

CANADA / JUDGMENT

Cobble Hill Holdings Ltd. v. British Columbia

2020 BCCA 91

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 91 Cobble Hill Holdings Ltd. v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cobble Hill Holdings Ltd. v. British Columbia,

2020 BCCA 91

Date: 20200316

Docket: CA45936

Between:

Cobble Hill Holdings Ltd.

Appellant

(Plaintiff)

And

Her Majesty the Queen in Right of the Province of British Columbia

and Mary Polak

Respondents

(Defendants)

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 6, 2019 (Cobble Hill Holdings Ltd. v. British Columbia, 2019 BCSC 151, Victoria Docket S173135).

Counsel for the Appellant:

B.A. Marlatt

D.G. Quantz

Counsel for the Respondents:

M. Butler

B. Wagner

Place and Date of Hearing:

Victoria, British Columbia

December 3, 2019

Place and Date of Judgment:

Vancouver, British Columbia

March 16, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

Summary:

The appellant, Cobble Hill Holdings Ltd., challenges the chambers judge's order granting, in part, an application to strike its claims against the respondents, the Province of British Columbia and the former Minister of Environment. The appellant's claim was in negligence, arising from the cancellation of its permit issued by the Ministry of Environment. The judge found that this case did not fall within the established categories in which a duty of care has been recognized. In considering whether a new duty of care may be recognized, the judge found that there was a basis to conclude: (1) the harm suffered by the appellants was reasonably foreseeable by the respondents; and (2) the relationship between the appellant and the respondents was of sufficient proximity to establish a prima facie duty of care. Nonetheless, the judge found that residual

policy considerations militated against recognizing a duty of care. As a result, the appellant's negligence claim was struck as disclosing no reasonable cause of action. Held: Appeal dismissed. The judge did not err in concluding that any duty of care was negated by policy considerations. However, the judge could and should have found that there was also insufficient proximity between the parties to establish a duty of care.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I: Introduction

- [1] This is an appeal from a Supreme Court chambers judge's order granting, in part, the dismissal of a portion of the appellant's claims against the respondents. The application was brought pursuant to Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR], seeking an order striking the appellant's pleadings under subsection (a) as disclosing no reasonable cause of action, and/or under subsection (d) as constituting an abuse of process.
- [2] The appellant, and plaintiff in the underlying action, is Cobble Hill Holdings Ltd. ("Cobble Hill Holdings"), a British Columbia corporation, which owns property near Shawnigan Lake, British Columbia. The property was the site of a mine quarry.
- [3] The respondents, and defendants in the underlying action, are the provincial Crown (the "Province") and the former Minister of Environment, Mary Polak (the "Minister").
- [4] Cobble Hill Holdings' claims were brought in tort, and based in both negligence and misfeasance in public office. They arise out of the cancellation of a permit issued by the Ministry of Environment (the "Ministry") to the appellant, which allowed it to accept contaminated soils at its quarry site and discharge waste into the environment. The appellant claimed the respondents acted negligently, and the Minister abused her public office, by cancelling the appellant's permit.
- [5] In reasons for judgment indexed as 2019 BCSC 151 (the "Reasons"), the judge was not satisfied that this was a case where it could be said that a duty of care had previously been found in an analogous decision. The respondents in this court say that "it was open" for the judge to reach this conclusion.
- [6] The judge then held that residual policy considerations under the second stage of the Anns/Cooper analysis (Anns v. Merton London Borough Council, [1978] A.C. 728; Cooper v. Hobart, 2001 SCC 79) militated against finding the appellant was owed a duty of care. Accordingly, the claims based in negligence were dismissed.
- [7] The judge granted the appellant leave to amend its pleadings to meet the requirements of the tort of misfeasance in public office. No appeal is taken from that order. Since the respondents' argument that the pleadings constituted an abuse of process related only to the misfeasance in public office allegations, this appeal concerns only the application of Rule 9-5(1)(a), and not 9-5(1)(d).

[8] For the reasons that follow, I would dismiss the appeal.

II: Background

[9] The factual and legal background to this matter is complex and has been the subject of three decisions of the British Columbia Supreme Court and three of this court. They can be summarized as:

- two preliminary decisions involving evidentiary and procedural matters: 2014 BCSC 728 and 2015 BCSC 1995;
- a decision granting the petition by the Cowichan Valley Regional District ("CVRD") for a declaration that the respondents, including Cobble Hill Holdings, were using property in the district as a contaminated soil treatment facility and a landfill facility, both of which are not permitted under the CVRD zoning bylaw, and granting injunctive relief (the "Injunctions"): 2016 BCSC 489;
- a chambers decision in this court ordering a stay of the Injunctions pending the expedited appeal: 2016 BCCA 160;
- a review decision by a division of this court, dismissing an application to vary the order staying the Injunctions: 2016 BCCA 215; and
- a decision of this court, allowing the appeal in part. The Injunction with respect to the "landfill facility" (which is in fact the quarry site reclamation, not a landfill) was reversed, with the Injunction with respect to the operation of the soil treatment facility being upheld: 2016 BCCA 432, supplementary reasons at 2017 BCCA 176.

[10] On August 21, 2013, the appellant's permit (the "permit") to discharge waste into the environment at its quarry site was issued pursuant to s. 14 of the Environmental Management Act, S.B.C. 2003, c. 53 [EMA].

[11] Between October 22, 2013, and June 21, 2016, the quarry underwent reclamation pursuant to the permit. This process attracted significant negative attention from local residents, politicians, and municipal government.

