

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Athletic Commissioner v.
Simon Fraser University,*
2026 BCCA 189

Date: 20260506
Dockets: CA50612; CA50620

Docket: CA50612

Between:

**British Columbia Athletic Commissioner and His Majesty the King
in Right of the Province of British Columbia**

Appellants
(Third Parties)

And

Simon Fraser University

Respondent
(Defendant)

- and -

Docket: CA50620

Between:

Simon Fraser University

Appellant
(Defendant)

And

Zhenhuan Lei by his Committee, Ying Li

Respondent
(Plaintiff)

And

**Tony Albertson, Marion Bonilla, Bill Hunter, Terry Hunter, Karen Walters,
Sarah Elizabeth Hawco, Maeghen Cotterill, Carmen Pelletier, and Tanner Scar**

Respondents
(Defendants)

And

**British Columbia Athletic Commissioner and His Majesty the King
in Right of the Province of British Columbia**

Respondents
(Third Parties)

And

Patrick Kelly Gilday

Respondent
(Proposed Third Party)

Before: The Honourable Justice Griffin
 The Honourable Justice Gomery
 The Honourable Justice Francis

On appeal from: An order of the Supreme Court of British Columbia, dated
March 27, 2025 (*Lei v. Simon Fraser University*, Victoria Docket S245068).

Counsel for British Columbia Athletic
Commissioner, His Majesty the King in
Right of the Province of British Columbia,
and Patrick Kelly Gilday:

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Place and Date of Hearing:

Vancouver, British Columbia
February 12, 2026

Place and Date of Judgment:

Vancouver, British Columbia
May 6, 2026

Written Reasons by:

The Honourable Justice Francis

Concurred in by:

The Honourable Justice Griffin
The Honourable Justice Gomery

Summary:

The underlying proceedings concern a catastrophic injury sustained at a martial arts tournament held at Simon Fraser University. SFU, a defendant, brought a third party claim against the British Columbia Athletic Commissioner and the Province of British Columbia. SFU alleges the Athletic Commissioner was responsible for regulating events of the sort that happened at SFU and was negligent in failing to protect the plaintiff and the public. The Province applied, unsuccessfully, to strike the third party claim. It appeals from that order. Held: Appeal allowed. The Athletic Commissioner Act, S.B.C. 2012, c. 29, and its regulations do not confer a private law duty of care. Further, to the extent that SFU seeks to establish proximity on the basis of specific interactions that the Athletic Commissioner had with the plaintiff or others, SFU's amended third party notice does not set out the material facts necessary to establish proximity. It contains nothing but a bare plea of the Athletic Commissioner's knowledge of the specific tournament in issue. It is plain and obvious that the facts as pleaded in SFU's amended third party claim do not give rise to the proximity necessary to establish that the Athletic Commissioner owed the plaintiff a duty of care. SFU's third party notice against the Province and Athletic Commissioner is struck.

Reasons for Judgment of the Honourable Justice Francis:

Introduction

[1] On October 14, 2023, Zhenhuan Lei participated in a mixed martial arts tournament called the Western Canadian Martial Arts Championship (the "Tournament"). The Tournament was held at Simon Fraser University ("SFU"). While participating in the Tournament, Mr. Lei was catastrophically injured. As a result, his committee sued the Tournament organizers and SFU for damages for personal injury. SFU brought third party proceedings against the British Columbia Athletic Commissioner (the "Athletic Commissioner") and the Province of British Columbia (the "Province").

[2] The Province applied to strike the third party notice on the basis that it was plain and obvious that the third party notice disclosed no cause of action. In a cross-application, SFU applied to amend its third party notice to, among other things, add Patrick Gilday, the Athletic Commissioner, personally. The applications were heard together in January and March 2025. The judge dismissed the Province's application

to strike and dismissed SFU's application to add the Athletic Commissioner in his personal capacity. The Province and SFU have both appealed that decision.

[3] This appeal raises questions about the extent to which a government regulator can be found liable in tort for injuries to individuals taking part in regulated activities. For the reasons that follow, I would allow the Province's appeal on the basis that the third party notice does not give rise to a cause of action against the Province and should have been struck. SFU's appeal of the judge's dismissal of its application to amend its pleadings to add Mr. Gilday personally was withdrawn in the course of oral submissions so it need not be considered by this Court.

