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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

SHARRON PATERSON AND RUSSELL PATERSON,	)	Eric Blouw for the plaintiffs
plaintiffs,	)	
- and –	)	
EVELYN WALKER, DIRECTOR OF PARKS AND NATURAL AREAS, AND THE GOVERNMENT OF MANITOBA,	)	Tristan Sandulak Tamara Edkins for Director of Parks and Natural Areas and The Government of Manitoba
defendants,	)	
AND B E T W E E N:	)	
RUSSELL PATERSON, AS ADMINISTRATOR OF THE ESTATE OF SHARRON PATERSON, DECEASED, AND RUSSELL PATERSON,	)	
plaintiffs,	)	
- and -	)	
EVELYN WALKER, EDWARD WALKER, MICHAEL WALKER, VICTOR WALKER, DAVID WALKER, DANIEL WALKER, DIRECTOR OF PARKS AND NATURAL AREAS AND THE GOVERNMENT OF MANITOBA,	)	
defendants.	)	Judgment Delivered: January 30, 2025

HUBERDEAU J.

INTRODUCTION

[1] The plaintiffs' action against the Director of Parks and Natural Areas (the "Director") and the Government of Manitoba (the "Government") (collectively, the "Government Defendants") relates to the development of leasehold Lot 1, Block 7, Plan 1903-3A in the Whiteshell Provincial Park (the "Walker Lot") by Evelyn Walker, Edward Walker, Michael Walker, Victor Walker, David Walker and Daniel Walker (the "Walkers").

[2] The action was bifurcated into two hearings. The first hearing dealt with the judicial review of four decisions made by one or more of the Government Defendants in relation to the development of the Walker Lot (the "Judicial Review Hearing").

[3] The Judicial Review Hearing was heard by Edmond J. (as he then was), who found as follows:

i. the Government Defendants breached their duty of procedural fairness to the plaintiffs when they approved the development of the Walker Lot in 2011 (the "2011 Variance Application") given they failed to follow the guidelines and consultation process outlined in the Cottagers Handbook (which is a policy or guideline document published by the Government Defendants and provided to lessees as a guide relating to the permitted land use and development within provincial parks (the "Handbook"));

ii. the Government Defendants' decision to issue a retroactive variance and the procedure it followed (referring the matter to the local variance committee, namely, the Whiteshell Advisory Board (the "WAB")) was reasonable;

iii. the Government Defendants' decision not to enforce its order requiring the Walkers to reconfigure the internal layout of the garage structure (the "Garage") such that the habitual, sleeping and storage areas not exceed 480 square feet and be on one level only was unreasonable; and

iv. the Government Defendants' decision to reduce the overall development footprint of the Walker Lot development by 244 square feet versus the amount requested by the plaintiffs (i.e. 288 square feet) was reasonable.

(See ***Paterson et al. v. Walker et al.***, 2021 MBQB 172, at paras. 68 - 73, 101 – 10, 132 and 155)

[4] Given his findings, Edmond J. ordered that the Walkers comply with the January 2, 2018 order relating to the reconfiguration of the internal layout of the Garage and that they reduce the overall footprint of their development by 244 square feet (see ***Paterson*** at para. 164).

[5] The second hearing, namely this trial before me, dealt with the private law remedies raised by the plaintiffs against the Government Defendants. This included whether the Government Defendants were negligent given the various decisions and actions/inactions they took in relation to the development of the Walker Lot and if so, whether the plaintiffs are entitled to damages (the "Negligence Hearing"). Although the Walkers were initially named as defendants, the action against them was struck on October 18, 2018.

[6] These are my reasons for judgment with respect to the Negligence Hearing.

THE ISSUES

[7] The issues are threefold. First, did the Government Defendants owe the plaintiffs a private law duty of care? Second, if a duty of care was owed, did the Government Defendants breach the requisite standard of care? Third, what are the damages that resulted from that breach?

BRIEF SUMMARY OF THE REGULATORY REGIME GOVERNING LESSEES IN MANITOBA PROVINCIAL PARKS AS PER THE AGREED STATEMENT OF FACTS

[8] The plaintiffs and the Walkers are neighbours who both lease cottage lots from the Government in the Whiteshell Provincial Park.

[9] As leaseholders, the plaintiffs and the Walkers are required to follow, among other things, the Handbook. The guidelines in the Handbook: (a) assist lessees to understand the rules and procedures applicable when they seek approval for site plan permits and variances to build on vacation lots; (b) are incorporated into all leases and are binding on all lessees; and (c) are required to be met and may be waived by the Director only in exceptional circumstances where the procedural rules are substantially complied with by a lessee.

