

CANADA / JUDGMENT

# Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)

2023 BCSC 296

COURT

Supreme Court of British Columbia

DECIDED

1 March 2023

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2023 BCSC 296 Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development),

2023 BCSC 296

Date: 20230301

Docket: S1813609

Registry: Vancouver

Between:

Ronald Gordon Fleming and Love Bros. & Lee Ltd.

Plaintiffs

**And**

Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development) and Doug Donaldson, Minister of Forests, Lands and Natural Resource Operations and Rural Development

Defendants

Before: The Honourable Justice E. McDonald

## Reasons for Judgment

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### Place and Date of Hearing:

Vancouver, B.C.

May 16-17, 24, and

June 3, 27-28, 2022

### Place and Date of Judgment:

Vancouver, B.C.

March 1, 2023

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## Introduction

- [1] The plaintiffs, Mr. Fleming, and the corporation, Love Bros. & Lee Ltd., apply to certify their claim as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].

- [2] At the heart of the claim is the 2017 decision of the provincial government of British Columbia (the "Province") to ban grizzly bear hunting in British Columbia.
- [3] The plaintiffs and the proposed class members are guide outfitters who, prior to the ban, had the ability to guide people in hunting grizzly bears. Grizzly bear hunting was a lucrative component of the plaintiffs' guide outfitting business and the plaintiffs say that since the ban, they have suffered economic loss.
- [4] The plaintiffs are careful to point out that the Claim is not an attempt to reinstate the grizzly bear hunt. The Claim does not allege that a class action arises just because of the plaintiffs' disagreement with a change government policy or a political decision. Rather, the plaintiffs say that their claim involves a very unique circumstance that gives rise to claims for negligent misrepresentation and misfeasance in public office.
- [5] There are four matters before the court: (1) the plaintiff's application to certify this action as a class proceeding; (2) the plaintiff's application to strike out all or parts of the affidavit #1 of Jennifer Psyllakis made January 21, 2022; (3) the defendant's application pursuant to Rule 9-5 to strike out part of the pleading (cause of action for negligent misrepresentation); and (4) the defendants' application pursuant to Rule 9-6 seeking summary judgment on one issue (misfeasance).
- [6] The key issues I am required to resolve are:
- a) Should the action be certified as a class action?
  - b) Should the court strike out the part of the claim alleging negligent misrepresentation?
  - c) Should the court grant summary judgment to dismiss the part of the claim alleging misfeasance in public office?
- [7] There are also issues raised in respect of the evidence tendered by the parties that I am required to resolve.

## Background

- [8] The plaintiffs have for many decades provided guided hunting services in British Columbia. Their business includes taking people on guided hunting trips for "big game", such as grizzly bears.
- [9] To operate their business, the plaintiffs hold various permits and licenses and they must comply with various regulatory requirements in British Columbia. The plaintiffs invested in the development and maintenance of camps and trails.

- [10] The plaintiff's ability to offer non-resident hunters the opportunity to hunt grizzly bears depended on the Province's system of allocating the plaintiffs to kill a specified number of grizzly bears in certain geographic areas during certain time periods. For many years, the plaintiffs were authorized to offer guided hunting for non-residents that could include hunting grizzly bears. The plaintiffs earned more or less revenue depending on whether a non-resident killed a grizzly bear while on a guided tour.
- [11] In 2001, the Province terminated the hunting of grizzly bears by imposing a three-year moratorium. However, that moratorium was repealed with a matter of months.
- [12] On December 18, 2017, Mr. Donaldson, who was the Minister of Forests, Lands, Natural Resources Operations and Rural Development (FLNRORD), issued Ministerial Order No. M414 which was indexed as B.C. Reg. 239/2017 (the "Ministerial Order"). The Ministerial Order states:

I, Doug Donaldson, Minister of Forests, Lands, Natural Resource Operations and Rural Development, order that

- (a) the Hunting Regulation, B.C. Reg. 190/84, is amended as set out in the attached Appendix 1, and
- (b) the Limited Entry Hunting Regulation, B.C. Reg. 134/93, is amended as set out in the attached Appendix 2.

Authority under which Order is made:

Act and section: Wildlife Act, R.S.B.C. 1996, c. 488, ss. 16, 108 and 109

### **Other: O.C. 1109/84 [the Hunting Regulation], 415/93 [the Limited Entry Hunting Regulation]**

- [13] The Ministerial Order enacted amendments to the Hunting Regulation, B.C. Reg. 190/84 and the Limited Entry Hunting Regulation, B.C. Reg. 134/93 by effectively removing any open season for grizzly bears and removing various references to grizzly bears.
- [14] There is no dispute that the Ministerial Order effected a ban on hunting grizzly bears in the Province. There is also no dispute that the decision to ban the grizzly bear hunt was not due to conservation issues but public opinion against hunting grizzly bears.
- [15] The plaintiffs filed a notice of civil claim on December 17, 2018 and an amended notice of civil claim on May 21, 2021 (the "Claim").
- [16] The plaintiffs submit the action is not really about hunting at all, rather, it is a claim for compensation for the loss of the grizzly bear hunt for guide outfitters who relied on the Province's representations that the Province would protect their interests. The plaintiff say that the Province failed to protect the interests of guide outfitters and the Province's wrongful conduct is actionable.

- [17] The plaintiffs submit that the defendants are liable to the plaintiffs, and the potential class members, for damages resulting from misfeasance of public office and negligent misrepresentation.
- [18] The plaintiff, Ronald Fleming, holds a Guide Outfitters Licence [Licence], and he is a licenced guide outfitter. The Licence, issued pursuant to s. 50 of the Wildlife Act, R.S.B.C. 1996, c. 488 [Wildlife Act] permits a holder to guide persons, who may or may not be British Columbia non-residents, to hunt for the species of game that is identified in the quota which is attached as a condition of the Licence and within the area described.
- [19] Mr. Fleming holds a Guiding Territory Certificate pursuant to s. 59 of the Wildlife Act [Certificate]. The Certificate describes an area and it grants the holder exclusive control over guiding privileges in that area for a specified time period not to exceed 25 years. Mr. Fleming's Certificate was valid for 25 years commencing on March 27, 2013.
- [20] The plaintiff, Love Bros., currently holds a Certificate, but it did not do so when the grizzly bear hunt was banned in 2017.
- [21] Mr. Fleming also held a guide outfitter license issued by FLNRORD, including a license for the 2017 to 2021 period providing him an allocation for the Five Year Maximum Harvest for the five year period of the license for the Skeena and Omineca Regions (the "License"). Mr. Fleming's allocation included big game species including grizzly bear and mountain goat. Specifically, his grizzly bear allocation included two and 11 grizzly bears in the Skeena and Omineca regions, respectively, within the five year period. There is a dispute between the parties as to what exactly the License provided in terms of allocation.
- [22] The five-year allocation was sent to Mr. Fleming under cover of a letter describing potential changes to the yearly quota and allocation. According to the Claim, the letter contains a representation that limits the potential for change that the plaintiffs and other potential class members reasonably relied upon.

### The Evidence

- [23] On this certification application, there was extensive affidavit evidence filed by the parties.

### Plaintiffs' Affidavit Materials

### Mr. Ronald Fleming

- [24] The plaintiffs rely on three affidavits made by Mr. Fleming: affidavit #3 made October 26, 2021, affidavit #5 made April 29, 2022 and affidavit #6 made May 31, 2022. During the hearing, I granted Mr. Fleming leave to file his affidavit #6 because I concluded that due to an administrative error, he had failed to include a statement in his affidavit #3 about his knowledge of material facts as required by s. 5(5) of the CPA. To address this, Mr. Fleming made his affidavit #6 setting out his knowledge of facts material to the application.

- [25] Mr. Fleming deposes that he is the plaintiff and the president of the corporate plaintiff, Love Bros. & Lee Ltd. Mr. Fleming states that he has long been an authorized guide outfitter with a quota and allocation for hunting grizzly bears within two regions of British Columbia. Mr. Fleming states that the grizzly bear hunting ban has had a negative financial impact on him and Love Bros.
- [26] Mr. Fleming confirms that he and his company, Love Bros., are willing to act as representative plaintiffs of the proposed class members and, in respect of the common issues, he is aware of no interest of the plaintiffs that is in conflict with the interests of any of the proposed class members. He sets out his reasons for believing that he and Love Bros. are suitable representative plaintiffs.
- [27] Mr. Fleming also sets out his knowledge of the issues, his understanding of his role as representative plaintiff in the proposed class proceeding and he describes the steps he has taken to fairly and adequately represent the interest of the proposed class members.

### Mr. Tim Sheldon

- [28] Mr. Sheldon is the former Deputy Minister of FLNRORD. Mr. Sheldon was Deputy Minister to Mr. Donaldson in December 201, when the ban on grizzly bear hunting was implemented.
- [29] Mr. Sheldon states that he has read the Claim and he states that he believes he has information relevant to the allegations in the Claim. Mr. Sheldon states he would be prepared to testify at trial subject to any objection raised by the defendants or any direction by the court.
- [30] The defendants object to the admissibility of Mr. Sheldon's evidence because he fails to include the attestation required by s. 5(5) of the CPA regarding his knowledge of facts that are material to the certification application. The defendants say that Mr. Sheldon's affidavit ought to be given no weight.

### Mr. Scott Ellis

- [31] Mr. Ellis is the Executive Director of the Guide Outfitters Association of British Columbia (GOABC). Mr. Ellis deposes that GOABC represents between 60-70% of the 245 guide outfitters in British Columbia. Mr. Ellis states that he regularly seeks information from the Province regarding matters of interest to the guide outfitting industry and he meets with Provincial government officials, ministers and members of the Legislative Assembly to advance the interests of guide outfitters.
- [32] Mr. Ellis attaches a copy of the Province's Commercial Hunting Interest policy to his affidavit and states that it contains a commitment to protect the commercial interests of guide outfitters.

- [33] Mr. Ellis sets out his recollection of meetings he had with Mr. Donaldson after the ban on grizzly bear hunting was announced and the things that Mr. Donaldson told him about the decision to ban grizzly bear hunting. Mr. Ellis attaches a copy of a report prepared by or for the Province concerning the financial impact of the ban on guide outfitters.
- [34] Mr. Ellis deposes that the Province eventually set up a transition fund for guide outfitters who lost their grizzly bear quotas and signed a release. Mr. Ellis says that to his knowledge, most guide outfitters turned down the offer of transition funds. Mr. Ellis deposes that in 2001 when the Province briefly banned the grizzly bear hunt, the GOABC was provided with \$1.235M to distribute to guide outfitters at \$5,000 per grizzly bear quota.
- [35] The defendants object to the affidavit of Mr. Ellis because it fails to include the attestation required by s. 5(5) of the CPA as to his knowledge of material facts to the application and because it includes, for example, unattributed hearsay and argument. The defendants say the impugned paragraphs out to be struck out or alternatively, given no weight.

### **Ms. Isobel Cuthill**

- [36] Ms. Cuthill is an administrative assistant with the law firm of the plaintiffs' counsel. In her affidavits, Ms. Cuthill attaches as exhibits the voluminous responses that Mr. Ellis received to his Freedom of Information Requests made to the Province as well as certain published media articles regarding Mr. Donaldson's public statements related to the grizzly bear hunting ban.

### **Mr. D. Jeffrey Harder**

- [37] Mr. Harder is a chartered accountant and chartered business valuator who specializes in valuations and litigation support. Mr. Harder was retained by the plaintiffs counsel to provide expert assistance and an opinion on a proposed methodology for assessing damages to guide outfitters on a class wide basis. Mr. Harder also provides his reply opinion to the defendants' expert report.

### **The Defendants' Affidavit Materials**

### **Ms. Jennifer Psyllakis**

- [38] Ms. Psyllakis is currently the Executive Director of FLNRORD's Species at Risk Recovery Branch. From January 2017 to January 2022, Ms. Psyllakis was the Director, Wildlife and Habitat Branch of FLNRORD where her duties included statutory decision making under the Wildlife Act regarding allocation and management of wildlife resources, including the permitting and licensing system.
- [39] Ms. Psyllakis provides evidence regarding her role and duties as the Director of the Wildlife Branch.

[40] The plaintiffs object to many parts of Ms. Psyllakis' affidavit #1, including because they say she provides opinions, legal arguments and unattributed hearsay.

### **Ms. Laura Ritchie**

[41] Ms. Ritchie is a paralegal for counsel for the defendants at the Legal Services Branch of the Ministry of Attorney General. Ms. Ritchie appends various documents to her affidavits, such as a copy of the Ministerial Order, news articles, an information release related to Mr. Donaldson's departure from the public service and a public statement by then-Premier Horgan.

