

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canada (Attorney General) v. Mowi
Canada West Inc.*,
2026 BCCA 295

Date: 20260710
Dockets: CA50651; CA50652;
CA50653; CA50654

Docket: CA50651

Between:

**The Attorney General of Canada, Minister of Fisheries, Oceans and the
Canadian Coast Guard, Bernadette Jordan, and Joyce Murray**

Appellants
Respondents on Cross Appeal
(Defendants)

And

Mowi Canada West Inc.

Respondents/
Appellant on Cross Appeal
(Plaintiffs)

- and -

Docket: CA50652

Between:

**The Attorney General of Canada, Minister of Fisheries, Oceans and the
Canadian Coast Guard, Bernadette Jordan, and Joyce Murray**

Appellants
(Defendants)

And

Allpen Diving Ltd.

Respondent
(Plaintiff)

- and -

Docket: CA50653

Between:

**The Attorney General of Canada, Minister of Fisheries, Oceans and the
Canadian Coast Guard, Bernadette Jordan, and Joyce Murray**

Appellants
(Defendants)

And

James Walkus Fishing Co. Ltd.

Respondent
(Plaintiff)

- and -

Docket: CA50654

Between:

**The Attorney General of Canada,
The Honourable Bernadette Jordan and The Honourable Joyce Murray**

Appellants
Respondents on Cross Appeal
(Defendants)

And

Cermaq Canada Ltd.

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated
April 4, 2025 (*Mowi Canada West Inc. v. Canada (Attorney General)*),
2025 BCSC 634, Vancouver Dockets S232397, S232511, S232510, S232380).

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Place and Date of Hearing:

Vancouver, British Columbia
March 19–20, 2026

Place and Date of Judgment:

Vancouver, British Columbia
July 10, 2026

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Riley

Summary:

The four corporate plaintiffs were involved in the aquaculture industry in the Discovery Islands. Between 2020 and 2022, open-net pen aquaculture in the area was effectively shut down through a series of government decisions. In the court below, the plaintiffs commenced actions against two federal Ministers and the Attorney General, claiming significant losses as a result of the manner in which their business operations were terminated. Canada applied to strike the actions pursuant to R. 9-5. The judge below upheld the claims for misfeasance in public office, negligence and negligent misrepresentation, but struck the portions of the pleadings related to constructive taking and abusive administrative action. Canada appeals, contending the plaintiffs failed to plead material facts sufficient to ground the claim in misfeasance and to establish a private law duty of care essential to both claims in negligence. Two of the plaintiffs cross appeal the striking of their constructive taking claims.

Held: Appeals and cross appeals dismissed. In relation to misfeasance, Canada argues the plaintiffs have only pleaded breaches of procedural fairness, which they say cannot without more ground a claim in misfeasance. However, the plaintiffs pleaded more than breaches of procedural fairness, and it cannot be said at this stage that it is plain and obvious that a deliberate and egregious breach of procedural fairness could not ground the claim. As to negligence and negligent misrepresentation, the pleadings set out facts which, if proved at trial, may be sufficient to establish a private law duty of care. The constructive taking claims, however, were bound to fail, and the judge was right to strike them, as the pleadings disclose neither the taking of a proprietary interest nor an advantage flowing to the Crown.

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Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The issue on these four related appeals is whether the plaintiffs’ tort claims against two Ministers of the federal Crown in misfeasance in public office, negligence and negligent misrepresentation should be struck, contrary to the conclusion of the judge below. The Attorney General of Canada appeals, contending the respondent plaintiffs failed to plead material facts sufficient to ground the claim in misfeasance or to establish a private law duty of care essential to both claims in negligence. Two of the plaintiffs cross appeal the striking of their claims in constructive taking.

[2] For the reasons that follow, I would dismiss the appeals and cross appeals.

Background

[3] Between December 2020 and December 2022, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “Minister”), made decisions that effectively ended the salmon aquaculture industry in the Discovery Islands, which lie between Vancouver Island and the mainland coast of British Columbia. The four corporate plaintiffs carried on business related to open-net pen aquaculture in the area. They claim significant losses as a result of the abrupt and allegedly unlawful manner in which their business operations were terminated.

[4] Cermaq Canada Ltd. (“Cermaq”) operated three aquaculture facilities in the Discovery Islands, the first of which was established in 1989. Mowi Canada West Inc. (“Mowi”) had ten aquaculture sites in the Discovery Islands, although an eleventh facility erroneously believed to be located in the region was also shut down. Like Cermaq, Mowi commenced fish farming in the area in 1989. Both companies raised Atlantic salmon.

[5] Allpen Diving Ltd. (“Allpen”) is a family-run company that has, since 1996, provided commercial diving services to the aquaculture industry.

[6] James Walkus Fishing Co. Ltd. (“JWFC”) is an Indigenous-owned and family-run company that has, for 20 years, transported fish between fish farms and processing plants, using specialized vessels.

[7] Cermaq and Mowi held aquaculture licences granted under the *Fisheries Act*, R.S.C. 1985, c. F-14, which allowed them to engage in fish farming—an activity that is otherwise prohibited in Canada’s waters. The companies also held leases from British Columbia entitling them to occupy the seabed to which their open-net pens were anchored, and a number of other federal licences required to engage in aquaculture, including release and transfer licences issued under s. 56 of the *Fishery (General) Regulations*, SOR/93-53.