Background

Pleadings

[4] When determining whether to strike a pleading, the facts pleaded (or as the pleadings could reasonably be amended) are assumed to be true: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 1985 CanLII 74. It is therefore necessary to first identify the pleadings in issue on this appeal.

[5] In the application before the chambers judge, the Province applied to strike SFU's third party notice and SFU applied to file an amended third party notice. The judge declined to grant leave to SFU to file its amended third party notice, holding that it was improper to name Mr. Gilday personally, and adjourned generally the remaining amendments. Therefore, the third party pleading presently filed with the Court is SFU's third party notice filed May 3, 2024, naming the Province and the Athletic Commissioner as third parties, not the amended third party notice that also names Mr. Gilday personally.

[6] The unfiled amended third party notice was before the Court on this appeal. In addition to naming Mr. Gilday personally, the amended third party notice contains a more complete statement of the material facts and legal basis that animate SFU's proposed third party claim. The court is required, on an application to strike, to consider the pleadings not only as they are, but as they could be amended. As such,

although the amended third party notice remains as yet unfiled, for the purposes of this appeal, the relevant question is whether the unfiled amended third party notice (rather than the filed third party notice) discloses a cause of action that is not bound to fail.

Statutory Framework

[7] There are two statutes that govern combat sports in the Province: the *Criminal Code*, R.S.C. 1985, c. C-46 [Code] and the *Athletic Commissioner Act*, S.B.C. 2012, c. 29 [ACA].

[8] The starting point for understanding the regulatory regime is s. 83 of the *Code*. It states that participation in certain types of combat sports tournaments (defined as “prize fights” in the *Code*) is a criminal offence.

[9] The definition of “prize fight” excludes a contest between amateur athletes if the sport has been designated by the Athletic Commissioner and, if required by the Athletic Commissioner, the contest is held with his permission: s. 83(2)(b).

[10] The *Amateur Combat Sports Designation Order*, OIC 342/2013 [Designation Order] made pursuant to s. 83(3) of the *Code* says that the permission of the Athletic Commissioner is required for a person to hold a contest in certain designated amateur sports. Pursuant to s. 2(2) of the *Designation Order*, the Athletic Commissioner may give permission for a person to hold a contest subject to terms and conditions that the Athletic Commissioner considers necessary or advisable. Kickboxing is one of the designated amateur sports which requires the Athletic Commissioner’s permission before a contest can be held.

[11] The ACA sets out the role and responsibilities of the Athletic Commissioner. In s. 4 it provides that the Athletic Commissioner is responsible for:

- (a) the regulation and supervision of professional contests or exhibitions in accordance with this Act and the regulations;
- (b) licensing and permitting under this Act;
- (c) the enforcement of this Act and the regulations.

[12] “Professional contest or exhibition” is defined as “a contest or exhibition of professional boxing or another sport prescribed by regulation”.

[13] The ACA contains a comprehensive legislative framework governing the licensing and regulation of professional contests and exhibitions, including safety rules for professional contests and exhibitions. It gives the Athletic Commissioner inspection, seizure, and enforcement powers.

The Tournament

[14] The Tournament organizers, five individuals (the “Organizers”), rented premises at SFU for the purposes of the Tournament. The Organizers had put on similar events in other places around the Lower Mainland.

[15] In his notice of civil claim, the plaintiff alleges that the Tournament involved the sport of kickboxing, which is regulated by the Athletic Commissioner, but the Organizers did not follow the safety protocols required by the Athletic Commissioner. The plaintiff alleges that the Organizers caused or contributed to his injuries by failing to enforce rules that would prevent a novice being matched with a serious opponent, failing to review his medical condition after he showed signs of injury, and failing to have proper medical care available.

[16] According to the amended third party notice, the Athletic Commissioner made statements on its website that amateur kickboxing was an activity regulated by the Athletic Commissioner and that a valid event permit must be obtained from the Athletic Commissioner for an amateur kickboxing event to take place.

[17] According to the amended third party notice, Mr. Gilday, in his capacity as Athletic Commissioner, had the following contact with the Organizers in the years preceding the Tournament:

- a) On October 16, 2019, Mr. Gilday contacted the defendant Tony Albertson, one of the Organizers, to advise him that a tournament scheduled for October

19, 2019 (the “2019 Event”) may be in contravention of the *Code* and the regulations under the *ACA*.

