

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chingee v. British Columbia*,
2016 BCSC 760

Date: 20160428
Docket: 1343188
Registry: Prince George

Between:

Harry Chingee

Plaintiff

And:

**(1) Her Majesty the Queen in Right of the Province of British Columbia;
(2) Canadian Forest Products Ltd.; (3) Conifex Mackenzie Forest Products Inc.;
(4) Lakeland Mills Ltd.; (5) Mackenzie Fiber Management Corp.; (6) Winton
Global Lumber Ltd.; (7) 813090 BC Ltd.; (8) 550031 BC Ltd.; (9) Dig Deep
Ventures Ltd.; (10) Dollar Saver Lumber Ltd.; (11) Duz Cho Logging Ltd.; (12)
EKO Logging Ltd.; (13) JEM Industries Inc.; (14) J.V. Logging Ltd.; (15) M.G.
Logging and Sons Ltd.; (16) Chief and Council of McLeod Lake Indian Band
and McLeod Lake Indian Band; (17) MJM Forestry Ltd.; (18) SDN Forest
Ventures Inc.; (19) Treeco Timber Corp.; (20) Timberspan Wood Products Inc.;
(21) Wayne Telford; (22) Loris Bedetti; and (23) Arnold Bremner**

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for Plaintiff:

J.M. Duncan
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Counsel for Defendant Her Majesty the
Queen in right of the Province of British
Columbia:

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M.S. Oulton

Place and Dates of Trial/Hearing:

Prince George, B.C.
February 16-19, 2016

Place and Date of Judgment:

Prince George, B.C.
April 28, 2016

I. INTRODUCTION

[1] The Province of B.C. and one of the other defendants, 813090 B.C. Ltd. (“813”) apply to strike out and dismiss the plaintiff’s claims under Rule 9-5 (1)(a) or (d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], or alternatively to dismiss the plaintiff’s claims under Rule 9-6 (summary judgment) of the *Rules*.

[2] The plaintiff, Harry Chingee holds a guiding territory certificate issued by the Province under s. 59 of the *Wildlife Act*, R.S.B.C. 1996 c. 488. He also holds or has an interest in two registered traplines issued by the Province under s. 42 of the *Wildlife Act*. In general terms, he complains of the effect of the logging activities on the lands to which the guiding territory certificate or the traplines relate, authorized by the Province and carried out by the other defendants.

[3] The defendants other than the Province and the McLeod Lake Indian Band are all logging companies who carried out their logging activities pursuant to timber sales licences (“TSLs”) issued by the Province under the *Forest Act*, R.S.B.C. 1996 c. 157.

[4] The plaintiff claims damages. As pleaded the claims are based upon private nuisance, negligence, breach of contract, and breach of fiduciary duty. During the hearing the plaintiff abandoned a claim for breach of contract against the Province.

[5] 813 and four other forestry defendants consent to the Province’s application. These four other forestry defendants also consent to the application of 813. The remaining forestry defendants have not formally taken a position, but it can be safely assumed that they are awaiting the outcome of these applications. Among the forestry defendants only 813 adduced evidence for the hearing of the applications and actively participated in the hearing.

[6] No trial date has been set. The parties have chosen to first proceed with the hearing of these applications.

II. BACKGROUND

[7] The claim was originally filed June 13, 2013. The plaintiff sued 22 defendants other than the Province. During the hearing of these applications, I was informed by counsel for the plaintiff that the plaintiff's intention was to claim against everyone who had carried out logging activities on the lands covered by the guiding territory certificate or the traplines during the two years preceding the commencement of the action. The two years is based upon the *Limitation Act*, S.B.C. 2012 c. 13, which in general provides for a two year limitation period to commence an action.

[8] The plaintiff refers to the other defendants as "Defendant Foresters" in his pleadings. I will refer to them as the forestry defendants or the logging companies.

[9] The guiding territory certificate relates to an area of about 196,000 hectares of land surrounding McLeod Lake and northeast of McLeod Lake, in the vicinity of the town of Mackenzie. Registered trapline 0716T011 (described in the Amended Notice of Civil Claim ("ANOCC") as "trapline no. 1") relates to lands that surround McLeod Lake. Registered trapline 0723T006 (described as "trapline no. 2") relates to lands lying east of McLeod Lake, adjacent to trapline no. 1.

[10] The area of the traplines is not in evidence. The maps in evidence show that they encompass large areas but they are substantially smaller than the area of the guiding territory.

[11] The ANOCC refers (para. 40) to 20 listed TSLs logged by the defendants over various dates. The majority of the TSLs are alleged to have been logged between March 17, 2010 at the earliest and June 25, 2013 at the latest. The dates are less specific in several cases: para. 40 s, t, u, and v.1. What is apparent is that in most and perhaps all cases the defendants concluded their logging activities before the plaintiff commenced this action, and that following the completion of their activities they have had no further involvement with the lands.

[12] In the ANOCC, the plaintiff alleges that 813 carried out its logging activities pursuant to TSL A84919 between October 21, 2011 and October 11, 2012.

[13] The evidence of 813 is that TSL A84919 covers two blocks, totalling about 77.3 hectares in gross area. Its Response to Civil Claim states that it harvested timber pursuant to TSL A84919 starting in or around July 2012 and concluded its activities in or about late September 2012. The evidence on the application shows that it advised the Ministry of Forests that it had completed its obligations under the TSL on November 29, 2012, when it requested the return of its security deposit.

[14] TSL A84919 provides that 813 as Licensee “must not unreasonably interfere with the exercise of the following rights of use or occupation” and listed two traplines, one of which is trapline no. 2, and the plaintiff’s guiding territory certificate, No. 700023, and provided that the Licensee “must notify that person or each of those persons at least 14 days before commencing activities on the cutting authority area.” 813’s affidavit indicates that the notice to the plaintiff may possibly have been less than 14 days, as the letter to the plaintiff is dated July 11, 2012 and advised him that “the anticipated start date will be during the week of July 16, 2012”. The actual start date is not in evidence. The plaintiff does not plead any facts describing any consequence to the possible abbreviated notice.

[15] There is no pleading or evidence that Mr. Chingee seriously objected to the logging activities carried out by 813 or any other forestry defendant at any time before or during those activities. In short, his complaint is made after the fact and concerns the overall consequences of the logging activities upon his interests.

[16] On August 15, 2014, the plaintiff filed the ANOCC removing claims against eight forestry defendants, and recasting the claims somewhat. I was advised that the plaintiff had discontinued against these eight defendants upon being satisfied that they did not carry on logging activities on the relevant lands during the relevant time frame. Fourteen forestry defendants remain in the ANOCC. He added claims for breach of contract and breach of fiduciary duty against the Province.

[17] On the fourth and final day of the hearing of these applications, after the applicants had completed their submissions, the plaintiff presented a draft proposed further amended NOCC [the “Proposed AANOCC”] which removes claims against

two further forestry defendants. No application for leave to file the Proposed AANOCC has yet been filed. I understand that if the claims are not dismissed the plaintiff would seek leave to file the Proposed AANOCC.

[18] While the original NOCC included defendants whose logging activities were conducted under other forms of Crown authorizations, all of the remaining forestry defendants conducted their logging activities pursuant to TSLs.

[19] In the ANOCC, the plaintiff asserts breach of Aboriginal rights on behalf of the McLeod Lake Indian Band. However Chief Derek Orr of the McLeod Lake Indian Band has sworn an affidavit in these proceedings in which he denies that the traplines are held in trust for the Band, and denies that the plaintiff has authority to pursue claims or act on behalf of the Band.

[20] In the Proposed AANOCC the plaintiff proposes to withdraw the assertion that trapline No. 1 is held in part in trust for the McLeod Lake Indian Band or that the Band has assigned Aboriginal rights relating to trapline No. 1 to him. On the hearing of the application, plaintiff's counsel indicated that these proposed amendments are prompted by the affidavit evidence of Chief Derek Orr. However the plaintiff now proposes to claim the benefit of Aboriginal rights to all of the lands covered by the guiding territory certificate or the traplines, either on his own behalf or on behalf of the Band.

[21] Mr. Chingee's guiding territory certificate was issued July 14, 2009 and expires July 14, 2019.

[22] The plaintiff's pleadings in the ANOCC are inconsistent as to ownership of the traplines. He pleads that he is the holder of trapline no. 1. He pleads in the alternative that he holds trapline no. 1 in trust for the McLeod Lake Indian Band and Frederick Inyallie. He says he is the holder of trapline no. 2 with Wesley Chingee, or alternatively he holds trapline no. 2 in trust for Jim Chingee and Wesley Chingee. The trapline no. 1 registration certificate in evidence was approved by a Regional Manager under the *Wildlife Act* on June 26, 1996 and was issued to Frederick

Inyallie and Harry Chingee “representing the McLeod Lake Indian Band.” The trapline no. 2 registration was approved June 17, 1998 and was issued to Harry Chingee, Jim Chingee, and Wesley Chingee.

[23] For present purposes, it is sufficient for me to assume that the plaintiff has a beneficial ownership interest in one or both of the traplines.

III. THE AMENDED NOTICE OF CIVIL CLAIM

[24] The ANOCC is attached as Schedule A to these reasons. I have found it necessary to do so as it is not easy to discern the essential nature of the plaintiff’s claims. The drafter seems to have made a concerted effort to render the pleadings broad, vague, and uncertain, through the use of words and phrases such as “including but not limited to”, “in the alternative”, “and/or”, “or”, “and other”, and phrases containing synonymous terms such as “accommodation, consultation, and consideration.” These types of devices can be useful and convenient in pleadings, but here they are carried too far. The Proposed AANOCC extends this practice.

[25] The Proposed AANOCC is attached as Schedule B to these reasons.

[26] As it stands, the ANOCC does not satisfy the basic purposes of pleadings. It does not clearly define the issues of fact and law to be determined by the court.

[27] The plaintiff concedes that the lands encompassed by the guiding territory certificate and the traplines (the “Lands”, as defined in the ANOCC) are owned by the Province (ANOCC para. 29). He argues that the guiding territory certificate and the traplines constitute interests in land as *profits à prendre* or some other kind of property right (paras. 36, 37, 37.1). (The references to “contractual” rights can be ignored as the plaintiff has abandoned such claims.)

[28] As I perceive it, the gist of the claim is centered on paras. 38, 43.1, 45, 46, 47, 52, and 57. The plaintiff contends that the logging activities carried out by the forestry defendants have “reduced the wildlife on the Lands, compromised the vitality of the forest on the Lands and reduced the amount of forested area on the

Lands” (para. 43.1). The logging activities have “interfered with and injured” the plaintiff’s business or property interests (paras. 45, 46) which has caused “loss and damage” (para. 47). The “loss and damage” is not described with any precision but paras. 38, 52, 57, taken together, indicate that the damages claimed would relate to either the value of the claimed property interests of the plaintiff or possibly to loss of business income. (Paragraph 60, now abandoned, refers to loss of income.)

[29] No specific facts are pleaded as to any particular loss or damage claimed.

[30] The ANOCC is sprinkled with references to duties to “accommodate”, “consult”, and “consider” the plaintiff’s interests: (paras. 41, 40.1, 42, 43, 44.1, 66.) However, these vague allegations are unconnected to any particular consequence or loss. Therefore as I have said the gist of the claim appears to relate to the effects of the timber harvesting activities themselves upon the economic interests the plaintiff, not the failure to consult, etc., standing alone.

[31] Several aspects of the claims as pleaded are noteworthy:

- a) the plaintiff concedes that the Crown validly granted the TSLs pursuant to statutory authority and that the forestry defendants harvested the timber pursuant to TSLs validly granted to them. These admissions were made in paras. 41 and 43 of the original NOCC. In its application the Province challenged the apparent withdrawal of these admissions as reflected in paras. 41 and 43 of the ANOCC. In its filed Application Response the plaintiff reiterated its concessions. The plaintiff’s draft Proposed AANOCC also reflects these concessions.
- b) Identical claims are made against every forestry entity who carried out harvesting activities on any part of the relevant land in the relevant time frame. There is no allegation of any specific actions or failures to act on the part of any forestry defendant or by the Province. There is no pleading specific to any forestry defendant.

- c) There is no allegation that any forestry defendant breached any term of their TSLs or any statute or regulation;
- d) While is not so stated, it appears the plaintiff claims in nuisance against the Province as a party to the nuisance tort, in having permitted the forestry defendants to carry out timber harvesting activities: para. 42.

[32] The applicants take the position that the court must deal with their applications on the basis of the existing pleadings. No doubt that is correct. Nonetheless, the Proposed AANOCC can be used as an indication of the nature of amendments that the plaintiff could potentially be permitted to make.

IV. APPLICATIONS TO STRIKE THE ANOCC

A. Legal Principles – Striking Pleadings

[33] I adopt my comments in *Lessor v. Toll Estate*, 2015 BCSC 427:

[14] As noted, Ms. Tyler applies pursuant to Rule 9-5(1)(a) and (d) for an order striking the pleadings on the basis that they fail to disclose a reasonable cause of action, or, alternatively, that they constitute an abuse of process. On an application under Rule 9-5(1)(a), no evidence is admissible: Rule 9-5(2).

[15] Pleadings must clearly define the issues of fact and law. Rule 3-1(2) requires that a notice of civil claim must:

(2)...

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

...

