

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Bioenergy Corporation v. AG
Growth International Inc.*,
2025 BCSC 80

Date: 20250120
Docket: S227239
Registry: Vancouver

Between:

Pacific Bioenergy Corporation

Plaintiff

And

**AG Growth International Inc., also doing business as Westeel Canada,
also doing business as AGI Westeel, also doing business as AGI Union Iron,
Westeel Canada, also doing business as AGI Westeel, Union Iron Inc.,
also doing business as Union Iron, also doing business as AGI Union Iron, and
Donald W. Deal**

Defendants

Before: The Honourable Justice Giaschi

On appeal from: An order of the Supreme Court of British Columbia, dated
September 13, 2023 (*Pacific Bioenergy Corporation v. AG Growth International Inc.*
2023 BCSC 1619, Vancouver Docket S227239).

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.
February 29 and June 26, 2024

Place and Date of Judgment:

Vancouver, B.C.
January 20, 2025

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Introduction

[1] The plaintiff is a manufacturer and vendor of wood pellets. The pellets are shipped by rail from manufacturing sites to a terminal in North Vancouver that is owned and operated by Fibreco Export Inc. (“Fibreco”). The pellets are temporarily stored at the terminal while awaiting transfer to ships and ultimate delivery to the plaintiff’s customers. On September 11, 2020, a silo at the terminal, one not containing the plaintiff’s product, collapsed causing damage to the terminal and necessitating its closure for several weeks. The plaintiff says the collapse and shut down was due to the negligence of the various defendants who had been involved in the design and construction of upgrades to the terminal. By notice of civil claim filed September 7, 2022, the plaintiff claims damages against the defendants, *inter alia*, for the loss of 62.2 days of operations at the terminal between September 11, 2020, and April 6, 2021 (the “NCC”).

[2] By notice of application filed January 17, 2023, the defendants applied for an order striking the NCC under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, for failure to disclose a reasonable cause of action. More precisely, the defendants’ alleged the plaintiff’s claim is one of relational economic loss or pure economic loss.

[3] In written reasons delivered on September 13, 2023 and indexed as 2023 BCSC 1619, the Associate Judge dismissed the defendants’ application and refused to strike the NCC. The defendants appeal this order.

[4] For the reasons that follow, I have determined that the Associate Judge erred in refusing to strike the NCC. The plaintiff’s claim is a classic case of relational or pure economic loss. In the absence of any special circumstances giving rise to a relationship of proximity, none of which are pleaded, the claim must be struck.

The Notice of Civil Claim

[5] As the application was to strike the NCC under Rule 9-5(1)(a), no evidence was admissible. Accordingly, only the NCC is to be considered.

[6] The NCC contains the following allegations:

- a) The plaintiff carries on business as a wood pellet manufacturer. Its pellets are transported by rail to the Fibreco terminal where they are temporarily stored in silos before being loaded onto vessels for transport overseas (Part 1; para. 2);
- b) The Fibreco terminal is owned and operated by Fibreco. The terminal was originally limited to handling wood chips and pellets on behalf of the plaintiff and one other pellet producer (Part 1; para. 10);
- c) In or around 2017, Fibreco entered into a contract to store agricultural food products which required an expansion of the terminal, including new silos, towers and conveyors. [The entity with whom Fibreco contracted is not pleaded.] The purpose of the agreement was to diversify the terminal operations (Part 1; para. 11);
- d) During the terminal expansion the plaintiff continued to ship wood pellets by rail to the terminal for storage and transfer to cargo containers (Part 1; para. 13);
- e) In or around March 20, 2018, Fibreco and AGI [a defined term in the pleading meaning the defendant AG Growth International Inc.] entered into an agreement whereby AGI agreed, *inter alia*, to design, engineer, manufacture, supply, and deliver silos, towers and related components at the terminal (Part 1; para. 14);
- f) Fibreco issued purchase orders to AGI and its related divisions and companies, and to Union Iron Inc. and Westeel Canada, all in relation to the terminal expansion work (Part 1; para. 15);
- g) The individual defendant, Donald Deal, was a senior structural engineer and Engineering Manager with AGI and the engineer responsible for the overall design and certification of the work (Part 1; para. 16);

- h) On September 11, 2020, a newly constructed silo collapsed during commissioning, causing significant damage to the silo and adjoining structures (Part 1; para. 17);
- i) As a result of the silo failure, the terminal was closed for a period of about eight weeks and the plaintiff lost 62.2 days of operations between September 11, 2020 and April 6, 2021 (Part 1; paras. 19-21).

