COURT OF APPEAL OF YUKON

Citation: *Grove v. Yukon (Ministry of the Environment)*, 2022 YKCA 8

Date: 20220915
Docket: 21-YU876

Between:

Wayne Andrew Nixon Grove and Alison Jane Grove dba El Dorado Ranch

Appellants
(Plaintiffs)

And

Government of Yukon
(Ministry of the Environment)

Respondent
(Defendant)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Charlesworth

On appeal from: An order of the Supreme Court of Yukon, dated June 23, 2021 (*Grove v. Yukon (Government of)*, 2021 YKSC 34, Whitehorse Docket 20-A0028).

Counsel for the Appellants:	J.D. Vilvang, Q.C. J.M.S. Woolley
Counsel for the Respondent:	I.H. Fraser K. McGill
Place and Date of Hearing:	Whitehorse, Yukon May 16, 2022
Place and Date of Judgment:	Vancouver, British Columbia September 15, 2022

Written Reasons by:
The Honourable Madam Justice Charlesworth

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel

Summary:

The Yukon government introduced wild elk between 1951 and 1994 in the area where the appellants purchased a ranch in 1996. The wild elk frequent the appellants' ranch and cause damage to it. A judge struck their claim in negligence and nuisance for disclosing no reasonable prospect of success because the government did not owe them a duty of care. Held: Appeal allowed. It is not plain and obvious the appellants failed to establish any of the elements of negligence. In particular, it is not plain and obvious the government did not owe them a duty of care, and the potential policy reasons for negating such a duty are insufficient to do so. The judge also conflated the negligence and nuisance analyses, leading to an erroneous conclusion. When faced with complex and competing arguments about unsettled and fact-specific areas of law such as these, and of course when it is not plain and obvious a claim is bound to fail, courts must leave such a conclusion to the trial judge.

Reasons for Judgment of the Honourable Madam Justice Charlesworth:

Facts and Procedural History

[1] Wayne Grove and Alison Grove ("Groves") own property known as the El Dorado Ranch located in the Takhini River Valley near Whitehorse, Yukon. The Groves filed a statement of claim in the Supreme Court of Yukon against the Yukon Ministry of the Environment ("Ministry") on June 11, 2020.

[2] The Groves claimed that wild elk, which the Ministry had introduced to the Takhini River Valley region, and which were under the stewardship of the Ministry, had caused significant damage to their property, including damage to lands and domestic livestock. The Groves framed their claims in negligence, negligent misrepresentation, and nuisance.

[3] The Ministry filed an application to strike the statement of claim without leave to amend pursuant to Rule 20(26) of the *Rules of Court* of the Supreme Court of Yukon on October 2, 2020. The Ministry argued the Groves' claim had no reasonable prospect of success because the Ministry owed no private-law duty of care to the Groves, and thus they could not establish a cause of action.

[4] On June 23, 2021, Chief Justice Duncan, who heard the Ministry's application in chambers, ordered the statement of claim be struck, with leave to amend. The

judge found the Groves had been unable to establish the existence of a special relationship in the context of a statutory scheme in which the Ministry owed duties to the public at large.

[5] The judge also found that if a duty of care did exist, there were at least three policy reasons that negated such a duty: (1) the non-operational nature of the plans and policies; (2) the availability of an alternative remedy to the Groves, namely, a compensation scheme; and (3) the conflict between the private-law duty and the duty to the public at large.

[6] The judge found it was plain and obvious the claim had no reasonable prospect of success. She granted leave to amend the statement of claim in the event the Groves uncovered additional facts that could establish a special relationship between them and the Ministry 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.

[7] The Groves appeal, seeking to dismiss the judge's order. They argue the judge erred in law by striking out the claims in negligence and nuisance. The Groves say she erred in concluding the Ministry did not owe the Groves a duty of care and policy reasons negated any possible duty of care. The Groves also argue the judge erred by conflating the Groves' claim in nuisance with their claim in negligence and striking the nuisance claim based on the absence of a duty of care.

[8] For the reasons that follow, I would allow the appeal and set aside the order. I would dismiss the Ministry's application to strike the Groves' claims in negligence and nuisance.

Discussion

Plain and Obvious Requirement

[9] The Ministry applied pursuant to Rule 20(26)(a), which reads:

> (26) 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, …

[10] The Supreme Court of Canada established the test for striking a claim in *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras. 19–25. The judge correctly set out the test in her reasons:

> [20] … 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.

[11] The judge also correctly outlined the purpose of a court's power to strike a statement of claim with no reasonable prospect of success as being the promotion of litigation efficiency and to reduce time and cost:

> [21] … 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).