[10] The Handbook requires, among other things, that a letter of support be provided by adjacent neighbours as part of an application for a site plan permit in certain circumstances or when a variance is sought. Having said that, the Director has discretion to issue a site plan permit and impose conditions that it considers appropriate in accordance with the *Park Activities Regulation*, M.R. 141/96 (the "*Regulation*"). If the Director determines that it is appropriate to issue a site plan permit notwithstanding that

there has been no letter of support, it must act reasonably in exercising that discretion. Acting reasonably includes investigating the reasons why a neighbour has refused to consent to the variance being sought.

[11] The Handbook provides that exceptions to the guidelines will not normally be granted, and in any event, will not be considered without a leaseholder first obtaining a written recommendation of support from the WAB.

FACTUAL BACKGROUND

[12] Sharron Paterson ("Sharron") began leasing Lot 1A, Block 7, Plan 1903-3A in the Whiteshell Provincial Park from the Government in 1986 (the "Paterson Lot"). Sharron passed away in July 2014. Her interest in the lease was then transferred to her spouse, Russell Paterson ("Russell").

[13] Evelyn Walker ("Evelyn") began leasing the Walker Lot from the Government in 1988. In 2010, she filed an application for a site plan permit and variance (the "2010 Variance Application"). Included with the 2010 Variance Application was a letter of support signed by Sharron dated June 2010 (the "2010 Letter of Support") as required by the Handbook.

[14] The 2010 Letter of Support acknowledged and supported Evelyn's application for a variance as follows:

i. to build the Garage as a two-storey structure inside the 10-foot buffer by five feet having a main level of 340 square feet, and an upper-level guest cottage to be 340 square feet;

ii. to reduce the 15-foot back buffer zone from 15 feet to 10 feet for the Garage;

iii. to encroach into the side 10-foot buffer by five feet to build a two-storey boathouse, having a main level of 336 square feet and an upper level of 266 square feet which was to be used as storage only and not as habitable space; and

iv. to exceed the allowable footprint of 2,700 square feet by 185 square feet.

[15] The 2010 Variance Application was denied by the Director.

[16] Between May and June 2011, Evelyn assigned her interest in the Walker Lot to the remaining Walkers while also submitting to the Director the 2011 Variance Application which included architectural plans and the 2010 Letter of Support.

[17] The Director granted the 2011 Variance Application and issued a site plan permit (collectively the "Site Plan Permit") despite:

i. having identified that:

(a) it differed from the 2010 Variance Application in that the main level of the Garage was now 367 square feet (instead of 340) while the upper-level was now 388 square feet (instead of 340); the upper level of the boathouse was reduced to 244 square feet (instead of 266) and now included an open deck; and the maximum allowable footprint had been exceeded and was now 193 square feet (instead of 185);

(b) the 2010 Letter of Support did not directly identify the structures that were being proposed in 2011 and did not include the correct square footage respecting the garage, the boathouse and the maximum allowable footprint; and

(c) the guidelines contained in the Handbook had not been met.

ii. not referring the matter to the WAB or providing the plaintiffs with an opportunity to be heard by the Director; and

iii. taking no steps to investigate why the plaintiffs refused to sign a new letter of support to incorporate the changes noted in the 2011 Variance Application.

[18] Following the issuance of a building permit from the Manitoba Office of the Fire Commissioner (the "OFC"), the Walkers commenced construction of the Garage in the summer of 2011.

[19] In early September 2011, the Director determined that the Garage was not being built in conformity with both the Site Plan Permit and building permit in that a man door had been installed where the overhead garage door was to be located.

[20] On September 7, 2011, the Director issued a stop work order and advised the Walkers that it would only be lifted upon proof that they had purchased an overhead garage door. The Director also advised the Walkers that living accommodations were only allowed on one level and that employees were prohibited from staying in the Garage (see Agreed Book of Documents ("ABD") tab no. 84).

[21] On October 4, 2011, the Director lifted the stop work order given the Walkers provided to the Director proof of purchase of the required overhead garage door (see ABD tab no. 85).

[22] On May 29, 2012, the plaintiffs contacted the OFC advising that the Walkers were not complying with the conditions that had been imposed respecting the Garage and

boathouse. These included employees living in the second storey of the boathouse (see ABD tab no. 88).

[23] On October 24 and 25, 2012, the plaintiffs again contacted the Director and advised that the Garage was built too close to their lot, that the structure was not a garage and that it was being used to house the Walkers' employees (see ABD tab nos. 94 – 96).

