COURT OF APPEAL FOR ONTARIO

CITATION: Aylmer Meat Packers Inc. v. Ontario, 2022 ONCA 579
DATE: 20220810
DOCKET: C68799

Lauwers, Roberts and Nordheimer JJ.A.

BETWEEN

Aylmer Meat Packers Inc.

Plaintiff (Appellant)

and

Her Majesty the Queen in Right of Ontario
and the Attorney General of Canada

Defendants (Respondent)

Jonathan C. Lisus and Zain Naqi, for the appellant

Darrell Kloeze and Adam Mortimer, for the respondent

Heard: June 1, 2022

On appeal from the judgment of Justice Kelly C. Tranquilli of the Superior Court of Justice, dated October 5, 2020, with reasons reported at 2020 ONSC 6053.

Lauwers J.A.:

I. OVERVIEW

[1] Officials from the Ontario Ministry of Agriculture, Food and Rural Affairs took control of an abattoir in August 2003. After 19 months, they returned control to the owners, Aylmer Meat Packers Inc., but by then the business was destroyed. Eventually the abattoir and the land on which it stood were sold to pay outstanding

municipal taxes. The trial judge dismissed Aylmer's claim for tort damages in negligence, and trespass and conversion.

[2] I would allow the appeal in part for the reasons that follow.

[3] The action (and the appeal) turns principally on the trial judge's duty of care analysis and on the conduct of officials from the Ministry of Agriculture, Food and Rural Affairs (which I will sometimes call the Ministry and sometimes OMAF), specifically, whether their conduct breached any duty of care owed by the Ministry to Aylmer and caused Aylmer's losses.

[4] This appeal presents the following negligence law issues for determination:

1. Did the Ministry owe Aylmer a private law duty of care in exercising its regulatory responsibilities?
2. If so, did Ministry officials fail to meet the standard of care?
3. If so, did the Ministry's breaches cause Aylmer's losses?
4. If so, what are Aylmer's damages?

[5] After the factual overview, I address each of the issues in turn.

II. FACTUAL OVERVIEW

[6] I set the regulatory context, then describe the investigation of Aylmer and the resulting charges, and end with a review of the trial judge's factual findings.

(1) The Regulatory Context

[7] In 2003, the licensing and operation of provincial abattoirs was overseen by OMAF under the *Meat Inspection Act (Ontario)*, R.S.O. 1990, c. M.5. Ministry meat inspectors were required to assess and approve each animal immediately before slaughter and the carcass and some entrails after slaughter. An approved carcass was ink-stamped. A carcass not approved was to be destroyed.

[8] Aylmer operated one of the busiest abattoirs in Ontario. It specialized in processing cows at the end of their dairy production and cows that were unable to stand or walk but were otherwise healthy for slaughter and processing.

(2) The Investigation and Charges

[9] In early 2003, a confidential informant advised the Ministry manager responsible for overseeing Aylmer that the plant was unlawfully processing, for human consumption, sick and disabled animals, as well as stock that had died from a cause other than slaughter, which is prohibited under the *Dead Animal Disposal Act*, R.S.O. 1990 c. D.3. The informant also alleged that Aylmer employees used an illegal approval stamp on uninspected carcasses.

[10] This information prompted inspectors from the Ministry of Natural Resources ("MNR") to conduct covert surveillance between May and August 2003. They saw suspicious activity suggestive of breaches of the *Meat Inspection Act* and other statutory requirements. On August 21, 2003, MNR inspectors executed search

warrants of Aylmer's plant and related properties with the assistance of the Ontario Provincial Police. Evidence was seized in support of the investigation of Aylmer for breaches of the *Meat Inspection Act* and other provincial legislation. The investigators discovered unauthorized federal meat packaging material and informed the Canadian Food Inspection Agency, which issued a meat recall and began investigating breaches of federal law.

[11] The Aylmer abattoir ceased doing business that day. Aylmer was forced to sell off some cattle and euthanize others. OMAF occupied the plant and retained control of the plant and the meat stored there for the next 19 months. Shortly after the Ministry took control of the plant, the freezer began to malfunction and the meat began to spoil. The Ministry undertook some repairs in 2004, but the freezer never maintained optimal temperatures to preserve the meat. The Ministry destroyed the meat in March 2005 and returned the keys to the plant.

[12] The OPP charged Aylmer, its principal, Walter Richard "Butch" Clare, and his two sons, Jeff and Jay, with fraud, conspiracy, forgery, selling meat unfit for human consumption, deceptive labeling of meat, and for unlawfully possessing bags bearing a federal meat inspection legend and selling meat in that packaging. In 2007, Aylmer and Butch Clare pleaded guilty to selling meat that had not been inspected and to selling meat wrapped in bags bearing an unauthorized federal meat inspection legend. They were fined, and each was sentenced to one year of

probation. All the other charges were withdrawn, including those against Clare's sons, Jeff and Jay Clare.

(3) Factual Findings at Trial

[13] Butch and Jeff Clare both testified that the confidential informant had provided false information. They asserted that there was not "one ounce" of uninspected meat at the plant in August 2003. Each also denied that Aylmer ever processed dead stock.

[14] The trial judge did not accept this assertion. She relied on the Agreed Statement of Facts filed with the criminal court and on the evidence provided by the MNR investigators. The trial judge, at para. 45, distilled several "key admissions" from the Statement:

> a. On 5 occasions between May 11 and August 19, 2003, MNR investigators observed nine apparently dead cows being taken into the plant after ministry inspection staff had left for the day;
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> b. On August 20, 2003, the night before the execution of the search warrant, MNR investigators observed and videotaped a pickup truck and trailer arrive with a dead cow that was taken into the plant and presumably processed;
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> c. Aylmer employees confirmed that the freshly dressed cow carcass the MNR and OPP found hanging in the cooler when the search warrant was executed was from the dead cow observed being taken into the plant the night before.

> d. Biological samples were taken from the dressed cow carcass, a cow hide located in the hide shed, a cow liver located in a rendering truck parked on site and a set of knives in an employee's locker. Testing confirmed that the DNA profiles of the samples were all the same.
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> e. More than 20 Aylmer employees told the OPP that they processed animals when ministry inspectors were not present during the years that Aylmer was in operation. The animals that were processed during these times were usually dead stock or old downer cows[1];
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> f. Employees and former employees also told the investigator that the uninspected animals were processed into meat the same way as inspected animals and that they would stamp an "Ontario Approved" inspection legend onto the uninspected carcass.