[7] Paragraphs 22 to 24 of the NCC allege that the silos designed and supplied by the defendants contained various defects and deficiencies attributable to the defendants' negligence and deficient engineering work (Part 1; paras. 22-24).

[8] Paragraphs 25 to 29 of the NCC allege the defendants owed a duty to warn the plaintiff of silo defects and failed to do so. It is specifically pleaded that there were two prior incidents involving failures of silos designed and constructed by the defendants (one at the Fibreco terminal on September 17, 2019 and another at a work site near Fox Creek, Alberta) and that the defendants failed to adequately inform and warn Fibreco and its customers of these incidents.

[9] Paragraphs 30 to 31 allege that the defendants owed a duty of care to the plaintiff and were negligent in designing, engineering, manufacturing, supplying, and commissioning the silos.

[10] Paragraphs 32 to 40 of the NCC, allege that as a direct result of the silo failure, the plaintiff has suffered damages in excess of \$2.6 million including a reduction and curtailment of production, lost orders, lost margin of profit, and the incurring of rail and vessel demurrage and other expenses.

[11] The relief sought in the NCC is general and special damages.

[12] The legal basis, as set out in the NCC, is negligence, negligent misrepresentation and failure to warn.

[13] Paragraph 47 of the NCC is particularly relevant. It provides:

47. The Defendants owed the Plaintiff a prima facie duty of care. The Defendants knew or ought to have known of the Plaintiff's existences [sic] and knew or ought to have known that the Plaintiff would suffer damages as a result of the Silo Failure at the Terminal.

[14] It is to be noted that nowhere in the NCC is it pleaded that any property owned or leased by the plaintiff was damaged, directly or indirectly, in the silo failure.

The Associate Judge's Reasons

[15] The Associate Judge commenced her analysis by noting the general rule that claims for pure economic loss are not permitted unless they fall within one of the narrow exceptions recognized by the authorities. She summarized the facts alleged in the NCC and, at para. 17, she noted that the plaintiff sought to prove novel but arguable claims for the existence of a duty of care.

[16] At paras. 21-26, the Associate Judge addressed the test for striking out a NCC. Relying on *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, and *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, she observed that:

- a) Where a reasonable prospect of success exists, the matter should proceed to trial;
- b) The motion to strike is a tool that should be used with care;
- c) The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial; and
- d) A claim should be struck only "if the action is certain to fail because it contains a radical defect".

[17] At paras. 27-33, the Associate Judge summarized the law relating to pure economic loss, relying on *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf*], and *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corp.*, 2021 ONCA 25 [*Subway*]. She noted that:

- a) There is no general right in tort protecting against negligent or intentional infliction of pure economic loss case;
- b) The loss sought to be recovered must result from interference with a legally cognizable right;
- c) There are currently three categories of pure economic loss in the absence of privity of contract, namely,
 - i. negligent misrepresentation or performance of a service;
 - ii. negligent supply of dangerous goods or structures; and
 - iii. relational economic loss;
- d) The plaintiff conceded its claim did not fall under the first two categories but argued it did come under the third category, relational economic loss,
- e) To establish a duty of care in a relational economic loss claim, the plaintiff was required to demonstrate,
 - i. that the parties are in such a close and direct relationship that it would be just and fair to impose a duty of care in law,
 - ii. that an injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence, and
 - iii. that policy considerations of indeterminate liability were not engaged.

[18] At para. 34, the Associate Judge identified the issue before her as being whether it was plain and obvious the plaintiff's claim for relational economic loss was bound to fail? She then proceeded to analyze: (1) whether there was a sufficiently proximate relationship to give rise to a duty of care, and (2) whether policy considerations ought to negate the recognition of a novel duty of care.

[19] The Associate Judge acknowledged:

- a) Proximity requires an interference with a legally cognizable right (para. 35);
- b) The categories of proximate relationships are not closed (para. 37);
- c) The three recognized categories of relational economic loss are cases where the plaintiff has a proprietary or possessory interest in damaged property, general average cases, and joint venture cases (para. 38); and
- d) None of the existing categories applied, as was conceded by the plaintiff (para. 39)

[20] At para. 40, the Associate Judge stated that, as the case was novel, a full proximity analysis was necessary.

[21] At paras. 42-44, she concluded that there was a sufficiently close relationship of proximity to give rise to a duty of care.