[16] I adopt my comments in *Stoneman v. Denman Island Trust Committee*, 2010 BCSC 636 (CanLII) concerning the purpose of pleadings:

16 The purpose of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 (CanLII) at paras. 59-60, citing *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.); and *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544 (CanLII).

17 In *Homalco*, K. Smith J. stated at para. 5:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action.

[17] Chief Justice McLachlin emphasized in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII) [*Imperial*] that the plaintiff must clearly plead the facts upon which it relies in making its claim:

[22] ... A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[emphasis added]

[18] As observed by Justice Frankel in *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 (CanLII) at para. 10, the test for striking pleadings because they fail to disclose a reasonable cause of action is well-known. In *Imperial*, McLachlin C.J.C. enunciated the test in these terms:

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) [now Rule 9-5(1)(a)] of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial...

[19] In *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342 (CanLII) at para. 40, Justice Kirkpatrick provided the following guidelines for determining whether it is “plain and obvious” that a claim will fail:

- (1) whether there is a question fit to be tried regardless of complexity or novelty;
- (2) whether the outcome of the claim at trial is beyond a reasonable doubt;
- (3) whether serious questions of law or questions of general importance are raised or if facts should be known before rights are decided;
- (4) whether the pleadings might be amended; and
- (5) whether there is an element of abuse of process.

[20] A successful application under Rule 9-5(1)(a) can lead to an order striking the pleadings with leave to amend, or an order dismissing the claim outright. If the defect in the pleading may be cured by amendment, the court may grant leave to amend: *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 (CanLII) at para. 38. If, however, the claim is without legal foundation regardless of how it is pleaded the court may dismiss the claim: *Henry* at para. 38; *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426 (CanLII) at para. 22.

B. The Claims in Nuisance

[34] The tort of private nuisance consists of two elements. The plaintiff must establish a substantial, (meaning non-trivial) interference with the plaintiff's use or enjoyment of the plaintiff's land, and that the interference is unreasonable in all of the circumstances: *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)* 2013 SCC 13, at paras. 19, 24, 28 [*Antrim*].

[35] The reasonableness of the interference must be assessed in light of all of the relevant circumstances: *Antrim*, para. 25. Traditionally, the courts have assessed whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: *Antrim*, para. 26. While the focus of the reasonableness analysis is on the character and extent of the interference with the claimant's land (para. 28), the nature of the defendant's conduct is not irrelevant. Where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability (paras. 29, 30).

[36] In *Antrim*, the plaintiff asserted claims based upon the tort of private nuisance when highway construction permanently harmed the plaintiff's truck stop business. The Supreme Court of Canada held that in the case of activities carried out by a public authority for the greater public good, as in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances, however the focus of that balancing exercise is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation (paras. 25, 38, 40).

a) **Does the plaintiff have an interest in land to support a claim in private nuisance?**

[37] The plaintiff does not claim as owner of the lands. His asserted interests in the land are very limited. He claims as a licensee with certain rights specified by statute. His primary argument is that as holder of the guiding territory certificate and the trapline registrations, he holds interests in the lands that constitute *profits à prendre*. He also makes other, secondary and vague assertions as to interests in land, unsupported by any specific facts. At paras. 37, 37.1 and 46 he refers to other “property rights” of the Plaintiff and other rights to use and occupy the Lands. In the Proposed AANOCC, he refers in para. 37.1 to “substantial occupancy” and in paras. 62, 63 and 64 he refers to the rights of the McLeod Lake Indian Band in relation to the Lands.

[38] As noted by the Court of Appeal in *Thomas v. Rio Tinto*, 2015 BCCA 154, [Thomas] there is some uncertainty in Canadian law as to what occupiers of land, other than owners, may pursue claims in private nuisance (para. 38).

[39] The Crown argues that neither the guiding territory certificate nor the registered traplines qualify as *profits à prendre*.

[40] A *profit à prendre* is “a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right.”: *British Columbia v. Tener*, [1985] 1 S.C.R. 533, paras. 11-12.

[41] A guiding territory certificate gives the holder exclusive control over the privilege of guiding hunters in the area covered by the certificate: *Wildlife Act*, section 59(3). However a further licence, a guide outfitter licence, is required to act as a guide for hunters of game: *Wildlife Act*, ss. 48 and 51. In effect, a guiding territory certificate, coupled with a valid and subsisting guide outfitter’s licence, confers the right to conduct a guiding business over a specified area of land during the term of the certificate. Neither the guiding territory certificate nor the guide

outfitter's licence grants the right to hunt for game or to retain any game that has been killed. For those purposes a hunting licence is required: *Wildlife Act*, s. 11.

[42] The Crown relies on *Stafford v. British Columbia*, [1996] B.C.J. No. 1010 (S.C.) at para. 93 for the proposition that a Crown grant of guiding "privileges" by way of a guiding territory certificate is not property, or an interest in land. The plaintiff argues that this proposition is incorrect.

[43] While the proposition appears quite correct to me, it is not necessary that I decide that question. In the appellate chambers decision in *Bolton v. Forest Pest Management Institute* (1985), 21 D.L.R. (4th) 242, at para. 21 [*Bolton*], Macfarlane J.A. stated that while the holder of a trapline registration has no proprietary rights in wildlife, the holder has a right to take wildlife from the lands covered by the registration, and that the registered trapline falls within the definition of a *profit à prendre*. The Crown argues that in that decision the court misconstrued the statutory privileges conveyed by a registered trapline under the *Wildlife Act*, and that a registered trapline is not a *profit à prendre*. However, the Crown and 813 concede that based upon that decision it is at least arguable that the registered traplines constitute *profits à prendre*. I note that *Bolton* was cited for this proposition by the Court of Appeal in *Thomas* at para. 55.

[44] As noted, the plaintiff's pleadings as to the nature of the interests he holds are unclear, and inconsistent. Paragraphs 27 and 28 of the ANOCC assert that the plaintiff holds the registered traplines for his own benefit. Paragraphs 27.1 and 28.1 assert, inconsistently, that he holds the registered traplines in trust for others. This is a vital distinction given the apparent nature of plaintiff's claims for loss and damage. Moreover, as noted, beyond the guiding territory certificate and the registered traplines he vaguely asserts other property rights.

[45] It is doubtful whether the plaintiff has pleaded facts supporting this element of the claim in nuisance, due in part to the lack of clarity of the pleadings.

[46] Nevertheless, I conclude that, at least, based upon the registered traplines, if held as principal, to at least some extent, it is arguable that the plaintiff holds an interest in land sufficient to advance claims in nuisance.

b) Could the plaintiff establish an unreasonable interference in all of the circumstances?

[47] In my view, it is plain and obvious that the plaintiff cannot establish the second element of the nuisance claim: that the interference he complains of is unreasonable in all of the circumstances.

[48] Against the backdrop of all of the circumstances, two key considerations combine to lead to this conclusion: the nature of the claims as pleaded, and the nature of the interests of the plaintiff in the context of the statutory scheme. I will first address this second consideration.

i. The nature of the interests of the plaintiff in the context of the statutory scheme

[49] The licences under the *Wildlife Act* upon which the plaintiff bases his claims are part of a sophisticated, complex, integrated scheme, designed to facilitate, accommodate and balance various conflicting objectives of the Province and the many users of the forested Crown lands in the Province of B.C. Both the objectives and the processes for achieving them are prescribed in detail in the relevant statutes and regulations. The TSLs are also a part of this larger scheme.

[50] The manner in which the government regulates timber harvesting activities in the context of competing considerations and interests is set out in detail in the legislative scheme.

[51] The *Ministry of Forest and Range Act*, R.S.B.C. 1996, c. 300 continues the Ministry of Forests and Range. The current name of the Ministry is Ministry of Forests Lands and Natural Resource Operations (“MFLNRO”).

[52] Section 4 of the *Ministry of Forests and Range Act*, R.S.B.C. 1996 c. 300, sets out the Crown’s forest and range management objectives as follows:

The purposes and functions of the ministry are, under the direction of the minister, to do the following:

- (a) encourage maximum productivity of the forest and range resources in British Columbia;
- (b) manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia;
- (c) plan the use of the forest and range resources of the government, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the government and with the private sector;
- (d) encourage a vigorous, efficient and world competitive
 - (i) timber processing industry, and
 - (ii) ranching sector in British Columbia;
- (e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

[53] As can be seen, realization of wildlife values is one of many considerations among the purposes and functions of the Ministry described in its legislation. Other objectives relate to maximizing forest productivity, timber harvesting, and recognizing the financial interests of the government.

[54] Other legislation relevant to forest, range and wildlife matters includes the *Wildlife Act*, the *Fisheries Act (BC)*, the *Forest Act*, the *Range Act*, the *Forests Range and Practices Act*, S.B.C. 2002, c. 69 [FRPA] and the *Water Act*.

[55] Statutes dealing with the same subject matter should be interpreted in a manner which presumes harmony, coherence, and consistency between them: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, at para. 27.

[56] In its Notice of Application, the Province provides the following overview of the legislative scheme:

i. Allocation and Apportionment of Timber Harvesting Rights

28. The main legislation governing the harvesting of Crown timber is the Forest Act. Under section 8 of that Act, the chief forester must determine an allowable annual cut for each timber supply area ("TSA") in the province at least once every 10 years, subject to some exceptions. In determining the

allowable annual cut the chief forester must consider, among other things, the sustainability of timber production in the area, the implications for British Columbia of different rates of timber harvesting in an area, and the economic and social objectives of the government for the area, the region and British Columbia.

29. At this high level, the legislation is already contemplating the competing uses to which Crown land may be put, and the effects different rates of timber harvesting may have within the TSA and more broadly. The effects may include effects on wildlife.

30. Under section 10 of the Forest Act, the minister may specify a portion of the allowable annual cut for Crown land in a TSA to be available for granting under a form of agreement referred to in section 12 of the Act. The apportionment determines the extent of harvesting expected to be undertaken under each form of agreement.

31. Under section 12 of the Forest Act, various forms of tenure may be granted. Major licences may subsist for up to 25 years and require the licensee to carry out most of the forest planning work which precedes harvesting.

32. TSLs, on the other hand, subsist for up to 4 years and the forest planning work is done by BCTS, an administrative division of MFLNRO. The licences are usually acquired by competitive tender by BCTS Enterprise registrants, many of whom are smaller operators.

33. Importantly, a TSL must describe the area to be harvested and requires the holder to pay money to the government, whether or not the harvesting actually occurs.

Forest Act, section 22

...

ii. Planning and Consultation in relation to Forestry Activities

34. Harvesting rights are subject to the planning processes set out in the Forests Range and Practices Act, S.B.C. 2002, c. 69 ("FRPA") and the Forest Planning and Practice Regulation, BC Reg. 14/2004 ("Regulation"). Major licensees and Timber Sales Managers must prepare and obtain ministerial approval of a forest stewardship plan ("FSP") before harvesting timber: see sections 3 and 52 of the FRPA.

35. Section 5 of the FRPA establishes the necessary requirements of an FSP. Section 5(b) requires an FSP to specify intended results or strategies related to government objectives or other objectives established under the FRPA. The holder of an FSP must also ensure that the intended results specified in the plan are achieved: see section 21 of the FRPA.

36. In addition, before harvesting, the holder of an FSP must prepare site plans identifying how government objectives will be met and the approximate locations of cutblocks and roads: see section 10 of the FRPA. The content of site plans is prescribed by section 34 of the Regulation.

37. Under sections 11 and 18 of the FRPA, FSPs and site plans must be made available to the public in accordance with the Regulation. Additionally, s. 21(1)(d) expressly provides that those who publish notice of their FSP must make reasonable efforts to meet with First Nations affected to discuss the FSP before submitting it for approval.

iii. Coordinating Wildlife and other Objectives

38. Section 149 of the FRPA empowers the Lieutenant Governor in Council to specify objectives in relation to subjects which include timber and wildlife. Section 149.1 empowers the Lieutenant Governor in Council to make regulations authorizing the minister responsible for the Wildlife Act to, among other things, establish ungulate winter ranges and wildlife habitat areas. Section 150.4 empowers the Lieutenant Governor in Council to make regulations that ensure consistency amongst these objectives.

39. Statutory objectives are prescribed in the Regulation: see sections 4.1-10. These include objectives for timber (s. 6) and wildlife (ss. 7-9.1). In particular, section 6(a) states that an objective is to maintain and enhance a valuable commercial timber supply from the forests of British Columbia.

40. Section 7 of the Regulation expressly states that government's objectives for wildlife should not "unduly [reduce] the supply of timber from British Columbia's forests" while "[conserving] sufficient wildlife habitat for the survival of the species at risk, the survival of regionally important wildlife, and the winter survival of ungulate species". Other objectives for wildlife in ss. 8-9.1, expressly limit those objectives so as to not "unduly [reduce] the supply of timber from British Columbia's forests".

41. The scheme addresses the regulation of wildlife and timber harvesting in other ways, including the following:

(a) Under section 11 of the Forest Act, the right to Crown timber may be granted only in accordance with the Act and regulations, subject to the Land Act and to the Park Act. Harvesting rights, for the most part, may not be granted over timber in a park: see section 9 of the Park Act, R.S.B.C. 1996, c. 344, and may be suspended in an area designated under Part 13 of the Forest Act. These provisions allow the Crown to prevent or suspend harvesting in sensitive areas. Lawful trapping and hunting, on the other hand, are for the most part permitted in parks.