[15] The trial judge concluded: "By their pleas of guilty, Aylmer and Mr. Clare acknowledged that between October 1990 and August 21, 2003, Aylmer sold meat that had not been inspected in accordance with the provincial statutory scheme and was thereby unfit for human consumption, contrary to s. 4(b) of the *Food and Drugs Act*".

[16] The trial judge accepted that these admissions, which had been made under s. 655 of the *Criminal Code*, were not "conclusive in a subsequent civil or criminal proceeding", citing *R. v. Baksh*, 199 C.C.C. (3d) 201 (Ont. S.C.J.), at paras. 98-101, 119, affirmed, 2008 ONCA 116, leave to appeal refused, [2008] S.C.C.A.

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[1] The trial judge defined "downers", at para. 6, as "cows that were unable to stand or walk but were otherwise healthy for slaughter and processing."

No. 155. In making her own assessment, she heard testimony from the MNR investigators and from Butch and Jeff Clare.

[17] The trial judge found, at para. 68, that the admissions in the Agreed Statement of Facts "were reinforced by the compelling evidence of the MNR investigators, including the surveillance" and tended "to corroborate some of the material admissions contained within the Statement". She noted that: "The plaintiff's explanations do not provide an innocent explanation or put the MNR evidence in a different light". She added: "The plaintiff elected not to address this evidence and the plaintiff's explanations and the reasons for pleading guilty simply do not explain the observations and investigation findings".

[18] The evidence led the trial judge to conclude, at para. 69, that "there was reason to believe, on a balance of probabilities that uninspected meat was on the Aylmer premises". She added: "Given the nature of the suspected noncompliance, it was also reasonable for OMAF to be concerned about the conditions under which other species were processed at Aylmer, such as hogs and lamb, and to also detain those products".

[19] None of these factual findings is challenged by the appellant. I now turn to the analysis of the issues raised by this appeal.

III. ANALYSIS

[20] I consider the governing principles and their application under each issue.

(1) Did the Ministry owe the abattoir's owner, Aylmer, a private law duty of care to act reasonably in exercising its regulatory responsibilities?

[21] Aylmer argues that the Ministry owed it a duty to act reasonably in exercising its regulatory responsibilities in suspending the abattoir licence, in occupying its plant, and in storing and destroying the detained meat.

(a) The Governing Principles – *Anns/Cooper* Overview

[22] In order to ground a private law duty of care in negligence when the actions of public bodies adversely affect the private interests of regulated entities, three elements are necessary: the harm complained of must have been reasonably foreseeable; there must have been sufficient proximity between the plaintiff and the governmental defendant, such that it would be fair and just to impose a duty of care on the defendant; and, there must be no residual policy reasons for declining to impose such a duty.[2] The last two elements comprise the two-stage *Anns/Cooper* analysis.

[23] The trial judge found it to be "reasonably foreseeable that OMAF's actions in occupying Aylmer's abattoir, suspending Aylmer's licence to operate and detaining Aylmer's meat product would harm Aylmer's economic interests": at

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[2] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38, [2007] 3 S.C.R. 83. See, also, *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

para. 76. This case, therefore, hinges on the outcome of the two-stage *Anns/Cooper* analysis, to which I now turn.

(i) The first *Anns/Cooper* stage: Is there sufficient proximity?

[24] The term "proximity" in the context of public actors is generally used in the authorities to characterize the type of relationship in which a duty of care arises from a statute or through the interactions between the governmental actor and the plaintiff in the operation of a statutory scheme.[3] The court must consider whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. If the case does not fall into a recognized category, then the court considers whether the case is one for which a new duty of care should be recognized: *Cooper*, at para. 31.

[25] The key cases in the evolution of the *Anns/Cooper* test after *Cooper*, in the context of the negligence of government agencies, are *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; and, *Nelson (City) v. Marchi*, 2021 SCC 41.

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[3] The statute provides some of the relevant context for assessing the sufficiency of proximity between the parties: *Cooper*, at para. 43; *Edwards*, at para. 9; *Syl Apps*, at paras. 27-29; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 75.

[26] In *Nelson*, the Supreme Court explained, at para. 41, that: "[a]s a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual" (citing *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at p. 1244).

[27] But *Cooper* had introduced a potential stumbling block for plaintiffs that was later clarified in *Imperial Tobacco*. At para. 43 of *Cooper*, the court stipulated that, “the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed.” Because “that statute is the only source of his duties, private or public…[i]f a duty to investors with regulated mortgage brokers is to be found, it must be in the statute”. Plaintiffs did not fare well under this single-source stipulation.

[28] In *Imperial Tobacco*, McLachlin C.J. clarified *Cooper*. She identified three situations in which legislation could play a role in determining whether the governmental actor owes the plaintiff a *prima facie* duty of care. The first is where the legislation gives rise to a duty of care explicitly or by implication. The second is:

> [W]here the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. [Emphasis added].

The third type of situation combines the other two: *Imperial Tobacco*, at paras. 43-46.

[29] Courts determine proximity in new situations by "looking at expectations, representations, reliance, and the property or other interests involved", in order to "evaluate the closeness of the relationship between the plaintiff and the defendant", and by asking "whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant": *Cooper*, at para. 34. However, "[t]here is no definitive list" of factors: *Syl Apps*, at para. 30.

[30] I consider *Hill* to be somewhat analogous to this case. In *Hill*, the court recognized the tort of negligent investigation by police. McLachlin C.J. stated that while proximity requires the actions of the wrongdoer to have a sufficiently "close and direct" effect on the victim, this does not require physical proximity: at para. 29. The absence of a personal relationship, while an "important factor to consider", is "not necessarily determinative": at para. 30.

[31] In *Hill*, McLachlin C.J. noted that once an investigating police officer identifies a “particularized suspect”, “a close and direct relationship” arises between the officer and the suspect: at para. 33, even in the absence of “personal representations and consequent reliance”: at para. 34. This is because the “targeted suspect”, whose interests are directly affected, has a stake in the investigation: at para. 34.

[32] If the court finds proximity at the first *Anns/Cooper* stage, the second stage of the analysis comes into play.

(ii) The second *Anns/Cooper* stage: Are there residual policy reasons for declining to impose a duty?

[33] At the second stage of the *Anns/Cooper* analysis, the court determines whether there are residual policy reasons to decline to impose a duty of care on the governmental actor. A significant policy consideration is whether the imposition of negligence on the government actor would trigger a conflict with its public duty. As this court noted in *Williams v. Toronto (City)*, 2016 ONCA 666, 133 O.R. (3d) 663, at paras. 65-66: “The negative policy consequences of such a conflict could provide a compelling reason for refusing to find proximity: *Syl Apps*, at para. 28; *Fullowka*, at para. 72”.