[24] Between November 2012 and April 2013, the Director investigated the various complaints made by the plaintiffs respecting the Walkers not complying with the Site Plan Permit (see ABD tab nos. 101, 103, 105, 107 – 110, 245, 246 and 317).

[25] On April 25, 2013, the plaintiffs sent a further letter to the Director advising that the Garage was located too close to the main road in contravention of the Site Plan Permit (see ABD tab no. 112). Following its investigation, the Director determined that the Garage appeared to intrude on the 10-foot rear buffer by seven feet, which was more than what had been authorized. The Director advised the Walkers that they would be required to supply a building location certificate by the end of July 2013 (see ABD tab nos. 115 and 118).

[26] On August 22, 2013, the Director advised the plaintiffs that the Walkers had verbally confirmed that the Garage was not in the correct location, and that the Director would be obtaining their own building location certificate given the Walkers refusal to obtain their own (see ABD tab no. 126).

[27] In August 2013, the OFC conducted an inspection of the Garage and deemed it as being inaccessible for a vehicle.

[28] On October 25, 2013, the Director directed the Walkers to relocate the Garage by 2.58 feet by July 1, 2014, to maintain the 10-foot rear buffer. The Director also directed the Walkers to reduce the square footage of their development by 193 square feet to comply with what had been approved in the Site Plan Permit, and that the structures were not to be used for employee accommodations (see ABD tab no. 131).

[29] On or about January 17, 2014, the Director advised the Walkers that it would be preparing a formal order to have the Garage relocated in accordance with the Site Plan Permit and to reduce the overall square footage of the development (see ABD tab no. 136).

[30] Between the end of January and the end of March 2014, discussions occurred between the Director and the Walkers relating to the Garage, which resulted in the Director allowing the Walkers to apply for a retroactive variance subject to the plaintiffs providing a letter of support (see ABD tab no. 138).

[31] The Walkers' retroactive application was denied on or about May 2, 2014, given they failed to provide the required letter of support from the plaintiffs. The Director then referred the matter to the WAB for a hearing (see ABD tab no. 139).

[32] On May 23, 2014, the Director advised the WAB that its mandate relating to the Walkers' retroactive application was limited to reviewing the current location of the Garage and the failure to obtain a letter of support from the plaintiffs (see ABD tab no. 150).

[33] The WAB hearing occurred on June 12, 2014 (see ABD tab no. 151).

[34] On September 12, 2014, the WAB recommended that the Walkers' variance application be approved (see ABD tab no. 152). On October 3, 2014, the Director granted the retroactive variance to allow the Garage to remain in its current location.

[35] On February 26, 2016, the Director advised the Walkers to reduce the overall development footprint by 213 square feet. The Walkers refused and asked that the matter be referred once again to the WAB (see ABD tab nos. 251 and 252).

[36] On November 2, 2017, the WAB recommended that the Walkers reduce their overall development by 213 square feet to comply with the Site Plan Permit (see ABD tab no. 258).

[37] On January 2, 2018, the Director ordered the Walkers to reduce their overall development by 213 square feet and to reconfigure the internal layout of the Garage such that the habitable space, sleeping and storage areas did not exceed 480 square feet and would be on one level (the "January 2018 Order") (see ABD tab nos. 259 – 261).

[38] Over the course of 2018, the Director and the Walkers exchanged correspondence and discussed issues relating to the January 2018 Order (see ABD tab nos. 268, 278 and 280).

[39] On March 11, 2019, the Director advised the Walkers that it did not have the authority to engage in enforcement action with respect to the internal layout of the Garage and that its focus would be limited to reducing the overall development footprint (see ABD tab nos. 303 and 304).

[40] Following further calculations of the development of the Walker Lot, the Government Defendants, on April 12, 2019, ordered the Walkers to reduce the overall

development footprint by 244 square feet but did not set a compliance date given the ongoing litigation ("April 2019 Order") (see ABD tab nos. 173, 177 and 312).

[41] Between September and December 2021, the Walkers advised the Director that they would not be making any changes to the overall development footprint (see ABD tab nos. 160, 165 and 179).

[42] On June 28, 2021, Edmond J. ordered the Walkers to comply with the January 2018 Order as it relates to reconfiguring the internal layout of the Garage and the April 2019 Order by December 31, 2021, failing which the Director would then do all things necessary to bring the Garage back in compliance.

[43] The Walkers did not perform the work as ordered and failed to allow the Director access to the Garage.

[44] On June 2, 2022, Edmond J. granted an order to aid enforcement ("Enforcement Order") which included imposing deadlines for the Director to issue a request for proposal ("RFP") and to complete the remedial work itself.

