Court File No. CV-18-00611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS LP, SPE MASTER I LP, ESL INSTITUTIONAL PARTNERS LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

RESPONDING BOOK OF AUTHORITIES OF THE PLAINTIFF

April 11, 2019

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2013 ONCA 740
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Rausch v. Pickering (City)

2013 CarswellOnt 17090, 2013 ONCA 740, [2013] O.J. No. 5584, 17 M.P.L.R. (5th) 1, 235 A.C.W.S. (3d) 534, 313 O.A.C. 202, 369 D.L.R. (4th) 691

James Rausch, Plaintiff (Respondent) and The Corporation of the City of Pickering, Defendant (Appellant)

J. MacFarland, David Watt, Gloria Epstein JJ.A.

Heard: June 25, 2013
Judgment: December 9, 2013
Docket: CA C56543

Proceedings: affirming *Rausch v. Pickering (City)* (2012), 2012 CarswellOnt 11213, 2012 ONSC 4688, 112 O.R. (3d) 41, 2 M.P.L.R. (5th) 54, 354 D.L.R. (4th) 549 (Ont. Div. Ct.); affirming *Rausch v. Pickering (City)* (2011), 2011 ONSC 2797, 2011 CarswellOnt 5591 (Ont. S.C.J.)

Counsel: Stuart Zacharias, for Appellant
Yan David Payne, Andrew D. Pelletier, for Respondent

***Gloria Epstein J.A.*:**

Introduction

1 This appeal involves the relationship between statutory authority and civil liability. The respondent, James Rausch, raised a herd of wild boars on property he occupied within the jurisdiction of the appellant, the City of Pickering. The City, relying on a by-law that restricted keeping certain types of animals within its limits, forced Mr. Rausch to get rid of his herd. Mr. Rausch sued the City for damages suffered as a result of the loss of his wild boar business. Initially, his claim was advanced on the basis of trespass, abuse of process and malicious prosecution. Mr. Rausch later obtained an order, subsequently affirmed by an order of the Divisional Court, allowing him to add a claim in negligence. The City appeals this order, arguing that the negligence claim is not tenable and should not be allowed to proceed to trial.

2 The viability of Mr. Rausch's negligence claim turns on three issues: first, whether the City may be said to owe either a statutory or common law duty of care; second, if a common law duty of care may be said to exist, whether Mr. Rausch has pleaded such a duty; and, third, if so, whether it is statute-barred. In my view, the statutory framework imposes no explicit duty of care. That said, I would not foreclose the possibility that Mr. Rausch may be able to establish an implied statutory duty of care. I am also of the view that Mr. Rausch's amended pleading advances a viable common law duty of care — one that is not out of time. I would therefore confirm the order of the Divisional Court and dismiss the City's appeal.

Mr. Rausch's Pleading

3 In 2007, Mr. Rausch brought this action against the City seeking a remedy for the financial loss he suffered as a result of the City's alleged wrongful enforcement of By-law No. 1769/83, (17 September 1984) (the "By-law"), which restricted having certain categories of animals on property within its limits. [1]

4 The allegations in Mr. Rausch's original statement of claim can be summarized as follows:

• Mr. Rausch is a tenant on 10 acres of land within the City's boundaries (para. 2).

• Pursuant to the *Municipal Act, 2001*, S.O. 2001, c. 25, the City has jurisdiction to enact by-laws, including those relating to animals' being kept on land within its boundaries (para. 3).

• Between 1997 and 2006, Mr. Rausch invested time and money raising premium wild boars for human consumption (paras. 4-7).

• Late in January 2006, the City advised Mr. Rausch that his enterprise violated the By-law and that if he did not immediately remove the wild boars from his property, the City would issue an order to comply, charge Mr. Rausch for violating the By-law and forcibly remove the animals (paras. 9-10).

• Mr. Rausch protested the application of the By-law. The City refused to change its position and Mr. Rausch, under protest, got rid of his animals (paras. 10-11).

• The City then charged Mr. Rausch for breaching the By-law and proceeded with its investigation. In so doing, City representatives came onto Mr. Rausch's property without permission (paras. 12, 16).

• A few days before Mr. Rausch's trial for breaching the By-law, the City withdrew the charges without explanation (para. 14).

• Mr. Rausch later learned that the City acted on the advice of Transport Canada in taking these steps against him. The City conducted no investigation of its own (para. 15).

• The City charged him without reasonably believing it would obtain a conviction; rather, its goal was to remove him from the property (para. 17).

5 Following examinations for discovery, Mr. Rausch brought a motion to amend his pleading to add a claim in negligence. In the proposed amendments Mr. Rausch alleged that the City owed him a duty of care pursuant to s. 6 of the *Farming and Food Production Protection Act, 1998*, S.O. 1998, c. 1 (the "*FFPPA*"), a provision that prevents a municipal by-law from restricting a normal farm practice that is part of an agricultural operation.

6 The Master granted an order allowing Mr. Rausch to amend his pleading. However, in his endorsement, the Master did not explicitly rule on whether the negligence pleading was a legally tenable cause of action.

7 As a result of the Master's order, the following paragraphs were added to the statement of claim:

> 18A. Further, or in the alternative, the Plaintiff states that the said by-laws as referenced herein are not applicable to him pursuant to the provisions of s. 6 of the *Farming and Food Production Protection Act*.... Specifically, the Plaintiff states that his raising of wild boars as hereinbefore described constitute a "normal farm practice" as defined under the provisions of the Act and accordingly, pursuant to s. 6 thereof, the by-laws in question would not apply to him or to his property.
>
> 18B. The failure of the Defendant to comply with the terms of s. 6 of the Act rendered any enforcement proceedings as against the Plaintiff *ultra vires* of the Defendant. Additionally, by taking enforcement procedures as hereinbefore described as against the Plaintiff, the Defendant was in breach of the terms of the Act, as the by-laws in question did not apply in the circumstances.
>
> 18C. The Plaintiff states that the Defendant knew, or ought to have known, that the by-laws in question did not apply to him given the provisions of the Act and that they should not have taken any enforcement proceedings as hereinbefore described, whether advising him to remove the wild boars from his property as set out in the

correspondence from Brad Suckling, dated January 20, 2006, charging him under any or all by-laws, or proceeding with the prosecution of him under the said by-laws.

18D. The Plaintiff states that the said statutory breach is a direct cause of damages as set out herein for which the Defendant is liable in negligence.

8 The City then brought a Rule 21 motion to strike out the amendments as disclosing no cause of action. The motion judge dismissed the motion on the basis that the City may owe a duty under the *FFPPA*, and that it was therefore not plain and obvious that Mr. Rausch's claim was doomed to fail. The majority of the Divisional Court dismissed the City's appeal from the motion judge's order and the City, with leave, appeals that decision to this court.

The Statutory Framework

9 As the City is a statutory actor, any allegation of negligence against it must be analyzed in the context of the statutory scheme comprised of the *Municipal Act*, the *FFPPA* and the By-law.

10 The main source of the City's powers is the *Municipal Act*, which states that its purpose is to create municipalities that are "responsible and accountable governments with respect to matters within their jurisdiction" and that the powers given to municipalities under the *Municipal Act* and other provincial legislation is for the purpose of providing good government with respect to those matters: see s. 2. Section 8 makes it clear that municipalities have broad powers. These powers are enforced through various provisions, including those that permit the City to require a person who contravenes a by-law to discontinue the contravening behaviour: see s. 444.

11 The City's jurisdiction is, however, circumscribed by s. 14 of the *Municipal Act*, which states that a municipal by-law is ineffective to the extent of any conflict with a provincial or federal statute. Section 14(2) provides that a conflict exists if a by-law frustrates the purpose of the provincial or federal statute.

12 Finally, the *Municipal Act* addresses the question of liability. Section 448 relieves a municipality from liability for damages that result from acts or neglect in exercising its authority in good faith. However, the municipality remains liable in tort: see s. 448(2). The statute also relieves the municipality of liability for the good faith exercise or non-exercise of discretion, so long as it is the result of a policy decision: see s. 450. Thus, while the *Municipal Act* grants the City immunity for many acts, it expressly *does not* relieve it of liability for torts, for damage that results from acts done in bad faith or for the exercise of discretion with respect to operational decisions.

13 The purpose of the *FFPPA* is as narrow as the purpose of the *Municipal Act* is broad. As described in the preamble of the *FFPPA*, its goal is to promote normal farm practices in agricultural areas and to balance the needs of the agricultural community with provincial health, safety and environmental concerns. To further its goal of protecting farming operations, the *FFPPA* removes municipalities' jurisdiction to enforce by-laws that interfere with "normal farm practices". Specifically, s. 6(1) provides that "[n]o municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation." In the event of a dispute as to whether a particular operation constitutes a normal farm practice, the *FFPPA* establishes a tribunal, the Normal Farm Practices Protection Board, which is authorized to determine this issue.

14 Significantly, there is neither an obligation on any party to bring an application to the Board for a determination nor any presumption as to whether a particular farming operation is or is not a normal farm practice.

15 The Board has no authority to grant a remedy for damages and there is no compensation fund established in the statute: the Board's powers are limited to determining whether a given operation is or is not a normal farm practice.

16 The final relevant law is the By-law, passed pursuant to s. 11(3) of the *Municipal Act*, which authorizes the City to deal with animals. Under the terms of the By-law, residents are prohibited from keeping certain types of animals.

Section 8 of the By-law creates a provincial offence for any breach of its provisions and provides that anyone who is guilty of violating its terms may be fined.

The Decisions Below

The Master

17 In granting Mr. Rausch leave to amend his pleading, the Master's analysis focused on whether the proposed amendments were precluded by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The Master concluded that the negligence claim arose out of facts already contained in Mr. Rausch's pleading and that the amendments were therefore not statute-barred. He did not deal with whether the proposed amendments disclosed a cause of action. Rather, he left that issue open by expressing the view that allowing the amendments did not preclude the City's bringing a motion challenging them under Rule 21.

The Motion Judge

18 The City subsequently brought a motion to strike the amendments. The motion judge, at para. 7 of her brief endorsement, described the amendments as asserting "a claim in negligence against the [City] for conduct which includes an alleged breach of s. 6 of the [*FFPPA*]." Relying on *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.), the motion judge observed that a breach of statute does not give rise to a separate cause of action, but is subsumed in the law of negligence. She concluded that whether or not the City actually breached the *FFPPA* and whether the City is therefore liable in negligence are questions that depend on the determination of what constitutes a "normal farm practice" under the *FFPPA* and whether Mr. Rausch's operation falls within this definition.

19 The motion judge went on, at para. 9, to say that "[i]f [Mr. Rausch] is able to prove at trial that the [City] breached the [*FFPPA*] by prosecuting him under the By-law when it knew or ought to have known that it did not apply to him and was negligent in so doing, [Mr. Rausch] may succeed in his claim."

20 On this basis, the motion judge held that it was not plain and obvious that Mr. Raush's claim in negligence was doomed to fail and dismissed the City's motion.

The Divisional Court

21 Three different sets of reasons emerged from the Divisional Court's decision to uphold the motion judge's order.

22 In dismissing the City's appeal, Harvison Young J. reasoned that there may be an implicit statutory duty of care and that it was therefore not plain and obvious that the action could not succeed. She also found that the facts, as pleaded, may give rise to a "common law duty of care on the part of the City, even in the absence of a statutory duty of care."

23 Harvison Young J. considered this possibility using the test in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.). The first branch of the test examines whether the relationship between the plaintiff and the alleged tortfeasor discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care. Harvison Young J. answered this question in the affirmative. She held that Mr. Rausch was "individualized" by the City. Specifically, City representatives visited his property, took photos of his premises, corresponded directly with him and ultimately charged him under the By-law. She therefore concluded that it was not plain and obvious that there is no *prima facie* duty of care. Harvison Young J. also held that because there were no compelling policy reasons that negated the duty of care, the second branch of the test was satisfied. She explained her reasoning, in paras. 32-34, as follows:

> Concerns about potentially overbroad liability may be addressed by the formulation of the standard of care. Mr. Rausch alleges that the City, in enforcing the By-law, had a duty to *consider* whether the By-law actually applied to him before charging him and\or advising him to get rid of his animals. In essence, the allegation is that a reasonable by-law enforcement officer should, in the circumstances, have considered whether s. 6(2) of the *FFPPA* applied. This will be a question of fact, as the issue of standard of care always is. If, at trial, Mr. Rausch establishes that

the operation appeared farm-like, in other words, that the City knew that he was raising the animals with a view to slaughter them for commercial sale, the trial judge might conclude that the City knew or ought to have known that Mr. Rausch's operation could be a normal farm operation within the meaning of s. 6(2), and that the City failed to meet the standard of care when it did not consider referring the matter to the Board for determination.

. . . . .

... I wish to be clear that I am not suggesting that, because the City has a duty to reasonably enforce the By-law, it will always have a duty to refer every single matter to the Board. What will be required of the City to meet its standard of care will be dependent on the particular facts of each situation. For this reason, it is not obvious to me that a floodgates argument could justify negating the duty of care, particularly at this preliminary stage.

[Emphasis in original.]

24 Harvison Young J. therefore found that the City may owe Mr. Rausch a common law duty of care. Examining the amended claim she held that, with one exception, Mr. Rausch's pleadings were broad enough to cover such a duty. The exception was paragraph 18D, which explicitly referred to a "statutory breach". Harvison Young J. therefore held that she would grant leave to amend paragraph 18D to remove the word "statutory" from the allegation of "statutory breach", without prejudice to any argument under the *Limitations Act, 2002*.

25 Aston J. (concurring with Harvison Young J. in the result) was not prepared to endorse her conclusion that the City owed Mr. Rausch a common law duty of care when that alternative theory was never part of Mr. Rausch's submissions before the motion judge or the Divisional Court.

26 While Aston J. found that the *FFPPA* imposed no positive obligation on the City, he concluded that the City may still have an obligation under it. Aston J. held that the *FFPPA* may sometimes impose a duty on the City to refrain from enforcing its by-laws on the basis that an activity is part of a "normal farm practice" carried on as part of an "agricultural operation". Based on this conclusion, he found that s. 6(1) of the *FFPPA* may create a relationship of proximity sufficient to support a duty of care in particular cases. He concluded that a generous reading of the amended pleading alleged a valid cause of action in negligence.

27 In dissent, Murray J. held that it was plain and obvious that a claim in negligence could not succeed. He shared Aston J.'s view that the amendments were not based on any common law duty. He viewed Mr. Rausch's claim in negligence as being "inextricably tied to an alleged breach of the [*FFPPA*]."

28 Murray J. found that the *FFPPA* imposed no duty of care on the City. If that conclusion were wrong, Murray J. identified two policy considerations negating the *prima facie* duty of care. First, he held that Mr. Rausch had an adequate alternative remedy: he could apply to the Board for a determination that he was engaged in a normal farm practice. Second, citing *Pyke v. Tri Gro Enterprises Ltd.* (2001), 55 O.R. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused, (2002), [2001] S.C.C.A. No. 493 (S.C.C.), Murray J. concluded that the question of whether an operation is a "normal farm practice" ought generally to be determined by the Board and that the existence of this specialized tribunal provided a further policy reason to negate a duty of care.

Issues

29 There are three issues on appeal:

1. Should the appeal be dismissed as a collateral attack on the Master's order allowing the amendments?

2. Did the majority of the Divisional Court err in refusing to strike the impugned paragraphs in the statement of claim by improperly concluding that Mr. Rausch's pleading asserts a viable claim in negligence for

i. the breach of a statutory duty; or

ii. the breach of a common law duty?

3. Are the impugned amendments to the statement of claim barred by the *Limitations Act, 2002*?

Analysis

(1) Should the appeal be dismissed on the basis that it amounts to a collateral attack on the Master's order?

30 Mr. Rausch argues that the Rule 21 motion is a collateral attack on the Master's order and should be dismissed. Mr. Rausch relies on the basic premise that on a motion to amend pleadings under Rule 26, the court is not permitted to allow the proposed amendment unless it asserts a tenable cause of action: *Teva Canada Ltd. v. Bank of Nova Scotia*, 2012 ONCA 486, 294 O.A.C. 323 (Ont. C.A.); and *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Ont. Gen. Div.), at p. 784. Mr. Rausch therefore submits that the Master, by granting leave to add the claim in negligence, implicitly found that the amendments disclose a valid cause of action. As a result, Mr. Rausch argues that any subsequent challenge to the viability of the negligence claim is barred by the doctrine of *res judicata*.

31 The City relies on a sentence in the Master's reasons in which he specifically purported to leave the door open to a further legal challenge. For reasons the Master did not explain, near the end of his endorsement the Master said, "[c]ounsel [for the City] indicated that he was contemplating bringing a Rule 21 motion in the event that I permitted any of these amendments. I see no reason why these reasons in any way prevent his taking that step, if he chooses to do so."

32 In my view, the collateral attack argument is not properly before this court as it was neither raised before nor dealt with by the Divisional Court.

33 I would therefore not give effect to this argument except to make the following comment. In my view, a disposition that allows amendments that raise a cause of action the tenability of which is in dispute and leaves the door open to a subsequent Rule 21 challenge of the amendments is a disposition that is internally contradictory and legally not available.

(2) Did the majority of the Divisional Court err by refusing to grant the motion to strike?

The Rule 21 test

34 There is no dispute as to the test and associated principles that apply to a motion to strike pleadings for not disclosing a reasonable cause of action. The test is stringent, and the moving party must satisfy a very high threshold in order to succeed: *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155 (Ont. C.A.), at paras. 32-33. Unless it is "plain and obvious" that there is no chance of success, a claim, even a novel one, ought to be allowed to proceed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980; and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 15. The motion proceeds on the basis that the facts pleaded are true unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at p. 455. While the facts pleaded are the basis upon which the possibility of success must be evaluated, the pleading must be read as generously as possible, erring on the side of permitting an arguable claim to proceed to trial.

35 I do not accept the City's submission that in determining the issues raised, the analysis is restricted to a consideration of whether the amendments, taken in isolation, raise a tenable cause of action. The amendments are part of the amended claim and the legitimacy of the claim or claims they advance must be considered in the context of the amended pleading as a whole: *R. v. J.D. Irving Ltd.*, [2000] F.C.J. No. 558 (Fed. C.A.), at paras. 3-6.

36 It is with this test and these principles in mind that I turn to the main issue on this appeal — whether the amended claim alleges that the City owed Mr. Rausch a duty of care recognized by law.

The legal principles regarding the duty of care

37 The foundation of a claim in negligence is the recognition of a duty of care owed by the defendant to the plaintiff. A duty of care is not a duty to do anything specific: the duty is to take reasonable care to avoid causing foreseeable harm to those with whom one is in a relationship of proximity.

38 An error frequently made is conflating the duty of care with the standard of care. They are discrete concepts. As the Supreme Court of Canada wrote in *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 32, "the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct." The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care. This important point is expressed in Carolyn Sappideen & Prue Vines, *Fleming's The Law of Torts*, 10th ed. (Sydney: Thomson Reuters, 2011), at pp. 123-24:

> The general standard of conduct required by law is a necessary complement of the legal concept of "duty". There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of the defendant to discharge it?" Indeed, it is not uncommon to encounter formulations of the standard of care or of some particular precaution that an actor in the defendant's position should take in terms of "duty", as when it is asserted that a motorist is under a duty to keep a proper lookout or that a person has (or has not) a duty to warn another of a certain risk. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. "Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. Secondly, it is apt to obscure the division of functions between judge and jury or the distinction between questions of law and fact. It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury or judge sitting alone to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained or the duty breached.

39 The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), at paras. 25-27.

40 If a duty of care is recognized, then the standard of care necessary to discharge the duty and whether it has been breached will be determined at trial.

Could the City owe a statutory duty of care under the FFPPA?

41 The City's basic argument, with which Murray J. agreed in his dissenting reasons, is that since Mr. Rauch's negligence action is based on a breach of the *FFPPA* and since that statute imposes no explicit duty on the City, there can be no breach and therefore no claim in negligence.

42 I agree that the *FFPPA* does not explicitly impose a duty on the City to do anything relevant to Mr. Rausch's complaint. There is nothing in s. 6(1) of the *FFPPA* that specifies that a municipality has a duty to take or refrain from taking any action. Under s. 6(2), a municipality "may" apply to the Board "for a determination as to whether a practice is a normal farm practice for purposes of the non-application of a municipal by-law." But, the legislation does not require the municipality to make such an application. In fact, the only requirement s. 6 of the *FFPPA* explicitly imposes on a municipality is found in s. 6(13). It requires municipalities to provide the Board with landowners' addresses to enable the Board to give notice of a hearing. This obligation has no relevance to the negligence alleged against the City.

43 The absence of a specific statutory duty of care imposed by the *FFPPA* means that a negligence claim based on the breach of a duty explicitly set out in the statute has no chance of success and should not be allowed to proceed to trial.

44 Before I turn to the other aspect of the majority decision, Harvison Young J.'s conclusion that the City may owe Mr. Rausch a common law duty of care, I feel it is necessary to make one additional comment about a statutory duty of care. A statutory duty of care may be explicit or implied. I have found that in these circumstances, the legislation imposed no explicit statutory duty on the City. However, while not raised in the courts below or on appeal, in my view this decision does not foreclose the possibility that there may be an implied statutory duty of care arising out of the statutory scheme.

Could the City owe a common law duty of care?

45 Although I would reject Mr. Rausch's claim that there is an explicit statutory duty of care, I do not agree with the City that this is the end of the matter. In my view, when negligence is alleged against a government actor, the reach of the duty of care divining rod is not restricted to the legislative scheme and whether it imposes a statutory duty of care. In *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at paras. 43-45, the Supreme Court recognized that in addition to a statutory duty of care set out in the governing legislation, there may be a common law duty of care that arises by virtue of interactions between the statutory actor and a private individual.

46 Before analyzing whether there may be a common law duty of care, the statutory scheme must be examined to determine whether it forecloses such a duty.

47 In my view, the statutory scheme in play in this case does not preclude the recognition of a common law duty of care. I see nothing in either the *FFPPA* or the *Municipal Act* that impedes a finding that such a duty may exist in appropriate circumstances.

48 As I noted earlier, while the *Municipal Act* relieves the City from liability for many acts, it expressly does not relieve it of liability for torts, for damage that results from acts done in bad faith or for the exercise of discretion with respect to operational decisions: see ss. 448-450.

49 It is true that the *FFPPA* created a tribunal to determine whether a farm operation is protected by s. 6. However, this court has held that the *FFPPA* does not preclude a court's making the determination, if warranted by the circumstances: *Pyke*, at para. 55.

50 Having concluded that the statutory scheme does not foreclose the existence of a common law duty of care, two issues must be determined in order to resolve the question of whether Mr. Rausch's negligence claim based on such a duty is viable and should otherwise be allowed to proceed to trial, subject to the limitation period issue. First, in these circumstances, can it be said that the City may owe a common law duty to Mr. Rausch? Second, does the amended pleading, read generously, advance such a claim?

51 The parties take the position, and I agree, that in the context of by-law enforcement actions, the relationship between municipal by-law enforcement officers and farmers against whom they are enforcing a by-law is not a settled or analogous category that automatically gives rise to a common law duty of care. Therefore, to determine whether a cause of action in negligence based on a common law duty of care has a reasonable prospect of success in these circumstances, consideration must be given to whether the general requirements for liability in tort are met according to the two-stage *Anns* test, as honed and consistently applied by the Supreme Court in subsequent decisions, most notably, *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.); and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.).

52 In the first step of the *Anns* test, the plaintiff must establish a *prima facie* duty of care by demonstrating reasonable foreseeability of harm and a proximate relationship between the plaintiff and the defendant. At this stage, the court must also examine whether policy considerations arising out of the relationship support a finding of proximity. If the court finds both foreseeability and proximity, it then proceeds to the second step, in which the evidentiary burden shifts to the defendant to raise additional policy factors that should eliminate or limit the *prima facie* duty found under the first branch of the test.

53 While they differ in nature, policy considerations are relevant to both steps in the analysis. In *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.), at para. 32, Abella J. explained that policy factors in the first step pertain to the relationship between the parties whereas at the second step they address broader issues reflecting the need to shield specific activities from judicial control or to prevent the floodgates of litigation from opening into areas of potentially unlimited liability. That said, so long as the relevant factors are considered at some point in the analysis, it may not matter at which "stage" any particular policy consideration is examined: *Cooper*, at para. 27.

Step one — does the relationship establish a *prima facie* duty of care?

54 In this appeal, we are considering the relationship between a municipality's by-law enforcement officer and a farmer against whom a by-law was enforced. The requirement of foreseeability is clearly made out. A by-law enforcement officer who takes steps to ensure a farmer's compliance with a by-law, the effect of which may be to restrict a farm operation, must surely be aware that any missteps carry a real potential of harm to the farmer.

55 Therefore, the only remaining issue at this stage is whether Mr. Rausch is able to establish a relationship of proximity.

56 Since *Cooper*, proximity has been the focus of the analysis of whether a public body owes a common law duty of care. Because the City may only exercise powers delegated to it by statute, the legislative scheme is at the core of the proximity analysis: see *Cooper*, at para. 43; and *Edwards*, at para. 9. As previously noted, the *Municipal Act*, the *FFPPA* and the By-law affect the City's responsibilities to Mr. Rausch by defining the parameters of its jurisdiction to enforce by-laws against farming operations. Consequently, and as I will discuss below, they all provide context to the proximity analysis: see *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 259 (S.C.C.); and *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35 (Ont. C.A.), leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 491 (S.C.C.).

57 The existence of a "close and direct" relationship between the wrongdoer and the victim is a basic factor relevant to proximity. The presence or absence of a personal relationship between the parties is an important — but not determinative — consideration: *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at paras. 29-30; and *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 40.

58 Here, we are not concerned with every resident in the municipality. The by-law enforcement officer approached Mr. Rausch after receiving a complaint. His attention was focused on Mr. Rausch in the same way as the attention of the police was focused on the suspect in *Hill* - not as one of a "universe of all potential suspects" or city residents potentially in contravention of a by-law, but as a particular person being specifically investigated. The City communicated directly with him regarding his alleged breach of the By-law, threatened to issue an order to comply and informed him that it would lay provincial offence charges and remove his wild boars if he did not do so himself. In so doing, the City targeted Mr. Rausch.

59 The finding of a close and direct relationship is bolstered by the type of steps open to the City to ensure compliance with the By-law. Among other powers, the City has the ability to restrain activities that violate by-laws; to issue orders to comply; to order remedial action; and, in the case of this By-law, to levy a fine and lay provincial offence charges: see *Municipal Act*, ss. 440-46; and the By-law, s. 8. These are all actions — particularly the order to comply — that carry the potential of seriously damaging a farmer. In this case, at stake was a business Mr. Rausch had spent almost a decade developing. This high interest supports a finding of a proximate relationship giving rise to a duty of care: see *Hill*, at para. 34.

60 Reliance is another factor that affects the proximity analysis. Here, I am referring to Mr. Rausch's reliance on the City's taking precautions to avoid the harm he suffered: *Fullowka*, at para. 30. In my view, a reasonable citizen would assume that if a by-law enforcement officer decided to enforce a by-law that had the potential to destroy a business or

create other serious consequences, the officer would first put his or her mind to whether there was jurisdiction to do so. Mr. Rausch's actions are consistent with this proposition. Based on the City's insistence that he had violated the By-law and in reliance on its jurisdiction to enforce compliance, Mr. Rausch took steps that caused him to lose his animals, his business and his investment of considerable time and money.

61 Another consideration relevant to proximity is whether there are adequate alternative remedies for the wrongful enforcement of the By-law: *Hill*, at para. 35. I do not agree with Murray J.'s conclusion that Mr. Rausch's ability to apply to the Board for a determination that he was engaged in a "normal farm practice" constituted an adequate alternative remedy.

62 When Mr. Rausch received the City's letter alleging that he was in violation of the By-law and ordering him to get rid of his herd, he was faced with only two options apart from complying with the order: (i) apply to the Board for a determination that his operation was a "normal farm practice" and therefore exempt from the By-law, or (ii) bring an application for judicial review of the City's decision, seeking a declaration, injunction or order of prohibition.

63 Inherent in these options is the assumption that Mr. Rausch was aware of his legal rights. The amended claim is pleaded on the basis that he was not. It follows that because the City's letter gave Mr. Rausch just a little over a week to comply with its order, to obtain meaningful relief, in short order he would have had to secure legal advice from someone familiar with this area of the law. Moreover, absent the City's consent to forestall enforcement while he established his rights, Mr. Rausch would have had to bring an urgent motion for a stay of the enforcement of the By-law.

64 However, after Mr. Rausch complied with the City's sudden demands and got rid of his herd, his only meaningful avenue of redress for his financial loss was a civil action, given that neither the Board nor a court conducting judicial review has the jurisdiction to award damages. I agree with Feldman J.A.'s comments in *Haskett v. Trans Union of Canada Inc.* (2003), 63 O.R. (3d) 577 (Ont. C.A.), at para. 50, that a legislative scheme that does not provide a remedy in damages may not be an adequate alternative to recognizing a cause of action.

65 The absence of an adequate remedy means that unless a duty of care is recognized, Mr. Rausch will have no recompense for the harm he suffered because of the City's taking potentially unwarranted steps. To deny a remedy in tort would deny justice. This supports recognition of the tort of negligent assumption of jurisdiction to enforce a by-law that may result in the restriction of a farming operation.

66 In considering the issue of alternative remedies, the real question is whether there is anything in the *FFPPA* that suggests that tort liability should not exist alongside the statutory scheme at issue. As I see it, the answer is no.

67 One final relevant factor is whether the recognition of a *prima facie* duty of care would conflict with an overarching statutory or public duty: *Children's Aid Society of Halton (Region)*, at para. 28; and *Cooper*, at para. 44. It may be argued that recognizing a duty of care in this case would conflict with the City's duty to the public by rendering it more difficult to enforce by-laws. However, as emphasized in *Hill*, at para. 43, "a *prima facie* duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences."

68 The Supreme Court considered this issue in *Hill*, in which it was argued that if police officers owed a duty to take reasonable care toward a suspect, it would conflict with their crime prevention duties. The Supreme Court was not persuaded that this was a policy reason sufficient to negate the duty of care. The Chief Justice found, at para. 41, that "[t]he officer's duty to the public is not to investigate in an unconstrained manner. It is a duty to investigate in accordance with the law." The implication is that the duties to the public and to the suspect are not at odds; rather, they are consistent with each other.

69 The same logic applies here. The by-law enforcement officer's duties to the municipality and its residents will not be affected by recognizing a duty of care between officers and farmers whom they are investigating for possible violation

of a by-law that may restrict their farming operation. These are co-extensive duties. It is in everyone's interest that by-laws not be enforced in an "unconstrained manner".

70 Furthermore, I note that s. 444 of the *Municipal Act* begins the section on remedial actions and orders premised on the municipality's being "satisfied" that a contravention has occurred. A "satisfaction" requirement in the context of contraventions may add support for the argument that the City has a duty to take reasonable steps to satisfy itself that there has been a violation of such a by-law before taking enforcement steps.

71 I therefore do not see a serious potential for conflicting duties in this case. As set out in the *Municipal Act*, the purpose of delegating powers to municipalities is to promote good government over areas within their jurisdiction. When warranted, holding municipalities to an obligation to take reasonable steps to consider whether they have jurisdiction before enforcing a by-law furthers this goal.

72 These factors lead me to conclude that a municipality considering whether to enforce a by-law that may restrict a farm operation is in a relationship that is close and direct such that a *prima facie* duty of care should be recognized.

Step two — do policy considerations negate the *prima facie* duty of care?

73 The second stage of the *Anns* test requires an examination of whether the City is able to establish that there are any policy concerns that negate or limit the *prima facie* duty of care. As the Supreme Court stated in *Cooper*, at para. 37, the policy considerations at this stage "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally." Policy concerns raised against a duty of care must raise a real possibility of negative consequences: such concern cannot be speculative: *Hill*, at para. 48.

74 I note at the outset that because this appeal arises out of a Rule 21 motion and is therefore based on a limited motion record, this court should be reluctant to find that policy reasons conclusively negate a duty of care at this early stage: *Trans Union of Canada Inc.*, at para. 52.

75 Although there are several potentially relevant policy considerations, in my view, they do not militate against recognizing a duty of care. On the contrary, they support the recognition of a duty of care.

76 Whenever a government or statutory actor is alleged to owe a duty of care, the court must consider whether the decision in issue is an operational or policy decision. It is generally considered inappropriate to hamper legislative action by imposing liability in negligence for policy decisions; however, statutory actors may be liable for operational decisions: *Cooper*, at para. 38. Policy decisions are "dictated by financial, economic, social or political factors or constraints," while operational decisions are based on "administrative direction, expert or professional opinion, technical standards or general standards of reasonableness": *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.), at p. 434. In keeping with this general approach, s. 450 of the *Municipal Act* protects the City from liability arising out of policy decisions but not out of operational decisions.

77 In my view, the decision to enforce the By-law against Mr. Rausch is operational in nature. It involved a decision to enforce a specific by-law against him: it was not motivated by broader policy concerns. There is therefore no concern that imposing a duty of care in this situation would undermine the City's ability to legislate or set policy.

78 A common policy consideration under the second stage of the *Anns* test is whether there is a risk of overbroad or indeterminate liability. It was on this basis that the Supreme Court held that a government actor did not owe a duty of care to ensure it acted within the law in *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2008 SCC 42, [2008] 2 S.C.R. 551 (S.C.C.). The City argues that there is no material distinction between Mr. Rausch's claim and the one advanced in *Holland*; it therefore submits that *Holland* is dispositive of the issue.

79 However, *Holland* is distinguishable. In that case, the plaintiff argued that acting without statutory authority constituted negligence in and of itself, an argument that had already been rejected in *Saskatchewan Wheat Pool* because a cause of action in negligence on this basis would open the door to liability based on nothing more than the fact that the impugned action was *ultra vires*. Such a proposition would dramatically revise the law that applies to the consequences of *ultra vires* action: see *Holland*, at paras. 10-11. Here, the proposed common law duty of care is not based on the City's acting without statutory authority. It is based on its failing to take care in considering whether it had statutory authority. Such a duty would not have the far-reaching consequences that were of concern in *Holland*: it would arise in limited situations involving municipalities enforcing by-laws against farmers in the context of a statutory scheme that precludes the enforcement of by-laws that restrict normal farm practices.

80 In addition, any concerns about overbroad liability may be addressed by the formulation of the standard of care. For example, if the standard of care is ultimately defined as an obligation to consider the provisions of the *FFPPA* when enforcing a by-law against an operation that appears farm-like, there will be no risk of indeterminate liability. Such a formulation would limit liability to a narrow range of situations in which there is some uncertainty over whether the targeted farming operation constitutes a "normal farm practice".

81 Finally, it is not clear that in a situation in which enforcement officers are investigating potential by-law contraventions, indeterminate liability could be thought to exist in any event. The duty of care only exists between the municipality and the limited class of people that it is investigating at any given time. Therefore, "the class of persons to whom the duty would be owed is a group that is not only wholly within the knowledge, but also the control" of the municipality: *Trans Union of Canada Inc.*, at para. 45; and *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at pp. 197-98. In a situation such as this, in which the class of defendants and their identity is known, indeterminate liability does not arise.

82 The argument that recognizing a duty of care would have a chilling effect on by-law enforcement is based on the proposition that if the City can be sued in negligence, it will be overly restrained in enforcing its by-laws against farmers. It will have no choice but to refer every case to the Board. This would be costly and time-consuming and may also arguably impose a duty on the municipality that could have been specified in the *FFPPA* but was not.

83 In my view, this argument does not justify refusing to recognize a duty of care in these circumstances. In many cases, whether the use of the property constitutes a normal farm practice will be clear and the City will have no trouble determining whether or not it can enforce its by-laws. It is antithetical to good government to suggest that in those few cases in which it is unclear whether the property is being used in a manner that constitutes a normal farm practice, there is no duty to conduct some form of jurisdictional due diligence before taking steps to enforce a by-law that could cause reasonably foreseeable harm.

Conclusion on the common law duty of care

84 In my view, no compelling reason has been shown to negate a *prima facie* common law duty of care. I therefore conclude that the City may owe Mr. Rausch a common law duty of care to exercise its considerable powers over farmers in a manner that reduces risk of unwarranted harm.

The standard of care

85 This naturally takes me to the issue of the standard of care.

86 Although the arguments with respect to the sufficiency of Mr. Rausch's negligence pleadings were properly confined to the question of whether the City owes a duty of care, various analyses in the decisions below considered the standard of care as well.

87 The approach to determining the standard of care in these circumstances would be to assess what a reasonable by-law enforcement officer would have done in considering whether to enforce the By-law against Mr. Rausch. It is at this stage of the analysis that the court must define the conduct required to satisfy this standard, bearing in mind that the *FFPPA* imposes no obligation on the City to apply to the Board for a determination as to whether a targeted farming operation is a "normal farm practice".

88 Municipalities are presumed to know the law: *Boundary Bay Conservation Committee v. Provincial Agricultural Land Commission*, 2008 BCSC 946, [2008] B.C.J. No. 1369 (B.C. S.C.), at para. 71. Further, this court has held that enforcement officers are obliged to (i) act in good faith in relation to their decisions as to how a by-law will be enforced, and (ii) act with reasonable care in any steps they take to enforce a by-law: *Foley v. Shamess*, 2008 ONCA 588, 297 D.L.R. (4th) 287 (Ont. C.A.), at para. 29; see also *Butterman v. Richmond (City)*, 2013 BCSC 423, [2013] B.C.J. No. 461 (B.C. S.C.), at para. 38. The combination of these two factors — presumed knowledge of the law and an obligation to act reasonably and in good faith in enforcing it — and the wording of s. 444 of the *Municipal Act* mentioned above, may be relevant to the determination of the standard of care. Specifically, it may permit a finding that when attending at Mr. Rausch's premises and observing livestock in circumstances that appeared farm-like, the by-law enforcement officer ought to have considered the implications of the *FFPPA* before proceeding with enforcement steps.

89 As already discussed, the question of the type of conduct necessary to meet the standard of care is a matter for trial as it is a fact-driven assessment. In *Ryan*, at para. 28, the Supreme Court stated that when determining the conduct required to satisfy the standard of care, courts must consider the likelihood of a known or foreseeable harm occurring, the gravity of that harm and the cost that the defendant would incur in preventing the harm. Here, relevant factors that might be raised include the ease with which the foreseeable risks may have been avoided (i.e. by informing Mr. Rausch of the opportunity to seek judicial review or apply to the Board); the relevant policy decisions of the municipality with respect to by-law enforcement; and the City's internal standards, guidelines or directives pertaining to the enforcement of by-laws.

90 I emphasize that it is both for the sake of completeness and to respond to the City's concern that recognizing a duty may conflict with the *FFPPA* that imposes no duty on the City to seek a determination of the Board that I have briefly addressed the standard of care.

Are Mr. Rausch's pleadings broad enough to support a negligence claim based on a common law duty of care?

91 The City argues that the question of whether Mr. Rausch's negligence claim is tenable must be approached on the basis of the true character of the amended pleading, which grounds the negligence claim against the City in a breach of s. 6 of the *FFPPA*.

92 I agree that the thrust of the negligence alleged in the amended pleading is based on the breach of a statutory duty under the *FFPPA*. However, in my view, when read generously, the amended statement of claim also advances a claim based on the breach of a common law duty of care owed by the City to Mr. Rausch. I refer to the following aspects of the amended claim:

- The City's jurisdiction to enact and enforce by-laws is found in the *Municipal Act* (para. 3).

- This jurisdiction is circumscribed by s. 6 of the *FFPPA*. Specifically, no by-law applies to restrict a "normal farm practice" (para. 18A).

- The City enforced the By-law against Mr. Rausch without taking any steps to determine whether the By-law could be enforced against his operation. In fact, the City relied solely on the advice of representatives of Transport Canada (paras. 15, 18).

• The City enforced the By-law against Mr. Rausch when it knew, or ought to have known, that the By-law did not apply to his farming operation (para. 18C).

• The steps the City took to enforce the By-law singled Mr. Rausch out for enforcement and involved personal and direct contact with him (paras. 9-14).

• Mr. Rausch removed the wild boars from his property because of the City's insistence that he was violating the By-law and its threat that it would charge him under the By-law and forcibly remove the wild boars if he refused to comply (paras. 9-11).

• For nearly a decade, Mr. Rausch invested a great deal of time and money in cultivating his wild boar herd, and because of the City's actions, he now has to begin cultivating his herd from scratch. As a result, he has lost the revenue that he would have been able to earn from his herd (paras. 4-7, 21-22).

93 It is true that Mr. Rausch's amended claim is faulty in many respects. It is also true that his negligence claim focuses on the breach of a duty of care imposed by the *FFPPA*. However, in my view, the amended pleading also contains allegations sufficient to support a negligence claim based on the breach of a common law duty of care.

94 I appreciate that this interpretation of Mr. Rausch's amended statement of claim requires a charitable reading of the pleading. However, as I have said, the Supreme Court has mandated that pleadings are to be construed as generously as possible with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies: *Operation Dismantle Inc.*, at p. 451. This mandate advances the fundamental objective that guides the application of rule 1.04 of the *Rules of Civil Procedure* — the just determination of cases on their merits.

95 In determining whether pleadings disclose a cause of action, the focus must be on the substance of the pleading, not its form: *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.), at p. 239. Courts have refused to strike pleadings even in cases in which the plaintiff has not specifically pleaded all elements of the cause of action, so long as those elements are implicit in the rest of the pleadings: *Jane Doe*, at pp. 238-39; and *1309489 Ontario Inc. v. BMO Bank of Montreal*, 2011 ONSC 5505, 107 O.R. (3d) 384 (Ont. S.C.J.), at paras. 26-27. As Lauwers J. (as he then was) emphasized in *BMO Bank of Montreal*, at para. 27, as long as the existing pleading "raises the factual matrix of concern to the plaintiff and within which [the defendant's] possible liability is to be located[,] it successfully asserts a cause of action within the meaning of rule 21.01(1)(b)." Thus, even if the plaintiff does not explicitly set out the technical cause of action on which it relies, if the facts as pleaded implicitly advance such a claim, the court ought not to strike the pleadings: *BMO Bank of Montreal*, at paras. 26-27.

96 Applying these principles in this case, I conclude that Mr. Rausch's amended pleading contains the factual matrix necessary to support a negligence claim based on a common law duty of care. The statutory framework of the City's jurisdiction, including the *Municipal Act* and the *FFPPA*, is pleaded. Certain indicia relevant to establishing a relationship of proximity are pleaded. The fact that the by-law enforcement officer took no steps to consider jurisdiction is pleaded. Reliance is pleaded. Causal damages are pleaded. To strike his pleading, one that pleads breach of a duty of care arising out of a statutory framework because it does not explicitly refer to its being a common law duty would be to privilege form over substance. In my view, this narrow approach is not called for here.

97 I would therefore not give effect to the argument that Mr. Rausch's pleadings do not support a negligence claim based on a common law duty of care.

98 For these reasons, I conclude that it is not "plain and obvious" that Mr. Rausch's negligence claim based on a common law duty of care has no chance of success. Subject to the limitation argument to which I now turn, it should be allowed to proceed to trial.

(3) Are the impugned amendments to the statement of claim barred by the Limitations Act, 2002?

99 The City alleges that the statutory limitation period precludes Mr. Rausch from claiming negligence based on a common law duty. Mr. Rausch submits that a claim for negligence at common law is simply a claim based on a different theory of legal liability that flows from facts already pleaded and that it is therefore not statute-barred.

100 The law is clear that after the limitation period has expired, amendments are permissible if they advance an alternative theory of liability based on the same facts whereas they are not permissible if they advance a new cause of action: see *BMO Bank of Montreal*.

101 There is no issue about whether the negligence claim was added after the expiry of the limitation period. It was. Therefore, the question is whether Mr. Rausch's negligence claim based on a common law duty of care advances a new cause of action or merely an alternative theory of liability.

102 My answer to that question is the latter. As set out above, the Supreme Court in *Imperial Tobacco Canada Ltd.* recognized two avenues of liability in negligence arising out of the interaction between a government actor and a private citizen: negligence based on the breach of a statutorily imposed duty of care and negligence based on the breach of a common law duty of care arising out of conduct within the statutory framework. Relying on a common law duty as opposed to a statutory one is merely relying on a different legal path to reach the same conclusion. Moreover, Mr. Rausch's pleadings already allege the material facts necessary to support such a claim. Thus, in relying on a common law duty of care, Mr. Rausch asserts an alternative theory of liability flowing from the facts as pleaded. His claim is therefore not barred by the limitations period.

103 I would therefore not give effect to this ground of appeal.

Conclusion

104 In my view, Mr. Rausch's amended claim, read broadly, pleads breach of a common law duty of care. It is not clear that the claim cannot succeed, and the claim is not statute-barred. Furthermore, as I previously indicated, I would also not foreclose the possibility of an implied duty in the statute. The amendments should therefore be allowed to remain part of Mr. Rausch's pleading for the purposes of trial.

Disposition

105 While my reasoning differs somewhat from those expressed by the majority of the Divisional Court, in my view the decision to allow Mr. Rausch's negligence claim to proceed to trial was correct.

106 I would therefore dismiss the appeal with costs to the respondent fixed in the amount of $15,000, including disbursements and applicable taxes.

***J. MacFarland J.A.*:**

I agree.

***David Watt J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The City also advised Mr. Rausch that his herd violated the City of Pickering Zoning By-law 3037, (3 August 1965); however, the City ultimately laid charges under By-law 1769/83.

TAB 2

See paras. 14-15

2003 SCC 69, 2003 CSC 69
Supreme Court of Canada

Odhavji Estate v. Woodhouse

2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 2003 SCC 69, 2003 CSC 69, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74, [2004] R.R.A. 1, 11 Admin. L.R. (4th) 45, 127 A.C.W.S. (3d) 178, 180 O.A.C. 201, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 70 O.R. (3d) 253 (note), J.E. 2004-47

Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, Appellants/Plaintiffs v. Detective Martin Woodhouse, Detective Constable Philip Gerrits, Officer John Doe, Officer Jane Doe, Metropolitan Toronto Chief of Police David Boothby, Metropolitan Toronto Police Services Board and Her Majesty the Queen in Right of Ontario, Respondents/Defendants

Metropolitan Toronto Chief of Police David Boothby, Appellant on Cross-Appeal v. Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, Respondents on Cross-Appeal and Attorney General of Canada, Attorney General of British Columbia, Canadian Civil Liberties Association, Urban Alliance on Race Relations, African Canadian Legal Clinic, Mental Health Legal Committee, Association in Defence of the Wrongfully Convicted and Innocence Project of Osgoode Hall Law School, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 17, 2003
Judgment: December 5, 2003
Docket: 28425

Proceedings: reversing in part (2000), 52 O.R. (3d) 181 (Ont. C.A.); reversing in part (), [1998] O.J. No. 5426 (Ont. Gen. Div.)

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John P. Zarudny, Troy Harrison and James Kendik for respondent Her Majesty the Queen in right of Ontario
David Sgayias, Q.C., and Anne M. Turley for intervener Attorney General of Canada
D. Clifton Prowse and J. Gareth Morley for intervener Attorney General of British Columbia
John B. Laskin and Kristine M. Di Bacco (written submissions only) for intervenor Canadian Civil Liberties Association
Peter J. Pliszka and Anne C. McConville (written submissions only) for intervener Urban Alliance on Race Relations
Marie Chen and Sheena Scott (written submissions only) for intervener African Canadian Legal Clinic
Suzan E. Fraser and Najma Jamaldin (written submissions only) for intervener Mental Health Legal Committee
Sean Dewart and Louis Sokolov (written submissions only) for intervener Association in Defence of the Wrongfully Convicted
Marlys A. Edwardh and Breese Davies (written submissions only) for intervener Innocence Project of Osgoode Hall Law School

The judgment of the court was delivered by *Iacobucci J.*:

1 This appeal concerns actions for misfeasance in a public office and negligence within the context of motions to strike the actions as disclosing no reasonable cause of action. Unlike the Court of Appeal, I would permit the actions

for misfeasance in a public office to proceed. Like the Court of Appeal, I would permit the action against Metropolitan Toronto Chief of Police David Boothby to proceed, but would strike the actions for negligence against the Metropolitan Toronto Police Services Board and Her Majesty the Queen in Right of Ontario.

I. Facts

2 On September 26, 1997, Manish Odhavji was fatally shot by officers of the Metropolitan Toronto Police Service while running from his vehicle subsequent to a bank robbery. Within 25 minutes of the shooting, an assistant to Metropolitan Toronto Chief of Police David Boothby (the "Chief") notified the Special Investigations Unit of the Ministry of the Solicitor General (the "SIU") of the incident.

3 The SIU is a civilian agency statutorily mandated to conduct independent investigations of police conduct in cases of death or serious injury caused by the police. The SIU began its investigation immediately. It requested that the defendant officers remain segregated, that they make themselves available for same-day interviews, and that they provide their shift notes, on-duty clothing, and blood samples. Under s. 113(9) of the *Police Services Act*, R.S.O. 1990, c. P.15, members of the force are under a statutory obligation to cooperate with members of the SIU in the conduct of the investigation. Under s. 41(1) of the *Police Services Act*, a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act.

4 The estate of Mr. Odhavji and the members of his immediate family (the "plaintiffs") allege that the defendant officers intentionally breached their statutory obligation to cooperate fully with the SIU investigation. In particular, the plaintiffs allege that the defendant officers did not attend for interviews with the SIU until September 30, that they did not comply with the request to remain segregated, and that they failed to comply with the request for shift notes, on-duty clothing, and blood samples in a timely manner - and that when statements were eventually given to the SIU, they were both inaccurate and misleading. In the plaintiffs' statement of claim, the lack of a thorough investigation into the shooting incident has caused the plaintiffs to suffer mental distress, anger, depression and anxiety. The plaintiffs further allege that these damages are consequences that the defendant officers and the Chief knew or ought to have known would result from an inadequate investigation into the shooting incident.

5 The actions at issue in this appeal are not related to the allegedly wrongful death of Mr. Odhavji but, rather, to the defendant officers' alleged failure to cooperate with the SIU. It is the plaintiffs' submission that the foregoing facts give rise to an action for misfeasance in a public office against the defendant officers and the Chief, and actions for negligence against the Chief, the Metropolitan Toronto Police Services Board (the "Board") and Her Majesty the Queen in Right of Ontario (the "Province"). More specifically, this appeal concerns (i) the plaintiffs' appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office, and the actions for negligence against the Board and the Province, on the basis that they disclose no reasonable cause of action; and (ii) the Chief's cross-appeal against the Court of Appeal's decision to allow the action for negligence against the Chief to proceed.

II. Relevant Statutory Provisions

6 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 21

> **Rule 21 Determination of an Issue before Trial**
>
> 21.01(1) A party may move before a judge,
>
> . . . . .
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

Police Services Act, R.S.O. 1990, c. P.15

> 3(2) The Solicitor General shall,

(a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels;

(b) monitor boards and police forces to ensure that they comply with prescribed standards of service;

. . . . .

(d) develop and promote programs to enhance professional police practices, standards and training; . . .

. . . . .

31.(1) A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall, [since amended]

. . . . .

(b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;

(c) establish policies for the effective management of the police force;

. . . . .

(e) direct the chief of police and monitor his or her performance; . . .

. . . . .

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

. . . . .

41.(1) The duties of a chief of police include,

. . . . .

(b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force; . . .

. . . . .

113.(1) There shall be a special investigations unit of the Ministry of the Solicitor General.

. . . . .

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

III. Judicial History

A. Ontario Court (General Division),

7 According to Day J., misfeasance in a public office can be established in one of two ways: either by proof of malice with intent to injure or by proof that the public officer intentionally engaged in acts that were *ultra vires* the scope of his or her office and that she or he could foresee with a degree of certainty that harm would be caused to the plaintiff. As applied to the facts of this case, Day J. concluded that the action against the defendant officers could proceed, but only if the cause of action for misfeasance was framed in malice. He held that it was plain and obvious that the action for misfeasance in a public office against the Chief would fail, owing to the fact that he was not directly and consciously involved in the breach of the obligation to cooperate with the SIU investigation.

8 Day J. allowed the action for negligent supervision against the Chief to proceed on the basis that he made no submissions in respect of this issue. In respect of the actions for negligent supervision against the Board and the Province, Day J. found that there was sufficient proximity between the parties to conclude that the defendants owed a duty of care to the appellants. Nonetheless, Day J. struck the action against the Board, on the basis that a duty of care is negatived in situations in which the agency's involvement was limited to establishing policy. He found that the action for negligent supervision against the Province could succeed on the basis that a cause of action for negligence lies where the responsible Minister fails to take sufficient steps to implement a particular policy decision, in this instance, the decision to establish the SIU.

B. Ontario Court of Appeal (2000), 52 O.R. (3d) 181

9 Borins J.A., for the majority of the court, held that the defining element of misfeasance in a public office is the unlawful exercise of a statutory or prerogative power that adheres to the defendant's office. On this view, the failure of a public officer to perform a statutory duty cannot constitute misfeasance in a public office. Consequently, Borins J.A. found it plain and obvious that neither action for misfeasance in a public office could succeed, owing to the fact that the defendants had not been engaged in the exercise of a statutory or prerogative power that adhered to their respective offices. The most that could be said was that the defendants failed to comply with the obligations imposed upon them by the *Police Services Act*.

10 In respect of the actions for negligent supervision, Borins J.A. held that the action against the Chief was based on s. 41(1)(b) of the *Police Services Act*, which imposes a duty on a chief of police to ensure that members of the police force carry out their duties in accordance with the Act and its regulations. Borins J.A. concluded that it was not plain and obvious that the action for negligent supervision against the Chief must fail. It was, however, plain and obvious that the actions against the Board and the Province must fail. With respect to the Board, Borins J.A. agreed with Day J. that the Board's involvement was limited to establishing policy. With respect to the Province, Borins J.A. held that the *Police Services Act* does not impose a duty on the Province to control the operational conduct of the municipal police officers or to ensure that police officers comply with their obligation to cooperate with an SIU investigation.

11 Feldman J.A., dissenting, did not agree that it was plain and obvious that the actions for misfeasance in a public office must fail. In her view, the essence of the tort is the misfeasance in or misuse of the office itself; its purpose is to prevent the deliberate injuring of members of the public by the intentional disregard of official duty. Feldman J.A. thus held that there is no principled reason to distinguish between a public officer who improperly exercises a power and a public officer who deliberately fails to carry out a duty where they know or are recklessly indifferent to the fact that injury to the plaintiff is the likely result. Applied to the facts of this case, Feldman J.A. would have found that the actions for misfeasance in a public office should have been allowed to proceed.

12 Feldman J.A. also was of the view that each of the actions for negligent supervision should have been allowed to proceed. She agreed with Borins J.A. that the Province is not under an obligation to ensure that individual officers comply with their statutory obligation to cooperate with the SIU, but noted that the nature of the claim was that the Province failed to implement training procedures or other policies in order to ensure that officers, as a matter of general practice, cooperated with the SIU. Feldman J.A. was uncertain whether the *Police Services Act* imposes a statutory duty on the Province in respect of these operational matters, and thus felt it inappropriate to strike the claim at this stage of the action. In respect of the Board, Feldman J.A. found that it was not immediately clear whether the Board is under an obligation to establish policies and monitor their implementation for the purpose of ensuring that police officers comply with their statutory obligations. Thus, Feldman J.A. would have found that it was not plain and obvious that the actions for negligent supervision could not succeed.

IV. Analysis

13 In discussing the issues in this appeal, I will begin by stating the test for striking a statement of claim on the basis that it discloses no reasonable cause of action. I will then consider that test within the context of the actions for misfeasance in a public office, and then within the context of the actions for negligence.

A. Striking out a Statement of Claim

14 The defendants' motions to have the actions dismissed were made pursuant to R. 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 21.01(1)(b) stipulates that a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, R. 19(24)(a) of the *Rules of Court*, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.

15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980:

> . . . assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out . . . .

The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.).

B. The Actions for Misfeasance in a Public Office

16 The essence of the Court of Appeal's decision is that the "radical defect" from which the actions for misfeasance in a public office suffer is their failure to plead the constituent elements of the tort. In particular, the Court of Appeal held that the defining element of the tort is the unlawful exercise of the statutory or prerogative powers that adhere to the defendant's office. Because the alleged misconduct involved the breach of a statutory duty rather than the improper or unlawful exercise of a statutory or prerogative power, it is "plain and obvious," on this view, that the actions for misfeasance in a public office cannot succeed.

17 Consequently, I begin by considering the Court of Appeal's conclusion that the unlawful exercise of a statutory or prerogative power is a constituent element of the tort. With respect, a review of the leading cases clearly reveals that the tort is not limited to circumstances in which the defendant officer is engaged in the unlawful exercise of a particular statutory or prerogative power. As I will discuss, the class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

(1) The Defining Elements of the Tort

18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126 (Eng. K.B.), in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was simply applying the principle *ubi ius ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: John W. Smith, *A Selection of Leading Cases on Various Branches of the Law*, 13th ed. (Toronto: Carswell, 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.

19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See, for example, *Powder Mountain Resorts Ltd. v. British Columbia*, 94 B.C.L.R. (3d) 14, 2001 BCCA 619 (B.C. C.A.), and *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 220 D.L.R. (4th) 474, 2002 ABCA 283 (Alta. C.A.). In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to

revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission." Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all." From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

20 This understanding of the tort is consistent with the widespread consensus in other common law jurisdictions that there is a broad range of misconduct that can found an action for misfeasance in a public office. For example, in *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (Australia H.C.), Brennan J. wrote as follows, at p. 25:

> The tort is not limited to an abuse of office by exercise of a statutory power. *Henly v. Mayor of Lyme* [(1828), 5 Bing 91, 130 E.R. 995] was not a case arising from an impugned exercise of a statutory power. It arose from an alleged failure to maintain a sea wall or bank, the maintenance of which was a condition of the grant to the corporation of Lyme of the sea wall or bank and the appurtenant right to tolls. *Any act or omission done or made by a public official in the purported performance of the functions of the office can found an action for misfeasance in public office*. [Emphasis added.]

In *Garrett v. New Zealand (Attorney General)*, [1997] 2 N.Z.L.R. 332 (New Zealand C.A.), the Court of Appeal for New Zealand considered an allegation that a sergeant failed to investigate properly the plaintiff's claim that she had been sexually assaulted by a police constable. Blanchard J. concluded, at p. 344, that the tort can be committed "by an official who acts or omits to act in breach of duty knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff."

21 The House of Lords reached the same conclusion in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 (U.K. H.L.). In *Three Rivers*, the plaintiffs alleged that officers with the Bank of England improperly issued a licence to the Bank of Credit and Commerce International and then failed to close the bank once it became evident that such action was necessary. Forced to consider whether the tort could apply in the case of omissions, the House of Lords concluded that "the tort can be constituted by an omission by a public officer as well as by acts on his part" (*per* Lord Hutton, at p. 1267). In Australia, New Zealand and the United Kingdom, it is equally clear that the tort of misfeasance is not limited to the unlawful exercise of a statutory or prerogative power actually held.

22 What, then, are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class or persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see, for example, *Powder Mountain Resorts Ltd.*, *supra*, *Alberta (Minister of Public Works, Supply & Services)* (C.A.), *supra*, and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (Ont. S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers*, *supra*, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (Eng. C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 70 Alta. L.R. (3d) 267, 1999 ABQB 440 (Alta. Q.B.), at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of (i) an intentional illegal act and (ii) an intent to harm an individual or class of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 156 Man. R. (2d) 14, 2001 MBCA 40 (Man. C.A.), in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts Ltd.*, *supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> . . . it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231]. Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power - i.e., an act committed without knowledge of (or *subjective* recklessness as to) its unlawfulness and the probable consequences for the plaintiff.

Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

26 As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett*, *supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers*, *supra*, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." As each passage makes clear, misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: see *Three Rivers*, at p. 1273, *per* Lord Millett. Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control. A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who is *unable* to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do otherwise.

27 Another factor that may remove an official's conduct from the scope of the tort of misfeasance in a public office is a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against

self-incrimination. Should such circumstances arise, a public officer's decision not to comply with his or her statutory obligation may not amount to misfeasance in a public office. I need not decide that question here except that it could be argued. A public officer who properly insists on asserting his or her constitutional rights cannot accurately be said to have deliberately disregarded the legal obligations of his or her office. Under this argument, an obligation inconsistent with the officer's constitutional rights is not itself lawful.

28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty." In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

29 The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but, absent some awareness of harm, there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, *as an individual*. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

30 In sum, I believe that the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. Once these requirements have been satisfied, it is unclear why the tort would be restricted to a public officer who engaged in the unlawful exercise of a statutory power that she or he actually possesses. If the tort were restricted in this manner, the tort would not extend to a public officer, such as Mr. Duplessis, who intentionally *exceeded* his powers for the express purpose of interfering with a citizen's economic interests. Nor would it extend to a public officer who breached a statutory obligation for the same purpose. But there is no principled reason, in my view, why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional *excess* of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

31 I wish to stress that this conclusion is not inconsistent with *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is *insufficient* that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation. This, however, is not the case. The principle established in *Saskatchewan Wheat Pool* has no bearing on the outcome of the motion on this appeal.

32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must

prove that the tortious conduct was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law.

(2) Application to the Case at Hand

33 As outlined earlier, on a motion to strike on the basis that the statement of claim discloses no reasonable cause of action, the facts are taken as pleaded. Consequently, the primary question that arise on this appeal is whether the statement of claim pleads each of the constituent elements of the tort.

34 In respect of the first constituent element, namely, unlawful conduct in the exercise of public functions, the statement of claim alleges that the defendant officers did not cooperate with the SIU investigation but, rather, took positive steps to frustrate the investigation. As described above, police officers are under a statutory obligation to cooperate fully with members of the SIU in the conduct of investigations, pursuant to s. 113(9) of the *Police Services Act*. On the face of it, the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty. Similarly, the alleged failure of the Chief to ensure that the defendant officers cooperated with the investigation also would seem to constitute an unlawful breach of duty. Under s. 41(1)(b) of the *Police Services Act*, the duties of a chief of police include ensuring that members of the police force carry out their duties in accordance with the Act. A decision not to ensure that police officers cooperate with the SIU is inconsistent with the statutory obligations of the office.

35 As discussed above, an obligation inconsistent with a public officer's constitutional rights cannot give rise to misfeasance in a public office. It is arguable that the statutory obligation to cooperate fully with the members of the SIU cannot trump a police officer's constitutional right against self-incrimination. I do not need to answer this question because it has not been argued that the SIU's requests were inconsistent with the officers' constitutional rights. Nor has it been argued that the alleged misconduct, which includes submitting inaccurate and misleading shift notes and disobeying an order to remain segregated, is privileged by the right against self-incrimination. As a consequence, it is not "plain and obvious" that the officers were faced with a stark choice between complying with the SIU's requests and abandoning their right against self-incrimination, either as a matter of fact or law. The potential conflict between the duty to cooperate with the SIU and the right against self-incrimination cannot be relied on to dismiss the action at this stage of the proceedings.

