COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *599253 Alberta Ltd. v British Columbia,* 2026 BCCA 424

Date: 20261029
Docket: CA50852

Between:

599253 Alberta Ltd. and Larry Penner

Appellants
(Plaintiffs)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated June 24, 2025 (*599253 Alberta Ltd. v British Columbia*, 2025 BCSC 1175, Kamloops Docket S62010).

Counsel for the Appellants:	J. Frame
Counsel for the Respondent:	D.L. Brownell K.M. Fast
Place and Date of Hearing:	Kamloops, British Columbia April 1, 2026
Place and Date of Judgment:	Vancouver, British Columbia October 29, 2026

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Justice Warren

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Summary:

The appeal concerns a private dam alleged to have been defectively constructed in 1968 on a water course near Kamloops. The appellants have been responsible for the dam's licence since 2002, when the corporate appellant purchased a property adjacent to the dam. The appellants' claim alleged that the Province owed them a duty of care to warn of the dam's defects. The judge struck the claim as failing to disclose a cause of action. On appeal, the appellants argue the judge erred in her application of the principles concerning claims against public regulators acting under statutory authority as set out in Waterway Houseboats Ltd. v British Columbia, 2020 BCCA 378. They argue the judge should have found that the Province owed a duty of care or that the question of whether their relationship with the regulator was sufficiently proximate for a duty of care to be found should have been referred to trial.

Held: Appeal dismissed. The appellants are unable to identify any error in the judge's findings or analysis. The decision in Waterway is an analogous precedent, and the non-existence of a duty of care being owed by the regulatory authorities acting under the relevant legislation has been definitively answered. There is no need to conduct a full Anns/Cooper analysis or to refer the matter to trial to consider the proximity question.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] The appellants appeal the order of Justice Sharma striking their amended notice of civil claim (the "ANOCC") under Rule 9-5(1) of the British Columbia *Supreme Court Civil Rules* as failing to disclose a cause of action. The appellants' claim concerns alleged design and construction defects in a private dam built in 1968 on Cherry Creek, a water course near Kamloops. The appellants became responsible for the dam's licence in 2002, when the corporate appellant, 599253 Alberta Ltd., purchased a property adjacent to the dam. The appellants allege that the provincial regulator learned of the defects when it first licenced the works. Further, they argue that the respondent, His Majesty the King in Right of the Province of British Columbia (the "Province"), owed a duty of care to warn subsequent purchasers of the properties, to which the licence was appurtenant, of the defects in the dam structure.

[2] The judge concluded the respondent did not owe a private law duty of care to the appellants and struck the claim through application of the principles in

Waterway Houseboats Ltd. v British Columbia, 2020 BCCA 378 [*Waterway*]. The parties agree that the framework established in *Waterway* to consider claims against public regulators acting under statutory authority is applicable to the appellants' claims. However, the appellants contend the judge misapplied those principles and argue that a duty of care is owed under basic tort principles because the respondent's actions created a risk of harm which must have a remedy in tort. The respondent submits the judge made no error in her application of the principles in *Waterway* and, in the alternative, that the appeal should be struck as an abuse of process.

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[3] The Province's abuse of process argument is founded on the resolution of provincial court proceedings brought against Mr. Penner, who is the individual appellant, and the corporate appellant. They were charged under the *Offence Act*, RSBC 1996, c 338 with failing to comply with a series of orders made by provincial regulators under s 93 of the *Water Sustainability Act*, SBC 2014, c 15 [*WSA*] that required them to maintain or repair the dam. The appellants pleaded guilty to the charges, and the court imposed a modest fine because it was apparent the appellants would have to pay significant sums to repair or remove the dam structure. The appellants' claim seeks compensation for the legal fees they incurred in defending that charge as well as for the costs they will incur to comply with the orders. The Province submits it would be an abuse of process to permit the claim to continue where the appellants: admitted the offence; did not contest the authorization of the orders in those proceedings; pledged at sentencing to work with the provincial water branch to address the deficient works; and received the benefit of their remorse on sentencing.

[4] I agree with the respondent that the claim is ill conceived. In my view, the judge did not err in her application of *Waterway*, nor did she err in concluding the respondent does not owe a private law duty of care to the appellants. Having arrived at that conclusion, I need not consider the abuse of process allegation. I would dismiss the appeal for substantially the same reasons as the judge.