[45] Given that neither deadline was met, costs were ordered against the Director, but only for not having met the RFP deadline. As of the Negligence Hearing, the remedial work was ongoing.

MY ANALYSIS

A. The Law on Private Law Duty of Care

[46] The law of negligence in the context of a public authority was succinctly summarized by the British Columbia Court of Appeal in ***Held v. Sechelt (District)***, 2021 BCCA 350:

> [12] The well known Anns/Cooper test for assessing whether a private law duty of care exists comprises two stages. At the first stage, the court must ask whether the existence of a duty of care has been established by precedent in sufficiently analogous circumstances. If no analogous precedent exists, the court must assess whether a *prima facie* duty of care arises between the parties, which involves asking whether the harm that was suffered by the plaintiff was reasonably foreseeable, and whether the parties were in a relationship of sufficient proximity such that imposing a duty of care would be just in the circumstances. If a *prima facie* duty arises at the first stage, the court then evaluates whether there are any residual policy considerations which should negate or limit that duty…

(i) <u>The First Stage</u>

a. Has a duty of care been established by precedent in sufficiently analogous circumstances?

[47] As to the issue of whether an analogous precedent exists, the Supreme Court of Canada noted in ***Deloitte & Touche v. Livent Inc. (Receiver of)***, 2017 SCC 63, at para. 28, that judges should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship is truly the same as or analogous to that which was previously recognized. The reason for this is that the residual policy considerations are not considered where proximity is found based on an established category.

(i) Position of the plaintiffs

[48] The plaintiffs submitted that the Government Defendants' failure to act in accordance with its established policy (i.e. the Handbook) by issuing a Site Plan Permit to the Walkers despite the plaintiffs' refusal to provide a letter of support is sufficiently analogous to the established category set out in ***Heaslip Estate v. Ontario***, 2009 ONCA 594:

> [21] …once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk.

[49] The plaintiffs further submitted that although they did not suffer any physical harm, they did incur other harms such as loss of use and enjoyment of their property and distress.

(ii) Position of the Government Defendants

[50] The Government Defendants submitted the following:

i. ***Heaslip*** is in no way analogous to the circumstances of this case given the plaintiffs own admission that its claim is both unique and novel; and

ii. even if the plaintiffs had demonstrated that this case belonged within an established category like in ***Heaslip***, they did not suffer the required physical harm as required in ***Heaslip*** (see para. 21).

(iii) The Court's findings

[51] Having considered the evidence and submissions of the parties, I see little merit in the plaintiffs' argument on this point. As noted by the Government Defendants, ***Heaslip*** is a case that recognizes a private law duty of care which is rooted in protecting an individual against personal injury and/or death and not the harms alleged by the plaintiffs. Furthermore, the plaintiffs acknowledged that this matter and the relief sought are both unique and novel.

[52] I conclude that the circumstances of this case do not support a finding that the Government Defendants owed the plaintiffs a private duty of care under this branch of the *Anns/Cooper* test.

b. Was the harm that was suffered by the plaintiffs reasonably foreseeable?

[53] Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether an injury to the plaintiff was a reasonably foreseeable consequence of the defendants' negligence. This inquiry is not amenable to, and does not require, actuarial precision (see ***Deloitte***, at paras. 32 and 33).

[54] Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other (see ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, at para. 41).

[55] The test for foreseeability is whether the harm would be viewed by a reasonable person as being very likely to occur (see ***Fullowka v. Pinkerton's of Canada Ltd.***, 2010 SCC 5, at para. 21).

(i) Position of the plaintiffs

[56] The plaintiffs submitted that the harm they suffered (i.e. increased noise, activity, overall risk of physical harm and loss of privacy) was reasonably foreseeable given the following:

i. their physical proximity to the Walker Lot;

ii. the overall size and complexity of the Walker Lot development; and

iii. the Government Defendants' failure to ensure Site Plan Permit compliance through regular inspections and/or enforcement.

[57] In short, the plaintiffs submitted that because employees were staying in the Garage it was reasonably foreseeable that there would be an increase in both activity and

noise, which included loud parties. Furthermore, given the size and placement of the Garage (into the rear and side buffer), it was also reasonably foreseeable that the plaintiffs' privacy would be impacted (i.e. removal of trees in the side buffer) and they may be physically harmed when accessing the main road given the obstructed view (i.e. family member was almost struck by a car and that they must now slowly drive onto the main road to avoid being hit by ongoing vehicular traffic).