(b) Section 46 of FRPA prohibits forest practices that result in damage to the environment, as defined by s. 3 of the Regulation.

(c) Under section 67 of the Regulation, no harvesting is permitted in a wildlife tree retention area.

(d) Under section 69 of the Regulation, timber harvesters must comply with general wildlife measures.

(e) Section 70 of the Regulation obliges timber harvesters not to damage or render ineffective "resource features" and "wildlife habitat features". Wildlife habitat features are defined in section 11 of the Government Actions Regulation, BC Reg. 582/2004, and include

specific features central to wildlife growth and development (e.g. bird nests, fisheries and marine sensitive features); however, these regulations are subject to s. 2(1)(b) of the Government Actions Regulation, which requires the minister to be satisfied that any order would not unduly reduce the British Columbia timber supply or constrain timber harvesters' abilities to exercise their rights to harvest.

42. Section 75 of the Forest Act provides that no agreement under the Act prevents or impedes government from using, or granting the use of, Crown land for any purpose the minister considers compatible with timber harvesting.

[57] The *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004 [FPPR] sets out various objectives for Forest Stewardship Plans in relation to soils, timber, wildlife, water, fish, biodiversity, visual quality, and cultural heritage resources. The sections dealing specifically with timber and wildlife are as follows:

Objectives set by government for timber

6 The objectives set by government for timber are to

- (a) maintain or enhance an economically valuable supply of commercial timber from British Columbia's forests,
- (b) ensure that delivered wood costs, generally, after taking into account the effect on them of the relevant provisions of this regulation and of the Act, are competitive in relation to equivalent costs in relation to regulated primary forest activities in other jurisdictions, and
- (c) ensure that the provisions of this regulation and of the Act that pertain to primary forest activities do not unduly constrain the ability of a holder of an agreement under the Forest Act to exercise the holder's rights under the agreement.

Objectives set by government for wildlife

7 (1) The objective set by government for wildlife is, without unduly reducing the supply of timber from British Columbia's forests, to conserve sufficient wildlife habitat in terms of amount of area, distribution of areas and attributes of those areas, for

- (a) the survival of species at risk,
- (b) the survival of regionally important wildlife, and
- (c) the winter survival of specified ungulate species.

(2) A person required to prepare a forest stewardship plan must specify a result or strategy in respect of the objective stated under subsection (1) only if the minister responsible for the Wildlife Act gives notice to the person of the applicable

- (a) species referred to in subsection (1), and

(b) indicators of the amount, distribution and attributes of wildlife habitat described in subsection (1).

(3) If satisfied that the objective set out in subsection (1) is addressed, in whole or in part, by an objective in relation to a wildlife habitat area or an ungulate winter range, a general wildlife measure, or a wildlife habitat feature, the minister responsible for the Wildlife Act must exempt a person from the obligation to specify a result or strategy in relation to the objective set out in subsection (1) to the extent that the objective is already addressed.

(4) On or after December 31, 2004, a notice described in subsection (2) must be given at least 4 months before the forest stewardship plan is submitted for approval.

[58] Section 27 of the *FPPR* provides that the Minister may balance various objectives when determining whether to approve an FSP, stating:

27 On request of a person who submits a forest stewardship plan for approval, the minister may balance established objectives, results, strategies or other plan content when making a determination under section 16 [approval of forest stewardship plan or amendment] of the Act.

[59] The Province argues that the evidence it adduced for these applications shows that the Plaintiff was consulted and his interests accommodated pursuant to the scheme established by the *Forest Act* and *Forest and Range Practices Act*. The evidence is not admissible on the 9-5(1)(a) application. I will refer to it below in the context of rule 9-5(1)(d). But what is important here is that the statutory scheme provides for consultation of interested parties before timber harvesting occurs (see para. 37 of the Province's Notice of Application above). FSPs and site plans must be made available to the public: ss. 11 and 18 of the *FRPA*. The site plans prepared must be quite specific: s. 10(2) of the *FRPA* is as follows:

(2) A site plan must

(a) identify the approximate locations of cutblocks and roads,

(b) be consistent with the forest stewardship plan, this Act and the regulations, and

(c) identify how the intended results or strategies described in the forest stewardship plan apply to the site.

ii. The nature of the claims as pleaded

[60] The plaintiff's claims are based upon his asserted property interests, which arise from and are based upon the same legislative scheme as the TSLs the forestry defendants relied upon in conducting their activities.

[61] The plaintiff challenges no part of the legislative scheme. No challenge was or is brought to the administrative legality of the TSLs.

[62] As noted, the claims are identical against all forestry defendants. No complaint is made concerning any specific activities of any particular TSL holder and forestry defendant. Every single person or entity who carried out logging activities on any lands touched by the plaintiff's licenced interests is sued. The plaintiff does not identify anything specific done by any forestry defendant that is beyond exercising their lawful harvesting rights under the TSLs. No facts are pleaded as to any specific breach of the terms of the TSLs.

[63] The plaintiff's claims as pleaded (under all causes of action) are centred on the effects of logging in general. If the plaintiff's claims are permitted to proceed, there would be no reason that he could not seek to add other parties who may have carried on timber harvesting activities at later dates on some part of the vast areas in question.

[64] I agree with the submission of the Province that in the circumstances of this case, on the pleadings of the plaintiff, his challenge is to the timber harvesting activities themselves, as they relate to his licences. However, the extent and scope of these activities and the manner and degree to which they are to be balanced against other objectives such as preservation or enhancement of wildlife are all matters dealt with in the statutory scheme and are matters of government policy.

[65] The question, then, is whether in such circumstances the plaintiff could potentially establish that the timber harvesting activities of the forestry defendants as permitted by government is an unreasonable interference with his interests as a guiding territory certificate holder, guide outfitter, or registered trapline holder.

[66] Under the scheme, it is ultimately the Province as owner of the lands and as government that is the arbiter of competing interests in its lands. In effect, the plaintiff would be seeking to have the court review and reconsider after the fact the decisions made by various statutory decision makers within a highly policy driven context, in order to seek to establish that the end result of the decisions is an unreasonable interference with his own licensed interests, when he made no timely objection to the activities. In my view, the plaintiff is bound to fail in establishing this element of the claim in nuisance on the facts as pleaded.

c) The Proposed Amendments - Nuisance

[67] The Proposed AANOCC adds a reference to “Trespass” in the heading to the section heading to the Nuisance section. Plaintiff’s counsel advised that the reference to “trespass” falls within the ANOCC’s references to “other property rights” in paras. 37, 45, 46.

[68] An action in trespass to land must be supported by the claimant’s possession of the land in question: Lewis N. Klar, *Tort Law*, 5th ed. (Toronto: Carswell, 2012 at 112.) In the case of Crown land, possession of the land will not give a claimant sufficient interest to maintain an action in trespass unless the plaintiff is in possession with the privity or concurrence of the Crown: p. 113. Thus the plaintiff would likely fail to establish standing to claim in trespass. The defendants would have no trouble establishing that their activities on the lands were not a wrongful interference, as they were expressly licensed to conduct them. It is plain and obvious that the proposed claim in trespass is bound to fail.

[69] Another proposed amendment (para. 41.1) refers to alleged TSL terms: (1) a requirement to give 14 days’ notice to the plaintiff prior to commencement of activities, and (2) a requirement that the licensee “must not otherwise unreasonably interfere with [...] the proprietary interests of other interest holders, including but not limited to the plaintiff.” No facts are pleaded in relation to these points. No consequences of any breach are pleaded.

[70] The Proposed AANOCC also refers extensively a provincial government document, “A Practical Guide to Effective Coordination of Resource Tenures (the “Guide”). The proposed pleading states:

Although the Guide is not itself policy, the Guide refers to Crown expectations of the Defendant Foresters as follows:

- a. The licensee must give other tenure holders at least 14 day’s advance notice before commencing activities on the Lands.
- b. The licensee must meaningfully consult the Plaintiff prior to commencement of harvesting.
- c. The licensee must reasonably accommodate the interests of other tenure holders such as the Plaintiff.

[71] Again, however, no specific facts or consequences of any alleged breach are pleaded. As a result, no cause of action is made out. The lack of any specifics even in the proposed pleading further confirms that the plaintiff’s real complaint is with the scope or scale of the timber harvesting activities in general.

[72] The plaintiff’s proposed pleadings centred on the Guide do not support the plaintiff’s case that the timber harvesting activities are an unreasonable interference with his interests. The existence of the Guide underscores the multi-use and multi-user nature of the Crown’s lands and the nature of the Crown’s efforts to balance competing uses and interests.

[73] The plaintiff also proposes at para. 45.2 to allege that the forestry defendants have clear-cut the lands “rather than employing other more reasonable harvesting methods which were reasonably available and which would not have harmed or would have lessened the harm to the Plaintiff’s *profit à prendre* and other rights of use and occupation.” There are again no facts pleaded, and no specifics, about this. The other methods are not indicated. Why or how one method of harvesting versus another would transform non-nuisance harvesting into tortious interference is not explained. Clearly, this late proposed amendment is a desperate effort to introduce something of substance into the pleading. However, in the context of the plaintiff’s complaint which is centred on harvesting in general, and without any relevant

specific facts, I conclude that the plaintiff's Proposed AANOCC continues to fail to plead a potentially viable cause of action in nuisance.

C. The Claims in Negligence

[74] The plaintiff pleads that the harvesting activities of the forestry defendants have caused damage to his "business interests" (ANOCC, paras. 48, 52, 53, 57). He pleads loss of value of his business interests: ANOCC, paras. 52, 57. He pleads that the Crown and its agents and servants had a duty of care to take all reasonable steps "to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by the Defendant Foresters' harvesting activities" (para. 50) and a breach of this duty: para. 51.

[75] Other than the harvesting activity in general, no specific facts are pleaded as to what the Province or the other defendants did or failed to do which could constitute the negligence complained of. On these pleadings the Province and the forestry defendants would have no idea as to what claims are being made against them. The essence of the claim is simply that the Province should not have allowed harvesting activities by the other defendants, who should not have carried them out.

1. The Claims in Negligence against the Province

[76] A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.* 2008 SCC 27, at para. 4.

[77] Thus, the first question is whether the pleadings support a duty of care owed by the Province to the plaintiff. The duty of care must be connected to the alleged breach and damage, of course.

[78] The plaintiff concedes that the asserted duty of care is novel. No cases have been cited in which a holder of a guiding territory certificate or registered trapline issued by the Province has established a duty of care by the Province to the holder

to prevent loss caused by other activities expressly permitted by the Province on the same lands, nor in any similar or analogous circumstance.

[79] In this case, the factors giving rise to the required relationship of proximity must arise out of the relevant statute, or here, the statutory scheme: *Cooper v. Hobart*, 2001 SCC 79, at paras. 30, 43.

[80] The appropriate analysis is summarized in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at paras. 66-70:

66 The first and central question is whether the pleadings, assuming the facts alleged to be true, support a duty of care on Alberta to members of the plaintiff class. This requires us to determine first whether Alberta and the class members were in a relationship that gave rise to a prima facie duty of care, based on foreseeability and proximity. If a prima facie duty of care is established, the second step is to ask whether it is negated by policy considerations: See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30; and *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 14.

67 The claim raised in this case has not been previously recognized as giving rise to a duty of care. Therefore, we must examine whether it meets the foregoing requirements for imposing a duty of care in negligence: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15.

68 In this case, as in *Broome*, the plaintiff class relies on provincial statutory obligations as the source of a private duty of care. The allegation, in essence, is that statutory and regulatory duties brought Alberta into a relationship of proximity with members of the class, whom it was reasonably foreseeable would be affected by failure to discharge these duties in a non-negligent manner. The *Cooper* analysis applies to claims grounded in statutory duties. As the Court, per Cromwell J., stated in *Broome*, at para. 13:

[13] [The *Anns/Kamloops*] test is the appropriate one even though the appellants mainly rely on statutory duties. Such duties do not generally, in and of themselves, give rise to private law duties of care. The *Anns/Kamloops* test determines whether public as well as private actors owe a private law duty of care to individuals enabling them to sue the public actors in a civil suit.

69 Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

70 In this case, the legislative scheme does not impose a duty on the Crown to act in relation to the class members with respect to the accommodation charges. A review of the relevant provisions discloses a

general duty on the Minister to provide insured health care services: Alberta Health Care Insurance Act, s. 3. However, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges in the provisions. ... This case is distinguishable from *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25 (C.A.), relied on by the plaintiffs, where the statute in question imposed on the public authority a positive duty to act.

71 For these reasons, I conclude that the legislative scheme does not impose a duty of care on Alberta.

...

72 In the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a prima facie duty of care.

...

73 I therefore conclude that, assuming the facts pleaded to be true, the negligence claim is bound to fail at the first step of the Anns/Cooper inquiry. Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out.

[Emphasis added.]

[81] A preliminary difficulty with the plaintiff's pleadings lies in deciphering what is the allegedly negligent conduct complained of. As I have stated, given the lack of any specifics, I conclude that the claim relates to allowing logging activities in general. Reading generously, it may be inferred that is the scope or scale of the logging that the plaintiff objects to. The nature of the duty alleged, the manner in which the duty was breached (for example, by reference to some applicable standard of care), and the nature of the consequential loss are all unclear.