[12] In August and September 2013, the CVRD, the Shawnigan Residents Association, and some individual residents filed appeals of the granting of the permit to the Environmental Appeal Board ("EAB"). These appeals were ultimately unsuccessful: *Shawnigan Residents Assn. v. British Columbia (Ministry of Environment)*, [2015] B.C.E.A. No. 5 (March 20, 2015) (B.C.E.A.B.).

[13] In October 2013, the CVRD similarly filed a petition in the British Columbia Supreme Court, seeking various declaratory and injunctive orders. The CVRD agreed to put the petition proceedings on hold, pending the outcome of the EAB appeal. After the EAB upheld the validity of the permit in March 2015, authorizing the importation of contaminated waste to the quarry site, the CVRD proceeded with its petition and successfully obtained the

Injunctions against the respondents, including Cobble Hill Holdings, which were partially overturned on appeal: 2016 BCCA 432, rev'g in part 2016 BCSC 489.

- [14] The Ministry conducted inspections of the site and identified several instances of non-compliance with the permit. It issued Cobble Hill Holdings warning letters on November 18, 2015, June 28, 2016, and August 8, 2016.
- [15] On June 21, 2016, the Ministry requested, pursuant to the permit, that the appellant produce by July 29, 2016, an updated closure plan and costs estimate together with additional security, all to be approved by the Director under the EMA.
- [16] On October 11, 2016, then Minister Polak, advised the appellant that she was considering suspending or cancelling the permit for ongoing non-compliance, which included failing to provide an updated closure plan, a future remediation costs estimate, and additional security to cover these costs.
- [17] On November 4, 2016, the Minister advised the appellant that it had until December 20, 2016 to clarify how it planned to rectify the identified issues of non-compliance.
- [18] On January 27, 2017, the Minister suspended the permit until such time as the Director confirmed to the appellant, among other things, that: (i) the Director approved a cost estimate for a closure plan, and (ii) the appellant provided adjusted financial security, in the form of an irrevocable letter of credit, in an amount consistent with the approved cost estimate.
- [19] On February 20, 2017, the appellant submitted a cost estimate to the Ministry for review and approval, but it did not provide the adjusted financial security.
- [20] On February 23, 2017, the Minister cancelled the permit pursuant to s. 18(3)(c) of the EMA due to the appellant's failure to provide adjusted financial security.
- [21] The appellant did not seek judicial review of the Minister's decision to cancel the permit, its position being that it wished to seek damages rather than to continue operating the facility. Accordingly, judicial review would not provide an appropriate remedy.
- [22] On June 12, 2017, Mary Polak ceased to be the Minister.
- [23] On August 22, 2017, the appellant filed a notice of civil claim ("NOCC") in tort against the respondents/defendants alleging negligence and misfeasance in public office.
- [24] The statement of facts in Part 1 of the NOCC contains an amplification of the background facts set out above. Specifically, paras. 30 and 31 of the NOCC plead that as a result of the cancellation of the permit, the appellant's lease of the quarry to a third party was terminated and damages have resulted.
- [25] The claim in negligence is set out in paras. 1-3 of Part 3 (Legal Basis) of its NOCC:

Part 3: LEGAL BASIS

Negligence

1. In relation to the issuance and cancellation of the Permit, the Crown was at all material times governed by the Environmental Management Act in all its dealings with CHH and the Crown owed a duty of care to CHH to conduct its operational decisions lawfully and in a manner consistent with the legislative context.
2. The Defendants negligently and in breach of the said duty of care, unlawfully cancelled the Permit, the particulars of which include but are not limited to:
 - a. In exercising its authority pursuant to s. 18 of the Environmental Management Act, the Defendants breached their duty to conduct said authority and exercise their discretion in a judicious manner;
 - b. Contrary to s. 18(3)(c) the Defendants cancelled the Permit when they knew or ought to have known that CHH had complied with the requests of Minister Polak by the February 20, 2017 deadline;
 - c. Contrary to s. 18(3)(c) the Defendants cancelled the Permit when they knew or ought to have known that on February 23, 2017 CHH had not received approval from the Director for the proposed closure plan, nor for the updated security amount;
 - d. Contrary to s. 18(3)(c) although CHH had complied with all requests and submitted the review, reassessment and Updated Plans by the deadline imposed on CHH by the Defendants' letter of November 4, 2016, the Defendants cancelled the Permit claiming CHH was avoiding payment of additional security when the additional security had not been approved by the Director;
 - e. Contrary to s. 18(3)(c) the Defendants cancelled the Permit without reviewing, or alternatively without sufficiently reviewing, CHH's submissions made in compliance with the Defendants' letter of November 4, 2016; and
 - f. Such further and other particulars as may become known to CHH.
3. In reliance on the Permit CHH developed a business to accept contaminated soil as allowed under the Permit and CHH has suffered loss and damage as [a] result of the unlawful cancellation of the Permit, all of which was reasonably foreseeable by the Defendants.

III: Chambers Judgment

- [26] The judge began her legal analysis by setting out the test for striking out claims under Rule 9-5(1) of the SCCR. She held that "[a] claim will only 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 at para. 17.