(ii) Position of the Government Defendants

[58] The Government Defendants submitted that the plaintiffs' argument is completely disconnected from its decision to issue the Site Plan Permit for the following reasons:

i. the Walker Lot development in both the 2010 and 2011 Variance Application always contemplated guests attending the Walker Lot, including a portion of the Garage;

ii. the changes contemplated in the 2011 Variance Application versus the 2010 Variance Application (which the plaintiffs supported) were not significant; and

iii. the plaintiffs failed to provide documentary evidence (i.e. photos) showing the number of trees in the side buffer pre-development, when the trees were removed, why they were removed or by whom.

(iii) The Court's findings

[59] I agree with the Government Defendants that the plaintiffs have failed to establish that harm to the plaintiffs was reasonably foreseeable given the following:

i. *Employee Noise* - even with employees staying in the Garage (which the Government Defendants never authorized as part of the Site Plan Permit), it

would not necessarily increase the level of noise or activity, given that the Walkers were always allowed to have guests attend their lot (under the lease) and the second level of the Garage (both in the 2010 and 2011 applications) had always been approved for guest accommodations;

ii. *Reporting of noise, increased activity* - although Russell testified having repeatedly told the Government Defendants of the increased traffic and loud parties coming from the Garage, there was no documentary evidence to support this, despite significant correspondence between the parties throughout the development of the Walker Lot;

iii. *Increased risk of harm (size and placement of the Garage) and loss of privacy (tree removal)* - the changes set out in the Site Plan Permit were not so significant as to change the fundamentals of the construction project initially contemplated in the 2010 Variance Application.

(a) the Site Plan Permit only approved a 27 square foot increase on the main level and a 48 square foot increase on the upper level of the Garage;

(b) both the 2010 and 2011 Variance Application contemplated the same reduction of the side and rear buffer; and

(c) the plaintiffs failed to provide any documentary evidence indicating the number of trees in the rear side buffer pre-development.

[60] Having completed my analysis on this point, I find that the plaintiffs have not met the evidentiary burden of proving that the harm they allege having suffered was reasonably foreseeable.

c. Were the parties in a relationship of sufficient proximity such that imposing a duty of care would be just in the circumstances?

[61] Courts will more readily find a private law duty of care where the public body is under a statutory duty to act, as opposed to exercising only permissive powers or when a public body acts in the public interests, even if a potential claimant is a person who benefits from the implementation of the scheme (see ***Held*** at paras. 23, 32 and 33, and ***Wu v. Vancouver (City)***, 2019 BCCA 23, at paras. 55 and 56).

[62] In the absence of a duty based statutory scheme, proximity can still be assessed in the *prima facie* duty of care analysis by considering 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" (see ***Deloitte***, at para. 25, and ***Drady v. Canada (Health)***, 2008 ONCA 659, at paras. 38 – 40).

[63] To impose a private duty of care on a public body, one needs to overcome the generic relationship and establish a private one, although it need not be personal. There may be interactions between public bodies and plaintiffs, such as to give rise to a relationship between them (see ***Wu***, at paras. 58 – 60).

[64] Factors for consideration include expectations, representations, reliance and the property or other interest involved (see ***Deloitte***, at paras. 29 – 31).

(i) Position of the plaintiffs

[65] The plaintiffs submitted they have established a relationship of sufficient proximity given the following:

i. the statutory authority governing the parties, namely, ***The Provincial Parks Act***, C.C.S.M. c. P20 (the "***Act***") is a neutral consideration in the proximity analysis;

ii. the existence of a "close and direct" or "non generic" relationship between the parties given:

   (a) the landlord/tenant relationship under the lease;

   (b) the requirements set out in the Handbook and the plaintiffs' expectations that those requirements would be followed; and

   (c) the multitude of interactions and communication between the parties throughout the development of the Walker Lot.

iii. they are part of a small defined group, namely the adjacent neighbours of lot holders in a provincial park (see ***Fullowka,*** at paras. 43 – 44).

(ii) Position of the Government Defendants

[66] The Government Defendants submitted that the plaintiffs failed to establish a duty of care based on the proximity analysis given the ***Act*** is aimed at the public good, their authority is discretionary, the lease does nothing to change the relationship between the parties other than allowing the plaintiffs the right to sue (which they have not done), and the interaction between the parties was that of an individual communicating with its regulator.