- b) Mr. Gilday personally attended the 2019 Event.
- c) On February 6, 2020, Mr. Gilday communicated further with Mr. Albertson about the 2019 Event.
- d) On February 27, 2022, Mr. Gilday advised Mr. Albertson that certain prize fights were governed by the *Code* and the *Designation Order*.
- e) On September 15, 2022, Mr. Gilday notified Mr. Albertson that an upcoming tournament at BCIT (the “BCIT Event”) contained activities prohibited under the *Code*. He advised Mr. Albertson and others of his concerns about the BCIT Event on September 22 and 27, 2022, and “repeatedly” between October 13, 2022 and October 22, 2022.
- f) After being told by one of the Organizers, Sarah Hawco, that the Athletic Commissioner had no jurisdiction over the BCIT Event, and that the BCIT Event would be held as planned, the Athletic Commissioner posted a warning on its website that the Athletic Commissioner had not provided permission for the Western Canada Martial Arts Championship to hold any prize fights.
- g) This warning was later removed from the Athletic Commissioner’s website, and was not re-issued prior to the Tournament at issue in these proceedings.
- h) The Organizers ignored the warnings from the Athletic Commissioner and proceeded with the BCIT Event on October 22, 2022.
- i) The Organizers held another event on April 22, 2023 that was not approved by the Athletic Commissioner.

[18] The only material facts pleaded in the amended third party notice with respect to the Athletic Commissioner’s knowledge of the Tournament are contained in paragraphs 28 and 29 of the amended third party notice:

28. BCAC and/or Gilday knew or ought to have known that the WCMAC Defendants were promoting, organizing and conducting martial arts competitions or tournaments, which included strikes or kicks that are intentionally thrown to injure or cause damage, and that were in contravention of the *Criminal Code* and the ACA and regulations, including specifically the October 22, 2022, April 22, 2023 and the October 14, 2023 tournaments.

29. The BCAC and/or Gilday knew or ought to have known that the manner in which the WCMAC Defendants were conducting events, including specifically the October 22, 2022, April 22, 2023 and the October 14, 2023 tournaments, and the WCMAC's contravention of the *Criminal Code* and the ACA and regulations created a significant risk of severe injury or death for participants in the WCMAC's events.

[Underlining removed.]

[19] SFU seeks to have the Athletic Commissioner found negligent and liable for the injuries suffered by the plaintiff.

Reasons for Judgment

[20] In considering the Province's application to strike the third party notice, the judge instructed himself that courts "must not dismiss claims that are novel or new, for to do so would stagnate the law and never allow the courts to consider different arguments or changing circumstances". He noted that, as far as he could tell, the parameters and scope of the Athletic Commissioner's responsibilities had never been judicially considered.

[21] The judge summarized SFU's theory of liability against the Province on behalf of the Athletic Commissioner as follows: the Athletic Commissioner is responsible for regulating events of the sort that happened at SFU, the Athletic Commissioner had a duty as a regulator to protect the public, and he was negligent in failing to protect the plaintiff and the public in this case. The Province argued that there was no possible cause of action under the legislation or regulatory scheme and that the Athletic Commissioner did not owe any duty of care to the plaintiff. The judge ultimately found that he could not conclude that SFU's theory of liability was bound to fail.

[22] With respect to SFU's application to amend its third party notice against the Province, the judge adjourned this application, but held that it was not proper to name Mr. Gilday personally as a third party.

Standard of Review

[23] An application to set aside a third party notice under Rule 3-5(8) on the basis that the pleadings disclose no cause of action is subject to the same test as an application to strike pleadings under Rule 9-5(1)(a): *WorleyParsons Canada Ltd. v. David Nairn and Associates*, 2013 BCCA 513 at para. 17.

[24] Rule 9-5(1)(a) provides:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

...

[25] For the defendant to succeed on an application to strike, it must be plain and obvious that the pleadings disclose no reasonable cause of action. Courts are generous at this stage so as not to foreclose the development of the law through novel claims: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21 [*Imperial Tobacco*].

[26] Deciding whether the pleadings disclose a reasonable cause of action is a question of law that does not attract appellate deference on appeal: *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 21. The question as to whether the Athletic Commissioner owed the plaintiff a duty of care is also a question of law to be reviewed for correctness: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 24 [*Maple Leaf*].

