, and the fact that the affected homes do not share a common location, construction type or age indicate that there is a common systemic water chemistry cause rather than a series of individual, unique (idiosyncratic) failures.
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> b. Reasonable methodologies exist to test and establish that the City's use of sodium hydroxide caused or contributed to the occurrence in pinhole leaks experienced by the putative Class Members.
>
> c. The City could have considered or used other chemicals in the water supply after it ceased using sodium hydroxide - or while it was using sodium hydroxide - to arrest the growth of pits and pinholes.
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> d. Reasonable methodologies exist that could have been used by the City to monitor the putative Class Members' plumbing systems in respect of the development of pits and pinhole leaks.

E. The Law of Nuisance

[34] Before analyzing whether or not the claim in nuisance is certifiable and because it bears directly on the cause of action criterion and the common issues criterion and to the City's argument about a statutorily granted immunity protecting it from the putative Class Members' claim in nuisance, it is helpful to describe: (a) the law of nuisance; and (b) the immunity provision of s. 449 of the *Municipal Act, 2001*.

[35] It should be noted at the outset that the law of private nuisance is sort of a platypus or a tort that bears some resemblance to the other tort species of public nuisance, trespass, negligence, and the doctrine of *Rylands v. Fletcher*, but it is a unique and much different beast of the tort kingdom.

1. Nuisance

[36] Nuisance is amongst several torts that can be used to provide compensation to landowners

whose enjoyment, sanctity, and use of land has been violated.

[37] Of the several torts, "trespass" protects the landowner's interest in his or her land from any physical intrusion and is actionable without proof of damage, although damages may have occurred and will be awarded in any event just for the intrusion.[4]

[38] Of the several torts that protect interests in land, the rule from *Rylands v. Fletcher*[5] provides the remedy of damages as compensation for harm to the land caused by the escape of something likely to do mischief from a neighbour's non-natural use of his or her land.

[39] The tort of negligence, which has the five elements of (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law,[6] is available to a plaintiff whose land has been physically damaged by a person who owes the plaintiff a duty of care to prevent the damage from having occurred.

[40] Private nuisance, which is not actionable without damage having occurred to the land or to the landowner's enjoyment and use of his or her land,[7] is an available tort when the use or enjoyment of the land has been interfered with by the defendant. The elements of a claim in private nuisance are an interference with the owner's use or enjoyment of land that is: (a) substantial, i.e., non-trivial; and (b) unreasonable in all the circumstances.[8]

[41] To determine whether a nuisance has occurred, there is a two-step analysis of: (1) determining whether the interference is substantial, which threshold analysis recognizes that not every interference is an actionable nuisance and that some interferences must be accepted as part of the normal give and take of life and then (2) determining whether the interference is unreasonable in all the circumstances.[9] The types of nuisance are not closed, but interferences that do not: (a) significantly alter the nature of the plaintiff's property or (b) significantly interfere with the plaintiff's actual use of the property are not actionable private nuisances.[10]

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[4] *Pyper v. Crausen*, [2008] O.J. No. 1042 (S.C.J.), var'd [2008] O.J. No. 2383 (Div. Ct.); *Q. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2007 NSCA 92; *Bellini Custom Cabinetry Ltd. v. Delight Textiles Ltd.*, [2005] O.J. No. 3687 (S.C.J.), aff'd 2007 ONCA 413; *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (S.C.J.).

[5] (1868), L.R. 3 H.L. 330 aff'g (*sub nom. Fletcher v. Rylands*) (1866) L.R. 1 Ex. 265 (Ex. Ch.). See also: *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143; *Smith v. Inco Limited*, 2011 ONCA 628, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 539; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Gersten v. Municipality of Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (H.C.J.); *Richards v. Lothian*, [1913] A.C. 263.

[6] *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27.

[7] *Mann v. Saulnier* (1959), 19 D.LR. (2d) 130 (N.B.C.A.).

[8] *British Columbia (Minister of Public Safety) v. Latham*, 2023 BCCA 104; *LaSante v. Kirk*, 2023 BCCA 28; *Gautam (c.o.b. Cambie General Store) v. Canada Line Rapid Transit Inc*., 2020 BCCA 135; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Smith v. Inco Limited*, 2011 ONCA 628, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 539; *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 175; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906.

[9] *Gautam (c.o.b. Cambie General Store) v. Canada Line Rapid Transit Inc*., 2020 BCCA 135; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906.

[10] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906.