[42] I do not need to consider whether Pac Bio's argument that a full proximity analysis should be deferred because I have concluded that, based on the pleadings, Pac Bio has demonstrated a proximate relationship.

[43] I agree with Pac Bio's position that the parties were in a proximate relationship as set out in the application response at paragraph 18 of Part 5: Legal Basis. The parties had proximity through their expectations. Pac Bio expected to actively use the Terminal during the Work, and the AGI parties expected the Work not to interrupt Terminal services. The parties had proximity through the representations of the AGI parties to the public that they were experts in the design and manufacture of silos. The parties had proximity through their knowledge. The AGI parties knew that Fibreco's business was predicated on other parties using the Terminal. Fibreco commissioned the Silos from the AGI parties to diversify their operations. The AGI parties knew, as experts in silo design, that the catastrophic Silo failure would cause damage to the Terminal rendering the Terminal unusable to Fibreco and its two customers. The AGI parties knew that if Pac Bio was unable to use the conveyance systems and Terminal they would suffer economic damages.

[44] The September 2019 incident triggered a duty on the part of the AGI parties to warn the users of the Terminal. The facts, as pleaded, set up a viable claim of failure of duty to warn. The AGI parties knew of Pac Bio's existence (or of others in a similar situation to Pac Bio) and knew that Pac Bio would suffer economic losses if the property damage occurred: *Bow Valley* at para. 61.

[22] At para. 46, the Associate Judge noted that, if she was wrong in her determination that the pleading demonstrated a sufficient relationship of proximity giving rise to a duty of care, then she would nevertheless have allowed the case to proceed so the claims could be evaluated “in their factual and legal context”.

[23] Having found a duty of care existed, the Associate Judge then addressed whether there were policy considerations that negated the duty. She initially held the class of potential plaintiffs was not indeterminate but she then said the case should proceed so the parties could investigate and establish by evidence whether indeterminate liability was at issue.

[55] On the facts pleaded, I am not convinced to the level required to strike the notice of civil claim that the class of plaintiffs into which Pac Bio falls is impossible to delineate. At the time of the incident, before the Silo Failure, the AGI parties would have known how many active users of the Terminal there were and, therefore, the class of potential plaintiffs was not indeterminate. Pac Bio specifically limits the liability to two potential plaintiffs: itself and another wood pellet manufacturer. These were the only users of the Terminal at the time the duty to warn arose.

[56] I do not think that the facts of *Bow Valley* are directly applicable to this case, at least at this stage of the proceedings before document disclosure and examinations for discovery have occurred. Within the general class of claims for pure economic loss, the cases have little in common with each other. I am unable to generalize from the facts in *Bow Valley* to find, as urged by the AGI parties, that the claim is foreclosed. Although it is possible that the trial judge (or the chambers judge on a summary trial application) may find the claim to be barred on the basis of indeterminate liability, at this stage, the claim should be allowed to continue.

...

[58] The claim alleges as a fact that the AGI parties knew that Fibreco's business was predicated on other parties' use of the Terminal. Pac Bio should be permitted to develop its case and compile the evidence to establish (if it can) that the class of active users of the Terminal can be determined. By the same token, the AGI parties will be permitted to build a case that establishes that, on the evidence, the class of potential plaintiffs is indeterminate.

[59] It is possible that as the case proceeds, evidence will establish the contrary that given how the Terminal was used, there is too great a risk of indeterminate liability because the class of potential plaintiffs cannot be clearly determined in a principled way. In those circumstances, the AGI parties would be able to make a summary trial application for dismissal of Pac Bio's claim (assuming a summary trial as opposed to a conventional trial is appropriate). Such a process would not be an excessive use of court resources or disproportionate to the size of the claim.

[24] The Associate Judge concluded at para. 62 as follows:

[62] Applying the approach required by *Imperial Tobacco* and *Nevsun*, I am unable to find that it is plain and obvious that the claim is bound to fail. On the facts pleaded, it cannot be ruled out that Pac Bio may succeed. Pac Bio's claim might fail, but it is not doomed to fail. The claims stemming from the AGI parties' negligence in designing and constructing the Silo and in failing to warn of previous defects should be allowed to proceed to trial (conventional or summary, if appropriate) where they can be evaluated in their factual and legal context.

Positions of the Parties

[25] The defendants submit that the Associate Judge erred both in finding the existence of a *prima facie* duty of care and in determining that policy considerations did not negate the existence of a duty of care.

