

CANADA / JUDGMENT

BC1178980 v. British Columbia

2023 BCSC 1641

COURT

Supreme Court of British Columbia

DECIDED

18 September 2023

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2023 BCSC 1641 BC1178980 v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

BC1178980 v. British Columbia,

2023 BCSC 1641

Date: 20230918

Docket: S221484

Registry: Victoria

Between:

BC1178980, BC1221580, BC1155387, BC1207297, 1826900 Alberta Ltd., BC1155274, BC1187520,
BC1142545, BC1201852, BC1187613,

BC1156356, BC1143782, 2090442 Alberta Inc., BC1142367

Plaintiffs

And

Her Majesty the King in Right of the Province of British Columbia as represented by the Attorney
General of British Columbia,

The Minister of Public Safety and the Community Safety Unit

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Dates of Hearing:

Victoria, B.C.

June 12-13, 2023

Place and Date of Judgment:

Victoria, B.C.

September 18, 2023

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Introduction

- [1] The defendant, His Majesty the King in Right of the Province of British Columbia (the "Province"), applies to strike the plaintiffs' notice of civil claim (the "Claim") for failing to disclose a reasonable cause of action.

- [2] The plaintiffs are a group of licensed cannabis retailers in BC. They seek a declaration that the Province committed the torts of negligence and negligent misrepresentation by failing to adequately enforce the licencing requirements of the Cannabis Control and Licensing Act, S.B.C. 2018, c. 29 [CCLA] on Indigenous Reserves.
- [3] During the course of their submissions, the plaintiffs acknowledge that the proper defendant to this action is the Province, pursuant to s. 7 of the Crown Proceeding Act, R.S.B.C. 1996, c. 89.
- [4] For the reasons that follow, I have concluded that it is plain and obvious that the Claim has no reasonable prospect of success because the Province does not owe a private law duty of care to the plaintiffs.

Factual Background

The Regulation of Non-medical Cannabis in British Columbia.

- [5] On October 17, 2018, the federal Cannabis Act, S.C. 2018, c. 16 and Cannabis Regulations, SOR/2018-144 came into force. They establish a legal and regulatory framework for the distribution and sale of non-medical cannabis. Provincial governments are responsible for the implementation of this framework subject to minimum standards set by the federal government: *Vancouver (City) v. Weeds Glass & Gifts Ltd.*, 2019 BCCA 190 at para. 33 [Weeds Glass].
- [6] The British Columbia legislature enacted the CCLA and the Cannabis Distribution Act, S.B.C. 2018, c. 28 [CDA] as well as regulations promulgated under the CCLA and the CDA, such as the Cannabis Licensing Regulations, B.C. Reg. 202/2018. These instruments establish the licencing and regulatory regime for the sale of non-medical cannabis in British Columbia: *Weeds Glass* at para. 34.
- [7] As per s. 15 of the CCLA, a person may not sell cannabis in BC unless one or more of the following apply:
- a) the person is the provincial government;
 - b) the person is a federally licensed cannabis producer who is selling to the provincial government or another federally licensed producer; or
 - c) the person holds a provincial licence to sell non-medical cannabis.
- [8] Division 2 of Part 7 of the CCLA creates a framework for cooperation between the provincial government and Indigenous nations. Subject to the approval of the Lieutenant Governor in Council, the Minister of Public Safety and Solicitor General (the "Minister"), on behalf of the provincial government, may enter into agreements with an Indigenous nation with respect to cannabis: CCLA, s. 119(1).

- [9] In 2021 and 2022, three Indigenous nations entered into new or updated cannabis agreements with the provincial government.

Enforcement Powers under the CCLA

- [10] The Community Safety Unit ("CSU") is a unit of the Ministry of Public Safety and Solicitor General. The Director of the CSU (the "Director") is responsible for compliance and enforcement of the CCLA as it relates to cannabis sellers and the sale of unlicensed cannabis: CCLA, s. 7 and Part 6, Division 2.
- [11] The CCLA provides the Director with enforcement powers in relation to the production and sale of non-medical cannabis by unlicensed persons. These enforcement powers are discretionary.
- [12] These discretionary enforcement powers include the authority for the Director to enter and search non-residential premises without a warrant where there are reasonable grounds to believe that the sale, supply, production, or storage of cannabis has occurred or is occurring: CCLA, s. 89.
- [13] If in the course of such an inspection the Director finds cannabis that, in the Director's opinion, is possessed in contravention of the CCLA or its regulations, the Director may seize and remove the cannabis and the packages containing it: the CCLA, s. 89(1)(g)
- [14] The Director may also require production of written statements or records: CCLA, s. 93.
- [15] If the Director determines that a person has unlawfully sold or produced cannabis in contravention of the CCLA, the Director may impose a monetary penalty on that person: CCLA, s. 94.