[8] The Minister has a statutory duty to manage fisheries and aquaculture in the public interest. The defendant, Bernadette Jordan, was the Minister from November 2019 to October 2021. The defendant, Joyce Murray, was the Minister from October 2021 to July 2023. Under s. 7(1) of the *Fisheries Act*, the Minister has absolute discretion to issue licences for fisheries or fishing, taking into account sustainability, scientific information, Indigenous knowledge, and social, economic and cultural factors in the management of fisheries.

[9] In order to assess the issues raised on appeal, it is necessary to have some understanding of the complex, five-year production cycle of Atlantic salmon farmed in open-net pens. Salmon eggs are raised in hatcheries. The juvenile salmon (called fry) are transferred into large freshwater rearing tanks for over a year until they naturally undergo smoltification—the physical changes required for fish to transition to a saltwater environment and become “smolts”.

[10] The smolts must be transferred from the freshwater rearing tanks to saltwater pens within a week or so of smoltification, or they will die. In order to control the spread of a particular parasite common to Atlantic salmon, hatchery smolts are often transferred from their freshwater rearing tanks to saltwater smolt-entry sites called “nursery farms” for six to eight months before being transferred to grow-out sites in the Discovery Islands.

[11] Once in the saltwater sites, the smolts continue to grow until they reach a marketable size, about 18 to 24 months after smoltification. They are then loaded onto purpose-built harvest vessels and transported to processing plants in British Columbia. It is common ground that raising and harvesting each generation of Atlantic salmon over a five-year cycle requires long-term planning and a predictable and consistent approach to regulation. In particular, transfer licences enabling the movement of fish from site to site are an integral part of the salmon aquaculture industry, without which the fish cannot reach maturity: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 293 at paras. 8–12, 14.

[12] I note parenthetically that the description of events that follows is necessarily based on the pleadings. Whether these facts will ultimately be established at trial remains to be seen.

[13] In December 2019, the Prime Minister published a mandate letter directing the Minister to work with British Columbia and Indigenous communities to create a plan to transition away from open-net pen aquaculture in coastal British Columbia waters by 2025. Following receipt of the mandate letter, Minister Jordan publicly referred to the need for a transition plan, but did not communicate an intention to shut down operations in the Discovery Islands.

[14] On December 8, 2020, the Minister had before her applications for the renewal of 19 aquaculture licences for facilities in the Discovery Islands and a briefing note provided by the Deputy Minister of the Department of Fisheries and Oceans (“DFO”). The Minister did not accept any of the recommendations made by DFO staff. Instead, she decided to temporarily renew the aquaculture licences, but prohibit the transfer of any new smolts into pens. Her decision read as follows:

My decision is for a temporary (18 month) renewal of aquaculture licences for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.

- During the period between licence renewal and June 30th, 2022, no hatchery smolts will be introduced.

- The intent of allowing time to grow out and harvest fish already in pens is to avoid culling in order to meet timelines.

[Emphasis added.]

[15] In a press release issued the next day—which is how the plaintiffs learned of the decision—the Minister expanded on the prohibition on moving fish, stating that “no new fish of any size” could be transferred into any of the Discovery Island facilities (*emphasis added*). The Minister’s decision-making on December 16 and in the press release on December 17 are referred to in these reasons as the “2020 Decision”.

[16] When the Minister made the 2020 Decision, Cermaq’s three pens in the Discovery Islands were empty, waiting to receive smolts. As a result, the Minister’s decision to prohibit the transfer of fish meant the aquaculture licences granted to Cermaq were useless. Mowi, too, could not carry on operations because it could not move its fish to various sites in keeping with their lifecycle. Mowi and Cermaq say the 2020 Decision effectively forced the closure of their operations in the area.

[17] Cermaq, Mowi and other operators in the Discovery Islands applied for judicial review of the 2020 Decision in the Federal Court. The petition was heard in October 2021, but a decision was not rendered until April the following year. In the meantime, Cermaq and Mowi repeatedly applied to the Minister for transfer licences, desperately trying to save the fish that were in need of transfer into the pens. Those applications were consistently rejected on the basis of “social acceptability”.

[18] On April 5, 2021, pending the outcome of the judicial review, Mowi obtained an interim injunction restricting the Minister from implementing the 2020 Decision insofar as it interfered with the issuance of transfer licences: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 293. Cermaq then reapplied to transfer smolts into its empty pens, expecting that the interim injunction would ensure that its applications were treated in the usual way under the existing criteria and would be granted as they always had been. That did not occur. Instead, Cermaq was told the Minister had decided to implement a new approach for

assessing transfer applications in the Discovery Islands (the “New Application Process”). Each transfer application would now be decided by the Minister directly, rather than by the usual statutory decision-maker; standard processing times would be extended from 20 to 40 business days; and each individual transfer application would require consultation with First Nations. In addition, DFO would retroactively apply the New Application Process to pending transfer applications.

[19] Faced with unworkable timelines, Cermaq tried to obtain another interim injunction to prevent the Minister from implementing the New Application Process. That application was denied: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 700. The Federal Court held that the Minister had the authority to change the application process. All subsequent requests for transfer licences by Mowi and Cermaq were denied.