Discussion

Duty of Care

[27] This appeal turns on the question of whether the Athletic Commissioner had a duty of care to the plaintiff. The parties agree that the analysis in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79 (the “*Anns/Cooper* analysis”), is the correct legal framework to apply.

[28] The *Anns/Cooper* analysis applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before: *Nelson (City) v. Marchi*, 2021 SCC 41 at para. 16 [*Nelson*].

[29] In novel duty of care cases, a two-stage framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is a relationship of proximity between the plaintiff and the defendant: *Nelson* at para. 17.

[30] If a duty of care is established, it is necessary to proceed to the second step of the *Anns/Cooper* test, which is to ask whether there are residual policy concerns outside the parties' relationship that should negate the duty of care: *Nelson* at para. 18.

[31] Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant": *Cooper* at paras. 32 and 34.

[32] Proximity is the controlling concept in the duty of care analysis and serves as the "foundation of the modern law of negligence" and as such, proximity is generally determined before foreseeability: *Maple Leaf* at paras. 21 and 62.

[33] SFU does not argue that this case falls under a recognized category of duty of care. Rather, SFU submits that the regulatory framework governing the Athletic Commissioner, which includes the ACA, s. 83 of the *Code*, the *Designation Order*, and the regulations under the ACA, combined with the dealings between the Athletic Commissioner and the Organizers, together establish the necessary relationship of proximity to give rise to a duty of care owed to the plaintiff as a participant in the Tournament. The Province argues that the material facts necessary to demonstrate a relationship of proximity between the plaintiff and the Athletic Commissioner are

absent on the pleadings and therefore the third party claim ought to have been struck.

Proximity

[34] In *Wu v. Vancouver (City)*, 2019 BCCA 23, this Court noted that proximity is the “touchstone” in applying the *Anns/Cooper* framework and remarked on the increasing emphasis placed on the analysis of proximity, at the expense of reasonable foreseeability, as the critical element in recognizing a *prima facie* duty of care: at para. 50. Discussing the principle of proximity, Justice Harris described some of its hallmarks:

[51] The law has not defined “proximity” with precision. Indeed, as was said in *Cooper*, the word may amount to little more than a label identifying the type of relationship in which duties of care arise: *Cooper* at para. 31. Nonetheless, one can recognize the kind of considerations pertinent to analysing proximity. Such relationships are said to be “close and direct”: *Cooper* at para. 32. They may involve physical closeness, direct relationships or interactions, the assumption of responsibility; or turn on expectations, representations, reliance, or the nature of property or other interests involved: see, *Cooper* at paras. 32-34. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests. Proximity involves an analysis both of the nature of the relationship between the parties and the kind of harms carelessness might cause: see *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34. It involves having regard to all relevant factors arising from the relationship between the parties: *Deloitte* at para. 29.

[Emphasis added.]

[35] In considering proximity, the court must examine all relevant factors arising from the relationship between the parties. These factors are diverse and depend on the circumstances of each case: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 29.

[36] There is a robust body of case authority considering whether the relationship between a government regulator and an individual member of the public is sufficiently proximate to give rise to a duty of care. As a general principle, statutory

duties do not, in and of themselves, give rise to private law duties of care: *Reference re Broome v. Prince Edward Island*, 2010 SCC 11 at para. 13.

[37] As Justice Harris noted in *Wu* at para. 52, there are two significant impediments to grounding a private law duty of care in a statutory regulatory scheme:

... In relation to the proximity analysis in relation to public authorities, the issue is complicated first by the underlying principle that no nominate tort of breach of statutory duty is recognized in Canada, and second by the fact that public authorities generally have powers and duties to act in the public interest rather than in a manner designed to protect the private interests of individuals affected by a scheme of regulation.

[38] Nevertheless, there are circumstances in which courts have found a private law duty of care to be owed by public regulators to private parties. In *Frazier*, at para. 34, this Court summarized the three ways in which a private law duty of care could arise between government actors and a private citizen, as described by the Supreme Court of Canada in *Imperial Tobacco*:

1. the statute itself implicitly or explicitly creates a private relationship of proximity giving rise to a *prima facie* duty of care;
2. proximity arises from a “series of specific interactions” between the government and the claimant, through which the government has entered into a “special relationship” with the claimant that is sufficient to establish proximity; or
3. through a combination of specific interactions between the parties and the government actor’s statutory powers and duties.