### **Ms. Jenni Warburton**

[42] Ms. Warburton is an administrative assistant with the law firm Farris LLP and she assists Mr. Michael Wagner, who is one of the co-counsel acting for the defendants. In her affidavit, Ms. Warburton attaches correspondence and documents from Mr. Wagner's file related to administrative and procedural matters, such as problems identified in the plaintiffs' application materials.

### **Mr. Paul D. McEwen**

[43] Mr. McEwen is a chartered accountant, chartered business valuator and a certified fraud examiner who was retained by the defendants to provide an expert report. Mr. McEwen provides a response to Mr. Harder's expert report and more specifically, he responds to Mr. Harder's proposed methodology for assessing damages on a class-wide basis.

### **Evidentiary Issues**

[44] Section 5 of the CPA stipulates the evidence required on a certification application:

#### **Certification application**

5(1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

- (2) A copy of the notice of application and supporting affidavit must be filed and
  - (a) served by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding, and
  - (b) served by personal service on any other persons named in the style of proceedings.
- (4) Unless otherwise ordered, a person to whom a notice of application and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and serve a copy of the filed affidavit by ordinary service on all persons by whom or on whose behalf a pleading has been filed in the proceeding.

- (5) A person filing an affidavit under subsection (2) or (4) must
- (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
  - (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
  - (c) provide the person's best information on the number of members in the proposed class.
- (6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
- [45] The plaintiffs submit that due to s. 5(4), Mr. Donaldson was required to file an affidavit, but he has failed to do so. The plaintiffs submit that as a result of this failure, the court should draw an adverse inference against Mr. Donaldson and accept the plaintiff's evidence as uncontroverted.
- [46] The plaintiffs rely on *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 [Cantlie]. In that case, the plaintiffs alleged a number of deficiencies in the affidavit evidence provided by the corporate defendants. The court agreed that the affidavits were deficient including because they failed to make it clear whether "there are other materials in the defendants' knowledge that were not included".
- [47] The defendants before me submit that *Cantlie* does not stand for the proposition that a person such as Mr. Donaldson is required to file an affidavit; rather, *Cantlie* stands for the proposition that if an affidavit is provided, it must include the attestation required by s. 5(4)(b). The defendants point out that certain of the affidavits provided in support of the application, lack the attestation required by s. 5(4)(b).
- [48] The defendants submit that s. 5(4) does not necessarily require Mr. Donaldson to file an affidavit in the particular circumstances of this claim. The defendants emphasize the opening words of s. 5(4) which state that "unless otherwise ordered", a person served with a notice of application and affidavit must file an affidavit.
- [49] The defendants referred me to *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, para. 25 as support for their submission that s. 5(4) does not necessarily require a person served with a certification application to file an affidavit:
- [25] Although it is clear that no assessment of the merits of the claim takes place at the certification stage, it is equally clear that an "evidentiary basis" is required for each of the certification requirements other than that the pleadings disclose a cause of action. The phrases "evidentiary basis" and "basis in fact" were used by the Supreme Court of Canada in *Hollick*, (supra, at paras. 24-26) in such a manner as to be synonymous with "evidence", and as the Chief Justice pointed out, the requirement arose from the statutory obligation placed on the plaintiff in a class proceeding in Ontario to file "one or more affidavits setting forth the material facts" to be relied upon. The British Columbia legislation is similar in this

regard: s. 5(1) of the Act requires an applicant for certification to file an affidavit containing the items specified at s. 5(5), and the recipient of the notice of motion may also file affidavit material: s. 5(4). In *Hollick*, after citing with approval the Ontario cases of *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) and *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), McLachlin C.J.C. noted:

I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see *Branch*, *supra*, at para. 4.60. [para. 25; underline in original]

[Bold emphasis added]

[50] In the defendants' view, the requirements of s. 5 of the CPA must be considered in light of the fact that the plaintiffs allege that Mr. Donaldson, who was a cabinet minister at the relevant time, committed an intentional tort, namely, misfeasance in public office, based on his subjective knowledge of an unlawful act. The defendants point out that the issue of Mr. Donaldson's subjective knowledge may invoke solicitor-client and cabinet privilege. The defendants submit that s. 5(4) must not be construed so as to require Mr. Donaldson to potentially waive privilege in order to satisfy the requirement of disclosing all known material facts.

[51] The defendants submit that there is no authority for the plaintiffs' submission that, absent an affidavit from a person in the position of Mr. Donaldson, the court should draw an adverse inference against him. The defendants also submit that Mr. Donaldson's evidence is unnecessary for the certification application since the court may certify if satisfied that the amended claim sets out material facts amounting to an unlawful act together with some evidence capable of supporting the other elements of misfeasance of public office.

- [52] After considering the requirements of the CPA, together with the authorities, I have concluded that Mr. Donaldson was required to file an affidavit in response to the certification application because he is a party and he was served with the material. It seems to me that even if solicitor-client privilege and cabinet privilege attaches to Mr. Donaldson's knowledge of material facts, he could have confirmed that in his affidavit. The defendants could have, but did not, apply to exempt Mr. Donaldson from making an affidavit.
- [53] In my view, the proper approach in the circumstances before me is the same as the approach taken by Mr. Justice Harris (as he then was) in *Cantlie*, at para. 171:
- [171] As a remedy, the plaintiffs submit that where any evidence in the affidavits is controversial, it should be ignored and, where there is any doubt on whether some basis in fact exists, the benefit of that doubt should go to the plaintiffs. As will be noted, the plaintiffs have the burden of establishing "some basis in fact" in the evidence for several of the requirements for certification. I agree with the defendants that failure to comply with the requirements under s. 5 does not relieve the plaintiffs of this burden; however, I find that where the defendants rely on their own affidavits to attempt to rebut the plaintiffs' established basis in fact, I must give the defendants' evidence less weight as it is now unclear if there are other materials in the defendants' knowledge that were not included in the affidavits.
- [54] To summarize, because there is no affidavit from Mr. Donaldson, which leaves it unclear if there are other material facts in the defendants' knowledge, that are excluded from the affidavits, where the defendants rely on their own affidavits to rebut the plaintiffs' established basis in fact, the approach I will take is to give the defendants' evidence less weight.

### The Requirements of s. 5(5)(b)

- [55] Section 5(5)(b) of the CPA requires that affidavits made in support of, or in response to, a certification application must include a sworn or affirmed statement that "the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding".

Should the Court Strike Out all or Parts of the Psyllakis/Ellis Affidavits?

- [56] The court may strike all, or parts of, an affidavit containing inadmissible material: *McMahon v. Harper*, 2017 BCSC 2328 at para. 108 citing *Chamberlain v. Surrey School District No. 36*, [1998] B.C.J. No. 2923 (BCSC) [In Chambers] at para. 15.
- [57] Rule 22-2 provides for information that may be included in an affidavit. Rule 22-2(12) stipulates that an affidavit may not include things that the affiant could not state in evidence at trial. In other words, an affidavit is not an opportunity for a witness to provide evidence that would be inadmissible at trial. Subrule 22-2(13) provides that an affidavit may include statements based on information and belief as long as the affiant reveals the source of the information and belief, the affidavit is not made in respect of an application seeking a final

order, or by leave of the court.

- [58] In *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7, the court states that affidavits should include only relevant facts that are within the personal knowledge of the affiant and should not include inadmissible hearsay, opinions, argument, legal conclusions or irrelevant evidence.
- [59] There is no dispute that in the interlocutory context of a certification application, the affidavits may contain information based on the affiant's information and belief as long as the source/identity of the information is provided and the affiant confirms their belief in the truth of the information: *Huebner v. PR Seniors Management Housing Ltd., P.R. Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 15. [Huebner]
- [60] The plaintiffs apply to strike out all or parts of the Affidavit #1 of Jennifer Psyllakis made January 21, 2022 on the grounds that it contains inadmissible argument, opinion, hearsay and/or irrelevant material.
- [61] Before I address the objections, I note that there are unchallenged portions of Ms. Psyllakis' affidavit. For example, in para. 4, Ms. Psyllakis explains the details of her employment duties when she was the Director, such as, leading the development and implementation of programs, conservation and management of sustainable wildlife populations and their habitats, supporting the minister in making regulations under the Wildlife Act, statutory decision making under the Wildlife Act respecting allocation and management of wildlife resources, including permitting and licensing system, consultation and collaboration with Indigenous governments, natural resource sectors and stakeholders, and, representing the Province in inter-governmental negotiations on wildlife and habitat management matters.
- [62] Ms. Psyllakis states in para. 5, that she has had "regular involvement to some degree" with factors involved in grizzly bear management since 2008. At paras. 9-10, Ms. Psyllakis describes the policies and procedures, including the "order of operations", that she and others use when applying statute, regulation, policy, guidelines and procedures. At para. 11, she describes who has authority to do what, including her understanding of her own authority and how she understands and applies the "order of operations". The plaintiffs raise no objections to these paragraphs.
- [63] The plaintiffs submit that all or parts of paras. 12 to 22, 24-25, 30, 32, 35, 39-40, 42, 51-53, 57-58, 60-62, 64-67, 69, 73-75, 77-78, 80-82 and 88 of Ms. Psyllakis' affidavit should be struck out as they contain inadmissible argument, opinion evidence, speculation or irrelevant information. The impugned paragraphs are set out in Appendix A to my reasons for judgment.
- [64] I will begin by dealing with the objections regarding inadmissible opinion evidence in paras. 15, 17, 19, 21, 22, 25, 30, 57, 58, 60, 61, 62, 67, 80 and 81 of Ms. Psyllakis' affidavit #1.

[65] In Huebner, the court considers objections to affidavits filed in support of a certification application on the ground that they contain inadmissible opinion evidence. The court addresses the objections as follows:

[35] In *R. v. D.(D.)*, 2000 SCC 43, the Supreme Court of Canada articulated the scope of lay opinion evidence as follows:

49 A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience. This is a commendable principle since it is the task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the facts proved.

[36] Finally, as noted in Paciocco [David M. Paciocco, Palma Paciocco, & Lee Stuesser, *The Law of Evidence* (8th ed.), (Irwin Law Inc.: Toronto ON, 2020) at 135] at 239:

Lay witnesses may present their own relevant, personal observations in the form of opinions where:

- they are in a better position than the trier of fact to form the conclusion;
- the conclusion is one that persons of ordinary experience are able to make;
- the witness, although not expert, has the experiential capacity to make the conclusion; and
- the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated effectively without resort to conclusions.

[37] Without going into great detail at this point, I am generally satisfied that much of the impugned opinion evidence is within the realm of ordinary experience and/or the experiential capacity of the affiant. For example, statements about whether a facility was understaffed, staff were overworked or hallway clutter formed a safety risk to residents are within the realm of ordinary experience. Specialized knowledge or training is not required to make those observations. As well, I am satisfied that in many cases, the affiants were in a position to make the observations upon which they formed their opinions.

[66] I agree with the plaintiffs that paras. 15, 17 (except for the second sentence), 67 (first sentence only), 80 (first sentence only), 81 (except for the second sentence), contain inadmissible opinion evidence.

[67] In the remaining paragraphs, I am unable to agree that these paragraphs contain inadmissible opinion evidence. For example, in paras. 19 and 21, Ms. Psyllakis refers to the Aventure Tourism policy and how it applies to guide outfitters. Earlier in her affidavit, Ms. Psyllakis states that as the Director she had discretion to either follow or depart from policies and procedures when she made a decision. Effectively, Ms. Psyllakis is describing a policy available to her as a decision maker and her understanding of the policy from that perspective.

- [68] In my view, even if this is opinion evidence, it is one of those circumstances where a lay witness may offer an opinion because Ms. Psyllakis' duties required her to apply the policy and she has the "experiential capacity to make the conclusion", for example, that it is intended to assist decision makers. Further, Ms. Psyllakis is entitled to provide evidence about facts that are within "within her knowledge, observation and experience".
- [69] The plaintiffs object to paras. 12, 13, 14, 16, 17, 19-21, 25, 65, 66, 69, 73, 74, 75, 77, 78, 82 and 88 on the basis that these paragraphs contain argument.
- [70] I agree with the plaintiffs that paras. 14 (third and fourth sentence only), 17 (except for second sentence), 20, 64, 65, 66, 69 (third sentence only), 73-75, 77, 78, 82 and 88 contain argument and as such, these paragraphs are not admissible.
- [71] For the remaining paragraphs, I disagree that these paragraphs contain argumentative material that is inadmissible. In reaching that conclusion, I have kept in mind that Ms. Psyllakis, as a former Director and as a current Executive Director at FLNRORD, has had long-standing involvement in performing duties, including as a decision maker on matters such as Licences and Quotas. In carrying out those duties, she applies policy, guidelines and regulations.
- [72] Many of the paragraphs that are impugned by the plaintiffs as argumentative, actually involve Ms. Psyllakis describing her understanding of her authority and her duties. For example, in paras. 13 and 14 (except for 3rd and 4th sentences of para. 14), she provides her understanding of her authority to attach a quota to a guide outfitter's licence and how the five year maximum harvest operates.
- [73] The plaintiffs submit that paras. 18, 24, 32, 51-53 and 80 of Ms. Psyllakis' affidavit contain irrelevant information that ought to be redacted or disregarded.
- [74] I agree with the plaintiffs that para. 24, contain information that is irrelevant and I will disregard this paragraph.
- [75] Regarding the balance of the paragraphs, I disagree that they are irrelevant. For example, in paras. 18 and 32, Ms. Psyllakis provides evidence concerning announcements and positions taken by different Provincial governments concerning the grizzly bear hunt. I disagree that this information is irrelevant especially when the Claim alleges that the decision was made for political reasons.
- [76] The plaintiff submits that paras. 39 and 40 of Ms. Psyllakis' affidavit contains speculative information that is not within her personal knowledge and these paragraphs should be redacted or disregarded. These paragraphs attach and discuss a report prepared for FLNRORD by a consultant it retained to elicit and report on public and stakeholder comments on regulatory and policy changes to the grizzly bear trophy hunt. Paragraph 40 contains details of the outcome and facts surrounding the Ministerial Order made by Mr. Donaldson.