[20] In total, after the 2020 Decision, eight transfer applications were refused (the “Transfer Decisions”). Cermaq and Mowi say that as a result they had to cull millions of fish.

[21] On April 22, 2022, Justice Heneghan issued reasons for judgment in the judicial review proceeding, quashing the 2020 Decision: *Mowi Canada West Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588. She also extended the injunction restraining the Minister from implementing a general prohibition on transfers of fish.

[22] Justice Henneghan concluded the 2020 Decision was a licencing decision affecting individuals, rather than a policy decision affecting fisheries generally. It followed that Cermaq and Mowi were owed procedural fairness, and that the Minister had breached that obligation by not giving operators notice of the 2020 Decision and a meaningful opportunity to be heard before it was made. She also found the 2020 Decision to be unreasonable because it was not supported by written reasons—reasons that were required because the 2020 Decision had significant consequences for operators and because the Minister had departed from the recommendations of DFO staff.

[23] Upon receiving Henneghan J.’s decision, and without giving Cermaq and Mowi an opportunity to be heard, or gathering any new information, Minister Murray announced that a final decision on open-net pen salmon aquaculture would be made in 2023 but, in the interim, she would not reissue licences for Atlantic salmon farming in the Discovery Islands (the “2022 Decision”)—thereby precluding any resumption of the aquaculture operations that had effectively been terminated by the 2020 Decision.

Proceedings in the court below

[24] In March 2023, Cermaq, Mowi, Allpen and JWFC filed claims against Canada and the two Ministers concerning the 2020 Decision, the Transfer Decisions, the New Application Process and the 2022 Decision (collectively, the “Impugned Decisions”). All four plaintiffs advanced claims of misfeasance in public office. Mowi and Cermaq also plead negligence, negligent misrepresentation and constructive taking (expropriation). Cermaq alone pursued a claim for abusive administrative action.

[25] In April 2024, Canada applied to strike all four actions under R. 9-5(1)(a) and (d), contending the pleadings disclosed no reasonable cause of action and amounted to an abuse of process.

[26] In thorough reasons, the chambers judge concluded it was not plain and obvious that the claims for misfeasance in public office, negligence, and negligent misrepresentation were bound to fail. However, she found it was plain and obvious that the claims for constructive taking and abusive administrative action were bound to fail and struck those parts of the pleadings.

On appeal

[27] Canada submits the judge erred in law by not striking the claims for misfeasance in public office, negligence and negligent misrepresentation by:

1. As to misfeasance, accepting legal conclusions and bare pleadings without sufficient material facts; and
2. As to all three claims, not giving due consideration to the Minister's absolute discretion to refuse licences in the public interest, which is also incompatible with a private law duty of care.

[28] Mowi and Cermaq cross appeal, asserting the judge erred in striking their constructive taking claims. Cermaq does not appeal the striking of its claim for abusive administrative action.

[29] The standard of review for orders made under R. 9-5(1)(a) is correctness, because whether an arguable cause of action has been pleaded is a question of law.

Analysis

[30] I begin by addressing two points of general application. First, in assessing an application to strike, the court is to read the pleadings generously, assuming the pleaded facts to be true: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21.

[31] Second, Canada places considerable emphasis on the wording of s. 7 of the *Fisheries Act*, which gives the Minister “absolute discretion” to issue licences for fisheries or fishing. Canada asserts the judge failed to recognize that this broad discretion is inconsistent with the imposition of private tort liability. However, there is no such thing as “absolute and untrammelled discretion” at law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 108, citing *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140, 1959 CanLII 50. In the administrative law context, such decisions are constrained by the requirements of reasonableness and procedural fairness. In other contexts, the exercise of statutory power is constrained

by the object and scope of the discretion conferred by the statute: *Roncarelli* at 140; *Auer v. Auer*, 2024 SCC 36 at paras. 59–65.

[32] I turn now to the first cause of action in issue.

1. Misfeasance in public office

[33] Misfeasance in public office is an intentional tort directed at curbing unlawful behaviour by government officials. It consists of a public officer either using their authority to intentionally injure a person or category of persons (Category A), or intentionally acting, knowing they have no authority to so act, and are acting unlawfully, being subjectively aware that the act is likely to injure a person (Category B): *Odhavji Estate v. Woodhouse*, 2003 SCC 69 [*Odhavji*] at para. 22; *Dargatz Mink Ranch Ltd. v. British Columbia (Ministry of Agriculture and Food)*, 2025 BCCA 272 [*Dargatz*] at paras. 30–33. In issue on this appeal is whether the judge erred in finding that the plaintiffs adequately pleaded a Category B misfeasance.

[34] It must be recognized that claims for misfeasance in public office are to be advanced and assessed with caution and restraint. The tort of misfeasance in public office provides redress for egregious intentional misconduct, not for maladministration, official incompetence or bad judgment in the execution of public duties: *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 [*Rain Coast*] at para. 3; *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 [*Powder Mountain*] at para. 2. Nonetheless, properly utilized, the tort of misfeasance in public office is an important protection against improper use of authority by government officials.

[35] Canada’s fundamental criticism of the pleadings is that they rest on nothing more than “public law unlawfulness”—i.e., breaches of procedural fairness, such as a failure to give notice, provide reasons, and afford the affected parties an opportunity to be heard. Canada argues that procedural irregularities are not enough to ground an action in misfeasance. Missing from the pleadings, it says, is the essential allegation that the Ministers acted in a manner that was inconsistent with their statutory authority under the *Fisheries Act*.

