SUPREME COURT OF YUKON

Citation: *Grove v Yukon (Government of)*, 2021 YKSC 34

Date: 20210623
S.C. No. 20-A0028
Registry: Whitehorse

BETWEEN

WAYNE ANDREW NIXON GROVE AND ALISON JANE GROVE
DBA EL DORADO RANCH

PLAINTIFFS

AND

GOVERNMENT OF YUKON (MINISTRY OF THE ENVIRONMENT)

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the plaintiffs — James D. Vilvang, Q.C.

Counsel for the defendant — I.H. Fraser

REASONS FOR DECISION

Introduction

[1] The plaintiffs raise elk and bison, and grow hay and other crops on their land in the Takhini River Valley. They claim against the defendant Government of Yukon in negligence, negligent misrepresentation and nuisance. They allege the Yukon government's failure to implement the government approved elk management plans from 1990, 2008 and 2016, and specifically the failure to maintain the wild elk herd at 100, has caused damage to their property, including broken fences, ruined hay and other crops. It has also increased the risk of the spread of pathogens from wild to domesticated elk.

[2] The defendant Government of Yukon applies to strike the plaintiffs' statement of claim without leave to amend under Rule 20(26) of the *Rules of Court* of the Supreme Court of Yukon, and costs. The defendant argues the plaintiffs' claim has no reasonable prospect of success because they are owed no private law duty of care and therefore no cause of action can be established.

Background

[3] The following background comes from the statement of claim and particulars as well as the material submitted in this application. For the purposes of this application all the allegations in the claim, including the particulars, are to be read generously and deemed to be true.

[4] The plaintiffs, Wayne and Alison Grove, own and operate El Dorado Ranch (the "ranch") on the Takhini River Road. They bought it in or about 1996. The land contains a house, main fields, a dog kennel, grazing or pasture fields used by the farmed elk and bison, a rental home and pasture, an elk handling facility and camp site for northern lights viewing and hay fields. The plaintiffs grow hay and other feed crops, for sale and to feed their own livestock. They raise farmed elk and domesticated bison.

[5] The defendant, Government of Yukon and specifically the Minister of Environment, has responsibility for the management of the natural environment, including Yukon wildlife, under the *Environment Act*, RSY 2002, c.76. The Minister of Environment is given general responsibility for administration and enforcement of the *Wildlife Act*, RSY 2002, c.229, including regulatory management of hunting, and the operation of game farms, such as that of the plaintiffs. Neither of these statutes is referred to in the pleading but there is no question that they apply.

[6] Wild elk were introduced by the Government of Yukon to the Yukon, and in particular to the Takhini River Valley, between 1951 and 1994, for the purpose of providing hunting opportunities. The size of the herd has grown from approximately 60 in the 1990s to over 200 currently.

[7] After the 2008 elk management plan was completed, the Government of Yukon established a core zone, a buffer zone, and an exclusion zone for wild elk. The core zone encompassed the historical range of the Takhini River herd, and a second herd. The buffer zone encompassed an area east, south and west of the core zone that the elk were known to frequent. The exclusion zone is the rest of the Yukon.

[8] The ranch is in the buffer zone. Wild elk regularly frequent the ranch, especially in winter. They cause the following damage:

a) melt snow in the hay fields by lying in them, causing ice to form when they leave, killing the planted grass underneath, and allowing wild grasses to invade, and reduce hay production;

b) feed on the forage grown on the fields, reducing sales and feed for their farmed elk;

c) dig rutting pits, damaging agricultural fields;

d) destroy fencing resulting in increased costs to repair and replace, and increasing risk of escape of farmed elk;

e) risk reducing value of the ranch's elk calves if wild elk impregnate the domesticated elk;

f) risk transferring parasites or disease to domesticated elk; and

g) risk damaging the plaintiffs or the property because of bull elk aggression.

[9] As a result of a moratorium on importing elk into the Yukon, the plaintiffs are unable to replace any farmed elk who may be killed.

[10] The defendant published elk management plans in 1990, 2008 and 2016 ("the Plans"). Their purpose included recommendations for actions, goals, and objectives to reduce conflict between wild elk and agriculture.

[11] The plaintiffs claim in negligence against the defendant for its failure to implement operational measures to reduce conflicts between elk and agriculturalists. Other than issuing some limited hunting permits, which has not reduced the numbers or modified the elk behaviour, the plaintiffs say the defendant has not implemented any of the recommendations in the Plans. As a result, they say farmers and ranchers bear the burden of elk mitigation strategies. They acknowledge there is a Government of Yukon compensation scheme but say it is inadequate.