36 Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers." This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate. Insofar as the Chief is concerned, the statement of claim alleges as follows:

> i) Chief Boothby, through his legal counsel, was directed by S.I.U. officers to segregate the defendant officers and he deliberately failed to do so;
>
> ii) Chief Boothby failed to ensure that defendant police officers produced timely and complete notes;
>
> iii) Chief Boothby failed to ensure that the defendant police officers attended for requested interviews by S.I.U. in a timely manner; and
>
> iv) Chief Boothby failed to ensure that the defendant police officers gave accurate and complete accounts of the specifics of the shooting incident.

37 Although the allegation that the Chief *deliberately* failed to segregate the officers satisfies the requirement that the Chief *intentionally* breached his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a

public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.

38 The statement of claim also alleges that the defendant officers and the Chief "knew or ought to have known" that the alleged misconduct would cause the plaintiffs to suffer physically, psychologically and emotionally. Although the allegation that the defendants *knew* that a failure to cooperate with the investigation would injure the plaintiffs satisfies the requirement that the alleged misconduct was likely to injure the plaintiffs, misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct: see, for example, *Three Rivers*, *supra*, *Powder Mountain Resorts Ltd.*, *supra*, and *Alberta (Minister of Public Works, Supply & Services)* (C.A.), *supra*. This, again, is not a sufficient basis on which to strike the pleading. It is clear, however, that the phrase "or ought to have known" must be struck from the statement of claim.

39 The final factor to be considered is whether the damages that the plaintiffs claim to have suffered as a consequence of the aforementioned misconduct are compensable. In the defendant officers' submission, the alleged damages are non-compensable. Consequently, it is their submission that even if the plaintiffs could prove the other elements of the tort, it still would be plain and obvious that the actions for misfeasance in a public office must fail.

40 In the defendant officers' submission, the essence of the plaintiffs' claim is that they were deprived of a thorough, competent and credible investigation. And, owing to the fact that no individual has a private right to a thorough, competent and credible criminal investigation, the plaintiffs have suffered no compensable damages. If this were an accurate assessment of the plaintiffs' claim, I would agree. Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize. This, however, is not an accurate assessment of the plaintiffs' submission. In their statement of claim, the plaintiffs also allege that they have suffered physically, psychologically and emotionally, in the form of mental distress, anger, depression and anxiety, as a direct result of the defendant officers' failure to cooperate with the SIU.

41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law currently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see, for example, *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216 (S.C.C.), and *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.). Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.

42 In the final analysis, I would allow the appeal in respect of the actions for misfeasance in a public office. If the facts are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against the defendant officers and the Chief must fail. The plaintiffs may well face an uphill battle, but they should not be deprived of the opportunity to prove each of the constituent elements of the tort.

C. The Actions for Negligence

43 In addition to the actions for misfeasance in a public office, the statement of claim includes actions for negligence against the Chief, the Board and the Province. The essence of these claims is that the Chief, the Board and the Province

are liable as a consequence of their failure to ensure that the defendant officers complied with s. 113(9) of the *Police Services Act*.

44 In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care, (ii) that the defendant breached that duty of care, and (iii) that damages resulted from that breach. The primary question that arises on this appeal is in respect of the first element, namely, whether the defendants owed to the appellants a duty to take reasonable care to ensure that the defendant officers cooperated with the SIU investigation. If the defendants are under no such obligation, the actions for negligence cannot succeed. After discussing the general principles applicable to the duty of care analysis, I will go on to discuss this approach in the context of the negligence actions against the Chief, the Board and the Province. I will also address the defendants' submission that complained-of harm is non-compensable.

(1) The Duty of Care

45 It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in *Le Livre v. Gould*, [1893] 1 Q.B. 491 (Eng. C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.

46 It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), at pp. 751-752:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

See, for example, *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.), *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.), and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.).

47 The first stage of analysis, then, demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and defendant that the defendant owes to the plaintiff a *prima facie* duty of care. The question of when such a duty arises is one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the neighbour principle in *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), at p. 580:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As eloquently observed by Professor J.G. Fleming, this passage is a sacrosanct preamble to judicial disquisitions on duty, yet contains a fateful ambiguity: *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998), at p. 151. More specifically, does the reference to persons so closely and directly affected by the conduct in question that the

defendant ought reasonably to have had them in contemplation conflate foreseeability of harm and duty? Or does it require something in addition to foreseeability of harm?

48 In *Cooper*, *supra*, the Court clearly stated that the latter approach is the correct one. At para. 29 of their joint reasons, McLachlin C.J. and Major J. stated that there must be reasonable foreseeability of harm "plus something more." At para. 31, they concluded that this "something more" is proximity: in order to establish that the defendant owed the plaintiff a duty of care, the reasonable foreseeability of harm must be supplemented by proximity. It is only if harm is a reasonably foreseeable consequence of the conduct in question *and* there is a sufficient degree of proximity between the parties that a *prima facie* duty of care is established. The question that thus arises is what precisely is meant by the term proximity.

49 McLachlin C.J. and Major J. concluded, at para. 32, that the term proximity, in the context of negligence law, is used to describe the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 24:

> The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50 Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk*, *supra*, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23; and *Cooper*, *supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

51 The second stage of the *Anns* test requires the trial judge to consider whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed. In *Cooper*, McLachlin C.J. and Major J. wrote, at p. 554, that this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.

(2) Application of the Anns Test

52 The essence of the appellants' claim is that the Chief, the Board and the Province breached a duty to take reasonable care to ensure that the defendant officers complied with their legal obligation to cooperate with the SIU investigation. In order for this to give rise to an action in negligence, it must first be true that the defendants owed the appellants a duty to take such care. On the analysis above, this requires the Odhavji family to establish each of the following: (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach, (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants, and (iii) that there exist no policy reasons to negative or otherwise restrict that duty. If the defendants did not owe such a duty to the appellants, it is plain and obvious that the actions for negligence cannot succeed.

i. Police Chief Boothby

53 The conclusion that the harm complained of is a reasonably foreseeable consequence of the Chief's conduct is dependent on the prior conclusion that it is a reasonably foreseeable consequence of an inadequate investigation into the

shooting incident. If it is not reasonably foreseeable that the plaintiffs would suffer psychiatric harm as a consequence of an inadequate investigation into the incident, it is not reasonably foreseeable that the Chief's failure to ensure that the defendant officers' failure to cooperate with the SIU would injure the plaintiffs.

54 It is not immediately clear, in my view, that this initial threshold has been satisfied. Although it is to be expected that an inadequate investigation would distress or anger the close relatives of Mr. Odhavji, it is less obvious that this distress or anger would rise to the level of compensable psychiatric harm. Nevertheless, I do not think it "plain and obvious" that such harm is an unforeseeable consequence of the defendant officers' failure to cooperate with the investigation. The task might be a difficult one, but the appellants should not be deprived of the opportunity to prove that the complained of harm is a reasonably foreseeable consequence of a truncated or otherwise inadequate investigation into the shooting incident. It is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the appellants. As the Chief was responsible for ensuring that the officers cooperated with the SIU investigation, it is reasonably foreseeable that the Chief's failure to do so would also harm the appellants.

55 The next question that arises is whether there is sufficient proximity between the parties that a duty of care may rightly be imposed on the Chief. It may be that the appellants can show that it was reasonably foreseeable that the alleged misconduct would result in psychiatric harm, but foreseeability alone is an insufficient basis on which to establish a *prima facie* duty of care. In addition to showing foreseeability, the appellants must establish that it is just and fair to impose on the Chief a private law obligation to ensure that the defendant officers cooperated with the SIU. A broad range of factors may be relevant to this inquiry, including a close causal connection, the parties' expectations and any assumed or imposed obligations. See, for example, *Norsk*, *supra*, at p. 1153, *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860, 2000 SCC 60 (S.C.C.), at paras. 51-52, and *Cooper*, *supra*, at para. 35.

56 In the present case, one factor that supports a finding of proximity is the relatively direct causal link between the alleged misconduct and the complained of harm. As discussed above, the duties of a chief of police include ensuring that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act*. In those instances in which a member of the public is injured as a consequence of police misconduct, there is an extremely close causal connection between the negligent supervision and the resultant injury: the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* leads directly to the police misconduct, which, in turn, leads directly to the complained of harm. The failure of the Chief to ensure the defendant officers cooperated with the SIU is thus but one step removed from the complained of harm. Although a close causal connection is not a condition precedent of liability, it strengthens the nexus between the parties.

57 A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.

58 Finally, I also believe it noteworthy that this expectation is consistent with the statutory obligations that s. 41(1)(b) of the *Police Services Act* imposes on the Chief. Under s. 41(1)(b), the Chief is under a freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community. This includes an obligation to ensure that members of the police force do not injure members of the public through misconduct in the exercise of police functions. The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers did, in fact, cooperate with the SIU investigation.

59 In light of the above factors, I conclude that the circumstances of the case satisfy the first stage of the *Anns* test and raise a *prima facie* duty of care. If it is reasonably foreseeable that the defendant officers' decision not to cooperate with the SIU would injure the plaintiffs, a private law obligation to ensure that the officers cooperate with the SIU is rightly imposed on the Chief. Consequently, the only issue that is left to consider is whether there exist any broad policy considerations that ought to negative the *prima facie* obligation of the Chief to prevent the misconduct.

60 Counsel for the Chief submits that imposing a private law duty on the Chief to ensure that the officers cooperate with the investigation would compromise the independence of the SIU. It is difficult to see how this is the case, particularly as the Chief already is under a statutory obligation to ensure such cooperation. Imposing a duty of care on the Chief to ensure that members of the force cooperate with the SIU would have no bearing on the capacity of the SIU to determine how or in what circumstances to conduct such an investigation. Counsel for the Chief also submits that another factor to consider is the availability of alternative remedies, namely, the public complaints process that allows members of the public to complain in respect of the conduct of a police officer. What the appellants seek, though, is not the opportunity to file a complaint that might result in the imposition of disciplinary sanctions but, rather, compensation for the psychological harm that they have suffered as a consequence of the Chief's inadequate supervision. The public complaints process is no alternative to liability in negligence.

61 In short, I believe that it would be inappropriate to strike the action for negligent supervision against the Chief on the basis that he did not owe the plaintiffs a duty of care. If the plaintiffs can establish that the complained of harm is a reasonably foreseeable consequence of the Chief's failure to ensure that the defendant officers cooperated with the SIU, the Chief was under a private law duty of care to take reasonable care to prevent such misconduct. The cross-appeal against the Court of Appeal's decision to allow the action in negligence against Police Chief Boothby to proceed is therefore dismissed.

ii. Metorpolitan Toronto Police Services Board

62 The plaintiffs do not allege that the Board was under a private law obligation to ensure that the defendant officers in this appeal cooperated with the SIU investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Board breached a duty of care to ensure that police officers, as a matter of general practice, cooperate with SIU investigations. The duty of care is owed not to the Odhavjis in particular, but to the family of a person harmed by the police.

63 The first question to answer is whether it is reasonably foreseeable that the family of a person harmed by the police would suffer acute anxiety or depression as a consequence of the Board's failure to enact additional policies or training procedures for the purpose of ensuring that police officers cooperate with the SIU. But, once again, foreseeability alone is insufficient. Even if it is reasonably foreseeable that the Board's decision not to enact additional procedures would exacerbate the allegedly systematic failure of the police officers to cooperate with the SIU, and that this, in turn, would cause the families of persons harmed by the police to suffer psychiatric harm, it still must be determined whether the Board is under a private law duty to ensure that members of the force, as a matter of general practice, cooperate with the SIU. For the reasons that follow, I am of the view that the Board is under no such duty.

64 The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm. As discussed earlier, the fact that a chief of police is in a direct supervisory relationship with members of the force gives rise to a certain propinquity between the Chief and the Odhavjis; the close connection between the Chief's inadequate supervision and the officers' subsequent failure to cooperate with the SIU establishes a nexus between the Chief and the individuals who are injured as a consequence of the officers' misconduct. The Board, however, is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force but, rather, supervises the Chief (who, in turn, supervises

members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.

65 A second factor that distinguishes the Board from the Chief is the absence of a statutory obligation to ensure that members of the police force cooperate with the SIU. As discussed earlier, the express duties of the Chief include ensuring that members of the force comply with s. 113(9) of the *Police Services Act*. Under s. 31(1), the Board is responsible for the provision of adequate and effective police services, but is not under an express obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.

66 It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force. But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of its obligation to provide "adequate and effective" police services.

67 Considered against this backdrop, I conclude that the circumstances of the relationship inhering between the plaintiff and the defendant are not such that a duty of care to ensure that members of the police force cooperate with the SIU may rightly be imposed. The appeal against the Court of Appeal's decision to strike the action against the Board is dismissed.

iii. The Province

68 As with the Board, the plaintiffs do not allege that the Province, through the Solicitor General, was under a private law obligation to ensure that the defendant officers in this appeal cooperated with the investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Province breached a private law obligation to institute policies and training procedures for the purpose of ensuring that members of the force, as a matter of general practice, cooperate with the SIU. Owing to the fact that my conclusions in respect of the action against the Province mirror my conclusions in respect of the action against the Board, the following analysis is fairly brief.

69 As above, I am not certain that it is reasonably foreseeable that the Solicitor General's decision not to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm. This, however, is a matter that is properly addressed at trial. But even if it is reasonably foreseeable that the failure of the Solicitor General to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm, there is insufficient proximity between the parties to conclude that the Province is under a private law obligation to ensure that members of the force comply with s. 113(9) of the *Police Services Act*.

70 Like the Board, the Province is not directly involved in the day-to-day conduct of members of the police force. Whereas the Police Chief is in a direct supervisory relationship with members of the force, the Solicitor General's involvement in the conduct of police officers is limited to a general obligation to monitor boards and police forces to ensure that adequate and effective police services are provided and to develop and promote programs to enhance professional police practices, standards and training. Like the Board, the Province is very much in the background, perhaps even more so. The lack of any direct involvement in the day-to-day conduct of members of the force substantially weakens the nexus between the Province and the plaintiffs. The Province simply is too far removed from the day-to-day

conduct of members of the force to be under a private law obligation to ensure that members of the force cooperate with the SIU.

71 This lack of any direct involvement in the day-to-day conduct of police officers is compounded by the fact that the responsible minister is not under a statutory obligation to ensure that police officers cooperate with the SIU. Under s. 3(2) of the *Police Services Act*, the Solicitor General is under a general duty to monitor police forces to ensure that adequate and effective police services are provided. It is not, however, under an obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act* and the needs of the community. Although I do not foreclose the possibility that s. 3(2) might give rise to a statutory obligation to address widespread or systemic misconduct of a particularly serious nature, the circumstances of this case do not give rise to such an obligation. The Solicitor General's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of his duty to ensure that the Board provides "adequate and effective" police services in the municipality.

72 For the above reasons, it is my conclusion that the Province does not owe to the plaintiffs a duty of care. Absent a more direct involvement in the day-to-day conduct of police officers or a statutory obligation to ensure that members of the force comply with s. 113(9), it would be improper to impose on the Province a private law obligation to ensure that members of the police force cooperate with the SIU. The appeal against the Court of Appeal's decision to strike the action against the Province is dismissed.

(3) Damages

73 The final factor to consider is the defendants' submission that the alleged injuries are non-compensable. Consequently, it is their submission that even if it is established that the defendants owed the plaintiffs a duty of care, it is still plain and obvious that the actions for negligence must fail.

74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm." At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. Causation and the magnitude of psychiatric damage are matters to be determined at trial.

D. The Court of Appeal's Costs Award

75 A final issue to consider is the Court of Appeal's decision to follow the usual rule that the successful party is entitled to costs. In the plaintiffs' submission, it was improper for the Court of Appeal to award costs to the defendant officers and the Province. By the consent of the parties, a "no-costs" order was made in respect of the actions against the Chief and the Board. The plaintiffs submit that they are public interest litigants and should not have been required to pay costs.

76 Although circumstances might arise in which there are cogent arguments for departing from the normal cost rules, I have difficulty conceptualizing the plaintiffs in the present appeal as public interest litigants. In the plaintiffs' own submissions, there are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g., a non-profit organization) and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings. The plaintiffs in the present case do not fit into either category - and thus do not fit their own definition of a public interest litigant. Indeed, it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.

77 Moreover, under R. 57.01(1) of the *Rules of Civil Procedure*, costs awarded in a proceeding are a matter of discretion for the court. Consequently, this Court should not interfere with a lower court's exercise of that discretion unless there is a clear and compelling reason for doing so. See, for example, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*

(1994), [1995] 1 S.C.R. 315 (S.C.C.). In the present case, there is no such basis on which to interfere with the Court of Appeal's decision to award costs in accordance with the usual rule that the successful party is entitled to costs.

V. Disposition

78 In the result, the appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office is allowed. The judgment of the Court of Appeal is set aside, and an order will issue striking the phrase "or ought to have known" from the amended statement of claim. The cross-appeal against the Court of Appeal's decision to allow the action in negligence in respect of the SIU investigation against the Chief to proceed is dismissed, as is the appeal against the Court of Appeal's decision to strike the actions in negligence in respect of the SIU investigation against the Board and the Province. Although success has been divided, the plaintiffs have achieved a significant success in respect of the actions against the defendant officers and the Chief. Accordingly, I would award costs to the plaintiffs in this Court.

Appeal allowed in part; cross-appeal dismissed.

Pourvoi accueilli en partie; pourvoi incident rejeté.

TAB 3

2014 ONSC 889
Ontario Superior Court of Justice

Holley v. Northern Trust Co. Canada

2014 CarswellOnt 1571, 2014 ONSC 889, [2014] O.J. No. 651,
10 C.C.P.B. (2nd) 13, 10 C.B.R. (6th) 1, 237 A.C.W.S. (3d) 888

Jennifer Holley Plaintiff and The Northern Trust Company, Canada and the Royal Trust Company Defendants

Perell J.

Heard: January 23-24, 2014
Judgment: February 11, 2014
Docket: 12-CV-462273CP

Counsel: Joel P. Rochon, Peter Jervis, Remissa Hirji for Plaintiff
Jeff Galway, Nicole Henderson for Defendant, Northern Trust Company, Canada
R. Paul Steep, Christine L. Lonsdale, Daniel Dawalibi for Royal Trust Company

***Perell J.*:**

A. Introduction

1 Jennifer Holley is the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992. She sues The Royal Trust Company and The Northern Trust Company, Canada.

2 As I will describe below, because of a release granted in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), Ms. Holley can only sue the Defendants for fraud.

3 Royal Trust and Northern Trust each move for an order striking out Ms. Holley's Amended Statement of Claim on the basis that her pleading discloses no reasonable cause of action for fraud or, in the alternative, they each seek a judgment dismissing her action as statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

4 Royal Trust also asserts that Ms. Holley's action should be dismissed as an abuse of process.

5 For the reasons expressed below, I do not regard Ms. Holley's action as an abuse of process. However, in my opinion, it is plain and obvious that her Amended Statement of Claim does not plead a tenable cause of action for fraud. She does plead a tenable cause of action for constructive fraud, but, in my opinion, constructive fraud is encompassed by the CCAA release. Further, it is my opinion that it is plain and obvious that her claims for constructive fraud or for common law fraud are statute-barred.

6 Accordingly, for the reasons expressed below, I dismiss her action against Royal Trust and Northern Trust.

B. Factual and Procedural Background

1. Introduction

7 In this part of my Reasons for Decision, I shall describe the factual and procedural background. In this introduction, I identify several contested issues of mixed fact and law that will be important to the legal analysis that will come later, and I explain why attention to these matters is important.

8 I have already noted above that because of a release in CCAA proceedings, Ms. Holley can sue Royal Trust and Northern Trust only for fraud. The practical consequence of this restriction is that the Defendants advance a two-pronged argument. First, they say that their actions were compliant with the Trust Agreement, and second, they say that if there was non-compliance, it did not amount to fraud. This two-pronged argument makes for contested issues about: (a) the interpretation of the Trust Agreement; (b) whether Ms. Holley has a tenable argument that the conduct of Royal Trust and Northern Trust breached their respective obligations under the Trust; and (c) assuming that it is arguable that Royal Trust and Northern Trust acted unlawfully, was the alleged misconduct fraudulent?

9 Further, the matter of the fraud exception in the CCAA release raises an interpretation issue about the scope of the release, and, in particular, there is the contested issue of whether as a matter of interpretation, constructive fraud was released by the CCAA release. Thus, it is necessary to pay attention to the circumstances in which the CCAA release came into existence in the CCAA proceedings.

10 Moreover, it is necessary to pay attention to the circumstances in which the release was granted because those circumstances are important to Royal Trust's and Northern Trust's argument that the limitation period began to run at the time of the CCAA Monitor's 31st Report to the court, which Report discussed the delivery of a release.

11 Ms. Holley denies that her claim is statute-barred, and she submits that the earliest date for discovery of her claims came with the Monitor's 51st Report, which Report, she submits, reveals the factual information necessary to discover a fraud action against the Defendants.

12 Thus, there is a contested issue about discoverability that turns on the nature of the disclosures in these two Reports from the Monitor. It shall, therefore, be important to pay attention to the information disclosed by the Monitor and also to pay attention to what the circumstances reveal about what Ms. Holley and her lawyers knew or ought to have known about seeking a remedy against Royal Trust and Northern Trust at the time of the Monitor's 39th Report.

2. The Parties

13 The Plaintiff, Jennifer Holley, was an employee of Nortel Networks Corporation ("Nortel"). Nortel is the applicant in ongoing proceedings under the CCAA. As an employee, Ms. Holley was on long-term disability ("LTD") for over 12 years. Given her current health, it is unlikely that she will ever be able to return to work. Because of the CCAA, she and other employees or former employees of Nortel will no longer receive LTD benefits, although they will receive something modest from the winding up of the Trust.

14 Ms. Holley brings this proposed class action on her own behalf and on the behalf of the following class of persons:

> All Beneficiaries of the Nortel Health and Welfare Trust ("HWT"). Beneficiaries include:
>
> (a) LTD Beneficiaries for LTD Income and LTD Life;
>
> (b) LTD Beneficiaries participating under Optional Life for the LTD Optional Life Benefit;
>
> (c) STB Beneficiaries in pay on or before December 31,2010 for STBs;
>
> (d) SIB Beneficiaries in pay on or before December 31,2010 for SIBs; and
>
> (e) Pensioners (including LTD Beneficiaries) for Pensioner Life.
>
> (the "Class" or "Class Members").

15 Nortel provided LTD and other benefits through the Nortel Health and Welfare Trust, which is also known as the HWT, which I will refer to as the Trust.

16 Replacing the original trustee, which, from 1980 to 1997, was the Montreal Trust Company, Royal Trust was the trustee of the Trust from April 1997 to November 30, 2005.

17 Then, Northern Trust was appointed as trustee of the Trust effective December 1, 2005, and it continues to act as trustee of the Trust, which is in the process of being wound-up. Northern Trust is also the trustee of Nortel's pension plans.

3. The Nortel Health and Welfare Trust

18 Nortel (and its predecessors) provided LTD, health, and welfare benefits to its employees. The benefits were funded and administered through the Nortel Health and Welfare Trust ("the Trust").

19 The Trust is governed by the Trust Agreement, which began with an agreement dated January 1, 1980 between Northern Telecom Limited (a predecessor to Nortel) and Montreal Trust Company, as trustee. The Trust Agreement was amended by agreements dated September 24, 1984, June 1, 1994, December 1, 2005, and by a letter agreement dated December 1, 2005.

20 It may be noted that in the CCAA Proceedings, discussed below, Justice Morawetz held that the Trust constitutes one trust created for the purpose of providing health and welfare plan benefits for Nortel's employees. See *Nortel Networks Corp., Re*, 2010 ONSC 5584 (Ont. S.C.J. [Commercial List]) at paras. 9, 10, and 33.

21 For present purposes, the following provisions in the Trust Agreement are relevant:

> **RECITALS**
>
> 1. The Corporation has established for the benefit of certain of its employees and the employees of such affiliated or subsidiary Corporations as the Corporation may designate, certain Health and Welfare Plans, and such other similar plan or plans as the Corporation may from time to time place in effect, as follows:
>
> (a) a Health Care Plan;
>
> (b) a Management Long Term Disability Plan;
>
> (c) a Union Long Term Disability Plan;
>
> (d) a Management Survivor Income Benefit Plan;
>
> (e) a Management Short Term Disability Plan;
>
> (f) a Group Life Insurance Plan
>
> All of which are hereinafter collectively referred to as the "Health and Welfare Plan".
>
> 2. To give effect to the Health and Welfare Plan it is necessary to establish a trust fund to be known as the "Health and Welfare Trust".
>
> Now therefore in consideration of the premises and the mutual covenants herein contained the Corporation and the Trustee, here covenant and agree as follows:
>
> **ARTICLE II — DEFINITIONS ...**
>
> 1. The term "Trustee" shall mean the Trustee herein named its successors and assigns and shall include the person, legal entity or corporation to whom the Trustee may delegate such 'powers as are necessary for the sound and efficient administration of the Trust fund.

2. The term "Benefits" as used herein shall mean payments benefits as determined under the Health and Welfare Plan.

4. The term "Employees" shall mean those active and retired employees of the Corporation and designated affiliated or subsidiary corporations which have adopted the Health and Welfare Plan including dependents as defined in Schedule "A", on whose behalf contributions are or have been made to the Trust Fund and who are eligible for benefits under the Health and Welfare Plan.

5. The term "Employer's Contribution" as used herein shall mean payments required to be made by the Corporation and by designated affiliated or subsidiary corporations to the Trust Fund to enable the Trustee to discharge; the obligations arising under the Health and Welfare Plan.

6. Trust Fund as used herein shall mean all of the assets of the 'Health and Welfare Trust', including all funds received by way of contributions from the Corporation and those of its designated affiliated or subsidiary corporations in accordance with the provisions of the Health and Welfare Plan and of this Trust Agreement, and all employees' contributions together with all profits, increments, and earnings thereon.

ARTICLE II — TRUST FUND

1. The trust fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Employees.

2. All payments made to the trustee from time to time by the Corporation and designated, affiliated or subsidiary corporations and by the employees, together with all profits, increments and earning thereupon, shall be irrevocable and constitute upon receipt by the trustee, the trust funds to be administered by the trustee in accordance with the terms of this trust agreement, the Health and Welfare Benefit Plan and the Eligibility Requirements.

3. The Trustee shall from time to time on the written directions of an officer of the Corporation so designated by its Board of Directors, or failing such designation, by the Secretary, of the Employees' Benefit Committee of the Corporation, or a Plan Administrator appointed by the Corporation, make payments out of the Fund to such persons, in such manner and in such amounts as may be specified in such directions to the Trustee. In each instance, the written directions shall be deemed to include a certification to the Trustee that such directions and the payments to be made pursuant thereto are in accordance with the terms of the Health and Welfare Plan, which certification shall constitute full and complete protection to the Trustee in complying with such directions.

ARTICLE III - TRUSTEE

1. The Trustee, who shall also be known as the "Trustee of the Health and Welfare Trust", hereby accepts the trust created by the Trust Agreement and agrees to hold, invest, distribute and administer the Trust Fund in accordance with the terms and conditions of the Health and Welfare Plan and this Trust Agreement.

ARTICLE IV — EMPLOYER'S CONTRIBUTIONS

1. The Corporation and its designed affiliated or subsidiary corporations agree to make Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund as a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time by the Trust for the purposes of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

2. The Trustee shall determine or cause to be determined, on a sound actuarial basis from time to time, and in any event, once every calendar year, the level of contributions to the Trust Fund necessary to fund adequately the Health and Welfare Plan.

3. Subject to paragraphs (1) and (2) hereof, the Corporation and its designated affiliated or subsidiary corporations shall be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Health and Welfare Plan. (emphasis added)

ARTICLE VI — AMENDMENT AND TERMINATION

2. Upon sixty (60) days prior written notice to the Trustee, the Corporation may terminate its obligation to make Employer's contributions in respect of benefits after the date of written notice to the Trustee (hereinafter called the Notice of Termination)..Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice of Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the trust Agreement and the Health and Welfare Plan shall revert to the Corporation.

22 Effective December 1, 2005, Northern Trust replaced Royal Trust to become the trustee of the Trust.

23 When Northern Trust became the trustee, the Trust Agreement was amended to provide that Nortel would assume sole responsibility for determining the amount of required contributions. The letter agreement stated:

Notwithstanding anything to the contrary in the Health and Welfare Trust and for the avoidance of any doubt, we [Nortel] agree that you [Northern Trust] shall have no responsibility for determining, reviewing or monitoring the amounts of Nortel Networks Limited's contributions required in order to adequately fund the Health and Welfare Plan ("Contribution Amounts") nor to advise and carry out administrative procedures in accordance with the Health and Welfare Plan and the eligibility Requirements.

Nortel Networks Limited agrees that it shall be solely responsible for determining said Contribution Amounts on a sound actuarial basis...and agrees to indemnify and hold you harmless from any and all costs, losses, damages, claims, actions, suits, liabilities, expenses or other charges (including attorneys' fees) that you incur directly or indirectly arising out of the contributions made (or not made) by Nortel to the Health and Welfare Trust or out of the administration of the Health and Welfare Plan.

4. The Operation of the Trust and the Allegations of Breach

24 I will return several times below to the parties' arguments about whether Royal Trust or Northern Trust breached their obligations under the Trust or whether they were authorized to do what they did or what they allowed to be done. Answering that issue depends upon interpreting the Trust Agreement. However, there actually is little dispute about how the trust operated and how the various constituent benefit plans were administered. The disputed legal issue is whether the Trustees' administration of the Trust was compliant with the Trust Agreement.

25 The Trust operated in the following way. Over the history of the Trust, Nortel made contributions of three sorts. First, Nortel made cash contributions for some plans for which the trustee had established a reserve account. The trustee

would invest the contributions in accordance with the investment powers set out in the Trust Agreement. The trustee would pay the benefits for the Reserved Plans from the reserve account. A payment to an employee's survivor spouse is an example. LDT benefits are another example of benefits paid from the reserve account. It will be a matter of debate between actuaries about the extent to which and when, if ever, the reserve account had a surplus or was underfunded and had a deficit.

26 Second, Nortel made cash contributions to put the trustee in funds or to reimburse the trustee for the payment of benefits by the trustee to employees under plans administered through the Trust for which there was no reserve account and for which the benefits were being paid on a pay-as-you-go basis. Medical or dental plan benefits are an example. This benefit was administered through the Trust but no reserve account was established for the benefit.

27 Third, Nortel would, in effect, promise to pay the trustee for contributions to the reserve account or to reimburse the trustee for its payment of the pay-as-you-go benefits for the plans that did not have a reserve account.

28 Before it became the subject matter of litigation, this third way of Nortel making a contribution was described by the parties as the "Due," which nickname derives from the Trust's financial report asset item "Due from Sponsoring Company." Now that the matter is in litigation, the parties characterize the Due in different ways. Royal Trust and Northern Trust characterize it as a non-cash payment made by Nortel, much the way that a promissory note, IOU, or post-dated cheque is a payment or an account receivable.

29 In contrast, Ms. Holley characterizes the Due as an unauthorized loan, a fraud, and a breach of the terms of the trust and the obligations owed by the trustee to the beneficiaries of the Trust. Ms. Holley submits that allowing the Due to persist uncollected and without security meant that reserve funds had to be used to pay non-reserve benefits and this practice imperilled the reserves earmarked for LTD beneficiaries and others, especially during the time when financial funnel clouds were in the financial weather forecast for Nortel.

30 Royal Trust and Northern Trust submit that they did nothing wrong in accepting the Due. They submit that the Trust Agreement never imposed upon the trustee a duty to compel Nortel to make contributions and the Trust Agreement never imposed an obligation on the trustee to otherwise monitor Nortel's compliance with its contribution obligations.

31 There was an issue between the parties during the hearing of the motion about whether the December 1, 2005 letter agreement acknowledged that but for the letter agreement, the trustee did indeed have a responsibility to determine the amount of Nortel's contribution or whether the December 1, 2005 letter agreement was introduced when Northern Trust became trustee out of its abundance of caution to make it clear that it did not have such an obligation.

32 There was an issue between the parties about whether the trustee had a responsibility to ensure that the benefit plans were actuarially sound. In her Statement of Claim, Ms. Holley pleads that for Nortel to secure favourable tax treatment for its contributions, the LTD benefits under the Trust must respect the principles of insurance, even if the benefits are not insured with a licensed insurer. In this regard, paragraph 7 of CRA [Canada Revenue Agency] Interpretation Bulletin IT-428 provides:

> If, however, insurance is not provided by an insurance company, the plan must be one that is based on insurance principles, i.e., funds must be accumulated, normally in the hands of trustees or in a trust account, that are calculated to be sufficient to meet anticipated claims. If the arrangement merely consists of an unfunded contingency reserve on the part of the employer, it would not be an insurance plan.

33 In her Amended Statement of Claim, Ms. Holley pleads that Nortel and the trustee played a role similar to that of an insurance company and thus the trustees had an obligation to ensure that the Trust reserve account reflected the funded liability for future long term benefit payments. She submits that the Trust Agreement imposed on Royal Trust and then Northern Trust the obligation to ensure that the Trust was adequately funded for future liabilities, especially the LTD benefits.

34 It is thus a matter of significant controversy between the parties as to the nature of the funding to make payments of the benefits conferred by the Trust. As already noted above, in actual operation, some of the benefits under the Trust, described as the "Reserved Plans" and which included long term disability and survivor income benefits, were paid by the trustee from invested Trust assets. As noted above, other benefits under the Trust, which were described as "paid as incurred plans" or "pay-as-you-go plans" and which included medical and dental costs and life insurance premiums, were paid in a two-step process in which Nortel paid the beneficiaries' claims by funding the Trust on an as-needed basis. This was described as administering the payments through the Trust.

35 As a factual matter, only the Reserved Plans had assets notionally allocated in the Trust as reflected by the Trust's financial statements; however, assets were not segregated in the Trust for each Reserved Plan and no separate bank accounts were established.

36 All of the Trust assets were commingled in one common trust bank account. Royal Trust and Northern Trust submit that the Trust Agreement permits any trust asset to be used to pay benefits, which is in fact what occurred during the lifetime of the Trust.

37 In the Statement of Claim, Ms. Holley pleads that when Northern Trust became trustee it was aware that Nortel and Royal Trust had been breaching the Trust Agreement by using the trust fund as an unfunded contingency reserve to pay as incurred short term employee benefits without compensating the Trust as required. She pleads that Northern Trust knew that Nortel had failed to maintain the Trust as required by sound actuarial analysis and by Article IV paragraph 1 and 2 of the Trust Agreement.

38 Ms. Holley pleads that Northern Trust agreed to facilitate this breach of trust and continued the breach of the fiduciary duty owed to the beneficiaries of the Trust but demanded that Nortel provide an indemnification. She submits that by the December Letter Agreement, Nortel agreed to indemnify Northern Trust for any liability associated with employer contributions not being made on a sound actuarial basis. She pleads that the Letter Agreement does not derogate from Northern Trust's obligations to the beneficiaries of the Trust.

39 Whether or not it was a breach of the trust, it is a fact that as at December 31, 2008, just before the CCAA proceedings, Nortel owed the Trust contributions of $37 million. There was a Due of $37 million.

5. The CCAA Proceedings

(a) The Monitor's 39th Report and the CCAA Releases

40 On January 14, 2009, Nortel and its subsidiaries sought and were granted protection from their creditors under the CCAA. The CCAA Proceedings are ongoing. Pursuant to the Initial CCAA Order, Ernst & Young Inc. was appointed as the Monitor in the CCAA proceedings.

41 Under the initial CCAA Order, Nortel continued to provide health and welfare benefits to its active employees, pensioners, and LTD employees. However, given Nortel's insolvency, it advised its employees that payment of benefits would cease after March 31, 2010.

42 As might be expected all sorts of claims were made by creditors and stakeholders in the CCAA proceedings, and subject to court approval, by agreement dated February 8, 2010, various CCAA stakeholders, including representatives of the active, former, and LTD employees of Nortel, entered into a Settlement Agreement. There, however, was a dissenting group of LTD beneficiaries, including Ms. Holley, who opposed the proposed settlement or their claims.

43 Under the Settlement Agreement, certain health and welfare benefits would continue to be paid past March 2010 until December 31, 2010. Under the proposed Settlement Agreement, Royal Trust and Northern Trust were released

from claims regarding the Trust and the parties agreed to work towards developing a court-approved distribution of the corpus of the Trust in 2010.

44 The Monitor provided information to the court about the proposed settlement. On February 18, 2010, the Monitor released its 39th Report in the CCAA Proceedings. The expressed purpose of the report was to provide the court with information about the settlement including an analysis of the impact of the settlement on the stakeholders.

45 The 39th Report attached the Trust Agreements. The Report attached the unaudited financial statements for the Trust for the period ending December 31, 2008. The Monitor's report indicated that net assets of the Trust available for benefit payments at December 31, 2008 were approximately $123 million of which approximately $37 million was an unsecured promise from Nortel, which, as noted above, the parties call "the Due."

46 In its 39th Report, the Monitor stated that in order to understand the Settlement Agreement, it was necessary to have basic information about the benefits and the role of the Trust. The Monitor noted that: "The HWT has been operated such that certain employee benefits have been paid by the HWT with trust assets, whereas other employee benefits have been funded by the Applicants on a pay-as-you-go basis, but paid through the HWT as an administrative matter."

47 The Monitor noted that: "Based on the Monitor's review to date, the HWT has never had sufficient assets in the trust to pay the present value of all the benefits for all the plans that are designated under it nor was it legally required to do so."

48 In paragraph 49 of the 39th Report, the Monitor noted the "Due". The report stated:

> 49. The net assets of the HWT available for benefit payments at December 31, 2008 were approximately $123 million, of which approximately $37 million was represented by an amount "Due from Sponsoring Company". The Monitor has been advised by the Applicants that this balance represents amounts due by the Applicants primarily related to benefit payments made to beneficiaries of the HWT prior to the Filing Date.

49 The 39th Report described the releases that were part of the Settlement Agreement, and the Report expressed the Monitor's opinion that the releases were an important step in "resolving issues related to claims and potential claims against [Nortel], which will assist in the development of a [Restructuring] Plan." At paragraphs 101 to 103 of the Report, the Monitor described the importance of the releases under the heading "Avoiding Litigation Costs" as follows:

> **Avoiding Litigation Costs**
>
> 101. Provisions of the Settlement Agreement and the Settlement Approval Order result in the release of certain rights and claims primarily concerning pension plan administration, HWT administration and priorities (see paragraphs 94 and 95 above). The Monitor understands that the releases were part of the settlement process necessary in order for the Representatives, on their own behalf and on behalf of those they represent, to achieve certainty of payment of employee benefits and pension benefits, an achievement that Settlement Representative Counsel expressed as important to their constituents in the process leading up to the Settlement.
>
> 102. The release of certain claims and rights is an important step in the development of a Plan. The releases assist in claim determination and reduce the risk of litigation against the Applicants and their directors (who benefit from a priority charge pursuant to the Initial Order); thereby reducing the risk that assets would be depleted in order to fund potentially significant litigation costs.
>
> 103. The Monitor will not comment on the relative risks or potential success of any claims released as part of the Settlement; however, the Monitor is of the view that the releases represent a fair balancing of interests given the certainty achieved regarding employee benefits and the avoidance of potential litigation risks and costs and disruption to the development of a Plan.

50 I pause here to note that Ms. Holley says that the Monitor's 39th Report did not disclose the facts that support her proposed class action for fraud. In particular, she says that the report did not disclose how the shortfall accrued or that the trustee had over a one-year period in 2005-2006 assisted Nortel to trust funds for unauthorized purposes. However, to foreshadow my conclusion below and as will become readily apparent from reading the affidavits and factums filed in opposition to the recommendations of the 39th Report and comparing them to the allegations in the Amended Statement of Claim, Ms. Holley did know the fundamental allegations that underpin her fraud action; namely, that there was a breach of trust by underfunding the Trust by $37 million and that there was a breach of trust by the trustee using trust assets reserved for the LTD and survivor beneficiaries to pay the pay-as-you-go plan beneficiaries.

51 On March 26, 2010, Justice Morawetz declined to approve the February Settlement Agreement, but the agreement was amended and restated, and Justice Morawetz approved it on March 31, 2010, with written reasons released on April 8, 2010. See *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]).

52 As mentioned above, at the time of the settlement approval motion, a group of LTD beneficiaries under the Trust opposed the Settlement Approval Order. This group was represented by the law firm of Rochon Genova LLP, who are Ms. Holley's lawyers of record and the proposed Class Counsel for Ms. Holley's proposed class action. In the CCAA proceedings, the objectors delivered affidavits from Diane Urquhart and from Ms. Holley.

53 Ms. Urquhart, an economist, financial analyst, and mathematician, who was put forward as an expert, took the position that the Settlement Agreement ought not to be approved. In her affidavit she said that the settlement was grossly unfair and prejudicial. She referred to the information obtained from the Monitor's report, and she noted an underlying "breach of trust," and she referred to the negative impact of the Due. She deposed that she was extremely concerned because it appeared that there was a breach of trust and that the Trust had been seriously depleted by as much as $100 million. She noted that there appeared to be a $37 million loan made from the Trust to fund Nortel's pay-as-you-go plans. She said that there was evidence of a breach of trust.

54 In her affidavit, Ms. Urquhart noted that she had reviewed the 39th Report and she understood it to reveal that there had been a breach of trust. She was concerned that the release would take away her rights of legal action as against the Releasees. Under the heading "The HWT is massively underfunded in breach of Nortel's trust obligations" she stated that the $37 million loan to record amounts owed to the Trust was likely cash taken out of the Trust to pay for the Pay-As-You-Go Employee Benefit Plans for which Nortel did make an annual contribution to fund annual claims. She said that this loan was effectively made from the assets belonging to the LTD beneficiaries and survivors of deceased Nortel employees. She stated that it was evident that there was a massive shortfall in the Trust of an amount likely in excess of $100 million and that the shortfall was only recently disclosed to the LTD beneficiaries. She said that Nortel's contributions in 2007 and 2008 were grossly inadequate at a time when the Trust was seriously underfunded. Her belief was that Nortel breached its obligations to make contributions from time to time for the purpose of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

55 The Dissenting LTD Beneficiaries filed a factum opposing the Settlement Agreement. The factum alleges a breach of trust by one or more trustees with respect to the shortfall in the Trust, referred to the Due, and noted the withdrawal of reserve assets to fund benefits under the pay-as-you-go plans. The factum stated at paragraphs 58-60 as follows:

> 58. Although counsel have not had the opportunity to fully analyze the HWT Claims being released, the disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make: "Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund as a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time for the purpose of the Health and Welfare Plan, and determined by the Trustee on a sound actuarial basis."
>
> 59. This breach occurred under one or more of the trustee(s)' watch. Even where the trustee's stated role is more of a custodian, courts have still recognized the fiduciary obligations owed by the trustee to the beneficiaries of the trust.

As stated by the British Columbia Court of Appeal in *Weaver v. William Head Institution* [1999] B.C.J. No. 1091 at para. 39 "there is what academics call an "overarching" obligation upon a custodial or administrative trustee to pay attention to the interest of the beneficiaries additional to its contractual duties provided in the trust indenture."

60. In *Froesse*, *supra*, the Court held that "within the scope of its duties as administrator ... the defendant breached its duty of care to the beneficiaries when it failed to respond to the discontinuance of Company contributions. ....

56 Pausing here, it is worth noting for a variety of reasons that in paragraph 59 of this factum presented to oppose the CCAA release, Ms. Holley states that a breach of trust occurred while Royal Trust and Northern Trust were administering the Trust and that they breached their duties as defined by the British Columbia Court of Appeal in *Froese v. Montreal Trust Co. of Canada*, [1999] B.C.J. No. 1091 (B.C. C.A.). Paragraph 59 of the factum for the CCAA proceedings is replicated as paragraph 58 in Ms. Holley's factum for these motions now before the court. In her current factum, she adds in the next paragraph a quote from *Froese* at para. 26 that: "it is difficult to imagine a more significant indication of trouble than the virtual termination of contributions from the principal contributor to the plan."

57 One reason why all this is notable, is that it belies Ms. Holley's argument that all the information released until August 2010 when the Monitor's 51st Report was released focused on Nortel's behaviour. A second reason that paragraph 59 of the CCAA factum is notable is that it indicates that as of the 39th Report, Ms. Holley was aware of alleged misconduct by Royal Trust and Northern Trust.

58 Returning to the narrative of the CCAA proceedings, in his reasons for decision at paras. 45-47, Justice Morawetz summarized the objections to the Settlement Agreement, including the breach of trust allegations, of the dissenting group, as follows:

45. The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD employees are giving up legal rights in relation to a $100 million shortfall of benefits...

46. The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT [the Due] that they should be able to pursue.

47. Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, [visualize to avoid Nortel being sued by the trustee for an indemnity] rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue. [...]

59 In his decision approving the Settlement Approval Order, after referring to the LTD group's argument that the Court should not release the trustee for breaches of trust including responsibility for the $37 million shortfall in contributions, Justice Morawetz stated at paras. 80-82:

80. In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

81. The releases benefit creditors generally as they reduce the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

82. Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

60 Notwithstanding the objections, Justice Morawetz authorized a CCAA release. The Settlement Approval Order released Royal Trust and Northern Trust from all claims regarding the Trust except with respect to claims of fraud. The Order stated:

THIS COURT ORDERS AND DECLARES that the Releasees, the trustee [Northern Trust] and the custodian of the Pension Plans ... are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to... (ii) the HWT, including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

61 It should be noted that the Settlement Agreement provided for a release in favour of various third-party releasees, which would include Royal Trust and Northern Trust. The Releasees are released from all claims relating to the Trust including without limitation, the administration of the Trust, funding of the Trust, and any obligation to contribute to the Trust, except claims with respect to fraud on the part of a Releasee.

62 The Settlement Agreement also provides for a "claim-over release," which prohibits former and current Nortel employees and Trust beneficiaries from bringing any claim against any third-party, if that third-party may reasonably be expected to have a claim against a Releasee.

63 The objectors sought leave to appeal Justice Morawetz's approval of the Settlement Agreement. In a factum filed on May 18, 2010 in the Court of Appeal, they argued at paras. 29, 54, and 59 as follows:

29. The Objecting LTD Beneficiaries again emphasized that the Amended Settlement Agreement was patently unfair because the benefits it provided were far outweighed by the confiscation of their legal rights regarding the over $100 million breach of trust and ensuing shortfall in the HWT. [...]

54. It is equally offensive to public policy for solvent third parties such as the HWT trustee to escape liability for breaches of fiduciary duties without providing any "tangible and realistic" consideration to the releasing parties. In this regard, the limited disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make 'Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund [...]

59. Beyond the third party releases, the LTD Beneficiaries' potential claims for priority are also meritorious. Here, given the nature of the alleged breaches of trust, the LTD Beneficiaries have, at a minimum, a very tenable basis for asserting priority in respect of the $37 million removed from the HWT.

64 The Court of Appeal refused leave to appeal on June 3, 2010.

(b) The Monitor's 51st Report

65 On August 27, 2010, the Monitor released its 51st Report. The purpose of this Report was to seek approval of a methodology for the termination of the Trust and for the allocation of the corpus of the Trust. The distribution

was problematic because the Trust Agreement did not provide guidance and competing claimants had different interpretations and positions as to how the Trust's remaining assets should be distributed. With greater particularly about the various funds within the Trust, the Monitor's 51st Report described the history and operation of the Trust, in the same way that it had been described in the 39th Report.

66 For the purposes of the motions now before the Court, it is particularly important to note what the Monitor had to say about the Trust's Financial Statements from 1982 to 2009, copies of which were attached as appendices to the Report. The Monitor attached a summary and a chart to assist in the review of the financial statements. The summary and the charts were described in paragraph 77 of the Report as follows:

> 77. To assist in a review of the financial statements:
>
> (a) A summary including certain notes that have evolved over the years from the years in which the notes first appeared is attached as Appendix "QQ"; and
>
> (b) A chart summarizing amounts from the financial statements called accounts receivable or "due from sponsoring corporations or company" is attached as Appendix "RR". As indicated therein, almost from the inception of the HWT, there have been amounts receivable from the sponsoring companies. As set out in the Thirty-Ninth Report, the Monitor has been advised by the Applicants that these amounts are primarily related to benefit payments made to beneficiaries of the HWT prior to the filing date. The Monitor has found nothing to indicate that these amounts represent anything other than accumulated contributions owing.

67 Appendix RR was a chart setting out the "Due" from the inception of the Trust. Ms. Holley states that knowing the information contained in this chart, most particularly, a footnote with respect to the Due for 2006 was necessary before her fraud claim could be discovered. For present purposes, the following excerpt will suffice:

APPENDIX "RR"

Health & Welfare Trust Fund

Debt Due from Sponsoring Company(ies) as shown on the HWT financial statements

Year	**Amount $**
1981	3,615,003
1982	2,488,577
1983	3,530,315
1984	7,575,941
1985	15,390,909
. . . . .	
2000	29,697,000
2001	29,825,000
2002	27,759,000
2003	19,991,000
2004	20,290,00
2005	31,121,000
2006	42,518,0001
2007	40,643,000
2008	37,064,000

2009		1,358,000

1. As reported in the notes to the 2009 HWT financial statements, in 2005 Nortel undertook a valuation of the fund to determine the funded status of the plans. Nortel suspended contributions to the HWT for a 12 month period over 2005 and 2006, resulting in an increase in the Due from the Sponsoring Company amount.

68 Once again, Ms. Holley with the aid of Ms. Urquhart represented a dissenting group that opposed the methodology for distributing the Trust's corpus. Ms. Urquhart again delivered an affidavit setting out the alleged misappropriation of the Trust's assets. The objectors made written submissions to Justice Morawetz. In opposing the allocation methodology, the objectors noted the breaches of trust and the mishandling of the Trust's assets.

69 Since, as noted above, Ms. Holley submits that she did not discover that there was an action in fraud against Royal Trust and Northern Trust until the delivery of the Monitor's 51st Report, it is necessary to examine what Ms. Urquhart said in her affidavit for the objectors.

70 In her affidavit, under the heading "New Evidence Confirms $32 Million Withdrawal of Assets from HWT for 'Pay as You Go Items'," Ms. Urquhart stated that she had analyzed the contributions of Nortel by cash and by the Due and that she had identified a one-year moratorium in Nortel contributions between 2005 and 2006. She said the information in the Monitor's 51st Report confirmed that in 2005, $21 million, and in 2006, $11 million, was wrongly taken out of the Trust's assets and used to pay pay-as-you-go medical claims and life insurance premiums that Nortel was required to fund from its operations. She said this $32 million was removed when the Trust was under-funded for the incurred claims of the LTD and Survivors income beneficiaries.

71 Referring to her March 2010 affidavit filed to oppose the Settlement Agreement, Ms. Urquhart said that new information in the 51st Report confirmed that the loan recorded as "Due from Sponsoring Company" in the Trust's financial statements meant that Nortel recognized it had an obligation to make contributions for the incurred claims of the LTD and Survivors income beneficiaries. She said the loan had existed for many years and had grown larger since 2005. It was her opinion that Nortel's ability to repay this loan was impaired by 2005 and that the reserve portion of the Trust was in a deficit position thereafter so that payments for pay-as-you-go insurance premiums of $17 million should not have been made from reserve assets.

72 In November 2010, notwithstanding the objections of the objectors, by order dated November 9, 2010, Justice Morawetz approved an allocation methodology for the corpus of the Trust. See *Nortel Networks Corp., Re*, 2010 ONSC 5584 (Ont. S.C.J. [Commercial List]), leave to appeal to Ontario Court of Appeal refused, 2011 ONCA 10 (Ont. C.A. [In Chambers]), leave to appeal to SCC refused [2011] S.C.C.A. No. 124 (S.C.C.).

6. The Proposed Class Action

73 On August 27, 2012, precisely on the second anniversary of the Monitor's 51st Report, Ms. Holley commenced this action by notice of action. The definition of the Class Members claimants is set out earlier in these Reasons for Decision.

74 On September 26, 2013, there was a case conference at which the Defendants advised Ms. Holley that her Statement of Claim was defective.

75 On October 29, 2013, Ms. Holley delivered an Amended Statement of Claim. She advances claims for fraudulent breach of trust, constructive fraud, and fraud. Given that she knew that a pleadings attack was inevitable, it is safe to assume that Ms. Holley held nothing back in pleading her case of fraud.

76 Ms. Holley pleads that Royal Trust and Northern Trust knowingly and intentionally breached their trust and fiduciary duties because they knew that the trust fund was significantly underfunded. She submits that in concert with the soon to be insolvent Nortel they facilitated the breaches of trust and concealed the truth from the CCAA Monitor.

77 She says Royal Trust and Northern Trust schemed with Nortel to unlawfully use trust funds for unauthorized purposes to protect Nortel's business interests. She alleges that the Defendants assisted Nortel to withdraw $32 million from the Trust between May 2005 and September 2006 without any actuarial basis or justification for the withdrawal of trust funds and any belief that the funds could be repaid and rather knowing that there was a high risk that the funds would not be paid. She says that Royal Trust and Northern Trust allowed Nortel to post an IOU (the Due) instead of actually making the necessary contributions to the Trust. She says that breached their duties by failing to collect on the Due before Nortel became insolvent.

78 Ms. Holley pleads that the $32 million withdrawn was money for the Reserved Plans but was unlawfully used by Nortel to pay for benefits in the Paid as Incurred Plans, including active, LTD and pensioner medical and dental benefits, and active and LTD life insurance premiums that Nortel was obligated to pay directly from its own operations and funds. She submits that Nortel had no right to withdraw funds from the Trust to pay for benefits in the Pay as Incurred Plan.

79 Ms. Holley submits that Royal Trust and Northern Trust knew, or were reckless and wilfully blind to the fact that the beneficiaries of the Trust would be at risk if the Trust was not funded on a sound actuarial basis. Ms. Holley pleads that Royal Trust and Northern Trust took unconscionable risks that would prejudice the rights of the beneficiaries, without having any right to take those risks by allowing trust funds to be removed from the Trust and not informing the beneficiaries. She pleads that the Defendants knew or ought to have known that their conduct would prejudice the beneficiaries who would not receive the benefits to which they were entitled.

80 Ms. Holley pleads that the acceptance of the unsecured Due (the IOU) as Nortel's contribution to the Trust was a breach of fiduciary duty. She says the Due was effectively a varying loan from the Trust in favour of Nortel. She pleads that Royal Trust and Northern Trust granted increases to the Due despite their knowledge that Nortel's financial distress created a significant risk for the beneficiaries of the Trust who would not receive the benefits to which they were entitled.

81 Ms. Holley pleads that Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

82 On November 22, 2013, Royal Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

83 On November 25, 2013, Northern Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

84 Both Royal Trust and Northern Trust deny any misconduct amounting to fraud and they rely on the CCAA release as barring Ms. Holley's action.

85 The Defendants both plead that Ms. Holley's action is statute-barred under the *Limitations Act, 2002*. Northern Trust's pleading is illustrative. It states in paragraphs 20, 21, and 29, and 30 as follows:

> 20. Contrary to the allegations in paragraph 40 of the Amended Statement of Claim considerable information regarding the funding and operation of the HWT was disclosed in the CCAA Proceedings prior to the Settlement Approval Order being granted information contained in the 39th Report, including the 21st.
>
> 21. On the motion before Morawetz J. to approve the Settlement Agreement, the plaintiff made submissions to the Court in the CCAA Proceedings objecting to the Settlement Approval Order, and in particular to the Release in favour of Northern Trust contained therein. The plaintiff relied on substantially the same allegations contained in

the Amended Statement of Claim, including but not limited to the existence of the Due, the use of HWT assets to fund "paid as incurred plan" benefits (which was permissible under the Trust Agreement), and the alleged non-disclosure of financial information regarding the HWT, to oppose the granting of the Release. The plaintiff's objections were not accepted by the Court, which ultimately granted the Settlement Approval Order.

Plaintiff's Claim is Statute-Barred

29.. The plaintiff's claim is statute-barred, as the matters complained of in the Amended Statement of Claim were known to the plaintiff at the latest when the 39th Report was released on 29. February 18, 2010. Northern Trust pleads and relies on the provisions of the *Limitations Act*, S.O. 2002, c. 24, sch. B, as amended.

30. As to paragraph 46 of the Amended Statement of Claim, Northern Trust admits that the 51st Report of the Monitor in the CCAA Proceedings was delivered on or about August 27, 2010, but repeats that financial status of the HWT, including the existence and amount of the Due, the value of the HWT assets, and the estimated actuarial liabilities for the so-called "reserved plans," were all disclosed in the 39th Report.

C. Discussion and Analysis

1. Introduction

86 Three different attacks are made against Ms. Holley's proposed class action.

87 The Defendants' first attack is the two-pronged attack that because of the release granted in the CCAA proceedings Ms. Holley can sue only for fraud and she has failed to do so for two mutually exclusive reasons. For the first prong, the Defendants argue that it is plain and obvious that there was no wrongdoing. For the second prong, they argue that if there was wrongdoing, it is plain and obvious that the wrongdoing does not equate to fraud and is rather the wrongdoing that was released by the release in the CCAA proceedings. As I will explain below, the Defendants' first argument fails at this juncture of the proceedings but their second argument succeeds.

88 The Defendants' second attack is that in any event Ms. Holley's claim is statute-barred. As I will explain below, I agree that the action is statute-barred.

89 The third attack is made just by Royal Trust. It argues that Ms. Holley's action is an abuse of process. As I will explain below, I disagree with this argument.

90 Thus, as explained more fully below, because it is plain and obvious that Ms. Holley has no fraud claim to plead and also because her claim is statute-barred, I dismiss her action.

2. The Test on a Rule 21 Motion

91 The Defendants' motions are brought pursuant to Rule 21.01, which states:

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that, ...

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

92 Insofar as the motions were brought pursuant to rule 21.01 (1)(a), I grant leave to admit evidence. Ms. Holley did not consent to leave being granted, but she did not oppose the granting of leave.

93 Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

94 In *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at paras. 17-25, the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

95 In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.); *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (Ont. C.A.).

96 The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (Ont. C.A.), leave to appeal to the S.C.C. refused 35 O.R. (2d) 64n (S.C.C.).

97 Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (Ont. C.A.).

98 Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

99 A motion under rule 21.01(1)(a) for a determination before trial of a question of law may permit the court to strike out an action when it has been brought beyond a limitation period; *Beardsley v. Ontario*, [2000] O.J. No. 4057 (Ont. S.C.J.) at para. 11; aff'd [2001] O.J. No. 4574 (Ont. C.A.) at paras. 21 and 24. Under rule 21.01(1)(a), the court may consider whether the determination of the applicable limitation period is a question of law that would dispose of all or part of the action, if the material facts upon which such a determination depends are not in dispute: *Gowling Lafleur*

Henderson LLP v. Springer, 2013 ONSC 923 (Ont. S.C.J.) at para. 19; *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (Ont. S.C.J.); *Whittaker v. Great-West Life Assurance Co.*, [2008] O.J. No. 1194 (Ont. S.C.J.) at paras. 32-37.

100 In the case at bar, I granted leave for evidence to be admitted, and the facts upon which I shall decide the limitation issue are indisputable or assume that the facts set out in the Amended Statement of Claim are taken as proven.

3. Was There Wrongdoing by Royal Trust and Northern Trust?

101 Royal Trust and Northern Trust have decent arguments that they did nothing wrong in how they administered the Trust. They rely on Justice Morawetz's finding there was a single trust, and they say that if the reserve funds were depleted, they were depleted to make payments to the beneficiaries of the one trust. They point out that under the Trust Agreement there is no express obligation on the trustee to compel contributions from Nortel and there is the undisputable fact that the approach of accepting a "Due" from Nortel as a form of making contributions seems to have been an operative and transparent fact from the outset of the Trust. They point out that there was nothing hidden about how benefits were paid throughout the history of the Trust.

102 In my opinion, although Royal Trust's and Northern Trust's arguments are decent arguments, the arguments are not so strong as to make it plain and obvious that Ms. Holley's claim is untenable and that she has no reasonable prospect of success.

103 I do not see Justice Morawetz's finding of a single trust precluding Ms. Holley's possible success. As I suggested during oral argument, a last will and testament is often also a single trust and depending on the terms of the will, it might be wrong to use one beneficiary's trust fund assets to pay the legacies of another beneficiary under the same will. It is not plain and obvious that a similar type of wrongdoing did not occur in the case at bar.

104 I do not see the circumstance that the trustees accepted a "Due" from Nortel as a form of making contributions from 1980 until the end of the Trust makes Ms. Holley's allegation of wrongdoing untenable. Although a trial judge may agree with the trustees that there never was a breach, it is not plain and obvious that a trial judge could not conclude that the approach of the trustees was wrong. It is also not plain and obvious that a trial judge would not conclude that taking a Due or permitting a contribution holiday was only acceptable provided that the reserves of the Trust were actuarially sound to deliver the benefits for the designated beneficiaries.

105 If a trial judge were to come to the conclusion that some Dues were unlawful, then it seems to me that it is not plain and obvious that the trustees taking a Due from Nortel, when it was attempting to put on some financial makeup to cover its business's blemishes, would not be wrongdoing.

106 I appreciate that Northern Trust has the additional protection of the letter agreement dated December 1, 2005, but recalling that the plain and obvious standard sets a pole-vault high bar to jump over, it is not plain and obvious to me that this letter exculpates Northern Trust for what it did or what it allowed Nortel to do.

107 Therefore, I conclude that it remains to be determined if Royal Trust's and Northern Trust's acts and omissions were compliant or non-compliant, authorized or unauthorized, under the Trust Agreement.

4. Fraud and Constructive Fraud and the Scope of the Release

(a) The Nature of Fraud and Constructive Fraud

108 The second prong of Royal Trust's and Northern Trust's argument about their conduct not exposing them to liability is that assuming there was wrongdoing in the administration of the Trust, the wrongdoing did not amount to fraud and, therefore, the wrongdoing was released by the release ordered by Justice Morawetz in the CCAA proceedings.

109 In order to evaluate the merits of the Defendants' argument that there was no constructive fraud or common law fraud, which I will consider in the next section of these Reasons, it is necessary to consider first the law about the nature of fraud and of constructive fraud.

110 It is also necessary to consider the nature of fraud because Ms. Holley argued that the CCAA release did not release constructive fraud and conversely the Defendants argued that the exemption in the release for fraud was only for common law fraud.

111 As a matter of the common law, fraud is associated with the tort of deceit, which is also called the tort of fraudulent misrepresentation.