(iii) The Court's findings

[67] I agree with the Government Defendants' submissions as to why the plaintiffs have failed to establish a relationship of sufficient proximity. This would include:

i. the Government Defendants not being under a statutory duty to act and its powers being discretionary (see ss. 16 [Leases and Permits], 23 and 24 [Enforcement], 29 [Advisory Committees] and 30 [Delegation] of the ***Act***);

ii. both the preamble and s. 4 of the ***Act*** are aimed at the public good, as stated:

> **Preamble**
>
> … provincial parks are special places that play an important role in the protection of natural lands and the quality of life of Manitobans; …
>
> **Dedication of provincial parks**
>
> 4 Provincial parks are dedicated to the people of Manitoba and visitors to Manitoba, and shall be maintained for the benefit of future generations in accordance with this Act and the regulations.

iii. although the lease does create a contractual relationship between the parties (under which the plaintiffs could have sued but chose not to) imposing a duty of care grounded in the lease would result in the creation of a two-tiered system within Manitoba provincial parks where leaseholders would have more rights than private lot holders (which also exists in Manitoba provincial parks);

iv. much of the correspondence and/or communication between the parties relate to issues between a party and its regulator (i.e. employees residing in the Garage, whether the Garage meets the definition of a garage, building code compliance issues, letter of support); and

v. grounding proximity in the lease would increase the spectre of liability from that of a small defined group (i.e. immediate adjacent neighbours) to all 6,000 leaseholders in Manitoba provincial parks (see Residual Policy Considerations at para. 73).

[68] Having completed my analysis on this point, I find that the plaintiffs have not met the evidentiary burden of establishing a relationship of sufficient proximity between the parties.

(ii) <u>The Second Stage</u>

a. Does there exist residual policy considerations that would make the imposition of a duty of care unwise?

[69] Despite my decision that the plaintiffs have not established a *prima facie* duty of care under stage 1 of the *Anns/Cooper* test, I shall proceed to assess the issue of residual policy considerations on a provisional basis.

[70] The Supreme Court in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, at para. 51, stated that at this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise (i.e. indeterminate liability), even though harm was a reasonably foreseeable consequence and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.

(i) Position of the plaintiffs

[71] The plaintiffs submitted that there are no residual policy considerations that would negate or limit the duty of care owed to the plaintiffs for the following reasons:

i. the liability would be limited to a narrow class of individuals, namely those who are in a landlord/tenant relationship with the Government Defendants and who are the adjacent neighbour of a lot holder who is developing their lot; and

ii. the Government Defendants have since altered their development process to avoid many of the issues identified in this case (i.e. lot inspector field reports

have been modernized, legal surveys are required, advisory boards are no longer used, the definition of habitable spare has been changed).

(ii) Position of the Government Defendants

[72] The Government Defendants submitted that exposing them to liability in the exercise of discretionary powers would, especially in the absence of foreseeable impacts, create a spectre of indeterminate liability.

(iii) The Court's findings

[73] Even had I found harm was a reasonably foreseeable consequence and there was a sufficient degree of proximity between the parties (grounded in the lease), I find the imposition of such a duty on the Government Defendants (even when considering that certain changes have since been implemented) would be unjust. I say this given it would increase the spectre of liability not only to adjacent leaseholders, but to any leaseholder located in a provincial park across the province of which there are approximately 6,000.

[74] Having completed my analysis on this point, I find that residual policy considerations do not support a finding that the Government Defendants owed a duty of care to the plaintiffs.

B. <u>Did the Government Defendants breach their standard of care?</u>

[75] Despite my decision that the plaintiffs have failed to establish a *prima facie* duty of care under both stages 1 and 2 of the *Anns/Cooper* analysis, I will assess whether the plaintiffs have established that the Government Defendants breached the requisite standard of care to the plaintiffs on a provisional basis.

[76] The standard of care in negligence is set by what a reasonable person would do in similar circumstances. Perfection is not required (see ***Aylmer Meat Packers Inc. v. Ontario***, 2022 ONCA 579, at para. 63). The measure of what is reasonable depends on the facts of each case, including the likelihood of a known and foreseeable harm, the gravity of the harm, and the burden or cost which would be incurred to prevent the injury. Also, one may look to external indicators of reasonable conduct, such as statutory or regulatory standards (see ***Ryan v. Victoria (City)***, [1999] 1 SCR 201, at para. 28).

(i) Position of the plaintiffs

[77] The plaintiffs submitted that the Government Defendants breached the requisite standard of care in three ways:

i. approving the Site Plan Permit;

ii. failing to properly inspect the construction of the Walker Lot development between June 2011 to late May 2012; and

iii. failing to enforce its own rules, regulations and/or orders (including the January 2018 and April 2019 Orders) and/or when it did, it did so in an untimely manner.