[42] To appreciate the role of nuisance as a type of civil wrong, it is important to appreciate that private nuisance's purpose is to regulate two competing rights or interests that society values; on one side of the balance is the right of a person to use and enjoy his or her land and on the other side is the right of a person to not have his or her use and enjoyment of the land infringed.[11] As explained by the Ontario Court of Appeal in *Smith v. Inco Limited*,[12] the law of nuisance involves how to govern these two competing interests in land. The Court stated at paragraph 39:

> 39. People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable: *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.), at pp. 760-61.

[43] Several aspects of the tort of private nuisance that make it unique and that differentiate it from trespass, the rule from *Rylands v. Fletcher*¸ and negligence are that: (a) unlike trespass, nuisance is not actionable without damages and is not an intentional tort; (b) unlike *Rylands v. Fletcher*, it is not limited to the escape of harmful materials from a non-natural use of land (although the escape of materials from a non-natural use of land might constitute a nuisance); and (c) unlike negligence, nuisance is not fault-based, nuisance is about the effects of the defendant's actions and is a strict liability tort that imposes liability because of a harmful event having occurred regardless of whether the defendant's conduct would or would not be a civil wrong.

[44] The first and last points are particularly important, liability for nuisance does not depend upon the intention or negligence of the defendant's conduct and focuses on the nature and effect of the defendant's conduct on the plaintiff's land and on the plaintiff's use and enjoyment or his or her land. Nuisance is not actionable without damages and the damages may include non-trivial damage to the plaintiff's land itself or non-trivial damages to the plaintiff's use and enjoyment of the land.

[45] The damages must be existent and the increased risk of suffering an interference that causes physical harm to the plaintiff's land because of the defendant's behaviour or an increased risk that the plaintiff's use or enjoyment of the land will be harmed is not an actionable nuisance.[13] The contemporary law is that the creation of a risk of harm as such is not wrongful conduct.[14]

[46] Although the nature of the defendant's conduct is relevant to the unreasonableness analysis,

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[11] *Smith v. Inco Limited*, 2011 ONCA 628, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 539.

[12] *British Columbia (Minister of Public Safety) v. Latham* 2023 BCCA 104; *Smith v. Inco Limited*, 2011 ONCA 628, leave to appeal to S.C.C. ref'd [2011] S.C.C.A. No. 539; *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.).

[13] *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143.

[14] *Palmer v. Teva Canada Ltd*., 2022 ONSC 4690; *Kaissieh v. Done*, 2022 ONSC 425; *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Ring v.* Canada *(A.G.)*, 2010 NLCA 20, leave to appeal ref'd [2010] S.C.C.A. No. 187; *Rothwell v. Chemical & Insulating Co. Ltd*. [2007] UKHL 39.

the focus of the nuisance analysis is on whether the interference suffered by the plaintiff is unreasonable not on whether the nature of the defendant's conduct is unreasonable or fault-based; the primary focus of a private nuisance claim is on the impact of the defendant's behaviour.[15]

[47] Nuisance has a tolerance factor; interference will be reasonable where it should properly be accepted by an individual as a part of the cost of living in society, but unreasonable where it is properly viewed as an expense that the plaintiff should not be expected to bear and therefore should be borne by the defendant or in the cases where the defendant is a government or public authority borne by the public generally.[16]

[48] To determine whether the interference is unreasonable, the court balances the severity of the harm against the utility or purpose of the defendant's conduct in all the circumstances. The factors that the court may consider include: the nature of the interference; the duration of the interference, be it temporary, occasional, or permanent; the physical impact, if any, on the land; the character including the location of the neighbourhood; the normal sensitivities of the reasonable person to interferences to their property;[17] the public utility of the defendant's use of its property; the nature of the defendant's conduct including whether the defendant's use of its own property is a natural or unnatural use; and whether a disproportionate harm is being visited on the plaintiff for a benefit to the community at large.[18]

[49] When measuring public utility, the question is not whether the public good outweighs the individual interference but whether the interference is greater than the individual should be expected to bear in the public interest without compensation as part of the cost of living in a communal organized society.[19]

[50] There are no categories of interference that are self-evidently unreasonable and the test of reasonableness in all the circumstances of the particular case applies in all cases of alleged nuisance, including cases where the defendant's interference constitutes material or physical damage to the plaintiff's land.[20] However, where actual physical damage occurs particularly of a permanent nature, it may not require any lengthy balancing analysis to conclude that the interference is unreasonable.[21]