[12] The claims in negligent misrepresentation are based on the defendant's promise to promote agriculture in the Takhini River Valley and their failure to protect agriculturalists from the wild elk. The plaintiffs say the representations made by the Government of Yukon for both the promotion of agriculture and the management of elk were misrepresentations because the recommendations were not implemented.

[13] The claim in nuisance is based on the defendant's interference with property rights of the plaintiffs by failing to implement the recommendations in the Plans.

[14] The documents incorporated by reference into the pleadings include: *Elk Management Plans* 1990, 2008 and 2016; *Agriculture for the 90s: A Yukon Policy*, November 1991; *Hotsprings Road Local Area Plan*, January 2002; and *Vision for Yukon*

Agriculture: 2006 Yukon Agriculture Policy. These documents are referred to in the response to demand for particulars, which forms part of the pleadings.

Issues

[15] The question is whether the failure of the Government of Yukon to implement the recommendations in the Plans, in particular the recommendation to keep the wild elk herd to 100 elk, and the failure to adhere to the plan to foster agriculture in the Yukon, constitute a claim that has no reasonable chance of success.

[16] This requires an analysis of the duty of care, if any, owed by the defendant to the plaintiffs, and, if a duty is found to exist, whether there are any policy reasons why a duty of care should not be recognized. In this case, it is agreed that any private law duty of care owed to the plaintiffs must be established through a special relationship between the plaintiffs and the defendant.

[17] If this question gives rise to genuine legal or factual uncertainties, it cannot be answered at this stage and the answer must await a trial and a complete record (*Taylor v Canada (Attorney General)*, 2012 ONCA 479 ("*Taylor*") at para. 22).

Legal Principles – Strike Claim

[18] Rule 20(26)(a) provides:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
> …

[19] No evidence is admissible on an application under this rule (Rule 20(29)).

[20] The Supreme Court of Canada set out the elements of the modern test to be met on a motion to strike pleadings and its purpose in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 ("*Imperial Tobacco*") at paras. 19-25. It must be plain and obvious that the claim has no reasonable prospect of success. The assessment must be done on the basis of the pleading, the particulars, and any documents incorporated by reference. The facts in the pleading must be read generously and accepted as true, unless they are manifestly incapable of being proven. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show.

[21] The purpose of giving the court power to strike a statement of claim with no reasonable prospect of success is to promote litigation efficiency and to reduce time and cost. Weeding out unmeritorious claims allows resources to be devoted to the claims with a reasonable chance of success. "The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice" (*Imperial Tobacco* at para. 20).

[22] The high bar on an application to strike pleadings was confirmed by the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras. 64-66. The court reiterated that the facts pleaded are assumed to be true and that a court must construe the pleading generously and overlook defects that are drafting deficiencies. The pleading should not be struck solely on the basis of the complexity of the issues, the novelty of the claims being advanced, or the apparent strength of the defences to the claim. Only material facts capable of being proven need be accepted as true. Allegations based on speculation or assumptions, bare allegations or bald assertions without any factual foundation, pleading of law, or allegations that are patently ridiculous or incapable of proof do not have to be accepted as true (*Northern Cross (Yukon) Ltd v*

Yukon (Energy, Mines and Resources), 2021 YKSC 3 at para. 16, and the cases cited therein).

[23] This test has been applied in the Yukon in: *Wood v Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16; *North America Construction (1993) Ltd v Yukon Energy Corporation*, 2019 YKSC 42; *Northern Cross*.

Legal Principles – duty of care in negligence/negligent misrepresentation

[24] A claim in negligence requires the plaintiff to show that the defendant owed a duty of care to the plaintiff, that the defendant failed to meet the requisite standard of care, and that the defendant's failure to meet the standard of care caused the plaintiff some injury.

[25] A claim in negligent misrepresentation requires the establishment of the existence of a duty of care based on a special relationship between the representor and the representee; the representation is untrue, inaccurate or misleading; the representor acted negligently in making the misrepresentation; the representee reasonably relied on the negligent misrepresentation; and the reliance was detrimental to the representee because damages resulted.

[26] In both types of claims the first step is the establishing of a duty of care.

[27] The jurisprudence developed by the Supreme Court of Canada in determining the existence of a duty of care requires a two-stage analysis. The first stage is a consideration of the specific relationship between the plaintiff and the defendant and whether it justifies the imposition of a duty of care on the defendant. The court first looks at whether this relationship fits into a settled category of cases that has already been recognized to create a duty of care, or whether it is analogous to one of the cases in the

existing categories, or whether it is a new category creating a duty of care, or whether, as in this case, there were a series of specific interactions between the plaintiffs and the defendant that led to the creation of the duty of care. In making this assessment it is important to focus on the specific circumstances of the case before the court.