The Claim

- [16] The plaintiffs allege that the Province failed to enforce the licencing requirements of the CCLA to shut down retail cannabis locations that operate on Indigenous Reserves. They assert that they suffered damages of at least \$40 million for negligence and/or negligent misrepresentation.
- [17] The plaintiffs further allege that the Province made representations that it would ensure a viable retail cannabis industry in BC by, among other things, ensuring that the CSU would take enforcement action against unlicensed retailers on Indigenous Reserves. They assert that they relied on these representations to their detriment.
- [18] The plaintiffs assert that the government's representations amount to an undertaking to protect the economic interests of current and prospective licensed cannabis retailers.

Relevant Legal Principles

Striking Pleadings

- [19] The parties agree on the test to strike a pleading pursuant to R. 9-5(1)(a) of the Supreme Court Civil Rules. This rule provides the court with discretion to "order to be struck out or amended the whole or any part of a pleading [] on the ground that [] it discloses no reasonable claim or defence".
- [20] A claim will be struck "if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Imperial Tobacco*] at para. 17.
- [21] The assessment must be done on the basis of the pleading, the particulars, and any documents incorporated into the pleading by reference: *Darmar Farms Inc. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 44.
- [22] The facts in the relevant pleading must be read generously and accepted as true unless they are manifestly incapable of being proven. No evidence is admissible on the application: *Imperial Tobacco* at paras. 22-25.
- [23] The test is stringent: *Rausch v. Pickering (City)*, 2013 ONCA 740 at para. 34.
- [24] A claim should not be struck simply because it raises novel points of law: *Imperial Tobacco* at para. 21.
- [25] Any doubt in applying the test should be resolved by allowing the claim to proceed if it involves a difficult and important point of law, a question of general importance, or if facts should be known before rights are definitely decided: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 978, 990, 1990 CanLII 90.

Duty of Care

- [26] The elements that the plaintiffs must prove to establish negligence and/or negligent misrepresentation are well established. Both torts require, at the first stage, that a plaintiff establish that they are owed a private law duty of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 1993 CanLII 146.
- [27] The test to determine whether or not a duty of care exists is the same in either a negligence or negligent misrepresentation case: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 16.
- [28] Courts apply the "Anns/Cooper" test (see: *Anns v. Merton London Borough Council*, [1978] A.C. 728/*Cooper v. Hobart*, 2001 SCC 79) to determine whether the defendant owed a private law duty of care in any particular case.

[29] A preliminary criterion in the Anns/Cooper test is to determine whether the court, in a previous decision, answered the question of the existence of a sufficiently analogous duty of care in a similar case: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 52.

[30] Under the first stage of the Anns/Cooper test, the court asks whether a prima facie duty of care exists between the parties. The questions at this stage are:

- a) whether the harm alleged in the claim was a reasonably foreseeable consequence of the defendant's conduct; and
- b) whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff".

See: *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at paras. 18-19.

[31] Proximity arises in relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant": *Cooper* at paras. 32, 34; *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 17.

[32] There are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator:

- a) the task at the first stage is to "determine whether the statutory scheme discloses the legislative intention to exclude or confer a private law duty of care"; and
- b) at the second stage, if the legislation is not determinative, courts must look to the interaction(s) between the regulator and the plaintiff to determine whether a sufficiently close and direct relationship exists to impose a prima facie duty of care.

See: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 243.

[33] Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals: *Wu v. Vancouver (City)*, 2019 BCCA 23 at para. 58.

[34] If the statutory purpose is to promote a public good, and the regulator's actions involve the administration and enforcement of the statutory scheme, and it did not stray from that role, a private law duty of care will generally not arise from the plaintiff's interactions with the regulator: *Waterway Houseboats Ltd.* at para. 246.

[35] If there is sufficient proximity to ground a prima facie duty of care, it is necessary to proceed to the second stage of the Anns/Cooper test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the recognition of a prima facie duty of care: *Cooper* at para. 30.

- [36] These residual policy concerns include the presence of existing legal remedies, the spectre of indeterminate liability to an indeterminate class, and the unintentional creation of a taxpayer-funded insurance scheme: *Cooper* at paras. 52-55 and *Imperial tobacco* at paras. 61-102.