[51] What is a nuisance is highly contextual. In the famous old English nuisance case of *Sturgess*

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[15] *Krieser v. Garber*, 2020 ONCA 699; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *St Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.
[16] *Gautam (c.o.b. Cambie General Store) v. Canada Line Rapid Transit Inc*., 2020 BCCA 135; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181.
[17] The standard is that of the reasonable and ordinary individual resident living in the same neighbourhood: *Noyes v. Huron & Erie Mortgage Corp.*, [1932] O.R. 426 (H.C.J.); *Robertson v. Kilvert* (1889), 41 Ch. D. 88 (C.A.); *Walter v. Selfe* (1851), 4 D. G. & Sm. 315, 64 E.R. 849.
[18] *Krieser v. Garber*, 2020 ONCA 699; *Gautam (c.o.b. Cambie General Store) v. Canada Line Rapid Transit Inc*., 2020 BCCA 135; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Royal Anne Hotel Co. v. Village of Ashcroft*, [1979] B.C.J. No. 2068, (C.A.); *The Queen v. Loiselle*, [1962] S.C.R. 624.
[19] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Newfoundland (Minister of Works, Services and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 455; *Mandrake Management Consultants Ltd. v. Toronto Transit Commission* (1993), 62 O.A.C. 202 (C.A.); *Schenck v. The Queen* (1981), 34 O.R. (2d) 595 (H.C.J.)
[20] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal to SCC ref'd, [2011] S.C.C.A. No. 175.
[21] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal to SCC ref'd, [2011] S.C.C.A. No. 175.

v. Bridgman,[22] the distinction was drawn between what might count as a nuisance in the upper-class residential neighbourhood with what would be accepted as tolerable for residents in an industrial neighbourhood. The case law is replete with the metaphor that residents in a farm community will have to tolerate noises, smells, and sounds of agricultural activity that would be a nuisance in an urban setting and conversely residents of a farm community may not have to tolerate the noises, smells, and sounds of the hustle and bustle of a more densely populated urban community.

[52] This contextuality makes a nuisance claim fact specific but does not make nuisance a subjective matter of the discretionary taste of the judge. It is an objective determination of what in the particular circumstances of the case are the effects of human activity that interfere with the ordinary Canadian individual's use and enjoyment of his or her land (real property in the legalese). Nuisance cannot be reduced to a determination using *a priori* standards.[23]

2. Section 449 of the *Municipal Act*

[53] In 1996, the Ontario government amended the *Municipal Act* to bar all claims against municipalities based *"on nuisance, in connection with the escape of water or sewage from sewage works or water works …"*. The Minister, when presenting the bill for second reading, confirmed that this amendment was intended to protect municipalities from claims in nuisance when municipal sewer and water systems fail.[24] The Minister added that this was done in direct response to the Supreme Court of Canada's decision in *Tock v. St. John's Metropolitan Area Board*,[25] a nuisance claim brought against a municipality after sewage flooded the plaintiffs' basement because of a blockage in the City's sewer system.

[54] The text of s. 449 of the *Municipal Act, 2001* is set out above. The section stipulates that "no proceeding based on nuisance, in connection with the escape of water … from water works (facilities for the collection, production, treatment, storage, supply or distribution of water), shall be commenced against, a municipality …"

[55] In the immediate case, Ms. Stadnyk has brought a proceeding against a municipality. The proceeding is based on nuisance. Her nuisance claim is based on pinhole leaks that are in connection with the escape of water from the water works of the City of Thunder Bay.

[56] A leak is an escape of water.[26] The Merriam-Webster Dictionary defines the intransitive verb "leak" as "to enter or escape through an opening usually by a fault or a mistake". While in some of the putative Class Members' cases, the leak occurred in the City's water works facilities, i.e., the leak was found in a part of the City's supply of water infrastructure, in all the putative Class Members' cases, the leaks occurred in connection with the escape of water from the water works of the City of Thunder Bay into which the municipality had added sodium hydroxide. It is plain and obvious that s. 449 bars Ms. Stadnyk's private nuisance claim.