[82] Leaving those difficulties aside for the moment, the first, most general question is whether the legislative scheme imposes a duty of care in favour of the plaintiff to protect his interests. The ANOCC makes no reference to any particular statutory duty.

[83] The plaintiff has not pleaded and did not direct me to any other statutory provision which could support a duty of care on the part of the Province.

[84] The relevant statutory scheme requires the Minister to plan the use of forest and range resources of the government so that various activities and uses including timber harvesting and wildlife are “coordinated and integrated, in consultation and cooperation with other ministries and agencies of government and with the private sector...” (s. 4, *MFRA*). s. 5(1)(b) of the *FRPA* requires every forest stewardship plan to specify “intended results or strategies” in relation to “objectives set by government” and “other objectives that are established under this Act and that pertain to all or part of the area subject to the plan.” I reiterate here the summary set out in the Province’s Notice of Application, at paragraphs 38 – 42, which I quoted in full above. The essence of these provisions is that the Minister will plan and balance uses, which may be competing uses, in such a way as to maximize overall benefits and utility in conformity with the policy decisions of government. While there is a reference in s. 4 of the *MFRA* to “consultation” with the “private sector” there is no suggestion of a private law duty of care to protect any particular private sector party, or forest licensee. Indeed, imposition of a private law duty of care to protect the interest of one licensee or group of licensees to make planning or resource allocation decisions in a particular way is inconsistent with the scheme.

[85] The *Wildlife Act* is largely concerned with permits, licenses and regulation of hunting, trapping, and fishing activities. As noted that *Act* provides for registration of traplines and issuance of guiding territory certificates. Nothing in that statute suggests a duty of care on the part of the Province to protect the commercial value of registered traplines or of guiding territory certificates, or the amount of wildlife that may be available to licensees for hunting or trapping. Section 2(1) states that ownership of all wildlife in British Columbia is vested in the government. Section 42(5) provides that registration of a trapline does not give the holder of the trapline any proprietary rights in wildlife, or restrict the rights of another person to hunt, or to capture wildlife if authorized by the regulations or a permit.

[86] The affidavit of the Timber Sales Manager, Mr. Ian Hamann, states that registration of a trapline gives the holder an exclusive right to trap within the

boundaries of the trapline. However, the legislation does not so expressly stipulate. This point is not central, and was not argued.

[87] In the event of a dispute as to priority of rights respecting a trapline, the regional manager may alter, eliminate or reassign all or part of a trapline: s. 45. Similarly, s. 67 provides that a guiding territory certificate does not give the holder any proprietary rights in wildlife or fish, or restrict the rights of a resident to hunt or fish. Guiding territory certificates have a limited duration, not to exceed 25 years: s. 59 (3). As noted, Mr. Chingee's guiding territory certificate was issued July 14, 2009 and expires July 14, 2019.

[88] In summary, in my view the plaintiff has failed to plead any facts which could establish a duty of care on the part of the Province. The pleadings fail to set out facts which establish the required relationship of proximity.

[89] On these pleadings, any forest or range licensee could presumably claim for damages based upon the overall consequence or effects of decisions of the Province. This consideration leads me to conclude that that imposition of a duty of care would also fail at the second branch of the *Anns* test.

[90] The applicants contend that the plaintiff's claims are for economic loss. The plaintiff argues that he holds interests in property which have suffered physical damage. I agree with the applicants. The trapline registrations and the guiding territory certificate do not constitute physical property which could be said to be damaged by the timber harvesting activities complained of. They are licences granting certain privileges, such as to set traps or to control guiding privileges within defined areas. The plaintiff has no proprietary interest in the wildlife itself. The pleadings indicate that the loss and damage complained of is to economic interests. The plaintiff's claims are for economic loss.

[91] Claims for economic loss must either (1) fit within a recognized duty of care category, or (2) establish a new duty of care: *Design Services Ltd. v. Canada*, 2008 SCC 22, at para. 2. The recognized categories are:

1. the independent liability of statutory public authorities;
2. negligent misrepresentation;
3. negligent performance of a service;
4. negligent supply of shoddy goods or structures;
5. relational economic loss.

Design Services, para. 31, citing *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021.

[92] The plaintiff's claims do not fall within any of these categories. The first category covers recognized governmental liability for such activities as enforcing by-laws, or inspection of homes or roadways. I have said previously that the plaintiff does not point to any similar or analogous case where liability has been imposed. Categories 2, 3 and 4 are obviously inapplicable. Relational economic loss involves circumstances where the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property: *Design Services*, para. 33, 34. Here, there is no claim of injury or property damage to a third party. The only relevant third parties are the forestry defendants who are alleged to have caused the loss the plaintiff complained of.

[93] Thus, the plaintiff would be required to persuade the court that a new category of recovery for pure economic loss should be recognized. This requires the court to return once again to the *Anns* test as applied in Canadian law: *Design Services*, paras. 45-47. However I as I have already said, in my view the plaintiff is bound to fail in establishing a duty of care on that basis, in the circumstances of this case.

[94] In summary, in my view the plaintiff is bound to fail in establishing a duty of care on the part of the Province in relation to his interests in the registered traplines or the guiding territory certificate.

2. The claims in negligence against the forestry defendants

[95] The plaintiff's ANOCC does not set out a potentially viable basis for a duty of care on the part of the forestry defendants. It does not set out any conduct of the

forestry defendants that could potentially support a conclusion that they breached a relevant standard of care.

[96] The only allegation that is made in negligence against the forestry defendants is that their “harvesting activities” could and did cause damage to the plaintiff; ANOCC paras 53 - 57. Thus, the plaintiff alleges that the harvesting activities in and of themselves were the negligent conduct. As previously noted, there is no complaint of any specific conduct of any defendant forester or group of foresters. No distinction is made between their activities. All are sued merely for carrying out the logging activities they were specifically licensed to carry out by the Province.

[97] On these pleadings it is plain and obvious that the plaintiff will fail to establish a duty of care. There is no likelihood that a court would hold that the forestry defendants have a duty to refrain from logging activities they are authorized by the Province to conduct. As there is no pleading of a relevant standard of care, nor of breach of the standard, the claim is also bound to fail in relation to these elements as well.

a) The Proposed Amendments - Negligence

[98] In an effort to cure these radical defects, as noted, on the final day of the hearing of these applications, and after the applicants had concluded their submissions, the plaintiff presented the proposed AANOCC. However, the amendments if permitted do not address the deficiencies.

[99] The proposed amendments in relation to the negligence claims are similar to those proposed in relation to nuisance, such as the reference to the Guide, and allegations of “unreasonable interference”, failure to “accommodate, consult and consider” the interests of the plaintiff, failure to give 14 days’ notice before commencement of harvesting, and clear-cutting. As I have stated, the plaintiff’s proposed reference to “clear-cutting” the forest rather than using “other harvesting methods” is too vague to be meaningful.

[100] Once again, beyond vague and conclusory statements, no facts are pleaded. There is no pleading connecting such failures to any specific consequence or loss.

[101] The Proposed AANOCC refers to ss. 76, 77 and 78 of the *Forest Act*. No specifics are pleaded in that regard. These provisions allow the Minister to suspend or cancel agreements such as the timber sales licences under which the forestry defendants carried out their logging activities, for such things as failure to perform obligations under the agreement or failure to comply with the requirements of the *Forest Act* or the *FRPA* or other statutes. Nothing in these provisions suggests the kind of duty the plaintiff would need to establish.

[102] I reiterate that, as Chief Justice McLachlin emphasized in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII) [*Imperial*], at para. 22, the plaintiff must plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated.

D. Statutory Authority Defence

[103] The Province and 813 argue that as the ANOCC makes no specific allegation concerning the manner of timber harvesting, or breach of statutory authority or the terms of the tenures of the forester defendants, the claim can be characterized as a challenge to the act of timber harvesting itself.

[104] On that basis, the applicants contend that the claims are bound to fail based upon the defence of statutory authority.

[105] In the context of nuisance, the onus is upon the defendant asserting the defence to establish clear and unambiguous statutory authority for the work, activity or conduct complained of, in the place where that work, activity or conduct takes place, and express or implied authority to cause a nuisance as the only reasonable inference from the statutory scheme: *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, at para. 118 [*Sutherland*]. The harm complained of must be the

inevitable result of the exercise of the statutory authority: *Sutherland*, at paras. 63-67, 105; *Thomas*, at para. 93.

[106] The difficulty with the application of this argument is that the claims for damage relate to the overall effect of all of the timber harvesting activities upon wildlife. The plaintiff has provided no specifics as to any particular activities that resulted in the alleged harm. It leaves the defendants in the position of being required to demonstrate both that all of the timber harvesting activities were specifically prescribed by statute and that they could not have been conducted in such a way as to avoid harming wildlife. Naturally, they have not attempted to do so.

[107] As I have indicated, the statutory scheme is relevant to the issues of whether the plaintiff has pleaded a viable cause of action in nuisance or negligence, however. As I will explain, it is also relevant to the issue of abuse of process.

E. The Claims in Breach of Fiduciary Duty

[108] The pleadings in the ANOCC relate to the contention that the plaintiff holds Trapline No. 1 “in part for or on behalf of the McLeod Lake Indian Band.” Characteristically of these pleadings, the plaintiff also asserts that “in addition or in the alternative, all Aboriginal rights held by the McLeod Lake Indian Band in relation to the subject lands are exercised by the plaintiff or have been assigned to the plaintiff.” The plaintiff claims to be entitled to assert the Band’s rights in trapline No. 1. The plaintiff claims a breach of fiduciary duty on the part of the Province in failing to consult and accommodate the interests of the plaintiff and the Band, “prior to granting the timber harvesting licenses to the forestry defendants. There are no particulars or specifics of the failure, or the loss.

[109] As noted, however, Chief Derek Orr of the McLeod Lake Indian Band has sworn an affidavit in these proceedings in which he denies that the traplines are held in trust for the Band, and denies that the plaintiff has authority to pursue claims or act on behalf of the Band.

[110] In response to the Proposed AANOCC, the plaintiff proposes to abandon the allegation that trapline No. 1 is held in trust for the Band or that the Band has granted him authority, consent or an assignment of Aboriginal rights. I take these allegations to have been abandoned. However the plaintiff proposes a broader claim, relating to all of the Lands as defined in the pleading (the guiding territory certificate and the registered trapline lands): “All aboriginal rights held by the McLeod Lake Indian Band are exercised by the plaintiff.” No facts are pleaded which support this contention.

[111] The Proposed AANOCC refers again to an obligation on the part of the Province to consult him “on behalf of the McLeod Lake Indian Band” before issuing the timber harvesting licenses.

[112] Section 35(1) of the *Constitution Act*, 1982 provides:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[113] The Crown’s duty to consult exists to protect the collective rights of Aboriginal peoples, and is therefore owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 13, at para. 30 [*Behn*].

[114] The Crown’s duty to consult applies to the relevant Aboriginal group, even where the decision affects a trapline held by a member of the group: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para. 35.

[115] However I note that in *Behn*, the Supreme Court declined to decide whether the plaintiffs’ individual hunting and trapping activities might provide a basis for claims of breach of treaty rights on their individual part, on a motion to strike.

[116] The plaintiff has not pleaded facts which might raise a breach of Aboriginal or treaty rights. Unlike *Behn*, he has not pleaded a breach of treaty rights, or that the lands in question have traditionally been assigned to him by the Band. However, the

relationship between the plaintiff and the Band in this respect is unclear to me, (and may perhaps be a matter of some controversy between them). In the circumstances, based upon the comments in *Behn*, I would not dismiss the claims of breach of Aboriginal rights on the ground of standing.

[117] However, just as in *Behn*, to the extent the plaintiff is seeking to advance claims based upon Aboriginal or treaty rights, I consider the claims an abuse of process, and dismiss them on that ground, pursuant to Rule 9-5(1)(d).

F. Collateral Attack and Abuse of Process

[118] The defendants argue that the claims should be struck as an abuse of process, in that they are in effect a collateral attack on administrative decisions to issue the TSLs. They argue that the plaintiff's remedy would have been to challenge the decisions to issue the TSLs by way of judicial review, rather than waiting until the activities authorized by the TSLs are completed, and then suing in tort.

[119] The evidence shows that the plaintiff was given notice of the planned logging activities. He provided some comments during the planning stages, as he was invited to do. In general he did not object.

[120] In November 2004, the Province sent a letter to the plaintiff inviting him to make his concerns known regarding a proposed Forest Stewardship Plan [FSP] for the area. A similar letter was sent July 4, 2006. The FSP was sent to him August 8, 2006. He received notice of an amendment to the FSP January 14, 2008. He was again advised that the amended FSP would be available for his review and comment for a period of 60 days. He attended the B.C. Timber Sales offices in Prince George for this purpose on January 24, 2008. He had no major complaints. He was advised that he would receive notice in due course of operating plans. He received notice of further amendments to the FSP on November 15, 2011. He received notices from the Province about proposed operating plans and harvesting activities on numerous occasions. Approximately 16 such notices are in evidence, spanning the period from December 28, 2007 to September 20, 2014. On August 25, 2009 and January 5, 2011, Mr. Chingee met with staff of B.C. Timber Sales (Province of B.C.) and

discussed various concerns about timber harvesting activities. There is no evidence that the concerns he expressed were not dealt with to his satisfaction. He received numerous letters from BC Timber Sales of proposed TSLs prior to their issuance. Approximately 22 such letters are in evidence, dated from April 20, 2009 to February 18, 2014. One such letter refers to TSL A84919, eventually issued to 819, which advised him that harvesting was anticipated to commence in 2011. Finally, as noted, 813 sent a letter to the plaintiff dated July 11, 2012 in which he was advised that logging activities in relation to TSL A84919 were anticipated to commence during the week of July 16, 2012. There is no evidence of any complaint by the plaintiff in response to that communication.

