IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Caditz v. Vancouver (City),* 2024 BCSC 1807

Date: 20241001
Docket: S244617
Registry: Vancouver

Between:

Michael Robert Caditz, Katherine Rose Caditz, Anita Ahlmann Hansen and Jillian Margaret Maguire

Plaintiffs

And

City of Vancouver, Board of Parks and Recreation, Joe McLeod and B.A. Blackwell & Associates Ltd.

Defendants

Before: The Honourable Justice Giltrow

Reasons for Judgment

The Plaintiff, appearing in person:	M.R. Caditz
The Plaintiff, appearing in person:	K.R. Caditz
The Plaintiff, appearing in person:	A.A. Hansen
The Plaintiff, appearing in person:	J.M. Maguire
Counsel for the Defendants City of Vancouver, Board of Parks and Recreation and Joe McLeod:	I.K. Dixon
Counsel for the Defendant B.A. Blackwell & Associates Ltd.:	G. Trahan
Place and Dates of Hearing:	Vancouver, B.C. September 16 and 20, 2024
Place and Date of Judgment:	Vancouver, B.C. October 1, 2024

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Introduction

[1] This is an application brought by the plaintiffs for an interlocutory injunction to prevent the imminent removal of further trees from Stanley Park, except under circumstances discussed below, until trial of the underlying claim.

[2] The plaintiffs are four Vancouver citizens who regularly use and rely upon Stanley Park, and the forest it contains, for their psychological and emotional well-being. They plead that the tree removal from Stanley Park by the defendants in the latter half of 2023 and the spring of 2024 was so extensive and unnecessary that it caused them harm, and that the defendants are liable to the plaintiffs in negligence for it.

[3] The first three named defendants are the City of Vancouver (the "City"), the Vancouver Board of Parks and Recreation (the "Park Board") and an employee of the Park Board, Joe McLeod (I will refer to them collectively as the "Public Respondents" except where distinction needs drawing between them). The Public Respondents are all jointly represented by counsel for the purposes of this application, and oppose the relief sought in it. The fourth defendant is B.A. Blackwell and Associates Ltd. ("Blackwell"), a forestry consulting company, which is independently represented by counsel in this application and takes no position on it.

[4] In 2022, the Park Board became aware that the Hemlock Looper Moth, which cyclically infests conifers, especially the coastal western hemlock which is common in Stanley Park, had significantly impacted the forest in the Park from about 2019-2022 (I will refer to this as the "Looper Moth Impact"). The Looper Moth feeds off the leaves of conifers, leading to defoliation and often tree mortality. Because of its cyclical nature, the recent Looper Moth outbreak had been anticipated by the Park Board. However, the extent of the impact that materialized was still being assessed in the fall of 2022. On September 1, 2022, the Park Board was advised that the Park Board Urban Forestry team were working to fully understand the extent of the Looper Moth Impact. What followed is the subject of the civil claim which underlies this pre-trial application for injunctive relief.

[5] The plaintiffs say the Public Respondents' response to the Looper Moth Impact, which involves extensive tree removal from Stanley Park, is negligent in that it relies upon a fundamentally flawed report and recommendation from Blackwell (the "Blackwell Report"). They further allege this occurred in part because the Public Respondents failed to properly oversee and decide upon how to respond to the Looper Moth Impact. In the result, the plaintiffs say, a negligent response based upon a negligent report has led to, and will lead to further, extensive and unnecessary tree removal from Stanley Park, which in turn has and will harm the plaintiffs.

[6] Along with increased stress, anxiety and sadness that come from not being able to rely on Stanley Park due to its degradation, the plaintiffs say they also suffer from increased fear for their safety, as they say the evidence demonstrates that the logging is making the Park less, not more, safe.

[7] Accordingly, the plaintiffs seek an injunction to prevent further tree removal in Stanley Park by Blackwell under the approach recommended in the Blackwell Report. They seek instead that until trial of this matter, any immediately hazardous trees be assessed and removed by Park Board staff, on the standard and by the method it was done before October 2023.

[8] It is undisputed that pursuant to the Blackwell Report and the recommendation contained in that report, approximately 7,000 trees were removed from Stanley Park between October 2023 and April 2024, when tree removal was paused for the summer season. It is also undisputed that the Blackwell Report ultimately contemplates removal of up to 160,000 trees from Stanley Park over 3-5 years as a response to the Looper Moth Impact, amounting to approximately 1/3 of the trees in the Park. However, during the hearing of this application, counsel for the Public Respondents advised that this level of removal may not materialize. The Public Respondents also advise that the tree removal contemplated for the 2024/2025 window, i.e., from October 2024 to April 2025, is slightly less than that of the 2023/2024 period, being approximately 6,000 trees.

[9] The Public Respondents oppose the injunction sought, primarily on the basis that the action, as pled, does not give rise to a serious question to be tried. They say that the questions at issue in this case are public law issues, not private law issues under tort law. Notably, counsel for the Public Respondents acknowledged at the hearing of this application that the manner in which one or all of the Public Respondents has allowed tree removal to proceed in response to the Looper Moth Impact may well give rise to meritorious public law questions. I will return to this below.

