COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chingee v. British Columbia,* 2017 BCCA 250

Date: 20170629
Docket: CA43665

Between:

Harry Chingee

Appellant
(Plaintiff)

And

Her Majesty The Queen in Right of the Province of British Columbia, Canadian Forest Products Ltd., Conifex Mackenzie Forest Products Inc., Lakeland Mills Ltd., Mackenzie Fiber Management Corporation, Winton Global Lumber Ltd., 813090 B.C. Ltd., 550031 B.C. Ltd., Dig Deep Ventures Ltd., Dollar Saver Lumber Ltd., Duz Cho Logging Ltd., EKO Logging Ltd., JEM Industries Inc., J.V. Logging Ltd., M.G. Logging and Sons Ltd., Chief and Council of McLeod Lake Indian Band and McLeod Lake Indian Band, MJM Forestry Ltd., SDN Forest Ventures Inc., Treeco Timber Corp., Timberspan Wood Products Inc., Wayne Telford, Loris Bedetti, and Arnold Bremner

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated April 28, 2016 (*Chingee v. British Columbia*, 2016 BCSC 760, Prince George Registry 1343188).

Counsel for the Appellant:	J.M. Duncan
Counsel for the Respondent Her Majesty the Queen in Right of the Province of B.C.:	J.D. Eastwood, Q.C. M. Weintraub
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Place and Date of Hearing:	Vancouver, British Columbia April 28, 2017
Place and Date of Judgment:	Vancouver, British Columbia June 29, 2017

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Willcock

Summary:

Plaintiff holder of traplines and guiding territory certificate appeals order striking his various claims against the defendant forestry companies, who logged on land covered by the plaintiff's statutory tenures pursuant to statutory timber sale licences. Held: appeal dismissed. None of the pleaded causes of action has any reasonable prospect of success. The pleadings do not state material facts with sufficient specificity to ground the various causes of action.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction and Background

[1] This is an appeal of an order pronounced pursuant to Rule 9-5(1)(a) and (d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, dismissing the appellant Mr. Chingee's action. Mr. Chingee sued the Provincial Crown as a party to nuisance and in negligence and breach of fiduciary duty. He sued a large number of forest companies in nuisance and negligence. He also proposed to add a claim against the forestry defendants in trespass. The province and one forest company, supported by four others, applied to dismiss the action both under Rule 9-5(1)(a) or (d) and Rule 9(6), the summary judgment rule.

[2] The judge dismissed the nuisance and negligence causes of action because it was plain and obvious the action must fail on the facts pleaded, or as they could be amended. He exercised his discretion to dismiss the action rather than just strike the pleading. The judge also dismissed the action on the ground that it was an abuse of process. He did not consider whether the action should be dismissed under the summary judgment rule.

[3] The action arises out of conflicts between uses of land by holders of statutory tenures or interests granted by the province over land owned by it. Mr. Chingee challenges neither the validity of the statutory scheme granting the statutory tenures nor the administrative structure regulating or governing the balancing, accommodation, or reconciliation of potential conflicts between tenure holders' exercise of their statutory rights. Mr. Chingee's claim rests solely on alleged

interferences with his statutory rights in the implementation of a scheme he does not otherwise challenge.

[4] Mr. Chingee holds a guiding territory certificate covering some 196,000 hectares of land owned by the province surrounding McLeod Lake and northeast of McLeod Lake. He also holds or has an interest in two registered traplines in the same general area. The certificate and the traplines were issued by the province pursuant to the *Wildlife Act*, R.S.B.C. 1996, c. 488.

[5] The core of Mr. Chingee's complaint is that logging activity in his guiding territory and on his traplines has caused damage to the value of his tenures or the business they support. Logging was authorized by the province and carried out by the forestry defendants pursuant to Timber Sale Licences ("TSLs") issued under the *Forest Act,* R.S.B.C. 1996, c. 157. He says the forestry defendants failed to give him required notice of intended logging activity, failed to consult meaningfully with him before harvesting, and failed to reasonably accommodate his statutory interests when they logged pursuant to their licences. He contends that contrary to their licences, the forestry companies unreasonably interfered with his tenures. Unreasonable logging practices, including clear cut logging, occurred on the lands, thereby reducing wildlife, compromising the vitality of the forest by destroying non-merchantable and non-commercial trees and brush, reducing the amount of forested area available for trapping and guiding, and causing damage to his tenures because of the time it could take for the forest to regenerate.

[6] The judge undertook a careful and lengthy analysis of the statutory scheme, the causes of action pleaded, and the material facts alleged. He analyzed the filed pleadings in an amended notice of civil claim ("ANOCC"). During the course of the application, he received and considered a further proposed amended amended notice of civil claim ("AANOCC") designed to remedy defects in the existing pleading. The judge took those proposed pleadings into account in analyzing whether the proposed amendments would indeed remedy any deficiencies in the existing pleadings.

