

CITATION: Big Thunder Windpark et al v. Ontario, 2026 ONSC 3046
COURT FILE NO.: CV-15-00535812-0000
DATE: 20260625

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BIG THUNDER WINDPARK INC.; BIG
THUNDER WINDPARK LP; HORIZON
WIND INC.

Plaintiff

– and –

HIS MAJESTY THE KING IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF THE ENVIRONMENT

Defendant

*Peter Jervis and Pritpal Mann, for the
Plaintiffs*

*Brent McPherson, Vanessa Glasser and Ram
Rammaya, for the Defendant*

HEARD: November 24-December 12, 2025,
with written closing arguments provided
January 21, March 5, and March 16, 2026

PARGHI J.

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Introduction

- [1] Horizon Wind Inc. develops, owns, and operates sustainable wind energy projects. It says that between 2005 and 2014, it, together with Big Thunder Windpark Inc. and Big Thunder Windpark Limited Partnership (I will refer to all three collectively as “Horizon”), invested roughly \$10 million to develop a proposed onshore wind power project, called Big Thunder Windpark, to be located in Thunder Bay, Ontario (the “project”). The project was to be developed pursuant to a feed-in-tariff (“FIT”) contract with the Ontario Power Authority (“OPA”). It was to be located on private lands owned by the City of Thunder Bay, within the Municipality of Neebing, and leased by Horizon. The lands in question were adjacent to the Fort William First Nation (“FWFN”) reserve and on FWFN’s traditional territory.
- [2] In 2011, Horizon submitted a formal Renewable Energy Approval (“REA”) application to the Ministry of Environment (the “Ministry”) in respect of the project, pursuant to various requirements under Ontario’s *Environmental Protection Act*, R.S.O. 1990, c. E.19.
- [3] The approval process for Horizon’s REA application was protracted and the project itself highly contentious. There were numerous meetings; extensive correspondence; various consultation efforts with stakeholders, including FWFN, which came to strenuously oppose the project; and several legal proceedings commenced both by Horizon and FWFN.

- [4] In October 2015, the Director of the Ministry's Assessments and Approvals Branch refused Horizon's REA application.
- [5] Horizon now seeks up to \$50 million in damages for what it describes as its reasonable and detrimental reliance on the Ministry's representations before and during its REA application process. As pleaded, its action is for negligent misrepresentation and misfeasance of public duty. At the conclusion of the evidence, Horizon withdrew the allegation of misfeasance and now maintains only the claim of negligent misrepresentation. Its damages claim is based on the loss of the profit it would have made from the operation of the project, or, in the alternative, the investment costs it incurred and lost in pursuit of the project.
- [6] For the reasons below, I dismiss Horizon's action. While I find that the Ministry did owe Horizon a duty of care on the facts before me, I am not persuaded that any negligent misrepresentations were made. Some of the alleged misrepresentations appear to have been expressed in provincial government press releases; such statements are not actionable in tort. Other alleged misrepresentations, even if they were made by individual Ministry employees, were factually correct and therefore not misrepresentations.

The Parties and the Claim

- [7] Horizon Wind Inc. is a general partner of Horizon Wind Limited Partnership. Big Thunder Windpark Inc. is a subsidiary of Horizon Wind Inc. that was incorporated for the purposes of the Big Thunder Windpark project. Big Thunder Windpark Limited Partnership was also set up for the purposes of the project. All three have their head offices in Toronto.
- [8] Horizon states that between 2005 and 2014, it made extensive efforts to develop the project, including by obtaining an option to lease the land on which the project would be located, conducting site assessments, consulting with public and municipal stakeholders and FWFN, entering into a community cooperation and support agreement with FWFN in respect of the proposed project in June 2007, and obtaining a feed-in-tariff contract with the OPA in April 2010.
- [9] FWFN, although not a party to this proceeding, looms large in Horizon's allegations and in the evidence heard at trial. It is common ground between the parties that the Ministry was under an obligation to consult with FWFN about the proposed project, in accordance with its duty to consult under section 35 of the *Constitution Act, 1982*. It is also common ground that the regulations governing the REA application process required Horizon, as the project proponent, to consult with FWFN, in what is referred to as "delegated consultation". Much evidence was led at trial regarding these consultations.
- [10] Further to its delegated consultation obligation, Horizon says that, starting in 2005, it had been "in consistent and frequent communication with the FWFN, often on multiple times a month, via email, meetings and phone calls." Its efforts with FWFN included communicating and exchanging correspondence with them, providing project notices and informational material, requesting consultation protocols, forwarding environmental

studies, responding to FWFN concerns and inquiries, hiring a First Nations energy consultant to represent Horizon in its consultation efforts, and offering various forms of joint ventures and economic partnerships to FWFN.

- [11] Horizon says that despite its efforts, in 2009, FWFN “resiled from” its 2007 support agreement with Horizon and “arbitrarily demanded different terms [and] more compensation”. Horizon attempted to renegotiate the agreement, without success. Eventually, FWFN stopped cooperating and “began to thwart Horizon’s efforts to consult”. FWFN acted “in bad faith, disingenuously and arbitrarily.” Despite this, Horizon integrated FWFN concerns into its project plans, for instance by increasing its setback from a watershed, investigating the impact of the project on the watershed, and conducting site-specific moose habitat studies.
- [12] Horizon alleges that by 2012, it “had met all the technical and legal requirements for the requisite” REA. Although the Ministry “had repeatedly represented to Horizon ... that Horizon was entitled to receive” the REA for the project, the Ministry “arbitrarily” and “indefinitely” postponed granting the REA to Horizon due to pressure from the Ontario Cabinet, the Premier’s office, and others. The Ministry “did this arbitrarily to damage the prospects for” the project and “acted deliberately to destroy the Project feasibility.” The driving force behind the Ministry’s actions was FWFN’s opposition to the project. The Ministry “would not grant” the REA “in the face of continued objection from the FWFN.”
- [13] Horizon states that Ontario made “untrue, inaccurate and misleading representations” to Horizon “about the REA process, review, criteria and issuance”, on which Horizon relied to its detriment. Horizon identifies four alleged misrepresentations on the part of Ministry officials:
- a. That the REA process “was an efficient, fair and streamlined regulatory process that would enable wind proponents to get the REA in a timely way, taking into account the feed-in-tariff ... deadlines”;
 - b. That Horizon’s REA application would be considered fairly and on its merits by the appropriate Ministry officials in the context of the regulatory requirements and without arbitrary or political interference;
 - c. That, “if the technical review determined that the reports filed by [Horizon] satisfied the requirements of the technical review for the purposes of the regulatory requirements, then there would be no need for additional time for a decision to be made and the REA would be granted based on the technical review”; and
 - d. That FWFN did not have a veto over the granting of an REA for the project.
- [14] Horizon states that the Ministry owed it a duty of care, that the Ministry breached that duty by making these negligent misrepresentations, that Horizon reasonably relied on the Ministry’s misrepresentations to its detriment, and that it incurred damages as a result. Horizon says it lost the reasonably anticipated profit it would have earned over the length of the project and pursuant to the favourable terms the feed-in-tariff contract would have

afforded it. In its Statement of Claim, Horizon values this loss of profit at \$50 million, although its expert evidence at trial was that this loss could have been up to \$58 million. Alternatively, Horizon says it expended significant funds to fulfill the various technical and environmental requirements for the project, to acquire rights to the land for the project, and to pursue a contract with the OPA to sell energy generated from the project to the provincial power grid. It seeks damages for \$10 million in respect of this loss of investments.

- [15] This action was originally framed as a claim of negligent misrepresentation and misfeasance in public office. It was on this basis that the claim was litigated from its inception and throughout the trial.
- [16] After the evidence was closed and just prior to the scheduled date for closing arguments, Horizon withdrew the claim of misfeasance in public office and advised that it was advancing only the claim of negligent misrepresentation. Horizon undertook to provide Ontario and the court with a “marked-up” version of its Statement of Claim that struck out the allegations and material facts that were no longer being pleaded so that the nature and contours of the reframed action could be understood.
- [17] Horizon did not do this. Instead, after closing submissions were exchanged, Horizon offered a proposed Amended Statement of Claim that not only struck through the abandoned misfeasance pleadings but also purported to elaborate on the negligent misrepresentation claim. Ontario objected to these purported amendments. I ruled that Horizon had not been given leave to amend its pleading, that it had undertaken only to strike through the now-abandoned passages of the pleading, and that that was all it was permitted to do. To the extent that Horizon was now seeking leave to amend its pleading, no such leave was granted because such late amendments would give rise to non-compensable prejudice to Ontario.
- [18] Accordingly, the summary of Horizon’s claim set forth above is based on the original Statement of Claim, not the proposed amended one.

Background

The Legal Framework, the Feed-in-Tariff Contract, and the Renewable Energy Approval

- [19] In 2009, Ontario enacted the *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A. According to a Province of Ontario press release, the legislation, along with its regulations, was intended to “provide a stable investment environment where companies know what the rules are – giving them the confidence to invest in Ontario, hire workers, and produce and sell renewable energy.” The *Green Energy Act* featured a feed-in-tariff program, which would enable “individuals and companies to sell renewable energy ... into the grid at set rates”, and a “streamlined approvals process and a service guarantee to bring developers greater certainty.” The set rates at which companies would be able to sell renewable energy to the provincial power grid were higher than market rates. This was intended to incentivize

companies to expend the resources required to develop and build renewable energy projects.

- [20] Pursuant to the *Green Energy Act*, on April 12, 2010, Horizon entered into a feed-in-tariff contract with the Ontario Power Authority. The FIT contract gave the project the right to produce 16,500 kilowatts of onshore wind energy to be sold to the provincial power grid at a rate of 13.5 cents per kilowatt hour. The evidence of Anthony Zwig, Horizon's Chief Executive Officer, was that without a FIT contract, they could not have participated in the project: "[t]he project would be dead because we would not have any assured revenue. The value in a FIT contract was the 20 year contract, offered by the government, so the credit rating was the best it could be which meant we could borrow at the most advantageous rates."
- [21] The FIT contract obligated Horizon to submit a request for a Notice to Proceed with the project. The initial deadline for doing so was January 14, 2011. To submit such a request, Horizon first had to provide a Renewable Energy Approval from the Ministry, under Part V.0.1 of Ontario's *Environmental Protection Act*, described below. Ultimately, Horizon evoked the *force majeure* clause in the contract to obtain an extension of the request for a Notice to Proceed deadline until July 17, 2014. Under the terms of the contract, if Horizon did not obtain an REA and submit a request for a Notice to Proceed by that date, the OPA would be permitted to terminate the contract. As discussed below, that is what happened.
- [22] Under section 47.4(1) of the *Environmental Protection Act*, an application for an REA is to be prepared in accordance with O. Reg. 359/09, *Renewable Energy Approvals Under Part V.0.1 of the Act* (the "Regulation") and submitted to the Director of the Ministry. Under the Regulation, which came into effect in 2009, before an applicant can submit an REA application, they must carry out certain activities, known as "pre-submission activities", enumerated in sections 12 to 32 of the Regulation. These include conducting noise and environmental impact studies and archaeological assessments, conducting community outreach programs, and obtaining from the Director a list of Indigenous communities that have constitutionally protected Aboriginal or treaty rights that may be adversely impacted by the proposed project (section 14(1)(b)(i)), and a list of Indigenous communities that may be interested in any negative environmental effects of the project (section 14(1)(b)(ii)). The applicant must also consult with those communities (section 17), including by communicating with them about any constitutionally protected Aboriginal or treaty rights that may be adversely affected by the proposed project (section 17(2)(a)) and about any measures for mitigating any such adverse effects (section 17(2)(b)).
- [23] Extensive evidence was given at trial about these consultations. In different ways, both parties to this action were subject to consultation obligations. The Regulation requires the proponent, Horizon, to lead these pre-submission consultation efforts with affected First Nation communities. However, the Crown bears ultimate responsibility for ensuring that proper consultation has occurred, in keeping with the Crown's constitutional duty to consult with potentially affected Indigenous communities under section 35 of the *Constitution Act*. The consultation carried out by the proponent is often referred to as "delegated consultation". While it is a genuine and significant obligation on the part of the

proponent, it is not a substitute for the Crown's duty to consult, which by law cannot be delegated (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 53):

[T]he duty to consult and accommodate ... flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. ... The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

- [24] As a matter of law, the initial consultation work performed by a project proponent does not exhaust or end the consultation process. This is underscored by section 17(4) of the Regulation, which permits the Director to direct a proponent to conduct further consultations where they deem it necessary.
- [25] When an REA application is submitted, it is checked for completeness in what is called the "screening phase" of the REA process. The evidence at trial was that this screening is not a substantive technical review of the REA application, but rather a review to ensure that the information required by the Regulation is included, the studies required by the Regulation have been conducted, and that there is enough detail in the application to allow for a technical review. The Ministry may also consult with affected First Nations communities during the screening phase. The Ministry did so here.
- [26] If an REA application is "deemed incomplete", it is returned to the proponent with comments about its deficiencies.
- [27] If the application is "deemed complete", it is submitted for a technical review under section 47.5 of the *Environmental Protection Act*. This is where the substantive and more detailed review of the application occurs, carried out by the Ministry and drawing on technical expertise from other ministries as needed
- [28] At the outset of the technical review, the Ministry posts the complete application to the Environmental Registry of Ontario (previously known as the Environmental Bill Registry) for public comment, pursuant to section 22(1) of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28. Any comments received are reviewed by the Ministry as part of the technical review. Comments are also shared with the proponent. This step allows affected Indigenous communities and their members, and members of the broader public, to learn about a proposed project.
- [29] Following the technical review, once Ministry staff are ready to make a recommendation, a decision package is provided to the Ministry Director. The Director is a Ministry official who is given the statutory authority to exercise the discretionary powers articulated in

section 47.5 of the *Environmental Protection Act*. In 2013 and 2014, the designated Director for Horizon's REA application was Vic Schroter. From March 2015 until October 2014, when Horizon's REA application was refused, the designated Director was Mohsen Keyvani.

