

**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

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EPHRAIM J. BIRD, JAMES MCBURNEY, AND DOUGLAS CAMPBELL**

**MOTION TO STRIKE
RETURNABLE APRIL 17, 2019**

March 29, 2019

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2011 SCC 42
Supreme Court of Canada

Knight v. Imperial Tobacco Canada Ltd.

2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, [2011] 11 W.W.R. 215, [2011] 3 S.C.R. 45, [2011] B.C.W.L.D. 6757, [2011] B.C.W.L.D. 6758, [2011] B.C.W.L.D. 6759, [2011] B.C.W.L.D. 6761, [2011] B.C.W.L.D. 6832, [2011] B.C.W.L.D. 6931, [2011] B.C.W.L.D. 6932, [2011] B.C.W.L.D. 6933, [2011] B.C.W.L.D. 6948, [2011] A.C.S. No. 42, [2011] S.C.J. No. 42, 205 A.C.W.S. (3d) 92, 21 B.C.L.R. (5th) 215, 25 Admin. L.R. (5th) 1, 308 B.C.A.C. 1, 335 D.L.R. (4th) 513, 419 N.R. 1, 521 W.A.C. 1, 83 C.B.R. (5th) 169, 86 C.C.L.T. (3d) 1

Her Majesty The Queen in Right of Canada (Appellant / Respondent on cross-appeal) and Imperial Tobacco Canada Limited (Respondent / Appellant on cross-appeal) and Attorney General of Ontario and Attorney General of British Columbia (Interveners)

Attorney General of Canada (Appellant / Respondent on cross-appeal) and Her Majesty The Queen in Right of British Columbia (Respondent) Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. (Respondents / Appellants on cross-appeal) and Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: February 24, 2011

Judgment: July 29, 2011 *

Docket: 33559, 33563

Proceedings: reversing *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.); reversing in part *British Columbia v. Imperial Tobacco Canada Ltd.* (2008), 2008 BCSC 419, 2008 CarswellBC 687, [2008] 12 W.W.R. 241, 292 D.L.R. (4th) 353, 82 B.C.L.R. (4th) 362 (B.C. S.C.); and reversing *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.); reversing in part *Knight v. Imperial Tobacco Canada Ltd.* (2007), 2007 BCSC 964, 2007 CarswellBC 1806, [2008] 4 W.W.R. 156, 76 B.C.L.R. (4th) 100 (B.C. S.C.)

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McLachlin C.J.C.:

I. Introduction

1 Imperial Tobacco ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages ("*Knight* case").

2 In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

3 In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously struck the remainder of the tobacco companies' claims.

4 The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

5 For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. The Knight Case

6 In the *Knigh* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

7 Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

8 Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knigh* case, amended third-party notice of Imperial, at para. 97).

9 Imperial makes five allegations against Canada:

1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.

4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.

5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

10 Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (*Knigh v. Imperial Tobacco Canada Ltd.*, 2007 BCSC 964, 76 B.C.L.R. (4th) 100 (B.C. S.C.)). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93 (B.C. C.A.)). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. The Costs Recovery Case

11 The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

12 Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

13 The tobacco companies brought the following claims against Canada:

- 1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.
- 2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- 3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.
- 4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.
- 5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

14 Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362 (B.C. S.C.)). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201 (B.C. C.A.)). Hall J.A., dissenting, would have struck all the third-party claims.

III. Issues Before the Court

15 There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

16 There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?
2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?
3. Should the tobacco companies' negligent misrepresentation claims be struck out?
4. Should the tobacco companies' claims of failure to warn be struck out?
5. Should the tobacco companies' claims of negligent design be struck out?
6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?
7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?
8. Should the tobacco companies' claims of equitable indemnity be struck out?
9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. The Test for Striking Out Claims

17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 15; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.); *Odhavji Estate*; *Hunt*; *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 F.C.R. 735 (S.C.C.).

18 Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

20 This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932]

A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

22 A motion to strike for failure to disclose a reasonable cause of action 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. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

23 Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding.

26 With this framework in mind, I proceed to consider the tobacco companies' claims.

B. Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

27 In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

28 The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence*

Act is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

29 I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Dominion Chain Co. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346 (S.C.C.), dealing with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss.

[Emphasis added; p. 1354.]

30 Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

31 The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. The Claims for Negligent Misrepresentation

32 There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

33 Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

34 For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

35 The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

36 Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

37 The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be

established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

38 In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test set out by the House of Lords in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.).

39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.).

(1) Stage One: Proximity and Foreseeability

40 On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the potential losses of the tobacco companies under that Act.

41 Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

42 Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.). In *Hercules Management*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (para. 24). Where such a relationship is established, the defendant may be liable for loss suffered by the plaintiff as a result of a negligent misstatement.

43 A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

44 The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*D. (B.)*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *D. (B.)*. As stated in *D. (B.)*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 39).

45 The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *D. (B.)*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 (Ont. C.A.). However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

46 Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

47 Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *D. (B.)*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

48 As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49 The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50 The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion

and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, S.C. 1988, c. 20, s. 3 (repealed), only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos v. Ontario (Minister of Health & Long Term Care)* (2006), 276 D.L.R. (4th) 411 (Ont. C.A.), "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

51 Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

52 The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Management*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

53 What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, 5 A.R., vol. 2, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54 What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

55 The indices of proximity offered in *Hercules Management* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in

the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

56 Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F. at para. 36).

57 In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Management*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysse J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (at para. 78).

58 Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

59 In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Management*. When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Management*, at para. 41.

60 In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight* case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

61 Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

62 For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) Government Policy Decisions

63 Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

64 The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

65 In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

[Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

66 In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

67 The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct — one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct — conduct relevant to statements and representations made by Canada — is at issue.

(ii) Relevance of Evidence

68 This brings us to the second and related preliminary matter — the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be struck. The majority of the Court Appeal

concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

69 There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct — the development and marketing of a strain of low-tar tobacco — that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

70 The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

71 Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune from Judicial Review?

72 The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73 The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Dorset Yacht Co. v. Home Office*, [1970] 2 W.L.R. 1140 (U.K. H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

74 The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just; Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.); *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 (S.C.C.); *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 (S.C.C.).

75 To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 500).

76 There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge, to repeat, is to fashion a just and workable legal test.

77 The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78 The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

79 The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht Co. v. Home Office*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision, in which case it was entirely exempt from judicial scrutiny: *X (minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353 (U.K. H.L.). Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (U.K. H.L.), *per* Lord Hoffman. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield LBC* (1999), [2001] 2 A.C. 550 (Eng. H.L.). The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

80 Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (Australia H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J. for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] H.C.A. 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

81 In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("FTCA"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[Emphasis added.]

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (U.S.S.C. 1990), at p. 430; *U.S. v. Neustadt*, 366 U.S. 696 (U.S. Sup. Ct. 1961).

82 Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions: e.g., *Dalehite v. United States*, 346 U.S. 15 (U.S. Tex. 1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (U.S. Tex. 1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. U.S.*, 486 U.S. 531 (U.S. Pa. S.C. 1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (U.S. Cal. 1984).

83 In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy — though ... not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

84 A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

85 The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

86 A third observation is that defining a core policy decision negatively as a decision that it is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

87 Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a

"policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

91 Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

(iv) Conclusion on the Policy Argument

92 As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

93 The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

94 The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada

accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

95 In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

96 Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) Indeterminate Liability

97 Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

98 The tobacco companies respond that Canada faces extensive, but not indeterminate liability. They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

99 I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper v. Hobart*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

100 The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737 (S.C.C.), the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

101 Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) Summary on Stage-Two Policy Arguments

102 In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. Failure to Warn

103 The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

104 B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

105 The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

(2) Failure to Warn Imperial About Health Hazards

106 The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

107 Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

108 I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36 (B.C. S.C.), *per* Drossos J.; see also *Elias v. Headache & Pain Management Clinic* [2008 CarswellOnt 8657 (Ont. S.C.J.)], 2008 CanLII 53133, *per* Macdonald J. (paras. 6 to 9).

109 Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. Negligent Design

110 The tobacco companies have brought two types of negligent design claims against Canada that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

111 In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) Prima Facie Duty of Care

112 I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

113 In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

114 The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

115 For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

116 For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage- two policy objection to the claim of negligent design.

F. The Direct Claims Under the Costs Recovery Act

117 The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("*RBH*") and Philip Morris only).

118 Section 2 of the *CRA* establishes that "[t]he government has 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 words "manufacture" and "manufacturer" are defined in s. 1 of the Act as follows:

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, brings Canada within the definition of "manufacturer" of the *CRA*.

119 Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

120 For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed, holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the Costs Recovery Act?

121 The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of

the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) Text of the Statute

122 The definition of manufacturer in s. 1 "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

123 The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

124 Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

125 The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

126 I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

(b) Legislative Intention

127 I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Debates of the Legislative Assembly*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

128 Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation, in order to achieve this purpose.

(c) Broader Context

129 The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.):

[T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

130 The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

131 Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

(d) Summary

132 For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the Health Care Costs Recovery Act?

133 The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

134 In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

(3) Could Canada Be Liable for Contribution Under the Negligence Act if It Is not Directly Liable to British Columbia?

135 RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

136 As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

137 Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

138 RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.), in which this Court recognized claims of contribution which were not permitted by statute.

139 I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (per McLachlin C.J.), which stated that a "common law right of contribution *between tortfeasors* may exist" (para. 68 (emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. Liability Under the Trade Practices Act and the Business Practices and Consumer Protection Act

140 In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practices Act (TPA)* and the *Business Practices and Consumer Protection Act (BPCPA)*. The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

141 In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined supplier as follows:

"**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

Section 1 of the *BPCPA* defines supplier as follows:

"**supplier**" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 [*Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit*], includes a person who solicits a consumer for a contribution of money or other property by the consumer;

142 The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (para. 35).

143 Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

144 I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

145 Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

H. The Claim for Equitable Indemnity

146 RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

147 Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635 (S.C.C.), claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham & District Land Co. v. London & North Western Railway* (1886), 34 Ch. D. 261 (Eng. C.A.), at p. 275).

148 In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

[I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

I. Procedural Considerations

149 In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

150 The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

151 I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Crown's appeals allowed; defendants' cross-appeals dismissed.

Pourvois de l'État accueillis; pourvois incidents des défenderesses rejetés.

Footnotes

* A corrigendum issued by the Court on September 29, 2011 has been incorporated herein.

2008 CarswellOnt 3754
Ontario Superior Court of Justice

Research Capital Corp. v. Skyservice Airlines Inc.

2008 CarswellOnt 3754, [2008] O.J. No. 2526, 170 A.C.W.S. (3d) 47

**Research Capital Corporation (Plaintiff / Responding Party) and
Skyservice Airlines Inc., Skyservice Investments Inc., Gibralt Capital
Corporation, 6756140 Canada Inc., 6806929 Canada Inc., Russell
Payson, Timothy Casgrain, Marshall Myles, Rob Giguere, Ron
L.Patmore and Thomas W. Cryer (Defendants / Moving Parties)**

B. Allen J.

Heard: May 28, 2008

Judgment: June 19, 2008

Docket: 07-CV-340284PD3

Counsel: Bernie McGarva for Plaintiff / Responding Party

Gavin Smyth for Defendants / Moving Parties, Skyservice Airlines Inc., Gibralt Capital Corporation, 6756140 Canada Inc., 6806929 Canada Inc., Russell Payson, Timothy Casgrain, Marshall Myles, Rob Giguere, Ron L.Patmore, Thomas W. Cryer

Julie Rosenthal for Defendant / Moving Party, Skyservice Investments Inc.

B. Allen J.:

Relief Sought

1 Two motions were heard together in this proceeding.

2 The Defendant, Skyservice Airlines Inc. ("Skyservice") and the Defendants other than Skyservice Investments Inc. (collectively, "the other Defendants") bring a motion under Rules 21.01(1)(b), 25.06(1) and 25.06(8) to strike out certain portions of the Plaintiff, Research Capital Corporation's ("RCC") Fresh Statement of Claim ("the Fresh Claim"). Skyservice and the other Defendants are represented by the same counsel. The Defendant, Skyservice Investments Inc. ("Investments") seeks to strike out portions of the Fresh Claim pursuant to Rules 21.01(1)(b), 21.01(3)(d), 25.06, and 25.11. Investments is represented by separate counsel. Skyservice¹ and Investments argue RCC's claims are improperly pleaded.

3 The Rules relied upon by Skyservice and Investments are set out in Schedule A to this Endorsement.

The Parties

4 The corporate parties are as follows:

- a) RCC, an investment dealer;
- b) Skyservice, a company that operates a charter airline service;
- c) Investments, a former shareholder of Skyservice;

d) Gibralt Capital Corporation Inc. ("Gibralt"), a private equity investment company; and,
e) the numbered companies *6756140 Canada Inc. ("675 Inc.") and *6806929, ("680 Inc."), wholly owned subsidiaries of Gibralt (*"the New Shareholders").

5 The individual Defendants are as follows:

a) **Timothy Casgrain ("Casgrain") and **Russell Payson ("Payson") both former shareholders and Directors of Skyservice; (**"the Former Shareholders") and,

b) ***Marshall Myles ("Myles"), ***Rob Giguere ("Giguere"), ***Ron L. Patmore ("Patmore") and ***Thomas W. Cryer ("Cryer") are all Directors of Skyservice (**"the Directors").

Background

6 RCC issued an original Statement of Claim against Skyservice on September 21, 2005 and then issued a further Statement of Claim on September 19, 2007, against Skyservice, Investments and the other Defendants. The court ordered the two Claims be consolidated. Subsequently, on December 21, 2007, RCC issued the Fresh Claim which is the subject matter of this motion. RCC claims damages against all of the Defendants, including punitive damages, requests various declarations and an order to return property.

7 The following forms the background to RCC's claims:

a) Skyservice contracted to retain RCC as an agent in a sales transaction of 12 million of Skyservice's special share warrants for \$2.50 each, under which arrangement owners could acquire one Class A voting common share for no additional consideration ("the Agency Agreement"). Skyservice agreed to pay a fee for RCC's services.

b) Skyservice granted RCC an option to acquire 1,548,460 special warrants at no fee ("the Special Warrant Compensation Option"). The warrants could be exercised at any time until a date 18 months after the date Skyservice obtained receipts from securities commissions for a final prospectus qualifying the issuance of the shares. RCC claims it exercised its option to acquire all 1,548,460 special warrants and attempted to exercise 100 of those warrants in order to acquire 100 Class A shares. In September 2005, Skyservice refused to issue the 100 shares and refused to deliver to RCC the certificates of broker warrants.

c) RCC further claims under the agreement Skyservice promised to appoint RCC as the lead manager for any future financings by Skyservice until at least the date of the public offering. Skyservice advised it would not retain RCC as the lead manager on a financing Skyservice contemplated in the Fall of 2005, which ultimately RCC acknowledged did not occur.

d) Skyservice promised to allow an individual chosen by RCC to be a member of the Board of Directors of Skyservice. Also in the Fall of 2005, Skyservice wrongfully and without notice removed RCC's designate from the Board of Directors.

e) On May 23 and 29, 2007, meetings took place between the CEO of RCC and the Defendants Patmore and Myles, Directors of Skyservice, to discuss, among other things, resolving RCC's 2005 action.

f) In August 2007, Skyservice entered into an Arrangement Agreement with 680 Inc., 675 Inc. and Investments where Gibralt agreed to purchase, through 675 Inc. and 680 Inc., all the shares of Skyservice for \$82,000,000, which amount was subject to certain holdbacks as provided in the Arrangement Agreement. 680 Inc. and Skyservice amalgamated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, as amended ("the *CBC Act*") to form "Amalco" whereby Amalco assumed liability for Skyservice's obligations and would use the Skyservice corporate name.

g) The Arrangement Agreement was approved by the Ontario Superior Court on September 28, 2007. RCC did not attend or participate in that proceeding.

General Principles for Striking Pleadings

8 Under Rule 21.01(1)(b), where the statement of claim pleads insufficient facts to support a cause of action, or pleads a cause of action that cannot succeed, the claim should be struck. Assuming the facts as pleaded are true, it must be plain and obvious the statement of claim discloses a reasonable cause of action. The plaintiff must plead all the material facts on which it relies and all the facts needed to establish a cause of action. If the plaintiff lacks knowledge of the facts at the time of pleading, it is inappropriate to make the allegation in the statement of claim. [*Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Ont. S.C.J.) at paras. 25 and 29].

9 Rule 25.11 allows the court to strike all or part of a statement of claim that does not conform to the rules on pleading on the ground that it may delay the fair trial of an action, is scandalous, frivolous or vexatious, or is an abuse of the court's process. The function of pleadings is to clearly and precisely define the controversy between the litigants, to give fair notice of the case to be met and the remedy sought, and to assist the court in its inquiry into the truth and the allegations made. [*National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div. [Commercial List]), at para. 9].

10 The courts have also held a director of a corporation is not automatically to be identified with their company in relation to a tort action regardless of how small the company may be or the extent of the director's influence in the company. The court may refuse an application where adding the corporate directors as personal defendants is a purely tactical move. [*Foy v. Royal Bank* (1995), 37 C.P.C. (3d) 262 (Ont. Gen. Div. [Commercial List]), at paras. 15-17].

Parties' Arguments and the Court's Analysis

Investment's Argument

11 Investments seeks to have RCC's claim against it struck in its entirety or, in the alternative, that paragraphs 1(b), 1(c), 36-39, 49-52, 53-65, 66-70 and 76-79 be struck. Those paragraphs contain allegations of:

- a) a conspiracy with the other Defendants against RCC; and,
- b) inducing Skyservice to breach its contract with RCC.

12 In its Factum, RCC undertook not to pursue its breach of contract claims against Investments, Gibralt, 675 Inc. and 680 Inc. contained in paragraphs 1(b), 49, 56, 69 and 76.

Plea of Conspiracy — Paragraphs (c), 53-65 and 77

13 Investments argues RCC's pleadings asserting conspiracy against Investments are deficient and ought to be struck. RCC alleges Investments, along with the other Defendants, conspired to induce Skyservice to breach its contract with RCC. Paragraph 1(c) contains the prayer for relief. Paragraph 54 contains the general allegation of conspiracy against the Defendants, including Investments. Investments argues that claim fails to plead the essential elements of the plea of conspiracy. Paragraph 54 states:

[T]he Defendants, Investments, Gibralt, 675 Inc., 680 Inc., Payson, Casgrain, Marshall, Giguere, Patmore and Cryer ... have conspired to induce [Skyservice] to breach both the Agency Agreement and the Special Warrant Compensation Option.

14 Estey, J., for the Supreme Court of Canada, set out the essential elements of the cause of action in conspiracy:

- a) an agreement or combination between two or more persons;

b) a predominant intent to injure the plaintiff, or, in the alternative, unlawful conduct by the defendants in circumstances where the defendants should know that injury will be likely to result; and,

c) an actual injury/damage suffered by the plaintiff.

[*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at 471-472].

15 Investments argues the essential element of an agreement is lacking in RCC's plea of conspiracy. Investments says nowhere in the Fresh Claim are facts pleaded as to any agreement by Investments with any of the other Defendants to induce Skyservice to breach its contract. Investments relies on court decisions for the proposition that a plaintiff must set out full particulars of a conspiracy. [*Morrison Financial Services Ltd. v. Mahabirsingh*, [2004] O.J. No. 5514 (Ont. S.C.J.) at para 8]. A plea of conspiracy that contains a mere assertion that someone "conspired to do something" pleads a conclusion of law and is not sufficient for the cause of action in conspiracy.

16 Investments argues it is not sufficient for a plaintiff to claim that an agreement is implicit by their pleading that the defendants "conspired to" take certain actions. That assertion is simply pleading the conclusion. [*D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (Ont. S.C.J.), at para. 35].

17 The courts are concerned that each person alleged to be part of a conspiracy know the particular of acts they are alleged to have conspired with others to do. Nordheimer, J. held:

While there are a number of overt acts alleged, they are not specifically identified to any particular defendant, that is, no specific defendant could know from the statement of claim what it is that the plaintiffs say that that particular defendant did as part of the conspiracy.

[*J.G. Young & Son Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 (Ont. S.C.J.), at paras. 6 and 9].

18 In sum, Investments argues RCC has done nothing more than plead the legal conclusion that Investments conspired with the other Defendants. It has failed to plead any facts to support that plea or the particulars of Investments' alleged role in conspiring to induce Skyservice to breach its contract. In those circumstances, a defendant would not know the case it has to meet.

19 I am compelled to agree with Investments' position.

20 I cannot find in the Fresh Claim any facts to establish its claim that Investments conspired with all or any of the other Defendants to induce Skyservice to breach its contract. There is no plea of the particulars of Investments' alleged participation in the conspiracy.

21 RCC acknowledges there is a dearth of facts about the conspiracy, but argues this results from the very nature of a conspiracy. That is, it is difficult to gather the facts because of the secrecy involved in a conspiracy. [*North York Branson Hospital v. Praxair Canada Inc.*, 1998 CarswellOnt 3847 (Ont. Gen. Div.) at para. 22].

22 I do not accept that argument as a basis to allow RCC's pleading as it stands, as it is not clear what Investments is alleged to have conspired with others to do as part of the conspiracy. While the court in *North York Branson* acknowledged the difficulty in obtaining the facts to support such a plea, it found the amended claim in that case did contain the requisite relationship between the parties, an agreement, the purposes and objects of the conspiracy and the particular acts the defendants were alleged to have done. [*North York Branson*, at para. 35].

23 RCC asserts that further details to develop the claim can only be obtained through documentary and oral discovery of the Defendants. However, courts have also held, and I find in this case, the plaintiff is not entitled to advance a deficient plea of conspiracy and just await discovery. The plaintiff cannot go on a fishing expedition at discovery to

gather the facts to make a proper plea. [*Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)*, [1990] O.J. No. 589 (Ont. H.C.) at para. 19].

24 I find therefore paragraphs 1(c), 53-65 and 77 of the Fresh Claim pertaining to the plea of conspiracy against Investments ought to be struck.

Plea of Inducing Breach of Contract — Paragraphs 66-70 and 78

25 Investments similarly argues RCC's plea that Investments induced Skyservice to breach its contract is deficient and asks the court to strike paragraphs 66-70 and 78 of the Fresh Claim. Courts have set out the following basic elements that constitute the cause of action of inducing a breach of contract:

- a) an enforceable contract;
- b) that the defendant knew of the contract;
- c) the defendant committed an intentional act to cause a breach of that contract;
- d) that the contract was actually breached; and,
- e) the resulting damage.

[*Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (Ont. H.C.), at 44].

26 It is the third element of the plea that Investments argues is lacking from the Fresh Claim, being that RCC has failed to plead facts as to an intentional act committed by Investments to cause a breach of Skyservice's contract with RCC. The courts have been clear that the plaintiff must plead full particulars of the intentional act by the defendant that resulted in the breach of contract, when pleading inducement of a breach of contract. [*Goodman & Carr v. Wallace Stairbridge Inc.*, [1999] O.J. No. 3146 (Ont. S.C.J.) at para. 7 and *Morris v. Makos*, [2006] O.J. No. 2919 (Ont. S.C.J.) at para. 26].

27 RCC argues it has pleaded the facts to show the acts it says Investments committed to induce the breach of contract. I do not agree. I find RCC has advanced bald legal conclusions. I cannot find anywhere in the many paragraphs of the Fresh Claim where RCC has particularized the act or acts it says Investments committed to induce the breach of Skyservice's contract. Again, in accordance with *Region Plaza*, *supra*, I do not accept RCC's contention that it should be allowed to await documentary and oral discovery to acquire the facts upon which to support the plea.

28 In the result, I find RCC has failed to make out the claim against Investments of inducing breach of contract. Paragraphs 66-70 and 78 of the Fresh Claim should be struck.

Skyservice

29 Skyservice does not dispute a reasonable cause of action has been alleged that it breached its obligations under the Agency Agreement and the Special Warrant Compensation Option. What it does dispute is the deficiencies in RCC's pleas against the other Defendants in breach of contract and RCC's pleas against Skyservice and the other Defendants in relation to RCC's other claims. Skyservice seeks to have pleadings pertaining to the following claims struck from the Fresh Claim:

- a) breaches of the two contracts (the Agency Agreement and the Special Warrant Compensation Option) by the New Shareholders;
- b) oppression under s. 241 of the *Canada Business Corporations Act*, R.S.C 1985, C-44 for "the failure or refusal to recognize RCC's rights under the Special Warrants Compensation Option";
- c) misrepresentation and conspiracy to breach the plan of arrangement;

- d) conspiracy to induce breach of contract;
- e) unlawful interference with contractual relations; and,
- f) a claim for punitive damages.

30 In its Factum, RCC undertook to withdraw certain claims:

- a) to discontinue any independent claims against Giguere and Cryer (Skyservice Directors), to have their names removed from the Fresh Claim, and to amend the Fresh Claim accordingly, and
- b) not to pursue the claims of misrepresentation against Gibralt and Skyservice contained in paragraphs 1(c), and 56.

31 Skyservice says the effect of RCC adding new claims and parties to a straightforward claim of breach of contract against Skyservice is to expand the scope and complexity of the litigation unnecessarily with groundless claims as a tactic to challenge Skyservice's business decisions. Skyservice argues the entire claim ought to be struck or, in the alternative, that all pleadings against Skyservice beyond those involving breach of contract against Skyservice be struck.

The Plea of Breach of Contract by the New Shareholders — Paragraphs 1(a)(ii), (iii), and (iv), 18, 22,23, 31, 32, 33, 47, 48, 49 and 52

32 In the Fresh Claim, RCC alleges breach of the Agency Agreement and the Special Warranty Compensation Option by the New Shareholders and the other Defendants including Investments. However, in its Factum (at paras. 73 and 79) RCC withdrew the breach of contract claim against Investments, and the New Shareholders, Gibralt, 675 Inc., and 680 Inc. I therefore need not address Skyservice's argument on the deficiencies of the breach of contract claims against the New Shareholders.

33 Paragraphs 49 and 52 claim "the Defendants" breached RCC's contractual rights, which term includes the New Shareholders. I therefore find paragraphs 49 and 52 and any other paragraphs asserting breach of contract by the New Shareholders should be struck.

The Plea of Oppression — Paragraph 51

34 In paragraph 51 of the Fresh Claim, RCC pleads:

the *Defendants'* refusal to permit RCC to exercise its rights under the Special Warrant Compensation Option is "oppressive" and unfairly prejudicial to and unfairly disregards RCC's interests as the holder of the Special Warrant Compensation Option. RCC pleads and relies upon section 241 of the *CBC Act* [italics added].

Skyservice argues the plea of oppression is inappropriate in the circumstances because RCC's complaint is directed at the effects on its rights in its contractual relationship with Skyservice and not on its rights as a shareholder in Skyservice. I agree with Skyservice that the Fresh Claim does not, in the prayer for relief or throughout the claim, raise an issue as to RCC's expectations as a shareholder of Skyservice.

35 Skyservice argues, under s. 241 of the *CBC Act*, the court can rectify matters where the conduct that is the subject of a complaint is oppressive, unfairly prejudicial or unfairly disregards the interests of any security holder, creditor, director or officer. However, where the complaint in its nature concerns contractual rights, the terms of the contract should be looked to for a remedy. The Ontario Court of Appeal held where a simple breach of contract has occurred, it is not appropriate for the court to invoke the oppression remedy provisions of the *CBA Act* just because the breach is alleged against a corporation [*J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, [2008] O.J. No. 958 (Ont. C.A.)]. Even where a complaint is made under the *CBC Act* by an individual who is a shareholder, only their interest as

a shareholder can be protected under the oppression remedy. [*Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.) at paras. 25-26].

36 I do not accept RCC's argument that its complaint about its relationship with Skyservice principally arises as a result of its position as a shareholder or a security holder. I find the allegations in the Fresh Claim that Skyservice's conduct ran counter to RCC's rights to acquire the shares to which it is entitled under the Special Warranty Compensation Option arise essentially from its position as a promisee in that agreement with Skyservice and not as a shareholder in Skyservice.

37 I therefore find paragraph 51 should be struck from the Fresh Claim.

Pleas of Misrepresentation and Conspiracy to Breach the Plan of Arrangement — Paragraphs 1(c)(i) and (iii), 57, 58, 61, 62 and 64, 65-66 and 77-79

38 It appears RCC is alleging misrepresentation and conspiracy to breach the plan of arrangement. This allegation is directed against the New Shareholders, the Former Shareholders and Directors for allegedly passing on to the RCC shareholders the cost of holdbacks agreed upon in the amalgamation arrangement to protect Amalco from the increased cost of RCC's claim. It is Skyservice's view that the fact that RCC has advanced those additional, unsubstantiated claims against those Defendants is evidence the claims are a tactical move to assert unfair pressure to settle, a practice that courts have cautioned as a reason to strike a claim. [*C. C. Evans & Sons Ltd. v. Spritebrand Ltd.* (1984), [1985] 1 W.L.R. 317 (Eng. C.A.).

Plea of Misrepresentation

39 At the motion, RCC withdrew its claim of misrepresentation against the Directors Giguere and Cryer.

40 Skyservice relies on Rule 25.06(8), arguing RCC has failed to set out precisely the facts and relevant circumstances pertaining to each wrongful act, when the act occurred, by whom and against whom the alleged act was committed. A claim of misrepresentation must contain certain requisite elements to be pleaded appropriately — a duty of care based on a special relationship, an untrue, inaccurate or misleading statement, that the representor acted negligently in making the statement, that the representee relied upon the statement and suffered detriment as a result of that reliance. [*Balanyk v. University of Toronto*, *supra*, at paras. 28, 64 and 65].

41 RCC argues that subsequent to judicial approval of the Arrangement Agreement, the Defendants acquiesced to Gibralt's demand to increase the holdbacks above the amount agreed to before approval because of the increase in RCC's claim. The increase, according to RCC, was not contained in the disclosure documents before the court. The misrepresentations RCC alleges relate to the change in the amount of the holdbacks from what was represented by Gibralt and Skyservices before approval, to the increased amount after approval, which increase, according to RCC, caused a decrease in the compensation to RCC shareholders.

42 I am persuaded to agree with Skyservice's position. I agree with Skyservice that the Fresh Claim fails to plead the requisite facts to establish: a duty of care by any of the Defendants to RCC and its shareholders; the Defendants' negligence; inducement of RCC by the Defendants; reliance by RCC on a misrepresentation; and detriment to RCC as a result of reliance.

43 Skyservice also claims it would be an abuse of process to permit a multiplicity of proceedings which would allow RCC to re-litigate the provisions of the Arrangement Agreement that has already been approved by this court. I agree with Skyservice that the issues RCC raises in the Fresh Claim about the Arrangement were within RCC's knowledge at the time of the approval proceeding and RCC chose not to attend to present the issues for the court's consideration. I agree RCC is engaging in an inappropriate challenge to an existing determination of this Court.

44 I also accept Skyservice's argument that the claim in paragraphs 56 and 62 that Skyservice's shareholders were misled to believe the holdbacks were sufficient to deal with RCC's claims are irrelevant as they do not relate to any claim

in the Fresh Claim. If that claim is allowed to proceed, the fair trial of the matter could be affected by the delay and added complexity of dealing with such a claim on discovery and at trial.

45 For all the above reasons, paragraphs 1(c)(iii), 56, 61, 62 and 64 of the Fresh Claim should therefore be struck.

Plea of Conspiracy to Induce Breach of Contract / Unlawful Interference with Contractual Relations

46 Skyservice argues RCC's Fresh Claim fails to plead the material facts to support causes of action in both conspiracy and inducing a breach of contract. Skyservice submits inclusion of those pleas represents a tactical move by RCC to include the New and Former Shareholders of Skyservice and its Directors in the litigation, unnecessarily extending its claim beyond the straightforward breach of contract against Skyservice.

47 Skyservice asserts RCC has simply made a bald allegation that the New Shareholders, the Former Shareholders and the Directors conspired to induce Skyservice to breach the Agency Agreement and the Special Warrant Compensation Option. [*Canada Cement, supra; Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 37 O.R. (3d) 97* (Ont. C.A.), at para. 21].

48 As I found in relation to Investments, it is not an appropriate approach to pleading conspiracy to lump together several defendants and allege they conspired to do something, without providing the material facts and full particulars to support the plea, being: facts as to the parties to the conspiracy and their relationship; the agreement between the parties; the purpose or object of the conspiracy; acts done in furtherance of the conspiracy; and any injury to the plaintiff. As RCC did in its claim of conspiracy against Investments, it acknowledged it lacked the information to cite the requisite facts, but hoped to acquire information to establish conspiracy through oral and documentary discovery. Again, I find a plaintiff is not permitted to make a deficient claim and await discovery to gather the facts to make a proper plea. [*Region Plaza, supra*].

49 Regarding RCC's allegation the Defendants induced a breach of contract or interfered with contractual relations, Skyservice submits RCC has also failed to plead the full particulars and requisite material facts on which to found that cause of action.

50 RCC alleges the conspiracy to induce a breach of contract is based on the facts alleged with respect to Skyservice's breach of contract, the conspiracy element being based on the "wrongful" failure by the Defendants to acknowledge the contractual rights RCC claims in the Arrangement Agreement. I agree with Skyservice, it is not sufficient simply to recite a series of events and assert they were intended to injure the plaintiff. [*Normart, supra*, at para. 21].

51 With respect to claims against the directors of a corporation for conspiracy to induce breach of contract, the courts have determined it is not automatic that the officers will be held liable for the acts or omissions of the corporation. Finlayson, J. in *Normart, supra*, held:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some 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 such as to make the acts or conduct complained of those of the directing mind.

.....

The fact situation on its face is a straight action for breach of contract. It cannot proceed as an action in tort unless something radical is added to the present fact situation. The facts as pleaded would not sustain a cause of action in conspiracy [*Normart Management Ltd., supra*, at paras. 18 and 26].

52 The Fresh Claim asserts the same amounts of damages in relation to the claim of breach of contract as for the claim of conspiracy — the total for each claim being \$13,578,468. I do not see that RCC has added anything radical to the breach of contract fact situation such that there is support for a cause of action in conspiracy.

53 I accept Skyservice's position that the same arguments apply to the claim of interference with contractual relations as apply to the claim of inducing a breach of contract, the latter being a subset of the former.

54 RCC has failed to plead the material facts and full particulars of the causes of action it seeks to assert against the Defendants. Again, I do not agree with RCC's argument that it is acceptable to wait for discovery to garner the particulars to support its pleas of conspiracy and inducing breach of contract/interference with contractual relations.

55 I therefore find, for all the above reasons, paragraphs 1(c)(i), 57, 58, 65-69, 77, 78 and 79 ought to be struck from the Fresh Claim.

Claim for Punitive Damages — Paragraphs 1(d) and 80

56 RCC seeks punitive damages against Skyservice and the Former Shareholders, Payson and Casgrain. The allegation is that those Defendants' conduct was "of such a high-handed character and in such complete disregard for RCC's rights" that it should attract an award of punitive and exemplary damages. RCC further alleges Payson and Casgrain must be sanctioned for repeatedly prioritizing their interests as controlling shareholders over those of the minority shareholders and RCC.

57 Binnie, J, for the Supreme Court of Canada in *Whiten v. Pilot*, cautioned it is not sufficient for a claim for punitive damages to be asserted in a conclusory manner. He held:

Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious" (*per* McIntyre J. in *Vorvis, supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory. [*Whiten v. Pilot Insurance Co.*, CanLII 2002 SCC 18 (S.C.C.) at para. 87]

58 I find RCC has used the strong adjectives without pleading any additional material facts in the Fresh Claim to support its claim for punitive damages.

59 I therefore find paragraphs 1(d) and 80 of the Fresh Claim ought to be struck.

Other Pleading Drafting Problems

References to Settlement — Paragraphs 36-40, 58, 61 and 62

60 Investment and Skyservice argue several paragraphs improperly contain express references to settlement discussions that took place on May 23 and 29, 2007 during meetings between officials of RCC and Skyservice and, for that reason, ought to be struck.

61 RCC argues there is no allegation the meetings were "without prejudice" and submits the impugned paragraphs simply set out the facts of those meetings.

62 I find paragraphs 36-39 inclusive contain clear references to an intention in those meetings to try to settle RCC's claims. I find references to settlement discussions are inappropriate for pleadings based on Rule 25.11(a). The inclusion of such references in pleadings, which often contain admissions by parties with an aim to resolution, may prejudice a fair trial [*Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.)] Paragraph 40 is less direct in its reference to the settlement discussions. However, as I understand that paragraph, it refers to the "intimations" from the May 2007 meetings of two Skyservice participants that were contrary to Skyservice's subsequent actions. I find for that reason paragraph 40 should be struck.

63 However, I find the substance of paragraphs 58, 61 and 62 do not refer to the settlement discussions as those paragraphs speak more of RCC's allegation that Skyservice and the other Defendants induced the breach of contract and

interfered with the contractual relations. They should not be struck for containing a reference to settlement discussions. Those paragraphs should be struck for reasons set out earlier in my Endorsement.

64 Therefore, paragraphs 36-40 should be struck from the Fresh Claim on the basis they refer to discussions about settling RCC's claims against Skyservice.

Pleading Evidence — Paragraphs 60-63

65 Investments argues, and I find, RCC improperly pleads evidence in non-compliance with Rule 25.06(1). That Rule provides a pleading shall not contain the evidence by which the facts are to be proved. Courts have routinely disapproved of that form of pleading [*Sun Life, supra* and *Soheil Mosun Ltd. v. ABC-Naco Inc.*, [2002] O.J. No. 4704 (Ont. S.C.J.), at paras. 5-6]

66 For instance, some of the paragraphs dealing with the matter of the sufficiency or insufficiency of the holdback amounts improperly plead the evidence by which RCC seeks to prove the facts. Those paragraphs also plead admissions by the Defendants that RCC's view on the quantum of the holdback is correct. That too is improper pleading [*R. v. S. (B.)*, [2007] O.J. No. 3046 (Ont. C.A.) (Master's decision) and *Sun Life Trust Co. v. Dewshi* (1993), 99 D.L.R. (4th) 232 (Ont. Gen. Div.)].

67 I therefore find the paragraphs referring to holdbacks and any other paragraphs that contain improper pleas of evidence shall be struck from the Fresh Claim.

Failure to Plead in the Alternative — Paragraph 56

68 Investments pointed to a further deficiency in the pleadings. RCC failed to plead inconsistent claims in the alternative in non-compliance with Rule 25.06(4) which provides a party may make inconsistent allegations in a pleading so long as it is clear the inconsistent allegations are pleaded in the alternative. RCC makes inconsistent pleas as to the sufficiency or insufficiency of the holdbacks. In the prayer for relief at paragraph 60, RCC claims \$13,578,468 in damages and, in paragraph 56, RCC asserts the amount held back from RCC shareholders is \$18.8 million, an amount clearly in excess of the damage claim.

69 I find paragraph 56 should be struck as inconsistent with the prayer for relief.

Disposition

70 I have decided to strike some pleadings with leave to amend and to strike others without allowing RCC to amend. The Fresh Claim is fairly lengthy containing 90 paragraphs. I find it is drafted in such a manner that it would be an overly burdensome task to attempt to parse out portions of paragraphs that are required to be deleted from portions that can be salvaged. Throughout the Fresh Claim the various causes of action are intertwined within paragraphs and between paragraphs in such a fashion that it would be difficult to strike portions of paragraphs and leave other parts intact. As well, in some paragraphs evidence is interwoven with the facts.

71 In the circumstances, I order the entire Fresh Claim to be struck out and redrafted in accordance with the directions set out below.

Pleadings Allowed to Stand

72 Pleadings containing independent claims of breach of contract by Skyservice are allowed provided the pleadings are drafted in conformity with the rules on pleading drafting.

Pleadings Struck Without Leave to Amend

- a) RCC has agreed to withdraw the claims of breach of contract against the Defendants other than Skyservice. All pleadings containing claims of breach of contract against any Defendant other than Skyservice are therefore struck without leave to amend.
- b) RCC has agreed not to pursue the claims of misrepresentation against other than Gibralt and Skyservice. All pleadings containing claims of misrepresentation against other than Gibralt and Skyservice are therefore struck without leave to amend.
- c) RCC has agreed not to pursue any independent claims against the Skyservice Directors, Giguere and Cryer. All pleadings containing independent claims against Giguere and Cryer are therefore struck without leave to amend.
- d) RCC has agreed not to pursue its allegation in paragraph 56 relating to deficiencies in the Arrangement Agreement Circular disclosure. That allegation shall be struck without leave to amend.
- e) RCC has agreed not to pursue its allegation in the second sentence of paragraph 69 pertaining to Gibralt assuming responsibility for Skyservice's obligations to RCC. That allegation shall be struck without leave to amend.
- f) The plea of oppression shall be struck without leave to amend.
- g) References to the May 2007 meetings shall be struck without leave to amend.
- h) The pleadings pertaining to RCC's claim Skyservice's shareholders were misled shall be struck without leave to amend.

Pleadings Struck With Leave to Amend

73 As discussed above, the tort pleadings pertaining to allegations of misrepresentation, conspiracy, and inducing breach of contract/interference with contractual relations, and other pleadings, are deficient as failing to conform to the rules on pleading drafting.

74 I accepted it is inappropriate for RCC through its Fresh Claim to challenge the judicial approval of the Arrangement Agreement in its attempt to advance facts and allegations that were within in RCC's knowledge before the approval proceeding. RCC was entitled to attend to assert its position but failed to do so. With that in mind, I will allow RCC to amend its pleadings in tort as follows:

- a) I allow the pleadings of misrepresentation, with respect to the Defendants against which RCC seeks to maintain that claim, to be amended to exclude reference to facts and allegations known to RCC before the approval proceeding. Those pleadings shall also be amended to conform to the drafting requirements, set by the Rules and the relevant case law, to exclude pleas of evidence and must plead the material facts and particulars of the cause of action.
- b) I allow the pleadings of conspiracy, inducing a breach of contract/ interference with contractual relations, with respect to the Defendants against which RCC seeks to maintain those claims, to be amended to exclude reference to facts and allegations known to RCC before the approval proceeding. Those pleadings shall also be amended to conform to the drafting requirements set by the Rules and the relevant case law, to exclude pleas of evidence and must plead the material facts and particulars of those causes of action.

75 I also allow leave for the following pleadings to be amended:

- a) The claim for punitive damages shall be amended to include the necessary particulars to establish such a claim.
- b) The inconsistent pleading in paragraph 56 shall be amended to be pleaded in the alternative.

Order

76 Order accordingly.

Costs

77 If the parties are unable to settle costs, they shall deliver brief written submissions on costs with a Cost Outline within 30 days of this Order. If the parties succeed in settling costs, they shall promptly advise the court.

Schedule A

Pertinent Rules

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,

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

.....

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

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.

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence.

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

(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.

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the

extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

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.

Footnotes

- 1 Because Skyservice and the other Defendants are represented by the same counsel, for simplicity, I will generally refer to both collectively as "Skyservice". When I am required to refer to "the other Defendants" as a separate category, it is intended to exclude Skyservice and Investments. Otherwise, when required to speak of any individual Defendant, I will refer to them by their individual name. When "Defendants" is used, it can be determined from the context in which it is used which defendants are being referred to.

1999 CarswellOnt 1786
Ontario Superior Court of Justice

Balanyk v. University of Toronto

1999 CarswellOnt 1786, [1999] O.J. No. 2162, 1 C.P.R. (4th) 300, 88 A.C.W.S. (3d) 1157

Thomas E. Balanyk, Plaintiffs and The Governing Council of the University of Toronto, Barry J. Sessle, Richard Ten Cate, H. James Sandham, The University of Toronto Innovations Foundation, Edward J. Kenney, APO Diagnostics Inc., Apotex Inc., Max Marmel, The Oralife Group, Inc. (formerly Knowell Therapeutic Technologies Inc.), Ross Perry, Howard Rocket, Mark Pinvidic, Mark J. Bortolotti, John J. Connelly, and John B. Houston, Defendants

Cameron J.

Heard: April 26, 1999
Judgment: June 11, 1999
Docket: 94-CQ-53555CM

Counsel: *Eric Polten*, for Thomas E. Balanyk.
Patricia Jackson and *Paul Michell*, for Defendants, Oralife.
David G. Merner, for Defendants, University of Toronto.
Mark Adilman, for Defendants, Apotex.
Bradley Teplitsky, for Howard Rocket.

Cameron J.:

1 Motions by the defendants to strike out the Statement of Claim without leave to amend and stay or dismiss the action.

Background

2 Dr. Thomas Balanyk ("Balanyk") is a dentist and dental consultant. In 1981-82, while doing post-graduate work in the Faculty of Dentistry at the University of Toronto ("U. of T.") he and his supervisor Dr. H. James Sandham ("Sandham") invented a dental varnish with disease preventing properties (the "Invention"). The policy of U. of T. required that an invention developed in these circumstances be assigned to U. of T., and shortly thereafter to the University of Toronto Innovations Foundation ("Innovations"). The Invention was assigned to Innovations in 1984, although Balanyk now attacks the validity of the assignment. In 1986 Innovations granted a licence to APO Diagnostics Inc., later merged into Apotex Inc. ("Apotex"), to manufacture, use and sell products incorporating or using the Invention ("Products") which by then had received a U.S. patent and had applications for patent in several other countries.

3 In the late 1980's the trademark "Chlorzoin" was registered for use in connection with the Products.

4 In 1992 Apotex granted an exclusive world wide licence to Knowell Therapeutic Technologies Inc., later to become the Oralife Group Inc. ("Oralife"), to distribute the Chlorzoin, subject to first obtaining regulatory approval in each market.

Motions

5 These proceedings consist of Motions under Rules 21.01(1)(b), 25.06, 25.11, 26.01 and 51.05 by:

1. The Governing Council of the University of Toronto ("U. of T. Council"). The University of Toronto Innovations ("Innovations"), Sessle, Ten Cate, Sandham and Kenney ("U. of T. Defendants")

and

2. The Oralife Group, Inc. ("Oralife"), Perry, Pinvidic, Bortolotti, Connelly and Houston ("Oralife Defendants")

and

3. APO Diagnostics Inc., Apotex Inc. and Marmel ("Apotex Defendants")

and

4. Howard Rocket ("Rocket")

to:

(a) strike out all or portions of the Statement of Claim without leave to amend; and

(b) to dismiss this action against them.

6 The U. of T. Defendants, Oralife Defendants and Rocket also move to dismiss or stay action 98-CV-3557CM ("98CV") under Rules 21.01(3)(c) and (d) and 25.11.

Request for Adjournment

7 Balanyk moved to adjourn these motions for the following reasons:

(a) Balanyk and the U. of T. Defendants are discussing settlement of the action;

(b) the other defendants would be affected by such settlement since it would reduce the claims against Apotex and fundamentally alter the nature of the claims against the Oralife Defendants and Rocket, which would in turn require yet another amendment of the pleadings;

(c) in any event, the Amended Fresh Statement of Claim must be amended because it was prepared and served without Balanyk's approval because of (i) the TTC strike from Monday April 19, to Wednesday April 21, (ii) inadequate time to prepare the Amended Fresh Statement of Claim and (iii) Balanyk was too ill to give instructions on the amendments; and

(d) Mr. Polten, Balanyk's counsel has not had sufficient time to prepare for this hearing, having devoted the past week to other matters, including the settlement discussions.

8 The Oralife Defendants and Rocket opposed the motion for adjournment on the following grounds:

(a) the date for this hearing had been agreed over 3 weeks ago;

(b) the basis of the litigation was the alleged undue influence which the U. of T. asserted over Balanyk;

(c) the statement of claim has already been amended at least 4 times in the past 5 years;

(d) any settlement agreement with U. of T. does not affect this motion; and

(e) while sympathizing with counsel's stress, the defendants have been under the prejudice of the cloud of this litigation for five years.

9 All the other defendants also opposed the adjournment.

History of the Litigation

10 The history of this action and related litigation follows:

July 12, 1994

Balanyk commences Action No. 94-CQ-53555 against Oralife

December 1994

Balanyk amends statement of claim and adds defendants

1995

Statements of Defence filed

Balanyk commences action against U. of T. and Apotex ("95 Action")

Statements of Defence filed

1996

94-CQ and 95 Action consolidated into 94-CQ

1997

Fresh Statement of Claim in 94-CQ

June 1997

Defendants' motions re pleadings adjourned *sine die* at Balanyk's request.

September 2, 1998

Mr. Polten becomes Balanyk's fourth lawyer.

September 18, 1998

New action 98-CV-155357CM ("98-CV") largely duplicative of causes of action in 94-CQ, though adds some individual defendants

October 28, 1998

Amended Statement of Claim in 98-CV consisting of 63 pages with 60 causes of action against 16 defendants, most of whom are defendants in 94-CQ. Based on same events as 94-CQ and highly duplicative of 94-CQ.

January 1999

94-CQ referred to me under Rule 37.15.

January 21, 1999

Case conference. Mr. Polten given an opportunity to prepare a timetable with a view to continuing one of 94-CQ and 98-CV, amending the pleadings therein and ceasing the other action.

January 27, 1999

Balanyk and two other shareholders of Oralife, Messrs. Brigham and Tomicic, represented by Mr. Polten, commenced Commercial List action 98-CL-3257 ("98-CL") against Oralife Defendants and Rocket (excluding Bartolotti) and others.

February 1, 1999

98CL served on some of Oralife Defendants and Rocket at special meeting of shareholders.

February 5, 1999

Case Conference:

The following timetable was set:

- (a) Amended Fresh Statement of Claim in 94-CQ action combining 94-CQ and 98-CV to be served by March 15, 1999.
- (b) Defendants' motion on pleadings or Statement of Defence by April 15, 1999.
- (c) Replies by May 15, 1999.

Once 94-CQ Statement of Claim settled, 98-CV to be dismissed.

February 9, 1999

98-CL assigned to me by Commercial List judge under Rule 37.15.

February 18, 1999

Case Conference.

Plaintiffs announce intention to move for an injunction in 98-CL to prevent Oralife making a capital distribution to its shareholders on February 26 Oralife gave notice of the distribution to its shareholders on January 5, 1999 and its shareholders approved of the distribution February 1, 1999.

Revised timetable to accommodate injunction motion by extending time 3 weeks:

- (a) Amended Statement of Claim in 98-CL by March 8.
- (b) Defendants' pleadings motion or Statements of Defence in 98-CL by March 15.
- (c) Fresh Amended Statement of Claim in 94-CQ by April 6, 1999.
- (d) Defendants' pleadings motion or Statements of Defence in 94-CV by May 7, 1999
- (e) Reply in 94-CV by June 7, 1999.