[7] For current purposes it is sufficient to observe that at the heart of the judge's conclusion, that the claim was bound to fail, was his conclusion that no material facts were or could be pleaded that took the action beyond complaining about the general consequences of authorized logging activity approved in a policy-driven process designed to balance competing interests in which opportunities for interested parties to advance their interests were provided. The judge then concluded the claims were an abuse of process because, on the evidence, Mr. Chingee had been amply consulted, did not raise the concerns he now advances, and waited until after logging had removed any possibility that his concerns could be accommodated.

[8] Mr. Chingee rests his appeal principally on an argument that the judge failed to appreciate that, in his pleadings, he alleged sufficient material facts to demonstrate that although the forestry companies were authorized to harvest timber, they exercised their rights unreasonably by adopting logging practices, such as clear cutting, that were not necessary under their licences and which had the result of unreasonably damaging his continuing interest in the areas logged. In short, they exercised their authorized right to harvest in an unauthorized manner; both by failing to consult him beforehand and adopting unreasonable logging methods resulting in damage to him. The judge was wrong, he says, to characterize the claim as a complaint about the consequences of authorized logging. Moreover, he contends the judge was wrong to treat the claim as an abuse of process because the claim was directed to how logging occurred, not whether it occurred. Hence, for example, the facts necessary to ground a cause of action in nuisance only arose as a result of the way the TSLs were exercised and a nuisance claim could be advanced only after the affected lands were logged. If there were any continuing shortcomings in the pleadings, they could be readily rectified by yet further amendments to the proposed pleading and permission to make those amendments should have been given.

[9] In order to appreciate the reasoning of the judge and the issues on appeal, it is necessary and useful to provide an overview of the statutory scheme that provides the context for this dispute, even though, as I explain later, the appellant does not take issue with the validity of the scheme as described.

Statutory Scheme

Guiding Territory Certificates and Traplines

[10] The *Wildlife Act* sets out the legislative framework for the issuance of guiding territory certificates and traplines. It does so within a framework in which the ownership of all wildlife is vested in the government: s. 2(1).

[11] Section 59 of the *Wildlife Act* allows the regional manager to issue guiding territory certificates. The holder of a guiding territory certificate has "exclusive control over guiding privileges in the area described in the certificate for the period stated in the certificate, which may not exceed 25 years" (s. 59(3)).

[12] Section 51 the *Wildlife Act* allows a regional manager to issue a guide outfitter licence. A guide outfitter licence authorizes the holder to guide persons to hunt for those species of game and in the area described in the licence (s. 51(2)).

[13] Together, a guiding territory certificate and guide outfitter licence confers the exclusive right to conduct a guiding business over the specific area of Crown land during the term of the certificate. It does not however confer an exclusive right to hunt in the territory.

[14] Section 42 of the *Wildlife Act* allows the regional manager to issue traplines. A registered trapline allows the holder to enter into an area of Crown land to set traps and to remove fur-bearing animals caught by those traps. A trapline *licence* is also required for trapping fur-bearing animals, but an "Indian residing in British Columbia" is exempt from this requirement (ss. 11(8)-(9)). This exemption applies to Mr. Chingee. Section 42(5) provides that registration of a trapline does not give the holder of the trapline any proprietary rights in wildlife, or restrict the rights of another person to hunt, or to capture wildlife if authorized by the regulations or a permit.

[15] None of the guide outfitter licence, guiding territory certificate, or having an interest in a registered trapline grant a proprietary interest in the land or the animals on the land.

Timber Sale Licences (TSLs)

[16] TSLs are governed under the *Forest Act* and related statutes and regulations.

[17] Under s. 12(2)(a) of the *Forest Act*, a timber sales manager may enter, on behalf of the government, into an agreement in the form of a timber sale licence granting rights to harvest Crown timber. It is not in dispute that TSLs cover relatively small parcels of land, certainly by comparison with the areas covered by traplines or guiding certificates.

[18] Section 22 sets out the content of a TSL. For instance, a TSL must describe the area of land on which the holder is permitted to harvest (s. 22(b)(i)). Section 22(f) sets out various amounts the holder must pay to the government. Sections 22(e) and (g) permit the government to include and specify various standards, terms and conditions. A TSL has a maximum allowable term of four years (s. 22(a)). TSLs are granted through a competitive auction process (s. 20).

[19] Once a TSL is issued, the holder is responsible for notifying other tenure holders who have overlapping "rights of use or occupation" of its anticipated harvesting activities (in this case, the appellant's interests are listed as being so overlapping in the TSLs). The TSL also requires the holder not to "unreasonably interfere with the exercise [of those rights]."