The Test for Interlocutory Injunction

[10] The parties agree the test for granting interlocutory injunctive relief is the well-known test articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR-MacDonald*]. At 334 of *RJR-MacDonald*, the Supreme Court of Canada stated:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interrogatory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[11] The three factors are not a checklist or a series of independent hurdles, nor do they form separate watertight analytical compartments. They are intended to be considered together in assessing the central issue of the relative risks of harm to the parties resulting from granting or withholding interlocutory relief: see *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19; *British Columbia (Attorney-General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 346–7, 1986 CanLII 171 (C.A.), aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109.

Serious Question to be Tried

Negligence: Duty of Care

[12] The plaintiffs plead their case in negligence against the Public Respondents and Blackwell. A threshold issue for any claim in negligence is establishing a duty of care between the alleged tort feasor and the plaintiff who alleges they have been harmed by the defendant's actions. This is so whether the defendant is a public or a private body. In *Nelson v. Marchi*, 2021 SCC 41, the Supreme Court of Canada explained:

> [15] The foundation of the modern law of negligence is the neighbour principle established in *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.), under which "parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act" (*Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 16). The neighbour principle does not discriminate between private and public defendants — it is applicable to both alike, subject to any contrary statutory provision or common law principle (*Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 22).
>
> [16] In Canada, the *Anns/Cooper* test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. But as *Cooper* and subsequent cases make clear, the framework applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before.
>
> [17] In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> [18] If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:

> Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[13] The plaintiffs acknowledged at the hearing of this application that the duties of care alleged against the defendants in this case would be “novel” ones if found at trial. The Public Respondents agree. Accordingly, the full two-stage *Anns/Cooper* analysis is required.

[14] In order to apply the full *Anns/Cooper* analysis, a more detailed review of the alleged facts is required. It is helpful to note that the procedural facts are generally undisputed between the parties.

[15] However, dispute does lie between the parties with respect to whether the Blackwell Report is scientifically sound, and whether the extensive tree removal it recommends in response to the Looper Moth Impact is necessary or safe. The plaintiffs filed several affidavits from specialists in ecology, biology, forest science, and fire behaviour in support of their claim that the tree removal is neither necessary nor safe. In response, the Public Respondents filed an affidavit from a professor of forest and conservation sciences, which generally supported the approach recommended in the Blackwell Report. While the Public Respondents filed this affidavit in support of the Blackwell Report and the tree removal undertaken pursuant to it, their fundamental point is that it is not for this Court to decide on this application (or, they argue, in the underlying negligence action) which of the competing expert opinions is the “right” one for Stanley Park.

Park Board and City of Vancouver

[16] The City and the Park Board are public bodies incorporated pursuant to provincial legislation, the *Vancouver Charter*, S.B.C. 1953, c. 55. The Park Board is governed by a publicly elected Board of Commissioners, and the City has an elected mayor and council. Park Board staff, including the Urban Forestry team, are employed and paid by the City of Vancouver, but are accountable directly and only to the Park Board.

[17] The Park Board is established by s. 485 of the *Vancouver Charter*:

> **Park Board established**
>
> **485.** A board of commissioners, to be known as the "Board of Parks and Recreation" or "Park Board," shall be elected as hereinafter provided, and shall consist of seven members or such other number as the Council may by by-law prescribe. The Board has the legal capacity to exercise the powers bestowed on it and to enforce those powers and the exercise thereof by actions, proceeding or prosecution.

[18] Under the *Vancouver Charter*, the Park Board has exclusive possession, jurisdiction and control of all areas designated as permanent public parks, of which Stanley Park is one. The relevant portions of s. 488 are set out here:

> **Parks in care of Board**
>
> 488. (1)The Board shall have exclusive possession of, and exclusive jurisdiction and control of all areas designated as permanent public parks of the City [...] and such areas shall remain as permanent public parks, and possession, jurisdiction and control of such areas shall be retained by the Board...

[19] That the Park Board has a statutory duty to maintain Stanley Park pursuant to s. 488 is undisputed. The Public Respondents expressly acknowledge in their argument that the Park Board has responsibility for custody, care and management of Stanley Park pursuant to s. 488 of the *Vancouver Charter*. They go on to state that, in turn, the City has a statutory duty to fund the Park Board pursuant to ss. 492 and 493 of the *Vancouver Charter.*

[20] Despite this, there is, the plaintiffs say, a stark absence of any decision by the Park Board (that is, the elected Commissioners) regarding the important matter of the course of action for Stanley Park in light of the Looper Moth Impact. This is all the more concerning, the applicants say, because very significant action has been taken in Stanley Park in response to the Looper Moth Impact, namely the removal of over 7,000 trees in 2023/2024 and the prospective removal of over 150,000 more in the next few years. The applicants suggest it is not clear who made the decision to proceed on this course of action—Park Board staff, City staff, or City Council—but

the point is, it was not the Park Board of Commissioners, which is the body with exclusive jurisdiction, control, and they say, responsibility, to care for Stanley Park.