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[22] (1879), 11 Ch. D. 852.
[23] J.P.S. McLaren, "Nuisance in Canada", chapter 13 in *Studies in Canadian Tort Law*, (A.M. Linden, ed.) (Toronto: Butterworths, 1968), p. 340.
[24] Ontario, Legislative Assembly, *Hansard*, 36th Leg. 1st Sess., November 18, 1996, Orders of the Day, *Better Local Government Act, 1996*, https://ww.ola.org/en/legislative-business/house-documents/parliament-36/session-1/199611-18/hansard, pages 1 & 31-34.
[25] [1989] 2 SCR 1181.
[26] *Merriam-Webster Online Dictionary*, sub verbo "leak", https://www.merriamwebster.com/dictionary/leak.

[57] This is a straightforward matter of statutory interpretation. There are no ambiguities that have been identified. The interpretation is consistent with the obvious purpose of the statute, which was to eliminate certain types of nuisance claims connected with the water and sewer works of a municipality. What happened in the immediate case is similar to what happened in the *Tock* case, which remarkably also was against the City of Thunder Bay. It is not of course precisely the same, but the Legislature used language which in its plain and every day meaning captures the factual circumstances of the immediate case.

[58] I conclude that while Ms. Stadnyk's negligence claim may succeed, her nuisance claim is doomed to fail because of s. 449 of the *Municipal Act, 2001*.

F. Certification General Principles

[59] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[60] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[27] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.[28] That said, in *Pro-Sys Consultants Ltd v. Microsoft Corp.*,[29] the Supreme Court of Canada stated that although not a merits determination, certification was meant to be a meaningful screening device, that does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".

[61] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[30] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[31] In particular, there must be a basis in the evidence

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[27] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[28] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[29] *Pro-Sys Consultants Ltd v. Microsoft Corp*., 2013 SCC 57 at para. 103.
[30] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[31] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.

to establish the existence of common issues.[32] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[33]

[62] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[34]

[63] Although it has recently garnered renewed attention, it has been for a long time, and it continues to be a fundamental principle that for an action to be certified as a class proceeding there must be some evidence that two of more putative Class members suffered compensatory harm.[35]

G. Cause of Action Criterion

1. General Principles

[64] The first criterion for certification is that the plaintiff's pleading discloses a cause of action.

[65] The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,*[36] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.[37] The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[38]

[66] In *R. v. Imperial Tobacco Canada Ltd*.,[39] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin

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[32] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[33] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[34] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[35] *Marcinkiewicz v. General Motors of Canada Co*., 2022 ONSC 2180; *MacKinnon v. Volkswagen*, 2021 ONSC 5941; *Maginnis v. FCA Canada Inc* 2021 ONSC 3897 (Div. Ct.), aff'g 2021 ONSC 3897, leave to appeal dismissed April 8, 2022 (C.A.); *Setoguchi v. Uber B.V.*, 2021 ABQB 18; *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19; *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130, aff'd 2019 ONSC 6845 (Div. Ct.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42.
[36] *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959.
[37] *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.
[38] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[39] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 17-25.

stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[67] In *Atlantic Lottery Corp. Inc. v. Babstock*,[40] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. However, Justice Brown stated that it is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings.[41]

[68] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[42] and the court's power to strike a claim is exercised only in the clearest cases.[43] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[44] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[45] In the Ontario Court of Appeal's decision in *Darmar Farms Inc. v. Syngenta Canada Inc.*,[46] Justice Zarnett stated:

> The fact that a claim is novel is not a sufficient reason to strike it. But the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed.

2. Discussion and Analysis – Cause of Action Criterion

(a) Negligence

[69] It is not disputed that Ms. Stadnyk satisfies the cause of action criterion for her claim in negligence.

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[40] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 87–88.
[41] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.
[42] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[43] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[44] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.
[45] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[46] *Darmar Farms Inc. v. Syngenta Canada Inc*., 2019 ONCA 789 at para. 51.

(b) Private Nuisance

[70] It is not disputed that Ms. Stadnyk has properly pleaded a claim in private nuisance.

[71] What is disputed in the immediate case is whether Ms. Stadnyk's private nuisance case is barred by the immunization provided by s. 449 of the *Municipal Act, 2001*.

[72] While it is disputed, for the reasons set out earlier in these Reasons for Decision, it is plain and obvious that her private nuisance claim is caught by s. 449 of the *Municipal Act, 2001*. Her nuisance claim is doomed to fail.

[73] It therefore follows that the nuisance claim does not satisfy the cause of action criterion and that the City's motion pursuant to Rule 21 to strike the claim should be granted.