- [77] In para. 38, Ms. Psyllakis states that in her role as Director she was very involved in the consultation and engagement process surrounding the grizzly bear hunt issue in 2017, including, by reviewing submissions, receiving staff reports and providing briefings to Ministry executives and elected officials. The facts contained in these paragraphs appear directly related to Ms. Psyllakis' self-described role and duties in the consultation and engagement process. I therefore, disagree that these paragraphs are speculative or that they involve facts beyond Ms. Psyllakis' personal knowledge.
- [78] Finally, the plaintiffs submit that paras. 35, 42, 58 and 62 contain unattributed hearsay which ought to be redacted or disregarded. Regarding the last sentence of para. 58, I agree that it is inadmissible but in my view, it is inadmissible because it is either argument or inadmissible opinion evidence.
- [79] In para. 35, Ms. Psyllakis refers to "many voices" that wanted to comment on the new policy of ending some or all of the grizzly bear hunt. I do not agree that this is inadmissible hearsay because in my view, this paragraph simply contains information about the consultation, engagement and communication process that Ms. Psyllakis was involved in, which she describes at paras. 36-40.
- [80] In paras. 42 and 62, Ms. Psyllakis refers to a prior moratorium on the grizzly bear hunt that was enacted and then cancelled in 2001. While the plaintiffs allege that this is unattributed hearsay, Ms. Psyllakis ties her claim of "institutional knowledge" about these events to the relevant Orders in Council. I disagree that these paragraphs contain unattributed hearsay because the source of the information is the orders in council which she includes as exhibits.
- [81] In respect of the parts of Ms. Psyllakis' affidavit that I have concluded contain inadmissible material, I will disregard the inadmissible material identified.
- [82] I turn now to consider the affidavit #2 of Mr. Ellis, which is tendered by the plaintiffs. This affidavit lacks the attestation that is required by s. 5(5)(b) of the CPA. In my view, the proper approach to take in light of the missing attestation is set out by the court in *Cantlie*. In other words, as it is unclear if there are other material facts that are excluded from the affidavit, where the plaintiffs rely on the affidavit of Mr. Ellis, the approach I will take is to give that evidence less weight.
- [83] The defendants also object to particular paragraphs in the affidavit #2 of Mr. Ellis including the first two sentences of para. 8, which the defendants say contains unattributed hearsay and/or argument. These sentences touch on the issue of reliance, for example, when Mr. Ellis says that in his experience, guide outfitters rely on the 5 year allocations and their multi-year Guide Territory Certificates to plan their businesses.

- [84] However, I disagree that this is unattributed hearsay since Mr. Ellis identifies the source of the statement as his many years of experience as the Executive Director of GOABC. However, I do agree that the second sentence is argumentative as it states that "procedures have been in place for many years without significant changes to their processes". I will disregard the second sentence of para. 8 as it contains inadmissible argument.
- [85] In para. 10, Mr. Ellis provides a statement of information from "relevant ministry" about setting grizzly bear quotas and their view regarding the sustainability of the grizzly bear harvest. The defendants object to this sentence as argumentative.
- [86] In my view, Mr. Ellis provides hearsay in this sentence. Although he has not identified which official supplied him the information, he has endeavoured to identify the source of the information as coming from the relevant ministry. I regard this paragraph as attributed hearsay, but not as argument, and in my view, this sentence is admissible on the certification application.
- [87] Finally, the defendants point out that para. 14 of Mr. Ellis' affidavit is unreliable since it does state not when alleged meetings or statements were made by Mr. Donaldson. In my view, these are not objections related to the admissibility of the paragraph, rather they are arguments about the weight that the court ought to give to allegedly unclear and unreliable statements. I disagree that para. 14 is inadmissible.

Should the Court Consider the Affidavit of Mr. Sheldon?

- [88] The defendants submit that the court should disregard the affidavit #2 of Mr. Sheldon because, among other things, it contains no material facts beyond those already disclosed by the Province. The defendants say the purpose of the affidavit appears to be aimed at inviting the court to infer that he has relevant evidence that he is prepared to give if the evidence is not covered by privilege.
- [89] I agree with the defendants' that I ought not to accord any weight to affidavit #2 of Mr. Sheldon because I agree that is really just a statement that he possesses information that may be subject to a claim of privilege. Mr. Sheldon's affidavit #2 is not probative because it does not assist in establishing some basis in fact for the purposes of a certification hearing and it is irrelevant.

Should the Court Certify This Action as a Class Proceeding?

- [90] The plaintiffs submit that this action involves a very unique circumstance quite unlike most situations where a party is engaged in a regulated activity and, after regulatory change, seeking to allege damage caused by that change. The alleged unique circumstance is a long-standing partnership between the Province and guide outfitters whereby the Province promised, including in policy documents, that it would protect guide outfitters and their economic interests.

The Legislative framework

[91] The CPA, in s. 4(1), provides that for an action to be certified as a class proceeding, certain criteria must be satisfied:

### **Class certification**

4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) 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
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[92] As to whether a class proceeding would be the preferable procedure, s. 4(2) of the CPA requires the court to consider all relevant matters including some specific factors:

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

- [93] In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 [Finkel], at paras. 13-15, our Court of Appeal summarized the legislative framework and legal standards applicable to certifying an action as a class proceeding:
- [13] A class action is a procedural tool that allows an individual class member to prosecute a suit on behalf of other class members. The procedure has three principal goals: behaviour modification, judicial economy and access to justice: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 13, 27. Behaviour modification is facilitated by encouraging actual and potential wrongdoers to take full account of the harm they cause or might cause to the public; judicial economy, by avoiding unnecessary duplication in fact-finding and legal analysis: *Hollick* at para. 15. Access to justice is facilitated by providing class members with a fair, economical process to resolve their claims and, if the claims are established, with a just, effective remedy: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) [hereinafter AIC] at para. 24.
- [14] Section 4(1) of the Class Proceedings Act sets out the statutory requirements for certification as a class action. When they are met, the proceeding must be certified:
- [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. As Justice Rothstein stated in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 104, for an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 (B.C. C.A.) at para. 51.
- [94] Save and except for the requirement that the pleading disclose a cause of action, the representative plaintiff is required to meet the standard at a certification hearing of satisfying the court that there is "some basis in fact" for the certification requirements in ss. 4(1)(b)-(e) of the CPA: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. [Hollick].

### **Do the pleadings disclose a reasonable cause of action / Rule 9-5 Application**

- [95] The plaintiffs submit that when the facts pleaded in the Claim are assumed to be true, it cannot be said that it is plain and obvious that the Claim discloses no cause of action. On the other hand, the defendants assert that it is plain and obvious that the Claim fails to disclose a reasonable cause of action for each cause of action pled.

- [96] As noted in *Cantlie*, for certification purposes, the pleadings need only disclose a single cause of action to meet the requirements of s. 4(1)(a) of the CPA. However, all of the causes of action pled must be evaluated to determine whether they are bound to fail: *Cantlie*, at para. 179, citing *Morrison Estate v. Nova Scotia (Attorney General)*, 2011 NSCA 68.
- [97] The certification judge must carefully scrutinize "the pleadings to ensure that all requisite elements are pleaded with sufficient material facts to make out each claim": *Cantlie* para. 180, citing *Ladas v. Apple Inc.*, 2014 BCSC 1821 and *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301.
- [98] In general, the facts pleaded in a claim are assumed to be true and no evidence is admissible on an application to strike a pleading pursuant to Rule 9-5(1)(a): see Rule 9-5(2) and *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 [2011 *Imperial Tobacco*].
- [99] While I have already discussed the extent of the evidence filed and addressed the evidentiary issues raised, in considering whether the pleadings disclosing a cause of action and the application to strike pleadings, I have not considered that evidence. Rather, I have assumed the pleaded material facts to be true.
- [100] However, bald assertions or conclusory statements of law are not facts that must be assumed to be true on an application to strike: *Kindylides v. John Does*, 2020 BCCA 330 at para. 34 citing *Owimar v. Stewart*, 2019 BCSC 1198 (B.C.S.C.) at para. 19.
- [101] There is a high threshold to strike a claim for failing to disclose a cause of action. It must be "plain and obvious", assuming the facts pleaded to be true, that the pleading discloses no cause of action. Only claims certain to fail due to radical defect are appropriately struck out.
- [102] If there is a reasonable prospect of success, the claim should be allowed to proceed: 2011 *Imperial Tobacco*, citing *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15 [Odhavji]; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 36 [Hunt]. A strong defence, novel causes of action and complex issues are not, without more, sufficient grounds to prevent the plaintiff from proceeding with a claim: *Hunt* at para. 36.

## Negligent Misrepresentation

- [103] The requirements of s. 4(1)(a) of the CPA involve the application of the same "plain and obvious" test that is required by Rule 9-5(1)(a) to strike a pleading. For that reason, I will consider the requirements of s. 4(1)(a) CPA together with the defendant's application pursuant to Rule 9-5(1)(a), which seeks to strike out the claim for negligent misrepresentation.
- [104] As explained in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 (S.C.C.) [Cognos], there are five general requirements for a successful claim for compensation based on negligent misrepresentation:

- i. a duty of care must exist based on a "special relationship" between the representor and representee;
- ii. the representation at issue must be untrue, inaccurate or misleading;
- iii. the representor must have acted negligently in making the representation;
- iv. the representee relied, in a reasonable manner, on the negligent misrepresentation; and
- v. the reliance must have been detrimental and resulted in damage to the representee.

[105] The alleged representations are set out in paras. 46-48 of the Claim:

- 46. The Government represented to Fleming in the five year allocation letter issued to Fleming, and to each class member, in writing that the only time an allocation or yearly quota would change would be because of wildlife management reasons such as 'changes in population estimates or other conservation matters' or 'changes in population or permissible harvest rates' for the exercise of Aboriginal rights. The wording of all of the letters from Government to the class members were the same or substantially the same.
- 47. Fleming and class members reasonably relied on these representations.

### The Representations

- 48. The Government represented to the Plaintiffs and class members by (a) conduct and by (b) oral and written statements that the Government would implement and maintain a scheme that would permit the Plaintiffs and class members to harvest wildlife, including grizzly bears, on a preferential or exclusive basis indefinitely, which scheme would only be modified for valid wildlife management or First Nations reasons, and not for political, social or public opinion reasons. Particulars of the representations include, but are not limited to, the following are as follows:
  - a. The adoption of the guide outfitting scheme, which included the exclusive territories, the license, the allocation and quotas system for licensed guide outfitters and criminal or quasi-criminal sanctions for those who were unlicensed, which did provide and was intended by the Government to provide assurances to the Plaintiffs and class members that they should purchase Guide Territory Certificates, invest in the guide outfitting industry and that the Government would provide a long-term scheme to protect their financial investments.
  - b. The Government published policy manuals to provide information to the Plaintiffs and class members on the principles and direction of the Government regarding hunting and intended that the Plaintiffs and class members rely on such statements. The Commercial Hunting Interests policy published effective March 29, 2007 specifically represented to the Plaintiffs and class members that:
    - (a) That guide outfitters' commercial interests in the harvest of big game species will be addressed by:

- (i) requiring non-resident hunters to hire a guide outfitter to hunt big game in the province, except when permits to accompany have been issued;
  - (ii) providing guided hunters with predictable, fair shares of the allocations of category A species in certificated areas;
  - (iii) supporting the viability of the guide outfitting industry by committing to: a. the timely application of decision-making processes regarding the transfer and disposition of guide territories; b. the timely review of the status of uncertificated areas; c. creating and maintaining a regulatory framework that maximizes guided hunters' success, enjoyment, and participation; d. the maintenance of exclusive guided hunting rights for guide outfitters; and
  - (iv) removing unnecessary barriers to achievement of allocation prior to reducing allocation.
- c. The Big Game Harvest Management policy further represented the Government's approach to hunting regulation making and its policy of involving stakeholders in decisions:

4.1 Stakeholder involvement in game harvest policy issues and provincial regulatory decisions will be encouraged and facilitated through a provincial hunting regulation and policy committee.