February 23, 1999

Case Conference

Plaintiffs' motion for summary judgment and other relief in 98-CL to be heard Tuesday March 2. Motion to be limited to injunction to prevent distribution set for February 26.

Oralife to file responding material on the motion for injunction by Thursday February 25.

Oralife to cross examine plaintiff on the morning of Friday February 26

Plaintiffs to cross examine Oralife on the afternoon of Friday, February 26

Factums to be filed with the court by Monday, March 1, 1999 at 4:00 p.m.

Oralife later undertook to withhold distribution until after the hearing on Tuesday, March 2.

Friday, February 26, 1999 4:00 p.m.

Case Conference

Plaintiffs declined to cross examine Oralife on Friday afternoon because they wanted to file further affidavit evidence on Monday, March 1 before cross examining. Court suggested Oralife was under no present obligation to withhold distribution. Plaintiffs declined to state scope and nature of additional evidence. Oralife offered to make officer available for cross-examination over weekend.

Monday, March 1, 1999

Plaintiffs' counsel advised he and Balanyk sick and want adjournment of hearing set for next day and interim injunction preventing distribution.

Oralife objected to any adjournment.

Tuesday, March 2, 1999

Plaintiffs in 98CL formally moved for interim injunction and adjournment.

Motion dismissed for reasons stated at time and confirmed by written reasons issued March 31.

March 17, 1999

Plaintiffs in 98-CL represented by Mr. Polten commence 99-CL-3313 against Oralife Defendants, Rocket, two of the individuals in the U. of T. Defendants (but not U. of T. or Innovations), and Yorkton Securities Ltd. and others.

March 19, 1999

Action 99-CL-3302 commenced by P. Dowell, D. Milroy and K.F. Moore, represented by Mr. Polten against Oralife, Yorkton Securities, a number of individuals, including some of the defendants in this action, and the firm of Wildeboer Rand Thomson Apps and Dellelce.

March 31, 1999

Case Conference

New Schedule Agreed:

- (a) 98-CL Statement of Claim by Monday April 12
- (b) Defendants' pleadings motion or Statement of Defence in 98-CL by April 19, 1999
- (c) Fresh Amended Statement of Claim in 94-CQ by April 19, 1999 and withdraw 98-CV.

(d) Defendants' pleadings motion in 94-CQ April 26, 1999. One day to be set aside. Plaintiff's counsel complained of overwork and I again encouraged him to obtain help.

Plaintiff said nothing about action 99-CL-3313

April 12, 1999

Plaintiff missed deadline for filing new Statement of Claim in 98-CL This required cancellation of the one day hearing date set aside for April 19, 1999.

Tuesday, April 20 1999

Plaintiff files Amended Fresh Statement of Claim in 94-CQ.

Thursday, April 22, 1999

Oralife files Notice of Motion and Motion Record to strike out Fresh Amended Statement of Claim in 94-CQ

Plaintiff seeks adjournment of hearing set 3 weeks earlier for Monday, April 26 because:

- (a) Time consumed in talking settlement with U. of T.
- (b) Mr. Polten's physical exhaustion from workload.

Friday, April 23, 1999

Oralife objects to adjournment.

Mr. Polten advises he has further facts and wants to further amend Amended Fresh Statement of Claim. Mr. Polten advises that the Plaintiff was sick and unable to instruct him on the Amended Fresh Statement of Claim before it was sent out.

Plaintiff suggests hearings be adjourned to May 10, 1999.

I was advised on Monday, April 26, 1999 late in the afternoon that Mr. Polten filed a substantial Application record in No. 99-CL-3376 on Friday April 23, 1999 on behalf of Messrs. Dowell, Milroy and Moore (the plaintiffs in 99-CL-3302) against Oralife, Yorkton Securities, Oralife's solicitors, Tory, Tory, DesLauriers and Binnington and 3 of its partners involved in this litigation, and numerous individuals, including some of the individual defendants herein.

Motion for Adjournment

11 Mr. Polten agreed on March 31 that this motion be heard Monday, April 23. He has had ample time to amend the Statement of Claim and prepare to defend it. It appears he chose instead to commence another proceeding, being an application on behalf of Balanyk and others on the Commercial List. Mr. Polten filed nothing on this hearing, not even the requisite factum. This failure has deprived the defendants and the court of the benefit of focussing on the material issues in dispute and the relevant pleadings. It has forced the court to spend substantially greater time considering and analyzing the Statement of Claim.

12 Mr. Polten's written request Thursday, April 22 for an adjournment was not agreed to by any of the defendants and was opposed by the Oralife Defendants and Rocket. Mr. Polten offered to attend, but did not arrange, a case conference on Friday, April 23 to deal with the issue. Friday was too late for me and other counsel to reschedule Monday, April 26.

13 I had no time available to hear this matter before June, unless a cancellation arose.

14 The defendants have been under the cloud and the burdens of the cost, prejudice and stress of this litigation since it arose in 1994 and 1995. There comes a point when they become entitled to a resolution of the matter. They ought not to be forced to endure Balanyk's delays, indecision and numerous amendments of the Statement of Claim until he finally, if ever, decides he's "got it right".

15 Based on evidence I received in the injunction motion, I was concerned that Balanyk may be unable to pay any material amount of costs or damages to compensate for the prejudice to the defendants of further delay of these claims against them.

16 The value of Oralife to its shareholders will decrease substantially with the loss of the potential tax benefit of \$2,000,000 of non-capital loss carry forwards at the end of its fiscal year on July 31, 1999 and further losses every year thereafter until the corporation can be sold. A sale of the shares for any price is a practical impossibility until all outstanding claims against Oralife are withdrawn.

17 It was with these considerations in mind that I ordered on April 26, 1999 that:

- (a) the pleadings motions would proceed today to the extent they involve the individual defendants;
- (b) the motion to stay or dismiss 98-CV will proceed today;
- (c) the motions respecting the corporations, U. of T. and Innovations would be adjourned to a date to be arranged with the trial co-ordinator on the following conditions:
 - (i) Balanyk to pay \$10,000 into court within 7 days as security for the defendants' costs of today thrown away because of Balanyk's failure to proceed today, such costs to be fixed or assessed on application of the defendants;
 - (ii) If Balanyk fails to make the payment into court, the defendants may bring this motion on 2 clear days' notice before any judge of this court, including me, if the trial coordinator determines that my time has become free;
 - (iii) Such adjourned or renewal date is peremptory to Balanyk.

Withdrawal of Some Claims

18 Balanyk then agreed to withdraw all claims against the individual defendants Marmel, Pinvidic, Bortollotti and Houston.

19 Counsel for Marmel was excused from the hearing. Counsel for the U. of T. Defendants, Mr. Merner, asked to be excused, reserving his objections on behalf of the individuals among his clients to the adjourned date.

Pleadings Motions

20 The motions proceeded with respect to the individual defendants Rocket, Perry and Connelley.

Rules of Pleading

21 The motions to strike out pleadings in the Statement of Claim are brought under Rule 21.01(1)(b)

...on the ground that it discloses no reasonable cause of action....

22 No evidence is admissible on a motion to strike a pleading on the grounds it discloses no reasonable cause of action or defence: Rule 21.01(2).

23 The motions to dismiss or stay the action are brought under Rule 21.01(3)(c) and (d).

(c) another proceeding is pending ... between the same parties in respect of the same subject matter; or

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

Rule 25.06 provides:

25.06(1) Every pleading shall contain a concise statement of material facts on which the party relies for the claim or defence.

.....

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars...

Rule 25.11 provides:

25.11 The court may strike out or expunge all or part of a pleading ... with or without leave to amend, on the ground that the pleading

.....

(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.

In considering the motion to refuse leave to amend Rule 26.01 provides:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

24 There are several bench marks for a motion to strike pleadings in addition to the rules noted above.

25 The test to be applied is whether, assuming the facts pleaded are true, it is 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 the pleading contains a radical defect should the relevant portions be struck out. If the pleading has some chance of success, it should remain. An arguable point of law or a novel cause of action should be left to the trial judge or a motion for judgment based on the point after exchange of pleadings. The motion for judgment may be under Rule 21.01(1)(a) on the basis of some question of law or under Rule 20 where a factual context is required for its resolution: see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (Ont. C.A.); *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.); *Abramovic v. Canadian Pacific Ltd.* (1991), 6 O.R. (3d) 1 (Ont. C.A.).

26 When a statement of claim sufficiently pleads a document in accordance with Rule 25.06(7) it is necessary for the court to have the document in order to assess the substantive adequacy of the impugned statement of claim. By making reference to the document the plaintiff is asserting its contents as facts: see *Web Offset Publications Ltd. v. Vickery* (1998), 40 O.R. (3d) 526 (Ont. Gen. Div.) at 531-2.

27 In assessing the adequacy of pleadings under Rules 21.01, 25.06 and 25.11 I must bear in mind their purposes. These are:

(a) define clearly and precisely the questions in controversy between the litigants;

(b) give fair notice of the precise case which is required to be met and the precise remedies sought; and

(c) assist the court in its investigations of the truth of the allegations made

See *National Trust Co. v. Furbacher* (October 12, 1994), Doc. 93-CQ-41889, B-152/94 (Ont. Gen. Div. [Commercial List]) at paras 9 and 10.

28 The full particulars of allegations of fraud, breach of trust or misrepresentation required by Rule 25.06(8) must set out precisely what each allegation of such wrongful act is, and the when, what, by whom and to whom of the relevant circumstances: see *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Ont. Gen. Div.).

29 The plaintiff must plead all the material facts on which it relies and all of the facts which it must prove to establish a cause of action which is legally complete. If any fact material to the establishment of a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars. If the plaintiff does not, at the time of pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim. It is improper to allow conclusions to be pleaded baldly and without any supporting facts: see *Region Plaza Inc. v. Hamilton — Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.).

30 A pleading should be read generously, with the foregoing principles in mind, so as to not unfairly deny a party the benefit of the pleading: see *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.).

Withdrawal of Admission

31 In considering the proposed withdrawal of the admission in the earlier drafts of the statement of claim that Balanyk was a co-inventor in order that Balanyk can assert claims on the basis that he is the sole inventor, I must consider Rule 51.05:

...an admission in a pleading may be withdrawn on consent or with leave of the court.

Consideration of the Statement of Claim

Overview

32 The Amended Fresh Statement of Claim ("Statement of Claim") is 76 pages long containing 206 paragraphs.

33 Paragraph 1 contains on 5 pages claims for 19 separate declarations, some of which refer to more than one matter.

34 Paragraph 2 consists of claims for accountings by the corporate defendants.

35 Paragraph 3 contains 4 ¹/₂ pages of claims for general, aggravated, special and punitive damages and restitution for breaches of contract, breaches of statutory and fiduciary duties, breach of trust and numerous torts, including fraud, fraudulent misrepresentation, conversion, misappropriation and conspiracy.

36 Paragraph 4 is a claim for injunctions and other collateral relief.

37 Paragraph 203 contains a pleading that were allegations of fact and law are already stated in the prayers for relief, they are not repeated in the Statement of Claim.

38 Paragraph 200 alleges civil conspiracies based on "facts as particularized beforehand". This apparently refers to unspecified portions of the preceding 199 paragraphs and 75 pages.

Agreements Referenced

39 The Statement of Claim refers, in paragraph 3(a)(iii) and elsewhere to the assignments of the invention titled "Benzoin Antimicrobial Dental Varnishes" by H. James Sandham and Balanyk, as inventors, to Innovations on October 19, 1984 and again on December 10, 1984. The operative language in the assignment dated October 19, 1984 signed by each of Balanyk and Sandham, in the presence of two witnesses, states:

...do hereby sell, assign and transfer unto the said University of Toronto Innovations Foundation the full and exclusive right to the said invention in the United States of America and all other countries and we hereby sell assign and transfer unto the said University of Toronto Innovations Foundation the entire right, title and interest in and to any and all Letters Patent which may be granted therefor, and the entire right, title and interest in and to said application...

40 The operative language in the assignment by Sandham and Balanyk to Innovations in the presence of two witnesses on December 10, 1984 is the same.

41 Both assignments include a covenant for further assurances in the filing and prosecution of any patent application.

42 The Statement of Claim also refers to the agreement between Innovations to Apotex dated the 10th day of April 1986 whereby Innovations granted to Apotex, as licensee, a non-exclusive, world-wide licence to manufacture, use and sell products incorporating or using the Invention (being the dental varnish described in a specific U.S. patent and specific patent applications in other countries) ("Products") and to grant sub-licences to manufacture, use and sell Products. The Licensee was obliged to pay Innovations a royalty of the greater of the minimum royalty stipulated therein or an amount based on sales and licensing fees. Recitals in the licence acknowledge Balanyk and Sandham are the inventors, recite the assignments of the inventions by the inventors and U. of T. to Innovations, and the desire of the Licensee to enter into a contract with Innovations to have U. of T. carry out a government funded R & D program using the inventors. This licence was amended most recently in 1992 to provide for an exclusive licence, and acknowledge an exclusive worldwide licence to Oralife's predecessor Knowell and the consent of Innovations to that licence.

43 In September 1992 Apotex agreed to appoint Oralife's predecessor Knowell exclusive distributor of Chlorzoin worldwide, subject to first obtaining regulatory approval in each particular market. This Apotex-Knowell agreement is referred to frequently in the Statement of Claim. The agreement recites Balanyk and Sandham as the inventors of Chlorzoin. It then recites the assignment of all rights in Chlorzoin by Sandham and U. of T. to Innovations. Balanyk's assignment is not recited. The agreement then recites the licence agreement by Innovations to Apotex. Knowell agrees to use all reasonable endeavours to diligently obtain regulatory approval for each market within the regulatory timetable. Oralife also agrees to develop the production of all marketing and sales literature, technical and professional literature and scientific publications and presentations required in connection with the sale and marketing of Chlorzoin. It goes on to provide that Knowell

...shall, where economically reasonable to do so, in Knowell's sole direction, include recognition of the inventors, the University of Toronto and [Innovations] with respect to the Product.

44 Apotex has the right to terminate the distributorship agreement if Knowell fails to commence the process for regulatory approval or fails to meet minimum sales levels as therein provided.

Thrust of Complaints

45 The thrust of Balanyk's complaints in the Statement of Claim are based on an allegation that his assignments to U. of T. and Innovations were void for duress and so Oralife's rights are non-existent, and on alleged breaches of contracts, being the assignments to which he was a party and the licence to Apotex and sub-licence to Oralife, to which he was not a party, breach of fiduciary duty or trust and numerous torts, including fraud, because he has not received:

(a) the publicity to which he says he is entitled as a co-inventor of Chlorzoin and any goodwill that may attach to such reputation;

(b) the royalties that would flow to him as a co-inventor under his contractual arrangements with U. of T. or Innovations had the defendants obtained regulatory approvals and achieved greater sales of Chlorzoin;

(c) the opportunity to participate in the development and research of Chlorzoin.

Vague Incorporation by Reference

46 The caveats such as those in paragraphs 200 and 203 cannot oust the paramountcy of Rule 25.06 and the applicable case law requiring clarity and precision to achieve the purposes of pleadings. Neither the opposite party nor the court should be forced to nit-pick their way through a long, complex and sometimes redundant and split pleading, parsing each paragraph and each sentence with a view to extracting the claims and related material facts and redrafting them into a clear and precise pleading. It is the responsibility of the party pleading to plead in accordance with the requirements of our law and the purposes of pleading. Bearing in mind *National Trust Co. v. Furbacher* those purposes are:

(a) to give precise notice to the opposite party of the case which is to be met, sufficient to enable the opposite party to plead;

(b) to assist the court in understanding the material facts alleged and the factual and legal issues in dispute between the parties;

(c) to establish a benchmark against which the parties and the court may determine the relevance of evidence on discovery and at trial and the scope of the evidence which will be required to fairly and efficiently address the issues in dispute.

This requires the party pleading to understand the facts and the law as to what is required to support or defend a cause of action and to then state its position clearly and concisely.

Consideration of the Claims

Claim for Breach of Contract

Paragraphs 1(p), 3(a)(iii) 49, 59-60, 73, 75-76, 78-80, 85, 89-90, 92, 94-95, 100-102, 107, 109-111, 128, 152, 156-168, 170, 173-176, 189.

47 A person who is not a party to a contract cannot, subject to some limited exceptions, enforce the contract or be made subject to the terms of the contract. Those limited exceptions, such as intention to create a trust for the claimant as beneficiary, agency and collateral contract, are not pleaded here: see Waddams, *The Law of Contracts*, 4th ed. Canada Law Book, 1999, paras. 281 to 292; Fridman, *The Law of Contract*, 3rd ed. 1994, Carswell, at p. 185 — 194; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Ont. Gen. Div.); *International Airport Industrial Park Ltd. v. Tanenbaum* (1976), 69 D.L.R. (3d) 1 (S.C.C.), at 8 and 12.

48 Balanyk has pleaded the licence agreement from Innovations to Apotex and the sub-licence agreement from Apotex to Knowell. The only references in these agreements to Balanyk is that in the first recital of each agreement that he is stated to be a co-inventor and (a) in paragraph 25 of the Licence Agreement between Innovations and Apotex wherein Apotex agreed to give recognition where possible to the inventors and (b) in paragraph 5.6 of the sub-licence agreement between Apotex and Knowell wherein Knowell agreed that it would, where economically reasonable and in its sole discretion, include recognition of the inventors in the marketing and sales literature.

49 Balanyk has not pleaded in the Statement of Claim any contract which exists between him and any of either the Apotex Defendants or the Oralife Defendants or Rocket. He asserts claims in respect of the licence agreements between Innovations and Apotex and between Apotex and Knowell, now Oralife, but he does not assert, or make any reference to a fact which would make him a party so as to entitle him to sue any of the Apotex Defendants, Oralife Defendants or Rocket in contract. There is no allegation that he is the beneficiary of a trust in which one of the parties is the trustee or that he is the principal of a party who signed as his agent.

50 During argument it became clear, and Mr. Polten acknowledged, that Balanyk has no right of action in contract against either the Apotex Defendants or the Oralife Defendants, there being neither a privity of contract nor allegations of a trust, agency or other relationship sufficient to give Balanyk a right to sue on the licence agreement between Innovations and Apotex or the sub-licence agreement between Apotex and Knowell.

51 I order struck from the pleadings all claims against Perry, Connelly and Rocket based in contract.

Liability of Officers, Directors and Employees for Torts of the Corporation

Paragraphs 25-26, 60, 72, 75-80, 94-96, 100-104, 120-127, 129-130, 145, 152, 154-155, 169-170, 178-179.

52 Perry is described as a "a past president and founding director of Oralife, until his removal on May 20, 1997" and now a consultant to Oralife.

53 Connelly is described as a dentist in Ottawa and director of Oralife from 1992 until May 20, 1997.

54 Rocket is described as Oralife's marketing director at all material times until March 29, 1996.

55 In paragraph 77 it is alleged that Perry, Rocket and others as

director, advisor or senior officer of [Oralife] individually and jointly, have ordered, directed, authorized and condoned each and all of the tortious activities of [Oralife] as pleaded herein.

56 Corporations can act only through their directors, officers, employees and other agents. These individuals cannot be held civilly liable for the actions of their corporation unless there is some conduct of the individual that is either tortious in itself or exhibits a separate identity of interest from that of the corporation such as to make the act that of the individual personally: *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) at 491. In the circumstances of that case the court declined to discuss the nature of the conduct which would be sufficient to cause the directors to shed their identity with the corporation and expose themselves to personal liability.

57 The directors and officers cannot be held personally liable for a breach of contract by their corporation where they are not party to the contract and there is no suggestion that they were doing anything other than acting in the normal course of their employment in the ordinary business of the corporation: *Aspiotis v. Coffee Time Donuts Inc.* (February 21, 1995), Doc. 92-CU-51828 (Ont. Gen. Div.).

58 In *Berger v. Willowdale A.M.C.* (1983), 41 O.R. (2d) 89 (Ont. C.A.) the court was prepared to find a director and senior officer of a corporation personally liable in negligence where a duty of care was owed to the plaintiff by the officer, the officer was in breach of that duty and the damages resulted from a breach of that duty.

59 An employee was found liable in tort in performing his job and personally liable to his employer's customers: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.).

60 In *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 168 D.L.R. (4th) 351 (Ont. C.A.) the sole director and two senior employees of the defendant corporation were sued by a competitor of the defendant corporation for interference with economic interests and inducing breaches of fiduciary duty arising out of alleged raiding of the plaintiff's

employees to service a contract for which the parties had competed. The court concluded at para 43 that there is no principled basis for protecting directors and officers from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. Until some limits are placed on the scope of this liability, the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort.

61 It is open to the plaintiff to plead specific elements of a tort against an individual director, officer or employee provided the plaintiff specifies the material facts giving rise to the independent liability in respect of each individual. It is improper to plead against a number of individual defendants as a group in the hope some liability may attach to one or more of them.

Tort Claims

62 In view of the possible personal liability in tort of a corporate director, officer or employee to the plaintiff, each of the tort claims against each of Perry, Connelly and Rocket must be examined. The paragraphs noted are those where the defendants suspect there may be some allegation of the tort alleged.

Misrepresentation

Paragraphs 3(a)(vii) & (viii), 3(g), 36(b), 69-80, 96, 117-120, 125-127, 129-131, 145, 150-152, 155, 177-179, 185-186, 189 and 201

63 Balanyk alleges Perry, Connelly and Rocket are liable to him for damages arising out of negligent misrepresentation by failing to state in publications to third parties respecting Chlorzoin that Balanyk was a co-inventor of Chlorzoin.

64 The tort of misrepresentation requires that all the following elements be pleaded and proved:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted intentionally or negligently in making the misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on the misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted to the representee from the representation.

See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110 following a review of Canadian cases based on *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.).

65 The pleading is deficient because it lacks the particularity required for pleading misrepresentation by Rule 25.06(8) and *Lana International Ltd. v. Menasco Aerospace Ltd.*, noted earlier, namely those noted in *Rahn v. McNeill* (1987), 19 B.C.L.R. (2d) 384 (B.C. S.C.), at 392:

1. The alleged misrepresentation itself.
2. When, where, how, by whom and to whom it was made.
3. Its falsity.
4. The inducement
5. The intention that the plaintiff should rely upon it.

6. The alteration by the plaintiff of his or her position relying on the representation
7. The resulting loss or damage to the plaintiff
8. If deceit is alleged, an allegation that the defendant knew of the falsity of his statement.

66 The cause of action in misrepresentation also fails here because there is no pleading that the plaintiff was the representee, that it was intended he should rely on the representation and that he relied on it to his detriment and, as a result, suffered damage.

67 There is a pleading in paragraph 201 under the heading "Civil Conspiracy" of a false representation by the Oralife Defendants and Rocket to their shareholders. There is no allegation of the representation being made to Balanyk or his reliance on it to his detriment.

Conspiracy

Paragraphs 1(n), 3(a)(x), 3(g), 200-201

68 Balanyk claims a declaration that "any or all of the defendants [including the Oralife Defendants and Rocket as a group] have conspired against Balanyk by encouraging and/or allowing "Oralife, Sandham and Connelly to proceed with patent applications in various countries which should have been obtained in Balanyk's name.

69 Balanyk alleges in paragraph 200 that

...the University defendants, the Apotex defendants and the Oralife Defendants [and Rocket] or any combination of individual defendants to this action not yet further ascertained have engaged in a civil conspiracy or conspiracies to exclude Balanyk from protecting his rights and interests with respect to his invention Chlorzoin, and relies upon the facts as particularized beforehand. The defendants in question have agreed to injure by way of unlawful acts, or lawful acts by unlawful means, and have committed the overt acts causing damages to the plaintiff, all as specified in this Statement of Claim.

70 A tortious conspiracy exists where:

- (1) there is an agreement between the defendant and one or more others,
- (2) the defendant acted in furtherance of the agreement,
- (3)
 - (a) the predominant purpose of the agreement is to injure the plaintiff or
 - (b)
 - (i) the conduct of the defendants is unlawful;
 - (ii) the conduct is directed towards the plaintiff, alone or with others; and
 - (iii) the defendant should know in the circumstances that injury to the plaintiff is likely,
- (4) injury to the plaintiff results.

See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at 471; *Hunt v. T & N plc*, above, at p.985.

71 The statement of claim in an action for conspiracy should describe concisely the material facts respecting the following:

- (a) the specific parties to the conspiracy and their relation to each other;
- (b) the agreement between the defendant and one or more others;
- (c) the precise purpose or objects of the conspiracy;
- (d) the overt acts alleged to have been done in pursuance and furtherance of the conspiracy by each of the alleged conspirators;
- (e) the injury and special damage occasioned to the plaintiff by reason of the conspiracy.

72 It is not sufficient to allege that the particulars are solely within the knowledge of the defendants. See *Ten-Ichi Japanese Restaurant Inc. v. Fred T. Reisman & Associates Ltd.* (1996), 4 C.P.C. (4th) 130 (Ont. Gen. Div.), at 132; *Key Property Management (1986) Inc. v. Middlesex Condominium Corp. No. 134* (1991), 50 C.P.C. (2d) 255 (Ont. Gen. Div.), *Apple Bee Shirts Ltd. v. Lax* (1988), 27 C.P.C. (2d) 226 (Ont. H.C.) (at 235-6).

73 Balanyk has not pleaded facts respecting:

- (1) particulars of the agreements and the parties;
- (2) the overt act or acts in furtherance of the conspiracy;
- (3) the injury and special damage caused by the conspiracy.

74 The pleading here is merely

- (1) a broad allegation against all the defendants;
- (2) a purpose and intent to injure; and
- (3) a restatement of the legal principles.

75 The pleading in paragraph 200 is not concise in that it pleads reliance upon the facts as particularized beforehand, being 199 paragraphs and 74 ¹/₂ pages containing many allegations of fact irrelevant to conspiracy.

76 I would strike out the claims in conspiracy against Perry, Rocket and Connelly.

Breach of Fiduciary Duty

Paragraph 172

77 Paragraph 172 of the Statement of Claim contains an allegation of a breach by the Oralife Defendants and Rocket as a group, of their fiduciary duty not to mismanage the marketing of Chlorzoin. A fiduciary duty arises where:

- (1) the fiduciary has scope for the exercise of some discretion or power;
- (2) the fiduciary can exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
- (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

See *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]) at p.262 citing *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.).

78 The proposition that an *exclusive* licensee has a fiduciary duty to the inventor to exploit the invention holds some attraction. The proposition was not argued before me but the elements necessary to find a fiduciary duty appear, on the surface, to be present.

79 The scope of the duty is not pleaded although Mr. Polten presented an oral argument that an exclusive licensee has a duty to the inventor to exploit the licence in good faith and to use due care where it knows the inventor is entitled to royalties based on sales. He further argued that where the licensee has an obligation, subject to the licensee's contrary decision, to mention the inventor's name in association with the invention, the licensee has a fiduciary duty to do so in the absence of good reason to the contrary.

80 The Statement of Claim contains no claim against the Oralife Defendants or Rocket in paragraphs 1 to 4 for a declaration of such a fiduciary duty, nor any claim for an accounting or damages resulting from the breach of such fiduciary duty or for an injunction based thereon.

Unjust Enrichment

Paragraphs 1(c), 3(d), 178 and 179

81 There are no claims against the individuals among the Oralife Defendants or Rocket under this cause of action.

82 Paragraphs 178-9 of the Statement of Claim states that:

the [Oralife Defendants' and Rocket's] negligent, premature, and/or improper marketing of Chlorzoin by Oralife, including suppression of scientific data and scientific reports on Chlorzoin, has resulted in their improper and unmerited acquisition of both financial and reputational benefits ... the [Oralife Defendants and Rocket] and in particular Sandham, have been unjustly enriched as a result of this financial and reputational gain. The plaintiff states that he has suffered a corresponding deprivation because the integrity of Chlorzoin has suffered as a result of Knowell/Oralife's improper marketing.

83 The elements of a claim for unjust enrichment are set out in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 987:

- (1) an enrichment;
- (2) a corresponding deprivation;
- (3) absence of a juristic reason for the enrichment.

84 No particulars are given of either the marketing activities or the suppression of scientific reports and data. No particulars are given of the financial and reputational benefits to any of the defendants, let alone the individuals.

85 No particulars are given of the deprivation to Balanyk from the pleading of "corresponding". There is no allegation of fact to suggest that the deprivation is corresponding to the alleged improper and unmerited acquisition of benefits.

86 There is no allegation of absence of juristic reasons.

87 Sandham is not one of the Oralife Defendants.

88 I find the pleading vague and lacking in particulars sufficient to enable the defendants to know the claims against them to respond to the claims. The court is unable to determine the scope of the claim so as to determine the relevance of any evidence which might be produced or sought.

Passing Off

Paragraphs 1(t)(iii), 3(a)(vi), 117-120, 124, 127, 130 and 185-186.

89 Balanyk claims a declaration that the defendants misappropriated his title and/or passed off Chlorzoin as the sole invention of Sandham rather than the invention of Balanyk which resulted in damage to Balanyk's reputation. He also claims damages for passing off.

90 In that portion of the Statement of Claim headed "Passing Off" Balanyk alleges he had a good reputation as a dental researcher and inventor of Chlorzoin from which he derived revenue and goodwill. He then alleges Oralife published literature to the dental profession and industry and to the public and caused other sub-licensed distributors to act similarly. However, the pleading does not state what was contained in the literature.

91 Balanyk then alleges he suffered actual and/or potential harm to his reputation, goodwill and revenues and he holds Oralife liable for such damages.

92 Balanyk then states that prior to the grant of the sub-licence to Oralife in September 1992, Perry and Rocket, in preparing and printing offending promotional literature, made repeated misrepresentations to the dental industry that Sandham was the sole inventor of Chlorzoin. Balanyk then alleges Perry and Rocket are liable for passing off Chlorzoin as the invention of Sandham and for complicity in conversion and/or misappropriation of title.

Paragraphs 124 to 151 are headed "Intellectual Property Rights"

93 In paragraph 124 Balanyk alleges that he is the originator and the owner of the trademark Chlorzoin prior to its registration in 1988. There is no claim in this paragraph against the individual defendants.

94 In paragraph 127 he alleges that the Oralife Defendants and Rocket knew that by consenting to the release of advertising materials they had converted and/or misappropriated Balanyk's title to Chlorzoin and passed off Chlorzoin as the sole invention of Sandham.

95 There is no claim in paragraph 130 against the individual defendants.

Paragraphs 185 to 189 are headed "Misappropriations and Conversions"

96 In paragraphs 185 and 186 Balanyk denies the legality of his assignment to U. of T., alleging that he has retained title to the invention. He then claims damages against each defendant for the misappropriation, passing off or conversion of Chlorzoin as the invention of Sandham. Balanyk makes no allegation that the defendants, other than U. of T., knew or ought to have known that his assignment was a nullity or otherwise ineffective.

97 The pleadings seem to confuse simple misappropriation or conversion of property with passing off.

98 Passing off is an economic tort based on the principle that no man may pass off his goods as those of another. Three elements must be proved to establish the tort:

- (1) the existence of goodwill in the goods or services being supplied, by association with the identifying get up, such as brand name, trade description or features of labeling or packaging, which the public recognizes as distinctive;
- (2) misrepresentation by the defendant, intentional or otherwise, deceiving the public into believing that the goods or services offered by the defendant are those of the plaintiff;
- (3) actual or potential damage to the plaintiff will likely result by reason of the erroneous belief engendered by the misrepresentation.

Ciba-Geigy Canada Ltd. v. Apotex Inc., [1992] 3 S.C.R. 120 (S.C.C.), at 131-132, citing *Reckitt & Colman Products Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873 (U.K. H.L.) at 880.

99 The purpose of the tort is to protect both manufacturers and customers: *Ciba-Geigy Canada Ltd.* at p.133-136.

100 The defendants argue that Balanyk's complaint is not that the defendants have appropriated his name or other identifying "get up" to themselves and their products. His assertion in the pleadings is to the contrary, namely, that the Oralife Defendants and Rocket have omitted any reference to his name in connection with the invention or its development. Balanyk cannot complain that the defendants were unfairly appropriating to themselves and their product Balanyk's reputation in the marketplace.

101 In the absence of allegations of appropriation of Balanyk's name or other unique "get up" as their own, these pleadings must be struck.

Fraud and Fraudulent Misrepresentation

Paragraphs 1(c), 3(a)(vii), 3(a)(viii), 121-123, 126, 127 and 130-131 and 179.

102 Fraud is a serious charge carrying with it the allegation of not only an actionable wrong but also an allegation of moral turpitude. The allegation alone, if publicized, could severely and irremediably damage a defendant's reputation. In view of the absolute privilege enjoyed by pleadings, Rule 25.06(8) requires that full particulars of the material facts alleged to constitute the claim be pleaded. This is the reason unproved allegations of fraud will have severe adverse cost consequences to the plaintiff. When potentially extraneous parties are included in the litigation, and possibly for merely tactical purposes, the pleadings must be even more closely scrutinized to ensure the requisite elements have been adequately pleaded.

103 The following elements must be proved to establish fraudulent misrepresentation:

- (1) That the misrepresentations complained of were made by the defendants;
- (2) They were false in fact;
- (3) The defendant knew when making the statement, that it was false or was recklessly uncaring whether it was true or false; and
- (4) That the representations induced the plaintiff to act to his prejudice.

104 As noted earlier, there is no allegation in any of the pleadings of fraudulent misrepresentation that the plaintiff Balanyk relied on or was induced by the alleged representations, fraudulent or otherwise, to act to his prejudice.

105 The pleading in paragraph 122 is a broad allegation that representation in a prospectus issued by Oralife on March 19, 1996 respecting Oralife's licence to a trademark was false. There is no suggestion Balanyk relied on the representation.

106 The pleadings in paragraphs 122, 123, 126, 127 and 179 are bald allegations of fraud as against the Oralife Defendants and Rocket as a group. They do not state the particulars of the alleged fraudulent conduct by each defendant. They do not state the nature or date of the advertising materials referred to in paragraph 127 or the misrepresentation alleged in paragraph 179. There is no indication that these pleadings refer to any of the documents referred to in paragraphs 69 and 70 and the broadcast in paragraph 71. They do not state the person to whom these materials were given or to whom the misrepresentations were made. The mere fact that each of these defendants was a director, officer or employee of, or consultant to, Oralife is not sufficient to make them liable individually for Oralife's tortious conduct.

107 These pleadings shall be struck as against the defendants Perry, Connelly and Rocket.

Unlawful Interference with Economic Interests

Paragraphs 49 and 104

108 There is no claim for relief based specifically on interference with economic interests.

109 Paragraph 49 contains no pleading against any of the individual defendants and only a bald claim, with no particulars as to the facts supporting this claim, against Oralife.

110 Paragraph 104 contains a pleading against Oralife Defendants and Rocket, as a group, of intentional interference with Balanyk's economic or business relations "through their tortious acts described above with intent to injure Balanyk" or "were recklessly indifferent to injury to Balanyk". The pleading then continues:

In particular, through their willful or reckless indifference to ensuring the publicity to which Balanyk was entitled as the inventor or co-inventor of Chlorzoin, the [Oralife Defendants and Rocket] ... have diminished the goodwill in Balanyk's business as a dental researcher and dentist.

111 The tort of unlawful interference with economic interests has these elements:

- (a) the deliberate intent of the defendants to injure the claimant;
- (b) the means employed by the defendant were unlawful;
- (c) economic loss to the plaintiff as a result of such intent and unlawful conduct.

Cheticamp Fisheries Co-operative Ltd. v. Canada (1995), 123 D.L.R. (4th) 121 (N.S. C.A.) at 126-131; leave to appeal refused by S.C.C. October 12, 1995 [reported (1995), 126 D.L.R. (4th) vii (S.C.C.)].

112 Balanyk has pleaded the intent and loss of goodwill but has not pleaded the means employed.

113 The allegation of unlawful acts is vague and bald. There is no precision as to specifically what the unlawful acts by each individual were, only a reference to the pleadings in the preceding 103 paragraphs and 48 pages.

114 These pleadings should be struck.

Food and Drugs Act Claim

Paragraphs 1(t)(i), 169 and 171

115 There is a claim for a declaration in paragraph 1 but no claim for damages in paragraph 3.

116 In paragraphs 169 and 171 Balanyk claims that the Oralife Defendants and Rocket made materially misleading and unsubstantiated claims respecting Chlorzoin prior to obtaining requisite regulatory approvals and in the absence of supportive clinical evidence and in doing so violated s.9(1) of the *Food and Drugs Act*.

117 This section creates a criminal regulatory offence. The Act does not create a private right of action for violations of the Act. See *Searle Canada Inc. v. Novopharm Ltd.* (1990), 31 C.P.R. (3d) 1 (Fed. T.D.) at 10-11.

118 The pleading does not give particulars of the facts supporting the participation of Perry, Connelly or Rocket in the commission of such alleged offences.

119 I would strike out these claims for failure to disclose a cause of action against Perry or Connelly.

Competition Act Claims

Paragraphs 3(a)(ii)(4) and 171

120 Balanyk claims damages against the Oralife Defendants and Rocket for a false representation to the public regarding the efficacy of Chlorzoin which constituted a breach of sections 52(1)(a) and (b) and (3) of the *Competition Act*. The pleading in paragraph 1 states that making a false representation to the public regarding the efficacy of Chlorzoin was a breach of the prohibition of misleading advertising.

121 Balanyk has not given particulars of conduct sufficient, if proved, to constitute conduct prohibited by this statute.

122 In order to advance such a civil claim Balanyk must rely on s.36 of that Act which requires that the claimant suffered loss or damages as a result of conduct contrary to Part VI of that Act. Balanyk has not alleged any such loss or damages: see *City National Leasing Ltd. v. General Motors of Canada Ltd.* (1989), 24 C.P.R. (3d) 417 (S.C.C.) at 448.

123 This claim should be struck.

Trade Marks Act Claims

Paragraphs 1(t)(I) and (iv), 3(a)(iv)(2) 122 and 171.

124 In paragraphs 1, 3 and 171 Balanyk seeks declarations and damages for unfair competition by the Oralife Defendants and Rocket for

(a) making false descriptions which are likely to mislead the public as to the proper indications for the use of Chlorzoin and/or the "character and quality" of Chlorzoin, contrary to section 7(d) of the *Trade Marks Act*; and

(b) business practices that are "contrary to honest industrial or commercial usage in Canada" or condoned or was recklessly indifferent to such dishonest business practices, pursuant to s.7(e) of the *Trade Marks Act*.

125 In paragraph 122 only, Balanyk claims damages against Oralife Defendants and Rocket as a group for misrepresentation in a prospectus dated March 19, 1996 and for misappropriation of title and/or breach of statutory duty, specifically s.7(c) of the *Trade Marks Act*, for passing off the trademark "Chlorzoin Therapy" as their own and for negligent and/or fraudulent misrepresentation.

126 Section 53 of the *Trade Marks Act* grants jurisdiction to a court to grant relief by way of injunction and damages for any act done contrary to the *Trade Marks Act*.

127 A claim relying on s.7(e) of the *Trade Marks Act* is a nullity because that section has been declared *ultra vires* of Parliament: *Figgie International Inc. v. Schoettler* (1994), 53 C.P.R. (3d) 450 (Fed. T.D.) at 458 citing *Bousquet v. Barmish Inc.* (1993), 150 N.R. 234 (Fed. C.A.) at 512-13 which cites *Vapor Canada Ltd. v. MacDonald* (1976), [1977] 2 S.C.R. 134 (S.C.C.); see pp.149, 172 and 175-6.

128 Section 7(c) of the *Trade Marks Act* is directed at prohibiting the substitution of "wares and services as and for those ordered or requested". That subsection requires the plaintiff to establish that:

(a) the get-up of its product has acquired a reputation;

(b) the defendant's similar get up has produced confusion in the minds of members of the public; and

(c) the defendant has induced, or enabled others, to pass off its formulations as those of the plaintiff:

See *Procter & Gamble Pharmaceuticals Canada Inc. v. Novopharm Ltd.* (1996), 116 F.T.R. 99 (Fed. T.D.) at 103 citing *Searle Canada Inc.*, supra.

129 This claim must fail for the same reason that the passing off claims fail. On the facts pleaded neither the Oralife Defendants nor Rocket have represented Chlorzoin as being associated with Balanyk and so they cannot be said to have appropriated Balanyk's reputation as their own or to have otherwise taken advantage of that reputation in supplying other wares or services. Balanyk claims that he is the owner of Chlorzoin. That does not support a cause of action under section 7(c).

130 Section 7(d) of the *Trade Marks Act* is directed to protecting the purchaser or consumer of wares or services from being misled or deceived as to:

- (a) the character, quality, quantity or composition;
- (b) the geographical origin; or
- (c) the mode of the manufacture production or performance

of the wares or services.

131 The Supreme Court of Canada has said in *obiter* that s.7(d) depends for its validity on being applied to a subject matter coming within federal legislative authority under s.91 of the *Constitution Act, 1867; Vapor Canada Ltd. v. MacDonald*, above, at pp.148 and 157. Balanyk has pleaded no facts in relation to these causes of action which takes the matter out of the common law of deceit or misrepresentation, which is within the legislative authority of the provinces, into the legislative authority of Parliament, such as trademarks.

132 These pleadings are again vague, even if one turns to paragraphs 169 of the Statement of Claim. There is particularity given to only one statement, namely a "No Cavities Guaranteed" warranty program, which was allegedly made to the public by Oralife effective after January 1995.

133 In paragraph 171 there is an allegation that the Oralife Defendants and Rocket, as a group, made false representation to the public regarding the efficacy of Chlorzoin and breached sections 7(d) and (e) of the *Trade Marks Act*. No particulars are given of facts which would support such a breach such as when, where, how, etc.

134 I would strike out the claims based on alleged breaches of the *Trade Marks Act*.

Claims Based on Moral Rights

Paragraphs 1(t)(ii), 3(a)(iv)(1), 101, 103 and 121

135 Balanyk claims a declaration against each defendant for infringement of his moral rights as an inventor under the *Copyright Act*, and damages for breach of his moral rights under the *Copyright Act*.

136 Paragraphs 101 to 103 of the Statement of Claim are headed "Infringement of Moral Rights".

137 In paragraph 101 Balanyk alleges an express and implied contractual obligation to recognize his role as inventor which "would by operation of law have flowed to" Oralife and its principals, Perry and Rocket.

138 In paragraph 102 he alleges that all the defendants have violated the contractual obligations which arise from his assignment to Innovations and his moral rights to be credited as a co-inventor of the invention in promotional materials. Alternatively, Balanyk alleges Rocket and Perry have participated in the infringement by the other defendants of Balanyk's common law moral rights or have been indifferent to such infringement by the Oralife Defendants and Rocket generally.

139 In paragraphs 103 and 121 Balanyk pleads that the Oralife Defendants and Rocket have infringed Balanyk's moral rights pursuant to sections 28.1 and 28.2 of the *Copyright Act*, particularly his right pursuant to s.14.1 of that Act

to be associated by name, when reasonable in the circumstances, as the author or co-author of various published works, when such works are used or referred to in preparing promotional materials for Chlorzoin.

140 Balanyk's role as inventor and his assignment of the invention to Innovations is recited in the licence and sub-licence. However this does not constitute notice to the licencees that he has some undefined right in the invention and its use beyond rights provided in the *Patent Act* or applicable Conventions.

141 Firstly, the mere reference to the contract of assignment in the licence does not constitute notice of its terms to the licensee or put the licensee on its inquiry as to its terms. Such reference does not constitute an incorporation of the terms of the assignment by reference into the licence or make the licensee subject to the obligations of the assignee in the assignment or force the licensee to fulfill the rights of Balanyk under the assignment.

142 Balanyk then argues that these rights can arise either by reason of the contract of assignment to Innovations or as inherent moral rights which accrue to the creator of an invention and are similar to those granted under s.14.1 of the *Copyright Act*. He suggests they are rights *in rem* which of necessity they run with the invention and merge with any patent, assignment or licences granted with respect to the invention, not unlike a right to real or personal property. He offers no authority for the proposition.

143 In *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (S.C.C.) at 372-375 the court stated:

Copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing at common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.

144 Moral rights in a work covered by the *Copyright Act* exist solely because of that statute and do not arise at common law. That Act addresses the products of creative authorship such as literary and other writings, photographs, dramatic works, music, films, artistic works such as paintings, drawings and sculpture, plans and designs and sound recordings.

145 The *Copyright Act* s.14.1

(1) The author of a work has, subject to s.28.2, the right to the integrity of the work and, in connection with an [assignment of copyright], the right where reasonable in the circumstances to be associated with the work as its author by name...

146 Section 28.2 provides

(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified, or

(b) used in association with a product, service, cause or institution

147 I do not see in the nature of an invention characteristics which would justify extending the rights of a moral right to an invention. An invention has a character wholly different from that of an artistic, literary or other work which can be the subject of copyright. In the absence of statutory patent rights the public would have immediate access to the invention for the purpose of manufacturing and selling the products of the invention. A patent is an exclusive statutory right for exclusive use of the invention for a limited period to enable the owner or assignee to make a profit from the manufacture and sale of the products of the invention. A copyright protects works more closely associated with the creator's persona and skills which impact on the reputation of the creator.

148 The *Patent Act* offers no protection for the integrity of a patent or the inventor's right to be associated with it. The *Copyright Act* is an exception to the common law rights to freely copy and reproduce works of others. The author's right of having his name associated with a work is a creature of that statute.

149 Neither Thomas Edison nor Alexander Graham Bell nor any other person has the right to have his or her name mentioned in connection with the marketing or sale of the products incorporating their inventions. In the absence of juristic reason to the contrary, Balanyk's counsel challenges me to allow the claim as this is an unexplored and novel area of law notwithstanding the absence of caselaw in support of the submission. I find the rationale offered by Balanyk for his allegation totally without merit.

150 In my analysis, and in the absence of any common law or provisions in the *Patent Act* supporting a moral right of any sort, I am obliged to say that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action in respect of moral rights.

151 It would be unfair to subject the Defendants to the costs and trouble of an action which clearly has no chance of success.

152 These pleadings should be struck.

Bald Claims

Paragraphs 25, 26, 36(b), 49, 50, 59, 77, 90, 94, 95 and 110 and 202.

153 Balanyk makes a number of allegations which are general, broad, bald or vague and lack the requisite particularity of supporting material facts.

Duty to Protect or Promote the Reputation of an Inventor or an Invention

154 No specific claim or pleading.

155 Balanyk argues, again without legal authority, that assignees and licencees of inventions have a duty of care to protect the reputation of both the invention and the inventor and that breach of this duty constitutes a tort.

156 The argument first analogizes inventions to copyright and the statutory protection for moral rights. I have dealt with that issue.

157 Then Balanyk argues that a person who knows of an invention, the name of the inventor, and the obligation in the licence agreement to recognize the inventor "where economically reasonable to do so, in the licencee's sole discretion", has a duty to protect and promote the reputation of the inventor and the invention. He offers no authority for the proposition. I have noted earlier that Balanyk has no remaining moral rights in the invention. After assigning the invention, his only remaining rights to it are in contract.

158 Balanyk has pleaded neither the duty to protect and promote nor the breach of duty nor facts which constitute the breach by the defendants individually. I am not prepared to extend the law of tort to encompass a positive duty to promote an individual's reputation. This sort of positive obligation is contractual. No contract is pleaded as between Balanyk and any of the Oralife Defendants and Rocket and he pleads no facts which would bring him within the narrow exceptions to the rule that he must be party to the contract to sue on the contract: see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.) at 368.

159 Balanyk then suggests, although the pleadings are silent on the issue, that the alleged duty of care to the inventor extends to protection of the reputation of the invention. He offers no authority for the proposition. If the inventor has no rights to the invention except as provided by the *Patent Act* one should look to that Act for any duty and remedy.

160 To the extent such alleged causes of action may be found by a meticulous parsing of the 206 paragraphs in the Statement of Claim, I would dismiss them because they have not been properly pleaded.

Slander of Title

161 Balanyk has offered, uninvited, written submissions on this subject but does not tell the court the specific pleadings to which the submissions relate. The Oralife Defendants have responded to the submissions on the assumption that they refer to paragraphs 3(a)(ii), 3(a)(iv)(5) and 4(a)(I)(2).

162 A cause of action based on slander of title requires four elements to be pleaded:

- (a) the defendants published words in disparagement of the plaintiffs property;
- (b) the words were false;
- (c) the words were published with actual malice;
- (d) the plaintiff suffered special damage

See *Almas v. Spenceley*, [1972] 2 O.R. 429 (Ont. C.A.) at 432.

163 This suggestion assumes that the assignment of the Invention to the U. of T. and Innovations was a nullity.

164 Balanyk has not identified any instance of words published in disparagement of his property or made any allegation that the words were false.

165 Balanyk has failed to plead malice on the part of the Defendants, that is, the direct intention to injure him and the material facts which support the allegation: see *Siopiolosz v. Taylor*, [1944] O.R. 195 (Ont. C.A.) at 204-205.

166 Balanyk makes no allegation of facts which would support the personal liability of any of the Oralife Defendants or Rocket.

Injurious Falsehood

167 Counsel for Perry acknowledges that the claim for damages for libel, slander or injurious falsehood and an injunction in paragraphs 3(a)(ii), 3(a)(iv)5 and 4(a)(i)(2) and the particulars given in paragraphs 190 to 195 are a sufficient pleading of this alleged cause of action against him.

Claims Against Connelly

Paragraphs 1(p), (q) and (r) and 187 - 188

168 Balanyk claims against Sandham and Connelly in paragraphs 1(p) and (q) declarations that specific patent applications in Canada, Australia, U.S.A. and the Patent Cooperation Treaty constitute a violation of the University's Inventions Policy and that a certain U.S. Patent in Connelly's name infringes the U.S. Chlorzoin patents of Balanyk and Sandham and "is a violation of Balanyk's original rights under the same policies and contractual agreements".

169 Paragraph 1(r) seeks a declaration that Sandham and/or Connelly swore a false affidavit stating Connelly was the sole inventor of two Canadian patents, an Australian patent and a Patent Co-operation Treaty application.

170 There is no claim for damages against Connelly in respect of these matters. This court has no jurisdiction over patent infringements in other countries.

171 There is no recognized cause of action in Balanyk in the allegation of violation by others of the University's policy or that a false affidavit was sworn where there is no allegation that it affects Balanyk's interest. The pleading is vexatious.

172 These claims should be struck

Amendment of Pleadings to Remove an Admission.

Fresh Statement of Claim dated July 12, 1994 — paragraphs 1(xix)(d), 2, 24, 25, 29, 32, 54, 58, 62, 63, 78 and 86.