H. Identifiable Class Criterion

[74] Since Ms. Stadnyk's nuisance claim does not satisfy the cause of action criterion, it follows that it cannot and therefore does not satisfy the remaining four certification criterion. However, these criteria were fully argued and given the possibility of appeal, I will address the remaining criterion on the assumption that the cause of action criterion was satisfied for the nuisance claim.

1. General Principles

[75] The second certification criterion is the identifiable class criterion. 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.[47]

[76] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[48] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[49] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[50] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[51]

[77] The class must also not be unnecessarily narrow or under-inclusive. A class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the

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[47] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[48] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (CA), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (SCJ), leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 1.
[49] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (SCJ).
[50] *Frohlinger v. Nortel Networks Corporation,* [2007] O.J. No. 148 at para. 22 (SCJ).
[51] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (SCJ) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (SCJ), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).

class be amended.[52]

2. Discussion and Analysis – Identifiable Class Criterion

[78] As already mentioned above, Ms. Stadnyk proposes the following class definition:

> All persons (individuals, corporations, partnerships and other entities) who owned, leased, rented or occupied properties that were serviced by water supplied by the Defendant which had been treated with or contained sodium hydroxide.

[79] The City objects to this definition as over-inclusive because it includes landowners with buildings that contain lead plumbing piping when the focus of the action is on copper piping. At this juncture of the proceeding that objection is misdirected because at this juncture the main purpose of defining the class is to provide the Class Members with the right to opt out and for those purposes, the class definition is not over-inclusive.

[80] Later in this proceeding, after the outcome of the common issues trial about negligence becomes known, it will be necessary to advise the Class Members that they have or that they do not have a negligence claim with respect to copper plumbing in the improvements on their real properties. If the court determines that there is a negligence claim with respect to copper plumbing, then the Class Members with copper plumbing will be eligible to proceed to individual issues trials or to participate in any settlement should the parties agree to settle. At the time of the decision in the common issues trial, notice of a right to opt out can be given to those class members who joined the class in the interim and did not have a previous opportunity to opt out.

[81] In other words, at this juncture, where the putative Class Members will be given notice that the action has been certified, there is no reason to require them for the purposes of exercising their right to opt out to investigate whether their property's plumbing contains copper pipes. In short, the matter of revising the class definition may be sorted out after the common issues trial.

[82] Turning to the City's second objection to the class definition, it is that there should be an end date to the class definition. Once again, for similar reasons, at this juncture it is not necessary to specify an end date, which is necessary to determine who is eligible for compensation or barred from receiving any depending on the outcome of the common issues trial. For present purposes, the notice of certification will be sent to all persons who owned, rented, or occupied properties that were serviced by water supplied by the City for the purposes of deciding whether they wish to opt out of the proceeding. Typically, very few putative Class Members opt out even those with serious claims but the current definition without specifying a class closing period is sufficient for the putative Class Members to exercise their right to opt out.

[83] In *Berg v. Canadian Hockey League*,[53] I discuss the matter of rolling class periods at paragraphs 155-162 as follows:

> 155. […] An open-ended class definition is potentially improper because it would deny class members their right to opt-out and, in general, it also makes for an unmanageable proceeding. See *Magill v. Expedia Inc.*, 2010 ONSC 5247 at para. 32; *Re Collections Inc. v. Toronto Dominion Bank*, 2010 ONSC 6560.

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[52] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (SCJ), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

[53] 2017 ONSC 2608, var'd 2019 ONSC 2106 (Div. Ct.).

156. The Plaintiffs, however, submit that it would be arbitrary and unjust to have what would be an under-inclusive and under-efficient class by having a class period that closes on the date of certification, and they propose that the class membership should remain open until the last notice of certification is issued, and that notices of certification should be given on a running basis, i.e., on two or more occasions after the order certifying the action as a class proceeding. This approach, the Plaintiffs say, would achieve an appropriately inclusive class, maximize judicial economy, and preserve the Class Members' right to opt out.

157. The Plaintiffs rely on Justice Horkins' decision in *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, where she rejected the defendant's argument that the class period must end when the action is commenced, rather than at the date of the certification award, which is the date that Justice Horkins used (and that I will use in the case at bar).

158. The approach of an open-ended or rolling period of class membership may be appropriate where there is a certainty that the predicament of the new class members is common with those Class Members at the time of certification. I permitted this approach in *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836 and in *Alexander v. Ontario*, 2016 ONSC 7059, but these were consent certifications and the point was not argued.