Reasons

[5] The judge's reasons, indexed at 2025 BCSC 1175 (the "Reasons"), are detailed and comprehensive. I will refer to the Reasons to set out the background and the judge's reasoning.

[6] The Reasons describe the relevant factual and procedural background, including: the building and licencing of the dam in 1967; the appellants' acquisition of the property and the dam licence; and the dealings between the Ministry of Forest, Lands, Natural Resource Operations and Rural Development which led to the issuance of the order under the *WSA* (the "Order"), requiring the appellants to repair and maintain the dam. When the appellants did not carry out the works to repair the dam as required by the Order, the Province brought criminal proceedings against the appellants under s 107(1)(i) of the *WSA* for their willful contravention of the Order. The appellants pleaded guilty and were sentenced for that offence: Reasons at paras 6-22.

[7] The licence in question was appurtenant to two properties, one of which is owned by the corporate appellant. The other property owner—Robert Simpson—was also charged and pleaded guilty to willful contravention of the Order. Mr. Simpson is not a party to this action. In sentencing the appellants and Mr. Simpson to a fine of $2,000 each for their willful breach of the Order, the provincial court judge considered a joint submission, as was quoted at para 22 of the Reasons:

> [22] …
>
> > [10] So I am prepared to accept the joint submission. I did express concerns and I think the parties addressed my concern, about the fact that the remediation has not yet happened, but the Crown assures me that my concern can be addressed through further actions, and in fact, defence counsel points out that the government can go ahead and do the work itself and simply bill the respondents if there is not a better solution to this. So it is not a situation where if I do not make an order -- a probation order or something like that compelling that the parties fix this dam, that there is no remedy for that.
> >
> > [11] So I am satisfied then that the parties have turned their minds to that, and they have a plan for that, and ultimately, there are a lot of details here that are going to have to be worked out between

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> Mr. Penner and Mr. Simpson and His Majesty, and there are at least, I suppose, three possible solutions. ...
>
> [12] So all of these things are going to be potentially costly. Removal of the dam would run at about $177,000, I am told. So this is not a situation where the parties are going to be walking away without consequences for this.
>
> [Emphasis in original.]

[8] The judge quoted directly from the appellants as to the foundation for their claim:

> [T]he illegal construction of a defective dam (the "Dam") by the then BC Minister of Highways, Phil Gaglardi; the Comptroller of Water Rights' overruling of the efforts by local officials to have the Dam brought into compliance; the transfer of legal responsibility for the Dam to others (and now the plaintiffs); the efforts by the Province to avoid disclosing the history of the Dam to the plaintiffs and the efforts by the Province to have the plaintiffs pay to fix the problem created by the then BC Minister of Highways, Phil Gaglardi, and ignored by the Comptroller of Water Rights.

Reasons at para 2.

[9] The judge set out the allegations in the pleadings relevant to the application to strike the claim:

> [23] After Mr. Penner paid the fine, the plaintiffs filed their notice of civil claim on March 24, 2023, and amended it on August 16, 2023 (the "ANOCC").
>
> [24] In the ANOCC, the plaintiffs plead, among others, the following facts regarding the history of the dam:
>
> > a) The Kamloops Water District office (the "District") received plans on February 28, 1967, for the dam on behalf of Karobil Enterprises Ltd. ("Karobil"). The plans were submitted by William Gaglardi on behalf of the Honourable Phil Gaglardi ("Gaglardi"), who stated the plans were drawn up by a professional engineer with the Department of Highways (Phil Gaglardi was Minister of Highways at the time).
> >
> > b) Gaglardi called the District on March 1, 1967, requesting approval of the plans. The same day, a deputy minister (it is not specific as to which ministry) also called the District requesting its recommendation as soon as possible.
> >
> > c) An engineer with the District recommended the dam be authorized conditional upon "adequate supervision, preferably by a registered engineer ... to ensure the dam is built as planned".