(ii) Position of the Government Defendants

[78] The Government Defendants submitted that although certain errors were committed during the Walker Lot development (i.e. how it defined habitable space, failing to inspect more frequently during the initial stages of development), their actions and decisions:

i. amounted to errors in judgment (see ***Aylmer***, at para. 63) conducted in good faith, not motivated by ill-will and in furtherance of the ***Act*** (see ***Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)***, 2011 NSCA 43, at para. 70) which typically does not result in a breach of the standard of care; and

ii. were made in the face of subterfuge behaviour on the part of the Walkers, specifically Edward Walker, given the building plans he provided his builder differed from those that he provided to the Government Defendants resulting in the Garage being larger than what had been approved.

(iii) The Court's findings

[79] Although the responsibilities conferred to the Government Defendants under the ***Act*** and *Regulation* are discretionary, permissive and not obligatory, it is reasonable to conclude that once they make the decision to act, they will conduct themselves in a reasonable manner.

[80] That said, I agree that the Government Defendants breached their standard of care as follows:

i. by approving the Site Plan Permit given the following:

(a) failing to follow the consultation process set out in the Handbook, in that:

(aa) it failed to have the Walkers obtain an updated letter of support from the plaintiffs;

(bb) it failed to investigate why the plaintiffs refused to sign the 2011 Letter of Support; and

(cc) it failed to refer the matter to the WAB for a recommendation.

(b) it committed mathematical errors in the application of the guidelines and regulations by allowing a maximum square foot overage of 185 square feet versus the maximum of 135 square feet (see ABD tab no. 126); and

(c) it approved the Garage plans when it knew or should have known that the main floor could not be used for that purpose (i.e. the plans showed a wooden floor).

ii. failing to forward the correct building plans to the OFC (sent the 2010 plans) which resulted in the issuance of a building permit based on the wrong plans (this error was only discovered by the Government Defendants in 2014);

iii. failing to inspect the construction of the Walker Lot development between June 2011 to late May 2012 (in that Mr. Nickel only attended on August 22, 2011, despite having been told by his superior, Mr. Colpitts, to monitor the project given the stop work order that had previously been issued) (see ABD tab no. 82);

iv. failing to enforce its own rules, regulations and/or orders and when it did act, it did so in an untimely manner. This included:

(a) failing to require the Walkers to use the main floor of the Garage for its intended purpose indicating they now only required the structure to have the appearance of a garage by adding an overhead door (see ABD tab no. 84);

(b) failing to investigate or take any enforcement action respecting the plaintiffs' repeated complaints that employees were staying in the Garage (see ABD tab nos. 95 and 131) other than writing a few letters. In fact, the practice only came to an end when one of the Walkers contacted the Government Defendants in August 2018 advising that the Walkers had instituted a family policy not to allow employees to stay in the Garage;

(c) failing to investigate the plaintiffs' complaint that the Walkers were using multiple different construction plans which resulted in the Garage being larger that what had initially been approved (see ABD tab nos. 117 and 119); and

(d) failing to enforce either the January 2018 and/or the April 2019 Orders.

[81] I disagree with the Government Defendants that the above referenced matters are simple errors in judgment or minor errors as contemplated in ***Aylmer***. The Handbook is clear as to the process required to be followed in approving variance applications. Furthermore, having:

i. only conducted one inspection over the course of an 11-month period, during a critical time of construction, with a leaseholder who has already been the subject of a stop work order (failing to install an overhead garage door) and a prior history on noncompliance (failing to provide a commitment letter in 2010 to clean up their lot) (see ABD tab nos. 54 – 62); and

ii. failed to investigate and/or take enforcement action relating to:

(a) the Walkers housing employees in the Garage (other than forwarding a few letters); and

(b) the Walkers use of multiple different building plans

amounted to something more than an error in judgment.

[82] Finally, although I agree there was no evidence to support that the Government Defendants were motivated by ill-will, I find this factor is irrelevant when conducting a reasonableness analysis.

[83] Having completed my analysis on this point, I find that the plaintiffs have met the evidentiary burden of proving that the Government Defendants breached their standard of care.

C. <u>What are the Damages?</u>

[84] Despite my decision that the plaintiffs have failed to establish a duty of care under both stages 1 and 2 of the *Anns/Cooper* analysis, I will assess the issue of damages on a provisional basis.

a. General Damages (Mental/Psychological Injury & Loss of Use, Enjoyment and Privacy) and Aggravated Damages

[85] A claimant is not required, as a matter of law, to adduce expert evidence to prove that it suffered a compensable mental injury. It is simply required to show that it has suffered the requisite degree of disturbance (see ***Saadati v. Moorhead***, 2017 SCC 28, at paras. 13 and 37 – 38).

[86] Compensable mental injury at law "must be serious and prolonged and rise above ordinary annoyances, anxieties and fears that people living in society routinely, if

sometimes reluctantly, accept" (see ***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27, at paras. 8 – 9 and 13 – 15).