[36] In short, Canada submits that breaches of procedural fairness cannot, on their own, support a claim in misfeasance.

[37] Canada does not dispute that material facts establishing a breach of procedural fairness could overlap with material facts capable of supporting a claim of misfeasance in public office (as was the case in *Slater v. Pedigree Poultry*, 2022 SKCA 113, leave to appeal to SCC ref'd, 40476, 40482, 40485 (11 May 2023)). However, relying on *Odhavji* at para. 24, Canada submits that in order to amount to misfeasance, a breach of procedural fairness would have to involve deliberate unlawful conduct falling into one of three categories:

1. An act in excess of the public official's powers;
2. The use of a power for an improper purpose; or
3. A breach of a statutory duty.

[38] In summary, Canada argues the judge erred by relying on procedural unfairness alone to ground a claim for misfeasance in public office, and erred in refusing to strike a claim that contained no material facts supporting an unlawful use of the Minister's powers under the *Fisheries Act*.

[39] I would not accede to this argument for two reasons. First, the plaintiffs do plead use of a statutory power for an improper purpose. Here, they plead that Minister Jordan exceeded her statutory authority when, having issued aquaculture licences covering the period to June 30, 2022, she simultaneously used her statutory authority to prohibit the granting of the transfer licences necessary to conduct aquaculture during that period.

[40] While accepting that the Minister had the authority to issue or deny transfer licences, the plaintiffs submit that she could do so only in accordance with s. 56 of the *Fishery (General) Regulations*, which reads:

- 56 The Minister may issue a licence if
- (a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;
 - (b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and
 - (c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

Read generously, the pleading contends the Minister used her authority over transfer licences for the improper purpose of immediately ending aquaculture in the Discovery Islands despite purporting to gradually phase out aquaculture in accordance with the issued aquaculture licences. The viability of this claim cannot be determined on the basis of the pleadings alone. It is therefore distinguishable from the unsuccessful pleading in *Dargatz* that regulatory amendments ending mink farming were *ultra vires* because they were made to appease animal rights groups and others—political and social factors this Court found to be within the scope of the enabling legislation in issue.

[41] Second, I cannot agree that it is plain and obvious that deliberate and egregious breaches of procedural fairness alone cannot ground a claim in misfeasance in public office. The Supreme Court of Canada in *Odhavji* reframed the elements of this private law tort in broad terms, saying:

- 32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.
- [Emphasis added.]

[42] In *Odhavji*, the issue before the Court was whether the tort was restricted to the unlawful exercise of a statutory or prerogative power, as opposed to a failure to comply with a statutory duty—i.e., failing to act rather than engaging in an improper act. However, in the course of reviewing the origins and development of the tort (including this Court's judgments in *Powder Mountain* and *Rain Coast*) Justice Iacobucci made a number of observations relevant to the assessment of Canada's argument in this case:

- The class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of public power, but is more broadly based on unlawful conduct in the exercise of public functions generally (at para. 17);
- There is a widespread consensus in other common law jurisdictions that a broad range of misconduct can found an action for misfeasance in public office (at para. 20);
- Both Category A and Category B forms of the tort involve deliberate disregard of public duty, coupled with knowledge that the misconduct is likely to injure the plaintiff (at para. 23);
- Insofar as the nature of the misconduct is concerned, the essential question is whether the conduct was deliberate and unlawful (at para. 24);
- Where a public officer is under a legal duty to act, a deliberate breach of that duty can amount to misfeasance (at para. 24);
- The ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff (at para 25).

[43] The Supreme Court has recently explained the nature of the cause of action for misfeasance in public office. In *Resler v. Anglin*, 2026 SCC 23 the majority said:

[84] Professor Chamberlain notes that the tort of misfeasance in public office occupies a unique position at the intersection of tort law and administrative law (“When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law” (2015), 44 *Advocates’ Q.* 489, at p. 502). Its very purpose is to serve as a tool against misconduct by government officials (p. 501). The tort does not stand in contradiction to administrative law proceedings. Rather, it addresses conduct that is uniquely tortious in nature and distinct from an administrative wrong, thus providing an entirely separate remedy (pp. 492-93). In fact, since a misfeasance claim requires proof of “deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff”, as well as material damage, a plaintiff cannot bring such a claim merely to vindicate a right or because a public officer has acted unlawfully, or breached a statutory duty (*Odhavji Estate*, at para. 23; see also *Watkins*, at para. 27; *Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1 (SCC), [1971] S.C.R. 957, at pp. 969-71; *R. in right of Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205, at pp. 224-28). Those seeking declarations to remedy such breaches or reconsideration of a decision are restricted to administrative law remedies (Chamberlain (2015), at p. 493).

[85] The focus in tort is not on reassessing the propriety of the administrative decision. Instead, actions taken in the administrative context become tortious when the use of public power serves a purpose outside the proper scope of public law, such as injuring the plaintiff (A. Ripstein, *Private Wrongs* (2016), at pp. 182-83). In exercising public powers for a purpose beyond the scope for which they were conferred, public officers create a “relationship that lack[s] a basis in public law” and instead “makes those powers private as between the official and the person against whom they are used” (pp. 183-84).