112 The constituent elements of a common law fraud, deceit, or fraudulent misrepresentation claim, as they are variously called, are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages: *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344; *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.); *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) at para. 87; *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Alta. Q.B.) , aff'd (1992), 3 Alta. L.R. (3d) 124 (Alta. C.A.); *Peek v. Derry*, L.R. 14 App. Cas. 337 (U.K. H.L.).

113 At the fundamental core of fraud, deceit, or fraudulent misrepresentation is the moral turpitude or the defendant. As Professor Emeritus G.H.L. Fridman states in *The Law of Torts in Canada* (3rd ed.) (Toronto: Carswell, 2010) at p. 707: "Liability for fraud or deceit is based upon the idea that to lie or to deceive are morally wrong acts which merit legal sanction when they result in suffered by the victim."

114 While the notion of fraud may elude precise definition, it necessary involves some aspect of impropriety, deceit, or dishonesty: *Royal Bank v. Gentra Canada Investments Inc.*, [2001] O.J. No. 2344 (Ont. C.A.) at para. 8; *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.*, [1993] O.J. No. 112 (Ont. Gen. Div. [Commercial List]) at para. 30.

115 In *Washburn v. Wright* (1914), 31 O.L.R. 138 (Ont. C.A.), Justice Riddell said, at p. 147:

> Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" *Ex p. Watson* (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.

116 The moral turpitude of fraud, deceit, or fraudulent misrepresentation are found in the constituent elements that: (1) the defendant knows that his or her statement is false or the defendant is indifferent to the statements truth or falsity; and (2) the defendant having an intent to deceive the plaintiff. The common law punishes the immorality of lying for an evil purpose with an award of damages. In the contractual setting, equity also provided the remedy of rescission for fraudulent misrepresentation with the same constituent elements, save that it is not necessary for the plaintiff to show damages in order to obtain rescission.

117 That the moral turpitude elements of fraud are fundamental to liability was very recently demonstrated by the Supreme Court of Canada's judgment in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), which was the companion case to *Hryniak v. Mauldin*, *supra*, now the leading judgment about the test for a summary judgment.

118 In *Hryniak v. Mauldin*, the Supreme Court upheld a summary judgment for fraud, and in *Combined Air Mechanical Services Inc. v. Flesch*, the Supreme Court upheld the dismissal of a summary judgment for fraud precisely because there was a genuine issue for trial about the moral turpitude elements of fraud, which were confirmed by Justice Karakatsanis for the Court. At paragraphs 18 to 21 of her judgment, she stated:

18. The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false... . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

19. This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".

20. Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330 "fraud without damage gives ... no cause of action" (p. 340).

21. From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss..

119 Constructive fraud is not a common law tort, but a doctrine of equity in its supervision of trustees, trustees *de son tort*, fiduciaries, and contracting parties, but constructive fraud also involves an element of immorality. However, the moral turpitude of constructive fraud is of a different sort than the lying with an intent to deceive which is the insignia of common law fraud. Thus, in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) at p. 389, Justice Dickson focused on unconscionability and adopted the definition of equitable fraud from the English case of *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241 (Eng. C.A.) at p. 249 as: "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

120 In *Nocton v. Lord Ashburton*, [1914] A.C. 932 (U.K. H.L.) at p. 953, the famous case about a lawyer's breach of fiduciary duty, Lord Haldane stated that in equity, constructive fraud means "not moral fraud in the ordinary sense, but a breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

121 Justice Blair recently discussed the utility of equitable or constructive fraud to supervise a variety of relationships in *Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526 (Ont. C.A.) at para. 93, where he stated:

> 93. Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 356 (*per* Wilson J.) and at p. 390 (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal refused, [2008] S.C.C.A. No. 416. Secondly, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 571.

122 In *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 (S.C.C.), Justice Binnie for the majority of the Supreme Court of Canada considered whether equitable fraud could provide the basis for a claim for rectification, and at para. 39 of his judgment, Justice Binnie described the nature of equitable or constructive fraud as follows:

> 39. What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (BCSC), McLachlin C.J.S.C. (as she then was) observed that "in this context fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud ... Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": [citations omitted].

123 As appears from this passage in Justice Binnie's judgment, equitable fraud refers to conduct falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained by his or her conduct. The idea of unconscientiousness connotes the idea of conduct not guided by principles of what is the right thing to do but falling short of the evil or wickedness of deceitful conduct. Justice Binnie described constructive fraud as wider than strict fraud and including all kinds of unfair dealing and unconscionable conduct.

124 Returning to *Guerin v. R.* , *supra*, where Justice Dickson referred to constructive fraud as unconscionable conduct, in this case, there was no trust relationship between the Federal Government and the Musqueam Indian Band, but the Federal Government was found liable for breach of fiduciary duty. The Band had surrendered lands from its reserve, and the Crown entered into a lease of the lands to a golf club. The breach of fiduciary duty was that the government agreed to terms of the lease that were contrary to the terms approved by the Band at the surrender meeting.

125 For present purposes the important point to note is that the judges of the Supreme Court agreed that the trial judge had been correct in dismissing the alternative claim in deceit because there was no finding or dishonesty or moral turpitude. Justice Wilson (Justices Ritchie and McIntyre concurring) stated at paras. 39-40:

> 39. The appellants base their claim against the Crown in deceit as well as in trust. They were un-successful on this aspect of their claim at trial but have raised it again on appeal to this Court. While the learned trial judge found that the conduct of the Indian Affairs personnel amounted to equitable fraud, it was not such as to give rise to an action for deceit at common law. He found no dishonesty or moral turpitude on the part of Mr. Anfield, Mr. Arneil and the others. Their failure to go back to the Band and indicate that the terms it had approved were unobtainable, their entry into the lease on less favourable terms and their failure to report to the Band what those terms were all flowed, he found, from their paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm.
>
> 40. Nevertheless, there was a concealment amounting to equitable fraud. It was "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (*Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, per Lord Evershed M.R., at p. 573). The effect of the finding of equitable fraud was to disentitle the Crown to relief for breach of trust under s. 98 of the *Trustee Ac*t, R.S.B.C. 1960, c. 390, now R.S.B.C. 1979, c. 414. A trustee cannot be exonerated from liability for breach of trust under that section unless he has acted "honestly and reasonably".

126 It was in the context of the Supreme Court's conclusion that equitable fraud was sufficient to prevent the running of a limitation period that Justice Dickson (Justices Beetz, Chouinard, and Lamer concurring) made the comment noted above alluding to equitable fraud as defined by Lord Evershed *Kitchen v. Royal Air Force Assn.*. The complete text of his comment at para. 115 of his judgment about the distinction between fraud and equitable fraud is as follows:

> 115. It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975.

127 That equitable or constructive fraud does not necessarily connote dishonesty and is therefore less odious than common law fraud is a point that also emerges from Justice Sharpe's judgment in *Edwards v. Law Society of Upper Canada* (1998), 39 O.R. (3d) 10 (Ont. Gen. Div.) , revd. (2000), 48 O.R. (3d) 321 (Ont. C.A.), leave to appeal to the S.C.C. refused, [2000] S.C.C.A. No. 533 (S.C.C.).

128 In this case, Edwards sued the executors of the estate of a deceased lawyer who was alleged to have committed fraud. Justice Sharpe dismissed the action based on the executor's plea of *plene administravit*. This decision was reversed by the Court of Appeal. However, the Court of Appeal agreed with Justice Sharpe's conclusion that that claim against the executors was not statute-barred by the two-year limitation period under the *Trustee Act* because under the former *Limitations Act*, R.S.O. 1990, common law actions for fraud were exempted from all limitation periods, including the one found in the *Trustee Act*. For present purposes, the point to note is that Justice Sharpe drew a distinction between common law civil fraud for which there was no limitation period and equitable fraud for which there was a limitation period under the *Trustee Act* and he explained the reason for the distinction at paragraphs 28-32 of his judgment.

129 Justice Sharpe explained that the limitation period in the *Trustee Act* was designed to apply only to "innocent breaches of trust" and not applying to "fraudulent acts." He pointed to English cases that drew a distinction between "constructive or equitable fraud" and "actual fraud." As a matter of statutory interpretation, he concluded that the former *Limitations Act* exempted only common law fraud from the running of limitation periods but the statutory language did not apply to cover acts which are not dishonest. These claims could be statute-barred. At paragraph 32 of his judgment, Justice Sharpe stated:

> 32. .... The suggestion that an innocent breach of trust gains the protection accorded by s. 44 from otherwise applicable limitation provisions cannot, in my opinion, be reconciled with the language of s. 44 which only applies to "fraud or fraudulent breach of trust." That statutory language is simply not apt to cover acts which are not dishonest. Giving full allowance for the concept of constructive or equitable fraud, it is difficult to see how an innocent breach of trust could be included within the phrase "fraudulent breach of trust." ....

130 To summarize, at its core, common law fraud involves dishonest and moral turpitude. The fraud elements of common law fraud are that the defendant has an intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value. Constructive fraud does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of sort that would be enforced by a court of conscience.

(b) The Scope of the CCAA Release

131 Justice Sharpe's interpretative reasoning commends itself to me in interpreting the scope of the release ordered in the CCAA proceedings in the immediate case. Given the factual circumstances of those proceedings and the arguments that the parties made in supporting or opposing the release, I would interpret the CCAA release as discharging liability

for all forms of misconduct including equitable or constructive fraud and the exemption part of the release as excluding only common law fraud from the discharge of liability.

132 Justice Morawetz was aware that Ms. Holley was objecting to the conduct of the Trustees and at paragraph 81 of his Reasons for Decision, set out above, he said that the CCAA release benefitted creditors generally because, amongst other things, it reduced the risk that Nortel would be sued by the trustees for contribution and indemnity if they were sued. The release he ordered covered the administration of the trust and the investment of the Trust's assets; i.e. it covered the activities of Royal Trust and Northern Trust. If Ms. Holley's interpretation of the release as not covering constructive fraud were correct, then the release would become sterile. In my opinion, Justice Morawetz intended the release to have the utility of barring constructive fraud and other breaches of trust or fiduciary duty by the trustees.

133 Contrary to what I was told during the argument of these motions, Justice Morawetz could have also released Ms. Holley's claims for fraud against the trustees. Justice Morawetz, a scholar in bankruptcy and insolvency law, would have been aware of the Court of Appeal's 2008 decision in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.), where at para. 111, the Court held that the parties to a CCAA proceeding are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. Justice Morawetz recently invoked this authority in *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List]).

134 In the *Metcalfe & Mansfield Alternative Investments II Corp.* case, Justice Blair stated at para. 111:

> 111. The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotini's Restaurant Corp. v. White Spot Ltd.*, [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

135 The *Metcalfe & Mansfield* case at para. 115 is also authority that a CCAA release can release claims against third parties including claims for fraud, tort, breach of fiduciary duty, etc.

136 For present purposes, the point to keep in mind is that Justice Morawetz had argument before him that the conduct of the trustees in their administration of the trust was being impugned as an egregious breach of trust; i.e., the trustees were being impeached for a constructive fraud, and yet while carving out fraud, Justice Morawetz approved a release that covers misconduct with respect to contributions to the Trust and with respect to the administration of the Trust. It appears that he was surgical in approving a release that encompassed constructive fraud (fraud in equity) but that did not cover common law civil law fraud.

137 This interpretation that the CCAA release in the case at bar encompasses constructive fraud but not common law fraud is supported by the express language of the release, set out above. The discharge of liability part of the release expressly includes equitable claims; visualize:

> ... are hereby released, discharged ... from all ... claims ... whether arising by contract, agreement ... under statute, civil law, common law, or in equity ... related to... the HWT, including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, ...

The exemption from the release does not refer to equity and refers only to fraud; visualize:

> ... provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

138 I conclude that the release bars constructive fraud claims but the common law torts of fraud, deceit, or fraudulent misrepresentation are not barred. It appears from the circumstances that Justice Morawetz intended that the CCAA release be as encompassing as possible while excluding civil law fraud.

139 I will return to this conclusion below, but for the purposes of this Rule 21 motion, its significance is that if I am correct, then it is plain and obvious as a matter of interpretation of the release that Ms. Holley's constructive fraud or equitable fraud causes of action are barred by the release. If I am wrong, then the questions become: (a) whether or not Ms. Holley has pleaded a tenable cause of action of constructive fraud, with its taint of unconscionability or unconscientiousness; or (b) whether or not Ms. Holley has pleaded a tenable cause of action for common law fraud with its taint of dishonesty.

5. Does Ms. Holley Have a Cause of Action for Constructive Fraud?

140 Assuming that constructive fraud is not released by the CCAA and assuming that the claim for constructive fraud is not statute-barred under the *Limitations Act, 2002*, the next question is whether or not Ms. Holley's Amended Statement of Claim pleads a tenable claim for constructive fraud.

141 With the above assumptions, if her Amended Statement of Claim adequately pleads constructive fraud with its taint of unconscionability or unconscientiousness, then it would survive the attack being made by the Defendants' Rule 21 motions.

142 I can be brief in answering this issue. With the above assumptions about the scope of the CCAA release and about the operation of the *Limitations Act*, in my opinion, Ms. Holley has adequately pleaded a claim for constructive fraud. In other words, to use the double-negative legal jargon of a Rule 21 motion, it is not plain and obvious that she has not pled a tenable constructive fraud claim.

143 The problem for Ms. Holley, however, is that although she has pleaded a tenable constructive fraud claim, the claim is caught by the CCAA release.

6. Does Ms. Holley Have a Cause of Action in Fraud?

144 Before considering the Defendants' arguments about the *Limitations Act, 2002* and Royal Trust's abuse of process argument, the last cause of action issue to consider is whether Ms. Holley has pleaded a tenable claim of common law fraud against Royal Trust and National Trust.

145 Having regard to my conclusion that the CCAA release covers constructive fraud, for Ms. Holley's Amended Statement of Claim to survive the Defendants' Rule 21 motion, this issue is crucial.

146 When one removes the rhetorical salt, pepper, and hot spices of conclusory adjectives of wrongdoing and moral turpitude, Ms. Holley's cause of action for fraud can be distilled to the following constituent elements of material fact:

- Royal Trust and Northern Trust knew that the Trust was underfunded and permitted Nortel or schemed with Nortel to allow it to withdraw $32 million from the Trust so that Nortel could pay its pay-as-you-go obligations rather than paying for them as required from its own assets.

- Royal Trust and Northern Trust knew or were willfully blind to the fact that the withdrawal of funds was unlawful, unjustified, and imperilled the viability of the Trust to pay the benefits under the Trust. They breached their trust and fiduciary duties by accepting the unsecured Due rather than requiring cash from Nortel and the acceptance of the Due imperilled the viability of the Trust to pay the benefits under the Trust.

- Royal Trust and Northern Trust breached their trust and fiduciary duties by not enforcing the unsecured Due and this failure imperilled the viability of the Trust to pay the benefits under the Trust.

• Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

147 In paragraphs 54 of her factum for this motion, Ms. Holley describes her claim for fraudulent breach of trust as follows:

> 54. The facts as pleaded demonstrate that Northern Trust and Royal Trust committed breach of trust in respect to the HWT that has reached the level of fraudulent breach of trust, as defined in numerous common law cases, which is: "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take." Northern Trust and Royal Trust knowingly took risks with the HWT assets, when they had no right to do so. Alternatively, the trustees were reckless or wilfully blind to the risks taken and to the rights of the HWT beneficiaries.

148 In my opinion, accepting these material facts as true, there is no dishonesty or moral turpitude of the degree necessary to establish common law fraud, and it is plain and obvious that the Amended Statement of Claim does not plead the fraud elements of the common law torts of fraud, deceit, or fraudulent misrepresentation. There may be a breach of contract or a breach of trust, or a constructive fraud, but there is no dishonesty or moral turpitude of the degree necessary to constitute common law fraud, which is a very serious tort precisely because it responds to genuine and not constructive dishonesty and moral turpitude.

149 If their interpretation of the Trust Agreement is wrong, then it may be that Royal Trust and Northern Trust were negligent, careless, and in breach of their contractual or fiduciary duties under the Trust Agreement, but there was no lying or trickery or intent to deceive in making payments to beneficiaries of the Trust or in accepting the Due from Nortel.

150 There may be constructive fraud pleaded in the Amended Statement of Claim, but there is no common law fraud because there is no false statement by commission or omission. Rather, the Trustees transparently disclose that Nortel was not making its contributions and that there was a "Due from Plan Sponsor" and it is disclosed that the Trust is using its reserve account to pay not only for the Reserve Plans but also for the pay-as-you-go plans. Ms. Holley cannot plead that she was misled or deceived by any disclosures, non-disclosures, or false statements because she was not misled.

151 Ms. Holley knew the truth that $37 million was being allocated in a way that she says was contrary to the terms of the Trust Agreement. While the Trust may arguably have been recklessly administered by the Defendants to the extent of their conduct constituting constructive fraud, they made no statements knowing the statements to be untrue and they made no statements with reckless indifference to their truth value. There is no malice or intent to deceive the beneficiaries of the Trust or any trick perpetrated by the trustees on Ms. Holley and the other LTD beneficiaries.

152 In my opinion, it is plain and obvious that the material facts pleaded by Ms. Holley do not constitute a tenable plea of common law fraud and the Amended Statement of Claim should be struck out without leave to amend because Ms. Holley has had the opportunity to put her best case forward, and she has failed to show a reasonable cause of action for fraud.

7. Is Ms. Holley's Claim Statute-Barred?

153 Royal Trust and Northern Trust argue that Ms. Holley's claim is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24. Sch. B. It should be appreciated that this defence applies to both the fraud claim and also the constructive fraud claim. In other words, this defence is mutually exclusive from the defence based on the effect of the CCAA release, which I have interpreted to discharge constructive fraud but not fraud claims.

154 For this argument, the pertinent sections of the *Act* are a sections 1, 4, and 5, which state:

> **Definitions**

1. In this Act, ...

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. ...

155 The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Nielsen v. Kamloops (City)* (1984), 10 D.L.R. (4th) 641 (S.C.C.); *Central & Eastern Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.); *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (Ont. S.C.J.) at para. 26 (S.C.J.) affd. 2009 ONCA 692 (Ont. C.A.). Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.

156 The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period, if he or she knows or ought to know the existence of the material facts, which is to say the constitute elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (Ont. S.C.J.) at para. 27 affd. 2009 ONCA 692 (Ont. C.A.); *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (Ont. C.A.).

157 I can be relatively brief in discussing whether or not Ms. Holley's claims are statute barred. Quite simply, I agree with the Defendants' argument, and I conclude that it is plain and obvious that Ms. Holley discovered her claim around the time of the Monitor's 39th Report.

158 The case at bar may be somewhat unique in that the mental state of discovery, usually in the metaphysical realm of what a person knows or ought to know, has manifested itself through affidavits and factums and reported judgments

with written expressions of knowledge, akin to admissions of what Ms. Holley discovered at the time of the 39th Report. Those written expressions reveal that with the 39th Report, she knew the factual basis for her constructive fraud and fraud claim against the Defendants.

159 Although it is not necessary for the running of the limitation period for the plaintiff to know the legal significance of the facts, in the case at bar, Ms. Holley had legal representation and the record of the affidavits and factums and, in particular, the reference to *Froese*, *supra* shows that that she was aware of the legal basis of the claim against Royal Trust and National Trust.

160 The case at bar is not the type of case in which the court should postpone deciding the application of the *Limitations Act, 2002* to a summary judgment motion or a trial. Apart from the presumption in s. 5 (2) of the *Act* that a person with a claim shall be presumed to have discovered the claim on the day the act or omission on which the claim is based took place, which would commence the running of the limitation period in 2006, the court's own record from the CCAA proceedings shows that Ms. Holley discovered the factual basis for her claim around the time of the 39th Report of the Monitor in February 2008. She did not commence her claim until August 2010 and, in my opinion, it is plain and obvious that both her claim for constructive fraud and also her claim for common law fraud, if any, are statute-barred.

8. Is Ms. Holley's Action Barred as an Abuse of Process?

161 Having regard to my conclusions above that Ms. Holley's constructive fraud claim is barred by the release in the CCAA proceedings and that her claims for constructive fraud and common law fraud are statute-barred under the *Limitations Act, 2002*, it is not necessary to rule on Royal Trust's argument that Ms. Holley's action should be dismissed as an abuse of process.

162 However, because the point was fully argued and because there may be an appeal, I will briefly explain why I would not dismiss her action on this basis. There are two reasons.

163 First, it is not plain and obvious that her present action re-litigates any cause of action that was already decided by Justice Morawetz. He certainly did not decide whether any frauds had been committed and the CCAA release excludes fraud claims. He also did not decide whether constructive fraud had been committed but, in my opinion, he decided only that constructive fraud, if any, should be released by the CCAA release.

164 There may be an *issue estoppel* about whether the Trust is a single trust, but as I explained above, the unanswered question is whether there was fraudulent conduct with respect to that singular trust and in my opinion that issue was not litigated on its merits.

165 Second, the application of the abuse of process doctrine is discretionary. The court has a discretion in regards to estopping a litigant from re-litigating an issue, and the court will not preclude a litigant from proceeding with its claim, if a bar would lead to an injustice: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (S.C.C.) at paragraph 19. See also: *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.); *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.); *Monteiro v. Toronto Dominion Bank* (2008), 89 O.R. (3d) 565 (Ont. C.A.) at paragraphs 53-54.

166 In my opinion, in the circumstances of the case at bar, excepting the limitation period defence, and assuming that there was a tenable claim for fraud, it would be unjust to bar Ms. Holley from having that tenable fraud claim determined on the merits. Further, in my opinion, in the circumstances of the case at bar, excepting the limitation period defence, it would be unjust to bar Ms. Holley from having her tenable constructive fraud claim determined on the merits.

D. Conclusion

167 For the above reasons, I grant Royal Trust's and Northern Trust's Rule 21 motions.

168 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Royal Trust's and Northern Trust's submissions within 20 days of the release of these Reasons for Decision followed by Ms. Holley's submissions within a further 20 days.

Motions granted.

TAB 4

See para. 27

2013 ONSC 7142
Ontario Superior Court of Justice

Cami International Poultry Inc. v. Chicken Farmers of Ontario

2013 CarswellOnt 15769, 2013 ONSC 7142, [2013] O.J. No. 5273, 234 A.C.W.S. (3d) 301

Cami International Poultry Incorporated, Plaintiff and Chicken Farmers of Ontario, The Association of Ontario Chicken Processors, Cargill Limited, Maple Leaf Foods Inc., Maple Lodge Farms Ltd., Pinty's Delicious Foods Inc., Riverview Poultry Limited, and T&R Sargent Farms Ltd., Defendants and L'Association des Abattoirs Avicoles du Québec Inc., Intervenor

J.R. Henderson J.

Heard: October 15, 2013; October 16, 2013; October 17, 2013
Judgment: November 19, 2013
Docket: Welland 5521/12

Counsel: Ronald F. Caza, Alyssa Tomkins, for Plaintiff
Geoffrey P. Spurr, for Defendant, Chicken Farmers of Ontario
Herman Turkstra, for Defendants, Association of Ontario Chicken Processors, Cargill Limited, Maple Leaf Foods Inc., Maple Lodge Farms Ltd., Pinty's Delicious Foods Inc., Riverview Poultry Limited, and T&R Sargent Farms Ltd.
Antoine Aylwin, for Intervenor

***J.R. Henderson J.*:**

Introduction

1 This is a motion brought by the Association of Ontario Chicken Processors ("AOCP") and Cargill Limited, Maple Leaf Foods Inc., Maple Lodge Farms Ltd., Pinty's Delicious Foods Inc., Riverview Poultry Limited and T&R Sargent Farms Ltd. (collectively called "the Defendant Processors") to strike out certain parts of the Statement of Claim, primarily with respect to the Plaintiff's claim for monetary damages.

2 This motion is brought pursuant to Rule 21.01(1)(b), which reads as follows:

> 21.01 (1) A party may move before a judge,
>
> . . .
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

3 No evidence is admissible on a Rule 21 motion, and the Defendants have not yet delivered their pleadings. All Defendants and the Intervenor support the motion.

The Background

4 The AOCP is an industry association whose members are Ontario chicken processors. All of the Defendant Processors are Ontario chicken processors who are members of the AOCP.

5 The Plaintiff ("Cami") is also an Ontario chicken processor carrying on business in Welland, Ontario. However, Cami is one of a small number of Ontario chicken processors who are not members of the AOCP.

6 The Chicken Farmers of Ontario ("CFO") is a marketing board created by a regulation authorized by the *Farm Products Marketing Act*, R.S.O. 1990, C. F.9 ("*FPMA*"). Another regulation, known as Ontario Regulation 402 (Chicken-Marketing), gives the CFO broad powers for the purpose of regulating the production and marketing of chicken in Ontario.

7 Pursuant to these regulations, the CFO has created a mandatory quota system for the production and processing of chicken in Ontario. Under this system the CFO determines a specific amount of live chicken (in kilograms) that may be purchased from Ontario producers by each Ontario chicken processor during each period (usually eight weeks). That is, each Ontario chicken processor is only permitted to purchase live chicken from Ontario producers in an amount that is allocated to them by CFO.

8 In order to implement this system, the CFO determines a "calculated base" for each Ontario chicken processor. This calculated base is similar to a quota, and represents the total amount of live chicken in kilograms that each Ontario chicken processor is permitted to purchase from Ontario producers for processing during any period. In this way, the CFO controls the supply of processed chicken that will be available for sale in Ontario.

9 As an Ontario chicken processor, Cami's business is regulated by the CFO system. Accordingly, Cami has historically purchased live chicken for processing from Ontario chicken producers in accordance with its calculated base.

10 In addition, Cami pleads that between 2007 and 2012 Cami also purchased live chicken for processing from Quebec chicken producers. Cami pleads that by purchasing live chicken from Quebec producers it was able to supplement its allocated supply of live chicken from Ontario producers. Cami alleges that it developed a significant business by carrying on its operation this way.

11 Cami alleges that the interprovincial trade in live chicken between Ontario and Quebec was a free market, unregulated, and competitive. That is, although Cami's ability to purchase live chicken from Ontario producers was limited by the calculated base allocated to it by the CFO, Cami's ability to purchase live chicken from Quebec producers was not limited.

12 Cami alleges that the AOCP and the Defendant Processors agreed or conspired to attempt to extinguish Cami's ability to purchase live chicken from Quebec producers. Consequently, the AOCP and the CFO along with their Quebec counterparts, Les Eleveurs de Volaille du Quebec ("EVQ") and "L'Association des Abattoirs Avicoles du Québec Inc. ("AAAQ"), entered into a written agreement dated January 26, 2011, referred to in the pleadings as "The Arrangement".

13 One of the stated purposes of The Arrangement was "...to provide particulars of the manner in which CFO and EVQ will alter their respective processor allocation systems so that contracting between producers and processors in Ontario and Quebec will occur subject to substantially similar rules ..."

14 In accordance with The Arrangement, the CFO and the EVQ each passed similar regulations ("the Impugned Provisions") that purported to regulate the interprovincial trade in live chicken between Ontario and Quebec. That is, the free market interprovincial trade in live chicken was brought into the existing regulated systems in each of the two provinces.

15 In Ontario, the net effect of the Impugned Provisions was that the CFO controlled, by the use of a calculated base, the ability of each Ontario chicken processor to purchase live chicken from any chicken producer in Ontario or Quebec. The total available amount of live chicken, whether it was produced by an Ontario or a Quebec producer, was reallocated to each Ontario chicken processor as part of each processor's new calculated base.

16 As a result, Cami's ability to purchase live chicken from Quebec producers is now controlled by the CFO. Cami may still in fact purchase live chicken from Quebec producers, but the total amount of chicken purchased by Cami, whether from Ontario or Quebec, is limited by its calculated base as determined by the CFO.

17 Cami alleges that it has suffered monetary damages because the business it had developed by purchasing live chicken from Quebec producers has been extinguished by The Arrangement and the Impugned Provisions.

18 Further, Cami alleges that its allocation of live chicken as determined by its new calculated base is not sufficient to compensate Cami for the loss of its interprovincial chicken business. Cami alleges that prior to the Impugned Provisions its share of the interprovincial trade in live chicken exceeded 800,000 kilograms per period, but after the Impugned Provisions were passed its share was reduced to approximately 250,000 kilograms per period.

19 In summary, Cami alleges that the Defendants collectively took Cami's business that was based on purchasing live chicken from Quebec producers, brought that business into the Ontario regulatory system, and then divided the business up primarily between the members of the AOCP.

The Impugned Parts of the Statement of Claim

20 For the purposes of this motion, it is helpful to categorize Cami's claims as set out in the pleadings. First, Cami claims a declaration that the Impugned Provisions passed by the CFO to implement The Arrangement are *ultra vires*. This claim is not the subject of this Rule 21 motion. The Defendants acknowledge that this claim is properly pleaded, and the merits of this claim will be determined at some point in the future.

21 Second, Cami claims damages against the CFO for expropriation without compensation, intentional interference with economic relations, and misfeasance in public office. In this motion the Moving Parties request that the parts of the Statement of Claim that relate to expropriation without compensation and intentional interference with economic relations be struck. The claim of misfeasance in public office is not the subject of this motion.

22 Third, Cami claims damages against the AOCP and the Defendant Processors for intentional interference with economic relations, conspiracy, and conduct that is contrary to s.45 of the *Competition Act*, R.S.C. 1985 c.C-34. In this motion the Moving Parties request that the parts of the Statement of Claim that relate to all of these claims be struck.

23 Fourth, Cami makes a claim for punitive damages and for the loss of reputation and goodwill against all Defendants. The Moving Parties request that these claims be struck.

24 In addition, as part of this motion, the Moving Parties request that the reference in the Statement of Claim to the *Agreement on Internal Trade* be struck because it is not properly identified in the pleadings.

The Law Regarding Rule 21 Motions

25 On a Rule 21 motion, the motions judge must assume that the facts contained in the pleadings are correct. Then, the motions judge must determine whether, based on those facts, the claims set out in the pleadings have a chance of success. Only if the claims have no chance of success will those parts of the pleadings be struck.

26 The leading authority on Rule 21 motions is the case of *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.). At page 979 of that decision, Wilson, J. endorsed the "plain and obvious test" as described by Estey, J. in the case of *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 740 as follows:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt".

27 The governing principles relating to Rule 21 motions are nicely summarized by Conway J. in the case of *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 (Ont. S.C.J.) at para. 12 as follows:

> (a) The facts in the pleading are to be taken as proven and true unless they are patently ridiculous or incapable of proof.
>
> (b) It must be "plain and obvious" that the pleading is unfounded or contains no reasonable cause of action in order for the motion to succeed.
>
> (c) The threshold for sustaining a pleading is not high — a "germ" or "scintilla" of a cause of action will be sufficient.
>
> (d) The pleading will only be struck if the allegations do not give rise to a recognized cause of action or if the claim fails to plead the necessary elements of an otherwise recognized cause of action.
>
> (e) No evidence is to be admitted on the motion.
>
> (f) The pleading is to be read generously.
>
> (g) The novelty of the claim does not prevent a plaintiff from proceeding with its case.
>
> (h) The court's role at the motion is not to determine the strength of the case or the likelihood of success.

Expropriation Without Compensation

28 Expropriation occurs if the Crown or a public authority acquires an interest in property from the owner of that property. In such circumstances, there is a presumption that the Crown will pay for the property. Thus, the claim of expropriation without compensation has two elements. First, property must be taken from the owner, and second, that property must be acquired by the Crown for its use or destruction. See the decision of Estey, J. in *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.) at page 556, and the decisions in *A & L Investments Ltd. v. Ontario (Minister of Housing)* (1997), 36 O.R. (3d) 127 (Ont. C.A.) at paras. 23 to 28, and *Sanders v. British Columbia (Milk Board)*, [1991] B.C.J. No. 236 (B.C. C.A.) at p. 6.

29 In this case the Moving Parties submit that the Statement of Claim is confusing as to what property was taken from Cami. The Moving Parties also submit that if the property that was taken was calculated base, Cami's claim cannot succeed because calculated base is analogous to quota, and there is case law that has determined that quota is not property. Further, the Moving Parties submit that if something was taken from Cami, it was not acquired by the Crown.

30 I accept that there is confusion in the Statement of Claim as to what was taken. In paragraphs 1(b)(i) and 1(c)(i) Cami makes a claim for "$7,288,242 or the value of the expropriated calculated base". This clearly suggests that the property that was taken was Cami's calculated base. However, paragraphs 1(b)(iv) and 1(c)(iv) refer to "loss of the use of physical assets and investments in the plant", and paragraphs 1(b)(v) and 1(c)(v) refer to "loss of reputation and goodwill".

31 I find that paragraphs 35 to 69 of the Statement of Claim contain pleadings in support of Cami's claim for the loss of its interprovincial business and the loss of goodwill. For example, paragraph 35 states in part, "The defendants subsequently negotiated and implemented The Arrangement, thereby illegally acquiring a significant portion of Cami Poultry's processing business ..."

32 Further, paragraph 66 reads in part, "At the time the Impugned Provisions were enacted, Cami Poultry possessed valuable goodwill in terms of the suppliers and customers who it had acquired and cultivated over the years." Paragraph 67 continues, "A significant portion of that asset was completely extinguished upon the enactment of the Impugned Provisions ..." Paragraph 69 reads, "The reallocation had the effect of depriving Cami Poultry of much of its goodwill as a going concern and rendering its physical assets virtually useless."

33 In my view, paragraphs 35 to 69 of the Statement of Claim adequately describe Cami's allegations that it had invested money and assets into its interprovincial business; that its business was extinguished by the Impugned Provisions; and that it has suffered damages as a result of the loss of its business and the goodwill associated with its business. Thus, I find that the material facts in support of the claims made in paragraphs 1(b)(iv) and (v) and 1(c)(iv) and (v) are properly pleaded.

34 The confusion is the reference to "expropriated calculated base" in paragraphs 1(b)(i) and 1(c)(i). Paragraphs 70 to 76 of the Statement of Claim appear to be pleadings that are intended to support that claim. However, it is clear from the pleadings that there was no calculated base allocated to any Ontario chicken processor, including Cami, with respect to the interprovincial chicken market, prior to the Impugned Provisions. Therefore, even if I were to accept that calculated base is property, Cami had no calculated base in respect of the interprovincial business that Cami alleges was lost. Thus, the claim for expropriated calculated base cannot succeed.

35 As an aside, I note that Cami may allege that it received inadequate compensation for the loss of its interprovincial business, but that is an issue of damages that would flow from Cami's claim for lost business or lost goodwill. Inadequate compensation for lost business or lost goodwill does not provide a foundation for a claim for expropriated calculated base.

36 For these reasons I will strike out the parts of paragraphs 1(b)(i) and 1(c)(i) that refer to "the value of the expropriated calculated base", as well as all of paragraphs 70 to 76. It may be that Cami believes that some parts of paragraphs 70 to 76 are important regarding its claims for lost business or lost goodwill, and Cami may wish to replace paragraphs 1(b)(i) and 1(c)(i) with revised damages claims. Therefore, Cami will be given leave to amend its Statement of Claim in this respect within 30 days.

37 The Moving Parties' submission that calculated base is not property will remain an unresolved issue. I accept that the landmark decision is the case of *National Trust Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 (Ont. C.A.), in which the Ontario Court of Appeal determined that a tobacco quota was not personal property within the meaning of the *Personal Property Security Act*. There is an interesting argument as to whether the *National Trust Co.* case should be restricted to its facts, as summarized at paras. 25 to 35 in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58 (S.C.C.). As interesting as this argument may be, it is not necessary for me to decide that issue on this motion. I have determined that Cami's claim for expropriated calculated base cannot succeed as pleaded. Therefore, I will make no finding as to whether calculated base can constitute property.

38 The remaining issue under this topic is the Moving Parties' submission that the Crown has not acquired for itself any of the property that was taken from Cami. Clearly, if the allegation is that Cami's business and goodwill was taken, the CFO has not directly acquired that business and goodwill for itself.

39 In response, Cami submits that this element of expropriation without compensation is satisfied because the CFO took Cami's business and divided it up between the other chicken processors. That is, Cami submits that the CFO does not have to acquire Cami's business for itself, but the CFO's conversion of Cami's business for a purpose beneficial to the CFO will satisfy this element of the cause of action.

40 In that respect, Cami relies upon the case of *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.), a case which decided that the elimination of the plaintiff's fish exporting business by a statute that gave a Crown corporation a monopoly in the field could constitute expropriation without compensation. Further, Cami relies upon the *Tener* case, aforementioned, a case which decided that the elimination of the plaintiff's ability to use its mining rights in a provincial park in order for the state to create a better park could constitute expropriation without compensation.

41 Although Cami's case on this element may require a favourable extension of the existing case law, I cannot find that it has no chance of success. There is at least a germ or a scintilla of a chance that Cami may succeed on the expropriation without compensation claim.

42 In summary, the only portions of the Statement of Claim that I will strike with respect to the expropriation without compensation claim are the parts of paragraphs 1(b)(i) and 1(c)(i) that refer to "the value of the expropriated calculated base", as well as all of paragraphs 70 to 76, with leave to amend as indicated.

The Competition Act

43 In the Statement of Claim, Cami alleges that the AOCP and the Defendant Processors have acted in contravention of s.45(1)(a), (b), and (c) of the *Competition Act*, which reads as follows:

> **45.** (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> a) to fix, maintain, increase or control the price for the supply of the product;
>
> b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

44 Section 36 of the *Competition Act* permits any person to bring a civil action if that person has suffered loss or damage as a result of conduct that is contrary to Part VI (which includes s. 45) of the Act. Cami relies upon this section in support of its claims against the AOCP and the Defendant Processors.

45 The Moving Parties submit that this claim cannot succeed because the written agreement referred to as "The Arrangement" contains no terms that would be in contravention of the *Competition Act*. Further, the Moving Parties submit that The Arrangement is ineffective and of no value because the CFO has complete control by statute of the chicken processing market. That is, only the CFO can fix prices or control markets, and thus any agreement by Cami's competitors to do so would have no effect.

46 Regarding the first point raised by the Moving Parties, that The Arrangement contains no anticompetition terms, I note that on a Rule 21 motion I am to assume that all facts in the pleadings are correct. In the present case, Cami pleads that the Defendant Processors are competitors of Cami, and that the Defendant Processors intentionally entered into negotiations and made an agreement with the goal of lessening or eliminating competition for a product, namely live chicken. In my view, those pleaded facts are all of the facts necessary to support a civil action based on conduct that is contrary to s.45 of the *Competition Act*.

47 The fact that a written agreement exists is evidence that could assist Cami or the Defendants depending upon how that agreement is interpreted. But, the interpretation of any written agreement must necessarily be made in the context of all the surrounding circumstances, and is not an exercise that should ordinarily be undertaken on a Rule 21 motion. This is a matter for argument that should be made after pleadings have been exchanged, productions have been made, and examinations have taken place.

48 Regarding the second point raised by the Moving Parties, the allegation that any agreement is ineffective given the control that the CFO has over the market, I note that it is the agreement, not the validity of the agreement, which constitutes an offence under s.45. If the agreement cannot be put into effect that does not mean that there has been no breach of s.45. Therefore, whether The Arrangement in this case can only be put into effect through the actions of the CFO is not determinative.

49 Lastly, the Moving Parties raise what has been called the regulated conduct defence. That is, the AOCP and the Defendant Processors submit that they are not in breach of s.45 of the *Competition Act* if they are simply acting in accordance with statutory regulations.

50 I do not accept Cami's submissions that this defence is only available in the context of a criminal prosecution. In my view, an aggrieved party cannot bring a successful civil action based on a breach of s.45 of the *Competition Act* if the accused party has a complete defence to a prosecution under s. 45. In such a case there would be no misconduct on which to base the civil action. Thus, if the regulated conduct defence provides a complete defence to a prosecution under s. 45, then a civil action under s. 36 cannot succeed.

51 However, I agree that the regulated conduct defence is a defence that must be pleaded by the Defendants. The onus is on the Defendants to plead and prove that this defence applies. Thus, I agree with the comments made by van Rensburg, J. in the case of *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, 2012 ONSC 2752 (Ont. S.C.J.), at para. 53, as follows:

> Ordinarily, a court will not strike a pleading of a cause of action simply because a defendant may be able to establish a particular defence: See, for example, *Mansoor Electronics Ltd. v. BCE Mobile Communications Inc.*, [1995] F.C.J. No. 1208 (Fed. T.D.), where Richard J. refused to strike a claim under the *Competition Act* on the basis that the regulated conduct defence should be pleaded in the Statement of Defence and the court should consider its application on such facts as might be proven at trial (at para. 23).

52 Further, as was discussed in the *Fournier Leasing Co.* case, the regulated conduct defence involves an analysis of the activities of the individuals involved. Simply because an industry is regulated does not mean that all anticompetition practices are authorized within that industry. This issue should be the subject of proper pleadings, productions, and discoveries. Therefore, a claim based on a breach of the *Competition Act* should not ordinarily be struck out on the ground that the regulated conduct defence may apply.

53 Still further, I note that in the present action Cami challenges the validity of the very regulations that would form the basis for the regulated conduct defence. If the Impugned Provisions are not valid, then those provisions would not regulate the conduct of the Defendant Processors. Thus, the merits of this defence cannot be assessed at this point in the action.

54 In summary, based on the facts as pleaded, I find that Cami has a chance of success on its claim for damages as a result of an alleged breach of s.45 of the *Competition Act*. No part of the Statement of Claim will be struck with respect to this claim.

The Consipiracy Claim

55 This is a claim against the AOCP and the Defendant Processors. This claim should only be struck if the claim under the *Competition Act* were struck. Therefore, no part of the Statement of Claim will be struck regarding this claim.

Intentional Interference With Economic Relations

56 This is a claim against the CFO, the AOCP, and the Defendant Processors. This claim is closely related to the *Competition Act* claim. No part of the Statement of Claim will be struck regarding this claim.

Loss of Goodwill Claim

57 The Moving Parties submit that Cami has not pleaded material facts in support of this claim. In this decision I have dealt with the loss of goodwill claim under the heading "Expropriation without Compensation". In my view, this claim has been adequately pleaded.

Punitive Damages

58 Cami requests punitive damages against the CFO, the AOCP, and the Defendant Processors. Paragraph 113 of the Statement of Claim reads as follows, "The Plaintiff further pleads that the Defendants' conduct in committing the

acts described in the Statement of Claim was arbitrary, malicious, oppressive and/or highhanded. Accordingly, the acts of the Defendants merit an award of punitive damages."

59 The Moving Parties submit that the specific acts that are alleged to attract punitive damages have not been identified in the pleadings. However, in my view, the first 112 paragraphs of the Statement of Claim describe the alleged misconduct of the Defendants, and it is not necessary to repeat every act contained therein in reference to a claim for punitive damages. This type of pleading for punitive damages is a routine pleading, particularly in a claim involving an intentional tort.

60 Therefore, the claim for punitive damages will not be struck.

Agreement on Internal Trade

61 Paragraph 115 of the Statement of Claim simply states that Cami relies upon the *Agreement on Internal Trade*. The Moving Parties are troubled because this document has not been identified, and its applicability has not been pleaded.

62 I agree that a pleading that references an unidentified document is inadequate. Therefore, the reference to this document in paragraph 115 of the Statement of Claim will be struck, with leave to amend within 30 days.

Conclusion

63 In summary, the parts of paragraphs 1(b)(i) and 1(c)(i) in the Statement of Claim that refer to "the value of the expropriated calculated base", and all of paragraphs 70 to 76, are hereby struck.

64 Further, the reference to the *Agreement on Internal Trade* in paragraph 115 of the Statement of Claim is hereby struck.

65 Cami is granted leave to amend the Statement of Claim within 30 days.

Motion granted in part.

TAB 5

2005 CarswellOnt 1963
Ontario Superior Court of Justice

Fiber Connections Inc. v. SVCM Capital Ltd.

2005 CarswellOnt 1963, [2005] O.J. No. 3899, 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271

In the Matter of the Ontario Business Corporations Act, R.S.O. 1990, c. B-16

Fiber Connections Inc. (Applicant) and SVCM Capital Ltd. (Respondent)

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, Section 47.1, as Amended

In the Matter of the Proposal of Fiber Connections Inc. of the Town of Schomberg, in the Province of Ontario

C. Campbell J.

Heard: February 25, 2005
Judgment: March 10, 2005
Docket: 04-CL-5680, 31-OR-437021

Proceedings: allowed leave to appeal *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 2005 CarswellOnt 1834 (Ont. C.A. [In Chambers]) [Ontario]

Counsel: Raymond S. Slattery, Timothy R. Dunn for Applicant, Fiber Connections Inc.
Jonathan H. Wigley for SVCM Capital Ltd., Russell Shoemaker
Martin Greenglass for SF Partners Inc. (Proposal Trustee)

***C. Campbell J.*:**

1 Two inter-related motions were heard together. One, under the *Bankruptcy & Insolvency Act*, R.S.C. 1985 c. B-3 (the "BIA"), seeks approval of a Proposal made by Fiber Connections Inc. ("Fiber.") The second, an application under the *Ontario Business Corporations Act*, R.S.O. 1990 c. B-16 (the "OBCA"), seeks termination of a Unanimous Shareholders Agreement ("USA") among Fiber and its current shareholders.

2 Both sets of relief are opposed by SVCM Capital Ltd. ("SVCM") and its president Russell J. Shoemaker, essentially because they believe the proposal will fail and that the only value of Fibre is in a patent application that will be better realized if sold in bankruptcy.

Background Facts

3 Most of the underlying facts are not in dispute. The Amended Proposal, dated September 15, 2004, was presented to the Court by the Proposal Trustee. It has been approved by 25 of the 26 creditors of Fiber representing approximately 98% of its indebtedness.

4 The Proposal also has the support of the Business Development Bank ("BDB"), the major secured lender, and of the Government of Prince Edward Island, and preserves employment there and in Schomberg, Ontario. Aside from the need to deal with the position of SVCM and Mr. Shoemaker, I am satisfied that the proposal represents a conscientious and realistic effort on the part of both creditors and shareholders.

5 There is no issue that Fiber is insolvent and has been for some months, during which time the Proposal has been initiated, negotiated, amended and finalized.

6 The proximate cause(s) of the insolvency are not directly relevant to the relief sought, given the strong support of all creditors and shareholders with the exception of Mr. Shoemaker and his company. There is no question but that the high tech industry crash in 2000 and the events of September 11, 2001 both contributed.

7 As of January 2004, it was clear to all concerned that Fiber was insolvent. Mr. Shoemaker was sufficiently concerned with events that on February 5, 2004, he resigned as financial manager of Fiber, and in March 2004 as a director.

8 SVCM advanced a claim in response to the Notice to Creditors in support of the Proposal, which was disallowed by the Trustee by Notice dated October 5, 2004.

9 The claim, which was advanced by proof of claim in the sum of $1,712,048, was valued at Nil pursuant to s. 135(1.1) of the BIA, on the following grounds:

> (A) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have determined that your unliquidated claim reflected on your proof of claim at $1,712,048, has been valued at NIL and therefore, there is no amount that has been a proved claim pursuant to subsection 135(1.1) of the Act.
>
> (B) As trustee acting in the matter of the proposal of Fiber Connections Inc., we have further disallowed your claim in the sum of $1,712,048 pursuant to s. 135(2) of the Act for the following reasons;
>
> > (i) The said claim is an unliquidated damage claim based upon allegations of misrepresentation and/or fraudulent non-disclosure. The trustee understands that Fiber Connections Inc. disputes the allegations made and no proof has been provided to the trustee of the allegations which would entitle the trustee to determine if the claim is a valid claim.
> >
> > (ii) The claim as presented clearly indicates that the primary allegation is as against directors, and therefore, the claim may be a claim properly made as against someone other than Fiber Connections Inc.

10 The disallowance has been appealed. In addition, I am satisfied that any claim that SVCM or Mr. Shoemaker has against directions personally for misrepresentation or misappropriation survive and can be pursued.

11 In its Amended Report, the Proposal Trustee advises that in its opinion, the value of the assets of Fiber, less the secured claim of BDB, are approximately $275,000. Hence it is urged the terms of the Amended Proposal are reasonable and calculated to benefit the general body of creditors, if approved, particularly as both BDB and the Province of Prince Edward Island are in support.

The Patent Application

12 The opposition of Mr. Shoemaker and SVCM to the Amended Proposal came from their view of the potential value of an outstanding patent application for a device that converts electrical signals to optical signals and back, to allow configured devices to use a fibre optic link.

13 The mechanism for advancing opposition to the Proposal is the terms of the USA.

14 The effect of paragraph 4.4 set out below, to which Fiber is a signatory, is that the company shall not make any changes in the authorized or issued capital in the company or declare dividends without the written consent of Mr. Shoemaker. There is also what is known as a "drag along" provision that provides for a deemed consent to sell to a third party, if approved by 50% of the shareholders. Paragraph 4.4 reads as follows:

> 4.4 Notwithstanding anything else contained in this agreement, and in addition to any other approval that may be required at law, so long as Russellco owns five percent (5%) of the outstanding Common Shares, the Corporation shall not;

(a) make any change in the authorized or issued capital of the Corporation, save and except that the Corporation may issue such number of Common Shares as are properly issuable pursuant to the due exercise, in whole or in part, of the Warrant; or

(b) declare dividends or other distributions in respect of the Common Shares or the Class "A" Preference Shares

in either case, without the prior written consent of Russell Shoemaker on behalf of Russellco, in its sole discretion. In the event of an assignment or transfer of any of the Common Shares owned by Russellco, the provisions of Section 4.4 shall not apply to the Common Shares acquired by the subsequent transferee(s).

15 Mr. Shoemaker's opposition comes from his belief that the Proposal Trustee has not appropriately valued the patent application in assigning an amount of $200,000 to it. In his affidavit, he attests to the possibility that the application (which is in the names of officers of Fiber) could be worth anywhere from $1,000,000 to $8,000,000 based on internal projections or in excess of $50,000,000 based on statements by Fiber's CEO.

16 If the events of the last few years and the high tech bubble have taught anything, it is that the value of technological innovations, whether devices, software or services, are at best risky and highly speculative.

17 In my view, the only evidence that the Court has or should have regard to is the amount attributed by the Proposal Trustee, namely $200,000. I have no doubt that all the creditors and shareholders hope that the patent, if approved, is worth more than $200,000. Indeed, that is implicit in the Amended Proposal and is in the future.

18 Mr. Shoemaker is alone in believing the Patent Application will realize greater value through bankruptcy than the Amended Proposal. There is simply no reliable evidence before me to support this conclusion. Indeed, there is the suggestion that through bankruptcy, Mr. Shoemaker or his company could acquire the Patent Application for themselves to exploit.

19 As noted, the preferable "valuation" recognizing its inherent flaws, is that of the Proposal Trustee.

20 Without assigning a very significant value to the Patent Application, which I have not, there is no economic value to the shares of Fiber.

The Issue

21 The question then arises: can a shareholder who has no effective value to his shares successfully oppose a Proposal under the BIA simply because the variation of Agreement to implement the Proposal requires his consent to a revised share structure?

22 Mr. Wigley on behalf of Mr. Shoemaker and SVCM submits that the answer to the above is yes. He submits that the USA permits a shareholder, obstinate as some might think him, to withhold consent (a) because there can be no oppression of the applicant Fiber under s. 248 of the OBCA; and (b) absent an oppression finding, there is no authority in the Court under the BIA to set aside a unanimous shareholder agreement to permit alteration of share structure.

23 The position of Fiber is that the Court should grant its approval order and terminate the USA, either pursuant to its inherent jurisdiction to enable successful restructuring under the BIA or the specific jurisdiction provided in s. 248 of the OBCA.

24 Section 245 of the OBCA provides that for the purpose of among other matters s. 248 "complainant" means... "(c) any other person who, in the discretion of the Court, is a proper person to make an application..."

25 Counsel for SVCM submits that in this case, Fiber should not be accorded status as a complainant since under s. 248, conduct complained of must be "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the Corporation."

26 It is submitted that since the interests of the Corporation are not mentioned in the section, the Corporation cannot be a proper complainant.

27 I disagree with the proposition advanced by SVCM. In this case, I find that Fiber is a proper complainant, since as a party to the USA the contemplated re-organization cannot be carried out without change to the share structure, which requires actions on the part of the Company. See *Gainers Inc. v. Pocklington* (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.) and *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. (3d) 659 (Ont. S.C.J. [Commercial List]), at 665.

28 This is not an oppression application brought by SVCM as a minority shareholder. I conclude that when all of the other creditors and shareholders consent to the remedy sought in the name of the company, it would unduly technical to say that the remedy could not be brought in the name of the company, when it is a necessary party to the remedy.

29 In addition, it would be oppressive to the Corporation and its stakeholders to end its existence when virtually all of the shareholders, directors, creditors and employees believe it has a future. In that sense, creditors and directors, among others, are oppressed.

30 Counsel for SVCM relies on language from the decision of the Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), which delineates the importance of shareholder expectation as part of shareholder interest. Reference is made in the decision to the decision of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at 113, where at p. 123 speaking of shareholder expectation, there appears the following:

> They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

31 Applying the language to the facts of this case, can it be said that it was the expectation of all the shareholders of Fiber, whose shares currently have no economic value, that one shareholder could deprive them of the possibility of achieving some value by employing a veto the effect of which is to put the company in bankruptcy? I think the answer is clear. That would not have been the reasonable expectation of the shareholders as a group.

32 I have not been referred to any authority that would suggest that shareholder expectation would necessarily exclude consideration of the majority, when one single shareholder seeks to be obstinate for his own purpose, which is not that of the rest of the stakeholders, not just the other shareholders.

33 I conclude that the purported exercise of a veto of the amendments to the share structure proposal is oppressive of the Corporation, its shareholders and directors.

34 The remedy is an order permitting the Company to amend its articles and/or by-laws and/or the USA including the power to create a new unanimous shareholders' agreement in the terms set forth in the Company's proposal under s. 248 and s. 168 of the OBCA. See *Bury v. Bell Gouinlock Ltd.* (1984), 12 D.L.R. (4th) 451 (Ont. H.C.) and *Walsh v. Erectoweld Co.* (1992), [1993] O.J. No. 24 (Ont. S.C.J. [Commercial List]).

The BIA

35 In the event I am found in error in respect of the ability to find Fiber a complainant oppressed under the OBCA, it is necessary to consider the submission of SVCM that there is no jurisdiction in the BIA that would expressly permit termination of the USA and that it would be inappropriate to draw on the "inherent jurisdiction" of the Court to do so.

36 Part of the submission under the BIA is that since the matter of the USA is specifically regulated under the OBCA, the Court should not stretch to do so under the BIA.

37 I agree with counsel for SVCM that much of the law regarding inherent jurisdiction and cases under the *Companies Creditors Arrangement Act* are as a result of the general language in that statute, as opposed to the more specific language of the BIA. As a result, I agree that the use of "inherent jurisdiction" under the BIA, which is a much more detailed statute, must be used with caution.

38 Much of the recent focus on the duties of directors is to recognize that there may be duties that extend beyond shareholders, to other stakeholders. See *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 (S.C.C.).

39 For the purposes of this case, it is not in my view an extension of the concept of inherent jurisdiction, but rather the prevention of one shareholder, with no economic value of his equity, holding all the stakeholders hostages. In this respect, I conclude that the considerations expressed for the exercise of the Court's inherent jurisdiction under the CCAA are applicable under the BIA to the facts of this case. See *Algoma Steel Inc., Re* (2001), [2002] O.J. No. 66 (Ont. S.C.J. [Commercial List]) at paragraph 5; *Doman Industries Ltd., Re*, [2004] B.C.J. No. 1402 (Ont. S.C.J. [Commercial List])

40 There is no practical reason for a distinction to be made for the consideration of "inherent jurisdiction" on the facts of this case, since it is only insolvency that prevents this having been a CCAA application. This is a proposal, not a bankruptcy. It would indeed be scandalous if the use of "inherent jurisdiction" under one statute of the CCAA would prevent bankruptcy but a proposal to achieve the same purpose under the BIA could not.

41 Where the corporation is insolvent and the shareholders would, upon liquidation, get nothing, it would be unfair to creditors and other stakeholders to permit one shareholder with no economic interest to block a reorganization. The alternative would be bankruptcy and nothing for most of the creditors and all of the shareholders. (See *Loewen Group Inc., Re*, [2001] O.J. No. 5640 (Ont. S.C.J. [Commercial List]), paragraph 8 and *Canadian Airlines Corp., Re*, [2000] A.J. No. 771 (Alta. Q.B.) at p. 74-79.

42 For the foregoing reasons, I conclude that there is power under the BIA in these circumstances to set aside the USA and approve the proposal of the company, as set forth in the Report of the Proposal Trustee, and it is so ordered. Pursuant to s. 186 of the OBCA an order will issue amending the share structure of Fiber in accordance with its Proposal.

43 If it is necessary to deal with the issue of costs, written submissions should be made within the next 10 days.

Motion and application granted.

2005 CarswellOnt 1834
Ontario Court of Appeal [In Chambers]

Fiber Connections Inc. v. SVCM Capital Ltd.

2005 CarswellOnt 1834, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10, 198 O.A.C. 27

In the Matter of the Proposal made by Fiber Connections Inc. of the Town of Schomberg in the Province of Ontario

SVCM Capital Ltd. (Moving Party) and Fiber Connections Inc. (Respondent)

Armstrong J.A.

Heard: April 19, 2005
Judgment: May 10, 2005
Docket: CA M32409, C43287

Proceedings: allowing leave to appeal *Fiber Connections Inc. v. SVCM Capital Ltd.* ((March 10, 2005)), Doc. 04-CL-5680, 31-OR-437021 ((Ont. S.C.J.))

Counsel: Raymond M. Slattery for Respondent
Jonathan H. Wigley for Moving Party

***Armstrong J.A.*:**

1 This is a motion for directions as to whether leave to appeal is required from an order of Colin Campbell J. (the "motions judge") terminating a unanimous shareholders' agreement and approving a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the "BIA"). If leave to appeal is necessary, the moving party, SVCM Capital Ltd. ("SVCM") seeks leave to appeal the order. The moving party, on consent, also seeks an order pursuant to ss. 6(2) and 6(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended that a related appeal in the Divisional Court be transferred to the Court of Appeal and heard with this appeal in the event that leave is granted or is not required.

Factual Background

2 SVCM is a creditor and major shareholder of Fiber Connections Inc. ("Fiber"). SVCM is a party to a unanimous shareholders' agreement which provides that as long as SVCM holds more than 5% of the shares of Fiber, no changes can be made to Fiber's share structure without SVCM's consent. The agreement provides SVCM with other rights mentioned below.

3 Fiber is insolvent and made a proposal under the BIA which was approved by 25 of 26 creditors representing approximately 98% of the company's indebtedness.

4 The proposal was opposed by SVCM because it provided for a significant change to the capital structure of the company involving the creation of a new class of shares, conversion of debt to the new class of shares and the issuance of new common shares which will have the effect of diluting existing common shareholders to about 1%.

5 SVCM takes the position that in order for the proposal to receive court approval, SVCM must first consent in accordance with the unanimous shareholders' agreement. SVCM has refused to consent.

6 Fiber sought court approval for the proposal and in doing so first sought an order terminating the unanimous shareholders' agreement. Fiber also brought an application in which it invoked the oppression remedies under the *Ontario Business Corporations Act*, R.S.O. 1990 c. B-16 (the "OBCA").

7 The motions judge concluded that SVCM's purported exercise of a veto of the proposal was oppressive of the corporation, its shareholders and directors and he issued an order permitting the company to amend the unanimous shareholders' agreement and other documents in accordance with the terms of the proposal. That order has been appealed by SVCM, as a right, to the Divisional Court.

8 The motions judge also considered whether he had any authority to set aside the unanimous shareholders' agreement under the inherent jurisdiction of the court. He concluded, "that the considerations expressed for the exercise of the court's inherent jurisdiction under the *C.C.A.A.* [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended] are applicable under the BIA to the facts of this case." He then proceeded to set aside the unanimous shareholders' agreement and approve the proposal under the purported exercise of his inherent jurisdiction. It is common ground that there is no express authority to accomplish this under the BIA.

Is Leave to Appeal Required?

9 The first issue before me is whether leave to appeal is required in respect of the order made under the BIA.

10 Section 193 of the BIA provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> a) if the point at issue involves future rights;
>
> b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> e) in any other case by leave of a judge of the Court of Appeal.

11 Counsel for SVCM relies upon s. 193(a) and submits that leave is not required because the termination of the unanimous shareholders' agreement involves the termination of future rights. He argues that the unanimous shareholders' agreement provides SVCM with ongoing rights which it may exercise in the future depending on the existing circumstances. These include the veto over changes in the share structure, the right to appoint a director, rights restricting transfer and certain rights related to a bid to purchase the company. He also argues that the unanimous shareholders' agreement is, in fact, a constating document of the company which governs its affairs in the future and hence any alteration in its terms will affect the future rights of its shareholders.

12 I do not agree that the termination of the unanimous shareholders' agreement involves the termination of future rights. The rights under the unanimous shareholders' agreement are rights which presently exist, although they are capable of being exercised in the future. Rights which presently exist are not future rights. See *TFP Investments Inc. (Trustee of) v. Singhal*, [1991] O.J. No. 323 (Ont. C.A.) p. 13; *Devcor Investment Corp., Re*, [2001] A.J. No. 158 (Alta. C.A.) para. 5.

13 Counsel for SVCM also submits that if SVCM should succeed in an appeal, the proposal may not be approved and in the result Fiber will go into bankruptcy. Given that the future rights of SVCM to a distribution are different

in a proposal situation, than they are in a bankruptcy liquidation, it follows that future rights are, in fact, at issue in the appeal. While there may be some simplistic attraction to such an argument, I am not persuaded. To adopt such an argument leads to the conclusion that the result of almost every appeal involves the issue of future rights. See *Elias v. Hutchison*, [1981] A.J. No. 896 (Alta. C.A.) at para. 23.

14 I therefore conclude that the points at issue in this matter do not involve future rights. There is no automatic right of appeal under s. 193(a) of the BIA. Leave to appeal is required pursuant to s. 193(e) of the BIA.

The Test for Leave to Appeal under s.193(e) of the BIA

15 There would appear to be a measure of confusion as to what the test for leave to appeal is under s. 193(e) of the BIA. In *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A.) at para. 6, Goodman J.A. cited the following passage from *Houlden and Morawetz Bankruptcy and Insolvency Law of Canada* (Third Edition) Vol. II at 7-56:

> The factors to be considered on an application for leave to appeal are (a) whether the point of appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous and (d) whether the appeal will unduly hinder the progress of the action: *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.); *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279, 24 B.C.A.C. 318, 40 W.A.C. 318 (C.A.).
>
> Section 193(3) gives a judge of the Court of Appeal a discretion, but leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice, for which there is no remedy: *MacNab v. B.S. & B. Enterprises Ltd.* (1951), 32 C.B.R. 53 (Que. K.B.); *Re Leard* (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135 (Ont. C.A.). If the order sought to be appealed from is discretionary, leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to litigation: *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291, 84 B.C.L.R. (2d) 283, 18 B.C.A.C. 221, 31 W.A.C. 221 (C.A.).