[21] It is undisputed that the only resolution the Park Board Commissioners passed in relation to responding to the Looper Moth Impact was on July 10, 2023, when, having received a memo from staff outlining the Park Board Urban Forestry team's preliminary understanding of the Looper Moth Impact, the Commissioners voted to direct staff to develop an updated risk management plan for the park. The text of the resolution is reproduced here:

> 1. The Stanley Park Forest Management Plan (2009) was implemented subsequent to the 2006 windstorm which blew down over 10,000 trees in Stanley Park. The management plan accurately predicted that the Hemlock Looper moth was an expected threat to forest canopy. This risk materialized in 2020-2023, killing most of the Western Hemlock and leaving an estimated 20% of the mature forest as standing dead trees.
>
> 2. The Stanley Park Forest Management Plan (2009) also predicts that wildfire poses a substantial risk to the forested areas of Stanley Park. The management plan has not been updated since March 23, 2009.
>
> 3. The Urban Forest Strategy (2018 Update) report acknowledged that climate change was raising threats to forest health, including the risk of forest fire, and proposed Action 33
>
> Action 33: Work with Vancouver Fire and Rescue Services to update procedures for preventing, minimizing and controlling wildfire in urban forests.
>
> 4. Unlike previous eras, climate change, erratic weather, and extended drought periods are now routinely experienced in Vancouver.
>
> 5. The Stanley Park Forest Management Plan (2009) did not directly incorporate indigenous perspectives on wildfire risk in Stanley Park.
>
> 6. Residents often observe Vancouver Fire and Rescue Service activity in Stanley Park regarding fires in stumps, roots and duff.
>
> THEREFORE BE IT RESOLVED THAT the Vancouver Park Board direct staff to develop an updated risk mitigation plan, including measures to address and/or remove dead trees and other materials that might constitute a wildfire risk, working closely with Vancouver Fire and Rescue Services, including estimated costs and implementation timelines of any recommended actions
>
> [further resolution regarding engagement with First Nations omitted]
>
> CARRIED UNANIMOUSLY

[22] A core aspect of the plaintiffs' concern is that after this resolution, but before the requested updated risk management plan was developed, finalized and

presented to the Park Board, or any course of action decided upon by the Park Board Commissioners, Park Board staff decided on July 26, 2023 to enter into a sole source contract with Blackwell to begin removing trees as a response to the Looper Moth Impact. On September 11, 2023, Park Board staff entered into a supply agreement on behalf of the City as represented by the Park Board with Blackwell to commence the work (the "September 2023 Supply Agreement"). Under the September 2023 Supply Agreement, approximately 7,000 trees were removed from Stanley Park. A further concern arises because in January and May 2024, a $16 million budget for Stanley Park tree removal work was approved by City Council without a resolution by the Park Board Commissioners authorizing the work or the budget request for the work.

[23] It is not clear on the record whether the requested updated risk management plan was ever developed or submitted to the Park Board Commissioners. It is a matter of dispute between the parties as to whether the document that was ultimately prepared and submitted to Mr. McLeod by Blackwell on January 24, 2024, the Blackwell Report, amounts to or satisfies the scope of the request made in the Park Board Resolution for an updated risk management plan. It is, however, uncontroverted that tree removal began before the Blackwell Report was finalized and before any updated risk management plan was provided to Park Board.

[24] Blackwell began tree removal in October 2023.

[25] On November 7, 2023 the City of Vancouver's Risk Management Committee, which is comprised of City staff, not Park Board Commissioners, was given a presentation which set out three options for mitigating the effects of the Looper Moth Impact in Stanley Park. It is not clear whether the Public Respondents say a decision was made by this Committee.

[26] The Blackwell Report was completed and submitted to Mr. McLeod January 24, 2024.

[27] At an *in camera* meeting February 5 2024, the Park Board Commissioners were updated by Park Board staff on efforts to mitigate the Looper Moth. However it does not appear the Commissioners were presented with the Blackwell Report at this meeting. The Report was sent to the Commissioners by memo a few days later, on February 8 2024. They were sent two more memo updates on looper moth mitigation in March and April 2024, but did not discuss the mitigation at a meeting again until May 27 2024, after the 2023/2024 tree removal season had ended.

[28] As noted, it is common ground that there is no resolution of the Park Board authorizing the large scale tree removal contemplated by the September 2023 Supply Agreement or the Blackwell Report.

[29] A second supply agreement with Blackwell, under which the imminent tree removal at issue in this application would occur, was entered into by Park Board staff on June 21, 2024 (the “June 2024 Supply Agreement”, together with the September 2023 Supply Agreement, the “Supply Agreements”). This contract expires in April 2025.

[30] The plaintiffs say that, given the Park Board’s responsibility for the care and management of Stanley Park, and given the extent of the response contemplated by the Blackwell Report—the ultimate removal of up to approximately 160,000 of the trees of Stanley Park—this is a matter that should have been considered and decided upon by the Commissioners of the Park Board; not by Park Board staff, City staff, nor City Council. The plaintiffs point out, by contrast, that Park Board Commissioners routinely consider, authorize and direct staff on matters whose consequence is at least comparable to the removal of up to 1/3 of the trees of Stanley Park. For example:

a) A resolution by the Park Board directing staff to lift the moratorium on the introduction of new commercial event initiatives in Vancouver parks, and communicate to the public and the festivals and events community that the Park Board will now entertain applications for new commercial events and initiatives in Vancouver parks.

b) A resolution by the Park Board directing staff to restore the pre-COVID traffic and parking configuration on Stanley Park drive with a direction to staff to report back to the Park Board on actions taken.

c) A resolution by the Park Board directing staff to reframe and repurpose a mobility study toward a comprehensive strategy as a planning tool that can deliver new, permanent, dedicated cycling infrastructure in Stanley Park.

d) A resolution by the Park Board directing staff to bring forward the Field Sports Strategy to the Park Board in Q1 2023 and directing staff to allocate funds in 2023 for the delivery of initiatives outlined in the Field Sports Strategy.