[44] Applying these principles, I can see no basis why a decision made by a public official who knows they have a duty to afford procedural fairness to an applicant and intentionally refuses to carry out that duty, knowing the applicant could suffer as a result, could not ground a claim in misfeasance in public office. To be clear, misfeasance is not to be conflated with an administrative wrong or a public official inadvertently or negligently failing to adhere to the requirements of natural justice. Maladministration and poor judgment are not misfeasance. Such cases are excluded from the ambit of the tort by the requirements for knowledge of the wrong and of the impact on the person or category of persons affected.

[45] The allegation pleaded in this case is not based on maladministration or poor judgment. It rests on the exercise of a statutory power with deliberate disregard for the official's duty and for a purpose the official knows to be beyond their authority. The plaintiffs contend Minister Jordan knew she had a duty to afford procedural fairness, and deliberately and knowingly decided to breach that duty, well aware of the circumstances of the applicants and of the harm that would flow from that denial. They say this conduct constitutes the bad faith that lies at the heart of the tort of misfeasance in public office.

[46] In support of the allegation that Minister Jordan knew she had a duty to give them notice of the 2020 Decision and an opportunity to be heard, the plaintiffs plead the announcement by the government of its plan to halt open-net pen aquaculture by 2025 and the Minister's announcement of her intention to engage with stakeholders in formulating an orderly transition plan so as to provide stability to the industry and ensure economic feasibility. They also plead that the consultations for the 2025 transition plan had not even begun when the Minister made the 2020 Decision.

[47] In support of their allegation of bad faith, the plaintiffs also plead that the Impugned Decisions were arbitrary, capricious and so inconsistent with the relevant context that good faith cannot be supported.

[48] The material facts pleaded in support of that allegation include the Minister's decision to ignore legal advice and recommendations from DFO staff; Henneghan J.'s finding that Minister Jordan acted in contravention of the interim injunction issued in the judicial review proceeding; and the Minister's decision in the face of that injunction to impose the New Application Process, thereby increasing timelines, requiring extensive consultation with First Nations (consultation the Federal Court had earlier ruled to be unnecessary) and moving the decision-making to herself personally—all on a timeline she knew could not work for the applications Cermaq and Mowi had made to move smolts into pens within the window necessary to ensure their survival.

[49] The plaintiffs also plead the material fact of Minister Murray’s 2022 Decision, which effectively re-implemented the 2020 Decision Henneghan J. had set aside on the basis that it could not be made without notice, consultation and reasons—again without fulfilling clearly delineated duties to afford procedural fairness to Cermaq and Mowi. They also allege the Minister knew, in relation to the Impugned Decisions, that judicial review would come too late in the day to save the fish that had to be culled in the millions.

[50] In support of the allegation that the Ministers knew that their decisions would cause harm, the plaintiffs plead a close link between the operations of the various aquaculture farms and DFO, such that the Ministers were fully informed on the status of the fish and the plaintiffs’ operations. In particular, they plead Minister Jordan was aware that Cermaq had empty pens and therefore could not utilize the aquaculture licences in any way without also receiving transfer licences. In relation to Mowi, they plead the Minister was aware that they would need to move fish in order to grow out their stocks due to biomass restrictions, again making the denial of transfer licences inconsistent with the stated purpose of having a transition plan that would permit operators to grow out their fish and prevent culling.

[51] Mowi further pleads the Minister’s refusal to grant licences for its Hardwicke site even after she realized it was not located in the Discovery Islands and had been included in the prohibition on transfers due to an administrative error.

[52] The plaintiffs could point to no case in which a breach of procedural fairness alone was found to be sufficient to ground a claim for misfeasance in public office. They rely on *Slater*, in which the Saskatchewan Court of Appeal recognized that a breach of procedural fairness can constitute unlawful conduct supporting a claim in misfeasance: at para. 109. The Crown submits *Slater* does not support the plaintiffs’ position, as the breaches of procedural fairness in that case resulted in the use of statutory power for an improper purpose. However, as noted above, the plaintiffs also plead use of statutory power for an improper purpose. Insofar as they rely on the procedural fairness breaches to constitute the “unlawful act” element of

misfeasance, their position does not rest on *Slater* alone. They rely on the broad description of “unlawful conduct” in *Odhavji* and the principles stated therein.

[53] I will address here Canada’s contention that the plaintiffs’ reading of *Odhavji* is inconsistent with this Court’s decision in *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214 [*Greengen*].

[54] In *Greengen*, the plaintiff applied for a water licence and a Crown land tenure to support a run-of-river hydropower project at Fries Creek, located within the traditional territory of the Squamish Nation. The Province denied *Greengen*’s application, citing the interests of the Nation. In January 2016, *Greengen* filed a petition for judicial review of the government decisions, contending they were unreasonable. A few months later, in March 2016, *Greengen* also filed a notice of civil claim against the Province, alleging misfeasance in public office on the basis that the Province had denied the licences for “collateral political or otherwise improper reasons having no relation to the merits or legality of the [p]roject”. The Province applied to strike the claim under R. 9-5(1)(d) as an abuse of process, arguing it was a collateral attack on the statutory decisions which were being challenged concurrently in the judicial review proceedings. The chambers judge agreed that the civil claim should not be allowed to proceed, saying:

[227] ... in its essence, the civil action seeks to challenge the lawfulness of decisions made by the relevant statutory decision-makers, including the fairness of the process by which their conclusions were reached. These are questions that are more appropriately decided by way of judicial review, within the context of the deferential analytic framework that has been jurisprudentially tailored for proceedings of this nature in light of the recognized expertise of statutory decision-makers, and administrative tribunals.