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d) An assistant engineer with the District noted that “overturning is almost critical, but with the addition of dowels into the bedrock safety should be assured” and that the dam is feasible “so long as it is founded on a rock base”.

e) In March 1967, conditional water license 32042 was issued to Karobil, and it included clause K, which read, in part, “construction of the dam authorized under clause (h) hereof shall not be commenced until plans of same have been submitted to and approved by Comptroller of Water Rights”.

f) Some time after March 1967, Karobil constructed the dam without first submitting plans to the Comptroller for approval as required by clause K of the water license.

g) The District undertook a review of the structural stability of [the] dam in March 1968, concluding that it was “outside acceptable limits but is believed [to have been] keyed and doweled into bedrock” but that “the steel struts, provided as an emergency measure to prop up the dam, are inadequate”.

h) On March 7, 1968, a District engineer wrote to Karobil stating, among other things, that the engineer considered the dam to be “inadequate against overturning” and to be “a hazard”. The engineer directed Karobil to “present a proposal to make the dam safe” and failure to do so by April 15, 1968, would result in an order to remove it.

i) On April 30, 1968, the District engineer issued an order under s. 37 of the *Water Act*, stating that the dam could overturn such that “storage of water behind the dam creates a hazard” and, therefore, Karobil must “cease storing water behind the dam and ... [must] maintain the dam sluicegate fully open”.

j) There continued to be interactions and communications amongst Karobil, the District, and the Comptroller.

k) On June 25, 1968, the Comptroller wrote to Karobil, indicating he had personally inspected the dam. The letter also noted that:

> i. the plans for the dam were inadequate;
>
> ii. the construction of the dam had not followed the plans as the base was considerably less, “the whole Dam [had] been built backwards”, and the spillway completely altered;
>
> iii. the District engineer could not confirm the placement of the shear dowels or other reinforcing; and
>
> iv. the engineer had been correct not to accept Karobil’s engineer's conclusion that the dam was safe.

l) However, in light of the relatively small quantity of water impounded by the dam, its failure would not pose a hazard to the downstream rail tracks, and therefore there was “no further necessity for Water Rights Branch involvement in the safety of the Dam”.

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> m) Clause K of the conditional water license and the Ministry's instructions in the March 7, 1968 letter and April 13, 1968 order were rescinded.
>
> [25] Based on the foregoing, the plaintiffs allege that the Province breached its duty to warn subsequent owners of the Property that the dam was built deficiently and unlawfully given the preceding history.
>
> [26] The ANOCC also contains numerous paragraphs relating to the history of disclosure of information to the plaintiffs about the dam (at paras. 51-70). Mr. Penner deposed that after he received the September 2018 letter from the Ministry, he made requests for information and disclosure of documents regarding the history and construction of the dam, including invoking the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("FOI Process"). He maintained that he received minimal information until he received disclosure from the Crown relating to the prosecution.
>
> [27] The plaintiffs allege they have suffered damages in an amount over $25,000, which is comprised of the costs to defend the criminal proceedings, to hire an engineer and follow the Ministry's recommendations, and the FOI Process.

[10] The judge then described the statutory regime applicable to the appellants' claims. She noted that up to 1974, including when the dam was built and licenced, the Crown enjoyed virtually absolute immunity. She observed that the earliest date the plaintiffs could claim they suffered damage was when they purchased the property in 2002, at which time the *Water Act*, RSBC 1996, c 483 governed the regulation of water and works in and around streams. Since 2014, the *WSA* has governed the regulation of water and water works.

[11] The *WSA*, and the *Water Act* before it, establishes a comprehensive legislative and regulatory scheme governing the diversion and use of water. While the legislation vests all surface water in the Crown, a licensee can gain rights to divert and use water. Those rights are subject to the provisions of the legislation, the regulations, the terms of any licences granted and the orders of the comptroller and engineer: Reasons at paras 29-33.

[12] At paras 34 to 42 of the Reasons, the judge thoroughly recites the relevant statutory provisions. I need not set those out here. In summary, the legislation seeks to make licence holders responsible for works appurtenant to their lands for the use or diversion of surface water in accordance with the statutory provisions, the

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regulations and any orders of the comptroller and the engineer, and seeks to limit possible claims against regulators and the government. A licensee is required to exercise reasonable care to avoid damage to land and property of other persons and has an obligation to inspect, maintain and repair works in accordance with any requirements or orders made under the legislation. Further, a licensee is liable to other landowners for damage or loss resulting from the "construction, maintenance, use, operation or failure" of their works: s 29, *WSA*. The *WSA* also contains a strong privative clause that prevents "an order of the Lieutenant Governor in Council, the minister, the comptroller, a water manager or an engineer [from being] questioned, reviewed or restrained by any process or proceeding in any court": s 120. The former *Water Act* similarly made licensees liable for damage or loss and contained a privative clause: ss 21, 91.