[34] However, in *Hill*, McLachlin C.J. cautioned that “policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent”: at para. 48, because “a duty of care in tort law should not be denied on speculative grounds”: at para. 43. It is not sufficient for the defendant to posit an abstract and only “potential conflict”.

[35] In *Hill*, McLachlin C.J. dismissed the argument that a conflict might arise between the officer’s duty to prevent crime and a duty of care to the suspect, because the officer’s public duty “is not to investigate in an unconstrained manner”

but “in accordance with the law”, including tort law: at para. 41. She pointed out that “police might become more careful in conducting investigations if a duty of care in tort is recognized”, which she considered “not necessarily a bad thing”: at para. 56. This thought is consistent with Cromwell J.’s observation in *Fullowka*, that imposing a duty of care on mining inspectors would complement their statutory duty, not conflict with it.

[36] This is also the stage at which the court decides whether the government action at issue is a policy decision or an operational decision. As Brown J.A. noted in *Bowman v. Ontario*, 2022 ONCA 477, at para. 59: “at common law public authorities enjoy an immunity from suit for negligence for ‘true policy decisions’”.

[37] The basic principle was expressed in *Just*: because “the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions”, “[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors": at pp. 1239-40.

[38] The distinction between policy and operational decisions remains important but, as McLachlin C.J. noted in *Imperial Tobacco*, at para. 72, this “question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one”. There is no “stark dichotomy between two water-tight

compartments – policy decisions and operational decisions", because "decisions in real life may not fall neatly into one category or the other": at para. 86.

[39] In *Nelson*, the Supreme Court reflected, at para. 53, on McLachlin C.J.'s observations in *Imperial Tobacco*, and noted that in some cases, "the juxtaposition of core policy and operational implementation may clearly identify the decisions that should not be subject to court oversight as opposed to those which attract liability in negligence". As I interpret these comments, the converse would also be true; in some cases, it will be plain and obvious that only operational decisions are in play, not "core policy decisions". As I will explain, although in argument Ontario alluded to policy considerations to justify the Ministry's conduct, only its operational decisions are in play.

[40] I also note that it is no business of the court to micromanage operational decisions by governmental actors. The court must accord a reasonable margin of manoeuvre, margin of judgment, or range of discretion to the governmental actor in exercising its regulatory responsibilities. See, *Hill*, at paras. 54, 73. However, the existence of discretion is not to be taken into account in determining whether a duty of care exists, but rather, in specifying the standard of care: *Hill*, at para. 56.

(b) The Duty of Care in the Decision Under Appeal

[41] As noted, Aylmer argued to the trial judge that the Ministry owed it a duty to act reasonably in exercising its regulatory responsibilities in suspending the

abattoir licence, in occupying its plant, and in the storing and destroying the detained meat. Although the issue on appeal has narrowed to whether the Ministry's long occupation of the plant breached a possible duty of care to Aylmer, the detention of the meat forms part of the factual backdrop.

[42] The trial judge found, at para. 75, that the circumstances were "insufficient to establish a *prima facie* duty of care" based on "physical damage to property or person", which is a recognized category. In her view, the "claimed physical damage to [the meat] in these circumstances is too general and arises from a non-feasance in terms of OMAF's failure to maintain the freezer, as opposed to a direct and overt act".

[43] The trial judge then undertook the two-stage *Anns/Cooper* analysis and concluded, at para. 89, that, at the first stage: "the relationship between OMAF and Aylmer was not sufficiently proximate that it would be fair and just to impose a duty of care". At the second stage, she found, at para. 92, that "a private duty of care towards licensees cannot coexist with OMAF's public duties on the facts of this claim".

(c) The Duty of Care Principles Applied

[44] The trial judge's findings relating to the MNR's investigation establish conclusively that the actions of its investigators were reasonable and justified. The same factual findings establish that OMAF's initial actions in suspending Aylmer's

abattoir licence, detaining the meat, and occupying the plant were likewise reasonable and justified by the urgency of the situation. The issue is whether, with the passage of time, OMAF's actions in continuing to occupy the plant became unreasonable and were not justified.

[45] Three elements come into play. As noted, *Imperial Tobacco* specifies that at the first *Anns/Cooper* stage, the court considers whether the relevant legislation gives rise to a duty of care explicitly or by implication, or whether proximity arises from the specific interactions between the government and the plaintiff, alone, or in combination with the legislative provisions. At the second *Anns/Cooper* stage, the court considers whether there are residual policy reasons for declining to impose a duty of care. I assess the application of each of these elements.

(i) The Legislation

[46] The trial judge took the view that "the *Meat Inspection Act* does not disclose a legislative intention to confer a private law duty of care by OMAF towards the economic interests of abattoir operators": at para. 85. She found the Ministry's obligation to hold a hearing after suspending an abattoir licence to be "insufficient to establish a private law duty of care where the overall purpose of the statute is public health".

[47] Ontario argued to the trial judge that this court's decision in *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1,

leave to appeal refused, [2009] S.C.C.A. No. 259, was dispositive. River Valley sued the Canadian Food Inspection Agency and Health Canada for damages for negligently investigating whether its flock was infected by a potentially dangerous strain of salmonella. The trial judge distinguished *River Valley*, at paras. 83-84, on the basis of Laskin J.A.'s finding that three features of the federal legislation showed the intention to exclude a private law duty of care: the absence of any indication that a purpose of the statutory scheme was to protect the business interests of farmers; the existence of a compensation scheme to protect the interests of farmers harmed by CFIA's actions; and immunity provisions protecting the Crown and CFIA inspectors. The Ontario legislation in the present case does not have the last two features.[4]

[48] The trial judge invoked, at para. 87, the language in *River Valley*: "Mere targeting in the context of a statutory regime under which a government agency is responsible for animal and public health is not enough to establish proximity: *River Valley, supra* at para. 59". She also invoked the decision in *Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34, 358 D.L.R. (4th) 581, leave to appeal refused, [2013] S.C.C.A. No. 134, in which the court found that the CFIA did not owe a duty of care to a food producer for the negligent

[4] I observe in passing that although the trial judge did not take this view, arguably the first – protecting the economic interests of licence holders – could be understood to be one of the purposes for requiring a hearing on the suspension of an abattoir licence or the condemnation of meat.

inspection of carrots. The trial judge stated, at para. 87: “Although proximity may be created by a regulator’s conduct, it does not typically arise when the regulator is simply discharging his or her statutory responsibilities in the public interest: *Los Angeles Salad, supra* at para. 51”.