[20] In addition to any restrictions imposed in the terms of the TSL itself, including its territorial limitation, various legislative restrictions limit the amount of timber that may be harvested under a TSL. These include: (1) the chief forester's determination of the allowable annual cut (s. 8); (2) the Minister's apportionment of volume to TSLs (s. 10); (3) restrictions under the *Land Act,* R.S.B.C. 1996, c. 245, and the *Park Act,* R.S.B.C. 1996, c. 344, ss. 2, 9, from, generally, taking natural resources (other than fish and wildlife in accordance with the *Wildlife Act*); and (4) wildlife tree retention and coarse woody debris requirements under ss. 66-68 of the *Forest Planning and Practices Regulation,* B.C. Reg. 14/2004 (the "*Regulations*").

[21] Under s. 4 of the *Ministry of Forests and Range Act*, R.S.B.C. 1996, c. 300, the ministry is responsible for balancing a number of, at times, competing interests. Economic, financial and sustainability considerations each plays a role:

> 4. The purposes and functions of the ministry are, under the direction of the minister, to do the following:
>
> (a) encourage maximum productivity of the forest and range resources in British Columbia;
>
> (b) manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia;
>
> (c) plan the use of the forest and range resources of the government, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the government and with the private sector;
>
> (d) encourage a vigorous, efficient and world competitive
>
> (i) timber processing industry, and
>
> (ii) ranching sector
>
> in British Columbia;
>
> (e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

[22] The *Forest and Range Practices Act*, S.B.C. 2002, c. 69 [*FRPA*], and the *Regulations* also set out required planning, consultation and approval processes. Section 3(1) requires all holders of licences or agreements to harvest timber to prepare and obtain the Minister's approval of a forest stewardship plan ("FSP"). Section 5, which sets out the content of an FSP, requires, *inter alia*, the plan to specify intended results or strategies each in relation to objectives set by the government or the *FRPA*. These objectives, which include conservation of wildlife habitats and biodiversity, are set out in part in s. 149(1) of the *FRPA* and s. 7 of the *Regulations*. The licence holder also must give public notice of the FSP (*Regulations* s. 20), must make the FSPs publicly available for review and comment (*FRPA* ss. 11, 18; *Regulations* s. 21), must consider comments received from interested parties (*Regulations* s. 22), and must make reasonable efforts to meet with First Nations (*Regulations* s. 21(1)(d)).

[23] The *Government Actions Regulation,* B.C. Reg. 582/2004, promulgated pursuant to the *FRPA,* also requires the Minister to be satisfied that certain orders he or she makes are consistent with established objectives, would not unduly reduce the supply of timber from B.C.'s forests, and would benefit the public (s. 2).

[24] In sum, the web of legislation including the *Forest Act*, *FRPA, Regulations*, and other related statutes and regulations allow persons to bid for TSLs, and upon winning the bid and being granted a TSL, harvest timber in the described areas of Crown land after a public planning, consultation and review process aimed at achieving the objectives set out in, *inter alia*, s. 4 of the *Ministry of Forests and Range Act*.

[25] It is evident that, as the judge observed, the province has established a "complex and highly regulated policy driven administrative scheme" incorporating discretionary elements to coordinate, balance and reconcile competing rights to use or exploit Crown lands in the public interest. The scheme contemplates conditions imposed on harvesting intended to protect and conserve forests over the long run, and wildlife and the environment as well. The plaintiff's case necessarily has to be examined in the context of this regulatory environment.

The Pleadings and the Judge's Analysis

[26] The judge analyzed the pleadings as they stood at the time of the application as well as the proposed amendments submitted during the application. It is important to point out that the pleadings are generic in the sense that the allegations against the multiple forestry defendants are identical even though each defendant logged at different times and in different places.

[27] Mr. Chingee pleaded an interest in the traplines and the guiding certificate, the value of which is dependent on the availability of game, the vitality of the forest, and the amount of forested land on the tenures. The judge was prepared to treat the pleading as sufficient, for the purpose of a motion to strike, to allege an interest capable of supporting a claim in nuisance.

[28] The pleading then identified the numerous forestry defendants who harvested timber pursuant to their TSLs. The list of forestry defendants had changed with different iterations of the pleadings depending on whether they had harvested timber within the applicable limitation period. Several defendants were removed because Mr. Chingee accepted they had logged more than two years before his action started and, accordingly, had the benefit of a limitation defence.

[29] It is necessary to describe the nature of the alleged wrongs in the filed pleadings before considering the proposed amendments, since the judge considered both pleadings.

[30] The filed pleading alleges the province exceeded its statutory authority because it did so by granting TSLs without accommodation, consultation and consideration of the plaintiff's statutory interests or without requiring such accommodation, consultation, and consideration of those interests. Further, Mr. Chingee alleges the province permitted the forestry defendants to harvest timber without accommodation, consultation, and consideration; thereby unreasonably interfering with his rights.

[31] Against the forestry defendants, the claim similarly alleges a lack of accommodation, consultation, and consideration, but goes further. The allegation is that while carrying out the activities permitted by licence, the forestry defendants reduced wildlife, compromised the vitality of the forest and reduced the amount of forested lands. In a variation on the theme, Mr. Chingee pleads that the forestry defendants were not authorized to harvest without consultation and accommodation or to harvest in a way that unreasonably interfered with his tenures.