[Emphasis added].

[55] On appeal, the primary issue before this Court was whether the judge erred in finding the misfeasance claim to be a collateral attack on the decisions under review in the administrative proceeding. That question required consideration of *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 [*TeleZone*]. In that case,

the Supreme Court of Canada overruled a line of authority holding that any private law claim for damages against the Crown based on an allegedly unlawful government decision constituted an impermissible collateral attack—unless the plaintiff first applied for judicial review to have the decision overturned. The Supreme Court of Canada concluded this approach created an unnecessary barrier to access to justice. The Court reasoned that, if the claimant is content to let the allegedly unlawful decision stand, and instead seeks compensation for losses flowing from that decision, “there is no principled reason why [they] should be forced to [engage in] a judicial review application” to determine whether the decision is unlawful when they are not seeking to set aside the order: at para. 19. In other words, the Court in *TeleZone* determined that civil actions seeking damages for unlawful decisions are distinct from judicial review proceedings and should be allowed to proceed without the requirement that plaintiffs first establish unlawfulness on judicial review. The Court recognized, however, that a civil action may constitute a collateral attack if it seeks to invalidate an administrative decision or avoid its consequences.

[56] In keeping with *Telezone*, this Court in *Greengen* found that, although the plaintiff could not proceed with both tracks simultaneously, it could choose to proceed with the civil claim since it was not, in that proceeding, trying to set aside the impugned decisions or compel the Province to issue a land tenure or water licence—it was, rather, seeking damages for misfeasance of public office.

[57] The Court concluded that the chambers judge erred in her analysis when she focussed on whether both proceedings challenged the lawfulness of the decisions, instead of considering whether *Greengen* had pleaded a proper civil cause of action for misfeasance in public office. The Court then wrote:

[57] Clearly, both proceedings arise from the same facts. Although *Greengen*’s allegation of unlawfulness touches on issues of jurisdiction and process, it raises a fundamental issue about the substantive basis for the decisions rejecting its applications. Specifically, *Greengen* alleges that the decisions were made for “collateral political or otherwise improper reasons having no relation to the merits or legality of the Project”, thus rendering them “unlawful” – not for the purpose of declaring them invalid – but rather for the purpose of asserting that the decision makers engaged in deliberate and unlawful conduct. These purposes are distinct. The unlawful conduct alleged

in support of a misfeasance claim is of a different character than that alleged in support of a remedy on judicial review. As the Province acknowledges, a finding of invalidity is common to both proceedings but whether that invalidity constitutes misfeasance of a public office depends on other evidence.

[Emphasis added.]

[58] Canada contends that the paragraph above should be read as a ruling by this Court that a breach of procedural fairness cannot constitute the “unlawful conduct” element of the tort of misfeasance in public office. I would not accede to this submission. In my respectful view, the passage reflects nothing more than the Court taking the step the judge below had missed—i.e., assessing whether Greengen had pleaded a proper civil cause of action for misfeasance in public office, as distinct from complaints that could only be addressed on judicial review. The Court observed that both proceedings arose from the same facts, touching on issues of jurisdiction and process, but then turned to the key question, finding that Greengen alleged unlawful decisions “not for the purpose of declaring them invalid”—as would be the case on judicial review—“but rather for the purpose of asserting that the decision makers engaged in deliberate and unlawful conduct”—one of the elements of the tort of misfeasance in public office.

[59] The Court’s description of the misfeasance claim raising an issue about the “substantive basis” for the unlawful decision and depending on “other evidence” cannot, in my view, be read as a ruling on whether procedural breaches of natural justice could also constitute deliberate unlawful conduct sufficient to ground a claim in misfeasance. That point was not in issue in *Greengen*. As I see it, the Court was simply describing the nature of the unlawful conduct pleaded in the case before it, which rested on a decision made for an improper purpose.

[60] Accordingly, even if the illegality alleged by the plaintiffs rests in whole or in part on breaches of procedural fairness, I cannot find at this point that their misfeasance of office claim is bound to fail for that reason alone. The plaintiffs allege intentional and knowing breaches of procedural fairness amounting to unlawful conduct, with subjective awareness that the unlawful conduct is likely to cause injury. In my view, the plaintiffs should be given the opportunity to prove their case,

recognizing that, if the Minister is ultimately found to have had the authority to make the Impugned Decisions (albeit in accordance with procedural fairness), damages may be limited or difficult to prove. The judge will have to consider what would have happened if the proper procedure had been followed. In that regard, the plaintiffs hope to establish that the outcome would have been different.

[61] The damages essential to a claim in tort are pleaded to include, at a minimum, the loss of millions of fish that would not have been culled if the 18-month aquaculture licences granted by the Minister had not been nullified by her refusal to permit the transfers of fish necessary to make use of those licences. The corresponding damages for Alpen and JWFC are rooted in the loss of income from services that would have been provided during the 18-month period of the renewed licences—and potentially beyond—had the Minister decided to phase out the farms in an orderly way following consultation.