- [27] Turning to the appellant's negligence claim, the judge identified that the appellant would need to establish the following elements: a duty of care, breach of the standard of care, causation, and actual loss. She noted that a duty of care is not often at issue because most cases fall into established categories in which proximity between the plaintiff and the defendant has been recognized in the past. However, where a claim asserts a duty of care that does not fall into a prior established category, then the court must decide whether a new duty of care relationship can be found on the Anns/Cooper test: Reasons at paras. 45-46.
- [28] In finding that the circumstances in this case did not fall into a prior established category, the judge distinguished *James v. British Columbia*, 2005 BCCA 136, which the appellant asserted established an analogous duty of care. *James* involved a consideration of the Forest Act, R.S.B.C. 1996, c. 157 provisions, including a requirement in s. 27, as it stood in 1991, that the Minister evaluate the impact of the issuance of a license on employment opportunities and other social benefits in the province. Those same considerations did not necessarily apply to the cancellation of a permit under the EMA.
- [29] The judge then noted at paras. 52 and 53 of the Reasons that:
- [52] I also note that the search for precedent in cases like these must focus more on relationships, and less on other superficial factual similarities: *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 at para. 25. It is true that both the case at bar and *James* involved a British Columbia Cabinet Minister. Again, in *James* the court simply held that it was not plain and obvious that the class-action plaintiffs could not establish that the Minister had the alleged duty of care to mill workers who were affected by an omission in the issuance of a tree farm licence. In my view the relationship in *James* is different from the relationship before me, which involves a Minister and a corporation that had secured a regulatory permit.
- [53] As stated by McLachlin C.J.C. in *Childs v. Desormeaux*, 2006 SCC 18 at para. 15, "if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established."
- [30] Having concluded that she was not satisfied that this was a case where it could be said that a duty of care had previously been found in an analogous situation, the judge then turned to the Anns/Cooper framework to consider whether a new duty of care could be found.
- [31] In doing so, she summarized the applicable framework at paras. 55 and 56:
- [55] An overview of the framework was provided in *Cooper* at para. 30:
- [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors

arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

[Emphasis in original].

[56] To summarize, the *Anns* / *Cooper* analysis can be set out as follows:

(a) Stage One: Is there a *prima facie* duty of care?

(i) Was the harm reasonably foreseeable?

(ii) Is there a relationship of proximity?

(b) Stage Two: Are there conflicting policy considerations?

(i) Are there residual policy concerns against the imposition of a duty of care?

[32] The judge's summary at para. 56 of the Reasons is in accordance with that set out by this court in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 50 [Carhoun].

[33] The judge found step one of stage one was satisfied in that the respondents conceded that the harm the appellant suffered was reasonably foreseeable as a result of the decision to cancel the permit: Reasons at para. 57.

[34] On the second step of stage one, the judge, at para. 60 of the Reasons, recognized that in *Imperial Tobacco*, the Court, at paras. 43-46, accepted that there were three situations in which a *prima facie* duty of care relationship could be found between a state actor and a plaintiff:

(a) explicitly or by implication from a statutory scheme;

(b) from the interactions between the plaintiff and the government; and

(c) as a result of a combination of the first two situations (paras. 43-46).

[35] I note that in relation to (b), *Imperial Tobacco* at para. 43 in fact states, "where the duty of care is alleged to arise from interactions between the claimant and the government and is not negated by statute" (emphasis added).

[36] The judge then found that a *prima facie* duty of care did not arise as a result of the statutory scheme, noting that:

[61] As argued by the defendants, the purposes of the Environmental Management Act are to protect the environment and human health while allowing industry to operate under regulated conditions. Under s. 18(3)(i), the Minister may cancel a permit if (among other lawful bases) the permit is not in the public interest. The overall context of the Act appears

to be oriented towards striking a reasonable balance between protecting the environment and allowing economic growth and development. In my view, a prima facie duty of care is not created explicitly or implicitly by the Act.

[Emphasis added.]

[37] She held, however, that in the circumstances of this case, the specific interactions that occurred between the parties were sufficient to give rise to a prima facie duty of care. This was because the province and the appellant supported each others' positions before the EAB: Reasons at para. 63.

[38] In reaching this conclusion, the judge stated at paras. 62-64:

[62] However, I am not certain the same can be said with regard to the second scenario described in Imperial Tobacco. In Cobble Hill Holdings' application response, it argued:

... the fact that the MOE [Minister of the Environment] fought alongside CHH [Cobble Hill] to defend the permit when it came under attack, is evidence of a direct and close relationship between the parties such as contemplated in the Anns test and supports a finding that once the permit had been issued, a prima facie duty of care existed.

[63] The plaintiff did not specifically refer to the Minister "fighting alongside" Cobble Hill Holdings in the notice of civil claim. But there is evidence of this relationship within the record before me. Specifically, in the decision of the British Columbia Environmental Appeal Board included in the application record (*Shawnigan Residents Assn. v. British Columbia (Ministry of Environment)*, [2015] B.C.E.A. No. 5 (B.C.E.A.B.)), the first page shows appearances by counsel for the province and Cobble Hill Holdings. The body of the decision suggests that the province and Cobble Hill Holdings supported each others' positions (see e.g. para. 145).

[64] On this basis, I am not prepared to conclude that it is plain and obvious that no prima facie duty of care relationship existed between the defendants and Cobble Hill Holdings in this case. Here, I accept that, as in *Imperial Tobacco*, the specific interactions that occurred between the parties is sufficient to give rise to a prima facie duty of care.

[Emphasis added.]