Statement of Claim paragraphs 1(a), 3(a)(i), 56(g), 57, 58 and 185.

173 In the 1994 Fresh Statement of Claim dated July 12, 1994 Balanyk acknowledges in paragraphs 1(xix)(d), 54, 63, 78 and 86 that he is a co-inventor. In paragraph 2 of the 1994 Fresh Statement of Claim he alleges, in describing himself that "He is the sole inventor or a co-inventor with the defendant H. James Sandham ("Dr. Sandham") of Chlorzoin".

174 Balanyk alleges in the 1999 Statement of Claim that he is the sole inventor or alternatively, co-inventor: paragraphs 1(a) ("sole owner"), 3(a)(i) "plaintiff's invention Chlorzoin", 3(a)(vii) ("sole or primary inventor"), 29, 32 ("At the request of Sandham, Balanyk disclosed Chlorzoin to the University"), 56(g) ("sole or primary inventor"), 57 ("sole owner of all rights and title to Chlorzoin"), and 58 ("sole or primary inventor").

175 The claim for an injunction in paragraph 4(a)(i)(1) is limited to Balanyk being a sole inventor or primary co-inventor.

176 In other paragraphs he pleads in the alternative, e.g. paragraph 80 pleads "an inventor or co-inventor".

177 The pleading of sole inventor is clearly contrary to the apparent parties to the assignments to Innovations.

178 I am not satisfied that there is a material change here which prejudices the Oralife Defendants or Rocket. I would permit the revised pleading to stand subject to any necessary changes to make it clear that such pleadings are in the alternative.

Conclusion

179 In reflecting on the Statement of Claim generally, bearing in mind Balanyk's basic complaints, I find a breadth of bald allegations against the Oralife Defendants and Rocket as a group without particulars of factual allegations as to the involvement of each of them.

180 I would strike out all claims made in the Statement of Claim against Perry, Connelly and Rocket except for the claims for libel and injurious falsehood against Perry.

181 In view of the history of these proceedings and the fact the Statement of Claim is Balanyk's fifth attempt in almost five years to get it right, I would allow no further amendment against these defendants.

182 I allow the amendments to the pleadings that allege that Balanyk was the sole inventor provided it is made clear that such pleading is in the alternative to his pleading as a co-inventor.

183 The purpose of allowing the amendments resulting in the Statement of Claim was to incorporate any claims in 98-CV that were not already in the statement of claim in 94-CQ. I assume this was done. Accordingly, I dismiss action 98-CV-3557CM as against Perry, Connelly and Rocket.

Application granted in part.

2015 ONSC 6269
Ontario Superior Court of Justice

Best v. Lancaster

2015 CarswellOnt 15687, 2015 ONSC 6269, 125 W.C.B. (2d) 650, 259 A.C.W.S. (3d) 72

Donald Best, Plaintiff and Gerald Lancaster, Rex Ranking, Sebastien Jean Kwidzinski, Lorne Stephen Silver, Colin David Pendrith, Paul Barker Schabas, Andrew John Roman, Ma'Anit Tzipora Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock and Blackwell LLP, Blake, Cassels & Graydon LLP, Miller Thomson LLP, Kingsland Estates Limited, Richard Ivan Cox, Eric Iain Stewart Deane, Marcus Andrew Hatch, Philip St. Eval Atkinson, Pricewaterhousecoopers East Caribbean (Formerly 'Pricewaterhouse Coopers'), Ontario Provincial Police, Peel Regional Police Service a.k.a. Peel Regional Police, Durham Regional Police Service, Marty Kearns, Jeffery R. Vibert, George Dmytruk, Laurie Rushbrook, James (Jim) Arthur Van Allen, Behavioural Science Solutions Group Inc., Tamara Jean Williamson, Investigative Solutions Network Inc., Toronto Police Association, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Defendants

Healey J.

Heard: June 15, 2015; June 16, 2015; June 17, 2015; June 18, 2015

Judgment: October 9, 2015

Docket: CV-14-815-00

Counsel: Paul Slansky, for Plaintiff

Peter Wardle, Adrienne Lipsey, for Defendants, Gerald Lancaster, Rex Ranking, Sebastien Jean Kwidzinski, Lorne Stephen Silver, Colin David Pendrith, Paul Barker Schabas, Andrew John Roman, Ma'anit Tzipora Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock & Blackwell LLP, Blake, Cassels & Graydon LLP and Miller Thomson LLP
Mark Polley, Jessica Prince, for Defendants, Pricewaterhouse Coopers East Caribbean (formerly PricewaterhouseCoopers), Kingsland Estates Limited, Philip St. Eval Atkinson, Richard Ivan Cox and Marcus Andrew Hatch

Jeffrey Claydon, Dominic Polla, for Defendants, Ontario Provincial Police, Marty Kearns, Jeffery R. Vibert, John Doe #3 and Jane Doe #3

Mike Cremasco, for Defendant, Peel Regional Police Service a.k.a. Peel Regional Police

Jennifer Hunter, Shannon Gaudet, for Defendants, Durham Regional Police Service and George Dmytruk

Philip Wright, for Defendants, James (Jim) Arthur Van Allen, Behavioural Science Solutions Group Inc. and Tamara Jean Williamson

Paul-Erik Veel, for Defendant, Toronto Police Association

Norman Groot, for Investigative Solutions Inc. (by written submissions on costs only)

Healey J.:

Nature of the Action and Motions

1 This is an action brought by Donald Best ("Best") against 39 defendants, by which he seeks damages in the aggregate amount of \$20M, injunctive relief to protect his safety and identity and an accounting of funds paid by two of the defendants to their lawyers in a prior proceeding, together with costs. The prior proceeding is referred to in these

Reasons as the "Nelson Barbados Action". The action that is the subject matter of these Reasons, being Court File No.: CV-14-815-00, is referred to as the "Second Action".

2 The 39 defendants may be grouped into categories and are defined as follows in these Reasons:

(i) The "Caribbean defendants" are Kingsland Estates Limited, Richard Cox, Eric Deane, Marcus Hatch, Philip Atkinson and PricewaterhouseCoopers East Caribbean;

(ii) The "lawyer defendants" are Gerald Ranking, Sebastien Kwidzinski, Lorne Silver, Colin Pendrith, Paul Schabas, Andrew Roman, Ma'anit Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock & Blackwell LLP, Blake Cassels & Graydon, LLP and Miller Thomson LLP;

(iii) The "OPP defendants" are Ontario Provincial Police, Marty Kearns and Jeffery Vibert;

(iv) The "Peel Regional Police defendant" is Peel Regional Police Service ("PRPS");

(v) The "Durham Regional Police defendants" are Durham Regional Police Service ("DRPS"), George Dmytruk and Laurie Rushbrook;

(vi) The Toronto Police Association defendant ("TPA");

(vii) The "private investigator defendants" are James (Jim) Van Allen, Behavioural Science Solutions Group Inc. and Tamara Williamson.

3 The causes of action set out in the statement of claim in the Second Action, with an inconsistent level of clarity and specificity throughout, are: abuse of process, negligent investigation (also referenced as negligent regulation/performance of statutory duty) and false imprisonment, all claimed by way of both the common law and the *Canadian Charter of Rights and Freedoms*. Further causes of action are: intentional and/or negligent infliction of harm and/or mental suffering (also referenced as intentional, reckless and/or negligent endangerment); misfeasance and/or misfeasance of public office and/or abuse of authority; malicious prosecution; conspiracy to injure the plaintiff (also referenced as conspiracy to do an unlawful act and/or causing loss by unlawful means); breach of common-law privacy rights; breach of ss. 7 and 8 of the *Charter*; and breach of fiduciary duty.

4 It is a truism in advocacy that a pleading sets the tone for the entire action, usually being the first document read by the presiding judge. In James Carthy, Derry Millar & Jeffrey Cowan, *Ontario Annual Practice* (Aurora: Canada Law Book, 2014), at p. 1006, the editors include these apt comments in the advocacy notes prefacing Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194:

It is worth repeating, for emphasis, the advocacy value of a carefully crafted pleading. It travels with you to motions, trial and appeal and is the written spokesperson for the virtue of your client's position. If clear, lucid and a complete formulation of the claim or defence, it becomes much easier for a judge to accept evidence and argument in support. If vague, muddy and evasive, the reader assumes the search is ongoing for a foundation for the claim or defence and will be skeptical of formulations scratched out of the evidence or presented for the first time in argument.

5 The claim that initiated the Second Action is 90 pages in length, and contains 234 paragraphs. Best also sought leave of this court to amend the claim to add five new defendants and to amend the names of two others. There are numerous paragraphs of the claim that could serve to exemplify its overall tone and substance, but some are particularly illustrative. Under the heading "Particulars of the Claim", at para. 32, is the following:

The lawyers, law firms and clients knew about this dissemination and publishing of confidential information and, in fact, were actively involved in the dissemination and publication. They did so knowing and intending that would likely endanger the life of the Plaintiff and the life and/or safety of his family. They conspired with Van Allen and the police to injure him in this manner. Even after the Plaintiff begged them to stop distributing to the public his and his

family members' private information including Identity Information, the lawyers, law firms and clients distributed and published even more of this confidential information, which they continue to do to this day. The lawyers, law firms, clients and police later conspired to cover up this unlawful activity and the unlawful nature of Van Allen's "private" investigation services while he was a police officer. They did so flagrantly and outrageously. They did so knowing that this was unlawful and criminal. They did so intentionally for the improper and collateral purposes of encouraging the Plaintiff to leave Canada or as a means to pressure him and others in respect of litigation and potential litigation in other jurisdictions. As officers of the Court, the lawyers and law firms were acting in an official state capacity. Van Allen, as a serving police officer and the police were state agents.

6 Under the heading "Negligent Investigation and/or s. 7 of the *Charter*", at para. 201, is the following:

The secret investigation itself, that was premised on the Plaintiff being convicted, before he had been found guilty, was itself a negligent investigation. If the court itself was involved (not Justice Shaughnessy who denied knowledge of it, but Court administration), this suggested a possible institutional bias. If initiated by the lawyers, law firms and/or clients, this suggested that the police were involved in the civil contempt proceeding, which would be extraordinary and suggested bias or corruption by the police. If initiated by Van Allen defendants, this suggested further abuse of power by a serving police officer as a private investigator on behalf of private interests. One way or the other, the secret investigation was illegal and corrupt. The fact that a police and Court police investigation is premised on a person being found guilty before he is found guilty is offensive. The fact that it is being done in secret suggests that there is something to hide. Such an investigation is inherently negligent. As is clear from *Hill* (SCC) and *Taylor* (OCA), the duty of care in relation to criminal investigations inherently creates a duty of care because of the targeting of the suspect. The DRPS owed a duty to the Plaintiff having targeted him. The conduct of the secret investigation with the presumption of conviction creates an unreasonable risk of substantial harm and does not meet the standard of care. This is similar to *R. v. Beaudry*, [2007] S.C.J. No. 5..

7 In his submissions on costs at the conclusion of the motions, Best's counsel submitted that, in terms of degree, this claim could not be said to fall at the extreme end of vexatious or abuse of the court's process. This court completely disagrees with that submission. This claim, both in form and substance, is the most vexatious and abusive to ever come before me. The allegations are scandalous, oppressive and shocking, very clearly aimed at undermining key public institutions such as the courts, judges and local and provincial police services, as well as individuals whose professional reputations are intended to be impugned by the allegations made, including lawyers, police officers and a private investigator. The claims are a torturous yarn spun from the most flimsy of material; the evidence presented by Best to purportedly justify these allegations is either non-existent, disturbingly convoluted, irrelevant or, in many instances, the allegations are simply incapable of proof.

8 For example, in one of many affidavits relied on by Best, he presented the following evidence:

Defendants also published on the Internet calls for criminals I had previously arrested or investigated to hunt me and my family down, and to stalk us and my company's witnesses. Defendants and their co-conspirators also made public threats to shoot me, my lawyer and others, and other threats to murder and rape some of my company's witnesses and to burn down their business. Defendants and their co-conspirators published on the Internet my photo and what they said were the names of my children, ex-wife and other family members. This is all in the context of the history of actual violent criminal acts against witnesses in Barbados; including arson, home invasion, abduction at gunpoint, beatings, sabotage of the vehicles, killing of family dogs, threats to lose employment unless witnesses stop testifying and the loss of employment at the University of the West Indies when the witness bravely testified notwithstanding the threats.

9 A reading of all of the affidavits filed by Best for use on this motion, together with attached exhibits, confirms that he has placed no credible, corroborative evidence before the court to support the outrageous facts alleged in the foregoing paragraph. This makes the related allegations set out in the statement of claim all the more vexatious and shocking. Unfortunately, this is not an isolated example of the type of evidence advanced by Best to attempt to support

the allegations made in his claim. Best's affidavit material is replete with alleged facts that are equally spurious and lacking in any substantive proof.

10 The motions before this court were brought by 21 of the 39 defendants, each seeking an order dismissing the action as being frivolous, vexatious and an abuse of process pursuant to rule 21.01(3)(d) and rule 25.11 of the *Rules of Civil Procedure*; or, in the alternative, striking the claim as disclosing no reasonable cause of action pursuant to rule 21.01(1)(b), without leave to amend.

11 The motions were argued over three days, following which this court released the following endorsement, with minor variations on some of the moving parties' motion records:

For further Reasons to be released at a later date, this Court orders that the action is dismissed as being vexatious and an abuse of process pursuant to Rule 21.01(3)(d) and Rule 25.11. In the event that such ruling is found to be in error, the alternative relief sought by the moving party/parties is also granted, such that this Court orders that the Statement of Claim is struck on the ground that it discloses no reasonable cause of action, pursuant to Rule 21.01(1)(b), without leave to amend.

The Claim is a transparent attempt to re-litigate the findings and rulings of the Superior Court, Court of Appeal and Supreme Court of Canada in action 07-0141, without basis in law, and is vexatious for the same reason and others to be addressed in my full Reasons. The Claim further offends generally the law of pleadings, and because it is plain and obvious that the causes of action as pled have no chance of success, and that in the circumstances of this case, an opportunity to cure these defects will not result in a Statement of Claim recognized at law as being viable.

12 As stated in that endorsement, this court has found that the claim was an attack on the results of prior litigation in the Nelson Barbados Action. In that action Best was, both personally and through the corporate plaintiff, Nelson Barbados Group Inc. ("Nelson Barbados"), wholly unsuccessful. The defendants in this action are those individuals upon whom he unjustifiably places blame for the fact that he was found in contempt by order of Shaughnessy J. on January 15, 2010, and ultimately served a period of incarceration. The history of that litigation is set out in the following section.

History of The Nelson Barbados Action (Court File 07-0141)

13 In 2007, Nelson Barbados commenced the Nelson Barbados Action in Ontario against 62 defendants, the majority of who reside in Barbados. Best was the principal of Nelson Barbados. In May 2009, the Caribbean defendants brought an application for a stay. Shaughnessy J. ordered that the Nelson Barbados Action be permanently stayed in Ontario.

14 In the concluding paragraphs of his Reasons for Judgment on Motion dated May 4, 2009, Shaughnessy J. noted that Mr. Ranking, who represented PricewaterhouseCoopers East Caribbean, had advised the court that his client and the other represented defendants would be seeking an award of costs on a substantial indemnity basis as against the principal of Nelson Barbados and personally against Nelson Barbados' lawyer, who at that time was Mr. McKenzie. In his Reasons, Shaughnessy J. directed counsel to contact the trial coordinator at Whitby to arrange a date to speak to the issue of costs: *Nelson Barbados Group Ltd. v. Cox* (2009), 75 C.P.C. (6th) 58, [2009] O.J. No. 1845 (Ont. S.C.J.), at paras. 121-122.

15 As Best was still represented by counsel at the time of the release of those Reasons, it can be properly assumed that he was informed of the court's ruling by Mr. McKenzie, and provided with a copy of the Reasons. It is clear from Best's affidavit evidence that, by at least August 2009, Mr. McKenzie had made Best aware that he would be seeking an order removing his firm as solicitors of record because the defendants were seeking costs against him personally. Mr. McKenzie was later removed as counsel of record, but not until September 15, 2009. Yet Best asks this court to accept that despite the Reasons of Shaughnessy J. and his communications with Mr. McKenzie between May and November 2009, he never became aware of the intention of the defendants to seek costs against him personally. I reject that submission; it is patently false given that Best had counsel at the relevant time and had been informed of the reason that Mr. McKenzie was getting off the record.

16 Nevertheless in his current claim, at para. 23, Best alleges that he was not aware that costs were being sought against him personally prior to November 2, 2009. It was a premise underlying his present counsel's submissions to this court, which is that some of the alleged unfairness experienced by Best resulted from a lack of awareness that costs were being sought against him personally. In his affidavit sworn April 23, 2015, after detailing various forms of persecution (such as being targeted and beaten on the street, having "thugs" hired in Auckland to hunt him and his family down, and having the family automobile "shot up with 9mm bullets while parked beside the family home", resulting in Best having to flee to other countries such as Singapore), all arising from steps allegedly taken by unspecified defendants, Best theorizes about the motives underlying the costs hearing. At para. 13, he alleges:

Then while this horrendous situation was happening, and having created this criminal attack against my family and me, in a matter of a few weeks over the 2009 Christmas season, some of the defendants rushed through a private prosecution of me for Contempt of Court in the civil case costs hearing, that I was unaware of until after the conviction. The lawyers, law offices and their clients knew that I was half way around the world to protect my family, was unrepresented by counsel, not served of many crucial legal documents, not notified of the hearing and that their Campaign was the reason that I had left Canada and was seeking safety for my family. The defendants also knew that they had fabricated false evidence against me and placed this before the court.

17 The key element which seems to elude Best is that the defendants were, as permitted by law, seeking to be compensated for costs incurred by them arising from Nelson Barbados' decision to commence an action in the wrong forum, a decision for which Best, as the operating mind of the corporation, was responsible. In his Reasons, at para. 30, Shaughnessy J. noted that the Corporate Profile Report listed "Donald Best" as the president of Nelson Barbados, but that little else was known of the company. He noted that Nelson Barbados and Best had refused or failed to provide evidence that would identify shareholders, directors, officers and business activities. He further noted that the defendants' concern was that the plaintiff had been incorporated in Ontario for the primary purpose of assisting with the attack on jurisdiction. At para. 54 of his Reasons, Shaughnessy J. found that Nelson Barbados, through its counsel, had made a deliberate choice not to provide details that would demonstrate its connection to Ontario. He remarked that what little was known or disclosed was that the plaintiff had a head office and business address which was the same as Mr. McKenzie's in Orillia, Ontario. Shaughnessy J. further noted that the transcript of the cross-examination of Nelson Barbados' representative revealed that Mr. McKenzie, by repeated interjections and improper refusals, prevented defence counsel from obtaining information directly relevant to the status of Nelson Barbados, its business and its interest in the action. These facts help to understand at least some of the bases upon which Mr. Ranking's client and other defendants sought to have costs paid by both Best and his lawyer.

18 It is clear from the record that service of any documents on Best was problematic, as he refused to provide any contact information other than the address of a post office box located in Kingston, Ontario. On September 15, 2009, Eberhard J. made an order that Nelson Barbados could be served with documents in the action by sending such documents by ordinary mail to 427 Princess Street, Suite 200, Kingston, Ontario, service deemed to be effective ten days after mailing.

19 On November 2, 2009, Shaughnessy J. made an order relating to the costs motion, which included:

- i) that service of all motion material relating to the costs motion upon Best was validated and the service of all such materials was effective four days after such materials were served upon Nelson Barbados by virtue of having been mailed to 427 Princess Street, Suite 200, Kingston, Ontario;
- ii) that service of any and all further materials (including motions, court orders or notices of examination) upon Best will be effective four days after mailing or couriering same to him at the above Princess Street address; and
- iii) that Best was to appear at an examination on November 17, 2009, at Victory Verbatim in Toronto, and to deliver various documents to Mr. Ranking at least one week prior to the examination.

20 Filed with the court for use at the November 2, 2009, appearance was an affidavit of James (Jim) Van Allen sworn October 21, 2009 (the "Van Allen affidavit"), which sets out his attempts to locate Best to serve him with a Summons to Witness in order to have his evidence available at the hearing of the costs motion. This affidavit became the genesis of some of Best's claims made in the Second Action, encompassing allegations that Van Allen committed actionable wrongs by acting as a private investigator while he was a police officer, using police resources directly or indirectly during the course of an investigation of Best, conducting an unlawful secret investigation, swearing a misleading affidavit, distributing Best's personal and private information to the public, redaction of invoices to conceal unlawful use of police resources and colluding and conspiring to cover up these facts, among others. It is alleged that the lawyers and law firms were part of a conspiracy that involved obtaining and using the Van Allen affidavit.

21 Best was not present in court on November 2, 2009, nor did he send a representative. Still, he knew of the hearing date and knew that its purpose was to address the issue of costs. He acknowledged such awareness in a letter written directly to Shaughnessy J. on October 30, 2009, in which he stated "Nelson Barbados Group Ltd. therefore respectfully asks the court to immediately proceed with the costs hearing that is preemptorily scheduled for November 2, 3 and 4, 2009".

22 According to Best, it was on November 16, 2009, that he first learned that he had been ordered to attend an examination the next day, as a result of a telephone call that he made to the trial coordinator at Whitby. However, when and how he may have learned of the requirement of the examination is of no relevance given that there was an order recognizing and validating service on him, made at a court attendance at which he chose to have no representation or agent present for Nelson Barbados or himself.

23 Best did not attend the examination. Instead, he telephoned Victory Verbatim Reporting, and spoke with Mr. Ranking and Mr. Silver. Best deposed that he recorded that call, and subjected the recording to forensic audio analysis. Accepting for the purpose of these motions that the transcription of this recording is accurate, as Best asks the court to do, it is clear that Mr. Ranking and Mr. Silver made offers to accommodate Best's attendance later that day or on another day, and also that Mr. Ranking's office had couriered motion records pertaining to the costs hearing, and the draft order of November 2, 2009, to Best on November 6, 2009. Best asserted that he did not have a copy of the November 2 order. It is clear from the transcript that Best refused to state whether he had checked the contents of the Kingston post office box, that he refused to provide a date on which he would produce himself for cross-examination as ordered by the court and he refused to give counsel any information about his location. Best was insistent on having the cross-examination conducted over the telephone. Counsel warned Best several times that they would proceed with having him found in contempt due to his noncompliance with the order if he did not attend in person. Following their conversation with Best, the lawyers went on the record at the examiner's office to summarize the contents of the call, referenced in the claim as the lawyers' "Statement for the Record". It is clear from that record that there was some confusion in the lawyers' minds about whether Best had acknowledged receiving the order of November 2, but there is a clear statement from one, Ms. Rubin, who recorded her belief that Best had stated that he had not received it.

24 Best was served with another notice of examination, to occur on November 25, 2009, and again did not attend.

25 There are allegations in the claim that on the next court attendance, which occurred on December 2, 2009, that Mr. Ranking and Mr. Silver misled the court about whether Best had received the order. This allegation is one of several used to justify the Second Action. In his claim Best alleges, at para. 46:

The lawyers misled Shaughnessy, J. with respect to the facts and law regarding the adequacy of service, knowledge and notice. Contrary to the law they falsely urged the Court to act upon substituted service. They falsely asserted prior knowledge of the November 2, 2009 order in the "Statement for the Record". They relied upon misleading and/or false evidence and/or opinions in the Van Allen affidavit suggesting that the Plaintiff was attempting to evade service. They unreasonably asserted that notice the day before (when the person claimed to be outside of the country) was adequate (in respect of November 17 and November 25, 2009). The contempt order made on January 15, 2010

was a product of the misleading of the court by the lawyers, law firms and clients and the Van Allen defendants, with the police and the TPA.

26 Best did not attend on December 2, 2009, even though that date was set by the order of November 2, 2009, and counsel clearly told Best of their intention to go back to Shaughnessy J. to deal with Best's noncompliance. On December 2, Shaughnessy J. made an endorsement permitting substituted service of the motion for contempt, after making a specific finding that Best was deliberately avoiding personal service and that there were no other steps that could be taken by the defendants to locate Best to effect personal service of the contempt motion. Shaughnessy J. scheduled the contempt hearing for January 15, 2010.

27 In his Reasons on Motion for Contempt, *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, [2010] O.J. No. 278 (Ont. S.C.J.), Shaughnessy J. reviewed the history of the costs proceeding and the attempts to serve Best, and concluded, at para. 16, that he was satisfied based on all the material filed, including Best's correspondence to the court and the trial coordinator, that he had actual knowledge of the proceedings and the orders of the court. Best was found to be in contempt of the orders of November 2, 2009, and December 2, 2009. He was ordered to pay a fine of \$7,500 and to serve a three month sentence of incarceration. It was further ordered that Best could apply to purge his contempt by appearing before Shaughnessy J. on or before February 22, 2010, and answering questions and making productions as detailed in those orders.

28 For the next couple of years, Best resided outside of Canada, but in the latter part of 2012 he retained counsel to obtain a stay of his warrant of committal in order that he could return to Canada and move to set aside the findings of contempt. Best's application was heard on May 3, 2013, and Shaughnessy J. found that Best remained in contempt of court.

29 In his application Best claimed that:

- (i) Certain of the lawyer defendants had made false, fabricated and perjured affidavits related to the Nelson Barbados Action, and engaged in obstruction of justice, fabrication of evidence, conspiracy and fraud upon the court;
- (ii) Those frauds were such that Best's contempt conviction was based on 'false evidence';
- (iii) Best had no notice of the contempt proceeding;
- (iv) Best feared for his safety, and the safety of his family, in part on the basis of blog posts disclosing his personal information;
- (v) PricewaterhouseCoopers East Caribbean was not a legal entity;
- (vi) There was a cover up or conspiracy devised to prevent a full hearing of the contempt proceeding; and
- (vii) There was an "undocumented, secret, private or 'on the side' ... Court police investigation involving Durham Regional Police and others".

30 Each of these same allegations is repeated in the Second Claim. Shaughnessy J. rejected all of Best's allegations. Shaughnessy J.'s perception of Best's conduct in the litigation was the subject of comment several times in his Reasons arising from the May 3, 2013 hearing (*Nelson Barbados Group Inc. v. Cox*, 2013 ONSC 8025, 2013 CarswellOnt 18814 (Ont. S.C.J.), at pp. 53-54, 56-57), as follows:

Today Mr. Best remains in contempt. Notwithstanding that Mr. Best is well aware of his obligations as prescribed by my orders, he has done everything in his power to avoid compliance with the same. ...Mr. Best is engaged in a self-serving and obstructionist campaign to vilify and impugn the reputation and integrity of counsel, their clients and this court, all in an attempt to avoid compliance with my orders.

.....

Mr. Best's affidavits are replete with irrelevant and baseless allegations of misconduct, deceit, fraud and illegality by Mr. Ranking, Mr. Silver, Mr. Andrew Roman and their respective law firms. Again, this is the case, notwithstanding that Mr. Best has been told repeatedly by me that these allegations are irrelevant, and as I stated previously, Mr. Best has persisted in his campaign of baseless allegations during his cross-examinations on affidavits and his "Answers to Advertisements, Undertakings and Refusals", and as well as his factum and his submissions to this court. I find that Mr. Best has shown a continued and complete disregard for the court's instructions, as well as a continued contempt for the court's process.

31 Best appealed Shaughnessy J.'s decision to the Court of Appeal for Ontario. Best made a motion before a single judge of the Court of Appeal for an order that Mr. Ranking and Mr. Silver be removed as counsel and be prevented from arguing the appeal, based on the allegations of misconduct that Best had made in the application to set aside or purge his contempt. Feldman J.A. dismissed the motion to remove counsel, noting that the motion judge rejected Best's allegations that counsel deliberately misled him regarding the facts surrounding Best's failure to attend for examination as ordered, and had made it clear that his findings were based on the appellant's own letters, recorded words and actions. Feldman J.A. ordered costs of \$72,000 payable by Best for the motion in order to express the court's condemnation of Best's tactic of making "serious allegations of deliberate misconduct against two counsel for the respondents [Mr. Silver and Mr. Ranking] both in writing and in open court in the face of a finding to the contrary": *Best v. Cox*, 2013 ONCA 695, 2013 CarswellOnt 18839 (Ont. C.A.), at para. 10.

32 Best appealed Feldman J.A.'s decision to a three-judge panel of the Court of Appeal. He sought to introduce fresh evidence at that appeal, which was the Van Allen affidavit and Best's allegations of misconduct in relation thereto. The appeal was unsuccessful. In the court's ruling of March 4, 2014, *Best v. Cox*, 2014 ONCA 167, 2014 CarswellOnt 6936 (Ont. C.A.), at paras. 11-13, leave to appeal to SCC refused, 35785 (September 4, 2014) [2014 CarswellOnt 12140 (S.C.C.)], the court ruled that the fresh evidence would not be admitted, for these reasons:

[11] We would not admit the fresh evidence. It suffers from an overwhelming problem: it is utterly irrelevant to Feldman J.A.'s decision which was explicitly anchored in recognition that Shaughnessy J. was the case management judge for several years; accordingly, said Feldman J.A., "[c]onsiderable deference is owed to his findings."

[12] The entire thrust of the fresh evidence is to attack Mr. Van Allen's affidavit in support of the respondents' attempt to obtain substitute service for the appellant because his whereabouts were difficult to ascertain. On this point, two crucial observations must be made. First, Shaughnessy J. did not rely on substituted service or the Van Allen affidavit in his contempt reasons which form the subject matter of the appeal. Second, the appellant himself confirmed, in an affidavit and in cross-examination on his affidavits, that he had obscured his residential address. In an affidavit, the appellant deposed that "I have used unlisted phone numbers and post box offices to conceal my home address." In cross-examination, he said: "Sir, I have had and have used various addresses that are not my residence address since '76, '78, somewhere around there."

[13] In short, the proposed fresh evidence is irrelevant to the appeal and, therefore, would have been irrelevant to the disposition of the motion before Feldman J.A.

33 By March 31, 2014, cost orders made against Best in the Court of Appeal totalled \$192,000, which he had been ordered to pay by April 1, 2014, failing which his appeal of the contempt finding and sentence would be dismissed by the Registrar. Best sought a stay. In dismissing the application for a stay, MacPherson J.A. stated:

[7] In my view, there is no serious issue to be tried on the proposed appeal. The core of the motions and the appeal heard by this court from November 2013 to March 2014 has been allegations of misconduct (including criminal behavior) against opposing counsel that this court has found to be completely devoid of merit. (I note that these allegations were made by the moving party as represented by previous counsel, not his counsel today.)

[8] Moreover, the proposed appeal does not raise an issue of public importance. Although the appellant attempts to dress up his leave application with the language of access to justice, protection of rights in civil contempt and, most vividly, the return of debtors' prison, the reality is that the subject matter of the proposed appeal is simply the non-payment of costs orders relating to motions and an appeal in meritless proceedings impugning the integrity of counsel. This is not an issue of national importance.

34 In my view, this latter comment also applies to the claim in the Second Action. It stridently attempts to apply recognized causes of action and legal principles, developed in the law to redress legitimate needs, to a set of baseless allegations devoid of merit.

35 Best's application to the Supreme Court of Canada for leave to appeal from the March 4, 2014 judgment of the Court of Appeal was dismissed with costs on a solicitor-client basis. Accordingly, the Nelson Barbados action ran the full gamut of review available, and reached its inevitable, final disposition, with all due process being offered to Best along its course.

36 That there can be no doubt that the Second Action seeks to review and challenge the rulings made in the contempt proceeding is confirmed by paras. 49 and 50 of the claim, which read:

[49] In fact, had the true facts been known to the Court, there were no reasonable grounds to allege contempt, let alone constitute proof beyond a reasonable doubt. The prosecution initiated against the Plaintiff by the lawyers, law firms and clients should have been (and hopefully will be) concluded favorably for the Plaintiff. Even if it is not, the Plaintiff asserts that where this did not occur as a result of fraud by the lawyers, law firms and clients, precluding an appeal on the merits for administrative reasons, malicious prosecution and false imprisonment should still be available. There was no honest belief in guilt and there was a further improper purpose of seeking to pressure discovery and otherwise pressure the termination of litigation in other jurisdictions involving other persons and entities, not the plaintiff or NBGL [Nelson Barbados Group Ltd.].

[50] The actions, and inactions in the face of duties to act, of the lawyers, law firms, clients and other defendants resulted in the contempt order and resulting warrant of committal. The execution of the warrant resulted in the wrongful imprisonment of the Plaintiff in May 2013 after he returned to Canada to challenge the contempt finding, until bail pending appeal was granted in June 2013. The Plaintiff was again wrongfully imprisoned in April 2014 when his appeal was dismissed for procedural reasons (inability to pay costs) triggered by continuation of the intentional abuse of process and lying to the Court of Appeal on and before February 27, 2014.

37 Direct criticism of Shaughnessy J.'s review and assessment of the evidence, and of his findings, are found throughout the Claim. A glaring example is found at para. 45 of the claim, in which Best seeks to attack service of the notice of contempt hearing:

There was no personal service of any order prior to any obligation arising and no evidence of knowledge of such an obligation until, in respect of November 17 and 25, 2009, the day prior to the obligation arising and otherwise, no knowledge of any obligation until after the deadline. The Supreme Court of Canada, in *Bhatnager*, [1990] S.C.J. No. 62 has made it clear that service that is not personal service may, in some circumstances be adequate for the conduct of civil litigation, but is legally inadequate to found civil contempt. Personal service or knowledge is a precondition for a finding of civil contempt.

38 As several defence counsel submitted during argument, Best is necessarily asking that the entire proceedings before Shaughnessy J., and the higher courts thereafter, be reviewed by way of inquiry into whether the presiding judges "got it right". This court agrees; the Second Action is premised upon allegations that the presiding judges were led into error, or made errors of law and/or fact, in the Nelson Barbados Action, as a result of the concerted efforts of the defendants individually and collectively.

History of the Second Action

39 This action was commenced on July 14, 2014, within months of the administrative dismissal of Best's appeal in the Nelson Barbados Action.

40 Three of the 39 defendants in the Second Action were also defendants in the Nelson Barbados Action. These are three of the five Caribbean defendants. The other two Caribbean defendants appear to be related to or involved with the other three, as all five are alleged to be clients of the lawyer defendants and are alleged to be part of the civil wrongs committed against Best by the Caribbean defendants as a group.

41 All of the defendants, except for Mr. Deane, filed a defence but not before some of them were noted in default. This court received evidence during the costs arguments at the conclusion of these motions that leaves no doubt that the Caribbean defendants were noted in default even when Best's counsel knew that they were represented and had received communications asking that the Caribbean defendants not be noted in default. Best then opposed the setting aside of the noting in default until the final moment, but not before several time-consuming and costly interlocutory steps had been taken by Best. The Caribbean defendants were awarded by the motion judge in their favour in the amount of \$45,235.13.

42 The Caribbean defendants have not brought a motion to dismiss or strike the claim, but instead have a motion before this court to have the action stayed for lack of jurisdiction, on the same grounds on which the Nelson Barbados Action was permanently stayed. It was agreed by plaintiff's counsel, but only at the outset of the hearing, that this jurisdictional motion would not be argued until after the disposition of the motions to dismiss. As a result of this court's disposition of these latter motions, by which the Second Action is dismissed in its entirety, the jurisdictional motion is moot other than the costs incurred by the Caribbean defendants.

43 As earlier stated, Best also had a motion before the court to amend his claim and a motion for an interim injunction. As a result of the dismissal of his claim without leave to amend, those motions, as well as the motion for default judgment against Mr. Deane, were dismissed on June 18, 2015.

44 It is undisputed that at the time of commencing this action, and still today, Best has unpaid costs orders arising from the Nelson Barbados Action in the aggregate amount of \$375,375.40. This entire amount is owed to the Caribbean defendants as a result of an agreement reached in the Nelson Barbados Action.

The Law and Analysis

A. Dismissal on the Grounds of being Frivolous, Vexatious or otherwise an Abuse of Process

45 The authority of the court to have an action dismissed on the ground that it is frivolous or vexatious or is otherwise an abuse of the process of the court is found in rule 21.01(3)(d). Evidence is permitted on a motion under this rule.

46 The applicable principles to be taken into account when assessing whether a proceeding amounts to an abuse of process may be summarized as follows:

1. The doctrine of abuse of process concentrates on the integrity of the adjudicative process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 51. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that will be manifestly unfair to a party to the litigation before it, or would in some other way bring the administration of justice into disrepute: *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), 2000 CanLII 8514, at para. 55, Goudge J.A. dissenting, aff'd [2002] 3 S.C.R. 307 (S.C.C.).

2. Policy grounds behind the doctrine of the abuse of process are essentially the same as those supporting issue estoppel, and include the need that there be an end to litigation, that no one should be twice vexed by the same cause, to preserve the courts and litigants resources, to uphold the integrity of the legal system in order to avoid inconsistent

results and to protect the principle of finality: *C.U.P.E.*, at para. 38; and *Demeter v. British Pacific Life Insurance Co.* (1983), 43 O.R. (2d) 33 (Ont. H.C.), 1983 CanLII 1838, at para. 53, aff'd (1984), 48 O.R. (2d) 266 (Ont. C.A.).

3. One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to re-litigate a claim which the court has already determined: *Canam*, at paras. 55-56; *Donmor Industries Ltd. v. Kremlin Canada Inc.* (1991), 6 O.R. (3d) 501 (Ont. Gen. Div.), 1991 CanLII 7360, at paras. 3-4; *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815, (2003), 233 D.L.R. (4th) 657 (Ont. C.A.), at para 17; and *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), 1974 CanLII 168, at pp. 265-267, Laskin J. dissenting.

4. Abuse of process may be established where the proceedings are oppressive or vexatious, and violate the fundamental principles of justice underlying the public interest in a fair and just trial process and the proper administration of justice: *C.U.P.E.*, at para. 35, citing *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at para 70.

5. An implicit attack on the correctness of the factual basis of a decision is a "collateral attack" and an abuse of the court's processes: *C.U.P.E.*, at para. 34. The rule against collateral attack attempts to prevent a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.), at para. 28.

6. Abuse of process is used to bar proceedings that are inconsistent with the objectives of public policy: *Canam*, at para. 31.

7. Collateral attacks and re-litigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result: *C.U.P.E.*, at para. 54.

8. *Res judicata*, including its two branches of issue estoppel and action estoppel, and collateral attacks, may be viewed as particular applications of a broader doctrine of abuse of process, but the three doctrines are not always interchangeable: *C.U.P.E.*, at paras. 22-23.

9. There may be instances where re-litigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original results should not be binding in the new context: *C.U.P.E.*, at para. 52, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 80.

10. Unfairness in the prior proceedings or unfairness in preventing re-litigation can be the basis to refuse to apply abuse of process: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125 (S.C.C.), at para. 39.

11. A party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favorable judicial determination: *Penner*, at para. 42.

12. The principle of *res judicata* applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first, but also where the subject matter of the two actions is the same, and the litigant seeks to raise in the second action matters of fact or law directly related to the subject matter which could have been, but were not, raised in the first action: *Chevron Canada Resources Ltd. v. R.* (1998), [1999] 1 F.C. 349 (Fed. C.A.), 1988 CanLII 9090, at para. 36, citing *Thomas v. Trinidad & Tobago (Attorney General)* (1990), 115 N.R. 313 (Trinidad & Tobago P.C.), at p. 316.

47 Frivolous and vexatious actions referenced in rule 21.01(3)(d) were discussed by the Court of Appeal in *Currie*. In that case, at para. 14, reference was had to the definition of "frivolous" in *Black's Law Dictionary*, 7th ed. (St. Paul, MN: West Publishing Co., 1999), at p. 677: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".

48 The fact that Best asserts that the Nelson Barbados Action was unfair and tainted with fraud does not make it so, nor does his assertion that Shaughnessy J. and the judges of the Court of Appeal were misled in their evaluation of the evidence. The Reasons of Shaughnessy J. of May 3, 2013, leaves no doubt that his assessment was that it was Best, not the defendants, who had a persistent strategy in the litigation to mislead and deceive the court, and to obstruct its processes, as explicitly referenced in *Nelson Barbados Group Inc. v. Cox*, at pp. 28-29, 32, 33-35, 49-50, 51-52, 53, 55, 56-57.

49 Just as he has asserted in the Second Action, Best asserted during the contempt proceeding that there had been a cover-up or conspiracy in order to prevent a full hearing into the evidence pertaining to that proceeding, which was addressed at p. 36 of the Reasons of Shaughnessy J. of May 3, 2013. In terms of the issue of service of the order of November 2, 2009, and the representations made to the court by Mr. Ranking and Mr. Silver in respect of it, Shaughnessy J. deals fully with those issues, at p. 54 of his Judgment: "Further, and in any event, this court was never misled concerning Mr. Best's possession of the November 2, 2009 order." Additionally, Best's allegations in his claim that PricewaterhouseCoopers is not a legal entity, and that the court was "misled into refusing to decide" whether it was a legal entity, is another example of Best inviting this court to reach a different result than that already reached. That allegation was raised in the course of the contempt proceeding and dealt with summarily by Shaughnessy J. in his Reasons of May 3, 2013, at p. 36. Further, the "secret investigation" referenced in the current claim was also the subject of comment by Shaughnessy J. in his judgment, at pp. 33-35, which he referred to as "yet a further tactic". Finally, the Van Allen affidavit, to which Best misguidedly attempts to attach much significance in his second claim, is not fresh evidence, as it formed a part of the record before Shaughnessy J., and was the subject of findings in both the Superior Court and the Court of Appeal. Various challenges to the veracity of the Van Allen affidavit were raised by Best during the contempt proceeding.

50 The claim in the Second Action is founded entirely on the previous litigation which dealt with the motion for costs, orders for substituted service and examination of Best, a motion for contempt of court and a finding of contempt, an application to set aside the finding of contempt, an application to remove certain lawyer defendants from appearing on the appeal and the appeals against the 2013 order of Shaughnessy J. There is no new issue raised in the claim that Best did not raise in the prior proceedings, either before Shaughnessy J. or in the appeal process by way of affidavit or oral argument.

51 To summarize, the Second Action is an abuse of process, as defined in the leading cases referenced at para. 46, because it is a collateral attack on and an attempt to re-litigate the findings and rulings made in the Nelson Barbados Action, in which all avenues of appeal were exhausted by the plaintiff. The fact that the appeal was administratively dismissed does not mean that Best was not given a fair forum in which to litigate the costs orders related to Nelson Barbados' former claim. It would be extremely perverse for this court to rationalize a "second kick at the can" on the ground that a litigant's appeal was dismissed for failure to pay costs orders imposed in the course of a judicial process that was untainted by procedural unfairness, fraud or dishonesty. Best's second claim is unmeritorious because it seeks to re-litigate a cause which has already been decided by a court of competent jurisdiction.

52 As the foregoing suggests, this court finds no merit in the plaintiff's submissions: 1) that privacy violations and the Van Allen investigation were not dealt with, with finality in the prior litigation; 2) that the allegation that PricewaterhouseCoopers was not a legal entity and was not dealt with, with finality; or 3) that the finding of contempt was not subject to a full and fair hearing, or that evidence relative to setting aside such finding was not fully considered. While the plaintiff argues that no court addressed and/or determined the above issues with any certainty of finality, the above review of the history of the prior litigation proves the contrary. Further, a judge is not required to give extensive reasons to the satisfaction of every litigant on arguments raised, particularly when they are spurious or unreasonable. The issues and allegations raised by the plaintiff arising from the Van Allen affidavit, the privacy violations and the legal

status of the PricewaterhouseCoopers all fall within such characterization; the courts allotted to these issues the amount of attention they merited. There is no rational reason to apply any of the exceptions to the abuse of process doctrine advanced by Best in argument or through his counsel's factum, or for this court to exercise its discretion to permit re-litigation of any of the issues raised in the second action as permitted by *C.U.P.E.* and *Penner*.

53 The pleading is also an abuse of process because of its scandalous and vexatious content, the majority of it a regurgitation of the allegations made in the Nelson Barbados Action and, with the exception of two paragraphs, all stemming from the contempt hearing arising from that action. The two paragraphs in question, being paras. 31 and 32 of the claim, contain the inflammatory allegations already referenced in these Reasons regarding the personal safety of Best and his family and the role of the lawyers and law firms in conspiring to cause such injury. As commented on by Shaughnessy J. extensively in his Judgment of May 3, 2013, this is a continuation of Best's campaign to vilify and defame the lawyers and law firms, and this time around, Mr. Van Allen and his company, police departments and individual officers.

54 Dismissing the Second Action will meet the policy objectives which underlie *res judicata* and abuse of process: Best will not be permitted to use any more judicial resources to retry the same issues to attempt to get a different result; there will be finality to the issues raised in the contempt proceeding; the integrity of the administration of justice will be upheld by preventing Best from repeatedly challenging adjudicative decisions and continuing to harass and oppress the defendants in the face of unpaid costs orders; and the court will control its own processes by preventing a vexatious pleading from proceeding. On this latter point, part of the reason why this claim is particularly vexatious is that the damages allegedly suffered by Best are claimed to arise, in whole or in part, from his incarceration. A litigant is not entitled to claim damages from harm suffered as a consequence of a court order: *Apotex Inc. v. Ontario (Minister of Health & Long-Term Care)*, 2005 CanLII 32910, (2005), 204 O.A.C. 275 (Ont. C.A.), at para. 28.

55 While in my view there are sufficient grounds to dismiss the claim in its entirety on the basis that it is an abuse of process, for the sake of completeness I will consider the alternate relief sought by the defendants, which is to strike out the claim either under rule 25.11 or rule 21.01(1)(b).

56 Before proceeding however, it is noted that the plaintiff's counsel conceded during argument that the Ontario Provincial Police does not have the legal capacity to be sued and that all claims against this entity should be dismissed: *McNabb v. Ontario (Attorney General)* (2000), 50 O.R. (3d) 402 (Ont. S.C.J.), 2000 CanLII 22413, at para. 30.

B. Applicable Principles for Striking Pleadings

57 The threshold for striking a pleading is high. On a motion to strike a claim the test is whether there is any reasonable prospect of success, the effect being to weed out the hopeless claims and ensuring that those that have some chance of success go to trial: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 118 O.R. (3d) 641 (Ont. C.A.). On a motion under r. 21.01(1)(b), the moving party bears the burden of showing that it is "plain and obvious" and "beyond doubt" that the claim or defence has no chance of success: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), 1990 CanLII 90, at pp. 979-980; and *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279 (S.C.C.), 1990 CanLII 131, at p. 280. Only if the action is certain to fail because it contains a radical defect should it be struck out: *Hunt*, p. 980. The pleading must be read generously, with allowances for drafting deficiencies: *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.), (*sub nom Nash v. Ontario*) 1995 CanLII 2934, at p. 6; *Tran v. University of Western Ontario*, 2015 ONCA 295, [2015] O.J. No. 2185 (Ont. C.A.), at para. 16.

C. Rules 25.11 and 21.01(1)(b): Striking the Claim

58 Rule 25.11 permits the court to strike out or expunge all or part of a pleading, 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.

59 I find that the claim is also vexatious and an abuse of process because it is inadequate in meeting the purposes of pleadings under the Rules, which are set out in *Balanyk v. University of Toronto*, 1999 CanLII 14918, (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.), at para. 27; *Cerqueira v. Ontario*, 2010 ONSC 3954, [2010] O.J. No. 3037 (Ont. S.C.J.), at para. 11; and *Senechal v. Muskoka (District Municipality)* (2003), 37 M.P.L.R. (3d) 131, [2003] O.J. No. 885 (Ont. S.C.J.), at para. 50, as follows:

(a) to define clearly and precisely the questions and controversy between the litigant;

(b) to give fair notice of the precise case which is required to be met and the precise remedy sought; and

(c) to assist the court in its investigation in the truth of the allegations made.

60 The law is clear that it is improper to plead allegations based on assumptions and speculations, because they are incapable of proof. A pleading must contain a plaintiff's knowledge of the facts and not merely those facts that he believes or wishes may or may not be true. A plaintiff must clearly plead the facts in support of his claim. Mere bald allegations, without supporting facts or with facts incapable of proof, must not be permitted to proceed: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 22; *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385, (2005), 262 D.L.R. (4th) 222 (Ont. C.A.); *Deep v. Ontario*, [2004] O.T.C. 541, [2004] O.J. No. 2734 (Ont. S.C.J.), aff'd [2005] O.J. No. 1294 (Ont. C.A.), at para. 6; *Fitzpatrick v. Durham Regional Police Services Board* (2005), 76 O.R. (3d) 290 (Ont. S.C.J.), 2005 CanLII 63808, at para. 25; *Wilson v. Toronto Police Service*, [2001] O.T.C. 483, [2001] O.J. No. 2434 (Ont. S.C.J.), aff'd 2002 CanLII 4770 [2002 CarswellOnt 335 (Ont. C.A.)], at paras. 1-2; *Hunter v. Bravener* (2002), 55 W.C.B. (2d) 39, [2002] O.J. No. 3100 (Ont. S.C.J.), aff'd (2003), 57 W.C.B. (2d) 449 (Ont. C.A.) [2003 CarswellOnt 1604 (Ont. C.A.)], at paras. 3-5; *Gravelle v. Ontario*, 2012 ONSC 5149, 95 C.C.L.T. (3d) 228 (Ont. S.C.J.), at paras. 122-123; *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), 1990 CanLII 6761, at para. 19; and *Senechal*, at para. 50.

61 Bare allegations are scandalous and are to be struck out under rule 25.11(b), and allegations of fraud, misrepresentation, negligence and conspiracy must be pleaded with particularity: *Cerqueira*, at para. 11. The opposing party is entitled to have the case against it set out in an intelligible form: *Craik v. Aetna Life Insurance Co. of Canada* (1995), 58 A.C.W.S. (3d) 941, [1995] O.J. No. 3286 (Ont. Gen. Div.), at para. 31, aff'd [1996] O.J. No. 2377 (Ont. C.A.).

62 The claim fails to meet any of these requirements. It is a challenging, if not impossible, task to gain an understanding from it of which causes of action are being asserted against which defendants, which defendants are being referenced from time to time, which allegations are being levelled against which defendants and why and how, all the while casting scandalous aspersions on the defendants amidst irrational and convoluted argument in support of the allegations made. The allegations are vague and sweeping, with little to no specificity or particulars to enable the defendants to know the case that they must meet.

63 Rule 21.01(1)(b) permits a court to strike out a pleading on the ground that it discloses no reasonable cause of action. As earlier stated, no evidence is admissible under this rule, and the court must take the allegations pleaded as true: *Hunt*, at pp. 989-990.