[28] The second stage is reached only if a duty of care is found. At the second stage, the court must consider whether there are any residual policy concerns beyond the specifics of the case that justify the negation of the *prima facie* duty of care (*Taylor* at para. 71). Examples of these policy considerations include "the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general" (*Edwards v Law Society of Upper Canada*, 2001 SCC 80 ("*Edwards*") at para. 10).

[29] To establish a duty of care, proximity and foreseeability are necessary. As stated in *Imperial Tobacco* at para. 41, "[p]roximity and foreseeability are two aspects of the one inquiry – the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law."

[30] The proximity aspect of the inquiry has been described as determining whether the case discloses factors showing the relationship between the plaintiff and the defendant was sufficiently close and direct that it is just to impose a duty of care. The factors to be considered include representations made by the defendant, especially if made directly to the plaintiff, reliance by the plaintiff on the defendant's representations, the nature of the plaintiff's property or other interests involved, the specific nature of any direct contact between the plaintiff and the defendant, and the nature of the overall relationship existing between the plaintiff and the defendant (*Cooper v Hobart*, 2001

SCC 79 at paras. 34-35; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras. 29-30). Proximity is not confined to physical proximity. The court in *Hill* wrote at para. 29:

> This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.

[31] A close and direct connection may exist regardless of whether there is a personal relationship between the victim and the wrongdoer.

[32] The foreseeability test is whether the harm alleged in the claim would be viewed by a reasonable person as being very likely to occur. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just to impose an obligation on one party to take reasonable care not to injure the other.

[33] When a claim in negligence or negligent misrepresentation is made against a government authority, the courts generally refer in their analysis to a "private law duty of care." This is because a duty of care owed by a government to the public at large does not give rise to a claim in negligence. Many of the powers of government are for the purpose of preventing or reducing risks of harm to the public at large. When these measures to reduce risk fail, it is difficult to impose a duty on government to prevent such losses. The law does not generally impose such a duty on private persons to take action to reduce the risk of harm caused by a third party unless there is a special relationship. A duty of care owed by government to an individual plaintiff, may, in certain circumstances, give rise to a claim because of the existence of a special relationship. This is the issue in this case.

[34] Courts have consistently stated there are two situations in which a government may owe a private law duty of care to an individual plaintiff. The first does not apply in this case. It is where the duty of care is said to arise explicitly or by implication from the statutory scheme. The second is where the duty of care is alleged to arise from interactions between the claimant and government and is not negated by statute (*Imperial Tobacco* at paras. 43-47). This is the situation in the case at bar.

[35] The argument in the cases relying on specific interactions between the claimant and government is:

> … that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant. (*Imperial Tobacco* at para. 45)

[36] The Supreme Court of Canada in *Imperial Tobacco* cautioned that:

> [47] … [W]here the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

Analysis

Effect of statutory provisions on duty of care

[37] The parties agree and this Court confirms that statutory duties do not in and of themselves create a private law duty of care (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 68-71).

[38] In this case there are several reasons why the two statutes show the legislature's intention not to create a private law duty of care. First, all of the duties of the Minister under the *Environment Act* and the *Wildlife Act* are owed to the public at large. There are no duties owed specifically to agriculturalists or game farm owners. "[A] public law duty aimed at the public good does not generally provide a sufficient basis to create proximity, even for individuals affected by the scheme" (*Waterway Houseboats Ltd v British Columbia*, 2020 BCCA 378 ("*Waterway Houseboats*") at para. 237).

[39] Second, the statutes do not contain any positive statutory duty on the government to create, adopt or implement the recommendations of an elk management plan, or manage the wild elk herds in any specific way.

[40] The duties owed by the Minister under the *Environment Act* include:

> **Responsibilities of the Minister**
>
> 58 Except as otherwise provided in this Act, the Minister shall be responsible for
>
> (a) planning, management, research, and investigation with respect to the natural environment;
>
> (b) the development, coordination, and implementation of policies, strategies, objectives, standards, programs, services, and administrative procedures of departments and agencies of the Government of the Yukon in matters pertaining to environmental management and conservation of the

> natural environment within the authority of the Government of the Yukon; and
>
> (c) implementation and coordination of a development approvals process.
>
> **Powers and duties of the Minister**
>
> 59(1) The Minister may
>
> …
>
> (b) establish advisory or consultative committees and retain experts to report to the Minister with respect to any matter under this Act, and specify the functions that the committees and experts are to perform, and the manner and time period in which those functions are to be performed;
>
> …
>
> (d) conduct, carry out, or participate in research and studies, investigate problems, and compile and assess information directly or indirectly relating to matters pertaining to the environment with a view to making the information or the results of the study and assessment available to government, and to the public through any medium of communication;

[41] The Minister has general responsibility for the administration and enforcement of the *Wildlife Act*, including regulatory management of hunting and the operation of game farms set out in the *Game Farm Regulations*, OIC 1995/015.