[32] The judge analyzed these pleadings. He made a number of important observations about them. He noted the lack of pleaded material facts alleging that Mr. Chingee objected to logging activities before or during logging. The complaint is made after the fact and concerns the consequences of logging: para. 15. He described the pleading as broad, vague, and uncertain. It did not satisfy the basic

purpose of pleadings to define clearly the issues of fact and law to be adjudicated: paras. 24, 26.

[33] The judge noted that no specific facts were pleaded as to any particular loss or damage claimed: para. 29. He described the references to duties to "accommodate", "consult", and "consider" the plaintiff's interests as vague and unconnected to any particular consequence or loss: para. 30. As a result, he concluded that the gist of the claim is focused on the effects of timber harvesting on the economic interests of the plaintiff rather than on the failure to consult and so forth standing alone. He went on:

> [31] Several aspects of the claims as pleaded are noteworthy:
>
> a) the plaintiff concedes that the Crown validly granted the TSLs pursuant to statutory authority and that the forestry defendants harvested the timber pursuant to TSLs validly granted to them. …
>
> b) Identical claims are made against every forestry entity who carried out harvesting activities on any part of the relevant land in the relevant time frame. There is no allegation of any specific actions of failures to act on the part of any forestry defendant or by the Province. There is no pleading specific to any forestry defendant.
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> c) There is no allegation that any forestry defendant breached any term of their TSLs or any statute or regulation;
>
> d) While [it] is not so stated, it appears the plaintiff claims in nuisance against the Province as a party to the nuisance tort, in having permitted the forestry defendants to carry out timber harvesting activities: para. 42.

[34] After a detailed examination of the statutory scheme, the judge concluded:

> [60] The plaintiff's claims are based upon his asserted property interests, which arise from and are based upon the same legislative scheme as the TSLs the forestry defendants relied upon in conducting their activities.
>
> [61] The plaintiff challenges no part of the legislative scheme. No challenge was or is brought to the administrative legality of the TSLs.
>
> [62] As noted, the claims are identical against all forestry defendants. No complaint is made concerning any specific activities of any particular TSL holder and forestry defendant. Every single person or entity who carried out logging activities on any lands touched by the plaintiff's licenced interests is sued. The plaintiff does not identify anything specific done by any forestry defendant that is beyond exercising their lawful harvesting rights under the TSLs. No facts are pleaded as to any specific breach of the terms of the TSLs.

> [63] The plaintiff's claims as pleaded (under all causes of action) are centred on the effects of logging in general. If the plaintiff's claims are permitted to proceed, there would be no reason that he could not seek to add other parties who may have carried on timber harvesting activities at later dates on some part of the vast areas in question.
>
> [64] I agree with the submission of the Province that in the circumstances of this case, on the pleadings of the plaintiff, his challenge is to the timber harvesting activities themselves, as they relate to his licences. However, the extent and scope of these activities and the manner and degree to which they are to be balanced against other objectives such as preservation or enhancement of wildlife are all matters dealt with in the statutory scheme and are matters of government policy.
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> [65] The question, then, is whether in such circumstances the plaintiff could potentially establish that the timber harvesting activities of the forestry defendants as permitted by government is an unreasonable interference with his interests as a guiding territory certificate holder, guide outfitter, or registered trapline holder.
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> [66] Under the scheme, it is ultimately the Province as owner of the lands and as government that is the arbiter of competing interests in its lands. In effect, the plaintiff would be seeking to have the court review and reconsider after the fact the decisions made by various statutory decision makers within a highly policy driven context, in order to seek to establish that the end result of the decisions is an unreasonable interference with his own licensed interests, when he made no timely objection to the activities. In my view, the plaintiff is bound to fail in establishing this element of the claim in nuisance on the facts as pleaded.

[35] The judge then turned to consider whether the proposed amendments succeeded in grounding a reasonable cause of action in nuisance and trespass (a proposed additional cause of action). The proposed amendments allege the TSLs created "limits" on the exercise of harvesting rights, namely, a requirement to give 14 days' notice before beginning activities and an obligation not to interfere unreasonably with the interests of other tenure holders. In addition, Mr. Chingee proposed to plead the TSLs were subject to "expectations" contained in "A Practical Guide to Effective Coordination of Resource Tenures" a guide manual published by the government. Those expectations repeated the obligations to give notice, meaningfully consult before harvesting, and reasonably accommodate the interests of other tenure holders. The proposed pleading alleges breaches of the limits and expectations and sought to specify more clearly the alleged consequences of the breaches. Mr. Chingee pleaded the forestry defendants clear cut the lands rather than using other more reasonable harvesting methods that would have mitigated the

harm to his tenures, and that by acting unreasonably, the forestry defendants substantially reduced wildlife on the lands, compromised the vitality of the forest by taking non-merchantable timber and non-commercial trees and brush, and reduced the amount of forested area available for trapping and guiding; all in ways that would take up to 40 years for the forest to become usable again for trapping.