[121] In his affidavit in response to the applications the plaintiff does not specifically deny any of this. He states “As an Elder and Hereditary Chief of the Tsekehne People I was not consulted regarding these impacts to My Guiding Territory and My Trapping Territory.” He also states that he feels the concerns he expressed to the Province were not being heard and addressed. He states that he was prepared to accommodate harvesting up to a point, and was not asking the Province not to grant timber licenses and harvesting permits entirely, but merely did not want to see the whole area clear-cut. He does not deny that he never objected to the issuance of the TSLs in any formal sense.

[122] The TSL of 813 in evidence and the other example TSL in evidence both contain what I take to be standard TSL terms allowing the Timber Sales Manager to vary or suspend the licence if a court determines that activities under the TSL will infringe an Aboriginal right or title, or a treaty right, or grants an injunction. As Mr. Chingee did not bring legal proceedings to challenge the issuance of any TSL or the activities under any TSL on the basis of asserted Aboriginal or treaty rights at any time, these provisions were never triggered.

[123] Here, the plaintiff does not attack the validity of the TSLs. He expressly concedes their validity. This demonstrates a level of consistency, inasmuch as the plaintiff himself bases his claim on statutory licenses. His claim is in tort. In that

sense the circumstances are more akin to those in *Thomas*. I do not consider that the doctrine of collateral attack is applicable.

[124] However, the claims are an abuse of process in the larger sense.

Mr. Chingee was notified not only of the FSP, but also the operational plans and the issuance of the specific TSLs he now complains of. The evidence is that he was amply consulted and raised few concerns. Even if that were not the case, he waited until the TSLs were issued and the lands harvested before bringing these proceedings. By the time the proceedings were commenced, nothing could be done to accommodate any general or specific concerns he might have raised. The question of whether Mr. Chingee has standing to make claims of Aboriginal or treaty rights could have been dealt with long ago. Instead, having made no complaint, he now sues, seeking compensatory damages, and arguing in effect that too much logging has been allowed. The circumstances are analogous to *Behn*, where on behalf of the court Mr. Justice LeBel stated:

42 In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[125] Mr. Chingee has initiated legal proceedings rather than resorting to self-help remedies as did the Behns. However the other concerns referred to by LeBel J. apply. The lack of timely complaint is in my view particularly significant in the context

of the statutory scheme, which is designed to balance competing interests and to allow interested parties to provide input into the decision-making process at relevant stages. To instead allow Mr. Chingee to stand by and then to make after the fact wholesale claims for damages would be an abuse of process.

V. REMEDY

[126] In relation to the nuisance and negligence claims the plaintiff has failed to plead a reasonable claim within meaning of Rule 9-5 (1)(a) of the *Rules*. This is not a case where the pleadings contain a defect or defects that could be cured by amendment. The plaintiff already made extensive amendments in the ANOCC. Careful consideration of the Proposed AANOCC shows that the defects are fundamental and not curable by amendment.

[127] The claims are also an abuse of process. This applies to all three causes of action pleaded. Thus, in all of the circumstances, the appropriate remedy is dismissal of the claims.

[128] The applicants applied for summary dismissal of the claims under Rule 9-6 (Summary Judgment) in the alternative to their applications under Rule 9-5(1) (a) and (d). As the claims are dismissed under Rule 9-5(1), there is no need for me to consider the summary dismissal applications.

[129] The applications of the Province and 813 are allowed, and the claims made against them are dismissed, with costs.

“The Honourable Mr. Justice Verhoeven”

VI. SCHEDULE A

[...]

AMENDED NOTICE OF CIVIL CLAIM

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

[...]

Claim of the Plaintiff(s)

Part 1: STATEMENT OF FACTS

Background

1. The Plaintiff, Harry Chingee, is a businessman, who resides in Prince George, British Columbia.
2. The Defendant, Her Majesty the Queen in right of the Province of British Columbia ("the Crown"), represents the government of British Columbia pursuant to Section 7 of the *Crown Proceedings Act*, R.S.B.C. 1996 c. 89.
3. ~~The Defendant, Canadian Forest Products Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
4. ~~The Defendant, Conifex Mackenzie Forest Products Inc is a company incorporated pursuant to the laws of British Columbia?~~
5. ~~The Defendant, Lakeland Mills Ltd., is a company incorporated pursuant to the laws of British Columbia:~~
6. ~~The Defendant, Mackenzie Fiber Management Corporation, is a company incorporated pursuant to the laws of British Columbia.-~~
7. ~~The Defendant, Winton Global Lumber Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
8. The Defendant, 550031 BC Ltd., is a company incorporated pursuant to the laws of British

- Columbia.
9. The Defendant, 813090 BC Ltd., is a company incorporated pursuant to the laws of British Columbia.
 10. The Defendant, Dig Deep Ventures Ltd., is a company incorporated pursuant to the laws of British Columbia.
 11. ~~The Defendant, Dollar Saver Lumber Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
 12. ~~The Defendant, Duz Cho Logging Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
 13. The Defendant, EKO Logging Ltd., is a company incorporated pursuant to the laws of British Columbia.
 14. The Defendant, JEM Industries Inc., is a company incorporated pursuant to the laws of British Columbia.
 15. The Defendant, J.V.-Logging Ltd, is a company incorporated pursuant to the laws of British Columbia.
 16. The Defendant, M.G. Logging and Sons Ltd., is a company incorporated pursuant to the laws of British Columbia.
 17. The Defendant, McLeod Lake Indian Band, is an Indian Band registered pursuant to the Indian Act as Band No. and is represented by its Chief and Council.
 18. The Defendant, MJM Forestry Ltd., is a company incorporated pursuant to the laws of British Columbia.
 19. The Defendant, SDN Forest Ventures Inc., is a company incorporated pursuant to the laws of British Columbia.
 20. The Defendant, Treeco Timber Corp., is a company incorporated pursuant to the laws of British Columbia.
 21. The Defendant, Timberspan Wood Products Inc., is a company incorporated pursuant to the laws of British Columbia.
 22. The Defendant, Wayne Telford is a logger who resides in or around Prince George, British Columbia.
 23. The Defendant, Loris Bedetti, is a logger who resides in or around Prince George, British Columbia.
 24. The Defendant, Arnold Bremner, is a logger who resides in or around Prince George, British Columbia.
 25. The 2nd through 24th Defendants shall be collectively referred to as the Defendant Foresters.
 26. At all material times, the Plaintiff is and was the holder of Guiding Territory Certificate No. 700023 (the "Guiding Certificate"), issued by the Crown pursuant to the *Wildlife Act*, R.S.B.C. 1996 c. 488 (the "*Wildlife Act*").
 27. At all material times, the Plaintiff is and was the holder of a Registered Trapline, Registration No. TR0716T011 (the "Trapline No. 1"), issued by the Crown pursuant to the *Wildlife Act*.

27.1 In the alternative, at all material times the Plaintiff is and was the holder of Trapline No. 1 as a trustee for the benefit of McLeod Lake Indian Band and Frederick Inyallie and holds his interest on trust for the said beneficiaries.

28. At all material times, the Plaintiff and Wesley Chingee are and were the holders of a Registered Trapline, Registration No. TR0723T006 (the Trapline No. 2"), issued by the Crown pursuant to the [*Wildlife*] Act.

28.1 In the alternative, at all material times, the Plaintiff is and was the holder of Trapline No. 2 as a trustee for the benefit of Jim Chingee and Wesley Chingee and holds his interest on trust for the said beneficiaries.

29. At all material times, the Crown was the owner of the lands subject to the Guiding Certificate and the two Traplines (the "Lands").

30. At all material times, the Crown operated and continues to operate B.C. Timber Sales to manage the sale of Crown timber on Crown Lands.

31. At all material times, the Defendant Foresters were the holders of timber licenses and/or other forms of forestry tenures permitting them to enter upon the Lands and remove various stands of timber.

32. At all material times, some or all of the Defendant Foresters also carried on various other forestry activities in relation to the Lands, including but not limited to pest control, road constructions and maintenance.

The Claim in Nuisance

33. At all material times, the Plaintiff was the legal and beneficial owner of all of the rights which were attached to the Guiding Certificate including, but not limited to the right to obtain a guiding license thus permitting the Plaintiff to enter upon the Lands for the purposes of guiding and the right to profit from his guiding.

33.1 At all material times, the Plaintiff was the legal and beneficial owner of all the rights which attach to the guiding licenses granted to him by the Crown.

34. The Guiding Certificate granted the Plaintiff exclusive rights over the guiding privileges described in the certificate on the Lands.

35. At all material times, the Plaintiff was the legal and beneficial owner of all of the rights which were attached to the two Traplines including, but not limited to the exclusive right to enter upon the Lands for the purposes of trapping and the right to profit from his trapping.

35.1 In the alternative, at all material times, as trustee, the Plaintiff was the legal owner of all of the rights which were attached to the two Traplines including, but not limited to the exclusive right to enter upon the Lands for the purposes of trapping and the right to profit from his trapping.

36. In the premises, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute a profit a prendre in favour of the Plaintiff.

37. In the alternative, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute property rights owned exclusively by the Plaintiff which granted the Plaintiff a substantial degree of use and occupation over the Lands.

37.1 In the further alternative, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute a right to use the Lands.

38. The value of the profit a prendre or other property or contractual rights possessed by the Plaintiff is dependent in whole or in part on the availability of game for hunting and trapping, the vitality of the forest, and the amount of forested area on the Lands.

39. From July 2009 to the present time, the Crown has from time to time and continuously throughout the period granted cutting licenses to the Defendant Foresters permitting them the right to enter upon and remove timber from the Lands.

40. From July 2009 to the present time, the Defendant Foresters have from time to time and continuously throughout the period entered upon and removed timber from the Lands. The particulars are as follows:

a. —Since 2010-and ongoing throughout the period up to-and including the-date of-this action, the Defendant, Canadian Forest Products Ltd, has entered upon and' removed timber from various parts of the Lands including but not limited to that part of the Lands subject to-TFL 30.-

b—Since 2010-and ongoing throughout the period up to and including the date of this action, the Defendants, Winton Global Lumber Ltd and Lakeland Mills Ltd , have entered upon and-removed-timber from various parts of the Lands including but not limited to the lands referred to as the "Winton Global and Lakeland Mills operating areas".

c—Since 2019-and ongoing throughout the period up to and including the-date of this action, the-Defendant, Conifex Mackenzie Forest Products Inertias entered upon and removed timber from various parts of the Lands.

d—Since 2010 and ongoing throughout the period up to and including the date of this action, the Defendant, Mackenzie Fibre Management Corporation, has entered upon and removed timber from various parts of the Lands including-but not limited to that part of the Lands subject to FLTC A87345.

e—Since 2008 and ongoing throughout the period up to and including the date of this action, the Defendants, Duz Cho Logging Ltd and McLeod Lake Indian Band, have entered upon and removed-timber from various parts-of the-Lands including but not limited to-that part-of the Lands subject to TFL 30.'

f. Between March 25, 2010, and June 25, 2013, the Defendant, EKO Logging Ltd, entered upon and removed timber from that part of the Lands subject to TSL A85802.

g. Between July 22, 2010, and May 4, 2011, the Defendant, Wayne Graham Telford, entered upon and removed timber from that part of the Lands subject to TSL A84867.

g. 1 After May 4, 2011, and continuing to the present, the Defendant, Hartwood Holdings Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A84867.

h. Between October 21, 2011, and October 11, 2012, the Defendant, 0813090 BC Ltd, entered upon and removed timber from that part of the Lands subject to TSL A84919.

i. Since December 19, 2011, the Defendant, 550031 BC Ltd, entered upon and removed timber from that part of the Lands subject to TSL A87623.

j. Between March 31, 2010 and March 30, 2012, the Defendant, Loris Bedetti, entered upon and removed timber from that part of the Lands subject to TSL A84362,

k. Between April 9, 2010 and May 8, 2012, the Defendant, Arnold Joseph Bremner, entered upon and removed timber from that part of the Lands subject to TSL A84865.

l. Between January 4, 2011, and July 3, 2012, the Defendant, Treeco Timber Corp, entered upon and removed timber from that part of the Lands subject to TSL A85832.

m. Between March 17, 2010 and March 16, 2012, the Defendant, Dig Deep Ventures Inc., entered upon and removed timber from that part of the Lands subject to TSL A84864.

n. Between April 27, 2011 and December 13, 2012, the Defendant, Dig Deep Ventures Inc., entered upon and removed timber from that part of the Lands subject to TSL A87613.

n.1 After December 13, 2012, the Defendant MJM Forestry Ltd entered upon and removed timber from that part of the Lands subject to TSL A87613.

o. Between March 17, 2011 and March 16, 2013, the Defendant, Dig Deep Ventures Inc,

entered upon and removed timber from that part of the Lands subject to TSL A84488.

p. Between December 2, 2011 and May 1, 2013, the Defendant, Timberspan Wood Products Inc, entered upon and removed timber from that part of the Lands subject to TSL A88372.

q. Between January 27, 2011, and July 26, 2012, the Defendant, JEM Industries Inc, entered upon and removed timber from that part of the Lands subject to TSL A88218.

r. Between October 18, 2010, and November 17, 2012, the Defendant, MJM Forestry Ltd, entered upon and removed timber from that part of the Lands subject to TSL A85833.

s. Since November 2, 2012, the Defendant, M.G. Logging & Sons Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88847.

t. Since January 8, 2013, the Defendant, M.G. Logging & Sons Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88559.

u. Since 2013, the Defendant, J. V. Logging Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88473.

v. Between December 1, 2010 and March 24, 2011, the Defendant, SDN Forest

Ventures Inc., entered upon and removed timber from that part of the Lands subject to TSL A86214.

v.1 After March 24, 2011 and continuing through to the present, the Defendant, All Wood Fibre Ltd has entered upon and removed timber from that part of the Lands subject to TSL A86214.