- [30] The Director then reviews the package. Under subsections 47.5(1) and (2) of the *Environmental Protection Act*, the Director may, "if in his or her opinion it is in the public interest to do so," issue an approval with or without conditions, or refuse to issue the REA. The evidence of both Mr. Keyvani and Sarah Raetsen, the Senior Program Support Coordinator at the Approval Services Unit of the Ministry, was that the Director makes the decision on the application and is not bound by any recommendation from the Ministry review team.
- [31] Before making a decision on an REA application, the Director must be satisfied that the Crown's constitutional duty to consult with potentially affected Indigenous communities under section 35 of the *Constitution Act* has been satisfied. This determination is for the Director alone: the Divisional Court held, in the *mandamus* proceedings commenced by Horizon in 2013, that "[i]t is for the Director to determine whether the Crown has met the constitutional duty to consult" (*Big Thunder Windpark Inc. v. Her Majesty the Queen in Right of Ontario*, 2014 ONSC 3050 (Div. Ct.), at para. 8).
- [32] To that end, Mr. Keyvani testified that when evaluating an application, and applying the "public interest" test set forth in the statute, he considers whether the duty to consult has been satisfied:

[U]nder the powers given, I have to look at pros and cons of the project with respect to potential impact on the environment and health of the public, and ... part of that is duty to consult with the First Nations and potential impact on their treaty rights. So that is what we have to consider.

- [33] Mr. Keyvani also gave evidence that if the Director determines that the duty to consult has not been satisfied, they "will ask for additional information to support the case to say whether the proponent fulfilled the duty to consult and addressed all the concerns or issues that had been raised by the First Nations to the satisfaction of the Director."
- [34] Whether to grant the REA, with or without conditions, after determining whether it is in the public interest, is "clearly a matter of the Director's discretion" (Divisional Court decision, at para. 4). This point is uncontested by the parties.

Horizon's REA application and first application for *mandamus* against the Ministry

- [35] Horizon submitted its first REA application to the Ministry on February 14, 2011. The application proposed 18 wind turbines with a total maximum name plate capacity of 36 megawatts. It attached over 15 reports and documents required by the Regulation. These included a project description and reports on operations, construction plans, consultations, and environmental and natural heritage issues. The consultation report discussed meetings

and correspondence between Horizon and four Indigenous communities, one of which was FWFN. It described the communities' concerns and changes being made to the project in response to concerns raised by the communities, the public, and municipalities.

- [36] On March 11, 2011, Doris Dumais, Director of Environmental Approvals Access and Service Integration at the Ministry, advised Horizon that the Ministry deemed the REA application incomplete. She stated that the application needed further documentation, including in respect of Aboriginal consultation, and that the proposed change in project capacity from 27 to 36 megawatts was to be clarified with the Ministry and necessitated further public consultation. She also requested various other documents and information.
- [37] In the ensuing months, there were meetings and correspondence between Horizon and the Ministry, including a meeting on March 16, 2011, and a letter from Ms. Dumais to Horizon the following day. FWFN raised concerns regarding the potential impacts of the project on moose habitats. Horizon obtained a study from Pesca Environment, dated June 20, 2011, which took the view that the project's likely impact on moose would be minimal. (Horizon would also obtain a second moose study in 2012.)
- [38] On June 7, 2011, the Chief of FWFN informed Horizon via letter that FWFN no longer supported the project, as the project information Horizon was providing now was significantly different from the information Horizon had provided in 2007, when FWFN had entered into the support agreement.
- [39] On August 25, 2011, the Ministry sent Horizon a letter indicating that Horizon had provided the required notices to the Indigenous communities and recommending that it make additional efforts to consult with those communities and review the Ministry's Draft Aboriginal Consultation Guide. Horizon invited FWFN to provide proposals for the consultation plan. While I will not provide a detailed account of what Horizon says ensued, I will simply say that consultations between Horizon and FWFN appear to have been fraught and, at times, acrimonious. Horizon says that FWFN refused to consult with it and became intent on preventing the project from moving forward.
- [40] By 2011 at the latest, the project was reduced to eight turbines, located at least 3 kilometres from the shore of Loch Lomond.
- [41] On April 2, 2012, Horizon and Ms. Dumais met again.
- [42] On April 26, 2012, Horizon sent a letter to Ms. Dumais, indicating that FWFN was refusing to consult with Horizon.
- [43] On August 13, 2012, Horizon submitted its second REA application, dated July 20, 2012. It attached 16 reports and studies.
- [44] On September 27, 2012, the Ministry gave Horizon the results of its preliminary screening, together with comments and requests for information. Horizon changed the project by removing a plan for electrical taplines that would have run from the facility and across FWFN's reserve lands. Horizon then submitted a revised and final REA application on

October 19, 2012, reflecting the tapline removal. The application proposed 16 wind turbines with a total maximum name plate capacity of 32 megawatts.

- [45] On December 3, 2012, FWFN wrote to the Ministry stating that it was opposed to the project.
- [46] On January 25, 2013, Horizon brought an application for *mandamus* before the Divisional Court, seeking to compel the Minister to deem its REA application complete. The parties settled the application and Horizon provided a release to Ontario, about which I will say more later.
- [47] On April 23, 2013, the Ministry deemed the REA application complete.
- [48] The technical review phase then began. The Ministry advised Horizon, “[i]n accordance with our six-month service standard, your application will be reviewed and a decision is expected to be made by October 23, 2013, provided that there are no significant issues raised during the Ministry’s review.”
- [49] The public consultation period for the REA application began at the same time and ran until June 22, 2013. The Ministry advised FWFN via letter of the status of the application.
- [50] In June 2013, FWFN submitted a report prepared by an expert named Rick Gollat, summarizing his review of two reports that Horizon had previously submitted on the impact of the project on the moose population and on FWFN members’ hunting rights. Correspondence and meetings between the Ministry and FWFN continued over the course of the summer and fall and into the following year.
- [51] The initial deadline by which Horizon was to obtain its REA and submit a request for a Notice to Proceed with the project was August 8, 2013. Prior to that date, Horizon, having not yet obtained an REA, evoked the *force majeure* clause in the FIT contract to obtain an extension of that date until July 17, 2014.
- [52] In September 2013, FWFN requested a meeting with the Ministry regarding its opposition to the project.
- [53] On October 23, 2013, the Ministry emailed Nhung Nguyen, Horizon’s Vice President of Development. In its email, the Ministry said it was considering a recent meeting request from FWFN. It stated the following:

The ministry has a six-month service standard date, not a guarantee, of October 23, 2013 (i.e. Today). While the ministry strives to meet the service delivery standard for all REA applications, the ministry may extend the review of an application beyond the six month service standard date depending on the issues and complexities of a project. In view of the scope and scale of the issues surrounding the Big Thunder project, please note that the ministry is not in position to issue the REA and post the decision today, October 23. The

ministry is currently finalizing the technical review of the application, with particular emphasis on ensuring that project-related concerns have been adequately addressed and that the Crown's Duty to Consult has been met.

- [54] On November 5, 2013, the Ministry sent a letter to FWFN indicating it was happy to meet with FWFN to hear its response to the project proposal adaptations Horizon had agreed to make in an effort to address FWFN's concerns. The letter said the Ministry was interested in learning of any additional relevant concerns that FWFN might have and receiving any additional information. It told FWFN that it may not be able to address all of FWFN's concerns and that it wished to move toward making a decision:

[We cannot] assure you that the statutory mandate within which we must consider the application is broad enough to address all of the concerns you have articulated about the situation ... Horizon Wind's project has been the subject of discussion between the Ministry and the First Nation, for some years. It is reasonable for Horizon to expect a decision, one way or the other, from the Ministry on their REA application within a reasonable time

. . . The Ministry is moving forward to make a decision on the REA application and wants to ensure that the Fort William First Nation has had ample opportunity to provide all relevant information and concerns to the Ministry regarding the Big Thunder Wind Park project so that we may make an informed decision.

- [55] Ministry staff prepared, and provided to the Director for review, an internal "Decision Document" dated November 21, 2013. The Decision Document stated that "all technical reviews concluded that the [Big Thunder] project is compliant with MOE regulations" and recommended that an REA be granted with certain conditions. Its detailed discussion of the project included a description of Horizon's consultations with FWFN and a chart setting forth the concerns raised by FWFN and how Horizon considered each of those concerns. The Decision Document substantively mirrored an earlier version Ministry staff had prepared of the document on October 15, 2013. As discussed below, Horizon imparts a particular significance to the Decision Documents.
- [56] On November 26, 2013, the Ministry met with FWFN, after which it told Horizon that FWFN did not raise any new issues at the meeting.
- [57] On December 3, 2013, FWFN's legal counsel sent a letter to the Ministry advising of FWFN's position that Crown consultation had not taken place. That letter was also sent to various politicians, including then-Premier of Ontario Kathleen Wynne and the then-leaders of the NDP and Progressive Conservative parties, Andrea Horwath and Tim Hudak.

[58] That same day, Horizon wrote to the Ministry requesting a decision and outlining how, in its view, it had carried out its delegated consultation obligation in a way that warranted the REA's issuance.

[59] On December 11, 2013, the Ministry emailed Mr. Zwig, stating as follows:

The Ministry of the Environment (MOE) received a substantial amount of information at the meeting on November 26 with FWFN. The MOE is currently reviewing the information from FWFN along with all of the Aboriginal consultation information provided by Horizon Wind as part of the Renewable Energy Approval (REA) application. All of this information is being considered by the MOE in the decision making of this REA application to ensure that project related concerns have been adequately addressed and that the Crown's Duty to Consult has been met.

[60] That same day, the Ministry and Ms. Nguyen spoke by phone. The Ministry said it was still looking into comments FWFN had raised at the November 26, 2013 meeting, including its concerns about the lease to the land on which the project would be developed. It said the Ministry had to ensure that the duty to consult was satisfied and that it would exceed the six-month service standard before making its decision. Soon after, Ms. Nguyen requested a meeting with the Ministry.

[61] On January 8 and 10, 2014, a representative of the Ministry spoke to counsel for Horizon and advised that the Ministry did not require any additional information from Horizon to make a decision on the REA application and that the REA would be finalized in a couple of weeks. The Ministry reiterated this view verbally on February 6, 2014.

[62] On February 11, 2014, the Ministry wrote to FWFN indicating, among other things, that the Ministry would make a decision on the REA application on or shortly after February 25, 2014 and that FWFN had to provide any additional relevant information it wished to by that date. The letter stated in relevant part:

Both the [Ministry] and [Horizon] have made efforts to consult with FWFN over the years, including meetings with the current Chief and Council and with the community.... [Horizon] has agreed to several changes to its original project proposal in an effort to address concerns raised by FWFN.

During the consultation process [Horizon] undertook additional studies regarding impacts on moose and impacts to the Loch Lomond watershed as a result of concerns that were raised by FWFN, shared those studies (and all other studies) with FWFN, offered funding to the community to subsidize independent peer review of these studies, and revised its application to address

concerns FWFN had expressed about water quality and possible impacts on harvesting rights.