[36] The judge concluded these proposed amendments did not remedy the deficiencies in the filed pleading. First, he concluded the claim in trespass was bound to fail because the defendants' activities on the lands were not a wrongful interference, as they were expressly licenced to conduct them: para. 68. In relation to the pleading in respect of the limits on the TSLs, the judge noted the plaintiff had not pleaded any facts in relation to them, and there was no pleading of any consequences of a breach. Again, in relation to the so-called expectations in the "A Practical Guide to Effective Coordination of Resource Tenures", the judge observed:

> [71] Again, however, no specific facts or consequences of any alleged breach are pleaded. As a result, no cause of action is made out. The lack of any specifics even in the proposed pleading further confirms that the plaintiff's real complaint is with the scope or scale of the timber harvesting activities in general.

[37] In relation to the alleged consequences of harvesting, the judge concluded:

> [73] The plaintiff also proposes at para. 45.2 to allege that the forestry defendants have clear-cut the lands "rather than employing other more reasonable harvesting methods which were reasonably available and which would not have harmed or would have lessened the harm to the Plaintiff's *profit à prendre* and other rights of use and occupation." There are again no facts pleaded, and no specifics, about this. The other methods are not indicated. Why or how one method of harvesting versus another would transform non-nuisance harvesting into tortious interference is not explained. Clearly, this late proposed amendment is a desperate effort to introduce something of substance into the pleading. However, in the context of the plaintiff's complaint which is centred on harvesting in general, and without any relevant specific facts, I conclude that the plaintiff's Proposed AANOCC continues to fail to plead a potentially viable cause of action in nuisance.

[38] The judge did not deal specifically with the pleading about reduction of wildlife and the taking of non-merchantable timber, although his comments in para. 73 quoted above may be taken to embrace those general allegations.

[39] I turn now to the claim in negligence. The essence of the filed pleading against the forestry defendants is that they owed a duty to the plaintiff not to cause foreseeable economic harm to his interests arising from a breach of duty to provide notice, accommodate his interests, and harvest timber in a manner that accommodated those interests. The specific consequences of the alleged breaches of duty mirror the harm alleged in relation to the nuisance claim. In brief, the forestry defendants had a duty to exercise their authorized harvesting rights in a manner that accommodated his interests, but breached that duty by failing to provide notice and in the way they logged.

[40] The negligence claim against the province appears to be a claim in negligent supervision. The plaintiff alleges it was reasonably foreseeable to the province that, if the forestry defendants exercised their harvesting rights unreasonably, his tenures would be injured, causing him economic or business loss. Mr. Chingee alleges the province failed to take steps it ought reasonably to have taken to ensure that licencees complied with their obligations and knew or ought to have known the forestry defendants were acting unreasonably. In those circumstances, the province owed a duty to regulate the forestry defendants to ensure compliance with their licences or to have exercised discretion to suspend their licences.

[41] The judge characterized the pleading thus:

> [75] Other than the harvesting activity in general, no specific facts are pleaded as to what the Province or the other defendants did or failed to do which could constitute the negligence complained of. On these pleadings the Province and the forestry defendants would have no idea as to what claims are being made against them. The essence of the claim is simply that the Province should not have allowed harvesting activities by the other defendants, who should not have carried them out.

[42] Mr. Chingee conceded that, as against the province, his asserted duty of care is novel. The judge, accordingly, analyzed the asserted duty within the principled framework established by such cases as *Cooper v. Hobart*, 2001 SCC 79. The judge had to determine whether, in the context of the statutory scheme, a private law duty of care to protect the economic interests of the holder of tenures, such as traplines

or guiding certificates, should be recognized. He concluded that the statutory scheme was inconsistent with the recognition of such a duty:

> [83] The plaintiff has not pleaded and did not direct me to any other statutory provision which could support a duty of care on the part of the Province.
>
> [84] The relevant statutory scheme requires the Minister to plan the use of forest and range resources of the government so that various activities and uses including timber harvesting and wildlife are "coordinated and integrated, in consultation and cooperation with other ministries and agencies of government and with the private sector… The essence of these provisions is that the Minister will plan and balance uses, which may be competing uses, in such a way as to maximize overall benefits and utility in conformity with the policy decisions of government. While there is a reference in s. 4 of the *MFRA* to "consultation" with the "private sector" there is no suggestion of a private law duty of care to protect any particular private sector party, or forest licensee. Indeed, imposition of a private law duty of care to protect the interest of one licensee or group of licensees to make planning or resource allocation decisions in a particular way is inconsistent with the scheme.
>
> [85] The *Wildlife Act* is largely concerned with permits, licenses and regulation of hunting, trapping, and fishing activities. As noted that Act provides for registration of traplines and issuance of guiding territory certificates. Nothing in that statute suggests a duty of care on the part of the Province to protect the commercial value of registered traplines or of guiding territory certificates, or the amount of wildlife that may be available to licensees for hunting or trapping. Section 2(1) states that ownership of all wildlife in British Columbia is vested in the government. Section 42(5) provides that registration of a trapline does not give the holder of the trapline any proprietary rights in wildlife, or restrict the rights of another person to hunt, or to capture wildlife if authorized by the regulations or a permit.