[26] Concerning the existence of a duty of care, the defendants say the Associate Judge ignored relevant factors and relied on irrelevant factors. The relevant factors they say the Associate Judge ignored include: the absence of any proprietary interest on the part of the plaintiff in the terminal; the absence of a contractual relationship between the plaintiff and the defendants; the absence of any representations made to the plaintiff by the defendants; and more generally, the absence of any direct relationship or interactions between the plaintiff and defendants. The defendants further say the Associate Judge erred in finding a duty of care predicated on a representation made by them to the public that they were experts, which, in the absence of reliance, is irrelevant. They further say the Associate Judge erred in concluding that foreseeability of damage to users of the terminal was sufficient to establish a duty of care.

[27] Concerning the policy considerations, the defendants say that the Associate Judge erred in deciding that the case should be allowed to continue to determine the active users of the terminal.

[28] The plaintiff submits that the Associate Judge correctly identified its claim as being one of relational economic loss, properly applied the law, and correctly determined that the case was novel and should be allowed to proceed to trial. It says

the pleaded facts establish a sufficiently proximate relationship to give rise to a duty of care through reliance, expectation and knowledge. The plaintiff further says that indeterminate liability is not an issue in this case as there are only two users of the terminal.

Issues

[29] The overarching issue on this appeal is whether the Associate Judge erred in concluding that it was not plain and obvious the plaintiff's claims were bound to fail and should be allowed to proceed to trial. This turns on the following questions:

- a) What is the standard of review?
- b) Did the Associate Judge err in concluding a duty of care was owed in the circumstances?

Analysis

Standard of Review

[30] The parties disagree on the standard of review to be applied. The defendants submit that whether a pleading discloses a cause of action is an extricable question of law and is reviewable on a standard of correctness. The plaintiff submits that the Associate Judge's decision was discretionary and is therefore entitled to deference on appeal, absent an error law. In particular, relying on *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91, at paras. 13-15, the plaintiff says where the claim involves a novel question of law, the decision is discretionary and should not be interfered with.

[31] I agree with the defendants that the standard of review is one of correctness. In *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 [*Frazier*], Justices MacKenzie and Horsman conclusively laid to rest any suggestion that decisions under Rule 9-5(1)(a) are discretionary and confirmed that the applicable standard of review is one of correctness. At paras. 21-23, they wrote:

[21] The rigorous nature of the test for a motion to strike was affirmed in *Nevsun Resources Ltd v. Araya*, 2020 SCC 5 at paras. 63–64, 66–67 and

69; see also *Grove* at para. 13. Deciding whether the pleadings disclose a reasonable cause of action is a pure question of law that does not attract appellate deference on appeal: *Workers' Compensation Board v. Sort*, 2022 BCCA 318 at para. 75 [*Sort*]; see also *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para 46. Since it is a question of law, it is reviewed on the correctness standard: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 33; *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 14, leave to appeal to SCC ref'd, 40051 (30 June 2022); see also *Sort* at para. 75. Justice Groberman for the Court recently affirmed that despite older cases suggesting that decisions under Rule 9-5(1)(a) are discretionary, this is no longer the case and the standard of correctness should be used: *Kamoto Holdings Ltd. v. Central Kootenay (Regional District)*, 2022 BCCA 282 at para. 37 [*Kamoto*]. [Emphasis added.]

[22] In this case, the existence of a viable claim turns on whether Canada owed Ms. Frazier a duty of care, which is also a question of law reviewed for correctness: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 24 [*Maple Leaf*]; *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 218 [*Waterway*], citing *Rankin (Rankin's Garage and Sales) v. J.J.*, 2018 SCC 19; *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 at para. 73, leave to appeal to SCC ref'd, 35293 (15 August 2013).

[23] More specifically, the issue here is whether it is plain and obvious there is no proximity in the relationship between the claimant and Canada to ground a *prima facie* duty of care. In determining this, one aspect that must be considered is whether it is plain and obvious that specific interactions between Ms. Frazier and the regulator do not support a relationship of sufficient proximity such that it would not be just to impose a duty of care: *Grove* at para. 33. Each component of the analysis supporting a *prima facie* duty of care — proximity of relationship and reasonable foreseeability of injury — raises questions of law: *Maple Leaf* at para. 24.

[32] I therefore proceed on the basis that I must determine whether the Associate Judge was correct when she concluded it was not plain and obvious the claim was bound to fail. Moreover, as in *Frazier*, the issue is whether it is plain and obvious there is no proximity in the relationship between the plaintiff and the defendants to ground a *prima facie* duty of care.