2. Negligence

[62] This part of the appeal turns on whether Mowi and Cermaq have pleaded material facts that could support the proximity necessary to establish a *prima facie* duty of care in accordance with the *Anns/Cooper* framework governing the identification of novel private law duties of care: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79.

[63] In general, the law does not recognize an action for negligent breach of a statutory duty: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 227; 1983 CanLII 21. It is therefore incumbent on Cermaq and Mowi in this case to establish that a relationship of potential liability in negligence should be recognized: *Wu v. Vancouver (City)*, 2019 BCCA 23 at para. 45.

[64] Where the pleaded duty of care falls outside previously recognized categories, the plaintiff must show both a relationship of proximity and that the harm alleged was a reasonably foreseeable consequence of the defendant's conduct:

Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19 at para. 18; *Cooper* at para. 42. In *Wu*, Justice Harris addressed proximity, saying:

[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.

[65] The role that a statutory scheme of regulation plays in analysing whether sufficient proximity exists between a public authority and a claimant is a difficult issue: *Wu* at para. 52. 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 those being regulated. That is so even if a potential claimant is a person who benefits from the proper implementation of the regulatory scheme: *Cooper* at paras. 43–44; *Gill v. Canada (Minister of Transport)*, 2015 BCCA 344 at para. 23.

[66] In this case, Canada argues that none of the interactions relied on by Cermaq and Mowi describe conduct that is outside the administration and enforcement of the regulatory scheme. It says there is, accordingly, nothing to create the kind of proximity necessary to give rise to a duty of care.

[67] I would not accede to this argument. Although Cermaq and Mowi plead interactions within the regulatory relationship, they also plead interactions that go beyond that scope. For example, Cermaq points to the Aquaculture Policy

Framework adopted by DFO in 2008, which describes DFO's vision for aquaculture development. It contains a series of commitments made by DFO, including:

... being both an enabler and a regulator of aquaculture development, affirming its role as a department of sustainable development. Enabling means improving the business climate for aquaculture development, to benefit Canadians.

[68] I agree with the judge that the pleadings identify a series of interactions, which, if proven at trial, may be sufficient to establish the necessary proximity. At para. 215 of her reasons, the judge set out the following material facts in support of the pleading of proximity:

- a) the finfish aquaculture industry in the DI is small and closely regulated. It is comprised of three larger operators, which include Mowi and Cermaq;
- b) aquaculture operators have been directly involved in the development of DFO's regulation, policies, licensing criteria, conditions of license, action plans, government frameworks, risk frameworks, and other similar measures. They also regularly communicate with DFO regarding the company's business;
- c) the Aquaculture Policy Framework, and [Framework for Aquaculture Risk Management], was developed with input from members of the aquaculture industry;
- d) the long-term and perennial nature of aquaculture required the DFO, and the Ministers, to be in a close, direct, and ongoing relationship with the plaintiffs;
- e) the DFO and the Ministers were aware of both the importance of the transfer of smolts to the production plans, the tightly timed nature of applications for transfers between marine facilities within production cycles, and the plaintiffs' expectations that it would be able to make routine transfers as had historically occurred;
- f) the plaintiffs provided regular reporting to the DFO providing details of the fish population and biomass expected at each farm, the anticipated stocking and harvesting dates for each farm, and the year class of the fish at each farm;
- g) the DFO and Ministers were aware that without transfers of smolts to marine facilities, aquaculture licenses are rendered effectively useless, and so the plaintiffs were in a special relationship of dependence on the DFO and the Ministers;
- h) the parties engaged in numerous meetings and communications with the plaintiffs outside of the ordinary bounds of regulator and regulated under the *Fisheries Act*, the [*Pacific Aquaculture Regulations*], and the [*Fishery (General) Regulations*]; and

- i) historically, any time the DFO or the Ministers contemplated making materials changes to a licence, or other activity that would affect the plaintiffs' operations, the DFO would engage with the plaintiffs.

[69] As the Supreme Court of Canada observed in *Imperial Tobacco* at para. 47, since the question on a motion to strike is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of establishing proximity, “where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at this stage may be difficult”.

[70] In my view, it is not plain and obvious that Cermaq and Mowi will be unable to establish proximity sufficient to ground a duty of care. I would therefore not accede to this ground of appeal.

3. Negligent misrepresentation

[71] Negligent misrepresentation is a subset of negligence in which a duty of care stems from an undertaking made by the defendant, on which the plaintiff reasonably relied. Where negligent misrepresentation is established, the claimant has a legally enforceable right to recover damages for losses caused by their reasonable reliance: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 32.

[72] I have already addressed Canada's submission that the claim in negligence should fail for lack of sufficient pleading of proximity to establish a duty of care. What remains to be addressed is Canada's argument that Cermaq and Mowi failed to plead undertakings or representations sufficient to ground a claim in negligent misrepresentation. Canada contends the plaintiffs have only pleaded statements concerning future policy that cannot bind a Minister.

[73] Cermaq pleads that it relied on several documents as representations, and that it was involved in the creation of many of them. These documents include the Aquaculture Policy Framework, the Framework for Aquaculture Risk Management, and the National Code on Introductions and Transfers of Aquatic Organisms. Mowi pleads that it also relied on representations regarding stability in the aquaculture industry and the provision of notice to the industry of any regulatory

changes, a commitment to not making decisions that would compromise local economies, and an acknowledgement that the recommendations made in 2012 by the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River regarding the assessment of risk posed by open-net pen aquaculture in the Discovery Islands had been resolved.