[31] These are examples, the plaintiffs say, of the Park Board Commissioners exercising authority to direct staff, not the other way around. They point out an example where decision making authority is expressly delegated by the Park Board:

> That the Vancouver Park Board delegate authority to the General Manager to make any further decisions to alter, amend or suspend the Attire for Swimming in Public Aquatics Facilities Policy to ensure alignment with the City of Vancouver's policies.

[32] They say, and the Public Respondents do not dispute this, that no such authorizing or delegating resolution was made by the Park Board in respect of the removal of trees from Stanley Park in response to Looper Moth Impact.

[33] The logging that proceeded in 2023/2024, and that is proposed to proceed in 2024/2025 pending determination of this application, is, it appears, allowed only by virtue of Park Board staff having directly entered on behalf of the City (as represented by the Park Board) the Supply Agreements with Blackwell to perform the logging, and City Council having approved a budget allocation of $16 million for Looper Moth mitigation work.

[34] The plaintiffs make no claim either way as to whether the City had lawful authority to enter into the Supply Agreements with Blackwell absent a resolution by

the Park Board authorizing the logging of Stanley Park. But they do claim that one way the City was negligent was in not seeking the Park Board's authorization of the works contemplated in the Supply Agreements.

[35] As noted, the Public Respondents agreed at the hearing of this application that no Park Board resolution was passed authorizing the works contemplated in either of the Supply Agreements. They do point to the delegated authority of Park Board staff to enter into contracts under certain monetary values (no argument was made about whether this applied to all of the contracts entered with Blackwell, i.e., the Supply Agreements and contract under which the Blackwell Report was commissioned), but concede there is no expressly delegated authority for Park Board staff to authorize the works contemplated in the Supply Agreements. They also point to the City's Risk Management Committee's review of the Blackwell Report. However, the Public Respondents agree that the Risk Management Committee is a committee comprised of City staff, not a committee of Park Board Commissioners.

[36] Counsel for the Public Respondents concedes there may well be public law issues with how the works in dispute have been allowed. He does, however, point to evidence which demonstrates that, starting in October 2023, the Park Board Commissioners were updated several times on the tree removal being done in Stanley Park. Counsel states that the Commissioners could have, of their own motion at any time, brought a motion and resolution with respect to the works. He also notes that the Public Respondents, including the Park Board, have all instructed counsel to oppose the granting of the injunction sought in this application. He argues that the Court can, from these circumstances, infer Park Board support for the work being done.

[37] The plaintiffs say that the above circumstances, rather than being taken to indicate Park Board support for the work, are in fact the basis for the Park Board's liability. They submitted at the hearing that at "every step of the way the Park Board was informed and did nothing." This lack of transparent oversight, the plaintiffs say,

has led to reliance and action based upon a fundamentally flawed report, the Blackwell Report.

Joe McLeod

[38] The named defendant Joe McLeod is a Park Board employee who is paid by the City. Counsel for the Public Respondents confirmed that despite the source of Mr. McLeod's pay, he is accountable to the Park Board, not the City.

[39] The plaintiffs say Mr. McLeod's negligence lies in selecting Blackwell for both the assessment phase and the implementation phase of the Stanley Park work, and in not thoroughly vetting the Blackwell Report, especially in light of Blackwell's interest in doing the tree removal work. The applicants say Mr. McLeod failed to take sufficient steps to protect against reliance upon a possibly biased Blackwell Report, citing actions Mr. McLeod could have taken including retaining additional consultants to peer review and verify the Blackwell findings and seeking Park Board approval such that a transparent and deliberative process would have led to the recommended Blackwell approach being either corroborated or refuted.

[40] For their part, the Public Respondents repeat that the claims being advanced by the petitioners against Mr. MacLeod are public law questions, not private law questions. They say that as a Park Board employee, Mr. McLeod does not owe a private duty of care to the plaintiffs. To the extent that Mr. McLeod's private law duties arise, they do so only as a matter of contract between him and his employer.

Blackwell

[41] The applicants say that Blackwell owes a duty of care to them outside the scope of its contractual obligations to the City of Vancouver and the Park Board, citing *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering Ltd.,* 2024 BCCA 25.

[42] The applicants filed several affidavits from forestry and ecology specialists, which asserted that there are a number of issues with the Blackwell Report, including that:

a) Of the 14 citations used in the Blackwell Report, only one was a peer-reviewed study and thus the report has scientific flaws that make it unreliable.

b) To the extent the Blackwell Report applied the Prometheus Fire Prediction System ("PFPS") modelling software, it did so incorrectly, violating two of the assumptions of the system (one pertaining to the fuel type being modelled, since the PFPS does not contemplate hemlock as a fuel type, and the other relating to the lack of fuel connectivity in Stanley Park due to many gravel covered roadways throughout the park).

c) The Blackwell Report also overestimated the fire risk posed by leaving trees affected by Looper Moth undisturbed, as it did not account for the existing and extensive fire suppression infrastructure (water hydrants) within Stanley Park.

d) That the extensive logging is making Stanley Park less, not more, safe, including because of:

    i. the ways in which machine logging are fragmenting the forest and forest floor, and

    ii. the Park heating caused by the deforestation.