Duty of Care/Pure Economic Loss

General Principles

[33] I have been referred to multiple cases that address the recovery of claims for pure economic loss. I do not intend to refer to all of the cases to which I have been referred. The general principles to be applied are primarily set out in *Deloitte &*

Touche v. Livent Inc. (Receiver of), 2017 SCC 63 [*Livent*], *Maple Leaf, Subway* and, to a lesser extent, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 [*Bow Valley*].

[34] There is no general right in tort to recover for negligent or intentional infliction of pure economic loss, which is economic loss that is unconnected to an injury to the plaintiff or to physical damage to the plaintiff's property. [*Maple Leaf*, paras. 17-19]. However, there are three categories of cases involving pure economic loss between private parties where recovery has been permitted. Those categories are:

- a) Negligent misrepresentation or negligent performance of a service;
- b) Negligent supply of shoddy goods or structures; and
- c) Relational economic loss. [*Maple Leaf*, para. 21].

[35] The categories of economic loss are analytical tools and the fact that a claim arises from a type of pure economic loss does not mean it is recoverable. What matters is whether the requirements for imposing a duty of care are satisfied, in particular, whether the parties were at the time of the loss in a sufficiently proximate relationship [*Maple Leaf*, para. 22]. This requires a determination of whether the appellant's alleged loss represents an injury to a right that can be the subject of recovery in tort law and possesses the requisite factors to support a finding of proximity under that category [*Maple Leaf*, para. 23; *Subway*, para. 87];

[36] The test for establishing tort liability involves the application of the two-part *Anns/Cooper* framework: first, inquire whether the relationship of neighbourhood or proximity is sufficient to found a *prima facie* duty of care; and, second, inquire whether the policy concerns that usually preclude recovery of contractual relational economic loss, such as indeterminacy, are overridden [*Bow Valley*, para. 56; *Livent*, para. 19];

[37] The question of whether a duty of care exists is a question of the relationship between the parties, foreseeability of injury alone is not sufficient to ground the existence of a duty of care [*Livent*, paras. 23 and 34; *Maple Leaf*, paras. 25 and 30]

[38] There are two routes to establishing liability; through prior case law that has determined an analogous relationship of proximity exists and, where there are no prior case authorities recognizing an analogous proximate relationship, through a full proximity analysis. [*Livent*, paras. 26 and 29; *Maple Leaf*, paras. 64-65]

[39] The court must be particularly attentive in finding proximity based on a previously established or analogous category. To ground an analogous duty the case authorities relied on must be shown to arise from an analogous relationship and analogous circumstances. [*Livent*, para. 28; *Maple Leaf*, para. 65, *Subway*, para. 83]

[40] A full proximity analysis requires examining all relevant factors arising from the relationship between the plaintiff and the defendant including expectations, representations, reliance and other considerations. It involves asking whether the parties are in such a “close and direct” relationship that it would be “just and fair having regard to that relationship to impose a duty of care in law. [*Livent*, para. 25; *Maple Leaf*, para. 67]

[41] For cases falling within the categories of negligent misrepresentation or performance of a service, two factors are determinative of proximity; the defendant’s undertaking and the plaintiff’s reliance. [*Maple Leaf*, para. 32; *Subway*, para. 91]

[42] Relational economic loss, which is conceded to be the category of economic loss at issue in this case, has not been considered by the Supreme Court of Canada since *Bow Valley*. There it was determined that relational economic loss is generally recoverable in only three “special circumstances”, namely: (1) where the claimant has a possessory or proprietary interest in the damaged property; (2) in general average cases; and (3) where the relationship between the claimant and property owner constitutes a joint venture [*Bow Valley*, para. 48]. The Supreme Court

recognized, however, that the categories were not closed and that the two-part *Anns/Cooper* framework should be used to determine new categories. [*Bow Valley*, paras. 50 and 52]

[43] I further observe that in *Maple Leaf*, the majority noted that relational economic loss is recoverable only in “exceptional circumstances”. [*Maple Leaf*, Footnote #2]

Discussion

[44] The plaintiff concedes that it seeks to recover for relational economic loss and further properly concedes that this case does not fall within any of the three recognized categories of recoverable relational economic loss (possessory or proprietary interest, general average or joint venture). The plaintiff therefore sought before the Associate Judge, and seeks before me, to establish a novel case for the recovery of relational economic loss.