[13] The judge then turned to the issue raised by the application to strike the claim. The judge found, and the parties agreed, that the dam is a work as described in the legislation and is subject to the legislative scheme. The application was brought under Rule 9-5(1)(a), and accordingly the question was whether it was plain and obvious the claim did not disclose a reasonable cause of action. The Province argued that the claim did not disclose a cause of action because it did not owe the appellants a duty of care. Given the positions of the parties, the judge identified two significant issues: the extent to which the decision in *Waterway* was determinative of the issues raised; and how to approach and resolve the issue of proximity: Reasons at paras 43-48.

[14] The judge set out a brief but accurate summary of the background facts of *Waterway* and observed that this Court undertook a comprehensive review of the proper approach to proximity in the context of a regulatory scheme. The judge incorporated key paragraphs from *Waterway* that explained the test for proximity in her decision: Reasons at paras 49-62. In doing so, she set out the steps this Court found must be considered when a plaintiff contends that a private law duty of care is owed and was breached by government as a result of actions taken in the course of the application of a regulatory scheme:

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> [60] The test is comprised of the following questions:
>
> a) Is there a sufficiently analogous precedent that definitively determined the existence or non-existence of a duty of care in the circumstances? If so, the enquiry ends.
>
> b) If not, was the harm suffered by the plaintiff reasonably foreseeable?
>
> c) If so, is there a sufficiently proximate relationship between the plaintiff and the defendant to impose a *prima facie* duty of care, taking into account:
>
> i. stage one – whether the legislative scheme shows an intention to impose or preclude a private law duty of care;
>
> ii. stage two – if the legislative scheme is not determinative, whether specific interactions between the regulator and the plaintiff give rise to a duty of care;
>
> d) Are there residual policy considerations that negate a *prima facie* duty of care?

[15] The judge then examined how in *Waterway* this Court applied the test to conclude that the trial judge had erred in finding a duty of care was owed by the regulator acting under the *Water Act*. As there was no sufficiently analogous precedent and as the harm suffered by the plaintiffs was reasonably foreseeable, the Court considered whether the relationship between the plaintiffs and the regulator was sufficiently proximate to give rise to a duty of care. At stage one of the analysis the Court concluded, based on consideration of the legislative scheme, that there was insufficient proximity between the regulator and the Vinco plaintiffs (who owned houseboats and property damaged by the flood), as members of the general public, for the imposition of a private duty of care in their favour: Reasons at paras 63-64.

[16] Despite this finding, the Court also conducted the stage two analysis. Under that analysis, the Court noted that for interactions between the parties to lead to a sufficiently close relationship of proximity, the regulator's interactions must be "directly with the claimant". As there had been no interaction between the Vinco plaintiffs and the regulator, there was no basis for a finding that a duty of care arose in the circumstances: Reasons at para 65.

[17] The judge turned to consider whether *Waterway* was an analogous precedent. The appellants argued that they could be considered "regulated parties"

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and were in a position similar to the McLaughlin parties in *Waterway* such that a duty of care might be found to be owed to them. They argued that this question should not be determined on the application to strike. The Province took the position the appellants were members of the public and that *Waterway* precludes any finding of a duty of care to members of the public who could be harmed by defective works licenced under the *Water Act* (or the *WSA*).

[18] The judge examined the allegations in the ANOCC to consider whether they could support the assertion that the appellants were regulated parties as described in the authorities, including *Waterway*. She noted that the pleadings did not "specifically identify a key date or date range attached to particular actions or inactions alleged to arise to a breach of the duty to warn": Reasons at para 73. Reading the pleadings generously, the judge nevertheless concluded that the claims advanced by the appellants were foreclosed by *Waterway*. She reasoned:

> [74] The primary claim is that the Province had a duty to warn "subsequent owners" that the dam was built deficiently. I assume the plaintiffs meant to refer to "subsequent potential purchasers", since a duty to warn is intended to provide notice and knowledge to someone before the purchase or use of a product, or in this case, before purchasing the Property. Since any member of the public could purchase the Property after Karobil and/or Gaglardi owned it, this is indistinguishable from a claim brought on behalf of general members of the public.

[19] The judge's conclusion that *Waterway* was a "definitive analogous precedent" was a complete answer to the claim, but she nevertheless considered the plaintiffs' additional arguments: Reasons at para 75. She found that a claim of a duty to warn arising because the dam was built unlawfully or deficiently was bound to fail because the dam was not unlawful or deficient. The comptroller had exercised his discretion to authorize the dam and remove clause K (the requirement for plans to be submitted and approved). In addition, any claim based on these allegations was clearly time-barred. Further, at the time those events took place, the Province enjoyed absolute immunity: Reasons at paras 77-80.