[42] Third, there is a statutory limitation of liability of the Government of Yukon with respect to damage or injury caused by wildlife in the *Wildlife Act*:

> **Title to wildlife and Crown liability**
>
> 101(1) Subject to this Act, all property, rights, title and interest in and to wildlife are vested in the Crown.
>
> (2) Despite subsection (1) or any other provision of this or any other Act, no right of action lies, and no right of

> compensation exists, against the Crown for death, personal injury or property damage caused by any wildlife.

[43] This is another indication that the legislature did not intend the statutory scheme to create a private law duty of care: see *Waterway Houseboats* at para. 243.

[44] Finally, the existence of a compensation scheme is a factor that courts have considered in determining there was no intention to create a private law duty of care; see *Waterway Houseboats* at para. 243. The compensation scheme here is not part of the statutory provisions, but is a program jointly funded by the Government of Canada and the Government of Yukon (Yukon Wildlife Damage Compensation Program). It compensates farmers for lost revenue as a result of damage by wildlife.

Specific interactions between Government of Yukon and Wayne and Alison Grove

[45] As noted above, even where it is clear that the statutory provisions do not in and of themselves give rise to a duty of care, it is still possible to meet the requirement of proximity through specific interactions between the government and the claimant. The plaintiffs argue that proximity is created here based on both statutory language and specific interactions (*Imperial Tobacco* at para. 46).

[46] The plaintiffs rely on the following specific interactions between the Government of Yukon and the plaintiffs, asserting that they have created a “special relationship”:

> 1. The Government of Yukon established agriculture zoning in the Hotsprings Road area of the Takhini Valley where the Ranch is located;
>
> 2. The Government of Yukon sold the Ranch to the plaintiffs;
>
> 3. The Government of Yukon involved agriculturalists, including Mr. Grove, in the creation of the Agriculture Policies;

> 4. The Government of Yukon published the Agriculture Policies with the expectation that agriculturalists such as the plaintiffs would read and rely on them;
>
> 5. The Government of Yukon involved agriculturalists, including Mr. Grove, in the creation of the Elk Management Policies;
>
> 6. The Government of Yukon published the Elk Management Policies with the expectation that agriculturalists including the plaintiffs would rely on them; and
>
> 7. Mr. Beckman of the Agriculture Branch specifically encouraged and assisted Mr. Grove to obtain a game farm license for domestic elk. (Response to Demand for Particulars, p. 27)
>
> …
>
> 4. In or about 2000, when Mr. Grove inquired at the then Agriculture Branch about obtaining a license for game farming domestic elk and bison, David Beckman of the Agriculture Branch replied with words to the effect of "*right on, we need more diversified livestock farmers*";
>
> 5. In or about 2000, Mr. Beckman then provided advice and assistance to Mr. Grove in obtaining the license for game farming domestic elk and bison; (Response to Demand for Particulars, p. 20)

[47] The plaintiffs argue that they are part of a small and well-defined group, agriculturalists living in the buffer zone, known to the Government of Yukon, at the very least because of their claims for compensation under the government program, to suffer harm from wild elk.

[48] The plaintiffs rely on the decisions of *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 ("*Fullowka*") and *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, [1990] 74 OR (2d) 225 (HCJ) ("*Jane Doe*") in support of this argument of the establishment of a special relationship. These cases are distinguishable, in my view.

[49] In *Fullowka*, the court found a duty of care existed as a result of the establishment of a close and direct relationship between the mining inspectors and the miners. The case was about the liability of the Government of the Northwest Territories, a union, and a private security firm, after an explosion in the Giant Mine near Yellowknife killed nine miners. In upholding the trial judge's decision that a duty of care was owed by the government to the miners as a result of the relationship between the inspectors and the miners, the Supreme Court of Canada relied on three factors:

a) The inspectors owed a duty to a small, clearly defined group of people – those working in the mine – and not to the public at large.

b) The inspectors had direct dealings with the deceased miners, as they visited the mine almost daily, conducted 11 official inspections, and were always accompanied on tours of the mine by a member of the occupational health and safety committee, who was a miner.

c) The inspectors' statutory duties related directly to the conduct of the miners themselves, rather than regulating another entity, separate from the claimants.

[50] In *Jane Doe*, liability for duty to warn was found to be owed by the Toronto Police to a woman who was attacked by a serial balcony rapist in her neighbourhood. Even though there was no direct relationship or interaction between the plaintiff Jane Doe and the police, her membership in a small group – that is, women in that neighbourhood who lived in apartments with balconies and who were known to be vulnerable, gave rise to an entitlement to be warned of the danger.