159. The matter of an open-ended class period was very briefly discussed in *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168 and 2017 ONSC 1409, an overtime pay class action, where Justice Gray stated at paras. 4-6:

> 4. With respect to a cut-off date, the caselaw, such as it is, is inconsistent as to whether the date should be the date of certification, or the date notice is given to the class members, or some other date. It is not clear that matters of principle have been debated at any length in the cases that have been drawn to my attention.
>
> 5. I see no reason why the date notice as given should not be the appropriate cut-off date. That date is approximately five months after the date of certification. I assume that there will not be an extraordinarily large number of additional potential members of the class that will have been added since the date of certification.
>
> 6. Counsel for the defendant argues that there is no evidence that the terms and conditions of employment of any persons hired since the date of certification are the same as, or different from, the terms and conditions of employment in existence prior to the date of certification. Assuming that to be so, I do not think it is a relevant consideration for the purposes of identifying a specific cut-off date. If it is the defendant's position that the terms and conditions of employment, as they relate to overtime, are significantly different for persons hired after the date of certification, this is an issue that can be raised and dealt with by the trial judge. At this point, however, I see no reason why persons who were hired within that somewhat short window should not at least be given notice that their rights may be affected, and be given the opportunity to remain within the class at this stage, or opt out.

160. In my opinion, where the circumstances of additional putative class members may be different, it may not be appropriate to have a rolling class period end date. Apart from the management and administration difficulties of the approach of an open-ended class period, the approach ignores the fundamental problem that there has been no adjudication to determine whether the circumstances of the new class members, (who in the case at bar, at the time of the original certification motion, were not even playing hockey for OHL Clubs), are such that the criteria for certification continue to be satisfied for them. Who's to say that the evidentiary record has not changed between the date of certification and the next notice of certification? And, commonality is not a matter to be proven at the common issues trial.

161. I note here that in other circumstances where representative plaintiffs seek to increase class size, which sometimes occurs as part of the settlement of an already certified class action, it is necessary to determine that the criterion for certification are satisfied, and this typically occurs as a

> part of a consent certification for settlement purposes. The point is that the class size usually cannot be altered without a certification motion.
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> 162. I, therefore, shall amend the class definition to add a class closing date as of the date of the certification motion. This amendment is made without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.

[84] In *Berg*, I observed that the approach of an open-ended or rolling period of class membership may be appropriate where there is a certainty that the predicament of the new class members is common with those Class Members at the time of certification. That would appear to be the case for any persons who are the successors in ownership to the current Class Members. But even if that is not the situation, the Class Definition is fine for present purposes. If the class definition needs to be amended to take account of the outcome of the common issues trial, that is a matter that can be postponed until the completion of the common issues trial.

[85] I conclude that the class definition criterion is satisfied for the claim for negligence.

[86] By way of a postscript to this conclusion, I observe that at the certification motion stage, defendants often have a knee-jerk reaction to narrow a class definition, which narrowing they later will regret when they desire to expand the discharges of liability available in a settlement or a successful trial outcome.

I. Common Issues Criterion

1. General Principles

[87] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[54]

[88] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[55]

[89] An issue is not a common issue, if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[56] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[57] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of

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[54] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[55] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[56] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).
[57] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

extrapolation, in the same manner, to each member of the class.[58]

[90] The common issue criterion presents a low bar.[59] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[60] Even a significant level of individuality does not preclude a finding of commonality.[61]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[62]

[91] From a factual perspective, the plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class members and the proposed common issues.[63]

2. Discussion and Analysis – Common Issues Criterion

(a) Negligence

[92] It was not disputed that the negligence claim satisfies the common issues criterion.

(b) Private Nuisance

[93] Because the claim in private nuisance does not satisfy the cause of action criterion, it cannot satisfy the common issues or the preferable procedure criterion. However, for the sake of argument

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[58] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572 at para. 48; *McCracken v. CNR,* 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 40.

[59] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[60] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[61] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[62] *Harrington v. Dow Corning Corp.,* [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[63] *LaSante v. Kirk*, 2023 BCCA 28; *Engen v. Hyundai Auto Canada Corp.*, 2021 ABQB 740, aff'd (on this point) 2023 ABCA 85; *Jensen v. Samsung Electronics Co. Ltd.,* 2023 FCA 89; *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 6; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338; *Ewert v. Canada (Attorney General*), 2022 BCCA 131; *Simpson v. Facebook*, 2022 ONSC 1284 (Div. Ct.); *Simpson v. Goodyear Canada Inc*., 2021 ABCA 182; *Canada v. Greenwood*, 2021 FCA 186; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.); *.Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd 2017 ONSC 6098 (Div. Ct.); *Shah v. LG Chem Ltd*., 2015 ONSC 6148, , aff'd 2017 ONSC 2586 (Div. Ct), rev'd on other grounds 2018 ONCA 819; *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583 aff'd 2016 ONCA 250; *MacInnis v. Bayer Inc*., 2020 SKQB 307; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.

and the possibility of an appeal, I will assume that the cause of action criterion was satisfied.