[39] The judge then considered the second stage of the Anns/Cooper analysis; namely, whether residual policy considerations existed that militated against finding a new duty of care. This stage of the test was set out at para. 65 of the Reasons:

Stage 2: Conflicting policy considerations

[65] The Anns / Cooper analysis at the second stage looks at whether there are residual policy considerations that militate against finding a new duty of care, even where the test is otherwise satisfied. As it was framed in *Cooper*:

- [37] This brings us to the second stage of the Anns test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.
- [38] It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the Anns test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons - more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).
- [66] As stated in *Cooper*, there is a threshold issue that must be determined at the second stage of the Anns / Cooper test: was the decision of a policy nature, or an operational nature? If the decision was a policy decision, then I cannot find a duty of care. As stated by Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 at 1240, "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors."
- [40] As these passages demonstrate, the judge was alive to the distinction between policy and operational decisions. She found that since the Minister's decision, as pleaded by the appellant, was made "without reason", it "could be considered an operational one", satisfying the threshold question of the second stage: *Reasons* at para. 73.
- [41] She noted the three residual policy considerations identified at para. 37 of *Cooper*, cited at para. 39 above, and grounded her decision that a duty of care should not be recognized in the circumstances of this case on the third, being, "other reasons of broad policy": *Reasons* at paras. 78-79.

- [42] On this point, the judge acceded to the respondents' arguments that imposing a duty of care would conflict with the Minister's responsibilities to society and the public at large, and that the Minister's duties to the public under the EMA precluded the establishment of a private duty of care to individual regulated entities: Reasons at para. 79.
- [43] The judge held that establishing a private law duty of care between the Minister and a regulated entity would render the Minister unable to effectively accomplish the balancing of interests between environmental protection and economic development that the EMA requires. On that basis, the judge held such a duty of care would have a "chilling effect on the proper performance of [the Minister's] duties": Reasons at para. 84.
- [44] In the result, the judge ordered that the pleadings in negligence should be struck pursuant to Rule 9-5(1)(a) in that "there are residual policy considerations for why such a duty of care would have to fail": Reasons at para. 85.

IV: Analysis

Standard of Review

- [45] The question before the judge was whether it was plain and obvious that the respondents did not owe a duty of care to the appellant in the context set out in the NOCC.
- [46] Rule 9-5(1)(a) provides:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be
- [47] While relief under Rule 9-5(1) is generally discretionary, the question of whether or not a duty of care is owed is an extricable question of law, reviewable on a correctness standard: Carhoun at para. 23.

Statutory Provisions

- [48] The EMA sets out the Minister's authority, in part, as follows:

Minister's authority

5. The duties, powers and functions of the minister extend to any matter relating to the management, protection and enhancement of the environment including, but not limited to, the following matters:
- (a) planning, research and investigation in relation to the environment;
- (b) development of policies for the management, protection and use of the environment;

- (c) planning, design, construction, operation and maintenance of works and undertakings for the management, protection or enhancement of the environment;
- (d) providing information to the public about the quality and use of the environment;
- (e) preparing and publishing policies, strategies, objectives, guidelines and standards for the protection and management of the environment;
- (f) preparing and publishing environmental management plans for specific areas of British Columbia which may include, but need not be limited to, measures with respect to the following:
 - (i) flood control, flood hazard management and development of land that is subject to flooding;
 - (ii) drainage;
 - (iii) soil conservation;
 - (iv) water resource management;
 - (v) fisheries and aquatic life management;
 - (vi) wildlife management;
 - (vii) waste management;
 - (viii) air management.

[49] With respect to the issuance or cancellation of permits, the EMA further provides, in part, the following:

Permits

14(1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

- (a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;
- (b) require the permittee to give security in the amount and form and subject to conditions the director specifies;
- (c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;
- (d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;

- (e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;
- (f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy potential from wastes.

Suspension or cancellation of permits and approvals

18(1) Subject to this section, the minister or a director, by notice served on the holder of a permit or approval, may

- (a) suspend the permit or approval for any period, or
 - (b) cancel the permit or approval.
- (3) The minister may exercise the authority under subsection (1) in any of the following circumstances:
- (a) a holder of a permit
 - (i) fails to complete construction of works specified in the permit within the time specified in the permit or, if no time is specified in the permit, within 3 years after issuance of the permit, or
 - (ii) does not exercise any rights under the permit for a period of 3 years;
 - (b) a holder of a permit or an approval fails to pay money owing to the government under the permit or approval;
 - (c) a holder of a permit or an approval fails to comply with the terms of the permit or approval;
 - (d) a holder of a permit or an approval fails to comply with an order issued under this Act and related to the subject matter of the permit or approval;
 - ..
 - (f) a holder of a permit or an approval fails to comply with any other requirements of this Act or the regulations;
 - (i) a permit or an approval is not, in the opinion of the minister, in the public interest.
- (4) The authority conferred by subsection (1) may be exercised by a director in any of the circumstances referred to in subsection (3) (a), (b), (g) and (h).
- (6) For certainty, a permit or an approval that is suspended or cancelled is not a valid and subsisting permit or approval.