[51] In this case, the direct individual dealings relied on by the plaintiffs are first, a conversation in 2000 with a civil servant in the Agriculture Branch when the plaintiff Wayne Grove inquired about a licence for farming elk and bison. The civil servant said words to the effect of "right on, we need more diversified livestock farmers."

[52] The civil servant then provided advice and assistance to the plaintiff Wayne Grove in obtaining the licence for game farming domestic elk and bison. This was the second direct interaction relied on by the plaintiffs.

[53] A third individual interaction relied on by the plaintiffs is the sale of the ranch to them in or about 1996 by the Government of Yukon.

[54] The plaintiffs also rely on the duty of care they say arises and is owed by the Government of Yukon to a small group of agriculturalists, to which they belong, and who were consulted on agricultural policies and the Plans.

[55] The case at bar is different from the facts in *Fullowka* in several ways. First, there were far fewer direct interactions in this case between the plaintiffs and the defendant. In *Fullowka*, the inspectors, whose interactions with the deceased miners were found to have given rise to a duty of care, were present at the mine site on an almost daily basis, conducted 11 official inspections and were always accompanied by a miner on tours of the mine. By contrast, the plaintiffs in this case describe at most three direct interactions – the "right on" comment, the assistance in obtaining a game farming licence, and the sale of the ranch. The nature of the contact in *Fullowka* was more direct and meaningful than the interactions described by the plaintiffs here.

[56] Second, the governing statute in *Fullowka*, the *Mining Safety Act* R.S.N.W.T.1988, c. M-13, and *Mining Safety Regulations* R.R.N.W.T. 1990, C. M-16,

set out duties owed by the inspectors directly to the miners, such as ordering the immediate cessation of work in a mine that the inspector considers unsafe and to give notice to management of any matter, thing or practice that in the opinion of the inspector is dangerous (see para. 38 *Fullowka*). The statutes in the case at bar do not set out any direct duties to agriculturalists in the position of the plaintiffs. Instead, the statutes provide that the government manages wildlife. The plaintiffs in this case say they are relying on statutory language as well as the specific interactions. However, they have not pleaded any statutory language that creates a duty similar to that in *Fullowka*. On this basis, *Fullowka* is not applicable.

[57] The *Jane Doe* case is distinguishable because of its unique factual circumstances that created a proximity relationship between the plaintiff victim and the defendant police and gave rise to a duty to warn. The *Jane Doe* decision was an exception to the general approach that the duty to warn is limited to the liability of a manufacturer for a defective product. The court in *Jane Doe* considered it was fair to impose a duty of care, and specifically a duty to warn, on the police to provide vulnerable members of the public, a “narrow and distinct group of potential victims” with information about risks (para. 19).

[58] Here, there is no allegation in the pleading that the defendant failed to warn the plaintiffs of any risk related to wild elk. The allegations are focussed on the defendant’s failure to implement the recommendations in the Plans. This makes any reliance on the *Jane Doe* duty to warn case unhelpful.

[59] Counsel for the plaintiffs argues that the assessment of sufficiency of the facts to establish a special relationship should be left for trial and is not appropriate at the

application to strike stage. He argues as long as there are some facts that are alleged to constitute a special relationship that could create a duty of care, the action must proceed.

[60] The court on an application to strike is permitted to make some determination of whether the facts pleaded, accepted as true and interpreted generously, can establish a special relationship. There does not have to be certainty, but there must be some factual basis that gives rise to a reasonable chance of success of the claim. This is the analytical process that was undertaken in *Taylor,* also a case of an application to strike the statement of claim on the basis of no private law duty of care. See for example, the court's statement at para. 110, in which it reviewed the allegations in the statement of claim about the relationship between the plaintiff and the defendant and then wrote: "The more difficult question is whether the allegations create a sufficiently close relationship to give rise to a private law duty of care." The court went on to assess the nature of the allegations and the circumstances of the relationship to make its determination.

[61] The interactions described in the case at bar between the plaintiffs and the government officials are insufficient to establish a special relationship such that it would be just to impose a duty of care on the government.

[62] First, the Government of Yukon's sale of land to the plaintiffs for the establishment of a ranch, occurred in or about 1996, when it was known that there were wild elk nearby, albeit the numbers in the elk herd were lower. There were no representations made by the Government of Yukon at that time about reducing or preventing the risks of harm to property from any wildlife, including elk. The sale of land

to the plaintiffs allowing them to carry out agricultural pursuits, without more, does not create a special relationship.