[49] I agree with the trial judge that *River Valley* is distinguishable on the bases she set out, but, more importantly, that case was decided before the Supreme Court’s clarification in *Imperial Tobacco* that, in addition to construing the statute, the court must have regard to whether proximity arose from specific interactions between the governmental actor and the plaintiff. I point out that the trial judge’s statement that “mere targeting” is not enough is inconsistent with McLachlin C.J.’s focus on the “targeted suspect” whose interests are at stake: *Hill*, at para. 34.

(ii) Specific Interactions

[50] The trial judge did not address directly whether the specific interactions between Aylmer and Ministry officials gave rise to a duty of care. She took the view, at para. 87, that there is “no evidence of dealings between the parties or representations made by OMAF to Aylmer outside of that regulatory relationship”. In my view, she took too narrow a view of what constitutes relevant specific interactions, in light of Imperial Tobacco’s approach, and particularly in light of McLachlin C.J.’s observation in *Hill* that targeting a suspect for investigation, even without more interaction, could bring a duty of care into existence.

[51] The relevant specific interactions include the manner and timing of:

- Suspending Aylmer's abattoir licence and failing to hold the prescribed hearing;
- Taking control of the plant, securing it, and forcing Aylmer's personnel to pass through security to gain access;
- Failing to maintain the freezer;
- Allowing the meat to spoil;
- Removing and destroying the meat; and
- Returning control of the plant to Aylmer.

These specific interactions were not the ordinary day-to-day regulatory contacts between Ministry personnel and a regulated abattoir.

[52] Although the trial judge instructed herself correctly on the principles of the *Anns/Cooper* analysis, as clarified in *Imperial Tobacco*, she did not correctly apply them. The specific interactions between the Ministry and Aylmer gave rise to a duty of care on the Ministry's part. Aylmer was targeted as a suspect in regulatory breaches, much like the suspect in *Hill*. The Ministry treated Aylmer as a "particularized suspect", so that "a close and direct relationship" arose because, as a "targeted suspect" whose interests are directly affected, Aylmer had a stake in the regulatory exercise of authority that attracted a duty of care. Nothing in the legislation relieved the Ministry of this duty of care.

[53] Further, the trial judge did not consider whether the Ministry owed Aylmer a duty of care relating to its 19-month occupation of the plant. In limiting her discussion of Aylmer's property interests to the Ministry's detention of the meat, the trial judge again took too narrow a view.

[54] Accordingly, the trial judge erred in failing to find that the relationship between OMAF and Aylmer was sufficiently proximate at the first *Anns/Cooper* stage, such that it would be fair to impose a duty of care on the Ministry. The duty of care was to ensure that the Ministry's regulatory actions did not unreasonably or unnecessarily harm Aylmer's business interests.

[55] I pause here to comment on the trial judge's finding that the Ministry's failure to maintain the freezer was an act of non-feasance, not a positive act, and, as such, insufficient to establish a *prima facie* duty of care. In *Childs*, McLachlin C.J. explained the distinction between nonfeasance and misfeasance. She noted that "[r]unning through" all of the situations in which the courts have found a positive duty to act and attached liability for not acting, the defendant has created the risk or has had "control of [the] risk": at para. 38. I explain below that the Ministry had "control" of the plant and the risk. See also, *Goodwin v. Goodwin*, 2007 BCCA 81, 279 D.L.R. (4th) 227, at para. 27. I add that the maintenance of the freezer was just one piece of the factual matrix that connected the Ministry and Aylmer in a duty of care relationship.

(iii) Residual policy reasons for declining to impose a duty

[56] This is the second *Anns/Cooper* stage. Ontario argues that:

> The statutory scheme that governed the relationship between [Aylmer] and Ontario did not contemplate Ontario accounting for [Aylmer]'s economic interests. Indeed, recognizing such a private duty to [Aylmer] would conflict with Ontario's ability to perform its duty to protect the public from unsafe meat and encourage confidence in the regulated meat industry as a whole.

[57] The trial judge accepted Ontario's policy-based argument. She noted, at para. 91, "the potential for conflict if OMAF must be mindful not only of the health of the public but the individual economic interests of the meat processors", citing *River Valley*. She considered the disputes over "whether the detained meat was fit for human consumption" and whether the Ministry should have released it to be examples "of the potential for conflict between the economic interests of an individual operator and the public interest in protecting the food supply". The trial judge concluded, at para. 92, that "a private duty of care towards licensees cannot coexist with OMAF's public duties on the facts of this claim".

[58] There are three errors in the trial judge's approach in refusing to recognize a duty of care based on residual policy concerns. First, it was inconsistent with the rigorous approach taken by the Supreme Court in *Hill* and *Fullowka*. The conflict between the economic interests of an individual operator and the public interest in protecting the food supply must be real and not speculative. The trial judge was

correct in determining that the Ministry was not obliged to release the detained meat to Aylmer because Mr. Clare would have tried to sell it, but she was wrong to focus only on the meat and not on the appropriateness of the Ministry's continued and lengthy occupation of the plant.

[59] Second, the trial judge did not give effect to *Hill* and similar authorities that reject the argument that recognition of a duty of care should be refused because it would have a "chilling effect" on government action: *Hill*, at paras. 56-58. In *Fullowka*, the Supreme Court rejected the Court of Appeal's assertion that "imposing a duty to carry out their public duties with reasonable care 'might cause [the regulators] to over-regulate or under-regulate in an abundance of caution'": at para. 73. In *Paradis Honey Ltd. v. Canada (Attorney General),* 2015 FCA 89, [2016] 1 F.C.R. 446, leave to appeal refused, [2015] S.C.C.A. No. 227, Stratas J.A. noted, at para. 98: "One can always speculate that recognizing a duty of care could have a chilling effect". He cautioned that: "Such a low standard would immunize government from liability in every case of bureaucratic ineptitude, no matter how substandard or damaging the misconduct may be". He concluded that: "No court anywhere has set the bar that low". See also, *Williams,* at paras. 66-67.

[60] The trial judge's third error was to conflate the duty of care with the standard of care. Confirming the approach taken by the court in *Hill*, Cromwell J. added, in *Fullowka*, that "any tension between the broader public interest with the immediate

demands of safety may be taken into account in formulating the appropriate standard of care": at para. 73.