[43] The petitioners argue that based on the evidence, there is no need for the immediate and extensive removal of trees that the defendants have undertaken. They say both human safety and wildfire risks are overstated in the Blackwell Report, and in any event, there is no urgency to extensive tree removal given the long range time frame for risk that even the Blackwell Report acknowledges. By contrast, they say, the extensive removal of trees and coarse woody debris from Stanley Park harms the ecosystem of the Park, and in turn, the plaintiffs.

[44] The Public Respondents say that no special duty of care arises between Blackwell and the plaintiffs, and any duty Blackwell has lies in contract with the City and the Park Board.

[45] In response to the plaintiffs' evidence that the extent of tree removal contemplated in the Blackwell Report is unnecessary and harmful to biodiversity in Stanley Park, the Public Respondents filed an affidavit from a third-party forestry scientist supporting the Park Board's decision to rely on the Blackwell Report in deciding its course of action, recognizing that difficult decisions need to be made in the face of the Looper Moth Impact.

[46] Significantly, the Public Respondents are overt in acknowledging that the risk assessment standard used in the Blackwell Report, the Tree Risk Assessment Qualification ("TRAQ") standard, is one that quite deliberately places higher weight on human safety and lower weight on biodiversity and habitat preservation. The TRAQ standard will lead to identification of more trees as being "hazardous" (and thus requiring removal) than will other assessment models, such as the methodology that would be used in a remote forest in British Columbia.

Duty of Care: Proximity and Public Law Remedies

[47] As I have already noted, the plaintiffs concede that, if found by the Court, the duty of care alleged in this case would be a novel one. Accordingly, a full two-stage *Anns/Cooper* analysis is required in order to determine whether a duty of care should be recognized in the present circumstances.

[48] The plaintiffs argue that the emotional and psychological harm they have suffered, and will continue to suffer, from unnecessary logging of Stanley Park is foreseeable and is harm of a character recognized in tort law. They cite in particular *Saadati v. Moorhead*, 2017 SCC 28, where the Supreme Court of Canada said at para. 23:

> …Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's

> mental health — like a person's physical integrity or property, injury to which is also compensable in negligence law — is an essential means by which that person chooses to live life and pursue goals.... And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury…. To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger"….
>
> [Citations omitted]

[49] It is true that mental suffering is a type of loss recognized and compensated in tort law. There is also merit to the point that parks, and particularly parks as rare, forested and beautiful as Stanley Park, which is recognized as the "jewel" of Vancouver, are established and maintained in part to foster and benefit the mental well-being of those who visit and use the park. However, these two points are not sufficient to establish the duty of care alleged in this case. More is required.

[50] As the Court of Appeal for British Columbia said in *Canada (Attorney General) v. Frazier*, 2022 BCCA 379, foreseeability of harm alone is insufficient, without proximity, to establish a prima facie duty of care:

> [27] A *prima facie* duty of care has two required elements: reasonable foreseeability of harm, and a sufficiently proximate relationship between the parties such that it would be just and fair having regard to that relationship to impose a duty of care in law on the defendant: *Livent* at para. 25. Foreseeability of harm alone is insufficient to establish the existence of a *prima facie* duty of care. Rather, a duty of care only arises where the parties are in a relationship of proximity...
>
> [Emphasis added]

[51] Establishing a relationship of proximity in respect of a public body is rare. As explained in *Sekhon v. Canada (Attorney General)*, 2019 BCSC 1164:

> [19] It is important to distinguish between a private law duty of care and the public law duty owed by all government actors to exercise their statutory powers in a manner that is lawful and rational. Public law duties are enforceable through administrative law remedies that can be obtained on an application for judicial review. However, on its own a breach of a statutory duty is not a breach of a private law duty of care: *Wu v. Vancouver City*, 2019 BCCA 23 at para. 43, leave to appeal denied [2019] S.C.C.A. No. 90.
>
> [20] A private law duty of care is a duty owed by a party to take reasonable care not to injure another individual, the breach of which is remediable in

> damages. The existence of a private law duty of care must be established through the application of common law negligence principles.
>
> [21] In cases where the defendant is a government actor, a private law duty of care may, in exceptional cases, arise by implication from the legislative scheme itself. Given that legislation typically serves broad public objects, it is unusual to find a private law relationship of proximity between a government actor and a distinct claimant, or group of claimants, within a legislative scheme: *Imperial Tobacco* [2011 SCC 42] at para. 44.
>
> [22] Alternatively, a relationship of proximity may arise from a series of specific interactions between the government and the claimant. In such a case the government may, through its conduct, have entered into a special relationship with the plaintiff sufficient to establish the necessary proximity: *Imperial Tobacco* at para. 45. The mere fact that the plaintiff may have directly interacted with a public official is insufficient on its own to establish proximity. Such direct interactions are a typical feature of any government application or licencing process. The interactions that are said to ground the duty of care must take the relationship between the parties outside of what is inherent in the scheme of regulation: *Wu* at para. 67.
>
> [Emphasis added]

[52] As Justice Watchuk explained in *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258:

> [149] Something more is needed to give rise to a private duty of care. Such a duty will only arise when a public authority steps outside its strict regulatory role and engages with risk on an individual, rather than collective basis. To fall under a private duty of care, a public authority must assume responsibility for the private interests of specific individuals, as opposed to its responsibility to the collective interests of the public at large.
>
> [Emphasis added]