[39] SFU submits that it is the third circumstance that applies in this case, namely that a combination of the interactions between the Athletic Commissioner and the Organizers and the government actor’s statutory powers and duties gives rise to sufficient proximity to ground a duty of care owed to the plaintiff as a participant in the Tournament. Or at the very least, SFU submits, it is not plain and obvious that it does not.

Does the Legislation Confer or Exclude a Private Law Duty of Care?

[40] In determining whether legislation excludes or confers a private law duty of care, the first required step is to identify the purpose of the legislation. Public law duties aimed at the public good generally do not create private law duties: *Wu* at para. 56. However, a statutory duty to act can be a strong indicator of an intention to create a private law duty of care: *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at paras. 37–55; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 72.

[41] In this case, the Athletic Commissioner's responsibilities are grounded in the ACA. The *Code* is relevant to the responsibilities of the Athletic Commissioner, but only insofar as the *Code* designates certain activities, absent the authorization of the Athletic Commissioner, to be criminal offences. In its amended third party notice, SFU grounds its pleading of proximity in part on the ACA and the requirement under the ACA that all persons participating as a contestant in a sport prescribed by the regulators must obtain a licence from the Athletic Commissioner.

[42] One of the issues of controversy between the parties is whether, properly interpreted, the ACA governs amateur kickboxing contests such as the Tournament, or whether the ACA applies only to professional contests. It is not necessary on this appeal to pronounce on this issue because the question of whether the Athletic Commissioner owed a duty of care to the plaintiff under the ACA does not turn on whether or not the Tournament was a professional contest or exhibition.

[43] The purpose of the ACA, in SFU's submission, is to protect athletes from harm. Certainly, this appears to be one purpose of the legislation. However, it is not clear that this is the sole, or even the primary, purpose of the legislation. As Justice Kasirer recently noted in *R. v. Nguyen*, 2026 SCC 10 at para. 81, in the context of statutory interpretation, "the legislature's intent is rarely that one purpose be pursued at all costs".

[44] *Hansard* indicates the ACA has a broader purpose, namely, "to increase the safety of athletes and officials as well as to provide certainty for communities and the

industry”: British Columbia, “Bill 50, Athletic Commissioner Act”, 1st reading, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39-4, Vol 37 (7 May 2012) at 11570 (Ida Chong).

[45] A review of the provisions of the ACA and its regulations suggests that the regulations are primarily directed towards governing organizers of combat events by requiring organizers to obtain a licence and event permit and to abide by certain rules. Section 17(1) of the ACA requires an event permit holder to pay to the Athletic Commissioner an amount not greater than 5% of the gross gate receipts for the professional contest or exhibition. The ACA grants the Athletic Commissioner inspection powers and the power to make seizure and prevention orders: ss. 22, 24. Administrative penalties of up to \$100,000 can be imposed by the Athletic Commissioner: s. 27. The *Minister’s Athletic Commission Regulation*, B.C. Reg. 171/2013, contains a comprehensive administrative scheme for issuing licences and event permits, with terms prescribing the amount that officials shall be paid and detailed regulation of professional events. While the conditions imposed under licence and event permits may indirectly protect the safety of athletes, the direct focus of the statute and regulations is on regulating the organizers.

[46] Unregulated combat events are generally prohibited under the *Code* because they involve activities that are broadly understood to be harmful to the public good, not just to the individuals participating in the events. The *Code* prohibition is indicative of a societal recognition that unregulated fighting as a spectator sport, even with the consent of the participants, violates community values and is contrary to the public interest.

[47] Further, where there is to be an exemption from the *Code* prohibition, the statute and regulations advance the public good in another way, to ensure that event organizers need to have a licence and permit, which in turn impose some strict rules on the conduct of events. This benefits the members of the public who attend such events, by enabling them to discern between legal and licensed events and those that are neither.

[48] Thus the purpose of the ACA is to regulate the industry of combat sports for the benefit of participants, organizers, the general public and the communities in which these events take place. It is not a statute with a singular purpose, and one of its purposes is the advancement of the public interest.