[61] Ontario has not pointed to any specific conflict between the Ministry's regulatory duties and any duty of care to Aylmer in relation to the occupation of the plant after the investigation of the plant was completed at the end of October 2003 and the necessary meat samples were removed and stored elsewhere. Even with regard to the detained meat, the fact that a licensee might dispute a regulatory decision does not establish a conflict, but manages it; our legal system offers various ways of resolving such disputes that can and do accommodate urgency.

[62] To sum up on the duty of care, in undertaking the *Anns/Cooper* analysis to determine whether a new duty of care should be recognized, the trial judge erred in her approach to the interpretation of the legislation, in not taking into account the specific interactions between the Ministry and Aylmer, and in her consideration of residual policy reasons to decline to impose a duty of care on the Ministry. There is, in short, no residual policy reason for declining to impose a duty of care on the Ministry. In my view, the Ministry's duty of care was to ensure that its regulatory actions did not unreasonably or unnecessarily harm Aylmer's business interests.

(2) Did Ministry officials fail to meet the standard of care?

(a) The Governing Principles on the Standard of Care

[63] The standard of care in negligence is set by what a reasonable person would do in similar circumstances: *Hill*, at para. 69, *Nelson*, at para. 91. This rule applies to both private and governmental actors: *Nelson*, at para. 92, citing *Just*, at p. 1243. Perfection is not required. In *Hill*, for example, the applicable standard was that of a reasonable police officer. The standard of care accommodates the exercise of professional discretion, but this must "stay within the bounds of reasonableness" or "within the range of reasonableness". This is the margin of manoeuvre afforded to regulators. The standard of care also permits "minor errors or errors in judgment": *Hill*, at para. 73.

[64] The elements to be taken into account in determining the standard of care include "the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct (including professional standards) and statutory standards": *Hill*, at para. 70.

[65] Put simply, the standard of care applicable to the Ministry and its officials is that of a reasonable health and food safety regulator. Ordinarily, expert evidence is required to prove a professional standard of care and any breach, but not always. Sometimes, as in this case, the plain facts are enough to meet the test of common

sense: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, *per* Brown J., at para. 2.

(b) The Standard of Care in the Decision under Appeal

[66] The trial judge did not specify or define the standard of care to be applied to Ministry officials, but simply said: "if OMAF owed a private law duty of care to Aylmer, the court finds that OMAF did not breach the standard of care": at para. 142. However, her sense of what the standard of care required can be inferred from her analysis.

[67] I agree with the trial judge's conclusion, at para. 115, that "OMAF was not unreasonable in its refusal to release the detained meat", based on the expert evidence. She immediately noted that "questions arise from OMAF's failure to convene regulatory hearings, its decision to detain the meat at the Aylmer plant and the spoilage of the meat". However, the trial judge never considered the impact of the Ministry's decisions and the resulting long occupation of the plant on the Ministry's adherence to the standard of care.

(c) The Standard of Care Principles Applied

[68] Ontario asserts that it "had the statutory authority to detain any meat at …[Aylmer] plant premises under s. 85 of the Regulation" and adds that the Ministry had "by necessary implication, the authority to maintain detention at the [Aylmer]

plant premises". While Ontario had the statutory authority to detain the meat and to do so on the premises, this authority had to be exercised reasonably.

[69] The statutory authority to detain could not be reasonably interpreted to be indefinite. The 19-month occupation in this case was not a reasonable exercise of that statutory authority. Ontario made the oral argument, but then under questioning seemed to draw back from it, that the initial justification for taking control of the plant served to immunize the Ministry from accountability for its long occupation. There is no authority for that unsound position.

[70] Objectively, given that it eventually did so, the Ministry could have done at the end of October 2003 what it waited until March 2005 to do – remove the meat and vacate the plant. It would not be unreasonable to add a margin of a couple of months.

[71] What followed the Ministry's initially appropriate actions in detaining the meat was a litany of bureaucratic ineptitude. The trial judge's framing comments, at para. 133, bear repeating:

> The court agrees with Aylmer that OMAF's execution of its statutory duties does not allow the ministry to disregard the rights of its licensee. There are indeed aspects of OMAF's conduct that are troubling: the detention at the plant, the spoilage of the meat, the failure to offer regulatory hearings. It was not OMAF's finest hour. Analyzed in isolation, the reasonableness of OMAF's conduct could lead to a conclusion that it did not meet the standard of care.

I return to these observations below after setting the factual context.

[72] The trial judge considered the evidence and submissions under the following headings: the Ministry's refusal to release the detained meat; its failure to hold regulatory hearings; its detention of the meat at the plant; and, permitting the meat to spoil.

[73] On the detention of the meat, the trial judge noted, at para. 119:

> OMAF had authority to detain an animal, meat or meat product if it considered that it did not meet the requirements of the regulation. Authority over the meat was limited to inspecting and detaining it. It could not dispose of the meat without first providing an opportunity for a hearing: s. 85(1), (6); s. 87(1), (9).

[74] The trial judge noted, at para. 141, that the Ministry had the power to "direct that the detained meat be stored elsewhere".

[75] In a telling exchange in cross-examination, counsel for Aylmer put the following question to Ministry official Dr. Tom Baker:

> Q. There was no, there was no attempt to balance that $40,000.00 a month - which I think adds up to about three-quarters of a million dollars through to March of '05 - by going and get a competitive bid for instance at McLaughlin where the CFIA took its products to be held in frozen storage - there was no, it was never even a, any kind of attempt to find out what that would cost, was there?
>
> A. No

[76] The trial judge noted, at para. 127, that “once OMAF confirmed the meat was spoiled, it was ‘contaminated’ within the meaning of s. 1 of the regulation and OMAF then had jurisdiction to condemn the meat and dispose of it in accordance with the regulation: s. 1, 41, 74”. However, the meat was condemned only in October 2004 and, after skirmishing with Aylmer, which refused to consent to its condemnation, the Ministry destroyed the meat in March 2005: at para. 128.

[77] The Ministry had the statutory power to condemn the meat and destroy it much earlier than October 2004. OMAF knew that the meat was spoiling every day that the freezer was unable to maintain the required temperature. OMAF’s area manager, Edward Bailey testified that, “the meat had likely spoiled by late 2003”: at para. 126. In response to a question in oral argument, Ontario could not explain why the meat was not condemned in 2003, given the Ministry’s clear knowledge that the meat was spoiling.