[20] The judge then rejected the appellants' arguments based on a breach of "some type of informational duty": Reasons at para 82. The appellants had argued

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that the duty arose because of the "Ministry's Dealings with the Plaintiffs", all of which occurred after 2018, when Mr. Penner was notified that maintenance work was required on the dam. The judge reasoned:

> [86] The only link drawn between the above facts to the claims in Part 3 is the allegation that the "Province chose to withhold that information from the public". However, reading the ANOCC, there is a material gap in the factual narrative. The plaintiffs bought the Property in 2002, but the facts underlying the disclosure allegations occurred more than 16 years after that. I cannot see how the plaintiffs can establish they suffered damage by a "failure to warn", when they have not pleaded any representations or reliance by them prior to buying the Property.
>
> …
>
> [88] In addition, it is unclear how anything about the alleged inadequate disclosure is actionable in negligence. I specifically note there is no plea in the ANOCC of malicious prosecution, malfeasance of office, or bad faith.
>
> [89] Furthermore, as the statutory regime is the underpinning for the negligence claim in this context, the plaintiffs have pointed to no provision of the *Water Act* or *WSA* that would purport to place positive obligations on the Province regarding disclosure of historical licensing information.
>
> [Emphasis added.]

[21] Although it was unnecessary for her to do so, the judge also considered whether, if *Waterway* was not an analogous precedent, there was a relationship of sufficient proximity between the plaintiffs and the Province to impose a *prima facie* duty of care. The Province argued there was no possibility the claim could succeed because the pleadings contained no allegations of direct interactions with the regulators. The appellants argued, with reference to para 277 of *Waterway*, that the Province's misrepresentations about the dam were made to a "limited class of person who might acquire a license" through purchase of the property.

[22] The judge rejected the appellants' arguments, noting that they were based on an incomplete interpretation of *Waterway*: Reasons at para 94. The statement about misrepresentation to a plaintiff class concerned the decision in *Taylor v Canada (Attorney General)*, 2012 ONCA 479, a case involving a claim in negligent design about the safety of a medical device. The judge noted that in *Waterway*, at paras 287-290, this Court had rejected a similar argument and that its reasoning was directly applicable to the facts of this case.

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[23] The judge noted that the ANOCC contained no allegations of interactions with regulators, let alone of any representations by the Province. Further, it contains no allegation that the appellants made any effort before purchasing the property to inquire into the history of the dam. In addition, the appellants could not point to any statutory or regulatory provision requiring publication of information about a dam's approval to property owners or the public at large: Reasons at paras 97-98. She concluded:

> [99] For all those reasons, even if I had not concluded that the claim had no prospect of success because *Waterway Houseboats* precludes the existence of a private duty of care, I would have found that the plaintiffs have failed to plead any direct interactions with the Province that could support a finding of proximity. Nor do the facts and circumstances of this case, whether pleaded or not, support such a finding.

[24] Having concluded that the claim must be struck pursuant to Rule 9-5(1)(a), she found it unnecessary to address the abuse of process arguments.

On Appeal

[25] The test on an application to strike under Rule 9-5(1)(a) is whether it is "plain and obvious" the plaintiff's claim, even if amended, is bound to fail: *Canada (Attorney General) v Frazier*, 2022 BCCA 379 at para 18. Whether a duty of care exists is a question of law and the applicable standard of review is correctness: *Tekamar Mortgage Fund Ltd. v British Columbia*, 2023 BCCA 20 at paras 3, 27. The issue on appeal is thus whether the judge was correct in concluding that it is plain and obvious the appellants' claims are bound to fail.

Alleged Errors in Judgment

[26] The appellants allege six errors in judgment:

a) The judge misapplied *Waterway* by mislabelling the plaintiffs in the context of their interactions with the regulator as merely members of the public.

b) The judge erred in law by concluding that the plaintiffs' claims were bound to fail due to the absence of a sufficiently proximate relationship between the regulator and the plaintiffs.

c) The judge erred in law by concluding that the plaintiffs' claims were bound to fail due to being time-barred.

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d) The judge erred in law by concluding that the plaintiffs' claims were bound to fail due to the Crown's absolute immunity under s. 50 of the *Water Act*.

e) The judge erred in law by concluding that the plaintiffs' claims were bound to fail due to the Crown's virtually absolute immunity prior to 1974.

f) The judge erred in law by concluding that the plaintiffs' claims were bound to fail due to the recission of clause K from the original water licence relating to the dam.