[43] Apart from the fact that, in the judge's opinion, the plaintiff had to plead any facts capable of establishing a duty of care or the required relationship of proximity, he concluded the claim to recognize the asserted duty failed on the second branch of the *Anns* test (*Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.)). The claims were for economic loss that did not fall within any of the existing recognized categories for the recovery of economic loss. On policy grounds, he was not persuaded a new category of recovery for pure economic loss should be recognized.

[44] The judge then examined the claim against the forestry defendants. His reasons are succinct:

> [95] The plaintiff's ANOCC does not set out a potentially viable basis for a duty of care on the part of the forestry defendants. It does not set out any conduct of the forestry defendants that could potentially support a conclusion that they breached a relevant standard of care.
>
> [96] The only allegation that is made in negligence against the forestry defendants is that their "harvesting activities" could and did cause damage to the plaintiff; ANOCC paras 53 - 57. Thus, the plaintiff alleges that the harvesting activities in and of themselves were the negligent conduct. As previously noted, there is no complaint of any specific conduct of any defendant forester or group of foresters. No distinction is made between their activities. All are sued merely for carrying out the logging activities they were specifically licensed to carry out by the Province.
>
> [97] On these pleadings it is plain and obvious that the plaintiff will fail to establish a duty of care. There is no likelihood that a court would hold that the forestry defendants have a duty to refrain from logging activities they are authorized by the Province to conduct. As there is no pleading of a relevant standard of care, nor of breach of the standard, the claim is also bound to fail in relation to these elements as well.

[45] The judge then dealt with the proposed amendments:

> [98] In an effort to cure these radical defects, as noted, on the final day of the hearing of these applications, and after the applicants had concluded their submissions, the plaintiff presented the proposed AANOCC. However, the amendments if permitted do not address the deficiencies.
>
> [99] The proposed amendments in relation to the negligence claims are similar to those proposed in relation to nuisance, such as the reference to the Guide, and allegations of "unreasonable interference", failure to "accommodate, consult and consider" the interests of the plaintiff, failure to give 14 days' notice before commencement of harvesting, and clear-cutting. As I have stated, the plaintiff's proposed reference to "clear-cutting" the forest rather than using "other harvesting methods" is too vague to be meaningful.
>
> [100] Once again, beyond vague and conclusory statements, no facts are pleaded. There is no pleading connecting such failures to any specific consequence or loss.
>
> [101] The Proposed AANOCC refers to ss. 76, 77 and 78 of the *Forest Act*. No specifics are pleaded in that regard. These provisions allow the Minister to suspend or cancel agreements such as the timber sales licences under which the forestry defendants carried out their logging activities, for such things as failure to perform obligations under the agreement or failure to comply with the requirements of the *Forest Act* or the *FRPA* or other statutes. Nothing in these provisions suggests the kind of duty the plaintiff would need to establish.

> [102] I reiterate that, as Chief Justice McLachlin emphasized *in R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [*Imperial*], at para. 22, the plaintiff must plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated.

[46] For current purposes, the final part of the pleadings dealt with an alleged breach of fiduciary duty by the province. The premise of the pleading is that the fiduciary duty arose out of an assertion and breach of Aboriginal rights. But these tenures are wholly statutory; they are not Aboriginal rights or interests. The judge did not deal with this claim on that basis, however. Rather, relying on *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, the judge dismissed any Aboriginal treaty or rights claim as being an abuse of process because the appellant was amply informed during the statutory planning and consulting stages and raised few complaints. He did not seek judicial review of the decision to grant the TSLs. In the judge's view, the appellant was bringing a compensatory claim long after the logging was complete when nothing could be done to address his concerns about logging. The judge also considered the AANOCC, and noted that the fundamental defects would not be curable by amendment.

[47] In sum, the judge found all three causes of action to be abuses of process, given the statutory consultation process open to the appellant, and the negligence and nuisance claims were also bound to fail.

On Appeal

[48] The focus of oral argument was on whether the proposed amended claim, or as it might yet be further refined, sufficiently articulated alleged wrongful conduct that took the complaint beyond a generic complaint about the consequences of authorized harvesting activity. As I understood the argument as it developed, Mr. Chingee accepted that his complaint was really about the consequences of the unreasonable exercise of authority to harvest, which resulted in loss of trees and brush beyond what was authorized in the TSLs together with loss of wildlife. The complaint really focused on the activities of harvesting, rather than issues to do with

consultation in advance of harvesting. The judge erred, he argued, in failing to bring a sufficiently nuanced appreciation of his allegation that authorized harvesting took place in unreasonable and unauthorized ways. He said that his proposed pleading either does, or can be adjusted so that it does, state a reasonable cause of action; one that is not bound to fail.