Summary of Certain Authorities Referred to by the Parties

- [50] It is useful to summarize certain of the principal authorities relied on by the parties, both in the court below and/or on appeal, which relate to either or both stages of the Anns/Cooper analysis.
- [51] In *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 [Syl Apps], the Supreme Court of Canada declined to impose a private duty owed to parents in child protection proceedings because of the potential conflict between a private duty of care owed to parents and the statutory duty of social workers to promote the best interests, protection, and well-being of the child. The Court held that "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity": para. 28. Furthermore, statutory immunity provisions indicated legislative intent to protect child protection workers from liability for the good faith exercise of their statutory duty. As no legal duty of care existed, the claim was properly struck.
- [52] In *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, leave to appeal ref'd [2009] S.C.C.A. No. 259, *River Valley Poultry Farm Ltd.* sued the Canadian Food Inspection Agency and Health Canada for negligently investigating whether its flock was infected with salmonella. The Court held that no duty of care existed because the parties lacked sufficient proximity, as evidenced by the *Health of Animals Act*, S.C. 1990, c. 21, which disclosed an intention to exclude a private duty of care. In obiter, the Court added that policy reasons would have negated any liability on the part of the regulator in any event due to a potential conflict if the regulator must not only be mindful of animal and public health, but also the economic interests of individual farmers by virtue of owing a private duty of care.
- [53] In *Imperial Tobacco*, in 2011, the Supreme Court of Canada concluded that all of the claims brought against Canada in two related proceedings were bound to fail and should be struck. The underlying proceedings included: (1) an action by the Government of British Columbia seeking to recover health care costs from treating tobacco-related illnesses; and (2) a class action brought against *Imperial Tobacco Ltd.* on behalf of class members who purchased "light" or "mild" cigarettes. In both cases, the tobacco companies issued third-party notices to Canada on the basis of negligent misrepresentation, negligent design, failure to warn, and equity. The Court found conduct-based proximity between Canada and the tobacco companies arising from roles assumed by Canada apart from its statutory duties, including "its roles as designer, developer, promoter and licensor of tobacco strains": para. 54. However, the *prima facie* duty of care was negated at the final stage of the Anns/Cooper test because Canada's allegedly negligent actions were core policy decisions, rather than operation decisions, and were thus immune from tort liability: paras. 90-91 and 95. Further, the prospect of exposing Canada to indeterminate liability would have itself been fatal to the tobacco companies' claims in negligent misrepresentation.

- [54] *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2013 BCCA 34, leave to appeal ref'd [2013] S.C.C.A. No. 134, involved allegedly negligent inspection of imported carrots by the Canadian Food Inspection Agency. The chambers judge struck the plaintiff's claim as disclosing no reasonable cause of action, finding that no duty of care was owed. This court affirmed, at paras. 49-55, that the government regulator's conduct in carrying out its statutory mandate did not establish sufficient proximity, and that recognizing a private duty of care owed by food inspectors to food sellers would conflict with the clear purpose of the legislative scheme to protect public health.
- [55] In *Carhoun*, in 2015, this court upheld the chambers judge's order dismissing an application to strike the plaintiff's claim pursuant to Rule 9-5(1)(a) of the SCCR. The underlying claim was in negligence and misfeasance in public office against the Attorney General of Canada for negligently adjudicating its ultimately successful, but allegedly delayed, applications under s. 35(2) of the Fisheries Act, R.S.C. 1985, c. F-14, for authorization to infill and develop potential fish habitat areas. Applying the *Anns/Cooper* framework, this court concluded that it was not plain and obvious that no duty of care existed. As the plaintiff relied on conduct-based proximity, "the only potential barrier to a finding of proximity would be an express or implicit statutory prohibition on Canada considering Carhoun's interests": para. 99. No such prohibition was found in the legislative scheme, which instead required environmental assessments to be conducted with a view to multiple interests, including private interests in efficiently processing an application. Furthermore, residual policy considerations did not negate a duty of care. The pleadings did not establish that the undue delay resulted from a true policy decision, nor did they raise concern over indeterminate liability in the circumstances of the case.
- [56] In *Wu v. City of Vancouver*, 2019 BCCA 23, leave to appeal ref'd [2019] S.C.C.A. No. 90, this court reversed the lower court judgment recognizing a private law duty of care imposed on municipal officials to make a decision on a development permit application within a reasonable time in accordance with applicable bylaws. This court held that the proper remedy for delay in making a decision is mandamus. As a general rule, subject to rare exceptions, the Court recognized that "statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions that are inherent in the exercise of the public law duty": para. 58. In the circumstances, the Court held the judge erred in finding that the regulatory scheme created a relationship of proximity. Further, and in the alternative, policy reasons would negate any *prima facie* duty of care because of the risk of indeterminate liability and the availability of alternative remedies.
- [57] While James was relied on in the court below and discussed in the Reasons, neither party relies on it on appeal. James is reviewed at para. 28 of these reasons.

The Anns/Cooper Framework: Stage One

- [58] Stage one of the Anns/Cooper framework requires the plaintiff to establish a prima facie duty of care by proving that: (1) the harm was the reasonably foreseeable consequence of the defendant's act; and (2) a relationship of sufficient proximity between the parties existed: Cooper at para. 30.
- [59] Although the respondents were successful in having the negligence claims dismissed under stage two of the Anns/Cooper analysis, they take issue with the judge's finding that a sufficient relationship of proximity existed between the parties such that the second step of stage one had been satisfied.
- [60] They argue that no special relationship existed and that, contrary to Rule 9-5(2), the judge erred in considering evidence in basing her conclusion, in part, on facts that were not pleaded. Specifically, the respondents take issue with the judge's reliance on the fact that the parties had supported each other's position before the EAB: Reasons at para. 63, cited at para. 38 above.
- [61] The appellant, for its part, argues that its "close and direct conduct" with the respondents, included:
- requiring that it notify and engage with the public, first nations, and local government authorities, together with persons who could be affected by the proposed discharge;
 - providing details as to the source and location of the waste, characteristics of the waste, and volume of material to be discharged;
 - providing a technical assessment report setting out risk management, together with appropriate security; and
 - requiring an updated plan, water management plan, and a revised closure plan cost estimate to monitor the facility for 50 years.
- [62] Accordingly it submits that this relationship between it and the Minister required a balancing of economic and environmental concerns which gave rise to a prima facie duty of care.
- [63] It also points to what it alleges is a duty of care--which arises, in part, from the operation of s. 18 of the EMA--between the Minister and a permit holder such as the appellant. This alleged duty encompasses the authority to cancel a permit, potentially ending the permit holder's commercial operations.
- [64] Wu was decided after submissions were completed in the court below, but before the Reasons were rendered.