[12] The plain and obvious test *Imperial Tobacco* established places a high bar on applicants who wish to satisfy a motion judge that a plaintiff's claim has no reasonable prospect of success.

[13] The Supreme Court of Canada, in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, recently affirmed the rigorous nature of the test on a motion to strike. In a case that involved a determination of whether the court should strike, at a preliminary stage, litigation involving Eritrean workers' claims based on breaches of customary international law, the Court stated:

> [63] Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).
>
> [64] A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are

> manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).
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> …
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> [66] This Court admonished in *Imperial Tobacco* that the motion to strike
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> > is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. . . . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]
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> [67] The Chambers Judge in this case summarized the issues as follows:
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> > The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:
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> > (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
> >
> > (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.
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> He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.
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> …
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> [69] For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".

[14] As discussed below, the legal concepts of negligence, nuisance, and Crown immunity necessitate fact-specific adjudication and analysis of unsettled law. The complex and competing arguments of counsel at both the motion stage and on

appeal illustrate how the potentially unmeritorious nature of the claim is anything but plain and obvious.

[15] These arguments also highlight the potential pitfalls of determining an action at the interlocutory step. Courts must guard against frustrating the development of the common law in the pursuit of gaining trial efficiencies. The majority in *Nevsun* stated as follows in this regard:

> [131] This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:
>
> > The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law . . . will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

[16] The judge, in determining the motion to strike application, was limited to deciding whether the claim, as pled, was bound to fail. A judge may ultimately find the Ministry owes no duty of care to the Groves. However, when the law is not settled, we must leave such a conclusion to the trial judge. Here, the judge erred by concluding it was plain and obvious the Ministry owed no duty of care to the Groves and consequently their statement of claim had no reasonable prospect of success.

[17] I now turn to a discussion of the substantive legal issues to demonstrate the meritorious nature of the claim.

Negligence

[18] The tort of negligence requires some relationship between a plaintiff and a defendant such that the latter owes a duty of care to the former. If the plaintiff establishes this duty of care, they must then demonstrate the defendant failed to meet the standard of care the duty requires, and such failure resulted in loss or damage to the plaintiff.

[19] When the defendant is a government actor, the plaintiff must show the defendant owed the plaintiff a private duty of care. According to *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163:

> [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. The test requires a court to address the analysis by considering the following series of questions:
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> 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;
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> If not;
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> 2) Was the harm suffered by the plaintiff reasonably foreseeable;
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> If yes;
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> 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;
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> 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.
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> If not, then a novel duty of care is found to exist.
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> [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 at para. 13.

[20] I will consider the *Anns/Cooper* test, using the above as a guide.

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

[21] Regarding analogous precedents, the Court in *Carhoun* commented:

> [52] … different government agencies responsible for different government functions generally have distinguishable relationships with the public they interact with and serve. For this reason, it may be rare to find a sufficiently analogous precedent such that a full *Anns/Cooper* analysis is not necessary in claims of negligence against the government generally.

[22] At the motion to strike, the Groves did not argue there was a sufficiently analogous precedent. On appeal, however, they cite *Diversified Holdings v. British*

Columbia (1982), 35 B.C.L.R. 349 (S.C.), 1982 CanLII 539, aff'd 41 B.C.L.R. 29 (C.A.), 1982 CanLII 508. In that case, the government established a feeding program for wild elk in the vicinity of the plaintiff's ranch. When the program ended after five years, the elk went to the ranch to feed and caused damage to the ranch.

[23] In the current case, the Ministry did not have a feeding program, but it did introduce wild elk to the area of the Groves' ranch, and as the herd grew, the elk went to their ranch to feed, causing damage. Both cases involve similar government officials dealing with the same wild animals, similar damage to similar property, and similar plaintiffs.

[24] The trial judge's conclusion in *Diversified Holdings* with respect to the first part of what was then simply the *Anns* test is as follows:

> [35] … I have no hesitation in finding that a relationship exists between those who manage wildlife in the area and the local ranchers on farms contiguous, or in close proximity, to the range lands, so that the former would clearly appreciate that carelessness on their part could very well cause damage to the ranchers. The close nature of this relationship is evident from the geographical location of the ranches and the range, the nature and known propensities of the elk, and the mutual concerns expressed by the ranchers at meetings with representatives of the ministry and in the correspondence.

[25] The judge in *Diversified Holdings* ultimately held the government did not owe the ranchers compensation. However, this was because the government actions were not negligent, not because the government did not owe a duty of care to the ranchers.