[74] In my view, it is not at all clear that a statement by a Minister concerning how she intends to address a matter within her authority—even if it could be described as a policy decision—could never amount to a representation upon which a claimant might reasonably rely. Whether that is so in this case, and whether reliance was reasonable in the context of discretionary licence renewals, is properly a matter for trial.

[75] The same response can be made to Canada’s assertion that all of the statements relied on referred to future events, which cannot ground a claim for negligent misrepresentation: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 12. The judge assessed the pleaded representations and concluded that whether they concerned future events was a question of fact to be determined at trial. I agree. Interpreting the representations requires an examination of the context in which they were made. For example, can it be said that a statement that aquaculture “will be transitioned over a five-year period” refers only to a future event and is not a representation that the transition would not take place abruptly in 2020?

[76] In summary on this ground of appeal, I see no reviewable error in the judge’s analysis. I turn now to Cermaq and Mowi’s cross appeals.

4. Constructive taking

[77] Constructive taking is a forcible acquisition by the Crown, through an exercise of its regulatory powers, of privately-owned property for public purposes: *Annapolis*

Group Inc. v. Halifax Regional Municipality, 2022 SCC 36 [Annapolis] at para. 18.

To establish constructive taking, the claimant must demonstrate that:

- a) a public authority has acquired a beneficial interest either in the claimant's property or flowing from it—i.e., an advantage; and
- b) the state action has removed all reasonable uses of the property: *Annapolis* at para. 44.

[78] Canada acknowledges that a determination of whether the second branch of the test (removal of all reasonable uses) could be met would require determinations on the evidence. Therefore, this ground of appeal turns on whether the notices of civil claim set out the material facts necessary to establish that Canada has either obtained a beneficial interest in the plaintiffs' property, or an advantage flowing from that property.

[79] In my view, this issue can be dealt with summarily. I see no error in the judge's reasoning and would largely adopt it.

[80] In brief, fishing licences, which include the aquaculture and transfer licences in issue, are property of the Crown, not of licensees, and do not confer any future right or privilege: *Fishery (General) Regulations*, ss. 2, 16. They do not therefore confer a proprietary right of the kind that could be expropriated, or from which an advantage or benefit could flow: *Anglehart v. Canada*, 2018 FCA 115 at para. 40. This is not a case like *R. v. Tener*, [1985] 1 S.C.R. 533, 1985 CanLII 76, in which the claimant was effectively dispossessed of a vested proprietary interest in Crown land—mineral rights—which was made inaccessible by regulation, thereby denying the claimant the right to go on the land to take the minerals they owned.

[81] Put another way, the Crown has the right to control whether aquaculture occurs in the Discovery Islands. Accordingly, it did not acquire anything, whether property or an advantage, when the licences were not renewed, quite apart from the fact that the licences do not confer a proprietary interest to licence holders.

[82] Mowi and Cermaq point out that they plead the taking of more than the aquaculture and transfer licences. They rely on property interests in their fish, provincial licences of occupation (which are a form of land tenure), specialized facilities, equipment and infrastructure, as well as commercial goodwill, all of which they say were taken when the aquaculture and transfer licences were not granted or given effect.

[83] There is no doubt that Canada's regulatory decisions had an impact on Cermaq and Mowi's operations, but that is not sufficient to establish constructive taking. As the Alberta Court of Appeal observed in *Altius Royalty Corporation v. Alberta*, 2024 ABCA 105:

[20] The concept of "acquisition" in the *CPR/Annapolis* test must be understood as pertaining to property. In the words of *Annapolis*, a constructive expropriation may arise where a "beneficial interest – understood as an advantage – in respect of private property accrues to the state, which may arise where the use of such property is regulated in a manner that permits its enjoyment as a public resource": at para 4.

[Italic emphasis in *Altius Royalty Corporation*; underline emphasis added.]

[84] There is no such accrual to the state pleaded here. The refusal of licences under the *Fisheries Act* does not give the state the benefit or advantage of using the plaintiffs' fish, facilities, equipment, or commercial goodwill as a public resource. All of that property continues to belong to the plaintiffs. Those assets may no longer be of the same use to the plaintiffs, but that is a question distinct from whether the state enjoys an advantage or benefit flowing from the claimant's inability to use its assets. I also agree with the judge that the political and policy advantage to the Crown of accommodating First Nations opposition to fish farming in the Discovery Islands is insufficiently tethered to the property interests the plaintiffs rely on to be arguable as a benefit flowing from their "taking": *C&A Mink Ranch Ltd. v. British Columbia*, 2024 BCSC 770 at paras. 52–53, *aff'd* 2025 BCCA 272.

[85] In summary, the pleadings disclose neither the taking of a proprietary interest, nor an advantage or benefit flowing to the Crown from the termination or nonrenewal of licences. I can see no basis on which an amendment could be made to remedy these defects.

[86] As the constructive taking claim is bound to fail, the judge was right to strike it.

Disposition

[87] I would dismiss the appeal with costs to the respondents. I would dismiss the cross appeals with costs payable to Canada by Cermaq and Mowi.

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Mr. Justice Harris”

I AGREE:

“The Honourable Mr. Justice Riley”