64 The test for striking out a claim or cause of action was set out in *Imperial Tobacco Canada Ltd.*, at para. 17, where McLachlin C.J. stated:

The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause

of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735..

65 Reading the claim as generously as possible and making allowances for some drafting deficiencies, I still find that none of the claims made by Best disclose a reasonable cause of action, even taking as true the facts as pleaded. Each cause of action will be discussed in turn. First, however, I will deal with a legal argument threaded throughout the factum filed by Best for opposing these motions.

66 In his discussion of the applicable law, Best's counsel relies on a line of cases referenced by him as the "joint party liability" cases: *Fallowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.); and *Ontario Industrial Loan & Investment Co. v. Lindsey* (1882), 4 O.R. 473, [1883] O.J. No. 263 (Ont. H.C.), and the "common design" liability cases: *Fallowka*; and *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 (S.C.C.), 1995 CanLII 60. His argument, in summary, is that the plaintiff alleges that the defendants have worked in complicity toward the common goal of harming the plaintiff. Accordingly, regardless of the clear confirmation in the law regarding the elements of each cause of action presented by the claim, the argument is that the causes of action are all viable because each party is a tortfeasor working together for this common purpose.

67 In *Fallowka*, at para. 152, the Supreme Court of Canada states: "Inciting another to commit a tort may make the person doing the inciting a joint tortfeasor with the person who actually commits it". At para. 35 of *Ontario Industrial Loan*, the court stated: "All persons procuring, commanding, aiding or assisting the commission of a wrongful act, are principals in the transaction" (cases omitted). Concerted action liability is a specific form of joint liability, where those participating in the commission of the tort must have acted in furtherance of a common design: *Botiuki*, at para. 74, citing John G. Fleming, *The Law of Torts*, 8th ed. (Law Book Company, 1992), at p. 255.

68 While there can be no argument with these legal principles, they cannot be overlaid on a fact situation to create joint liability unless a tort has been properly pleaded in the first place. Joint liability can have no application to allege tortfeasors where neither the essential elements of the tort in question nor the facts underpinning those elements have been pleaded.

The Claim for Abuse of Process

69 In *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 272 O.A.C. 214 (Ont. C.A.), at para. 27, the four constituent elements of the tort of abuse of process are set out as follows:

- (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.

70 In this case, some of the defendants in the Nelson Barbados Action gave instructions to their former counsel to pursue the legitimate objective of recovering their wasted costs after that action was stayed. There was a legal basis for their counsel to pursue the steps that they did in furtherance of that objective. There can be no liability when a defendant employs a regular legal process to its proper conclusion: *WestJet Airlines Ltd. v. Air Canada*, 2005 CarswellOnt 2101, [2005] O.J. No. 2310 (Ont. S.C.J.), at para. 19. Accordingly, it is plain and obvious that this cause of action against the

lawyer defendants and their firms cannot succeed, and it cannot succeed against the Caribbean defendants who sought to recover their wasted costs.

71 In all other cases, it is plain and obvious from the claim that this cause of action fails at the first branch of the test; none of the other defendants can be reasonably characterized as "initiating" the costs proceeding or the contempt hearing arising out of it, and they were not parties in the Nelson Barbados Action. As earlier explained, the plaintiff seeks to draw in the defendants in the Second Action as being "co-conspirators" in the legal process initiated by those of the Caribbean defendants who were parties in the Nelson Barbados Action. Best's counsel cites *Fullowka* as authority for the proposition that liability can attach for encouraging someone to commit a tort. However, the elements of the offence set out in *Harris* are clear and unambiguous, and cannot be circumvented by an argument of the sort raised by Best's counsel.

Negligent Investigation/Negligent Performance of a Statutory Duty

72 The elements of the tort of negligent investigation were established in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at paras. 19, 60, 73, 88, 90, 93, as follows:

- (a) the defendant owed the plaintiff a duty of care related to an investigation;
- (b) the defendant breached the standard of care associated with that duty; and
- (c) compensable damages were caused by the breach.

73 Compensable harm only arises in a claim of negligent investigation where the investigation has terminated in the plaintiff's favor, for instance, where there has been a finding of wrongful conviction: *Hill*, at para. 97; and *Romanic v. Johnson*, 2013 ONCA 23, [2013] O.J. No. 229 (Ont. C.A.), at para. 6.

74 Best has not pleaded that any investigations alleged to have been undertaken, secret or otherwise, were terminated in his favor. Likewise, he has not pleaded that the contempt proceeding which allegedly flowed from those investigations terminated in his favor. On this basis alone, this cause of action has no reasonable prospect of success against any of the defendants.

75 Further, a successful action in negligence requires that the plaintiff demonstrate: (1) that the defendant owed him a duty of care; (2) that the defendant's behavior breached the standard of care; (3) that the plaintiff sustained damages; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3.

76 Lawyers do not owe a duty of care to their adversaries in litigation except in very limited circumstances, which do not apply in this case. Best has not pleaded that the present case is one of those exceptional circumstances: *Martel v. Spitz*, 2005 ABCA 63, [2004] A.W.L.D. 536 (Alta. Q.B.), at para. 17, leave to appeal to SCC refused, 30879 (August 18, 2005) [2005 CarswellAlta 1131 (S.C.C.)]; and *Biron v. Aviva Insurance Co.*, 2014 ONCA 558, [2014] O.J. No. 3436 (Ont. C.A.), at para. 6.

77 With respect to the private investigator defendants, there are no facts pled in the claim setting out what the duty of care is in respect of a private investigator. Best pleads that a private duty of care to "investigate lawfully" emanates from the legislation set out in the statement of claim: *Criminal Code*, R.S.C. 1985, c. C-46; *Police Services Act*, R.S.O. 1990, c. P.15; *Private Security and Investigative Services Act*, 2005, S.O. 2005, c. 34; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; and unspecified "OPP policies", all of which he asserts preclude a serving police officer from acting as or being hired as a private investigator. First, the premise of the argument is inaccurate. The *Police Services Act*, s. 49, deals with secondary employment of police officers and conflicts of interest, with a mechanism in that Act to provide a remedy for any unauthorized breach. That statute does not itself create a duty of care, but rather is a labour relations statute that provides for an internal disciplinary process. Likewise, the *Private Security and Investigative Services Act* does not contain provisions expressly prohibiting a police officer from working as a private investigator.

78 To make such generalized references to a duty of care, without greater specificity, is to create an unfocused action that will prolong the discovery and trial process, and which leaves the defendants without an understanding of the facts that give rise to a duty of care, and how that duty was breached. A claim in negligence must, for these reasons, be particularized: *Basdeo (Litigation Guardian of) v. University Health Network*, [2002] O.T.C. 54, [2002] O.J. No. 263 (Ont. S.C.J.), at paras. 16-17, citing *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), at para. 17, Rosenberg J.

79 Further, Best alleges that Van Allen accessed and disseminated "information" as a police officer that could not otherwise have been lawfully obtained. However, the exhibits attached to an affidavit of Mr. Sebastien Kwidzinski filed in the Nelson Barbados Action reveal that all information contained in the Van Allen affidavit was in the public domain other than Best's former address. Nowhere in the claim does Best clarify or particularize how the publishing of his former address was the proximate cause of any damages suffered.

80 In terms of the Toronto Police Association, the claim identifies this defendant as "an incorporated entity which represents active and retired police officers and others which are its members". The claim fails to plead sufficient facts to establish that the TPA was in any way involved in a police investigation.

81 In terms of the Durham Regional Police Service, the core of the allegations, and indeed the only facts pleaded as against the DRPS defendants, relate to two investigations supposedly conducted by one or more of the DRPS defendants. Both investigations are alleged to have contributed to the court's finding that Best was in contempt of court and/or to his subsequent failed attempt to set aside that finding in 2013. These two alleged investigations were a "secret investigation" and an investigation by the professional standards unit of the OPP and the DRPS.

82 As pleaded, the "secret investigation" alleged to have occurred in December 2009 was in relation to and for the purpose of the contempt proceeding and the hearing in January 2010. This proceeding was not terminated in Best's favour. As such, the claim does not disclose a reasonable or tenable cause of action.

83 The law is clear that a police service does not owe a private law duty of care to complainants or victims when it investigates the conduct of its own officers. There is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation, which includes seeking a viable civil cause of action against the alleged perpetrators. To impose a private law duty of care would introduce an element seriously at odds with the fundamental role of the special unit created to investigate the conduct of police officers in the public interest: *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81 (Ont. C.A.), at paras. 43-48, leave to appeal refused, [2011] S.C.C.A. No. 258 (S.C.C.).

84 Therefore, with respect to the second alleged investigation by the professional standards unit, Best was the complainant rather than the subject of the investigation. *Wellington* confirms that there can be no duty owed to Best. Accordingly, Best cannot prove an essential element of the claim.

85 With respect to the OPP officers, Mr. Kearns and Mr. Vibert, the claim does not detail any investigation of Best by these two officers. Even had Best alleged that the two officers participated in such an investigation, on the basis of *Wellington*, at para. 33, such an allegation does not give rise to a relationship of proximity sufficient to ground an action for damages in tort.

86 With respect to the Peel Regional Police Service, the claim again does not detail the specifics of any investigation of Best by this defendant and there is uncertainty whether this defendant is even included in the term "the police" repeatedly referred to by Best in his claim.

87 Where this claim most decidedly fails, however, is with respect to the requirement that compensable damages were caused by the breach. Causation is not addressed in the claim at all. The root of the cause of action is the allegation that Mr. Van Allen used his position as a police officer to obtain Best's former address. All other defendants are alleged

to be involved because of their knowledge of Mr. Van Allen's conduct. Best then alleges that this information "helped" persons to locate the plaintiff and his family and threats of harm and violence ensued. Nowhere in the claim does Best set out the particulars of how the former address was or could be used by the identified individuals to harm him. How any alleged damages were caused by this conduct remains uncertain.

88 Accordingly, it is plain and obvious that this cause of action against all of the defendants has no chance of success.

False Imprisonment

89 The essential elements of a cause of action for false imprisonment are set out in *Ernst v. Quinonez*, [2003] O.T.C. 847, [2003] O.J. No. 3781 (Ont. S.C.J.), at para. 93. A party alleging false imprisonment must prove that:

- (a) the plaintiff was totally deprived of liberty;
- (b) the deprivation was against the plaintiff's will; and
- (c) the deprivation was caused by the defendant.

90 There can be no cause of action for false imprisonment once there has been judicial intervention, and if the imprisonment was lawfully justified there is no false imprisonment: *Frazier v. Purdy* (1991), 6 O.R. (3d) 429, [1991] O.J. No. 2154 (Ont. Gen. Div.), at paras 22-23; and *Zareian v. Durham Regional Police Services Board* (2006), 147 A.C.W.S. (3d) 507, [2006] O.J. No. 1296 (Ont. S.C.J.), at paras. 34, 38. The tort requires an intentional and unauthorized confinement of an individual: *Sheridan v. Ontario*, 2014 ONSC 4970, [2014] O.J. No. 4023 (Ont. S.C.J.), at para. 50, aff'd 2015 ONCA 303, [2015] O.J. No. 2281 (Ont. C.A.).

91 Although Best has pled that the lawyer defendants initiated the contempt proceeding, there are no facts pleaded in the claim to suggest that his imprisonment preceded a judicial intervention, and in fact he describes in the claim that he was imprisoned pursuant to Shaughnessy J.'s order.

92 Additionally, the plaintiff must establish that the defendants caused the arrest or detention. Given that it was the plaintiff's conduct which led to the finding of contempt and his incarceration, it is plain and obvious that none of the defendants caused the arrest or detention.

93 There is no cause of action for false imprisonment under these circumstances in relation to any of the defendants.

Malicious Prosecution

94 The Supreme Court of Canada has described the elements of the cause of action for malicious prosecution in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), 1989 CanLII 77, at pp. 192-193, and has since reiterated the test in *Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339 (S.C.C.), at paras. 78-89, as follows:

- (a) the defendant initiated or continued the impugned prosecution;
- (b) the prosecution terminated in the plaintiff's favor;
- (c) the defendant initiated or continued the prosecution in the absence of reasonable and probable cause; and
- (d) the defendant actuated the prosecution for an improper purpose and did not have an honest belief in guilt.

95 Best has not pled that the contempt proceeding terminated in his favor, and in fact has pled that he was found guilty of contempt and that that judgment was never set aside. Accordingly, it is plain and obvious that this cause of action has no chance of success in relation to any of the defendants.

96 These allegations should also be struck due to the vagueness of Best's allegations as to the "improper purposes" for which the contempt proceeding was allegedly initiated and pursued. In addition to a generalized allegation that there was an improper purpose in wanting to have Best found in contempt and incarcerated, Best makes unsupported and vague allegations that include:

- (i) "seeking to pressure discovery";
- (ii) "otherwise pressure the termination of litigation in other jurisdictions involving persons and entities, not the Plaintiff or NBGL";
- (iii) "as a means to pressure him and others in respect of litigation and potential litigation in other jurisdictions";
- (iv) "encouraging the plaintiff to leave Canada"; and
- (v) "to gain advantage in or to prevent the continuation of litigation in other jurisdictions".

97 Clearly these allegations lack the specificity needed to allow the defendants to properly respond. The alluded-to litigation and parties are never identified in the claim. The allegations beg the question of how Best would be entitled to compensation for alleged wrongs done to others. And the notion that the Caribbean defendants and their lawyers would want to drive Best out of the jurisdiction when their intent was to recover costs from him is simply ludicrous.

98 Best's counsel argues in the factum that there was no basis to pursue contempt in the first place, setting out, again, all of the arguments addressed by Shaughnessy J. in his Reasons of May 3, 2013. Again, Best's counsel argues that this is a case where re-litigation should be permitted in accordance with the exceptions discussed in *Canam, C.U.P.E.*, and *Penner*. For the reasons already given, this is not a case where any alleged grounds of such exceptions are adequately pled in the claim to give rise to such relief, and the facts of the case do not suggest that re-litigation would be in the interests of justice.

Intentional Infliction of Harm or Mental Suffering

99 The elements of the tort of intentional infliction of mental suffering are set out in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.), 2002 CanLII 45005, at para. 48, as follows:

- (1) flagrant or outrageous conduct;
- (2) calculated to produce harm; and
- (3) resulting in a visible and provable illness.

100 As with other torts requiring intentional conduct, material facts must be pled with sufficient particularity: *Sheridan* (ONSC), at para. 53.

101 Best's allegations that the defendants intentionally undertook steps in the litigation in order to harm him are bald and scandalous and are not supported by material facts. Additionally, the requirement of a visible and provable illness is not described in the claim.

102 Given the failure to plead material facts in support of the essential elements of this tort, it is plain and obvious that it cannot succeed against any of the defendants.

Misfeasance of Public Office

103 The Supreme Court of Canada has set out the elements of the tort of misfeasance in public office in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 23, and in *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, 319 D.L.R. (4th) 74 (Ont. C.A.), at para. 20, as follows:

- (a) that a public officer, acting in his or her capacity as a public officer, engages in deliberate and unlawful conduct;
- (b) the public officer is aware both that the conduct is unlawful and that it is likely to harm the plaintiff;
- (c) the public officer's tortious conduct was the legal cause of the plaintiff's injuries; and
- (d) the injuries suffered are compensable in law.

104 In *Freeman-Maloy v. York University* (2006), 79 O.R. (3d) 401 (Ont. C.A.), (*sub nom Freeman-Maloy v. Marsden*) 2006 CanLII 9693, at para. 10, leave to appeal refused, [2006] S.C.C.A. No. 201 (S.C.C.), Sharpe J.A. writing for the Court stated that "[t]he tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen."

105 It is plain and obvious that certain of the defendants are not public officers and were never exercising a public function, including the lawyers, law firms, Van Allen and the other private investigator defendants, the Caribbean defendants and the Toronto Police Association. Further, the claim does not plead any material facts setting out that any of the defendants are in fact government actors fulfilling public functions. Accordingly, this cause of action has no chance of success.

Conspiracy

106 A pleading of conspiracy must be detailed and precise, including in respect of the conduct by each alleged conspirator. As expressed by I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London, England: Sweet & Maxwell, 1975), at p. 341 and cited by the Court of Appeal with approval in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), 1998 CanLII 2447, at para. 21:

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.

107 Similarly, in *Tran v. University of Western Ontario*, 2014 ONSC 617, [2014] O.J. No. 407 (Ont. S.C.J.), at para. 31, rev'd on other grounds 2015 ONCA 295 (Ont. C.A.), the court described that a pleading in conspiracy must make a number of distinct points, including:

- (a) describe who the several parties are and their relationship with each other;
- (b) allege the agreement between the defendants to conspire;
- (c) state precisely what the purpose or what were the objects of the alleged conspiracy; and
- (d) 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
- (e) describe the injury and damage occasioned to the plaintiff thereby.

108 An allegation of conspiracy will be defective and should be struck unless the specific elements are pleaded in the statement of claim: *Dryden v. Dryden*, 2011 ONSC 7060, 74 E.T.R. (3d) 301 (Ont. S.C.J.), at para. 39.

109 Best has neither pleaded what agreements existed between the defendants nor set out what purpose they had in conspiring. He pleaded bald and spurious allegations concerning an intention to influence proceedings in other jurisdictions, some of which are alleged to not even involve Best or to harm Best personally. Best has not pleaded sufficient precise acts which any of the defendants allegedly undertook in furtherance of conspiracy to ground the cause of action. Where Best has attempted to plead precise acts, for example, that the lawyer defendants committed fraud on the court in relation to the legal entity of PricewaterhouseCoopers, the allegations are vexatious and patently ridiculous.

110 As it is plain and obvious that the pleading does not support this cause of action against any of the defendants, it should be struck.

Breach of Privacy Rights

111 As set out in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 (Ont. C.A.), at para. 71, a party alleging breach of common law privacy rights must plead as follows:

- (a) the defendant's conduct must be intentional or reckless;
- (b) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
- (c) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

112 Best pleads that his private information was disclosed in the Van Allen affidavit, prepared in relation to the Nelson Barbados Action. This affidavit and other nonspecified documents were allegedly filed with the court by the lawyer defendants. Best further alleges that certain of the lawyer defendants disseminated his private information on the Internet, including his date of birth, driver's license information, addresses and employment record. He alleges that this is a breach of the deemed/implied undertaking rule and is therefore unlawful. Best claims that these allegations are "highly offensive" to a reasonable person because his information was accessed without proper purpose and without regard to his safety. He has not pleaded particulars regarding the lawyer defendants' alleged intention to invade his privacy. He has not pled that the former address released by the Toronto Police Association was in fact his former address.

113 The preparation and filing of affidavits and other unspecified material in the Nelson Barbados Action was not without lawful justification, as it was undertaken in the normal course of an action. Further, Best's allegations that the defendants participated in disseminating his personal information on the Internet are bare, scandalous, patently ridiculous and incapable of proof. With respect to this cause of action, Best makes sweeping allegations against all 36 defendants concerning the access and distribution of his private information, without particularizing who accessed what information, when, and who is alleged to have done what with the various categories of information. This approach provides none of the defendants with a reasonable opportunity to prepare a defence other than to deny the allegations, and fails to set out the material facts necessary to support this intentional tort.

114 The only defendant against whom this cause of action has any potential merit is the Toronto Police Association, who allegedly released Best's former address to Mr. Van Allen. However, the facts fail to satisfy the third part of the test set out in *Jones v. Tsige*, in that a reasonable person would not find it highly offensive in the circumstances of this case. Best had concealed any address at which he could be personally served. Accepting for argument's sake that he did so because of his former profession as a police detective, his conversation with Mr. Ranking and Mr. Silver on the morning of his scheduled examination reveals that he would not cooperate in making his whereabouts known, even generally, or cooperate in making himself available to be examined personally, even in the face of a court order. Even in the course of an examination in aid of execution, the defendants would have been entitled pursuant to rule 60.18(2) to examine Best in relation to far more intrusive matters, such as his income, assets and liabilities and any other matter pertinent to the

enforcement of the order, including his residential address. Further, the pleading fails to convey how the revelation of a former address specifically caused distress, humiliation and/or anguish.

115 Accordingly, it is plain and obvious that this cause of action has no chance of success and should be struck against all defendants.

Breach of ss. 7 and/or 8 of the Charter

116 Best admitted at the outset of the argument of the motions that this cause of action cannot stand against individual state actors: *Ward v. Vancouver (City)*, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.). Best had indicated an intention to pursue *Charter* claims had his motion to amend the claim been successful, such that PRPS and DRPS were replaced with their respective Police Service Boards. As the motion to amend has not been granted, these claims have no chance of success.

117 Further, there are no material facts pleaded to engage ss. 7 and 8 of the *Charter*.

Breach of Fiduciary Duty/Negligence in Respect of Fiduciary Duty

118 Best conceded in his factum that this cause of action cannot apply in this case.

Absolute Privilege and Witness Immunity

119 Absolute privilege and witness immunity provides further bases for dismissing the claim against the Van Allen defendants.

120 In *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, 1999 CanLII 3776, (1999), 124 O.A.C. 125 (Ont. C.A.), at para. 19, Feldman J.A. speaking for the court, stated that the law on absolute privilege is found in *Halsbury's Laws of England*, vol. 28, 4th ed. Reissue (London, England: Butterworths, 1997), at para. 97:

Absolute privilege. No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings.

121 It flows from this that the Van Allen affidavit used in the Nelson Barbados Action is a communication captured by absolute privilege. Similarly, as a witness, Mr. Van Allen and the private investigator defendants may not be sued for things said or done in the course of preparing evidence for judicial proceedings: *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, 256 D.L.R. (4th) 674 (N.S. C.A.), at paras. 112-114. The principle behind absolute privilege and witness immunity is to ensure candor and cooperation of witnesses and to protect the substance of evidence from collateral attack in subsequent proceedings, such as this action: *Elliott*, at para. 119.

122 On the basis of absolute privilege and witness immunity, it is plain and obvious that the action against the Van Allen defendants cannot succeed.

Limitation defence of the Toronto Police Association

123 The Toronto Police Association also raised the argument that the claim should be struck under rule 21.01(1)(a) on the grounds that it is barred by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B. I accept the arguments put forth by counsel for this defendant and rule that, in the alternative, this is another basis for striking the claim against this particular defendant.

124 The case law supports the proposition that, where it is plain and obvious based on the undisputed facts contained in the pleadings that the limitation period had begun to run at a point in time which ensures that it had expired by the time the claim was filed, an action can be held to be statute-barred and an order striking the claim can be granted: *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (Ont. C.A.), 2001 CanLII 8621, at para. 21; *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (Ont. S.C.J.), 2004 CanLII 35934, at paras. 48-49; and *Whittaker v. Great-West Life Assurance Co.* (2008), 63 C.C.L.I. (4th) 100, [2008] O.J. No. 1194 (Ont. S.C.J.), at paras. 33-48.

125 In this case Best has put before the court all of the material facts in relation to the principle of discoverability by way of his pleading and reply to demand for particulars. A reply to a demand for particulars is not prohibited evidence barred by rule 21.01(2)(b); it is deemed to form part of the statement of claim: *Sinclair v. Markham (Town)*, 2014 ONSC 1550, 27 M.P.L.R. (5th) 32 (Ont. S.C.J.), at para. 14; and *Perth Insurance Co. v. Osler Rehabilitation Centre Inc.*, 2013 ONSC 7033, [2013] O.J. No. 5408 (Ont. S.C.J.), at para. 8.

126 Furthermore, a motion judge is entitled to consider any document specifically referred to and which forms an integral part the statement of claim, as these documents are not evidence but rather are incorporated into the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.), 1999 CanLII 4462, at para. 3, leave to appeal refused, (2000), [1999] S.C.C.A. No. 460 (S.C.C.); *D.L.G. & Associates Ltd. v. Minto Properties Inc.*, 2014 ONSC 7287, [2014] O.J. No. 6018 (Ont. S.C.J.), at para. 13; and *Sheridan* (ONCA), at para. 12. It stands to reason that the same principle would apply to documents referred to in a reply to demand for particulars. In this case, the Toronto Police Association relies on a transcript provided by Best of a phone call allegedly held with Mr. Rick Perry, the Legal Director of the Toronto Police Association. This recorded conversation is referenced at para. 7 of Best's reply to demand for particulars.

127 The transcript reveals that as of the date of the conversation on November 24, 2009, Best is aware of the following facts:

1. That an affidavit exists in which a private investigator had deposed that he had contacted the Toronto Police Association, been given Best's name and was given Best's former home address;
2. That Best believed that such conduct would violate the Association's privacy rules;
3. That the release of his past address history was published on the Internet on October 30, and that people were making threats against his family on "the web", and that Best had left the country with his family as a result;
4. That Best had the intention to be "pursuing this";
5. That Best wanted to cross-examine the private investigator to try to determine "who he really spoke to" at the Association to obtain the information, or who accessed their database to find the information; and
6. That Best had suffered damage, which he described in the transcript as follows "... I'll tell you how bad it is. Not even my relatives know how to contact me right now and it's by... If you knew the whole situation, you'd know it was by no means an over reaction. It's ah, they're calling, their calling to ah, this particular thing that I find myself caught up in, they've actually called for the rape of a witness, burning down another witness' business. This is serious stuff so..."

128 The Supreme Court of Canada set out the discoverability principle in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), 1997 CanLII 325, at para. 18:

Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of the damage nor the type of damage need be known. To hold

otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

129 The Court of Appeal for Ontario emphasized the difference between "damage" and "damages" in the case of *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 347 D.L.R. (4th) 657 (Ont. C.A.), at para. 54. The comments of the court make clear that one does not have to know the full extent of the loss in order to have the limitation period begin to run:

The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. *Damage* is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage*.

130 Best argued, at para. 102 of his factum, that the limitation period could not begin to run in 2009 because "there was little damage known to flow from that at the time", and that when the affidavit was distributed abroad between 2009-2012 "he suffered some damage", but that the damage giving rise to the claim did not arise until he was incarcerated on May 3, 2013.

131 First, the opposite is alleged in the claim and the incorporated reply to demand for particulars, which is that the release of the information immediately caused damage, being the catalyst for Best and his family to flee various jurisdictions beginning in late 2009. Second, on the basis of *Metcalfe*, the admission that Best suffered "little" or "some" damage is sufficient. Taken together with the direct knowledge evidenced in the transcript, all of the material facts are available to conclude that Best had discovered all of the necessary elements set out in s. 5(1)(a) of the *Limitations Act, 2002* as of November 24, 2009. This was actual, as opposed to deemed, discovery. He admitted during that telephone call that he knew that injury, loss or damage had occurred, he knew of the act that caused such injury, loss or damage, he knew that the Toronto Police Association, as the source of the information, was the tortfeasor and he knew that a proceeding would be the appropriate means by which to seek a remedy.

132 Accordingly, the limitation period for making the claim against the Toronto Police Association expired on November 24, 2011, and therefore Best was well out of time when this claim was issued in 2014. Best's claim must also be dismissed under rule 21.01(1)(b) on the basis of being statute-barred.

Leave to amend

133 It is rare that a court should deny leave to amend a pleading, except in truly hopeless cases: *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385, (2005), 262 D.L.R. (4th) 222 (Ont. C.A.), at paras 17-18. As stated in my endorsement, I find that this is one of those exceptional cases in which leave to amend should not be granted, as granting the plaintiff the opportunity to do so will still not result in a statement of claim that is viable at law.

134 This case is similar to that of *Gravelle*, in which Quigley J. denied leave to amend because the "plaintiff has had more than adequate opportunity to fine tune these pleadings to cause them to be more than mere bald accusations with no factual underpinnings to support them" (at para. 126). While the plaintiff has a motion before the court to amend the claim, the proposed amendments do nothing to address the deficiencies noted throughout these Reasons. As Quigley J. noted, at para. 123: "to be accorded this indulgence the plaintiff must have knowledge of the facts supporting the allegations of intentional misconduct by the defendants at the time of the pleading, and the plaintiff cannot plead speculative allegations that are incapable of proof".

135 The court was provided with Best's responses to two requests for particulars. These responses illustrate what occurs when Best is given the opportunity to remedy what were identified by the defendants as being inadequacies in the claim. By way of example, the Toronto Police Association requested:

Particulars of the circumstances in which private and/or confidential information relating to the plaintiff was allegedly provided by the TPA, Jane Doe #4, and/or John Doe #4 (as alleged at paragraphs 18, 33, 35, 90, 100, 110, 120, 133, 140, 143, 152, 153, 159, 163, 171, 172, 174, 177, 178, and 188 of the Statement of Claim) to a third-party, including:

- (a) The precise information relating to the Plaintiff alleged to have been provided by the TPA, Jane Doe#4, and/or John Doe #4 to a third-party;
- (b) The identity of the person(s) to whom such information was allegedly provided; and
- (c) The date(s) on which such information was allegedly provided.

136 In Best's reply to the TPA's request, he states:

1. The affidavit of James Van Allen states, at para. 12, says that he was given information regarding the Plaintiff, Donald Best, a member of the TPA. It is alleged that this information, regarding a former address, and other information, was confidential information which could be used and was used, together with other information, to track down my client and put his physical safety and security of the person interests at risk. Further this risk resulted in further real harm to the plaintiff.

137 This response illustrates, in my view, what can be anticipated by permitting Best to attempt to bolster his claim. His response begs the following questions: What "other information"? How was it used, either alone or together with other information, to track down Best, and when and by whom? Was this "other information" the same information referred to earlier in the same paragraph? Who used this information to put Best at risk, and when? What was the specific threat to his safety and security? How did this risk result in further "real harm"? What connection does this "real harm" have to the information provided in the affidavit, such as the provision of a former address?

138 One can foresee that any attempt to obtain the particulars of any material facts underlying these speculative and bald assertions will only lead to more obfuscation. Best has had an opportunity to come up with the material facts during the contempt hearing, particularly when he was attempting to set aside the finding of contempt and raised the same allegations in his material and argument. In that proceeding he did not put forth the material facts successfully, thus making it even more unlikely that he will be able to put forth the necessary facts to support the causes of action he now pleads. Given that he has been unable to establish the necessary elements of the torts in an already compendious claim, granting leave to amend will ultimately serve no purpose.

Costs

Costs of the Motions to Strike

139 Costs arguments were heard immediately after this court granted the defendants' motions to strike Best's claim.

140 This court made costs awards in favour of the defendants in the following amounts totalling \$363,209.06, with reasons to be delivered at a later date:

- i. The Caribbean defendants - \$84,000 on a full indemnity basis;
- ii. The lawyer defendants - \$79,134.79 on a substantial indemnity basis;
- iii. The OPP defendants - \$16,986.50 on a partial indemnity basis;
- iv. Peel Regional Police Services - \$31,242.67 on a substantial indemnity basis;
- v. Durham Regional Police Service defendants - \$28,587.53 on a substantial indemnity basis;

vi. The Toronto Police Association - \$30,419.30 on a substantial indemnity basis; and

vii. The private investigator defendants - \$92,838.27 on a substantial indemnity basis.

141 This court found that the arguments put forth by Best to defend against the motions to strike had "not a scintilla of merit", as stated at the conclusion of the argument of the motions. However, as set out in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), 1993 CanLII 34, at pp. 134-135, that fact alone is not a basis for awarding solicitor-client costs. It is generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties that solicitor-and-client costs may be awarded. The test for awarding costs on a substantial indemnity basis was referenced by Newbould J. in *Schreiber v. Mulroney*, 2007 CanLII 34441, [2007] O.J. No. 3191 (Ont. S.C.J.), at para. 9, citing Mark Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1987), at para. 219:

Costs on a solicitor-and-client scale should not be awarded unless special grounds exist to justify a departure from the usual scale.

As the court said in *Foulis v. Robinson*:

Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. There are, of course, cases in which justice can only be done by a complete indemnification for costs.

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus.

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or the proceedings, which make such costs desirable as a form of chastisement.

The Supreme Court of Canada has approved the following statement of principle:

Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

142 Examples of where a costs award on the higher scale has been warranted are:

1) Where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of the litigation: *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (Ont. S.C.J.), 2007 CanLII 18579, at para. 9, citing *Shier v. Fiume* (1991), 6 O.R. (3d) 759 (Ont. Gen. Div.), 1991 CanLII 7188; *Benquesus v. Proskauer, Rose, LLP*, 2005 CanLII 21097, [2005] O.J. No. 2418 (Ont. S.C.J.); *Donmor Industries Ltd.*; *Aspiotis v. Coffee Time Donuts Inc.* (1995), 53 A.C.W.S. (3d) 508, [1995] O.J. No. 419 (Ont. Gen. Div.); and *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.), 1991 CanLII 2729.

2) Where unproven allegations of false representation, concealment or misconduct are made that impugn the integrity of a lawyer; *Alie v. Bertrand & Frère Construction Co.* (2000), 11 C.L.R. (3d) 149, [2000] O.J. No. 4860 (Ont. S.C.J.), at para. 26, aff'd (2001), 11 C.L.R. (3d) 12 (Ont. C.A.), at para. 28, leave to appeal refused, (2002), [2001] S.C.C.A. No. 418 (S.C.C.); and *Sun Life Trust Co. v. Bond City Financing Ltd.* (1997), 36 O.R. (3d) 758 (Ont. Div. Ct.), 1997 CanLII 16221.

3) Where needed to sanction a party's vexatious, contumelious or oppressive conduct of the whole litigation or a step in it: *Abrams v. Abrams*, 2009 CanLII 23375, [2009] O.J. No. 1907 (Ont. Div. Ct.), at para. 15.

4) Where a claim has been dismissed as an abuse of process, in particular where a defendant has been forced to respond to a plaintiff's attempt to relitigate claims: *Said v. University of Ottawa*, 2014 ONSC 771, [2014] O.J. No. 515 (Ont. S.C.J.), at para. 5, citing *Rousseau v. Scotia Mortgage Corp.*, 2013 ONSC 677, 19 C.C.L.I. (5th) 288 (Ont. S.C.J.), at para. 23.

5) Where a plaintiff has made unfounded allegations of improper conduct that were seriously prejudicial to the character and reputation of the defendants: *Said*, at para. 8, citing *Aba-Alkhail v. University of Ottawa*, 2013 ONSC 6070, 14 C.C.E.L. (4th) 133 (Ont. S.C.J.), at paras. 5-7.

6) Where unsubstantiated allegations of dishonesty, illegality and conspiracy are advanced without merit: *Direk v. Ontario (Attorney General)*, 2014 ONSC 1916, [2014] O.J. No. 1403 (Ont. S.C.J.), at para. 4; and *Baryluk v. Campbell* (2009), 66 C.C.L.T. (3d) 160, [2009] O.J. No. 2772 (Ont. S.C.J.), at para. 10. *Marcus v. Cochrane*, 2012 ONSC 2331 (Ont. S.C.J.) at para. 11.

143 Based on the above precedents and the test for awarding solicitor-and-client costs articulated by Orkin in *The Law of Costs*, this case should also attract costs on the higher scale. Best's claim was dismissed as an abuse of process, he was attempting to relitigate issues already determined by the prior proceeding and he made unproven and scandalous allegations of fraud, dishonesty, false representations and other improper conduct against various professional individuals. He attempted to malign the integrity of justice system. These allegations were summarized by Best's counsel, at paras. 60 and 79 of his factum, as follows:

1. Seeking costs for ulterior purposes, such as to intimidate the plaintiff, deter him from litigation and force him to leave the country;
2. Engaging in a campaign to endanger the plaintiff;
3. Seeking documents and conducting an examination or an improper purpose;
4. Disseminating the plaintiff's private information on the Internet, with an intent to harm;
5. Engaging in a conspiracy between lawyers, law firms, clients and police to cover up Van Allen's status as a serving police officer;
6. The dissemination of the plaintiff's information and the cover up of the conspiracy was knowingly criminal or unlawful and done with the intent to pressure the plaintiff;
7. The lawyers, law firms and clients conspired to have Best wrongly found in contempt;
8. The lawyers lied in order to secure examination orders and to "set up" the plaintiff for contempt, in furtherance of their part in the conspiracy;
9. The lawyers lied in court before Shaughnessy J. on December 2, 2009, to further this conspiracy;
10. The lawyers used their positions as officers of the court to mislead the court and perpetrate a fraud to further their conspiracy to have the plaintiff found in contempt;
11. The other lawyers involved - Mistery Chabas, Roman, Quidenski and Zemel - failed to correct the falsehoods of Mr. Ranking and Mr. Silver although they had a duty to correct these falsehoods;
12. Mr. Ranking and Mr. Silver mislead the court with respect to the statement for the record as part as a conspiracy to have the plaintiff found in contempt;

13. The purpose of pursuing contempt against the plaintiff was to pressure him to leave Canada and to influence the course of other litigation;

14. The various lies of the defendants culminated in the wrongful imprisonment of the plaintiff;

15. The filing of an affidavit was done to facilitate further dissemination of the plaintiff's private information in order to harm him;

16. The lawyer, Mr. Colin Pendrith, assisted in the continuation of the conspiracy in respect of contempt at the appeal stage;

17. The lawyer defendants and their clients refused to say what questions had not been answered, in perpetuation of pressure through contempt proceedings;

18. The lawyer defendants unreasonably opposed requests for time for the plaintiff to find counsel in order to pursue the conspiracy;

19. The court erred with respect to the timing of the plaintiff's concerns about his safety issues, and the lawyer defendants chose to reinforce this misunderstanding; and

20. There was continued pressure and intimidation of the plaintiff during two days of examination in January 2013.

144 Faced with allegations of this nature, this is one of those cases where the court should react to show its condemnation for this type of litigation conduct, particularly within the context of a proceeding that is an abuse of process.

Application of the Rule 57.01 Factors

The amount claimed and recovered in the proceeding

145 Best claimed damages of more than \$20,000,000 against the 39 named defendants.

The result of the proceeding

146 The defendants were entirely successful in having the action dismissed as an abuse of process, and alternatively, having the claim struck as being vexatious and disclosing no cause of action.

The complexity of the proceeding

147 The proceeding was factually and legally complex because of:

(i) the extensive history of the Nelson Barbados Action;

(ii) the 90 page, 234 paragraph claim advancing numerous causes of action which is vague, repetitive and imprecise in its language;

(iii) the nine volumes of affidavit material filed by Best in response to the motions; and

(iv) the 59 page factum filed to refute the defendants' arguments.

148 The plaintiff had also served and filed a motion to amend the claim, and short served an injunction motion even though such motion had not been scheduled in advance. Neither of these had to be dealt with following the disposition of the main motions, but the affected defendants filed responding material to the motion to amend.

The importance of the issues

149 These motions were extremely important to the defendants, as the claim openly challenged the professional integrity of many of them, and for all, made scandalous allegations that they worked in concert to cause deliberate harm to Best.

150 The claim itself, the material filed for these motions and the examples of Best noting various defendants in default and resisting the setting aside of such noting in default, all signal that this action would have been extremely lengthy and costly due to unreasonable steps and positions taken by the plaintiff had it been permitted to continue.

Conduct of any party that shortened and lengthened unnecessarily the duration of the proceeding

151 The defendants collectively scheduled the motions to dismiss/strike as expeditiously as possible and tailored their arguments so that there was minimal overlap among them.

152 As earlier stated, Best filed nine volumes of material, much of which was not referred to during argument, but which had to be reviewed by counsel in advance and which increased the time required to be expended by them to prepare for this hearing.

153 The plaintiff also insisted on proceeding with a motion to amend the statement of claim to add additional defendants rather than waiting to learn the outcome of the defendants' motion to dismiss/motion to strike, the success of which would render the amending motion moot. The plaintiff's proposed amendments sought to add two chiefs of police yet failed to plead any material facts regarding either individual's personal involvement. The affected defendants were required to incur costs preparing responding materials to oppose the plaintiff's amending motion.

154 Even though the plaintiff made concessions that the PRPS, DRPS and OPP are not suable entities with respect to his *Charter* claims, and he conceded that the tort of fiduciary duty could not be pursued in this case, these concessions made little impact on the time expended in argument.

Whether any step in the proceeding was improper, vexatious or unnecessary

155 The entire action was improper and thus, dismissed as an abuse of process.

156 However, the plaintiff noted in default not only the Caribbean defendants, but many of the other defendants.

157 With respect to two of the DRPS defendants, Best did so notwithstanding that counsel for DRPS had effected service of a notice of intent to defend by fax on Best's counsel on August 18, 2004, within the time requirement prescribed by the *Rules of Civil Procedure*. These defendants were required to move to set aside the noting in default. Although asked for his consent, the plaintiff refused but did not file responding material. Instead he attended on the motion and requested an adjournment in order to prepare and file materials and conduct cross-examinations. The adjournment was granted with costs left to the motion judge.

158 Best also noted the OPP defendants in default. No evidence was given to the court for the OPP defendants regarding this step. In its costs outline, these defendants simply submit that the noting in default was ultimately set aside on consent, but required significant additional resources.

159 Best also took the same step with the lawyer defendants. He also noted the TPA in default, notwithstanding the delivery of a notice of intent to defend and a covering letter from counsel asking that the TPA not be noted in default without further notice. Best's counsel claimed that he had not received it, and despite being provided with a copy of the affidavit of service and fax confirmation form, refused to consent to an order setting aside the noting in default. Consequently the TPA prepared and served a motion record to set aside the noting of default, only in the face of which did the plaintiff advised that he would consent to the noting in default being set aside.

The amount of costs that the unsuccessful party could reasonably expect to pay in relation to these matters

160 Best personally has now been the recipient of numerous costs orders made in favour of the defendants in the Nelson Barbados Action, and in this action. As recently as April 10, 2015, approximately two months before these motions were argued, McCarthy J. ordered that Best must pay the sum of \$45,253.13 to the Caribbean defendants arising from their initially opposed motion to set aside Best's noting in default of those defendants, and from Best's pursuit of a motion to cross-examine two witnesses in relation to the defendants' motion.

161 During the course of the Nelson Barbados Action, the courts imposed significant costs orders on Best, including \$192,000 in the Court of Appeal alone. As earlier stated his unpaid costs orders from that proceeding total \$375,375.40. Accordingly, there should be ample understanding by him that the motions of this complexity, requiring argument over three days, would attract a very high costs award in the event he was unsuccessful.

The principle of indemnity

162 Each of the moving parties' counsel filed a costs outline setting out the lawyers involved, their hourly rates, time expended on the steps involved in the case and a calculation of disbursements. None of the fees sought to be recovered by the defendants are disproportionate to the complexity of the proceeding to date and the steps required to be taken to properly defend the unmeritorious action and to bring forward the motions to strike/dismiss.

163 For some defendants, the fees are elevated in part due to communicating with and reporting to insurers.

164 The only defendant seeking partial indemnity costs was the Ontario Provincial Police, on the basis that it is an agent of the Crown.

165 The actual rates charged to their clients in all cases is less than the amount sought by the parties, being 90 percent of the full indemnity rate, other than in the case of lawyer defendants. In that case they have shown that the actual rates charged are less than the maximum rates set out by the costs subcommittee of the Rules Committee, adjusted to inflation in accordance with the Bank of Canada's "inflation calculator", for fixing partial indemnity costs. Accordingly, I find that the rates used to be particularly reasonable, and that no downward adjustment is required from the full indemnity rate.

166 With leave of the court, counsel for Investigative Solutions Network Inc., who was not in attendance at the motions, submitted written material on costs. Although this defendant did not have its own motion to dismiss/strike before the court, the outcome of the other parties' motions was obviously to its benefit. As it also would be entitled to costs of the action caused by the dismissal, the most expeditious and costs effective process available was followed, which allowed that defendant to be permitted to file written argument on costs, on notice to Best's counsel and giving him full opportunity to respond on behalf of the plaintiff.

167 It is clear from the bill of costs filed, with attached dockets, that although costs are sought on a partial indemnity basis only by Investigative Solutions Network Inc., the fees are high because counsel was reporting to an insurer and was working in conjunction with counsel for all defendants, but particularly with counsel for the private investigator defendants, including a review of facta.

168 Best's counsel submits that of the 69.4 hours spent there should be a reduction of approximately 7.5, arguing that it was unnecessary to expend time on the preparation of an affidavit of documents (1 hour) in light of the motion to strike, and that it was not reasonable for counsel to review the facta filed by other parties, having decided not to participate in the motions.

169 I disagree; Investigative Solutions Network Inc. saved costs by not bringing its own motion and making submissions, but it was not unreasonable for counsel to monitor the legal issues addressed in the action and being raised in the motions given his own client's stake in the outcome.

170 Accordingly, this court orders that costs shall be paid by Best to Investigative Solutions Network Inc. fixed in the amount of \$21,527.83 on a partial indemnity rate, as requested.

171 Costs are to be determined in accordance with s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the factors set out in rule 57.01(1). Wide discretion in fixing costs therefore remains with the court, bearing in mind the principles enunciated in the leading cases: see *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10 (Ont. Div. Ct.); and *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), 2004 CanLII 14579.

172 In summary, there is no question that the allegations made by the plaintiff in the proceeding and the fact that this particular proceeding was commenced, is deserving of an award of costs on a substantial indemnity basis in order that court signalled to the plaintiff, not for the first time, that vexatious, abusive, time-wasting and unmeritorious litigation will receive the court's condemnation and costs orders that attempt to indemnify the defendants.

173 Having regard to all the factors set out in rule 57.01 and the applicable legal principles, including what is fair and reasonable to Best in all of the circumstances, justice requires that the defendants moving to dismiss/strike the claim be awarded the costs set out at para. 140 of these Reasons.

Costs of the Caribbean defendants' jurisdiction motion

174 Counsel for the Caribbean defendants asks that costs of their jurisdictional motion be quantified but that the issue of potential for joint and several liability on the part of both the plaintiff and his counsel for payment of same be left for another day.

175 Costs were awarded to these clients on a full indemnity basis, as this is one of those rare cases described in the law, and canvassed fully in *Baryluk*, where the action was described as a scurrilous attack on the administration of justice.

176 The Caribbean defendants are in a unique position in that three of them were also defendants in the Nelson Barbados Action. They have been plagued with Best's frivolous and vexatious litigation for many years. Despite costs awards and admonishment from many courts along the way, Best has continued his campaign against them in this litigation.

177 At the beginning of this action the Caribbean defendants, on noting that there were various motions to dismiss scheduled for the week of June 15, 2015, proposed to await the outcome of those motions before taking any steps, in order to avoid incurring costs. As suggested in their submissions, this would have prevented almost all of the costs that have been spent by the Caribbean defendants, totalling \$165,264. Best refused this suggestion. It was not until the first day of the argument of these motions that Best's counsel conceded that the Caribbean defendants' jurisdictional motion should await the outcome of the motions to dismiss/strike.

178 As with the other defendants, Best noted the Caribbean defendants in default despite being notified by their counsel of their intention to bring a jurisdiction motion, and requesting that they not be noted in default in those circumstances. I will not review in detail the steps that were required to be taken by the Caribbean defendants to set aside that noting in default; suffice it say that the costs order imposed by McCarthy J. in the excess of \$45,000 on a substantial indemnity basis was imposed for conduct that he described as "reprehensible" and conduct that "should meet with the strong disapproval of the court".

179 The alternative to the last eight months of litigation for the Caribbean defendants would have been for Best to agree to await the outcome of the dismissal motions. Had he agree to this reasonable suggestion, their costs would be minimal.

180 Claims that amount to a clear abuse of process, as this one does, should not be permitted to be an endless financial drain on a defendant. Where a party initiates baseless litigation such as this, which clearly invites the same stay to be ordered in favour of these clients as did the Nelson Barbados Action, the Caribbean defendants should not have to bear

further legal costs. The common thread in cases where full indemnity costs have been awarded is "the strong sentiment that the matter, or the issue at least, should never have been brought before the court in the first place, leading to a reaction that the innocent party should not have to pay a penny toward the costs of the litigation": *Envoy Relocation Services Inc. v. Canada (Attorney General)*, 2013 ONSC 2622, [2013] O.J. No. 1999 (Ont. S.C.J.), at paras. 114, 116.

181 The action against the Caribbean defendants is even more egregious when one considers that in excess of \$375,000 in costs orders remain unpaid to these defendants. This is a case where Best's conduct of the litigation and its effect on the Caribbean defendants is so outrageous, reprehensible and blameworthy that it shocks the conscience of the court and requires deterrence with costs on the highest scale.

182 The same considerations, as set out above regarding rule 57.01(1) factors, apply to the Caribbean defendants' costs.

183 As a result, an order was issued by this court that the Caribbean defendants shall have their full costs and disbursements for the entire action, with the exception of the \$45,253.13 already awarded by McCarthy J. Conclusively, Best has been ordered to pay the sum of \$84,000 to the Caribbean defendants on a full indemnity basis.

Summary on Costs

184 In *Boucher*, Armstrong J.A. held that the fixing of costs involves more than merely a calculation using the hours docketed and the costs grid. Courts fixing costs are required to give further consideration to quantum. At para. 24, Armstrong J.A. directed that "it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable." He reiterated what the Court of Appeal said in *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577, (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4:

In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

185 These authorities require that I step back to assess whether the cost claimed are fair and reasonable in the circumstances. Given all of the factors and considerations outlined above, I am fully satisfied that the costs ordered are fair and reasonable for this protracted and complex proceeding. While the awards are high, they reflect what the defendants have had to spend in order to respond to the tactics facing them, and secure an order that dismisses this meritless proceeding.

Motions granted.

2014 ONSC 4154
Ontario Superior Court of Justice

Ontario Consumers Home Services Inc. v. EnerCare Inc.

2014 CarswellOnt 9427, 2014 ONSC 4154, 243 A.C.W.S. (3d) 569

Ontario Consumers Home Services Inc., Plaintiff and EnerCare Inc., EcoSmart Home Services Inc., EcoSmart Energy Savings Corp., Direct Energy Marketing Limited, Stephen Wells, Patricia Carraretto, Tom Cooper, Shannon Miranda and Tanya Faulds, Defendants

A.J. O'Marra J.