Goodman J.A. proceeded to apply the test set out in the second paragraph of the passage from *Houlden and Morawetz* without reference to the test in the first paragraph of the passage. The test described in the first paragraph is the familiar test applied for leave to appeal orders under the *C.C.A.A*. See *Stelco Inc., Re*, [2005] O.J. No. 729 (Ont. S.C.J. [Commercial List]) para. 24.

16 Osborne J.A. in *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]) referred to the test applied by Goodman J.A. in *R.J. Nicol, supra.* He also made reference to the first test referred to in the *Houlden and Morawetz* passage as follows at p. 381:

> An alternative test for determining whether leave to appeal should be granted was proposed by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.). McLachlin J.A. set out the following consideration: (a) is the point appealed of significance to the practice; (b) is the point raised of significance in the action itself; (c) is the appeal *prima facie* meritorious; and (d) will the appeal unduly hinder the progress of the action?

Osborne J.A. then concluded at p. 381:

> In my view, the factors generally relevant to the issue whether leave to appeal should be granted are set out by Goodman J.A. in *R.J. Nicol Construction Ltd.* I do not, however, think that in each case all of the listed factors should be given equal weight. It seems to me that in this case, the question whether the trustee's failure to provide the notice required by s. 168.1 of the Act can be remedied by resort to s. 187(9) of the Act is a matter of considerable general importance in bankruptcy practice. It seems to me to be likely that from time to time trustees handling a large number of personal bankruptcies will, due to administrative errors, not comply with the requirements of s.

168.1 (see annotation to *Re Tong* (1993), 23 C.B.R. (3d) 39 (Ont. Gen. Div.)). In addition, while I am satisfied that there are arguable grounds of appeal, I do not express any view as to whether the appeal will, or will not, succeed.

17 In spite of his stated preference for the test adopted by Goodman J.A. in *Nicol*, Osborne J.A. was not prepared to adopt the test without some flexibility. He considered that the issues before him were of general importance to the bankruptcy practice which displayed arguable grounds of appeal. In effect, he invoked two of the factors considered by McLachlin J.A. in *Power Consolidated*, *supra*.

18 More recently, Feldman J.A. in *GMAC Commercial Credit Corp. of Canada v. TCT Logistics*, [2003] O.J. No. 5761 (Ont. C.A.) considered the test for granting leave under s. 193(e) of the BIA. At para. 9 of her endorsement, she said:

> The test for granting leave to appeal under s. 193(e) of the BIA has been described as containing the following criteria: leave should only be granted if the judgment is contrary to law; amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: *McNab v. B.S. & B. Enterprises Ltd.* (1951), 32 C.B.R. 53 (Que. K.B.), and from *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.): whether the point of the appeal is of significance to the practice; whether the point raised is of significance to the action itself; whether the appeal is *prima facie* meritorious or frivolous; and, whether the appeal will unduly prejudice the progress of the action. When the order appealed from is discretionary, the issue must be of importance to the administration of justice or to the rights of the parties: *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291 (B.C.C.A.). Finally, the significance of the issue in bankruptcy law can determine whether leave is granted: *Re Nagy* (1987), 1 C.B.R. (4th) 179 (Alta. C.A.).

Feldman J.A. proceeded to grant leave to appeal on the ground that the issues before her were significant to commercial practice regulating bankruptcy and receivership and ought to be considered by this court. As well, she found the issues were of significance to the action.

19 It is apparent that judges of our court have not adopted a rigid approach to the factors which a chambers judge should consider on an application for leave under s. 193(e) of the *Bankruptcy and Insolvency Act*. There is a variety of factors to consider depending upon the circumstances presented to the court.

Should Leave be Granted in this Case?

20 The approach taken by the motions judge in invoking the inherent jurisdiction of the court to set aside the unanimous shareholders' agreement represents a case of first impression. Like Osborne J.A. in *Baker, Re*, *supra*, I do not think I need to express a view as to whether the appeal will succeed. Like him, I am satisfied that there are arguable grounds of appeal and like Feldman J.A. in *GMAC Commercial Credit Corporation of Canada*, *supra*, the issues raised are significant to bankruptcy practice and ought to be considered and addressed by this court.

21 There is also an additional reason to grant leave to appeal in this case. If leave were not granted, such an order would effectively render the companion appeal to the Divisional Court moot. SVCM has an appeal as of right to the Divisional Court in respect of the oppression remedy. In my view, it would be unfair to effectively frustrate the prosecution of that appeal by denying leave to appeal the order under the BIA to this court.

22 Leave to appeal is therefore granted. An order will also go transferring the Divisional Court appeal (court file no. 116/05) to this court to be heard and determined by the Court of Appeal with this appeal.

23 SVCM shall have its costs of this motion on a partial indemnity basis fixed at $5,000 including disbursements and Goods and Services Tax.

Leave to appeal granted.

TAB 6

See para. 48

2016 ONCA 458
Ontario Court of Appeal

Paton Estate v. Ontario Lottery and Gaming Corp.

131 O.R. (3d) 273, 2016 CarswellOnt 9109, 2016 ONCA 458, 19 E.T.R. (4th) 171, 267 A.C.W.S. (3d) 79, 349 O.A.C. 106, 403 D.L.R. (4th) 485

The Estate of Ollie John Paton, Deceased, by His Estate Trustee During Litigation, Ronald McKay and the Estate of Eva Paton Deceased by Her Estate Trustee During Litigation, Ronald McKay, Plaintiffs (Appellants) and Ontario Lottery and Gaming Corporation, c.o.b. as Fallsview Casino Resort and as OLG Casino Brantford, Defendant (Respondent)

Alexandra Hoy A.C.J.O., G. Pardu, L.B. Roberts JJ.A.

Heard: February 2, 2016
Judgment: June 10, 2016
Docket: CA C60606

Proceedings: reversing *Paton Estate v. Ontario Lottery and Gaming Commission* (2015), 2015 CarswellOnt 7468, 2015 ONSC 3130, 10 E.T.R. (4th) 307, *(*sub nom. *Paton Estate v. Ontario Lottery and Gaming Corp.)* 125 O.R. (3d) 519, P.B. Hambly J. (Ont. S.C.J.); additional reasons at *Paton Estate v. Ontario Lottery and Gaming Commission* (2015), 10 E.T.R. (4th) 333, 2015 CarswellOnt 10426, 2015 ONSC 4455, P.B. Hambly J. (Ont. S.C.J.)

Counsel: Don Morris, T. Andrew Sprung, for Appellants
Matthew Milne-Smith, Bryan McLeese, for Respondent

***G. Pardu J.A.*:**

A. Overview

1 This case illustrates, once again, the catastrophic social consequences caused by problem gamblers, those unable to resist the allure of a casino. The appellants are two estates defrauded by an addicted gambler. They sued the respondent, Ontario Lottery and Gaming Corporation ("OLGC"), hoping to recover some portion of their losses. Their statement of claim was struck by the motion judge, who concluded that it was plain and obvious that the action could not succeed. They appeal from that dismissal, arguing that their claims for knowing receipt of trust funds, unjust enrichment, and negligence should be allowed to proceed to trial.

2 I would allow the appeal, and dismiss the motion to strike the action. While the action is by no means certain to succeed, nor is it necessarily certain to fail.

B. Facts

3 Shellee Spinks was a law clerk. She stole over $4,000,000 from the appellants and others by forging documents, selling estate assets and taking the money for herself. She lost about $3,000,000 of that money in the respondent's casinos over a roughly 14-month period. The appellants allege that they were defrauded of approximately $1,500,000 by Ms. Spinks, that she gave about $200,000 of that money to her mother, and that the two women gambled and lost about $950,000 of the estates' money in the respondent's casinos, where Ms. Spinks held herself out to be a lawyer. The gambling took place between late 2006 and Ms. Spinks' arrest on March 13, 2008.

C. The Motion Judge's Decision

4 Under r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, a party may move before a judge to strike out a pleading on the grounds that it discloses no reasonable cause of action.

5 The motion judge correctly set out the test for striking an action under r. 21.01, at para. 3:

> In considering a motion under this rule to strike out a statement of claim, the judge must assume that the facts pleaded are true. He must read the statement of claim generously allowing for inadequacies due to drafting deficiencies. Because a cause of action is novel it should not be struck out on this basis. The statement of claim should only be struck out if it is "plain and obvious" and "certain" that the claim will fail. *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 and *Nash v. Ontario*, [1995] O.J. No. 40343 (C. of A.).

(1) Knowing receipt of trust funds

6 The motion judge concluded that the fact that Ms. Spinks held herself out as a lawyer to the operators of OLGC's casinos did not mean that OLGC had notice that she was gambling with trust funds or that it had an obligation to investigate. He noted that many people lose money at gambling casinos and represent themselves, truthfully or not, as being from various occupations. The motion judge concluded that this could not be sufficient to put a casino on notice to investigate its customers as to the source of the money they are losing. The motion judge stated that such a practice would destroy the business of the casinos, a legally permitted activity.

(2) Unjust enrichment

7 The motion judge concluded that OLGC had valid juristic reasons for retaining any money it received: (i) it entered into valid contracts with Ms. Spinks and her mother; and (ii) it was a *bona fide* purchaser without notice that they were gambling with money obtained by fraud. Therefore, the claim for unjust enrichment could not succeed.

(3) Negligence

8 The motion judge concluded that the respondent did not owe a duty of care to the appellants. He held that in order for OLGC to owe a duty of care to the appellants, it would first have to owe a duty of care to Ms. Spinks and her mother as problem gamblers. After reviewing the jurisprudence from Canada and other jurisdictions, the motion judge concluded that OLGC did not owe a duty of care to problem gamblers, except perhaps in very limited circumstances, none of which existed in this case.

9 The motion judge also concluded that even if OLGC owed a duty of care to problem gamblers, this would not help the appellants' cause of action for the following reasons: (i) the duty to problem gamblers would be negated because of residual policy concerns, specifically the danger of indeterminate liability; (ii) even if OLGC had prevented them from gambling, there were problems with proof of causation because Ms. Spinks and her mother would have retained the stolen money; and (iii) OLGC would still not owe a duty to the appellants to investigate the source of its customers' money.

D. Standard of Review

10 As recently explained by this court in *Frank v. Legate*, 2015 ONCA 631, 390 D.L.R. (4th) 39 (Ont. C.A.), at para. 35, a motion judge assessing whether a statement of claim discloses a reasonable cause of action is engaged in a purely legal analysis, and the standard of review is therefore correctness.

E. Analysis

(1) Motions to strike

11 As the Supreme Court indicated in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 19, the purpose of a motion to strike is to eliminate hopeless claims. However, the court in that case also noted, at para. 21, that it "is a tool that must be used with care."

12 It is not determinative, on a motion to strike, that the law has not yet recognized a particular claim. Rather, the court must ask whether it is plain and obvious that the claim has no reasonable prospect of success. The court must take the facts pleaded in the statement of claim as true, unless they are patently ridiculous or manifestly incapable of being proven, and the approach must be generous, erring on the side of allowing a novel, but arguable, claim to proceed. While no evidence is admissible on a motion to strike, claimants must clearly plead all facts on which they intend to rely, as those facts are the basis on which the possibility of success will be evaluated. See *Imperial Tobacco*, at paras. 17-22; and *Frank v. Legate*, at para. 36, and the cases cited therein.

(2) The statement of claim

13 The statement of claim in this action is not a model of clarity, but, read generously, the following factual allegations may be gleaned from that document:

- Ms. Spinks was a problem gambler;
- OLGC knew she was a problem gambler;
- OLGC knew problem gamblers sometimes steal to feed their habit and cause losses to others;
- Ms. Spinks' gambling of vast sums of money over a relatively short period would have caused a reasonable person to make inquiries about the source of her funds, and to suspect that the money might have been stolen; and
- OLGC's failure to act contributed to the appellants' losses.

14 I recognize that these factual allegations were not always neatly tied to a particular cause of action in the statement of claim. However, that is not fatal on a pleadings motion, provided the material facts are pleaded: *Dean's Standard Inc. v. Hachem*, 2014 ONSC 1977 (Ont. S.C.J.), at para. 14; *McGillvray v. Penman*, 2016 ONSC 1271 (Ont. S.C.J.), at para. 12. See also *Almas v. Spenceley*, [1972] 2 O.R. 429 (Ont. C.A.), at p. 433.

(3) The causes of action

(i) Knowing receipt of trust funds

15 A stranger to a trust may be liable where it receives trust property for its own benefit, has knowledge of facts which would put a reasonable person on inquiry, but fails to inquire as to the possible misapplication of trust property: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 49. The recipient's enrichment is "unjust" due to the lack of inquiry with respect to the possible misapplication of the trust property. The focus is therefore on the recipient's state of mind because, without constructive or actual knowledge of the breach of trust, the recipient could have a lawful claim to the funds and the plaintiff would not be entitled to a restitutionary remedy. See *Citadel General Assurance*, at paras. 48-51.

16 I am not convinced that the appellants' claim for knowing receipt could not possibly succeed. If a trier of fact were to conclude that OLGC had good reason to suspect that the money gambled by Ms. Spinks might have been stolen, the appellants may fall within the protection afforded by *Citadel General Assurance*.

17 According to Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, loose-leaf (2015-Rel. 16), (Toronto: Canada Law Book, 2015), at paras. 5-16 to 5-25, money obtained by fraud can be subject to a constructive trust. In *Healthy Body Services Inc. v. 1261679 Ontario Ltd.*, 2015 ONCA 516, 338 O.A.C. 346 (Ont. C.A.), at paras. 30-40,

Lauwers J.A., dissenting, would have held that money obtained by fraud was subject to a constructive trust and that a party that subsequently obtained that money could be liable in knowing receipt. The majority in that case did not consider the issue of knowing receipt, as it held the funds in question could not be traced.

18 Moreover, in *Equipment Acquisition Resources, Inc. v. Hammond*, 803 F.3d 835 (U.S. C.A. 7th Cir. 2015), a plan administrator sought to recover embezzled funds lost at a casino. The District Court for the Northern District of Illinois granted the casino's summary judgment motion, and the Seventh Circuit Court of Appeal upheld the result, on the ground that unless the casino had some reason to know that it was receiving funds resulting from a fraudulent transfer, it should not be liable to the debtor's creditors. The court also held that certain evidentiary "red flags" were not sufficient to impose a duty on the casino to investigate the source of the funds. Although the action failed, the court did not suggest that the cause of action itself was not valid.

19 The motion judge in this case rejected the appellants' claim that the OLGC knowingly received trust funds, at para. 37 of his reasons:

> S. Spinks held herself out to be a lawyer to the operators of the gambling casinos. Many people lose money at gambling casinos who will represent themselves truthfully or not as being from various occupations. This cannot be sufficient to put the casinos on notice to investigate these people as to the source of the money that they are losing. Such a practice would destroy the business of the casinos which they are conducting legally.

20 These factual assertions cannot form the basis to reject the appellants' claim, if it was adequately pleaded. The question before the motion judge was whether, taking the facts in the statement of claim as true and reading the claim generously, it was plain and obvious that the action would fail. In my view, on a generous reading of the statement of claim, and given the appellants' allegations that OLGC had knowledge sufficient to put a reasonable person on inquiry, but failed to take the necessary action, the appellants' claim for knowing receipt of trust funds should be allowed to proceed to trial.

(ii) Unjust enrichment

21 The trial judge correctly set out the requirements for a claim in unjust enrichment: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment. See *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 30.

22 The motion judge held that third parties such as the appellants could not advance a claim for unjust enrichment unless Ms. Spinks, the gambler, also had that right. He held that while OLGC was enriched, and Ms. Spinks was correspondingly deprived, there were juristic reasons for the enrichment — namely, a valid gambling contract and the fact that OLGC was a *bona fide* purchaser for value without notice that it was receiving money obtained by fraud.

23 The motion judge did not consider the possibility that the juristic reasons for the enrichment might be vitiated on the ground of unconscionability. The appellants pleaded in their statement of claim that OLGC received an "unconscionable benefit." If OLGC knew that Ms. Spinks was addicted to gambling, and was in fact unable to refrain from losing money, but allowed her to continue gambling nonetheless, I am not convinced that the appellants' claim in unjust enrichment would necessarily fail.

24 This approach was adopted by the Court of Appeal of the Supreme Court of Victoria in *Kakavas v. Crown Melbourne Ltd. and Ors*, [2012] VSCA 95 (Australia H.C.), aff'd [2013] H.C.A. 25 (Australia H.C.). In that case, the appellant claimed that he was a "pathological gambler" and that the casino's actions in luring him back to the casino, and in encouraging his gambling, were unconscionable.

25 The court described, at paras. 17-19, the parameters of unconscionability in that context as encompassing circumstances in which: (i) a party to a transaction is under a special disability in dealing with the other party, such that

there is no reasonable degree of equality between them; and (ii) the disability is sufficiently evident to the stronger party to make it *prima facie* unfair for him or her to procure or accept the weaker party's agreement to the transaction in the circumstances. The common characteristic of adverse circumstances constituting a special disability is that they have the effect of placing one party at a serious disadvantage with respect to the other party. The focus is on the conduct of the stronger party in attempting to enforce or retain the benefit of a transaction with a person under special disability, where it is not consistent with equity or good conscience to allow him or her to do so.

26 Following trial, the plaintiff's claim in *Kakavas* was dismissed on the ground that he did not suffer from the special disability or disadvantage of addiction to gambling. Appeals to the Court of Appeal and the High Court of Australia were dismissed. Again, while the plaintiff lost because of the factual findings made in that case, a finding of unconscionability — knowingly taking advantage of an addicted gambler — could have opened the door to compensation.

27 In this case, if a trier of fact were to determine that OLGC acted unconscionably with respect to Ms. Spinks, a problem gambler, it is not plain and obvious that the appellants' action in unjust enrichment would fail. While the argument may be novel, as observed by Professor Stephen M. Waddams in *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 551, "[t]he categories of unconscionability can never be closed."

28 Furthermore, in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at paras. 34 and 43, the Supreme Court of Canada recognized that the remedy of a constructive trust could be imposed where required by good conscience, including both for wrongful acts like fraud and where there is unconscionable unjust enrichment:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
>
> . . . . .
>
> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

29 In addition to the notion of unconscionability, legislation such as the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, may shed light on the impact of the disability of one party to a contractual relationship on the agreement, such as when the consumer is not reasonably able to protect his or her interests because of disability and when unfair practices on the part of the supplier of services may entitle the consumer to rescission of the contract: see ss. 15(2)(a), 17, and 18(1).

30 In light of the foregoing considerations, it is my view that it is not plain and obvious that the appellants' claim in unjust enrichment is certain to fail.

(iii) Negligence

31 The appellants allege that OLGC owed them a duty of care to prevent Ms. Spinks from losing their money by stopping her from gambling. The motion judge applied the "*Anns*/*Kamloops*" test for recognizing a duty of care, as expressed in *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.), at paras. 9-10. In that

case, the Supreme Court confirmed that at the first stage of the *Anns/Kamloops* test, the court must examine whether the circumstances disclose reasonably foreseeable harm and sufficient proximity between the plaintiff and defendant to establish a *prima facie* duty of care. At the second stage, the question is whether there are residual policy reasons for not imposing a duty of care. See also *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), at para. 30; and *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.), at paras. 23-26, 30-32.

32 The motion judge held that the respondent could not owe any duty of care to the appellants unless it also owed a duty of care to Ms. Spinks, the gambler. He referred to a number of authorities holding generally that problem gamblers are the authors of their own misfortune and should not be able to recover for economic loss: see *Burrell v. Metropolitan Entertainment Group*, 2010 NSSC 476 (N.S. S.C.), aff'd 2011 NSCA 108 (N.S. C.A.); and *Calvert v. William Hill Credit Ltd.*, [2008] EWHC 454 (Eng. Ch. Div.), aff'd [2008] EWCA Civ 1427 (Eng. C.A.).

33 The motion judge held, at para. 24, that the pleadings did not disclose facts sufficient to establish the required reasonable foreseeability and proximity between casinos and problem gamblers:

> In this case, it is not pleaded that S. and A. Spinks recognized that they were problem gamblers and sought to have the casinos exclude them. The plaintiffs do not plead special circumstances as there were in *Preston.* The plaintiffs do not plead facts linking S. and A. Spinks to the casinos where they gambled that would differentiate them to the staff from the general population of patrons who attend to gamble there other than that they were problem gamblers. The case law establishes that this is not sufficient to create a duty of care to them by OLGC. That S. and A. Spinks would lose money at the casinos like every other person who gambled there for any length of time was foreseeable. It could hardly be otherwise or the casinos would go out of business. The facts pleaded, however, fail to assert sufficient proximity between S. and A. Spinks and OLGC to satisfy the second requirement of imposing a duty of care to them by OLGC.

34 The motion judge went on to hold that to impose a duty of care on OLGC would create indeterminate liability to problem gamblers for their losses, making it impossible for casinos to operate at a profit — policy concerns that the appellants had not adequately addressed in their pleadings. Because he found that OLGC owed no duty of care to problem gamblers, he found that it could not owe a duty of care to the appellants either.

35 I do not agree with the motion judge that case law binding in Ontario establishes definitively that casinos owe no duty of care to problem gamblers. I agree that casinos cannot be expected to conduct an individualized assessment of each of their customers to determine the wisdom of the decision to gamble. However, more may be expected when an individual is obviously addicted to gambling and out of control. Moreover, the factual assertion that casinos would go out of business if a duty of care to problem gamblers were to be recognized has no place on a pleadings motion. Factual findings will have to await a hearing on the merits with the benefit of an evidentiary record.

36 Nor am I persuaded at this early stage that recognition of a duty of care confined to the victims of an obvious problem gambler in circumstances where a reasonable person would have realized that the gambler could be using stolen funds to feed his or her addiction will necessarily result in indeterminate liability. The dimensions of this problem cannot be determined on a pleadings motion.

37 I recognize that there are some formidable barriers to a finding that casinos owe a duty of care to third parties who are the victims of problem gamblers. For one thing, the claim is for pure economic loss. Moreover, while loss to third parties may be reasonably foreseeable, the casinos have no relationship with the third parties, and there may be some indeterminacy in assessing the number of persons from whom addicted gamblers may have stolen.

38 On the other hand, this issue may be seen as analogous to that of a commercial host who serves alcohol to an intoxicated patron, who then drives while inebriated and injures an innocent third party. In that context, there is a recognized duty to both the intoxicated patron and the third party: see *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.).

The server of alcohol has no relationship with the third party, but injury is reasonably foreseeable and a sufficient degree of proximity exists between the server and the class of persons who could be expected to be on the road.

39 In the context of the proposed analogy, it is important to note that the respondent is in the casino business. The Supreme Court drew a distinction between social hosts and commercial hosts in *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at paras. 17-23. The court concluded, at para. 47, that "[a] social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk."

40 However, the court also made clear, at para. 37, that where the defendant is a commercial enterprise that benefits from offering a service to the general public, it may have attendant responsibilities to act with special care to reduce risk, and a duty of care may arise. The court described the rationale underlying the imposition of a duty of care on such a defendant, at para. 38:

> Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing... The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.

41 Moreover, in the course of distinguishing between social hosts and commercial alcohol providers, the court noted, at para. 22:

> [T]he contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. The appellants argue that there is "nothing inherently special" about profit making in the law of negligence. In the case of alcohol sales, however, it is clear that profit making is relevant. Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. The costs of over-consumption are borne by the drinker him or herself, taxpayers who collectively pay for the added strain on related public services and, sometimes tragically, third parties who may come into contact with intoxicated patrons on the roads. Yet the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.

42 These comments apply with equal force to casino operators.

43 Gambling, like serving alcohol, is a regulated activity. It is prohibited under the *Criminal Code*, unless a provincial government decides to adopt a law permitting the conduct and management of the activity by the province. The Alcohol and Gaming Commission of Ontario is the regulatory agency responsible for administering the statutes and regulations applicable to casinos. The Commission is mandated to "exercise its powers and duties in the public interest and in accordance with the principles of honesty and integrity, and social responsibility": *Alcohol and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c. 26, Sched., s. 3(3).

44 For all of these reasons, it is not plain and obvious that the appellants' claim in negligence against OLGC is hopeless.

(iv) Conversion

45 The appellants did not pursue the cause of action asserted in conversion in oral argument.

(4) Conclusion

46 I have had the advantage of reading the dissenting reasons of Hoy A.C.J.O. I agree that there is no jurisprudence perfectly matching the claims in issue here, but in my view, that is inherent in the novelty of the claim.

47 My colleague is also of the view that the appellant has not adequately pleaded the knowledge that is a requisite element of the knowing receipt and unjust enrichment claims in this case. In particular, she is of the view that pleading "that the OLGC had knowledge sufficient to put a reasonable person on inquiry" is insufficient. I respectfully disagree and I would not require a more detailed pleading about OLGC's knowledge at this stage of the action.

F. Disposition

48 These are novel claims. A factual record is necessary to allow a court to confidently make judgments about the legal and policy issues raised, and to determine whether it is fair and just to expect casinos to pay some compensation for the high social costs of gambling out of the revenues generated by that activity. I am not persuaded that the appellants' action is certain to fail. This was a pleadings motion under rule 21.01, based on the argument that no viable cause of action was pleaded. It was not a motion for summary judgment. The muddled organization of the statement of claim is not a basis to strike the claim, provided the essential material facts are pleaded. The appeal is accordingly allowed, and the motion to strike out the claim is dismissed. Costs are awarded to the appellants in the sum of $15,000 on the appeal, all inclusive.

***L.B. Roberts J.A.*:**

I agree

***Alexandra Hoy A.C.J.O.* (dissenting):**

49 I acknowledge that the appellants' claim illustrates the sometimes very serious social and economic consequences to gamblers and others of government-regulated gambling in Ontario. And I agree with my colleague that this claim is novel. However, unlike my colleague, I would dismiss the appeal. When considering a novel claim on a motion to strike, the court must nonetheless evaluate it in the context of the facts pleaded and the applicable jurisprudence. I agree with the motion judge that the appellants' claim has no reasonable prospect of success.

50 I begin by outlining the facts pleaded by the appellants. As my colleague has already discussed the motion judge's reasons, I do not need to summarize those. Then I address the various causes of action advanced by the appellants.

A. What the Appellants Have Pleaded

51 I agree that a court hearing a motion to strike must proceed on the basis of the facts pleaded by the plaintiff and that the pleadings should be construed generously. However, this indulgence is not limitless.

52 A plaintiff cannot simply plead legal conclusions or assert the constituent elements of a cause of action: *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, 334 O.A.C. 99 (Ont. C.A.), at para. 21. A claimant must clearly plead the facts upon which it relies in support of its claim. The facts pleaded are the sole basis on which the claims at issue can be evaluated, and a court cannot consider the possibility that additional facts or evidence may become available in the future: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at paras. 22-23.

53 The appellants have amended their claim twice. It is important to consider precisely what facts they plead in their Amended Amended Statement of Claim ("Claim"). There are three categories of facts that are significant: the Spinks' fraud and their gambling, what Ontario Lottery and Gaming Corporation ("OLGC") knew about the Spinks, and OLGC's interactions with problem gamblers in general.

(1) The Spinks' fraud and gambling

54 Shellee Spinks forged Ollie John Paton's signature on an alleged will, appointing herself as executrix: Claim, at para. 12. Between January 1, 2006, and March 13, 2008, she defrauded the appellant estates of approximately $1.5 million: Claim, at para. 4. Ms. Spinks gambled and lost about $750,000 of the money she took from the appellant estates at OLGC casinos, at least $550,000 of which was gambled and lost between late 2006 and March 13, 2008: Claim, at paras. 5 and 7. Between December 21, 2006, and her arrest in 2008, Ms. Spinks gave about $200,000 of the money she took from the plaintiff estates to her mother, who gambled and lost that money at OLGC casinos: Claim, at paras. 9 and 10.

55 Ms. Spinks also defrauded other clients of at least another $3 million. Except for about $1 million, the Spinks gambled away all the money that Ms. Spinks defrauded the appellant estates and other clients of: Claim, at para.18. The appellants do not plead when Ms. Spinks defrauded the other clients or the time period during which the Spinks gambled most of the money away.

56 The appellants do not know the precise amount of money lost by the Spinks, but OLGC knows or is capable of ascertaining the amount: Claim, at paras. 7 and 10. The Spinks' gambling losses were inordinately high: Claim, at para. 16(a). They exhibited addictive, inordinately excessive gambling behaviour: Claim, at para. 28.

(2) What OLGC knew about the Spinks

57 It is significant that the appellants do not plead that OLGC actually knew that the Spinks were problem gamblers, was wilfully blind to that fact, or wilfully and recklessly failed to make inquiries that an honest and reasonable person would make in the circumstances.

58 The appellants have pleaded only the following facts about what knowledge OLGC actually had: (i) Ms. Spinks held out to OLGC that she was a lawyer (Claim, at para. 5); (ii) OLGC knew that the Spinks lost large amounts of money at its casinos (Claim, at para. 17); and (iii) OLGC at all times knew how much money the Spinks had gambled and lost (Claim, at para. 25).

59 I acknowledge that the appellants have pleaded that the respondent had "at all material times knowledge of facts that would put a reasonable person on inquiry" and that the respondent had "constructive knowledge" of a potential breach of trust: Claim, at para. 17. However, these pleadings are legal conclusions and, as I discuss below, the appellants have not pleaded the material facts necessary to justify them.

(3) OLGC and problem gamblers

60 According to the appellants, OLGC knows that a "certain percentage" of its customers are problem gamblers or people who have a gambling addiction: Claim, at para. 19. OLGC has been told by others of many specific instances where problem gamblers and addicted gamblers have lost "extremely large amounts of money" and have obtained the money they gamble from criminal activity, including fraud: Claim, at para. 20. More specifically, the appellants have pleaded that:

- OLGC is aware at all times of losses being incurred by the vast majority of problem and addicted gamblers who gamble in OLGC casinos: Claim, at para. 21.

- OLGC trains its employees to keep track of the gambling losses of its patrons, to spot problem gamblers, and to intervene in situations involving losses by problem gamblers: Claim, at paras. 21 and 22.

- 85 percent of OLGC employees believe that they can identify problem gamblers and intervene in situations where they are losing inordinate amounts of money: Claim, at para. 22.

- OLGC had information at its disposal that permitted it to predict with statistical accuracy the risk of problem and addicted gamblers losing money obtained by illegal means, and it was sufficiently expert in the gaming industry

to easily spot and quickly prevent the danger of Ms. Spinks gambling an inordinate amount of money that was obtained by fraud: Claim, at para. 34.

• OLGC knows that problem and addicted gamblers cause great harm to themselves and to their families, employers, and creditors: Claim, at para. 23.

• OLGC knows that long-term gambling will result in financial losses to the gambler: Claim, at para. 26.

B. Knowing Receipt of Trust Funds

(1) Legal principles

61 A person who has not been appointed as trustee and is therefore a "stranger to a trust" may, under certain limited circumstances, attract the liabilities of trusteeship. In a category of liability referred to as "knowing receipt", which the appellants rely on, a claimant may assert a restitution-based claim against a defendant that receives property in its own right and in breach of trust: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at paras. 19 and 24.

62 As noted in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 (S.C.C.), at paras. 53 and 74, in order to recover property on the basis of knowing receipt, a plaintiff must prove that (1) the disputed property was subject to a trust in favour of the plaintiff; (2) the defendant received property, in its own right, which was taken from the plaintiff in breach of trust; and (3) the defendant had "knowledge" or "notice" of the breach of trust. Knowledge or notice may be established by showing that the defendant

(i) had actual knowledge;

(ii) wilfully shut its eyes to the obvious;

(iii) wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make;

(iv) had knowledge of circumstances that would indicate the facts to an honest and reasonable person; or

(v) had knowledge of circumstances that would put an honest and reasonable person on inquiry.

The types of knowledge described in (iv) and (v) are referred to as "constructive knowledge". For the sake of convenience, I will refer to categories (i)-(iii) as "actual knowledge".

63 Where the foregoing requirements are met, the recipient of the trust property is held liable as a constructive trustee for the breach of trust: *Citadel*, at para. 19.

(2) Appellants' claim

64 In this case, the appellants argue that the funds gambled by the Spinks were subject to a trust in their favour. They advance two potential bases for that trust. First, I understand them to assert that Ms. Spinks improperly took on a trustee's responsibilities and committed a breach of the trust created by Mr. Paton's will. Second, the appellants submit that the stolen funds were impressed with a constructive trust while in Ms. Spinks' hands. I assume from this that they argue that the Spinks breached this constructive trust by gambling with the stolen funds and that, as a result, OLGC received those funds for its own benefit.

65 The appellants submit that OLGC was aware of facts that would put a reasonable person on notice or inquiry as to a possible misapplication of trust funds because (i) it had been told by others of many specific instances where problem gamblers have obtained the monies used to gamble from criminal activity, including fraud; and (ii) because Ms. Spinks — whom OLGC believed to be a lawyer — sustained the quantum of gambling losses pleaded. The appellants

do not submit that OLGC was required to conduct an investigation. Rather, they say that OLGC should have called the police and put the police on inquiry.

(3) Analysis

66 I agree with my colleague that money obtained by fraud can be subject to a constructive trust: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para 43. I am not aware of any case where liability for knowing receipt has been found arising out of a breach of a constructive trust, and the appellants have not provided any authorities that would support this proposition. However, in light of the dissenting reasons of Lauwers J.A. in *Healthy Body Services Inc. v. 1261679 Ontario Ltd.*, 2015 ONCA 516, 338 O.A.C. 346 (Ont. C.A.), which my colleague relies on, it cannot be said that there is no reasonable chance that a claim for knowing receipt based on the breach of a constructive trust could succeed.

67 Consequently I agree that the appellants may be able to establish the first two requirements for knowing receipt, i.e. existence of a trust and receipt of property subject to that trust.

68 However, in my view, there is no reasonable chance that a trial judge would find that the knowledge element that the appellants rely on — namely that OLGC had knowledge of circumstances that would put an honest and reasonable person on inquiry as to a breach of trust — was satisfied in this case and that OLGC is accordingly liable as constructive trustee for the breach of the trust.

69 Though the appellants' claim and their submissions are far from clear, I believe that they rely on the following chain of arguments: (i) OLGC knows of many instances where problem gamblers have stolen or committed fraud to obtain the money they gamble with; (ii) OLGC and its staff are capable of identifying problem gamblers; (iii) the Spinks were problem gamblers and, therefore, fall into a category of people who may steal or commit fraud; and (iv) OLGC should have known that the Spinks were problem gamblers and that they may be gambling with stolen funds. The appellants' claim for knowing receipt rests on their assertion that the Spinks were problem gamblers.

70 The appellants do not plead that OLGC had actual knowledge that the Spinks were problem gamblers. As noted, according to the appellants' pleadings, OLGC knew only two things about the Spinks: that Ms. Spinks identified herself as a lawyer and that the Spinks spent a lot of money. Neither of those can be equated with a pleading that OLGC had actual knowledge that the Spinks were problem gamblers.

71 That an individual gambles large amounts of money does not, in and of itself, make that individual a "problem gambler". Whether or not an individual is a problem gambler requires a careful, individualized assessment of factual issues relating to her personal autonomy and responsibility: *Dennis v. Ontario Lottery and Gaming Corp.*, 2013 ONCA 501, 116 O.R. (3d) 321 (Ont. C.A.), at para. 57. The significance of the quantum gambled depends on the means and circumstances of the gambler. In *Kakavas v. Crown Melbourne Ltd.*, [2013] H.C.A. 25, 250 C.L.R. 392 (Australia H.C.), a case that my colleague relies on, the court refers to "high rollers" who frequently gamble with huge sums but are not problem gamblers. The difficulty of distinguishing the two was noted in *Burrell v. Metropolitan Entertainment Group*, 2011 NSCA 108, 309 N.S.R. (2d) 375 (N.S. C.A.), at para. 43, where the court noted that a casino "could not reliably distinguish a gambling addict from a frequent gambler" in the absence of a prohibition notice, put in place because of a request from the gambler.

72 The appellants do not plead that Ms. Spinks had identified herself as a problem gambler by self-excluding from OLGC casinos.

73 Taking their claim at its highest, the appellants plead that Ms. Spinks exhibited addictive, inordinately excessive gambling behaviour — behaviour which, *if observed*, might put an honest and reasonable person on inquiry as to whether Ms. Spinks was a problem gambler. They do not allege that OLGC observed any of this behaviour.

74 I question whether something less than actual knowledge of the fact that the Spinks were problem gamblers would be sufficient to put an honest and reasonable person on inquiry as to a possible breach of trust by the Spinks. However,

assuming that it would, there is nonetheless no reasonable prospect that the appellants' claim for knowing receipt of trust funds could succeed.

75 The appellants plead no facts that would put a reasonable person on inquiry as to whether these particular gamblers, i.e. the Spinks, were among the problem gamblers who were gambling with funds received through a breach of trust. The appellants do not plead that "almost all" problem gamblers gamble using monies obtained through criminal activity. How was OLGC to distinguish Ms. Spinks from a problem gambler who gambled using monies not obtained through a breach of trust?

76 I agree with the motion judge that OLGC's belief that Ms. Spinks was a lawyer is not a fact that would put an honest and reasonable person on inquiry as to whether Ms. Spinks was misapplying trust property.

77 The appellants do not plead that lawyers are more likely to engage in fraud than other persons, and I would find it difficult to accept such a proposition. The isolated fact that OLGC believed Ms. Spinks to be a lawyer more reasonably supports the inference that she had a reasonable and possibly significant income, possibly had significant assets, and was less likely to be involved in criminal conduct than other high-spending gamblers. A lawyer could well have had legitimate sources of the quantum of funds gambled: an inheritance, a mortgage on her home or other source of credit, significant return on investments, a large contingency fee award, or a lottery win.

78 For the appellants' claim to have a reasonable prospect of success, the pleaded facts must be capable of supporting the inference that the gambled funds were obtained through breach of trust. These competing inferences preclude a leap from the pleaded fact that Ms. Spinks identified herself as a lawyer to the conclusion that OLGC should have suspected a breach of trust.

79 The appellants also do not plead that OLGC knew of facts that would suggest that Ms. Spinks was the kind of person likely to engage in fraud. They do not plead that OLGC had knowledge that Ms. Spinks had been implicated in any prior fraudulent activity, was the subject of pending criminal charges, or that she associated with a known criminal element.

80 Furthermore, for the same reasons that the quantum of funds gambled is not in and of itself an indicator that someone is a problem gambler, it is not a fact that would put an honest and reasonable person on inquiry as to the misapplication of trust funds.

81 This conclusion is supported by the decision in *Gold*. There, the issue was whether an honest and reasonable person in the position of the defendant bank would have made inquiries into whether another defendant had breached his fiduciary duties as trustee by obtaining a guarantee from the appellant. Sopinka J., speaking for the majority on this issue, concluded that the bank did not have a duty to make inquiries just because the relationship between the appellant and defendant trustee fell into a category of relationships where concerns might arise. Rather, for an obligation to make inquiries to arise, there must be suspicious circumstances in the particular relationship at issue: *Gold*, at paras. 79 and 83.

82 That conclusion is also supported by the decision in *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.). [1] In *Andersen*, the issue was whether the defendant bank was liable for accepting funds paid to it in breach of a trust imposed by the *Construction Lien Act*, R.S.O. 1990, c. C-30. At p. 381, Grange and McKinlay JJ.A. stated that, "in the absence of sufficient facts or circumstances indicating that there is a *good possibility* of trust beneficiaries being unpaid there is no duty of inquiry on a bank" (emphasis added).

83 In other words, a generalized possibility of breach of trust is not sufficient. A claimant must plead facts showing a real possibility of breach of trust in the particular circumstances.

84 Therefore, OLGC could not be subject to a duty to make inquiries solely because of knowledge, actual or constructive, that the Spinks were problem gamblers. There need to be facts showing that there was reason to suspect that these problem gamblers were gambling with stolen funds. In the absence of such facts, there is no reasonable prospect

that OLGC was subject to a duty to make inquiries and, therefore, no reasonable possibility that OLGC will be found liable for knowing receipt.

85 Respectfully, my colleague's reliance on *Equipment Acquisition Resources, Inc. v. Hammond*, 803 F.3d 835 (U.S. C.A. 7th Cir. 2015), is flawed. The issue in that case was whether the payment of funds to the casino was voidable under the U.S. *Bankruptcy Code*. It was not a "knowing receipt" case; it is not authority for the proposition that a U.S. court has considered and not ruled out the application of the doctrine of knowing receipt in the context of the operation of a casino.

C. Unjust Enrichment

(1) Legal principles

86 A plaintiff asserting a claim for unjust enrichment is required to prove (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 30. Canadian law recognizes certain established categories of juristic reasons, including contracts: *Garland*, at para. 44.

87 The contract at issue, or any other juristic reason for that matter, need not arise from the relationship between the plaintiff and the defendant. A valid contract leading to a debtor-creditor relationship between the person being enriched and another is a valid juristic reason: *Bank of Montreal v. i Trade Finance Inc.*, 2009 ONCA 615, 96 O.R. (3d) 561 (Ont. C.A.) ("*iTradeONCA*"), aff'd, 2011 SCC 26, [2011] 2 S.C.R. 360 (S.C.C.) ("*iTradeSCC*"), at para. 39. In cases involving allegations of fraud, a contract will be a valid juristic reason unless the defendant had notice of the fraud. To hold otherwise "would defeat the purpose of the long-established equitable protection which the law makes available — for equally long-established policy reasons — to *bona fide* purchasers for value without notice": *iTradeONCA*, at para. 42.

(2) Analysis

88 The motion judge concluded that OLGC had a juristic reason for retaining the money that the Spinks gambled — namely, the Spinks had entered into a valid contract with OLGC when they placed a bet. The chance of winning and the thrill of gambling were the consideration for the money advanced. The motion judge also concluded that OLGC did not have notice of Ms. Spinks' fraud and was a *bona fide* purchaser for value without notice.

89 In my opinion, that analysis is correct. The Spinks and OLGC entered into a contract: *Tal v. Ontario Lottery & Gaming Corp.*, 2011 ONSC 644, 80 B.L.R. (4th) 248 (Ont. S.C.J.), at para. 43; *Ross v. British Columbia Lottery Corp.*, 2014 BCSC 320, 12 C.C.L.T. (4th) 57 (B.C. S.C.). As noted, contracts, even between a defendant and a third-party other than the plaintiff that suffered a deprivation, are a valid juristic reason.

90 The appellants argue that OLGC received an unconscionable benefit because it received the gambled funds with knowledge of circumstances that would put an honest and reasonable person on inquiry as to a possible misapplication of trust property. They argue that OLGC had constructive notice that it was receiving money obtained by fraud. *Gold*, at paras. 46 and 53, makes clear that a *bona fide* purchaser for value will take any property it receives subject to an equity if it has constructive notice of the equity.

91 *Gold* is a decision that dealt with the law governing knowing receipt. I have already discussed why the appellants cannot establish the kind of knowledge needed to successfully assert that cause of action. For the same reasons, it cannot assist them in vitiating the juristic reason that justifies OLGC's enrichment in this case.

92 My colleague does not seem to take issue with any of the analysis noted above. However, she states that the motion judge erred by not considering the possibility that the contract might be vitiated on the ground of unconscionability. The basis for her assertion is the appellants' pleading that OLGC received an "unconscionable benefit". Relying on the decision in *Kakavas*, my colleague posits that there is a reasonable chance that a gambling contract with a "problem gambler" would be found unconscionable simply because the gambler is a "problem gambler" and that OLGC would

accordingly be found to have no juristic reason for its enrichment. If successful, this argument would require casinos to refund all monies gambled by "problem gamblers".

93 Respectfully, *Kakavas* does not support the appellants' position. In *Kakavas*, the plaintiff gambled more than AU $1.479 billion over 14 months at the Crown casino, losing AU$20.5 million in the process. Crown was aware that the plaintiff had a conviction for a fraud perpetrated ten years before, had been diagnosed by a clinical psychologist as a "classic pathological gambler" eight years before, had self-excluded from several casinos in Australia, and was subject to an exclusion order issued with respect to one casino at the direction of the police. Six years before the gambling in issue, Crown had withdrawn the plaintiff's licence to gamble at its premises because of pending armed robbery charges. The plaintiff repeatedly sought re-entry to the Crown casino. Crown was aware that the plaintiff was gambling significant amounts in Las Vegas. Finally, after requiring the plaintiff to provide an application accompanied by an opinion from a psychologist to the effect that he no longer had any gambling problems, Crown permitted him to gamble at its premises again.

94 The plaintiff's claim for restitution was struck at the pleadings stage. [2] The plaintiff sued for his losses, claiming that Crown's conduct in permitting him — a compulsive or pathological gambler — to gamble amounted to unconscionable conduct contrary to applicable consumer protection legislation and under the general law.

95 While accepting that he was a problem gambler, and indeed possibly a pathological gambler, three levels of court in Australia rejected his argument.

96 In *Kakavas*, the High Court of Australia wrote at para. 20:

> The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position.

97 It explained, at para. 21, that the flaw in the plaintiff's case was that it consists "essentially of a complaint about the outcome of risk-laden activity between the parties conducted in the ordinary course of Crown's business."

98 At para. 26, it noted that the conduct of the business was lawful:

> And the courts of equity have never taken it upon themselves to stigmatise the ordinary conduct of a lawful activity as a form of victimisation in relation to which the proceeds of that activity must be disgorged. As the primary judge observed, "[i]n the absence of relevant legislative provision, there is no general duty upon a casino to protect gamblers from themselves."

99 The High Court characterized the plaintiff as a "high roller" and observed, at para. 28, that "members of that class of gambler present themselves to the casino, and are welcomed by it in the ordinary course as persons who can afford to lose and to lose heavily." It reasoned that requiring Crown to single out the plaintiff from other high rollers and to refuse to accommodate him would have cast too great a responsibility on Crown. And, in any event, it noted that the plaintiff would likely have taken his business elsewhere.

100 At para. 161, the High Court made clear that the principle of "constructive notice" had no part in a claim of unconscionability:

> Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose.

101 Given the facts pleaded in this case, the decision in *Kakavas* could not support the appellants' claim. They have not pointed to any conduct on the part of OLGC that fell outside the latter's ordinary course of business. Constructive notice of the Spinks' addiction cannot be sufficient to vitiate an otherwise valid contract. Here, OLGC was operating a

business it is legally permitted to and there is no allegation that it failed to abide by legislation or regulations governing its conduct. Therefore, there is no reasonable prospect that the appellants could vitiate the contract between the Spinks and OLGC on the basis of an unconscionable benefit.

102 Moreover, the appellants cannot invoke the principles articulated in *Kakavas*. The non-statutory claim advanced by the appellant in *Kakavas* is a species of equitable fraud which permits the *victim* to rescind the relevant transaction and to be restored to his or her original position: John McGhee, *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005), at para. 8-02. Fraud makes a transaction voidable but it remains effective until voided by the party subject to the fraud: *Snell's Equity*, at para. 8-03; *iTradeSCC*, at para. 53. The appellants were not party to the contract between the Spinks and OLGC, nor were they the victims of any alleged fraud committed by OLGC. Therefore, they cannot rely on *Kakavas*.

103 In any event, the parties did not rely on *Kakavas* and this point was not argued before the motion judge or on appeal.

104 Nor did the appellants plead that OLGC breached the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A. Respectfully, my colleague's reference to it is misplaced.

105 Furthermore, the sections my colleague relies on do not support the appellants' position either. Neither she nor the parties provide any authority for the proposition that permitting a problem gambler to gamble is either an "unconscionable representation" within the meaning of s. 15(1) or an "unfair practice" within the meaning of s. 17. Significantly, s. 18 only permits the consumer who suffered an unfair practice to rescind an agreement. In the context of this case, that may give the Spinks the ability to rescind the contracts with OLGC; however, it is not a basis for the appellants to attack those contracts. And, as noted, an agreement that may be rescinded remains effective until it is rescinded.

106 Finally, the passages from *Soulos* cited by my colleague are not a basis for providing the appellants a remedy. While it is true that the constructive trust is a flexible remedy and that "good conscience" may permit a court of law to employ it, that principle is subject to clear limits. Significantly, it cannot be employed against a *bona fide* purchaser for value without notice. As noted in *iTradeSCC*, at para. 60:

> The effect of the defence [i.e. being a *bona fide* purchase without notice] is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

107 As I have explained, there is no reasonable prospect that a court will find that OLGC was not a *bona fide* purchaser without notice of any fraud. Therefore, in my opinion, there is simply no basis for subjecting any receipt in its hands to a constructive trust.

D. Negligence

(1) Legal principles

108 In order to advance a successful claim in negligence a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3.

109 The issue on this negligence claim is whether there is no reasonable prospect that a court would find that OLGC owed a duty of care to the appellants. In cases where the jurisprudence has already accepted or rejected a duty of care, courts do not have to conduct an extensive analysis. However, where, as in this case, the proposed duty of care is novel, courts will consider whether to recognize a new duty by applying the "*Anns*/*Kamloops*" test.

110 In order to establish that OLGC owed them a duty of care, the appellants must demonstrate that (1) the harm complained of was reasonably foreseeable; (2) there is sufficient proximity between OLGC and the appellants that it would be fair and just to impose a duty of care; and (3) there are no residual policy reasons for declining to impose such a duty: *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.), at para. 34.

111 The factors that may satisfy the proximity requirement are diverse and will depend on the particular circumstances of the case. A court will look to factors such as expectations, representations, reliance, and the property or other interests involved: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 34-35. Where the relationship at issue is within the context of a statutory scheme, the governing statute will be relevant to this inquiry: *Syl Apps*, at para. 27. The ultimate question is 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.

112 At the final stage, a court should consider if there are any policy considerations that negate a *prima facie* duty: *Imperial Tobacco*, at para. 39. At this stage, the court will consider the "effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37.

(2) Appellants' claim

113 The appellants plead that OLGC owed a duty to two different classes: (i) to protect the Spinks from their addictive or inordinately excessive gambling behaviour; and (ii) to protect the appellant estates and other persons "sufficiently connected to or related to [the Spinks] by virtue of family ties, business connections, or social and community ties and relationships" from frauds that could be committed by the Spinks (Claim, at para. 28).

114 They argue that OLGC breached both duties by failing to intervene and stop the Spinks from gambling.

115 My colleague concludes, at para. 34, that "when an individual is obviously addicted to gambling and out of control" there is a reasonable chance that a casino would be found to owe the individual a duty of care. At para. 36, she further concludes that "recognition of a duty of care confined to victims of an obvious problem gambler in circumstances where a reasonable person would have realized that the gambler could be using stolen funds to feed his or her addiction will [not] necessarily result in indeterminate liability." While acknowledging "some formidable barriers" to finding that casinos owe a duty of care to third parties who are the victims of problem gamblers, she concludes that it is not plain and obvious that the appellants' claim in negligence is hopeless.

116 I disagree. In my view, the barriers to the appellants' negligence claim are formidable and, when considered in the context of the applicable jurisprudence, it has no reasonable chance of succeeding: *Imperial Tobacco*, at para. 25.

117 As noted, the appellants plead that OLGC owed a duty to problem gamblers and to people "sufficiently connected" to problem gamblers. I will only address the latter duty as that is sufficient to dispose of this appeal. I will first analyze the prior jurisprudence the appellants rely on. Then, I will analyze the appellants' claim in three steps: foreseeability, proximity, and residual policy considerations.

(3) Analysis

(a) Prior authority

118 I agree with my colleague that Ontario law has not definitively determined that a casino owes no duty of care to persons it knows are problem gamblers (or to persons whom the casino ought to have recognized were problem gamblers). At the same time, the jurisprudence has not recognized the duty advanced by the appellants.

119 The appellants refer to the decision in *Dennis*, where it was held that it was not plain and obvious that a casino operator did not owe a duty of care to a class of problem gamblers. However, as I discuss below, the decision in *Dennis* does not assist the appellants here.

120 In *Dennis*, the plaintiffs moved for certification of a class action on behalf of individuals who had signed self-exclusion forms, seeking to recover gambling losses incurred as a result of OLGC's alleged failure to exclude them from its gambling venues. While dismissing the certification motion for other reasons, the motion judge concluded that it was not plain and obvious that the claim in negligence could not succeed: *Dennis v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 1332, 318 D.L.R. (4th) 110 (Ont. S.C.J.).

121 On its cross-appeal to this court in *Dennis*, OLGC argued that the motion judge erred in finding that the plaintiffs' statement of claim disclosed a cause of action in negligence. At para. 73, Sharpe J.A., writing for the court, acknowledged that the plaintiffs' claim faced many significant legal hurdles, including the difficult issues of proximity and duty of care in negligence. However, he was not persuaded that the motion judge "erred in concluding that the claim survived the minimal scrutiny for substantive adequacy mandated by s. 5(1)(a)" of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The test applied under s. 5(1)(a) is the same as that applied on a motion to strike, such as in this case.

122 To begin with, I note that the decision in *Dennis* is not sufficient to establish a reasonable chance that OLGC owed a duty of care to the Spinks. As noted by Sharpe J.A., at para. 6, the pleadings in *Dennis* alleged that the class members had given notice of their vulnerability as problem gamblers by signing self-exclusion forms. In addition, as noted at para. 24, the motion judge in that case (whose analysis Sharpe J.A. approved of) found that "it was arguable that [OLGC] was in a relationship of proximity with Dennis because [OLGC] established the self-exclusion program and held the program out as assisting problem gamblers."

123 More importantly, the appellants in this case allege that OLGC owes a duty of care to different and much broader classes. In addition to alleging that OLGC owes a duty of care to the Spinks, they also claim that OLGC owes duty of care to anyone "sufficiently connected" to the Spinks. Therefore, the decision in *Dennis* is not authority for the duty of care asserted by the appellants.

124 I note that, in *Dennis*, the plaintiffs had also proposed a secondary class, consisting of family members of the self-excluded gamblers in the primary class. Neither the motion judge nor this court analyzed their claim independently of the primary class' claims. The secondary class was relying on s. 61 of the *Family Law Act*, R.S.O. 1990, c. F-3. That provision provides family members with a right of action on the basis of "wrong done, not to oneself, but to another": *Lord (Litigation Guardian of) v. Downer* (1998), 66 O.T.C. 39 (Ont. Gen. Div.), aff'd, (1999), 179 D.L.R. (4th) 430 (Ont. C.A.), at para. 10. Therefore, it is extremely dissimilar from the claim advanced by the appellants in this case.

(b) Foreseeability

125 The appellants argue that they are linked to OLGC by the foreseeability of economic harm. While I am not persuaded that a reasonable person in the position of OLGC would have foreseen that Ms. Spinks had obtained the money she gambled with from fraud, I am willing to accept that it might be reasonably foreseeable that a failure to prevent problem gambling in general might lead to loss.

126 The appellants have pleaded that, over the years, OLGC has learned about specific instances of problem gamblers spending a lot of money and committing fraud to feed their habit. Therefore, there is a possibility that it was reasonably foreseeable that a failure to take action may permit a problem gambler to gamble away the proceeds of crime.

(c) Proximity

127 The next question is whether there is sufficient proximity. In my opinion, it is plain and obvious that the facts pleaded by the appellants do not disclose sufficient proximity. I come to that conclusion for two reasons.

128 First, the facts pleaded do not disclose any relationship or interaction between OLGC and the appellants. There were no representations by OLGC, nor any evidence of reliance by the appellants on OLGC.

129 In many ways, this relationship is analogous to the one between Canada and consumers of light cigarettes at issue in *Imperial Tobacco*. There, at para. 49, McLachlin C.J.C. noted that the pleadings did not disclose any "specific interactions between Canada and the class members" and only disclosed statements made by Canada to the general public. Turning to the statutes that governed Canada's conduct in that case, at para. 50, McLachlin C.J.C. concluded that they did not impose any private law duties of care and disclosed duties owed to the public at large.

130 Those observations would inevitably lead to a similar conclusion in this case. The appellants' claim discloses *no* interaction between them and OLGC. The plaintiffs have referred to the *Ontario Lottery and Gaming Corporation Act, 1999*, S.O. 1999, c. 12, Sched. L, and the *Gaming Control Act 1992*, S.O. 1992, c. 24. These laws do not impose any duty of care in respect of a particular individual. And, in fact, I note that Section 0.1 of the *Ontario Lottery and Gaming Corporation Act* provides the following purposes for that statute:

> (a) to enhance the economic development of the Province;
>
> (b) to generate revenues for the Province;
>
> (c) to promote responsible gaming with respect to lottery schemes; and
>
> (d) to ensure that anything done for a purpose set out in clause (a), (b) or (c) *is also done for the public good and in the best interests of the Province*. [Emphasis added.]

131 I am not suggesting that, in this case, OLGC was a public authority, as it was clearly acting in a commercial capacity at all material times. However, as the appellants refer to these statutes, I note that to the extent that the legislation is relevant, in my opinion it imposes only a duty to the public at large and not to any specific gambler or people connected to specific gamblers.

132 My colleague refers to the *Alcohol and Gaming Regulation and Public Protection Act*, 1996, S.O. 1996, c. 26, Sched. This Act created the Alcohol and Gaming Commission of Ontario, and defined the powers and obligations of that commission. It does not apply to OLGC and, therefore, cannot be a basis for concluding that OLGC owes a duty of care to the appellants.

133 Second, in this case, the appellants' claim alleges negligent inaction on the part of OLGC and they seek damages for pure economic loss. Canadian law has been extremely reluctant to impose a duty of care in such circumstances.

134 In *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 31, the court noted that where a defendant alleges a negligent failure to act, foreseeability alone cannot establish a duty of care. The mere fact that a person has become a danger to others does not impose any kind of duty on those in a position to become involved. In such cases, a duty of care requires foreseeability of harm *and* a special link or proximity disclosed by other aspects of the relationship: *Childs*, at para. 34.

135 At paras. 35-37 in *Childs*, the court identified three situations where proximity has been found. The first is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that it has created or controls. The court mentioned a few examples in this category: a boat captain will owe a duty of care to a passenger who falls overboard and the operator of a dangerous inner-tube sliding competition owes a duty of care to exclude people who cannot safely participate. These examples all involve instances where the defendant created a risk of *physical injury*. Gambling is not a comparable, inherent, and obvious risk.

136 The second situation is where there is a paternalistic relationship of supervision and control, such as a parent-child or teacher-student relationship. It is also not applicable here.

137 The third concerns a defendant who exercises a pubic function or engages in a commercial enterprise that includes implied responsibilities to the public at large. Where a defendant assumes a public role or benefits from offering a service

to the public at large, special duties arise. The duty of a commercial host who serves alcohol to prevent foreseeable harm to third-party users of the highway falls into this category.

138 I agree with my colleague that there are analogies between a commercial host who serves alcohol and a casino operator. However, there are also material differences.

139 It is recognized that commercial hosts owe a duty to patrons to take care that the patron is not exposed to injury because of her or his intoxication: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 26. No duty to ensure that a patron does not drink away her or his family's earnings has been recognized. To date, Canadian courts have limited tort recovery for economic loss absent physical harm or damage to property: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113 (Ont. C.A.), at para. 52. Proximity and foreseeability are heightened concerns in claims for economic loss: *Imperial Tobacco*, at para. 42. In my opinion, that difference between the nature of the loss suffered is what distinguishes the present case from those involving commercial hosts who serve alcohol.

140 *Dynasty Furniture Manufacturing Ltd. v. Toronto Dominion Bank*, 2010 ONCA 514, 321 D.L.R. (4th) 334 (Ont. C.A.), is instructive. The plaintiffs in that case alleged that the defendant bank owed a general duty of care to third parties, who were not customers of the bank, to ensure that its customer was not engaged in a fraudulent scheme. They argued that to discharge this duty of care, the bank was required to, among other things, verify the legitimacy of a customer's business activities at the time of opening new accounts and conduct a reasonable inquiry after being put on notice of facts suggesting the possibility of a fraudulent scheme. In other words, like the appellants here, the plaintiffs in that case were alleging negligent non-action on the basis of a failure to detect fraudulent activities.

141 Applying the *Anns*/*Kamloops* principles, the motion judge in *Dynasty* rejected the proposition that the defendant bank could owe a duty of care to third parties to prevent the use of its facilities for fraudulent purposes in circumstances where the bank did not have actual knowledge of the fraudulent activities, was not wilfully blind to the existence of such activities, and had not recklessly disregarded the existence of such activities: *Dynasty Furniture Manufacturing Ltd. v. Toronto Dominion Bank*, 2010 ONSC 436, 74 C.C.L.T. (3d) 286 (Ont. S.C.J.). To the extent that the claim was based on alleged constructive knowledge, there was insufficient proximity to ground a duty of care. The relationship between the plaintiffs and the bank was "very indirect". At para. 67, the motion judge wrote:

> [The bank] could not reasonably be expected to have had the plaintiffs in contemplation except as a member of the indeterminate class of all third parties who might have business dealings with [the fraudster] at that time or in the future. This is far too distant and indeterminate a relationship to establish proximity in respect of a claim for financial loss resulting from a failure to make inquiries as to the legitimacy of a new customer's business. The plaintiffs' position would expose a bank to guarantor liability...

142 This court upheld the motion judge's decision and, at para. 6 of its reasons, expressed general agreement with his *Anns*/*Kamloops* analysis.

143 In the present case, the relationship between OLGC and the appellants is just as distant and indeterminate. On the facts presented by the appellants, it is not reasonable to expect OLGC to have the appellants in contemplation when arranging or managing its affairs. Particularly given the fact that this is a claim seeking recovery for pure economic loss and given the tenuous relationship between the parties, in my view, there is no reasonable prospect that sufficient proximity between OLGC and the appellants would be found.

(d) Policy concerns

144 However, even if there were a reasonable prospect that sufficient proximity between OLGC and the appellants would be found, there is a clear residual policy concern — the prospect of indeterminate liability — that is fatal to the appellants' claim in negligence. In cases involving a claim for pure economic loss, a court must take care and recognize a duty of care only if the class of plaintiffs, the time, and the amounts are determinate: *Imperial Tobacco*, at para. 100.

145 My colleague, while recognizing the potential for indeterminate liability in this case, would not strike the claim on that basis at this stage of the litigation process. However, in my view, it is perfectly appropriate for a court to make that determination at a pleadings stage. Courts have done so in the past, for instance, in *Imperial Tobacco*, *Cooper*, and *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35 (Ont. C.A.).

146 Moreover, as noted in *Arora*, at para. 90, a court should consider what "a factual record could reasonably be expected to add to the court's determination." As in *Arora*, it is unclear what useful evidence the appellants could possibly adduce. The issue here is not whether the appellants could prove their factual assertions; rather, the problem is that even if all of their assertions were accepted as true, their claims would fail because of the risk of indeterminate liability. A factual record cannot cure that defect.

147 The court in *Arora*, at para. 92, also noted that the motion judge had access to a significant body of jurisprudence and that, therefore, it was appropriate for him to conduct a policy analysis on a pleadings motion. We too have the benefit of a significant body of case law addressing the issue of indeterminate liability.