[63] Second, the consultation with the plaintiffs by the defendant on agricultural policies and the Plans is not enough to create a special relationship in the context of the duty of care. The Government of Yukon consults regularly with Yukoners who have various specific interests. Public consultation is part of policy and legislative development and is valuable to increase government understanding of issues. Consultation in the public context cannot give rise to legal liability, even if requests are aimed at smaller groups with specific interests. The nature of consultation is such that it is a gathering of information to be included and assessed in a decision-making process for possible future actions. It is not a commitment to those who are consulted by government that government will act in a certain way or at all.

[64] Third, the plaintiffs' reliance on and expectation from the agricultural policies and Plans are also insufficient to establish a special relationship with the defendant. The character of policies and Plans differs from a statutory duty. The existence of policies and Plans containing recommendations in a variety of competing areas, without a clear commitment of Government of Yukon to act on some, all or any of those recommendations, does not amount to a creation of expectation or reliance sufficient to establish a special relationship giving rise to a duty of care.

[65] Fourth, the specific interaction of the plaintiff Wayne Grove with the civil servant also does not create a special relationship. One statement of support made to the plaintiff by a civil servant about his decision to start a game farm is far different, for example, from multiple inspections and visits to a mine by inspectors, in the presence of

miners, to assure them of a safe working environment. Similarly, the civil servant's provision of assistance to the plaintiff to obtain a game farming licence is no more than a civil servant doing his job to assist a member of the public with a government application process. The character of this interaction is not enough to establish a special relationship giving rise to a duty of care in this context.

[66] To conclude, considered separately and cumulatively, the facts of the sale of the ranch, the other consultation interactions with Government of Yukon for the creation of policies and Plans applicable to the plaintiffs' situation and relied on by them, and the interactions with the one civil servant are not sufficient to constitute a special relationship of proximity giving rise to a duty of care. They do not describe circumstances of a sufficiently close and direct relationship where it would be just to impose on the defendant a duty of care.

[67] Rule 20(26) allows a court to order an amendment of a pleading. The defendant has requested in its notice of application that the claim be struck with no leave to amend. However, in its oral submissions, the defendant did acknowledge the possibility of the Court ordering leave to amend the pleading.

[68] The plaintiffs shall be given leave to amend their claim. There may be other interactions with government officials that have not been included in the pleading, or other factual circumstances about the relationship, that may change the interpretation of this allegation.

Negation of duty of care through policy considerations

[69] The above analysis is sufficient to support a successful application to strike the claim. In the event the above conclusion is incorrect, I will address the second stage of

the duty of care analysis. This stage requires a determination of whether there are any policy considerations that negate a *prima facie* duty of care. In addition to the general considerations as described above at para. 28, the courts at this stage consider such factors as:

a) the prospect of unlimited liability to an unlimited group of people;

b) whether or not the matter at issue is policy or operational;

c) whether there is an effective remedy other than a civil action for damages;

d) whether there exists a statutory provision immunizing the good faith actions of public officials (K. Horsman & G. Morley, *Government Liability*, (Aurora, Ont.: Cartwright Law Group, 2006) (loose leaf updated 2020, release 36) c. 5 at 5-5).

Any one of these could be sufficient to negate a duty of care.

[70] All three causes of action in this case – in negligence, negligent misrepresentation and nuisance – are based on the same facts and allegations. These are summarized at paras. 25 and 26 of the statement of claim in which the plaintiffs allege the defendant's failure to implement operational measures to reduce conflicts between wild elk and agriculturalists, and specifically to decrease numbers of wild elk through issuing more hunting licences, have caused their damages. The plaintiffs further allege that the defendant's failure to implement the Plan recommendations and the failure to establish a sufficient compensation scheme caused damages.

[71] The plaintiffs also refer to "Agriculture Representations", which they define as two Local Area Plans in the Takhini River Valley designated "Primary Agriculture Use" and an "Area Development Act" providing the land would be for agricultural use, as well as

general promotion by the defendant of agriculture, including forage production and game farming of elk, bison and muskox. Other documents incorporated by reference into the statement of claim and response to the demand for particulars are set out above at para. 14.

[72] There are three applicable considerations in this case that negate any duty of care that may be found. First, the matter at issue is not operational. Second, there is an alternative effective remedy other than a civil action for damages. Third, there are other legal obligations created by statute that conflict with the duty of care sought to be imposed here by the plaintiffs.

Policy v operational

[73] The Plans and policies contain statements of goals, objectives, values, concerns, interests, encouragements, options and aspirations. They also reference recommendations for research projects, management techniques and communication strategies. This is consistent with the responsibilities of the Minister under the *Environment Act* in ss. 58 and 59, set out above.