[49] He did not abandon the arguments advanced in his factum.

[50] The respondents contend this Court should defer to the judge's reading of the pleadings as failing to plead the material facts that describe the cause of action that has a reasonable prospect of success, as well as to the judge's decision to dismiss the action on the basis that the deficiencies in the pleading could not be remedied. In their view, the judge applied the correct test in striking the pleadings, did not commit any extricable legal error in his analysis of the law, and properly viewed the action as an abuse of process. They suggest that, in any event of the abuse of process argument, the judge could have readily dismissed the breach of fiduciary duty claim on the basis that the pleadings do not state a reasonable cause of action.

Analysis

[51] Although there is no dispute over the test to be applied in striking pleadings for not disclosing a reasonable cause of action, it is helpful to recall its rationale as explained by the Chief Justice in *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42. In brief, the test is designed to weed out claims that have no reasonable prospect of success to ensure that only those claims that have some chance of success go to trial: paras. 17 and 19.

> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless.

[52] This important gatekeeping tool is to be used with care, so as not to hinder the development of the law. Hence, the court assumes the facts pleaded are true and asks whether there is a reasonable prospect the claim will succeed. It is,

however, incumbent on a plaintiff clearly to plead the facts relied on. A court can evaluate the possibility of success only on the firm basis of the pleaded facts: para. 22. It is, I think, also clear that the exercise of evaluating the prospects of success does not reduce to a mechanical exercise of checking whether the material elements of a recognized cause of action have been set out. The exercise must examine whether the pleaded facts underlying the cause of action establish a reasonable prospect of success.

[53] In this case, the judge necessarily had to interpret the pleadings in order to assess the true nature of the claim. This is so because the pleading does not plead material facts supporting a claim in nuisance that, for example, might apply to the specific exercise of harvesting rights by a defendant on a particular TSL which had particular consequences for the trapline that were capable of being described in concrete and specific terms. I have no doubt that such a claim in nuisance capable of surviving a motion to strike could be pleaded. I do not think the judge took a contrary view. But that was not the defining nature of the claim that was pleaded.

[54] As the judge recognized this claim is of a fundamentally different character and it is that claim which had to be assessed to decide whether it has a reasonable prospect of success. It follows that the judge was right to point to a number of its characteristics as part of his analysis. It is not merely an accidental feature of the claim that it alleges private legal wrongs in relation to all logging in respect of all TSLs in the entire area covered by Mr. Chingee's interests. The number of defendants is limited only by the operation of limitation periods. The judge was right to point out the lack of particularity in the claim, its generality and its failure to plead specific consequences of alleged wrongs. In my view, he accurately recognized that the pleadings which placed great weight on the alleged lack of consultation or accommodation did not relate those alleged breaches to any particular consequences arising therefrom. Rather, the real wrongs alleged had to do with the manner and consequences of the logging itself, not pre-logging lack of consultation. It is clear that the pleading failed in its purpose to define the issues to be adjudicated at trial and give notice to the defendants of the case they had to meet.

[55] The claim had to be analyzed in the context of the regulatory environment governing the balancing and coordination of conflicting interests or tenures which are the creation of that statutory scheme. This scheme is the context in which the claim arises and, necessarily, has a profound effect on the possibility of Mr. Chingee being able to articulate material facts giving rise to a claim with a reasonable prospect of success. The statutory framework is designed to balance and accommodate potentially competing uses of the same land burdened by different statutory tenures, all in the public interest contemplated by the scheme. In the face of that scheme, a plaintiff needs to be able to plead the material facts capable of demonstrating that an activity that had been authorized in the face of those conflicting interests had been carried out in a manner that nonetheless unreasonably interfered with them. As I read the judgment, articulating a cause of action with a reasonable prospect of success would require pleading sufficiently precise material facts capable of demonstrating the unreasonableness of the conduct of otherwise authorized activity and the consequences of that conduct in affecting the claimant's legally protected interests. This level of specificity was lacking in the pleadings. The judge concluded that it could not be provided. I cannot conclude that he was wrong.

[56] In my view, the judge's reading of the pleading was fair. The respondents contend this Court should defer to the judge's interpretation of the pleadings. They argue an application to strike pleadings is discretionary and this Court should interfere with the order only if a judge erred in principle or was in some other way clearly wrong in the exercise of discretion. Although they accept that a judge may make an extricable legal error in applying the law, to which a correctness standard of review would apply, interpreting the pleadings is not such an issue.