[65] In Wu, Justice Harris comprehensively reviewed the first stage of the Anns/Cooper analysis, and in particular, the second step proximity requirement. The following general principles are derived from Wu at paras. 49-51:

- a prima facie duty of care requires both reasonable foreseeability and proximity, with an increasing emphasis on the latter;
- proximity refers to the type of relationship in which duties of care arise, which are said to be "close and direct" (Cooper at para. 32), and may be evidenced by physical closeness, direct interactions, assumptions of responsibility, expectations, representations, reliance, or the nature of interests involved;
- proximity involves an analysis of the nature of the relationship between the parties and the harms that carelessness might cause.

[66] With respect to the recognition of private law duties owed by public authorities, Harris J.A. set out the following specific principles in Wu at paras. 52-60:

- the historical emphasis on the distinction between true policy decisions and operation decisions has been overshadowed by a rigorous proximity analysis;
- a statutory scheme of regulation does not foreclose the possibility of finding proximity, although the existence of such a scheme is generally insufficient to establish proximity;
- statutory duties aimed at public goods, in and of themselves, generally do not create private law duties;
- a private law duty is unlikely to be recognized if it potentially conflicts with the public authority's duty to the public (this may be viewed as an issue of proximity or a policy reason to negate a duty of care);
- if a private law duty of care is recognized, typically, proximity will be grounded in specific interactions between the parties or in the statutory scheme.

[67] Within this framework, as was the case in Wu, "[i]t is necessary therefore, to begin by characterizing the purpose of the regulatory scheme in this case": para. 61.

[68] At para. 84 of the Reasons, in the judge's analysis of the second stage of the Anns/Cooper framework, the judge stated:

[84] I am of the view that the purpose of the Act is to allow the Minister of the Environment to strike a balance between environmental protection and economic development. As a result, the Act does require the Minister to take economic interests into consideration

[69] As I have noted, a similar observation was made in the proximity analysis. However, it is noteworthy, in my view, that the judge concluded that "a prima facie duty of care is not created explicitly or implicitly by the [EMA]": Reasons at para. 61 (emphasis added).

[70] Rather, the judge found that the negligence claims were not bound to fail at this stage of the analysis based on the specific interactions between the parties as set out at paras. 63 and 64 of the Reasons, cited at para. 38 above. Specifically, the judge relied on evidence of the parties "fighting alongside each other" before the EAB as the basis for establishing a prima facie duty of care.

[71] As I shall outline below, while I am of the view that the judge was correct in dismissing the negligence claim on the basis of the second stage of the Anns/Cooper analysis, I agree with the respondents that she could and should have done so at the second step of stage one.

[72] First of all, the respondents submit the judge erred in not following Rule 9-5(2) which provides:

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1)(a).

[73] In my view, the judge was in error in not adhering to this subrule by going beyond the specific pleadings as set out in the NOCC in considering whether the claim in negligence was bound to fail within the framework of Rule 9-5(1)(a). But I recognize that, from a practical perspective in the circumstances of this case, even if the appellants pleaded allegations of the parties "fighting alongside each other", this would not have been sufficient to ground the necessary proximity in a regulatory scheme such as this to create a prima facie duty of care. Accordingly granting leave to amend the NOCC could not have cured this defect.

[74] In my opinion, the fact the parties may have been aligned before the EAB should not, without more, have been the primary, and arguably the sole factor, relied on by the judge to find a special relationship creating a private law duty of care.

[75] That is because the proceedings before the EAB arose as a result of third parties opposing the issuance of the appellant's permit on the basis that the proposed landfill could affect the local groundwater. In my view, the fact the parties supported the issuance of the permit before the EAB was, with respect, insufficient in the circumstances of this case to conclude that the allegation a special relationship existed that could form the basis for a private law duty of care and was not bound to fail.

[76] Notwithstanding the judge's conclusion that a prima facie duty of care was not created explicitly or implicitly by the legislative scheme, specifically the EMA, the appellant in this court submits that it was.

[77] In that regard, Harris J.A.'s comments at paras. 69-71 of Wu are applicable in this case:

[69] In summary, I do not think that the factors inherent in administering a regulatory scheme of this nature are sufficient to create a relationship of proximity.