[27] These allegations of error are based on findings or observations the judge made in the course of considering what she identified as the two significant issues raised by the Province's application to strike: 1) the extent to which the decision in *Waterway* was determinative of the claims advanced; and 2) if it was not determinative, whether the appellants were in a position of significant proximity for a duty of care to arise. In my view, no purpose would be served by considering the appellants' alleged errors. The judge correctly identified the issues raised by the application and the appeal is resolved by considering whether the judge erred in her conclusions on those issues. Moreover, as the judge correctly determined that *Waterway* is a sufficiently analogous precedent and that the Province does not owe a private law duty of care to the appellants in the circumstances alleged, there is no need to consider the second issue identified by the judge.

[28] Given my conclusion that *Waterway* is an analogous precedent, there is also no need to consider the Province's abuse of process argument. However, before turning to the issue on which the appeal turns—whether *Waterway* is an analogous precedent—I will expand briefly on my earlier observation that the appellants' claims and appeal are ill conceived.

[29] As the judge noted, the appellants' claims are confusing as they raise a variety of complaints directed at different time frames. For example, many of the allegations are directed at the events that occurred when the dam was built in 1967-1968, including the comptroller's decision to remove clause K from the conditional water licence issued to the owner. The allegations appear to raise issues of negligence, malfeasance of office, or bad faith on the part of government actors at that time. However, as the judge noted correctly, the Crown enjoyed absolute

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immunity at that time. Further, any claim based on those events would be statute-barred by the passage of time. The appellants argue that the judge was incorrect to note the limitation issue and the existence of Crown immunity. I disagree. The judge was responding to the allegations of wrongdoing that underlie the appellants' claims. It is disingenuous of them to suggest that the judge's observations are irrelevant when their claim is premised on the actions that they allege were wrongful. While the appellants are correct that the judge's findings are not directly relevant to the duty of care issue, she cannot be faulted for pointing out the problems with their premise. The actions in question were not unlawful or deficient and any claim based on them would be out of time.

[30] More importantly, the claim that the Province owed a duty to warn the public, including subsequent purchasers of properties to which licences attached, is not grounded in any way in the statutory scheme. There is nothing in the *Water Act*, *WSA*, or regulations that could provide a foundation for the appellants' allegation. In argument, counsel stated that the appellants take issue with the principles set out in *Waterway* and other authorities concerning the duty of care owed by government regulators operating under a statutory scheme. Their disagreement is irrelevant, but it appears to be based on an argument that ignores the critical first step in analyzing whether a duty of care is owed by a government regulator: consideration of the underlying statute: *Waterway* at paras 222, 243.

[31] Moreover, the principal damage claim advanced by the appellants—that the Province should be responsible for the cost of repairing or removing the dam—is directly contrary to the statutory regime. The *WSA* and the *Water Act* make a licensee responsible for inspecting and maintaining the licenced works and liable to compensate downstream property owners for any damage. As the Province argues, the claims not only ignore the statutory provisions, but would turn the statutory scheme on its head.

[32] While I find it unnecessary to consider the abuse of process argument, the Province's observation that it would be improper to permit a party in the position of

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the appellants to proceed with an action asserting regulatory breaches having taken advantage of a guilty plea to a "high penalty" offence with a maximum fine of up to $1,000,000 (Reasons at para 20) and accepted leniency in sentencing is not without merit. In the proceeding under the *Offence Act*, the appellants did not challenge the statutory authority for the order they contravened. The guilty plea and the modest fine were thus premised on the appellants' acceptance of responsibility for their failure to comply with valid orders. The question raised by the abuse of process argument, which I need not answer, is whether the appellants should have raised their arguments in the criminal proceeding rather than waiting to do so in this civil action.

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Is *Waterway* Determinative?

[33] As I have indicated, I agree with the judge's reasoning and conclusion that *Waterway* is determinative.