Heard: June 5, 2014
Judgment: July 10, 2014
Docket: CV-12-464349

Counsel: Kevin D. Toyne, Pradeep Chand, for Plaintiff / Respondent
Stuart Svonkin, Mark Klaiman, Paul Le Vay, Barry Kuretzky, Jennifer Wu, for Defendants / Moving Parties

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal; Torts

Related Abridgment Classifications

Civil practice and procedure

X Pleadings

X.2 Statement of claim

X.2.f Striking out for absence of reasonable cause of action

X.2.f.i General principles

Headnote

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles

Plaintiff alleged defendants caused attachment of GPS tracking devices to plaintiff's service vehicles to track location of plaintiff's customers and potential customers — Plaintiff alleged that information obtained was used to contact plaintiff's customers to dissuade them from contracting with plaintiff and contract with defendants — Plaintiff alleged civil conspiracy, unlawful interference with economic interests, trespass to property, trespass to land, and misappropriation of confidential information — Defendants brought motion to strike out statement of claim — Motion granted — Pleading of conspiracy was struck with leave to amend by providing particulars — Pleading of civil conspiracy was defective and did not plead material facts — Claim for intentional interference with economic interests was struck with leave to amend denied because acts alleged did not support claim — Paragraphs amounted to unnecessary historical recitation irrelevant to causes of action and were struck — Trespass to land pleading was speculative and was struck, but leave was granted to amend pleading by adding particulars — Claims of trespass to property and of misappropriation of confidential information were not struck as it was not plain and obvious that they were doomed to fail — Claims against individual defendants were struck — None of individual defendants were alleged to have exhibited separate identity or interest beyond their roles as employees or directors of corporate defendants — There was no evidence that individual defendants acted outside scope of their authority.

Table of Authorities

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Adelaide Capital Corp. v. Toronto Dominion Bank (2007), 2007 CarswellOnt 3989, 2007 ONCA 456 (Ont. C.A.) — considered

AGFA Inc. v. Partners Prepress (2006), 2006 CarswellOnt 5096 (Ont. S.C.J.) — considered

Agribands Purina Canada Inc. v. Kasamekas (2011), 2011 ONCA 460, 86 C.C.L.T. (3d) 179, 278 O.A.C. 363, 87 B.L.R. (4th) 1, 2011 CarswellOnt 5034, 334 D.L.R. (4th) 714, 106 O.R. (3d) 427 (Ont. C.A.) — referred to

B.W. International Inc. v. Thomson Canada Ltd. (1996), 1996 CarswellOnt 2912, 3 C.P.C. (4th) 41, 137 D.L.R. (4th) 398, 68 C.P.R. (3d) 289, 10 O.T.C. 301 (Ont. Gen. Div.) — considered

Balanyk v. University of Toronto (1999), 1 C.P.R. (4th) 300, 1999 CarswellOnt 1786 (Ont. S.C.J.) — considered

Ballard v. Stavro (1997), 1997 CarswellOnt 3424, 38 O.T.C. 321 (Ont. Gen. Div. [Commercial List]) — followed

Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd. (1991), 1991 CarswellAlta 203, 83 Alta. L.R. (2d) 289, [1992] 1 W.W.R. 577, 120 A.R. 241, 8 W.A.C. 241, 1991 ABCA 351 (Alta. C.A.) — considered

Bram Enterprises Ltd. v. A.I. Enterprises Ltd. (2014), 2014 CarswellNB 17, 2014 CarswellNB 18, 2014 SCC 12, (sub nom. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*) [2014] 1 S.C.R. 177, 2014 CSC 12, 48 C.P.C. (7th) 227, 453 N.R. 273, 1079 A.P.R. 1, 416 N.B.R. (2d) 1, 366 D.L.R. (4th) 573, 7 C.C.L.T. (4th) 1, 21 B.L.R. (5th) 173 (S.C.C.) — considered

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Fitzpatrick v. Orwin (2012), 2012 ONSC 3492 (Ont. S.C.J.) — considered

Grace v. Fort Erie (Town) (2003), 2003 CarswellOnt 3366, [2003] O.T.C. 806, 42 M.P.L.R. (3d) 180 (Ont. S.C.J.) — followed

Harris v. GlaxoSmithKline Inc. (2010), 78 C.C.L.T. (3d) 52, 106 O.R. (3d) 661, 272 O.A.C. 214, 2010 ONCA 872, 2010 CarswellOnt 9696 (Ont. C.A.) — considered

Hudson's Bay Co. v. White (1997), 32 C.C.L.T. (2d) 163, 22 O.T.C. 366, 7 C.P.C. (4th) 109, 1997 CarswellOnt 313 (Ont. Gen. Div.) — followed

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to

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J.G. Young & Son Ltd. v. TEC Park Ltd. (1999), 48 C.P.C. (4th) 67, 1999 CarswellOnt 3463 (Ont. S.C.J.) — considered

Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), (sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*) 1 C.R.R. (2d) 211, (sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*) 72 D.L.R. (4th) 580, 1990 CarswellOnt 442, (sub nom. *Jane Doe v. Board of Police Commissioners of Metropolitan Toronto*) 40 O.A.C. 161, 5 C.C.L.T. (2d) 77, (sub nom. *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*) 74 O.R. (2d) 225, 50 C.P.C. (2d) 92 (Ont. Div. Ct.) — followed

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National Trust Co. v. Furbacher (1994), 1994 CarswellOnt 6058 (Ont. Gen. Div. [Commercial List]) — considered

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Penson Financial Services Canada Inc. v. Connacher (2010), 2010 ONSC 2843, 2010 CarswellOnt 3398 (Ont. S.C.J. [Commercial List]) — referred to

Rare Charitable Research Reserve v. Chaplin (2009), 2009 CarswellOnt 5530, 52 E.T.R. (3d) 170 (Ont. S.C.J.) — considered

Saltman Engineering Co. v. Campbell Engineering Co. (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413 (note) (Eng. C.A.) — considered

Tran v. University of Western Ontario (2014), 2014 ONSC 617, 2014 CarswellOnt 1111 (Ont. S.C.J.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 21.01 — considered

R. 21.01(1) — considered

R. 21.01(1)(b) — considered

R. 21.01(3)(d) — considered

R. 25 — considered

R. 25.06 — considered

R. 25.06(8) — considered

R. 25.11 — considered

R. 25.11(b) — considered

MOTION by defendants to strike out statement of claim.

A.J. O'Marra J.:

1 The defendants move to strike out the statement of claim of the plaintiff as failing to disclose a reasonable cause of action under Rule 21.01(1) (b); the allegations are scandalous, frivolous and/or vexatious, and otherwise an abuse of the court process, Rules 21.01(3) (d) and 25.11; and for failing to conform to the rules of proper pleadings, pursuant to Rule 25.06 of the *Rules of Civil Procedure*.

2 In the statement of claim the plaintiff alleges five causes of action against the corporate and individual defendants: 1) civil conspiracy, 2) unlawful interference with economic interests, 3) trespass to property/chattels, 4) trespass to land, and 5) misappropriation of confidential information (breach of confidence). The plaintiff seeks damages of \$10,000,000, jointly and severally against all defendants, and an accounting and disgorgement of the revenues and profits of each defendant.

3 The principal allegation against the defendants is that they caused the attachment of GPS tracking devices, to a number of the plaintiff's service vehicles in order to track the location of the plaintiff's customers and potential customers. Further, it is alleged that the information obtained was then used by the defendants to contact the plaintiff's customers to dissuade them from contracting with the plaintiff and contract with them, thereby interfering with the plaintiff's economic interests.

4 The plaintiff, Ontario Consumers Home Services Inc. (OCHS), is a home service company that, among other things, rents hot water heaters to residential homes. OCHS is a competitor to the defendants, Direct Energy Marketing Limited (Direct Energy) and EnerCare Inc. (EnerCare). EcoSmart Home Services Inc. and EcoSmart Energy Saving Corp. (EcoSmart) are Direct Energy Service providers through EnerCare. Individual defendants, Tom Cooper, vice president, sales and marketing, Shannon Miranda, marketing coordinator and Tanya Faulds, marketing manager are employees of EnerCare. Stephen Wells and Patricia Carraretto are directors of EcoSmart.

The Claim

5 The plaintiff claims that since March 2012 it has experienced an increase in the cancellation of its customer contracts, and "a dramatic increase in the number of prospective customers who refused to listen to the presentations made by its sales people".

6 About mid-June, 2012, OCHS received a call from a former EcoSmart employee to advise them that they were under surveillance. OCHS examined several of its vehicles and discovered GPS tracking devices on two of them.

7 The plaintiff alleges that EnerCare, EcoSmart and Direct Energy arranged for OCHS's vehicles to be tracked by a motion activated GPS unit by a private investigation firm, which in turn reported the information as to the duration the vehicles were in motion as well as the location of each stop the vehicle made. The information was then reported by EcoSmart to EnerCare.

8 The statement of claim states the following:

26. At a lunch meeting attended by a representative of the (investigation) firm and Mr. Cooper, Mr. Cooper directed the firm to report only to EcoSmart and to bill EcoSmart.

27. Mr. Wells and Ms. Carraretto arranged for the resulting information to be delivered, reported and/or accessible to EnerCare. This information is confidential and proprietary to OCHS (the "confidential information").

28. At the direction of Mr. Wells and/or Ms. Carraretto, EcoSmart and the firm shared the confidential information with Ms. Miranda, Ms. Faulds and Mr. Cooper at EnerCare. In addition to providing access to the confidential information by the firm's servers, the firm's private investigators reported directly to Ms. Miranda.

29. The confidential information was misappropriated and used by Direct Energy, EnerCare and EcoSmart to target areas where OCHS's sales people have been working in an effort to persuade customers to cancel their contracts with OCHS and remain with Direct Energy.

30. Direct Energy, EnerCare and EcoSmart have used the confidential information to inappropriately target areas that OCHS's sales people were going to visit in an effort to dissuade potential customers from listening to OCHS sales people. Direct Energy used the EcoSmart door-to-door sales people in these efforts in order to maintain an appearance of independence.

31. In taking the above-noted actions, the defendants have acted together with the intent to harm OCHS's business. They have used unlawful means that they knew, or ought to have known, would cause injury to OCHS.

32. OCHS has suffered damages as a result of the defendant's conspiracy, the full particulars of which will be provided prior to trial.

9 The other causes of action, interference with economic interest, trespass to property and land, and misappropriation of confidential information are cited in paragraphs 33 to 35 of the statement of claim:

33. By using the confidential information to persuade customers to cancel their contracts with OCHS, remain with Direct Energy and to dissuade potential customers from listening to OCHS sales people, the defendants have used illegal means to intentionally interfere with OCHS's economic interests.

34. In order to install the GPS tracking devices used to obtain the confidential information, the defendants must have trespassed onto OCHS's property.

35 By improperly tracking OCHS's vehicles, the defendants have misappropriated OCHS's confidential information to OCHS's detriment.

Applicable Rules

10 Under Rule 21.01(1) (b), a court may strike out all or part of a pleading on the basis it "discloses no reasonable cause of action". An order striking out a claim and dismissing all or part of a claim at the pleading stage should only be granted if it is "plain and obvious" that the claim discloses no reasonable cause of action (see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)). The Court is to presume the facts as set out in the statement of claim are true and taken as proven. The threshold for sustaining a pleading challenged under Rule 21.01(1) is low, as it is under Rule 21.01(3) (d) where the statement of claim is challenged as being frivolous, or vexatious or otherwise an abuse of the court process. Such an order should be granted only in the clearest of cases.

11 Under Rule 25 a statement of claim must contain a concise statement of all 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. Rule 25.06(8) provides that:

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.

12 In *Ballard v. Stavro*, [1997] O.J. No. 3577 (Ont. Gen. Div. [Commercial List]) Epstein J., as she then was, relying on Divisional Court in *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.) noted the following principles to be applied on a motion to strike a statement of claim:

- a) The pleadings must disclose a cause of action founded in law. So long as this criterion is met, the novelty of the cause is of no concern;
- b) In determining whether a cause of action exists, the material facts pleaded are to be taken as proved. However, this principle does not apply where the alleged facts are based on assumption or speculative conclusions which are incapable of proof;
- c) If the facts, taken as proved, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and
- d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

13 In *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Ont. S.C.J.) Cameron J. observed that in assessing the adequacy of pleadings under Rules 21.01, 25.06 and 25.11 the purpose of the rules must be born in mind. The pleadings must:

- a) Define clearly and precisely the questions in controversy between the litigants;
- b) Give fair notice of the precise case which is required to be met and the precise remedy sought; and
- c) Assist the court in its investigations of the truth of the allegations made. (See *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div. [Commercial List]) at paras. 9 and 10).

14 The defendants argue that there are three reasons which the statement of claim must be struck in its entirety.

15 First, the statement of claim does not allege material facts that support each claim made by the plaintiff.

16 Second, the defendants that they do not know the case that they are to meet. The fundamental rules of pleading require that the pleadings are to frame the issues in a clear and concise manner for the parties and the court. The pleadings are to put the parties on notice as to the case they have to meet. Each corporate and individual defendant has made a demand for particulars. However, most of the responses by the plaintiff have been that "the information is within the knowledge of the defendants" or "the particulars requested are not required by the Rules of Civil Procedure". Such responses are inadequate and do nothing to allow the defendants to prepared responsive statements of defence.

17 Third, insofar as the individual defendants are concerned, the plaintiff has not provided any material facts to support any personal liability alleging the individual defendant committed a separate tort or act outside the scope of his or her employment.

18 I shall deal with each cause of action cited in the statement of claim in turn.

Civil Conspiracy

19 There are two types of civil conspiracy recognized in Canadian law, 1) "unlawful conspiracy" in which the defendant's conduct is unlawful, it is directed against the plaintiff, and the defendant knows in the circumstances that injury to the plaintiff is likely to result, and 2) "conspiracy to injure" in which the means used by the defendant may be lawful or unlawful and the predominant purpose of the defendant's conduct is to cause injury to the plaintiff. (See *Agribrands Purina Canada Inc. v. Kasamekas*, [2011] O.J. No. 2786 (Ont. C.A.) at para. 24 citing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.) at p.47).

20 It is unclear as to which type of civil conspiracy the plaintiff alleges in its statement of claim, however, for the purpose of the motion both are assumed to be pleaded.

21 To allege unlawful conspiracy material facts must be pleaded in support of the following elements:

- a) The defendants must act in combination, that is, in concert, by agreement or with a common design;
- b) Each defendant's conduct must be unlawful and in furtherance of the conspiracy;
- c) The defendants' acts must be directed towards the plaintiff;
- d) The defendants should have known that in the circumstances injury to the plaintiff would likely result; and
- e) Each defendant's conduct causes injury to the plaintiff.

22 To make out a claim for conspiracy to injure the plaintiff must plead material facts as outlined with respect to an unlawful conspiracy. However, the overt act(s) of each defendant need not be unlawful, but the predominant purpose of each defendant must be to inflict harm on the plaintiff as noted by Moldaver J.A. (as he then was) in *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872 (Ont. C.A.) at para. 39.

23 The defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if the harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendant and not the consequences that the defendant either realized or should have realized would result.

24 To plead civil conspiracy a statement of claim must state with precision and clarity material facts as to:

- a) the parties to the conspiracy and their relationship of one to the other;

b) the agreement between or amongst the defendants to conspire, including particulars as to the time, place and mode of agreement;

c) the precise purpose or object of the conspiracy;

d) the overt acts alleged to have been done by each of the alleged conspirators in pursuance and furtherance of the conspiracy, including the time, and place and nature of the acts; and

e) the injury and damage caused to the plaintiff as a result of conspiracy.

25 Conspiracy is an intentional tort and a serious allegation as such the material facts must be pleaded with heightened particularity. In *Ballard v. Stavro*, the court stated at para. 31:

Under Rule 25, a statement of claim must contain a concise statement of all the material facts on which a party relies for the claim. The issues in dispute must be sufficiently identified as to enable the parties to plead a response without having to speculate. Where this minimum level of disclosure is not satisfied, the pleading is irregular. In certain circumstances, it may be appropriate to grant leave to amend or order that particulars be granted. In others the pleading is ordered to be struck. In an action such as this where there are serious allegations of conspiracy, the level of disclosure of material facts is required to be higher.

26 It is insufficient to simply "lump some or all of the defendants together into a general allegation that they conspired". (See *Person Financial Services Canada Inc. v. Connacher*, [2010] O.J. No. 2114 (Ont. S.C.J. [Commercial List]) at para. 15; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), and *J.G. Young & Son Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 (Ont. S.C.J.), at 451.)

27 Further, it was noted in *J.G. Young & Son*, that the plaintiff is under a heavy burden as a consequence of seeking to plead such a serious cause of action as that of conspiracy. In *Balanyk v. University of Toronto*, at para. 29 Cameron J. stated:

If the plaintiff does not, at the time of the pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.

28 In reading the statement of claim generously and as a whole together with responses to the defendant's demand for particulars the necessary material facts in support of a claim of civil conspiracy are lacking in six respects:

1) There are no material facts which support the allegation of an agreement. There are no particulars as to the time, place or mode of agreement amongst the alleged co-conspirators.

2) There is no particularization of the precise purpose of the conspiracy. OCHS alleges that in taking the "above-noted actions, the defendants have acted together with the intent to harm OCHS's business. They used unlawful means that they knew, or ought to have known, would cause injury to OCHS" (para. 31 Statement of Claim). It is a conclusory statement as opposed to one of material fact.

3) With respect to the conspiracy to injure claim there is no pleading that the predominant purpose of the conspiracy, or conspirators acting together were motivated predominantly to injure OCHS as opposed to advancing a commercial self-interest.

4) The plaintiff in its statement of claim fails to identify with any specificity the overt act of each of the defendants in furtherance of the conspiracy, but rather simply lumps all defendants, corporate and individuals together.

5) The plaintiff has cited a series of independently actionable acts and then added an allegation that the defendants conspired to commit the acts. Any unlawful acts that are independently actionable cannot support a claim of civil

conspiracy. In this instance the allegations concerning the GPS surveillance also forms the basis for the claims of unlawful interference with economic interests, trespass and breach of confidence.

6) The plaintiff has failed to plead material facts that would establish, if proven, that the alleged conspiracy caused it to suffer damages distinct from those caused by the other claims alleged. There are no pleadings of material facts of separate harm or damage that flowed from the conspiracy alleged.

29 The pleadings of conspiracy which simply restate legal principles and bald, or speculative conclusions rather than alleging material facts must be struck as failing to disclose the cause of action.

30 Each of the defendants, as noted earlier, made demands for particulars as to: a) the nature of the relationship between the various defendants, b) the overt acts allegedly committed by the defendants, c) the loss of business as allegedly suffered by OCHS as a result of each cause of action and, d) the quantum of damages claimed as a result of each cause of action.

31 In response, with respect to the claim of conspiracy the plaintiff to each request in turn wrote:

a) As to the nature of the relationship between the various defendants, the plaintiff's response was that the facts "are within the knowledge of the defendants".

b) With respect to overt acts committed by each defendant, the plaintiff's response was that the facts "are within the knowledge of the defendants" and that some of the particulars requested "are not required by the Rules of Civil Procedure".

c) With respect to the loss of business suffered by the plaintiff it replied "the requested particulars are not required by the Rules of Civil Procedure".

d) As to the \$10,000,000 in damages it replied that the claim is against the defendants jointly and severally in respect to the five causes of action.

32 I am satisfied that the pleading of civil conspiracy is defective and that it does not plead material facts as to the agreement, overt acts alleged to have been done by each of the alleged co-conspirators in pursuance and in furtherance of the conspiracy, or with respect to conspiracy to injure that the predominant purpose of each defendant was to inflict harm on the plaintiff. The pleading of conspiracy as such fails to meet the requirements for the cause of action and must be struck.

33 Counsel for the plaintiff argued strenuously that its response to particulars did not mean that particulars were not available. If such is the case it is unfortunate that the plaintiff was reticent to provide them. However, in *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456, [2007] O.J. No. 2445 (Ont. C.A.) [hereinafter *South Holly Holdings Ltd.*] at para. 6 the Court of Appeal emphasized that "a litigant's pleadings should not lightly be struck without leave to amend." It should only be denied in the "clearest of cases". Where deficiencies may be cured by appropriate amendments and without prejudice to the defendants leave should be granted. There is no evidence of prejudice to the defendants. Accordingly, leave is granted to amend the pleading to correct the deficiencies with particulars, if available, bearing in mind the higher requirement of disclosure for an intentional tort.

Intentional Interference with Economic Interests

34 Intentional interference with economic interests, like civil conspiracy is an intentional tort and it must be pleaded with "full particulars". A plaintiff, to advance a claim of intentional interference with economic interest, must plead material facts that, if proven, would establish the following elements:

1) An intention to injure the plaintiff;

- 2) The interference with the plaintiff's economic interests must be by unlawful means;
- 3) The unlawful means are directed at a third party who has an actionable claim based on the defendant's conduct or would have a claim if it suffered a loss as a result of that conduct;
- 4) The defendant's conduct results in economic loss to the plaintiff (see *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] S.C.J. No. 12 (S.C.C.) at paras. 5, 23, 24, 26, 28, 37, 42-49, 74, 76).

35 Shaw J. in *AGFA Inc. v. Partners Prepress*, [2006] O.J. No. 3373 (Ont. S.C.J.) observed at para. 36:

The pleading of intentional interference with economic relations is an intentional tort that requires full particulars. As noted in *Lysko v. Braley* (supra), the strict pleading requirements relating to a plea of conspiracy apply equally to a plea of intentional interference with economic relations. The particulars must set out with clarity and precision each of the overt acts which are alleged to have been done in furtherance of the intentional interference with economic relations

36 Rule 25.06(8) requires that where intention is alleged the pleadings must contain full particulars. In the statement of claim it is alleged that the defendants by using confidential information to persuade customers to cancel contracts with OCHS, remained with Direct Energy and to dissuade potential customers from listening to OCHS sales people the defendants used illegal means to intentionally interfere with OCHS's economic interests.

37 In *A.I. Enterprises*, Cromwell J. observed that the tort of causing loss by unlawful means is 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. The conduct would be "unlawful" if it was actionable by the third party or would have been actionable if the third party had suffered loss as a result of the defendant's unlawful act. It is a tort that creates a type of "parasitic" liability in a three party situation. It permits a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Cromwell J. cited, as he described it, an old case as an example at para. 24 of the decision:

The defendant, the master of a trading ship, fired its cannons at a canoe that was attempting to trade with its competitor, the plaintiff's trading ship, in order to prevent it from doing so. The defendant was held liable, Lord Kenyon being of the opinion that these facts supported an action: *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153. The plaintiffs were able to recover damages for the economic injury resulting from the defendant's wrongful conduct toward third parties (the occupants of the canoe) which had been committed with the intention of inflicting economic injury on the plaintiffs.

38 In this situation, the defendants argue that this is not a situation where the actions of the defendants, as alleged, would give rise to a civil cause of action by the third party (the customers) or would do so if the third party (customers) had suffered loss as a result of the conduct.

39 The plaintiff has not alleged facts that would establish wrongful acts were directed against a third party, that the third party as a result of wrongful acts had an actionable claim or would have if it had suffered a loss, or how any wrongful acts directed at the third party, the customers caused a specific or concrete economic loss to the plaintiff.

40 Even accepting that there were wrongful acts committed there is nothing alleged that the third party (the customers) had an actionable cause or would have if it suffered a loss. The only wrongful acts referenced in the statement of claim are alleged to have been directed against OCHS and not third parties (customers). An essential element of the cause of action is lacking. There is no canoe in this claim as counsel for EnerCare aptly put it in submissions.

41 The acts alleged do not support a claim for unlawful interference with economic interest. There is no cause of action pleaded. The cause of action will be struck without leave to amend.

Prejudicial and Irrelevant Allegations

42 In this instance, the corporate defendants seek to have struck paragraphs 4, 16-19 as citing irrelevant allegations. Portions of the claim should be struck for offending Rule 25.11(b) under which a pleading may be struck if it is "scandalous, frivolous or vexatious".

43 In *Rare Charitable Research Reserve v. Chaplin* [2009 CarswellOnt 5530 (Ont. S.C.J.)], [2009] CanLII 49639 D.M. Brown J. stated at para. 22 the following, which is apposite here:

Finally, the facts pleaded in a statement of claim or defence must relate to the elements of the claim or defence. Portions of a pleading that are irrelevant, argumentative, speculative inserted merely for colour, or that constitute bare allegations or unfounded and inflammatory attacks on the integrity of a party are treated as scandalous and struck out under Rule 25.11(b) as offending the basic principles of pleading: *George v. Harris*, [2000] O.J. No. 1762 (SCJ) para. 20. So, too, unnecessary historical recitation which is irrelevant to the cause of action or defence in issue should be struck: *Lac Des Mille Lacs First Nation v. Canada (Attorney General)*, [2002] O.J. No. 1977 (SCJ), para. 51.

The whole point of these restraining rules is to keep pleadings focused on their major purpose - to identify the key issues in dispute and the material facts relating to those issues. Put another way, counsel should strive to write a pleading as a short story, not as an effort to match the length of war and peace.

44 Paragraph 4 alleges a history of the corporate predecessors and various restructurings that led to the current corporate entities, Direct Energy and EnerCare. None of the predecessors are parties to the action. The paragraph is irrelevant and has no connection to the causes of action advanced or relief sought in the statement of claim.

45 Paragraphs 16 and 17 allege that Direct Energy was the subject of anti-competitive proceedings before the Canadian Competition Tribunal which resulted in a consent order that expired in February 2012. The proceedings referenced have been fully resolved and the order therefrom has been spent. The allegations, both temporarily and substantively contained in these paragraphs of statement of claim are entirely irrelevant and disconnected to the claims advanced in the action. It would appear the paragraphs have been included for colour and possibly to undermine the integrity of Direct Energy. In any event, they are irrelevant to the claims asserted.

46 Paragraphs 18 and 19 allege that in February and March 2012 Direct Energy announced that it would unilaterally change the terms and conditions of its hot water rental contracts but then abandoned the plan and faced negative public and media reaction. These allegations, in the context of the claims advanced in the action are entirely irrelevant. They appear as well to have been inserted to cast Direct Energy in an unfavourable light and attack its integrity.

47 I do not accept submissions of plaintiff's counsel that paragraphs 4 and 16-19 are necessary background to the claims advanced. They amount to an unnecessary historical recitation irrelevant to the causes of action and will be struck.

Trespass to Property (Chattels and Land)

48 The plaintiff's claim with respect to trespass to property and land is set out at paragraph 34: "In order to install the GPS tracking devices used to obtain the confidential information, the defendants must have trespassed onto OCHS's property."

49 Simply put the plaintiff's claim is that the defendants attached GPS tracking devices surreptitiously to a number of its vehicles and obtained information therefrom.

50 In *Hudson's Bay Co. v. White*, [1997] O.J. No. 307 (Ont. Gen. Div.) Lederman J. at para. 8 referenced the criteria necessary for trespass to chattels:

In Clerk and Lindsell on Torts, 17th ed. (London: Sweet and Maxwell, 1995), at p. 705, the authors define trespass to chattels, or "trespass to goods", as being concerned with "the direct, immediate interference with the plaintiff's possession of a chattel". Halsbury's offers a similar definition at Vol. 45, para. 1491: "Trespass to goods is an unlawful disturbance of the possession of goods by seizure or removal, or by a direct act causing damage to the goods".

51 The defendants' position with respect to trespass to property (chattels) is that the statement of claim does not contain an allegation that the devices found on the plaintiff's motor vehicles interfered with the plaintiff's possession or use of those motor vehicles.

52 With respect to the claim of trespass to land Lederman J. in *Hudson's Bay* at para. 9 states as follows:

Clerk and Lindsell define trespass to land, at p. 837, as consisting of "any unjustified intrusion by one person upon land in the possession of another". Halsbury's, Vol. 45, para. 1384 states that "every unlawful entry by one person on the land in possession of another is trespassed for which an action lies...

53 The elements for the claim of trespass to land are set out by Crane J in *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (Ont. S.C.J.) at para.86:

The elements of trespass have been described as follows:

- Any direct and physical intrusion onto land that is in the possession of the plaintiff, (indirect or consequential interference does not constitute trespass).
- The defendant's act need not be intentional, but it must be voluntary.
- Trespass is actionable without proof of damage.
- While some form of physical entry onto or contact with the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto the plaintiff's land can constitute trespass.

54 The parties referred to a number of trespass cases involving a wide variety of circumstances, such as a motor vehicle towed and impounded, *McGrath's Auto World Inc. v. Primus Automotive Financial Services Canada Co.*, [2010] O.J. No. 436 (Ont. S.C.J.); a vessel that sank after being attached (moored) to the plaintiff's property preventing its movement and use, *North King Lodge Ltd. v. Gowlland Towing Ltd.*, [2005] B.C.J. No. 2485 (B.C. C.A.); a trespass that involved in part the depositing of a dead coyote on the hood of an owner's truck, *Fitzpatrick v. Orwin*, [2012] O.J. No. 2731 (Ont. S.C.J.).

55 However, neither party presented cases in which the interference alleged involved the placement or insertion of GPS tracking devices, which is not in and of itself indicative that it is plain and obvious that the claim must fail. Rather, in my view, it tends to lend itself to an acceptance that there is a novel aspect to the claim, even if the attachment or insertion of the device did not prevent use or movement of the vehicles, and *de minimus* damage. If proved it amounts to an intrusion and direct interference with the plaintiff's property nonetheless.

56 In *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), 120 A.R. 241 (Alta. C.A.) at p.259 the Alberta Court of Appeal stated actual damage is not required:

Moreover, to recover damages for trespass to goods, a plaintiff is not required to prove actual damage: *Leitch and Co. v. Leydon*, [1931] A.C. 90, at 106 (HL). Liability flows from the act of trespass. G.H.L. Fridman, Q.C., in the Law of Torts in Canada, Vol. 1, at 7 (Toronto: Carswell, 1989), explains this principle in this way:

Trespass in all its forms is actionable per se, i.e. without the need for the plaintiff to prove he has sustained actual damage... [t]he absence of any requirement that damage must be shown before an action will lie is an important hallmark of trespass as contrasted with other torts. Torts which are actionable per se such as trespass attract damages at large.

57 There are material facts alleged that the corporate defendants had knowledge of and involvement with the tracking devices, thereby meeting at a minimum the requirements of pleading trespass to chattels.

58 The trespass to land pleading is speculative, as evidenced by use of the phrase "the defendants must have trespassed onto OCHS's property" and is thereby deficient. The trespass to land pleading is struck. However, leave is granted to amend. The plaintiff should be given the opportunity to amend that aspect of the pleading by providing particulars.

Misappropriation of Confidential Information (Breach of Confidence)

59 In paragraph 34 of the statement of claim it is alleged that the defendants by improperly tracking OCHS's vehicles misappropriated OCHS's confidential information to OCHS's detriment.

60 In *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.) at para. 17 the Court of Appeal stated that a claim for breach of confidence requires proof of three elements:

1. The information conveyed was confidential,
2. The information was conveyed in confidence, and
3. The confidential information was misused by the party to whom it was communicated to the detriment of the confider. (See also *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.)).

61 The position of the defendants is that the information as to where the plaintiff's motor vehicles attended and how long the vehicles were at specific locations was not confidential information. Rather, counsel submits it was public information, in the sense that the vehicles operated on public streets and attended openly to various locations. Anyone following the vehicles would have been able to obtain the information. Counsel contends that the threshold requirement that the information is confidential has not been met.

62 The plaintiff contends that it is not public information. The information that was surreptitiously acquired was the information that identified its customers, potential customers and their residential locations, all of which was information conveyed to their drivers in confidence. It is alleged that the defendants misused the information to the plaintiff's detriment.

63 In *B.W. International Inc. v. Thomson Canada Ltd.*, [1996] O.J. No. 2697 (Ont. Gen. Div.) at para. 16 Kiteley J. referenced the description of the cause of action of a claim for breach of confidence as stated in *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), [1963] 3 All E.R. 413 (note) (Eng. C.A.) as follows:

If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

64 In this instance, the facts presumed to be true are that the defendants obtained confidential information surreptitiously after which the plaintiff's contract sales declined to its detriment. If proved, intrusive and unseemly means of espial were employed to obtain information at the expense of the plaintiff.

65 In my view, reading the statement of claim generously and as a whole it is not plain and obvious that the claims of trespass to chattel and breach of confidence are doomed to fail. As such those causes of action shall not be struck.

Individual Defendants

66 The individual defendants, Tom Cooper, Patricia Carraretto, Stephen Wells, Shannon Miranda, and Tanya Faulds submit that a \$10,000,000 against them personally is frivolous and vexatious. In order for an employee or officer of a corporation to be found personally liable, there must be specific allegations of material fact that would support a finding of individual liability. The leading case is *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) [hereinafter *People's Jewellers Ltd.*] in which the Court of Appeal explained:

The decided cases in which employees and officers and companies have been found personally liable for actions ostensibly carried out under a corporate name are fact specific. In the absence of findings of fraud, deceit, dishonesty or wanton authority on the part of the employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff...additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

(Emphasis added)

67 Also, where a plaintiff asserts personal liability of an individual defendant there is a heightened onus at the pleading stage. In *Tran v. University of Western Ontario*, [2014] O.J. No. 407 (Ont. S.C.J.) E.M. Morgan J. noted at para. 16 the following:

[D]espite the fact that the onus in a Rule 21 motion is on the moving party to demonstrate that it is "plain and obvious" the claim must fail, *Hunt v. T&NPLC*, [1990] CanLII 90 (SCC), [1990] 2 SCR 959, at para. 36, a party who pleads personal liability against the employees of a corporate defendant with which he has had dealings must satisfy a rather stringent test. As the Prince Edward Island Court of Appeal put it in *Kay Aviation v. Rofe* (2001), 2002 DLR (4th) 683 at para. 25, "[t]he minimum level of material facts in a statement of claim founded on causes of action against an officer, director or employee of a corporation with whom the plaintiff has contracted is very high.

68 In order to give rise to personal liability the factual underpinnings to the claim must be specifically and sufficiently pleaded.

69 In this matter, none of the individual defendants are alleged to have exhibited a separate identity or interest beyond their role as employee or director of the corporate defendants. There are no allegations in the statement of claim that any of the individual defendants engaged in any acts or conduct other than that said to have been done in their roles as employees or directors of the corporate defendants. There is no allegation that any of them acted outside the scope of his or her authority.

70 It would appear, as noted in the circumstances of *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div. [Commercial List]) that asserting a claim in the amount of \$10,000,000 in which the individual defendants would be jointly and severally liable amounts to either tactical harassment or an inappropriate attempt to get discovery of senior personnel possibly for an impermissible fishing expedition. The claims of personal liability against the individual defendants are an abuse of process.

71 The claims against all of the individually named defendants shall be struck.

Conclusion

72 In summary:

- 1) The claim of civil conspiracy is struck due to the deficiencies in pleading the requisite elements, with leave to amend by providing particulars.
- 2) The claim of intentional interference with economic interests is struck as disclosing no cause of action, with leave to amend denied.
- 3) All claims against the individual defendants are struck for failing to plead any material facts that the individual defendants committed acts or that their conduct was "tortious or exhibited a separate identity or interest from that of the company so as to make the act or conduct complained of their own".
- 4) Paragraphs 4 and 16-19 in the statement of claim are hereby struck as unnecessary to the narrative or providing context for the claims asserted and as irrelevant.
- 5) The claim of trespass to land is struck, with leave to amend to provide particulars.
- 6) It is neither plain nor obvious that the claims of trespass to property (chattels) and breach of confidence are doomed to fail, requiring the plaintiff to be driven from the judgment seat.

73 In that the results are divided on the motion I make no order as to costs as between the plaintiff and corporate defendants. However, costs are awarded to the individual defendants against whom all claims are struck.

74 If the parties are unable to agree as to costs then submissions may be made no more than four pages in length together with the bill of costs within 15 days of the release of the judgment and the response no later than 15 days thereafter.

Motion granted.

2010 ONSC 2441
Ontario Superior Court of Justice

Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.

2010 CarswellOnt 3311, 2010 ONSC 2441, [2010] O.J. No. 2060

Hostmann-Steinberg Limited (Plaintiff) and 2049669 Ontario Inc., Prografix Inc., Narendra Patel, also known as Andy Patel, Najib Jamal, Sulekha Patel and Nikita Patel (Defendants)

Romain Pitt J.

Heard: April 12, 2010
Judgment: May 12, 2010
Docket: CV-08-00363144

Counsel: David Preger for Plaintiff
Robert W. Wilson for Defendants

Romain Pitt J.:

Facts

1 In September 2008, the plaintiff commenced an action against the Jamal defendants (2049669 Ontario Inc., Profix Inc. and Najib Jamal), Andy Patel, Patel's wife and his daughter, alleging conspiracy and fraudulent conveyances with the intent of making certain assets unavailable to satisfy the plaintiff's judgment against them. In his endorsement dated July 9, 2009, Justice Strathy found the statement of claim to be deficient in several key respects:

- Contained irrelevant facts
- Contained evidence contrary to rule 25.06(1)
- With respect to the fraudulent conveyance claim,
 - Failed to plead that the plaintiff will be defeated, hindered, delayed or defrauded
 - Failed to plead sufficient facts
- Failed to provide particulars of the alleged conspiracy

2 He struck the statement of claim with leave to amend to enable the plaintiff to plead all the necessary ingredients of the causes of action and to give full particulars. On December 17, 2009, the plaintiff delivered an amended statement of claim, which the defendants contend not only fails to rectify the deficiencies that troubled Justice Strathy but contains new shortcomings. The defendants want this Court to strike the amended statement of claim without leave to amend. The defendants' motion to remove the plaintiff's solicitor as solicitor of record having been withdrawn, the only issue I am required to determine is whether the amended statement of claim satisfactorily addresses the defects in the original statement of claim identified by Justice Strathy, and if it does not, whether or not another amendment should be allowed.

Analysis

Has the plaintiff rectified the inadequacies in its original pleading?

3 The plaintiff has properly expunged the irrelevant facts and evidence from its pleading. However, its conspiracy claim continues to suffer from the defects identified by Justice Strathy. Likewise, the pleading of fraudulent conveyance remains inadequate in that it does not plead 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.

4 In order to respond to the case against it, a defendant is entitled to know the material facts upon which the plaintiff relies for each specific claim. This is one of purposes underlying the material fact pleading rule, namely rule 25.06(1). In *Cohen v. Cambridge Mercantile Corp.*, [2007] O.J. No. 2305 (Ont. S.C.J.) at para. 22, Justice Brown observed:

To satisfy this rule a plaintiff must make some effort to link particular material facts pleaded with a particular claim asserted. It is not sufficient to say to a defendant, "Here is my claim; you can find the relevant material facts pleaded somewhere in the rest of my pleading; go find them".

Under this rule and rule 25.11, facts or allegations in a pleading that are immaterial or irrelevant to the issues in the action should be struck out: see e.g. *Chopik v. Mitsubishi Paper Mills Ltd.* (2002), 26 C.P.C. (5th) 104 (Ont. S.C.J.).

5 At paragraph 37 of his endorsement, Strathy J. identified a number of paragraphs in the original pleading that are wholly irrelevant to the issues in the action. The plaintiff has properly deleted the offending paragraphs in its amended statement of claim.

6 At paragraph 33 of the amended statement of claim, the plaintiff alleges that representatives of 1627880 Ontario Inc. have been uncooperative with the trustee-in-bankruptcy in its bankruptcy proceedings. The plaintiff has made no attempt to link this fact to either the conspiracy claim or the fraudulent conveyance claim. This paragraph was obviously added for "colour" and serves no other purpose. As such, it must be struck.

7 Justice Strathy found the original pleading to be replete with evidence in violation of rule 25.06(1). The amended statement of claim is cleansed of evidence.

8 In *Balanyk v. University of Toronto*, [1999] O.J. No. 2162, 88 A.C.W.S. (3d) 1157 (Ont. S.C.J.), Justice Cameron summarized the principles to be borne in mind in adjudging the adequacy of pleadings:

The plaintiff must plead all the material facts on which it relies and all of the facts which it must prove to establish a cause of action which is legally complete. If any fact material to the establishment of a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars. If the plaintiff does not, at the time of pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim. It is improper to allow conclusions to be pleaded baldly and without any supporting facts: see *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750.

A pleading should be read generously, with the foregoing principles in mind, so as to not unfairly deny a party the benefit of the pleading: see *Doe v. Metropolitan Toronto (Municipality) (Commissioners of Police)* (1990), 74 O.R. (2d) 225.

9 When fraud or intent is alleged, the pleadings must disclose full particulars, as required by rule 25.06(8). In *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (Ont. Master), Master Sandler described particulars as "additional bits of information, or data, or detail, that flesh out the material facts, but they are not so detailed as to amount to evidence." Particulars can be obtained by a party under Rule 25.10, if the party swears an affidavit showing that the particulars requested are necessary to enable him/her to plead over and are not within his/her knowledge.

10 Section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, sets out the elements that must be established to void a transaction as a fraudulent conveyance. There must have been a conveyance of real or personal property of the

debtor made with the intent to defeat, hinder, delay or defraud creditors or others. See *J.G. Young & Son Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 (Ont. S.C.J.) at para. 21.

11 A proper plea of fraudulent conveyance would provide material facts and sufficient *particulars going to each of these elements*.

12 The original statement of claim alleges that "Patel has conveyed his interest in [Prografix], the Parkshore Property and the Palace Property with the intent to defeat, hinder, delay or defraud his creditors and that such conveyances are void as against the Plaintiff, pursuant to the *Fraudulent Conveyances Act*." It discloses no details of the impugned conveyances, save for the blanket statements that "on the [*sic*] September 2, 2004 in the midst of the HST Action, the Defendant Patel transferred his interest in the Palace Property, to his daughter for no apparent consideration," and "[Prografix] has obtained in some manner, the assets of 1627880 Ontario Inc. [former operating entity of Prodigy Graphics] and had taken over the business undertakings of 1627880 Ontario Inc. and now conducts business under the same name formerly utilized by 1627880 Ontario Inc., namely Prodigy Graphics". Justice Strathy found the fraudulent conveyance plea to be nothing more than a conclusory allegation unsupported by material facts.

13 In the amended statement of claim, the plaintiff added the following to shore up the general allegation:

- "Patel has conveyed his interests in the Defendants [Prografix] and [2049669 Ontario Inc.] *without consideration or for nominal consideration to the Defendant Jamal or other third parties* and has conveyed his interest in the Palace Property *without consideration or for nominal consideration to the Defendant Nikita Patel* with the intent to defeat, hinder, delay or defraud his creditors contrary to the provisions of the *Fraudulent Conveyances Act*..." (para.18)
- "At all material times, the Defendant Patel held directly or indirectly ownership interests in the corporate entities that presently comprise Prodigy Graphics, namely, the Defendants [Prografix] and [2049669 Ontario Inc.]" (para. 16)
- "The Defendant Jamal and or other third parties have and continue to hold the Defendant Patel's interest in the corporate entities that presently comprise Prodigy Graphics, namely the Defendants [Prografix] and [2049669 Ontario Inc.] and the Parkshore Property, in trust and/or for the benefit of the Defendant Patel" (para. 19)
- Patel has conveyed his interest in the Defendants [Prografix] and [2049669 Ontario Inc.], the Parkshore Property and the Palace Property with the intent to defeat, hinder, delay or defraud his creditors..." (para. 39)

14 In my view, the plaintiff has not alleged, with clarity and specificity, facts to support all of the elements necessary to found a claim under the *Fraudulent Conveyances Act*. No specifics of the conveyances - e.g., the nature of Patel's alleged interests, the steps taken by Patel to divest himself of those interests - have been provided. Equally obscure is the identities of the transferees of Patel's assets. The question is, has there been a conveyance or not? A conveyance is a constitutive element of a cause of action under the *Fraudulent Conveyances Act*; failure to plead it clearly is fatal. If there has been such a conveyance it must be pleaded.

15 Justice Strathy also took note of the absence of a plea that the plaintiff will be defeated, hindered, delayed or defrauded. In response, the plaintiff amended its pleading to add that "as result of the actions of the Defendants, as aforesaid [*sic*] the Plaintiff has been deprived of its entitlement to realize on the HST Judgement" (para. 41). The plaintiff has done this notwithstanding that the prejudicial effect on a specific creditor's claim is not an essential element of a fraudulent conveyance claim.

16 I am not convinced that the authorities relied upon by the defendants - *Runnymede Investment Corp. v. Mack Trucks of Canada Ltd.*, 1970 CarswellOnt 79 (Ont. S.C.) at para. 3 and *Barnett v. Price*, 1999 CarswellOnt 4824 (Ont. S.C.J.) at para. 5 - stand for the proposition that a proper pleading of fraudulent conveyance must allege that the plaintiff will be defeated, hindered, delayed or defrauded. In any event, the plaintiff has amended its pleadings in response to Justice Strathy's concern; this ought to be seen as indicative of its determination to comply with the Court's order.

17 Justice Strathy struck out the plaintiff's conspiracy claim because it failed to satisfy the requirements for a proper pleading of conspiracy as set out in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at 104. For ease of reference, the passage from *Normart Management* that was quoted in Justice Strathy's endorsement reads:

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.

18 In the original statement of claim, the parties are described as is their relationship with each other. The agreement to conspire is alleged, albeit implicitly by the assertion that "the defendants entered into a scheme." The purpose of the conspiracy - to move Patel's assets out of the plaintiff's reach for seizure under execution - is also set out. While there is no express allegation of actual damage suffered by the plaintiff, this is deducible from the pleaded fact that plaintiff has a judgment against the defendants that remains unsatisfied. What is missing is a description of the overt acts that are alleged to have been done by each of the alleged conspirators.

19 In an effort to mend this flaw, the plaintiff amended its statement of claim to include the following:

- "In pursuance of the scheme and conspiracy, the Defendant Patel has conveyed his interests in the Defendants [Prografix] and [2049669 Ontario Inc.] without consideration or for nominal consideration to the Defendant Jamal or other third parties and has conveyed his interest in the Palace Property without consideration or for nominal consideration to the Defendant Nikita..." (para. 18)
- "...at a time not within the knowledge of the Plaintiff but fully within the knowledge of the Defendants, the Defendant Patel left Canada and became a resident of the Republic of India. The Defendant Patel's exact residence is unknown. In furtherance of the scheme and conspiracy, the Defendant Patel left Canada in order to avoid creditors including, [sic] the Canada Revenue Agency and the Plaintiff." (para. 20)
- "In furtherance of the scheme and conspiracy, the Defendant [Prografix] has obtained in some manner, the assets of 1627880 Ontario Inc. and had taken over the business undertakings of 1627880 Ontario Inc. and now conducts business under the same name formerly utilized by 1627880 Ontario Inc., namely Prodigy Graphics (the "Transfer")." (para. 21)
- "The particulars of the Transfer are not within the knowledge of the Plaintiff and are fully within the knowledge of all or some of the Defendants." (para. 22)
- "In furtherance of the scheme and conspiracy, the Parkshore Property is or has been listed for sale pursuant to a MLS listing..." (para. 34)
- "In furtherance of the scheme and conspiracy, Patel with the assistance and cooperation of some or all of the other Defendants has made it appear that he has no present business interests and has severed all his personal and family relationships in Canada, notwithstanding that he continues to have business interests in Canada as set out herein and continues to maintain a personal relationship with his wife and daughter, the Defendants Suklekha Patel and Nikita Patel." (para. 35)
- "In furtherance of the scheme and conspiracy, Patel with the assistance and cooperation of some or all of the other Defendants has made it appear that he does not travel to Canada when in fact he does travel to Canada from time to time and enters and leaves Canada in a circuitous manner." (para. 36)

20 While the amended plea of conspiracy possesses more specificity than the original considered by Justice Strathy, it still does not meet the degree of clarity and precision required of a conspiracy pleading as enunciated in *Normart Management*. The plaintiff cannot just state that some or all of the defendants did something together, without attributing specific acts to specific defendants. Any given defendant would not be able to know from the face of the pleading what it is that he/she/it has done to make it appear that Patel has no present business interests in, and familial ties to, Canada. There are also no particulars provided as to the who, when, and what of the impugned transfer. It is not appropriate for the plaintiff to say that the particulars are within the defendants' knowledge and to await discovery to assemble the ingredients for a proper plea. Justice Cameron's directive in *Balanyk v. University of Toronto*, *supra* at para. 29 is resoundingly on point: "If the plaintiff does not, at the time of pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim."

Accordingly, the conspiracy claim must be struck.

Should another amendment be permitted?

21 In *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456 (Ont. C.A.), the Court of Appeal found that the motion judge rightly struck the bank's amended third party claim for want of particulars but should have given the bank another chance to cure the failing. The Court stated at para. 6:

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.

This is consistent with the customary practice of this court to permit amendment, and re-amendment if necessary, where the defects are corrigible: see e.g. *Kang Corp. v. KRIT Group Ltd.*, [2007] O.J. No. 1500 (Ont. C.J.); *Air Canada v. WestJet Airlines Ltd.*, [2004] O.J. No. 5627 (Ont. S.C.J.).

22 With this in mind, I am of the view that the draconian measure of striking the plaintiff's amended pleading without leave to amend - the practical effect of which would be to minimize the plaintiff's chances of collecting on its HST judgment - is not warranted. The plaintiff has tried to respond to all four categories of defects identified by Justice Strathy and has succeeded partially: the irrelevant facts and evidence have been removed, and some material facts have been added to ground its fraudulent conveyance and conspiracy claims. Moreover, the defendants have not said they would be prejudiced should leave to re-amend be granted, and I am not persuaded they would suffer any prejudice. The annoyance posed by a continuing lawsuit is not a legitimate prejudice.

23 I am allowing the plaintiff one last opportunity to provide further facts and particulars of its fraudulent conveyance and conspiracy claims, and to correct any other shortcomings I have noted. Having so ruled, fairness dictates that the defendants should not have to wait for an undefined period for a fresh pleading. The plaintiff has leave to amend its amended statement of claim within 30 days from the date hereof.

Costs

24 In the prior proceeding Justice Strathy set aside the *ex parte* relief granted to the plaintiff, for lack of full and fair disclosure, and imposed a significant cost award against the plaintiff.

25 As a result of the findings of lack of full and fair disclosure made by Justice Strathy, the defendants sought to remove the plaintiff's original solicitor as solicitor of record. Both the pleadings motion and the removal motion were dealt with by plaintiff's new counsel. It is fair to say that the latter motion would have been of real significance to the plaintiff and its original lawyer. The defendants abandoned the removal motion at the hearing before me. There was no authority offered to support the removal motion, and I think it was appropriate to abandon it.

26 With respect to the pleadings motion, it was conceded by the plaintiff that there was delay in approving the order reflecting the reasons of Justice Strathy, and in paying the costs award.

27 The defendants were successful in the pleading motion, although I found that the plaintiff has partially addressed the defects in the original Statement of Claim. In a sense, therefore, both parties had some success. If the defendants had not brought the removal motion, I would have been inclined to grant costs to the defendants who had greater success in the pleadings motion.

28 I find that the removal motion detracted from the defendants' success in the pleadings motion as there appeared to be some element of overreaching in the removal motion, which as I noted had to be abandoned.