148 In *Imperial Tobacco*, tobacco companies sought to advance third-party claims against the government of Canada for economic loss. The basis for their claim was that they had relied on representations made by the government of Canada and, as a result, incurred liability by selling light cigarettes to consumers. The Supreme Court concluded that the prospect of indeterminate liability was fatal to the tobacco companies' claims: *Imperial Tobacco*, at para. 99. Canada had no control over the number of people who smoked light cigarettes and therefore was not in control of the extent of its potential liability. The quantum of damages would depend on the number of smokers and the number of cigarettes sold. As Canada had no control over the number of people who smoked these cigarettes, the claim at issue raised the spectre of indeterminate liability.

149 That conclusion is also supported by the decision in *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737 (S.C.C.). Although the decision in *Design Services* was rendered after a trial, the Supreme Court relied upon it in *Imperial Tobacco*, an appeal from a motion to strike.

150 In *Design Services*, the Supreme Court held that recognizing a duty of care owed by owners to sub-contractors in a tendering process would lead to indeterminate liability. In the first place, Rothstein J. noted that the plaintiffs before him included a company that had not been approved as a sub-contractor and was a subsidiary of an approved sub-contractor. The fact that the class of plaintiffs could "seep into the lower levels of the corporate structure of the design-build team members" meant that the case had indications of indeterminate liability": *Design Services*, at para. 63.

151 Furthermore, Rothstein J. also noted that the nature of the construction-contract field itself gave rise to the risk of indeterminacy. At para. 65, he noted that "[e]ven where subcontractors are named and known by an owner, those subcontractors will have employees and suppliers and perhaps their own subcontractors who also could suffer economic loss. And these suppliers and subcontractors will have their own employees and suppliers who might claim for economic loss due to the wrongful failure of the owner to award the contract to the general contractor upon which they were all dependant."

152 Recognizing a duty of care to anyone "sufficiently connected to or related to" problem gamblers or persons whom OLGC should have recognized as problem gamblers "by virtue of family ties, business connections, or social and community ties and relationships" would similarly result in indeterminate liability. Even if we were to accept that OLGC could exercise complete control over who gambles at its facilities, it does not give it any meaningful control over the class of potential plaintiffs. OLGC has no control over the number of family members, friends, employers, and persons "sufficiently connected" to a gambler. And OLGC cannot control whether, when, and how much a problem gambler may choose to steal or misappropriate.

153 In other words, it is plain and obvious that recognizing the duty of care suggested by the appellants would expose OLGC to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".

E. Leave to Amend

154 The decision whether or not to grant leave to amend a pleading is a discretionary one and, absent palpable and overriding error of fact or error of law, such a decision is subject to deference on appeal: *Conway v. Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100 (Ont. C.A.), at para. 16.

155 In this case, the motion judge concluded that "[t]here is no amendment that could cure the statement of claim." I see no basis to interfere with his conclusion.

F. Disposition

156 For the reasons given, I would dismiss the appeal.

Appeal allowed.

Footnotes

1 Cited with approval in *Citadel*, at para. 40.

2 His claim in negligence was also struck at the pleadings stage: *Kakavas v. Crown Melbourne Ltd. and Ors*, [2012] VSCA 95 (Australia H.C.), at para. 37.

TAB 7

1994 CarswellOnt 787
Ontario Court of Justice (General Division)

Dalex Co. v. Schwartz Levitsky Feldman

1994 CarswellOnt 787, [1994] O.J. No. 1388, 19 O.R. (3d) 463, 23 C.C.L.I. (2d) 294, 48 A.C.W.S. (3d) 1117

DALEX CO. LIMITED v. SCHWARTZ LEVITSKY FELDMAN, MICHAEL B. SIMONETTA, SAUL M. MUSKAT, ALAN PAGE, KAI CHANG and ANTHONY VALERIE

Epstein J.

Heard: April 14, 1994
Judgment: June 24, 1994
Docket: Doc. 93-CQ-43386

Counsel: *Kathryn L. Knight*, for plaintiff.
A. Pettingill, for defendants.

***Epstein J.*:**

1 In this motion the plaintiff seeks to strike certain paragraphs contained in the defendants' statement of defence and counterclaim. The paragraphs under attack can generally be described as follows:

I. No Reasonable Defence

2

(a) a paragraph pleading that insurance benefits received by the plaintiff should be taken into consideration in determining the defendants' obligation to the plaintiff, if any (para. 68);

(b) a paragraph pleading that the plaintiff's tax treatment of the loss should be taken into consideration in determining the defendants' obligation, if any, to the plaintiff (para. 67);

II. Scandalous, Frivolous and Vexatious

3

(c) paragraphs referring to the involvement of plaintiff's counsel in the circumstances giving rise to the action (paras.76-82); and

(d) paragraphs alleging that the plaintiff and its counsel have breached an implied undertaking not to use information obtained in the course of the action for an ulterior purpose (paras.83-88 and 90).

4 The issue is: do the impugned paragraphs constitute proper pleading? Do they raise legitimate issues to be considered at trial or are they otherwise frivolous and vexatious?

5 The action is against the partners of an accounting firm for damages arising from breach of contract, negligence, negligent misrepresentation, and exemplary and punitive damages. The plaintiff is a corporation that formerly engaged the services of the defendants for its accounting and auditing needs. From 1989 into 1992, the plaintiff's controller defrauded the plaintiff of over $600,000. Simply put, the plaintiff takes the position in this action that had it not been for

the defendants' failure to audit, monitor and supervise the plaintiff's financial situation, the losses from the controller's theft would and should have been discovered and prevented.

6 I start with the proposition, advanced by the defendants, that although the court has inherent jurisdiction to strike out a pleading as disclosing no legally tenable position, such power should be exercised sparingly and only when there is no doubt that no cause of action or defence exists. In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended (see: *Krouse v. Chrysler Canada Ltd.*, [1970] 3 O.R. 135 (H.C.)).

7 It is also fairly common ground that no pleaded fact that is relevant can be scandalous. I refer to the often quoted decision of *Duryea v. Kaufman* (1910), 21 O.L.R. 161 at 165 (H.C.), where Justice Riddell stated at p. 168:

> No pleading can be said to be embarrassing if it alleges only facts which may be proved — the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading — but in a legal sense he cannot be "embarrassed." But no pleading should set out a fact which would not be allowed to be proved — that is embarrassing: *Stratford Gas Co. v. Gordon* (1892), 14 P.R. 407; *Heugh v. Chamberlain* (1877), 25 W.R. 742; *Knowles v. Roberts* (1888), 38 Ch. D. 263. Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded — but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: *Rock v. Purssell* (1887), 84 L.T.J. 45.

8 I accept these two propositions as correct statements of the law governing challenges to pleadings on the basis of no tenable cause of action or defence or as being scandalous, frivolous or embarrassing. I proceed to examine the impugned paragraphs using these tests.

I. (a) Insurance Proceeds — No Tenable Defence

9 The paragraph of the statement of defence and counterclaim sought to be struck out is as follows:

> 68. The defendants further plead that there have been certain insurance monies payable to and collected by Dalex, arising out of the defalcations, which have further reduced the loss.

10 The plaintiff argues that this paragraph does not constitute a proper or relevant pleading based on the proposition that recovery in tort is dependent on the plaintiff's establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the tortfeasor. A tortfeasor should not, and in fact cannot, benefit from the sacrifice made by a plaintiff in obtaining an insurance policy.

11 The plaintiff relies upon a recent decision of the Supreme Court of Canada in a trilogy of cases known as *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 [23 C.C.L.I. (2d) 205, ante].

12 In the actual *Cunningham v. Wheeler* case, the plaintiff was injured in a car accident. While he was off work he collected disability benefits pursuant to a collective agreement. These benefits were considered part of the plaintiff's annual remuneration. Benefits received from the defendants did not have to be paid to the employer or to the disability insurer. The trial judge held that the payments received by the plaintiff as a result of his employment should not be deducted in calculating the amount payable by the defendants for the wages lost by the plaintiff due to his injuries as the plaintiff had established that he had paid for these benefits as part of his wage package.

13 The Court of Appeal reversed the judgment. It determined that since there was no subrogation right, the plan was not in the nature of private insurance and the funds received should be deducted from the damage award. The Supreme

Court of Canada allowed the appeal on the basis of its finding that the benefits received were in the nature of a private insurance policy.

14 In the second case of *Cooper v. Miller*, the plaintiff also suffered injuries from a car accident. Under a collective agreement, she received short-term disability benefits which she funded, in part, through payroll deductions. Again, she was not obliged to repay these benefits to the employer or insurance carrier. The trial judge, Court of Appeal, and Supreme Court of Canada all held that the plaintiff's benefits should not be deducted from her recovery for lost wages from the defendant, even though there was no subrogation provision, as she had bought and partially paid for the insurance.

15 Finally, in *Shanks v. McNee*, another motor vehicle accident case, the plaintiff received both short-term and long-term disability benefits. There was some form of contribution by the employee to the cost of each plan. There was a subrogation clause in the long-term disability plan but not in the short-term. The benefits received by the plaintiff were not deducted from the amount the defendants were ordered to pay pursuant to the judgment at trial. The Court of Appeal reversed the trial judge only in respect of the short-term disability payments since there was no direct contribution by the employee and there was no subrogation with respect to those benefits. The Supreme Court of Canada dismissed the defendants' appeal concerning the deductibility of the long-term benefits.

16 Three principles emerge from the decision of the Supreme Court of Canada in this trilogy of cases. They are as follows:

> 1. The general proposition is that the plaintiff in a tort action is not entitled to a double recovery for any loss arising from an injury;
>
> 2. An exception to this general principle is the "insurance exception." To qualify, the plaintiff must show that the benefits received were in the nature of an insurance, i.e., some type of consideration must have been given up by the plaintiff in return for the benefit. Generally, subrogation is not relevant to a consideration of the deductibility of the benefits if they are found to be in the nature of insurance.
>
> 3. If the benefits do not fall within the insurance exception, then they must be deducted from the damages recovered, unless the third party who paid the benefits has the right of subrogation.

17 It is the plaintiff's submission that since the pleading itself refers to the plaintiff's recovery of insurance monies, it is clear that the case falls within the insurance exception and no deduction is permitted by law. If there is any doubt, it is also clear that the insurance company covering the plaintiff from theft by an employee has a right of subrogation at common law and most probably contractual as well. Using the *Cunningham v. Wheeler* rationale, it would appear that there can be no deduction from any amount found to be owing by the defendants to take into account insurance monies received by the plaintiff.

18 The defendants argue that the ratio established by the *Cunningham v. Wheeler* trilogy pertains only to employment cases. Since there has been no decision strictly on point other than in the discrete area of employment situations, the door remains open for refinement or development of the law involving the deductibility of insurance benefits received by a plaintiff from damages owed by defendants in other types of cases. As a result, the defendants submit that their pleading in this respect should be allowed to stand to enable them to argue that the law as set out by the Supreme Court of Canada in *Cunningham v. Wheeler* should not apply to the type of fact situation in this case.

19 I cannot accept this position for two reasons. First, even though the *Cunningham v. Wheeler* trilogy involved only employment situations, the court in no way indicated an intention to confine the law concerning the deductibility of insurance benefits to those types of cases. I refer to statements such as that of Cory J. at p. 400 [p. 220, ante] where he says without qualification that the proceeds of insurance should not be deducted from a plaintiff's damages. This statement follows a lengthy list of Canadian cases in which that principle of law has been consistently applied, some of

which involve situations other than wage loss claims (see: *Dawson v. Sawatzky*, [1946] 1 W.W.R. 33 (Sask. C.A.); *Gill v. Canadian Pacific Railway*, *(*sub nom. *Canadian Pacific Ltd. v. Gill)* [1973] S.C.R. 654).

20 The decision in *Cunningham v. Wheeler* does not, admittedly, contain a specific statement that the non-deductibility of insurance benefits received by the plaintiff from the calculation of the tortfeasor's obligation applies to a non-wage loss situation. However, in my view, the overall wording of the decision and the underlying rationale for the propositions listed above present a bar to the pleading proposed by the defendants in accordance with the test set out in *Krouse v. Chrysler*, supra.

21 The second reason I would apply *Cunningham v. Wheeler* to this fact situation, relates to the Supreme Court of Canada's comments on the importance of the doctrine of subrogation on these types of situations. In my opinion, to restrict the principle of non-deductibility of insurance proceeds to employment situations would effectively destroy the doctrine of subrogation in respect of other types of tort claims for losses that are covered by insurance.

22 Subrogation operates where the insured has a legally enforceable right against a party other than the insurer to recover the amount of loss. Where the insured has a right in tort to recover damages from a negligent tortfeasor, the insurer is said to be subrogated to such a right so that the insured party cannot retain both the insurance money and the damages recovered from the third party. The following principles are relevant:

1. The right of subrogation does not arise unless and until the insurers have admitted the insured's claim and have paid the sum payable under the policy.

2. The right of subrogation only arises on contracts of indemnity. Where the insured would be paid twice for the pecuniary loss, the insurer has the right of subrogation. All insurance contracts are presumed to be contracts of indemnity, unless otherwise specified.

3. The rights to which the insurers are subrogated must, as a general rule, be enforced in the name of the insured. The mere fact of subrogation does not entitle them to enforce such rights in their own names.

4. The insurer has the right to pursue the insured's rights in the insured's name against any defendant who caused the loss. If the insured has already exercised the right against the third party and recovered the value of the loss, the insurer may seek reimbursement from the insured.

5. The right of subrogation is independent of statute or the express terms of the policy, although it may be modified by the express terms of the statute or the contract: *Castellain v. Preston* (1883), 11 Q.B.D. 380 (C.A.); Baer, "Rethinking Basic Concepts of Insurance Law" (1987) L.S.U.C. Special Lectures 199, at p. 210.

23 To permit a tortfeasor to advance insurance proceeds as a defence in the reduction of damages conflicts with the doctrine of subrogation. If the plaintiff's damages were reduced by the amount received from the insurer, the insurer could not recover from the defendant the monies it paid to the plaintiff because the insurer is restricted to suing in the name of the plaintiff and in respect of the plaintiff's rights. The insurer could not be reimbursed by the plaintiff because the plaintiff would only have been awarded damages after deducting the insurance proceeds.

24 The superficial answer may be to allow the case to go to trial to enable the trial judge to examine the evidence as to what was paid under the insurance policy and as to the extent that a right of subrogation was exercised. This would be consistent with the reasoning of McLachlin J. in her dissent in *Cunningham v. Wheeler* [at p. 233, ante] and the majority in the previous decision of the court in *Ratych v. Bloomer* (1990), 39 O.A.C. 103 (S.C.C.).

25 McLachlin J., in her dissent in *Cunningham v. Wheeler*, suggested that subrogation is exercised very rarely in the wage benefits context. This would explain her comments about subrogation, in the decisions which she expressly stated are restricted to the wage benefits context, at pp. 386-387 [pp. 246-247, ante]:

> The argument that it makes sense for the tortfeasor to pay damages for wage losses already indemnified by others succeeds only if the employer or insurer who pays the wage benefit recovers the damages allocated to lost wages from the employee by way of subrogation. In this case there is no double recovery. The burden is properly placed on the tortfeasor rather than the employee or insurance company. The latter result, unlike the result of double payment to the plaintiff, is defensible economically and in justice. For this reason, *Ratych v. Bloomer* suggested that *where subrogation is exercised, no deduction for double recovery need be made*. (emphasis added)

And at p. 388 [p. 247, ante]:

> The rare exercise of the right of subrogation suggests that the best approach is a regime of deductibility of employment plan benefits, subject to the plaintiff's right to claim the benefits *if it is established that they will be paid over to the subrogated third party*. In that case, the plaintiff would hold the recovered monies in trust on behalf of the subrogated insurer or employer: *Ratych*, supra, at p. 978. (emphasis added)

26 Cory J. in *Cunningham v. Wheeler* takes the contrary view, at pp. 415-416 [p. 231, ante]:

> Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits if they are found to be in the nature of insurance. ... *However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages*. However, different considerations might well apply in a situation where the third party has formally released its subrogation right. (emphasis added)

27 Pursuant to Cory J.'s view of subrogation in *Cunningham v. Wheeler*, it is irrelevant whether the insurer actually exercises its right of subrogation. If the right of subrogation is paramount whether it is exercised or not, then the defence that there has been payment under the insurance policy must be irrelevant.

28 There has been previous judicial consideration of the relevance of the insurance benefits paid to the plaintiff to the determination of the defendant's obligations. In *Pickin v. Hesk*, [1954] O.R. 713 (C.A.), the court stated as follows, at p. 725:

> The trial judge seems to have had the opinion that because there was no evidence of the insurance this action would not lie. *The question of insurance or no insurance was entirely irrelevant*. The only issue in this action was whether the plaintiffs had been damnified by the defendants. If they have been paid under a contract of indemnity between them and their insurers then in this action they are only nominal plaintiffs and the action is brought in their names for the benefit of their insurers. If they have not been paid then they are suing in their own right. (emphasis added)

29 Where a pleading discloses no reasonable cause of action or defence it should be struck: r.21.01(1)(*b*) of the *Rules of Civil Procedure*. Whether the decision in *Cunningham v. Wheeler* acts as a direct bar to the pleadings at issue because of the insurance proceeds exception or as a result of its comments on the doctrine of subrogation, the Supreme Court of Canada has stated the law in a way that, in my view, renders para.68 of the statement of defence and counterclaim legally untenable and it therefore should be struck from the pleading.

(b) Tax Recovery

30 The paragraph that the plaintiff seeks to have struck is as follows:

> 67. The Defendants further plead that Dalex is entitled to and has made certain tax recoveries as a result of the fraudulent conduct of William Young. Such recoveries have significantly reduced the loss.

31 The plaintiff's submission is that tax recovery is a matter between the state and the individual and does not affect the damages due to the plaintiff from the defendants. If the plaintiff receives an unexpected windfall, that is a matter

to be dealt with through legislation. The application of the current *Income Tax Act* should not affect the rights and obligations between the plaintiff and the defendants.

32 Again, the plaintiff looks to the Supreme Court of Canada trilogy of decisions in *Cunningham v. Wheeler*, supra, for support. In one of the trilogy of cases, *Shanks v. McNee*, an issue arose over the fact that damages were intended to replace lost wages but that damages, unlike wages, would not be taxed. The defendants argued that their liability to the plaintiff should be reduced in order that the plaintiff not be over-compensated.

33 In dealing with this issue, Cory J. observed that Canadian courts have consistently held that damage awards in personal injury cases should be calculated without taking into account any such tax advantage, whereas in other countries tax is taken into account. The Supreme Court of Canada used the trilogy to renew its support for ignoring the impact of tax, agreeing with the conclusion of the Ontario Law Reform Commission that "[s]hould the impact of the *Income Tax Act* be regarded as overgenerous to plaintiffs, the legislation may be amended by Parliament." (at pp. 417-418 [p. 233, ante])

34 At first blush it would appear that para.67 of the statement of defence and counterclaim should be struck on the basis of similar reasoning to that applied to the paragraph involving insurance proceeds. However, on closer examination, in my opinion, the paragraph should stand.

35 Unlike the jurisprudence involving the treatment of insurance proceeds which included cases other than wage loss claims, the jurisprudence involving the tax deduction claimed by the defendants in *Shanks v. McNee* all appear to involve the income tax treatment of damages assessed for impairment of earning capacity. In these cases, damages were awarded to restore the plaintiff to the extent possible to the position in which he or she would have been but for the defendant's wrongdoing. Such damages would therefore represent compensation for loss of earning capacity and not for loss of earnings. In the case of personal injuries (as in each of these cases making up the trilogy), the plaintiff has lost some or all of his capital equipment necessary to earn an income and is not taxable according to the generally accepted taxation principles.

36 Since the wording of the Supreme Court of Canada in the trilogy appears to restrict the irrelevance of tax to earnings in personal injury cases and since the rationale for the decision in respect of tax cannot logically be applied to the case at bar I find that the Supreme Court of Canada has not definitively closed the door to the defendants' argument. Further, the plaintiff has not been able to refer me to any other case that clearly bars a defendant from claiming a reduction in damages payable by reason of the very business losses claimed in the action. Therefore, the defendants ought to be entitled to pursue this argument. The plaintiff's claim to have para.67 of the statement of defence and counterclaim struck is dismissed.

II. (a) Retainer of the Defendants by Robert Staley — Scandalous, Frivolous and Vexatious

37 The plaintiff argued that reference in the pleading to a separate retainer of the accountants by one of the plaintiff's lawyers was vexatious and an abuse. The defendants conceded that any such references were in error and agreed to amend the pleading to correct these errors.

38 Any other reference to Mr. Staley does not fall into the category of a fact essential to the defence or counterclaim and in my view is designed to lay the foundation for a motion to remove from the record, the plaintiff's solicitors. This is an improper motive, is embarrassing and an abuse. Accordingly, the defendants must amend their pleading to remove all references to Mr. Staley.

II. (b) Breach of Undertaking Justifying Punitive Damages Scandalous, Frivolous and Vexatious

39 I finally turn to the defendants' claim in their counterclaim for punitive damages. The factual underpinning pleaded in support of this claim involves an alleged breach of an implied undertaking not to use information obtained in the course of an action for any ulterior purpose. Specifically, the defendants plead that counsel for the plaintiff requested

information from their records supposedly to assist in the prosecution of the civil action against the former controller but really intending to use the data in an action against these defendants.

40 The plaintiff agrees that such a request was made but states that the materials were never provided. The plaintiff further argues that the implied undertaking applies to information and documents produced by a litigant during the discovery process and does not apply to the plaintiff's receipt of documents from its own accountant. The implied undertaking is designed to protect parties to litigation and the process itself by encouraging and facilitating full production without fear of ulterior purpose or use. At the time the request was made, the plaintiff and the defendants had no lis between them and therefore had no relationship which would give rise to an implied undertaking.

41 It is on this basis that the plaintiff urges me to find that the paragraphs in which this issue is addressed be struck as being scandalous, frivolous and vexatious, meant to embarrass the plaintiff and artificially bolster the defendants' claim for punitive damages.

42 The defendants candidly admit that the facts, as pleaded, do not come within the parameters of the law of implied undertaking as it currently exists in Ontario. However, they go on to submit that they ought to be permitted to advance arguments that the law of implied undertaking ought to be extended to hold that information provided to a litigant by an expert retained to assist the litigant in an action, and which information the expert was obliged to provide to the litigant by the terms of its retainer, ought not to be used for the collateral purpose of suing that expert in a separate action.

43 I return to the words of Justice Riddell in *Duryea v. Kaufman*, set out earlier in this decision. Can it be said, without doubt, at this stage, that any evidence concerning the source and use of these materials would not be accepted by the trial judge as a factual underpinning for the defendants' claim to punitive damages?

44 I do not believe that this aspect of the defendants' pleading should be struck at this stage thereby precluding any opportunity for them to establish the factual basis to enable them to recover under this head of damage. Rather, I am of the view that the case should proceed to trial with this part of the pleading intact so that the issues can be determined by the evidence presented at that time.

45 It may be that there is no decided case extending the implied undertaking to the circumstances of this case. On the other hand, no decision has been brought to my attention that presents itself as a complete bar to such a finding. I believe it would be inappropriate at this early stage to deprive the defendants of this possible opportunity.

46 Accordingly, the plaintiff's attempt to have the implied undertaking allegations struck from paras. 82 to 88 and 90 is dismissed.

47 The defendants will have ten days from the date of entry of this order to amend their pleading to remove para.68 and to remove all references to Mr. Staley anywhere in the pleading.

48 Success has been divided. There will be no order as to costs. Costs incurred in the appearance before Master Garfield are fixed at $200 to be paid by the plaintiff in any event of the cause.

Motion granted in part.

TAB 8

See para. 22

2018 ONSC 3256
Ontario Superior Court of Justice

APAC Limited v. Cronin

2018 CarswellOnt 22211, 2018 ONSC 3256, 300 A.C.W.S. (3d) 540

APAC Limited (Applicant) and Patrick Cronin and Interra Management Group Limited (Respondents)

M.A. Garson J.

Heard: April 11, 2018
Judgment: May 24, 2018
Docket: 2853-17

Proceedings: additional reasons at *APAC Limited v. Cronin* (2019), 2019 ONSC 86, 2019 CarswellOnt 15, J. Fregeau J., J. Henderson J., W. Matheson J. (Ont. Div. Ct.); and affirmed *APAC Limited v. Cronin and Interra* (2018), 2018 CarswellOnt 22210, 2018 ONSC 4542, M.A. Garson J. (Ont. S.C.J.)

Counsel: John K. Downing, for Applicant
Matthew Diskin, for Respondents

***M.A. Garson J.*:**

Introduction

1 This is an application pursuant to s. 248 of the *Ontario Business Corporations Act* ("*OBCA*") brought by APAC Limited ("the applicant") for an order compelling the respondents, Patrick Cronin ("Patrick") and Interra Management Group Limited ("Interra"), to produce financial documentation and disclosure and an accounting of the proceeds of mortgages.

2 Colin Jackson ("Colin"), indirectly through the applicant APAC, owns 35 percent of the respondent, Interra. APAC is owned by the Jackson Family Trust, which is controlled by Colin. Patrick owns the remaining 65 percent of the outstanding shares of Interra through a family trust. Although the parties

3 had discussed creating one in the past, there is no executed shareholders agreement.

4 Despite some potential for resolution of some of the issues, the parties advised the court on April 20, 2018 that there was no agreement on any of the issues and to proceed with this ruling.

5 The reasons that follow explain why I am satisfied that the respondents' failure to produce the requested financial documentation and disclosure is oppressive and unfairly prejudicial to the applicants' interest.

Background and Facts

6 Interra is a real estate development and management company that was founded by Colin and Patrick.

7 Although no formal unanimous shareholders agreement was executed, a June 14, 2004 letter from Patrick's counsel addresses a number of proposed terms for Colin's consideration, including:

(i) each of Patrick and Colin nominate an equal number of directors to the Board;

(ii) all decisions are to be unanimous; and

(iii) Colin will have onsite responsibility for day-to-day management.

8 Interra's first acquisition was the Belle River Plaza, purchased on June 4, 2004 for $2,344,000. Patrick contributed $350,000 and Colin contributed $74,000 with the remainder being financed through a CIBC mortgage for which Colin provided a personal covenant.

9 Interra purchased a second plaza on February 3, 2006, known as the Ridgetown Plaza for $1.025 million. Title to this plaza is held by 2091183 Ontario Inc. ("209"), which is a wholly-owned holding company of Interra.

10 In 2006 and 2007, two additional plazas were purchased at 310 and 371 Wellington Road, London ("Wellington Road Plazas").

11 Between 2004 and 2012, Colin ran the day-to-day operations of Interra. In late 2012, Colin moved to California. Around the same time, Interra sold the Wellington Street Plazas for a tidy profit that was split proportionately between Patrick and Colin. Thereafter, Patrick and Colin agreed that Patrick would assume responsibility for the day-to-day operations of Interra.

12 In July 2014, Colin returned to London, Ontario, and he and Patrick consulted on a number of leases and lease renewals. However, for reasons not apparent on the record, communication between Colin and Patrick hit a roadblock and became erratic.

13 Colin first became concerned about the financial circumstances of Interra when Patrick provided him with financial overviews prepared in 2015 that revealed, for the first time, an additional $500,000 added on to the Belle River Plaza by way of a second mortgage. Colin was also made aware that the renewal for the Ridgetown Plaza mortgage was scheduled for November 12, 2017, but Colin had received no information or inquiry from Patrick as to the status of this mortgage and Patrick had not sought Colin's consent for renewal or to seek out new financing.

14 As a result of these concerns, Colin obtained parcel registries for both the Belle River and Ridgetown Plazas that revealed two new mortgages on the Belle River Plaza, one dated April 13, 2016 in favour of RBC for $1.5 million and the other dated April 21, 2016 in favour of Olympia Trust Co. for $949,000 ("the Mortgages").

15 Colin also obtained a corporate profile report that did not list him as a director but showed that a person named Evan Cronin was made a director of Interra on February 19, 2015.

16 Colin filed for bankruptcy in 1991 and as a result of inadvertence, did not receive an absolute discharge from that status until November 18, 2014. [1]

17 Colin emailed Patrick on August 23, 2017 requesting a shareholders meeting. Patrick refused to hold such a meeting until the financial statements of Interra were completed. Subsequent efforts by counsel for Patrick to obtain details of the Mortgages have not resulted in receipt of this information. Rather, Patrick advised Colin that if he was prepared to sell his interest in Interra, a full accounting would be provided as part of the sale process.

18 The 2016 financial statements for Interra have since been provided to Colin. In addition to not providing any explanation for the need for the Mortgages or how such funds were used, the statements raise a number of concerns relating to:

(i) an apparent loan to an unidentified person for $1,104,015 in 2016;

(ii) a loan receivable from APAC of $933,750 (an apparent increase of $35,277 between 2015 and 2016);

(iii) a loan from Interra to Patrick's family trust in 2016 for $65,000; and

(iv) a series of expenses and fees that appear to be significantly higher in 2016 than 2015 without sufficient explanation, including $122,613 for Refinancing and Professional fees.

19 The 2017 financial statements remain outstanding despite an undertaking that they were to be produced by March 30, 2017. These statements are now more than 10 months overdue. A shareholder's meeting still has not been called.

Positions of the Parties

20 The applicant submits that Colin is entitled to receive financial information in relation to Interra, including an accounting of the proceeds of the Mortgages, in his capacity as a minority shareholder. The actions and conduct of Interra through Patrick, are both oppressive and unfair, and viewed objectively, Colin's expectations for this financial production are reasonable in the circumstances.

21 The respondents counter that APAC has not been oppressed and that Colin's failure to receive answers to his financial queries does not constitute oppression. The respondents submit that the oppression remedy only protects the reasonable expectations of a shareholder, rather than a shareholder's subjective expectation, and therefore, Colin's request for document review has no basis in law. The respondents point out that APAC could have cross-examined Patrick on his affidavit, but APAC elected not to do so. In any event, Interra submits that upon completion of its 2017 financial statements, it will hold a shareholder's meeting at which Colin can fully and properly exercise his rights as a shareholder to obtain the information that is the subject of this hearing.

Discussion

The Law

22 The oppression remedy under s. 248 of the *OBCA* is an equitable remedy and, as such, the focus must be on business realities and fairness as opposed to technical legalities. [2]

23 The Supreme Court of Canada in *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) set out a two-stage inquiry when considering an oppression claim:

(i) Does the evidence support the reasonable expectations asserted by the moving party claimant?

(ii) If yes, does the evidence support that such reasonable expectations were violated by conduct that could be described as oppressive or unfairly prejudicing or disregarding the relevant interest?

24 In short, a claimant that can establish a reasonable expectation to an entitlement is to be treated fairly and in good faith by the corporation.

25 Factors that determine the existence of a reasonable expectation include:

- general commercial practise;
- the nature of the corporation;
- relationship between the parties;
- past practices;
- steps the claimant could have taken to protect himself;

• representations and agreements; and

• the fair resolution of conflicting interests between corporate stakeholders. [3]

The Law Applied

26 I do not accept the position of the respondents that no remedy should be granted because Colin is not a party in this application. Section 248 of the *OBCA* authorizes a complainant to seek an oppression remedy, and s. 245 defines complainant as "a registered holder or *beneficial owner*, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates [emphasis added]." APAC is a shareholder in Interra, so is entitled to seek relief under s. 248. Colin controls APAC. Therefore, practically speaking, any information ordered to be produced to APAC will be given to and dealt with by Colin. As the beneficiary of APAC, Colin is a "beneficial owner" of Interra and may well have been entitled to seek relief under s. 248 of the *OBCA* as an individual. Accordingly, I will refer to Colin and APAC interchangeably in my reasons.

27 The facts before me are concerning. Patrick has essentially marginalized Colin in relation to being involved in any material developments or activities of Interra. Patrick continues to refuse to hold a timely shareholder meeting or to provide timely and pertinent financial information, including an accounting for the recent substantial increase in borrowing by Interra. Simply put, Patrick is treating Interra as his own private entity and refusing to respond to legitimate, relevant, and timely inquiries from Colin for information.

28 When I take into account the fact that Colin was a co-founder of Interra in 2004, ran the day-to-day operations until 2012, provided a personal covenant on the original CIBC mortgage for the Belle River Plaza, APAC and Colin reasonably hold a number of expectations, objectively viewed, including:

> (i) timely notice of and participation in meetings that affect their interest as shareholder and beneficial shareholder, including electing new directors; and
>
> (ii) timely notice and receipt of financial information and disclosure, particularly in relation to substantial increases in the indebtedness of Interra.

29 I note that the respondents' characterization of APAC's requests as only a "subjective expectation" is not supported by the *OBCA* or the case law. For example, s. 140(1)(b) and (d) of the *OBCA* require a corporation to prepare and maintain minutes and resolutions and information on directors. Under s. 145, shareholders or beneficial shareholders, which would include APAC and Colin, are entitled to review or to be given a copy of those documents. Additionally, s, 140(b) requires a corporation to prepare and maintain adequate accounting records and minutes. Under s. 154, a corporation is also required to provide shareholders with financial statements at the required annual shareholders' meeting. As noted by Lax J. at para. 21 of *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.*, 2007 CarswellOnt 1567 (Ont. S.C.J. [Commercial List]), shareholders have a statutory right to know the financial health of the corporation. Therefore, APAC's expectation of participation in a shareholders' meeting and of production of the financial documents are entirely reasonable expectations.

30 It is not unreasonable for APAC to believe that Patrick, based on the limited and incomplete disclosure provided to APAC to date, may well have caused a distribution of corporate profits to be released to himself of which APAC may well be entitled to a proportionate distribution. Such conduct may amount to oppressive and unfairly prejudicial conduct by Patrick in treating Interra as a sole proprietorship and refusing to provide Colin with the necessary access and disclosure to information.

31 Interra has borrowed in excess of $1.5M and has loaned out at least $1.1M without consultation with or disclosure to APAC. There is no information on who received the loan or the repayment terms. There is no explanation for why this information is being withheld.

32 Colin was incapable of acting as a director because of his status as an undischarged bankrupt at the time of his election. However, he was also an officer of the company (Vice-President and Treasurer) and an indirect minority shareholder. In any event, up to 2013, the parties acted as if Colin were a director by having him sign resolutions and providing him with information commensurate with that role.

33 Not every wrong yields a remedy. Yet a series of wrongful acts or a pattern of conduct that unfairly treats the interests of a stakeholder may well be sufficient to require court intervention. The oppression remedy protects the reasonable interests of shareholders, directors, and officers. APAC, as a shareholder, and Colin, as both an officer and indirect shareholder, possess such interests under s. 248 of the *OBCA*.

34 The June 14, 2004 letter from Patrick's counsel is instructive in understanding past practices and the relationship between the parties and in informing reasonable expectations of the parties.

35 The letter speaks to the right of each party to nominate an equal number of directors and to the fact that all decisions are to be "unanimous". Additionally, Colin signed By-Law No. 7, passed May 21, 2004 in his capacity as an officer, a director, and a shareholder of APAC.

36 I extract from this letter and the By-Law that Colin held a reasonable expectation that he would be involved in decision making processes in material matters and, commensurate with such involvement, a right to access pertinent information relative to the decision-making.

37 Objectively viewed, there are a number of material concerns, reasonably held by Colin, that merit intervention. These include:

> (i) Why was the $1.5M borrowed and where did the more than $1.1M go?
>
> (ii) Why were the 2016 financial statements produced 20 months late, and why are the promised 2017 financial statements still unproduced? [4]
>
> (iii) Why has Interra not filed a tax return since 2015 when it filed for the 2014 corporate year?

38 These financial concerns are properly troubling to Colin who retains a 35% interest in the company through APAC and remains as a personal guarantor on a CIBC mortgage.

39 The Supreme Court of Canada in *BCE* makes clear that when dealing with an application for an oppression remedy I must order the fair, just, and equitable remedy having regard to the reasonable expectations of the shareholders in the context of the relationship at play. [5]

40 Corporate actors may make decisions that unfairly advantage one shareholder and unfairly prejudice or disregard the legitimate interests of another. In these situations, the disgruntled or unfairly treated shareholder must establish on a balance of probabilities that he is entitled to reasonably expect fair treatment as dictated by the circumstances. As remedial legislation, the oppression remedy is subject to broad and liberal interpretation. [6]

41 On the evidence before me, I am satisfied that the applicant had a reasonable expectation of ongoing access to financial disclosure; involvement in decision making to acquire new debt, take on new loans, and enter into new leases; and to be informed about and participate in decisions of this nature. There is also a reasonable expectation of notice of any shareholder meetings. The applicant has clearly demonstrated an interest in and an entitlement to information having regard to the financial stability and wellness of Interra. Further, if in fact, any profits have been distributed to any other shareholder by way of loans or fees, the applicant has a reasonable expectation of an entitlement to participate in such distributions and to an accounting for same.

42 The facts before me are somewhat similar to those before Flynn J. in *Thomas v. Thomas Health Care Corp.*, 2005 CarswellOnt 977 (Ont. S.C.J.). In that case, the applicant was a minority shareholder, a director, and an officer. After leaving the company, he sought disclosure of financial records relating to the corporation's buildings and businesses. The applicant wanted this information because he was a guarantor on $17M of the corporation's debts. The corporation was forced to restructure to avoid financial ruin, and the applicant was given no details of the restructuring.

43 Similar to the position taken before me, the respondent in *Thomas* suggested that if the applicant sued the corporation, he would then, and only then, be entitled to full disclosure.

44 Before me, the respondent suggests that this application is premature and that the right time to discuss this is at the yet to be scheduled shareholder's meeting, which is to be held after the yet to be completed (and many months past due) 2017 financial statements are completed.

45 Flynn J., at para. 12, wasted few words expressing his views on the position of the respondent. "What nonsense". I agree. APAC and Colin both have a clear and pressing interest in assuring themselves of the financial viability and stability of Interra.

46 Efforts by the respondent to not disclose information that APAC has objectively established it reasonably expects constitutes oppressive, unfair, and prejudicial behaviour that disregards its many interests. Patrick's desire to treat Interra as his own entity in which he is the only investor or shareholder must stop.

Conclusion

47 For the above reasons, an order will issue compelling Interra and Patrick to provide APAC the following:

(i) a complete copy of Interra's Minute Book;

(ii) all documentation, whether paper or electronic, in relation to the Mortgages, including an accounting of the use and distribution of the Mortgages;

(iii) disclosure and financial documentation regarding the use made by Interra of the proceeds of the Mortgages;

(iv) all documentation, whether paper or electronic, in relation to the purported appointment of Evan Cronin as an officer and director of Interra;

(v) all documentation, whether paper or electronic, in relation to the lease between Pet Valu and Interra, and any amendments thereto;

(vi) all documentation, whether paper or electronic, in relation to the termination of the lease between Pizza Hut and Interra; and

(vii) financial information in relation to Interra for the past 36 months, including bank statements and cancelled cheques.

Costs

48 In the event that the parties cannot agree, I will receive written submissions, not to exceed three pages (exclusive of Bills of Costs and Offers to Settle), from the applicant within 30 days and from the respondents, within 21 days thereafter.

Application granted.

Footnotes

1 Sections 118(1)(4) and 121(1) of the *OBCA* prohibit an undischarged bankrupt from being a director of a corporation.

2 See *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) at para. 58.

3 *Ibid* at paras. 72-80.

4 I have taken into account the personal issues being dealt with by Interra's bookkeeper, Evan Cronin, which explain some, but not all, of the delay.

5 *BCE*, *supra* note 3 at paras. 58-59.

6 See *Danylchuk v. Wolinsky*, 2007 MBCA 132 (Man. C.A.) at para. 23

2019 ONSC 86
Ontario Superior Court of Justice (Divisional Court)

APAC Limited v. Cronin

2019 CarswellOnt 15, 2019 ONSC 86, 300 A.C.W.S. (3d) 539

APAC LIMITED (Applicant / Respondent in Appeal) and PATRICK CRONIN and INTERRA MANAGEMENT GROUP LIMITED (Respondents / Appellants in Appeal)

J. Henderson, J. Fregeau, W. Matheson JJ.

Heard: November 30, 2018
Judgment: January 4, 2019
Docket: London DC 28/18

Proceedings: affirming *APAC Limited v. Cronin* (2018), 2018 CarswellOnt 22211, 2018 ONSC 3256, M.A. Garson J. (Ont. S.C.J.); additional reasons at *APAC Limited v. Cronin and Interra* (2018), 2018 CarswellOnt 22210, 2018 ONSC 4542, M.A. Garson J. (Ont. S.C.J.)

Counsel: John K. Downing, Jack Masterman, for Applicant, Respondent in Appeal
Matthew Diskin, Meredith Bacal, for Respondents, Appellants in Appeal

***W. Matheson J.*:**

1 This is an appeal from a decision of Garson J. dated May 24, 2018, granting the applicant's oppression application. The appeal is brought under s. 255 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"). The appellants also challenge the related costs decision dated July 25, 2018, for which leave to appeal is required.

2 The application judge found oppression and ordered the appellants to produce certain financial documents relating to the business of the appellant company, Interra Management Group Limited ("Interra"), to the applicant minority shareholder, APAC Limited.

3 For the reasons set out below, the appeal is dismissed and leave to appeal the costs order is denied.

Brief background

4 The appellant Interra is a real estate development and management company that was co-founded by the appellant Patrick Cronin along with Colin Jackson in about 2004. Cronin controls 65 percent of the shares of Interra through a family trust. Jackson controls the respondent on this appeal, APAC, which owns 35 percent of Interra, through a family trust. There is no executed shareholders agreement. Cronin and Jackson were also the initial directors of Interra.

5 Between 2004 and 2012, Jackson ran the day-to-day operations of Interra. During this period, Interra bought a total of four commercial plazas, two of which were sold at a profit that was divided proportionately between Jackson and Cronin.

6 Jackson moved to California in 2012. The two agreed that Cronin would assume responsibility for the day-to-day operations of Interra. However, Jackson continued to be involved and Interra continued to own just the two plaza properties.

7 Jackson returned to London, Ontario in 2014 and continued to work with Cronin on Interra business. However, communications between them became erratic in 2016.

8 Jackson became concerned about the financial circumstances of Interra. He requested updated information from Cronin and was ultimately given copies of Financial Overview documents regarding each plaza, which Jackson had himself prepared earlier on, with handwritten changes by Cronin. The changes included a $500,000 second mortgage on one of the two plazas, Belle River Plaza, registered in 2015, of which APAC had no prior notice.

9 Belle River had been purchased in 2004 for about $2.35 million. When Jackson learned of the second mortgage, he had property searches done for both plazas. Those searches showed two more mortgages against Belle River Plaza, totaling over $2 million, which had not been disclosed to APAC.

10 Jackson also did a corporate search and discovered that he was no longer listed as a director and an Evan Cronin was listed as a director as of 2015, even though there had been no shareholders meeting.

11 In August 2017, Jackson asked Cronin to call a shareholders meeting. Cronin refused to do so. Cronin wanted to delay calling a shareholders meeting until after the 2016 and 2017 financial statements were completed.

12 Later on, Cronin also indicated that if Jackson was prepared to sell his interest in Interra to him, a full accounting would be provided as part of the sale process.

13 The parties began to correspond through counsel. APAC requested financial information but its requests were continually refused. The appellants took the position then and now that a shareholder is only entitled to information if there is a specific provision of the *OBCA* requiring it. APAC commenced this application.

14 Interra's financial year-end was May 31. The 2016 financial statements were ultimately provided to APAC in January 2018, about nineteen months after the end of the 2016 financial year. They did not provide an explanation for the need for the additional mortgages or what was done with those funds. As well, they revealed several concerning loans and expenses not previously disclosed, including the following:

(i) an apparent loan to an unidentified person for $1,104,015 in 2016;

(ii) an increased loan receivable from APAC;

(iii) a loan from Interra to Cronin's family trust for $65,000; and,

(iv) a series of expenses and fees that appeared to be significantly higher than past years, including $122,613 for "Refinancing and Professional fees."

15 As of the hearing of the application in April 2018, the 2017 financial statements remained outstanding despite having been promised earlier. Other requests for financial disclosure were denied. No shareholder meeting had been called.

Application decision

16 The application judge summarized the law in regard to the oppression remedy under s. 248 of the *OBCA* as set out in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.). No legal error has been demonstrated in this regard.

17 The application judge applied those legal principles and found oppression. He found that the applicant had a reasonable expectation of ongoing access to the requested financial disclosure and involvement in certain categories of business decisions such as acquiring new debt. He found that, viewed objectively, there were a number of material concerns about the finances of this business. Cronin's actions in refusing to disclose the requested financial information on behalf of Interra, constituted oppressive, unfair and prejudicial behaviour that disregarded the minority shareholder

APAC's interests. The application judge found that Cronin was treating Interra as his own private entity, as if he was the only investor or shareholder.

18 The application judge ordered financial disclosure that related to the specific concerns that had been identified by the applicant. On costs, the application judge halved the amount requested by the applicant and ordered that costs be paid by Cronin, and not Interra, given Cronin's conduct in relation to this matter.

Issues

19 This appeal gives rise to the following issues:

(i) whether the application judge erred in conflating the interests of the minority shareholder APAC with the interests of Jackson, giving rise to procedural unfairness; and,

(ii) whether the requirements of the oppression remedy were fulfilled and capable of supporting the order.

20 There is also the issue of the costs order if leave is granted, specifically whether the application judge erred in awarding costs against the respondent Cronin and not Interra.

Standard of review

21 As set out in *Basegmez v. Akman*, 2018 ONSC 812 (Ont. Div. Ct.), at para. 7, the following standard of review from *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037 (S.C.C.), at para. 59, applies to appeals from *OBCA* oppression decisions:

> Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact. Second, an appellate court may intervene and substitute its own decision for the trial courts if the judgment is based on "errors of law ... erroneous principles or irrelevant considerations". Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust. [Citations omitted.]

22 With respect to procedural fairness, the issue is not the standard of review but whether the required procedural fairness was provided.

23 With respect to the costs appeal (if leave is granted), there is no dispute that an appellate court should only set aside a costs award when the judge at first instance made an error in principle or if the costs award is plainly wrong.

Procedural fairness

24 The appellants submit that the application judge erred in wrongly imputing Jackson's expectations on APAC and submit that since Jackson himself was not an applicant, his expectations were not within the bounds of the notice of application. The appellants submit that this amounted to procedural unfairness since they could not have been expected to respond to Jackson's "irrelevant evidence" about his expectations.

25 We do not find that there was the alleged procedural unfairness. In the ordinary way, Jackson delivered an affidavit in support of his company's application. As was ultimately conceded in oral argument on this appeal, the company must act through people and Jackson was its principal. Just as Cronin delivered an affidavit for Interra, Jackson did so for APAC. In turn, the grounds in the notice of application itself and the related evidence from Jackson set out in detail the steps upon which the company relied for its oppression application including the course of conduct between the two people involved — Jackson and Cronin. Not surprisingly, the steps relied on by APAC were taken by Jackson.

26 The appellants rely on part of the reasons for decision in which the application judge addresses their position that no remedy may be granted because Jackson was not a party. The application judge noted that Jackson could have been a

party, but more importantly the application judge found that APAC was a shareholder in Interra, was therefore entitled to seek relief under the oppression remedy and that Jackson controlled APAC. The application judge further found that, practically speaking, any information ordered to be produced to APAC would be given to and dealt with by Jackson. The application judge indicated that in the circumstances, he was going to refer to Jackson and APAC interchangeably in his reasons for decision. We do not find that this nomenclature choice demonstrated procedural unfairness or other reviewable error.

27 The appellants also submit that the application judge erred in basing his decision in part on Jackson's involvement in the decision-making for Interra, yet that course of conduct is set out in the grounds in the notice of application and related evidentiary materials.

28 It is apparent from the correspondence between counsel before the hearing of the application and the court proceedings that there was sufficient notice of what was at issue. No procedural unfairness has been demonstrated by the appellants.

Requirements of oppression remedy

29 There is no dispute that, as set out in *BCE*, the test for oppression is as follows:

(i) the claimant must establish the reasonable expectations that it claims have been violated; and,

(ii) the claimant must show that these reasonable expectations were violated by corporate conduct that amounts to oppression, unfair prejudice or unfair disregard of a relevant interest.

30 There is also no dispute that many factors may be considered in determining reasonable expectations. Factors include the nature of the corporation, the relationship between the parties, past practices, representations and agreements, the fair resolution of conflicting interests between corporate stakeholders and general commercial practice: *BCE*, at paras. 72-80.

31 The appellants submit that the application judge erred because the required elements of the test for oppression were not met. In part, this submission is based on the use of Jackson's evidence in support of his company's expectations. Those arguments have been addressed and dismissed above.

32 The application judge considered the relevant factors to determine what reasonable expectations had been objectively established. He concluded on the evidence before him that APAC had a number of reasonable expectations, including ongoing access to financial disclosure regarding the financial stability of Interra and any distributions to the other shareholder by way of loans or fees. These findings were amply supported by the evidence and in turn support the remedial order made in this case.

33 In addition, the appellants submit that the application judge failed to account for changes in Interra's business practices after Jackson and Cronin began their venture, including Jackson's move to California for a period of time. However, the application judge did have regard for those changing roles. Interra was a closely-held corporation with two shareholders. It was variously run by two people, Jackson and Cronin. The application judge noted that the degree of their involvement changed from time to time. Jackson's involvement did not end when he moved, and continued upon his return.

34 The appellants further submit that the application judge erred by finding that "mere questions and concerns" amounted to oppression. The appellants submit that Jackson raised only questions and concerns and has not established any wrongful conduct or compensable injury. On the contrary, the application judge found that there was oppressive conduct and unfair prejudice, including the refusal to provide pertinent financial information in the face of increased unexplained borrowing of millions of dollars. The application judge found that Cronin was treating Interra as a "sole proprietorship" - as his "own entity in which he is the only investor or shareholder."

35 The appellants have also submitted that APAC should only be entitled to receive the specific documents required under the *OBCA*. Although not withdrawn, this argument was not the focus in oral argument and runs contrary to the well-accepted broad remedial scope of the oppression remedy. The Court may make any order it thinks fit. The oppression remedy "seeks to ensure fairness - what is 'just and equitable'": *BCE*, at para. 58. It calls for a fact-specific, contextual inquiry looking at "business realities, not merely narrow legalities": *BCE*, at para. 58.

36 The appellants further submit that an order for disclosure only is not a proper use of the oppression remedy. They submit that the order made is essentially pre-action discovery. They submit that it would be a different matter if APAC had sued alleging oppression and brought a motion for disclosure within that proceeding. In a similar vein, the appellants submit that APAC should have waited for a shareholder meeting and asked its questions there, or cross-examined Cronin and asked for the information then. These arguments ignore the realities recognized by the application judge that APAC has a "clear and pressing interest" in assuring itself of the financial viability and stability of Interra. The appellants have throughout refused the information and taken the position that this minority shareholder is not entitled to it.

37 In the circumstances of this case, the application judge found that APAC, the minority shareholder with a 35% interest, had a reasonable expectation of ongoing access to financial disclosure on the matters for which disclosure has been ordered, which was violated by the appellants' conduct. The appellants have not demonstrated a palpable or overriding error or other reviewable error in this regard.

Costs

38 The appellants have not established that leave to appeal the costs order should be granted in this case. They rely on the second branch of the test for leave to appeal, specifically Rule 62.02(4)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. They submit that there is good reason to doubt the correctness of the costs order because Cronin had no notice or insufficient notice that he could be ordered to pay costs, and the application judge should not have pierced the corporate veil and ordered costs against him. However, Cronin is a named respondent in the application and the notice of application claimed costs. As a party, he was on notice that he was exposed for a potential costs order in the ordinary course. It was not necessary to pierce the corporate veil to make the order against him nor did the application judge purport to do so.

39 Further, the appellants have not established any matters of such importance that, in the panel's opinion, leave to appeal should be granted. The application judge had a broad discretion, which he exercised in accordance with established costs principles. As set out in the costs reasons, the application judge took into account Cronin's conduct and concluded that costs should not act as a drain on the assets of Interra in the circumstances of this case.

40 In keeping with the costs order below, the respondent submits that if this appeal is dismissed, costs ought to be ordered against Cronin only because the assets of Interra should not be used to pay costs caused by the conduct of Cronin. We agree, and note that Cronin continues to be putting his interests first, submitting that Interra should pay costs instead of him even though it was his conduct, controlling Interra, that gave rise to the oppression.

Orders

41 This appeal is dismissed and leave to appeal the costs order is denied. Cronin shall pay the respondent costs in the amount agreed between the parties regarding quantum, specifically $10,000, all inclusive.

***J. Henderson J.*:**

I agree

***J. Fregeau J.*:**

I agree

Appeal dismissed.

TAB 9

See para. 95

2016 ONSC 59
Ontario Superior Court of Justice

Ontario v. Rothmans Inc.

2016 CarswellOnt 567, 2016 ONSC 59, 262 A.C.W.S. (3d) 894

Her Majesty the Queen in Right of Ontario, Plaintiff and Rothmans Inc., Rothmans, Benson & Hedges Inc., Carreras Rothmans Limited, Altria Group, Inc., Philip Morris U.S.A. Inc., Philip Morris International, Inc., Jti-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., Imperial Tobacco Canada Limited, British American Tobacco P.L.C., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, and Canadian Tobacco Manufacturers' Council, Defendants

Master Donald E. Short

Heard: February 11, 2015
Judgment: January 14, 2016
Docket: CV-09-387984

Counsel: Deborah Templer, for Defendants / Moving Parties, Rothmans Inc. and Rothmans, Benson & Hedges Inc.
Elder C. Marques, for Defendants / Moving Parties, Altria Group Inc., Philip Morris USA Inc., Philip Morris International Inc.
Ira Nishisato, Cindy Clarke, for Defendants / Moving Parties, JTI-Macdonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.
Craig Lockwood, for Defendant / Moving Party, Imperial Tobacco Canada Limited
David Byers, Vanessa Voakes, for Defendants / Moving Parties, British American Tobacco (Investments) Limited, B.A.T. Industries P.L.C. & Carreras Rothmans Limited
John Ormston, Joanne Collins, for Defendant / Moving Party, Canadian Tobacco Manufacturers Council
Bill Manuel, Lise Favreau, Kristin Smith, Farzin Yousefian, for Plaintiff, Her Majesty The Queen In Right Of Ontario

***Master Donald E. Short*:**

I. Overview

1 On September 29, 2009, Her Majesty the Queen in right of Ontario (the "Crown") commenced this action to recover the health care costs the Crown has incurred and continues to incur as a result of tobacco-related wrongs committed by the defendant tobacco manufacturers, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act, 2009*, SO 2009, c 13 (the "*Act*").

2 Similar legislation has been passed in most Canadian provinces having virtually the same operative content. The above quotation is from the motion addressing the Alberta legislation. In similar cases the same Defendants are defending largely the same claims in each province and using what seems to be a relatively common strategy.

3 That approach is reflected in the factum of one group of the moving defendants in the present motion which opens with the following:

> "1. Ontario brings this action against fourteen Defendants seeking to recover fifty billion dollars ($50,000,000,000) in costs allegedly incurred as a result of providing health care benefits to persons in Ontario over a period of more

than 60 years. The claim is based on the Tobacco Damages and Health Care Costs Recovery Act, 2009, S.O. 2009, c. C.13 ("the *Act*") and alleges "breaches of common law, equitable or statutory duties or obligations" to persons in Ontario.

2. Ontario alleges, *inter alia*, that [various defendants] engaged in misrepresentation and conspiracy, as described in the Fresh as Amended Statement of Claim (the "Claim").

3. Many of the allegations made against the Defendants, or sub-groups of the Defendants, are broad, vague, and not differentiated to permit each Defendant to know specifically what it is alleged to have done. The material facts required for a proper pleading are lacking. Particulars are required to permit the Defendants to plead, ensure that the scope of discovery is not unfocused and open-ended, and permit the action to proceed as efficiently as possible.

4. Nothing in the *Act* alters any pleading requirements established by the *Rules* or common law, which apply to this action in the same way as to any other action."

4 Each province's action is at a different stage, but they are all moving at a virtual snail's pace towards an eventual resolution. Five years ago, I dealt with service issues relating to the claim made in Ontario. Appeals and a number of procedural issues have taken place such that we are now at the stage where the defendants are being called upon to deliver a defence to the claims that was first asserted in 2009.

5 The various defendants have sought to obtain further clarification of the claims being made against them by moving in at least four provinces for the same type of particulars with respect to the allegations being made against the tobacco companies under the corresponding provincial statutes.

6 When this matter was argued, I had the advantage of the decision of Chief Justice G.D. Joyal of the Manitoba Court of Queen's Bench in *Manitoba v. Rothmans, Benson & Hedges Inc.*, 2014 MBQB 160, 244 A.C.W.S. (3d) 316, 308 Man. R. (2d) 161, 2014 CarswellMan 354 (Man. Q.B.). That decision was delivered on July 29, 2014.

7 While I was dealing with the present reserved decision, I had opportunities to review and consider the reasons in two parallel motions heard by justices in Alberta and Newfoundland. The latter decision of Justice William H. Goodridge of the Supreme Court of Newfoundland & Labrador, which was released about a fortnight ago, can be found at *Newfoundland and Labrador (Attorney General) v. Rothmans Inc.*, [2015] N.J. No. 434, 2015 NLTD(G) 191 (N.L. T.D.). I note in passing that while the period for appealing that decision has not yet expired, I understand the earlier two decisions were not appealed.

8 In these circumstances one would have hoped that there could have been an agreement amongst the parties to consolidate the various provinces' claims in some manner, so that the enormous costs for both sides associated with any one action, would not be multiplied unnecessarily.

9 Perhaps there is still a possibility for interprovincial cooperation on some basis. One would hope that all the parties could see the wisdom in choosing a single test case.

10 Given the legal expertise at the various counsel tables in these actions, I cannot fathom why a concerted effort to determine on a rational basis what liability there is, if any, would not ultimately accrue to the benefit of all.

11 Having expressed that perhaps unrealistic view at the outset, I turn to a more traditional consideration of the pleadings motions brought on behalf of the various defendants.

II. Preamble

12 The whole purpose of the *Rules of Civil Procedure* as they apply to pre-trial matters is to enable defendants to appreciate "the case they have to meet".

13 Over the years rule amendments and caselaw have progressively clarified the fine points of the process. More than 70 years ago in 1952, Senior Master Marriott was analyzing the problems faced in complex cases. Fifty five years ago a lustrous panel of the Ontario Court of Appeal made up of Gale, C.J.O., Jessup and Brooke, JJ.A. succinctly addressed these issues in a case dealing with an analysis of the billings of doctors to the province's health system, *Physicians Services Inc. v. Cass*, [1971] 2 O.R. 626 (Ont. C.A.). In their entirety, the Chief Justice's reasons, with my emphasis added, simply read:

> ...With great respect we think the application before Haines, J., ought to have been dismissed. The fresh statement of claim seems to assert that a contract was entered into between the parties under which the defendant was entitled to recover amounts for services rendered at certain rates, and that in breach of such contract the defendant claimed and was paid amounts in excess of those to which he was entitled under the agreement. In those circumstances, we see no reason why the defendant cannot plead to the allegation of breach of contract. **The plaintiff should not be obliged, at this stage, to go to very considerable measures to attempt to ascertain the particulars of each service rendered by the defendant to his patients. It is to be borne in mind that the general allegation is that the amounts paid to this defendant were considerably in excess of those paid generally.** Accordingly, we would apply the principles laid down in such cases as *Fairbairn v. Sage*, 56 O.L.R. 462, [1925] 2 D.L.R. 536, in which it was held that **particulars for pleading will only be ordered if (1) they are not within the knowledge of the party demanding them, and (2) they are necessary to enable the other party to plead. Neither of those requirements seem to be present in this case.** We also rely upon the judgment in *Czernewich v. Winnipeg Wholesale Grocery & Confectionery Ltd.*, [1939] 4 D.L.R. 739n, 47 Man.R. 208, [1939] 2 W.W.R. 385, and the useful observations on this subject by Mr. Marriott, the recent Senior Master, in *Golightly & Knight Ltd. v. Irwin*, [1952] O.W.N. 89.
>
> In coming to our conclusion, we do not, of course, intend to suggest that proper particulars of the plaintiff's claim will not have to be given for the purposes of trial. We are simply deciding that those particulars are unnecessary for the purpose of pleading.

14 I don't believe the test has changed over the past half century. Justice J. Strekaf of the Alberta Court of Queen's Bench in the parallel particulars motion brought in Calgary wrote about "The Purpose of Particulars" in her decision in *Alberta v. Altria Group, Inc.* found at [2015] A.J. No. 702, 2015 ABQB 390 (Alta. Q.B.). I adopt her observations in this regard in their entirety and in particular adopt these specific observations:

> 14 The purpose of particulars has been discussed in numerous decisions. Any request for particulars should be considered in light of the principle that each party is entitled to know the case that is intended to be made against it at trial. Particulars help to ensure that litigation is conducted fairly, openly, and without surprise. Particulars also help to narrow the scope of the issues to be decided, guide the discovery process, and help to streamline the litigation process.
>
> 15 A request for particulars is not akin to an examination for discovery. Particulars function to limit the generality of allegations and to define the issues to be tried, whereas examinations for discovery are to learn the knowledge of the adverse party: *Misericordia Hosp v Acres Consulting Services Ltd* (1977), 5 AR 254 at 255 (ABSC-TD) ....
>
> **The General Legal Test**
>
> 17 While not mandatory, an application for particulars should as a general rule be accompanied by an affidavit disclosing the applicant's need for particulars. No substantive affidavits were filed on behalf of any of the Defendants in this case. Therefore, to show that particulars are required, absent an affidavit stating as such, the Defendants must show that the pleading is defective on its face and that "the allegations are so general and so vague that the need for particulars is evident": *Oceatain Investments Ltd v Canadian Commercial Bank* (1983), 51 AR 364 (ABQB) at para 8 ....

18 The Court has discretion in determining whether the allegations are so vague as to necessitate an order for particulars. As noted by Justice McMahon in *Re Indian Residential Schools*, 1999 ABQB 823 at para 15:

> An order for particulars is discretionary. There are no precise rules as to the degree of particularity required in any given case. Generally, what is reasonable and fair will dictate whether, and to what degree, further particulars will be ordered.

19 Justice McMahon noted that there is a difference between ordering particulars for pleadings and ordering particulars for trial. For an order for particulars in order to plead, the court should ask itself: "are there sufficient facts present to formulate a defence?" This question must be answered with reference to the whole of the Crown's Statement of Claim: see *Wesley First Nation v Alberta*, 2009 ABQB 418 at para 34 ....

20 Pleadings must be succinct, but must still disclose sufficient material facts for the defendant to understand what case it must meet. The amount of detail necessary varies with the nature of each case: William Blake Odgers, *Principles of Pleadings and Practice in Civil Actions*, 21st ed (London: Stevens & Sons, 1975) at 103. If a specific fact is not set out, but can be properly inferred from other statements in the pleading, that is sufficient for the purposes of a statement of claim: see *O'Neill v Rosetown (Town)*, [1941] 2 WWR 481 (SKCA).