- d. The Government represented that the allocation of available species for harvest would adhere to certain principles, which included that:
- (i) Regional allocation splits to be in keeping with the principle of 'resident priority' whereby resident hunters continue to receive priority shares of the wildlife allocation, with a stable and predictable percentage.
  - (ii) A commitment to maintain vacant areas and areas not currently allocated to guides as unguided areas, available for First Nations and resident hunting only.
  - (iii) Clear splits for each allocated hunt resulting in less discretion in the hands of regional managers - and therefore more certainty for all user groups.
  - (iv) Targeted increased shares of allocation for guide outfitters to help ensure the guide outfitter industry remains economically viable.
  - (v) No additional mitigation measures for guides beyond the increased harvest percentages as noted.

These are collectively referred to as the "Representations."

[106] For the required element of making out the existence of a prima facie duty of care based on a special relationship between the plaintiffs and the Province, the plaintiffs submit the question is whether there is a "reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation": 2011 Imperial Tobacco, para. 37.

[107] In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 50-51 [Carhoun], the Court of Appeal describes the test for determining the existence of a private duty of care owing by a public authority:

[50] The test for determining the existence of a private duty of care owed by a public authority is known as the "Anns/Cooper" test: *Cooper v. Hobart*, 2001 SCC 79 (S.C.C.). The test requires a court to address the analysis by considering the following series of questions:

- 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;

If not;

- 2) Was the harm suffered by the plaintiff reasonably foreseeable;

If yes;

- 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;

If yes, a prima facie duty arises;

- 4) Are there any residual policy reasons for negating the prima facie duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.

If not, then a novel duty of care is found to exist.

[51] The onus is on the plaintiff to show a prima facie duty of care (through answering questions 1-3, above); but the onus is on the defendant to establish any policy reasons for negating the prima facie duty of care: *Childs v. Desormeaux*, 2006 SCC 18 (S.C.C.) at para. 13.

### **Prima Facie Duty of Care - Proximity**

[108] The parties appear to agree that there is no sufficiently analogous precedent in existence to ground the existence of a duty of care in the circumstances of the present case. Therefore, the full "Anns/Cooper" analysis must be undertaken: *Carhoun*, para. 50.

[109] In cases involving negligent misrepresentation, proximity is more usefully considered before foreseeability. Assessing proximity in cases involving negligent misrepresentation involves asking whether 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": *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [Livent] paras. 24-25; *Cooper v. Hobart*, 2001 SCC 79 [Cooper] paras. 32 and 34.

- [110] The court must examine "all relevant 'factors arising from the relationship between the plaintiff and defendant'" to determine the existence of a close and direct relationship: *Livent* at para. 29, citing *Cooper* para. 30 (emphasis in original). The factors are diverse and depend on the circumstances, but they include "expectations, representations, reliance, and the property or other interests involved" and statutory obligations: *Ibid.*
- [111] In circumstances where the court is asked to decide whether a duty of care is owed by a government regulator, the proximity analysis occurs in two stages: (1) at the initial stage, by determining "whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care"; and (2) at the second stage, where the legislation is not determinative, by looking to interactions between the regulator and the plaintiff to decide if there is a sufficiently close and direct relationship to ground a *prima facie* duty of care: *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 243 [*Waterway*].

### Proximity Analysis - Stage One: Legislative Scheme

- [112] The legislative scheme at issue before me is the Wildlife Act. The plaintiffs do not allege that proximity arises because of the legislative scheme *per se*.
- [113] However, the plaintiffs assert that the Wildlife Act includes a regulatory scheme with an exclusivity system providing guide outfitters with an economic right and guarantee in respect of allocations. The plaintiffs submit that it is mainly the nature of the interactions between the plaintiffs, the class members and the Province, that gives rise to proximity and ultimately, a *prima facie* duty of care. Put another way, the plaintiffs argue that the Wildlife Act does not foreclose the possibility of finding proximity.
- [114] The defendants agree that there is nothing in the legislative scheme to support an inference that the legislature intended to impose a duty of care owing to guide outfitters on the Province.
- [115] Considering the first step, which is to determine the purpose of the legislation, the courts in British Columbia have determined that the main purposes of the Wildlife Act include, "preservation and conservation of wildlife habitat, the enhanced production of wildlife as well as the regulation of the consumptive use of wildlife" and to comprehensively "regulate hunting by imposing rules and restrictions respecting who can hunt, the types of wildlife that can be hunted, when and by what methods": *Association for the Protection of Fur Bearing Animals v. British Columbia (Minister of Environment and Climate Change)*, 2017 BCSC 2296 [*Fur-Bearing Animals - BCSC*] paras. 46 and 47, *aff'd* 2018 BCCA 240 at para 22 [*Fur-Bearing Animals - CA*], *leave ref'd* 2019 CarswellBC 509 (SCC).
- [116] The court must also consider "specific and limited policy considerations arising from the statute itself: *Waterway*, para. 243 citing *Carhoun*, at para. 96; and *Cooper*, at paras. 37-39. In *Carhoun*, at paras. 96-98, the court discusses the role of policy considerations in the proximity analysis:

- [96] The "proximity" analysis includes specific, and limited, policy considerations. It is important to keep in mind that determining proximity is always a question of whether two parties were sufficiently related such that it would be just to expect the defendant to have considered the interests of the plaintiff. In *Cooper*, when the Supreme Court of Canada discussed how "policy" considerations come into play when determining proximity, it was within the context of the facts of that case, where the plaintiff was alleging that the statute created proximity. That is, the plaintiff alleged that the legislature imposed proximity on two persons who had never met each other; that being the investors and the Registrar of Mortgage Brokers. "Policy" is a relevant factor for finding proximity in those circumstances because the Court was engaging in statutory interpretation in order to find proximity in the first place, and statutory interpretation always involves questions of "policy".
- [97] In contrast, but still within the proximity stage of the analysis, when two parties are in a direct transactional relationship, "policy" has a much more limited role: generally, the only remaining proximity question is whether the statute expressly or implicitly prohibits considering the interests of the plaintiff party, such that it would not be just to expect the defendant to consider the plaintiff's interests. This was the case in, for example, *Los Angeles Salad*, where the Court found that the defendant could not fulfill his or her statutory duties if he or she was also considering the interests of the plaintiff. Essentially, "balancing" the public and private interests was impossible, as the interests were irreconcilable. Put in different words, there was no balancing the interests of public health with the producer's economic interests. The regulator's statutory duty was to protect the public from contaminated food. Policy factors prevented a finding of proximity.
- [98] Outside of these contexts of statutory interpretation, issues of "policy" -- including "residual" policy reasons for negating a duty of care and whether the defendant was engaged in a "true" policy decision -- are generally to be considered at the final stage of the analysis, after a court has found that it would be just to expect the defendant to consider the interests of the plaintiff
- [117] The Claim pleads facts to the effect that the Province, the plaintiffs and the proposed class members, engaged in a direct transactional relationship. For example, it is pleaded that the Province issued Mr. Fleming a 25-year Guiding Territory Certificate under the Wildlife Act that provided him "exclusive control over guiding privileges in the guiding territory described in the certificate" and permitted him to receive a five-year allocation and quota for hunting certain species in the territory: Claim, paras. 39-40.
- [118] In the circumstances, and assuming such pleaded facts to be true, the only question remaining is whether the Wildlife Act expressly or implicitly prohibits considering the plaintiffs' interests thereby making it unjust to expect the Province to consider their interests: Carhoun, para. 97. Any prohibition must be found within an interpretation of the legislative scheme at issue: Carhoun, para. 99.

[119] In my view, based on the authorities, the main purposes of the Wildlife Act, which includes the comprehensive regulation of hunting, requires the Province to, among other things, consider multiple interests such as preservation, conservation and production of wildlife, along with the consumptive use of wildlife through hunting. In other words, it does not appear that the legislative scheme created by the Wildlife Act prohibits consideration of various interests, including the plaintiffs' interests.

### Proximity Analysis - Stage Two: Interactions

- [120] Again, the plaintiffs assert that proximity arises because of interactions between the parties. The interactions alleged in the Claim to give rise to proximity include the Province representing in written policies, for example, that it would partner with, look after and consider the economic interests of licenced guide outfitters such as Mr. Fleming. The plaintiffs says that this unique and special relationship creates the proximity necessary to ground a duty of care.
- [121] Having found that the legislative scheme is not determinative, I must consider the specific circumstances of the interactions between the Province and the plaintiffs to decide if there is a close and direct relationship sufficient to establish proximity: Waterway, para. 243. The task is to decide "whether the actions of the regulator stayed within the administration and enforcement of the statutory scheme or whether the regulator otherwise strayed from that role": Waterway, para. 246.
- [122] It must be remembered that the point of the analysis is "to define the relationship between the claimant and the regulator by looking at expectations, representations, reliance and the nature of the property or other interests": Waterway, para. 281.
- [123] According to para. 50 of the Claim, the overall scheme of the Wildlife Act for management of the guide-outfitting business, the transactions undertaken during the currency of the scheme and the Province's active promotion of hunting and trapping industries, including by encouraging investment in the province by those industries, point to a unique relationship: Claim para. 50. The plaintiffs submit that the Province stepped outside of the role of regulator and entered in a partnership by advising and assisting the plaintiffs with protection of their commercial interests including through the routine renewal of five-year allocations and quotas and approval of the sales of Guiding Territory Certificates: Claim para. 51
- [124] In para. 46 of the Claim, the plaintiffs state that the Province represented in letters that the only time an allocation or yearly quota would be changed would be for certain specified reasons not including political, social or public opinion reasons.

- [125] In para. 48 of the Claim, the plaintiffs state that the Province represented that it would address the commercial interests of guide outfitters in the harvest of big game species; implement and maintain a scheme that would permit guide outfitters to harvest wildlife, including grizzly bears, on a preferential or exclusive basis indefinitely; and, the scheme would not be modified for political, social or public opinion reasons.
- [126] The defendants referred me to a number of authorities where courts have found no relationship of proximity giving rise to a prima facie duty of care. For example, in *Wu v. Vancouver (City)*, 2019 BCCA 23 [Wu], leave ref'd 2019 CarswellBC 1761, June 20, 2019 (SCC), the Court of Appeal considered an appeal from an order that the City was liable to the plaintiff for damages arising from the breach of a novel duty of care. In *Wu*, the plaintiff applied for a development permit and the issue was whether the City had, among other things, processed the plaintiff's application negligently.
- [127] In that case, the Court of Appeal found that the factors relied upon by the trial judge to ground a finding of a proximity were in fact "generic and inherent" in the regulatory framework: *Wu*, para. 64. The Court of Appeal noted that even though the relationship could be described as "direct and transactional", it did not materially advance the proximity analysis since the relationship is an inherent, inevitable and necessary part of the regulatory framework requiring people to apply for permission to undertake a specific activity: *Wu*, para. 54.
- [128] The Court of Appeal disagreed with the trial judge's conclusion that the factors inherent in administering the regulatory scheme (i.e. processing development permit applications) were sufficient to create a relationship of proximity: *Wu*, para. 69.
- [129] In the present Claim, the plaintiffs plead that the licenses and certificates issued to guide outfitters confer exclusive rights to conduct guide outfitting businesses in specified areas and to permit them to receive wildlife harvest allocations to harvest wildlife, including grizzly bears: Claim, para. 15. The Claim further states that the Province represented to the guide outfitters and the plaintiffs that the scheme would only be modified for certain reasons and it assured them their commercial interests in the harvest of big game species would be considered (Claim, paras. 46 and 48).
- [130] In my view, the facts pled, which must be assumed true, take the Claim out of realm of authorities such as *Wu* because the facts are capable of demonstrating that the Province stepped outside of the role of regulator in its interactions with the plaintiffs. For example, the Claim states that the Province represented in various letters sent directly to the plaintiffs that the scheme would only change in certain defined circumstances and that their commercial interests would be considered. These representations go beyond the sort of statements the Province would have made as a regulator "to the public at large": *Imperial Tobacco* at para. 54.

[131] At this pleadings stage of the proceeding, it is not plain and obvious that the Province and the plaintiffs were not in a sufficiently proximate relationship. As such, a prima facie duty of care arises on the pleadings.