29 In the result, I find this to be an appropriate case to order no costs.

2012 ONSC 2744
Ontario Superior Court of Justice

Martin v. Astrazeneca Pharmaceuticals PLC

2012 CarswellOnt 6210, 2012 ONSC 2744, [2012] O.J. No. 2033, 216 A.C.W.S. (3d) 294, 27 C.P.C. (7th) 32

Joanne Martin, Corrine Middleton, Bernard Van Kerrebroeck, and Don Martin, Plaintiffs and Astrazeneca Pharmaceuticals PLC, Astrazeneca Pharmaceuticals, LP and Astrazeneca Canada Inc., Defendants

C. Horkins J.

Heard: November 23-25, 28-29, 2011

Judgment: May 7, 2012^{*}

Docket: 06-CV-314632CP

Proceedings: additional reasons at *Martin v. Astrazeneca Pharmaceuticals PLC* (2012), 2012 ONSC 4666, 2012 CarswellOnt 9934 (Ont. S.C.J.)

Counsel: James C. Orr, Megan B. McPhee, Ahmad Erfan, for Plaintiffs
Frank J. McLaughlin, Sarah Chesworth, Brandon Kain, for Defendants

C. Horkins J.:

Introduction

1 This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*").

2 The focus of this action is a drug called Seroquel and health risks that it is alleged to cause. Seroquel, also called quetiapine, is an antipsychotic medication that Health Canada has approved for use in the treatment of schizophrenia, the acute management of manic episodes with bipolar disorder and the acute management of depressive episodes associated with bipolar I and bipolar II disorder ("approved uses").

3 Seroquel is also used to treat anxiety, sleep disorders, depression and dementia-related psychosis. These are known as off-label uses that Health Canada does not approve.

4 The plaintiffs allege that the defendants designed, developed, manufactured and sold Seroquel for approved and "off-label" uses and are responsible for the health risks that the drug causes.

5 The plaintiffs seek to certify this action on behalf of a class consisting of "all persons in Canada who were prescribed and who consumed Seroquel."

Overview of the Pleadings and Certification Motion

6 This action was commenced over five years ago. There have been several amendments to the statement of claim. On this motion, the defendants consented to the "Second Amended Fresh as Amended Statement of Claim" (the "statement of claim"). This amendment was required to remove Bernard Van Kerrebroeck as a representative plaintiff because he no longer wishes to act in this role. The defendants filed a statement of defence to an earlier version of the statement of claim.

7 The statement of claim alleges that the plaintiff Joanne Martin was prescribed Seroquel in September 2005 as treatment for bipolar disorder. Ms. Martin consumed up to 600 mg of Seroquel on a daily basis for approximately 1 year, at which point she stopped consuming Seroquel. While taking Seroquel, Ms. Martin alleges that she experienced side effects, including significant weight gain (approximately 55 pounds) and problems with her balance which caused her to fall down frequently. After she stopped taking Seroquel, Ms. Martin pleads that she was able to lose a portion of the weight that she had gained and no longer experienced difficulties maintaining her balance. The plaintiff Don Martin is Joanne Martin's husband. He asserts a claim on behalf of all Family Law Act claimants.

8 The statement of claim alleges that the plaintiff Corrine Middleton was prescribed Seroquel in June 2005 to treat stress and obsessive compulsive behavior. This was an off-label use. Ms. Middleton consumed up to 175 mg of Seroquel daily, for approximately 6 months, at which point she stopped consuming Seroquel. While taking Seroquel, Ms. Middleton alleges that she experienced side effects, including significant elevated blood sugars and weight gain (approximately 25 pounds), neuropathy, hyperglycemia, loss of energy, increased thirst, numbness in her hands and feet, and soreness in her feet. In addition, Ms. Middleton states that she was diagnosed with diabetes in or about November 2005. Ms. Middleton had tested negative for diabetes in October 2003. After she stopped consuming Seroquel, Ms. Middleton was able to lose a portion of the weight that she had gained as a result of taking Seroquel.

9 The plaintiffs allege that Seroquel causes health risks that are described in para. 20 of the statement of claim as follows:

Seroquel causes serious and sometimes fatal injuries to the liver, kidneys and pancreas. Its adverse effects include, but are not limited to, ketoacidosis, pancreatitis, diabetes mellitus, weight gain, impaired glucose regulation, hyperglycemia, blindness, cataracts, increased thirst and hypoglycemia. Other serious injuries include a potentially fatal condition referred to as neuroleptic malignant syndrome (NMS), tardive dyskinesia, which can cause potentially irreversible, involuntary movements and other serious health problems associated with the onset of diabetes including heart disease, blindness, coma, seizures and death.

10 Further it is alleged in para. 22 of the pleading that the "specific risk associated with Seroquel and the new onset of diabetes is nearly 3.34 times higher than older drugs used to treat schizophrenia" and that "Seroquel has a much greater increased association with the onset of diabetes mellitus than any other anti-psychotic on the market."

11 The plaintiffs allege that the group of AstraZeneca companies are jointly responsible for all health risks associated with Seroquel and the damages that the plaintiffs and putative class have suffered. It is alleged that the defendants designed, developed, manufactured, promoted, distributed and sold Seroquel in Canada for the approved uses. It is also alleged that that they heavily marketed Seroquel for off-label uses.

12 The plaintiffs allege in para. 21 of the pleading that the product warnings for Seroquel were "vague, incomplete or otherwise wholly inadequate, both substantively and graphically, to alert prescribing physicians as well as consumer patients of the actual Health Risks associated with consuming Seroquel."

13 Further, the plaintiffs allege that the defendants conspired and agreed together to submit false, inaccurate, incomplete, and misleading information to Health Canada and the FDA, conceal the Health Risks associated with the consumption of Seroquel, mislead the putative class members, health care providers and others about the safety and efficacy of Seroquel, delayed the amendment of package inserts and core data sheets to include warnings about the Health Risks associated with the consumption of Seroquel and engaged in a marketing campaign promoting the safety of Seroquel for off-label use, including use as a sleep aid and to treat anxiety, dementia-related psychosis and depression.

14 The respective roles of the defendants are set out in the statement of defence. AstraZeneca plc is incorrectly named by the plaintiffs as "AstraZeneca Pharmaceuticals plc." AstraZeneca plc is a public limited company organized under the laws of England and Wales, with its registered office located in London, England. AstraZeneca plc was formed in 1999 following a merger between Zeneca Group plc and Astra AB (this defendant is referred to as "AZ UK").

15 AstraZeneca plc is a holding company that indirectly owns 100% of AstraZeneca Canada Inc. ("AZ Canada") and AstraZeneca Pharmaceuticals LP ("AstraZeneca Pharmaceuticals"). AstraZeneca plc does not carry on business in Canada and did not at any material time manufacture, package, label, test, study, store, market, sell and/or distribute Seroquel for use in Canada.

16 AstraZeneca Pharmaceuticals ("AZ US") is an American company carrying on business as a Delaware limited partnership with its principal place of business in Wilmington, Delaware, U.S.A. AstraZeneca Pharmaceuticals is a brand name pharmaceuticals company that develops and manufactures prescription medicines in a number of therapeutic areas.

17 AZ US, *inter alia*, manufactures, packages, labels, tests, studies, stores, markets, sells, and/or distributes Seroquel for prescription by licensed physicians throughout the United States pursuant to approval by the United States Food and Drug Administration (the "FDA"). AZ US does not carry on business in Canada.

18 AZ Canada is an Ontario corporation carrying on business in Mississauga, Ontario. AstraZeneca Canada is a brand name pharmaceuticals company that develops prescription drugs in a number of therapeutic areas. Amongst other things, AstraZeneca Canada imports, packages, labels, tests, studies, stores, markets, sells, and/or distributes Seroquel for prescription by licensed physicians throughout Canada pursuant to approval by Health Canada.

19 AZ Canada has no authority to act as the agent for AZ UK or any subsidiary of AZ UK, including AZ US.

20 The statement of defence describes the development of Seroquel, its approved uses and the product warnings (what is known as the "product monograph"). In great detail, the defendants deny the allegations against them. They plead that they complied with all Health Canada requirements affecting Seroquel and that Seroquel is a safe and effective drug used to treat approved illnesses. Further, they deny that they marketed Seroquel for any off-label uses.

The Evidence

21 Before reviewing the evidence, it is important to note the purpose of evidence on a certification motion. Evidence explains the background to the action. A certification motion is not the time "to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight": *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.) at para. 50 ("Cloud").

22 Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would fall to be determined at a trial when the merits of the claims of class members are in issue: see *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 82, leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.) ("Lambert").

23 A plaintiff's evidentiary burden on a certification motion is low and the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1) (b) to (e) of the test for certification as a class action: see *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 16-26 ("Hollick"); *Lambert* at paras. 56-74 (S.C.J.); *Cloud* at paras. 49 - 52 (C.A.); *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (Ont. S.C.J.) at para. 21; *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.) at paras. 13-14, leave to appeal ref'd [2009] O.J. No. 4129 (Ont. Div. Ct.) ("LeFrancois"); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (N.L. C.A.) ("Ring").

24 A defendant is entitled to deliver evidence in rebuttal, but the standard of proof on the defendant is inversely heavy. On a certification motion, it is not enough for the defendant to establish on a balance of probabilities that the facts differ from those asserted by the plaintiff. Rather the onus is to show that there is no basis in the evidence for the facts asserted by the plaintiff. Evidence directed at the merits of the action may be admissible if it also bears on the requirements for certification. In determining the weight to be given to the defendant's rebuttal evidence, it is not the

function of the court at the certification stage to decide factual issues in the same manner, and to the same extent, as when the court exercises its function as a trier of fact in the exercise of its ordinary jurisdiction: see *Lambert* at paras. 68-69.

25 While the evidentiary threshold for meeting the statutory criteria is low, the court has a gatekeeper function and it must consider all of the admissible evidence and decide if the s. 5 criteria are satisfied. Evidence tendered on a motion for certification of a class proceeding must meet the usual criteria for admissibility: see *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488 (B.C. C.A.), at para. 31 ("*Ernewein*"), leave to appeal to SCC dismissed, (2006), [2005] S.C.C.A. No. 545 (S.C.C.); see also *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276 (Ont. S.C.J.), at paras. 49-50 ("*Singer*"); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (Ont. S.C.J.), ("*Schick*").

Sources of Evidence

26 The parties filed extensive affidavit evidence. The plaintiffs each filed an affidavit as did Victoria Paris, a lawyer with the class counsel team. The plaintiffs also filed affidavits from two experts: Dr. William C. Wirshing and Dr. Laura M. Plunkett.

27 Dr. Wirshing is a psychiatrist, the Vice President of research and continuing medical education at Exodus Inc. in Culver City, CA; Clinical Director of Exodus Real Recovery in Westlake Village, CA; Medical Director of Psychological Care and Healing in West Los Angeles, CA; and an Adjunct Professor of Psychiatry at the Keck School of Medicine at the University of Southern California in Los Angeles, CA. He has considerable experience treating patients who suffer from various mental illnesses. This experience includes many years of treating patients with a variety of medications including Seroquel. His affidavit replies to the defendants' expert opinions that deal with the alleged relationship between Seroquel and metabolic disorders, and related issues.

28 Dr. Plunkett is a pharmacologist, toxicologist, United States Food and Drug Administration regulatory specialist and principal of a consulting company called Integrative Biostrategies, LLC. Integrative Biostrategies is a Houston-based consulting firm that works at the interface of biological science, regulatory affairs and business decisions to provide its clients with science-based solutions to issues associated with product development and stewardship. Before joining Integrative Biostrategies in 2001, Dr. Plunkett was the head of a consulting firm called Plunkett & Associates. Dr. Plunkett is board-certified as a Diplomate of the American Board of Toxicology. She has over twenty years of experience in the areas of pharmacology and toxicology, has worked in both government and academic research and has taught pharmacology and toxicology at the undergraduate and postgraduate levels.

29 Dr. Plunkett offers her opinion on whether use of Seroquel is causally associated with adverse metabolic effects and whether the Canadian labelling contained appropriate warnings based on what was publically known about the potential metabolic side-effects of Seroquel.

30 The defendants filed affidavit evidence from five experts: Dr. Barry Arnold, Dr. Eugene Barrett, Dr. Pierre Chue, Dr. Gwenderlyn Jansz and Anne Tomalin. They also filed a solicitor's affidavit from Katherine Stubits.

31 Dr. Arnold was responsible for Drug and Patient Safety at AstraZeneca from October 1992 to June 2006. Since 2006, in his current role as European Union Qualified Person for Pharmacovigilance, he has continued to be actively involved in the defendants' safety surveillance and evaluation programs for Seroquel. Dr. Arnold was integral in developing and implementing the safety surveillance procedure detailed in his affidavit. His affidavit also speaks to the pharmacovigilance the defendants have engaged in with respect to Seroquel over the years and addresses some of the issues raised in Victoria Paris's affidavit.

32 Dr. Barrett is an endocrinologist and a professor at the University of Virginia. He chaired the November 2003 Consensus Conference on the relationship between second generation antipsychotics and obesity, diabetes, and lipid disorders. His affidavit reviews his opinion on the lack of a causal relationship between Seroquel and diabetes. It also

addresses the nature of the analysis that would have to be done to determine "general causation" and individual injury causation for diabetes and weight gain.

33 Dr. Chue, a Canadian psychiatrist with considerable experience in the field of atypical antipsychotics, and Dr. Jansz, a family physician experienced in the treatment of mentally ill patients, provide evidence that address the role of Seroquel in treating mentally ill patients, the analysis in relation to "general causation" and individual injury causation, and address issues relating to the duty to warn and informed consent.

34 Anne Tomalin is a Canadian regulatory expert with 40 years of experience dealing with Health Canada and its regulations. She describes the comprehensive regulatory regime within which AZ Canada operates. Ms. Tomalin reviewed AZ Canada's regulatory filings for Seroquel. She offers an opinion regarding AZ Canada's compliance with its regulatory obligations.

35 Finally, Kathy Stubits is a law clerk. Her affidavit attaches the proposed representative plaintiffs' medical records to provide an evidentiary basis for the opinions of Drs. Barrett and Chue.

Admissibility Issues

36 The defendants take the position that some of the plaintiffs' evidence is inadmissible and should be struck. In their written argument the defendants say that the following evidence is contentious:

- (1) Statements by Dr. Laura Plunkett, sworn November 23, 2007, which are outside of her area of expertise, and/or are bald and conclusory and made without the requisite foundation in fact;
- (2) All statements that constitute boilerplate, opinion, speculation, and statements of medical or legal opinion contained in the affidavits of the plaintiffs, Joanne Martin and Corrine Middleton, sworn November 22, 2007 and November 23, 2007 respectively;
- (3) Documents attached to the solicitor's affidavit of Victoria Paris, sworn August 22, 2011. Her affidavit attaches 29 exhibits, 24 of which the defendants say are inadmissible; and
- (4) Documents marked as exhibits to the cross-examination of the defence witness, Dr. Barry Arnold.

37 Initially, the plaintiffs objected to significant portions of Dr. Arnold's affidavit and requested that the court strike certain paragraphs of his affidavit. The complaint was based on the plaintiffs' position that parts of the affidavit were inadmissible because Dr. Arnold did not have direct knowledge of the evidence in issue. Further they relied on Dr. Arnold's evidence on his cross-examination when he stated that he did not talk to anyone at AstraZeneca Canada before swearing his affidavit. This request to strike Dr. Arnold's evidence was withdrawn in the plaintiffs' Admissibility of Evidence factum where the plaintiffs state that all evidence should be placed before the court and the court can "decide what weight if any to give to the evidence" that the plaintiffs and defendants have filed.

38 The proposal that the certification judge should weigh all the evidence is contrary to the direction in *Cloud*. Obviously there is a distinction between determining the admissibility of evidence and deciding what weight to attach to evidence that is admissible. As the gatekeeper, it is the role of the certification judge to determine admissibility. It is not the role of the certification judge to assess and weigh evidence and resolve conflicts in the evidence. When considering all of the admissible evidence that is before the court, the certification judge is assessing if there is some basis in fact for the s. 5(1) (b)-(e) criteria.

39 This limitation on the role of the certification judge does not mean that the court should accept the plaintiffs' affidavit without regard for the defendants' evidence. The court must consider all of the admissible evidence, including the cross-examinations, to decide if there is some evidence to support the s. 5 test.

40 The plaintiffs argue that courts in Ontario routinely adopt a more flexible approach to the admissibility of evidence on certification motions. I disagree. The plaintiffs rely on *LeFrancois* at para. 17 but it does not stand for the principle that admissibility rules should be relaxed on a certification motion.

41 In *LeFrancois*, Cullity J. was dealing with a different evidentiary issue. Having already certified the action, there was a dispute about the cut off dates to limit the plaintiff class. The defendant wanted to submit further fresh evidence to show that without the proposed cut off, notices would be set to people who did not have one of the defective alarm defibrillators. The plaintiff argued that this evidence was available during the certification motion and should not be allowed. Cullity J. decided to allow the evidence because to deny it would result in people being included who had no need to be put on notice about the action. While the usual rule of evidence precluded the introduction of fresh evidence that was always available, the court chose not to apply such a rigid exclusion of evidence in this unique situation.

42 *LeFrancois* does not stand for the general proposition that admissibility rules are relaxed on a certification motion. In fact there are numerous decisions confirming that evidence tendered on a certification motion must meet the usual criteria for admissibility: see *Schick* at para. 13; *Ernewein*, at para. 31; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.) at para. 65; *Ring* at para. 21.

43 Basic evidentiary rules that govern affidavits are set out in rules 4.06(2) and 39.01(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that provide as follows:

4.06(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

39.01(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

44 The court's "gatekeeper" role dealing with expert evidence is clear. Such evidence can only be tendered through a properly qualified expert: see *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at p. 20 ("*Mohan*"). This principle has been applied in several certification motions: see *Chopik v. Mitsubishi Paper Mills Ltd.* (2002), 26 C.P.C. (5th) 104 (Ont. S.C.J.); *Punit v. Wawanesa Mutual Insurance Co.* (2006), 45 C.C.L.I. (4th) 109 (Ont. S.C.J.); *Ernewein*; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (Ont. S.C.J.) ("*Stewart*").

45 When expert evidence is admissible and produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: see *Stewart* at para. 19.

46 This motion for certification fails regardless of the admissibility issues. As explained below, the plaintiffs have not satisfied s. 5(1)(a). In these circumstances there is no need to embark on a consideration of the defendants' attack on the admissibility of the plaintiffs' evidence. However, I will deal with what I consider to be the main admissibility issue: the admissibility of Dr. Plunkett's evidence.

Defendants' Position - Admissibility of Dr. Plunkett's Evidence

47 The defendants argue that several portions of Dr. Plunkett's affidavit should be struck because the opinions she provides are outside the scope of her qualifications. Other parts of her affidavit are inadmissible because the defendants say the opinions lack the cogency and factual foundation required for admission of expert evidence. Finally, the defendants say that several of Dr. Plunkett's assertions do not arise out of any direct knowledge and she fails to set out any basis for her assertions that would permit them to be tested.

48 I will review Dr. Plunkett's qualifications and her opinion as it is set out in her affidavit and explained further on cross-examination. The defendants identify specific paragraphs in Dr. Plunkett's affidavit that they say should be struck. As I review Dr. Plunkett's evidence I will deal with each of these paragraphs.

Dr. Plunkett's Qualifications

49 Dr. Plunkett's qualifications are described in her affidavit and as well she was cross-examined on this issue. She describes herself as a "pharmacologist," a "toxicologist" and a "United States Food and Drug Administration (FDA) regulatory specialist." She is a consultant based in Houston. She holds a Ph.D. and conducted doctoral research relating to "cardiovascular pharmacology." Dr. Plunkett describes her expertise as relating to the fields of "pharmacology, toxicology, regulatory issues, and drug efficacy and risk-benefit analysis."

50 When cross-examined, Dr. Plunkett agreed as follows. She is not a medical doctor and does not treat or diagnose patients or prescribe medications to them. She would "definitely" defer to psychiatrists in the diagnosis and treatment of psychiatric illnesses and would "absolutely" defer to endocrinologists in the diagnosis and treatment of diabetes. It is clear that Dr. Plunkett is not qualified to provide expert medical evidence and cannot opine on the risk-benefit analysis that is part of a medical decision to prescribe medication to a patient.

Review of Dr. Plunkett's Affidavit

51 The following is a review of Dr. Plunkett's evidence. I will identify what parts of her evidence are objected to and rule on the admissibility as I progress through her evidence.

52 Dr. Plunkett states in her affidavit that she reviewed the following material:

- a) scientific literature relating to the pharmacology and toxicology of anti-psychotic drugs in general and quetiapine (Seroquel) in particular;
- b) labelling for Seroquel as provided by the Physician's Desk Reference;
- c) the regulations of the U.S. Food and Drug Administration (FDA) relating to the development, approval, labelling and marketing of prescription drug products; and,
- d) warnings provided by Health Canada in relation to the use and consumption of quetiapine (Seroquel).

53 Dr. Plunkett's affidavit provides a brief description of bipolar disorder and schizophrenia and the atypical anti-psychotic drugs used to treat these conditions. She reviews the difference between the older anti-psychotic drugs and the atypical ones that followed, such as Seroquel.

54 The affidavit lists the symptoms that are treated with Seroquel including off-label uses. Dr. Plunkett explains how Seroquel is absorbed in the body and she lists the adverse effects ("health risks") of the drug. The defendants do not object to any of this evidence. They agree that Dr. Plunkett can opine on causation but not the product warnings.

55 The health risks that Dr. Plunkett describes are as follows:

21. Seroquel use has been associated with deaths that have been attributed to severe liver, kidney, and pancreatic damage. Its adverse effects include, but are not limited to, ketoacidosis, pancreatitis, diabetes mellitus, weight gain, hyperglycemia, blindness, increased thirst, and hypoglycemia. Other serious injuries associated with Seroquel use include: a potentially fatal condition known as neuroleptic malignant syndrome (NMS); tardive dyskinesia, which can cause potentially irreversible, involuntary movements; and other serious health problems associated with the onset of diabetes including heart disease, blindness, coma, seizures and death ("Health Risks"). These Health Risks have been reported following both short-term and longer-term use of Seroquel.

56 Dr. Plunkett states that it has been known for decades that many anti-psychotic drugs have effects to alter metabolism that can lead to weight gain and effects on glucose metabolism. Since 1999, it has been recognized that there are differences among the anti-psychotic drugs in relation to their propensity for inducing weight gain and changes in glucose metabolism, including the onset of diabetes. Further, since 2002 it has been recognized that clinically significant hyperglycemia and diabetic complications can occur during anti-psychotic treatment both with and without changes in weight gain.

57 Dr. Plunkett states that between January 1997 and July 2002 there were numerous adverse drug event reports to the US Food and Drug Administration, including reports that patients taking Seroquel experienced significant Health Risks. Her affidavit attaches copies of journal articles that discuss the relationship between Seroquel and some of the Health Risks. Dr. Plunkett includes a very brief sentence for each article describing what the author concluded. All of the articles dealt with the risk of diabetes when consuming Seroquel. In one case Dr. Plunkett attached an article from the Wall Street Journal about a study, rather than the study itself.

58 Dr. Plunkett relies on the above articles to provide the following opinion regarding the causal connection between Seroquel and the Health Risks. In paragraphs 31-32 of her affidavit she states:

31 When considered as a whole in a weight-of-the evidence assessment, the available scientific data indicate that Seroquel can cause physiological effects known to be risk factors for diabetes, including increased body weight and other metabolic effects, and can cause diabetes itself. The scientific data include case reports published on an ongoing basis since 1999, a survey of adverse drug reports, epidemiological data assembled since 1999, and animal data. In reaching this conclusion, I have considered each source of information as important in the analysis of the risks associated with the consumption of Seroquel and have used the information in a manner that is consistent with accepted methods for establishing causation in a weight-of-the-evidence analysis.

32. I believe that the available scientific data demonstrate that Seroquel consumption and use is associated with increased human Health Risks, including but not limited to an increased risk of clinically significant body weight gain, hyperglycemia, altered glucose metabolism, and an increased risk of diabetes and diabetes-related complications.

[Emphasis added.]

59 The defendants say that the opinion in the underlined portions of the above paragraphs should be struck because it lacks cogency and a factual foundation. When the defendants cross-examined Dr. Plunkett about this opinion, she conceded that she did not include the epidemiology studies that say there is no association between Seroquel and diabetes. As a result, the defendants say that this opinion is based on an unbalanced sampling of published research. Further, the defendants criticize the opinion because Dr. Plunkett provided no analysis for the opinion. In my view, the defendants' position is asking the court to assess and weigh Dr. Plunkett's evidence in these paragraphs, a task that is outside the scope of certification.

60 Dr. Plunkett states that clinical trials performed with Seroquel as part of the drug development process are limited in their ability to identify risks associated with the drug's use in the general population. This is because drug development clinical trials are performed in either healthy volunteers or in patients that have often been pre-screened for the propensity to develop adverse effects such as hyperglycemia or diabetes, with such patients then usually excluded from studies. It is only after a drug has been placed on the market, and wider exposure is seen, that a true picture of the adverse effects associated with a drug can be observed. As a result, Dr. Plunkett believes that companies have a duty to carefully monitor their drugs after approval and during marketing for either the existence of new adverse events or a higher than expected incidence of known adverse effects. There is no objection to this evidence.

61 The defendants object to the opinion in paragraph 35 of Dr. Plunkett's affidavit where Dr. Plunkett states that that "Seroquel is not unique in terms of its efficacy" and there are "safer alternative therapies." Paragraph 35 states as follows:

Studies have shown that other anti-psychotic drugs have similar effectiveness to Seroquel but have less risk for hyperglycemia, weight gain, metabolic disturbances and diabetes. Therefore, there are safer alternative therapies that could be used that would also provide for effective treatment but with fewer side effects.

62 Support for this opinion is given in paragraph 36 where Dr. Plunkett adds as follows:

...in the CATIE Schizophrenia Trial, a trial sponsored by the National Institute of Mental Health which is the largest trial conducted to date comparing efficacy and safety of some of the most prescribed anti-psychotic drugs, it was shown that clozapine was more effective than other atypical anti-psychotics (*i.e.*, Seroquel, Zyprexa, Risperdal). Further, when all of the atypical agents studied were examined, including Seroquel, none of the agents was more effective or better tolerated than the typical anti-psychotic, perphenazine.

63 The defendants argue that the evidence in paragraph 35 is an assertion that should be struck because Dr. Plunkett did not state any foundation facts or rationale for this opinion. They say that the assertion that "safer" alternatives to Seroquel were available was made without having considered what alternatives were in fact available on the Canadian market at various times, whether these alternatives were "safer" and without even identifying the so called safer alternatives. However, Dr. Plunkett does add support for her opinion in paragraph 36. Once again, the defendants' position goes beyond the scope of challenge that is permitted on a certification motion. While the defendants have raised compelling reasons to question the usefulness of this opinion, this is a challenge that goes to the weight to be attached to this opinion, not its admissibility.

64 The rest of Dr. Plunkett's affidavit discusses the warnings of the health risks associated with Seroquel. The defendants say that the following paragraphs seek to provide opinions outside Dr. Plunkett's area of expertise and are therefore inadmissible. Only the sentences underlined in para. 39 are in issue.

37. Despite the findings of the studies discussed above, AstraZeneca failed to warn Health Canada, the FDA, physicians, other health practitioners, and patients of the Health Risks associated with the consumption of Seroquel at the time these risks were first identified.

38. A review of the most recent product monograph for Seroquel that is available to both health professionals and consumers in Canada demonstrates that, in my opinion, the warnings related to risks of hyperglycemia and diabetes in particular are not adequate to convey the risks posed by Seroquel itself. In the health professional section of the monograph, the discussion of hyperglycemia and diabetes is put forth as an effect of anti-psychotics in general only. Moreover, the monograph section intended for consumers fails to even mention these health risks.

39 At the time that the Seroquel monograph in Canada failed to adequately warn physicians and consumers of the risks associated with use of the drug, other international regulatory bodies were requiring specific changes to product labelling related to the risks of hyperglycemia and diabetes that were associated with Seroquel, not anti-psychotics in general. For example, in Japan, physicians were being specifically warned to not use Seroquel in patients with a history of diabetes and to monitor patients for development of glucose abnormalities during treatment with Seroquel, regardless of their medical history. Additionally, in 2005 permission to market Seroquel in France had been denied due in part to the risk of hyperglycemia and diabetes associated specifically with Seroquel, again not anti-psychotics in general. Accordingly, I believe that the Defendants were not supplying physicians and consumers in Canada with risk information related to hyperglycemia and diabetes even though actions had been taken in other countries to warn physicians and patients of these risks. 40. I believe that the product warnings in place at the time were wholly inadequate to warn health care providers and patients of the significant Health Risks associated with the consumption of Seroquel. Nonetheless, Seroquel was marketed heavily by the Defendants as safe and effective for the treatment of bipolar disorder and schizophrenia, promising fewer side effects than other similar treatments including the other atypical anti-psychotics on the market. Further, Seroquel was being prescribed by physicians

for treatment of conditions other than bipolar disorder and schizophrenia, which use I believe was known by the Defendants.

...

42. I believe that the Defendants knew of the Health Risks associated with ingesting Seroquel. I believe that the Defendants failed to disclose these risks because of the anticipated negative impact it would have on the sale and consumption of Seroquel.

[Emphasis added.]

65 This case is about the marketing, sale and use of Seroquel in Canada not the United States. It is about the Canadian regulatory system that approves drugs such as Seroquel for use in Canada. It is Health Canada's approval of Seroquel in Canada and the defendants' warnings (product monographs) that Health Canada approved that are relevant, not the actions of the FDA in the United States. Dr. Plunkett does not have the necessary expertise to opine on the regulatory regime in Canada, what Seroquel was approved for in Canada and whether the Canadian warnings were adequate.

66 Dr. Plunkett's training and experience is entirely based in the United States. She has never worked or studied in Canada. Her only Canadian work appears to be the swearing of an affidavit dealing with Seroquel in the Quebec class action litigation. Dr. Plunkett admits that the Quebec affidavit is substantially identical to the one sworn for this motion. To the extent that Dr. Plunkett has regulatory expertise, it is purely American. She has no Canadian training or experience that could extend her American expertise to any of the Canadian regulatory issues in this litigation. She conceded that her affidavit says nothing at all about Canadian requirements for the approval or labelling of pharmaceutical products. While I appreciate that Dr. Plunkett has some expertise, it is grounded in her American work experience. Further, there is no evidence to show that such expertise is transferable to the regulation of drugs in Canada.

67 An expert witness is properly qualified to express an opinion only if he or she is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify (see *Mohan* at para. 27). It is clear that Dr. Plunkett does not have the relevant expertise. I conclude that paras. 37- 42 of Dr. Plunkett's affidavit are inadmissible (only the underlined portions of para. 39 are inadmissible).

Overview of Seroquel

68 Seroquel is one of a class of medicines known as "atypical antipsychotics" or "second generation antipsychotics." Seroquel is approved in Canada for the treatment of schizophrenia and bipolar disorder, both of which are incurable psychotic illnesses.

69 Before the second generation antipsychotics arrived on the market in Canada in the 1990s, these psychotic illnesses were treated with a class of medications known as first generation antipsychotics. The advent of first-generation antipsychotics in the middle of the last century marked a significant advancement in the treatment of these devastating illnesses. Previously, there was no effective treatment for these illnesses.

70 While first generation antipsychotics are effective in treating some aspects of schizophrenia and bipolar disorder, they are strongly associated with many side effects, including disabling and stigmatizing neurological movement disorders, including extrapyramidal side effects and tardive dyskinesia. Tardive dyskinesia is irreversible in 50% of those afflicted. Indeed, the neurological side effects of first generation antipsychotics are so prevalent that the class of drugs became known as "neuroleptics."

71 A search for medications with efficacy to treat psychotic illness but without the debilitating neurological side effect burden of first generation antipsychotics led to the development of the second generation antipsychotics. The second generation antipsychotics are referred to as "atypical" because they are better tolerated and have far less neurological

effects than first generation antipsychotics. The second generation antipsychotics generally also have better efficacy in treating the negative, cognitive and affective symptoms of psychiatric illness.

72 The individual response to these medications is highly variable in terms of both efficacy and side effects. Efficacy and tolerability cannot be accurately predicted in any given individual. Further, a person's own response to treatment may change over time.

73 Today, second generation antipsychotics are recognized as the first line treatment for schizophrenia and bipolar disorder and use of first generation antipsychotics is no longer regarded as the standard of care in most clinical situations in Canada.

74 Seroquel came to market in Canada in 1998 as the fourth second generation antipsychotic that Health Canada approved. The other second generation antipsychotics and their dates of approval are: Clozaril (clozapine) in 1991; Risperdal (risperidone) in 1994; and Zyprexa (olanzapine) in 1996.

75 As described by Dr. Chue, it is generally accepted in clinical practice in Canada that Seroquel has the most benign side effect profile of the second generation antipsychotics. Dr. Wirshing agrees that Seroquel is the best in its class in terms of subjective tolerability and is in the "upper tiers" in terms of overall toxicity.

76 All of the experts, including Dr. Wirshing and Dr. Plunkett, agree that Seroquel is an effective drug.

Approval of Seroquel in Canada

77 In order to market a drug in Canada, a manufacturer must file a New Drug Submission and receive a Notice of Compliance from Health Canada.

78 The Seroquel New Drug Submission consisted of 150 volumes of materials, which included, amongst other things, voluminous safety data, non-Canadian package inserts, a draft Seroquel Product Monograph and clinical trial reports. All of the data submitted as part of the New Drug Submission related to treatment of schizophrenia.

79 Following a review of the New Drug Submission by a specialized group of scientists at Health Canada, Seroquel was first approved in Canada as safe and effective for the treatment of schizophrenia on December 2, 1997.

80 On November 5, 2004, Health Canada approved Seroquel for the acute management of manic episodes associated with bipolar disorder. As of that date, prescribing and safety information relating to bipolar mania was added to the product monograph. Every prescription medicine in Canada is required to have a product monograph, which contains, *inter alia*, prescribing information, warnings, and other safety information for that medication.

81 Health Canada approved Seroquel for the acute treatment of the depressive episodes associated with bipolar I and bipolar II disorder on August 18, 2008. In conjunction with that approval, further prescribing information and safety data relating to bipolar depression was added to the product monograph.

The Seroquel Product Monograph and the "Health Risks"

82 The defendants' regulatory expert, Anne Tomalin, explains the role of the product monograph, how it is approved and its content. She describes Health Canada's review of a new drug submission as rigorous and exacting. The product monograph is subject to its own review by scientific experts with clinical and/or medical expertise. An excerpt from page 12 of her report discussed this evidence as follows:

The Product Monograph is regarded as "labelling" in Canada. All labels must have a statement that says, "Product Monograph available on request", or a similar statement. Once approved, the manufacturer is required to distribute a copy of the Product Monograph to all physicians at the time of marketing the product. Also, a copy of the Product Monograph is posted on the Health Canada website.

During the review of an NDS [New Drug Submission], the Product Monograph is reviewed sentence by sentence and word by word to ensure that the very best information is provided to Healthcare Professionals when the document is approved. The reviewer carefully compares the wording in the proposed Product Monograph contained within the NDS to their notes and understanding of the data in the submission. They also compare the wording to the wording of the Product Monographs of other similar products in Canada, and to the international labelling that is available for the drug. The reviewer then ensures that there is consensus within the Therapeutic Division at Health Canada in terms of the revisions required. When all of the revisions are ready, a Clarifax is sent to the company outlining all of the changes required. Frequently meetings or teleconferences are set up to discuss the changes required to ensure that there is a clear reflection of the data in the NDS.

Contents of a Product Monograph: There are three parts to the Product Monograph:

- Part I is referred to as the Prescribing Information for healthcare professionals. If there is a package insert for the healthcare professional, it must be identical to Part I of the Product Monograph. Part I of the Product Monograph is provided to a publication called the Compendium of Pharmaceutical Specialties (CPS), which is published and provided free of charge to all physicians and pharmacists in Canada once a year.
- Part 2 is referred to as the Scientific Information and contains information on the animal and clinical studies used to approve the drug.
- Part 3 is referred to as the Consumer Information section of the Product Monograph. If there is a package insert for the patient, it must be identical to Part 3 of the Product Monograph.

The Original Product Monograph - December 1997

83 As already noted, every prescription medicine in Canada is required to have a product monograph, which contains, *inter alia*, prescribing information, warnings, and other safety information for that medication.

84 During Health Canada's review of the New Drug Submission, the draft product monograph is evaluated "sentence by sentence and word by word to ensure that the very best information is provided to Healthcare Professionals" (Anne Tomalin's report at p. 2122). The language in the product monograph is compared to the data in the New Drug Submission, the wording of product monographs of other similar medicines, and international labelling for the drug in question.

85 Once the product monograph is approved and a Notice of Compliance is issued, pharmaceutical companies distribute the product monograph to physicians across Canada and an up to date copy is posted on Health Canada's website. In addition, all product labels are required to indicate that the product monograph is available upon request.

86 The initial Seroquel product monograph, dated December 2, 1997, contained warnings and information about a number of the "Health Risks" based upon the clinical studies conducted in patients with schizophrenia. The 1997 product monograph included warnings for weight gain, tardive dyskinesia, cataracts, neuroleptic malignant syndrome, transaminase (liver enzymes) elevations, dizziness, impaired motor skills, dry mouth, seizures and death (in relation to neuroleptic malignant syndrome).

Revisions to the Product Monograph Regarding "Health Risks" Over Time

87 Since December 1997, the Seroquel product monograph has been revised on 25 occasions. Nineteen of those revisions involved changes to the safety data contained in the product monograph.

88 Changes to a product monograph are a normal part of the life-cycle of a medicine. As both Dr. Plunkett and Ms. Tomalin have noted, it is only after a drug has been used in a broader population and over a greater amount of time that a full understanding of all of its risks and benefits can be known. Accordingly, the defendants (as well as Health Canada)

have developed and implemented a robust drug safety program to identify and assess safety signals to determine if the worldwide labelling for its medicines need to be updated.

89 All of the defendants' medicines, including Seroquel, have a Core Data Sheet that contains the company's most up-to-date knowledge regarding the safety and efficacy of the medicine. In order to ensure that the Core Data Sheet contains the most current safety information, careful monitoring, evaluating, and reporting of adverse event reports takes place on a daily basis at the national level. In addition, the defendants routinely review the aggregate safety data for a medicine as a part of its SERM (Safety Evaluation and Review Meeting) process. Where new information results in a change to the safety profile of a medicine, the Core Data Sheet for the medicine is updated accordingly.

90 The revised Core Data Sheet is then sent to regulatory staff in each country, including Canada, who work in consultation with the local regulatory authority to assess whether a change to that country's product monograph is warranted, and, if so, the content of that change. This assessment is based upon local regulatory standards, which differ between countries. Product monographs, therefore, vary from country to country. It is through this process that many of the changes to the Seroquel product monograph detailed below came about.

91 The dates of changes to the safety information contained in the Seroquel product monograph from 1997 to 2011 in relation to diabetes and weight gain are as follows. A diabetes warning (including exacerbation of diabetes, hyperglycaemia, diabetic ketoacidosis, diabetic coma, and death) was added to the product monograph on December 16, 2003 at the request of Health Canada as part of class-wide labeling for second generation antipsychotics. The warning was expanded on two occasions - April 25, 2005 and October 9, 2007. In addition, the April 2005 revision to the product monograph for diabetes added a recommendation that patients should be monitored for polydipsia (i.e., excessive thirst).

92 The original weight gain warnings in the product monograph were modified six times on the following dates: August 2, 2002; September 24, 2003; November 5, 2004; March 6, 2007; August 18, 2008; and May 19, 2009. The November 5, 2004 and August 18, 2008 revisions included the addition of weight gain data from the bipolar mania clinical trials and bipolar depression clinical trials, respectively, in conjunction with the approval of Seroquel for those indications.

The Legal Framework

93 Subsection 5(1) of the *Class Proceedings Act* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

94 These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14).

95 Winkler J. pointed out in *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 25 ("*Frohlinger*"), that the core of a class proceeding is "the element of commonality." It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

96 The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26-29 ("*Western Canadian Shopping*"); *Hollick* at para. 15.

97 In *Hollick*, at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

98 Since it is not the role of the court on a certification motion to "find facts," I conclude that *Hollick* directs the court to confirm that there is *some evidence* to support the s. 5 (b) - (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test: see *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 61 ("*Fresco*").

5(1)(a) - Cause of Action

99 There have been several amendments to the statement of claim. On this motion, the defendants consented to the "Second Amended Fresh as Amended Statement of Claim." This amendment was required to remove Bernard Van Kerrebroeck as a representative plaintiff because he no longer wished to act in this role. The amendment is granted on consent. The defendants filed a statement of defence to an earlier version of the statement of claim.

100 The first criterion for certification is the disclosure of a cause of action. In *Cloud*, the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) ("*Hunt*") that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action.

101 Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1) (a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

102 The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: see *Hunt* at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 679.

103 Before considering whether the plaintiffs have satisfied the s.5(1)(a) criterion, I will deal with a preliminary point that the plaintiffs raised. They take the position that because the defendants filed a statement of defence, they have taken a fresh step and are precluded from disputing the plaintiffs' compliance with s. 5(1)(a).

104 The plaintiffs rely on *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 (Ont. S.C.J.) at paras. 5-6 ("*Bell*") and *Tribar Industries Inc. v. KPMG LLP*, [2009] O.J. No. 959 (Ont. S.C.J.) at para. 22 ("*Tribar*"). Both

are decisions of Brown J. that involved motions to strike pleadings under Rule 21. In each case the defendant had already filed a statement of defence. In *Bell*, at para. 6, Brown J. stated that the "filing of a statement of defence signifies that the claim contains a recognizable cause of action to which the defendant can respond and should prevent a defendant from complaining subsequently about an irregularity in the statement of claim." However, in *Bell*, because the plaintiff did not object to the defendant bringing the motion, the court allowed it to proceed. In *Tribar*, the plaintiff raised the filing of the statement of defence as a bar to the motion and the court agreed. Brown J. noted, at para.22, that "[f]or courts to condone such a manner of pleading would strip the act of pleading over of any procedural significance and risk opening the door to interminable pleadings motions even after pleadings were closed."

105 The defendants rely on three decisions where despite the filing of the statement of defence, the court granted leave to bring the Rule 21 motion: see *Seale & Associates Inc. v. Vector Aerospace Corp.*, [2007] O.J. No. 1192 (Ont. S.C.J.); *Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (Ont. S.C.J.); *Markeljevic v. Ontario (Financial Services Commission)*, [2005] O.J. No. 2098 (Ont. S.C.J.). In these decisions the defendant did not concede in the statement of defence that a cause of action existed but rather disputed the existence of a cause of action in their pleading. The defendants in this action have taken the same approach and in paragraph 2 of their defence they plead that the statement of claim does not disclose a cause of action.

106 It is not necessary to resolve these two lines of cases. The issue in this case is unique to a class proceeding. I do not accept the plaintiffs' position that the filing of a statement of defence should preclude the defendants from taking a position on the s.5(1)(a) criterion. This is not a Rule 21 motion. While the same "plain and obvious test applies, the burden rests on the plaintiffs to satisfy s. 5(1)(a). A defendant may agree that there is a cause of action or dispute this criterion. Either way the plaintiff must still satisfy the court that the s. 5(1)(a) criterion is met. If the defendant disputes the existence of a cause of action and files a statement of defence this does not alter the plaintiff's burden.

Analysis of the Causes of Action

107 The plaintiffs say that they have pleaded the following causes of action: negligence and failure to warn, conspiracy and waiver of tort. In argument the plaintiffs agreed that waiver of tort is pleaded as a remedy.

108 For the numerous reasons that follow, this pleading is seriously deficient. It is plain and obvious that the causes of action as pleaded will fail. The plaintiffs have not satisfied the s. 5(1)(a) criterion.

109 Before considering whether the pleading discloses one or more of the causes of action, I will consider two fundamental problems with the way the causes of action are advanced against the defendants. First the description of each defendants' role is inconsistent with the alleged activities that are described in the pleading. Second, the pleading lumps the defendants together as a group and alleges that they are liable to the class for each cause of action.

Inconsistent Pleading

110 There is a real disconnect between the description of the defendants in this pleading and the actions that the plaintiffs seek to hold the defendants responsible for. Paragraphs 7 to 12 of the statement of claim describe the defendants and their respective roles. I have underlined the key excerpts to demonstrate this problem.

111 In para. 9, it is alleged that AZ Canada was "involved in and/or responsible for the *sales, distribution and marketing* of Seroquel in Canada."

112 In para. 11, it is alleged that the business of the three defendants "is inextricably interwoven with that of the other and each is the agent of the other for the purposes of *research, development, manufacture, marketing, sale and/or distribution of Seroquel in Canada.*"

113 In para. 12, it is alleged that the defendants "all or any one of them, were carrying on business as, *inter alia*, the *manufacturers and distributors* of Seroquel in Canada." However, in para. 9, AZ Canada's role is limited to *sales, distribution and marketing* of Seroquel in Canada.

114 In paragraph 19, the plaintiffs allege that the "[t]he Defendants *designed, developed, tested, manufactured, distributed, marketed and sold Seroquel in Canada.*" This is inconsistent with the narrower description of each defendant's role set out in paragraphs 7 to 12.

115 The scope of the defendants' alleged activities expands further in para. 26(a). The plaintiffs allege that the defendants owed them a duty of care and failed "to exercise reasonable care in designing, developing, researching, testing, manufacturing, analysing, recommending, merchandising, advertising, promoting, marketing, supplying and/or selling Seroquel." In para. 26(c) it is alleged that the defendants failed to "ensure that Seroquel was only promoted, marketed, advertised, recommended, merchandised, and sold for the uses approved by Health Canada."

116 A defendant is entitled to know the precise nature of what it is alleged to have done. The inconsistencies in this pleading create confusion and a lack of clarity as to which defendant did what in relation to Seroquel. The problem is compounded by the next pleading problem.

The Enterprise Liability Allegations

117 Not only is the pleading inconsistent but it lacks clarity as to each defendant's role because the pleading simply lumps them together as one.

118 The statement of claim alleges that the business of each defendant is "inextricably interwoven with that of the other and each is the agent of the other for the purpose of research, development, manufacture, marketing, sale and/or distribution of Seroquel in Canada." Courts have described this approach of lumping all defendants as one as the group or enterprise approach. It is the defendants' position that the enterprise liability allegation is deficient. For the reasons that follow, I agree.

119 The plaintiffs fail to identify the specific acts undertaken by each defendant which support these causes of action. The only pleaded conduct that is personal to any defendant is that AZ Canada "was involved in and/or responsible for the sales, distribution and marketing of Seroquel in Canada." The defendants, AZ U.K. and AZ U.S., are identified simply as "affiliate[s]" of AZ Canada. There is no indication of which defendant was the designer or manufacturer of Seroquel. Instead, the plaintiffs attribute liability to the defendants en masse, asserting that "[t]he business of each... is inextricably interwoven with that of the other and each is the agent of the other for the purposes of research, development, manufacture, marketing, sale and/or distribution of Seroquel in Canada." This bald assertion of enterprise liability is deficient for three reasons.

120 First, as a matter of pleading, it is inappropriate to simply "lump together" the three defendants. Allegations of enterprise liability were struck by Cumming J. in *Hughes v. Sunbeam Corp. (Canada) Ltd.*, [2000] O.J. No. 4595 (Ont. S.C.J.) at paras. 48-49 ("*Hughes*"), var'd on other grounds (2002), 61 O.R. (3d) 433 (Ont. C.A.), leave to appeal to S.C.C. refused, (2003), [2002] S.C.C.A. No. 446 (S.C.C.). This was a proposed class action and the defendants brought a motion to strike the pleading before the certification motion. Cumming J. stated as follows:

The Claim (para. 9) simply lumps together all corporate defendants (other than ULC) and then proceeds to generalize the various allegations as applicable to all defendants indiscriminately. For example, the Claim (para. 11) alleges that the representative plaintiff is the owner of an ionization smoke alarm manufactured by this amorphous collection of Sunbeam defendants. There is no identification of a particular manufacturer of his smoke detector until the Response (para. 2(a)).

In my view, and I so find, the pleading does not disclose any reasonable cause of action based upon the allegation of a single group enterprise by the so-called Sunbeam defendants.

121 Second, as a matter of substantive law, a parent corporation is not interchangeable with its subsidiary. As the Alberta Court of Appeal stated in *Cunningham v. Hamilton*, [1995] A.J. No. 476 (Alta. C.A.) at para. 4:

... It is true that Broken Hill operates a number of its worldwide companies as an integrated economic unit. But the mere fact it does so does not mean that for legal purposes, separate legal entities will be ignored absent some compelling reason for lifting the corporate veil....

122 Accordingly, "[a] position as shareholder, even a controlling shareholder, in a manufacturer is an insufficient foundation in itself to impose a manufacturer's duty": *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734 (B.C. S.C.) at para. 53 aff'd (2000), 193 D.L.R. (4th) 67 (B.C. C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 21 (S.C.C.). The same rule applies where a manufacturer's duty is sought to be imposed on a subsidiary corporation for the actions of its parent. As the Ontario Court of Appeal noted in *Gregorio v. Intrans-Corp.*, [1994] O.J. No. 1063 (Ont. C.A.) at para. 28, that is inappropriate "unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability."

123 Applying these principles, Ontario courts have frequently struck out allegations of enterprise liability where the plaintiff failed to plead material facts that would justify piercing the corporate veil: see *Sauer* at para. 89; *McCutcheon v. Cash Store Inc.* (2006), 80 O.R. (3d) 644 (Ont. S.C.J.) at paras. 16-26; *Di Gennaro v. BMO Nesbitt Burns Inc.*, [2007] O.J. No. 3934 (Ont. S.C.J.) at paras. 7-11.

124 As the court stated in the *Haskett v. Trans Union of Canada Inc.* (2003), 63 O.R. (3d) 577 (Ont. C.A.) at paras. 61-63, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 208 (S.C.C.):

... In order to found liability by a parent corporation for the actions of a subsidiary, there typically must be both complete control so that the subsidiary does not function independently and the subsidiary must have been incorporated for a fraudulent or improper purpose or be used by the parent as a shield for improper activity....

The pleading falls short of suggesting that the relationship of the respective related respondent corporations is that of a conduit to avoid liability, nor is there an allegation that the parent company controls the subsidiary for an improper purpose.