[34] The judge included key passages from *Waterway* in the Reasons. Having conducted an extensive review of authorities, this Court set out the steps involved in considering both stages of the proximity analysis. For convenience, I repeat the passages setting out those steps:

> [243] There are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator. At the first stage, the task is to determine whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care. At the second stage, if the legislation is not determinative, courts must 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:
>
> *Stage one: the legislative scheme*
>
> - The existence of a legislative scheme does not foreclose the possibility of finding proximity, but it is generally insufficient on its own to establish proximity: *Cobble Hill* at para. 66; *Wu* at para. 54.
>
> - At the first stage, the task is to determine whether the statute discloses a legislative intention to exclude or confer a private law duty of care: *Cooper* at para. 43; *River Valley Poultry* at para. 66; and *Imperial Tobacco* at para. 44.
>
> - The first step is to identify the purpose of the legislation: *Cooper* at para. 43; *Taylor* at para. 76; and *Imperial Tobacco* at para. 44.

- Public law duties aimed at the public good do not generally create private law duties, even if the plaintiff is a person who benefits from the proper implementation of the scheme: *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* at paras. 37–55; and *Elder Advocates* at para. 72.

- A private law duty is unlikely to be recognized if it conflicts with the public authority's duty to the public: *Los Angeles Salad* at paras. 39–40; *Cobble Hill* at para. 66; *Taylor* at para. 78; *Wu* at para. 57; and *Imperial Tobacco* at para. 44.

- Where the legislative scheme requires the government actor to exercise its powers having regard to multiple interests, including both the public interest and private interests, the legislation cannot be interpreted as expressly prohibiting consideration of a regulated party's interests: *Carhoun* at para. 104.

- It may be inferred that the legislature did not intend to create a private law duty of care where a statutory scheme provides immunity to the regulator or creates remedies for injured parties other than tort remedies: *Taylor* at para. 78; and *River Valley Poultry* at para. 67.

- The proximity analysis considers specific and limited policy considerations arising from the statute itself. The object is to determine whether there is a sufficiently close relationship between the claimant and the government authority. At the first stage, the policy considerations are relevant as the court is considering whether the legislature imposed proximity on two persons who had never met each other: *Carhoun* at para. 96; and *Cooper* at paras. 37–39.

Stage two: interactions between the parties

- If the legislative scheme is not determinative, courts then consider the specific circumstances of the interactions between the regulator and the plaintiff to determine if a close and direct relationship exists sufficient to establish proximity: *Imperial Tobacco* at para. 50; and *Taylor* at para. 79.

- Findings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific: *Taylor* at para. 80.

- Proximate relationships may involve physical closeness, direct relationships or interactions, or the assumption of responsibility; or may turn on expectations, representations, reliance, or the nature of property or other interests involved. 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: *Cooper* at paras. 32–34; and *Wu* at para. 51.

- Courts have found a duty of care where there is a relationship and connection between the regulator and individual that is distinct

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> from, and more direct than, the relationship between the regulator and that part of the public affected by the regulator's work: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*] at para. 33; *Fullowka* at paras. 44 and 55; and *Taylor* at paras. 80–87.
>
> - Courts have also found interactions between the plaintiff and regulator to create a duty of care where the nature of the duty imposed by the legislative scheme is consistent with the existence of a private law duty to an individual plaintiff: *Taylor* at para. 88; and *Hill* at paras. 36–41.
>
> - Policy has a more limited role at the second stage of the proximity analysis where the regulator and the regulated party are in a direct transactional relationship: *Cooper* at paras. 37–39; and *Carhoun* at para. 96.

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[35] The judge also set out this Court's conclusion in *Waterway* on the statutory purpose of the *Water Act*: to promote a public good for the benefit of all members of the public. On the stage one analysis, this Court found that the legislature had no intention to create, but rather an intention to foreclose, a private law duty of care. As the judge put it:

> [64] The Court then conducted the stage one analysis, highlighting the factors that militate against a private law duty of care to the plaintiffs, including: the purpose of the legislation; statutory compensation scheme; no statutory duty to act; building inspector authorities distinguished; privative clause; and indeterminate liability: at para. 265. Then the Court concluded that the *Water Act* did not impose a private duty of care in favour of members of the public:
>
> > [266] …. The statutory purpose of the *Water Act* is to promote a public good for the benefit of all members of the public; it is not directed at a particular class of or individual members of the public. In order to effect the *Act's* statutory purpose, regulators are given broad powers that they are to exercise taking into account a wide variety of interests. The approvals necessarily cover an extremely broad range of activities carried on throughout the province by a large number of people. In sum, the legislation does not evince any intention on the part of the legislature to create a private law duty of care *vis-à-vis* individual property owners. To the contrary, ss. 48 and 49 grant immunity to regulators and set out a strong privative clause limiting the ability to challenge approvals or orders, indicative of an intention to foreclose a private law duty of care. Further, s. 21 provides a robust statutory compensation scheme for property owners who are injured by works installed pursuant to the grant of approvals or changes made in or about a stream. This also strongly indicates that the legislature had no intention to create but rather foreclosed a private law duty in favour of those property owners.