### Residual Policy Considerations

[132] Next, the court must consider whether the defendants have shown that there are residual policy considerations capable of negating the prima facie duty of care. If the answer is no, a novel duty of care on the face of the pleadings may be established: Carhoun, para. 50.

[133] The defendants bear the burden of establishing a policy reason for negating a prima facie duty of care. They must do so based on the Claim, without resort to evidence.

[134] A prima facie duty of care will be negated if the impugned government conduct constitutes a "true" or "core" policy decision: Imperial Tobacco at para. 74; Carhoun at paras. 125. The government conduct in this case, the defendants argue, stems from true policy decisions respecting wildlife and hunting.

[135] As a preliminary step in the analysis, it is important to precisely define the government conduct at issue: Imperial Tobacco at para. 67. For claims of negligent misrepresentation, the focus is on the statements and representations made by the defendant: Imperial Tobacco at para. 67. Thus, in this case, the conduct at issue is not the decision itself to ban the grizzly bear hunt, but the specific representations made by the province respecting whether the plaintiffs would continue to be permitted to hunt grizzly bears. The defendant must show that it is plain and obvious that such representations constituted protected expressions of government policy.

[136] I agree with the defendant's submission that the decision to ban grizzly bear hunting is a true policy decision. It involves balancing social, economic, environmental, and other political considerations. Determining how to best balance these considerations is "the proper role of government, not the courts": Imperial Tobacco at para. 87. Therefore, the decision to ban grizzly bear hunting, on its own, cannot ground a claim in negligence.

[137] However, the conduct at issue goes beyond the discrete decision to ban the grizzly bear hunt. It includes specific representations made by the Province directly to the plaintiffs, some of which in the course of allegedly private interactions. Such representations cannot be as readily categorized as true policy decisions. Moreover, as I concluded above, the representations occurred in the context of the Province allegedly stepping outside of its role as a public regulator. This further militates against a finding that the representations constituted expressions of government policy.

[138] The defendants argue that the impugned representations are "part and parcel" of the Province's overarching policy with respect to wildlife and hunting in British Columbia. I acknowledge they may ultimately be successful in establishing that proposition. However, they have not done so on a "plain and obvious" standard at the certification stage.

[139] I find that the defendants have not shown, for the purposes of Rule 9-5, that it is plain and obvious that the alleged misrepresentations constituted decisions of "true" or "core" policy.

### Balance of Negligent Misrepresentation Elements

[140] In considering the remaining required elements for a successful negligent misrepresentation claim. The plaintiffs submit that the court is bound to accept as true the facts pleaded to the effect that the Province made certain representations in writing and by conduct that were false, negligent and reckless, and the impugned representations were acted upon by the plaintiffs and the proposed class members to their detriment.

[141] Regarding the final required element, that the impugned representations were acted upon by the plaintiffs to their detriment, I note that claim for negligent misrepresentation requires showing that the plaintiff took some action in reliance on the misrepresentation and that such reliance caused the plaintiff detriment: *Burns v. Homer Street Development Limited Partnership*, 2016 BCCA 371 at para. 13 [Burns]. There must be a "causal link between the misrepresentation and the loss suffered by the plaintiff": *Burns* at para. 12. As such, the relevant loss, or detriment, does not include that which the plaintiff would have incurred had the misrepresentation not been made.

[142] In support of their assertion that there has been detrimental reliance, the plaintiffs cite to para. 55 from their Claim, which reads:

The Plaintiffs and the class members have suffered, and continue to suffer, loss, damage and expense from the loss of revenue due to the cancelation of the grizzly bear hunt and the reduction in value of their Guiding Territory Certificates as a result of the false Representations.

[143] I accept that loss of revenue amounts to detriment, as does the reduction in value of the Guiding Territory Certificates. However, for the purposes of determining whether the pleading discloses a cause of action, those detriments, such as loss of revenue, do not appear causally connected to the plaintiffs' reliance on the Representations. Had the alleged misrepresentations not occurred - that is, had the Province not assured the plaintiffs that they would receive continued permission to hunt grizzly bears - the plaintiffs still would have suffered lost revenue from the Province's decision to ban the grizzly bear hunt.

[144] Thus, para. 55 of the Claim itself does not plead facts capable of establishing that there was detrimental reliance. However, in considering all of the facts pled in the Claim, such as para. 75, which states that the plaintiffs "incurred significant time and expense" as a result of relying on the defendant's alleged Representations. On a generous reading of the pleading, I conclude that the Claim does contain sufficient facts to support the final element for a successful negligent misrepresentation claim.

[145] On the whole, the plaintiffs have pled facts to establish all of the required elements of a claim for negligent misrepresentation. I find that it is not plain and obvious that the plaintiffs' claim pleads no reasonable cause of action for negligent misrepresentation.

### Misfeasance in Public Office

[146] The plaintiffs allege "Category B" misfeasance in public office against the defendant, Mr. Donaldson. The defendants allege the pleadings fail to disclose a reasonable cause of action for misfeasance as required by s. 4(1)(a) of the CPA. The defendants also seek an order dismissing that claim pursuant to Rule 9-6 on the basis that it raises no genuine issue for trial.

[147] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 61-65 and 71 [Madadi], the Court of Appeal described the elements of this intentional tort as follows:

[61] The tort of misfeasance in a public office is an intentional tort with two distinguishing elements: (i) deliberate unlawful conduct in the exercise of a public function; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. In addition to proving these elements, a plaintiff must prove that the tortious conduct was the legal cause of his injuries, and that those injuries are compensable in tort law: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (S.C.C.) at para. 32.

[62] As I read the Claim, the respondent purports to plead the essential elements of Category B misfeasance in public office. As Iacobucci J. explained in *Odhavji Estate* at paras. 22 -- 23, the tort of misfeasance in a public office can arise in one of two ways, which he referred to as Category A and Category B:

Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff . . . [T]he two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements . . .

. . . In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[63] This tort has a narrow ambit that requires an element of bad faith or dishonesty. The essential question to be determined is whether the alleged misconduct is unlawful and deliberate. The public officer must deliberately engage in conduct knowing it to be inconsistent with the obligations of the office (unlawful) and knowing it would harm the

plaintiff (deliberate). The knowledge element requires a subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct; at the very least, the defendant must have been "subjectively reckless or wilfully blind" to this possibility: *Odhavji Estate* at para. 38.

[64] As the court summed up in *Odhavji Estate* at para. 29:

. . . Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question.

[65] The seriousness of a claim for misfeasance of public office was reiterated by this court in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 (B.C. C.A.):

[3] . . . Primarily fact-driven, it serves to remind all concerned that claims for damages for the misuse of public power by dissatisfied citizens must be advanced, scrutinized and resolved with caution and restraint. As Justice Newbury explained in *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, the tort of misfeasance in public office provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties. For this reason, when addressing claims of misfeasance in public office, the courts strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions.

[71] The tort of misfeasance in public office requires more than a bald pleading that a public official acted with the intention of harming the plaintiff. There must be material facts about specific officials and their specific unlawful purpose in acting as they did. The material facts may lack detail in the early stages of a proceeding, but it is generally sufficient to establish "a narrow window of opportunity" to make out the claim: *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 (Ont. C.A.) at paras. 59 -- 61.

[Emphasis added]

[148] The Claim sets out the following regarding the impugned conduct of Mr. Donaldson:

- a) Mr. Donaldson knew when he signed Ministerial Order No. M414 that "there was no wildlife management reason for changing the plaintiffs' and class members' grizzly bear allocations or quota under the Wildlife Act and that the then existing level of grizzly bear harvest was sustainable" and he exceeded his authority in making the amendments to the regulations: Claim, para. 62.
- b) The Minister was advised and he had actual knowledge that banning the grizzly bear hunt would cause financial harm to licensed guide outfitters: Claim, paras. 63 and 81.

- c) The Minister did not act independently and he was influenced and pressured by others to sign Minister Order No. M414 and amend the regulations: Claim, para. 64.
- d) The Minister signed Ministerial Order No. M414 knowing he could not lawfully act under the Wildlife Act to stop the grizzly bear hunt and that any ban would harm the plaintiffs and the proposed class members making it impossible for them to utilize their pre-existing grizzly bear authorizations and quotas: Claim, paras. 65 and 70.
- e) The Minister signed Ministerial Order No. M414 and made the amendments to regulations knowing the decision was made for "political social and public opinion reasons or an otherwise improper purpose not related to the legislative scheme": Claim, para. 69

[149] The parties made lengthy submissions concerning the nature of the regulatory scheme at issue in the Claim. I will address some of the main submissions below and while I am not discussing every submission made, I have considered all of them.

[150] In British Columbia, wildlife, such as grizzly bears, are owned by the government: s. 2, Wildlife Act. At present, there are approximately 20 regulations pursuant to the Wildlife Act regulating wildlife hunting activity.

[151] No right of property in wildlife is acquired unless the person complies with the Wildlife Act and the regulations: s. 2, Wildlife Act.

[152] It is an offence for a non-resident of British Columbia to hunt big game unless accompanied by certain authorized individuals, such as a licensed guide outfitter: s. 47(b), Wildlife Act. Guide outfitter licences authorize guide outfitters to guide persons to hunt for wildlife species identified in the quota attached as a condition of the licence and within a geographical area specified in the Certificate that is associated with the Licence: ss. 51 and 60, Wildlife Act.

[153] The legislative framework grants certain powers to the minister responsible for the administration of the Wildlife Act and the Lieutenant Governor in Council. For example, the Minister may, by regulation, limit hunting for a species of wildlife in an area of British Columbia: s. 16(1)(a), Wildlife Act.

[154] The relevant portions of s. 108 of the Wildlife Act are as follows:

#### Regulations by Lieutenant Governor in Council

108(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

- (a) respecting threatened species or endangered species;
- (b) respecting the use and occupation of a wildlife management area;

...

- (c) respecting applications for licences, permits and limited entry hunting authorizations, specifying conditions of eligibility for them including proof of financial responsibility or insurance for third party liability and discriminating among classes of applicants for them whether or not the classes are specified in this Act;
  - (z) prohibiting or regulating the causing or allowing of a dog to hunt or pursue wildlife.
  - (3) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
    - (e) prescribing open seasons or closed seasons, or both, for
    - (i) wildlife by species, type, sex, age, circumstances or physical features of the wildlife, or
    - (ii) persons, licences or permits, including prescribing different seasons for different classes of persons, including, without limitation, classes based on age;
  - (4) The Lieutenant Governor in Council may delegate a power under subsection (2) or (3) to the minister.
  - (4.1) A delegation under subsection (4) of the power under subsection (3) (p) may impose limits or conditions on the exercise of the power.
  - (5) The Lieutenant Governor in Council, despite anything in this Act, may make regulations respecting the issue of permits.
- [155] The plaintiffs submit that in light of s. 40 of the Wildlife Act, the authority of the Minister to prohibit a person or class of persons from hunting is predicated on the Minister considering it necessary for the proper management of wildlife:

### **Power to prohibit hunting or trapping**

40(1) Despite anything in this Act or the regulations or the privileges conferred by a licence or limited entry hunting authorization, the minister may, by regulation, prohibit a person or a class of persons from

- (a) hunting or trapping, or
- (b) using a method of hunting or trapping

in a defined area for a period the minister considers necessary for the proper management of wildlife in that area.

- (2) Despite anything in this Act or the regulations, the minister may, by regulation, allow a person or a class of persons to hunt or trap in a defined area for a period the minister considers necessary for the proper management of wildlife in that area.

[156] In the plaintiffs' view, since the decision to ban the grizzly bear was predicated on public opinion, not wildlife conservation issues, the Minister exceeded the authority granted to him by the Wildlife Act. The plaintiffs also submit that the Minister knew he was acting outside of the purpose of the Wildlife Act by bypassing the requirement for a wildlife management reason before making the Ministerial Order banning the grizzly bear hunt.

[157] In para. 36 of the Claim, the plaintiffs plead that:

36. The Minister does not have the legal authority under the Wildlife Act:

- a. to prohibit the hunting of a specific species generally within the province;
- b. to regulate the hunting of grizzly bears outside of the scope of proper wildlife management or related legislative provisions;
- c. to regulate or prohibit the grizzly bear hunt for political, social or public opinion reasons; or
- d. to regulate in a manner inconsistent with the purpose and provisions of the Wildlife Act.

[158] In my view, para. 36 of the Claim sets out various conclusions of law, not material facts that I must assume true for the purposes of a certification application.

[159] The defendants point out that the Ministerial Order is not made pursuant to s. 40 of the Wildlife Act. The defendants submit that there is no implied purposive limit to the regulation-making powers under the Wildlife Act, namely, that there must be a wildlife management purpose before a regulation may be made, amended or repealed. Unlike s. 40, the authority granted under ss. 16 and 108 of the Wildlife Act is not predicated on the Minister considering it necessary for the proper management of wildlife in the area.