[45] The Associate Judge agreed with the plaintiff that, through the application of the *Anns/Cooper* framework, a novel duty of care of existed and that the plaintiff should at least be permitted to proceed with the case until such time as it could be determined whether issues of indeterminate liability should negate the *prima facie* duty of care.

[46] I am of the opinion that the Associate Judge fell into error in several particulars:

- a) First, she erred in her proximity assessment by failing to properly focus on the relationship between the plaintiff and defendants, by conflating proximity with foreseeability and by failing to take into account the absence of any pleaded facts of a relationship between the plaintiff and defendants;
- b) Second, she erred in failing to identify a legally cognizable right or interest of the plaintiff; and

- c) Third, she erred in determining that issues of indeterminate liability did not negate the *prima facie* duty of care she found and in delaying the assessment of this issue.

[47] As I addressed briefly above, *Livent* and *Maple Leaf* set out and clarified the proximity analysis required to be undertaken to find a duty of care. In *Subway*, Zarnett J.A., derived three fundamental points from this proximity analysis, as follows:

[78] First, proximity is distinct from reasonable foreseeability of harm. Parties are not in a proximate relationship simply because it is reasonably foreseeable that carelessness by one will harm the other economically. “[T]he defendant’s ability to reasonably foresee injury to a plaintiff is insufficient to ground a finding of proximity”: *Maple Leaf* (SCC), at para. 84.

[79] Second, the proximity analysis takes place against the backdrop of the fundamental principle that a plaintiff must have a right, or legally cognizable interest, that would be vindicated by recognizing a duty of care on the part of the defendant. This is particularly important in cases of pure economic loss because there “is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss”. The loss to be recovered must be “the result of an interference with a legally cognizable right”: *Maple Leaf* (SCC), at paras. 18-19.

[80] Third, the proper identification and assessment of all relevant factors arising from the relationship between the parties, in order to determine whether their relationship can truly be called proximate, furnishes a “principled basis” to determine to whom duties are owed and to whom they are not, as well as the scope of the duties: *Livent*, at para 31.

[48] The specific relationship between the parties is the focus of a properly performed proximity analysis. In *Subway*, at para. 83, Zarnett J.A. noted that “there is a need to examine the particular relationship at issue in each case”. At para. 87, he further wrote that there is a need for “an examination of the particular relationship in issue in each case between the plaintiff and the defendant”.

The Relationship Between the Parties

[49] The Associate Judge’s proximity analysis is primarily set out at para. 43 of her reasons. She found proximity on the basis of expectations, representations and knowledge. More specifically, she reasoned:

- a) The plaintiff expected to actively use the terminal during the work, and the defendants expected the work would not interrupt terminal services;
- b) The defendants represented to the public that they were experts in the design and manufacture of silos; and
- c) The defendants knew parties other than Fibreco used the terminal and knew that a catastrophic silo failure would render the terminal unusable and result in economic damages to the plaintiff.

[50] I agree that expectations, representations and knowledge are relevant factors to consider in a proximity analysis. However, they are only relevant insofar as they relate to or arise from the relationship between the plaintiff and defendant. Expectations, representations and knowledge unconnected with the relationship are not relevant considerations. This is clearly seen when one considers the representation referred to and relied upon by the Associate Judge. That representation was made “to the public”. However, in *Maple Leaf*, at paras. 34-35, the majority expressly stated that any representation or undertaking must be between the parties, must be relied on and the effect is limited to the purpose for which the undertaking or representation was made.

[34] In other words, it is the intended effect of the defendant’s undertaking upon the plaintiff’s autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff. Where that effect works to the plaintiff’s detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff’s reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance. The plaintiff’s pre-reliance circumstance has become “an entitlement that runs against the defendant” (*Weinrib*, at p. 230).

[35] That entitlement, however, operates only so far as the undertaking goes. As this Court cautioned in *Livent*, “[r]ights, like duties, are . . . not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant’s undertaking of responsibility □ that is, of the purpose for which the representation was made or the service was undertaken □ necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant’s duty of care” [Emphasis added.]

[51] Here, there are no representations pleaded as having been made by the defendants to the plaintiff and significantly there is no pleading of the plaintiff having relied on any representation or undertaking. Holding oneself out to the general public as being an expert in the design and manufacture of silos does not translate to a close and direct relationship sufficient to give rise to a duty of care.