[26] On the basis of the pleadings in the case at bar, *Diversified Holdings* appears to be sufficiently analogous to satisfy the first part of the *Anns/Cooper* test, save for the requirement to "definitively" establish a duty of care.

[27] The Ministry argues the law has changed since *Diversified Holdings*, as demonstrated by *Cooper v. Hobart*, 2001 SCC 79, and the first step in what was then the *Anns* test now includes a consideration of the statutory context. The judge in *Diversified Holdings* did not examine the statutory context in the first stage of the

test, but later did find the termination of the winter-feeding program was "obviously a policy decision": at para. 57.

[28] It may well be if the judge had examined the statutory context in the first part of the *Anns* test, they would have decided differently. Regardless, *Diversified Holdings* does not establish an analogous duty of care, as it is insufficiently definitive. Thus, I will continue with the remainder of the *Anns/Cooper* test.

Was the harm suffered by the Groves reasonably foreseeable?

[29] The parties agree the harm the Groves suffered was reasonably foreseeable in the circumstances. In fact, all three management plans for elk the Yukon government published between 1990 and 2016 set out potential harms to ranch properties from wild elk.

Was there a relationship of sufficient proximity between the Groves and the Ministry such that it would be just to impose a duty of care in these circumstances?

[30] The Court in *Carhoun* said this about proximity:

> [91] Proximity is said to connote relationships, "of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interest in conducting his or her affairs": *Cooper* at para. 33, citing *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24.

[31] The Ministry contested the issue of proximity, arguing there is no statute that imposes a positive duty on Yukon to manage wild elk in a particular manner; zoning or planning activity does not create a positive duty on the zoning authority to facilitate, support, or protect the permitted activity; and any interactions between the Groves and the Ministry were insufficient to establish the necessary proximity.

[32] The Groves conceded the first point regarding statutory duties. Further, the Ontario Court of Appeal overturned the case that suggested support for the second point on zoning: *Charlesfort Developments Limited v. Ottawa (City)*, 2021 ONCA 410, leave to appeal to SCC refused, 39818 (17 February 2022).

[33] That leaves the consideration of whether it is plain and obvious that specific interactions between the Ministry and the Groves do not support a relationship of sufficient proximity such that it would not be just to impose a duty of care.

[34] The Ministry argued there was a limited number of specific interactions, while the Groves assert the quality, not the quantity, of the interactions is what matters. At para. 46 of her reasons, the judge listed the interactions the Groves asserted in their statement of claim, which the court must assume are true:

> 1. The Government of Yukon established agriculture zoning in the Hotsprings Road area of the Takhini Valley where the Ranch is located;
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> 2. The Government of Yukon sold the Ranch to the plaintiffs;
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> 3. The Government of Yukon involved agriculturalists, including Mr. Grove, in the creation of the Agriculture Policies;
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> 4. The Government of Yukon published the Agriculture Policies with the expectation that agriculturalists such as the [Groves] would read and rely on them;
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> 5. The Government of Yukon involved agriculturalists, including Mr. Grove, in the creation of the Elk Management Policies;
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> 6. The Government of Yukon published the Elk Management Policies with the expectation that agriculturalists including the [Groves] would rely on them; and
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> 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)
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> …
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> 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*";
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> 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)

[35] The Groves supported government policies and plans to the extent that they purchased property from the Ministry to create a ranch in an area where the government specifically invited such activity. Now the Groves are suffering from government inaction to protect this ranch from known harms the government introduced and that have become more serious since their purchase. Further, the

government has title to and control of the animals causing the harm. It is not plain and obvious a judge would find these interactions do not support a relationship of sufficient proximity between the Groves and the Ministry.

Are there any residual policy reasons for negating the* prima facie *duty of care, aside from any policy considerations that arise naturally out of a consideration of proximity?

[36] As noted above, at this stage, the onus is on the Ministry to raise policy reasons to negate the *prima facie* duty of care the Groves have established. These policy reasons must be plain and obvious.

[37] In *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, the Court cautioned:

> [57] The question is whether there are broad policy considerations beyond those relating to the parties that make the imposition of a duty of care unwise: *Odhavji Estate*, at para. 51. At issue is the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper*, at para. 37. In order to trump the existence of what would otherwise be a duty of care (foreseeability and proximity having been established), these residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent: *Hill*, at paras. 47-48; A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at pp. 304-6.

[38] The policy considerations the judge identified were: (1) the non-operational nature of the plans and policies; (2) the availability of an alternative remedy to the Groves, namely, a compensation scheme; and (3) the conflict between the private-law duty and the duty to the public at large.