[160] According to the defendants, the allegation that Mr. Donaldson's conduct was unlawful because he lacked authority under s. 108(3)(3) of the Wildlife Act to prescribe open or closed seasons for species of wildlife ignores s. 108(4), which authorizes authorizing the Lieutenant governor in Council to delegate powers under subsection (2) and (3) the Minister. The defendants point to O.I.C. 135/2003 delegating many of those powers to the minister. The defendants submit that it is plain and obvious, by reference to the legislation, the relevant regulations and the O.I.C., that the Claim fails to raise a triable issue as to alleged unlawful conduct of Mr. Donaldson in issuing the Ministerial Order.

[161] Inquiries into the vires of a regulation do not involve the motives for promulgation, such as underlying "political, economic, social or partisan considerations", because that consideration is irrelevant: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras. 27-28.

[162] In respect of the pleading that Mr. Donaldson knew that the decision was lawful and made for the improper purpose, i.e. due to political pressure, the defendants refer me to *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683 at paras. 54-55 [Trillium], which was referred to in *Madadi*, at para. 71.

- [163] Trillium involves an appeal from the order of a motion judge striking out a misfeasance claim on the grounds that it fails to disclose a reasonable cause of action. On appeal, the court allows the appeal in respect of "Category A" misfeasance of public office, but dismisses the appeal related to striking out the "Category B" claim.
- [164] In upholding the order striking the "Category B" misfeasance claim, the court agrees that political "core policy decisions" are generally immune from review through civil tort actions:
- [52] Nor can the impugned decision be said to have been made in bad faith for purposes of the "political/electoral expediency" claim, in our view. A core policy decision made by the Executive based on political considerations or electoral expediency does not, on its own, constitute "bad faith" for purposes of a tort claim based on misfeasance in public office.
- [53] This is so even if the government actors were aware that such a decision might negatively impact the interests of Trillium or other offshore wind-power. To repeat the observations of Iacobucci J. in *Odhavji Estate*, cited above:

In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly... In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of office.

[Emphasis in original.]

- [54] In that broader sense, it is not "inconsistent with the obligations of office" for the Premier and his or her Ministers to respond to public pressure, even where that response is designed to shore up the government's electoral base and win more seats in an election. Ministerial policy decisions made on the basis of "political expediency" are part and parcel of the policy making process and, without more, there is nothing unlawful or in the nature of "bad faith" about a government taking into account public response to a policy matter and reacting accordingly. That is what governments do, in pursuit of their political and partisan goals in a democratic society. See *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.); *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (Ont. C.A.); *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.).
- [55] Accordingly, it is only to the extent that Ontario's decision was not made for political purposes, but was made with the specific intention of injuring the plaintiff, that the decision is subject to attack in tort. Political motivation for the decision may or may not become relevant - should Ontario choose to raise it by way of defence, for example - in determining what was, in fact, the real motivation for the decision. But the "political/electoral expediency" aspects of such a decision cannot, standing alone, provide a basis for a claim in tort for misfeasance in public office. Therefore, they are not properly a part of the

allegations in the statement of claim in this case.

- [165] The plaintiffs argue that Trillium is distinguishable from the present case because, unlike the present case, the plaintiffs were not yet licence holders. However, I was not directed to any language in Trillium suggesting that the status of the plaintiffs as licence-seekers, rather than licence-holders, impacted the relevant analysis.
- [166] I agree with the defendants' assessment that the Claim contains no allegation that Mr. Donaldson's decision to sign Ministerial Order No. M414 was irrational or made in bad faith. Rather, the Claim pleads that Mr. Donaldson knew there was no wildlife management reason for the Order and his decision to sign the Order was made for "political social and public opinion reasons".
- [167] The Claim also pleads that Mr. Donaldson signed Ministerial Order No. M414 without first consulting guide outfitters contrary to his promise to do so. It further pleads that Mr. Donaldson failed to act independently because he was influenced and pressured by others into signing the order. Even assuming these facts to be true, in my view, they are not material facts capable of satisfying the requisite elements of the tort of misfeasance in public office such as deliberate disregard of an official duty.
- [168] As the court noted in Trillium, at para. 54, a Minister's response to public pressure is not, without more, evidence of bad faith or conduct inconsistent with the obligations of office. In effect, the plaintiffs appear to take issue with the fact that Mr. Donaldson decided to sign the Order without the benefit of their input and instead, he is alleged to have proceeded based on input and pressure from others.
- [169] In relation to the cause of action for misfeasance in public office, for the reasons that I have explained, I conclude that the plaintiff has not pleaded a reasonable cause of action. In my view, the pleadings do not include facts related to the essential element of an unlawful act capable of demonstrating, for example, that the Ministerial Order is irrelevant, extraneous or completely unrelated to any of the purposes of the Wildlife Act.
- [170] When I take all of this in account, I find it is plain and obvious that the allegation of misfeasance in public office (Category B) set out in the Claim is doomed to fail. I considered whether an opportunity to amend to the Claim would be appropriate, but given the nature of the radical defect identified, I concluded that it was not.
- [171] I have also considered the plaintiffs submission that in order to properly resolve the question of whether the Minister acted unlawfully in making the Ministerial Order - it is not clear there is no triable issue and it is not plain and obvious that the claim is doomed - and so, a trial on the merits is warranted.
- [172] I disagree with the plaintiffs' submission. Even if the plaintiffs can establish that the Minister acted ultra vires, they have not pled the material facts capable of establishing that the Minister did so intentionally. The tort of misfeasance in public office requires deliberate unlawful conduct. Negligent excess of power is not sufficient: Powder Mountain Resorts

Ltd. v. British Columbia, 2001 BCCA 619 at para. 7; Odhavi at para. 25. In this case, the Minister acted pursuant to powers that were delegated to him under O.I.C. 35/2003. The plaintiffs have pled no facts suggesting that the Minister, when exercising those powers, believed his conduct to be unlawful.

[173] It is again worth emphasizing that the impugned decision is a true policy decision that generally would not give rise to liability in tort: Imperial Tobacco at para. 72. As such, in order to succeed in their claim, the plaintiffs need to show that the Minister's decision was made in bad faith, in a manner inconsistent with his "obligations of office": Odhavi at para. 28. However, the plaintiffs expressly plead that the Minister's decision was made for social and public opinion reasons. As noted above, doing so is not evidence of bad faith or inconsistent with the Minister's obligations of office: Trillium at paras. 54-55.

[174] I conclude that a trial is not necessary to determine whether the Minister's conduct was unlawful. The plaintiffs failed to plead facts capable of establishing that the Minister intentionally acted unlawfully and, on those grounds, it is plain and obvious that the claim cannot succeed.

[175] In addition, since the motive for the promulgation is irrelevant and as there can be no inquiry into underlying political, economic or social considerations, I agree with the defendants that there is also no triable issue raised in the Claim as to the vires of the regulatory amendments effected by the Ministerial Order.

Is there an Identifiable class of two or more persons?

[176] The plaintiffs, Mr. Fleming and Love Bros. & Lee Ltd., bring the action on their own behalf and on behalf of the proposed class members. The proposed class includes potentially up to approximately 75 plaintiffs.

[177] The defendants agree that the requirements of s. 4(1)(b) have been met.

Does the Claim raise common issues and do they predominate over issues affecting only individual members?

[178] The claims of the class members must raise "common issues", i.e. common but not necessarily identical issues of fact, or common but not necessarily identical issues of law arising from common but not necessarily identical facts: CPA, ss. 1 and 4(1)(c).

[179] The threshold for determining whether the Claim raises common issues is low and the court should take a purposive approach: Pro-Sys, at para. 108; Finkel, at para. 22.

## Proposed Common Issues

[180] The common issue proposed by the plaintiffs are attached as Appendix "B" to the notice of application filed April 29, 2022. Due to my conclusions regarding the cause of action pled for misfeasance in public office, I will not consider the proposed common issues related to that cause of action.

[181] The common issues proposed by the plaintiffs for the misrepresentation cause of action are as follows:

10. Did the Province owe a duty of care to the class members?
11. Did the Province make the representations as set out in paragraphs 46-48 of the Claim, which were untrue, inaccurate or misleading? If yes, what were the untrue, inaccurate or misleading misrepresentations made by the Province, when, where and how?
12. Did the Province make the representations negligently? If yes, when, where and how were the representations made?
13. Did the Province make the representations intending that class members would rely on them?
14. Did the class member suffer economic loss?

### Damages

15. If the answer to any of the common issues is yes, what remedies are class members entitled to?
16. If the answer to any of the common issues is yes, are the defendants potentially liable on a class wide basis?
17. Can the amount of damages be determined on an aggregate basis and if so, in what amount?
18. What is the appropriate method of procedure for distributing the damages award to the class members?
19. Are the class members entitled to an award of aggravated or punitive damages based on the defendants' conduct and, if so, in what amount?
20. If the answer to the above is yes, what is the appropriate method of procedure for distributing any aggravated or punitive damages to the class members?

### Interest

21. What is the liability, if any, of the defendants for court order interest?

[182] In *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85, the Court of Appeal refers to the following appropriate analysis of the common issues question:

[85] Mr. Justice Strathy, as he then was, described an appropriate analysis of the common issues question in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.), a product claim brought against manufacturers. He provided a helpful description of the jurisprudence prior to the Supreme Court of Canada's recent restatement of the evidentiary requirements for certification:

[140] The following general propositions, which are by no means exhaustive, are supported by the authorities:

A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.

B: The common issue criterion is not a high legal hurdle, and 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: *Cloud v. Canada (Attorney General)*, above, at para. 53.

C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.

F: 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 for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

[Emphasis added.]

[183] In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 at para. 115 [Krishnan], Mr. Justice Branch explains that the evidence matters in the context of the common issues:

[115] The evidence matters in establishing the common issues. The plaintiff must adduce some basis in fact that: (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class: *Simpson v. Facebook*, 2021 ONSC 968 at para. 43; *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at para. 120; *Bhangu* at para. 97-99; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26, at para. 85.

[184] The defendants submit that none of the plaintiffs' proposed common issues satisfy the common issues test. For example, they point out that the common issues concerning alleged negligent misrepresentations do not address the element of whether the plaintiffs and proposed class members reasonably relied on the Representations.

[185] The plaintiffs correctly point out that there is no requirement under the CPA for all legal issues to be addressed in the common issues. It is apparent that the plaintiff's first four proposed common issues do not address the required elements for a successful claim of negligent misrepresentation related to reasonable reliance. The plaintiffs have apparently deliberately avoided proposing common issues on this essential element of the tort. However, it is sufficient for a proposed common issue to involve a "substantial ingredient" of each class member's claim: *Hollick*, at para. 18.

- [186] In my view, proposed common issues #10 to #13, addressing things such as whether a duty of care is owed, whether the Representations were actually made, and, whether the Representations are untrue, inaccurate or misleading, are substantial ingredients of each class members' claim. In my view, the plaintiffs have established some basis in fact for concluding that these common issues actually exist and they can be answered in common on a class-wide basis. I also conclude that proposed common issues #10 to #13 materially advance the action and they qualify as common issues.
- [187] Proposed common issue #14, asking whether the class member suffered economic loss, is problematic. Proposed common issue #14 is not tethered to the Representations and I find it overly vague. As discussed earlier, mere loss of revenue from the grizzly bear hunt may be a detriment, but to succeed on a claim of negligent misrepresentation there must be causal link between the misrepresentation and the loss suffered. In other words, not all economic loss is necessarily compensable. Proposed common issue #5 does not materially advance the negligent misrepresentation claim and it does not qualify as a common issue.
- [188] Regarding proposed common issues #15 and #16, which ask - what remedies the class members are entitled to and are the defendants potentially liable on a class wide basis - are, in my view, also problematic. They do not materially advance the claim including because the court is not being asked to qualify common issues on each of five general requirements for a successful claim for compensation based on negligent misrepresentation. Put colloquially, these proposed common questions appear to place cart ahead of the horse.
- [189] As to the remaining proposed common issues #17 to #21, which address aggregate damages, punitive damages, aggravated damages, court order interest and the procedure for distributing the damages, I have similar concerns about these issues to the ones already discussed.
- [190] In addition, I note that the plaintiffs are required to demonstrate through supporting evidence that there is a workable methodology for determining such issues on a class wide basis. The plaintiffs rely on the affidavit of Mr. Harder. My concern is that Mr. Harder's expert report focuses mainly on calculating the value of the lost annual revenue opportunities associated with hunting grizzly bears which, as I noted earlier, is not clearly causally connected to the Representations.
- [191] Further, I do not find the expert methodology proposed by Mr. Harder sufficiently credible or plausible to establish some basis in fact for the commonality requirement, especially when Mr. Harder's methodology is mainly hypothetical.