. . .

Particulars in Complex Cases

23 What degree of particularity is "reasonable and fair" will depend on the circumstances of the case. Various courts have recognized that a realistic and pragmatic approach should be adopted at the pleadings stage in very complex litigation to ensure that these cases are not unduly delayed or prevented from proceeding to trial. This approach is exemplified by the reasoning of the Court of Appeal in *Lameman v Alberta*, 2013 ABCA 148 at para 29 (*Lameman*)

> A plaintiff is required to sufficiently particularize its claim so as to permit the defendants to identify their defenses for the purpose of filing a Statement of defense. However, the demands for particulars should not be permitted to turn into a delaying tactic, or a substitute for what can be obtained through a Notice to Produce Records or the Questioning process. **Otherwise, litigation will be stonewalled at an early stage through excessive particularization**. [my emphasis]
>
> . . .

26 While courts must avoid unduly burdening the plaintiff in its claims, there is a risk that the discovery process will become unwieldy and unnecessarily time-consuming and costly if insufficient particularization is given to the claims.

27 To strike a balance between these competing considerations in large and complex litigation, case management judges "must have some elbow room" in order to "keep the suit moving" and prevent it from being "[bogged] down in interlocutory matters": *Korte v Deloitte, Haskins & Sells* (1995), 36 Alta LR (3d) 56 (CA) at para 3. The Court of Appeal in *Lameman* noted that in complex cases that are case managed, litigation management orders can be more effective than particulars in providing an efficient structure to determine a claim: para 32.

15 Clearly Ontario's Courts have demonstrated that they are prepared to provide litigation management and I remain ready to assist with moving this matter forward in any manner helpful to the parties.

16 In that regard I note in passing the guidance of the Ontario Court of Appeal with respect to the proper approach of counsel to case management. While the particular case before the court dealt with the restoration of an action dismissed for delay, I nevertheless believe it is appropriate to refer highlight these extracts from Justice van Rensburg's recent observations in *Carioca's Import & Export Inc. v. Canadian Pacific Railway*, 2015 ONCA 592 (Ont. C.A.):

Delay

. . .

52 Applying too exacting a standard for restoring an action which has been struck from the trial list may well hinder the objective of an efficient justice system, as parties and counsel would argue over keeping matters on the trial list for fear that, once struck, they might never be restored. Fighting highly contested motions over cases being struck and restored to the trial list is not an effective use of scarce judicial and legal resources. Ontario courts are actively discouraging a "motions culture" among counsel, and the Supreme Court of Canada has called for **a "shift in culture", citing the need for a process that is proportionate, *timely* and affordable**: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 28.

53 While this court has stated frequently that the plaintiff bears the primary responsibility for moving a case forward, it has also acknowledged that **the conduct of a defendant is a factor, especially where a plaintiff encounters some resistance when trying to move the action along**: *1196158 Ontario Inc.*, at para. 29. The suggestion that it is normal and acceptable for a defendant, if not to actively delay, to simply wait for the plaintiff to make the next move, may be based on a conventional view of litigation strategy. **The objectives of timely and efficient access to justice, and effective use of court resources require all parties to play their part in moving actions forward, and for counsel to act in a way that facilitates rather than frustrates access to justice:** *Hryniak*, at para. 32. For these reasons, although the burden of proof on the motion is on the plaintiff, the **conduct of *all* parties in relation to the litigation is relevant** in determining whether to restore an action to the trial list.

III. Basis of Action

17 On this omnibus motion the defendants in this action seek particulars of a number of allegations in the plaintiff's pleading.

18 The *Tobacco Damages and Health Care Costs Recovery Act, 2009* is a new statute that gives Ontario "a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong", The *Act* permits Ontario to seek the recovery of the cost of health care benefits from manufacturers on the basis that Ontario incurred such costs as a consequence of what the *Act* calls "tobacco related wrongs" ("TRW") allegedly committed by the manufacturers.

19 The Crown's Fresh as Amended Statement of Claim (the "Claim") sets out the defendants' alleged conspiracy and concerted conduct over a fifty-year period in selling and promoting tobacco products; when the defendants knew the health risks associated with smoking and second hand smoke; and the defendants, acting together, nevertheless failed to warn the public and misrepresented these health risks.

20 The action is in its eighth year. Not one defence has been filed.

IV. The Tobacco Damages and Health Care Costs Recovery Act, 2009

21 The claims made in this action are virtually without precedent in Ontario. In the past attempts at recovery on behalf of individuals who alleged they were harmed by Tobacco products were brought under the generally applicable civil rules rubric.

22 Matters such as Construction Liens and Family Law disputes are governed by legislation drafted to address specific issues particular to the nature of the claims involved. Different production rules and disclosure requirements have been developed to facilitate effective resolutions of those particular disputes.

23 Similarly here, the legislature has created a statute aimed at a specific remedy. Thus this action is brought under a statute drafted for the single purpose of recovering public funds expended to address health issues arising from tobacco related wrongs.

24 The new statute that gives Ontario "a direct an distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong."

25 In determining the appropriate approach to the disputes now before me, I therefore need to consider the specific provisions of the *Act*"

26 Section 2(1) of the *Health Care Costs Act* confers on the Crown a direct right of action to recover the "cost of health care benefits" provided to insured persons resulting from tobacco related disease caused or contributed to by tobacco related wrongs, including, inter alia, a breach of duty owed to persons in Ontario.

27 An examination of the "Definitions and Interpretation" provisions in the *Act* outlines the legislatures broad intent with respect to the health costs recovery sought:

- "cost of health care benefits" means the sum of,

  (a) the present value of the total expenditure by the Crown in right of Ontario for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

  (b) the present value of the estimated total expenditure by the Crown in right of Ontario for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;

28 Similarly the definition of what actions can give rise to liability is wide ranging:

- "tobacco related wrong" means,

  (a) a tort committed in Ontario by a manufacturer which causes or contributes to tobacco related disease, or

  (b) in an action under subsection 2 (1), *a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in Ontario who have been exposed or might become exposed to a tobacco product*; [my emphasis]

29 Section 4 provides a mechanism for establishing joint liability for health care costs caused or contributed to by a tobacco related wrong (a "TRW').

30 In particular Section 4(1) provides that two or more defendants are jointly and severally liable for the cost of health care benefits if those defendants "jointly breached" a duty or obligation under the definition of tobacco related wrong and, as a result of the breach, at least one of the defendants is held liable for the cost of health care benefits under section 2(1).

31 Of particular relevance to pleadings by various sub-groups of defendants is the definition of "Joint Breach":

4(2) For purposes of an action under subsection 2 (1), two or more manufacturers, whether or not they are defendants in the action**, are deemed to have jointly breached a duty** or obligation described in the definition of "tobacco related wrong" in subsection 1 (1) **if,**

(a) one or more of those manufacturers are held to have breached the duty or obligation; and

(b) at common law, in equity or under an enactment, those manufacturers would be held,

(i) **to have conspired or *acted in concert*** with respect to the breach,

(ii) *to have acted in a principal and agent relationship* with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach. [my emphasis]

32 What then is the proper approach to the provisions in the Ontario *Rules of Civil Procedure*, in addressing the statutory concept in the *Act* of a tobacco related wrong?

33 The defendants rely upon the *Rules* provisions dealing with pleading of "Material Facts":

25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

34 The rule specifically addresses situations where "Nature of Act or Condition of Mind" are necessary elements:

25.06(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, **the pleading shall contain full particulars**, but *knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred*. [my emphasis]

35 What degree of particularity is necessary where it is clear to me that the Crown's pleading clearly asserts long term knowledge by the defendants of the potential harm of tobacco products?

36 As well, in considering the proper approach to the legislative intent apparent on the face of the *Act*, I observe that Section 2 permits Ontario to opt to seek recovery of the cost of health care benefits either for a particular individual insured person or on an aggregate basis for a population of insured persons. If Ontario opts to pursue health care costs on an aggregate basis it is not necessary for Ontario to:

(a) identify particular insured persons;

(b) prove the cause of tobacco related disease in any particular individual insured person; or

c) prove the cost of health care benefits for any insured person.

37 The *Act* also provides for certain presumptions in favour of Ontario that Ontario seeks to benefit from in the Claim. Subsection 3(1) of the *Act* provides that those presumptions apply:

3(1) ... if the Crown in right of Ontario proves, on a balance of probabilities, that, in respect of a tobacco product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to persons in Ontario who have been exposed or might become exposed to the type of tobacco product;

(b) exposure to the type of tobacco product can cause or contribute to disease; and

(c) **during all or part of the period of the breach** referred to in clause (a), the type of tobacco product, manufactured or promoted by the defendant, **was offered for sale in Ontario**.

[emphasis added]

38 *If* Ontario is successful in establishing the above, then *the court is required to presume*:

3(2)(a) that the population of insured persons who were exposed to the type of tobacco product manufactured or promoted by the defendant would not have been exposed to the product but for the breach referred to in clause [3] (1) (a); and

(b) the exposure described in clause (a) caused or contributed to disease or the risk of disease in a portion of the population described in clause (a).

[emphasis added]

39 *If* Ontario is entitled to the benefit of the presumptions, the *Act* requires that:

3 (3)(a) **the court shall determine on an aggregate basis the cost of health care benefits provided after the date of the breach** referred to in clause [3] (1) (a) resulting from exposure to the type of tobacco product; and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in clause (a) equal to its market share in the type of tobacco product.

[emphasis added]

40 Thus it appears that if a defendant is found to have committed a tobacco related wrong, the *later* such a wrong doing is established to have occurred the lesser will be the liability presumed under the *Act*.

41 In that event, a defendant is then granted the opportunity to reduce or readjust its assessed liability if it is able to meet the statutory onus. Specifically the *Act* provides:

3(4) The amount of a defendant's liability assessed under clause (3) (b) may be reduced, or the proportions of liability assessed under clause

(3) (b) readjusted among the defendants, **to the extent that a defendant *proves* on a balance of probabilities that the breach referred to in clause 3 (1) (a) did not cause or contribute** to,

(a) the exposure referred to in clause (2) (a); or

(b) the disease or risk of disease referred to in clause (2) (b).

[emphasis added]

42 The Crown submits that the defendants' motions for further particulars should be dismissed in their entirety. The Claim sets out detailed particulars and the Crown has provided extensive additional particulars in response to the defendants' Demands for Particulars

43 The defendants have not filed any evidence demonstrating that they do not have knowledge of the allegations in the paragraphs for which they seek particulars and that they require further particulars to plead. In fact, it appears the defendants have defended similar claims in other Canadian jurisdictions,without obtaining such particulars.

44 The similar motion was argued in Calgary the month before this motion was heard by me in Ontario. As noted above the decision of Justice J. Strekaf of the Alberta Court of Queen's Bench in *Alberta v. Altria Group, Inc.* on that previously argued motion was released prior to these reasons and can be found at [2015] A.J. No. 702, 2015 ABQB 390 (Alta. Q.B.).

45 I invited the parties to provide written submissions on the applicability of the Alberta and the more recent Newfoundland and Labrador decisions I found those submissions and both sets of reasons of assistance in coming to my conclusions in this Ontario case.

V. Approach to Motion

46 An omnibus motion such as this is difficult to manage given the extent of the specific issues raised. I wish to express my gratitude and admiration for the quality of the advocacy and degree of cooperation demonstrated by counsel for all parties in setting out their positions on what was a somewhat daunting motion.

47 In its factum the Crown argues that under the circumstances, these motions are nothing more than a delay tactic. "They argue, as well that if further particulars are ultimately required to narrow the issues for trial, this can be done after discoveries, as is appropriate in a claim of this scope.

48 Each group of defendants filed a separate factum and addressed those assertions in the statement of claim that were asserted in particular against them.

49 In these reasons I have reproduced a limited number of selected portions from some of the defendants' facta. It is neither appropriate nor possible to address every issue raised by every party, however, I note that there was a high degree of consistency amongst the positions taken on behalf of the various defendants.

50 The defendants submit that many of the allegations made against the Defendants, or sub-groups of the Defendants, are broad, vague, and not differentiated to permit each Defendant to know specifically what it is alleged to have done.

51 They assert that the material facts required for a proper pleading are lacking. However on my taking a contextual approach to this argument I am not satisfied that particulars are required to permit the Defendants to plead at this point in time.

52 The defendants indicate they wish to ensure that the scope of discovery is not unfocused and open-ended, and to "permit the action to proceed as efficiently as possible".

53 In my view arguing virtually the same issues in various forums across the country in provinces where legislation seeks to recover similar expenses for the same reasons is not the way to ensure these actions proceed "*as efficiently as possible*".

VI. Proportionality Revisited

54 I have been assigned the responsibility for all Master's motions in this case. In 2011 I set out much of the historical background to this case and specifically dealt with issues regarding the claims asserted against parties based outside Canada in *Ontario v. Rothmans Inc.*, 2011 ONSC 1083, 2011 CarswellOnt 3042, 200 A.C.W.S. (3d) 58 (Ont. Master).

55 Justice Perell in his reasons on the appeal of my decision found at *Ontario v. Rothmans Inc.*, [2011] O.J. No. 1896, 2011 ONSC 2504, 5 C.P.C. (7th) 112, 201 A.C.W.S. (3d) 341, 2011 CarswellOnt 2916 (Ont. S.C.J.) addressed the proper approach to the concept of proportionality that had been added to the Ontario *Rules* in 2010:

> 157 In the case at bar because the Master essentially treated the cross-examination as if it were an examination for discovery or because he regarded proportionality as relevant to his determination of the scope of proper questions and undertakings for a cross-examination on an affidavit filed for a very important motion, he considered the proportionality principle to be applicable. As noted above, he quoted rule 1.04 (1) and new subrule 1.04 (1.1.), which state:
>
> > **General Principle**
> >
> > 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> >
> > (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

. . .

159 The proportionality principle is a manifestation of the policy of frugality that led to the introduction of the simplified procedure to the *Rules of Civil Procedure*. To use a metaphor, the normal Rules of Civil Procedure are the Cadillac of procedure, an expensive vehicle with all the accessories. However, not all actions or applications require such an expensive vehicle, and a Chevrolet, a serviceable, no frills vehicle, will do just fine for many cases, and it will provide access to justice and judicial economy.

160 Proportionality is a parsimonious principle. In *Javitz v. BMO Nesbitt Burns Inc.*, 2011 ONSC 1332(Ont. S.C.J. [Commercial List]) at para. 28, Justice Pepall noted **that the proportionality principle was introduced because the system of justice was under severe strain because cases were taking too long and costing too much for litigants.** In the passage quoted by the Master from Chapter 5 of Lord Woolf s report, Lord Woolf said that his overall aim was to "improve access to justice by reducing the inequities, cost, delay, and complexity of civil litigation." In *Abrams v. Abrams*, 2010 ONSC 2703 (Ont. S.C.J.) at para. 70, Justice D.M. Brown, stated: **"Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most expeditious and least expensive determination of every proceeding on its merits."**

56 In considering the appropriate approach His Honour indicated at para 162 that he agreed with and "would endorse" my views:

"...in *Warman v, National Post Co.*, 2010 ONSC 3670 (Ont. Master), where he stated at paras. 84-86:

> [84] The time has come to recognize that the "broad and liberal" default rule of discovery has outlived its useful life. It has increasingly led to unacceptable delay and abuse. Proportionality by virtue of the recent revisions has become the governing rule. To the extent that there remains any doubt of the intention of the present rules I see no alternative but to be explicit.
>
> 85. Proportionality must be seen to be the norm, not the exception - the starting point, rather than an afterthought. Proportionality guidelines are not simply "available". The "broad and liberal" standard should be abandoned in place of proportionality rules that make "relevancy" part of the test for permissible discovery, but not the starting point.
>
> 86. If embraced by the courts, parties and their counsel, such proportionality guidelines offer hope that the system can actually live up to the goal of securing for the average citizen "a just, speedy and inexpensive determination" of his or her case.

57 Justice Perell's earlier decision in the present case continued:

In my opinion, an expansionary approach to proportionality is wrong. A parsimonious proportionality principle provides a useful tool for cases large and small. The base line is that the *Rules of Civil Procedure* are designed for cases of all sizes, but the proportionality principle allows the court to downsize the procedure and still do justice for the parties. If downsizing is not procedurally fair then the normal rules should apply to the proceedings without augmentation.

58 His Honour held that using proportionality was not intended to make very large cases more complex.:

[163]...having an expansionary influence destroys the parsimony of the proportionality principle and allows the argument that because a case is important or the claim large, there should be more procedure not less procedure. **The proportionality principle would lose its utility for large cases, such as class proceedings and other public interest litigation, where justice can be done by reducing not expanding the procedure. The proportionality principles yields an "equality of arms" by arms reduction and is not meant to prompt an arms race**....

59 Since that time other motions have been dealt with by Justice Conway including her decision in *Ontario v. Rothmans Inc.*, 2014 ONSC 3549 (Ont. S.C.J.) which addressed issues arising from a number of the defendants abandoned motion to strike the Crown's original Statement of Claim.

60 Since that time the Crown saw fit to deliver a Fresh as Amended Statement of Claim (the "Claim"). That document sets out the defendants' alleged conspiracy and concerted conduct over a fifty-year period in selling and promoting tobacco products; "when the defendants knew the health risks associated with smoking and second hand smoke; and the defendants, acting together, nevertheless failed to warn the public and misrepresented these health risks."

VII. Prologue to Motion

The Motions to Strike

61 In February 2014, all of the defendants brought motions to strike the then Amended Amended Statement of Claim, in whole or in part, primarily on the grounds that it failed to plead the required material facts to support the allegations of conspiracy and misrepresentation. In response, the Crown served the Fresh as Amended Statement of Claim which contained a number of significant changes, including, making clear which allegations of breaches of duty and conspiracy applied to which defendants and providing further material facts in support of the allegations of misrepresentation and conspiracy.

62 All of the defendants, with the exception of Imperial, subsequently abandoned their motions. Imperial proceeded with its motion for the limited purpose of striking references in the Claim to matters that are subject to parliamentary privilege. Justice Conway heard that specific challenge in June of 2014 and in *Ontario v. Rothmans Inc.*, 2014 ONSC 3382 (Ont. S.C.J.), claim "on the basis of parliamentary privilege" struck the impugned allegations concerning "Presentations" made to the House of Commons Standing Committee on Health, Welfare and Social Affairs in 1969.

The Demands for Particulars

63 In July 2014, the defendants served extensive Demands for Particulars, which collectively sought particulars in respect of 111 of the 151 paragraphs of the Fresh Claim.

64 In September 2014, the Crown delivered a comprehensive response to many of the defendants' Demands, which amounted to over two-hundred pages of charts and appendices.

Response to Demands for Particulars,

65 Then in November 2014, the defendants brought these motions for further and better particulars. Collectively, the defendants seek further particulars relating to the following allegations in the Claim:

(a) the defendants' knowledge of the risks of addiction and disease from smoking and second hand smoke: 51, 52, 53, 54, 55;

(b) *the defendants' misrepresentation and suppression of information regarding the risks of addiction and disease from smoking and second hand smoke*: 67, 71, 72, 72.1, 72.2, 72.3, 72.4(c), (d), (e) and (f), 73.1, 73.2, 73.3(b), (c), (d) and (e), 74, 75;

(c) *the defendants' conspiracies and concerted action within the International and Canadian Tobacco Industries, and within their Corporate Groups to commit tobacco related wrongs*: 88, 89, 91, 92, 93, 101, 106, 110, 117, 118, 118.1, 118.2, 118.3, 119, 121, 122, 123, 124, 125, 126, 126.1, 128, 129, 130, 133.3, 135, 135.1, 136, 137; and,

(d) *the defendants' statutory breaches under the Consumer Protection Act, 2002, and the Competition Act and their predecessor statutes*: 142, 143, 145.

VIII. Overview of Allegations

(a) the defendants' knowledge of the risks of addiction and disease from smoking and second hand smoke

66 The Claim asserts that the defendants breached common law and statutory duties of care by manufacturing, selling and promoting cigarettes with knowledge of the risks of smoking (i.e., addiction and disease), and the defendants.

(b) the defendants' misrepresentation and suppression of information regarding the risks of addiction and disease from smoking and second hand smoke:

67 The Claim further asserts that, as a result of these breaches of duty, including misrepresentations which were either made fraudulently, recklessly or negligently, persons in Ontario started, or continued, to smoke cigarettes manufactured and promoted by the "Direct Breach Defendants" or were exposed to cigarette smoke from such cigarettes, and thereby suffered tobacco related disease.

(c) the defendants' conspiracies and concerted action within the International and Canadian Tobacco Industries, and within their Corporate Groups to commit tobacco related wrongs

68 The Claim alleges that the defendants participated in three interrelated sets of conspiracies and concerted actions to mislead persons in Ontario and elsewhere with respect to the harmful effects of tobacco.

69 The allegations of conspiracy and acting in concert are not asserted as a common law tort claim. Rather, conspiracy and concerted action are pleaded pursuant to section 4 of the *Act* for the purpose of establishing joint liability of all defendants in respect of the breaches of duty committed by the Direct Breach Defendants.

70 In that regard, in accordance with the Act, the Crown has pleaded that all defendants are jointly liable for the breaches of duty pleaded in the Claim because the defendants conspired or acted in concert in breaching the common law and statutory duties pleaded.

71 Clearly the Claim pleads that as a result of the interrelated conspiracies, persons in Ontario started, or continued, to smoke cigarettes manufactured and promoted by the defendants, or were exposed to cigarette smoke, and thereby suffered tobacco related disease.

(d) the defendants' statutory breaches under the Consumer Protection Act, 2002, and the Competition Act and their predecessor statutes

72 In addition to the pleading of breaches of common law duties, the Crown has pleaded that the defendants breached statutory duties and committed offences under a variety of statutes by engaging in unfair practices, and by making false, misleading, deceptive and unconscionable representations about the risks of smoking and exposure to second hand smoke, and about the performance and efficacy of "light" and "mild" cigarettes. Those statutes are identified as [i.e. *Business Practices Act*, SO 1974, c 131; *Consumer Protection Act, 2002*, SO 2002 c 30; *Combines Investigation Act*, RSC 1952 (supp.), c 314 as amended by the *Criminal Law Amendment Act*, SC 1968-1969, c 38 and amendments thereto; *Competition Act*, RSC 1935, c C-34 and amendments thereto.

IX. Overview of Position of Defendants

73 I have considered the detailed submissions of all parties in coming to my conclusions on these matters. To provide a sense of the nature of just a very few of the matters in issue I have extracted brief elements of the factum filed on behalf of the R.J. Reynolds related defendants which asserts in part:

> "13. Ontario has sued fourteen tobacco companies comprising both Canadian companies like JTI and multinational corporations like RJR TC and RJR TI, all of which it alleges are "manufacturers" within the meaning of the Act

and engaged directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario and throughout the world.

14. Ontario alleges that the Defendants committed numerous breaches of common law, equitable or statutory duties or obligations owed to persons in Ontario. Ontario further alleges that the breaches of duties and obligations resulted in persons in Ontario being exposed to tobacco products which in turn caused insured persons to suffer tobacco related diseases, in respect of which Ontario incurred the cost of health care benefits.

. . .

20. Ontario makes the serious allegation that the three members of the "RJR Group" removed and destroyed material from a library and destroyed research relating to smoking without identifying, specifically, whom is alleged to have removed the material, when it was removed or destroyed, or what library materials or research are at issue.

21. Ontario makes bald and general allegations suggesting that all of the Defendants engaged in each of the misrepresentations alleged in the Claim. There are no allegations of any specific misrepresentations made against the RJR Defendants or any other specific Defendant.

22. Despite the significance of this action to all parties, and the requirements of the *Act* that Ontario establish specific breaches of duties or obligations committed by one or more specific Defendants, the Claim is vague, general and deficient in setting out specific allegations against particular Defendants. Ontario frequently lumps all of the Defendants together and, throughout its pleading, makes numerous broad, and very serious, allegations against groups of the Defendants, without specifying the alleged particular wrongdoing of each Defendant.

23. Ontario sought to remedy these concerns with the service of the Claim and with its Responses to the Demands for Particulars. While this went some distance to addressing the concerns, it was not a complete response and there remain particulars that are essential to understanding the nature of the claims against RJRTC, RJRTI and JTI." [documentary references omitted]

X. "Asked and Answered"

74 Somewhat in the nature of a sidebar, I am presenting at this point, an extract from one of the numerous charts setting out the requests and responses relating to only 4 paragraphs of the Plaintiff's 151 paragraph Fresh as Amended Statement of Claim. The defendants prepared a series of charts which were presented before me in a columnar fashion similar to that required by Form 37C under the *Rules*. For the purposes of the following extracts I have set out the requests and positions in what may be a more readable fashion for the published version issued under the ONSC Neutral Citation system.

75 While many readers may wish to skip this segment of these reasons, I felt it important and informative to provide a limited glimpse of the challenges faced by the both the parties and my judicial colleagues on a motion such as this in addressing similar challenges across the country.

76 In dealing with a portion category (b) of the particulars sought, dealing with the defendants' alleged misrepresentation and suppression of information regarding the risks of addiction and disease from smoking and second hand smoke I was provided with a table, indicating in part, following information.

The Pleading

77 Paragraph 71 of the Pleading reads:

Breach of the Duty — Misrepresentation

71. As manufacturers of tobacco products, the Direct Breach Defendants owed a duty of care to persons in Ontario who consumed, or were exposed to, cigarette smoke from cigarettes manufactured by them and sold in Ontario and ought reasonably to have foreseen that persons in Ontario who smoked would rely on any representations made by them with respect to the risks of addiction and disease from smoking and the risk of disease from exposure to second hand smoke. Such reliance by persons in Ontario was reasonable in all of the circumstances since as set out below the Direct Breach Defendants took steps to assure persons in Ontario of the truth of their misrepresentations and to conceal from them the true extent of the risks of smoking and exposure to second hand smoke. As a result, since 1950 the Direct Breach Defendants owed a duty to persons in Ontario not to misrepresent the risks of addiction and disease from smoking and the risk of disease from exposure to second hand smoke as was known, or should have been known to them based on research known to them on smoking and health.

78 The pleading continued:

72. The Direct Breach Defendants, with full knowledge of the risks of addiction and disease, misrepresented the risks of smoking and exposure to second hand smoke since 1950 by denying any link between smoking and addiction and disease and denying any link between exposure to second hand smoke and disease contrary to what was known or should have been known to them, based on research known to them on smoking and health. In particular, since 1950 and continuing to the present the Direct Breach Defendants misrepresented to persons in Ontario that:

(a) smoking and exposure to second hand smoke have not been shown to cause any known diseases;

(b) they were aware of no research, or no credible research, establishing a link between smoking or exposure to second hand smoke and disease;

(c) many diseases shown to have been caused by smoking tobacco or exposure to second hand smoke were in fact caused by other environmental or genetic factors;

(d) cigarettes were not addictive;

(e) they were aware of no research, or no credible research, establishing that smoking is addictive;

(f) smoking is merely a habit or custom;

(g) they did not manipulate nicotine levels in their cigarettes;

(h) they did not include substances in their cigarettes designed to increase the bio-availability of nicotine;

(i) the intake of tar and nicotine associated with smoking their cigarettes was less than they knew or ought to have known it to be;

(j) certain of their cigarettes, such as "filter", "mild", "low tar" and "light" brands, were safer than other cigarettes;

(k) smoking is consistent with a healthy lifestyle; and

(l) the risks of smoking and exposure to second hand smoke were less serious than they knew them to be.

79 While not included in the chart, I note that the Claim continues with detailed paragraphs 72.1; 72.2; 72.3; 72.4; 72.5 and 73; 73.1; 73.2; 73.3; 73.4 plus paragraphs 74 and 75. These very detailed paragraphs from 71 through to 75 constitute eight pages (21 through 29) of the impugned pleading.

Initial Request for Particulars

The initial request for further particulars of counsel for JTI-Macdonald Corp., R.J. ReynoldsTobacco Company and R.J. Reynolds was typical of those asserted on behalf of others and gives a flavour of the problem before this court and my colleagues across the country:

> With respect to **paragraphs 71 to 75** of the Statement of Claim, for each misrepresentation alleged to have been made by each of JTI and RJRTC in Ontario, particulars of:
>
> a. the specific words of each alleged misrepresentation listed in subparagraphs (a) through (l) of paragraph 72;
>
> b. the date or dates of each alleged misrepresentation;
>
> c. the person or persons to whom each alleged misrepresentation was made;
>
> d. whether the alleged misrepresentations were made orally or in writing and if in writing, the document(s) in which they were contained;
>
> e. the material facts supporting whether there was reliance on each of these misrepresentations by persons in Ontario;
>
> f. which of the means of misrepresentations alleged in subparagraphs 72.1 (a) through (g) are alleged to have been committed by each of JTI and RJRTC in Ontario and what specific words were used in the alleged misrepresentations;
>
> g. the publications alleged to have contained misrepresentations by each of JTI and RJRTC, when and where those were published, and the content of same;
>
> h. the specific advertising, marketing and promotional campaigns by JTI including when and where those were made, and the content of same;
>
> i. the research that is alleged to have been "presented to the public, governments, news and information media and other organizations" by each of JTI and RJRTC, by whom it was carried out and published, when and where it was published, the content, conclusions and findings of this research, and by which of JTI and RJRTC such research is alleged to have been funded;
>
> j. the alleged media interviews, correspondence, other materials, discussions, speeches and presentations, including when and where they are alleged to have occurred, who is alleged to have participated and on behalf of which of JTI and RJRTC, and what alleged misrepresentations were made by each;
>
> k. who is alleged to have been acting as agents of JTI and RJRTC, when and where such misrepresentations occurred, what information was conveyed to the public and through what means, and upon whose instructions the alleged agents were acting;
>
> l. particulars of which of JTI, RJRTC, and "their predecessors, as members of the RJR Group in Canada", made each of the alleged misrepresentations;
>
> m. particulars of the "variety of means" alleged to have been employed by each of JTI and RJRTC;
>
> n. the other publications, speeches, presentations, and public statements in which the misrepresentations were repeated;
>
> o. particulars of how each of JTI and RJRTC misrepresented to the Canadian Medical Association, the 1963 Conference on Smoking and Health, and the National Association of Tobacco and Confectionery Distributors

Convention in October 1969 and 1995, including the content of the misrepresentation(s), whether they were made orally or in writing, and if in writing, the document(s) and where and by whom they were made;

p. particulars of how each of JTI and RJRTC misrepresented to the listed federal Ministers and Department of Health officials, including the content of each of the misrepresentation(s), whether they were oral or written, and if in writing, the document(s) and where and by whom they were made;

q. particulars of the advertising, marketing, and promotional campaigns alleged to have been conducted by each of JTI and RJRTC, including when, where, and through what specific means such campaigns are alleged to have occurred;

r. what scientific and medical data is alleged to have been suppressed by each of JTI and RJRTC, how the data is alleged to have been suppressed, and when the data was allegedly suppressed by each of JTI and RJRTC;

s. what scientific and medical data is alleged to have been known or should have been known to each of JTI and RJRTC and when should such data have been known to JTI and RJRTC;

t. which predecessors are alleged to have been involved and when;

u. what scientific and medical findings were funded at Harrogate, UK in 1965 and 1966;

v. what research was stopped, when, and by whom;

w. who imposed such restrictions, when, and through what means;

x. how, what, when, and by whom it is alleged that research reports were invalidated and/or destroyed;

y. who is alleged to have destroyed such research, when, and by what means; and

z. when was the alleged total embargo imposed and by what means did ICOSI enforce the alleged embargo.

Initial Response to Demand

80 The Province responded to the request for particulars providing some degree of clarification which was reflected in the second column of the chart:

Paragraphs 71-75

[with respect to items:] a, f-h, j, m - n, q — The particulars provided are sufficient (including as pleaded in paragraphs 71 - 75 of the FSOC [i.e. Fresh Statement Of Claim]) given the extensive and continuous nature of the misrepresentations. Further particulars are not needed to plead, and are in the nature of evidence.

b - The misrepresentations were made from at least 1950 onwards. Further particulars are not needed to plead, are within the defendants' knowledge and are in the nature of evidence.

c - The misrepresentations were made to the public. The plaintiff is not required to provide further particulars because s. 2(5) of the statute specifically provides that the plaintiff is not required to identify specific individuals. Further particulars are not needed to plead, are within the defendants' knowledge and are in the nature of evidence.

d - The misrepresentations were made orally and in writing. Further particulars are not needed to plead, and are in the nature of evidence.

e - Reliance is sufficiently pleaded at paragraphs 76 and 77 of the FSOC, and the plaintiff is not required to provide particulars because reliance is presumed by the statute. No further particulars will be provided.

i - The research includes research created to cast doubt or controversy on the relationship between smoking, addiction and disease and to attribute health risks caused by secondhand smoke to poor air quality and ventilation in indoor spaces generally. Further particulars are not needed to plead and are within the defendants' knowledge.

j - No further particulars will be provided. Further particulars are within the defendants' knowledge, are not needed to plead and are in the nature of evidence.

k - p — The activities of these defendants included the conduct of the CTMC [i.e. the Defendant and Canadian Tobacco Manufacturers' Council] acting as their agent as set out in paragraphs 108 to 116 of the FSOC and Schedule A. Further particulars are within the defendants' knowledge, are not needed to plead and are in the nature of evidence.

r — Particulars of the suppressed information and conduct of the defendants include those pleaded at paragraphs 73, 73.1 and 73.2 of the FSOC and the particulars provided in connection thereto. Further particulars are not needed to plead and are within the defendants' knowledge.

s - See Schedule B. The plaintiff is not required to plead circumstances from which knowledge is inferred.

t - All the predecessors of these defendants are alleged to be involved. Ontario relies on paragraphs 30-32 of the FSOC and in addition states that R.J. Reynolds Tobacco Company was incorporated in 1992. In 2004, the U.S. assets, liabilities and operations of R.J. Reynolds Tobacco Company (at the time, incorporated pursuant to the laws of New Jersey) were combined with those of Brown & Williamson Tobacco Corporation, owned by the defendant British American Tobacco P.L.C. Concurrent with the completion of the business combination, R.J. Reynolds Tobacco Company became a North Carolina corporation. Its principal place of business continued to be North Carolina. For greater certainty Ontario pleads that R.J. Reynolds Tobacco Company (incorporated in North Carolina) is responsible in law for the actions and conduct of its predecessor in interest and name, R.J. Reynolds Tobacco Company (incorporated in New Jersey.) R.J. Reynolds Tobacco Company is a successor to R.J. Reynolds Tobacco International Inc., which is a company incorporated pursuant to the laws of Delaware.

Further particulars of the defendants' predecessors and their involvement are not needed to plead and are within the defendants' knowledge.

u - The scientific and medical findings funded at Harrogate, UK include the possibility that nicotine may be implicated in the aetiology of cardiovascular disease. Further particulars are not needed to plead, are within the defendants' knowledge and are in the nature of evidence. v - z - Particulars include those provided

at paragraphs 73, 73.1 and 73.2 of the FSOC. As a member of ICOSI, these defendants participated in the "total embargo" of all research relating to pharmacology of nicotine. Given the extensive and continuous nature of the defendants' activities to suppress, destroy and conceal any and all scientific and medical research and data which established a link between smoking and disease and revealed the addictive nature of smoking and cigarettes, further particulars are not needed to plead and are within the defendants' knowledge.

Response to Further Particulars Provided

81 In their response to the information thus provided those defendants, in a manner similar to the other moving defendants, set out their ongoing concerns under a heading argue before me under the chart heading "Position of JTI/RJRTC/RJRTI":

Paragraphs 71 and 72

The responses are insufficient relative to the broad scope of the allegations. They fail to provide sufficient particulars of the alleged misrepresentations to permit each of JTI, RJRTC and RJRTI to know what misrepresentations it is alleged to have made.

The responses suggest that every statement made by each of JTI, RJRTC or RJRTI from "at least 1950 onwards", "to the public", and "orally or in writing" constituted misrepresentation. This is not reasonable or tenable. Particulars of the specific claims or examples of the alleged misrepresentations made over time ought to be provided to permit each of JTI, RJRTC, and RJRTI to know the case that it has to meet.

Section 2(5) of the *Act* permits individual plaintiffs to avoid the obligation of proving a causal connection between their own smoking exposure history and any condition or disease from which the person allegedly suffers. It does not relieve Ontario from the burden of particularizing its misrepresentation allegations against each defendant.

Ontario refers to "research known to [the Direct Breach Defendants]" but fails to identify the specific research which it is alleged each of JTI, RJRTC or RJRTI had knowledge of. It is not sufficient to allege that the research was "within the knowledge" of the defendants. Each defendant is entitled to know specifically what misrepresentations it made and specifically what knowledge it is alleged to have had at the material times.

Ontario relies on vague allegations against the CTMC and suggests the particulars it provided in respect of the CTMC are sufficient. RJRTC and RJRTI have never been members of the CTMC. Thus any particulars concerning the CTMC cannot assist RJRTC and RJRTI in knowing the case they have to meet.

Ontario relies extensively on the response that the particulars sought are "within the Defendants' knowledge". This is not a sufficient response in a misrepresentation claim involving numerous Defendants and spanning more than 60 years.

Paragraph 72.1

This paragraph also fails to identify any specific misrepresentations by any of JTI, RJRTC or RJRTI. The response fails to provide any particulars of any specific means used by any of JTI, RJRTC or RJRTI to convey the alleged misrepresentations.

Paragraph 72.4 (c), (d), (e) and (f)

These paragraphs purport to provide particulars against RJRTC and JTI but only refer to "a variety of means" that are all very vague - "publications", "speeches and presentations", "public statements", and "advertising, marketing and promotional campaigns". These are not particulars. The few examples provided are insufficient to support a claim of misrepresentation where the statements were allegedly made "since 1950" and "repeated continually" by multiple Defendants.

JTI and RJRTC are entitled to know specifically what Ontario alleges against each of them. This is a requirement of pleading, not a request for evidence as asserted by Ontario. The fact that a Defendant knows what business it engaged in does not equate to that Defendant knowing what specific misrepresentations it is alleged to have made.

Paragraph 73.3 (b), (c), (d) and (e)

These sub-paragraphs purport to provide particulars of the suppression of scientific and medical data by RJRTC and JTI but they only provide vague and unparticularized statements concerning the termination of research, imposition of restrictions on research, and invalidation and destruction of research reports. No particulars were provided as to what specifically is alleged to have been done by each of RJRTC and JTI, who is alleged to have done these things, and when such actions were taken. Ontario ought to provide full particulars when making such serious allegations.

Paragraphs 74 and 75

Ontario refers to particulars allegedly provided in paragraph 72. As noted, paragraph 72 is deficient and fails to provide particulars. Ontario's response similarly fails to provide particulars of the alleged misrepresentations made by each of the Direct Breach Defendants. The allegations that the Direct Breach Defendants "misinformed the public in Ontario" and "participated in a misleading campaign" are similarly deficient and require particularization to enable JTI and RJRTC to respond.

82 The foregoing items were the basis for the argument before me with respect to just these four of the 151 paragraphs of the Province's pleading.

XI. Issues and the Law

Particulars Generally

83 It is asserted on behalf of some of the defendants that the allegations for which particulars are sought are,

> ...clearly within the category of bald and vague allegations. The Claim is so broad as to amount to an indictment of all of activities of each of the Defendants over 60 years, in alleging that they all conspired to downplay or deny the risks of smoking. The Claim takes issue with the design, manufacturing, and marketing of each of the Defendants over the past 60 years. Even if a particular Defendant had ready knowledge of all of its activities, it is impossible to tell from the pleading which of these acts Ontario alleges constituted conduct in furtherance of a conspiracy or as part of a strategy to misrepresent to the people of Ontario.

84 While recognizing the need for defendants to understand the case they have to meet, the Courts take a realistic and pragmatic approach when considering whether to order particulars. Especially when the claim is complex applications by defendants are often refused:

> "...the case made against them at the pleadings stage, the court must also recognize that not every claim is capable of being pleaded with the same degree of particularity and, that subsequent stages in the litigation process may also function to clarify and narrow the issues. Discovery should not be seen as a substitute for particulars, but nor should a demand for particulars be used to compel a Plaintiff to disclose evidence or the legal nature of its argument." [see *Wesley v Alberta*, 2009 ABQB 418 at para 23, and *Six Nations of the Grand River Band v Canada (Attorney General)*, [2000] OJ No 1431 at para 7 (Div Ct)]

85 Moreover a court should not order a party to provide particulars that are in the nature of evidence because to do so would offend Rule 25.06(1) which provides that pleadings are not to include evidence.

86 As in these motions, in New Brunswick's parallel action, the foreign defendants did not file affidavit evidence to support their motions for further and better particulars. In dismissing their motions, in reasons found at *New Brunswick v. Rothmans Inc.*, 2012 NBQB 230 (N.B. Q.B.) at paras 36-37, 39-40, Plaintiff's Cyr J. of the Court of Queen's Bench of New Brunswick stated:

> The Province provided extensive Statements of Particulars in response to their Demand for Particulars. These defendants now allege that they are unable to present a Statement of Defence.
>
> They did not provide the court with an affidavit confirming that the particulars are necessary and not within the knowledge of each defendant.
>
> [...]

> In the absence of appropriate affidavit evidence in support of these motions and in light of the aforementioned information, I cannot help but infer that each moving party is not in a position to demonstrate that further particulars are necessary for the purpose of pleading and that some of the information contained in the Province's pleadings, particularly as it relates to their respective corporate history, are not within the knowledge of the party asking them.
>
> These defendants leave me with no factual information supporting their respective motions other than the pleadings themselves. A review of the comparative pleading charts, provided to me at the hearing of the motions, leads me to the conclusion that the defendants have been furnished with adequate pleadings and that the orders they In Manitoba's parallel action, the defendants again brought motions for further and better particulars without affidavit evidence.

87 In *Manitoba v. Rothmans, Benson & Hedges Inc.* (as in this case), where adequate pleadings and additional particulars were provided, the defendants' failure to file affidavit evidence was considered decisive:

> In a situation like that of the present case - where the pleadings are already adequate on their face and not violative of any rules - and where additional particulars have further supplemented the allegations pled in the claim, the absence of additional affidavit evidence explaining why the defendants cannot plead is potentially determinative. This is no less so in a case where the Province has reasonably asserted that some of the information is "within the knowledge of" the defendants. In such circumstances, part of the discharging of the onus may involve explaining why in fact, notwithstanding the inferences the court might reasonably be inclined to draw about knowledge, it is not reasonable in the circumstances to assume such knowledge on the part of the party in question. [*Manitoba v Rothmans*, 2014 MBQB 160 at para 66**,]**

88 While the defendants' failure to file affidavit evidence should, in and of itself be fatal to these motions, their argument that they require particulars in order to defend *this* action seems somewhat disingenuous given that they have in fact defended similar actions in other jurisdictions. The courts have in fact recognized that this is a relevant factor on a motion for particulars. For example 20 years ago, in *Caputo v. Imperial Tobacco Ltd.*, [1996] O.J. No. 1396 (Ont. Master) *at para 9*, a proposed class action brought by smokers against Imperial, RBH and the predecessor of JTI-MacDonald, this Court found:

> [i]t would, however, be closing one's eyes not to realize ... the fact that the defendants are large sophisticated corporations and that similar issues have been litigated before in the United States of America if not elsewhere in actions to which the defendants' associates have been parties.

Allegations of Conspiracy and Misrepresentation

89 The defendants argue that Ontario's allegations of conspiracy and misrepresentation must be particularized. In particular, they submit that the *Act* does not alter the need for, or the requirements of, the Rules as they pertain to this proceeding, or the requirements for pleading as set out in the common law:

> Whether Ontario's claim is framed in statute or common law, it must be properly pleaded with sufficient material facts.

90 They further argue that the allegations of conspiracy do not meet the minimum level of material fact disclosure required. Specifically they point out that the Court of Appeal *in Ontario v. Rothmans Inc.* (2013), 115 O.R. (3d) 561 (Ont. C.A.), 48. confirmed that Ontario's claim is, "in substance, a conspiracy claim" and that "all of the considerations that apply to the common law tort of conspiracy apply to the statutory tort as well":

39. Cutting to the core of the statutory framework then, Ontario's claim in this action is founded on the common law tort of conspiracy - a conspiracy alleged in this instance to have been committed in Ontario because the damage flowing from the conspiracy was, and is, sustained in Ontario.

45. Here, all of the considerations that apply to the common law tort of conspiracy apply to the statutory tort claim created by the legislature. If a tort committed in Ontario is a presumptive factor entitling Ontario to assume jurisdiction over a dispute, a statutory tort with all of the same trappings, committed in Ontario, should be one too.

91 The defendants also assert that a pleading that does not distinguish amongst several defendants is clearly improper. In this regard they rely upon a judgment of Justice Strathy (as he then was) in *Cerqueira v. Ontario*, [2010] O.J. No. 3037 (Ont. S.C.J.) where he noted:

It is also impermissible for the plaintiffs to lump the defendants together with broad allegations. Each defendant is entitled to know the specific complaints made against it and is entitled to particulars of the acts or omissions which are claimed to support the cause of action.

92 However, I find that case distinguishable from the present matter. There the headnote in part, describes the pleading involved as:

"a jumble of complaints, some of which were recognized by law, and some that were not. It was almost impossible for the defendants to do anything other than statements about the nature, the plaintiffs complaints against them. The defendants were not required to guess. They were entitled to know the case they have to meet.

93 In my view, that description is very far from the case here. Nevertheless some further degree of identification may be appropriate.

94 In the factum filed on behalf of R.J. Reynolds group these specific concerns were raised:

50. Ontario alleges three distinct sets of conspiracies, but fails to plead sufficient material facts with the particularity required to support some of its conspiracy claims. In particular, Ontario fails to:

(a) plead the material facts concerning any agreement to conspire;

(b) plead who is alleged to have conspired with whom; and

(c) identify the overt acts alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy.

51. An example of Ontario's deficient pleading can be found at paragraphs 128 and 129 of the Claim, in which Ontario alleges that the members of the RJR Group entered into a conspiracy and continued that conspiracy "at or through committees, conferences and meetings ... and through written and oral directives and communications amongst the RJR Group members". The Claim fails to plead any material facts explaining how the coordination of policies within a Group is unlawful.

52. The plaintiffs are not entitled to plead a deficient case in conspiracy on the theory that more detailed evidence of the claim will arise from discovery. The "plaintiff cannot go on a fishing expedition at discovery to gather the facts to make a proper plea"

Research Capital Corp. v. Skyservice Airlines Inc., [2008] O.J. No. 2526 (S.C.J.) at para. 23, var'd on other grounds, 2009 ONCA 418

53. It is essential that the Defendants clearly know the case they have to meet and that the pleading complies with the law and meets the minimum criteria for pleading the various causes of action Ontario proposes to advance. This

is particularly so in a claim of this importance and significance for the parties, brought by a sophisticated litigant. Here, the question of "who did what to whom and when" cannot be discerned from the Claim, which does not permit the Defendants to know the case to be met. Whether the Claim is based in common law conspiracy or statutory conspiracy, it must be pleaded sufficiently for each Defendant to know the acts in which it is alleged to have engaged.

D. G. Jewelry Inc. v. Cyberdiam Canada Ltd., [2002] O.J. No. 1465 (H.C.J.), at para. 51;"

95 Ontario responds to these submissions by noting that pleadings involving allegations of conspiracy are treated more leniently at the early stages of the proceedings due to the secretive nature of conspiratorial conduct. To this end, courts are careful to avoid applying an "extraordinary standard" to conspiracy pleadings before the plaintiff has had an opportunity to ascertain further details of the alleged conspiracy at discoveries. *In North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993 (Ont. Gen. Div.) Justice Cumming observed at para 22:

> In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlying agreement bringing the conspirators together, proof of which is a requirement borne by a plaintiff, often must be proven by indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the conspirators from which the prior agreement can be logically inferred. Such details would not usually be available to a plaintiff until discoveries. These considerations and the general theme of [*Hunt v Carey*, [1990] 2 S.C.R., 959], instructing courts not to shy away from difficult litigation, also militate against holding pleadings in civil conspiracy cases to an extraordinary standard.
>
> [emphasis added]

96 The plaintiff asserts that this same standard should be applied to the Crown's pleading of conspiracy for the purpose of establishing joint liability under the *Act*. It is submitted that the Claim sufficiently particularizes all of the necessary elements of the claim of joint liability:

> (a) the Direct Breach Defendants committed tobacco related wrongs, *inter alia*, by breaching common law and statutory duties owed to persons in Ontario not to fraudulently or negligently misrepresent the adverse effects of smoking and exposure to cigarette smoke on health *[Claim, paras 71-77]*; and,
>
> (b) all of the defendants entered into a number of interrelated conspiracies or concerted actions for the purpose of breaching these common law and statutory duties. Specifically, the Claim pleads:
>
> > (i) that the defendants entered into agreements to commit these breaches *[Claim, paras 86-88, 92-96, 99-100, 108, 110-111, 150]*;
> >
> > (ii) that the purpose of the agreements was to fraudulently or negligently misrepresent the effects of smoking and exposure to cigarette smoke on health *[Claim, paras 87, 92-94, 96-97, 99, 101, 105-106, 108]*;
> >
> > (iii) that the overt acts committed by the defendants were the breaches of duty committed by the Direct Breach Defendants *[Claim, paras 86, 88, 99, 114 150]*; and,
> >
> > (iv) that as a result of these tobacco related wrongs committed jointly by the defendants, persons in Ontario suffered tobacco related disease and the Crown incurred the cost of health care benefits caused by these tobacco related wrongs *[Claim, paras 77, 147-150]*.

97 In this area I am inclined in large measure to accept the Crown's position as the more reasonable one in all the circumstances.

Misrepresentation / Suppression of Information

98 As detailed in the chart extract set out in Section X of these reasons, the defendants seek further particulars of paragraphs 71 to 75 which contain allegations that the defendants misrepresented the risks of smoking and exposure to second hand smoke and that they suppressed scientific and medical data within their knowledge about the risks of smoking and exposure to second hand smoke.

99 In addition, members of the Rothmans and Philip Morris groups independently seek particulars of paragraph 67 of the Claim and Ontario's assertion that the defendants took "public positions" that amounted to claims that cigarette health warnings were not justified so that the public ought not to pay heed to them, thereby neutralizing or negating the effectiveness of such warnings. They assert:

> 14. These are serious allegations made against the defendants generally, without any distinction among the defendants or particulars of the alleged conduct. RBH and PM are entitled to know - and must know in order to meaningfully respond - when, where, by whom and in what form these alleged "public positions" were taken, including the precise words spoken or written, and how such communications served to neutralize or negate the effectiveness of the warnings.

100 I do not accept that they "must know" in order to plead and rather accept that the Crown by the Claim and particulars it has already provided, sufficient material facts in respect of the allegations of misrepresentation and suppression have been provided. For example, paragraph 71 of the Claim sets out the nature of the misrepresentations made by the Direct Breach Defendants, paragraph 72 alleges the ways in which the Direct Breach Defendants have collectively made these misrepresentations, and paragraphs 72.1 to 72.5 contain details of how each Direct Breach Defendant specifically made the alleged misrepresentations.

101 Moreover, the Crown's response to the Demands of paragraphs 71 to 75 of the Claim provides additional particulars:

> • *Misrepresenting the Dangers of Smoking and Second Hand Smoke:* dates and titles of position papers and other public statements made to federal government ministers (identified by name and year), and in national media (i.e., The Globe and Mail newspaper) by CTMC on behalf of the defendants denying or creating ambiguity about the health risks of smoking and the addictive qualities of nicotine; that the scientific and medical findings the defendants funded at Harrogate, U.K in 1965 and 1966 include the possibility that nicotine may be cause cardiovascular disease; and, that the total embargo of research the defendants participated in related to research into the pharmacology of nicotine; and,
>
> • *Suppression of Information:* information concealed by the defendants includes scientific and medical research projects and findings conducted by the defendants (identified by year and project description) establishing a link between smoking and disease and the addictive nature of smoking and cigarettes; when and where the defendants agreed to conceal all information which confirmed scientific work on the carcinogenicity of tobacco smoke condensate, and to avoid reference to nicotine, nicotine dependence and nicotine pharmacology in the development of research proposals; information was concealed from the public, governments, news and information media.

102 The Defendant Imperial Tobacco Canada Limited specifically moves with respect to portions of the claim directed to alleged manipulation of scientific research results. Imperial seeks further particulars of paragraph 145(a)(i)-(iv) regarding the allegations that it manipulated the levels and bio-availability of nicotine in its cigarettes. The Crown provided substantial particulars about these allegations in its response to the Demands in respect of paragraphs 57 and 59 of the Claim.

103 The province's factum however asserts:

> 71. Although the defendants treated the information about their manipulation and "special blending" techniques as extremely confidential and highly proprietary, the Crown provided particulars identifying the years when the

defendants manipulated the level and bio-availability of nicotine in cigarettes, details of experiments conducted by the Direct Breach Defendants, including how to add nicotine salts to increase nicotine delivery, how to add free nicotine to filters, how to manipulate the nicotine/tar ratio, and how to treat cigarettes with high levels of ammonia vapour, as well as how such information and technology was shared among the defendants.

72. The precise manner in which these experiments were conducted and the specific products for which they were conducted is strictly within the defendants' knowledge. If Imperial denies engaging in any aspect of the alleged conduct they can so plead in their defence, and no further particulars are required for them to do so.

104 I agree that no further particulars need be provided to Imperial in this regard.

105 In my opinion the further details of the case the defendants seek with respect to misrepresentation and the suppression of information is evidence. In a case of this nature, involving numerous defendants and alleged breaches of duty spanning a lengthy period of time, it would be unreasonable to require the Crown to particularize further when, where, how, by whom and to whom each misrepresentation was made beyond what has already been provided in the Claim and the particulars provided.

106 In particular I note that Justice C.T. Hackland accepted this position in *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2013 ONSC 3224 (Ont. S.C.J.) where it was held that, in a case alleging widespread and numerous false or misleading representations to the public under the *Competition Act*, the Commissioner was not required under Rule 25.06(8) to plead details of each and every misrepresentation, including "when, where, how, by whom and to whom it was made." According to the Court: "what is required is a full description of the alleged deceptive marketing practice. The details of each representation are more properly characterized as evidence."

107 I ultimately find apt the Crown's assertion in this regard:

48. Contrary to the RJR defendants' assertion that the Crown is required to establish specific breaches of duty committed by specific defendants, the Crown is entitled to allege, as it has, that the defendants breached the duty not to misrepresent and conceal the risks of smoking and second hand smoke known to them over the entire period of the Claim; and, that all of their marketing, advertising and promotion of cigarettes over this entire period was in breach of these duties. The RJR defendants may not like that the claim is an "indictment of all of [sic] activities of defendants over 60 years". However this is not a valid objection to the Crown's pleading.

Need to Distinguish Between Specific Defendants

108 The defendants complain that the Claim repeatedly lumps the Defendants together - sometimes in smaller groups, identified as the "Lead Companies" or the "Direct Breach Defendants", for example, and sometimes altogether - and alleges that they engaged in breaches and wrongful acts. When the Defendants are lumped into such groups, the Claim lacks any specificity about how each Defendant falls within the group. They point to a decision the of Court of Queen's Bench of Alberta which stated in *Bank of Montreal v. Cochrane*, 2010 ABQB 545 (Alta. Q.B.), "each defendant is entitled to the answer to the question, 'What did I do?'"

109 In the factum of the Reynolds group it is asserted:

63. For example, paragraph 88 of the Claim makes undifferentiated claims of conspiracy against at least four Defendants, whom Ontario allege were acting on behalf of the other Defendants in their "Groups". Similarly, in paragraph 106 of the Claim, Ontario makes allegations of coordinated action regarding second hand smoke against the Lead Companies, but makes no effort to differentiate among the Defendants. Ontario may allege that all of these Defendants were involved in a conspiracy, but it cannot be that each of the Defendants is alleged to have done the exact same things in furtherance of that conspiracy.

64. The Claim also makes general, very serious allegations against RJR TC, RJR TI, and JTI without distinguishing between the Defendants or providing details, such as in paragraph 133.3 of the Claim, which alleges that these Defendants removed and destroyed smoking and health materials. Such significant allegations, in particular, necessitate clarity and specificity for these Defendants to respond.

65. In paragraphs 91 (e) and 92 of the Claim, Ontario makes allegations of misrepresentation and conspiracy against the Lead Companies. In response to the Demand for Particulars in respect of these paragraphs, Ontario provided details about its allegations in respect of the CTMC. However, RJRTC and RJRTI are not, and have never been, members of the CTMC. Moreover, in respect of paragraph 91(e), it is unclear whether the allegation that misrepresentations were made to "the national press and news organizations in Canada" were made only by the CTMC or also by the individual Defendants.

66. Where a plaintiff "lumps all the defendants together and fails to particularize the claim against each individual in their claim for conspiracy", as Ontario has done numerous times throughout this Claim, the minimum level of material fact disclosure has not been met. This principle was recently affirmed by Justice Horkins in *Martin v. Astrazeneca*, [[2012] O.J. No.2033, affd [2013] O.J. No. 1182 (Div. Ct.)]; who considered a pleading of conspiracy as against a number of defendants within the same corporate group, and held as follows:

> "176. Paragraph 37 of the statement of claim provides a long list of the overt acts that the defendants are alleged to have done. However, these acts are alleged against the defendants as a group. The group enterprise approach continues through the statement of claim into the conspiracy cause of action. The overt acts are not attributed to any particular defendant. It is not possible for a specific defendant to know from the statement of claim what it is alleged to have been done as part of the conspiracy. Rather, all of the defendants are simply lumped into the general allegation that they committed the list of overt acts in furtherance of the conspiracy. This "group" approach does not satisfy the degree of specificity that is required for a conspiracy claim....

67. An order directing Ontario to provide the particulars sought will allow each of RJRTC, RJR TI and JTI to plead and serve to narrow the scope of document production and questioning, which are important considerations in light of the expensive, broad reaching, and statutory nature of Ontario's claim. A more particularized claim will result in a more efficient proceeding. Given that the scope of examinations for discovery and the production of documents are defined by the issues raised in the pleadings, particularized pleadings ensure that questioning is confined to relevant issues and prevent a fishing expedition.

110 In the portions of its factum the Plaintiff addresses these concerns as follows:

75. It is not the Crown who has 'lumped all of the defendants together', but the defendants themselves who have aligned themselves together in a common front to prevent the public from being fully informed as to the risks of smoking, which were well known to the defendants. As this Court has held in an analogous case:

> "In my view, the plaintiff's pleading is such that the moving party defendants can plead a response to the allegations at hand. They must necessarily know full well whether or not they are participants in the alleged conspiracy and engaged in the alleged actions constituting the claimed wrongdoings. The defendants must have knowledge of such particulars if the allegations are true. If they are untrue, the time has come to deny them in a statement of defence and for the parties to move forward to discovery."
>
> *Holden v Infolink Technologies Ltd*, [2006] OJ No 638 at para 63 (Sup Ct),
>
> *Spasic Estate v Imperial Tobacco*, [2003] OJ No 824 at para 30 (Sup Ct),

76. The Claim provides sufficient particulars for the defendants to know what is being alleged against them by asserting whether specific allegations relate to either all of the defendants, the defendants in a specific Group of companies, the Lead Companies of specific Groups or the Direct Breach Defendants.

The names assigned to the various subgroups of defendants throughout the Claim are not ambiguous, but are sufficiently identified in the Claim. "**Groups**" refers to the four multinational tobacco enterprises; namely, (a) the Rothmans Group; (b) the Philip Morris Group; (c) the RJR Group; and, (d) the BAT Group; "**Lead Companies**", which is a defined term in the Claim, refers to the defendants within each Group; and "**Direct Breach Defendants**" refers to the defendants who have engaged directly or indirectly in the manufacture and promotion of cigarettes sold in Ontario. The Claim also specifies how each defendant falls within each group and the time period when the defendant was in each group based on their date of incorporation.

77. Moreover, paragraph 86 of the Claim makes it clear that all the defendants are alleged to have conspired or acted in concert to commit the tobacco related wrongs set out in paragraphs 45 to 85 and paragraphs 142 to 147 of the Claim. The Claim also provides additional material facts in relation to the defendants' respective participation in the interrelated conspiracies.

111 In the portion of the factum dealing with allegations of conspiracy the plaintiff provides further clarifications of its position:

51. The Claim also provides material facts about the intra-group conspiracy for each of the four corporate groups including the policies developed and coordinated by each group to misrepresent and conceal the risks of smoking, the time periods when the policies were developed, and direction given within the groups with respect to the role of the defendants in implementing these policies in Canada and internationally by attending and voting at meetings of the CTMC, ICOSI and its successor organizations. These material facts are asserted in the Claim for each corporate group as follows: The Rothmans Group (paragraphs 117-120); The Philip Morris Group (paragraphs 121-127); The RJR Group (paragraphs 128-134) and the BAT Group (paragraphs 135-141).

52. Besides the allegations in the Claim, the particulars provided by the Crown set out additional facts about the defendants' concert of action, such as, when and until what time the defendants established common policies, the companies with which the policies were shared, the means by which the policies were implemented and the defendants who conspired and acted in concert to commit the breaches of duty. The Crown also provided supplementary particulars specific to the concert of action within the Canadian and International tobacco industries:

- Canadian Tobacco Industry: the formation of the CTMC by the defendants and the specific activities of the CTMC on behalf of and as directed by the defendants to carry out the conspiracy and concert of action in Canada, including identifying the members of the CTMC from amongst the defendants at specific time periods, dates and location of CTMC meetings, dates and names of CTMC position papers, specific research funded by the CTMC, lobbying efforts in Canada to avoid anti-smoking initiatives and warnings [Response to Demands, Schedule "A"]; and,

- International Tobacco Industry: the formation of ICOSI through "Operation Berkshire" in 1976 and its successor organizations INFOTAB and TDC and the specific activities of these organizations on behalf of and as directed by the defendants to carry out the conspiracy and concert of action internationally, including identifying the involvement of the Lead Companies; the connection to and overlap with the policies of the CTMC; the "Issues Binders" prepared by ICOSI for its members; dates, location and topics of discussion of ICOSI and INFOTAB meetings that were attended by the CTMC

53. The Crown submits that the allegation that the defendants participated in a conspiracy or acted in concert to commit the alleged breaches of duties is not a case of a single agreement to commit a single act. This is a case where the defendants adopted in common and carried out over a number of decades the objective of keeping from the

public, as long as possible, the information known to the defendants about the risks of smoking and second hand smoke.

54. As stated by the court in *Spasic Estate v Imperial Tobacco Ltd.*, [[2003] OJ No 824 at para 30] "[t]he defendants [...] must have knowledge of such particulars if the allegations are true. If they are untrue, the time has come to deny them in a statement of defence." Similarly, in the present case, the time has come for the defendants to either admit or deny that they conspired and acted in concert in committing the tobacco related wrongs alleged in paragraphs 48 to 85 and 142 to 147 of the Claim.