- [70] Importantly, this does not foreclose the possibility that a relationship of proximity could be created in the context of a scheme, including this one, and specific facts and circumstances arising from interactions between the parties. There could be a case in which a public official negligently misrepresented certain facts that were relied on by an applicant. This is not such a case. Alternatively, a public official could act in such a way so as to assume a responsibility to have regard for the private interests of an applicant who in turn relies upon that assumption of responsibility. Again, this is not such a case. The representations the judge referred to were, at best, general statements about process. I see nothing in the evidence that would warrant treating them as actionable misrepresentations, and the judge did not do so.
- [71] In the result, I do not think the scheme of regulation, in and of itself, gives rise to private law duties of care that exist alongside public law duties. I see no basis to convert statutory duties into private law duties. The inevitable interactions involved in development permit applications are not sufficient to create a relationship of proximity. There is nothing in the individual and specific interactions in this case capable of creating a relationship of proximity between these respondents and the City.
- [Emphasis added.]
- [78] While I recognize that the examples cited in Wu do not constitute a complete list, I note that the NOCC does not allege negligent misrepresentation, nor is there a plea that the Minister assumed a responsibility to have regard for the appellant's private interests, which in turn were relied on.
- [79] With respect, contrary to what the judge concluded at para. 64 of the Reasons, I do not consider Imperial Tobacco to assist the appellant on the first stage of the analysis.
- [80] The first point of note regarding Imperial Tobacco is that negligent misrepresentation was in fact alleged. Secondly, Canada was found not to owe a prima facie duty of care to tobacco consumers based on the relevant statute, but a prima facie duty was nonetheless found with respect to the tobacco companies at the first stage of the Anns/Cooper analysis. This finding arose from the companies' pleading that Canada went beyond its role as a regulator and assumed a duty of care by entering into a special relationship that involved assisting and advising the companies in reducing harm to their customers. It was pleaded that Canada gave the tobacco companies erroneous advice, knowing the companies would rely on it, which in fact they did: Imperial Tobacco at para. 51.
- [81] The Court in Imperial Tobacco did negate the prima facie duty of care at the second stage of the analysis, finding that the alleged negligent misrepresentations were protected expressions of government policy and that recognizing a duty of care would expose Canada to indeterminate liability: Imperial Tobacco at para. 62.

- [82] In this case, there is no allegation in the NOCC that the respondents exceeded their role as regulator and assumed a duty of care towards the appellant where one did not otherwise exist under the governing statute. In other words, the pleadings do not disclose a sufficient basis for establishing proximity by virtue of the interactions between the parties. In this court, the appellant submits that this court's decision in Carhoun assists them on this point and that it was not discussed in Wu. I would note that the division of this court that decided Wu was aware of Carhoun in that it was raised in the parties' factums on appeal.
- [83] Be that as it may, in my view, Carhoun and Wu can be reconciled. Furthermore, the Wu reasoning regarding the proximity analysis is better suited to the circumstances of this case.
- [84] In Carhoun, the Court stated at paras. 100-105:
- [100] There are several features of this legislative scheme that are consistent with a private duty of care toward proponents. For example, the direct interactions between the Minister and a proponent are a result of the legislative scheme, which is directed at individual applications for an exemption and individual consideration on the part of the Minister or delegated officials.
- [101] As well, the inclusion in the Regulations of a series of specific timelines for the various stages of the CEAA screening process could be indicative of a legislative intention to protect the proponent's economic interests. After all, it is only the proponent who has an interest in his approval process being moved along the chain expeditiously.
- [104] This legislative scheme suggests Canada is to conduct environmental assessments having regard to multiple interests, including both the public interest in maintaining healthy fisheries and the private interest in efficiently processing an application... The legislation, therefore, cannot be interpreted as expressly prohibiting consideration of the proponent's interests. Instead, it operates from the presumption that these two interests are not irreconcilable, which can be contrasted with the findings in River Valley and Los Angeles Salad.
- [105] Therefore, I conclude it is not plain and obvious that Canada and Carhoun were not in a sufficiently proximate relationship
- [Emphasis in original.]
- [85] In Wu, Justice Harris stated at para. 67 :
- [67] I agree that a failure by a public official to process a development application according to the law could in some circumstances cause reasonably foreseeable harm to the economic interests of an applicant where there is a clear right to a permit. In this case, it may have been reasonably foreseeable that a failure to process the development permit application in accordance with the law might interfere with private property rights of the applicant. Again, much the same could be said about any scheme of regulation which involves granting or withholding permission to engage in certain kinds of activity. But none of this takes the

relationship between the parties outside what is inherent in the scheme of regulation. Moreover, reasonable foreseeability is now treated as a secondary factor. Primary emphasis is given to proximity. Reasonable foreseeability does not create proximity: Deloitte paras. 32-6.

[Emphasis added.]

- [86] Importantly, in Carhoun, the pleadings alleged that Canada's direct dealings with Carhoun over approximately ten years created a relationship of proximity: para. 25. In para. 104 of Carhoun, this court found only that the legislative scheme did not preclude a finding of proximity. This court did not find that statutory duties in and of themselves gave rise to a private law duty of care: paras. 97 and 99.
- [87] As was the case in Wu, nothing in this case takes the parties out of the relationship imposed by the statutory scheme so as to establish proximity. In this court, counsel for the appellant submitted that cancelling the permit in question was analogous to a misrepresentation, which would take the conduct outside of the statutory scheme. I do not accept such a broad proposition. The existence of a private law duty of care can only arise out of "the specific features of the relationship between the plaintiffs and the regulator in the circumstances of the case": Wu at para. 59. Where proximity is rooted in the interactions between the parties, it will often be necessary to point to a history of specific interactions, representations, or transactions: Imperial Tobacco at paras. 48-52.
- [88] Furthermore, counsel for the appellant conceded that the permit process and all communications in this case between it and the respondents all occurred within the statutory scheme. Counsel argued that this was also the situation in Carhoun. But the legislative scheme at issue in Carhoun was, as in Imperial Tobacco, materially different from the one in this case. In fact, the legislative scheme here more closely resembles those in Los Angeles Salad, Syl Apps, and Wu.
- [89] In conclusion, as in Wu, there was nothing in the individual and specific interactions in this case that was capable of creating the required proximity between the parties. As I have addressed, the fact that the parties' interests aligned in the EAB proceedings is insufficient to create a private law duty of care. I would thus conclude that the claims in negligence were bound to fail at this stage alone.