[78] The meat spoiled because the Ministry, having noticed the malfunctioning freezer in September 2003, took no steps to repair it for 10 months. The trial judge noted, at para. 126, that some repairs were eventually authorized at an approximate cost of $20,000, but these were insufficient because “the temperature logs showed the freezer never maintained the required minimum temperature throughout the 19 months that OMAF was in possession of the plant”. This

situation troubled the trial judge, who set out the Ministry's explanation, at para. 131:

> OMAF submitted that budgetary reasons… influenced its decision-making regarding the freezer disrepair. The court did not hear any evidence on the particulars of such decision-making, other than that they generally wanted to avoid such a "spend".

[79] The trial judge's conclusion was damning: "The court agrees with the plaintiff that such budgetary reasoning is difficult to reconcile with OMAF's decision to spend in the range of $40,000 a month in security in order to detain the meat at the plant". She added, at para. 132, that Dr. Baker acknowledged in cross-examination that "one could reasonably conclude that OMAF deliberately allowed the meat to spoil", although she did not so find. The trial judge noted, at para. 140, that: "The malfunctioning freezer arguably ought to have triggered consideration to detaining the meat elsewhere".

[80] The trial judge's accurate observation was that the Ministry demonstrated "decision-making paralysis": at para. 135. This assessment is buttressed by the Ministry's own evidence. Aylmer argues cogently that the Ministry "did not even turn its mind to the nature, length, and manner of detention and occupation". Aylmer cites the following Ministry evidence, in my view, fairly:

> (a) Dr. Baker, the ultimate person with statutory authority, had no hand in any key decisions about detaining the meat;

> (b) Dr. Baker and his deputy on the ground, Mr. Bailey, admitted there was no documented plan or even an informal plan for occupation of the plant. No one internally questioned the occupation and no timelines were discussed. There was little or no active consideration about the detention;
>
> (c) No hearings were held about the licence suspension or detention of the meat in spite of the usual practice of holding hearings within two to four weeks;
>
> (d) No real effort was made to fix the freezer when problems were first noted, despite Dr. Baker acknowledging that an attempt to preserve the meat should have been made. Neither he nor Mr. Bailey could explain why the freezer was only serviced 10 months after temperature-control issues were noticed;
>
> (e) No thought was given to storing the detained meat off-site and returning the plant to Aylmer, even though it had been noted within weeks of occupation that the freezer was not maintaining the appropriate temperature. Dr. Baker was not even aware he had the regulatory power to order the meat to be detained elsewhere;
>
> (f) No thought was given to condemning the meat in a timely manner so the plant could be returned. Mr. Bailey admitted the meat had likely spoiled by the end of 2003. Dr. Baker had concluded from the outset that the meat was presumptively unfit for consumption. If OMAF had wanted to, the meat could have been condemned and the plant returned in a timely manner.

[81] However, the trial judge found none of the Ministry's actions to be breaches of the standard of care. She excused them as "errors in judgment": at para. 134. The trial judge did not cite authority, but in *Hill*, McLachlin C.J. noted at para. 73 that any professional "may make minor errors or errors in judgment which cause

unfortunate results". She explained that the law "distinguishes between unreasonable mistakes breaching the standard of care and mere 'errors in judgment' which any reasonable professional might have made" that do not breach the standard of care. None of the decisions at issue here were individually momentary lapses that might be described as "mere errors in judgment", and, taken together, they simply do not qualify. These were plainly instances of bureaucratic ineptitude that the Ministry's witnesses admitted they were unable to explain because they just did not put their minds to them.

[82] The trial judge commented, at para. 121, on why the Ministry did not hold the regulatory hearings required by the statute: "It is evident that the criminal investigation took precedence over the regulatory process, as demonstrated by the Attorney General's direction that the MNR suspend its regulatory investigation in deference to the broader criminal inquiry". It is well recognized that a regulator has the discretion to hold a required hearing in abeyance while related criminal proceedings are unfolding. But this does not excuse the regulator from otherwise complying with the standard of care.

[83] The trial judge also noted, at para. 123, Dr. Baker's explanation that the Ministry "did not remove the meat before March 2005 because it was hoped at the time that the outcome of the criminal investigation would provide certainty to what should be done with the meat". This statement by Dr. Baker seems odd, and odd

for the trial judge to accept. Once the investigations were done, and the samples on which the charges were laid taken away, the Ministry had no forensic responsibility for keeping the meat. Nor could the outcome of the criminal prosecution add any intelligence to what the Ministry knew. I point out that the Ministry disposed of the meat well before the outcome of the criminal process in 2007.

[84] At bottom, the trial judge excused the Ministry's actions on the ground that the circumstances were "unprecedented": at paras. 136, 140, and "extraordinary": at paras. 135, 162, in light of "intense media and public scrutiny": at para. 135. In doing so, she largely accepted Ontario's policy-based argument that because the Ministry was acting "to protect public welfare and safety", "its actions were reasonable in the extraordinary circumstances of an overarching" criminal prosecution that resulted in conviction: at para. 24.

[85] As I see it, the trial judge permitted the Ministry's articulation of its regulatory policy and purpose to overwhelm the careful legal analysis required under the *Anns/Cooper* test as clarified in *Imperial Tobacco* and applied in *Hill* and *Fullowka*. Had she followed that legal analysis as required, she would have grasped that the passage of time rendered what she described as the "unprecedented" and "extraordinary circumstances" quite mundane – what to do with the meat and when to return control of the plant to Aylmer. There was no cogent reason why the

Ministry did not attend to what was going on in the plant, and why the Ministry did not ask or answer these basic questions by the end of 2003. And there is no reason why the risk of these instances of ministerial ineptitude should fall on Aylmer. This was not a close call. On any measure, 19 months of occupation showed the regulator's outrageous disregard for the interests of the regulated entity to which it owed a duty of care. Taking all the evidence together, the trial judge's observation, at para. 33, that "the reasonableness of OMAF's conduct could lead to a conclusion that it did not meet the standard of care" was exactly right.

[86] The trial judge erred in accepting the Ministry's excuses as valid bases for denying that the Ministry breached the standard of care by occupying the plant well past any valid regulatory need for so doing. In my view that need stopped at the end of October. Allowing a reasonable margin of manoeuvre could extend that time by a few months to the end of 2003. There is no evidence that would justify a longer occupation by the Ministry.

(3) Did the Ministry's breaches cause the owner's losses?

(a) The Causation Governing Principles

[87] For it to incur liability for damages, the Ministry's conduct must have been a cause-in-fact of Aylmer's injury, based on the well-known "but for" test in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 6-10; and, *Donleavy v. Ultramar Ltd*., 2019 ONCA 687, at para. 63, *per* van Rensburg J.A.