> [267] As such, on a proper interpretation of the statute, we conclude that it is not possible to find sufficient proximity between a regulator acting under s. 9 of the *Water Act* and a member of the general public in the position of the Plaintiffs. …
>
> [Emphasis in original.]

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[36] *Waterway* was concerned with the provisions of the *Water Act*. The time frame covered by the allegations here is lengthy, and it is not clear exactly when the appellants allege the cause of action arose. I agree with the judge that to the extent the action is based on breach of a duty to warn, it arose before or at the time when the property was purchased in 2002, at which time the *Water Act* governed the dam and the licence acquired by the appellants. However, if the allegations could be interpreted as alleging a cause of action after the *WSA* was enacted, the analysis is unchanged. There is no difference of significance in the relevant provisions in the two statutes. Accordingly, this Court's decision in *Waterway* about the proper interpretation of the statutory regime applies to this case: it is not possible to find in the legislation any intention to impose a private duty of care in favour of members of the public.

[37] The appellants' arguments on appeal challenge the judge's conclusion that they are members of the public for the purpose of the proximity analysis. Their primary submission is that in *Waterway*, the Court found that "the legislation cannot be said to foreclose the implication of a private duty of care to the McLaughlins as regulated parties": at para 296. The McLaughlins had installed the bridge that was found to have been a cause of the flooding. They had interacted directly with the government regulator. The appellants say that they were in a similar position to the McLaughlins and that the issue of their relationship of proximity to the Province's regulator should be determined at a trial, as ordered by this Court in *Waterway*.

[38] I note first that the argument advanced by the appellants below was that they were in a position of sufficient proximity because they were in a limited class of parties who might acquire a licence. They submitted that the Province thus owed them a duty to warn based on this Court's comment in *Waterway* that "a regulator's general representations to [a] plaintiff class" could form the basis for a relationship of

sufficient proximity: Reasons at paras 93-98. The judge rejected that argument, and the appellants have not repeated it on appeal. I agree with the judge's conclusion and see no error in her analysis. As noted above, the appellants' submissions took the comments of this Court in *Waterway*, at para 277, out of context.

[39] The appellants' argument on appeal is also an attempt to circumvent the judge's conclusion that they are members of the public for the purpose of the duty of care analysis given the nature of the duty alleged. I see no error in the judge's reasoning. She found that if such a duty was owed it must be to any member of the public because anyone could have purchased the property after the events that took place when Korobil and/or Gaglardi owned it.

[40] Further, the suggestion that the appellants are in a position similar to the McLaughlins in *Waterway* lacks merit. The reason this Court remitted the question of a possible duty of care to the trial court in that case was because the McLaughlins had *direct interactions* with the regulator and the trial judge had failed to make findings of fact that would have allowed this Court to consider the second stage of the proximity analysis. As noted above, the analysis at the second stage is necessarily fact specific. A finding of proximity must be based on the specific interactions, including any assumption of responsibility, and could turn on expectations, representations and reliance: *Waterway* at para 243; *Cooper v Hobart*, 2001 SCC 79 at paras 32-34; *Wu v Vancouver (City)*, 2019 BCCA 23 at para 51. Leaving aside my conclusion that any possible duty of care is foreclosed at the first stage of the analysis, in this case, there is no basis for referring the proximity issue to trial as the appellants have made no allegations of interactions with the regulator, let alone of representations or reliance arising from interactions.

[41] In summary, there is no need to conduct a full *Anns/Cooper* analysis to determine if a private duty of care is owed in the circumstances of this case. The decision in *Waterway* is an analogous precedent and the non-existence of a duty of care being owed by the regulatory authorities acting under the *Water Act* or the *WSA* has been definitively answered. Like the plaintiffs in *Waterway*, the appellants are

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members of the general public for the purpose of the duty of care analysis. The dam is undoubtedly a work subject to the statutory scheme and there is nothing in the legislation that could support the appellants' assertion of a duty to warn of a potential hazard in works that they are statutorily obligated to repair and maintain.

Disposition

[42] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Warren"

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