For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

125 The statement of claim in this case does not satisfy this test. There is no pleading that AZ U.K. or AZ U.S. completely controlled AZ Canada or used it as a conduit to avoid liability for a fraudulent or improper purpose.

126 Third, while the plaintiffs seek to justify enterprise liability on the basis that each defendant "is the agent of the other," this bald pleading, unsupported by any material facts, is insufficient to establish an agency relationship. This type of pleading was found to be deficient in *Gardner v. Ontario*, [1984] O.J. No. 3162 (Ont. H.C.) at para. 21:

These authorities satisfy me that the principal-agent relationship does not have to be explicitly stated in a statute or in an agreement entered into pursuant to that statute as is contended for by the applicant. They also support the inference that whether or not an agency relationship arises out of the factual context is a matter of law. However, an allegation of the bare conclusion of law is a bad pleading: see *Paradis v. Vaillancourt et al.*, [1943] O.W.N. 359. No facts are pleaded by the plaintiff in the statement of claim so as to support the conclusion of law alleged therein that the Dominion Government was the Band's agent in entering the 1894 agreement. Consequently, the pleading in so far as it alleges the agency relationship as the basis for claiming damages for breach of contract offends the rules.

127 Accordingly, the defendants cannot be liable for one another's conduct on this pleading. This is a critical failure, since no specific conduct is alleged against AZ U.K. and AZ U.S. at all. Further, no defendant, including AZ Canada, is individually identified as the designer or manufacturer of Seroquel. These are significant pleading deficiencies in the context of a products liability class action and prevent the statement of claim from satisfying s. 5(1)(a).

128 I will now review the causes of action in the pleading.

The Negligence Claim is Deficient

129 While the plaintiffs describe the cause of action simply as negligence and duty to warn, this is a pleading that covers different types of negligence, in addition to breach of the duty to warn. Based on the claim as asserted in paragraph 1 of the statement of claim, the negligence cause of action falls into three groups:

- negligent design, development and testing
- negligent manufacturing
- negligent distribution, marketing and sale.

130 The statement of claim does not distinguish between these different negligence claims. Rather, it lumps them all together as negligence and provides particulars for this broad group. The plaintiffs wrongly assume that these distinct activities are identical and can be thrown into one single cause of action. As I explain below, these different forms of negligence are not the same. Therefore, to allege one cause of action is a flawed approach.

131 There is also a complete failure to provide particulars of each type of negligence. Rule 25.06(1) of the *Rules of Civil Procedure* requires that a statement of claim "contain a concise statement of the material facts on which the party relies for the claim." This rule directs the disclosure of the "material" facts, which include facts that establish the constituent elements of the claim. The material facts are to be stated with precision and clarity.

132 This pleading offends rule 25.06(1) because it fails to acknowledge the differences between the various types of negligent activity. Instead of precision and clarity, the pleading is muddled and vague. The defendants are entitled to know the material facts that the plaintiffs rely on to support each area of negligence. Generalized allegations of negligence are not sufficient: see *Khan v. Canada (Attorney General)*, [2009] O.J. No. 715 (Ont. S.C.J.) at para. 19, aff'd, 2009 ONCA 737 (Ont. C.A.), leave to appeal to S.C.C. refused, (2010), [2009] S.C.C.A. No. 516 (S.C.C.). As Strathy J. emphasized in *Cerqueira v. Ontario*, 2010 ONSC 3954 (Ont. S.C.J.) at para. 12, "defendants are entitled to know the case they must meet. The court must be fair to the plaintiff, but it must also be fair to the defendants."

133 The lack of precision and clarity in this pleading is also obvious from the manner in which the plaintiffs deal with approved uses of Seroquel and off-label uses. The pleading asserts negligent activity for approved uses of Seroquel and off-label uses, without drawing a clear line between the two uses. There is no dispute that approved and off-label uses are factually distinct. The plaintiffs cannot lump the two together. Material facts must be pleaded for each plaintiff and for each distinct cause of action that the plaintiff is alleging.

Negligent Design, Development and Testing

134 This cause of action is advanced with respect to approved and off-label uses. Whether one looks at approved or off-label uses, the pleading is vague, there is no distinction drawn between approved and off-label uses and the pleading lacks essential elements that are necessary for this cause of action to survive. For example, in para. 1(b) the plaintiffs seeks a declaration that the "defendants were negligent in the design, development, testing, manufacturing, distribution, marketing and sale of Seroquel, as defined." At para. 26(a), the plaintiffs allege that the defendants owed a duty of care to the plaintiffs to "exercise reasonable care in designing, developing, researching, testing, manufacturing, analyzing, recommending, merchandising, advertising, promoting, marketing, supplying and/or selling Seroquel." It is alleged in

para. 28 that the plaintiffs' damages occurred as a result of the defendants' negligence and particulars of this negligence are set out. There is a reference to failing to adequately "test" Seroquel but no reference to particulars of negligence in the "design or development" of Seroquel.

135 Further, in the facts that are pleaded in paras. 15-25, the only reference to the design, development and testing of Seroquel is the bare allegation in para. 19 that states "[t]he Defendants designed, developed, tested, manufactured, distributed, marketed and sold Seroquel in Canada."

136 Aside from the problem that this is a vague and bare pleading, it lacks important elements that are necessary for such a claim to survive. The plaintiffs do not identify the alleged design defect, nor do they plead that a safer and economically feasible alternative to Seroquel would have been adopted but for the defendants' negligence. Indeed, they do not even plead that a safer and economically feasible alternative to Seroquel exists. Instead, the plaintiffs simply plead that the risk associated with Seroquel for the "new onset of diabetes is 3.34 times higher than older drugs used to treat schizophrenia such as "Haldol." There is no pleading of any alternative medicine that is safer and economically feasible to manufacture.

137 These deficiencies are fatal. The statement of claim does not disclose sufficient material facts to sustain a cause of action for negligent design. The essential elements of this cause of action are set out in *Kreutner v. Waterloo-Oxford Co-operative Inc.* (2000), 50 O.R. (3d) 140 (Ont. C.A.) at para. 8 as follows:

For the purpose of this appeal, it is unnecessary to state definitively the ingredients of a claim based on the defective design of a product. However, to succeed in this case the plaintiffs are required to identify the design defect in Sherwood's valve, establish that the defect created a substantial likelihood of harm and that there exists an alternative design that is safer and economically feasible to manufacture: *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150, 16 M.V.R. (2d) 86 (Ont. H.C.J.), affirmed [1994] O.J. No. 50 (C.A.).

138 Liability for negligent "development" and "testing" also requires the plaintiff to plead that a safer alternative to Seroquel would have resulted but for the defendants' negligence. However, no such facts are pled in the statement of claim. This point is stated in *Baker v. Suzuki Motor Co.*, [1993] A.J. No. 605 (Alta. Q.B.) at para. 75 as follows:

However, the absence of testing alone cannot be proof of negligence unless the tests, had they been done, would have enabled the manufacturer to design the motorcycle in such a way that the fire would not have occurred. Without this type of evidence, this allegation of negligence must fail.

139 There are additional problems with this pleading when one looks solely at the allegation that the defendants designed, developed and tested for off-label uses. The pleading simply does not make sense. The term "off-label" use is not defined in the pleading and the pleading does not allege what particular off-label uses the defendants are alleged to have designed, developed and tested. These material facts of the negligence claim are missing.

140 There is no attempt to carve out the causes of action that the plaintiffs allege concerning off-label use as distinct from approved uses. Instead, unclear allegations of off-label use have simply been dropped into the negligence pleading.

141 Ms. Middleton advances the claim for negligent design, development and testing in relation to off-label users. She alleges that she was prescribed Seroquel in or about June 2005 for an off-label use, specifically as treatment for stress and obsessive compulsive behaviour. Ms. Middleton consumed up to 175 mg of Seroquel on a daily basis for approximately 6 months, at which point she ceased consuming Seroquel. While taking Seroquel, Ms. Middleton alleges that she experienced, among other side effects, significant elevated blood sugars and weight gain (approximately 25 pounds), neuropathy, hyperglycemia, loss of energy, increased thirst, numbness in her hands and feet, and soreness in her feet. In addition, Ms. Middleton alleges that she was diagnosed with diabetes in or about November 2005. Ms. Middleton had tested negative for diabetes in or about October 2003. Upon ceasing the consumption of Seroquel, Ms. Middleton was able to lose a portion of the weight that she gained as a result of taking Seroquel.

142 The statement of claim provides some clarity about the off-label use but only for the conspiracy cause of action. At para. 35, it is alleged that the defendants conspired and agreed together, "to engage in a marketing campaign promoting the safety of Seroquel for Off-Label Use, including use as a sleep aid and to treat anxiety, dementia-related psychosis and depression." Beyond this example, the pleading does not describe what is meant by the term off-label use.

143 The lack of clarity in this statement of claim is even more apparent because the examples of off-label use in para. 35 do not include the off-label uses that Ms. Middleton's claim is based upon (stress and obsessive compulsive behaviour).

144 In addition to these deficiencies there is a fundamental incoherency in asserting a claim for negligent design, development and testing in relation to off-label uses. This was recognized by Perell J. in the *Goodridge v. Pfizer Canada (2010)*, 101 O.R. (3d) 202 (Ont. S.C.J.) at p.227 ("*Goodridge*"):

Negligence in design involves the innovator making poor choices and managing risk poorly when deciding how a product should be planned or put together. But the harm caused to the consumers of generic gabapentin is not a result of a design choice. Neurontin was not designed for any use other than as an adjunct treatment of epilepsy. Neurontin was not designed by the Defendants choosing to accept the risk of a propensity of suicidal behaviour; rather, a propensity for suicidal behaviour was a side effect to watch for and, if observed, it was a side effect to be disclosed by giving adequate warnings to the users of the drug. There is no design flaw in the case at bar because design errors presuppose design choices. The Plaintiffs submitted that Neurontin was a drug with a fatal flaw. That remains to be proven, but assuming that the submission is true, its flaw was not a design flaw. The Defendants may have designed a drug that turned out to have a defect, but that is different than choosing to design a drug with a defect that could have been avoided by more careful decisions about how to design the drug. And, in any event, the Defendants made no design choices with respect to the off label uses of Neurontin.

145 In summary the negligent design, development and testing cause of action is fatally flawed. It is plain and obvious that it will fail and therefore must be struck.

Negligent Manufacture

146 The statement of claim asserts that the defendants were negligent in the "manufacturing" of Seroquel. However, the statement of claim says nothing at all about what was allegedly negligent about the manufacturing process. As well it is unclear who the plaintiffs say manufactured Seroquel. There is a complete lack of material facts in the pleading. Negligent manufacturing claims arise when something goes wrong in the manufacturing process. This is a distinct form of negligence that the plaintiffs simply lump together with the other types of negligence.

147 In *Rowe (Guardian ad litem of) v. Sears Canada Inc.*, 2005 NLCA 65 (N.L. C.A.) at paras. 19- 21, the court reviews the differences between the types of negligence claims and in particular negligent manufacturing:

Products negligence cases fall into three general classes: manufacturing defect, design defect and failure to warn. This case does not concern the third. In manufacturing defect cases something which should not be present is (the classic snail in the bottle of ginger beer) or something which should be present is not. Something goes wrong in the manufacturing process itself, or the handling of the product, which produces a product which is below the standard set by the manufacturer. Generally a high standard of care is imposed on manufacturers in cases of defect in manufacturing. This coupled with permitted inferences from circumstantial evidence has resulted in liability being imposed on manufacturers in the absence of precise evidence of how the manufacturing defect occurred. The proof of the presence of the defect and that the defect resulted in injury to the plaintiff permits the trial judge to draw an inference of negligence.

Design defect is not the result of something having gone wrong in the production of the product but an error in the design of the product. The central question is whether a different design ought to have been used by the manufacturer. In cases of design defect it is the design specifications themselves which create the risk to the

consumer. As is obvious, a finding that there had been a design defect results in a whole line of products being defective. A finding of manufacturing defect relates only to the item under consideration.

148 It is plain and obvious that the statement of claim does not plead the material facts necessary to sustain a claim for negligent manufacturing. Accordingly, the statement of claim does not disclose a cause of action for negligent manufacturing and this pleading must be struck.

Negligent Distributing, Marketing and Sale

149 Once again the decision to lump the different negligence claims together is a problem. The statement of claim fails to deal with the fact that each type of negligence is unique.

(a) Approved Uses

150 The allegations of negligent distribution, marketing and sale in relation to the approved uses are deficient for several reasons.

151 First, the plaintiffs do not plead that Seroquel's propensity to injure outweighed the value of its use. However, this is a critical element of any negligent distribution, marketing and sale claim. In the absence of material facts to this effect, the pleading cannot justify the conclusion that the defendants were negligent in choosing to distribute, market and sell Seroquel, only that the defendants may have breached their duty to warn. This was explained by the British Columbia Court of Appeal stated in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 193 D.L.R. (4th) 67 (B.C. C.A.), at paras. 42-43 and 45, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 21 (S.C.C.):

At the risk of oversimplifying a complex decision-path, I venture to suggest the first step in every products liability case alleging negligent design, manufacture, or marketing is the determination of whether the product is defective under ordinary use or, although non-defective, has a propensity to injure. Some American authorities refer to this step as "general causation", whether a product is capable of causing the harm alleged in its ordinary use.

The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product to determine whether the manufacturer's duty was not to manufacture and distribute, or to distribute only with an appropriate warning. It may be prudent to refer to this as an assessment of the state of the art; it may be that a manufacturer did not but should have known of its product's propensity for harm.

...

If the value of the product's use outweighed its propensity to injure such that distribution with a warning was appropriate, the third step will be an assessment of the reasonableness of the warning (whether direct or by a learned intermediary) given the state of the art and the extent of the risks inherent in the product's use.

152 Second, and related to the above point, many of the negligent distribution, marketing and sale allegations are in fact allegations that the defendants and their employees simply breached the initial or continuing duties to warn. These allegations fail to disclose a cause of action for the reasons discussed in connection with the duty to warn claim below. Indeed, Canadian courts have repeatedly recognized that "negligent marketing" is merely a synonym for breach of the duty to warn. As the Newfoundland Court of Appeal stated in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1995] N.J. No. 150 (Nfld. C.A.) at para. 82, var'd on other grounds, [1997] 3 S.C.R. 1210 (S.C.C.):

Danger from products may be the result of negligence in manufacture, design or marketing. Here the finding of the trial judge is one of negligence in the marketing of the product, that is, failure to warn of the flammability of Thermo-clad....

153 Third, the remaining negligent distribution, marketing and sale allegations concern claims that the defendants or their employees misrepresented information about Seroquel. While these allegations are framed as particulars of

a negligence *simpliciter* claim, it is clear that they are effectively allegations of negligent misrepresentation. They are therefore deficient given the plaintiffs' failure to plead any particulars of the misrepresentation, or that they relied upon the misrepresentations and suffered damages as a result. As Strathy J. stated in *Singer* at paras. 67-69 and 73:

The plaintiff's claim in negligence, as summarized in his counsel's factum, is that the defendants owed a duty of care to the plaintiff and class members to provide them with accurate information on the labeling of the products and not to make false or misleading claims on the labeling, advertising and marketing of the products. The plaintiff claims that the defendants breached this duty and that he suffered damages. The plaintiff does not give particulars of his damages, other than to describe them as "economic and other damages". Nor does the plaintiff plead a causal link between the defendants' negligence and his alleged damages.

The pleading is replete with references to "misleading representations", "misleading claims", "misleading statements", "misleading labeling and advertising" and includes allegations that the defendants knew or should have known that their products did not have the qualities they ascribed to them.

In effect, rather than plead negligent misrepresentation, the plaintiff has pleaded that the representations made on the packaging were false due to the negligence of the defendants. The plaintiff asserts that this is a different cause of action in negligence, with different essential elements. I am not persuaded by this assertion. The plaintiff's claim is clearly in negligent misrepresentation, albeit improperly pleaded. This is clear from a reading of the statement of claim and from the common issues proposed by plaintiff, particularly common issues 1 to 4 (see below and see the attached appendix). As such, it suffers from the fatal defect that there is no pleading that the plaintiff relied on these misrepresentations and suffered damages as a result.

...

I conclude that the pleading expressed in negligence is really a claim for negligent misrepresentation; it fails to plead reliance and, as such, plainly cannot succeed.

154 As in *Singer*, the unparticularized pleadings of misrepresentation in this case fail to allege reliance by the plaintiffs or class members, and therefore do not satisfy s. 5(1)(a).

(b) OffLabel Uses

155 In addition to the above deficiencies, the negligent distributing, marketing and sale cause of action has a further defect as it relates to off-label uses. It is deficient and will fail because the defendants did not have a duty to "ensure" that Seroquel was not distributed, marketed or sold for off-label uses. This is because doctors have the legal right to prescribe Seroquel for off-label uses, regardless of the defendants' conduct. This was explained by Perell J. in *Goodridge* at paras. 14 and 98 as follows:

14 Physicians may lawfully prescribe a drug for other than its authorized use as set out in the product monograph. This practice is called "off-label" prescribing. Prescribing a drug for off label uses is not illegal, and it is a common practice of physicians. Medical practitioners are free to endorse or recommend off-label uses for medications and often do so, particularly when their patient's ailments are proving resistant to approved drugs....

...

98... Although the drug innovator can control the manufacture of its own product, monitor for adverse reactions to its product and give warnings about its own product, the innovator is not in a position to stop the generic manufacturer from releasing the generic drug or to stop physicians from prescribing the generic drug for off label uses. This conduct is not the innovator's conduct, and, in my opinion, it would be unfair to impose a duty of care on the innovator for another's conduct when the innovator cannot control, qualify, or stop that conduct. In my

opinion, it would not be fair or just to make the innovator liable for failing to do something that should and can only be done by others.

Failure to Warn Cause of Action

156 The statement of claim alleges that the defendants breached their duty to warn of the dangers associated with consuming Seroquel including the "Health Risks" that are described in paragraph 20 of the pleading as follows:

Seroquel causes serious and sometimes fatal injuries to the liver, kidneys and pancreas. Its adverse effects include, but are not limited to, ketoacidosis, pancreatitis, diabetes mellitus, weight gain, impaired glucose regulation, hyperglycemia, blindness, cataracts, increased thirst and hypoglycemia. Other serious injuries include a potentially fatal condition referred to as neuroleptic malignant syndrome (NMS), tardive dyskinesia, which can cause potentially irreversible, involuntary movements and other serious health problems associated with the onset of diabetes including heart disease, blindness, coma, seizures and death ("Health Risks").

157 It is alleged that the product warnings were "vague, incomplete or otherwise wholly inadequate, both substantively and graphically, to alert prescribing physicians as well as consumer patients of the actual Health Risks associated with consuming Seroquel." Further it is alleged at paras. 21 and 25 of the statement of claim that the defendants did not "sufficiently warn of the serious adverse Health Risks associated with consuming Seroquel" and that the product "label was particularly deficient when considering the labeling done in other countries."

158 First, the statement of claim fails to provide sufficient particulars regarding the alleged breach of a duty to warn. There is no indication of which particular defendant breached a duty to warn or which defendant owed such a duty by virtue of having manufactured Seroquel. This type of deficiency was recognized by Cumming J. in *Hughes* at paras. 58-59:

It is not clear from the pleading when the alleged duty to warn arose, either generally or in relation to each of the Sunbeam defendants. In alleging a failure with respect to a duty to warn, the pleading does not delineate this as an alternative, distinctive cause of action. Rather, the allegation of a breach of a duty to warn, being a failure to act, is blended together with the allegation of misrepresentation, that is, an improper action.

The Claim does not specify which defendant failed in respect of the alleged duty to warn and at what time. Any duty to warn with respect to a given product is owed only by the manufacturer of that product.

159 The statement of claim also fails to plead what warnings were given, how they were inadequate, and whether or how they could have been improved. A breach of the duty to warn requires a demonstration that the defendants failed to provide the appropriate level of specificity in the product monograph. The plaintiffs have not pleaded any material facts in relation to the actual warnings contained in the product monograph. This bare pleading does not disclose a tenable cause of action for duty to warn.

160 The pleading makes reference to the warnings in generic terms. However, there is no dispute that the warning is the product monograph. The defendants say that the content of the product monograph is therefore incorporated by reference for the purpose of assessing the s. 5(1)(a) criterion. This approach is consistent with well established case law: see *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.), at 395 -396); *Lubarevich v. Nurgitz*, [1996] O.J. No. 1457 (Ont. Gen. Div.); *Vaughan v. Ontario (Minister of Health)* (1996), 49 C.P.C. (3d) 119 (Ont. Gen. Div.), at 123) and *Web Offset Publications Ltd. v. Vickery*, [1999] O.J. No. 2760 (Ont. C.A.).

161 As the Ontario Court of Appeal stated in *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.) at para. 26 "[T]he determination required under s. 5(1)(a) is to be made by reference to the pleadings and any documents identified in the pleadings."

162 When the product monograph is considered, the problems with this pleading are even more apparent. The lack of particularity is illustrated by the fact that the product monograph does contain sufficient warnings to respond to the

representative plaintiffs' claims. For example, the statement of claim pleads that Ms. Martin suffered two "injuries" as a result of ingesting Seroquel: weight gain and balance problems. The Seroquel product monograph at the time when Ms. Martin was first prescribed Seroquel in September 2005 contained warnings regarding weight gain and effects on cognitive and motor performance. Similarly, Ms. Middleton pleads that she took Seroquel "for six months starting in June 2005 and suffered weight gain and diabetes," and yet the product monograph as of April 25, 2005 contained a warning for weight gain and an expansive warning regarding hyperglycaemia and diabetes. There are no particulars that allow the defendants to understand why the plaintiffs allege that the warning was deficient.

Conspiracy

163 The plaintiffs advance a conspiracy cause of action against the defendants. The manner in which this claim is plead is fraught with problems. To appreciate the depth of the problem, it is helpful to review the law concerning conspiracy.

164 In Canada, there are two types of civil conspiracy: (1) predominant purpose, or conspiracy to injure; and (2) unlawful means or unlawful conduct conspiracy: see *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.). The plaintiffs do not allege a predominant purpose type of conspiracy in the statement of claim.

165 The material facts pled in the statement of claim allege that the defendants' conduct was motivated by their own financial self-interest and was not undertaken for the primary purpose of injuring the class members.

166 The elements of the "unlawful means" form of conspiracy are set out in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.) at para. 26 ("*Agribrands*") as follows:

For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:

- a) they act in combination, that is, in concert, by agreement or with a common design;
- b) their conduct is unlawful;
- c) their conduct is directed towards the [plaintiffs];
- d) the [defendants] should know that, in the circumstances, injury to the [plaintiffs] is likely to result; and
- e) their conduct causes injury to the [plaintiffs].

167 To sustain a claim for unlawful means conspiracy, the statement of claim must concisely plead material facts in support of each of these elements. This was explained in *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1998] O.J. No. 391 (Ont. C.A.) at para. 21 ("*Normart*") where Finlayson J.A. quoted from Bullen, Leake and Jacob's, *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows:

The statement of claim should [1] describe who the several parties are and their relationship with each other. It should [2] allege the agreement between the defendants to conspire, and [3] state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to [4] 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 [5] allege the injury and damage occasioned to the plaintiff thereby.

168 Claims for conspiracy have been struck out where they were bald, overly speculative, or simply restated legal principles rather than pleaded material facts. As the court stated in *Penson Financial Services Canada Inc. v. Connacher*, 2010 ONSC 2843 (Ont. S.C.J. [Commercial List]) at para. 15:

Rule 25.06(1) mandates a minimum level of material fact disclosure and if this level is not reached, the remedy is a motion to strike out the pleading. A proper pleading of conspiracy should enable a defendant to know the case he or she must meet. Conspiracy is a serious claim. A recitation of a series of events coupled with an assertion that they were intended to injure the plaintiff is insufficient, nor is it appropriate to lump some or all of the defendants together into a general allegation that they conspired: *Normart Management Ltd. and J. G. Young & Son Ltd. v. Tec Park Ltd.*

[Emphasis added and footnotes omitted.]

169 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": see *Research Capital Corp. v. Skyservice Airlines Inc.*, [2008] O.J. No. 2526 (Ont. S.C.J.) at para. 23, var'd on other grounds, 2009 ONCA 418 (Ont. C.A.) ("[Research Capital](#)").

170 The pleading of conspiracy in this case offends all of the above requirements. It lacks clarity, precision and the material facts necessary to support the constituent elements. For the reasons set out below, it is plain and obvious that the conspiracy claim will fail.

The Parties to the Conspiracy

171 To begin with, the plaintiffs have failed to adequately plead the relationship between the alleged parties to the conspiracy. I refer to the inconsistencies in the pleading regarding each defendant's role and the flawed enterprise liability approach that is discussed above.

172 The alleged conspiracy is dealt with in paras. 35 to 41 of the statement of claim. In para. 35, the plaintiffs allege as follows:

35. From at least 1997 at London, England, Wilmington, Delaware, Mississauga, Ontario and elsewhere the Defendants, by their directors, officers, servants and agents, wrongfully, unlawfully, maliciously, and lacking *bona fides*, conspired and agreed together the one with the other and with persons unknown to:...

173 No particulars of the relationship between the individual defendants, or their unnamed "directors, officers, servants and agents", are alleged in relation to the conspiracy. This type of problem was identified in *Taylor v. Tamboril Cigar Co.*, [2005] O.J. No. 4182 (Ont. C.A.) at para. 1 ("[Taylor](#)") as follows:

We are not persuaded that Lax J. erred in finding that the appellants' statement of claim failed to plead properly the claims for conspiracy, breach of fiduciary duty and breach of trust. With respect to conspiracy, we agree with the motion judge that the pleading does not provide the required particularity. Among other deficiencies, it does not plead the particulars of the relationship between these defendants and the other alleged conspirators. Indeed, it does not plead that these defendants are conspirators....

174 The lack of clarity in the pleading continues because the plaintiffs assert that the defendants conspired with "persons unknown." Similar allegations of conspiracy have been struck out in other cases. For example, in *Robinson v. Medtronic Inc.*, 2010 ONSC 1739 (Ont. S.C.J.) at paras. 17-18 and 20 ("[Robinson](#)"), the court struck a reference in a conspiracy pleading to "person unknown" because such words are not a proper pleading of a claim of civil conspiracy.

175 In essence, the plaintiffs have simply lumped the defendants together without making any attempt to specify the nature of the defendants' relationship. Such a pleading cannot satisfy s. 5(1)(a). This was explained in *Research Capital* at para. 48:

...it is not an appropriate approach to pleading conspiracy to lump together several defendants and allege they conspired to do something, without providing the material facts and full particulars to support the plea, being: facts as to the parties to the conspiracy and their relationship; the agreement between the parties; the purpose or object

of the conspiracy; acts done in furtherance of the conspiracy; and any injury to the plaintiff. As RCC did in its claim of conspiracy against Investments, it acknowledged it lacked the information to cite the requisite facts, but hoped to acquire information to establish conspiracy through oral and documentary discovery. Again, I find a plaintiff is not permitted to make a deficient claim and await discovery to gather the facts to make a proper plea.

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.

177 Courts have recognized that a conspiracy pleading requires a high degree of specificity. However, this is the consequence of alleging such a serious cause of action. If the plaintiff does not have knowledge of the specifics, then it is not appropriate to plead conspiracy: see *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Ont. S.C.J.) at para. 29; *J.G. Young & Son Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 (Ont. S.C.J.) at paras. 6 and 9.

The Purpose or Objects of the Conspiracy

178 The plaintiffs have also failed to adequately plead the purpose or objects of the conspiracy. Courts have struck out conspiracy claims where the plaintiff failed to plead the precise object of the conspiracy, or the purposes of a particular conspirator in entering into the agreement: see *Taylor*, at para. 1.

179 In this case, the purpose and objects of the conspiracy are pleaded as follows:

36. The Defendants were motivated to conspire and their predominant purposes, concerns, and motivations were:

- a) to obtain approvals for Seroquel;
- b) to increase or maintain revenue;
- c) to increase or maintain profit;
- d) to increase or maintain market share;
- e) to avoid negative publicity and preserve public goodwill; and,
- f) to place corporate revenue and profit above the safety of the Class Members.

[Emphasis in original.]

180 In my view, the plaintiffs have simply plead a list of corporate activity that lacks the required precision.

The Overt Acts

181 Paragraph 37 of the statement of claim lists 25 "acts, among others" that were "done by the Defendants and their servants, agents and employees." The level of detail that a conspiracy pleading requires is missing. There is no indication of the time, place, actor or facts behind any of the acts: see *Dewan v. Burdet (In Trust)*, [2006] O.J. No. 5210 (Ont. S.C.J.) at para. 62, var'd on other grounds, 2007 ONCA 752 (Ont. C.A.).

182 Further, much of the same conduct is pled in support of the negligence claim. Such allegations are plainly insufficient as explained in *Normart* at paras. 22 and 25 as follows:

... While there is a statement as to the general terms of the conspiracy, there is no detail with respect to overt acts in furtherance of the conspiracy and no indication of what damages were suffered as a result of the conspiracy as opposed to the breach of contract....

...

... Simply reciting a series of events and stating that they were intended to injure the appellant is hardly sufficient to establish a conspiracy at law particularly where the same facts have already been pleaded in support of an action for breach of contract. The basis in law of a stand alone conspiracy is simply not established.

183 In summary, plaintiffs have failed to adequately plead the overt acts. Instead they have provided an unparticularized list of 25 acts.

The Unlawful Means

184 The conspiracy pleading is also deficient because the plaintiffs do not sufficiently plead how the alleged acts amount to "unlawful" conduct for the purposes of the conspiracy tort. Paragraph 39 simply states that the "[d]efendants' conduct was unlawful because they knowingly marketed and sold Seroquel when they knew, or had reason to know, of the Health Risks associated with the consumption of Seroquel." This is the same allegation that is made for the negligence cause of action. This pleading does not address why such conduct is alleged to be unlawful.

185 While the pleading alleges that the defendants breached various statutes, this does not assist in understanding why the conduct in question is "unlawful." Simply listing a group of statutes and alleging that they were breached does not provide sufficient clarity: see *Thermionics Ltd. v. Philco Products Ltd.*, [1940] S.C.R. 501 (S.C.C.) at para. 9; *Agribands*, at para. 28.

186 It is not possible to determine from the statement of claim whether all of the defendants engaged in the same unlawful act. This failing is particularly significant given that the defendants are resident in Canada (AZ Canada), the United States (AZ U.S.) and England (AZ U.K.), and the statement of claim alleges that their conduct is unlawful by virtue of violating both Canadian and American legislation.

187 Alleging a breach of a foreign law as support for the allegation of unlawful means conspiracy is a problem. As the Supreme Court of Canada stated in *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612 (S.C.C.) at para. 34 (and 100) "[i]t is well established that Canadian courts will not enforce a penal order, either directly or indirectly (Castel and Walker, at para. 8.3)."

Injury and Causation

188 The plaintiffs have also failed to adequately plead the injury and causation elements of the conspiracy. The only reference to this element of the conspiracy claim is found in para. 41 where the plaintiffs plead that the "[d]efendants knew that the conspiracy would cause injury and losses to the Plaintiffs, the Class Members and other Family Class members, and it did." This is clearly inadequate.

189 There is no allegation that the specific unlawful acts and/or the breaches of the various statutes caused the plaintiffs' injuries. There is also no allegation of what specific injuries the plaintiffs even suffered as a result of the conspiracy. These vague and unspecified allegations of causation are insufficient to meet the test in s. 5(1)(a).

190 As noted above, the plaintiffs rely on the alleged breach of foreign statutes. It is unclear how a violation of the U.S. Federal Food, Drug and Cosmetic Act could cause any injury to Canadian class members, when Health Canada undertakes its own independent review of pharmaceutical drugs, as it did for Seroquel.

Summary - s. 5(1) (a) criterion

191 In summary, this is a statement of claim that offends the most basic rules governing pleadings. The deficiencies are numerous and fatal. It is plain and obvious that the causes of action in this pleading will fail. The plaintiffs have amended their statement of claim no less than five times, and the defendants have requested particulars. Yet the pleading still contains numerous significant deficiencies. The defendants' factum contains a detailed description of the deficiencies and requests the court to strike the pleading with no leave to amend. Despite being put on notice of the defence position, the plaintiffs made no effort to try and remedy their pleading. The amendment that they requested at the start of the hearing was solely to remove one of the representative plaintiffs.

192 The plaintiffs have not satisfied the s. 5(1)(a) criterion and the action cannot be certified. I will nevertheless consider the remaining s. 5 criteria.

5(1)(b)- Identifiable Class

Legal Framework

193 Subsection 5(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.), at para. 10. To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

194 Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There must be a rational connection between the class member and the common issues: see *Sauer* at para. 32

195 In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class." The plaintiff must define the class by reference to objective criteria, so that a given person can be determined to be a member of the class without reference to the merits of the action.

The Class Definition

196 The plaintiffs propose the following class definitions:

- a) all persons in Canada who were prescribed and who consumed Seroquel ("Patient Class"); and
- b) the family members of the Patient Class, as defined by the Family Law Act and similar applicable provincial and territorial legislation ("Family Law Class").

197 The defendants state that there are four reasons why the plaintiffs have not satisfied s. 5(1)(b). First, there is no basis in the evidence to show that there are persons other than the representative plaintiffs who are interested in being included in the class. Second, the plaintiffs have failed to establish some basis in fact for a rational relationship between the broad Patient Class, and the common issues. Third, the Patient Class members do not share the same interest in the outcome of this litigation. Fourth, the Patient Class definition is unnecessarily overly broad.

Two or More Persons

198 The plaintiffs must provide some evidence of "two or more persons" who assert a claim. The plaintiffs state that the exact number and identity of class members is unknown. They rely on the affidavit evidence of Victoria Paris, a lawyer at the plaintiffs' law firm. The substance of this affidavit is information and belief. Ms. Paris was informed by Ms. McPhee, another lawyer at the plaintiffs' law firm.

199 Ms. Paris states that in addition to the named plaintiffs, the firm has "been in contact with more than thirty potential class members, who consumed Seroquel for both on and off label uses." No further evidence about these potential class members is provided.

200 As well, Ms. Paris states that there are proposed class actions in Alberta and British Columbia. The representative plaintiffs in the Alberta and British Columbia actions will seek to have their actions stayed if the Ontario action is certified. A third action was started in Quebec and the same class definition was proposed. The Quebec court denied certification for a variety of reasons, one being the absence of any evidence that a class exists. The decision denying certification is being appealed. This plaintiff therefore is still attempting to pursue his action in that province.

201 The statements of claim in Alberta and British Columbia allege the following. The representative plaintiff in the Alberta action took Seroquel in 2002 for schizophrenia and suffered weight gain and diabetes. In the British Columbia action one plaintiff took Seroquel in 2004 for depression and bi-polar disorder and experienced rapid weight gain. The second plaintiff in that action took Seroquel in 2001 for an antipsychotic disorder and experienced weight gain and diabetes. Aside from the fact that these statements of claim were issued, there is no evidence from the plaintiffs in these actions.

202 Therefore we are left Ms. Martin and Ms. Middleton. As will be clear later in this decision, there are real problems with Ms. Martin's claim. Due to the narrowing of the common issues Ms. Martin's claim is no longer connected to the common issues and she is not representative of a class, assuming one exists. This leaves Ms. Middleton as the sole representative plaintiff and her claim is limited to off-label use.

203 In my view, the plaintiffs have not provided a sufficient evidentiary basis to establish that a class of two or more persons exists. While I appreciate that the burden on the plaintiff to satisfy the s. 5 criteria is low, the evidence that has been provided is insufficient. I agree with the observations of Winkler, J. in *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (Ont. S.C.J.) at para. 23:

[A] class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. The record before the court must contain a sufficient evidentiary basis to establish the existence of the class.

204 As Nordheimer, J. stated in *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (Ont. S.C.J.) at para. 33 ("[Bellaire](#)"):

In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

[Emphasis added.]

205 Other decisions have expressed the same points. For example in *Chartrand v. General Motors Corp.*, 2008 BCSC 1781 (B.C. S.C.), Martinson J. described the identifiable class requirement as an "air of reality test," testing the reality of the linkage between the plaintiff's claim and the proposed class. This requires not simply that there be a theoretical link between the claim, the class and the common issues, but that there be a demonstrated link in fact to two or more bona fide claimants.

206 It is not enough to say that more than thirty potential class members, who consumed Seroquel for both on and off-label uses, have been in contact with class counsel. There is no evidence about the nature of the contact. More importantly, there is no evidence to show that any of these people are desirous of having their common complaint

(assuming there to be a common complaint) determined through the class action process. This cannot be assumed from the mere fact that a person contacted counsel.

The Class Definition is Over-Inclusive

207 The defendants argue that the class definition is overly broad. It captures those who have taken Seroquel without any side effects. The plaintiffs do not dispute that Seroquel helps patients. As noted above, Health Canada has approved Seroquel for use in Canada and it continues to be used to treat patients who suffer from schizophrenia, acute management of mania episodes associated with bipolar disorder I and II and acute treatment of depressive episodes associated bipolar disorder I and II. Further, all of the experts, including Dr. Wirshing and Dr. Plunkett agree that Seroquel is an effective drug. Therefore, the class definition is bound to include those who have no claim against the defendants. It will also include those who have suffered side effects that are not covered by the common issues and/or not covered by the statement of claim. For these reasons, the defendants say the class definition is overly broad.

208 A proposed class is not overbroad because it may include persons who ultimately will not have a claim against the defendants: see *Bywater* at para. 10; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22. However, it should not be defined wider than necessary: see *Hollick* at para. 21. Despite the fact that Seroquel was only introduced in Canada in 1997, the definition does not indicate a period of time that is in issue. Dr. Wirshing has no criticism of the product monograph from the time Seroquel was first introduced in Canada in 1997 until 2001. Therefore at a minimum, if I was certifying this action, the class should be bounded by a start date of 1997.

209 Given the above problems with the class definition it fails to satisfy s. 5(1)(b) criterion.

5(1)(c) - Common Issues

Legal Framework

210 Subsection 5(1) of the *Class Proceedings Act* requires that "the claims or defences of the class members raise common issues." Section 1 of the *Class Proceedings Act* defines "common issues" as:

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts....

211 For an issue to be common it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: see *Hollick* at para. 18.

212 An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.), aff'd, [2003] O.J. No. 3918 (Ont. Div. Ct.).

213 The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: see *Western Canadian Shopping Centres Inc.*, at para. 39.

214 The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: see *Frohlinger*, at para. 25; *Fresco*, at para. 21.

215 An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: see *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

216 The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that the issues are common: *Hollick* at para. 25. As Lax J. stated in *Fresco*, at para. 61 "[w]hile only a minimum *evidentiary* basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

217 Finally, a plaintiff is not required to produce evidence on each element of a cause of action pleaded. As Lax J. stated in *Glover v. Toronto (City)*, [2009] O.J. No. 1523 (Ont. S.C.J.) at para. 56: "One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged."

Analysis of Proposed Common Issues

218 Initially the plaintiffs' common issues focused on the causal connection between Seroquel and the extensive list of health risks described in the statement of claim. The defendants responded that this approach was fatal to certification because the common issues lacked commonality and there was no evidence to show that such a broad approach could be managed on class wide basis. In reply, the plaintiffs amended the common issues and described the health risks arising from the use of Seroquel as "weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom."

219 The revised common issues that the plaintiffs wish to certify are as follows:

General Causation

(1) Can Seroquel cause weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?

Off-Label Promotion

(2) Did the defendants, or any of them, promote, market, advertise, and/or recommend Seroquel for off-label uses? If the answer is yes, does this change the nature of the duty under common issue #3 or common issue #4, constitute unlawful conduct under common issue #7, and/or constitute behavior that would justify an election under common issue #8 or punitive damages under common issue #10?

Negligence/ Duty to Warn

(3) Did the defendants, or any of them, owe a duty of care to the Class in respect of the design, development, researching, testing, recommending, advertising, promoting and/or marketing of Seroquel as it relates to the risk of weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom? If so, what was the nature of the duty?

(4) Did the defendants, or any of them, owe a duty to the Class to warn that Seroquel can cause weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom, and if so, when did the duty to warn arise?

(5) If the answer to #3 and/or #4 is yes, did the defendants, or any of them, breach such duty? If so, what was the nature of the breach?

Conspiracy

(6) Did the defendants, or any two or more of the defendants, act in combination to conceal information from the Class and/or Health Canada relating to the safety and efficacy of Seroquel, as it relates to weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?

(7) If the answer to #2 and/or #6 is yes, was the defendants' conduct unlawful in that it violated the Food and Drugs Act or the Food and Drug Regulations?

Waiver of Tort

(8) Can the Class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of Seroquel?

(9) If so, in what amount and for whose benefit is such accounting to be made?

Special, Aggravated and/or Punitive Damages

(10) Should one or any of the defendants pay special, aggravated and/or punitive damages to the Class?

Aggregate Assessment of Damages

(11) Can damages be determined on an aggregate basis on behalf of the Class?

Costs of Administration and Distribution

(12) Should one or any of the defendants pay the costs of administering and distributing the amounts to which the Patient Class and Family Law Class are entitled?

Prejudgment Interest

(13) Should one or any of the defendants be ordered to pay prejudgment interest?

Common issue # 1 - General Causation

Can Seroquel cause weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?

220 There are fatal problems with this common issue. The issue lacks commonality and the phrase "metabolic disturbances as well as secondary injuries flowing therefrom" is unclear. This phrase is repeated through many of the common issues. The following critique applies to the use of these words throughout the common issues.

Unclear Terminology

221 I start with the phrase "related metabolic disturbances as well as secondary injuries flowing therefrom." What does this mean?

222 The source of this common issue is *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.) at paras. 82-83. The only difference with the common issue in this case is the presence of weight gain that was absent in *Heward*. The focus in *Heward* was Zyprexa, another second generation antipsychotic drug. The court certified *Heward* and approved this common issue. The reasons in *Heward* do not discuss the meaning of metabolic injuries and secondary injuries. If the court had some evidence to explain these terms it is not apparent from the reasons.

223 The wording of this common issue focuses on metabolic disturbance related to weight gain and diabetes. It is not clear if the "secondary injuries" are secondary to the metabolic disturbance or weight gain and diabetes. Are the metabolic disturbances and the secondary injuries some or all of a list of symptoms that are part of the health risks described in the

statement of claim? The plaintiffs made a decision to revise the common issues when faced with the defendants' criticism. It is unclear if this imprecise reference to "metabolic disturbances" and "secondary injuries" is an attempt to broaden the scope of the common issues to capture the full list of health risks that were originally in this common issue.

224 I questioned the plaintiffs about their use of the words "metabolic disturbances" as well as "secondary injuries flowing therefrom." In argument, plaintiffs' counsel explained that the earlier version of the common issue was too broad and this was an attempt to narrow it. The suggestion that they are trying to narrow this common issue is at odds with their next explanation. Plaintiffs' counsel went on to explain that they do not wish to catalogue all of the so called related injuries because this might exclude from a common issue trial, a related relevant injury that is not on the list. In effect this common issue has not been narrowed. Rather, through the use of such nebulous words it seeks to include an undefined list of symptoms.

225 Plaintiffs' counsel fairly conceded that there is no evidence that explains the term "metabolic disturbance and secondary injuries." Drs. Wirshing, Chue and Plunkett use the phrase "metabolic disturbance" without explaining it.

226 It is not an answer to say that a common issue can be certified because it was certified in another case: see *Lambert*, at para. 121. It does not relieve the plaintiffs of the some evidence requirement. Further, it is not an answer to say that expert evidence will be led at trial to explain unclear terminology in a proposed common issue. The common issues trial judge should not be left wondering what was intended by the words "metabolic disturbances as well as secondary injuries flowing therefrom." A common issue that lacks clarity will cause unnecessary confusion as the case progresses: see *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2011 ONSC 4914 (Ont. S.C.J.) at para. 188.

227 A certification judge cannot perform the task of assessing a common issue if it is unclear what it means. Some evidence from a medical expert explaining the phrase "metabolic disturbance as well as secondary injuries flowing therefrom" is required so the court can perform its task under s. 5. The plaintiffs have simply borrowed the words from *Heward* and assumed that the court will certify them in this case. That is not good enough. There must be some evidence to explain the meaning of the words together with some evidence that Seroquel can cause "related metabolic disturbances as well as secondary injuries flowing therefrom" and that this can be assessed in common.

228 To emphasize the importance of defining medical terms used in a common issue, consider the following definition of "metabolic" found on Medicinenet.com. This site describes "Metabolic" as "Relating to metabolism, the whole range of biochemical processes that occur within us (or any living organism). Metabolism consists of anabolism (the buildup of substances) and catabolism (the breakdown of substances)." In my view this dictionary definition suggests that the term has wide application. It reinforces the importance of providing some evidence so the medical term in the common issue is understood.

229 This leaves weight gain and diabetes. The defendants agree that there is some evidence that Seroquel can cause weight gain and diabetes. This evidence is obvious since the product monographs warn of these risks.

230 As I will explain below, Ms. Martin's statement in her affidavit that she gained weight as a result of taking Seroquel, is not supported by her medical records. The result is a representative plaintiff whose own claim is not grounded in the common issue.

231 The remaining consideration is whether this common issue, limited to weight gain and diabetes, can be assessed in common.

Lack of Commonality

232 Common issue 1 is a general causation question. This means that if it was accepted as a common issue, an individual trial would be required to determine if Seroquel caused each class member to gain weight and/or develop diabetes. This common issue alone would not determine liability.

233 The plaintiffs have offered no evidence to show that this issue is capable of being assessed in common. It is not susceptible to a single answer at this abstract level. Asking in the abstract if Seroquel can cause weight gain and diabetes is only the beginning of the inquiry. There is a problem with a general causation question when there is no evidence that "compelling epidemiological or statistical evidence might be sufficient to establish individual causation or go a long way to doing so": *Wuttunee v. Merck Frosst Canada Ltd.*, [2009] S.J. No. 179 (Sask. C.A.) at para 144, leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 512 (S.C.C.) ("*Wuttunee*").

234 Adding to the difficulty is the fact that this is not a case where the drug is alleged to have caused a unique harm. In contrast, Seroquel is alleged to cause weight gain and diabetes. These are two conditions that are ubiquitous in society. The evidence that has been provided shows that this general causation question is just the beginning of the inquiry and that its resolution is dependent upon individual findings of fact with respect to each claimant.

235 The plaintiffs' expert, Dr. Wirshing, states that there is "great variability in the degree to which different populations of patients are affected by the metabolic toxicity of Seroquel." When Dr. Wirshing was cross-examined he provided further evidence that there would be considerable difficulty managing this issue in common. He agreed that the population data shows that some patients taking Seroquel will gain weight, some will lose weight and others will experience no weight change. As a result, the population data will not assist in determining causation for the class and an individual inquiry is required.

236 In Dr. Barrett's report he also explains the inability to answer this common issue by relying on the population data. It is clear from the following evidence that this common issue cannot be assessed in common. He states as follows in section 5 of his report:

Population data is useful in providing an understanding for the risk factors that lead to diabetes and the relative magnitude of each risk factor. However, in determining whether or not Seroquel caused weight gain or DM in an individual patient it is not sufficient to simply examine population data. Population data cannot be translated to the issue of causation in the individual patient. This is underscored by the fact that diabetes and obesity are both common disorders in the Canadian population in the absence of Seroquel administration.

In order to determine individual causation the court does need to appreciate as necessary background and context the population risk factors described in the section on general causation. It is then necessary to identify all of the diabetes risk factors the individual has and consider the strength of each individual risk factor possessed by the individual in order to appreciate the overall diabetes risk for that individual. Only then can one address whether Seroquel as a possible single risk factor can reasonably be considered as causative in that individual. This process requires analysis of the medical records, psychiatric records, history of pharmaceutical use and life changes that are occurring in each individual.

237 The individuality of this issue is also apparent from the evidence of Dr. Chue. He states at page 31 of his report as follows:

In order to determine whether a drug such as Seroquel caused a specific "Health Risk" to occur in a particular individual, an understanding is required of the prevalence, nature, etiology, and known or associated risk factors in the general population for each of the specific "Health Risks".

With this understanding, one would then need to consider the individual's unique circumstances including their risk factors for that specific "Health Risk". This will require a comprehensive analysis by specialists qualified in the medical fields applicable to the particular "Health Risk". This will entail a review for each individual of their full medical history including complete medication exposure history, family history and psychiatric history, and other relevant factors including age, ethnicity, lifestyle, and gender. This information would be obtained from medical and psychiatric records, and pharmacy records. Where there is incomplete information, further investigations and/or physical examination may be required.

Taking weight gain as an example, there is an epidemic of obesity in Canada with weight gain being an increasing problem in all strata of the general population. The population with mental illness is at greater risk of weight gain and obesity than the general population. Thus, a recorded weight change in an individual patient treated with Seroquel must be analyzed carefully taking into account the individual's specific risk factors and medical history in the context of the background population risk.

238 When the evidence dealing with diabetes is considered the individuality of the issue remains and we are led to the same conclusion: there is no evidence that this issue can be managed in common.

239 The prevalence of diabetes in our society is explained by Dr. Barrett in his report. He describes an epidemic of type 2 diabetes driven by diet and lack of exercise. In 2005, the Canadian Diabetes Association indicated that "5.5% of the population had diagnosed diabetes, which represented a 70% increase in diagnosed diabetes between 1998 and 2005." He goes on to state that "according to the Canadian Diabetes Association in 2005 2 of 3 Canadian adults and nearly 1 of 3 children age 12 to 17 were overweight or obese and are therefore at high risk of developing type 2 diabetes." To further emphasize the point he states that the "morbidly obese woman has a risk of developing diabetes that is ~6000% greater than that of a lean woman."

240 The path that diabetes takes is also individual. Dr. Barrett states that "the complex natural history of type 2 diabetes has a natural time course through which each individual patient that develops diabetes will move. The likelihood of progressing along this pathway is determined by their risk factor profile...As a result all these individuals may already have or be transiting towards diabetes in the absence of any new medication or intervention. This can only be assessed for the individual patient, based upon their risk factor profiles."

241 Dr. Barrett explains that the diagnosis of diabetes requires a blood test. Further many people with type 2 diabetes "can be asymptomatic or have only very mild symptoms that are not recognized as due to diabetes." As a result, "the disease can be present and undiagnosed for a considerable period of time. It has been estimated that in the United States and Canada, approximately one quarter to one third of individuals with type 2 diabetes...have not been diagnosed. Put somewhat differently, the date of diagnosis of disease frequently lags by years the date of true onset of disease, making undiagnosed diabetes a significant health issue."