[88] The Ministry must also have been the cause-in-law of Aylmer's injury. That is, the risk of the actual injury suffered by the plaintiff as a result of the defendant's wrongful conduct must not be so remote that it would not be foreseeable to a reasonable person in the defendant's position: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 79. And, see, *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, at para. 13, citing *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643.

(b) Causation in the Decision under Appeal

[89] The trial judge applied the "but for" test separately to each of the Ministry's actions: in failing to hold a timely hearing on the loss of the abattoir licence; in permitting the meat to spoil rendering it unsaleable; in detaining the meat at the plant; and, in causing losses to Aylmer through the Ministry's occupation. On this appeal only the last is in issue.

[90] The trial judge's piecemeal approach to these elements is problematic. She addressed the Ministry's occupation of the plant at para. 147:

> The plaintiff alleges OMAF's use of the plant to detain the meat for 19 months caused a loss of use of the plant. However, the evidence fails to establish that but for the province's detention, the plaintiff would have had use of the plant. The plant could not be used by the plaintiff for its intended operation as an abattoir, given the provisional suspension of its licence.

[91] It seems that the trial judge is saying that there was no harm in the Ministry's occupation since, lacking a licence, Aylmer could not have used the plant anyway. This seems to discount the effect of the Ministry's occupation of the plant on Aylmer's efforts to sell it.

[92] Aylmer led evidence to show that the Ministry's occupation of the plant deprived it of the opportunity to sell it at a time when abattoirs were in demand. The trial judge, after reviewing the evidence, found:

> The court accepts that the province's presence at the facility may have made a sale more challenging. It is hard to accept that it would make it impossible to sell in a climate where there was significant interest taking advantage of the demand for Canadian slaughterhouses due to the BSE crisis. In the absence of evidence of active efforts to market and show the property to prospective [buyers], the court cannot find that but for the defendant's occupation, the plaintiff could have sold the Aylmer plant.

[93] In her remoteness analysis, the trial judge noted that there was evidence from the Ministry that economic harm to Aylmer was "reasonably foreseeable as a result of the suspension and meat detention": at para. 154. However, she immediately added: "the criminal investigation and the presence of uninspected meat [were] significant intervening factors and circumstances which [made] the claimed losses too remote to be recoverable at law". She found that Aylmer was the author of its own misfortune and that it "could have avoided its business loss through not causing or permitting uninspected meat to be in the plant": at

para. 154. The trial judge concluded her remoteness inquiry with the point that Aylmer "was in control of the very risk that led to its losses": at para. 154.

(c) Factual Causation Principles Applied

[94] The trial judge's implication that Aylmer's own conduct was the "but for" causal link does not respond to the relevant causation issue. The issue of Aylmer's lost opportunity to sell the plant is what is at issue on appeal. The factual causation inquiry is whether, but for the Ministry's ongoing occupation of the plant, Aylmer would have been able to sell the plant.

[95] The evidence is that in late 2003, Mr. Clare was aware that his business was in tatters as the result of the loss of Aylmer's abattoir licence, the Ministry's occupation of the plant, and the ongoing criminal prosecution. He resolved to sell the business and because of a particular crisis in the industry, late 2003 was a good time to do so. Mr. Clare had sold off other properties at this time, but was prevented from effectively marketing the Aylmer plant because of the Ministry's occupation of it.

[96] In response, the Crown makes several arguments: the Ministry did not occupy the plant; any occupation was necessarily incidental to the Ministry's statutory power to detain the meat; the Ministry's occupation after the initial investigation was justified by the Ministry's forensic responsibilities; because the initial occupation was justified, its continued occupation was too; and the

occupation did not adversely affect Aylmer's effort to sell the plant. None of these arguments bear scrutiny. The Ministry's lengthy occupation of the plant interfered with Mr. Clare's ability to sell the plant, such that, but for the Ministry's occupation, Mr. Clare would have been able to sell.

[97] First, the Ministry did occupy the plant. Ontario stated that the Ministry took control of the plant "by obtaining the keys to the plant, posting security at the gate, sealing the freezers containing detained meat, and monitoring any attendance at the plant". Ontario asserts that its interference with Aylmer's use of the plant was limited to ensuring that there was no breach of detention of the meat: "Specifically, seals were only placed on the coolers and freezer which contained detained meat. Once all detained meat was moved into the freezer, all seals were removed from cooler areas. As soon as the detained meat was removed from the premises [in 2005], security was lifted, seals removed, and keys returned to [Aylmer's] principals." This was, in any objective sense and consistent with the trial judge's factual findings, a total occupation of the plant by the Ministry.

[98] While the initial occupation was reasonable and justified, that justification collapsed with the flow of time, as I explained above.

[99] Second, the Ministry's occupation did impede Mr. Clare's ability to sell the plant. The trial judge overstated the burden on Aylmer when she said: "It is hard to accept that [the occupation] would make it impossible to sell in a climate where

there was significant interest taking advantage of the demand for Canadian slaughterhouses" (emphasis added). That statement was bookended by the preceding observation that: "The court accepts that the province's presence at the facility may have made a sale more challenging," and the immediately following statement: "In the absence of evidence of active efforts to market and show the property to prospective buyer, the court cannot find that but for the defendant's occupation, the plaintiff could have sold the Aylmer plant".

[100] I make this observation: Aylmer was not required to prove that the Ministry's negligent conduct made it "impossible to sell" the plant. Aylmer had only to show that, but for the Ministry's conduct, it would have been able to sell it. And it would be sufficient if the Ministry's conduct were a cause of the loss, not the sole cause.

[101] I would find that the trial judge's observation, that "the province's presence at the facility may have made a sale more challenging," was demonstrably correct on the evidence. In my view, Aylmer should not have been forced to work around any Ministry-imposed challenge where that challenge was unreasonable and unjustified.

[102] The practical problems of showing the plant to prospective buyers were manifest in the evidence. Aylmer called James Clark, an industry veteran and executive director of the Ontario Cattle Feeders Association, who testified that the market was ripe for a sale of the plant. Another plant in Kitchener owned by the

Clares had sold for $5.5 million. Mr. Clark said that in the fall of 2003, the Aylmer plant was “worth more than the Kitchener facility” because of its favourable location and upgrades. In his opinion, there was a competitive market for abattoirs in the fall of 2003. He stated, “[y]ou know I think anybody who had a, a processing facility that was the time if you’re ever going to sell it or want to get out of it, that was the time that, that you want to be doing it because there’s a lot of, a lot of people looking at facilities”.