[57] I am, with respect, doubtful that on a motion to strike pleadings this Court is required to defer to a chambers judge's interpretation of the pleadings. To the extent that it is an open question, it need not be decided in this appeal, because I substantially agree with the judge's analysis of the pleadings and its deficiencies. In my view, the pleadings are generic and fail to articulate with precision the material facts grounding the unreasonable exercise of authorized timber harvesting activity.

The claim is, in substance, an action challenging all timber harvesting on any land in respect of which the plaintiff has a statutory tenure.

[58] Many of the inherent frailties of the pleadings apply equally to the claim sounding in nuisance and in negligence. I will return to the negligence claim shortly, but before doing so I should record my view that I see no error in the judge's conclusion that a claim sounding in trespass had no reasonable prospect of success.

[59] It is possible to deal briefly with the claim in negligence against the province. The judge dismissed that claim on the basis that within this particular statutory scheme the plaintiff could not establish a sufficient relationship of proximity and that in any event any *prima facie* duty of care should be negated as a matter of public policy. I agree.

[60] I can see nothing in a statutory scheme designed to balance potentially competing interests in the context of promoting the public interest by, *inter alia,* encouraging the forestry industry, that suggests the Legislature contemplated creating a private law duty of care to any stakeholder within the framework of the scheme. As *Imperial Tobacco* confirms, conflicting public duties may rule out the possibility of proximity being established: para. 47. The regulators exercise public law discretionary powers in balancing competing interests in the public interest. As Justice Sharpe put it in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, 82 O.R. (3d) 321 (C.A.) at para. 17: "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals."

[61] Even assuming that recognizing a private law duty to an interested party arising from specific interactions between the regulator and the regulated entity within the statutory framework would not conflict with the general duty to balance interests in the public interest, the pleadings do not allege material facts capable of creating a relationship of proximity. The pleadings are generic and insufficiently

precise to define the specific circumstances giving rise to the duty and its alleged breach. I concur with the judge's analysis of the situation as he articulated it at paras. 84-5 of his reasons, quoted above.

[62] Turning to the negligence claim against the forestry defendants, I agree that the current pleading amounts to little more than an allegation that they carried out logging activities they were licenced to do. There is no reasonable likelihood that a court would hold that the forestry defendants have a duty to refrain from logging activities they were authorized to conduct. Moreover, in my view, the judge was correct in concluding the proposed amended pleadings remain vague and conclusory, unsupported by pleaded material facts which connect any alleged breaches to specific consequences or loss. The judge concluded, rightly in my view, based on *Imperial Tobacco*, that Mr. Chingee has to plead the facts on which he relies in making his claim, and that doing so is the necessary basis on which to assess the possibility of the success of a potential claim.

[63] In short, I agree with the conclusions reached by the judge on the negligence claims substantially for the reasons he gave.

Breach of Fiduciary Duty

[64] The judge dismissed the action for breach of fiduciary duty against the province on the basis that the claim was an abuse of process. In my view, it is preferable to uphold his order on the ground that the pleadings do not disclose a claim in fiduciary duty which has any reasonable possibility of success.

[65] The tenures grounding the plaintiff's claim are statutory. They are not Aboriginal interests or rights. There is nothing in the statutory scheme capable of supporting the proposition that the province had a fiduciary duty to protect the interests of a holder of a trapline or a guiding certificate. Inherent in the scheme is the need to weigh and balance potentially conflicting interests in the public interest. The test for a fiduciary duty cannot be met on the pleaded facts because the test for the creation of a fiduciary duty cannot be met.

[66] Crucial to making out a fiduciary relationship is that "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24 at para. 31 [*Elder Advocates*].

[67] Where the alleged fiduciary is the government, the Court in *Elder Advocates* stated:

> [37] The general principles discussed above apply not only to relationships between private actors, but also to cases where it is alleged that the government owes a fiduciary duty to an individual or class of individuals. However, the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances. As Dickson J., as he then was, wrote for the majority in *Guerin*, at p. 385:
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> > It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. [Emphasis added in original.]
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> [38] Binnie J., for the Court, made the same point in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting"….
>
> …
>
> [44] Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, [2002] 2 F.C. 484, at para. 178.

[68] In my view, given the complex policy interests, priorities, and considerations in play when the ministry, as required by legislation, administers and allocates rights and interests in the province's forestry and wildlife resources, it is not tenable to hold

that the province owes certain statutory tenure holders a fiduciary duty – a duty requiring the province to put those tenure holders' interests above all others, including holders of other statutory licences (e.g., TSLs) and, generally, society as a whole (the public interest).

[69] In my opinion, the claim in fiduciary duty against the province has no reasonable prospect of success.

Conclusion

[70] It is sufficient to uphold the order to conclude the pleadings as filed, or as they may be amended, disclose no cause of action with a reasonable prospect of success. That is sufficient to dispose of the appeal. It is unnecessary, therefore, to assess whether the judge was correct also to dismiss the claims as an abuse of process.

[71] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Willcock"