As such, we cannot agree that consultation with FWFN has never happened or that it is only now commencing.

...

In respect of concerns raised by FWFN during the pre-submission phase of the project on impact to moose hunting, [Horizon] commissioned both a literature review and an on-site study.... [The study] determined that the moose density was at least moderate.

According to a letter from former FWFN Chief Collins (October 2011), most of FWFN's hunting takes place in the Loch Lomond watershed. FWFN's Consultation Officer was more specific in August of 2010, stating that hunting occurred at the southwest end of Loch Lomond. That area is almost 4 km from the nearest turbine. There are no known moose calving areas or winter survival areas in the project site.

[63] Further correspondence ensued between FWFN and the Ministry, and between FWFN and other ministries. As before, Premier Wynne and other provincial party leaders were copied on some of the correspondence. In its correspondence to the Ministry, FWFN requested consultation meetings and told the Ministry it would need until March 14 to provide a response to the Ministry's February 11, 2014 letter requesting any additional relevant information.

[64] On February 28, 2014, the Ministry wrote back to FWFN declining to defer its decision:

... Given the time and opportunities for consultation provided over the past several years, I am not prepared to continue to withhold making a decision on the REA application until after March 14, 2014.

... As outlined in our February 11 letter, we have, of course, considered and addressed, as appropriate and to the extent possible, the concerns that we have heard so far from FWFN. If we receive any additional information [from] FWFN prior to making a decision, it will certainly be considered.

Litigation by FWFN, Horizon's second *mandamus* application, continued review of the REA application, and the termination of the FIT contract

[65] On March 3, 2014, FWFN brought various legal proceedings, including:

- a. An application for judicial review of the Ministry's 2013 decision to deem Horizon's REA application complete;
- b. A motion seeking an interlocutory injunction to prohibit the Ministry from making a decision on Horizon's REA application until after the application for judicial review was heard; and
- c. An order prohibiting the Ministry from authorizing Horizon to access and develop FWFN's treaty lands for the project, through either approval of the project or lease of the lands, pending final resolution of the judicial proceedings.

- [66] FWFN sought to have the various proceedings joined in a single judicial review hearing.
- [67] On March 5, 2014, the Ministry advised Horizon by telephone that the Ministry was seeking legal advice about whether to make a decision on Horizon's REA application while FWFN's applications were before the courts.
- [68] On or around March 19, 2014, a representative of the Ministry advised counsel for FWFN that the Ministry would not approve the project pending the determination of FWFN's injunction proceedings, provided that FWFN proceeded in a reasonable time frame in respect of those proceedings.
- [69] On April 1, 2014, Horizon served an application for *mandamus* and an order directing the Director to issue the REA to Horizon. In the application, Horizon asserted that the duty to consult had been satisfied and that Horizon had a legitimate expectation, based on representations made by Ministry officials, that a decision on the REA would be made by October 23, 2013. The "only reason" why the Ministry had not issued its decision on the REA was "unrelated to Horizon, the *Environmental Protection Act* or the Regulation" and related "solely to proceedings commenced by" FWFN. By holding its decision on the REA "in abeyance until after the" FWFN injunction proceedings were addressed, the Ministry was behaving in a way "contrary to" its "obligations under the *Environmental Protection Act* to issue a decision and effectively amounts to the MOE enjoining itself from issuing the REA."
- [70] The Ministry continued its review of the REA application. This included reviewing FWFN's application materials.
- [71] On May 9, 2014, the Ministry asked the Ministry of Natural Resources and Forestry ("MNRF") to review the three moose reports, and asked Horizon and FWFN for more information on moose and other issues. The Ministry had first asked MNRF to review the moose studies in the fall of 2013, but MNRF had said at the time that it did not have the resources available to do so.
- [72] On May 16, 2014, the Divisional Court dismissed Horizon's *mandamus* application (2014 ONSC 3050). It rejected Horizon's claim that it had a legitimate expectation that a decision on its REA application would be made by the end of the six-month period, holding that the doctrine of legitimate expectations, where it applies, gives a right to participate in a

promised process before a decision is made. Here, Horizon was “not seeking participation rights.” Rather, Horizon “wish[ed] to impose a time limit on the Director to make a decision because of the service standard adopted by the Ministry. However, that standard does not give rise to any enforceable right, as it is not prescribed by a statute or regulation.” The Court further held that there was no representation by the Ministry that the decision would be made within six months; such a representation was required to ground a legitimate expectation.

- [73] The Court also rejected Horizon’s alternative claim that the Crown’s duty to consult was satisfied by February 11, 2014, and the Director was then obligated to make a decision on the application. February 11, 2014 is the date when the Ministry wrote to FWFN indicating, among other things, that it would decide on the REA application on or shortly after February 25 and that FWFN had to provide any additional relevant information it wished to by that date. In rejecting this alternative argument by Horizon, the Court held (at paras. 8-9):

It is for the Director to determine whether the Crown has met the constitutional duty to consult, not this Court at this stage of the decision-making process (see *Beckman v. Little Salcom/Carmacks First Nation*, [2010] 3 S.C.R. 103 at para. 45).

The Director did not proceed to render a decision in March 2014 because the respondent Fort William First Nation commenced applications for judicial review and sought interlocutory injunctive relief, all based on challenges to the adequacy of consultation. In light of these new circumstances, the Director decided to postpone the decision on the REA in the expectation that the interlocutory injunction motion would be heard in a timely manner. In doing so, the Director was not refusing to make a decision, nor did the Director take into account an irrelevant factor. Consequently, the applicants have failed to show that the Director refused to perform a public legal duty owed to them, and they are not entitled to an order of mandamus.

- [74] On June 6, 2014, six days before a scheduled provincial election, FWFN sought and received an adjournment of its injunction because it did not want a decision rendered on the REA application before the election.
- [75] Horizon asserts that FWFN’s opposition to the project “was a significant political issue”, that the decision was made by the government to postpone consideration of the REA application until after the election, and that the Ministry and the government knew that, given the terms of the FIT contract, this decision to delay would “certainly defeat” the project.
- [76] In support of this claim, Horizon points to statements made before the election by Bill Mauro, then Liberal Member of Provincial Parliament for Thunder Bay-Atikokan, the

riding in which the project would be located, and Jim Bradley, then Minister of the Environment. On June 2, 2014, MPP Mauro stated publicly that the Premier and the Ministry had confirmed to him that there would be no decision on Horizon's REA until FWFN's legal proceedings were heard. Two days later, Minister Bradley sent a letter to Mr. Mauro to "assure" him that, "consistent with the existing practice at the Ministry of the Environment, a re-elected Ontario Liberal government would not approve an REA related to" the project until a final determination of the judicial review proceedings was made. Minister Bradley also said that Ministry officials had told him that there were "a number of outstanding technical questions with regard to the various moose studies and related issues" and that no decision on the REA would be made until those issues were resolved following further consultation with FWFN, which the Ministry was seeking to schedule for the week of June 30, 2014.

- [77] The election was held on June 12, 2014. The Liberal government won a majority of seats in the legislature.
- [78] On June 23, 2014, FWFN's injunction application was argued. The decision was reserved.
- [79] In June and July 2014, further correspondence was exchanged between the Ministry and Horizon regarding the lease of the land where the project would be built, and between the Ministry and FWFN regarding the lease and the moose studies that had been conducted.
- [80] In early July, the Ministry of Natural Resources and Forestry completed its review of the moose reports and highlighted its concerns.
- [81] On July 18, 2014, the OPA notified Horizon that it was terminating Horizon's FIT contract, citing "the extensive delays experienced by this project, and that are continuing to be experienced". As noted above, Horizon was obligated to submit a request to the OPA for a Notice to Proceed with the project by July 17, 2014. Because the REA had not been granted by this time, Horizon had not submitted that request.
- [82] On July 24, 2014, Horizon asked the Ministry to continue reviewing its REA application despite the FIT contract termination. The Ministry advised that it would do so.
- [83] On July 25, 2014, the Ministry advised Horizon by email that it was making efforts to obtain information from FWFN about its concerns and that it needed additional information on the moose reports Horizon had submitted.
- [84] On July 28, 2014, the Divisional Court dismissed FWFN's applications (*Fort William First Nation v. Ontario (Ministry of Environment)*, 2014 ONSC 4474). The Court held that it was premature to rule on whether the Crown's duty to consult had been satisfied. There was no indication of what decision the Director might make, and if the Director refused the application, the issue of the adequacy of the consultation would be moot. If the Director granted the application with conditions, those conditions might be relevant to an assessment of whether FWFN's objections had been addressed. Without knowing the decision, the Court could not conclude that the requirements for injunctive relief had been made out (at paras. 17-21).

- [85] The Ministry continued its technical review of the REA application, even though the FIT contract had been cancelled. On July 31, 2014, it advised FWFN that it was doing so and proposed dates for a consultation meeting the following month. FWFN raised concerns that the Ministry was continuing with the review.
- [86] In August and September 2014, the Ministry and Horizon continued to correspond with one another about the consultation plan and the lease issue.
- [87] On October 15, 2014, the Ministry wrote to Horizon stating that it had questions about the moose studies Horizon had undertaken in 2011 and asking for additional information and clarification to understand the potential impacts to moose as a result of the project. It laid out several questions to which it requested Horizon's response by November 15, 2014.
- [88] On October 27, 2014, Horizon responded to the Ministry's October 15 letter, raising concerns with the technical review process. It did not provide any of the information the Ministry requested.
- [89] On November 10, 2014, the Ministry wrote to Horizon again, reiterating the need for information.
- [90] Through October and November 2014, the Ministry and FWFN were also communicating with one another about the lease and the moose issue.

The refusal of Horizon's REA application

- [91] On May 26, 2015, the Director emailed Horizon saying that the Ministry was still waiting for a response to its October 14, 2014 information request.
- [92] On September 4, 2015, Horizon filed a Statement of Claim.
- [93] On October 29, 2015, the Director issued a Notice of Refusal of Horizon's REA application, which stated in relevant part:

The reason for this refusal is as follows: Horizon Wind Inc. has not provided the ministry with certain specific information in response to the ministry's detailed inquiries on the potential impacts of the project on moose and moose habitat. The additional explanation and detail requested from Horizon Wind Inc. was determined to be necessary to the ministry's review, and in particular, was required for the ministry to be satisfied that the potential impacts of the project on moose, moose habitat and the traditional moose hunting practices of members of the Fort William First Nation had been adequately assessed and mitigated.

- [94] Horizon states that the Ministry's requests for moose-related information ignored that Horizon had fulfilled its delegated consultation obligation with FWFN; that Horizon had given moose-related reports and information in June 2011 and June 2013, after which the

Ministry had deemed the application complete; that the Ministry had not flagged any concerns about moose habitat in the summary it gave Horizon of FWFN concerns in September 2013; and that the Ministry had told FWFN the project would not affect moose habitat in February 2014, had told Horizon nothing further was required for the Ministry to issue the REA, and had told FWFN it was prepared to decide on the REA application by March 14, 2014. It takes the position that the Ministry's rejection of the REA on the basis that Horizon had not answered these information requests was disingenuous and intended to manufacture a substantive basis for refusing the REA. Horizon submits that the real reason for refusing the REA was the political unpopularity of the project.

- [95] On November 12, 2015, Horizon filed an appeal to the Environmental Review Tribunal. It withdrew the appeal on January 25, 2016.

Preliminary issues raised by Ontario

- [96] Before I consider Horizon's negligent misrepresentation claim, I consider several preliminary arguments raised by Ontario.

Inadequate pleading of misrepresentations

- [97] Ontario alleges that the negligent misrepresentations advanced by Horizon in its closing submissions are not pleaded in the Statement of Claim.
- [98] I do not agree. The Statement of Claim does articulate specific alleged misrepresentations by Ministry officials to Horizon representatives. In my assessment, any differences between the alleged misrepresentations as described in the Statement of Claim and those discussed in Horizon's submissions at trial are not substantive. They amount to a reformulation or reorganization of the existing allegations rather than the assertion of new ones.
- [99] Alleged misrepresentation 1, that the REA process was efficient and streamlined and would enable wind project proponents to get their REAs in a timely way, taking into account FIT deadlines, largely mirrors the allegation in the Statement of Claim that the Ministry represented that it would process all aspects of the REA application in a timely manner and would grant the REA with sufficient time to allow Horizon to comply with the terms of the FIT contract.
- [100] Alleged misrepresentations 2 and 3 – that the REA application would be considered fairly, on the merits, and without arbitrary interference, and that it would be granted without delay if the technical review found the requirements were met – are captured in the pleading in the Statement of Claim that the Ministry represented that (1) it would issue an REA if Horizon met all the technical and legal requirements and fulfilled the delegated consultation obligations as required, and (2) a decision on the REA application would not be “political” but rather would be “based on science and/or engineering”.
- [101] Alleged misrepresentation 4, that FWFN did not have a veto over the granting of an REA for the project, is expressly pleaded in the Statement of Claim.