[53] In *Wu v. Vancouver (City)*, 2019 BCCA 23, the Court of Appeal allowed an appeal from a judgment which had recognized and imposed a private law duty of care upon municipal officials to make decisions on development permit applications within a reasonable time. The Court of Appeal explained:

> [49] The law concerning the recognition of a private law duty of care has evolved significantly in recent decades. This evolution has occurred within the *Anns/Cooper* framework.
>
> [50] The most significant evolution in applying the *Anns/Cooper* framework is the increasing emphasis placed on the analysis of proximity, at the expense of reasonable foreseeability, as the critical element in recognizing a *prima facie* duty of care. In *Cooper*, the Supreme Court of Canada made clear that reasonable foreseeability standing alone is insufficient to ground a *prima facie* duty of care. In addition to reasonable foreseeability, there must be

> proximity: *Cooper* at para. 42. In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, the Supreme Court of Canada has recently traced the refinements in the *Anns/Cooper* framework placing greater emphasis on a robust analysis of proximity as the touchstone for recognizing a novel *prima facie* duty of care.
>
> …
>
> [56] Third, a principal reason why public law duties are, standing alone, generally insufficient to create proximity is because statutory schemes generally exist to promote the public good. … The basic proposition remains, however, that a public law duty aimed at the public good does not generally provide a sufficient basis to create proximity with individuals affected by the scheme. This is so, even if a potential claimant is a person who benefits from the proper implementation of the scheme.
>
> [Emphasis added]

[54] The applicants say that by provincial statute, the Park Board, meaning the Commissioners, has exclusive authority and responsibility for the care, custody and maintenance of Stanley Park, and that the Park Board has abdicated its responsibility on a fundamentally important issue. As noted, the Public Respondents do not dispute the responsibility conferred by statute, and acknowledge no resolution has been passed by the Park Board authorizing the extensive tree removal in Stanley Park. However, in my view, that does not provide a sufficient basis to turn a public law duty into a private law duty of care.

[55] The applicants' argument is a similar argument to that made by the respondents in *Wu*—that a government actor has a private law duty to do the work required of them under statute because failure to do so harms individuals. This argument succeeded in the Court below in *Wu,* but was overturned on appeal. In allowing the appeal from the finding of a private law duty of care, the Court of Appeal said:

> [38] The judge concluded that under the bylaws the City owed the applicants a duty of care to make a final decision on a development permit application within a reasonable time, in accordance with the applicable statutory framework: at paras. 191, 211.
>
> [39] The duty, as characterized by the judge, is equivalent to and no different from the public law duty owed to applicants as a result of the empowering enactments. Public officials are under statutory duties to act in accordance with obligations imposed on them by statute, which also serve as the source of their authority to act. Public law duties exist in any circumstance where a

> public official is authorized and obliged to process an application seeking a grant of permission to act in certain ways.
>
> [40] Where an official fails to act in a manner required by statute and accordingly breaches his or her statutory obligations, remedies exist in administrative law. For current purposes, it is sufficient to note that the duty described by the judge is simply a duty to make a decision, not to make a particular decision where the official has a choice or a discretion about what decision to make within the regulatory scheme. *Mandamus* lies to compel an official to make a decision.
>
> [Emphasis added]

[56] In the case before me, the plaintiffs acknowledge that they were not entitled at law to a *particular* decision from the Park Board about the future of tree removal in Stanley Park, but assert that the failure of Park Board Commissioners to make any decision does give rise to the legal remedy they seek. The plaintiffs say so, not for the public law reasons described in the passage above from *Wu*, but for a different reason, grounded in negligence law. They say that public authorities' immunity from liability in negligence for policy (vs. operational) decisions described in *Nelson* does not apply in this case because the Park Board did not make a policy decision—instead, they say, the logging of Stanley Park has unfolded entirely at the staff and operational level. The plaintiffs say that if the Park Board *had* made a policy decision authorizing the significant tree removal in Stanley Park (even if the plaintiffs didn't agree with the decision) they accept that immunity from liability in negligence would apply to it as a policy decision.

[57] While the "policy vs. operational" public authority immunity question in negligence does not arise until a duty of care is established, it is worthy of note that the plaintiffs accept that they are not entitled to a particular result from a decision from Park Board—just that they are entitled, as citizens and park users, to have the Park Board (that is, the Commissioners) make the decision.

[58] I am not of the view that the relationship between the plaintiffs and the Public Respondents in this case is of a such character that it is likely to be found at trial of this matter to give rise to a *prima facie* duty of care. There is no distinct relationship between the parties to overcome what the Court of Appeal said in *Frazier* at

para. 46: “A statutory scheme aimed at promoting the public good does not generally provide sufficient basis to create proximity with individuals who are affected by the scheme. As stated in *Wu*, ‘[t]his is so, even if a potential claimant is a person who benefits from the proper implementation of the scheme’”.

[59] Were there sufficient proximity to establish a *prima facie* duty of care, the second part of the full *Anns/Cooper* analysis becomes highly relevant in a case such as this. The second step of the analysis asks whether there is a residual policy concern lying outside the parties’ relationship that should negate the *prima facie* duty of care, and particularly asks whether the law already provides a remedy. Related to this question, the court is to consider “the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally” and “would recognition of the duty of care create the spectre of unlimited liability to an unlimited class?” All of these factors are directly engaged in this case.