[103] Aylmer argues that it was the busiest provincial meat processing facility at the time. Mr. Clare consulted with Mr. Clark about a potential sale at a favourable price. Mr. Clark testified that a party was interested in purchasing the plant in fall 2003 and had the financial backing to do so. But the Ministry’s occupation, he said, was something “no investor’s going to want to deal with”. He testified there was no point in showing it to purchasers while OMAF was occupying it: “it’d be kind of [like] you’re a realtor [and] you had squatters in the house”.

[104] Ontario argues that the plant was partly accessible through security so that potential buyers could be shown through, but provided no independent expert evidence to counter Mr. Clark.

[105] To conclude, the Ministry’s prolonged occupation of the plant was a cause-in-fact of Mr. Clare’s inability to sell the plant, on the evidence. But for the Ministry’s

unreasonable occupation, in breach of the duty that it owed Aylmer, Mr. Clare would have sold the plant in a market that was eager to buy.

(d) Legal Causation Principles Applied

[106] Aylmer's claim would fail if the Ministry's occupation were not the legal, or proximate, cause of its injury. The question is whether Mr. Clare's inability to sell the plant was a reasonably foreseeable harm of the Ministry's continued occupation of the plant. Phrased differently, was Mr. Clare's inability to sell the plant too unrelated to the Ministry's wrongful conduct to hold the Ministry fairly liable for Aylmer's loss?

[107] The following propositions emerge from the negligence analysis: (1) the Ministry owed Aylmer a duty of care to act reasonably in the exercise of its regulatory duties; (2) the Ministry breached its duty by not acting in accordance with the standard of care expected from a reasonable health and food safety regulator over the course its 19-month occupation of the plant; and, (3) the Ministry's wrongful actions were the cause-in-fact of Mr. Clare's inability to sell the plant.

[108] The trial judge's conclusion that Aylmer's loss was too remote because the criminal investigation and presence of uninspected meat were "intervening factors" does not align with her finding one sentence earlier that there was evidence from the Ministry that the economic harm to Aylmer was "reasonably foreseeable".

[109] The trial judge's finding that "economic harm" to Aylmer was reasonably foreseeable satisfies the remoteness inquiry. Moreover, it is clear on the evidence that the Ministry could have reasonably foreseen the more particularized harm at issue in this case – Mr. Clare's inability to sell the plant. The Ministry's wrongful occupation of the plant included the presence of security, a locked freezer and a deteriorating plant in disarray. These are clearly not features that would entice a buyer. This reality would not be lost on a food regulator, who operates regularly in the industry. As Mr. Clark testified, the Aylmer plant had not been "cleaned up" and "still had meat on site", unlike the Kitchener facility, which "had been cleaned and…mothballed", making it more attractive to buyers. These factors make me hesitant to fault Mr. Clare for not asking the Ministry for permission to show the plant to a prospective purchaser during the fraught times in late 2003.

[110] The harm suffered by Aylmer was, therefore, not too remote to ground liability. This leaves the question of damages to be determined.

(4) What are Aylmer's damages?

(a) The Governing Principles of Damages

[111] The governing principles are trite law. The basic tort principle for the determination of damages is that the plaintiff is to be placed in the position it would have been in had the defendant not committed the negligent act: *Athey v. Leonati*,

[1996] 3 S.C.R. 458, at para. 32; *Tokarz v. Cleave Energy Inc*., 2022 ONCA 246, at para. 43.

[112] The plaintiff has a duty to mitigate its loss and cannot recover losses that it could have avoided. While the duty to mitigate is on the plaintiff, the onus is on the defendant to demonstrate the failure to mitigate: *Bowman v. Martineau*, 2020 ONCA 330, 447 D.L.R. (4th) 518, at para. 31, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, at p. 163. I note that the trial judge did not address mitigation, nor did Ontario raise it as an issue so that it need not detain this court.

(b) Damages in the Decision under Appeal

[113] Aylmer advanced three options for the calculation of damages. The trial judge found the "lost enterprise value of Aylmer plus the losses of cattle and the detained meat" to be preferable. She accepted the expert evidence of forensic accountant James Forbes, called by Aylmer. She found Ontario's expert, Ivor Gottschalk, to be of marginal assistance because he had limited instructions. The trial judge noted, at para. 178, that Mr. Gottschalk's instructions: "narrowed his inquiry to the assumption that the province did not cause any economic loss to the plaintiff apart from the occupation costs the province asked him to calculate".

[114] I need not set out the details of the trial judge's reasoning. She found, at para. 186, that "there is a reasonable basis to assess the loss of enterprise value

at the mid-point of $3,520,000". To this she added the value of the euthanized cattle and cattle sold at a loss, at para. 196:

> The court finds that the value of the loss of the euthanized cattle is at the lower end of Mr. Clare's estimated value, at $1,016,660, to reflect the fact that this was an estimate arising from an incomplete list of the destroyed cattle and that some of the cattle may not have passed inspection. Similarly, the damages from the cattle sold at a loss is also assessed at the low end of Mr. Clare's estimated range, at $954,473.

[115] The trial judge then considered the value of the detained meat, at para. 199: "The damages from the loss of the detained meat are assessed at the low end of the plaintiff's estimates to address any concerns about the reasonableness of the estimate: $783,000 if it was fit for human consumption and $243,000 if it was suitable for animal feed". In oral argument, counsel advised that Aylmer is no longer claiming these damages.

(c) Damages Principles Applied

[116] I would accept the loss of enterprise value as found by the trial judge at $3,520,000.

[117] I would also accept the trial judge's assessment of the value of the euthanized cattle and the sales at a loss. However, I would not award these amounts to Aylmer. These losses were the direct and immediate result of Aylmer's illegal activities, which caused the Ministry to suspend Aylmer's abattoir licence

and occupy the plant, and prevented these animals from being processed before October 2003, which is when they were euthanized. The trial judge found the Ministry's initial actions to be proper and within its statutory mandate. I agree.

IV. DISPOSITION

[118] I would allow the appeal in part and award Aylmer damages in the amount of $3,520,000. I would invite written submissions no more than 5 pages in length on whether pre-judgment interest should be awarded and the interest rate, to be submitted on a 7-day turnaround from the date this decision is released starting with Aylmer.

[119] Aylmer is entitled to the costs of the appeal in the agreed amount of $25,000, all-inclusive. Written submissions on the allocation and the amount of trial costs, no longer than 5 pages in length, may be provided on the same schedule as the submissions on pre-judgment interest.

Released: August 10, 2022 PDL

P Lauwers J.A.

I agree. J.B. Roberts J.A.

Tague. J.A. Leis j.a.