[74] The Plans were developed by the Department of Environment, with the participation of a variety of interested parties, including First Nations, Renewable Resources Councils, Yukon Agriculture Branch, Yukon Agricultural Association, Yukon Fish and Game Association. They address a number of topics, including ensuring the wild elk herds remain healthy and self-sustaining; carefully managing elk habitat and range; providing for greater human use, appreciation, and understanding of elk; and acknowledging and addressing concerns about the presence of elk on the landscape, the topic of most interest to the plaintiffs. The Plans are adaptive frameworks, subject to

change, containing multiple objectives – for example, keep elk herds healthy and manage their habitat and range, while also mitigating impacts of their presence.

[75] The Plans were accepted and approved by the Minister at the time. However, there is nothing referenced in the pleading, including the documents incorporated by reference, such as a statement in the legislature, a regulation or any other legislative instrument, in which the government of the day committed to implement any of the recommendations made in the Plans. As noted in the 2016 elk management plan:

> … The overall aim of this plan is to maintain self-sustaining populations of elk on the landscape to provide wildlife viewing and harvest opportunities, while acknowledging and addressing concerns related to elk-agriculture conflicts, collisions between elk and vehicles, and impacts of elk on other species and ecosystems.
>
> The strong interest in directing resources for fish and wildlife management towards subsistence species has been reiterated by the parties through many discussions over the years. However, Yukon government's responsibility for managing wild elk and the requirement to direct resources to the management of these herds is also acknowledged. These interests are largely reflected in budgets and resource allocation and are also reflected in the actions described in this management plan (p. 6)

[76] This indicates the Government of Yukon's view that ongoing balancing of interests and adjustments of resources are necessary in order to manage wild elk in the context of the various interests (wildlife viewing, harvesting opportunities, concerns of elk-agriculture conflicts, vehicle collisions and impacts on other species). While counsel for the defendant was unable to define precisely the nature of the Plans, they are not at the stage of a policy to be implemented by government. The Plans contain recommendations towards the development of policy or further actions in the future. While the plaintiffs argue that the allegations in their claim are a failure to implement,

this characterization is not accurate. The Plans and policies do not set out operational requirements. Tort liability is imposed only if the conduct or failure to act occurs in the course of operational implementation of policy.

[77] Given that the law requires judicial deference to government policy, and these documents are, something less than policy, there is a good policy reason not to impose a duty of care in this context.

[78] There is also no part of the claim, including particulars, that alleges the Government of Yukon did not or is not promoting the development of agriculture in the Takhini River Valley/Takhini River Road area. The allegation of the government's failure to implement certain Plan recommendations does not demonstrate that agriculture is not being promoted.

[79] Even if there were a clear statement made by the Government of Yukon of a future intention to act on the recommendations in the Plans, without consideration, liability for negligent misrepresentation cannot arise unless there are representations about existing facts, not future occurrences (*Queen v Cognos Inc,* [1993] 1 SCR 87 at p. 129). As stated by the Court of Appeal of Alberta in *Motkoski Holdings Ltd v Yellowhead (County)*, 2010 ABCA 72 at para. 44:

> ... [A]n action for misrepresentation generally cannot be based on a representation about how the speaker intends to act in the future, unless the representation amounts to a covenant that the speaker will act in that way. …
>
> Unless consideration has been given, the plaintiff is generally not entitled to rely on a representation about how the defendant intends to conduct itself. That liability sounds in contract, if at all.

[80] If consideration existed in a case where a future representation is made, such as in the case of *Clark's-Gamble of Canada Ltd v Grant Park Plaza Ltd,* [1967] SCR 614, then it becomes a contractual obligation.

[81] Here, the pleading does not allege that the Government of Yukon made representations about its future intention to act to implement the recommendations in the Plans.

Alternative remedy to damages

[82] Another factor that negates duty of care is the existence of an alternative remedy to a civil action for damages. As noted in the plaintiffs' claim, the defendant contributes funds to a compensation scheme for agriculturalists who have lost revenue due to damage by wildlife. While the plaintiffs allege that the scheme is inadequate given the magnitude of their property losses, the fact that such a scheme exists is a further negation of a duty of care.

Conflict between duties

[83] A final factor that negates any duty of care is the potential conflict between such a private law duty of care and the broader duty owed to the public at large. The Supreme Court of Canada in *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 ("*Syl Apps*") at paras. 26-30 said:

> The fact that an alleged duty of care is found to conflict with an overarching statutory or public duty may provide a policy reason for refusing to find proximity … In *Cooper*, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in *Edwards*, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives.

[84] In the *Syl Apps* case, the Supreme Court of Canada refused, in the first stage of the analysis, to impose on a social worker and court-ordered service provider who were caring for a child in need of protection, a private law duty of care owing to the parents of that child. This was because such a duty of care would create a potential conflict with the service-providers' statutory duty to promote the best interests of the child in their care. Even though there was a foreseeable risk of harm and the plaintiffs were directly affected by the actions of the public authority, no duty of care was found.