The Anns/Cooper Framework: Stage Two

- [90] Even if the claims in negligence did not fail at the first stage of the Anns/Cooper analysis, in my view the judge correctly found that they did so at the second.
- [91] At this stage, the defendant has the onus of establishing that there are residual policy considerations outside the relationship of the parties that negative the imposition of a duty of care: Cooper at para. 30; Carhoun at paras. 50-51.

- [92] The judge's analysis regarding the residual policy concerns are set out at paras. 39-44 above.
- [93] It bears repeating that the judge acceded to the respondents' arguments that imposing a duty of care would conflict with the Minister's responsibilities to society and the public at large and would render the Minister unable to effectively accomplish the purpose of the EMA.
- [94] I will first approach the threshold issue, being whether the decision to cancel the permit was one of policy or operational in nature.
- [95] Having set out the applicable framework, the judge concluded as follows at paras. 68-69 of the Reasons:
- [68] In this case, there are facts pointing in both directions. The high level position of Minister Polak suggests that this was a policy decision. The rank of the decision maker, although not determinative, often correlates with this determination: "Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices" (*Imperial Tobacco*, para. 89).
- [69] But other aspects suggest that the decision was operational. The decision did not affect a broad swath of the public, as would a tax or social-services policy change. The Minister's decision to cancel the permit was primarily concerned with one actor: Cobble Hill Holdings. I acknowledge that the decision likely had broader impacts and ripple effects. For example, the cancellation arguably had consequences on the local environment and community. But it seems inescapable that the decision to cancel Cobble Hill Holdings' permit mostly concerned the interests of Cobble Hill Holdings itself.
- [96] While the respondents take issue with certain aspects of this analysis, I conclude that the judge was correct in finding that the appellant's claim that the cancellation of the permit was operational in nature was not bound to fail.
- [97] Accordingly, this leads to the question as to whether the judge was correct in finding that reasons existed to negative a *prima facie* duty of care such that the claims in negligence were bound to fail.
- [98] The judge's conclusion on this issue was based on the third category of considerations outlined at para. 37 of *Cooper*, that is, "other reasons of broad policy" militate against recognizing a duty of care. The judge's analysis on this point was set out at paras. 78-79 of the Reasons:
- [78] In *Cooper*, the court also accepted that a *prima facie* duty of care could be negated where there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para. 10, the court wrote:

Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

- [79] The defendants argue that imposing a duty of care between the Minister of the Environment and Cobble Hill Holdings would conflict with the Minister's responsibilities to society and the public at large. The defendants say that the Minister's duties to the public under the Environmental Management Act preclude the establishment of a private duty of care to individual regulated entities. I agree with this position.
- [99] The appellant argues there were no residual policy concerns because inconsistencies did not exist between the interests of the public at large and finding that a public law duty of care was owed to it by the Minister. This was because the appellant did not challenge the Minister's authority to cancel a permit, but rather, the "irrationality" of that decision.
- [100] According to the appellant, both it and the Minister have an interest in addressing contaminated soil and the Minister ought to have known that the appellant could not comply with a demand for security until the Ministry had informed it of the amount to be provided. There would be no "chilling effect" by imposing a duty on the Minister to ensure an existing and operating permit holder was provided with an opportunity to comply with a demand for additional security before cancelling a permit.
- [101] The respondents' position is that the judge was correct in concluding that the creation of a duty would conflict with the Minister's overarching duties to the public at large, and in doing so, appropriately considered the reasoning in *Los Angeles Salad* and *Syl Apps*.
- [102] There can be some overlap between the required analysis under stages one and two of the *Anns/Cooper* framework, in particular, the policy considerations. In *Los Angeles Salad*, at para. 39, Justice Smith, citing Justice Abella's reasons for the Court in *Syl Apps*, noted that policy concerns must be considered in the proximity analysis. Further, it is clear that policy considerations ground the analysis at the second stage. As this court held in *Wu* at para. 57, a private law duty is unlikely to be recognized if it potentially conflicts with the public authority's duty to the public, whether this is treated as prohibiting proximity at stage one or negating a duty of care at stage two.
- [103] The judge recognized that it is for the respondents to demonstrate that imposing a private law duty on them would create a real potential for conflict. I agree with her that they did so.
- [104] In my view, while the EMA does not contain a "purposes" provision, it is clear from ss. 5, 14, and 18 that the overarching aim is directed to the interests of the public; that is, to ensure that if contaminated waste is to be discharged into the environment, the process must occur in a manner that will not be harmful to the environment and human health. This is accomplished by imposing parameters regarding the discharge of waste, monitoring the process, and requiring compliance with the terms of the permit. Non-compliance can result in the cancellation of the permit, which is what occurred here.

[105] This legislative scheme is irreconcilable, in my view, with any duty to assist in the promotion of the permit holder's financial or business interests.

[106] Accordingly, I would not accede to this ground of appeal.

V: Conclusion

[107] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Griffin"

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