112 Following the argument of this motion I was inclined to hold that sufficient particulars in this regard had been provided and that the time has certainly come for the defendants to either admit or deny that they conspired and acted in concert in committing the tobacco related wrongs alleged. However I have now had the advantage of considering as well the decisions on two more senior jurists who addressed these issues. I will address my resulting determination after dealing with a few remaining specific issues.

XII. Agents and Successors

113 By virtue of the provisions of section 4 of the *Act* the defendants have sought to clarify a number of issues with respect to their internal and external relationships. While it was still for the crown to prove the various connections. I am satisfied for the most part that there have already been sufficient particulars provided in these areas.

114 With respect to the agency relationships, I accept the submission on behalf of the plaintiff that:

55. An agency relationship may arise from an agency agreement, the implied conduct of the parties or even by subsequent ratification of the agent's conduct by the principal. Whether an agency relationship exists in a specific factual context is a matter of law which requires the support of material facts.

Gardiner et al v The Queen in right of Ontario et al, [1984] OJ No 3162 at para 21

Ontario College of Pharmacists v 1724665 Ontario Inc (cob Global Pharmacy Canada), 2013 ONSC 4295 at paras 98-102,

Durling v Sunrise Propane Energy Group Inc, 2012 ONSC 4196 at para 78,

GHL Fridman, *Canadian Agency Law, 1st ed* (Markham: LexisNexis, 2009) at p 33-34

115 In this regard, I adopt as well these portions of the crown's factum

56. Reading the Claim and supplementary particulars as a whole, the Crown submits that the material facts alleged are sufficient to establish an agency relationship between the CTMC and the defendants, as well as between Brown & Williamson Tobacco Corporation ("Brown and Williamson") and British American Tobacco (Investments) Limited ("Investments").

Border Enterprises Ltd v Beazer East Inc, 2001 BCSC 17 at paras 20-21, var'd on other grounds 2002 BCCA 449,

Ontario College of Pharmacists v 1724665 Ontario Inc (cob Global Pharmacy Canada), 2013 ONSC 4295 at paras 100 and 102,

57. Paragraphs 112 to 115 of the Claim allege that the CTMC acted as an agent on behalf of the Canadian Tobacco Company Defendants. Specifically, paragraph 114(a)-(o) details, inter alia, CTMC's efforts to lobby governments and regulatory agencies, disseminate false and misleading information, suppress research regarding the risks of addiction and disease caused by smoking, and to participate in public relations programs with the aim of promoting cigarettes.

58. Schedule "A" of the supplementary particulars provides further extensive details of the CTMC's actions on behalf of and as an agent for the defendants. The details in the Schedule include an overview of the CTMC's activities and objectives since the 1950s, what the CTMC knew or ought to have known with respect to the adverse health effects caused by smoking, details of third party research funded and sponsored by the CTMC, including particular dates, reports and researchers, lobbying efforts by the CTMC and its collaboration with TIRC and ICOSI, and the CTMC's public relations campaigns and public statements denying the health risks of smoking.

59. As for the agency relationship between Brown & Williamson and Investments, the Crown has pleaded sufficient material facts of this relationship. Particulars of the agency relationship between Brown & Williamson and Investments appear both throughout the Claim and in the Crown's response to the Demands. The Claim asserts at paragraph 47 that Brown & Williamson was a member of the BAT Group from 1927 to 2004. In addition, at paragraphs 88 and 94, the Crown alleges that Brown & Williamson acted as agent for Investments at meetings it attended on behalf of and as directed by Investments in developing a public relations campaign to undermine medical reports by the Royal College of Physicians in England, the Surgeon General in the United States, and the Canadian Medical Association, with the intention of misleading smokers.

60. Additionally, the Crown's particulars assert that Brown & Williamson is owned by British American Tobacco p.l.c., the agreement between Brown & Williamson and Investments was reached in April and September 1963, both orally and in writing, and the public relations campaign developed by Brown & Williamson as agent for Investments has been ongoing.

116 I accept as well, the crown's submission that the pleading of an agency relationship between the CTMC and the Canadian Tobacco Company Defendants, and between Brown & Williamson and Investments is more than a legal conclusion. The Crown has pleaded sufficient material facts so that the defendants are capable of admitting or denying the allegations of agency. Additional particulars are not needed to plead, are within the defendants' knowledge, and are in the nature of evidence.

Successor Liability

117 A successful pleading of successor liability turns on whether the claim establishes the basis for responsibility assumed by the successor corporation.

Manitoba v. Rothmans, Benson & Hedges Inc., 2014 MBQB 160 (Man. Q.B.) at paras 72 and 74,

New Brunswick v. Rothmans Inc., 2010 NBQB 381 (N.B. Q.B.) at paras 102-118

118 In response to the claims of successor liability with respect to some defendants and in this case specifically the defendant British American Tobacco P.L.C., the plaintiff asserts:

63. BAT p.l.c. narrowly focuses on paragraph 135 of the Claim to argue that the Claim does not plead any basis to support allegations that it is the successor in liability for the conduct of Investments and B.A.T. Industries p.l.c ("Industries"). The Crown's allegation that BAT p.l.c. and B.A.T. Industries p.l.c. are successors in interest and are responsible for the conduct of their predecessors is set out in detail in paragraphs 135 to 141 of the Claim, and in the responses provided to the Demands of paragraphs 17, 18 and 20.

64. In addition, the Crown provided particulars in response to the Demands supporting allegations that BAT p.l.c. is liable for the actions of Investments and Industries, and that Industries is liable for the actions of Investments. In response to the demands made of paragraphs 17, 18 and 20, the Crown's response in part was:

> In addition, since 1998, BAT plc has held itself out as the "ultimate parent" of the BAT Group. Since at least 1950 the ultimate parent of the BAT Group has controlled and directed the BAT Group's policy on smoking and health, engaged and influenced the industry as a whole in a common purpose, and has had control over ITCL

and substantial influence over the CTMC. Initially, the ultimate parent of the BAT Group was Investments. From 1976 to 1998, Industries was the ultimate parent with the core business "tobacco division" controlled and directed by both Industries and Investments. ITCL, known as Imasco during this time, reported directly to Industries. In 1997-1998, BAT plc became the ultimate parent for the BAT Group, and remains the ultimate parent.

The ultimate parent of the BAT Group, whether Investments, Industries or BAT plc, has controlled and directed the BAT subsidiaries and associated companies, including ITCL, with respect to the manufacture and promotion of their cigarettes, and their positions and policies on smoking, and exposure to cigarette smoke and health, as pleaded in the FSOC.[....]

There has been, and continues to be, central coordination of the BAT Group's international strategy, and an uninterrupted and absolute continuity of control, management and purpose of BAT Group policies on smoking and health issues through BAT plc.

65. Paragraphs 135-141 of the Claim and the particulars provided assert all the material facts required by BAT p.l.c. and Industries to respond to the Claim, and to admit or deny that they are successors in liability.

119 I agree with and adopt this assertion.

XIII. Fourth Hand Smoke?

120 It is my understanding that since this action was commenced in 2009, Ontario has responded to a number of objections regarding the sufficiency of its pleading. The plaintiff's factum asserted:

"Ontario's experience in responding to multiple procedural motions brought by the defendants has been mirrored in other provinces bringing similar actions based on an identical statute, namely British Columbia, New Brunswick and Manitoba. In all three provinces, some of the foreign defendants similarly moved unsuccessfully to set aside service *ex juris* of the statement of claim on the basis that the courts did not have jurisdiction *simpliciter* over them. In New Brunswick and Manitoba specifically, the defendants demanded extensive particulars. Each of New Brunswick and Manitoba responded to the demands by amending the Claim (in the case of Manitoba) and by providing comprehensive particulars. Despite this, the defendants persisted in unsuccessfully moving for further particulars on the same grounds they advance in these motions against Ontario.

Manitoba

121 During the course of the argument before me. I was referred to the 2014 decision of Chief Justice Joyal in *Manitoba v. Rothmans, Benson & Hedges Inc.*, (*supra*) at the outset of his reasons he described the matter before him:

1 The defendants bring a motion seeking an order for further and better particulars of the allegations contained in certain identified paragraphs of the plaintiff's amended statement of claim. In the alternative, the defendants seek an order that the allegations of deceit, misrepresentation and conspiracy in the claim be struck on the grounds that they fail to disclose a reasonable cause of action.

2 This motion arises in the context of an action brought by the plaintiff, Her Majesty the Queen in Right of the Province of Manitoba (hereinafter "the Province"), in which the Province seeks to recover health care costs incurred as a result of tobacco-related wrongs allegedly committed by the identified defendant tobacco manufacturers. The action is brought pursuant to *The Tobacco Damages and Health Care Costs Recovery Act*, C.C.S.M. c. T70 (the "*Recovery Act*").

3 The Province contends that its claim is already comprehensive and particularized. The defendants all disagree and had served on the Province, extensive requests for particulars. Despite what the Province calls its "comprehensive responses" to each of the requests for particulars, the defendants now bring this motion.

4 Given the positions and the submissions of the parties, the issues on this motion are reduced to two questions:

(1) Should this court exercise its discretion in favour of ordering the Province to provide "full and further" or "full and complete" particulars?

(2) In the alternative, should this court strike the allegations of deceit, misrepresentation and conspiracy on the basis that the allegations "fail to disclose a reasonable cause of action"?

122 He determined:

VII. DISPOSITION

83 In the result, the defendants' motions for further particulars are dismissed. The defendants' motions to strike paragraphs of the amended statement of claim are similarly dismissed.

84 The Province will have its costs. In my view, there is an inadequate basis so as to justify an award of costs to the Province on a solicitor/client basis.

Alberta

123 In January of 2015 Justice Jo'Anne Strekaf of the Alberta Court of Queen's Bench heard a similarly constituted motion. Her reasons which were released while my decision was still under reserve are found in *Alberta v. Altria Group, Inc.* at 2015 ABQB 390, [2015] A.J. No. 702 (Alta. Q.B.).

124 Her judgment opens

1 This action is a claim by the Province of Alberta ("the Crown") under the *Crown's Right of Recovery Act*, SA, c C-35 [CRRA] against 14 tobacco companies: Altria Group, Inc.; B.A.T. Indus-tries P.L.C.; British American Tobacco (Investments) Limited; British American Tobacco P.L.C.; Canadian Tobacco Manufacturers Council; Carreras Rothmans Limited; Imperial Tobacco Canada Limited; JTI-Macdonald Corp.; Phillip Morris International, Inc.; Phillip Morris USA, Inc.; R.J. Reynolds Tobacco Company; R.J. Reynolds Tobacco International, Inc.; Rothmans Benson & Hedges Inc.; and Rothmans Inc. ("the Defendants"). The Crown seeks damages of $10 billion to recover the cost of health services caused or contributed to by a "tobacco-related wrong" ("TRW") as defined in the CRRA.

2 The issue to be decided on these applications is whether the Crown should be directed to provide some, none, or all of the particulars sought by the Defendants at this stage of the proceedings.

125 She delivered reasons containing 101 paragraphs and allowed a small amount of particulars:

VII. Conclusion

98 In summary, the Plaintiffs are directed to provide the following particulars to the extent of their current knowledge:

1. To clarify whether the "predecessors, parents, affiliates or related companies" referred to in the Statement of Claim are limited to the entities identified in the Statement of Claim and, if not, to identify any additional entities and the nature of their relationship to particular named Defendants;

2. To provide details regarding the alleged misrepresentations made the Defendants including what was said, when, where, how, by whom and to whom; and

3. To clarify which entities are alleged to have been in principal-agent relationships, to the extent not already specified.

99 The Plaintiffs are not required to provide any further particulars sought by the Defendants prior to filing their Statements of Defence, exchanging Affidavits of Records and commencing the initial rounds of questioning.

100 This is a large and complex case. Success on this application was divided. In the circumstances, each of the parties shall bear their own costs of this application.

Newfoundland and Labrador

126 Very recently W.H. Goodridge J. of the Newfoundland and Labrador Supreme Court released his 48 paragraph reasons in *Newfoundland and Labrador (Attorney General) v. Rothmans Inc.*, 2015 NLTD(G) 191 (N.L. T.D.) which commenced:

1 The Defendants are applying for better particulars of various paragraphs of the Statement of Claim, or alternatively, striking those paragraphs that lack sufficient particulars.

2 On February 8, 2011 the Statement of Claim was filed by the Province of Newfoundland and Labrador (Attorney General) seeking recovery of the cost of health care services caused or contributed to by a "tobacco related wrong".1 It is a statutory claim based on ***Tobacco Health Care Costs Recovery Act***, S.N.L. 2001, c. T-4.2. Pursuant to section 4(1) of that *Act* the Province has "a direct and distinct action against a manufacturer to recover the cost of health care services caused or contributed to by a tobacco related wrong." No defences have yet been filed. The Defendants want better particulars before filing their defences.

3 In July 2014 the Defendants served the Province with formal demands for better particulars and on November 17, 2014 the Province provided its responses. The Defendants were not satisfied with the adequacy of these responses. On January 16, 2015 the Defendants filed applications (the subject of this current decision) for further and better particulars. On January 21, 2015, the Province filed an Amended Statement of Claim, which added some of the further particulars sought by the Defendants.

ISSUES

4 The issues arising from the Defendants' applications can be addressed by answering two questions:

- Does the Province's Amended Statement of Claim, as supplemented by the existing responses to demands for particulars, contain adequate particulars?

- Should the Province be ordered to deliver further and better particulars in respect of any of the claims pleaded?

127 He concudes his reasons by also ordering limited particulars:

43 A perfect level of particularization of every overt act is not required at this stage of the pleadings, especially given the size and magnitude of this litigation. What has already been pleaded is adequate to allow the Defendants to understand the case against them and respond....

CONCLUSION

45 In considering a request for particulars in the context of complex litigation, the court must balance the interests favouring detailed particulars against the interests favouring reasonable file advancement. The Rules must be applied and interpreted in a reasonable and pragmatic manner, while preserving trial fairness. In this case the Amended Statement of Claim, and the responses to the initial demands for particulars, provided sufficient particularity to allow the Defendants to understand the case against them and respond. The proportionality principle (as discussed in *Szeto* [2010 NLCA 36]) leads me to the conclusion that the level of particularity sought

by the Defendants is unnecessary at this early stage of the litigation. Most of what was sought as particulars will be available as evidence during the document disclosure and discovery stages of the litigation.

46 In answering the questions asked under the "Issues" heading, I find that the Province's Amended Statement of Claim, as supplemented by the responses to the initial demands for particulars, is substantially compliant with the Rules. Minor deficiencies (absence of particulars) arise in only two areas. These minor deficiencies can be addressed by delivery of further particulars identifying 'predecessor' corporations and explaining the alleged principal and agent relationships. The Plaintiff shall provide the Defendants with further particulars, as follows:

- identify all entities intended to be included as "predecessors" for each Defendant;

- provide details of the principal and agent relationship among CTMC and the "Canadian Tobacco Companies" including: how the agency relation-ships were established, what terms governed these relationships, and when these relationships began and ended; and

- confirm that the term "agent" used in paragraphs 63.1(g), 93, 121, and 127.2 of the Amended Statement of Claim relates only to the parent/subsidiary relationship, and if that is not that case, then provide details of the principal and agent relationship.

47 Excepting for these three bullet points, all of other requests for particulars sought by the Defendants are rejected. The Defendants' requests to strike various paragraphs of the Amended Statement of Claim are also rejected.

COSTS

48 Pursuant to Rule 55.01 the costs of these interlocutory applications are costs in the cause.

XIV. Ontario

128 In coming to my conclusion I am satisfied that there is no reason to deviate in Ontario from the determinations that have already been made elsewhere

129 I adopt the reasoning and succinct conclusions reached most recently by Justice Goodridge. Ultimately I come back to proportionality and my seeking to secure the just, most expeditious and least expensive determination of all of these proceedings and in particular the Ontario action on the merits. I believe I have decided this case in accord with the approach set out my east coast colleague:

16 What may reasonably be required will vary with the complexity and type of the case. In complex litigation, such as this, a pragmatic approach should be adopted at the pleadings stage to ensure that the cases are not unduly delayed or prevented from proceeding to trial (see *Lameman v. Alberta*, 2013 ABCA 148at para. 29 and *Indian Residential Schools, Re*, 1999 ABQB 823at paras. 16-21). The Rules governing pleadings should be applied in a manner that promotes, rather than frustrates, the underlying purposes and objectives of the Rules as a whole. In *Szeto v. Dwyer*, 2010 NLCA 36the Court of Appeal implied that the level of detail in the pleadings or particulars may vary in proportion to the complexity and value of the claims advanced. At paragraph 54 of *Szeto* Green, C.J. stated that "in the exercise of discretion relating to the application of the rules, a judge ought always to consider proportionality to ensure that a party invokes and applies the rules in a sensible and reasonable manner."

17 In a statutory claim, like this one, the material facts and elements that must be pleaded by the Plaintiff are generally determined by reference to the legislation creating the cause of action, and not by reference to the common law.

130 I confess I was not entirely convinced on the Ontario motion of the need for the particulars ordered by my colleagues from the West and East. Nevertheless, judicial comity and practicality lead me to requiring a degree of further particulars in those areas for the Ontario action. I am therefore ordering that the plaintiff provide the limited particulars

ordered by Justice Strekaf at paragraphs 98 (1) & (3) of her reasons (reproduced above at paragraph [125]), and any additional information required by Justice Goodridge at paragraph 46 of his reasons (reproduced above at paragraph [127]).

131 With the exception of these items, all of other requests for particulars sought by the Defendants are rejected.

132 It may well be that Ontario can adopt the particulars already provided in those jurisdictions. In any event, I am requiring that Ontario provide these limited particulars within 90 days of the release of these reasons. I see no reason to delay the delivering of pleading in the interim.

XV. Moving Forward

133 The Defendants had sought, to have the impugned portions of the Amended Statement of Claim struck for failure to disclose a reasonable cause of action, in the alternative to an order for further and better particulars. Considering my findings above, this aspect of the application is dismissed.

134 I regret the delay that my individually having to address this complex matter may have caused. It is now time for the defendants to deliver their pleadings. They have had 6 years to circulate and consider drafts. I am therefore ordering that all defenses, cross-claims and counterclaims be served and delivered by March 31, 2016.

135 I expect the parties to negotiate and promptly deliver a Discovery Plan in accord with Rule 29.1. I am available for case conferences to assist in any way the expedition of a result in this important dispute.

XVI. Costs

136 It would seem the only meaningful item on this quadruplet set of motions where there is not virtual unanimity is the appropriate cost disposition.

137 It seems to me that there are enough defendants and sufficient grounds to see Ontario indemnified for its costs of this motion on a substantial indemnity basis with the payment of those costs to be apportioned amongst the defendants as they see fit.

138 I am therefore ordering one set of costs on a substantial indemnity basis to be paid to the plaintiff within 60 days. If the parties cannot agree on an appropriate quantum I will make arrangements for written submissions to be assembled and submitted.

XVII. Conclusion

139 I again express my appreciation to all counsel and their litigation teams for the assistance and patience they have provided throughout this very complex and important motion. I continue to hope that they will apply their expertise and energies to strive to meet the goals of Rule 1.04 in Ontario and across our country.

Motion dismissed.

TAB 10

See para. 22

1998 CarswellOnt 3847
Ontario Court of Justice (General Division)

North York Branson Hospital v. Praxair Canada Inc.

1998 CarswellOnt 3847, [1998] O.J. No. 5993, 78 O.T.C. 231,
82 A.C.W.S. (3d) 1103, 84 C.P.R. (3d) 12, 88 A.C.W.S. (3d) 554

North York Branson Hospital, Humber Memorial Hospital Association, The Willet Hospital, Timmins & District Hospital, l'Hospital de Timmins et du District, The Royal Victoria Hospital of Barrie, The Listowel Memorial Hospital, Laurention Hospital, The Grey Bruce Regional Health Centre, Oakville-Trafalgar Memorial Hospital Association, Northwestern General Hospital, The North Bay Hospital Commission, Stevenson Memorial Hospital (Alliston), Brantford General Hospital, Lady Minto Hospital (Cochrane), Cornwall General Hospital, Hotel Dieu Hospital (Cornwall), Riverside Health Centre Facilities (Fort Frances), Geraldton District Hospital, Kingston General Hospital, Kirkland and District Hospital (Kirkland Lake), Credit Valley Hospital (Mississauga), Orillia Soldiers' Memorial Hospital, Children's Hospital of Eastern Ontario (Ottawa), Salvation Army Grace General Hospital (Ottawa), Great War Memorial Hospital of Perth, Norfolk General Hospital (Simcoe), Smith Falls Community Hospital, Sudbury General Hospital, Sudbury Memorial Hospital, Trenton Memorial Hospital, Salvation Army Grace Hospital (Windsor) Collingwood General and Marine Hospital, Dryden District General Hospital, Georgetown and District Memorial Hospital, Notre-Dame Hospital (Hearst), Anson General Hospital (Iroquois Falls), Sensenbrenner Hospital (Kapuskasing), Temiskaming Hospital (New Liskeard), Montford Hospital (Ottawa), SCO Health Centre (Ottawa), Charlotte Eleanor Englehart Hospital (Petrolia) Sault Ste. Marie General Hospital, Baycrest Hospital (North York), St. Michael's Hospital (Toronto), Toronto East General & Orthopaedic Hospital, Sydenham District Hospital (Wallaceburg), Welland County General Hospital, York-Finch General Hospital (Downsview), Queensway General Hospital (Etobicoke), Alexandra Marine & General Hospital (Goderich) Lake of the Woods District Hospital (Kenora), Ross Memorial Hospital (Lindsay), Huronia District Hospital (Midland), Greater Niagara General Hospital (Niagara Falls), St. Joseph's Hospital & Health Care (Peterborough), Hotel Dieu Hospital (St. Catharines), St. Mary's Memorial Hospital, Mount Sinai Hospital (Toronto), Princess Margaret Hospital (Toronto), Toronto Hospital, Wingham and District Hospital, The Arnprior and District Memorial Hospital, Clinton Public Hospital, The Mississauga Hospital, The York County Hospital Corporation (Newmarket), North Bay General Hospital, Sunnybrook Health Science Centre (North York), The Peterborough Civic Hospital, Port Colborne General Hospital, Plummer Memorial Public Hospital (Sault Ste. Marie), Hôpital Général de Nipissing Ouest/The West Nipissing General Hospital (Sturgeon Falls), Thunder Bay Regional Hospital, St. Joseph's General Hospital (Thunder Bay), The Riverdale Hospital (Toronto), and The Religious Ospitallers of Hotel Dieu of St. Joseph of the Diocese of London, operating as Hotel-Dieu Grace Hospital (Windsor), Plaintiffs and Praxair Canada Inc., Canadian Liquid Air Ltd./Air Liquide Canada Ltée., Liquid Carbonic Inc., Canadian Oxygen Limited/ La Compagnie Canadienne d'Oxygene Limitée, Air Products Canada Ltd./Prodair

Canada Ltée., Vernon N.S Lorish, Kenneth M. Hibbert, Neil F. Weaver, David S. Watson, Rene J. Mandeville, Alfred Dyke and T. John Tindale, Defendants

Cumming J.

Heard: September 21, 1998
Judgment: September 28, 1998
Docket: 93-CQ-42118

Proceedings: refused leave to appeal (January 29, 1999 (orally)), Doc. Toronto 665/98 (Ont. Div.Ct.)

Counsel: *William J. Burden*, for the Plaintiffs.
Peter H. Griffin, for Praxair Canada Inc., Liquid Carbonic Inc., Vernon N.S. Lorish, Kenneth M. Hibbert and Neil F. Weaver.
J. Christopher Osborne, for Air Products Canada Ltd./Prodair Canada Ltee.
Sharon Wong, for Canadian Oxygen Limited/La Compagnie Canadienne D'Oxygene Limitée, David Watson and T. John Tindale.

***Cumming J.*:**

Reasons For Decision

Introduction

1 The plaintiff hospitals and health care centres claim damages for the tort of civil conspiracy. They also claim damages pursuant to s. 36(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34 and predecessor statutory provisions. The *Competition Act* allows for the recovery of loss or damage resulting from conduct contrary to any provision of Part VI thereof. In brief, the plaintiffs allege the defendants conspired to engage in price-fixing, bid-rigging and other unlawful practices that restricted or eliminated competition, to the detriment of the plaintiffs. The plaintiffs also seek punitive damages.

2 The plaintiffs claim they purchased bulk compressed gasses for medical purposes supplied by the corporate defendants pursuant to contractual arrangements. The plaintiffs allege that the corporate defendants collectively constitute the suppliers to some 97% of the market with some $200 million in revenues annually. Each of the individual defendants is alleged to have been a senior officer of a corporate defendant over, at the least, the period of June 1989 to May 1990, and for other periods of time within the knowledge of the defendants. The plaintiffs allege the defendants unlawfully conspired and agreed during that period of time, June 1989 to May 1990, to reduce or eliminate competition in the sale of bulk gasses and services so as to artificially fix prices for these products. The plaintiffs further allege that the defendants (other than the defendant T. John Tindale) pleaded guilty and were convicted of unlawfully agreeing to prevent or unduly lessen competition, contrary to s.45(1)(c) of the *Competition Act*. The defendant Tindale was convicted after a trial. The defendants who pleaded guilty did so pursuant to agreed statements of fact, which indicate that the charges to which they pleaded guilty related only to the specific time period of June 1989 to May 1990.

3 The plaintiffs further allege that the said conspiracy was a continuation of a conspiracy which commenced as early as December 1954, between the defendants, their predecessors and others to an industry-wide agreement to control the supply and prices of bulk compressed gasses. The plaintiffs further allege that the harmful impact of the conspiracy lasted until approximately August 1992, when a free market was finally achieved.

The Motion

4 The defendants, other than the individual defendants Mandeville and Dyke, move to strike out paragraphs 28 to 33 of the Amended Statement of Claim as not disclosing a cause of action. The allegations made in the Amended Statement

of Claim, relating to the period June 1989 to May 1990, are not the subject of the motion. The defendants say that the Amended Statement of Claim asserts a 40-year conspiracy without meeting the basic elements of a pleading in respect of the tort of conspiracy. Paragraphs 28 to 33 allege that the conspiracy in effect over June 1989 to May 1990 existed for many years, and as early as December 1954.

The Issue

5 The issue in the motion at hand is whether paragraphs 28 to 33 of the Amended Statement of Claim disclose no reasonable cause of action and, therefore, are to be struck from the pleading.

The Demands for Particulars and Responses.

6 The defendants made demands for particulars to which the plaintiffs have responded. The responses to the demands for particulars set forth which of the 87 plaintiffs allegedly purchased products from which of the several corporate defendants. The plaintiffs also cited the terms of the agreements referred to by individual defendants in their respective agreed statements of facts filed in connection with the offences under the *Competition Act*. The plaintiffs outlined a marked similarity in terms in respect of such agreements with those in agreements, involving the corporate defendants, dating back a number of years. The plaintiffs submit that the terms are conductive to facilitating price-fixing and bid-rigging. The plaintiffs referred to documents, including documentation as to contracts, methods of billing, invoices, price quotations and notices of price increases and prepared an analysis of increases in prices over the years. This documentation is suggestive of a possible conspiracy over a number of years, going back to the 1950's.

7 The plaintiffs, in their responses to the demands for particulars, set forth that they also rely upon information given to obtain *ex parte* search warrants in May 1990 by Martin Crossman and Gwillym Allen, officers on the staff of the Director of Investigation and Research appointed under the *Competition Act*.

8 The information referred to by Mr. Allen relates in part to the period from June 1989 to May 1990. For example, paragraphs 13(a) and 14(a)(iii) of Mr. Allen's affidavit refer to documents found through a previous search warrant as including a note, inferred to be by the defendant Lorish relating to a telephone conversation with the defendant Weaver, of July 17, 1989, which is suggestive of an agreement to fix prices. Paragraph 13(d) refers to a document describing a telephone conversation involving the defendant Hibbert, dated October 1989, which suggests an agreement to fix prices.

9 However, the information referred to by Mr. Allen also includes documents found relating to prior years. This information refers in paragraph 14(b)(iii) to two memoranda dated December 20 and 23, 1954, which relate to a hospital in British Colombia and are suggestive of price-fixing on the part of the defendant Canadian Liquid Air Inc. Paragraph 14(b)(v) suggests collusion between the defendant Liquid Carbonic Inc. and a subsidiary of Union Carbide in respect of price-fixing in New Brunswick about 1986 or 1987. (Union Carbide later amalgamated with the defendant Praxair Canada Inc.) Paragraph 14(c)(i) refers to a memo dated April 17, 1988, suggesting an agreement as to non-competitive behaviour between the defendants Air Products Canada Ltd. and Liquid Carbonic Inc. Paragraph 14(c)(ii) refers to a letter dated January 10, 1983, to the defendant Hibbert, which suggests that a conspiracy to restrict competition in Quebec may have existed.

10 Paragraph 14(a) refers to undated notes of a telephone conversation, found in the office of a Senior Vice President for the defendant Liquid Carbonic Inc., involving the defendant Mandeville and perhaps referring to the defendant Hibbert, suggestive of an agreement as to price-fixing. Paragraph 14(a)(ii) then refers to a hand-written document, found in the office of the same Senior Vice President of the defendant Liquid Carbonic Inc., which is suggestive of collusion with the defendant Canadian Liquid Air Ltd. in 1985 with respect to price-fixing. Paragraph 14(a)(iii) refers to a letter dated October 30, 1985, suggestive of a price-fixing conspiracy with respect to a customer in Red Deer, Alberta, between the defendant Liquid Carbonic Inc. and Union Carbide. Paragraph 14(b)(ii) refers to a memorandum dated October 1985, seized in the premises of the defendant Canadian Liquid Air Ltd. in Nova Scotia, suggestive of an agreement to restrict competition as between that defendant and the defendant Liquid Carbonic Inc., in respect of both hospital and

industrial customers. Similarly, paragraph 14(b)(iii) refers to memos dated May 8, 1963, suggestive of collusion as to price-fixing in Western Canada.

11 In 1988, utilising a hidden "body-pack" or "wire", Mr. Crossman surreptitiously recorded two business meetings, involving the defendants Liquid Carbonic and Canadian Oxygen Limited as well as other corporate defendants, which suggest a conspiracy to fix prices.

12 The defendants submit that this historical, unproven "information" relates, at most, to alleged improprieties involving industries other than hospitals (except documentation that refers to one hospital in British Columbia) and to parts of Canada other than Ontario, and thus the "information" is not relevant to the allegations in the current action. I disagree. Such "information" suggests there may well have been a conspiracy, involving the defendants, to engage in price-fixing, bid-rigging and anti-competitive practices throughout Canada for many years, and perhaps as far back as 1954. The defendants have admitted to offences in contravention of the *Competition Act* in respect of the sale of compressed gasses in Canada, including Ontario, for the specific period of June 1989 to May 1990. The documentation given in response to the demand for particulars is suggestive of this admitted conspiracy, for the specific period June 1989 to May 1990, being in existence for a considerable number of years.

The Law

13 Rule 21.01(1)(b) reads:

> 21 01(1) A party may move before a judge,
>
> . . . . .
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

14 Rule 25.06(1), (2) and (8) read:

> 25 06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.
>
> . . . . .
>
> (8) Where fraud, misrepresentation, breach of trust, malice or *intent* is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. [emphasis added]

15 Rule 25.11(a) reads:

> 25 11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action.

16 The Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) per Wilson J. at 980, in dealing with the British Columbia *Rules of Court*, sets forth the test governing the application of provisions like Ontario's Rule 21.01(1)(b):

> ...[A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? ...Only if the action is certain to fail because it contains a radial defect ... should the relevant portions of a plaintiff's claim be struck out...

Pleading Conspiracy

17 In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385 (S.C.C.) the plaintiff alleged a conspiracy to eliminate competition which resulted in injury to the plaintiff. In delivering the judgment for the Supreme Court of Canada, Estey J. stated at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

18 In *Hunt*, Wilson J. at pp. 985-87, held that the plaintiff had met the "plain and obvious" standard by pleading his claim of conspiracy in the terms of Estey J.'s two-pronged summary of the law on civil conspiracy in *Canada Cement LaFarge*.

19 In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), the Ontario Court of Appeal at p. 104 endorsed the following passage from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975) at 646-7:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

20 It is noted that this passage was cited in the context of whether a cause of action against the individual directors, being the directing minds of the defendant corporations, could be maintained, an issue discussed below.

21 The tenor of Wilson J.'s reasons in *Hunt* is that the "plain and obvious" rule applies equally to pleadings for conspiracy; not that there is a special or higher threshold in conspiracy cases. The Bullen, Leake and Jacob passage describes what is necessary to plead the elements of the tort of conspiracy set out in *Canada Cement LaFarge*. In other words, when a conspiracy pleading meets the criteria of the above-quoted passage, it meets the "plain and obvious" standard of *Hunt* because the description of the alleged conspiracy, accepted as fact for the purpose of deciding whether it discloses a reasonable cause of action, would fall within the description of the tort in *Canada Cement LaFarge*. I refrain from commenting on whether the law as to *pleading* conspiracy differs significantly in Ontario from that in British Columbia or Alberta, as the moving parties submit, other than to note that the underlying *cause of action* for conspiracy was defined in *Canada Cement LaFarge*, a decision of the Supreme Court of Canada.

22 In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlying agreement bringing

the conspirators together, proof of which is a requirement borne by a plaintiff, often must be proven by indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the conspirators from which the prior agreement can be logically inferred. Such details would not usually be available to a plaintiff until discoveries. These considerations and the general theme of *Hunt*, instructing courts not to shy away from difficult litigation, also militate against holding pleadings in civil conspiracy cases to an extraordinary standard.

23 Most, or all, of the greater specificity the defendants submit should be seen in the plaintiffs' Amended Statement of Claim relates to matters that are within the knowledge of only the defendants. The defendants are not put to any real disadvantage by the present form of the plaintiffs' Amended Statement of Claim.

Liability of Directors and Officers for Civil Conspiracy

24 Case law demonstrates two reasons for striking conspiracy claims against principals of corporations. The first relates to the independent legal personality of a corporation; the second relates to the principle that in order for a claim of conspiracy to stand, it must be distinct from other pleaded causes of action.

25 In *Normart*, the plaintiff's statement of claim pleaded damages for breach of contract and fiduciary duty when it alleged that the corporate defendants had entered into secret negotiations with a bank, ultimately depriving the plaintiff of its joint interest in a property. In the alternative, the plaintiff claimed that the personal defendants had conspired with their corporations and with each other to bring about the same result, to the injury of the plaintiff. With regard to the personal defendants, the pleadings did not set out facts pointing to specific tortious acts they had committed which were independent of the breach of contract already alleged. The Court of Appeal upheld Pitt J.'s finding that no sustainable cause of action in conspiracy had been pleaded.

26 Finlayson J.A., writing for a unanimous panel of the Court of Appeal, found that the plaintiff was attempting to convert its straight forward action against the corporate defendants for breach of contract and fiduciary duty into a personal action against the officers and directors of those corporations. In order to sustain a civil action against the directing minds of corporations, there must be some allegation of conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations. In *Normart*, there was nothing in the pleadings which suggested that in making the alleged arrangements, the personal defendants were acting other than on behalf of and in the interests of the corporations that they controlled. The individual defendants, therefore, could not be liable for the alleged wrongdoing of the corporations, and thus the claims against them were struck.

27 As I said in *Craik v. Aetna Life Insurance Co. of Canada* (November 1, 1995), Doc. 95-CQ-64403 (Ont. Gen. Div.) at para. 19:

> When the director or officer is acting outside the scope of his/her authority in being motivated by advancing a personal interest contrary to the interest of his/her corporation or when the director or officer is committing a fraud or doing something with malice, the individual can be subject to personal liability. Unless the claim against the director or officer alleges fraud, bad faith, absence of authority, or a deliberate and intentional act constituting an intentional tort or some other exceptional circumstance whereby it can be said that the director or officer has made the act complained of his own distinct, personal act rather than the act of the [corporation], the claim should be struck out at the pleading stage.

See also *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) at 490-91.

28 In *Monogram Products Inc. v. 546332 Ontario Ltd.* (1996), 27 O.R. (3d) 335 (Ont. Gen. Div.), at 345, Kiteley J. puts the issue this way:

> A pleading is acceptable against a corporate officer/director where the defendant allegedly committed a *deliberate and intentional act constituting an intentional tort*. [emphasis added]

29 In *Monogram*, the defendant in its counterclaim alleged that the defendants by counterclaim conspired to cause the plaintiff in the main action to breach its contract with the defendant, and to intentionally interfere with the defendant's economic relations. Kiteley J. found that pleading sufficient to prevent the claim against a director/officer personally from being struck.

30 In my view, if it were asserted in a statement of claim (which otherwise meets all the requirements of the Rules for pleadings) that a director or officer engaged in an unlawful conspiracy for the purpose of eliminating or reducing competition, such would be an allegation of a "deliberate and intentional act constituting an intentional tort". Accordingly, the director or officer in such a situation would properly be named as an individual defendant party.

31 In the motion at hand, the defendants do not raise any issue that the individual defendant directors and officers are not properly defendants in their individual capacity.

The Complaint of Conspiracy as a Distinct Cause of Action

32 A second consideration when pleading conspiracy relates to the principle that pleadings are not to be redundant. In cases such as *Normart* and *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.), the impugned pleadings alleged conspiracy in addition to another cause of action. In *Normart* the plaintiff pleaded breach of contract and conspiracy; in *Sun Life*, a counterclaim pleaded fraud and conspiracy against some parties, and only conspiracy against other parties. While the Court of Appeal in *Normart* did not need to decide the point on the facts before it, it approved of the following statement of Lord Denning in *Ward v. Lewis*, [1955] 1 All E.R. 55 (Eng. C.A.) at 56:

> It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges in the tort.

33 Lang J. in *Sun Life* Stated at p. 689:

> The respondents argue that those defendants are sued only for conspiracy to injure. No allegation of fraud is made against them. I agree that *where the only claim against a defendant is that of conspiracy, the claim cannot be struck on the basis of merger*. [emphasis added]

Otherwise, according to Lang J. on the same page,

> Where the tort is charged and an allegation of conspiracy is superfluous, and will result in prolonged proceedings with no added advantage, the claim of conspiracy will be struck.

34 Lang J. struck the conspiracy claim against Sun Life as it added nothing to the claim for tort. However, she permitted the claim of conspiracy to stand against a number of individual defendants by counterclaim because they were sued solely on the claim of conspiracy.

Disposition

35 For the reasons given, in my view and I so find, the Amended Statement of Claim meets all the requirements imposed by the Rules. Specifically, I find that paragraphs 28 to 33 of the Amended Statement of Claim comply with the stipulations set for the in *Hunt*and *Normart*, and seen in the passage from Bullen, Leake and Jacob Quoted in *Normart*. I find that the Amended Statement of Claim describes the several parties and their relationship with each other. It alleges the agreement between the defendants to conspire, states precisely what were the purpose and objects of the alleged conspiracy, sets forth with sufficient clarity and precision the overt acts alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy and alleges the injury and damage occasioned to the plaintiffs thereby. The Amended Statement of Claim is sufficient to enable the defendants to prepare and file statements of defence. The Amended Statement of Claim discloses a reasonable cause of action.

36 For the reasons given, the motion is dismissed. If the parties cannot agree as to the disposition of the matter of costs in respect of the motion, they may make written submissions.

Motion dismissed.

1999 CarswellOnt 450
Ontario Superior Court of Justice (Divisional Court)

North York Branson Hospital v. Praxair Canada Inc.

1999 CarswellOnt 450, [1999] O.J. No. 399

North York Branson Hospital, Humber Memorial Hospital Association, The Willet Hospital, Timmins & District Hospital, L'Hospital de Timmins et du District, The Royal Victoria Hospital of Barrie, The Listowel Memorial Hospital, Laurention Hospital, The Grey Bruce Regional Health Centre, Oakville-Trafalgar Memorial Hospital Association, Northwestern General Hospital, The North Bay Hospital Commission, Stevenson Memorial Hospital (Alliston), Brantford General Hospital, Lady Minto Hospital (Cochrane), Cornwall General Hospital, Hotel Dieu Hospital (Cornwall), Riverside Health Centre Facilities (Fort Frances), Geraldton District Hospital, Kingston General Hospital, Kirkland and District Hospital (Kirkland Lake), Credit Valley Hospital (Mississauga), Orillia Soldiers' Memorial Hospital, Children's Hospital of Eastern Ontario (Ottawa), Salvation Army Grace General Hospital (Ottawa), Great War Memorial Hospital of Perth, Norfolk General Hospital (Simcoe), Smith Falls Community Hospital, Sudbury General Hospital, Sudbury Memorial Hospital, Trenton Memorial Hospital, Salvation Army Grace Hospital (Windsor), Collingwood General and Marine Hospital, Dryden District General Hospital, Georgetown and District Memorial Hospital, Notre-Dame Hospital (Hearst), Anson General Hospital (Iroquois Falls), Sensenbrenner Hospital (Kapuskasing), Temiskaming Hospital (New Liskeard), Montford Hospital (Ottawa), SCO Health Centre (Ottawa), Charlotte Eleanor Englehart Hospital (Petrolia) Sault Ste. Marie General Hospital, Baycrest Hospital (North York), St. Michael's Hospital (Toronto), Toronto East General & Orthopaedic Hospital, Sydenham District Hospital (Wallaceburg), Welland County General Hospital, York-Finch General Hospital (Downsview), Queensway General Hospital (Etobicoke), Alexandra Marine & General Hospital (Goderich) Lake of the Woods District Hospital (Kenora), Ross Memorial Hospital (Lindsay), Huronia District Hospital (Midland), Greater Niagara General Hospital (Niagara Falls), St. Joseph's Hospital & Health Care (Peterborough), Hotel Dieu Hospital (St. Catharines), St. Mary's Memorial Hospital, Mount Sinai Hospital (Toronto), Princess Margaret Hospital (Toronto), Toronto Hospital, Wingham and District Hospital, The Arnprior and District Memorial Hospital, Clinton Public Hospital, The Mississauga Hospital, The York County Hospital Corporation (Newmarket), North Bay General Hospital, Sunnybrook Health Science Centre (North York), The Peterborough Civic Hospital, Port Colborne General Hospital, Plummer Memorial Public Hospital (Sault Ste. Marie), Hôpital Général de Nipissing Ouest/The West Nipissing General Hospital (Sturgeon Falls), Thunder Bay Regional Hospital, St. Joseph's General Hospital (Thunder Bay), The Riverdale Hospital (Toronto), and the Religious Ospitallers of Hotel Dieu of St. Joseph of the Diocese of London, operating as Hotel-Dieu Grace Hospital (Windsor), Plaintiffs and Praxair Canada Inc., Canadian Liquid Air Ltd./Air Liquide Canada Ltée., Liquid Carbonic Inc., Canadian Oxygen Limited/ La Compagnie Canadienne d'Oxygene Limitée, Air Products Canada Ltd./Prodair

Canada Ltée., Vernon N.S. Lorish, Kenneth M. Hibbert, Neil F. Weaver, David S. Watson, Rene J. Mandeville, Alfred Dyke and T. John Tindale, Defendants

Meehan J.

Heard: January 29, 1999
Oral reasons: January 29, 1999
Docket: Toronto 665/98

Proceedings: refusing leave to appeal (September 28, 1998), Doc. 93-CQ-42118 (Ont. Gen Div.)

Counsel: *William J. Burden* , for the Plaintiffs.
Peter H. Griffin , for Praxair Canada Inc., Liquid Carbonic Inc., Vernon N.S. Lorish, Kenneth M. Hibbert and Neil F. Weaver.
J. Christopher Osborne , for Air Products Canada Ltd./Prodair Canada Ltée.
K. Kwinter , for Canadian Oxygen Limited/La Compagnie Canadienne D'Oxygene Limitée, David Watson and T. John Tindale.

Meehan J. **(orally):**

1 This matter comes before me as a motion for leave to appeal a decision of Mr. Justice Cumming where he refused an order striking out various paragraphs of the amended Statement of Claim. The action as a whole turns around an alleged conspiracy by suppliers of oxygen, nitrogen, carbon dioxide, argon, hydrogen, helium to various hospitals in the province of Ontario.

2 Shortly, it is the submission of the plaintiffs that as a result of actions by the federal government, evidence became available that there was a conspiracy which existed in Canada to prevent, lessen and so on, competition in the gases already referred to, Mr. Justice Cumming dealt with the matter in detailed reasons and despite the very able argument of Mr. Griffith on behalf of his client and indirectly, the other clients, I am not persuaded that the reasons for decision of Mr. Justice Cumming are in error.

3 The grounds on which motion for leave to appeal are advanced are that his decision conflicts with decisions by another judge in Ontario and that it is in the opinion of the judge hearing the motion desirable that leave to appeal be granted. A very able argument was presented that his decision as framed conflicts with decisions of Madam Justice Lang and Madam Justice Swinton in regard to the practice and pleading in conspiracies.

4 In his reasons Mr. Justice Cumming referred to *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* , [[1983] 1 S.C.R. 452 (S.C.C.)], a decision of the Supreme Court of Canada. He referred as well to *Nomart Management Ltd.* , a decision of our Court of Appeal in 1998 where Bullen and Leake is referred to as well, and he dealt with the matter on the basis of the unusual fact situation here where there is evidence of a conspiracy within a limited time frame which exists from the plea of guilty and from some of the materials contained in the federal prosecution.

5 It is suggested that he sets a new and lower standard. He deals at length with the decision of Madam Justice Lang to which I have already referred, *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* . (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.) . He specifically declines to deal with the exact standard, presumably because upon the facts in this case there is direct evidence of admitted conspiracy and the issues presumably are the people who suffered disabilities as a result of that conspiracy, the extent in time of the conspiracy and also the exact members of the conspiracy over a very lengthy time frame. Put in other words, I have no reason to doubt the correctness of his order and keeping in mind the unusual nature of this particular case and the nature of the evidence available I do not see that there is a matter of general importance such that leave should be granted despite the very able argument of Mr. Griffith in the circumstances. So, the application for leave will be dismissed. Costs fixed at $1,500.00.

Application dismissed.

TAB 11

See paras. 103, 115

2019 ONSC 128
Ontario Superior Court of Justice

The Catalyst Capital Group Inc. v. West Face Capital Inc.

2019 CarswellOnt 1851, 2019 ONSC 128

The Catalyst Capital Group Inc. and Callidus Capital Corporation and West Face Capital Inc., Gregory Boland, M5V Advisors Inc. C.O.B. Anson Group Canada, Admirality Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears, Sunny Puri, ClaritySpring Inc., Nathan Anderson, Bruce Langstaff, Rob Copeland, Kevin Baumann, Jeffrey McFarlane, Darryl Levitt, Richard Molyneux and John Does #1-10

H.J. Wilton-Siegel J.

Heard: October 29, 2018
Judgment: January 9, 2019
Docket: CV-17-587463-00CL

Counsel: Linda Plumpton, Leora Jackson, for Applicants, Anson Defendants
Brian Radnoff, for Applicants, Nathan Anderson and ClaritySpring Inc.
Nancy Tourgis, Melvyn Solmon, for Applicant, Richard Molyneux
Darryl Levitt, Applicant, for himself
David Moore, Ken Jones, Matthew Karabus, for Respondents, Catalyst Capital Group and Callidus Capital Corporation

***H.J. Wilton-Siegel J.*:**

1 On these motions, various defendants in this action (the "applicants") seek an order striking the statement of claim dated November 7, 2017 (the "Statement of Claim") and dismissing the action against them under Rules 21, 25.06(1) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The Parties

2 The following sets out the parties in the action and the defined terms in the Statement of Claim that are relevant for the present motions.

The Plaintiffs

3 The plaintiff The Catalyst Capital Group Inc. ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst describes itself as a firm in the field of investments in distressed and undervalued Canadian situations.

4 The plaintiff Callidus Capital Corporation ("Callidus") is a corporation with its head office located in Toronto, Ontario. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources.

5 The common shares of Callidus (the "Callidus Shares") are listed on the Toronto Exchange. Catalyst owns approximately 40 percent of the outstanding shares of Callidus.

6 Catalyst and Callidus are herein collectively referred to as the "plaintiffs".

The Anson Defendants

7 The defendant M5V Advisors Inc. is a hedge fund incorporated in Ontario that carries on business as Anson Group Canada.

8 The defendant Frigate Ventures LP ("Frigate") is a limited partnership organized pursuant to the laws of Texas. At all relevant times, Frigate was a registered investment fund manager with the Ontario Securities Commission (the "OSC"). The defendant Admiralty Advisors LLC ("Admiralty") is a limited liability company organized pursuant to the laws of Texas that is the general partner of Frigate.

9 The defendants Anson Investments LP and Anson Capital LP are limited partnerships organized under the laws of Texas.

10 The defendant Anson Investments Master Fund LP is a limited partnership organized under the laws of Texas. The defendant AIMF GP is the general partner of Anson Investments Master Fund LP.

11 The defendant Anson Catalyst Master Fund LP is a limited partnership organized under the laws of Texas. The defendant ACF GP is the general partner of Anson Catalyst Master Fund LP.

12 The parties described in the preceding five paragraphs are a family of hedge funds that carry on business as the "Anson Group". All of them engage in securities transactions on public markets. They are collectively referred to herein as the "Anson Corporate Defendants".

13 The defendants Moez Kassam ("Kassam") and Adam Spears ("Spears") are principals of the Anson Corporate Defendants. The defendant Sunny Puri ("Puri") is an analyst employed by the Anson Corporate Defendants. Kassam, Spears and Puri are collectively referred to herein as the "Anson Individual Defendants".

14 The Anson Corporate Defendants and the Anson Individual Defendants are herein collectively referred to as the "Anson Defendants".

The Wolfpack Conspirators

15 The defendant West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. West Face competes with Catalyst. One of the principals of West Face is the defendant Gregory Boland ("Boland").

16 The defendant ClaritySpring Inc. ("Clarity") is a Delaware corporation that is based in New York. Clarity's principal is the defendant Nathan Anderson ("Anderson").

17 In the Statement of Claim and herein, the Anson Defendants, West Face, Boland, Clarity and Anderson are collectively referred to as the "Wolfpack Conspirators".

The Guarantor Conspirators

18 The defendant Jeffrey McFarlane ("McFarlane") is an individual residing in North Carolina, in the United States of America.

19 The defendant Darryl Levitt ("Levitt") is an individual residing in Toronto, Ontario.

20 The defendant Richard Molyneux ("Molyneux") is an individual residing in Toronto, Ontario.

21 The defendant Kevin Baumann ("Baumann") is an individual residing in Red Deer, Alberta.

22 Baumann, McFarlane, Levitt and Molyneux are collectively referred to in the Statement of Claim and herein as the "Guarantor Conspirators".

The Remaining Defendants

23 The defendant Bruce Langstaff ("Langstaff") is a former employee of Canaccord Genuity.

24 The defendant Rob Copeland ("Copeland") is a reporter with The Wall Street Journal (the "WSJ") who resides in New York, New York.

25 The Wolfpack Conspirators, the Guarantor Conspirators, Langstaff and Copeland are collectively referred to in the Statement of Claim and herein as the "Conspirators".

26 The Statement of Claim also uses the defined term "Defendants" to include both the Conspirators and John Doe defendants who are alleged to have participated in the Conspiracy (as defined below) and whose identities are presently unknown.

The Pleadings and the Plaintiffs' Responses to the Applicants' Demands for Particulars

27 In the Statement of Claim, the plaintiffs plead that, in response to actions commenced to enforce personal guarantees of the Guarantor Conspirators and certain other parties (the "Guarantors") in respect of loans made by Callidus to certain borrowers, the Guarantor Conspirators coordinated their actions. In particular, it is alleged that they decided to defend the actions against them by filing spurious counterclaims against Callidus and by alleging claims of "fraudulent inducement". It is also alleged that certain of the Wolfpack Conspirators funded the Guarantor Conspirators in these actions through one or more of the Guarantor Conspirators.

28 It is further alleged in paragraph 61 of the Statement of Claim that the Wolfpack Conspirators and the Guarantor Conspirators then entered into a conspiracy to harm Callidus and Catalyst (herein the "Conspiracy"). The Conspiracy took the form of an agreement to a plan of action described in paragraph 64 of the Statement of Claim having the following elements (the "Plan"):

(1) The spreading of false information by rumours;

(2) The filing of false "whistleblower" complaints against Callidus with the OSC by certain of the Guarantor Conspirators to "confirm" the rumours;

(3) The leaking of the allegations contained in the complaints to the media to generate interest;

(4) The Conspirators taking short positions, directly or indirectly, in the Callidus Shares;

(5) The publication of a report in the Wall Street Journal, timed to be released near the end of the trading day, in order to cause a rapid decline in the price of the Callidus Shares; and

(6) The closing out of their naked short positions by the Conspirators to their profit and at the expense of the market value of Callidus.

29 Each of these alleged steps in the Conspiracy is the subject of specific pleadings in paragraphs 67-111. Paragraphs 67-74 set out allegations regarding the filing of "false and defamatory whistleblower complaints" with the OSC relating to Callidus and Catalyst by Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) (the latter being incorrectly referred to as one of the Guarantor Conspirators) (the "Complaints"). The plaintiffs allege that the Complaints were defamatory and that the sole motivation for filing the Complaints was the furtherance of the

Conspiracy. Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) are collectively referred to as the "Complainants" in the Statement of Claim.

30 In paragraph 69, the plaintiffs allege that the Complainants disclosed the Complaints, or the substance of the Complaints, to WSJ reporters. I note that this paragraph appears to do no more than anticipate the allegations in paragraphs 84-93. However, insofar as the pleadings say that the Complainants disclosed the Complaints, rather than the existence and substance of the Complaints, the pleadings are in error given the definition of "Complaints". The plaintiffs say that the error will be corrected.

31 In paragraphs 75-82, the pleadings allege that the Conspirators contacted journalists in an effort to leak the existence of the Complaints and other false allegations about them. The pleadings refer first to the engagement of a journalist, Bruce Livesey ("Livesey"), and then to an approach to Reuters, both of which are addressed further below.

32 The pleadings allege in paragraphs 84-93 that the Conspirators then approached Copeland who authored an article that was published in the WSJ (the "Article") after meetings between Copeland and each of the Guarantor Conspirators, at the urging of Anderson, and a meeting between Copeland and representatives of Callidus and Catalyst.

33 In paragraphs 94-100, the pleadings allege that the Wolfpack Conspirators and one or more of the John Doe Defendants took naked short positions, and other positions to simulate short positions, in Callidus Shares, either directly or indirectly, on or about August 9, 2017. The Article was released at 3:29 p.m. on August 9, 2017. The plaintiffs say the Conspirators encouraged Copeland to release the Article at that time in order that Callidus would not be able to make normal course issuers bid purchases of Callidus Shares in the last 30 minutes of trading on that day. They say the Wolfpack Conspirators thereby profited in the significant drop in the value of Callidus Shares between August 9 and August 14, 2017.

34 The plaintiffs allege that the Article and the Complaints made false and defamatory statements about Callidus and Catalyst and caused them loss. They also say that the Defendants' actions constituted breaches of the *Securities Act*, R.S.O. 1990, c. S.5, in particular ss. 126.1 and 126.2.

35 The principal claim of the plaintiffs against the Defendants is a claim for damages based on the tort of conspiracy, both predominant purpose conspiracy and unlawful means conspiracy. The plaintiffs also assert claims for damages based on defamation and the tort of intentional interference with contractual relations, in each case based on the alleged defamatory statements in the Article and the Complaints, as well as unjust enrichment. They seek disgorgement of the profits made by the Conspirators.

36 The Anson Defendants delivered a Demand for Particulars dated January 12, 2018. Molyneux delivered a Demand for Particulars dated May 15, 2018. Levitt delivered a Demand for Particulars dated May 16, 2018. Clarity and Anderson delivered a Demand for Particulars dated August 7, 2018.

37 The plaintiffs delivered a Response to Demand for Particulars on October 22, 2018 which responded to each of the foregoing Demands for Particulars. The plaintiffs further supplemented their Response to Demand for Particulars with an addendum dated October 23, 2018 (the "Addendum").

Applicable Legal Principles on a Motion to Strike

38 The following provisions of the *Rules of Civil Procedure* are applicable in respect of these motions:

> 21.01 (1) A party may move before a judge, ...
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly. ...

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. ...

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. ...

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

39 The principles pertaining to a motion to strike a claim under r. 21.01(1)(b) are well established. In *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980, the Supreme Court articulated the applicable test as follows:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out under [the counterpart under the British Columbia rules of civil procedure to r. 21.01(1)(b)].

40 More recently, in *Catalyst Capital Group Inc. v. Veritas Investment Research Corp.*, 2017 ONCA 85, 136 O.R. (3d) 23 (Ont. C.A.), at para. 21, the Court of Appeal set out the following principles that apply on a motion under r. 21.01(1)(b):

> No one contests that the bar for striking a pleading as disclosing no cause of action is very high - is it plain and obvious that the plaintiff cannot succeed? - or that the facts as alleged in the Statement of Claim are to be accepted as true for purposes of deciding the motion: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. No evidence is permissible on a rule 21.01(1)(b) motion: rule 21.01(2)(b). The statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties.

Preliminary Matter

41 Before addressing the applicants' motions in respect of the specific claims asserted against them, it is necessary to address certain issues pertaining to the pleadings in respect of the plaintiffs' defamation claims that also have implications for a number of the plaintiffs' other claims.

42 As currently drafted, the allegations in the Statement of Claim give rise to considerable confusion regarding the extent to which the plaintiffs are grounding a separate defamation claim in the Complaints, in addition to their defamation claim based on the Article. In this regard, the following provisions of the pleadings are relevant.

43 First, at paragraph 68, "Complaints" is defined as "false and defamatory whistleblower complaints" filed by the Complainants with the OSC relating to Callidus and Catalyst. The term "Complaints" therefore does not include any statements made to parties other than the OSC regarding the existence, or content, of the Complaints.

44 Second, at paragraph 112, the plaintiffs allege that the "Article, read as a whole and the Complaints make false and defamatory statements (the "Defamatory Words") ... about Callidus and Catalyst". This definition of "Defamatory

Words" is effectively confirmed in the statement at paragraph 11 of the Addendum that "[c]urrently, the only specific defamation claim pleaded in the [Statement of Claim] relates to the 'Defamatory Words' as stated in the [Statement of Claim]." This suggests that the plaintiffs base their defamation claim on "false and defamatory statements" in the Complaints as well as in the Article.

45 Third, there are a number of vague allegations made in the Statement of Claim to disclosure of the existence of the Complaints, or the substance of the Complaints, to various parties other than the OSC. These allegations include the references in paragraphs 64 and 73 to spreading "false information through the Bay Street rumour mill" and spreading "rumours within the financial industry". They also include the allegations in paragraphs 75-78 regarding the Conspirators' contact with, and engagement of, Livesey to write a negative story targeting the plaintiffs, as well as the allegations in paragraphs 79 and 81-83 that the Conspirators approached Reuters and "other reputable news organizations" in 2017 and encouraged them to publish a negative story about the plaintiffs.

46 As a result of these pleadings, a reasonable reader of the pleadings would be confused as to: (1) whether the plaintiffs are asserting defamation claims based on statements made regarding the existence of, or substance of, the Complaints in circumstances other than the preparation and publication of the Article; and (2) whether the plaintiffs are asserting defamation claims based on the content of the Complaints themselves as made to the OSC.

47 The applicants proceeded on the basis that the answer to both these questions was in the affirmative and argued that such claims should be struck for various reasons, in particular that they fail to set out the necessary facts to establish a claim against them, individually. At the hearing, however, the plaintiffs confirmed that, in fact, with one qualification addressed below, they are not asserting either of the claims described in (1) and (2) above. I will address each in turn.

48 First, the plaintiffs say that their defamation claims are based solely on the publication of the Article and, to the extent that it is relevant, the statements of the Complainants to Copeland regarding the existence, and the alleged content, of the Complaints. The plaintiffs do not allege defamation based on any of the other alleged communications to third parties regarding the existence or content of Complaints, including to Livesey or Reuters. Instead, they say they rely on these allegations as further improper means for the purposes of their conspiracy claims as well as their claims of intentional interference with economic relations and unjust enrichment.

49 Second, the plaintiffs also do not assert that the statements allegedly made by the Complainants to the OSC pursuant to the OSC's "whistleblower" programme are the subject of defamation claims, subject to the issue of the applicability of the tort of abuse of process discussed below. It is acknowledged that statements made to the OSC in such circumstances are entitled to absolute privilege: see *Fraleigh v. RBC Dominion Securities Inc.* (2009), 99 O.R. (3d) 290 (Ont. S.C.J. [Commercial List]), at paras. 31-35; *Hung v. Gardiner*, 2003 BCCA 257, 13 B.C.L.R. (4th) 298 (B.C. C.A.), at paras. 30-37. This immunity applies not only to the making of statements to the OSC staff performing investigatory functions but also to all causes of action that may be based on those statements. In any event, in the present circumstances, the actual content of the Complaints remains unknown and is not pleaded.

50 As mentioned, the plaintiffs have, however, suggested that the tort of abuse of process may apply to exclude the availability of absolute privilege in respect of the Complaints. The tort of abuse of process entails the following four elements as confirmed by the Court of Appeal in *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661 (Ont. C.A.), at para. 27:

> (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted. [Citations omitted.]

51 The plaintiffs suggest that a "whistleblower" complaint to the OSC is analogous to the commencement of legal proceedings, and, therefore, the tort of abuse of process should be applicable in respect of the communication of

knowingly false complaints to the OSC for an ulterior and predominant purpose to further an improper objective. They do not, however, provide any case law to support this proposition.

52 In my view, the plaintiffs have failed to establish a reasonable cause of action for abuse of process on the facts of this case for the reason that they have failed to plead facts that establish the first element of the tort. The making of a complaint to the OSC under its "whistleblower" programme does not constitute the commencement of legal proceedings for the purposes of the tort of abuse of process.

53 There is a significant distinction between the communication of a "whistleblower" complaint in confidence to OSC staff and the commencement of legal proceedings. Among other things, the communication of a complaint does not involve any publication to third parties of the allegedly false complaint. The complaint remains a matter of confidential disclosure to the OSC staff, who then determine whether or not to investigate the complaint. Further, if a decision is taken to commence legal proceedings after any such investigation, it is the OSC, rather than the "whistleblower" that takes that decision. Moreover, any public documents released in connection with such action will reflect the view of the OSC staff of the relevant events, which may not necessarily be the same as the view of the "whistleblower". Accordingly, the making of a complaint does not entail the publication of any documents by the "whistleblower" whose publication could cause special loss or damage to a defendant.