[49] Generally, a statutory scheme that exists to advance the public good will not provide a sufficient basis to create proximity for the purposes of establishing a private law duty of care. This is true even if a potential claimant is a person who benefits from the proper implementation of the scheme: *Frazier* at para. 46; *Wu* at para. 56. Part of the rationale for not recognizing a private law duty of care in these circumstances is that such a duty may interfere with the government actor acting in accordance with its duties to the public: *Wu* at para. 56; *Imperial Tobacco* at para. 47.

[50] SFU relies on *Fullowka* as an example of a case where a private law duty of care was grounded in a regulatory statute. In *Fullowka*, nine miners were killed when an explosive detonated at their workplace during a labour dispute. At issue was whether the regulator had a private law duty to keep the miners safe. The legislative scheme in question imposed upon the government regulator a positive duty to act. Specifically, the mining inspector was required to order the immediate cessation of work in a mine that the inspector considers unsafe. In this way, the legislative scheme in *Fullowka* is different than the ACA. The ACA does not impose any positive duty to act on the Athletic Commissioner in any circumstance.

[51] In this case, a relationship of proximity between the Athletic Commissioner and individual athletes cannot be grounded in the legislation's purpose, nor in any statutory duty to act. In my view, it is plain and obvious that the ACA and its regulations do not expressly or by implication create a private relationship of proximity between the Athletic Commissioner and individual athletes giving rise to a *prima facie* duty of care.

Does the Statutory Regime Combined with Interactions Between the Organizers and the Athletic Commissioner Give Rise to Proximity?

[52] A combination of specific interactions between the parties and the government actor's statutory powers and duties can give rise to the necessary proximity to ground a private law duty of care. However, the established approach to proximity when considering an allegation that a duty of care is owed by a government regulator requires the court to "look to the interaction between the regulator and the plaintiff to determine whether a sufficiently close and direct relationship exists to impose a *prima facie* duty of care": *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 243 [emphasis added]. See also *Tekamar Mortgage Fund Ltd. v. British Columbia*, 2023 BCCA 20 at para. 67.

[53] In this case, there is no allegation that there were any interactions whatsoever between the plaintiff and the Athletic Commissioner. SFU seeks to ground its theory of proximity on interactions between the Organizers and the Athletic Commissioner. A similar theory of liability was advanced in the companion cases of *Cooper* and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, where the plaintiffs allegedly suffered harm at the hands of a party involved in a regulated activity (in *Cooper*, a mortgage broker; in *Edwards*, a lawyer) and then alleged negligence on the part of the governmental authority in charge of regulating the activity that gave rise to the plaintiff's loss (in *Cooper*, the Registrar of Mortgage Brokers; in *Edwards*, the Law Society of Upper Canada). The plaintiffs in those cases were unsuccessful in establishing proximity in part because they had no direct relationship with the governmental authority.

[54] However, there is a body of jurisprudence in which proximity is grounded not in the direct interactions between the plaintiff and a government regulator but rather in the government's responsibility to prevent the actions of a third party from harming the plaintiff. In such cases, proximity is established by the fact that the government entity "failed to act to protect the life and safety of individuals when the regulator was fixed with knowledge of a clear, present and significant danger posed to a discrete and identifiable segment of the community": *Taylor v. Canada (Attorney General)*,

2012 ONCA 479 at para. 114. See also, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 74 OR (2d) 225, 1990 CanLII 6611.

[55] In *Frazier*, this Court considered a proximity argument where the alleged duty of care arose “from a combination of the factual relationship between the parties and the regulator’s powers and duties under the legislation”: at para. 53. The Court in *Frazier* did not rule out a duty of care being imposed on a regulator where the regulator has knowledge of a danger combined with foreseeable harm to a limited group of persons: at para. 66.

[56] Cases like *Taylor*, *Doe*, and *Frazier* support the proposition that proximity could arguably be established absent direct communication between a government entity and a plaintiff where the regulator knew of a danger to an identifiable population and took no steps to protect those individuals. However, claims that seek to ground proximity on this basis will not survive a strike application if the pleadings do not contain the material facts necessary to establish proximity: *Frazier* at para. 79.

Are the Pleadings Sufficient in this Case?