[94] With that assumption, in my opinion, the private nuisance claim does not satisfy the common issues criterion in the circumstances of the immediate case, which is not to say that a private nuisance claim is never certifiable because of a failure of commonality of the proposed common issues.

[95] In the immediate case, the resolution of the private nuisance claim is dependent upon individual findings of fact that would have to be made for each class member. As the description of the law of private nuisance above reveals, proof of private nuisance involves a two-step inquiry, and the first step is the seriousness of the interference.

[96] In the immediate case, with respect to the first step, there is no commonality of the seriousness of the interference. Damages are a requisite constituent element of the cause of action for private nuisance and while physical damages to the property or damages to the use or enjoyment of the Class Members has occurred for some class members, it has not yet occurred and may or may not ever occur for other Class Members.

[97] In the immediate case, where damage has occurred, there is no commonality of the extent or the intensity of the interference. For some, the interference would arguably appear to meet the non-trivial threshold first step of the nuisance determination; however, for other Class Members, it would appear that the damage suffered is tolerable, which is to say trivial and not actionable. The point is that the circumstances of the nuisance claim in the immediate case require individual inquiries of the Class Members.

[98] The second step of the proof of nuisance involves the unreasonableness of the defendant's interference. As noted above where actual physical damage occurs particularly if the damage is of a permanent nature, it may not require any lengthy balancing analysis to conclude that the interference is unreasonable. However, in the immediate case, once again, whether actual physical damage occurred is an idiosyncratic issue and not a common one and once again the unreasonableness of the defendant's interference has to be decided on an individual basis because the physical damage in the immediate case went through the range of no damage (but the risk of damage) to substantial damage and once again the analysis requires inquiries of the effects of the nuisance on individual Class Members.

[99] Ms. Stadnyk argued that there was a commonality that all of the Class Members experienced the interference of having sodium hydroxide added to the water that flowed to their homes and all of the Class Members experienced a corrosive chemical reaction in their copper pipes in their homes. However, that commonality breaks down into individual inquiries of what was the effect at their particular home of the City's having added sodium hydroxide to the water reaching their homes. The commonality also breaks down because some Class Members suffered damages and some have not and some may never suffer damages. Further, where damages to the property or to the use and enjoyment of the property have occurred, the issue of whether the damages are substantial enough or the interference unreasonable requires individual inquiries.

[100] I appreciate that in other proposed class actions, nuisance claims have been certified,[64] but all that reveals is that it is possible to certify a nuisance claim as a class action and therefore it

[64] *LaSante v. Kirk*, 2023 BCCA 28; *Gautam v South Coat British Columbia Transportation Authority*, 2020 BCCA 135; *Durling v. Sunrise Propane Energy Group Inc*., 2012 ONSC 4196; *Gautam v Canada Line Rapid Transit Inc*., 2011 BCCA 275; *Pearson v. Inco Ltd*. (2005), 78 O.R. (3d) 641 (C.A.), leave to appeal ref'd 2006 CanLII 7666.

cannot be categorically stated that nuisance claims are uncertifiable. I appreciate that in other proposed class actions, nuisance claims have not been certified,[65] but all that reveals is that it cannot be categorically stated that all nuisance claims are certifiable. The point is that each nuisance action that is proposed for a class action requires its own analysis. My analysis is that Ms. Stadnyk's proposed class action does not satisfy the common issues criterion in the circumstances of the immediate case.

J. Preferable Procedure Criterion

1. General Principles

[101] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[66]

[102] In *AIC Limited v. Fischer*,[67] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[68] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[69] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[70]

2. Discussion and Analysis – Preferable Procedure Criterion

[103] Because the claim in private nuisance does not satisfy the cause of action criterion, it cannot satisfy the common issues or the preferable procedure criterion. However, for the sake of argument and the possibility of an appeal, I will assume that the cause of action criterion was satisfied.