Issue estoppel and *res judicata*

- [102] Ontario asserts that this action is barred by issue estoppel and *res judicata*, or is an abuse of process, in two ways.
- [103] First, Ontario states that in Horizon's 2014 application for *mandamus*, in which it sought, without success, to compel the Director to issue the REA to Horizon, Horizon asserted that it consulted adequately with FWFN and should have been granted an REA on its preferred timeline. The Divisional Court rejected these arguments. Ontario submits that Horizon is now improperly attempting to relitigate them, in an abuse of process (*Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141, at paras. 32, 34; *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 15, 23).
- [104] Ontario further states that Horizon did not appeal the Director's October 2015 decision to refuse the REA: it commenced an appeal but withdrew it. Nor did Horizon seek judicial review of the Director's decision. As such, the Director's decision is considered final and binding. Horizon is barred from now asserting that it was entitled to receive an REA on the basis of issue estoppel and abuse of process. Through this proceeding, it is advancing a collateral attack on a final decision (*Wood Producers' Association of Ontario v. Ontario*, 2005 CanLII 3235 (Ont. S.C.), at paras. 12, 15; *Public Utility Commission of the City of London v. Ontario*, [2001] OJ. No. 2139 (Div. Ct.), at paras. 1-2).
- [105] I do not agree that this proceeding is abusive or barred by issue estoppel or *res judicata*.
- [106] Issue estoppel forms one strand of the doctrine of *res judicata*, which is concerned with finality in litigation and the principle that no one should have to defend the same action twice (*Canadian National Railway Company v. The Corporation of the City of Kitchener*, 2025 ONSC 73, at para. 21). It arises where a court of competent jurisdiction has made a final and direct determination as between the parties and their privies in respect of a right, question, or fact in issue (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 24).
- [107] For issue estoppel to apply, it must be shown that the issue to be estopped is the same as the one decided in the prior proceeding, the prior decision was final, and the parties in both proceedings were the same or their privies (*C.U.P.E.*, at para. 23). The question must have been actually litigated and determined in the prior proceeding and its determination must have been necessary to the result (*Pennyfeather v. Timminco Limited*, 2016 ONSC 3124, at para. 60).
- [108] The 2014 *mandamus* application raised a different question for the court than the one raised here. The *mandamus* application was concerned with whether Horizon had a legitimate expectation that a decision on its REA application would be rendered by October 2013, such that the Ministry had a duty to render the decision by that date. Here, the issue is not whether Horizon had such a legitimate expectation, or even, more broadly, whether the REA should have been granted. Rather, the question is whether the Ministry's agents made

negligent misrepresentations to Horizon in relation to the REA process on which Horizon relied to its detriment. While much time was spent at trial on the Director’s decision to not approve the application, I am of the view, as discussed below, that the appropriateness or correctness of that decision is not relevant to the negligent misrepresentation claim and is therefore not an issue that I am to determine here.

- [109] Nor do I consider this proceeding to be an abuse of process.
- [110] The doctrine of abuse of process is flexible. It is intended to preclude proceedings that are “unfair to the point that they are contrary to the interests of justice” (*C.U.P.E.*, at para. 35; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at para. 39, quoting *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616).
- [111] An abuse of process may arise where a claim effectively seeks to reopen or relitigate factual findings that have already been made (*Regan v. Esterbauer et al*, 2023 ONSC 2905, at para. 75; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, 500 D.L.R. (4th) 279, at para. 35), or a claim arises “from the same relationships and subject matter that have already been dealt with” (*Winter v. Sherman Estate*, 2018 ONCA 703, 42 E.T.R. (4th) 181, at para. 8). Here, “relitigation” is to be understood as something broader than issue estoppel or *res judicata*, although it engages the same underlying principles, including judicial economy, consistency, finality and the integrity of the administration of justice (*C.U.P.E.*, at paras. 37-38),
- [112] I am unable to identify any factual findings made by the Divisional Court that I am now being asked to litigate. Nor does Ontario clearly identify any such factual findings. In its reasons, the Divisional Court focused on a single piece of correspondence from the Ministry. The factual findings Horizon asks me to make here are different and far greater in number: they relate to individual alleged representations by the Ministry to Horizon over a period of time, the reliance allegedly placed by Horizon on those representations, and the harm allegedly experienced by Horizon as a result.
- [113] Nor am I of the view that the issues before me have already been dealt with more generally through the *mandamus* application, for the reasons above.
- [114] For similar reasons, I do not agree that Horizon’s decision to abandon its appeal of the Director’s decision, and to not seek a judicial review of the decision, preclude this action based on abuse of process concerns. I am of the view that the correctness of the Director’s decision not to grant the REA is not at issue before me, because it is not relevant to the negligent misrepresentation claim. The *mandamus* application sought administrative law relief, while this action seeks damages in tort for negligent misrepresentation. Further, any arguments that might have been made in an application for judicial review, such as a claim that the Director exceeded his jurisdiction, are likewise not before me, because they are not relevant to the negligent misrepresentation claim.

The release

- [115] As discussed above, in 2013, Horizon commenced an application for *mandamus*, seeking to compel the Director to deem Horizon's REA application complete. The parties settled the application, Horizon provided a release to Ontario, and, on April 23, 2013, the Ministry deemed the application complete.
- [116] The release entered into by Horizon and Ontario provides that, "[i]n exchange for [Ontario's] agreement to confirm that [Horizon's] renewable energy application is deemed complete and to post the application on the environmental registry, [Horizon] agree[s] to abandon without costs" the application for *mandamus* and to "release" Ontario and its employees and agents from any claims it had "or may hereafter have against [Ontario] by reason of any act, cause, matter or thing howsoever arising, which heretofore may have been or may hereafter be sustained by [Horizon] relating to, or arising from or out of, or in connection with the matters in dispute" in the application.
- [117] Ontario asserts that the release the parties entered into expressly releases Ontario and its servants from any claims relating to the REA review process up to the date the release was signed, April 23, 2013. As such, the release precludes any claims arising from the discussions between Ministry officials and Horizon that took place up to the date of the release.
- [118] I am unable to agree.
- [119] Releases are to be interpreted like other contracts and are not subject to any special interpretive rules. I am to give the words of the release at issue "their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time of contract formation." To the extent that the ordinary meaning of the words and the surrounding circumstances are in tension with one another, I am to "decide whether to rely on the surrounding circumstances to refine the meaning of the words, or whether doing so would impermissibly overwhelm the words of the agreements, in which case the words must override". Releases are often worded broadly, and a literal interpretation of such broad language "could prevent the releasor from suing the releasee for any reason, forever." However, "the circumstances may ... indicate that such extreme consequences are not what the parties objectively intended." A release "must be considered in the context of the dispute" whose settlement gave rise to the signing of the release; such "context can serve as a limiting factor to the breadth of wording found in a release" (*Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at paras. 34-36, citing *Sattva*, at paras. 47-48, 57).
- [120] Applying these principles here, I note, first, that the release is worded expansively to release Ontario from any current or future claims "by reason of any act, cause, matter or thing ... sustained by [Horizon] relating to, or arising from or out of, or in connection with the matters in dispute" in the application. The matters in dispute in the application were, broadly speaking, the Ministry's interactions with Horizon before the REA application was deemed complete, and, more narrowly, the Ministry's failure to deem the application

complete by a particular date. As such, the language of the release indicates that it applies to any complaints Horizon had or might have in the future have relating to those interactions with the Ministry and that conduct by it.

- [121] However, reading this contractual language in the context of the surrounding circumstances known to the parties when the release was signed in April 2013, I am of the view that such an expansive reading is not tenable. Rather, this language must be read more narrowly so as to not extend the release to any and all issues associated with the dealings between Horizon and the Ministry prior to April 23, 2013. At the time the release was signed, the issue in dispute was the Ministry deeming Horizon's REA application to be complete. The technical review had not begun. The ultimate decision to not grant the REA was years away. Neither party had any idea of how things would unfold. Neither could have anticipated the protracted and often contentious course of events that would follow. Neither could have known whether, and how, Horizon might in the future rely on representations made by the Ministry before April 2013. The cause of action of negligent misrepresentation may therefore not have crystallized.
- [122] I accordingly find that the release, or reliance by the plaintiffs on any interactions or representations by the Ministry that pre-date the signing of the release, cannot be reasonably construed as precluding this action. In my view, Ontario espouses an unreasonable interpretation of the release that, if accepted, would have the effect of disincentivizing litigants from settling their disputes.

The claim of negligent misrepresentation

The elements of negligent misrepresentation

- [123] The elements of the tort of negligent misrepresentation are well established. They were articulated by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 877, at p. 110:
- a. the existence of a duty of care based on a "special relationship";
 - b. an untrue, inaccurate, or misleading representation;
 - c. negligence in making the representation;
 - d. reasonable reliance by the party to whom the representation was made; and
 - e. damages resulting from the representation.

Crown liability

- [124] I pause to comment on the nature of Crown liability in this proceeding.
- [125] Horizon's position appears to be predicated on the idea that the Crown can be directly liable in tort. That view is not correct at law. At the time this action was commenced in 2015, it

was governed by the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, which provided that the Crown could only be sued in tort to the extent that the tort claim may be advanced against a Crown servant or agent for whom the Crown is vicariously liable. Section 5 of the Act provided in relevant part:

5 (1) Except as otherwise provided in this Act, and despite section 71 of the Legislation Act, 2006, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

- (a) in respect of a tort committed by any of its servants or agents;
- (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
- (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Where proceedings in tort lie

(2) No proceeding shall be brought against the Crown under clause (1) (a) in respect of an act or omission of a servant or agent of the Crown unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent or the personal representative of the servant or agent.

[126] Pursuant to this provision and its successor provision in the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17, the courts have consistently held that the Crown is immune from direct liability in tort. It may only be found liable in tort to the extent that a proceeding in tort could be brought against one of its officers, employees, or agents in respect of an act or omission by that individual (*see Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, at paras. 142-45). The Court of Appeal for Ontario has recently described the doctrine as follows (*Ontario v. Madan*, 2023 ONCA 18, at para. 52):

Under the Act, Ontario is liable for torts committed by an officer, employee or agent of the Crown and Ontario's liability in tort extends only to acts or omissions attributable to an officer, employee or agent of the Crown. Finally, the Crown is liable in tort for an act or omission, only if a proceeding in tort in respect of that act or omission could be brought against an officer, employee or agent of the Crown. Ontario's tort liability is vicarious and depends on the plaintiff's ability to prove the tortious conduct or omission of an officer, employee or agent of Ontario.

- [127] As such, Horizon must assert, and establish, liability by individual and identified officers, employees, or agents of the Crown in order to successfully demonstrate negligent misrepresentation. It must show that a specific Ministry official or officials negligently made an untrue representation or representations on which Horizon reasonably relied to its detriment, and must show that damages flow from that reliance.
- [128] Ontario asserts that Horizon has failed to assert liability as against individual, specific Ministry officials, instead framing its claim as against Ontario or the Ministry broadly. While I agree that Horizon has generally worded its claim that way, in my view, reading its pleadings and submissions as a whole, Horizon does in fact identify individual Ministry employees who it says made the alleged misrepresentations at issue. I discuss this further below.

The relevance of FWFN consultation

- [129] Before assessing whether the elements of negligent misrepresentation are made out on the record before me, I first consider what importance, if any, is to be given to the extensive evidence at trial, summarized above, regarding Horizon's efforts at consulting with FWFN about the project.
- [130] Horizon states that its consultation efforts with FWFN were sufficient so far as the REA process requirements are concerned, such that Horizon should have been granted an REA on its preferred timeline. Horizon says it satisfied its delegated duty to consult in three ways. First, commencing in 2005 and up until November 2013, it satisfied its duty by "making exhaustive and repeated communications to describe the Project details, sharing many technical reports, listening to and accommodating all concerns of the FWFN and other First Nations communities, and continuing to attempt to meet, listen and discuss all concerns, notwithstanding the repeated refusal of the FWFN to engage in consultation". Second, Ontario "was kept apprised of and advised Horizon on" these efforts. Third, by October 15, 2013, Ministry staff were of the view, expressed in the first Decision Document, that the REA should be approved with a condition requiring "continued consultation with the First Nations" potentially affected by the project. Horizon's position is that, in light of these three factors, the Ministry's review process was improper and/or negligent, and gave rise to the wrong outcome.
- [131] In my view, the claim that the Ministry's review process was improper and/or negligent because Horizon fulfilled any consultation obligations it owed is not properly before me. As discussed above, the negligent misrepresentation claim, which is now the only claim advanced in this action, requires Horizon to establish that the Ministry owed it a duty of care, and that it breached that duty by making negligent misrepresentations on which Horizon relied, to its detriment. The negligent misrepresentation claim does not turn on whether Horizon satisfied any duty to consult with FWFN and accordingly should have been granted the REA.
- [132] I say this for several reasons.