[57] In *Frazier*, this Court held that a bare allegation that the Minister knew of contraventions to the legislation was insufficient to ground proximity. This was because a pleading of a conclusory statement of a regulator’s knowledge of a risk of danger “frustrates the proximity analysis” by precluding the Court from undertaking the exercise of evaluating the possibility of the claim’s success under the *Anns/Cooper* test: at para. 68. In concluding that the pleadings were inadequate, the Court in *Frazier* commented on the particular importance of the plaintiff pleading material facts to support the key allegation of knowledge on the part of the regulator:

[77] In our view, the judge ought to have considered Canada’s argument that Ms. Frazier’s pleading was deficient for failing to plead material facts establishing a private law duty of care. This omission is of particular significance in relation to what the judge characterized as Ms. Frazier’s “key allegations”; that is, that the regulator knew or ought to have known of contraventions of the legislation, and took no action to address the danger. Ms. Frazier’s conclusory assertion that the regulator knew of the potential danger does not constitute a plea of material facts that supports the existence

of a proximate relationship between Ms. Frazier and the regulator. Ms. Frazier's explanation that she hoped to discover material facts through the discovery process was insufficient to defeat Canada's application to strike.

[Emphasis added.]

[58] SFU pleads knowledge on the part of the Athletic Commissioner in para. 28 of its amended third party claim, repeated here for ease of reference:

28. BCAC and/or Gilday knew or ought to have known that the WCMAC Defendants were promoting, organizing and conducting martial arts competitions or tournaments, which included strikes or kicks that are intentionally thrown to injure or cause damage, and that [they] were in contravention of the *Criminal Code* and the ACA and regulations, including specifically the October 22, 2022, April 22, 2023 and the October 14, 2023 tournaments.

[Underlining removed.]

[59] SFU's plea of knowledge on the part of the Athletic Commissioner is more developed than the bare plea advanced in *Frazier*. SFU's theory of arguable liability appears to rest on the notion that, because the Athletic Commissioner knew about the 2019 Event and the BCIT Event in the fall of 2022, he also knew or ought to have known about the Tournament in October 2023. However, missing from the third party claim are the material facts that would make this connection. For example, the pleading does not say what the Athletic Commissioner knew about the Tournament, nor if, how, or when he learned of the Tournament taking place. Further, no material facts are pleaded to describe the basis upon which SFU says the Athletic Commissioner ought to have been aware that the Tournament was taking place.

[60] In my view, it is plain and obvious that, as the amended third party claim is presently drafted, no special relationship of proximity arises from SFU's plea that the Athletic Commissioner knew or ought to have known about the Tournament, which contravened the legislation and gave rise to a foreseeable risk of harm.

[61] However, Courts are required to read pleadings generously, and to allow amendments to remedy deficiencies where possible: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 43.

[62] This Court in *Frazier* struck the claim in issue without leave to amend. In *Frazier*, as was the case in *Imperial Tobacco*, there was no issue about whether amendments could be made to remedy deficiencies in the pleadings in order to state a reasonable claim. The question on the pleadings in both those cases was whether, if the matter proceeded, new facts would come to light that would make out a claim that was not sustained by the existing pleading.

[63] In this case, it is simply not clear on the record before this Court whether there are material facts available to SFU that would remedy the defects in the amended third party notice. If such facts exist, they have not been pleaded, nor has SFU suggested in argument that it presently knows of additional material facts that would support its claim against the Athletic Commissioner. As such, the appropriate remedy is to strike the third party notice.

[64] However, unlike *Frazier* and *Imperial Tobacco*, in this case there may be additional material facts that support proximity, known to the parties but not to the Court. As a result, while I would strike the third party claim, I would do so without prejudice to SFU's procedural rights under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. Like any defendant, SFU may apply in the Supreme Court of British Columbia for leave to file a new third party notice under R. 3-5(4) of the *Rules* if it is aware of additional material facts that would support proximity, or if material facts are later discovered. Nothing in this judgment is intended to bar SFU from making such an application.

Disposition

[65] For these reasons, I would allow the appeal, set aside the order of the Supreme Court of British Columbia, and strike SFU's third party notice against the Province and Athletic Commissioner.

[66] As noted, the appeal with respect to naming Mr. Gilday personally as a third party was abandoned in the course of the hearing and need not be decided by this Court.

“The Honourable Justice Francis”

I AGREE:

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Justice Gomery”