54 There is, therefore, a causation problem in respect of complaints to the OSC, unlike the commencement of legal proceedings. In the latter case, the defendant's action in commencing litigation proceedings is a direct cause of any loss suffered by a plaintiff. In the former case, as mentioned, the independent action of the OSC in deciding to commence legal proceedings after conducting its own investigation is the cause of any loss suffered by a plaintiff.

55 Lastly, it is inherent in any "whistleblower" programme that a party making a "whistleblower" statement to a regulatory authority may have a questionable purpose in mind in doing so. However, the fact that a "whistleblower" may have the furthering of an improper object as his or her predominant purpose does not mean that the subject matter of his or her communication would not be of legitimate concern from a regulatory perspective. There are therefore compelling policy reasons why the tort of abuse of process should not apply in the case of "whistleblower" complaints to the OSC.

56 The plaintiffs' counsel advised the Court at the hearing of these motions that the plaintiffs would amend the pleadings to make the basis of their defamation claims clear if the Court found that, as currently drafted, the pleadings were confusing. Based on the foregoing, I find that the pleadings should be struck: (1) under r. 25.11, insofar as they suggest that the plaintiffs assert defamation claims in respect of statements made to third parties regarding the existence, or content of, the Complaints, other than statements made to WSJ reporters in respect of the Article; and (2) under r. 21.01(1)(b), insofar as they suggest that the plaintiffs assert a claim of defamation based on the assertion that the making of the Complaints was an abuse of process.

Analysis and Conclusions Regarding the Applicants' Motions to Strike

57 I propose to address the motions to strike of the various applicants by grouping them according to the plaintiffs' claims in the Statement of Claim.

Defamation

58 The plaintiffs allege that the Article was defamatory in respect of each of them. They assert a defamation claim against each of the applicants in these motions for loss arising from the publication of the Article. Based on the discussion above, it is my understanding that the plaintiffs' defamation claims against the applicants are based on the allegations in paragraphs 84-93. These pleadings pertain to Copeland's publication of the Article and to alleged conversations between McFarlane, Bauman, Molyneux, Levitt and Anderson with Copeland that formed the information upon which he based the Article.

59 The requirements for a pleading of defamation were addressed in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.), at para. 91:

> Both courts and leading authors on the law of defamation repeatedly state that pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts. A summary of the necessary material facts to allege a complete cause of action for defamation is found in Patrick Milmo and W.V.H. Rogers, ed., Gatley on Libel and Slander, 10th ed. (London: Sweet & Maxwell, 2003) at p. 806:
>
> > These facts are the publication by the defendant, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these facts by those to whom the words were published, and, where the words are slander not actionable per se, any additional facts making them actionable, such as that they were calculated to disparage the plaintiff in an office held by him or that they have caused special damage.

60 In *Catalyst Capital Group Inc*. at para. 23, the Court of Appeal addressed the requirements for a pleading of libel as follows:

> In libel actions (defamatory statements in writing, as in this case), the material facts to be pleaded are (i) particulars of the allegedly defamatory words; (ii) publication of the words by the defendant; (iii) to whom the words were published; and (iv) that the words were defamatory of the plaintiff in their plain and ordinary meaning or by innuendo. See, generally, Alastair Mullis and Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013), at paras. 26-1 to 26-26; *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 (C.A.), at para. 91; *Metz v. Tremblay-Hall*, [2006] O.J. No. 4134, 53 C.C.E.L. (3d) 107 (S.C.J.), at para. 13.

61 Each of the applicants seeks an order striking the plaintiffs' defamation claims against them, but on different grounds. I will address the position of each of the applicants in turn.

The Anson Defendants

62 The Anson Defendants move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of the Anson Defendants in the publication of the Article, including any particulars of any instances of publication of the Defamatory Words by the Anson Defendants.

63 The plaintiffs make three principal arguments. First, they argue that the defamation claim is part of the conspiracy claim. They say that, to the extent that the Anson Defendants participated in the Conspiracy, they also participated in the publication of the Article, even if they took no specific actions in furtherance of the publication of the Article. I do not think that this is correct.

64 I accept that a party who participates in the publication of a defamatory expression in furtherance of a common design will be liable to the plaintiff: see *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 (S.C.C.) at paras. 75-76. However, for such purposes, the common design must pertain to the publication of the defamatory statement.

65 In *Botiuk*, the issue concerned the liability of certain parties who participated in the publication of one of three documents that were treated collectively as a single libel. The Supreme Court upheld the lower court decisions that found these parties liable for all damages flowing from the publication of the three documents as a single libel. At para. 75, the Supreme Court expressed its finding as follows:

> The appellants' actions bring them within the third category of joint tortfeasors so well described by Fleming. In the context in which the text writer has utilized the word conspiracy, it refers to the design or agreement of persons to participate in acts which are tortious, even though they did not realize they were committing a tort.

66 In *Botiuk*, the Supreme Court therefore held that these parties were joint tortfeasors with the author and publisher of the two other articles. Not only are the facts in *Botiuk* significantly different from the present situation but there is also nothing in the decision of the Supreme Court that would attract liability to persons who did not participate in some manner in furtherance of the actual tortious act of libel of or slander upon which a plaintiff bases its claim of defamation.

67 In the present case, therefore, the plaintiff must plead facts that would support a finding that the Anson Defendants participated in the tortious act of publication of the Article in order to plead a viable cause of action in defamation against them. A pleading that the Anson Defendants participated in the Conspiracy, in furtherance of which certain of the other participants are alleged to have published the Article, is not sufficient to sustain a claim for defamation against the Anson Defendants.

68 Second, the plaintiffs say that the pleading is sufficient to permit the Anson Defendants to plead a simple denial of any involvement in the preparation or publication of the Article. This argument proceeds on an inadequate view of the purpose of pleadings. Under r. 25.06(1), the plaintiff has the obligation to plead facts upon which it relies and which, if proven, would ground a viable cause of action. In addition, a plaintiff is not entitled to plead a bald allegation and rely on the possibility that new facts might turn up that would support the allegation: see *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 22. Further, as mentioned in *Catalyst Capital Group Inc.* at para. 22, pleadings in defamation cases have traditionally been held to a higher standard, in terms of the precision with which the material facts must be pleaded, than is the case with other types of actions. More generally, in the absence of such particulars, a party should not be forced to bear the cost of an action for defamation in respect of a publication in which it took no part.

69 Third, the plaintiffs rely on the more flexible approach to pleadings of defamation in recent case law. In particular, they rely on the statements of Blair J.A. in *Catalyst Capital Group Inc.* at paras. 23 and 25. This principle has been applied in situations in which the plaintiff was unable to plead the exact wording of allegedly defamatory statements or the names of all of the parties to whom an allegedly defamatory statement was published.

70 In this case, however, apart from bald statements regarding the Conspirators collectively, the plaintiffs plead no details whatsoever regarding any involvement of the Anson Defendants in the preparation or publication of the Article. Moreover, there is no logical basis on which one could infer that they might have had knowledge of, and therefore been in a position to, participate in the preparation or publication of the Article. The plaintiffs' pleadings are therefore more properly regarded as bald allegations against the Anson Defendants for the purpose of a fishing expedition to determine whether or not the Anson Defendants played any role in the preparation and publication of the Article.

71 Accordingly, I agree with the Anson Defendants that the defamation claim against them does not disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that it fails to plead that the Anson Defendants participated in the publication of the alleged defamatory expression. This claim should therefore be struck.

Clarity/Anderson

72 Clarity and Anderson also move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of either of them in the publication of the Article including any particulars of any instances of publication by either of them. In opposition to the motion of Clarity and Anderson, the plaintiffs make the same three principal arguments discussed in respect of the Anson Defendants.

73 In the present circumstances, there is no basis in the pleadings for the defamation claim asserted against Clarity in its own right. The plaintiffs do not plead any actions by Clarity, in its own right, in respect of the preparation or publication of the Article. Clarity's position in respect of the plaintiffs' defamation claim against it is therefore substantially the same as that of the Anson Corporate Defendants with one qualification.

74 To the extent that there is a basis for asserting a claim against Anderson acting on behalf of Clarity, the plaintiffs' claim against Anderson would also constitute a claim against Clarity. Accordingly, any claim against Clarity requires the assertion of facts that would establish a viable claim based on actions of Anderson in his capacity as a representative of Clarity.

75 In paragraph 86 of the Statement of Claim, as mentioned, the plaintiffs plead that McFarlane told Copeland that "Callidus and Catalyst were engaged in allegedly nefarious accounting practices concerning a loan that Callidus had extended to XTG." The pleadings allege that Copeland had "similar conversations" with Anderson.

76 As literally drafted, the paragraph suggests that Anderson had a conversation or conversations with Copeland regarding the matters raised by McFarlane pertaining to XTG. It is understood, however, that the plaintiffs intended to plead that Anderson told Copeland the substance of his own Complaint to the OSC. I have therefore proceeded on this basis in analyzing the defamation claim against Anderson.

77 Neither Clarity nor Anderson was in litigation with Callidus, as were the Guarantor Conspirators. It is therefore unclear what Anderson is alleged to have said to Copeland in respect of his own position, or that of Clarity, that was defamatory of the plaintiffs. Moreover, the pleadings do not allege that the Article refers to the substance of any Complaint of Clarity or Anderson. It is therefore not possible to infer any defamatory statements to Copeland based on the pleadings regarding the content of the Article. Accordingly, Anderson cannot know the case that he has to meet and cannot plead otherwise than by way of a blanket denial that he made any defamatory statement to Copeland.

78 In my view, in the absence of a pleading regarding the substance, even if not the details, of a defamatory statement made by Anderson to Copeland, the pleadings fail to disclose a reasonable cause of action against Anderson and Clarity for the purposes of r. 21.01(1)(b). In addition, the plaintiffs have failed to plead the material facts upon which they base their claim that Anderson's alleged conversation with Copeland was actionable in view of the text of the Article. Accordingly, the plaintiffs' defamation plea against both Clarity and Anderson is also struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claim based on the Article.

Molyneux and Levitt

79 Molyneux and Levitt also move to strike the defamation claims against them.

80 Both Molyneux and Levitt are in litigation with Callidus and are attempting to enforce their personal guarantees in respect of a loan made by Callidus to an entity referred to as "Fortress Resources" in the Statement of Claim. However, there is no pleading that the Article refers to Fortress Resources nor is there a pleading regarding what either Molyneux or Levitt is alleged to have said to Copeland. There is therefore no pleading as to what either Molyneux or Levitt communicated to Copeland that was defamatory of the plaintiffs.

81 Further, Molyneux and Levitt could possibly be liable in defamation if they pursued a "common design" with McFarlane to publish a defamatory article concerning the plaintiffs. However, the plaintiffs' pleading does not plead facts that would establish such a common design, as opposed to an agreement for a larger conspiracy, which is discussed below.

82 In my view, therefore, the positions of Anderson, Molyneux and Levitt on this issue are substantially similar. On this basis, the defamation claims against each of Molyneux and Levitt should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action and, in addition, should be struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claims based the Article.

Intentional Interference with Economic Relations

83 The plaintiffs assert claims of intentional interference with economic relations against all of the applicants.

84 The elements of this tort were addressed by the Supreme Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.). In that decision, Cromwell J. concluded at para. 5 that the tort was available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. He also concluded that, for the purposes of the tort, conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. At para. 45, Cromwell J. went on to state that "[t]he two core components of the unlawful means tort are ... that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means." For this purpose, breaches of criminal or regulatory law do not satisfy the criteria for "unlawful means".

85 The plaintiffs' claims for damages for intentional interference with economic relations against all of the applicants in these motions should be struck for two reasons.

86 First, given the determinations above that the plaintiffs' defamation claims against the applicants should be struck, the plaintiffs' claims against the applicants for intentional interference with economic relations cannot survive. These claims are based on "unlawful means" in the form of actionable defamation of the plaintiffs. As the plaintiffs' defamation claims have been struck, the plaintiffs' claims for interference with economic relations fail to plead an essential element of the tort.

87 Second, with respect to the element of third-party involvement, the pleadings state simply that the Defendants "deceived third-party market participants into believing that Callidus and Catalyst were engaged in fraudulent activity and were subject to 'investigation' by the OSC and the Toronto police." The plaintiffs further plead that the Defamatory Words were published to induce these market participants to sell their Callidus Shares, thereby lowering the Callidus share price for a prolonged period of time.

88 The plaintiffs have therefore failed to identify the third party or third parties against whom the applicants are alleged to have committed an unlawful act. They have also failed to plead facts that establish the commission of an unlawful act that constitutes unlawful means, as understood for the purposes of this tort, directed against such third party or third parties. Specifically, they have failed to identify a claim of any third-party market participant against the applicants arising out of the publication of the Defamatory Words by the applicants.

89 Counsel for the plaintiffs conceded that if a plaintiff asserting a claim of intentional interference with economic relations must plead facts that identify a third party against whom the defendant has committed an unlawful act, and the actionable claim of such third-party against the defendant that arose as a result of the applicants' actions, the claim is deficient. As I find that such pleadings are required, the pleadings against the applicants fail to disclose a reasonable cause of action.

90 Accordingly, this claim should be struck under r. 21.01(1)(b) as against all of the applicants.

Unjust Enrichment

91 The plaintiffs assert a claim for unjust enrichment against all of the applicants.

92 In order to succeed in a claim for unjust enrichment, a plaintiff must prove three matters: (1) an enrichment of or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: see *Apotex Inc. v. Eli Lilly and Co.*, 2015 ONCA 305, 125 O.R. (3d) 561 (Ont. C.A.), at para. 20, referring to *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), at para. 32.

93 The plaintiffs plead that the applicants have been unjustly enriched through their participation in an unlawful short selling attack. Read generously, this is understood to proceed on the basis that the publication of the Defamatory Words rendered unlawful the Conspirators' short sales of Callidus Shares that would otherwise have been lawful. The pleading

alleges that the applicants received a benefit in the form of their profit made on the short sales, that "the benefit was at Callidus's expense, as it corresponded to a decline in Callidus's market capitalization, which constitutes an injury to Callidus", and that there was no juristic reason for the enrichment. The plaintiffs seek an order requiring the applicants to pay over their profits on the sale of Callidus Shares to the plaintiffs.

94 There are two problems with this pleading.

95 First, given the determination above that the defamation pleading must be struck, the pleading that there was no juristic reason for the applicants' profits from their short sales cannot stand. In the absence of a further act that vitiates the applicants' sales activity, there is nothing improper or illegal about the applicants' actions in taking short positions in the Callidus Shares that would support a claim for unjust enrichment.

96 Second, as was observed in *Apotex Inc. v. Eli Lilly and Co.* at para. 43, there must be a reciprocal relationship between the defendant's benefit and the plaintiff's deprivation for a claim of unjust enrichment to succeed, that is, the defendant's gain must correspond to the plaintiff's loss:

> The Supreme Court of Canada recently discussed the elements of unjust enrichment in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at paras. 148-158. With respect to the first and second elements, the enrichment and the corresponding deprivation, the court explained, at para. 151, that they are "the same thing from two different perspectives" or "two sides of the same coin." These elements are "properly understood to connote a transfer of wealth": at para. 152. Since "the purpose of the doctrine of unjust enrichment is to reverse unjust transfers of wealth", the first question the court asked in that case was whether the government was enriched at the plaintiffs' expense. The court affirmed that the government's gain had to correspond to the plaintiffs' loss for the unjust enrichment claim to succeed.

97 This requirement for a claim of unjust enrichment was confirmed in the recent decision of the Supreme Court in *Moore v. Sweet*, 2018 SCC 52 (S.C.C.). In that decision, Côte J. for the majority noted at para. 43 that "the plaintiff must demonstrate that the loss he or she incurred c*orresponds* to the defendant's gain, in the sense that there is some causal connection between the two."

98 In this case, there is no reciprocal relationship between the applicants' alleged gain, being profits from their short selling activity, and the plaintiffs' alleged deprivation, being the decline in Callidus' market capitalization. While the triggering event may have been the same — the publication of the Article — the alleged gains of the Conspirators and the losses suffered by the plaintiffs do not exhibit a reciprocal relationship, and are not causally related, as understood for the purposes of a claim of unjust enrichment.

99 The losses that corresponded to the applicants' gains from their short selling activity were transferred from the holders of Callidus Shares who sold their shares in the market to the Conspirators who acquired such shares for the purpose of covering their naked short positions. Neither Callidus nor Catalyst was a seller of Callidus Shares. The loss suffered by Callidus was a reduction in its ability to raise additional capital as a result of a lowered market capitalization. The loss suffered by Catalyst was a reduction in the market value of its investment in Callidus. However, the decline in Callidus's market capitalization was not a loss that was transferred from Callidus to the applicants nor was the decline in the market value of Catalyst's investment in Callidus.

100 In this regard, the pleadings in this case raise a similar issue to that which was presented in *Apotex Inc. v. Eli Lilly and Co.*, although in a very different context. The following reasoning of the Court of Appeal at para. 55 of that case is equally applicable in the present case:

> This is not a bilateral context where Apotex is the only party that has been wronged by Lilly. Effectively, Apotex is asking the court to designate it as the de facto beneficiary of the wrongfully-obtained monopolistic profits despite recognizing in its pleadings that it was the public that suffered actual deprivation as a result of the monopolistic pricing. Unlike the plaintiffs in the "profiting from wrong" cases discussed above, Apotex is not positioned as the

> sole party with a legitimate right to "enforce" or "deter" the underlying wrong. The pecuniary interests of consumers, and potentially other generic companies, are also implicated. Lilly did not owe Apotex an equitable duty, nor is this case akin to the "exceptional" breach of contract cases where courts award restitution damages to a plaintiff in order to prevent a defendant from exploiting a bilateral agreement to its advantage.

101 Accordingly, the plaintiffs' claims for unjust enrichment should be struck under r. 21.01(1)(b) as against all of the applicants.

Conspiracy

102 The plaintiffs' principal claim in the Statement of Claim is its claim of conspiracy against the Defendants. As discussed above, the pleadings allege that, in or about December 2016, the Wolfpack Conspirators and the Guarantor Conspirators entered into the Conspiracy with the intention of causing economic harm to the plaintiffs. The elements of the plan to be implemented in furtherance of the Conspiracy are set out in paragraph 64 of the Statement of Claim.

103 In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at paras. 21 and 22, the Court of Appeal approved the following statement of the pleading requirements for a civil conspiracy claim which is quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975) at pp. 646-47:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

104 In this action, the essence of the conspiracy claim is that the Conspirators agreed to a plan whereby a defamatory article would be published and the Conspirators would profit from the decline in the value of the Callidus Shares by covering short positions put in place shortly prior to publication of the article. For clarity, while the plaintiffs also alleged that the Guarantors co-ordinated their responses to the litigation commenced by Callidus against them and, in that connection, asserted allegedly spurious defences and counterclaims, these allegations do not form part of the conspiracy claim. They are instead alleged to be events that prompted the Guarantor Conspirators to enter into the Conspiracy with the Wolfpack Conspirators. Similarly, as mentioned, while the Conspirators are alleged to have communicated with certain parties, in addition to Copeland, with a view to publication of an article negative to Callidus and Catalyst, these efforts were not successful and were not directly part of the implementation of the Conspiracy as described in paragraph 64.

105 In the Addendum, the plaintiffs say that each of the Conspirators were aware of and agreed to participate in the Conspiracy and that each benefitted from and intended to unlawfully harm the plaintiffs through the Conspiracy. Significantly for present purposes, they also say that, because all of the Defendants were party to the common design shared by the Conspirators, each Defendant is liable for the damages caused, irrespective of whether such Defendants participated in each specific act constituting the Conspiracy.

Anson Defendants

106 I propose to consider the conspiracy pleadings relative to the Anson Defendants by first describing their alleged involvement in the Conspiracy and then addressing the claims against the Anson Corporate Defendants and the Anson Individual Defendants separately in turn.

The Conspiracy Pleadings and Particulars in Respect of the Anson Defendants

107 In the Statement of Claim, the plaintiffs plead that in late 2016 West Face encouraged Anson "to support its planned short attack" and disclosed to the Anson Defendants the identity of the Guarantors and its knowledge of co-ordination between the Guarantors. The pleadings further allege that in or about December 2016, the Wolfpack Conspirators, which includes the Anson Defendants, and the Guarantor Conspirators entered into the Conspiracy.

108 In the Addendum, by way of particulars, the plaintiffs allege that in February 2017 Spears and Puri discussed and agreed to a plan with Langstaff to work up false fraud complaints against the plaintiffs. They also say that, at or after this time, all of the Anson Defendants were in contact, directly or indirectly, with the other Conspirators and agreed to become part of the Conspiracy described in paragraph 64 of the Statement of Claim. In addition, the plaintiffs say that, from and after this time, Spears, Puri and the other Anson Defendants communicated directly or indirectly with the other Conspirators in furtherance of the Conspiracy. These communications, which the plaintiffs say are generally unknown to them but known to the Anson Defendants, are alleged to have included meals in June 2017 at a particular restaurant.

Disposition of the Motions of the Anson Corporate Defendants

109 The Anson Corporate Defendants argue that the pleadings fail to plead sufficient facts to disclose a claim of conspiracy against them in that there is no pleading of any specific action on the part of the Anson Defendants in respect of the Conspiracy. In particular, they say that the plaintiffs have failed to plead any particulars that enable the Anson Defendants to understand the steps comprising the plan described in paragraph 64 in which they are alleged to have participated. In this regard, it is not disputed that the plaintiffs do not allege that the Anson Defendants made any of the Complaints to the OSC or had any conversations with Copeland.

110 The Anson Corporate Defendants also suggest that, insofar as the pleadings plead any facts, they are inconsistent with, if not actually contradicted by, the particulars set out in the Addendum. In particular, they say that the timing of the alleged entering into of the Conspiracy by the Anson Defendants in or about February 2017 is inconsistent with, and excludes the Anson Defendants' participation in, the entering into of the Conspiracy by the other Conspirators in December 2017.

111 There are clearly difficulties with the pleadings in the Statement of Claim insofar as they address the involvement of the Anson Corporate Defendants in the Conspiracy. As noted, the particulars in the Addendum contradict the pleading that the Anson Defendants entered into the Conspiracy in December 2017. Further, Langstaff is not a Defendant and his only involvement, as pleaded in paragraphs 95 and 96 of the Statement of Claim, was to assist the Wolfpack Conspirators to put short positions in place. Therefore, the allegation in the Addendum that the Anson Defendants and Langstaff were involved in a plan to work up false complaints against the plaintiffs has no connection to the Conspiracy claim as currently pleaded. Moreover, there is no suggestion in the Addendum that Langstaff was the means of the alleged "indirect" communication between Spears, Puri and the Anson Corporate Defendants, on the one hand, and the other Conspirators, on the other hand.

112 Taking the foregoing into consideration, the allegations pertaining to the Anson Corporate Defendants can be summarized as follows on a generous reading. The Anson Corporate Defendants, as represented by Spears and Puri, agreed with the other Conspirators to become part of the Conspiracy in or after February 2017 and communicated with the other Conspirators after this time, including at meals in June 2017 involving Spears and Puri. The purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. The Anson Corporate Defendants were therefore aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, the Anson Defendants put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

113 The issue for the Court is whether these spare pleadings, together with the pleadings regarding the involvement of the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the requirements of r. 21.01(1)

(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against the Anson Corporate Defendants in that they address each of the requisite elements of the civil conspiracy claim as set out above.

114 Further, insofar as the Anson Defendants say that the pleadings do not allow them to know the case against them, I do not agree for the following reasons. The Anson Defendants are in a position to plead with respect to each of the matters referred to above as constituting the requisite elements of a civil conspiracy claim.

115 In particular, the issues of whether Spears and Puri agreed to the Conspiracy and whether they had the alleged communications with the other Conspirators are factual matters within the knowledge of the Anson Defendants. Insofar as it is necessary to establish knowledge of the Conspiracy on the part of the Anson Corporate Defendants, the plaintiffs' pleadings, together with the particulars in the Addendum, allege that the Anson Corporate Defendants became aware of the Conspiracy and agreed to it through the involvement of Spears and Puri described above. Further, the Anson Corporate Defendants are alleged to have participated by putting short positions in place to benefit from the anticipated market consequences of the Article and to have profited therefrom. These are also purely factual matters to which the Anson Corporate Defendants are in a position to plead. Conversely, given the allegation of a conspiracy, it is not reasonable to expect that the plaintiffs would necessarily know the specific communications among Spears, Puri and the other Conspirators in respect of the Conspiracy or the extent of the short positions of the Anson Corporate Defendants, if any, in the Callidus Shares.

116 Based on the foregoing, I conclude that the plaintiffs' pleadings of conspiracy against the Anson Corporate Defendants disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Enterprise Liability

117 As an alternative argument, the Anson Corporate Defendants say that paragraph 20 of the Statement of Claim should be struck in respect of the Anson Corporate Defendants because it alleges liability on an enterprise-wide basis, rather than against individual corporations. As I understand this argument, the Anson Defendants say that such a pleading fails to assert a viable cause of action against any of them individually for the purpose of r. 21.01(1)(b).

118 Paragraph 20 of the Statement of Claim alleges, in effect, that the Anson Individual Defendants and the entities that comprise the Anson Corporate Defendants at all material times operated, acted, and marketed themselves as a single entity. Accordingly, this pleading in paragraph 20 would treat all of the Anson Corporate Defendants as a single entity for the purposes of the conspiracy claim. It is also alleged in paragraph 20 that the Anson Individual Defendants and the Anson Corporate Defendants are vicariously liable for the acts and omissions of one another or alternatively that they acted as agent for the other Anson Defendants. These latter pleadings of vicarious liability and agency are not at issue in this section.

119 The Anson Corporate Defendants say that courts have struck pleadings that are drafted on the "enterprise liability" approach. They refer to and rely on *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2000), 11 B.L.R. (3d) 236 (Ont. S.C.J.) at paras. 48-49, varied on other grounds, (2002), 61 O.R. (3d) 433 (Ont. C.A.); and on *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, 27 C.P.C. (7th) 32 (Ont. S.C.J.), at para. 120, affirmed, 2013 ONSC 1169 (Ont. Div. Ct.). However, these cases exhibited compelling reasons on the facts as pleaded for excluding particular corporate entities from potential liability.

120 In the present case, it is alleged that Spears and Puri are respectively a principal of, and an analyst at, all of the Anson Corporate Defendants. Their actions and their knowledge are, therefore, the actions and knowledge of all of the Anson Corporate Defendants. Further, each of the Anson Corporate Defendants is alleged to trade in securities. There are no facts before the Court that would narrow the class of Anson Corporate Defendants who could have participated in the Conspiracy by putting short positions in place to profit from the decline in the market price of the Callidus Shares. Nor is there any basis for excluding the possibility that a short position of one of the Anson Corporate Defendants was

taken on behalf of one or more other Anson Corporate Defendants - that is, was allocated among the Anson Corporate Defendants.

121 Accordingly, I do not accept the argument that paragraph 20 of the Statement of Claim should be struck by virtue of the pleading therein of liability on an "enterprise liability" basis.

Disposition of the Motions of the Anson Individual Defendants

122 The Anson Individual Defendants also submit that the conspiracy claim against them should be struck on the basis that the plaintiffs have failed to plead any particulars of their involvement that satisfy the requirements of r. 25.06(1).

123 Given the conclusion above that the conspiracy claim should not be struck in respect of the Anson Corporate Defendants because, in part, of the actions of Spears and Puri in agreeing to the Conspiracy on behalf of the Anson Corporate Defendants and the allegation that, as Defendants, Spears and Puri took short positions in the Callidus Shares or otherwise benefitted from such trading, there is no basis for striking out the claims against them. The pleadings in respect of these parties are essentially the same as the pleadings against the Anson Corporate Defendants. For the reasons discussed above, such pleadings satisfy the requirements for a civil conspiracy pleading.

124 However, in my view the claim of conspiracy against Kassam must be struck for want of any pleading of any overt act on his part pertaining to his involvement in the Conspiracy. The pleadings in respect of Kassam therefore fail to plead an essential requirement for a claim of civil conspiracy. Based on the pleadings, and the Addendum, Kassam also cannot know the case against him that he has to meet. He is therefore not in a position to plead in any meaningful way based on the plaintiffs' pleadings in respect of him.

125 Accordingly, the conspiracy claim against Kassam should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action against him.

Clarity/Anderson

126 I will deal in turn with the conspiracy claims against Clarity and Anderson after first setting out the pleadings and particulars of the plaintiffs in respect of these claims.

The Conspiracy Pleadings and Particulars in Respect of Clarity/Anderson

127 In the Statement of Claim, the plaintiffs plead that West Face contacted Clarity and "encouraged it to participate in the upcoming wave of short attacks against Callidus". Clarity and Anderson are included in the Wolfpack Conspirators and, as such, are included in the pleading that alleges that, on or about August 9, 2017, the Wolfpack Conspirators took naked short positions in the Callidus Shares and covered those positions later to their profit.

128 The pleadings further allege that Clarity and Anderson entered into the Conspiracy in or about December 2017. Thereafter, in paragraph 68 the plaintiffs allege that Clarity or Anderson agreed to file, and did file, false "whistleblower" complaints with the OSC in coordination with the other Complainants in order to portray different alleged issues with Callidus' continuous disclosure and with matters relating to Catalyst.

129 In addition, the pleadings allege that Anderson, who had a prior relationship with Copeland, recruited Copeland to write the Article to further the Conspiracy. The Statement of Claim alleges that Copeland was directed by the Conspirators to "interview" McFarlane. It also alleges that Copeland had a conversation with Anderson that was "similar" to his conversation with McFarlane.

130 In the Response, the plaintiffs provide, by way of particulars, that Anderson and Clarity communicated frequently with the other Conspirators from and after January 2017 and agreed to join and participate in the Conspiracy prior to June 2017.

Disposition of the Motions of Clarity/Anderson

131 Clarity and Anderson say that the pleadings fail to identify their actual involvement in the Conspiracy. In particular, they rely upon the inconsistencies between the Statement of Claim and the particulars in the Response.

132 There is a clear inconsistency between the timing of the alleged agreement of Clarity and Anderson to enter into the Conspiracy as pleaded in the pleadings and as provided in the particulars in the Response. Further, insofar as the plaintiffs allege that Clarity and Anderson did not agree to participate in the Conspiracy until sometime in 2017 prior to June, the allegation that Clarity and Anderson filed a false "whistleblower" complaint to the OSC in furtherance of the Conspiracy cannot stand. This timing is contradicted by the pleadings in the Statement of Claim that the Complaints were filed with the OSC in late 2016 or early 2017.

133 In addition, I have dealt earlier with the issues of the substance of McFarlane's alleged conversation with Copeland in the context of the defamation claims against Anderson and Clarity. For present purposes, the allegation in paragraph 86 regarding Anderson's communication with Copeland is deficient in failing to set out the subject matter of such conversation. As mentioned earlier, Anderson was not the subject of a guarantor action by Callidus. There is also nothing in the Article that has been attributed to Anderson, whether pertaining to any alleged "whistleblower" complaint by him or otherwise.

134 Taking the foregoing into consideration, the pleadings pertaining to Clarity and Anderson are substantially similar to the pleadings in respect of the Anson Defendants. The plaintiffs allege that Clarity and Anderson agreed to participate in the Conspiracy by June 2017 and that the purpose of the agreement was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. As a result, Clarity and Anderson were aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, Clarity and Anderson put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

135 The issue for the Court is whether these pleadings, together with the pleadings regarding the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the requirements of r. 21.01(1)(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against Clarity and Anderson in that they address each of the requisite elements of a civil conspiracy claim as set out above.

136 Further, insofar as Clarity and Anderson say that the pleadings do not allow them to know the case against them, I do not agree. Clarity and Anderson are in a position to plead with respect to each of the matters referred to in the preceding paragraph as constituting the requisite elements of a civil conspiracy claim for the same reasons that I concluded that the Anson Defendants were in a position to plead with respect to the civil claim against them.

137 Accordingly, I conclude that the plaintiffs' pleadings of conspiracy against Clarity and Anderson disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Molyneux/Levitt

138 I propose to treat the plaintiffs' pleadings of conspiracy against Molyneux and Levitt together as, for present purposes, the claims against each of them are virtually identical.

The Conspiracy Pleadings in Respect of Molyneux and Levitt

139 In the Statement of Claim, Molyneux and Levitt are included as Guarantors and Guarantor Conspirators. Their involvement in the activities preceding the alleged agreement regarding the Conspiracy in December 2016, and its significance for the plaintiffs' conspiracy claim, has been described above. With respect to the Conspiracy, the pleadings allege that Molyneux and Levitt entered into the agreement to implement the Plan in December 2016. The pleadings

further allege that Levitt or Molyneux filed a false "whistleblower" complaint with the OSC in late 2016 or early 2017 relating to Callidus and Catalyst in furtherance of the Conspiracy. In addition, in paragraph 86 of the Statement of Claim, it is alleged that both Molyneux and Levitt had conversations with Copeland "similar" to the conversation between Copeland and McFarlane. Lastly, Molyneux and Levitt are included in the Wolfpack Conspirators who are alleged to have taken short positions, directly or indirectly, in the Callidus Shares on or about August 9, 2017 and to have profited therefrom.

Disposition of the Motions of Molyneux and Levitt

140 Molyneux and Levitt submit that, even with the particulars provided in the Response, they do not know the case they have to meet. There are two principal aspects to this position to be addressed.

141 First, Molyneux and Levitt argue that, to the extent they are alleged to have participated in the Conspiracy by making false statements to Copeland regarding Callidus and Catalyst, there is no pleading that states what they are alleged to have said.

142 I have dealt with this issue in the context of the defamation claims against Molyneux and Levitt. For this purpose, Molyneux and Levitt are in essentially the same position as Anderson, notwithstanding that, unlike Anderson, each is the subject of litigation by Callidus on their guarantees. Moreover, there is no pleading that the Article refers to any of Fortress Resources, Molyneux or Levitt, nor is there any pleading attributing any particular statements in the Article to Molyneux or Levitt or any pleading regarding any alleged defamatory statements made by Molyneux or Levitt to Copeland.

143 However, setting aside the aforementioned pleadings, the pleading of conspiracy that remains alleges that Molyneux and Levitt entered into the Conspiracy, and were therefore aware of the elements of the Plan to be implemented, were aware that the purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs, took short positions in the Callidus Shares, and profited therefrom by covering those positions after the market decline that followed the release of the Article. While these assertions may well be factually incorrect, the Court is required to assume the truth of the pleadings for the purposes of these motions to strike. The proper means of addressing any factual inaccuracies is a summary judgment motion.

144 For the reasons set out above in respect of the other applicants on these motions, I am of the opinion that the foregoing pleadings of conspiracy against Molyneux and Levitt, together with the pleadings regarding the Wolfpack Conspirators and the other Guarantor Conspirators, disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that they address each of the requisite elements of a civil conspiracy claim against Molyneux and Levitt as set out above.

Conclusion

145 Based on the foregoing, the plaintiffs' claims of defamation, intentional interference with economic relations, and unjust enrichment are struck in respect of each of the Anson Defendants, Clarity, Anderson, Molyneux and Levitt. In addition, the plaintiffs' claim of civil conspiracy against Kassam is also struck.

Costs

146 The applicants were partially but not completely successful on these motions. While most of the plaintiffs' claims against them have been struck, the principal claims of conspiracy have not been. In these circumstances, I think that the applicants should be entitled to a portion of their costs respecting an appropriate allocation between the claims struck and the conspiracy claims. For this purpose, I find the appropriate allocation to be 2/3: 1/3 based on a combination of the relevant portions of the parties' facta and the time required for submissions on the hearing of these motions. Further, I see no basis in the plaintiffs' conduct in respect of these motions to support costs on a substantial indemnity.

147 The Anson Defendants seek total costs of $37,467.86 on a partial indemnity basis. They took the primary responsibility for these motions. Given the importance of these motions to the Anson Defendants, and to the other applicants, the relative complexity of the motions, and the relative seniority of counsel, I find this aggregate amount to be reasonable. Accordingly, I fix fair and reasonable costs of the Anson Defendants at $25,000 on an all-inclusive basis.

148 Clarity/Anderson seek costs of $7,8436.90 on a partial indemnity basis. This is reasonable, given the issues affecting them and the time spent on this motion by their counsel. Accordingly, I find fair and reasonable costs of these applicants to be $5,230.

149 Molyneux seeks costs of $11,685.45. However, given the extent of his involvement in this motion, and the relative complexity of his arguments, neither of which exceeded that of Clarity/Anderson, I think that fair and reasonable costs would be the same amount as awarded to these other applicants. Accordingly, I find fair and reasonable costs to be $5,230.

150 Levitt did not provide a costs submission as he had left the hearing for a medical appointment before this matter was addressed by the Court. If Levitt wishes to make a costs submission, he will have thirty days to make written submissions not exceeding five pages in length together with a costs outline in the form required by the *Rules of Civil Procedure*.

TAB 12

See paras. 2, 6, 8

2007 ONCA 456
Ontario Court of Appeal

Adelaide Capital Corp. v. Toronto Dominion Bank

2007 CarswellOnt 3989, 2007 ONCA 456, [2007] O.J. No. 2445, 158 A.C.W.S. (3d) 399

South Holly Holdings Limited (Plaintiff) and The Toronto-Dominion Bank carrying on business as TD Canada Trust (Defendant / Appellant) and Miriam Tollis and Victor Tollis (Third Parties / Respondents)

Doherty J.A., E.A. Cronk J.A., and R.P. Armstrong J.A.

Heard: June 14, 2007
Judgment: June 14, 2007
Docket: CA C46330

Proceedings: reversing in part *Adelaide Capital Corp. v. Toronto Dominion Bank* (2006), 2006 CarswellOnt 7448 (Ont. S.C.J.) [Ontario]

Counsel: John Polyzogopoulos for Toronto-Dominion Bank
Pellegrino Capone for Miriam & Victor Tollis

***Doherty J.A.*:**

1 The appellant Bank appeals from the order of Pierce J. of the Superior Court of Justice striking its amended third party claim, without leave to amend, as disclosing no reasonable cause of action. The Bank alleges that the motion judge erred: (i) in concluding that its pleading was fatally deficient for failing to allege a reasonable cause of action, when in fact three separate causes of action were pleaded (fraudulent misrepresentation, negligent misrepresentation and a right to contribution and indemnity under the *Negligence Act*); (ii) by engaging in a fact finding exercise that is prohibited on a rule 21.01(1)(b) motion; and (iii) by relying on evidence that was inadmissible on a motion of this type.

2 In our view, the Bank's amended third party claim fails to satisfy the requirements of rule 25.06(8), which provides that where fraud or misrepresentation is alleged, full particulars of such an allegation must be pleaded. No particulars are pleaded. Instead, the Bank baldly claimed that if it was found liable in the main action, it necessarily followed that some or all of the challenged statements by the respondents' solicitor were false. The Bank provided no particulars of the basis or nature of the alleged falsity of these statements, nor did it identify which of the representations in issue were said to be false.

3 Moreover, the premise of the Bank's falsity assertion is inaccurate. A finding of liability against the Bank in the main action need not depend on the truth or falsity of any representations made by the respondents' solicitor.

4 Accordingly, in our view, even a generous reading of the Bank's pleading supports the motion judge's conclusion that it should be struck under rule 21.01(1)(b) as disclosing no reasonable cause of action.

5 However, we agree with the Bank that the motion judge erred in reaching this conclusion by making findings of fact relating to the Bank. This was not open to the motion judge on this type of motion. In addition, the motion judge based her decision, at least in part, on her consideration of documents that were not properly admissible on a rule 21.01(1)(b) motion.

6 We also agree with the Bank that, in the circumstances, it should have been granted leave to amend its third party claim. A litigant's pleading should not lightly be struck without leave to amend. To the contrary, leave to amend should be denied only in the clearest of cases. This is particularly so where the deficiencies in the pleading may be cured by an appropriate amendment, as in this case. Importantly, on this record, there is no evidence of prejudice to the respondents if leave to amend is granted.

7 Finally, the respondents' contention that the failure of the Bank to claim rescission of the settlement defeats the Bank's third party claim cannot be accepted. The relevance, if any, of the settlement to the claim advanced by the Bank is an issue to be raised in defence if the respondents are so advised.

8 For the reasons given, the appeal is allowed in part and the Bank is granted leave to amend its amended third party claim within twenty days from the date hereof.

9 The Bank acknowledges, fairly, that the costs of this appeal and of the motion below should be awarded to the respondents in the circumstances of this case. We fix those costs, as agreed by counsel, in the total amount of $10,000, inclusive of disbursements and G.S.T.

Appeal allowed in part.

TAB 13

See paras. 25, 34

2008 ONCA 111
Ontario Court of Appeal

Malata Group (HK) Ltd. v. Jung

2008 CarswellOnt 699, 2008 ONCA 111, 164 A.C.W.S. (3d) 94, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177, 89 O.R. (3d) 36

MALATA GROUP (HK) LIMITED (Plaintiff / Respondent) and HENRY CHI HANG JUNG (Defendant / Appellant)

J.C. MacPherson, R.P. Armstrong, G. Epstein JJ.A.

Heard: January 11, 2008
Judgment: February 15, 2008 *
Docket: CA C47199

Proceedings: affirming *Malata Group (HK) Ltd. v. Jung* (2007), 2007 CarswellOnt 2730 (Ont. S.C.J.) [Ontario]; &affirming *Malata Group (HK) Ltd. v. Jung* (2007), 2007 CarswellOnt 4714 (Ont. S.C.J.) [Ontario]

Counsel: Terry Corsianos for Appellant
Brett D. Moldaver, Brendan Hughes for Respondent

***R.P. Armstrong J.A.*:**

Introduction

1 This appeal concerns the relationship between derivative actions and oppression complaints under the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("the Act"), and the impact on that relationship of the rule in *Foss v. Harbottle* [1] that a shareholder has no personal cause of action for harm done to the corporation.

2 The appellant moved before Justice Ground of the Superior Court of Justice to dismiss certain paragraphs of the statement of claim pursuant to rule 21.01(3)(b) of the *Rules of Civil Procedure* on the ground that the claims advanced were derivative in nature and required leave of the court as provided in s. 246 of the Act. The motion judge declined the relief sought and held that the claims were appropriately advanced in an oppression action. In doing so, the motion judge observed that, "the rule in *Foss v. Harbottle* has been substantially diluted by the enactment of the derivative and oppression action provisions of the [Act]".

3 The appellant also appeals the judge's order declining to dismiss two other paragraphs of the statement of claim pursuant to rule 21.01(3)(b) on the ground that they breach the notice provisions of a unanimous shareholder agreement.

4 I would dismiss the appeal.

Facts

5 The respondent, Malata Group (HK) Limited ("Malata HK"), commenced an action against the appellant, Henry Chi Hang Jung. According to the allegations in the statement of claim, Malata HK, Mr. Jung and Jimmy Jian Yuan Chen are the three shareholders of Malata Canada Ltd. Jung and Chen each own approximately 41 per cent of the common shares of Malata Canada. Malata HK owns approximately 18 per cent of the common shares of Malata Canada. Malata HK is also a creditor of Malata Canada. Jung, Chen and Malata HK are parties to a unanimous shareholder agreement. Messrs. Chen and Jung are also directors and officers of Malata Canada.

6 Malata Canada is an Ontario corporation that imported and sold consumer electronic products manufactured in China. Malata Canada operated in the wholesale market in Canada and sold its products to customers such as Home Depot, Canadian Tire, Best Buy and Philips Electronics.

7 Malata HK alleges in its statement of claim that Mr. Jung misappropriated corporate funds, breached his fiduciary duty to Malata Canada, and failed to act honestly and in the best interests of Malata Canada and Malata HK. It is alleged that such conduct has threatened the business life of the company and rendered Malata Canada incapable of paying its debt to Malata HK. Malata HK also alleges that Jung breached the shareholder agreement.

8 In subparagraphs 1(a), (c), (d), (e) and (j) of the statement of claim, Malata HK seeks the following relief:

> (a) An Order for a declaration that the Defendant, Henry Chi Hang Jung, is in breach of the Unanimous Shareholder Agreement among Jimmy Jian Yuan Chen, Malata Group (HK) Limited and Malata Canada Ltd., entered into on April 1st, 2004.
>
> (c) An Order for a declaration that Henry Chi Hang Jung has acted [*sic*] and has failed to act honestly and in good faith as an officer and director of the Corporation in contravention of the *Ontario Business Corporation Act* R.S.O., 1990 c. B-16.
>
> (d) An Order for an ex-parte mandatory, interim mandatory, and mandatory injunction directing Henry Chi Hang Jung and the Canadian Imperial Bank of Commerce to forthwith immediately transfer and cause to be transferred the sum of $918,879.44 (USD) unlawfully diverted by him and deposited to an account solely operated by Henry Chi Hang Jung at the Canadian Imperial Bank of Commerce under the account name of Malata Canada Ltd. back to Malata Canada. Ltd.'s corporate account at the Scotia Bank bearing account number: 459220012815.
>
> (e) An Order for an ex-parte mandatory, interim mandatory, and mandatory injunction requiring Henry Chi Hang Jung forthwith to return $601,400.00 (CND) improperly removed by him on his instructions on or about January 13, 2005 from Malata Canada Ltd.'s corporate bank account at the Bank of Nova Scotia, bearing Account Number: 459220012815 and to forthwith provide the Plaintiffs with full details, banking records, instructions, and information as to where the said funds were transferred, to whose account, and to whose benefit including, but not limited to, all wiring instructions, account numbers, transit numbers, bank branch information, addresses, telephone numbers and fax numbers.
>
> (j) An Order for a mandatory injunction requiring that Henry Chi Hang Jung sell all of his shares to the Plaintiffs in Malata Canada Ltd. pursuant to sections 9.42, 9.5 and 9.6 of the Unanimous Shareholder Agreement.

9 In the motion, Mr. Jung sought to dismiss subparagraphs 1(c), (d) and (e) on the ground that the substance of the claims is derivative in nature and therefore required leave of the court before proceeding.

10 Mr. Jung also sought to dismiss subparagraphs 1(a) and (f) on the ground that Malata HK had failed to give Mr. Jung 30 days to rectify his breaches of the shareholder agreement and therefore Malata HK lacked standing to advance these claims.

The Motion Judge's Reasons

11 The motion judge's position is summarized in paragraphs 5, 6 and 7 of his reasons:

> [5] I am of the view that the relief in clauses (b) and (c) above is clearly appropriate in an oppression action in that it is premised on the conduct of the Defendant causing the business affairs of Malata Canada to be carried on or conducted in a manner that is oppressive or unfairly prejudicial to Malata HK. I am further of the view that it

would be appropriate in an oppression action to seek the relief sought in clauses (a) and (j) above, being relief sought pursuant to the provisions of the unanimous shareholders agreement governing Malata Canada, in that it is the position of the Plaintiff that the same conduct constituted a breach of the unanimous shareholders agreement and entitles the Plaintiff to an order requiring that the Defendant sell his shares of Malata Canada to the Plaintiff. ...

[6] The position of the Defendant appears to be principally based on the relief sought in clauses (d) and (e) above in that such relief is solely for the benefit of Malata Canada and the claims made by the Plaintiff in the action are therefore derivative in nature and cannot be brought within an oppression action. The defendant relies on the rule in *Foss v. Harbottle* as enunciated by LaForest J. in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at paragraph 59 as follows:

> The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.

[7] In my view, the Defendant's position ignores the development of the law in this province which recognizes that the rule in *Foss v. Harbottle* has been substantially diluted by the enactment of the derivative action and oppression action provisions of the *OBCA* and the case law recognizing that derivative actions and oppression actions are not mutually exclusive.

12 In support of his conclusion, the motion judge relied on three cases: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); and *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)*, [2004] O.J. No. 191 (Ont. S.C.J. [Commercial List]).

13 In *McLaughlin*, Henry J., on a motion to strike out a statement of claim, considered the scope of the then-relatively new oppression remedy section (then s. 247) of the Act and its relationship with the derivative actions section (then s. 245) of the Act. In so doing, he made the following comment at para. 12:

> Under the new Part XVII there is no inconsistency in a derivative action under sec. 245 requiring leave and sec. 247 not being so limited; leave is required under sec. 245 to protect the corporation from frivolous and unwarranted interference by disaffected claimants who seek to inject the corporation into litigation as a party plaintiff for which the corporation may initially have to provide the financing. The proceeding now created by sec. 247 on the other hand is quite different; it creates a new personal cause of action to which the corporation need not be a party. A careful reading of the statement of claim reflects a claim for payment direct to plaintiffs and not to Mascan.

14 In *Deluce*, the defendant moved to strike certain paragraphs of the statement of claim as being outside the scope of the oppression remedy. In dismissing the motion, R.A. Blair J. said at p. 155:

> The other thrust of Air Canada's attack on the pleading was that the allegations raise claims which are the claims of Air Ontario and not those of Deluceco as shareholder. The action is therefore derivative in nature and Deluceco requires leave of the court to commence it in relation to these claims, counsel submit. There is authority, however, that merely because the plaintiffs in a minority shareholder oppression action rely on conduct which might in the first instance have caused harm to the company (and, therefore, give rise to a derivative claim), the plaintiffs are not deprived of their personal remedy under s. 241: see *Ontario (Securities Commission) v. McLaughlin* (1987), 11 O.S.C.B. 442 (H.C.J.) (Henry J.). Accordingly, again, it cannot be said to be plain, obvious and beyond doubt that the plaintiff cannot succeed.

15 In *Ford*, Cumming J. said at para. 241:

> Conduct which may result in harm to a company and may therefore be the subject of a derivative claim may also result in oppression to minority shareholders. The presence of a derivative action remedy does not preclude minority

shareholders from pursuing their personal remedy under s. 241. The two are not mutually exclusive. (*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 at para. 5 (C.A.); *Ontario Securities Commission v. McLaughlin* (1988), O.S.C.B. 442, [1987] O.J. No. 1247 (H.C.J.)).

The Appeal

(i) The Position of the Appellant

16 Counsel for the appellant submits that the motion judge erred in ruling that Malata HK has the legal capacity to seek a declaration (as in subparagraph 1(c) of the statement of claim) that Mr. Jung has breached his statutory duties to the company to act honestly and in good faith with a view to the best interests of the corporation as required by s. 134(1)(a) of the Act. As such, absent an order granting the leave of the court, the appellant lacks standing to proceed.

17 In respect of subparagraphs 1(d) and (e) of the statement of claim, in which the appellant seeks the return of monies owed to Malata Canada, counsel for the appellant submits that the motion judge erred in holding that these claims could be advanced pursuant to the oppression remedy, because the harm alleged was harm to the company, and therefore the claim can only be advanced by way of derivative action with leave of the court.

18 Counsel for the appellant also argues that the oppression remedy cannot be invoked against an individual acting in his personal capacity. He submits that Mr. Jung is being sued in his personal capacity and not in respect of his powers as a director. Counsel for the appellant concludes, therefore, that the oppression remedy simply does not apply in these circumstances.

19 Counsel for the appellant further submits in respect of subparagraphs 1(a) and (j) that these claims assert breaches of the shareholder agreement which are subject to a 30-day notice period during which the appellant may correct its defaults. Since this action was commenced before the 30-day notice period had expired, the respondent lacked the capacity to commence the action and the motion judge erred in failing to so find.

(ii) The Position of the Respondent

20 The respondent's position *simpliciter* is that the motion judge got it right. Respondent's counsel submits that derivative actions and claims made under the oppression remedy are not mutually exclusive. There is a degree of overlap between the two. Respondent's counsel relies upon the endorsement in *Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (Ont. C.A.) where this court said at paras. 4-5:

> The oppression remedy in section 248 of the *Ontario Business Corporations Act* is very broad and may well entitle a minority shareholder in a closely-held company to relief arising out of a director's breach of fiduciary duty.
>
> Equally, although some of the claims in the proposed amended statement of claim could be the subject of a derivative action, they may also make out a case of oppression. The two are not mutually exclusive. See *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.) and *PMSM Investments Limited v. Bureau* (1995), 25 O.R. (3d) 586 (Gen. Div.).

21 Counsel for the respondent also argues that the respondent's claims are based upon breaches of the shareholder agreement to which the respondent is a party and therefore his client is entitled to sue Mr. Jung directly for those breaches whether or not the breaches also caused harm to the company.

22 Counsel for the respondent further submits that Malata HK's failure to abide by the 30-day notice period for the curing of defaults under the shareholder agreement does not oust the jurisdiction of the court to entertain this action.

Analysis

***(i) The rule in* Foss v. Harbottle**

23 Laskin J.A. in *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (Ont. C.A.) succinctly stated the rule in *Foss v. Harbottle* as follows at para. 12:

> The rule in *Foss v. Harbottle* provides simply that a shareholder of a corporation — even a controlling shareholder or the sole shareholder — does not have a personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See *Salomon v. Salomon*, [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation.

24 In *Meditrust* at para. 16, Laskin J.A. also considered the limits to the rule in *Foss v. Harbottle* as described by the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 62:

> The rule in *Foss v. Harbottle* does not, of course, preclude an individual shareholder from maintaining a claim for harm done directly to it. Again, in *Hercules*, LaForest J. explained the limit of the rule at p. 214 S.C.R.:
>
> > One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done *to the corporation*.
> >
> > Indeed, this is the limit of the rule in *Foss v. Harbottle*. [Emphasis in original.]

(ii) Can the claims advanced in subparagraphs 1(c), (d) and (e) be advanced under the oppression remedy of the Act?

25 The answer to this question raises the distinction between derivative actions and oppression claims. One author has described this distinction as "murky": see Markus Keohnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 443. Another author observed in 1991 that, "for every holding that the oppression remedy may not be enlisted in a derivative cause, there is an opposite holding": see Jeffrey G. MacIntosh. "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 at 49.

26 It appears from my reading of the case law that there is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

27 Owing to this overlap between the oppression remedy and the derivative action, a court cannot determine which is the appropriate avenue for a claim to proceed through the simple application of a rule such as the rule in *Foss v. Harbottle*. Instead, a court must examine the relevant statutory text and the facts of the claim at issue. I now turn to the language of s. 248.

28 Subsection 248(2) of Act defines the nature of the conduct which is covered by the oppression remedy:

> Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Subsection 248(3) sets out a non-exhaustive list of remedial orders available to the court. In its preamble, s. 248(3) states that, "the court may make any interim or final order it thinks fit".

29 It is stating the obvious to say that s. 248 of the Act is drawn in broad language, both in terms of the harms it addresses and the non-exhaustive list of remedies it contemplates. Included in the list of remedies in s. 248(3) is a provision for "an order varying or setting aside a transaction or contract to which a corporation is a party and *compensating the corporation* or any other party to the transaction or contract": see s. 248(3)(h). [Emphasis added.] This provision contemplates a remedy under s. 248 that benefits the company itself even though the claim made by the complainant could also have been pursued by way of a derivative action.

30 As already noted, this court recognized in *Jabalee*, *supra*, that there is a degree of overlap between the claims that could be made out as derivative actions and those that could fall under the oppression remedy. As this court said at para. 5 of the endorsement, "[t]he two are not mutually exclusive."

31 One situation in which the overlap between the oppression remedy and the derivative action can be found is where directors in closely held corporations engage in self-dealing to the detriment of the corporation and other shareholders or creditors. A relevant case in this respect is *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), in which Swinton J. observed at para. 41:

A number of oppression cases turn on the fact that there has been conduct by directors or majority shareholders that amounts to self-dealing at the expense of the corporation or other corporate stakeholders (*SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 36 B.L.R. (2d) 207 (Ont. Ct. (Gen. Div.)), aff'd (1998), 110 O.A.C. 160 (Div. Ct.)); *Neri v. Finch Hardware* (1976) Ltd. (1995), 20 B.L.R. (2d) 216 (Ont. Ct. (Gen. Div.)); *Loveridge Holdings Ltd. v. King-Pin Ltd.* (1991), 5 B.L.R. (2d) 195 (Ont. Ct. (Gen. Div.)). For example, in SCI, there was oppression because the directors unfairly removed assets from the corporation so as to prevent the payment of a corporate debt and to benefit themselves.

32 In *Covington*, the complainant purchased shares in and loaned money to a closely held company. The respondent, the CEO and majority shareholder of the company (presumably also a director), misappropriated intellectual property (patents) belonging to the company, resulting in the company's inability to pay its creditors. Invoking s. 248(3) of the Act, the court ordered the respondent to cease using the technology related to the patents and assigned the patents and patent applications to the company. In reaching this conclusion, Swinton J. said at paras. 46 and 47:

Section 248(3) of the OBCA confers a broad discretion on the Court in determining an appropriate remedy, including "any interim or final order it thinks fit". The purpose of the remedy is to rectify the oppression. The provision has been used to make compensation orders against individual directors where their conduct has been found oppressive in small, closely held corporations such as Delta, and they have personally benefited — for example, by the removal of assets from the corporation (see, for example, SCI; Sidaplex, supra).

In this case, Delta has represented that the patents and patent applications for the Snowfluent technology are the property of the corporation, and White, as a principal of the corporation, was behind those representations. The corporation has a right to claim beneficial ownership at common law. This is not a case where a monetary award against White will adequately protect the interests of the stakeholders, especially given his evidence that he faces financial difficulties personally. If Delta's proprietary interest is not protected, the corporation will be denied the value of the patents, both in terms of possible licensing fees for their use and their value if they can be sold. Clearly,

the creditors will be in a better position to recoup some of their funds if the patents are assets of the corporation which can be sold.

33 I find Swinton J.'s analysis persuasive and useful. Although not identical, the circumstances in *Covington* are not dissimilar from the circumstances alleged in the statement of claim in this case. The complainant in each case is a shareholder and creditor of a closely held corporation. In both cases, the complainant alleges misappropriation of corporate property by another shareholder and director. In both cases, a loss to the company results in a derivative loss to the complainant.

34 This analysis begs the question of whether there is any meaningful distinction between the oppression remedy under s. 248 of the Act and the derivative action under s. 246 of the Act. In my view, allowing s. 248 oppression claims to proceed where there is harm to the corporation would not nullify s. 246, because the two sections involve different threshold tests. Section 246 simply requires a violation of the corporation's legal rights. On the other hand, s. 248 requires, in the case of harm to the corporation, a violation of corporate legal rights that is oppressive or unfairly prejudicial, or that unfairly disregards the complainant's interests.

35 It is perhaps worth noting that another relevant difference between the derivative action and the oppression remedy relates to costs. Subsection 247(d) explicitly allows a court to order the corporation to pay the legal fees or other costs reasonably incurred in connection with a derivative action. The oppression remedy section of the Act, though it invests courts with broad remedial authority, contains no such provision.

36 On the appeal of the *Ford* case, *supra*, Rosenberg J.A., in a much different fact situation, considered the distinction between personal causes of action and derivative actions in the context of the oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. He observed at paras. 111 and 112:

> [111] It seems to me that it would be a serious mistake to attempt to confine the broad discretion granted courts by the oppression remedy within a formal construct of causes of action. To do so could bring with it all the complexities of the common law as to when a shareholder might, notwithstanding the rule in *Foss v. Harbottle* ... maintain a personal action and thrust those complexities into the oppression remedy. Parliament could not have intended such a result. The breadth of the remedy to which these shareholders are entitled must turn on the wording of the statutory provisions.
>
> [112] While s. 241 contemplates remedies that benefit the corporation or shareholders as a whole, it is nevertheless founded on the principle of a wrong done to a shareholder or identifiable group of shareholders. Section 241(2)(a) (the provision relied upon in this case) is drawn in broad terms but it depends upon a finding that the complained of act or omission by the corporation or any of its affiliates "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer".

See *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.).

37 While Rosenberg J.A. makes it clear in *Ford* that the minority shareholder in that case was seeking a personal remedy, i.e. damages, I find that his reasoning in the above paragraphs informs the approach to be taken to the issue raised in this case.

38 It is important in my view that in this case, we have a closely held corporation. It seems to me that if the alleged oppressive conduct is made out when Malata HK is one of three shareholders and, more particularly, is a major creditor of Malata Canada, it is appropriate for Malata HK to seek a return of the monies to Malata Canada under s. 248 of the Act. Malata HK could have proceeded by way of a derivative action. However, given the overlap between ss. 246 and 248 of the Act and the particular circumstances of this case, I do not believe that it was required to do so.

39 In disputes involving closely held companies with relatively few shareholders, such as the case at bar and *Covington*, there is less reason to require the plaintiff to seek leave of the court. The small number of shareholders minimizes the

risk of frivolous lawsuits against the corporation, thus weakening the main rationale for requiring a claim to proceed as a derivative action.

40 In the result, I am satisfied that the claims in subparagraphs 1(c), (d) and (e) of the statement of claim are properly advanced under the oppression remedy section of the Act.

41 Counsel for the appellant also submits that the oppression remedy cannot be invoked against an individual in his personal capacity. He argues that Mr. Jung was acting personally and not as a director of Malata Canada when he is alleged to have misappropriated the company's funds. This is a matter better left to the trial judge who will have the benefit of argument made on a full trial record. I would not give effect to this ground of appeal.

(iii) Are the claims advanced under subparagraphs 1(a) and (j) barred by reason of the failure to give 30 days' notice under the shareholder agreement?

42 In respect of the claims asserted in subparagraphs (a) and (j) of the statement of claim, I am unable to find anything in the notice provisions of the shareholder agreement that would preclude the respondent from commencing the action prior to the expiry of the notice period. The notice period simply provides an opportunity for the appellant to cure the alleged breaches; it does not limit the availability of resort to the court. In my view, it would take express language in the agreement to accomplish that result, and the agreement here contains no such language.

Disposition

43 For the above reasons, I would dismiss the appeal.

Costs

44 The parties are agreed that the appropriate award for the costs of the appeal is $5,000 inclusive of disbursements and GST. I would make that order in favour of the respondent.

***J.C. MacPherson J.A.*:**

I agree.

***G. Epstein J.A.*:**

I agree.

Appeal dismissed.

Footnotes

* A corrigendum isssued by the Court on February 20, 2008 has been incorporated herein.

1 *Foss v. Harbottle* (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.), Wigram V.C.

TAB 14

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 139 O.R. (3d) 1, 286 A.C.W.S. (3d) 658, 420 D.L.R. (4th) 23, 54 C.B.R. (6th) 173, 76 B.L.R. (5th) 171

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1], one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

5 For the reasons that follow, I would dismiss the appeal.

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad hoc* committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and

- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma

employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US $174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient

evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations. [3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring. [4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma

management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued

to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US $300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also, Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan

was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate

law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241 *o*f the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions

in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the

pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and negatively impact creditors. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .

The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.

Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the triaI judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

- US$150 million in cash from Essar Global under the amended RSA;
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and
- US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that

the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an

informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma

(the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence

and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

242 I would not give effect to this ground of appeal.

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

***R.A. Blair J.A.*:**

I agree.

***K. van Rensburg J.A.*:**

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.
Plaintiff

-and-

ESL INVESTMENTS INC. et al.

Defendants

Court File No. CV-18-00611214-00CL

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