[52] Similarly, concerning the party's expectations, there is nothing in the NCC alleging that the expectations of the parties emanated from their relationship with one another. In fact, the NCC does not mention expectations other than at para. 30 where it is pleaded the defendants, knew or ought to have known, that the terminal would continue to be used by the plaintiff during and after the completion of the work. Expectations in the air unconnected with anything said or done by the parties cannot give rise a close and direct relationship.

[53] The final factor relied upon by the Associate Judge as establishing a *prima facie* duty of care is the finding that the defendants knew the plaintiff would suffer economic loss from a silo failure. This is nothing more than a finding of foreseeability of damage which is not sufficient to establish proximity: *Maple Leaf*, para. 84; *Subway*, para. 78.

[54] Relatedly, the Associate Judge additionally erred in her proximity assessment by failing to take into account or giving appropriate weight to several highly relevant factors, namely:

- a) there is no allegation in the NCC the plaintiff had any proprietary interest in the terminal;
- b) there is no allegation in the NCC of a direct contractual relationship between the plaintiff and defendants;
- c) there is no allegation in the NCC that the plaintiff's expectations were based on anything said or done by the defendants;

- d) there is no allegation in the NCC of any representations or undertakings made by any of the defendants to the plaintiff;
- e) there is no allegation in the NCC of the plaintiff relying on a representation made by the defendants or altering its position in any way based on a representation by the defendants; and
- f) there are no allegations in the NCC of any dealings whatsoever between the plaintiff and the defendants.

[55] These are all relevant considerations that indicate an absence of a close and direct relationship between the plaintiff and defendants.

Legally Cognizable Right

[56] The authorities establish that, for there to be a duty of care and a right to recover for economic loss, the plaintiff must show it had a legally cognizable right or interest and that the loss suffered was the result of the defendant's interference with that right or interest: *Maple Leaf*, at para 18-19. In *Subway*, at para. 79, it was noted that:

... This is particularly important in cases of pure economic loss because there "is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss".

[57] The Associate Judge recognized this requirement at paras. 27 and 35 of her reasons, however, she failed to identify the legally cognizable right or interest of the plaintiff that the defendants interfered with.

[58] Other than a general right to be protected from negligently inflicted economic loss, which is not recognized in tort, it is not apparent to me what legally cognizable right of the plaintiff was interfered with by the defendants. In this regard, I note that the NCC contains no allegation of a legal right or interest that the plaintiff had and that the defendants interfered with. Additionally, in submissions before me, the plaintiff also failed to address the legally cognizable right or interest that the defendants allegedly interfered with.

Conclusions on Prima Facie Duty of Care

[59] In essence, the plaintiff alleges the existence of a duty of care merely because (1) the defendants had a contract with Fibreco for the expansion of the terminal, (2) it was a user of the terminal and (3) it was foreseeable that it would suffer economic loss if the defendants were negligent. Ultimately, the plaintiff relies on the foreseeability of suffering economic loss as the only basis for the existence of a duty of care. As such, the comments of Zarnett J.A., at para. 128 of *Subway*, are equally applicable here:

[128] The constellation of factors to which Subway points are primarily about foreseeability of harm, not proximity. They do not show a close and direct relationship. They do not show any expectations, representations, reliance, or statutory obligations as between Trent and Subway. They do not show anything that fulfils the purpose served by the requirement for an undertaking and reliance in a negligent misrepresentation or performance of services case, that is, something that shows a legally cognizable right of the plaintiff is affected. Nor do they show interests affected akin to rights in person or property. Subway's negligence claim is only about the pure economic harm it suffered. [Emphasis added.]

[60] Accordingly, I find that the Associate Judge erred in determining that there was a sufficient relationship of proximity between the plaintiff and defendants to give rise to a *prima facie* duty of care. The plaintiff's claims are for the pure economic loss it suffered as a consequence of the alleged negligence of the defendants and are not recoverable.

Indeterminate Liability

[61] Given my determination that a *prima facie* duty of care does not exist, I do not need to consider whether the Associate Judge was correct in holding both that the class of potential plaintiffs was not indeterminate and that indeterminate liability should be addressed at a later time. However, in my view, it was an error for the Associate Judge to suggest that issues of indeterminate liability could be addressed at a later time. The authorities are clear that the test for determining a duty of care involves two parts and both parts are to be addressed at the same time. The sole question before the court was whether a duty of care existed. The resolution of this issue required the court to determine both whether a *prima facie* duty of care existed

and whether considerations of indeterminate liability should negate any such duty of care.