W-Since July 15, 2011, the Defendant Dollar Saver Lumber Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A84917.

41. Although the Crown purported to act pursuant to statutory authority in granting timber licenses to the Defendant Foresters, the Crown exceeded this statutory authority. In particular, the Crown has authority to grant timber licenses; but by implication of the statutory regime permitting the use of Crown lands and Crown resources by various licensees the Crown cannot not grant such licenses without accommodation, consultation and consideration of the proprietary and other interests of other license holders using the same lands, including the Plaintiff's proprietary and other interests in relation to the Lands that are the subject of this proceeding or, in the alternative, without requiring accommodation, consultation and consideration of the proprietary and other interests of other license holders using the same lands, including the Plaintiff's proprietary and other interests in relation to the Lands that are the subject of this proceeding .

40.1 The Crown permitted the Defendant Foresters to enter upon and remove timber from the Lands without accommodation, consultation and consideration of the Plaintiff's proprietary and other interests, or without requiring accommodation, consultation and consideration the consideration of the Plaintiff's proprietary and other interests

42. By permitting the Defendant Foresters to enter upon and remove timber from the Lands without accommodation, consultation and consideration of the Plaintiff's proprietary and other interests, or without requiring accommodation, consultation and consideration the consideration of the Plaintiff's proprietary and other interests, the Crown has unreasonably or unlawfully interfered with and injured the Plaintiff's profit a prendre, other property rights, or right to use the Lands and has interrupted and substantially interfered with the Plaintiff's business interests associated with those rights and the right to use the Lands.

42.1 Furthermore, and in the alternative, the Crown by its actions described above has effectively extinguished the proprietary and other rights of the Plaintiff without lawful authority to do so.

43. Although the Defendant Foresters entered upon and removed timber from the Lands pursuant to timber licenses which were validly granted to them by the Crown, the Defendants Foresters did so without accommodation, consultation or consideration of the Plaintiff or the Plaintiff's proprietary and other interests.

43.1 Furthermore, the Defendant Foresters while carrying out the activities permitted by license, have reduced the wildlife on the Lands, compromised the vitality of the forest on the Lands and

reduced the amount of forested area on the Lands.

44. Furthermore, while conducting their business activities, the Defendant Foresters have unreasonably and unlawfully interfered with the Plaintiff's two Traplines.

44.1 The authority granted to the Defendant Foresters to enter upon and remove timber from the Lands did not permit them to enter upon the Lands and remove timber from the lands and conduct their otherwise licensed activities on the Lands without accommodation of consultation of and consideration of the Plaintiff's proprietary and other interest and in such a wayFF as to unreasonably interfere with the Plaintiff's proprietary and other interests.

45. By their actions, the Defendant Foresters have unreasonably and unlawfully interfered with and injured the Plaintiff's profit a prendre, other property rights, or right to use the Lands and have interrupted and substantially interfered with the Plaintiff's business interests associated with those rights and the right to use the Lands.

45.1 Furthermore, and in the alternative, the Defendant Foresters by their actions have effectively extinguished the proprietary and other rights of the Plaintiff without lawful authority to do so.

45.2 The Crown, being the owner of the Lands subject to the Guiding Certificates, the two Traplines and the various timber licenses granted to the Defendant Foresters, knew or ought to have known or ought to have reasonably foreseen that the activities of the Defendant Foresters, if permitted by the Crown, could substantially interfere with the Plaintiff's profit a prendre, other property rights, or right to use the Lands and has interrupted and substantially interfered with the Plaintiff's business interests associated with those rights and the Plaintiff's right to use the Lands.

46. In the premises, the Crown and Defendant Foresters have unreasonably and substantially interfered with the profit a prendre, other property rights, or right of the Plaintiff to use the Lands and have thereby committed a nuisance and/or other unlawful acts in relation to the Plaintiff's profit a prendre, other property rights or right to use the Lands.

47. As a result of the ongoing nuisances and other unlawful acts created by and caused by the Crown and the Defendant Foresters, the Plaintiff has suffered loss and damage.

The Claim in Negligence

48. In addition, the Crown, its agents and its servants, knew or ought to have known that the harvesting activities of the Defendant Foresters which were permitted by the Crown could cause damage to the Plaintiff and the business interests of the Plaintiff.

49. Moreover, the damage that could result from the harvesting activities of the Defendant Foresters was a reasonably foreseeable consequence of such activities.

49.1 The potential damage to the Plaintiff's interests caused by use of the lands by other tenure holders such as the Defendant Foresters was so clearly apparent that the Crown has itself published policies relating to the management of resource conflicts between tenure holders.

50. In the premises, the Crown, its agents and its servants, owed a duty of care to the Plaintiff to take all reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by the Defendant Foresters' harvesting activities.

51. The Crown, its agents and servants, failed to take reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by the harvesting activities of the Defendant Foresters.

52. The negligence of the Crown, its agents and servants, has caused and continues to cause damage to the Plaintiff and the business interests of the Plaintiff. In particular, as a result of the harvesting activities of the Defendant Foresters, the lands subject to the Guiding Certificate and two Traplines and the business interests of the Plaintiff have diminished in their value.

53. Each of the Defendant Foresters individually also knew, or ought to have known, or ought to have reasonably known that their harvesting activities could cause damage to the Plaintiff and the business interests of the Plaintiff.

54. Moreover, the damage that could result from their harvesting activities was a reasonable foreseeable consequence of their harvesting activities.

55. In the premises, each of the Defendant Foresters individually owed a duty of care to the Plaintiff to take all reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by their harvesting activities.

56. Each of the Defendant Foresters individually failed to take all reasonable steps to ensure that the Plaintiff and the business activities of the Plaintiff were not harmed by their harvesting activities.

57. The negligence of each of the Defendant Foresters individually has caused and continues to cause damage to the Plaintiff and the business interests of the Plaintiff. In particular, as a result of the harvesting activities of the Defendant Foresters individually, the lands subject to the Guiding Certificate and two Traplines and the business interests of the Plaintiff have diminished in their value.

The Claim in Breach of Contract

58. The license agreements granted to the Plaintiff by the Crown necessarily contained an implied contractual duty of good faith on the part of the Crown not to act in such a way that its acts would defeat the very purpose and objective of the license agreements.

59. The Crown failed to perform this contractual duty when it granted timber harvest licenses to the Defendant Foresters. In particular, the Crown breached this duty as follows:

a. by granting licenses to the Defendant Foresters without consideration of the rights and interests of the Plaintiff and by allowing them to cut all the timber and render the land unusable for the Plaintiff.

b. by granting licenses to the Defendant Foresters without regulating other users of the Lands in such a way as to reasonably protect the interests of the Plaintiff and to reasonably prevent fundamental, substantial, and irreparable harm to the property rights and business interests of the Plaintiff including but not limited to his right to use of the land.

c. By granting licenses to the Defendant Foresters without taking reasonable steps to ensure that the other tenure holders using the same Lands, including but not limited to the Defendant Foresters, would consult with and accommodate the rights and interests of the Plaintiff.

d. By granting licenses to the Defendant Foresters without requiring compensation for the destruction and substantial interference of the Plaintiffs property rights and right to use the land.

60. As a result of the Crown's breach of contract, the Plaintiff has suffered and will suffer loss and damage including but not limited to loss of income and loss of suitable guiding and trapping territory.

The Claim for Breach of Fiduciary Duty

61. By consent of the McLeod Lake Indian Band, the Plaintiff holds Trapline No. 1 in part for and on behalf of the McLeod Lake Indian Band and has been granted the right to exercise the band's rights in relation to the territory subject to this trapline.

62. In addition or in the alternative, all aboriginal rights held by the McLeod Lake Indian Band in relation to the subject lands are exercised by the Plaintiff or have been assigned to the Plaintiff.

63. In the premises, the Plaintiff has a vested interest in the protection of the rights accruing to the McLeod Lake Indian Band giving the Plaintiff the right to assert rights on behalf of the McLeod Lake Indian Band.

64. At all material times, the Crown knew or ought to have known that the Plaintiff held Trapline No. 1 in trust for the McLeod Lake Indian Band and has been granted the right to exercise the band's rights in relation to the territory subject to the trapline.

65. At all material times, the Crown knew or ought to have known that all aboriginal rights held by the McLeod Lake Indian Band in relation the subject lands are exercised by the Plaintiff or have been assigned to the Plaintiff.

66. In the premises, the Crown had a duty or an obligation, or both, to meaningfully consult the Plaintiff on behalf of the McLeod Lake Indian Band prior to granting timber harvesting licenses to the Defendant Foresters.

67. The Crown has failed to undertake any consultation prior to granting the timber harvesting licenses.

68. In the circumstances, the Crown has breached its duties to both the Plaintiff and the McLeod Lake Indian Band.

69. The Crown's breach of fiduciary duty has caused loss and damage to the Plaintiff and to the McLeod Lake Indian Band.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims general damages.
2. The Plaintiff claims special damages.
3. The Plaintiff claims interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.
4. The Plaintiff claims costs.
5. Such other relief as this Honorable Court may deem just in the circumstances.

Part 3: LEGAL BASIS

The Plaintiff relies on the laws of equity, and the common law of torts, contract, and aboriginal law.

VII. SCHEDULE B

Amended February ____, 2016
Pursuant to an Order of Justice _____
Made on February ____, 2016

Form 1
(Rule 3-1(1))

File No. 1343188
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Harry Chingee

Plaintiff(s)

And

- (1) Her Majesty the Queen in Right of the Province of British Columbia;
- ~~(2) Canadian Forest Products Ltd~~
- ~~(3) Conifex Mackenzie Forest Products Inc.~~
- ~~(4) Lakeland Mills Ltd~~
- ~~(5) Mackenzie Fiber Management Corp.~~
- ~~(6) Winton Global Lumber Ltd~~
- (2) 813090 BC Ltd.;
- (3) 550031 BC Ltd.;
- (4) Dig Deep Ventures Ltd.;
- ~~(5) Dollar Saver Lumber Ltd.;~~
- ~~(6) Duz Cho Logging Ltd.;~~
- (5) EKO Logging Ltd.;
- (6) JEM Industries Inc.;
- (7) J.V. Logging Ltd.;
- (8) M.G. Logging and Sons Ltd.;
- ~~(9) Chief and Council of McLeod Lake Indian Band and McLeod Lake Indian Band;~~
- (9) MJM Forestry Ltd.;
- (10) SDN Forest Ventures Inc.;
- (11) Treeco Timber Corp.;
- (12) Timberspan Wood Products Inc.;
- ~~(13) Wayne Telford;~~
- (14) Loris Bedetti; and
- (15) Arnold Bremner

Defendant(s)

AMENDED AMENDED NOTICE OF CIVIL CLAIM

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

This action has been started by the plaintiff(s) for the relief set out in part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT AGAINST YOU MAY BE MADE IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

Claim of the Plaintiff(s)

Part 1: STATEMENT OF FACTS

Background

1. The Plaintiff, Harry Chingee, is a businessman, who resides in Prince-George McLeod Lake, British Columbia.
2. The Defendant, Her Majesty the Queen in right of the Province of British Columbia (“the Crown”), represents the government of British Columbia pursuant to Section 7 of the *Crown Proceedings Act*, RSBC 1996 c. 89.
- ~~3. The Defendant, Canadian Forest Products Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
- ~~4. The Defendant, Conifex Mackenzie Forest Products Inc., is a company incorporated pursuant to the laws of British Columbia.~~
- ~~5. The Defendant, Lakeland Mills Ltd., is a company incorporated pursuant to the laws of British Columbia.~~
- ~~6. The Defendant, Mackenzie Fiber Management Corporation, is a company incorporated pursuant to the laws of British Columbia.~~
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13. The Defendant, EKO Logging Ltd., is a company incorporated pursuant to the laws of British Columbia.
14. The Defendant, JEM Industries Inc., is a company incorporated pursuant to the laws of British Columbia.
- ~~15. The Defendant, J.V. Logging Ltd, is a company incorporated pursuant to the laws of British Columbia.~~