[192] I am also concerned about the preponderance of individual issues associated with damages. I am not convinced on the evidence before me that the plaintiffs have demonstrated some basis in fact for the commonality of damages on a class-wide basis. In my view, the concern here is similar to the reasonable reliance issue, which I note the plaintiffs are not attempting to address through common issues. As a result, I do not find that proposed common issues #17 to #21 qualify as common issues.

Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[193] As I have already determined that many of the proposed common issues do not qualify as common issues, I will focus my preferability analysis on common issues #10 to #13.

[194] Section 4(2) of the CPA sets out a number of mandatory factors such as whether the whether question of fact or law common to members of the class predominate over questions affecting only individual members. In my view, there are some "substantial common core" questions that would materially advance the claim, such as whether the Province owes a duty of care: Krishnan, at para. 214. A favourable answer to this question would advance the cause of action for negligent misrepresentation is advanced.

[195] Although the plaintiffs are not proposing common issues related to reliance by the class members, from which I can infer they agree that each class member will need to establish reliance on the particular Representations, the inquiry into that issue may be constrained and potentially addressed by the exercise of powers contained in s. 27 of the CPA.

[196] In my view, overall, this factor weighs somewhat in favour of certification.

[197] As to the factor of whether a significant number of members have a valid interest in individually controlling the prosecution of individual actions, there is no evidence of proposed class members wishing to pursue individual actions.

[198] As to the factor of whether the class proceeding would involve claims that are or have been the subject of other proceedings, there is no evidence of any other individual or class proceeding concerning the issues raised in the Claim.

[199] As to the factors of whether other means of resolving the claim is less practical or efficient and whether the administration of the proceeding would create greater difficulties than relief pursued through other means, the defendants argue that based on the common issues, many issues will remain to be resolved on an individual basis.

[200] However, the need to address some issues individually is not necessarily a bar to certification. Overall, I find that these factors are favourable to the preferability of certification.

[201] In Finkel, at para. 25, the court explains that in the preferability analysis, two questions predominate:

- (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied:
- [202] The preferability issue has substantive and procedural aspects explainable from an access to justice perspective: Finkel, at para. 26 citing AIC Limited v. Fischer, 2013 SCC 69 at paras. 21, 23. From the substantive perspective, while an affirmative answer to common issues #10 to #13, will not address all of the general requirements for a successful claim for compensation based on negligent misrepresentation, it will still materially advance the claim for all class members. For example, common issue #10 asking whether the Province owes a duty of care to the proposed class members, is a central and important issue when considered the context of the action as a whole.
- [203] From the procedural aspect, the class members would have access to a fair process in light of the existence of economic and other possible barriers. There is some evidence concerning economic and other barriers to guide outfitters pursuing their claims individually. From a practical cost-benefit approach, the impact of a class proceeding on a class member speaks in favour of a class action over other possible procedures such as individual actions. I note that there is evidence that the proposed class members opted against taking funding in exchange for releases, and therefore, that non-judicial alternative is no longer available to them.
- [204] When I consider the two predominate questions in the preferability analysis, I conclude that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

Is there an appropriate representative plaintiff?

- [205] There is no submission by the defendants that the plaintiffs are unsuitable representatives. As long time guide outfitters and in light of the relevant factors, I find that the plaintiffs are suitable representatives.
- [206] The defendants submit that the main obstacle to regarding the plaintiffs as appropriate representative plaintiffs is the lack of an adequate litigation plan proposed by the plaintiffs. The plan is described either as "generic" or as inadequate, especially in regards to pre-trial discovery.
- [207] While the litigation plan may not be complete and possibly lacking details in some areas, I conclude that overall it is adequate at this stage of the proceeding.

## Conclusion

[208] The defendants' application pursuant to Rule 9-5 filed on January 21, 2022 is dismissed.

[209] The case is not certified against the defendant, Mr. Donaldson, for the reasons explained.

[210] The case is certified as a class proceeding against the remaining defendant.

[211] The common issues proposed by the plaintiffs in the attached Appendix "B" are approved, subject to the following:

- a) Issues 1-9 are not certified;
- b) Issues 14-21 are not certified.

[212] The parties will arrange a further hearing at which the parties may present a notice program for approval by the court.

"E. McDonald J."

Appendix "A"

## Impugned Paragraphs from Affidavit #1 of Jennifer Psyllakis

12. For example, procedure #3 of the Administrative Guidelines (found at Exhibit P, discussed and appended above) outlines a process for what should generally happen when the annual allowable harvest ("AAH") for a given species changes "at any point over the 5 year period". However, I do not see anything in the Administrative Guidelines that constrains the authority to engage in a recalculation of an AAH, such as tying that authority to the occurrence of any specific circumstance or event.
13. I have the statutory authority under the Wildlife Act to attach a quota to a guide outfitter's licence, and on an annual basis, where the statutory scheme permits hunting to take place.
14. For its own planning purposes, the Ministry projects what each guide's notional share of the licenced AAH is likely to be for a 5-year allocation period. It is sometimes referred to as the "5 Year Allocation" or the "Five Year Maximum Harvest" ("FYM"). I note that paragraph 30 of the Application suggests that allocation confers a legal entitlement on guides, which is not how I understand the FYM to operate. I understand the FYM as being a planning number communicated outside the Ministry's statutory framework to provide guides with some indication of what their maximum harvest is likely to be over the 5-year period and the Administrative Guidelines provide some flexibility to guide outfitters to manage their hunts and book clients. However, the FYM is "notional" because it is subject to change if circumstances change (e.g. as government policy decisions are made) or as new information emerges (e.g. an unexpected disease, wildfire or other climatic condition that has widespread impact on a particular game species; if too many animals or a particular sex of a species are killed in a certain period of time; if recent composition surveys indicate a downward turn, etc.). The quota decisions made under the Wildlife Act, which are made

annually, set the number of species that may be legally harvested by a guide in the year(s) specified. Quota is attached to the guide outfitter licence.

15. Overharvest of quota in any given year is not an offence under the Wildlife Act. However, a guide outfitter who exceeds their quota limit may be required to participate in an administrative hearing and penalties invoked, including the suspension of their licence.
16. In late 2017, when the Hunting and Limited Entry Hunt (LEH) regulations were changed to remove grizzly bear seasons, I had no discretion to consider issuance of either resident authorizations or guide quota after that point in time.
17. The Wildlife Act and its regulations are some of the most extensive in government. As part of my job, I have for years participated in working groups and committees where amendments to the statute and regulations are considered. It is my working understanding that no compensatory mechanism was established under the Wildlife Act, and that no proprietary right or ownership in wildlife is conveyed with the opportunity to hunt a species via the licensing system. For example, it is my understanding that an individual is not lawfully entitled to possess a wildlife species until the animal in question has been killed by a properly licenced hunter using lawful means in circumstances where the taking itself was authorized and consistent with the hunting regulations.
18. As described in more detail below, the Ministry's notional FYMH for grizzly bears for the 2017 - 2021 allocation period was communicated to guides in May 2017, when the Liberal government (under Christy Clark) was still in power.
19. The intent of the Adventure Tourism policy is to assist decision makers in balancing the growing pressure in the backcountry. The policy sets out parameters under which non guide outfitters must apply for permits and other authorizations under the Land Act to carry out their business. The policy refers to and has provisions as to how it interacts with the Wildlife Act with respect to guide outfitting and hunting.
20. With respect to the Adventure Tourism policy, it is my understanding that specific considerations are given to guide outfitters (see Exhibit N, section 1.2), an excerpt of which is as follows:
  - Commercial hunting and angling guide activities on provincial Crown land outside of parks are authorized under the Wildlife Act and are not applicable to this policy. As a result, a Licence of Occupation for an Extensive Use Area under the Land Act is not required for guided hunting or fishing. AT guide activities offered by a guide outfitter or angling guide that are not authorized under the Wildlife Act for hunting or fishing must be Tenured under this Policy.

- Any Improvements (e.g., lodges, cabins, camps) for the purpose of guided hunting or angling must be approved and Tenured under this policy as an Intensive Use Site. Minimal Impact Sites may be associated with an Intensive Use Site Licence of Occupation (refer to the definition of Minimal Impact Sites and sections 6.1.1 and 8.3).
  - Intensive Use Sites Tenured under the Land Act as part of a Guide Outfitter operation are considered part of the Guide Territory and cannot be assigned separately from the Guide Territory Certificate area. As such, any Intensive Use Sites must be Tenured under the name of the Guide Territory Certificate holder. For more information, refer to Section 8.4.1 regarding assignments for hunt camps/cabins/lodges. In addition, refer to Section 6.1.2 and 6.1.3 for specific considerations related to a longer Tenure term for a base camp lodge.
21. The Adventure Tourism policy does not permit applications for Crown grants. It is my understanding that a key consideration for not allowing application for Crown Grants under this policy was Indigenous Peoples' rights and title considerations. Instead, in light of business considerations for guide outfitters, the policy was updated (in or about February 2015) to allow for application for tenure terms up to 60 years for Leases. For "bankability" these leases provide for quiet enjoyment and greater certainty. Many hunt guide outfitters continued to apply for non-exclusive Licences of Occupation for their base camp lodge instead of a Lease, which resulted a clarification to Adventure Tourism in 2015 (see Exhibit N, section 6.1.2) stating "A Lease should be issued where substantial Improvements are proposed and is the recommended form of Tenure for a Primary Intensive Use Site with an AT base camp lodge". I have not reviewed the terms, conditions and limitations for each Land Act tenure document to understand the nature and scope of these tenures far enough to determine whether (e.g.) the holder of a Guide Territory Certificate chose not to apply for a Lease that might provide quiet enjoyment / "bankability", versus choosing to stay with a non-exclusive Licence of Occupation.

## Grizzly Bear Harvest Management

22. Historically grizzly bear was one of the most intensely managed hunted species. Annual expenditure on inventory, assessment, research, habitat management, attractant and conflict management, compulsory inspection, etc. easily ranged between \$500,000 to \$1,000,000 per year in provincial funds (not including additional funding secured through grants, partnerships, etc.). By comparison, the revenue per year (licence sales, royalties) was approximately \$530,000.
24. Grizzly bears are sensitive to over-harvest, particularly if females are removed from a population. It is not always easy for a hunter to "sex" a grizzly bear in the field so if too many females were hunted (or otherwise killed via a human cause) in one year then future harvests would need to be reduced. Since about 1996, grizzly bear populations in a PMU or Region were managed conservatively to reduce the risk of overharvesting and detrimental impact on the grizzly bear population from one year to the next. It is my understanding it was at about this time that all remaining open grizzly bear hunts were changed to Limited

Entry Hunt regulations and all guide outfitters issued quotas.

25. Further, the opportunity to hunt grizzly bear was only provided in PMUs where the grizzly bear population was stable and there were no underlying conservation concerns (e.g., low or declining populations). Also, hunts could be closed when conservation concerns arose. For example, when the Ministry became aware, through mandatory reporting, of an unusually high human-caused mortality rate for grizzly bears in a particular area (e.g., due to road or rail kill, defense of life or property). All human-caused mortality was reviewed annually for this purpose, and regulations typically changed on a biennial cycle. Occasionally an "off cycle" regulation was made to address an urgent concern that takes priority over licenced harvest (e.g., overharvest, population declines due to disease outbreak or impacts from wildfire, asserted or proven rights of First Nations, etc.). For clarity, as of December 18, 2017, conservation concerns were not a prominent factor in the 2017 decision to end the grizzly bear hunt throughout the province. While there were ongoing concerns about loss of habitat, the Province's data did not preclude an ongoing hunt in most PMUs with extant grizzly bear populations for conservation reasons.
30. In my experience GOLs and GTCs change hands from time to time. There may be a trend toward GTCs being transferred to corporations.

### **The policy decision to ban grizzly bear hunting province-wide**

32. The NDP election platform in 2017 included a pledge to end the grizzly bear trophy hunt. Soon after the NDP government formed in August 2017, it announced its plans to end the grizzly bear trophy hunt and impose a total ban on grizzly bear hunting in the Great Bear Rainforest, effective November 30, 2017. Appended to this affidavit as Exhibit AA is a true copy of the government's news release dated August 14, 2017.
35. Following the election and the direction to end the grizzly bear trophy hunt (and to end the hunt altogether in the Great Bear Rainforest), many voices inside and outside of government wanted to comment on the new "policy" of ending some or all of the grizzly bear hunt. Discussions considered how to deal with the prohibited parts once a grizzly bear had been harvested (e.g., leave the remains in woods, submit the remains to a wildlife officer, etc.). Within the Great Bear Rainforest area, however, a total ban on hunting grizzly bears was proposed from the outset.
39. Appended to this affidavit as Exhibit CC is a true copy of a November 15, 2017 report prepared for the Ministry by a retained consultant, titled "Engagement Report - Regulatory and Policy Changes to the Grizzly Bear Trophy Hunt". The consultant published online a call for comments, and wrote directly to stakeholders, also seeking comment. Over 4,000 responses were received and incorporated into the report's conclusions. The report identified, among other things, that 78% of respondents recommended a total ban on grizzly bear hunting over a ban on the trophy hunt. Enforcement challenges were among the concerns offered by respondents about the efficacy of a ban on trophy hunting.