Position of the Parties

- [37] The Province asserts that it does not owe the plaintiffs a private law duty of care to ensure they do not lose profits while competing with unlicensed cannabis retailers operating on Indigenous Reserves. This is because there is no relationship of proximity between the parties.
- [38] The plaintiffs contend that this case is unique in the sphere of government liability and negligence because it occurred in the context of the creation of an entirely new industry-- the legal sale of non-medical cannabis. They assert that the Province induced small business people into entering this new industry by assuring them that it would take enforcement action against illicit cannabis sellers on Indigenous Reserves. By failing to do so, the plaintiffs assert they were harmed financially.
- [39] The Province further asserts that the novel issues raised in this action cannot be adequately disposed of on a pleadings motion. This is because the relationship between the parties was sufficiently close and direct to support a finding of proximity based on the Province's public statements, correspondence, and statements in the legislative assembly.

Does the Province Owe a Duty of Care to the Plaintiffs?

- [40] There are no cases in which courts have recognized a sufficiently analogous duty of care to the one alleged in the Claim. Courts have not considered whether the province owes a private law duty of care to anyone when its administrative decision-makers discharge, or fail to discharge, their statutory duties under the CCLA. Accordingly, a full *Anns/Cooper* analysis must be undertaken to determine if the Province owes the plaintiffs a private law duty of care.
- [41] For the purposes of this application only, the parties agree that the economic harms alleged were reasonably foreseeable.
- [42] The CCLA does not disclose a legislative intention to establish that the Province owes a private law duty of care to cannabis licencees.
- [43] In examining the CCLA, the first step is to identify the purpose of the legislation: *Waterway Houseboats Ltd.* at para. 243; *Imperial Tobacco* at para. 44.
- [44] The CCLA does not contain a purpose clause. However, the comments of the Minister on the bill that became the CCLA are telling:

This bill establishes the provincial regulatory regime for the possession, sale, supply and production of non-medical cannabis in BC.

It establishes a licensing scheme for private cannabis retailers as well as training and registration requirements for cannabis workers. It establishes a minimum age of 19, and it sets restrictions on the possession, public use and cultivation of cannabis by adults. Further, the bill establishes a comprehensive compliance and enforcement regime for both licensed cannabis retailers and illegal sellers.

[]

It reflects our government's goals of prioritizing the health and safety of British Columbians, protecting children and youth, reducing crime in the illegal market and supporting economic development opportunities in our province.

[45] In my view, the broad purposes identified by the Minister in the Legislature confirm that the CCLA aims to promote the public good. This suggests that there was no legislative intent to create a private law duty of care: Wu at para. 56. This is because none of the purposes articulated by the Minister suggest a legislative intention to confer a private law duty owed to licensed cannabis retailers, through the enforcement of the CCLA, to ensure that they do not lose profits to competing unlicensed cannabis sellers, including those operating on Indigenous Reserves.

[46] I am also not persuaded that the Minister intended to induce retailers to enter this potentially lucrative new market with promises of specific, ongoing, and targeted use of its discretionary enforcement powers. I reject the assertion that the Minister had either an obligation or conveyed an intention to use these powers to shield licensed cannabis sellers from the indeterminate and largely unknown effects of illegal cannabis sales both on and off reserves.

[47] Specifically, none of the provisions of the CCLA provide for a right of action that could ground the Claim nor does it contain any other indication of the legislative intention to create a private law duty of care.

[48] The CCLA does not impose positive duties on the Province to enforce the statute so as to ensure that licencees do not lose profits to competing unlicensed cannabis sellers. This is because all of the relevant enforcement powers granted to the director of the CSU under the CCLA are discretionary. This is a well-understood indication that the legislature did not intend to confer a private law duty of care: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 70-71; *Waterway Houseboats Ltd.* at paras. 229-230, 265, 279, and 308.