16. The Defendant, M.G. Logging and Sons Ltd., is a company incorporated pursuant to the laws of British Columbia.
- ~~17. The Defendant, McLeod Lake Indian Band, is an Indian Band registered pursuant to the Indian Act as Band No. and is represented by its Chief and Council.~~
18. The Defendant, MJM Forestry Ltd., is a company incorporated pursuant to the laws of British Columbia.
19. The Defendant, SDN Forest Ventures Inc., is a company incorporated pursuant to the laws of British Columbia.
20. The Defendant, Treeco Timber Corp., is a company incorporated pursuant to the laws of British Columbia.
21. The Defendant, Timberspan Wood Products Inc., is a company incorporated pursuant to the laws of British Columbia.
- ~~22. The Defendant, Wayne Telford is a logger who resides in or around Prince George, British Columbia.~~
23. The Defendant, Loris Bedetti, is a logger who resides in or around Prince George, British Columbia.
24. The Defendant, Arnold Bremner, is a logger who resides in or around Prince George, British Columbia.
25. The 2nd through 15th Defendants shall be collectively referred to as the Defendant Foresters.
26. At all material times, the Plaintiff is and was the holder of Guiding Territory Certificate No. 700023 (the "Guiding Certificate"), issued by the Crown pursuant to the *Wildlife Act*, RSBC 1996 c. 488 (the "*Wildlife Act*").
27. At all material times, the Plaintiff is and was the holder of a Registered Trapline, Registration No. TR0716T011 (the "Trapline No. 1"), issued by the Crown pursuant to the *Wildlife Act*.
- 27.1 In the alternative, at all material times, the Plaintiff is and was the holder of Trapline No. 1 as a trustee for the benefit of McLeod Lake Indian Band and Frederick Inyallie and holds his interest on trust for the said beneficiaries.
28. At all material times, the Plaintiff and Wesley Chingee are and were the holders of a Registered Trapline, Registration No. TR0723T006 (the "Trapline No. 2"), issued by the Crown pursuant to the *Wildlife Act*.
- 28.1 In the alternative, at all material times, the Plaintiff is and was the holder of Trapline No. 2 as a trustee for the benefit of Jim Chingee and Wesley Chingee and

holds his interest on trust for the said beneficiaries.

29. At all material times, the Crown was the owner of the lands subject to the Guiding Certificate and the two Traplines (the "Lands").
30. At all material times, the Crown operated and continues to operate B.C. Timber Sales to manage the sale of Crown timber on ~~Crown Lands~~ the Lands.
31. At all material times, the Defendant Foresters were the holders of timber licenses and/or other forms of forestry tenures permitting them to enter upon the Lands and remove various stands of timber.
32. At all material times, some or all of the Defendant Foresters also carried on various other forestry activities in relation to the Lands, including but not limited to pest control, road constructions and maintenance.

The Claim in Nuisance and Trespass

33. At all material times, the Plaintiff was the legal and beneficial owner of all of the rights which were attached to the Guiding Certificate including, but not limited to the right to obtain a guiding license thus permitting the Plaintiff to enter upon the Lands for the purposes of guiding and the right to profit from his guiding.
- 33.1 At all material times, the Plaintiff was the legal and beneficial owner of all the rights which attach to the guiding licenses granted to him by the Crown.
34. The Guiding Certificate granted the Plaintiff exclusive rights over the guiding privileges described in the certificate on the Lands.
35. At all material times, the Plaintiff was the legal and beneficial owner of all of the rights which were attached to the two Traplines including, but not limited to the exclusive right to enter upon the Lands for the purposes of trapping and the right to profit from his trapping.
- 35.1 In the alternative, at all material times, as trustee, the Plaintiff was the legal owner of all of the rights which were attached to the two Traplines including, but not limited to the exclusive right to enter upon the Lands for the purposes of trapping and the right to profit from his trapping.
36. In the premises, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute a profit a prendre in favour of the Plaintiff.
37. In the alternative, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute property rights owned exclusively by the Plaintiff which granted the Plaintiff a substantial degree of use and occupation over the Lands.
- 37.1 In the further alternative, the rights possessed by the Plaintiff as the holder of the Guiding Certificate and/or the Traplines constitute a right to use and substantially occupy the Lands.

38. The value of the profit a prendre or other property or contractual rights possessed by the Plaintiff is dependent in whole or in part on the availability of game for hunting and trapping, the vitality of the forest, and the amount of forested area on the Lands.
39. From July 2009 to the present time, the Crown has from time to time and continuously throughout the period granted cutting licenses to the Defendant Foresters permitting them the right to enter upon and remove timber from the Lands.
40. From July 2009 to the present time, the Defendant Foresters have from time to time and continuously throughout the period entered upon and removed timber from the Lands. The particulars are as follows:
- a. ~~Since 2010 and ongoing throughout the period up to and including the date of this action, the Defendant, Canadian Forest Products Ltd, has entered upon and removed timber from various parts of the Lands including but not limited to that part of the Lands subject to TFL 30.~~
 - b. ~~Since 2010 and ongoing throughout the period up to and including the date of this action, the Defendants, Winton Global Lumber Ltd and Lakeland Mills Ltd, have entered upon and removed timber from various parts of the Lands including but not limited to the lands referred to as the "Winton Global and Lakeland Mills operating areas".~~
 - c. ~~Since 2010 and ongoing throughout the period up to and including the date of this action, the Defendant, Conifex Mackenzie Forest Products Inc, has entered upon and removed timber from various parts of the Lands.~~
 - d. ~~Since 2010 and ongoing throughout the period up to and including the date of this action, the Defendant, Mackenzie Fibre Management Corporation, has entered upon and removed timber from various parts of the Lands including but not limited to that part of the Lands subject to FLTC A87345.~~
 - e. ~~Since 2008 and ongoing throughout the period up to and including the date of this action, the Defendants, Duz Cho Logging Ltd and McLeod Lake Indian Band, have entered upon and removed timber from various parts of the Lands including but not limited to that part of the Lands subject to TFL 30.~~
 - f. Between March 25, 2010, and June 25, 2013, the Defendant, EKO Logging Ltd, entered upon and removed timber from that part of the Lands subject to TSL A85802.
 - g. ~~Between July 22, 2010, and May 4, 2011, the Defendant, Wayne Graham Telford, entered upon and removed timber from that part of the Lands subject to TSL A84867.~~
 - g.1 ~~After May 4, 2011, and continuing to the present, the Defendant, Hartwood Holdings Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A84867.~~
 - h. Between October 21, 2011, and October 11, 2012, the Defendant,

- 0813090 BC Ltd, entered upon and removed timber from that part of the Lands subject to TSL A84919.
- i. Since December 19, 2011, the Defendant, 550031 BC Ltd, entered upon and removed timber from that part of the Lands subject to TSL A87623.
 - j. Between March 31, 2010 and March 30, 2012, the Defendant, Loris Bedetti, entered upon and removed timber from that part of the Lands subject to TSL A84362.
 - k. Between April 9, 2010 and May 8, 2012, the Defendant, Arnold Joseph Bremner, entered upon and removed timber from that part of the Lands subject to TSL A84865.
 - l. Between January 4, 2011, and July 3, 2012, the Defendant, Treeco Timber Corp, entered upon and removed timber from that part of the Lands subject to TSL A85832.
 - m. Between March 17, 2010 and March 16, 2012, the Defendant, Dig Deep Ventures Inc, entered upon and removed timber from that part of the Lands subject to TSL A84864.
 - n. Between April 27, 2011 and December 13, 2012, the Defendant, Dig Deep Ventures Inc, entered upon and removed timber from that part of the Lands subject to TSL A87613.
 - n.1 After December 13, 2012, the Defendant MJM Forestry Ltd entered upon and removed timber from that part of the Lands subject to TSL A87613.
 - o. Between March 17, 2011 and March 16, 2013, the Defendant, Dig Deep Ventures Inc, entered upon and removed timber from that part of the Lands subject to TSL A84488.
 - p. Between December 2, 2011 and May 1, 2013, the Defendant, Timberspan Wood Products Inc, entered upon and removed timber from that part of the Lands subject to TSL A88372.
 - q. Between January 27, 2011, and July 26, 2012, the Defendant, JEM Industries Inc, entered upon and removed timber from that part of the Lands subject to TSL A88218.
 - r. Between October 18, 2010, and November 17, 2012, the Defendant, MJM Forestry Ltd, entered upon and removed timber from that part of the Lands subject to TSL A85833.
 - s. Since November 2, 2012, the Defendant, M.G. Logging & Sons Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88847.
 - t. Since January 8, 2013, the Defendant, M.G. Logging & Sons Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88559.
 - u. Since 2013, the Defendant, J. V. Logging Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A88473.

- v. Between December 1, 2010 and March 24, 2011, the Defendant, SDN Forest Ventures Inc, entered upon and removed timber from that part of the Lands subject to TSL A86214.
 - v.1 ~~After March 24, 2011 and continuing through to the present, the Defendant, All Wood Fibre Ltd has entered upon and removed timber from that part of the Lands subject to TSL A86214.~~
 - w. ~~Since July 15, 2011, the Defendant, Dollar Saver Lumber Ltd, has entered upon and removed timber from that part of the Lands subject to TSL A84917.~~
41. ~~Although The Crown purported to act acted pursuant to statutory authority in granting the timber licenses to the Defendant Foresters ~~the Crown exceeded this statutory authority. This statutory authority is governed by the Forest Act, the Forest and Range Practices Act, and the Wildfire Act but is also governed by various other regulations and standards. In particular, the Crown has authority to grant timber licenses; but by implication of the Statutory regime permitting the use of Crown Lands and Crown resources by various licencees, the Crown cannot not grant such licenses without accommodation, consultation, and consideration of the proprietary and other interests of other license holder using the same lands, including the Plaintiff's proprietary and other interests in relation to the Lands that are the subject of this proceeding or, in the alternative, without requiring accommodation, consultation, and consideration of the proprietary and other interests of other license holders using the same Lands, including the Plaintiff's proprietary and other interest in relation to the Lands that are subject of this proceeding.~~~~
- 41.1 ~~Although the licenses issued permitting the Defendant Foresters to harvest the trees subject to the license, the licenses granted to the Defendant Foresters were subject to limits set out in the timber license documents. The limits relevant to this claim are:~~
- a. ~~The licensee must give the Plaintiff at least 14 day's advance notice before commencing activities on Lands.~~
 - b. ~~The licensee must not otherwise unreasonably interfere with with the proprietary interests or other interest holders, including but not limited to the Plaintiff.~~
- 41.2 ~~The licenses granted to the Defendant Foresters were also subject to expectations imposed by the Crown on licensees contained in a policy manual, A Practical Guide to Effective Coordination of Resource Tenures (the "Guide"). Although the Guide is not itself policy, the Guide refers to Crown expectations of the Defendant Foresters as follows:~~
- a. ~~The licensee must give other tenure holders at least 14 day's advance notice before commencing activities on the Lands.~~
 - b. ~~The licensee must meaningfully consult the Plaintiff prior to commencement of harvesting.~~

- c. ~~The licensee must reasonably accommodate the interests of other tenure holders such as the Plaintiff.~~
- 41.3 ~~The Plaintiff pleads and relies on the terms of the individual licenses granted to the Defendant Foresters and the expectations and duties referred to in the Guide.~~
- 41.4 ~~By virtue of the statutory regime, the terms of the harvesting licenses granted to the Defendant Foresters and the expectations and duties referred to in the Guide, the Defendant Foresters harvesting of timber on the Lands becomes lawful only after reasonable notice is given to other tenure holders and by avoiding unreasonable interference with other tenure holders' interests including but not limited to reasonable accommodation, consultation and consideration with other tenure holders.~~
- ~~40.1 The Crown permitted the Defendant Foresters to enter upon and remove timber from the Lands without accommodation, consultation and consideration of the Plaintiff's proprietary and other interests, or without requiring accommodation, consultation and consideration the consideration of the Plaintiff's proprietary and other interests,~~
- ~~42. By permitting the Defendant Foresters to enter upon and remove timber from the Lands without ensuring accommodation, consultation, and consideration of the Plaintiff's proprietary and other interests by the Defendant Foresters, or without requiring accommodation, consultation of consideration the consideration of the the Plaintiff's proprietary and other interests by the Defendant Foresters, the Crown has unreasonably or unlawfully interfered with and injured the Plaintiff's profit a prendre, other property rights, or right to use the Lands and has interrupted and substantially interfered with the Plaintiff's business interest associated with those rights and the right to use the Lands.~~
- ~~42.1 Furthermore, and in the alternative, the Crown by its actions described above has effectively extinguished the proprietary and other rights of the Plaintiff without lawful authority to do so.~~
43. Although the Defendant Foresters entered upon and removed timber from the Lands pursuant to timber licenses which were ~~validly~~ validly granted to them by the Crown, the Defendant Foresters did so without adequate or any notice and without accommodation, consultation, or consideration of the Plaintiff or the Plaintiff's proprietary and other interests as was required by the licence documents and the Guide.
- ~~43.1 Furthermore, the Defendant Foresters while carrying out the activities permitted by licenses, have reduced the wildlife on the Lands, compromised the vitality of the forest on the Lands and reduced the amount of forested area on the Lands.~~
44. ~~Furthermore, by~~ As a result of their failure to comply with the terms of the licenses granted to them and by their failure to adhere to the expectations of the Guide while conducting or while in the course of carrying out their business activities, the Defendant Foresters have acted unlawfully and have unreasonably and unlawfully disturbed, interfered with and injured the Plaintiff's two Traplines profit a prendre and other rights of use and occupation of the Lands.
- ~~44.1 The Authority granted to the Defendant Foresters to enter upon the Land did not permit them to enter upon the Lands and remove Timber from the Lands and~~

conduct their otherwise licenced activities on the Lands without accommodation of, consultation of, and consideration of the Plaintiff's proprietary and other interests and in such a way as to unreasonably interfere with the Plaintiff's proprietary and other interest.