- [133] First, as discussed above, as a matter of law, while aspects of the Crown's duty to consult obligations were properly delegated to Horizon for the purpose of meeting its regulatory obligations, whether Horizon adequately consulted with FWFN is a separate issue from whether the Crown satisfied its constitutional duty to consult. Stated differently, the adequacy of Horizon's consultations with FWFN is not dispositive of the adequacy of the Crown's consultations with FWFN. Consequently, it is not, in its own right, dispositive of whether the REA should have been granted.
- [134] Moreover, the crux of the issue before me is whether the Ministry had a duty of care to Horizon and whether it breached that duty of care. Whether Horizon consulted sufficiently with FWFN is not relevant to my consideration of that issue. Horizon's satisfaction of any obligations toward an affected third party have nothing to do with whether Ministry representatives made negligent misrepresentations to Horizon, on which Horizon relied to its detriment.
- [135] Relatedly, the negligent misrepresentation claim does not encompass consideration of whether the Ministry should have granted the REA to Horizon. Presumably, if the Ministry had granted the REA, then Horizon would not have detrimentally relied on any alleged negligent misrepresentations by the Ministry. The negligent misrepresentation claim would therefore not have arisen. But whether the Ministry ought to have granted the REA, or whether the merits of Horizon's application warranted approval, is beside the point. Perhaps that issue would have been relevant to the misfeasance in public office claim, to the extent that Horizon wished to demonstrate that the Ministry conducted its REA application review so improperly as to have committed misfeasance. But the issue before me is whether the Ministry made actionable negligent misrepresentations to Horizon, and in my view, whether the REA should have been granted is not relevant to that issue.
- [136] In any event, even if the issue of Horizon's consultations with FWFN were properly before me, I cannot imagine how I could make a finding on it without the participation of, and evidence from, FWFN. It would be improper for me to do so, based on both basic procedural fairness concerns and the longstanding principle that findings on the adequacy of consultation ought not to be made in the absence of the affected First Nation or government (*Northern Superior Resources Inc. v Ontario*, 2016 ONSC 3161, at para. 50; *Behn*, at para. 31). Horizon's claim that its consultations with FWFN were adequate is an issue on which an obviously interested party, FWFN, has not had the chance to respond to in these proceedings.
- [137] I therefore do not consider or make any findings on whether or to what extent Horizon satisfied its duty to consult FWFN. I need not, and should not, do so.
- [138] FWFN's involvement may be relevant to the allegation, discussed below, that the Ministry negligently misrepresented to Horizon that FWFN would not be granted a "veto" over the REA application. To accept this claim, I would need to find as a factual matter that FWFN was granted such a "veto", rendering the Ministry's statements on this topic actual misrepresentations. I discuss this issue below.

- [139] Finally, I acknowledge that Horizon argues that the Director did not accept the REA application because of political pressures flowing from FWFN's opposition to the project. As discussed below, I find that there is no evidence that the Director succumbed to political pressures when making his decision. Had I found the opposite, then evidence regarding Horizon's ongoing consultations with FWFN may have been relevant, because it might have established that, despite Horizon's best efforts to consult with FWFN, the project had little prospect of success because it was unpopular. But given my finding that there was no such political interference, such evidence is not relevant to my analysis.

Whether the Ministry's representatives owed Horizon a duty of care

- [140] As a foundational matter, Horizon must establish that Ontario's representatives, namely the Ministry employees who interacted with Horizon, owed a duty of care toward Horizon in respect of the representations they made about the REA process, review, criteria, and issuance.
- [141] The Court of Appeal for Ontario considered the duty of care owed by a regulator in *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, 162 O.R. (3d) 532. In *Aylmer*, officials from the Ontario Ministry of Agriculture, Food and Rural Affairs issued a recall of the plaintiff's meat products and took control of an abattoir Aylmer owned and operated. When control of the abattoir was returned to Aylmer after 19 months, the business was destroyed and the abattoir and land beneath it were sold to pay outstanding taxes. Aylmer and some of its principals pleaded guilty to selling uninspected meat and selling meat in bags with unauthorized federal meat inspection legends. Aylmer commenced litigation for negligence, trespass, and conversion, arguing on appeal that the government had a duty to act reasonably in exercising its regulatory responsibilities in suspending Aylmer's abattoir license, occupying its plant, and storing and destroying the detained meat.
- [142] The Court held that when the actions of a public body adversely affect the private interests of a regulated entity, for there to be a private law duty of care in negligence, three requirements must be met (at paras. 22 and 29, citing various authorities including *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 and *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83). First, the harm complained of must have been reasonably foreseeable. Second, there must have been sufficient proximity between the plaintiff and the governmental defendant such that it would be fair and just to impose a duty of care on the defendant – that is, “to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests”. Third, there must be no residual policy reasons for declining to impose such a duty. The second and third of these requirements comprise what is commonly called the two-stage *Anns/Cooper* analysis for imposing a duty of care.
- [143] The same analysis is applied to determine if there is a duty of care where the loss in question is purely economic (*Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at paras. 54-55).

- [144] This court recently applied the test set forth in *Aylmer* to consider whether a duty of care existed between a government body and a private claimant, in *Quadrangle v. Attorney General of Canada* (2025 ONSC 4526). *Quadrangle* involved allegations of improper conduct by the federal government in relation to the regulation of the transfer of wireless spectrum licenses. In 2008, the government ran an auction for licenses for various bands within the wireless spectrum. In an effort to attract new entrants into the cellular telephone market, the government set aside certain of the auctioned licenses for new entrants, and made them unavailable to market incumbents. The terms of the licenses issued to new entrants provided that, after five years had passed, those licenses could be transferred to incumbents. The record established that this transferability provision was intended by the government to be, and in fact was, an incentive to new market entrants and those capitalizing them. But in 2013, Industry Canada issued a policy providing that the licenses would not become transferable to incumbents after five years. Mobilicity, a new entrant into the cellular telephone market that successfully bid on several spectrum licenses in the 2008 auction, faced financial losses after the policy was enacted. It eventually sought insolvency protection. The plaintiffs, shareholders of Mobilicity, sued the government of Canada, seeking the return of their investment and lost profits. Osborne J. (as he then was), allowed the action, applying the test set forth in *Aylmer* and finding, *inter alia*, that the government owed and had breached a duty of care to the plaintiffs.
- [145] Where the loss is alleged to flow from negligent misrepresentation, the test in *Aylmer* also applies (*Darmar*, at paras. 54-55). A special relationship giving rise to a duty of care will be found to exist “where the party making the representation should reasonably foresee that his statements will be relied upon by the plaintiff and reliance by the latter would be reasonable in the circumstances” (*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at pp. 186-188, 200 and *Haig v. Bamford et al.*, [1977] 1 S.C.R. 466). The existence of a proximate relationship is not sufficient on its own. Rather, the scope of that relationship and the purpose for which the representation is provided must be taken into account (*Darmar*, at para. 60; see also *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at paras. 30-31).

...In cases of pure economic loss arising from negligent misrepresentation, two factors are determinative in the proximity analysis: the defendant’s undertaking and the plaintiff’s reliance. Where the defendant undertakes to provide a representation in circumstances that invite the plaintiff’s reasonable reliance, the defendant becomes obligated to take reasonable care and the plaintiff has a right to rely on the defendant’s undertaking to do so.

Rights, like duties, however, are not limitless. Any reliance which falls outside the scope of the defendant’s undertaking of responsibility – that is, of the purpose for which the representation was made – necessarily falls outside the scope of the proximate relationship and therefore of the defendant’s duty of care. This principle, also referred to as the “end and aim” rule, properly limits liability on the basis that the defendant cannot be liable for a risk of

injury against which he did not undertake to protect. [Citations omitted.]

- [146] Applying these principles, I first consider whether the harm Horizon complains of was reasonably foreseeable. That harm is economic in nature, and stems from the loss of the FIT contract and ensuing damages. Those damages consist of either the lost investments in the project or the lost profits the project would have generated upon completion.
- [147] I am of the view that such harm was clearly foreseeable.
- [148] The Ministry's representatives were aware of the importance of the FIT contract to Horizon, and knew Horizon would lose the FIT contract if it could not obtain an REA by July 17, 2014. Horizon had communicated this information to the Ministry, including in writing. Ministry witnesses agreed that the FIT program was important for attracting renewable energy investment. Ian Parrott, the Manager of Approvals of the Ministry's Environmental Approvals Branch until November 2013 and its Acting Director until mid-February 2014, agreed in cross-examination that the government's FIT program was intended to provide financial certainty for project proponents by providing a guaranteed revenue stream for 20 years, making it easier to obtain project financing. He agreed that he and others in the Ministry knew that Horizon had to obtain the REA by a certain date, failing which the FIT contract could be terminated. Ms. Dumais, for her part, testified that she was aware of the NTP deadlines governing Horizon. She also recalled Horizon telling her that the consequences of not getting an REA in a timely way would be disastrous for their project. Ms. Raetsen, too, understood that the OPA could terminate the FIT contract if Horizon did not get the REA in time, and that that would effectively end the project. She was aware of the Notice to Proceed date by which they needed the REA.
- [149] The Ministry representatives would also have reasonably foreseen that Horizon would lose money if it lost the FIT contract. As detailed above, the Ministry was aware that Horizon had done extensive pre-submission work on the project, at significant cost, and was aware that Horizon sought to build the project for the purpose of earning money under the beneficial pricing terms of the FIT contract.
- [150] Next, I consider the first branch of the *Anns/Cooper* analysis: whether there was sufficient proximity between Horizon and the Ministry's representatives such that it would be fair and just to impose a duty of care on the representatives. Per *Hercules Management*, the issue is whether the Ministry's representatives should have reasonably foreseen that their statements would be relied upon by Horizon and whether Horizon's reliance would have been reasonable.
- [151] There is no "definitive list" of factors I am to assess when considering whether a relationship of sufficient proximity exists between the parties (*Syl Apps*, at para. 30). The required degree of proximity may arise from "a series of specific interactions between the government and the claimant", whereby the government, through its conduct, enters into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care; from legislation, expressly or by implication; or by a combination of the two

(*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 43-46; *Quadrangle*, at para. 159). In a new situation, the court is to consider proximity by “evaluat[ing] the closeness of the relationship” having regard to the “expectations, representations, reliance and the property or other interests involved”, and asking “whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant” (*Cooper*, at para. 34, cited in *Quadrangle*, at para. 29). Direct interactions between the government and private individuals are a hallmark of proximity (*Imperial Tobacco*, at paras. 53-54). Specific representations made by a regulator to an individual, and reliance by the individual on the representations, will “go a long way toward establishing a prima facie duty of care” (*Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 115, cited in *Quadrangle*, at para. 183).

- [152] I agree with Ontario that the applicable legislation does not give rise to a duty of care. In *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2012 ONSC 5619, this court held (at paras. 56-57) that the regulatory scheme for the approval, construction, and operation of a wind farm under the *Environmental Protection Act* does not create a private law duty of care on the part of the Crown toward project proponents. To the contrary, the court held, “the overall thrust of the regulatory scheme ... is the promotion of renewable energy in the public interest” (*Trillium Power*, at para. 57; see also *BM v. Ontario*, 2025 ONSC 4575, at para. 110). On appeal, the Court of Appeal held the claim for negligent misrepresentation was “properly dismissed” by the court below, “for the reasons” given by the judge in the court below (2013 ONCA 683, at para. 6).
- [153] However, I do find, based on the expectations, reliance, and interests in the relationship, that the relationship between the Ministry’s representatives and Horizon had the requisite proximity to give rise to a duty of care. In *Quadrangle*, Osborne J. found that “the relationship and interactions between [them] in the operation of the relevant statutory scheme ... was sufficiently proximate so as to provide the basis for a duty of care” (at para. 147). I make a similar finding here in respect of the Ministry and Horizon.
- [154] The Ministry plays an essential role in the Renewable Energy Program in Ontario. The Ministry has authority over, and administers, the REA process, pursuant to the *Environmental Protection Act* and the Regulation. It reviews each proponent’s REA application. It decides whether to deem applications complete, receives and provides feedback on the applications, conducts and stewards them through technical review, and issues the ultimate decision on the application. It is the entity responsible for REAs.
- [155] The Ministry’s role had an essential proponent-facing aspect. The Ministry’s representatives carried out that role. The evidence of Ms. Dumais was that the Renewable Energy Program was intended to “provide a one-window approach to project proponents to provincial approvals. And that one window of coordination resided in the Ministry of the Environment, because ultimately we were the ones responsible for issuing the Renewable Energy Approval. And so project proponents knew to come to the Ministry to learn all about the requirements for the Renewable Energy Approval, even though some of those requirements” came from other ministries. Mr. Parrott echoed this view. Ms. Dumais further said the Ministry tried to coordinate and time the requirements of various

provincial, municipal, and federal agencies together “so that a project proponent had a good understanding or a certain amount of certainty as to when all these approvals would be reached, when they would be issued and when they could proceed with their project.”