[60] The plaintiffs have raised legitimate concerns about the apparent lack of deliberative decision making by the Park Board, which is the body statutorily responsible for the care, management and control of Stanley Park, in relation to an important issue that will impact the future of Stanley Park. There has not been a transparent and considered decision by the Park Board Commissioners themselves to proceed in a particular way with respect to responding to the Looper Moth Impact. Rather, a significant course of action has been undertaken, ostensibly by Park Board and City staff and with significant budgetary backing by City Council, without any approval of the work by the Park Board or request from the Park Board to City Council for budget allocation. By contrast, the Park Board Commissioners regularly make decisions affecting parks in Vancouver that, on their face, appear of at least comparable consequence to the decision to remove up to 1/3 of the trees in Stanley Park.

[61] In these circumstances, a group of citizens has put their hands up and said something is amiss. It may well be; in fact, the Public Respondents acknowledged this possibility during the hearing of this matter. It is an important role of the court to

hear challenges to government action or inaction. However, the possibility of improper government action does not require this Court to establish a new private duty of care between the Public Respondents and four citizens. Moreover, doing so would have serious consequences for "the legal system and society more generally" and would create "the spectre of unlimited liability to an unlimited class" (as warned in *Cooper*). It would amount to "a fundamental shift in the way in which public and private spheres have historically addressed improper governmental action" (*Wu,* para. 47).

[62] The plaintiffs say the duty of care they allege could not, as the respondents argue, be extended to almost any user of a public park or amenity who does not agree with changes made by government to that amenity. They say they are different because they have been harmed. However, the harm they allege, mental suffering from the losses associated with unnecessary tree removal from Stanley Park, is not sufficiently distinct from the foreseeable impact to many users of Stanley Park to turn this from a public law duty to a private one. The potential removal of up to 1/3 of the trees of Stanley Park, whether necessary or not, will undoubtedly distress many Vancouver citizens and Park users.

[63] The question of whether the public process by which such an important decision was or is made, and even whether it is the right decision, are questions citizens are right to ask, and even in some circumstances right for the courts to review, but not under a private tort law analysis. Public law is a long-standing body of law that has evolved to allow courts to carefully consider and balance the obligations of public bodies which are under statutory obligations to work in and protect the public interest.

[64] The plaintiffs in this case say they were driven to framing their case in negligence because they could not bring judicial review as there was no decision to authorize the tree removal by the Park Board to review. That is, they say, the point. Proper oversight and review would or should have led to more careful consideration,

and would or should have avoided the embarkation upon execution of what the plaintiffs say is a fundamentally flawed course of action.

[65] Counsel for the Public Respondents acknowledged in argument that being able to identify the decision maker in this case is “a little murky”, but says that all of the decisions that have led to the course of conduct at issue were judicially reviewable, and importantly, that they remain so. Moreover he says they are reviewable on grounds that would capture the gravamen of the plaintiffs’ complaint: that the required and appropriate oversight was not exercised by the Park Board, and that the report upon which tree removal proceeded was fundamentally flawed. These are important concessions that demonstrate that a path to remedy against one or all of the Public Respondents, if warranted, is provided for under public law.

[66] For it’s part, Blackwell’s actions are entirely tied to the Public Respondents. Blackwell’s Report was commissioned by the Public Respondents. The tree removal Blackwell has been and would continue is also commissioned by the Public Respondents. While the plaintiffs have raised questions that may sound in public law as to how the Public Respondents have authorized that tree removal, that is not likely, in my view to be found a trial to elevate Blackwell’s private law obligations in contract to the Public Respondents to a new duty of care to the four members of the public, the plaintiffs. I am not persuaded that there is a serious issue to be tried based upon an alleged duty of care owed by Blackwell to the plaintiffs.

Conclusion on Serious Question to be Tried

[67] While the applicants have raised credible and legitimate questions about the process by which tree removal has been and will be allowed in Stanley Park in response to the Looper Moth Impact, I am of the view that it is unlikely that a novel duty of care would be found against any of the defendants at trial. Therefore, I must conclude that there is not a sufficiently serious question to be tried to weigh in favour of granting injunctive relief.

Irreparable Harm

[68] While failure to establish a serious issue to be tried may be dispositive on an application for discretionary injunctive relief, I will nevertheless consider irreparable harm. At this stage of the *RJR-MacDonald* analysis, the court looks at the nature of the harm the applicant may suffer if the injunction is not granted. The harm will be irreparable if it cannot be remedied, even if the applicant is eventually successful on the merits of the underlying proceeding. It is "harm which either cannot be quantified in monetary terms, or which cannot be cured,": *RJR* at 341.

[69] The plaintiffs say that the irreparable harm of the unnecessary removal of 1/3 of Stanley Park's trees speaks for itself.

[70] The Public Respondents say that when the case is pled in negligence (as opposed to public law) the harm must be to the applicants directly, not to Stanley Park, and that the applicants have not presented sufficient evidence to support that.

[71] The Public Respondents further argue that because the plaintiffs do not seek damages in the underlying civil action, the harm to them may not be deemed "irreparable" under the *RJR-MacDonald* injunction analysis. However, counsel did not press this position at the hearing, and I would not accede to it. Harm may well be determined irreparable and not compensable in damages in a case where the only relief sought is the abatement of the impugned conduct.