[104] With that assumption, in my opinion, the private nuisance claim does not satisfy the preferable procedure criterion in the circumstances of the immediate case, which is not to say that

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[65] *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143; *Hollick v. Toronto (City)*, 2001 SCC 68.
[66] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[67] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 24-38.
[68] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[69] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[70] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

a private nuisance claim is never certifiable because of a failure of the preferable procedure criterion.

[105] In the immediate case, without regard to the predominance requirement that was introduced into the preferable procedure criterion, a class action about private nuisance would not be the preferable procedure to obtain access to justice, behaviour modification, or judicial economy. In the immediate case, the hard work, the meaningful work, at a common issues trial is the negligence claim and not the private nuisance claim. The substantial work of the nuisance claim can only occur at individual issues trials where the serious of the interference and the unreasonableness of the interference will be determined.

[106] The preferable alternative to a class action is individual issues trials. In other nuisances, general causation of harm; i.e., connecting the interference (which in the immediate case is adding sodium hydroxide to the soft water of the municipal water supply) to the damage caused by the interference would be a common issue that would put wind into the sales of the individual issues trials to follow, but in the immediate case, the City is not in a position to contest seriously the matter of general causation. The scientific evidence is very strong that sodium hydroxide causes copper corrosion and deterioration, and the City has essentially admitted this to be the case when it abandoned its policy of adding it to the water supply. For the private nuisance claim, the material work in the immediate case will be the matter of specific causation. In other words, each Class Member who actually experienced physical damage to his or her property or to the use and enjoyment of the property will be confronted with the task of showing that the damages were caused by the corrosion caused by the sodium hydroxide which, however, is a possibility that does not exclude other possibilities. It remains to be seen whether the proof of specific causation will be an easy or difficult matter of proof but what does not remain to be seen is that the common issues trial will not advance the nuisance claim very far and that it is preferable for the Class Members with significant claims to get on with individual claims.

[107] The mere presence of a pinhole leak is neither *per se* trivial or *per se* non-trivial and will depend on the circumstances of the particular case. While as the saying goes that "for want of a nail a kingdom was lost,"[71] sometimes want of a nail is just the absence of a nail. The issue of whether an interference is trivial or non-trivial does not require the assistance of a judge's opinion at the common issues trial. The merits of advancing a private nuisance claim can be resolved by the Class Member discussing with his or her lawyer whether it is worthwhile issuing an individual claim.

[108] In the immediate case, for those putative class members who have experienced serious damage to their property from a leak in their copper plumbing, it would be preferable to get on with a no-fault nuisance claim and not to wait for a determination of whether the City breached a duty of care by adding sodium hydroxide to the water supply.

[109] The case at bar is not the appropriate case to test the predominance requirement because it is not necessary to do so. I conclude that the preferable procedure criterion would not be satisfied in the immediate case for a nuisance claim.

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[71] For want of a nail the shoe was lost.
For want of a shoe the horse was lost. For want of a horse the rider was lost. For want of a rider the message was lost. For want of a message the battle was lost. For want of a battle the kingdom was lost. And all for the want of a horseshoe nail.

K. Representative Plaintiff Criterion

1. General Principles – Representative Plaintiff Criterion

[110] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[72]

2. Discussion and Analysis

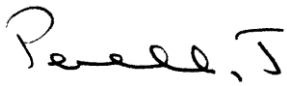
[111] While there is a dispute about the adequacy of the litigation plan, it is not a dispute that would entail disqualification and there is no dispute that Ms. Stadnyk is an appropriate representative plaintiff.

[112] In my opinion, the litigation plan, which in all events is a work in progress, is satisfactory for the purposes of certification, and I conclude that the representative plaintiff criterion is satisfied in the immediate case for the negligence claim.

L. Conclusion

[113] For the above reasons, the City's Rule 21 motion to strike the nuisance claim is granted and Ms. Stadnyk's motion to certify the negligence claim is granted.

[114] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Stadnyk's submissions within twenty days of the release of these Reasons for Decision followed by the City's submissions within a further twenty days.



Perell, J.

Released: July 6, 2023

[72] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

CITATION: Stadnyk v. The Corporation of the City of Thunder Bay, 2023 ONSC 3920
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DATE: 20230706

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PATRICIA JANET STADNYK

Plaintiff

- and –

THE CORPORATION OF THE CITY OF THUNDER BAY

Defendant

REASONS FOR DECISION

PERELL J.

Released: July 6, 2023