[87] A court must consider not only a claimant's psychological upset but also how seriously the claimant's cognitive functions and participation in daily activities were impaired, and the length of such impairment and the nature and effect of any treatment sought and taken in relation to the psychological upset (see ***Bothwell v. London Health Sciences Centre***, 2023 ONCA 323, at paras. 27 – 35).

[88] In circumstances where it is difficult to precisely assess a claimant's damages for mental distress, the "best that can be done is an arbitrary determination" (see ***Martens v. The Manitoba Public Insurance Corporation***, 2020 MBQB 158, at para. 247).

[89] The loss of enjoyment of a claimant's property may also include the privacy afforded to the claimant by the existence of wooded areas (see ***Crawford v. Town Council of The Town of Torbay***, 2008 NLTD 161, at paras. 66 – 67).

[90] Aggravated damages are awarded to compensate for a claimant's intangible emotional injury and are measured by the claimant's suffering and must be sufficiently significant in depth, or duration, or both, that they represent a significant influence in the claimant's life (see ***T.W.N.A. v. Canada (Ministry of Indian Affairs)***, 2003 BCCA 670, at para. 101).

(i) Position of the plaintiffs on damages

[91] The plaintiffs submitted that they are entitled to general and special damages totalling $40,000 ($10,000 for loss of enjoyment and mental distress, $10,000 for loss of privacy and $20,000 for aggravated damages). The plaintiffs submitted that but for the

negligent actions of the Government Defendants, they would not have incurred the damages, which included:

i. the loss of use and enjoyment of their property and privacy because of:

(a) the noise caused by loud parties and inordinate levels of activity both caused by the Walkers employees living in the Garage between 2012 to 2018;

(b) the increased risk to safety given the placement of the Garage (close to the main road) impacted the sightline when attempting to access the main road; and

(c) the loss of privacy given the trees located in the side buffer zone separating the two properties had been removed.

[92] The plaintiffs further submitted that not only was their suffering significant, both in intensity (noise and activity) and duration length (over 11 years), it also significantly impacted their daily lives.

(ii) Position of the Government Defendants

[93] The Government Defendants submitted that the plaintiffs are not entitled to any damages, or alternatively at a much-lower amount than requested, given the following:

i. the increased noise and activity:

(a) even with employees staying in the Garage (which was never authorized), it would not necessarily increase the level of noise or activity given the Walkers were always allowed to have people attend their lot

and the second level of the Garage had been approved for guest accommodations; and

(b) the plaintiffs never communicated with them about any issues relating to noise or increased activity.

ii. the placement of the Garage:

(a) the plaintiffs failed to demonstrate any actual harm due to the location of the Garage other than having to slowly drive onto the main road, nor was there any evidence to support Russell's testimony as to who, when or why the trees were removed; and

iii. the plaintiffs failed to establish how the alleged negligent acts impacted or impaired their life and/or daily activities in any material way (evidence was limited to the fact that it drove Russell crazy that the Walkers were able to proceed with the development, without his consent).

[94] The Government Defendants submitted that if the plaintiffs are entitled to damages, it should range between $2,500 to $7,500 for general damages (see ***Boggs v. Harrison***, 2009 BCSC 789; ***Gallant v Murray***, 2017 NBQB 13, and ***Hooker v Dawson Road Maintenance Ltd.***, 2023 BCSC 1977) and that if aggravated damages were to be awarded it should not exceed $2,500 (see ***Hooker***).

(iii) The Court's findings

[95] Even had I granted the plaintiffs' claim, I would not have awarded general damages for loss of enjoyment, mental distress or loss of privacy for the reasons set out at paragraph 59 of my decision. Nor would I have awarded aggravated damages given

I am not satisfied the plaintiffs' evidence established "emotional injury that was significant in depth that they represented a significant influence in the claimant's life".

[96] In short, Russell's evidence was that the Government Defendants' decisions and actions pertaining to the Walkers' Lot development "drove him crazy" which impacted his ability to sleep at times. Although the plaintiffs are justified in being upset and frustrated with both the Walkers and the Government Defendants (whose behaviour and/or conduct this Court in no way endorses), they failed to establish that the Government Defendants' actions and/or inactions caused them "serious psychological or emotional harm to the point where it impaired their cognitive functions and participation in daily activities".

[97] It is for these reasons that the plaintiffs' claim is dismissed.

[98] Despite the plaintiffs not having satisfied all the prerequisites to prove negligence, given my finding that the Government Defendants did not meet their standard of care, each party will bear their own costs in the matter.

_____ J.