[62] I would add that I also disagree with the Associate Judge's conclusion that the class of potential plaintiffs was not indeterminate, a conclusion which she reached on the basis that there were only two users of the terminal at the time the alleged duty to warn arose.

[63] *Bow Valley* is instructive on indeterminate liability. This case involved a fire on an oil rig that necessitated the rig be towed and repaired. The entity who had contracted with the rig owner for the use of the rig suffered economic loss as a consequence of the fire and commenced proceedings against the rig builder and a supplier of a component to the rig. McLachlin J. (as she then was) dismissed the claim on the grounds of indeterminate liability. At paras. 62-67 she wrote:

[62] The next question is whether this prima facie duty of care is negated by policy considerations. In my view, it is. The most serious problem is that seized on by the Court of Appeal -- the problem of indeterminate liability. If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Other investors in the project are the most obvious persons who would also be owed a duty, although the list could arguably be extended to additional classes of persons. What has been referred to as the ripple effect is present in this case. A number of investment companies which contracted with HOOL are making claims against it, as has BVI.

[63] No sound reason to permit the plaintiffs to recover while denying recovery to these other persons emerges. To hold otherwise would pose problems for defendants, who would face liability in an indeterminate amount for an indeterminate time to an indeterminate class. It also would pose problems for potential plaintiffs. Which of all the potential plaintiffs can expect and anticipate they will succeed? Why should one type of contractual relationship, that of HOOL, be treated as more worthy than another, e.g., that of the employees on the rig? In this state, what contractual and insurance arrangements should potential plaintiffs make against future loss?

[64] The plaintiffs propose a number of solutions to the problem of indeterminacy. None of them succeeds, in my respectful view. The first proposal is to confine liability to persons whose identity was known to the defendants. This is a reversion to the "known plaintiff" test, rejected by a majority of this Court in *Norsk, supra*. As commentators have pointed out, the fact that the defendant knew the identity of the plaintiff should not in logic or justice determine recovery. On such a test, the notorious would recover,

the private would lose: *Norsk*. The problem of indeterminate liability cannot be avoided by arbitrary distinctions for which there is no legal or social justification: *Norsk*, at p. 1112. There must be something which, for policy reasons, permits the court to say this category of person can recover and that category cannot, something which justifies the line being drawn at one point rather than another.

[65] Second, and in a similar vein, the plaintiffs argue that determinacy can be achieved by restricting recovery to the users of the rig, a class which they say is analogous in time and extent to the owners and occupiers of the building in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC), [1995] 1 S.C.R. 85. This argument fails for the same reasons as the known plaintiff test. There is no logical reason for drawing the line at users rather than somewhere else.

[66] Third, the plaintiffs attempt to distinguish themselves from other potential claimants through the concept of reliance. The defendants correctly answer this argument by pointing out that any person who is contractually dependent on a product or a structure owned by another “relies” on the manufacturer or builder to supply a safe product.

[67] Finally, the plaintiffs argue that a finding of a duty to warn negates the spectre of indeterminate liability as the duty to warn does not extend to everyone in any way connected to the manufactured product. This argument begs the question. The duty to warn found to this point is only a prima facie duty to warn in accordance with the first requirement of *Anns*, supra, that there be sufficient proximity or neighbourhood to found a duty of care. It is not circumscribed and imports no limits on liability. Considerations of indeterminate liability arise in the second step of the *Anns* analysis. Hence the prima facie duty of care, by itself, cannot resolve the problem of indeterminate liability.

[64] The considerations addressed by McLachlin J. in *Bow Valley* apply here. From the NCC it is apparent that there are many more than two potential plaintiffs. The potential plaintiffs would also include: the entitles who intended to store and ship agricultural products when the terminal expansion was completed; the ship owners and charterers who called at the terminal; the purchasers of cargo loaded from the terminal; the truckers and railways that delivered product to the terminal and the stevedores and other persons who worked at the terminal. It was foreseeable that all of these potential plaintiffs would suffer economic loss if the terminal was shut down due to negligence on the part of the defendants. There is no logical principled reason to draw a distinction between these other users and the plaintiff, especially considering that the plaintiff has not pleaded anything giving rise to a special or unique relationship between it and the defendants.

[65] Therefore, in my view, the recognition of a duty of care in these circumstances does raise serious concerns of indeterminate liability that ought to negate any *prima facie* duty of care.

Order

[66] Accordingly, the appeal is allowed and the NCC is struck.

[67] The parties have leave to speak with me regarding costs, if necessary.

“Giaschi J.”