[85] Another example is found in the case of *Abarquez v Ontario*, 2009 ONCA 374 ("*Abarquez*") at paras. 25-29. The Court of Appeal found that if the court imposed a private law duty of care on the province of Ontario to safeguard the health of the plaintiff nurses who were required to treat SARS patients, thereby allowing them to sue the government for damages for contracting SARS, there was a potential for conflict with the overriding public law duty to pronounce standards that are in the interests of the public at large. The interests of nurses could not be prioritized over the general public interest. They could not be given special consideration in the formulation of health care policy. The Court of Appeal did not allow them to sue for damages for contracting SARS.

[86] Here, the *Environment Act* provides that the management of the environment by the government is for the benefit of all Yukoners, present and future, and must consider a wide range of interests:

> Preamble
>
> Recognizing that the way of life of the people of the Yukon is founded on an economic, cultural, aesthetic and spiritual relationship with the environment and that this relationship is

> dependent on respect for and protection of the resources of the Yukon;
>
> Recognizing that the resources of the Yukon are the common heritage of the people of the Yukon including generations yet to come;
>
> …
>
> Objectives
>
> 5(1) The objectives of this Act are
>
> (a) to ensure the maintenance of essential ecological processes and the preservation of biological diversity;
>
> (b) to ensure the wise management of the environment of the Yukon;
>
> …
>
> (2) The following principles apply to the realization of the objectives of this Act
>
> (a) economic development and the health of the natural environment are interdependent;
>
> (b) environmental considerations must be integrated effectively into all public decision-making;
>
> (c) the Government of the Yukon must ensure that public policy reflects its responsibility for the protection of the global ecosystem;
>
> (d) the Government of the Yukon is responsible for the wise management of the environment on behalf of present and future generations; and
>
> (e) all persons should be responsible for the consequences to the environment of their actions.

[87] To allow the plaintiffs to sue the defendant for damages to their property as a result of conflicts with wild elk is to create a potential conflict with the duty owed to the

public at large to manage the environment and wildlife in a way that balances a number of different interests, including wildlife viewing, the preservation of biodiversity, and protection of the global ecosystem. While counsel for the plaintiffs may be correct in stating there is no conflict between those who hunt wild elk, and the interests of the plaintiffs, recreational hunters are only one of the interests the Government of Yukon is mandated by statute to protect. Following *Syl Apps* and *Abarquez,* the plaintiffs cannot be given a prioritized interest in the formulation of the policies and their implementation under the relevant statutes.

Nuisance Claim

[88] Neither party addressed this claim in their written outline. The claim is based on the same two paragraphs in the statement of claim (paras. 25 and 26) – that is, interference with property rights as a result of the Government of Yukon's failure to implement the recommendations in the Plans. Counsel for the Government of Yukon argued that this allegation is in effect a negligence claim. As a result of the findings above, that the Plans create no positive duty on the Government of Yukon to act, this claim is also struck. There is no legal obligation to compensate the plaintiffs for property damage when no legal duty is owed.

Limitations of Action

[89] As conceded by the plaintiffs, the limitation period for actions in negligence, including negligent misrepresentation, and nuisance is six years after the cause of action arose. As a result, any liability arising from the elk management plans from 1990 and 2008 can no longer form part of a cause of action. The limitation period for the 1990 plan expired in 2002, six years after the plaintiffs bought the ranch, and in 2014 for the

2008 plan. The 2016 elk management plan can be a basis for any cause of action that may emerge from any amended statement of claim. All claims arising prior to June 12, 2014 are barred, given that this claim was filed on June 11, 2020.

Conclusion

[90] The underlying purpose of this litigation is to persuade the Court that the Government of Yukon failed to implement recommendations towards the development of a policy that would assist the plaintiffs, who have an interest in protecting their property from wild elk. The plaintiffs have been unable to establish the existence of a special relationship in the context of a statutory scheme in which the Government of Yukon owes duties to the public at large, entitling them to a duty of care that allows them to sue the Government of Yukon for damages to property caused by wild elk.

[91] Even if a duty of care were found, there are at least three policy reasons that negate such a duty: non-operational nature of the Plans and policies; alternative remedy through compensation scheme; and conflict between the private law duty and the duty to the public at large.

[92] The statement of claim is therefore struck under Rule 20(26) because no duty of care is owed by the defendant to the plaintiffs in the circumstances pleaded. It is plain and obvious that the claim has no reasonable prospect of success. However, leave to amend is granted in the event there are additional facts that could establish a special

relationship between the plaintiffs or any other basis for a duty of care, or that could address any of the policy reasons to negate any duty of care that may exist.

_____
DUNCAN C.J.