- [156] The Ministry’s efforts were intended to further a policy imperative. They were intended to make the process more streamlined and create important certainty for renewable energy project proponents. The evidence of Mr. Parrott was that he understood that the REA process introduced in Ontario via Regulation 359 was intended to offer a “streamlined approval process” and to give “developers greater certainty” that their projects could move through the process without getting bogged down in red tape. Ms. Dumais echoed this evidence.
- [157] The Ministry held itself out as, and functioned as, an information resource regarding REA requirements. Ms. Dumais’ evidence, summarized above, makes this clear. So too does her evidence that the Ministry representatives’ meetings with Horizon “were simply to provide Horizon with the best guidance that we could to help them prepare an REA application for approval.” The record reveals numerous occasions during which the Ministry’s representatives provided guidance to Horizon which Horizon then implemented. As but two examples, Ms. Nguyen gave evidence that Horizon prepared a consultation plan in respect of FWFN “under the guidance and direction of the Ministry”. Horizon removed its plan to run electrical taplines across FWFN’s reserve lands in response to preliminary screening results provided by the Ministry to Horizon in September 2012.
- [158] Drawing on the language of the Court of Appeal in *Taylor*, it is uncontroverted that the Ministry’s representatives made specific representations to Horizon and Horizon relied on those representations.
- [159] Project proponents are also reliant on the Ministry to deal with their REA applications with sufficient speed as to not jeopardize their FIT contracts. Considerable trial evidence was adduced on the importance of FIT contracts to renewable energy project viability and the requirement to have an REA to move forward with a FIT contract with the OPA. There was also evidence about how the REA program and FIT contract program were two sides of the same coin, both formulated to encourage renewable energy project development, construction, and funding. Importantly, the Ministry representatives were well aware of the relationship of the REA program to the FIT contract program, and of the deadlines imposed by the OPA in relation to FIT contracts and the relationship of those deadlines to REA. Thus, Ms. Dumais agreed that the purpose of the *Green Energy Act* regulations was to facilitate investment and production in the renewable energy sector, and that FIT contracts would provide rates that were high enough to enable companies like Horizon to raise enough capital to build and run renewable energy projects profitably. She agreed that without the FIT program, investors would not have a guaranteed revenue source and would therefore not invest in renewable energy projects. Mr. Parrott, too, agreed that FIT contracts were necessary to make renewable energy projects economically feasible.
- [160] Horizon, much like the plaintiffs in *Quadrangle* (at para. 161), was not a member of the general public: it was the very kind of party that Ontario was trying to attract to facilitate

the development and construction of renewable energy projects. It had expended significant resources, even before submitting its first REA application, in the hope of obtaining regulatory approval to proceed with the project. I do not find that Horizon was “courted, induced, and encouraged” by the government as the plaintiffs were in *Quadrangle* (at para. 188), and in my view that is an important distinction. In my view, a duty of care will more readily arise where a regulated entity is courted in the first place, and encouraged by government representatives to take certain steps, as was the case in *Quadrangle*, than when they initiate the relationship with, and merely receive information from, the government, as was the case here. Nonetheless, I am of the view, and this was not seriously contested before me, that Horizon was the type of entity that the Renewable Energy Program sought to attract and with whom the Ministry intended to work to facilitate the REA process.

- [161] There was also very clearly a series of interactions between the Ministry’s representatives and Horizon. This was not a case like *Wu v. Vancouver (City)*, 2019 BCCA 23, in which the plaintiff and the defendant regulator interacted only at arms length through a formal regulatory process. To the contrary, the record reflects that Horizon and various Ministry officials communicated regularly, over several years, about the REA process and Horizon’s REA application. These communications began before Horizon submitted its first REA application in February 2011 and continued as Horizon submitted its subsequent applications in July 2012 and October 2012, after its application was deemed complete in April 2013, and up until early 2014, when the Ministry told Horizon the technical review would be completed soon. By March and April 2014, FWFN and Horizon had commenced their respective litigation proceedings, but prior to that time, there was ongoing, substantive communication between the Ministry and Horizon regarding the REA application and its technical review.
- [162] In my view, in light of this evidence regarding the interactions and relationship between the Ministry’s representatives and Horizon, and Horizon’s reliance on the Ministry’s representatives, there was sufficient proximity between them to give rise to a duty of care. The Ministry representatives played a central role in the Renewable Energy Program. That role was, in meaningful part, proponent-facing and intended to provide proponents with information on REA requirements. They furthered the Renewable Energy Program’s stated goals of streamlining the REA process and giving project proponents more certainty. These objectives were made manifest in their frequent interactions, over a period of many years, with Horizon: the Ministry’s representatives provided Horizon with a “one window approach” to REA; they sought to provide Horizon with “the best guidance that [they] could to help them prepare an REA application for approval” and indeed they did provide advice on a range of issues relating to the REA process, which advice Horizon implemented. Moreover, they knew about the FIT contract-related deadlines faced by Horizon and the implications for Horizon if it could not receive an REA in that time. I am satisfied that this branch of the test is satisfied.
- [163] Ontario asserts that the evidence does not establish any duty of care between any Ministry officials and Horizon. It says that the interactions on which Horizon relies to show a duty of care took place primarily between Ms. Dumais and Horizon, prior to the REA

application being deemed complete, and were focused on the issue of what Horizon needed to do to complete its application so that it could move on to the more substantive technical review. Ontario says it was not foreseeable that Horizon would purport to rely on those discussions for any other purpose. As such, if there was a duty of care, which Ontario denies, it relates only to information provided by the Ministry officials about what the Ministry required the REA application to contain in order for it to be deemed complete. There was no duty of care with respect to the subsequent technical review.

[164] I do not agree.

[165] As the chronology makes clear, many of the discussions between Ministry representatives and Horizon took place after the application was “deemed complete” in April 2013. These include, as examples, the following:

- a. Doris Dumais’ communications with Horizon about the REA application being deemed complete and its six month service standard for the technical review, on April 23, 2013;
- b. Another Ministry representative’s email to Ms. Nguyen about how the Ministry was considering FWFN’s meeting request to ensure that project-related concerns had been adequately addressed and the Crown’s duty to consult met, on October 23, 2013;
- c. Ian Parrott’s email to Mr. Zwig saying the Ministry had received substantial information at its meeting with FWFN, which it was reviewing, on December 11, 2013;
- d. Discussions between another Ministry representative and Horizon to the effect that the Ministry did not need further information from Horizon and would finalize the REA in a couple of weeks, on January 8 and 10, 2014;
- e. Communications between Vic Schroter and various other Ministry representatives and Horizon regarding the lease and moose studies, in June and July 2014;
- f. The request from Ministry representatives for more information on the moose studies from Horizon, on July 25, 2014; and
- g. Continued correspondence between a Ministry representative and Horizon about the consultation plan and the lease issue, in August and September 2014.

[166] Additionally, even before the application was “deemed complete”, Ministry representatives allegedly made statements to Horizon about how the technical review would unfold. For example, during meetings in 2011 and 2012, Ministry representatives are alleged to have misrepresented to Horizon that there would be no political interference with the project and the decision on the REA application would be based on the technical review, that the technical review would take six months at most, and that FWFN would not have a veto over the project. In my view, it was reasonably foreseeable that Horizon would

rely on those discussions to gain an understanding of the technical review stage of the REA application, even if the technical review had not yet begun. I do not accept that Horizon should have discounted what Ms. Dumais or anyone else told them about the technical review simply because the technical review had not yet begun.

- [167] Finally, I consider the second branch of the *Anns/Cooper* analysis: whether there is a residual policy reason to decline to impose a duty of care on the Ministry. Policy concerns raised at this stage of the analysis “must be more than speculative; a real potential for negative consequences must be apparent” (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 48). In this case, an important policy consideration is whether finding that the government defendant owed a duty of care “would trigger a conflict with its public duty” (*Aylmer*, at para. 33). The way in which the government defendant’s public duty is defined is important at this stage of analysis: public officials are to carry out their duties in accordance with the law, including tort law, and the courts have found that in certain circumstances, imposing a duty of care on a public official may not undermine their public duty and may even complement it (see, for example, *Hill*, at para. 56; and *Fullowka v. Pinkerton’s of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at paras. 72-73).
- [168] In the course of this analysis, the court is to decide whether the government action at issue is a policy or operational decision, as at common law, public authorities are immune from negligence claims for “true policy decisions” (*Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at para. 59). This is predicated on the principle that the Crown “is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions”; “[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors” (*Just v. British Columbia*, [1989] 2 S.C.R. 1228, at p. 1240).
- [169] Applying these principles here, I identify no residual policy reasons to decline to impose a duty of care on the Ministry.
- [170] The Ministry’s representations are properly construed as operational. They were made in the course of guiding Horizon, a renewable energy project proponent, on how to meet the REA application requirements set forth in the *Environmental Protection Act* and Regulation.
- [171] Nor do I see any basis for concluding that imposing a duty to make accurate representations regarding the REA process would conflict with the Ministry’s public duty as the regulator of renewable energy in the public interest. To the contrary, it might complement it, by ensuring that the public is better served and that project proponents receive accurate information that helps them understand the REA process, efficiently and effectively submit REA applications, and properly gauge likely delay and/or risk in pursuing REAs.
- [172] I acknowledge that in cases about pure economic loss, like this one, the prospect of opening the government up to indeterminate liability has often led the courts to find that there is no

duty of care under this stage of the *Anns/Cooper* analysis (per the Supreme Court in *Fallowka*, at para. 70). However, in my view, that prospect does not arise here. This is because, as discussed above, the government of Ontario cannot itself be held liable for making misrepresentations. Rather, this case is about a handful of Ministry employees who are alleged to have made misrepresentations during an involved, closely interactive process that lasted over the course of many years.

- [173] For the reasons above, I am satisfied that the Ministry representatives had a duty of care to Horizon to make accurate representations regarding the REA process.

Whether the Ministry made untrue, inaccurate, or misleading representations

- [174] A public authority will be liable for negligent misrepresentation on the same basis as a private actor (*Gauthier v. Canada (Attorney General)*, 185 D.L.R. (4th) 660 (N.B.C.A.), at para. 17; *Quadrangle*, at para. 500). When it makes a statement that implies a commitment about the way it will deal with private parties or the way in which a regulated entity will be treated by the government, an action for negligent misrepresentation will lie where that statement is incorrect and made without due care (*Quadrangle*, at para. 499).
- [175] Horizon identifies four alleged misrepresentations on the part of the Ministry. I consider each in turn below.

Misrepresentation 1

- [176] Horizon alleges that the Ministry misrepresented to it that the REA process “was an efficient, fair and streamlined regulatory process that would enable wind proponents to get the REA in a timely way, taking into account the feed-in-tariff ... deadlines”. To establish liability, Horizon must prove a negligent misrepresentation on the part of an individual Ministry employee for whom Ontario is vicariously liable. As such, Horizon must establish that a Ministry employee made a representation to Horizon to this effect.
- [177] I do not find that any Ministry employee made any such representation.
- [178] The only actual representation to this effect identified by Horizon consists of a Province of Ontario press release entitled “Green Energy Act Will Attract Investment, Create Jobs”, dated September 24, 2009. I agree with Horizon that the press release represented that the REA process would be streamlined and efficient, that investors could trust and rely on the REA process, and that the REA process would be subject to a 6-month service guarantee. However, these representations were all articulated in a press release issued by the provincial government itself. As discussed above, the Crown cannot be directly liable in tort. These representations therefore cannot, by law, attract tort liability.
- [179] Horizon asserts that Ms. Dumais represented that the technical review would be completed within six months of Horizon’s REA application being deemed complete. In support of this claim, it points to typed notes Ms. Nguyen prepared during Horizon’s meetings with Ministry officials, including their meeting with Ms. Dumais on March 16, 2011. Those notes indicate that Ms. Dumais said that once the application was deemed complete, the

Ministry would prioritize reviewing the REA application, and that waiting six months for approval was a “worse [sic] case” scenario.