[72] However, in this case, I am not of the view that allowing the 2024/2025 tree removal program to proceed would cause irreparable harm to the plaintiffs. As explained below under the balance of convenience analysis, the Public Respondents and Blackwell plan to proceed with identification and removal of hazardous trees based on the same assessment criteria, the TRAQ standard, as would be used if the injunction were granted under the terms sought by the plaintiffs. While this results in the identification and removal of more trees than the plaintiffs would wish to see, that is the result of a) the application of the TRAQ standard, which identifies more trees for removal than other assessment standards would, and b) the extent of the Looper Moth Impact, which has, under that standard rendered more trees hazardous.

[73] On the terms of injunction the plaintiffs seek, the only apparent difference if the injunction were granted would be that the Public Respondents would be prohibited from engaging Blackwell to do the tree removal. I am not of the view that Blackwell doing the tree removal would cause irreparable, or any, harm to the plaintiffs.

Balance of Convenience

[74] The plaintiffs argue that the preponderance of scientific evidence filed in the application refutes the claim that there is an immediate danger from ceasing removal of trees from Stanley Park.

[75] The plaintiffs also point out that Stanley Park has remained open to millions of visitors without tree removal being undertaken since April 2024. They say the Park Board and the City have clearly assessed that there is no immediate danger to cessation of the large scale removal of trees and that, as such, they must be taken to be of the view that the 2023/2024 mitigation efforts were sufficient to maintain an open park. The applicants add there is no evidence of new imminent danger.

[76] The plaintiffs acknowledge that the need for immediate tree toping or removal of imminently hazardous trees should not be enjoined. They argue that the approach to assessment and removal should return to that employed prior to the September 2023 Supply Agreement was entered into; that is to say, where the assessment and removal was made by Park Board Urban Forestry team staff, not the third-party contractor Blackwell. During the hearing of this matter, the plaintiffs asked that granted injunctive relief give effect to such pre-Blackwell Report *status quo* (and revised the relief sought to reflect such).

[77] However, the Public Respondents advise that the TRAQ standard assessment criteria for hazardous trees used by Blackwell is the same one the Park Board Urban Forestry team uses—it simply captures significantly more trees than it previously did because of the Looper Moth Impact.

[78] The Public Respondents say that the standard that Blackwell and the Park Board Urban Forestry staff have decided to apply to Stanley Park indicates the need for a quantity of hazardous tree removal beyond what the Park Board Urban Forestry staff has the capacity for. If they are prevented from using third-party contractors to undertake the work required, the result will be portions of the park, including roads and trails, will have to be closed.

[79] Based upon the evidence, I have considered the application before me in particular in relation to the upcoming work contemplated to take place from October 2024 to April 2025. This is in part because it is not clear that the Park Board (or any of the Public Respondents) has in fact approved or decided to proceed based upon the full extent of the Blackwell Report. What is contemplated imminently is the scope of work under the June 2024 Supply Agreement, which will expire in April 2025.

[80] At the hearing of the application, in response to questions from the Court, counsel for the Public Respondents advised that areas totalling approximately 30 hectares will be treated under the June 2024 Supply Agreement. These areas are deemed to be low tree density but high consequence areas, based upon their proximity to roads and high use areas of Stanley Park. It is estimated that approximately 2,000 trees greater than 20 centimetres in diameter, and about 4,000 trees smaller than 20 centimetres in diameter, will be removed. Counsel for the Public Respondents also advised that there is not currently a plan to ultimately remove all 160,000 dead or dying trees; however, about 12.5% of the approximately 160,000 are greater than 20 centimetres and the Public Respondents do expect to remove those. Of the remaining dead or dying trees, many may not be removed.

[81] In weighing the factors set out in the *RJR-McDonald* analysis, I place particular weight on the following:

a) I am of the view there is a low likelihood that a new duty of care will be found at trial to be owed by any of the defendants to the plaintiffs to ground the claims in negligence;

b) that whether or not the sought injunction is issued, the same TRAQ standard criteria would be used to assess and remove hazardous trees in Stanley Park;

c) that the upcoming 2024/2025 window for tree removal will see about 6,000 trees removed pursuant to the TRAQ standard;

d) before anything as extensive as the potential removal of 160,000 trees in Stanley Park is effected, there is time for either or both:

i. deliberative and transparent decision making by the Public Respondents, ensuring the Park Board (by virtue of its Commissioners) is allowed to and does fulfill its statutory obligations with respect to the care and management of Stanley Park, and/or;

ii. a public law challenge, by way of judicial review, to any decision to proceed with tree removal beyond that contemplated for the 2024/2025 window, if warranted.

[82] Taking all these factors into consideration, I am of the view that the balance of convenience does not favour granting the injunction sought.

Conclusion

[83] The application for injunctive relief is dismissed.

[84] At the hearing of this matter, in reply submissions, the plaintiffs requested leave to amend their pleadings to add an alleged statutory duty of care arising under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337. I denied the application at the time as the two-day application had been argued entirely on the basis of the original pleadings. However, the application was denied without prejudice to the plaintiffs' right to amend in the future in accordance with the *Supreme Court Civil Rules*.

[85] Costs of this application shall be in the cause.

"Giltrow J."