40. Minister Donaldson ultimately resolved the issue in favour of a province-wide ban on hunting grizzly bears. Appended to this affidavit as Exhibit DD is a true copy of the government's news release dated December 18, 2017, announcing the decision. The Hunting Regulation and LEH Regulation were amended at around the same time by a ministerial order.
42. To my knowledge, this is not the first time that government has imposed a moratorium on grizzly bear hunting. Though it occurred before my time in the public service, I have in my role as Director acquired institutional knowledge about a planned three-year moratorium that was implemented and effected one spring hunting season and was shortly thereafter lifted by the incoming Liberal government in about 2001.
50. Applications for transition funding were received by the Ministry (save for the Nisga'a Nation) up to the closing date of February 1, 2019.
51. I am advised that this claim was served on the Province on or about December 24, 2018.

### **Meeting with the Guide Outfitters Association of British Columbia ("GOABC")**

52. My recollection is that on or about September 13, 2018, which was not long after the transition funding announcement I mention above, Ward Trotter (who was then the Executive Director, Natural Resources in the Ministry) and I attended a meeting in Vancouver with Scott Ellis, Executive Director of the GOABC, and its counsel. During that meeting, litigation was threatened against the Province following the ban on grizzly bear hunting.
53. Notwithstanding that, ultimately twenty-seven (27) releases were subsequently executed by holders of GOLs, between June and August 2019. An example of one of the releases signed is appended to this affidavit as Exhibit II. That particular GOL held a quota for 4 grizzly bears as of December 2017. This release is in identical or very similar terms as the others that were signed. All 27 of those who signed releases received transition funding.
57. Notwithstanding the meeting held at GOABC's counsel's office in 2018, in my experience, the relationship between the Province and holders of GTCs and GOLs is most often professional and courteous. Conflicts can arise particularly around potential changes in management approaches or regulations.
58. The Province regulates the harvest of wildlife and as such, the Province regulates guide-outfitters, who take money for assisting others in harvesting wildlife. As with any regulator, the Province takes into account a variety of considerations and competing interests over the subject matter in question.

60. For non-Indigenous British Columbians, views regarding the public interest in and relationship to grizzly bears have evolved over the last century. Though always an iconic species, grizzly bears were historically overharvested throughout many areas of the province and remain extirpated in some PMUs. In recent decades, the public's increased interest in this species shifted regulation away from persecution or maximum sustainable harvest, towards the restricted LEH and conservative harvest rate, continuing to where we are today.
61. Despite independent reviews of the harvest management system prior to the hunt closure concluded that the management of the hunt was not a threat to the conservation of the species in the province, the grizzly bear hunt remained controversial. This public interest in and controversy surrounding grizzly bears, is reflected in the numerous policies, ancillary operational documents, reports, and investments in their management.
62. Additionally, as I mentioned above, there was a moratorium on the grizzly bear hunt in 2001. It is my understanding that the moratorium was enacted by the then NDP government in early 2001, and was intended to last three years while the above noted review was completed. It is my further understanding that after an election in 2001, as a result of which a Liberal majority government was elected, that Liberal government reversed the moratorium. In that regard I attach, collectively, as Exhibit JJ copies of two Orders in Council, the first being Order in Council No. 107 (Approved and Ordered February 8, 2001) and the second being Order in Council No. 662 (Approved and Ordered July 13, 2001). On reviewing the first order I note that the orders referred to an operative time period of March 1, 2001 to February 29, 2004.
64. These facts are important to understanding the relationship between the Province and holders of GTCs and GOLs. As regulated parties, holders are in a regulatory relationship with the Province. Communications take place in the form of regulatory instruments (e.g., licences, permits, quotas, harvest reports) and formal requests for information (e.g., consultation on regulation changes) and through less formal communications (e.g., identifying priorities of policy and management, correspondence and meetings).
65. Despite the catalogue of policies and other administrative guidance materials, I have not seen, and do not believe, that the Province has identified therein any relationship features with holders of GTCs or GOLs that I understand to be outside the core regulatory function of balancing what those parties want with the other competing, components of the public interest.
66. The guide outfitter sector has a long history in British Columbia and is an important part of rural economies. While there is interest in ensuring business opportunity and continuation of the guide outfitting practice this is prioritized last among the broad public interests the Province is required to manage when regulating wildlife harvest. Further, given the duty of the province to ensure the conservation of species and the rights of Indigenous Peoples, all indicated considerations, factors, and the like in the catalogue of policies and administrative guidance materials are, in my use and experience, are primarily oriented toward the

requirement to regulate the subject matter of their business (e.g., use of wildlife, use of land) and the administrative services provided by government.

67. I believe it is appropriate that the regulation making authorities rest with elected officials as a means to implement the public will and I do not see anything in the ongoing regulation of GTC or GOL holders that I understand to require the Province to do anything but follow the public interest in managing the harvest of wildlife. In this broad context I have never conducted my work with a view that the interests of a GTC or GOL holder (or any group of them) should be held more important than the other components of the public interest. I was cognizant of providing business certainty, as being one of the competing factors that I am required to balance in the discharge of my role and in my interactions with GTC or GOL holders (or any group of them).
69. In regard to the various regulatory considerations and objects, the "Commercial Hunting Interests" Policy is but one. This policy formalizes or reinforces terms of importance to guides' commercial interests, but I have not applied this policy in order to prioritize a commercial interest over, for example, a conservation interest. Nor do I believe it appropriate to view the Commercial Hunting Interests policy as "trumping" all other public interests, or even setting a guide's commercial interest against other factors in the public interest.
73. Based on my experience, education, and training, I do not disagree, except as may be indicated elsewhere in this affidavit (e.g., it was always communicated that the grizzly bear hunt would be closed in areas overlapping the Great Bear Rainforest) with the assertions of Mr. Ellis, though I note limited references to matters that touch on the question of common claim or common damages.
74. Based on my experience, education, and training, I specifically disagree with Mr. Fleming's assertion that he may fairly and adequately represent the interests of the class members as they touch on the question of common claim or common damages, for the reasons that follow.
  - a. In my view, guiding business are highly variable based on: location in the province; the wildlife species present, their distribution and abundance; opportunity to hunt (both quota and non-quota species); past harvest success; accessibility throughout the territory and mode of transportation used; size of territory; private property and leases, other tenures, licences and permits associated with the business; ancillary development; and impacts to, or uses of, the land from other commercial interests.
  - b. Most guide outfitters hunt multiple species. Although grizzlies were often a "premium" hunt (i.e., limited distribution in North America; and often no available hunt opportunities, due to conservation status, and where grizzly bear hunts do otherwise occur outside British Columbia, result in a relatively high price), in British Columbia there were relatively few grizzly bears harvested on an annual basis when compared to other big game species (e.g., mountain sheep, mountain goat, elk, moose and black bear), both by a single guide outfitter

and compared across multiple guide outfitters.

- c. Many species are not authorized through quota which provides guide outfitters flexibility throughout the seasons that are open and overlap with their guide certificate territories.
  - d. Individual guide outfitters may tailor their business to different wildlife species and hunt experiences based on a variety of combined factors and market these opportunities differently to many potential clients of guide outfitters that have different preferences for a variety of hunt experiences.
  - e. Cost structures and fees are variable based on individual business decisions. Payments due to government (e.g., land rents, royalties) can vary based on use and requests can be made for modifications that can change fees (e.g., reduce the size of a Land Act tenure or sub tenuring) to adjust to changing business needs.
75. Based on my experience, education, and training, I specifically disagree with Mr. Fleming's assertion that maintaining a grizzly bear hunt is required to uphold the principles laid out in the Commercial Hunting Interests Policy and that the overall legislative and policy scheme is designed for the protection of the guide outfitting industry. Rather this scheme is designed to ensure the conservation of wildlife species, public safety, and the rights of Indigenous Peoples in a manner that realizes social, cultural and economic benefits aligned with a broader public interest than only the commercial interests of guide outfitters.
77. Based on my experience, education, and training, I do not disagree with the assertions of Mr. Sheldon at paragraphs 3 through 5 of his affidavit, as they touch on the question of common claim or common damages though I note limited references to matters that touch on the question of common claim or common damages.
78. Mr. Harder bases his opinion largely on the facts asserted by other individuals. I do not propose to address his opinion. I note that Mr. McEwen has given opinions of his own.
80. Concerning the specific allegation of "misfeasance in public office", it is my understanding that then-Minister Donaldson was acting within his legal authority when he made the decision to end the grizzly bear hunt, nor have I seen or heard anything that suggests that he thought otherwise. The Guide Outfitter Transition Fund was approved by government, not as a compensatory mechanism (there are in my understanding no grounds for such compensation under the Wildlife Act), rather to support the adaptation of guide outfitting business aligned with the principles of the Commercial Hunting Interests Policy.
81. Concerning the allegation of negligent misrepresentation, I believe the regulatory framework, as written and as I understand it is practiced, does not establish anything other than an ordinary regulatory relationship. There was extensive communication on the matter of potential changes to the grizzly bear hunt when the NDP government formed office and consultation that occurred with guide outfitters on policy intention papers. While it is my understanding that the claim for negligent misrepresentation is confined to alleged written "representations" referred to in the Amended Claim (and therefore I need not interpret the

documents for the Court beyond the evidence provided above).

82. In terms of the damages that could conceivably be suffered if a claim is proven, I have reviewed the report of Paul McEwen, and advise the court that the general principles he outlines align with what I know about the diversity of guide operators in British Columbia that did in the past hunt grizzly bears: some have big operations, some have small operations; some have high-cost structures, other low-cost or rudimentary services; some have high rates of success, others not; for some grizzlies were a substantial part of their guided hunts, for others a grizzly bear hunt was a rare add-on. I cannot see a manner in which the damage done to an operation can be calculated without considering all these variables.
88. I have reviewed Mr. McEwen's use of the data in these databases and considered that use against what I know about the data's reliability. If anything, Mr. McEwen was 'conservative' in using the data, in the sense that, in my estimation, he based his opinion on reliable data, and often on the most reliable portions of the data gathered. Again, within the bounds of my scientific background, I consider Mr. McEwen's use of the data he identifies to be appropriate.

## Appendix "B"

### The Plaintiff's Proposed Common Issues

#### Misfeasance in Public Office

1. Was Minister Donaldson a public officer?
2. Did Minister Donaldson exercise a power as a public officer?
3. Did Minister Donaldson exercise public functions?
4. Did Minister Donaldson act with subjective knowledge that he had no power to amend the regulations to the Wildlife Act to ban grizzly bear hunting?
5. Did Minister Donaldson act with subjective knowledge that this act would probably injure the class members?
6. Did Minister Donaldson act with reckless indifference with respect to the illegality of the act and the subjective reckless indifference to the outcome?
7. Did Minister Donaldson owe a duty of care to the class members?
8. Did Minister Donaldson's acts cause harm to the class members?
9. Is Her Majesty the Queen in right of the Province of British Columbia vicariously liable for the acts of Minister Donaldson?

#### Misrepresentation

10. Did Her Majesty the Queen in right of the Province of British Columbia owe a duty of care to class members?
11. Did Her Majesty the Queen in right of the Province of British Columbia make the representations as set out in paragraphs 46-48 of the Amended Notice of Civil Claim, which were untrue, inaccurate or misleading? If so, what were the untrue, inaccurate or misleading representations made by Her Majesty the Queen in right of the Province of British Columbia, when, where and how?
12. Did Her Majesty the Queen in right of the Province of British Columbia make the above representations described above negligently? If so, when, where and how were the representations made?
13. Did Her Majesty the Queen in right of the Province of British Columbia make the representations intending that class members rely upon them?
14. Did the class member suffer economic loss?

#### Damages

15. If the answer to any of the common issues is yes, what remedies are class members entitled to?
16. If the answer to any of the common issues is yes, are the defendants potentially liable on a class wide basis?
17. Can the amount of damages be determined on an aggregate basis and, if so, in what amount?
18. What is the appropriate method of procedure for distributing the damages award to the class members?
19. Are the class members entitled to an award of aggravated or punitive damages based on the defendants' conduct and, if so, in what amount?
20. If the answer to the above question is yes, what is the appropriate method of procedure for distributing any aggravated or punitive damages to the class members?

#### Interest

21. What is the liability, if any, of the defendants for court order interest?

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Prepared on 28 October 2026 · Esheria