- [180] I view these notes with some circumspection. Ms. Nguyen acknowledged that she updated the notes in 2014, well after many of the meetings took place. They were not contemporaneously made. No evidence was provided as to what the 2014 updates entailed, either generally or with reference to specific notes.
- [181] Viewing the record as a whole, I find that the suggestion in the notes that Ms. Dumais said at the March 16, 2011 meeting that the technical review would be prioritized and would take six months on a “worse [sic] case” scenario” is likely overstated. Correspondence from Ms. Dumais and other Ministry officials to Horizon consistently referred to a six-month service “standard” that might not be met if the technical review raised significant issues. Thus, when Ms. Dumais sent Horizon a letter on April 23, 2013, advising that it had deemed the REA application complete, she told Horizon, “[i]n accordance with our six-month service standard, your application will be reviewed and a decision is expected to be made by October 23, 2013, provided that there are no significant issues raised during the Ministry’s review.” When that six-month time frame was about to expire, on October 23, 2013, the Ministry emailed Ms. Nguyen, again referring to a six-month “service delivery standard for all REA applications” and advising her that “the ministry may extend the review of an application beyond the six month service standard date depending on the issues and complexities of a project. In view of the scope and scale of the issues surrounding the Big Thunder project, please note that the ministry is not in position to issue the REA and post the decision today, October 23.”
- [182] Indeed, Mr. Zwig’s own evidence was that he understood that the six-month time frame held out by the Ministry “wasn’t a full guarantee, but it was an aspiration a date of six months that they would turn this around”, *i.e.* provide a decision on the REA. This casts doubt on Horizon’s claim that Ms. Dumais represented that the review would be completed in six months. Had she made such a representation, Mr. Zwig would presumably have viewed the six-month time frame as a guarantee, not an aspiration.
- [183] Horizon points to the fact that, as discussed above, Ministry representatives understood that the goal of the REA process was to facilitate renewable energy projects efficiently and in a way that worked around FIT contract deadlines. However, that does not in itself mean that they themselves directly represented to Horizon that the REA program would be efficient, fair, and streamlined. Working to operationalize a principle is not the same thing as expressing or representing it to others.
- [184] Horizon tenders evidence from Ms. Nguyen that Horizon expected the REA process to be “a streamlined process” that “provided certainty and simplicity for proponents to build renewable energy.” This, too, falls short. The fact that Horizon had an expectation does not in itself mean that the expectation was the result of a negligent misrepresentation by a Ministry employee.

- [185] I accordingly find that any representation that the REA process was efficient and timely was made by the government of Ontario, not by any one Ministry representative, and as such is not actionable. I find that no representation to this effect was made by any individual representative of the Ministry.

Misrepresentation 2

- [186] Horizon alleges that the Ministry negligently misrepresented that the REA application would be considered fairly and on its merits by the appropriate Ministry officials in the context of the regulatory requirements and without arbitrary or political interference.
- [187] Horizon states that the Ministry made this misrepresentation in part through the REA Regulation and the REA technical guide. For the reasons discussed above in relation to the Ontario press release, even if this is factually true, it is not sufficient to ground tort liability. The Ministry, or Ontario, cannot be directly liable in tort for allegedly negligent representations they make via regulation or in technical guides or similar publications.
- [188] Horizon’s evidence is that it had reasonable expectations that its application would be considered on the merits and without undue interference. Horizon observes, for example, that Mr. Parrott agreed in cross-examination that, because of how the REA program “was operated” and “was communicated to and understood by proponents”, they “had a legitimate expectation” that Ministry officials would review their REA applications based only on the REA regulation’s requirements. Former Premier Kathleen Wynne, in cross-examination, agreed to the same proposition. But this is not sufficient. It may well be that Horizon had this reasonable expectation, but it must demonstrate that that expectation was the result of representations made by a Ministry employee, or someone else who can be found liable in tort.
- [189] The only evidence before me of any specific interaction between a Ministry representative and Horizon in which this alleged misrepresentation was expressed consists of meeting minutes prepared by Ms. Nguyen regarding the March 16, 2011 meeting that Ms. Dumais had with Horizon. Those minutes state that Ms. Dumais, in response to public opposition to the Project by Bill Mauro, confirmed there will not be political interference and the REA decision will be based on the technical review. For the reasons above, I view Ms. Nguyen’s notes with some skepticism.
- [190] In any event, even if Ms. Dumais did say that Horizon’s REA would be considered on the merits and without inappropriate interference, that was not a misrepresentation. I find that Horizon’s REA application was in fact considered on its merits, with reference to regulatory requirements, and without any arbitrary or political interference.
- [191] The ultimate decision on the technical review is made by the Director; it is a discretionary decision made with reference to the “public interest” test articulated in subsections 47.5(1) and (2) of the *Environmental Protection Act*, which in turn entails consideration of whether the Crown’s constitutional duty to consult has been satisfied.

- [192] The evidence before me shows that the Director deferred making a decision on Horizon's REA application in March 2014 in light of those very requirements. Faced with FWFN's proceedings for judicial review and interlocutory injunctive relief, which were rooted in what FWFN said was inadequate Crown consultation, the Director was not yet prepared to determine that the Crown's section 35 duty to consult obligations were fulfilled. I pause to note that the Divisional Court, in dismissing Horizon's mandamus application, held that when the Director chose not to render a decision on the REA application after FWFN commenced legal proceedings, he was neither refusing to make a decision nor taking into account an irrelevant factor (*Big Thunder Windpark*, at para. 9).
- [193] The evidence also shows that the Director made the decision to reject the application in October 2015 based on those same legal requirements of the "public interest" test and the duty to consult. In May 2014, the Ministry continued its technical review, asking the Ministry of Natural Resources and Forestry to review the three moose reports and asking Horizon and FWFN for more information on moose and other issues. In July 2014, the Ministry of Natural Resources and Forestry completed its review of the moose studies and highlighted its concerns. In October 2014, the Ministry asked Horizon various questions about the moose studies Horizon had undertaken. Horizon did not respond to those inquiries by the requested deadline of November 15, 2014, or at all. When the Director refused the REA application on October 29, 2015, he explained that the application was being refused because Horizon had not provided the requested information about the impacts of the project on moose habitat. That information, the Director said, "was determined to be necessary to the ministry's review, and in particular, was required for the ministry to be satisfied that the potential impacts of the project on moose, moose habitat and the traditional moose hunting practices of members of the Fort William First Nation had been adequately assessed and mitigated."
- [194] I find that this decision was rooted in the statutory "public interest" test and the Crown's duty to consult. Mr. Keyvani's evidence, uncontested on this point, was that in considering whether it was "in the public interest" to approve an REA under the *Environmental Protection Act*, he was to consider whether the Crown's constitutional duty to consult with potentially affected First Nations communities under section 35 of the *Constitution Act* had been satisfied. His rejection of Horizon's REA on the basis that he could not be satisfied that the impact of the project on moose, moose habitat, and moose hunting practices had been "adequately assessed and mitigated" is rooted squarely in those considerations.
- [195] There is no evidence of political interference in the decision to refuse Horizon's REA application. Politicians certainly weighed in on the issue, but not in a way that can reasonably be understood as interfering. Horizon relies on evidence of comments and correspondence from MPP Mauro and Minister Bradley in early June 2014, after the Director had declined to approve the REA in March 2014, and well before he rejected it in October 2015. In effect, MPP Mauro and Minister Bradley were expressing in June 2014 what the Director had already told Horizon in March 2014: that the Ministry would delay deciding on the REA until after FWFN's injunction motion was heard. Those comments do not reflect interference because they were made after the Director decided to defer the decision on the REA. MPP Mauro and Minister Bradley did not signal a hoped-for outcome

on the technical review; they referred only to the deferral of the decision on the review. They did not suggest the Director ought to defer the decision; they said that he had deferred the decision. And they were correct: the Director had indeed deferred the decision because he was not satisfied that the Crown had discharged its constitutional duty to consult. I do not see how such after-the-fact comments can be considered interference.

[196] Nor can the comments be viewed as interfering with the ultimate decision on the merits of the REA. There is no evidence that MPP Mauro or Minister Bradley influenced or were in any way involved in the Ministry's decision to request information on the moose studies. To the contrary, the evidence suggests that it was the completion of the review of the moose studies by the Ministry of Natural Resources and Forestry in July 2014 that prodded the Ministry to ask for further information about the moose studies two months later. When Horizon did not respond to those information requests, the Ministry followed up. When Horizon remained unresponsive, the Director rejected the REA because he had not been provided with information "determined to be necessary to the ministry's review". There is no evidence to support the suggestion that politicians played any role in this process. The evidence suggests quite the opposite: that the Ministry carried out its technical review with the assistance of other ministries, and that the Director made the decision to reject the REA based on the information that was and was not before him.

[197] In support of these findings, I note the following.

- a. Mr. Mauro gave evidence that he did not promise FWFN that he would stop the project, and that he never promised anything except that he would convey FWFN's concerns about the project, in keeping with his role as their MPP. At a candidates' meeting with FWFN and other community groups, he reconfirmed to FWFN that the Ministry would not make a decision on Horizon's REA application until the judicial review had concluded. He did not contact the Ministry to ask them to hold off on deciding on the REA application; rather, FWFN would have made that request directly to the Ministry, and he would have supported such a request as their MPP. His evidence to this effect was not undermined on cross-examination, nor was it contradicted by any evidence tendered by Horizon.
- b. Former Premier Wynne testified that there was no political interference in the process. She agreed that both FWFN and elected officials in her government had concerns about the project, but was consistent in her evidence that she did not influence the outcome of the REA application. She understood Mr. Mauro's public comments to mean that the REA application would not be decided until FWFN's motion for an injunction had been decided by the court. Her evidence to this effect was not undermined on cross-examination, nor was it contradicted by any evidence tendered by Horizon.
- c. Ms. Raetsen's evidence was that she was not aware of any political interference in the decision making for Horizon's REA application. Nor was she aware of any direction from anyone outside of her team, other than the Director, as to the outcome of the application.

- d. Mr. Parrott likewise testified that he never faced any pressure from anyone outside of the Ministry regarding the decision on the application.

- [198] In support of its view that there was some form of political interference with the decision on the REA application, Horizon points to the Ministry’s internal “Decision Documents”, dated October 15 and November 21, 2013, which recommended that Horizon be granted an REA with conditions. Horizon states that the “Decision Documents” show that the Ministry had decided to approve the REA application on November 21, 2013, and that there was some subsequent arbitrary and/or political interference that led to the REA application being rejected many months later.
- [199] I do not view the “Decision Documents” in the same way. The evidence at trial was that Ministry staff would prepare these documents as iterative working drafts, updating them as the REA application review proceeded, and ultimately submitting it to the Director for the Director’s review and ultimate decision on the application. The decision of whether to approve the REA was for the Director, not Ministry staff, to make. The *Environmental Protection Act* is clear on this, and the evidence of the Ministry’s witnesses – both staffers and the Director – was consistent on this point. The decision of whether to approve was a discretionary one, as Horizon understood, and as the Director himself confirmed, testifying that he was free to depart from any recommendation made to him by Ministry staff regarding any REA application. Moreover, Horizon’s interpretation is at odds with other documentation from this time frame that makes clear that the Ministry had not formed its recommendation on the Horizon REA by the fall of 2013. This documentation includes internal Ministry documentation dated October 23, 2013, which indicated that the Ministry had not made a decision and would have to be satisfied the Crown had met its duty to consult. It also includes the email from Ministry staff to Ms. Nguyen of the same date advising her that further time was needed to complete the review given the “scope and scale of the issues surrounding” the project.
- [200] It may well be that the Director would have exercised his discretion to make a different decision about the application, or to make his decision sooner, had FWFN not launched its legal proceedings in March 2014. It may well be that the Ministry would not have revisited the issue of the moose studies had FWFN not commenced those proceedings, alleging that the Crown had not adequately consulted with it regarding the project. But that is neither here nor there. In the face of the legal proceedings, the Director decided first to defer a decision on the application pending a resolution of the proceedings because he determined that the Crown had not carried out its duty to consult, and, later, to reject the application because he did not have the necessary information to be satisfied that the “public interest” test and duty to consult had been satisfied. He did consider the application on its merits, in the context of the regulatory requirements, having regard to the public interest and the Crown’s duty to consult, and without arbitrary or political interference.
- [201] As such, I conclude that any representation that Horizon’s REA application would be considered on the merits and without arbitrary interference was made by the government of Ontario, not by any one Ministry representative, and as such is not actionable. Moreover,

to the extent that such a representation may have been made by Ministry staff, it was correct on the facts and therefore not a misrepresentation.