- [49] In considering the interactions between the parties, it is apparent that the regulators stayed within the administration and enforcement of the statutory scheme and did not stray from that role. This is because the written communications and public statements of government officials do not suggest an intention to create a private law duty of care owed to licencees so as to ensure that they do not lose profits to competing unlicensed cannabis sellers, including those on Indigenous Reserves.
- [50] On the contrary, the statements reflect the Province's acknowledgement of the CSU's public duty to carefully utilize the discretionary enforcement powers under the CCLA to reduce the unlicensed cannabis market. The Province did not comment on specific cases or actions taken by the CSU or otherwise interfere with, or direct, the discretionary decisions of the Director.
- [51] The nature of the communications between the Province and some of the plaintiffs did not create a special relationship sufficient to distinguish them from any other licence holder under the CCLA or for that matter from any member of the public to benefit from proper implementation of the scheme. The interactions amount to nothing more than regular interactions between the Province as regulator and the plaintiffs as licencees and members of the public: *Apotex Inc. v. Canada*, 2017 FCA 73 at para. 122.
- [52] In this case, the Province did not stray outside of its regulatory role by advising and assisting a specific group of licencees. This fact situation is fundamentally different from the one in *Imperial Tobacco* in which the manufacturers drew upon Health Canada's knowledge and expertise and entered into commercial relationships based in part on the advice given to them by government officials. This did not happen in the case at bar.
- [53] It is important to note that the Director does not have a statutory obligation to enforce the CCLA. Its powers are discretionary as set out in ss. 89 and 94 of this legislation. The discretionary exercise of these enforcement powers that takes reconciliation with Indigenous people into account is neither unusual nor surprising. This is because whenever such powers are conferred by statute it is expected that decision-makers will balance many competing rights and obligations beyond the obligation to enforce the law. These considerations include "the government's obligation to bring about the reconciliation of Indigenous and non-Indigenous peoples through negotiation": *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721 [Henco] at para. 117, 2006 CanLII 41649 (C.A.). Accordingly, it is not expected that every breach of a statutory provision will be enforced to the maximum extent of the law. As the Ontario Court of Appeal held in *Henco*, "the immediate enforcement and prosecution of violations of the law may not always be the wise course of action or the course of action that best serves the public interest": para. 118.
- [54] The representations made by the Province were made for the purposes of:

- a) updating members of the public on the CSU's ongoing efforts to obtain compliance with the CCLA; and
 - b) reassuring members of the public that in exercising its discretionary enforcement powers and seeking to obtain compliance on Indigenous Reserves, the Director would continue to take an approach that takes reconciliation with Indigenous peoples into account.
- [55] Any representations made by the Province have to be considered in the context and purpose of the CCLA. In my view, none of the representations relied on by the plaintiffs in this case were made for the purposes of inducing licencees to make investments necessary to apply for and maintain licences under the CCLA or to otherwise undertake to shield them from the economic impact of competition from unlicensed retailers on Indigenous Reserves.
- [56] It is, therefore, plain and obvious that this Claim does not disclose a sufficient level of proximity that could ground a prima facie duty of care at the first stage of the Anns/Cooper test.
- [57] Even if I were to conclude that the Province owed the plaintiffs a prima facie duty of care to enforce the CCLA such that they would not lose profits because of unlicensed competitors on Indigenous Reserves, such duty would be negated by residual policy concerns outside the relationship between the parties. This is because the recognition of such a duty would expose government to the spectre of indeterminate liability to an indeterminate class because such a duty would expose government to the possibility of being liable for the losses that any retail cannabis licensee in BC may incur from competing with unlicensed cannabis sellers. This is fundamentally inappropriate as a matter of policy because government has no control over the number of individuals that may seek to unlawfully sell cannabis in this province: *Imperial Tobacco* at paras. 97-101. The Province cannot control the number of individuals who sell cannabis through unlicensed dispensaries thereby causing licensed retailers to lose profits.
- [58] In *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, 2012 ONSC 4544 [Weninger], the plaintiffs were lawful sellers of tobacco products. They alleged that the governments of Ontario and Canada negligently failed to enforce certain statutes so as to permit the sale of contraband tobacco products, including on Indigenous Reserves, which diminished the market for the sale of legal tobacco by them. On facts similar to those at bar, the plaintiffs in Weninger alleged that the defendants "effectively abdicated" their statutory responsibilities, "ignored flagrant violations" of the law in order to "appease the aboriginal community."
- [59] The court in Weninger struck the claim on the basis that it was plain and obvious that the tort of negligence could not succeed. It found that there was no proximity and thus no prima facie duty of care at the first stage of the Anns/Cooper test. It also found that even if there had been such a duty of care, it would have been negated by policy considerations at the second stage of the test because of the spectre of indeterminate liability:

[68] [] [I]f a duty of care is recognized on these facts, the potential exposure of government to lawsuits is endless. Many industries are regulated. Most products are taxed. If a private law duty of care exists in this case where does it end? It seems to me that the government is exposed to the risk of suit by anyone disadvantaged by any decision made under regulatory or taxing statute. That cannot be the law. []

[60] The same analysis applies to the case at bar.

Disposition

[61] I am satisfied that it is plain and obvious that the Claim does not disclose a reasonable cause of action in either negligence or negligent misrepresentation. The plaintiffs cannot succeed in establishing a private law duty of care owed to them by the Province to enforce the licencing provisions of the CCLA on Indigenous Reserves, or anywhere else. Accordingly, the Claim is bound to fail and is dismissed with costs to the Province.

"Basran J."

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