Policy or Operational

[39] In general, government policy decisions are immune from negligence liability, but the implementation of policy decisions is considered operational and may attract liability in negligence. As the Court explained in *Imperial Tobacco*:

> [90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes

> positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.
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> [91] Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

[40] In this case, the Judge had to consider whether it was plain and obvious the Ministry's management of the elk was the result of a decision "as to a course or principle of action that [was] based on public policy considerations such as economic, social and political factors", that is, a core policy. In *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 79, the Court noted the public authority must prove the decision at issue was in fact core policy. Since the Ministry has not filed any pleadings at this stage, the issue must be plain and obvious on its face, or "readily identifiable" as the Court put it in para. 90 of *Imperial Tobacco*. I find that it is not. The court should not prevent the matter from proceeding to the next step.

Alternative Remedy

[41] The Groves' statement of claim discusses a compensation scheme in Yukon for agriculturists who have lost revenue due to damage by wildlife. The claim also argues the scheme is inadequate. Again, the court must accept these facts as true. An inadequate remedy should not negate a *prima facie* duty of care.

Conflict of Duties

[42] In her reasons, the judge said this:

> [87] To allow the [Groves] to sue the [Ministry] 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 [Groves] may be correct in stating there is no conflict between those who hunt wild elk, and the interests of the [Groves], recreational hunters are only one of the interests the Government of Yukon is mandated by statute to protect.

[43] The Supreme Court considered what conflicts of duties might negate a *prima facie* duty of care in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41:

> [40] It is argued that recognition of liability for negligent investigation would produce a conflict between the duty of care that a police officer owes to a suspect and the police's officer [*sic*] duty to the public to prevent crime, that [*sic*] negates the duty of care. I do not agree. First, it seems to me doubtful that recognizing a duty of care to suspects will place police officers under incompatible obligations. Second, on the test set forth in *Cooper* and subsequent cases, conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an "overarching public duty", and it must pose a real potential for negative policy consequences. Any potential conflict that could be established here would not meet these conditions
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> …
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> [43] Second, even if a potential conflict could be posited, that would not automatically negate the *prima facie* duty of care. The principle established in *Cooper* and its progeny is more limited. A *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds. *Cooper* illustrates this point. The proposed duty was rejected on the basis, not of mere conflict, but a conflict that would "come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole" (para. 50). Not only was there a conflict, but a conflict that would engender serious negative policy consequences.

[44] In the case at bar, it must be plain and obvious the suggested overarching duty—to manage the environment and wildlife in a way that protects various interests—is in conflict with a duty to protect the Groves' ranch from the elk. As stated in *Fullowka*:

> [72] … Of course, every exercise of discretion calls for weighing and balancing different considerations that do not all point in the same direction. But there is a difference between the need to exercise judgment and the existence of conflicting duties.

[45] It is not plain and obvious that repairing any conflict between the public interest and the Groves' interests requires more than an exercise of judgment, or that it would engender serious negative policy consequences.

[46] Overall, I do not find any of the policy arguments are sufficient to negate a possible duty of care.

Nuisance

[47] The Groves also argued the judge erred by conflating their nuisance claim with a negligence claim and striking it. The judge dealt with the nuisance claim in this way:

> [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 argues 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.

[48] Nuisance is the tort of interference with an individual's rights in or arising from property. It does not require a plaintiff to show a defendant owes them a duty of care. Private nuisance is the unreasonable interference with the use and enjoyment of land. The Supreme Court set out a two-part test to establish private nuisance in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 19:

(1) Is interference with the owner's use or enjoyment of land substantial, in the sense that it is non-trivial?

(2) If so, is the non-trivial interference also unreasonable in the circumstances?

[49] In nuisance, the focus is on the harm a plaintiff suffers, not the quality of a defendant's conduct. In this case, taking the assertions in the statement of claim as true, the wild elk caused significant interference with the Groves' use and enjoyment

of their land. It should be a matter for trial whether the interference is non-trivial and unreasonable in the circumstances.

Limitation Period

[50] The judge also discussed a possible limitation period issue *vis-à-vis* this action. However, parties must plead the defence of a limitation period, and the Ministry has not filed any pleadings on this point. This is an issue for determination by the trial judge, if the Ministry chooses to plead a limitation defence.

Conclusion

[51] For all of the foregoing reasons, I would allow the appeal and set aside the decision of the judge to strike the claim. The Groves are entitled to the costs of the appeal. They are also entitled to the costs of the application in the court below in any event of the cause.

"The Honourable Madam Justice Charlesworth"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"