Misrepresentation 3

- [202] Horizon alleges that the Ministry negligently misrepresented that, “if the technical review determined that the reports filed by [Horizon] satisfied the requirements of the technical review for the purposes of the regulatory requirements, then there would be no need for additional time for a decision to be made and the REA would be granted based on the technical review”.
- [203] In my view, the record does not disclose that any such representations were made.
- [204] Horizon says that, during a call on April 22, 2013, Ms. Dumais and Mr. Parrott told Horizon that if the technical requirements were met and Horizon had made good faith efforts to consult with FWFN, the REA would be approved and any concerns about FWFN consultation would be addressed through a condition in the REA requiring ongoing consultation. Horizon makes this claim based on notes from Ms. Nguyen regarding that conversation.
- [205] Viewing the record as a whole, I am unable to accept this claim.
- [206] First, for the reasons discussed above, I do not place much weight on Ms. Nguyen’s notes.
- [207] I am also of the view that Ms. Dumais’ consultations with Horizon were focused on helping them to prepare an REA application that could be “deemed complete” and undergo further technical review; she did not advise them on the technical review requirements and was clear with them that she would not be involved at that stage. This renders it highly unlikely that she would have made representations to Horizon about how the technical review would unfold.
- [208] Further, the evidence of the Ministry’s witnesses, and the law on the Crown’s duty to consult, both make clear that whatever role Horizon played in delegated consultation was not a substitute or proxy for the Ministry’s own consultation with FWFN. Against this legal backdrop, I find it hard to believe that Ministry representatives would have made representations of the type claimed by Horizon.
- [209] The record also discloses the following:
- a. Horizon understood that the Ministry could request additional information in the future as its technical review progressed: Mr. Zwig acknowledged in cross-examination that Ms. Dumais informed Horizon that the Ministry may ask for additional information during the technical review, and Ms. Nguyen similarly testified that she understood that during the technical review process there could be further questions asked about documents that had been provided.

- b. Horizon understood that the six-month service standard was aspirational and not binding, as discussed above.
- c. Horizon understood that the Director’s decision was discretionary, that it was to be made based on what the Director considered to be in the public interest, and that the Director had to be satisfied that the Crown had satisfied its constitutional duty to consult. I note that John Kim Bell, a consultant retained by Horizon to assist in its consultation with FWFN, acknowledged that the duty to consult rests with the Crown, which must be satisfied that the duty has been met.

[210] I accordingly find that the evidence does not establish that any representation was ever made that if Horizon filed the required reports, no additional time would be needed, and the REA would be approved.

Misrepresentation 4

[211] Horizon alleges that the Ministry negligently misrepresented on various occasions, including at the April 2, 2012 and May 9, 2012 meetings, that FWFN did not have a “veto” over the granting of an REA for the project. However, says Horizon, the Ministry granted FWFN such a veto from March 2014, when FWFN initiated its various legal proceedings, through to July 2014. As noted above, the ensuing delay caused the OPA to terminate Horizon’s FIT contract. Horizon points out that on March 5, 2014, two days after FWFN brought its proceedings, the Ministry advised Horizon that the Ministry was seeking legal advice about whether to make a decision on Horizon’s REA application while FWFN’s applications were before the courts. In Horizon’s view, “someone other than the appropriate [Ministry] officials” decided not to decide on the application until after the FWFN injunction motion was heard. Ontario then consented to an adjournment of the injunction motion from June 6, 2014 to June 28, 2014, which “effectively gave the FWFN a veto over” the project, “guarantee[ing]” that Horizon “would not receive a REA by the time of the FIT contract deadline”.

[212] The evidence is unclear as to whether Ms. Dumais in fact told Horizon that FWFN did not have a veto over the project. Ms. Nguyen’s notes say that she did say that. As discussed above, I view the notes with some hesitation. Ms Dumais’ evidence is that she told Horizon that FWFN had asked if it had a veto, and she intended to explain to them that they did not.

[213] I do not need to make a finding as to whether Ms. Dumais or any other Ministry representative told Horizon that FWFN did not have a veto, because, as a matter of law, that statement is correct. The consultation process “does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim” (*Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, at para. 56, citing *Haida Nation* at para. 48). The Supreme Court of Canada has put it this way in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 (at para. 83):

The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

- [214] If a Ministry official did tell Horizon that FWFN did not have a veto, that was not a misrepresentation. FWFN did not have such a veto as a legal matter. It was entitled to a process of consultation and accommodation, not a particular outcome. The jurisprudence is clear on this point, and the Ministry official's statement was correct.
- [215] In any event, the suggestion that FWFN was given a veto is undermined by the evidence that, after FWFN sought to stay the potential issuance of an REA to Horizon, the Ministry agreed to delay deciding on Horizon's REA application until after the injunction motion was heard, provided that the injunction proceeding was brought in a timely way.
- [216] There is no doubt that by the time the injunction was heard (June 28, 2014) and decided (July 28, 2014), the FIT contract deadline had passed. However, I am unable to accept Horizon's characterization of these events as the Ministry having handed FWFN a "veto" which FWFN then exercised. Even if the FWFN proceedings put Horizon's REA application on a different trajectory, that does not mean they functioned as a veto. The proceedings brought to the forefront complaints advanced by FWFN regarding the process of consultation and accommodation by the Crown. I am satisfied on the evidence that the Director decided first to defer a decision on the application, and then to reject the application, because he was not satisfied that the "public interest" test and Crown's duty to consult had been satisfied. In light of FWFN's strenuous objections, it is not unreasonable that the Ministry sought legal advice and carefully evaluated whether the Crown's duty to consult was satisfied. I appreciate that the ultimate effect of the FWFN proceedings and their sequelae was that the project could not proceed. But this was not arbitrary or political interference: it was an assertion by FWFN of what it characterized as its right to consultation by the Crown, and a determination by the duly appointed Ministry official that the duty to consult had not yet been satisfied.
- [217] I therefore find that FWFN did not have, and did not exercise, any "veto" over the project, with the result that even if a Ministry official told Horizon that FWFN did not have a "veto," that statement was not a misrepresentation. It was correct at law.

Conclusion regarding misrepresentations

- [218] For the reasons above, I am not satisfied that the alleged misrepresentations were in fact made by individual Ministry employees such that an action may lie in tort, and find that to the extent that the alleged misrepresentations were made, they were correct factually and therefore were not misrepresentations.

Whether Horizon reasonably relied on the Ministry's representations

- [219] In light of my finding that no negligent misrepresentations were made, I need not consider whether Horizon reasonably relied on any of the representations to its detriment.

Whether Horizon suffered damages as a result of its reliance

- [220] I need not consider whether Horizon suffered damages as a result of its reliance, given my finding that no negligent misrepresentations were made. However, in the event that I am mistaken regarding the misrepresentations, I offer the following comments on damages.
- [221] Tort damages are intended to put the plaintiff back in the position they would have been in but for the negligent acts of the defendant (*Aylmer*, at para. 111, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32, and *Tokarz v. Cleave Energy Inc.*, 2022 ONCA 246, at para. 43).
- [222] Horizon seeks damages on one of two bases. Its primary position is that it is entitled to damages reflecting between \$30.9 and \$58 million in profits it says it would have made had the project gone ahead. Alternatively, Horizon seeks damages reflecting the \$12.9 million it says it lost in direct and indirect investments into the project. This amount consists of Horizon's external costs on the project of \$5,881,025 for development, engineering and wind turbine costs, and internal costs of \$7,031,175 relating to the estimated amount of time Horizon's staff spent on the project, and overhead allocation to the Project.
- [223] As the Court of Appeal discussed in *Aylmer*, for the Ministry to be liable to Horizon for damages, I must be satisfied, first, that the Ministry's conduct was, in fact, a cause of Horizon's injury – that is, that but for the Ministry's negligent misrepresentations, Horizon would not have suffered the losses claimed (*Aylmer*, at para. 87, citing *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 6-10, and *Donleavy v. Ultramar Ltd.*, 2019 ONCA 687, at para. 63).
- [224] Second, I must be persuaded that the Ministry's negligent misrepresentations were the cause in law of Horizon's damages, *i.e.* that the risk of Horizon's damages as a result of the negligent misrepresentations is not so remote as to not have been foreseeable to a reasonable person in the Ministry's position (*Aylmer*, at para. 88, citing *Livent*, at para. 79. And, see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 13..

- [225] Because I have found there to be no liability in tort, I make no finding as to whether these requirements of causation in fact and in law are met, or which model for damages calculation is more appropriate on the facts before me. However, I make the following observations.
- [226] First, I am not persuaded that loss of profit is the appropriate measure of damages.
- [227] In seeking lost profits, Horizon relies on *Quadrangle*, in which Osborne J. held that allowing the plaintiffs to recover only the amount of the lost investment “would not adequately compensate” the plaintiffs because it “would essentially provide for return of principal ... but not compensate the plaintiffs in respect of any reasonable rate of return on that same capital” (at para. 635). He found that the plaintiffs were entitled to “damages based on a reasonable rate of return for a suitable portfolio over the relevant time period” (at para. 636), because, “[b]ut for the misrepresentations, the Plaintiffs would have deployed their capital elsewhere They would have received a return on that capital measured by historical investment returns” (at para. 640). A “suitable portfolio” is a “hypothetical portfolio” constructed by an expert in a manner consistent with the parties’ investment policy statement” (at para. 637).
- [228] Horizon invokes *Quadrangle* in support of its position that it is entitled to whatever profits it would have made on the project over the duration of the FIT contract. In my respectful view, this position misreads *Quadrangle*. What Osborne J. held in *Quadrangle* was that the plaintiffs were entitled not just to the amount of their lost investment, but also to some reasonable return on that investment. That reasonable return was to be calculated with reference to the plaintiffs’ historical investment returns. What Horizon seeks in its lost profit claim is not historical investment returns, but estimated profits on a large-scale project for which shovels were never even put in the ground. In my view, an estimate of investment returns predicated on the hypothetical profit that would have been earned by an entirely unconstructed, large-scale project over a 30-year period into the future is not reasonable and at odds with the court’s approach to damages in *Quadrangle*.
- [229] Second, I am not satisfied that the full \$12.9 sought by Horizon in lost investments is properly recoverable. The evidence before me is that the alleged misrepresentations by Ministry officials were made, at the earliest, starting in 2011. There is no suggestion that Horizon was in close contact with the Ministry prior to that time. As such, whatever costs Horizon incurred between 2005, when it started communicating and meeting with FWFN, preparing project notices and informational material, hiring an energy consultant, and so on, and 2011, when it started interacting closely with the Ministry, would not be recoverable. As well, the internal costs claimed, of over \$7 million, strike me as unduly high. I imagine that Horizon’s staff would have spent their time on other matters had they not spent it on the project.
- [230] As such, had I found the Ministry liable for negligent misrepresentation, I would have awarded Horizon some portion of its lost investment costs, plus some amount to reflect a reasonable return on a portion of those investment costs, based on Horizon’s historic investment returns on a suitable portfolio. I would not have based damages on the

anticipated profits of the project, if approved, constructed, and operationalized, as Horizon now seeks to do. Rather, I would have calculated damages based on the returns Horizon would have received had it invested the funds it put into the project into alternative investment opportunities.

Conclusion

[231] For the reasons above, the action is dismissed.

[232] The parties are strongly encouraged to work together to resolve costs. If they are unable to do so within 30 days, they are to contact my judicial assistant and I will set a timetable for costs submissions.

Parghi J.

Released: June 25, 2026

CITATION: Big Thunder Windpark et al v. Ontario, 2026 ONSC 3046
COURT FILE NO.: CV-15-00535812-0000
DATE: 20260625

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BIG THUNDER WINDPARK INC.; BIG
THUNDER WINDPARK LP; HORIZON
WIND INC.

Plaintiff

– and –

HIS MAJESTY THE KING IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF THE ENVIRONMENT

Defendant

REASONS FOR JUDGMENT

Parghi, J.

Released: June 25, 2026