45. By their actions, the Defendant Foresters ~~have unreasonably and unlawfully interfered with and injured the Plaintiff's profit a prendre, other property rights, or right to use and occupy the Lands and~~ have interrupted and substantially interfered with the Plaintiff's profit a prendre and the right to use and occupy the Lands and the business interests associated with those rights ~~and the right to use the Lands.~~
- 45.1 Furthermore, and in the alternative, the Defendant Foresters by their actions as alleged above, have effectively extinguished the proprietary and other rights of the Plaintiff in the Lands that have been harvested without lawful authority to do so.
- 45.2 In particular, the Defendant Foresters have clear-cut the Lands subject to their licenses rather than employing other more reasonable harvesting methods which were reasonably available and which would not have harmed or would have lessened the harm to the Plaintiff's profit a prendre and other rights of use and occupation.
- ~~45.3 The Crown, being the owner of the Lands subject to the Guiding Certificates, the two Traplines and the various timber licenses granted to the Defendant Foresters, knew or ought to have known or ought to have reasonably foreseen that the activities of the Defendant Foresters, if permitted by the Crown, could substantially interfere with the Plaintiff's profit a prendre, other property rights, or right to use the Lands and has interrupted and substantially interfered with the Plaintiff's business interests associated with those rights and the Plaintiff's right to use the Lands.~~
- 45.4 The Defendant Foresters by not providing any or inadequate notice and by not complying with the expectations and standards imposed on them by the Crown (as set out in the Guide) have thereby caused a nuisance which is not statutorily authorized and which has disturbed and substantially diminished the value and beneficial use of the Plaintiff's profit a prendre and other rights of use and occupation of the Lands.
- 45.5 This nuisance was created and continued by the Defendant Foresters by their acts and omission and further by the negligence of both the Defendant Foresters and the Crown as particularized below
46. In the premises, the Crown and Defendant Foresters have ~~unreasonably and substantially interfered with the profit a prendre, other property rights, or right of the Plaintiff to use the Lands and have~~ thereby committed a nuisance and/or other unlawful acts in relation to the Plaintiff's profit a prendre, other property rights or right to use the Lands.
47. As a result of the ongoing nuisances and other unlawful acts created by and caused by the Crown and the Defendant Foresters, the Plaintiff has suffered loss and damage. In particular, the Defendant Foresters substantially and unreasonably disturbed the Plaintiff's profit a prendre and other rights to use and occupy the Lands as follows:

- a. The Defendant Foresters have substantially reduced the wildlife on the Lands.
 - b. The Defendant Foresters have compromised the vitality of the forest by taking non merchantable and non commercial trees and brush
 - c. The Defendant Foresters have reduced the amount of forested area available for trapping and guiding.
- 47.1 Moreover, the damage caused to the profit a prendre by the Defendant Foresters and Crown will take up a substantial period of time to remedy. In particular, it will take up to 40 years for the forest to become usable again for the purposes of trapping.

The Claim in Negligence

48. ~~In addition,~~ The Crown, its agents and its servants, knew or ought to have known that the harvesting activities of the Defendant Foresters which were permitted by the Crown could cause damage to the Plaintiff and the business interests of the Plaintiff.
49. Moreover, the damage that could result from the harvesting activities of the Defendant Foresters was a reasonably foreseeable consequence of such activities.
- 49.1 The potential damage to the Plaintiff's interests caused by use of the Lands by other tenure holders such as the Defendant Foresters was so clearly apparent that the Crown has itself published the Guide which contained references to its expectations of all tenure holders. These expectations represent standards of conduct required of the Defendant Foresters as well as all other tenure holders. policies relating to the management of resource conflicts between tenure holders.
- 49.2 The Crown further inserted terms into the licenses granted to the Defendant Foresters requiring notice and prohibiting unlawful interference with the Plaintiff's interests.
- 49.3 Moreover, The Crown is statutorily empowered to regulate the activities of the Defendant Foresters. The Crown can even suspend or cancel licenses issued to the Defendant Foresters where the Defendant Foresters breach the statutory requirements or terms of the licenses.
- 49.4 The Plaintiff pleads and relies on Sections 76, 77 and 78 of the Forest Act.
50. In the premises, the Crown, its agents and its servants, owed a duty of care to the Plaintiff to take all reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by the Defendant Foresters' harvesting activities through lack of notice and lack of reasonable accommodation, consultation and consideration.
51. The Crown, its agents and servants, failed to take reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by the harvesting activities of the Defendant Foresters. In particular:
- a. The Crown issued licenses to the Defendant Foresters without taking any or adequate steps to ensure the Defendant Foresters complied with the terms of the license such as adequate notice to the Plaintiff and avoiding

unreasonable interference with the Plaintiff's interests.

- b. The Crown permitted the Defendant Foresters to enter upon and remove timber from the Lands without taking any or adequate steps to ensure that the Defendant Foresters gave notice and/or followed the Guide's expectations of accommodation, consultation, and consideration of the Plaintiff's proprietary and other interests.
- c. The Crown permitted the Defendant Foresters to enter upon and remove timber from the Lands ~~or~~ without enforcing its expectation of accommodation, consultation and ~~consideration~~ the consideration of the Plaintiff's proprietary and other interest by the Defendant Foresters as set out in the Guide.

51.1 In addition, the Crown at all material times, retained the discretion to suspend or cancel a harvesting license when a licensee failed to comply with obligations under its license.

51.2 Further, the Crown was obligated to use this discretion in good faith to ensure a reasonable accommodation of the Plaintiff's interests. On many occasions between June 2011 and June 2013, the particulars of which will be set out at trial, the Crown failed to exercise this discretion reasonably or at all, even when it knew or ought to have known that Defendant Foresters had failed to give notice or had failed to reasonably accommodate the interests of the Plaintiff contrary to the Crown's expectations set out in the Guide.

52. The negligence of the Crown, its agents and servants, as particularized above, has caused and continues to cause damage to the Plaintiff and the business interests of the Plaintiff including but not limited to physical damage and economic loss. In particular, as a result of permitting the continued harvesting activities of the Defendant Foresters, without requiring or enforcing expectations of notice or adequate notice, and without requiring or enforcing accommodation, consultation and consideration as set out in the Guide, the lands subject to the guiding certificate and two traplines and the business interests of the Plaintiff the Plaintiff's profit a prendre and other rights to use and occupy the Lands continue to be disturbed and have been further diminished in their value.

53. Each of the Defendant Foresters individually ~~also~~ knew, or ought to have known, or ought to have reasonably known that their harvesting activities could cause damage to the Plaintiff and the business interests of the Plaintiff.

54. Moreover, the damage that could result from their harvesting activities was a reasonable foreseeable consequence of their harvesting activities. In particular:

- a. The Crown made known to the Defendant Foresters in the Guide and otherwise that reasonable notice must be given and that harm could occur if notice was not given.
- b. The Defendant Foresters were directed in their licences to give notice and to avoid unreasonable interference with the Plaintiff's interests.
- c. The Crown made known to the Defendant Foresters of the Crown's expectations of accommodation, consultation and consideration of the Plaintiff's interests.

- d. The Crown made known to the Defendant Foresters through the Guide the harm that could occur if accommodation, consultation and consideration of the Plaintiff's interests did not occur.
 - e. The Defendant Foresters also knew that clear-cutting the forest rather than using other harvesting methods would substantially reduce the size of the forest, the available wildlife, and the vitality of the forest thus disturbing the Plaintiff's profit a prendre and other rights to use and occupy the Lands.
55. In the premises, each of the Defendant Foresters individually owed a duty of care to the Plaintiff to take all reasonable steps to ensure that the Plaintiff and the business interests of the Plaintiff were not harmed by their harvesting activities. This duty of care required among that the Defendant Foresters:
- a. Give reasonable notice prior to commencing harvesting.
 - b. Make reasonable efforts to accommodate other interest holder's interests.
 - c. Exercise due diligent to determine other tenures.
 - d. Communicate with other interest holders effective and often.
 - e. Ensure other tenure holders are involved
 - f. Make clear and meaningful agreements with other tenure holders.
- 55.1 Further, Defendant Foresters knew or ought to have known that they had discretion given to them in their licenses to choose the method of harvesting that they could employ to harvest the timber subject to their licenses and to choose what to cut. In particular, they knew that not all timber was required to be cut. Non-merchantable and non-commercial species could be left standing and brush and other forest cover could be left untouched in all the areas subject to the license.
56. Notwithstanding the discretion available to the Defendant Foresters to choose how to harvest the merchantable timber, and notwithstanding the expectation on them to accommodate, consult and consider the interests of the Plaintiff, each of the Defendant Foresters individually failed to take ~~an~~ reasonable steps to ensure that the Plaintiff and the business activities of the Plaintiff were not harmed by their harvesting activities.
57. The negligence of each of the Defendant Foresters individually has caused and continues to cause damage to the Plaintiff and the business interests of the Plaintiff. In particular, as a result of their harvesting activities without notice or adequate notice, and without taking reasonable steps of accommodation, consultation and consideration as set out in the Guide, ~~the lands subject to the guiding certificate and two traplines and the business interests of the Plaintiff~~ the Defendant Foresters have unreasonably disturbed and diminished the value of the Plaintiff's profit a prendre and other rights to use and occupy the Lands diminished in their value.

The Claim in Breach of Contract

- ~~58. The license agreements granted to the Plaintiff by the Crown necessarily contained an implied contractual duty of good faith on the part of the Crown not to act in such a way that its acts would defeat the very purpose and objective of the license agreements.~~
- ~~59. The Crown failed to perform this contractual duty when it granted timber harvest licenses to the Defendant Foresters. In particular, the Crown breached this duty as follows:~~
- ~~a. by granting licenses to the Defendant Foresters without consideration of the rights and interests of the Plaintiff and by allowing them to cut all the timber and render the land unusable for the Plaintiff.~~
 - ~~b. by granting licenses to the Defendant Foresters without regulating other users of the Lands in such a way as to reasonably protect the interests of the Plaintiff and to reasonably prevent fundamental, substantial, and irreparable harm to the property rights and business interests of the Plaintiff including but not limited to his right to use of the land.~~
 - ~~c. By granting licenses to the Defendant Foresters without taking reasonable steps to ensure that the other tenure holders using the same Lands, including but not limited to the Defendant Foresters, would consult with and accommodate the rights and interests of the Plaintiff.~~
 - ~~d. By granting licenses to the Defendant Foresters without requiring compensation for the destruction and substantial interference of the Plaintiff's property rights and right to use the land.~~
- ~~60. As a result of the Crown's breach of contract, the Plaintiff has suffered and will suffer loss and damage including but not limited to loss of income and loss of suitable guiding and trapping territory.~~

The Claim for Breach of Fiduciary Duty

- ~~61. By consent of the McLeod Lake Indian Band, the Plaintiff holds Trapline No. 1 in part for and on behalf of the McLeod Lake Indian Band and has been granted the right to exercise the band's rights in relation to the territory subject to this trapline.~~
- ~~62. In addition or in the alternative, All aboriginal rights held by the McLeod Lake Indian Band in relation the subject lands Lands are exercised by the Plaintiff or have been assigned to the Plaintiff.~~

63. In the premises, the Plaintiff has a vested interest in the protection of the rights accruing to the McLeod Lake Indian Band giving the Plaintiff the right to assert rights on behalf of the McLeod Lake Indian Band.
64. ~~At all material times, the Crown knew or ought to have known that the Plaintiff held Trapline No. 1 in trust for the McLeod Lake Indian Band and has been granted the right to exercise the band's rights in relation to the territory subject to the trapline.~~
65. At all material times, the Crown knew or ought to have known that all aboriginal rights held by the McLeod Lake Indian Band in relation the subject lands are exercised by the Plaintiff ~~or have been assigned to the Plaintiff.~~
66. In the premises, the Crown had an obligation and fiduciary duty to meaningfully consult the Plaintiff on behalf of the McLeod Lake Indian Band prior to granting timber harvesting licenses to the Defendant Foresters.
67. The Crown has failed to undertake any consultation prior to granting the timber harvesting licenses.
68. In the circumstances has breached its duty to both the Plaintiff and the McLeod Lake Indian Band.
69. The Crown's breach of fiduciary duty has caused loss and damage to the Plaintiff and to the McLeod Lake Indian Band, including but not limited to loss of cultural identity and dignity.

Part 2: RELIEF SOUGHT

1. The Plaintiff claims general damages.
2. The Plaintiff claims special damages.
3. The Plaintiff claims interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.
4. The Plaintiff claims costs.
5. Such other relief as this Honorable Court may deem just in the circumstances.

Part 3: LEGAL BASIS

The Plaintiff relies on the common law of nuisance and negligence. The Plaintiff also relies

on the law ~~of Contract and the law of~~ fiduciary duty as it relates to Aboriginal rights and title.