242 Further, Dr. Barrett states that diabetes is a "multi-factorial disease with multiple risk factors that predispose to its development." He adds as follows in para. 2D of his report:

These risk factors are both genetic and environmental and strongly associate with disease development and have been used to guide screening strategies to identify early on those at highest risk. Significant risk factors for type 2 DM include age, family history of DM, obesity, race, ethnicity, history of gestational diabetes, and major neuropsychiatric disorders. In a given individual the risk for developing diabetes is a function of the combined risk factor burden he or she carries.

243 Dr. Arnold also explains the challenges of evaluating whether a causal association exists between Seroquel and diabetes at paras. 71-76 of his affidavit:

71 Determining whether a causal association exists between SEROQUEL use and diabetes is a difficult task due to the nature of the disease process of diabetes, its prevalence in the general population and the psychiatric population in particular, and the low incidence of diabetes adverse events relative to the number patients taking the drug.

72 Diabetes is a progressive disease that begins sub-clinically and progresses to an impaired fasting glucose with glucose intolerance, and then to full-blown diabetes. According to the literature, the prevalence of diabetes in the general population is now approximately 10% and is greater in the schizophrenic population. Therefore, a percentage of patients taking SEROQUEL would be expected to develop diabetes and/or hyperglycaemia as part of the prevalence of the background risk in this population.

73 Because a percentage of patients treated with SEROQUEL would be expected to be diagnosed with diabetes as part of the natural incidence of that disease, individual adverse event reports of diabetes are of much more limited value than would be the case with adverse event reports for diseases that are less prevalent. Indeed, some disorders are reported so rarely and lack a natural cause that they are usually considered as drug-related unless demonstrated otherwise. Diabetes is not such a condition.

74 In the case of diabetes, because of its prevalence in society, it is far more complicated to assess the possible contribution of a medication such as SEROQUEL in an individual case report. To do so requires careful analysis of the individual's medical history, baseline medical condition, risk factors upon commencement of drug therapy, the changes during therapy, and the changes after therapy is discontinued. To compound this challenge, often the necessary information needed to assess an adverse event report cannot be obtained despite our follow-up protocols and best efforts to do so.

75 For these reasons, in evaluating whether there is a causal association between SEROQUEL and diabetes, it is necessary to analyse aggregate patient data to see whether the incidence of diabetes treated with SEROQUEL is higher than would be expected to occur without SEROQUEL treatment.

76 The results of the studies published in the scientific/medical literature over the years that have considered the association between SEROQUEL and diabetes have been inconsistent. A number of studies have assessed whether the use of SEROQUEL can increase patients' risk of diabetes, but many of the studies that did suggest an increased risk did not control for important risk factors. On the other hand, many of the studies which were better controlled for important diabetes risk factors failed to demonstrate any increased risk between SEROQUEL and diabetes. Therefore, it remains AstraZeneca's view that the evidence to date fails to demonstrate a causal association between SEROQUEL use and diabetes and, at most, any association suggested by some studies is extremely weak.

244 Dr. Wirshing's evidence is also relevant. It is his opinion that Seroquel causes the patient to become obese. Assuming such weight gain, he states that "diabetes is not a forgone conclusion even from significant amounts of weight."

245 When looking at whether Seroquel without weight gain can cause diabetes, Dr. Wirshing has seen this occur with individuals but he states that the causal connection is not shown in the group data. Even among the individuals, Dr. Wirshing states that there is no dose level for Seroquel above which you see a connection between Seroquel and weight gain and/or diabetes. This is important evidence because it reinforces the evidence of the defence experts that this issue cannot be answered on a common basis.

246 Lastly, Ms. Martin's evidence highlights the individuality of determining if Seroquel caused weight gain and diabetes. While taking Seroquel Ms. Martin states in her affidavit that she experienced several side effects including weight gain of 90lbs. She states that while she tested negative for diabetes in 2006, she experienced diabetic symptoms. Clearly on the issue of diabetes, an individualized inquiry would be required to determine if there was a causal connection between her consumption of Seroquel and the diabetic symptoms that she refers to.

247 While Ms. Martin states that she gained weight after taking Seroquel, her medical records do not document the connection between Seroquel and the weight gain. Further even if she did gain weight, identifying the cause requires an individual inquiry because she possessed multiple risks factors for weight gain aside from Seroquel. Dr. Chue reviewed these points in his report at p. 2007 as follows:

According to the chart it would appear that Ms. Martin gained 100 lbs in the year prior to the day she was first prescribed Seroquel (September 21, 2005). The only other dated weight reference in the chart was on December 20, 2005 where it was noted that her weight was "approaching 300lbs". Given that 280 lbs following a weight gain of 100 lbs could be said to be approaching 300 lbs", it is not clear from the record that Ms. Martin gained any weight on Seroquel. If Ms. Martin did gain weight while taking Seroquel, there is nothing in her records to support her claim of weight gain attributable to Seroquel. Ms. Martin possessed multiple risk factors for weight

gain including impaired mobility/sedentary lifestyle, sedative medications including Percocet and Oxycontin, pre-existing and longstanding obesity, bipolar disorder and age. Moreover, prior to treatment and concurrently with Seroquel, Ms. Martin had been treated with a number of medications Zyprexa, Epival and avil. These medications were continued after Seroquel and the dose of for example, the Epival actually increased. These are all psychotropics that are strongly associated with weight gain and their adverse effects in patients with risk factors are often additive (for example, weight gain especially Zyprexa with Epival). In fact, if any weight gain continued after Ms. Martin started taking Seroquel, the data suggest that prior and concomitant medications, physical disability and lifestyle factors caused the trajectory of progressive weight gain that began well before Ms. Martin started on the Seroquel. In my opinion, there is no evidence to support Ms. Martin's claim that Seroquel caused her to gain 55, 90 pounds or any weight at all.

[Emphasis added.]

248 In summary, the plaintiffs have not provided any evidence to show that a methodology exists whereby general population data (or some other approach) can be used to assess this issue in common and arrive at an answer that is of any use to the class. The result is that each putative class member must have this question determined on an individual basis.

249 Because of the individuality of this general causation question and the lack of evidence that it can be answered in common, it becomes a "scientific question of interest." As the court stated in *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (Ont. S.C.J.) at para. 67, aff'd, [2004] O.J. No. 5309 (Ont. Div. Ct.) "answering the scientific question only starts you on the necessary journey to find the final answer to the liability question in any given case."

250 The evidence in this case resembles the evidence in *Wuttunee*. The Saskatchewan Court of Appeal overturned the lower court's decision to certify. The defendant manufactured and distributed Vioxx, a pain relief medication that was voluntarily withdrawn from the market due to tests that suggested the drug caused an increased risk of heart attacks and strokes. As in this case, the plaintiffs in *Wuttunee* alleged that the medicine resulted in numerous types of unrelated health risks.

251 The plaintiffs in *Wuttunee* proposed a common issue for general causation in relation to two different types of physical injuries - gastro-intestinal injuries, and adverse cardiovascular events. The Court of Appeal rejected this common issue as paras. 145-146 as follows:

However, the wide diversity of complaints to which this issue is addressed was not considered below. In my respectful view, this diversity is fatal to consideration of this issue as a "common" issue. Clearly it is not susceptible to a single answer that would apply to the claims of all members of the class. Thus, while it is conceivable that proof that Vioxx significantly increased the risk of, for example, high blood pressure, might support the claims of the induced or purchaser subclasses (and I am by no means certain that it would), it would be irrelevant to those who claim other unrelated adverse conditions or injuries.

While, in theory, this lack of commonality across the class could be addressed by reference to subclasses (more refined and detailed, to be sure, than those identified in the certification order), it is significant that no attempt was made at the certification stage to do so, even though the class was divided into subclasses at that stage. In fact, any realistic attempt to break the question down into an array of distinct questions in a way that would apply to every claim asserted shows how very complex the question is. The appellants do not exaggerate, in my view, when they assert that this issue would require the court to determine and evaluate all of the effects that Vioxx may have on all of the gastrointestinal and cardiovascular body systems. The answers would almost necessarily vary from one subclass complaint to another. This is a far cry, in my respectful view, from the "limited differentiation amongst class members" envisaged in the suggestion, in *Rumley*, of the possibility of a "nuanced" answer, where there might be variations in the answer to a common issue among class members.

252 The same conclusions apply in this case. This is made clear by *Lavallee*, in which a similar class proceeding for failure to warn of multiple health risks in relation to Seroquel was brought against the same defendants in Quebec. Notably, the petitioner in Quebec relied on a virtually identical expert report of the same expert, Dr. Laura Plunkett, and the literature referred to in *Lavallee* includes the literature cited by Dr. Plunkett in her affidavit in this action.

253 Jacques J. refused certification (or "authorization") in *Lavallee*. He found that the petitioner failed to satisfy any of the criteria in s. 1003 of the *Code of Civil Procedure*. Dealing with the general causation question, Jacques J. found that the multiplicity of alleged risks, risk factors, warnings and other individuating factors (e.g., learned intermediaries), coupled with the fact that Seroquel was not defective, meant that "individual trials would be required in the case of each member in order to determine the liability of the Respondents, if any." I agree with and adopt the court's conclusions in *Lavallee*.

254 I reject this common issue.

Common issue # 2 - Off-Label Promotion

Did the Defendants, or any of them, promote, market, advertise, and/or recommend Seroquel for off-label uses? If the answer is yes, does this change the nature of the duty under common issue 3 or common issue #4, constitute unlawful conduct under common issue #7, and/or constitute behavior that would justify an election under common issue #8 or punitive damages under common issue #10?

Not Connected to the Statement of Claim

255 This is a common issue that is not connected to the statement of claim. I start by repeating what is set out above under my analysis of s.5(1)(a): the statement of claim lacks a clear statement of the material facts concerning the off-label use claim. In paragraph 15 of the statement of claim the plaintiffs allege as follows:

Seroquel is approved for use prescribed to combat schizophrenia and bipolar disorders. Seroquel is also marketed by the Defendants and prescribed by physicians for numerous "off-label" uses, including treatment for anxiety, sleep disorders, depression and dementia-related psychosis ("Off-label Uses"). Off-label Uses are not uses for which approval has been received from Health Canada.

[Emphasis added.]

256 It is alleged that the plaintiff Ms. Middleton was prescribed Seroquel in June 2005 for off-label uses described in para. 45 of the statement of claim as "*stress and obsessive compulsive behavior*", two uses not even referred to in paragraph 15 of the pleading.

257 This demonstrates the lack of connection between this common issue and the representative plaintiff that purports to represent the off-label claims. There is no allegation, let alone any evidence, that the defendants promoted Seroquel to Ms. Middleton's physician for stress or obsessive compulsive disorder. Indeed, there is no evidence regarding the doctor's reasons for prescribing Seroquel to Ms. Middleton for off-label uses.

The Evidence - Off-Label Use of Seroquel

258 There is evidence of numerous off-label uses for Seroquel. The expert evidence discloses at least 15 different types of off-label use: depression, substance abuse, post-traumatic stress, anxiety, behavioural disturbance in the elderly, autism, turrets, pervasive development disorders, control of impulsivity, agitation, sleep disturbance, aggression, dementia-related psychosis, obsessive compulsive disorder and other behavioural disorders.

259 It is important to draw a distinction between the defendants' alleged off-label promotion, marketing, advertising, and/or recommending of Seroquel and the prescription of Seroquel for off-label uses by Canadian physicians. The

evidence of both psychiatry experts, Dr. Chue and Dr. Wirshing, establishes that prescribing Seroquel for off-label uses is a common clinical practice that is regarded as acceptable within the medical community.

260 Dr. Chue's evidence is that off-label use of second generation antipsychotics, including Seroquel, is a common, and indeed necessary practice. Physicians prescribe medicines that have not been approved for particular illnesses or patient groups, either because there are no approved medicines for a particular condition, or the medicines that are approved are ineffective or not tolerated in particular patients.

261 Dr. Chue's evidence is that second generation antipsychotics have been widely used in the treatment of a variety of psychiatric disorders, including depressive disorders, substance abuse disorders, post-traumatic stress disorders, anxiety disorders, behavioural disturbance in the elderly, autism, turrets, pervasive development disorders, control of impulsivity, agitation, anxiety, sleep disturbance, aggression and behavioural disturbances in many different clinical situations. In his report Dr. Chue states as follows:

These are off-label, non-approved indications, but nonetheless reflect widespread and generally accepted clinical practice because they are effective and helpful to patients suffering from these conditions. Physicians have a duty to treat illnesses, ameliorate symptoms and reduce distress, especially where not treating illnesses will have life-threatening consequences. Thus, on an individual basis, a trial of a medication on a risk-benefits basis is not only warranted, but required to reduce suffering, morbidity and mortality.

262 Dr. Wirshing's opinion is that Seroquel has a unique receptor binding profile that gives it a broader range of properties than many of the antipsychotic medications. He testified that Seroquel's unique receptor binding profile and particular characteristics "encourages clinicians to use it for off-label uses." Dr. Wirshing has prescribed Seroquel for many off-label uses, including anxiety syndromes, affective syndromes, acute agitation, severe obsessive compulsive disease, panic syndromes, major depression and sleep.

No Evidence that Common Issue Exists

263 The above evidence explains that there are many effective off-label uses for Seroquel. Further the evidence explains that such off-label use is widespread and generally accepted clinical practice. However, this is not some evidence to support the existence of this common issue. There is simply no evidence that the defendants or any of them, promoted, marketed, advertised, and/or recommend Seroquel for off-label uses in Canada or any evidence to suggest that such conduct is unlawful. Given the prevalence of off-label use by doctors one would think that the plaintiffs could present some evidence that the defendants promoted, marketed, advertised, and/or recommended off-label use of Seroquel in Canada. However, no evidence was provided.

264 Dr. Plunkett is silent about this issue. Dr. Wirshing testified as follows:

Q. You also said from your own experience which is considerable with this drug and this company, you were not of the view that AstraZeneca illegally promoted Seroquel off-label?

A. Certainly not to me and not to my personal and specific knowledge.

Q. And the same is true obviously for Canada?

A. That's obviously true for Canada, yes, sir.

265 The plaintiffs rely on evidence from Dr. Chue, Dr. Arnold and evidence about a settlement in the United States concerning Seroquel. A review of this evidence does not provide some evidence to support this common issue.

266 Dr. Chue was asked during cross-examination about seminars or meetings that he attended in the United States that were organized and sponsored by what he loosely called AstraZeneca. Canadian and American doctors attended. He recalls that material about new indications for Seroquel would have been presented to the group of doctors during

the meeting. The content of these seminars is approved by an agency in Canada called PAAB. It regulates how a drug company interacts with the doctors and the advertising that takes place. Dr. Chue stated that "I have never been in a meeting where any product has been promoted in terms of off-label use."

267 The above evidence simply does not support this common issue. To the contrary, it is evidence that Dr. Chue never heard the defendants discuss off-label use and what the defendants told doctors during the seminars was regulated. Therefore it is not evidence of unlawful behavior.

268 Dr. Arnold was asked about a document titled "Seroquel Commercial Brand Plan (2001)" and a section called "Contents - Seroquel Marketing Strategy, Seroquel Communication Strategy, Seroquel Operational Plan 2001," prepared by the Global Seroquel Commercial Team. Dr. Arnold agreed that this is an internal Seroquel document. It lists "Key Issues" including "Broaden the Seroquel use on and off label." Dr. Arnold does not know what this means.

269 Under "Strategic Actions" the document states: "Broaden the use of Seroquel beyond its current label in a wide range of patient groups through aggressive communication of its unique profile, eg. mania, ADD, PDD." Dr. Arnold agreed that mania is a psychiatric condition and ADD may refer to Attention Deficit Disorder. He does not know what the Global Seroquel Commercial Team is but he surmised as follows:

No, but I think we can surmise that within the Commercial function they have a team with global responsibility for the sales and marketing commercial plan for Seroquel, and my interpretation of this document is that it is very aspirational in nature. I have no idea how this communicated — or how this developed into operational activities. This is just a plan.

270 While this document talks about expanding the use of Seroquel and refers to off-label use, it was just a plan and it is not evidence of what happened in Canada.

271 Dr. Arnold stated that the different defendant companies were structured so that that each had a "separate marketing company within each country and they are a business in their own right, with their own management structure, their own objectives....Sales and Marketing is you will have some sort of global strategy set by the center and then the local marketing company will deliver the local operations." When Dr. Arnold was asked about the Global Seroquel Commercial Team he said that to his understanding it did not reflect what would have been done from a marketing perspective in Canada.

272 The plaintiffs also rely on a Settlement Agreement from the settlement of the American Seroquel litigation. In the Settlement Agreement it refers to claims that AZ US promoted the sale and use of Seroquel for unapproved uses. AZ US settled the action without any admission of liability and paid \$520,000,000. There are problems with this evidence. It was a settlement without an admission of liability and it involved allegations concerning the promotion and sale of Seroquel for off-label use in United States, not Canada. It cannot be used to satisfy the some evidence test in this Canadian action.

273 In *Goodridge* at paras. 18-19, 36 and 41, Perell J. expressly rejected an attempt to use evidence about wrongful marketing activities in the United States as some evidence that it occurred in Canada. Evidence that the US company had paid a fine for wrongful off-label promotion of its drug and paid other amounts to settle civil liabilities, was rejected as some evidence to support an off-label use common issue in the Canadian action.

274 I agree with and adopt the approach taken in *Goodridge*. The similarity between *Goodridge* and this case is apparent from paras. 18-19 and 36 in *Goodridge* as follows:

As I have said, these wrongful marketing activities took place in the United States. On this certification motion, there is, however, no basis in fact to find that in Canada, Parke-Davis Canada was a participant in any of the activities promoting the off-label use of Neurontin. There is no evidence of any Canadian doctor or health practitioner having been influenced by any promotional activities emanating from the United States, and there is no evidence of any promotional activities taking place in Canada....

Further, on this certification motion, there is no basis in fact for concluding that the Parke-Davis in the United States carried on any wrongful promotional activities in Canada. The Plaintiffs submitted that since Canadian doctors would have been aware of and have had available to them the publications and presentations in the United States, this amounted to the United States division of Parke-Davis promoting the off-label uses in Canada. I disagree, the marketing and promotion of Neurontin in Canada was conducted by and under the authority of Parke-Davis Canada, and there is no evidence of Parke-Davis Canada wrongfully promoting the off-label uses of Neurontin in Canada.

...

Returning to the narrative, in May 2004, an information was laid against Pfizer Inc. in the United States District Court, District of Massachusetts, concerning Warner-Lambert's promotion of Neurontin for off-label uses in the United States, and the following month, Pfizer Inc. agreed, on behalf of Warner-Lambert, to plead guilty, and it agreed to pay a fine of more than \$240 million and to pay amounts in settlement of civil liabilities...

275 In this case, as in *Goodridge*, there is no evidence that AZ US was responsible for marketing activities in Canada. Dr. Arnold's evidence is that AZ Canada is a separate marketing company and while marketing strategy is created by a central global team, marketing in Canada is carried out by AZ Canada in accordance with Canadian regulations regarding promotional practices in the context of the Canadian PM. Nor is there any evidence that any physician in Canada was influenced by any off-label marketing by the defendants when deciding to prescribe Seroquel for off-label uses (assuming off-label marketing even occurred). As in *Goodridge*, the absence of such evidence is fatal to the certification of this common issue. I add that the above evidence distinguishes this case from *Andersen v. St. Jude Medical Inc.*, 2010 ONSC 4708 (Ont. S.C.J.). In *Andersen*, there was evidence that the US parent company was responsible for the marketing activities of the Canadian subsidiary.

276 In summary, there is simply no evidence that the defendants promoted, marketed, advertised, and/or recommended Seroquel for off-label uses. Assuming there was some evidence, there is simply no evidence of what might be "unlawful conduct."

No Commonality

277 Even if there was some evidence of this common issue, there is no evidence that it is capable of being assessed in common. This is not a case where one type of off-label use is alleged.

278 The common issue is presented in deceptively general terms. As Dr. Chue states at page 1982 of his report, Seroquel is used to treat a wide variety of illnesses as follows:

...in clinical practice, SGAs (and previously FGAs) have been widely used in the treatment of a variety of psychiatric disorders including depressive disorders, bipolar disorders all phases), substance abuse disorders, PTSD, anxiety disorders, behavioral disturbance in the elderly, autism, Tourettes, pervasive developmental disorder. They have also been used for the control of impulsivity, agitation, anxiety, sleep disturbance, aggression, and behavioral disturbances in many clinical situations (Beduin, 2010). These are off-label non-approved indications but nonetheless reflect widespread and generally accepted clinical practice because they are effective and helpful to patients suffering from these conditions.

279 As noted, this evidence and the statement of claim disclose at least 15 different types of off-label uses for Seroquel. The broad nature of this allegation leads to lack of commonality. For example, if the defendants promoted Seroquel for use in treating substance abuse, the issue would not be an ingredient of a claim for a person who was treated for one of the other uses. For individuals like Ms. Martin who were prescribed Seroquel for an approved use, the issue of whether the defendants marketed Seroquel for non-approved uses is not an ingredient of their claims and is not necessary for the resolution of their claims.

280 I reject this common issue.

Common issues 3, 4 and 5 - Negligence issues

Common issue #3 - Did the Defendants, or any of them, owe a duty of care to the Class in respect of the design, development, researching, testing, recommending, advertising, promoting and/or marketing of Seroquel as it relates to the risk of weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom? If so, what was the nature of the duty?

Common issue #4 - Did the Defendants, or any of them, owe a duty to the Class to warn that Seroquel can cause weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom, and if so, when did the duty to warn arise?

Common issue #5 - If the answer to #3 and/or #4 is yes, did the Defendants, or any of them, breach such duty? If so, what was the nature of the breach?

281 Common issues 3 and 4 and 5 are the negligence issues. The plaintiffs rely on what they call three areas of evidence to support these three issues. It is set out in their factum as follows:

1. Seroquel was introduced into the Canadian market in 1997. The chemical composition of Seroquel has remained the same since its introduction to market. While the level of knowledge may have changed over time, the possible side-effects associated with the use of Seroquel have not.
2. The approved target market for Seroquel has a number of risk factors for weight gain and metabolic disturbances. These risk factors may inform the appropriate standard of care.
3. The defendants are in possession of substantial information and data regarding the health risks associated with the consumption of Seroquel that is not available to the Class Members or the public. This information includes clinical data, results of internal studies, discussions with physicians and regulatory authorities, and adverse events data. This knowledge imbalance may inform the appropriate standard of care.

282 Point 1 does not offer any evidence of these common issues. The date of Seroquel's introduction in the market place and its chemical composition is not some evidence of negligence or duty to warn. The third sentence in point 1 is simply a statement and counsel has not offered any source in the evidence to back this up. Point 2 also offers no evidence of these common issues and the second sentence is argument. Point 3 is not evidence but simply argument. The plaintiffs offered no evidence reference for these statements.

283 It is worth noting that there is no common issue that asks if Seroquel is defective. As well, the statement of claim does not allege that this drug was defective. Such a question might ground the commonality of the negligence common issues. However, it is absent in this case because there is no evidence that would support such a question. To the contrary, the evidence from all of the experts is that Seroquel is an effective drug.

284 The following review demonstrates that there is no evidence to show these common issues exist and are capable of being assessed in common.

Common issue 3

285 Assuming there was some evidence to support this common issue, it would be impossible to manage it in common because the issue lumps all defendants and different types of negligence together and draws no distinction between approved uses and off-label uses of Seroquel.

286 Dealing with common issue 3, the plaintiffs' own expert, Dr. Wirshing, gave the opinion that there is no issue about the research, design, development, marketing or testing of Seroquel. He testified as follows:

Q. Okay. And just to knock off a few random points, Dr. Wirshing, you don't have any criticisms of AstraZeneca in respect to the research, design, development, pre-marketing, testing, that it carried out on Quetiapine?

A. I don't believe I ever expressed an opinion in that regard, and certainly don't have any off the top of my head now.

287 On his cross-examination, Dr. Wirshing also expressed the following opinions concerning Seroquel:

- Dr. Wirshing has no issue with the fact that Health Canada and the FDA approved Seroquel as being safe and effective for its indicated uses.
- Seroquel is safe and effective for its indicated uses.
- Seroquel is a useful medicine that works and is reasonably well-tolerated.
- Seroquel has good efficacy for both schizophrenia and bipolar disorder and is in the "upper tiers" amongst the other second-generation antipsychotics available in Canada in terms of its tolerability. It is a medicine that has very reasonable subjective tolerability.
- In his practice he prescribes Seroquel to approximately 15 to 20% of his patients for both on-label and off-label uses. He has prescribed Seroquel to approximately 10,000 patients and is of the opinion that its benefits outweigh its risks for many of his patients.

288 Dr. Chue's evidence must also be considered because it shows that there is no evidence to support this common issue. In his report, at pg.13-14 Dr. Chue states:

It is generally accepted in clinical practice that Seroquel has a more benign side effect profile than the other SGAs in Canada with low risks compared to others of agranulocytosis (Clozaril), cardiomyopathy (Clozaril), weight gain (Clozaril, Zyprexa), DM (Zyprexa, Clozaril), movement disorder (Risperdal, Invega), hyperprolactinemia (Risperdal, Invega), sexual dysfunction (Risperdal, Invega) and QTc prolongation (Zeldox, Invega).

In 2003, an Expert Review Panel of the Canadian Psychiatric association (CPA) on Efficacy and Effectiveness concluded in a report published in the Canadian Journal of Psychiatry that (Lalonde, 2003):

In terms of tolerability and safety, there are greater variations between the agents. Clozapine is associated with a minimal, yet definite, risk of life-threatening blood dyscrasias, which can be safely prevented by regular blood monitoring. Risperidone's tendency to cause EPS and hyperprolactinemia similarly limits its tolerability and acceptability for certain patients. Olanzapine may cause significant dosage-related EPS and weight gain and has also been linked to diabetes mellitus and hypertriglyceridemia. Of the 4 agents, quetiapine's tolerability and safety profile is the most benign.

Seroquel is frequently chosen as a preferred treatment option in patients at risk of certain side effects, or for patients who have already experienced side effects with other SGAs.

The 2003 Expert Review Panel report also stated that:

... In addition, its favourable tolerability make it the atypical least likely to degrade quality of life for most patients with side effects. For some, however, quetiapine-associated somnolence can initially decrease their quality of life.

The efficacy and tolerability profiles of quetiapine make it an attractive option in terms of patient acceptability.

... Quetiapine's efficacy has been documented in a number of different settings and its favourable relative to the other atypical antipsychotics is particularly appealing for acceptability in the long-term.

289 Even if there was some evidence to support common issue 3, it fails because it is overly broad. Eight different activities are listed which would require an inquiry into the defendants' activity for each one over a 14 year period. In essence, it is a common issue that asks multiple questions.

Common issue 4 - Duty to Warn

290 The last part of this question asks "when did the duty to warn arise." It assumes there is a single duty to warn. This ignores the fact that AZ Canada has an ongoing duty to warn. Further the evidence is clear: there was an evolution of knowledge and the question cannot be asked at one single point in time. The product monograph changed at different points in time and addressed weight gain and diabetes differently. There cannot be a single answer to this question that applies to the class for weight gain and diabetes. The lack of commonality is obvious.

Warnings re Weight Gain

291 Dealing specifically with the first part of common issue 4 and failure to warn, there is simply no evidence to support this issue. To the contrary, there is evidence that warnings were given for diabetes and weight gain. There is no evidence that these warnings were inadequate. The extensive evidence regarding the warnings is set out below.

Summary of the Warnings - Weight Gain

292 The defendants' warnings are set out in the product monographs that Health Canada approved. Anne Tomalin states that since the introduction of Seroquel and Health Canada's approval of the first product monograph, the product monograph has been updated 25 times and at least 19 of the updates have contained safety information within a 13 year period.

293 A weight gain warning was in the initial product monograph in 1997. In his affidavit, Dr. Arnold describes the warnings for weight gain and the amendments over time. An excerpt from his affidavit follows (his use of "NDS" means New Drug Submission):

1996 NDS and December 1997 Product Monograph

In the NDS filed with Health Canada in 1996, weight gain was noted as one of the important side effects seen in the clinical trials. Section 19.1.7 of the NDS stated that a statistically significantly greater proportion of subjects treated with SEROQUEL, compared with subjects treated with placebo, developed clinically significant weight gain (Exhibit C).

The initial SEROQUEL Product Monograph, dated 2 December 1997, included information on weight gain in both the Precautions and Adverse Reactions sections (Exhibit B). Under Precautions, the Product Monograph stated as follows:

Weight Gain

SEROQUEL was associated with weight gain. In clinical trials mean weight gain after 4-8 weeks of treatment was approximately 2.1 kg, after 18-26 weeks, 3.5 kg, and at 1 year, 5.6 kg.

The Adverse Reactions section of the monograph stated:

Weight Gain: As with other antipsychotics, SEROQUEL may be associated with weight gain. During acute therapy (up to 6 weeks) in placebo-controlled clinical trials, mean weight gain in patients taking SEROQUEL was 2.3 kilograms compared to a mean weight gain of 0.1 kilograms in patients taking placebo. In long-term trials average weight gain was 5.6 kilograms after one year of treatment (see PRECAUTIONS).

The Adverse Reactions section also included a table setting out certain adverse events reported in short-term, placebo-controlled Phase II-III schizophrenia trials, which included weight gain.

2 August 2002 Product Monograph

"Weight gain" was included in the list of possible side effects of SEROQUEL in the Information for the Consumer section that was introduced in the Product Monograph on 2 August 2002. Attached hereto and marked as Exhibit M is a true copy of the 2 August 2002 SEROQUEL Product Monograph.

24 September 2003 Product Monograph

On 24 September 2003, the Product Monograph was updated to incorporate weight gain data obtained from several uncontrolled, open label trials. The materials submitted to Health Canada for this label change included a PSUR, dated 14 September 2002; a SERM Justification Document; and clinical trial summaries. Attached hereto and marked as Exhibit N is a true copy of the 24 September 2003 SEROQUEL Product Monograph.

The weight gain data was revised in both the Precautions and the Adverse Reactions sections of the 24 September 2003 Product Monograph.

5 November 2004 Product Monograph

Health Canada approved AstraZeneca Canada's submission for a bipolar disorder - mania indication on 5 November 2004. The Product Monograph was updated in both the Precautions and Adverse Reactions sections to include additional weight gain data from the bipolar mania clinical trials. Weight gain was listed as a commonly observed adverse event in the short-term placebo-controlled bipolar disorder - mania trials, that being a side effect that occurred in 5% or more patients. Attached hereto and marked as Exhibit O is a true copy of the 5 November 2004 SEROQUEL Product Monograph.

6 March 2007 Product Monograph

In the Product Monograph, dated 6 March 2007, the Information for the Consumer section was updated to describe weight gain as a "common" side effect. Attached hereto and marked as Exhibit P is a true copy of the 6 March 2007 SEROQUEL Product Monograph. 18 August 2008 Updated Weight Gain Data in Conjunction with new Indication for Bipolar Depression

On 18 August 2008, Health Canada approved SEROQUEL for use of in the treatment of bipolar depression and approved a revised Product Monograph, which included weight gain data from the bipolar depression clinical trials. Attached hereto and marked as Exhibit Q is a true copy of the 18 August 2008 SEROQUEL Product Monograph.

The new weight gain data was added to the Warnings and Precautions and the Adverse Reactions sections of the Product Monograph.

19 May 2009 Product Monograph Safety Update

AstraZeneca Canada filed a Notifiable Change Submission on 18 December 2008 to revise the SEROQUEL Product Monograph based on recent safety updates to the CDS following a SERM meeting on 9 July 2008. The revised

Product Monograph was approved by Health Canada on 19 May 2009. Attached hereto and marked as Exhibit R is a true copy of the 19 May 2009 SEROQUEL Product Monograph.

Information about the cumulative results of all clinical trials on the frequency of clinically significant weight gain (based on 7% increase from baseline) that occurred in 9.6% of SEROQUEL-treated patients and 3.8% of placebo-treated patients was added to the Product Monograph at that time.

In addition, the revised Information for the Consumer section stated that weight gain has been reported "very commonly" in people taking SEROQUEL.

SERM's Consideration of Weight Gain

Weight gain data has been reviewed by SERM on three occasions (June 2000, February 2002, and July 2008). AstraZeneca Canada provided to Health Canada safety updates which included weight gain data (e.g., results from ongoing clinical trials and analyses of other published studies), on an ongoing basis.

294 Dr. Chue also reviews the warnings for weight gain in part 6 of his report as follows:

The original product monograph of December 2, 1997 reported weight gain and included data from the pre-registration clinical trials. Since 1997, the product monograph on weight gain has been updated to include data from clinical trials in 2003, and data from clinical trials for the bipolar disorder indications in November 2004 and August 2008. Further clinical trial data was added in May 2009. In addition, the information for the consumers section of the product monograph which was added to the monograph in 2002, contained the notation of "some weight gain" as a "possible side effect". This notation was revised in March 2007 to a "common" side effect, and revised again in May 2009, with the statement that weight gain has been reported "very commonly" in people taking Seroquel.

Weight gain is a recognized side effect of Seroquel and indeed, most psychotropic agents including the SGAs (Rummel-Kluge, 2010). From the literature and clinical experience, weight gain occurring with Seroquel is significantly less than with Clozaril or Zyprexa and comparable with Risperdal in keeping with the generally accepted hierarchy of association. This is a clinical scenario where order of treatment plays a role since weight gain or weight gain trajectory established on a previous treatment is very difficult to reverse. Metabolic side effects can easily be misattributed to the new medication rather than the medications switched from.

Furthermore, overweight and obesity are more prevalent in patients with schizophrenia and particularly bipolar disorder because of the illness itself, lifestyle and treatments. Of note, patients who are underweight before starting treatment may benefit from a treatment that restores normal body weight. Thus, appropriate treatments should avoid combinations of weight gain-inducing drugs and patients should be appropriately screened and counselled before starting treatment. Thereafter patients should be closely monitored according to a protocol and counselled throughout treatment with attention paid to the complications of weight gain and obesity. Patients should be referred for dietary and exercise consults and multidisciplinary programming provided to help patients manage weight gain through lifestyle change.

In my clinical experience, weight gain with Seroquel is manageable and is rarely a reason for discontinuation.

295 There is no evidence from the plaintiffs' experts to support this common issue. I have ruled that Dr. Plunkett's evidence is not admissible. However, even if it is admissible Dr. Plunkett offers no opinion at all about the warnings for weight gain.

296 In Dr. Wirshing's affidavit he states that the "dataset that AstraZeneca had compiled on [Seroquel] prior to its launch in December 1997 in Canada clearly indicated that clinically significant weight gain was a common side effect of [Seroquel]." He acknowledges that the weight gain data was "detailed in the Canadian package insert from launch in 1997." What he calls the "package insert" and then the "product label" must be the product monograph since he reviewed

all of them. He concludes in the report that the "product label" for diabetes was inadequate for diabetes. He does not include weight gain in this opinion.

297 When Dr. Wirshing was cross-examined he stated that, in his opinion, the information regarding weight gain in the Canadian Seroquel PM was adequate from the outset. He testified as follows:

Q. It's not your opinion that the Canadian product monograph warnings, let me restate it. You don't have the opinion that the Canadian product monograph warning in respect to weight gain was inadequate?

A. ... As I recall, the Canadian label - the Canadian label has had a warning, albeit at a variable weight gain since the very beginning.

Q. Right. And the warning since the very beginning on weight gain, you considered to have been adequate?

A. Correct. As I know from the reading of it, there was some discussion as to whether it was appropriate to change the magnitude of that warning.

Q. Right.

A. But the placement of the warning in that location is appropriate and yes, I have no specific complaints about that.

Warnings re Diabetes

298 A diabetes warning (including exacerbation of diabetes, hyperglycaemia, diabetic ketoacidosis, diabetic coma, and death) was added to the product monograph on December 16, 2003 at the request of Health Canada as part of class-wide labeling for second generation antipsychotics. The warning was expanded on two occasions - April 25, 2005 and October 9, 2007. To be clear this means that from 1997 (when Seroquel was first approved for use) until December 2003, the Seroquel product monograph did not contain any warning about diabetes.

299 Dr. Arnold offers a detailed review of the warnings and the reasons for same. An excerpt from his affidavit follows. Speaking about the 2003 "labeling" (a generic term for the product monograph) he states:

140. On or about 18 September 2003, Health Canada formally advised AstraZeneca Canada that it was implementing class labelling in Canada for the atypical antipsychotics in regard to glucose/diabetes. Health Canada advised AstraZeneca Canada that the class labelling was based on data available to Health Canada pertaining to all of the atypical antipsychotics. AstraZeneca did not have access to all of the data available to Health Canada, including the data submitted to Health Canada by the other manufacturers.

141. On 20 November 2003, AstraZeneca filed a Notifiable Change Submission to revise the SEROQUEL Product Monograph in accordance with the class labelling change regarding the use of antipsychotics and glucose dysregulation.

142. With this Submission, AstraZeneca Canada provided Health Canada with the 24 July 2003 Glucose Dysregulation Position Paper and the 22 September 2003 PSUR.

143. These revisions to the SEROQUEL Product Monograph were approved by Health Canada, effective 16 December 2003. Attached hereto and marked as Exhibit F is a true copy of the 16 December 2003 SEROQUEL Product Monograph.

144. A new section entitled "Hyperglycaemia" was added to both the Precautions and Adverse Reactions sections of the Product Monograph, which stated that exacerbation of pre-existing diabetes, hyperglycaemia, diabetic

ketoacidosis, and diabetic coma, including some fatal cases, have been reported very rarely with SEROQUEL use. Clinical monitoring was also recommended in patients with diabetes or with risk factors for diabetes.

145. In addition, the Information for the Consumer section was updated to recommend that, before starting SEROQUEL, patients tell their doctor if they have diabetes or a family history of diabetes.

300 Speaking about the April 2005 revisions to the product monograph Dr. Arnold states:

Further Class Labelling Change regarding Hyperglycaemia: 25 April 2005

157. On 24 January 2005, Health Canada asked AstraZeneca Canada to file a further Notifiable Change in order to implement another class labelling update for all atypical antipsychotics to incorporate the wording from the U.S. class labelling regarding hyperglycaemia.

158. The wording for the label change was provided to AstraZeneca Canada by Health Canada. The additional text included more details regarding recommendations for clinical monitoring of patients treated with atypical antipsychotics. It also acknowledged that the relationship between atypical antipsychotics and hyperglycaemia is not completely understood.

159. AstraZeneca Canada implemented the proposed change to the SEROQUEL label, but informed Health Canada of our assessment that the data did not establish a causal relationship between SEROQUEL and diabetes.

160. The revised Product Monograph was approved by Health Canada on 25 April 2005.

301 Speaking about the October 2007 revision to the product monograph Dr. Arnold states:

179. On 28 June 2007, AstraZeneca Canada submitted a Notifiable Change Submission to revise the SEROQUEL Product Monograph to accord with the changes to the CDS covering the glucose data from Trials 125, 126 and 127. The Submission included a Clinical Overview, entitled "Glucose Dysregulation", dated June 2007, which set out the rationale for the proposed label change.

180. The label change was approved by Health Canada on 9 October 2007. A reference to increases in blood glucose and hyperglycaemia, and occasional reports of diabetes, in clinical trials with SEROQUEL was added to the Warnings and Precautions section. In addition, the Warnings and Precautions section cross-referenced the new glucose data in the "Adverse Events" section which described the data from Trials 125, 126 and 127 of the label. The Information for the Consumer section was also revised, including a reference that increases in blood glucose and hyperglycaemia and occasional cases of diabetes have been reported with SEROQUEL.

302 Dr. Plunkett discusses the Seroquel labeling for diabetes in her affidavit. I have ruled that Dr. Plunkett's evidence is inadmissible. If I am wrong, her evidence is not helpful and cannot assist the plaintiffs despite the low burden that applies. I say this for the following reasons.

303 What did Dr. Plunkett review to offer her opinion about the warnings? Dr. Plunkett states in her affidavit that she reviewed the "labeling for Seroquel as provided in the Physicians' Desk Reference." This is the American equivalent to the Compendium of Pharmaceutical Specialties ("CPS"). It is not the product monograph, the warning that all drug manufacturers use and that Health Canada approves. As Anne Tomalin states, this American document has "no relevance in Canada." Dr. Plunkett states that she has also reviewed the regulations of the "U.S. Food and Drug Administration relating to the development, approval, labelling and marketing of prescription drug products but not the regulations of Health Canada." As well she says that she reviewed "warnings provided by Health Canada" regarding Seroquel.

304 Dr. Plunkett then states in para. 38 of her affidavit that she looked at the "most recent product monograph for Seroquel" and in her opinion "the warnings related to hyperglycemia and diabetes...are not adequate to convey the

risks posed by Seroquel itself." She has two criticisms. First, she says that "[i]n the health professional section of the monograph, the discussion of hyperglycemia and diabetes is put forth as an effect of anti-psychotics in general only [and not specific to Seroquel] and second she says that "the monograph section intended for consumers fails to even mention these health risks."

305 With this in mind I turn to her cross-examination evidence. When asked about what product monograph she looked at she said that she "would have to go back to [her] files." Defence counsel tried to clarify which product monograph she based her opinion on. She was shown the October 9, 2007 product monograph. This was the product monograph in place when she swore her affidavit on November 23 2007. It was at that time the "most recent product monograph" for Seroquel. It was posted on the Health Canada website that Dr. Plunkett said she accessed to get the product monograph.

306 Although she stated in her affidavit that the product monograph had no information for consumers, this is not accurate. She agreed on cross-examination that the October 2007 product monograph does include a consumer section that sets out health risks.

307 Dr. Plunkett's second criticism is that the warnings for diabetes were not specific to Seroquel. This is simply wrong. Dr. Plunkett agreed on cross-examination that the October 2007 product monograph does include Seroquel specific information.

308 If Dr. Plunkett meant to address her criticism to an earlier product monograph, this was never stated, not even on re-examination. It is worth noting that the previous 2005 product monograph also had consumer information about diabetes and it had a warning specific to Seroquel.

309 In summary, even if Dr. Plunkett's evidence is admissible, it does not assist the plaintiffs.

310 Dr. Wirshing's opinion was served as reply evidence. In paragraph 51 and 81(c) of his affidavit he discussed the Seroquel warnings for diabetes as follows:

Although the current label warns reasonably about the risks of diabetes and increases in cholesterol and triglycerides, AstraZeneca continues to flatly deny that [Seroquel] causes diabetes. Further, the current warning about hyperglycemia and diabetes is a comparatively recent addition — despite the fact that this expected toxicity (i.e., weight gain) was known (or should have been known) to the company since before launch in 1997.

Their product label has, until recently been inadequate in its warnings about the impact on lipid and glucose metabolism, hyperglycemia, and diabetes.

311 Dr. Wirshing was cross-examined about this evidence to clarify what product monograph he was referring to. Although he swore the affidavit in 2011, he was actually referring to the October 2007 product monograph. He agreed that he has no criticism of this 2007 product monograph as follows:

Q. So from and after October of 2007, you have no criticism of the Canadian product monographs warning with respect to glucose, hyperglycemia, and diabetes?

A. True.

312 This confirms that there is no basis in the evidence for a failure to warn common issue from October 2007 forward.

313 Defence counsel then questioned Dr. Wirshing about the time frame prior to October 2007. When cross-examined, Dr. Wirshing confirmed that he has no criticism of the absence of a diabetes warning from 1997-2002:

Q. But it is true that for the first, say, five years. So from 1997 to 2002, you don't have a criticism of the absence of a warning about diabetes in the Canadian product Monograph?

A. Yeah. It's a very fair question as to where that number lies. And given the overall environment, that's probably true. It's a disappointment for me to say that because I believe that all of the companies, AstraZeneca included, knew about the risk before 2002. If we're looking at all of the realities of the world that we live in and the competitive environment, I would be comfortable with 2001, certainly.

314 So in the above exchange Dr. Wirshing first agrees that he has no criticism of the Seroquel product monograph from 1997-2002, but then he says he would be more comfortable with it from 1997-2001. However, he does not explain why he is more comfortable with it in 2001 than in 2002.

315 The cross-examination continued and Dr. Wirshing was asked about the period from 1997-2001. It was noted that Dr. Wirshing did not discuss the 2003 product monograph in his report. When asked if the 2003 product monograph was an adequate warning, he said it was a "clear improvement" but criticized this 2003 warning because in his view it was a "class" warning (i.e. warned about the risk of diabetes for the class of drugs and did not warn about diabetes specific to Seroquel.) However, cross-examination revealed that Dr. Wirshing was wrong because the 2003 product monograph does include data specific to Seroquel. Dr. Wirshing was given a chance to read the wording of the 2003 product monograph and he agreed that it spoke specifically about Seroquel.

316 This narrowed the window of possible evidence from Dr. Wirshing regarding the failure to warn from 2001 to 2003 or 2002 to 2003. Dr. Wirshing never offers any evidence to explain why he is critical of the lack of warning from 2001-2002. So we are left with his bald statement and no explanation for why he feels more comfortable with the warning in 2002 rather than the one in 2001.

317 Dr. Wirshing is not new to the Seroquel litigation. He filed an affidavit in the U.S. litigation and on agreement this is the affidavit that was filed in reply in this Ontario action. He has had every opportunity to address the warning issue with clarity and in particular explain his bald statement. While I recognize that the burden on the plaintiffs to offer some evidence is low, this bald statement is seriously deficient and cannot be used to satisfy the some evidence test. This is particularly so when the following evidence is considered.

318 In 2003, a Consensus Conference reviewed the connection between the second generation antipsychotic drugs and diabetes and weight gain. A writing committee at the Conference published a report. Dr. Barrett was on this Committee and he reviewed the Conference and the report in his March 4, 2011 report as follows:

The conference was convened in November 2003. I had the responsibility of chairing the writing committee. Prior to the conference, the writing committee reviewed the peer-reviewed literature related to second-generation antipsychotics. The committee consisted of endocrinologists, psychiatrists and obesity specialists. Presentations were made by investigators from the scientific academic community, pharmaceutical companies including Pfizer, Bristol-Myers Squibb, AstraZeneca, Eli Lilly, and Janssen, and the FDA related to extant data on the safety and efficacy of second-generation antipsychotics. The Consensus Statement was subsequently published in the journals *Diabetes Care* and the *Journal of Clinical Psychiatry* in February, 2004.

319 After reviewing the extensive medical literature available at that time, Dr. Barrett states that the committee felt there was "sufficient data to suggest an association between both obesity and diabetes for two second-generation antipsychotic agents, specifically clozapine and Zyprexa. The committee was not prepared to make the same finding for four others, finding the evidence either lacking or not sufficiently persuasive." For Seroquel, the committee found that there was "evidence of an association with modest weight gain but the evidence was discrepant regarding allegations of an association with diabetes or glucose dysregulation." Despite the discrepant evidence the defendants nevertheless included a specific warning in the product monograph in 2003.

320 In the face of this evidence from a panel of numerous experts, it cannot be suggested that Dr. Wirshing's bald statement offers some evidence of the failure to warn issue for the period of 2001-2003. The low burden requires something more than a bald statement from an expert witness who had every opportunity to explain himself.

321 It is worth noting that it is a struggle to understand what the plaintiffs' experts have to say about the failure to warn issue. On such a key issue in this case, the plaintiffs argue that there is some evidence to support the failure to warn common issue. However, when the reader puts the pieces of this evidence together (without embarking on any weighing of the evidence) it becomes apparent that there is no evidence to support this core issue.

There is no Commonality in common issues 4 and 5

322 The duty to warn common issue is not common to the class. To ask if the defendants owed a duty to warn the class cannot be answered in the abstract. The issue is too broad and offends the principle in *Rumley* as stated in para 29:

It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings.

323 This common issue would result in an answer that is so general it would have no impact on the litigation. It would do nothing to advance the claims of the class. It is not even common as between the representative plaintiffs. The issue is stated in the broadest possible terms and masks the individual inquiries that are required.

324 As noted, the plaintiffs first proposed a group of common issues that focused on a long list of health risks. This was then narrowed on reply to weight gain diabetes and the unclear phrase "and/or related metabolic disturbances as well as secondary injuries flowing therefrom."

325 The narrowing of the health risks in the common issues to diabetes and weight gain means that all of Ms. Martin's health risks are dropped except for weight gain. She does not allege diabetes. It is not an ingredient of her claim. Even more problematic, there is no evidence to anchor her weight gain claim.

326 Properly understood, the duty to warn issue is not a single question for the entire class. You cannot owe a duty to an amorphous class of people that are situated differently. There is evidence of this lack of commonality in Dr. Barrett's report in section 2D as follows:

Each disorder has its own population prevalence, constellation of predisposing factors, pathogenesis and natural history. As such it is clear that to evaluate the possible relationship between each alleged health risk and Seroquel, it will be necessary to consider the known natural history and prevalence of each disorder, the known risk factors for developing that disorder and diagnostic characteristics used to diagnose the specific disorder and how each of these are reflect in the medical history and presentation of individual patients

327 There can be no single duty owed to the class as a group. Consider the variability of this case. The common issues describe two specific health risks (diabetes and weight gain). The warnings for diabetes are not the same as the warnings for weight gain. For each risk the warnings changed over time. There are 15 different types of uses. Three are approved and the rest are off-label.

328 In summary, there is no evidence to support this common issue or show that it can be managed in common. It is rejected.

Common issues 6 and 7 - Conspiracy Claim

Common issue #6 - Did the Defendants, or any two or more of the Defendants, act in combination to conceal information from the Class and/or Health Canada relating to the safety and efficacy of Seroquel, as it relates to weight gain, diabetes and/or related metabolic disturbances as well as secondary injuries flowing therefrom?

Common issue #7 - If the answer to #2 and/or #6 is yes, was the Defendants' conduct unlawful in that it violated the Food and Drugs Act or the Food and Drug Regulations?

329 As noted in the s. 5(1)(a) analysis, there are 5 elements to an unlawful conduct conspiracy claim. This common issue only covers two of the five elements: did they act in combination to conceal information and was this conduct unlawful. As a result, this common issue as framed cannot decide the conspiracy claim.

330 The plaintiffs describe seven pieces of evidence to support the conspiracy common issue. The following three clearly have nothing to do with concealing information. They are stated in para. 162 of the plaintiffs' factum as follows:

d) The Defendants' internal emails confirm that their own commercial interests governed the company's direction with respect to scientific research, dissemination of critical information, and product labelling;

f) The Defendants agreed to award funding for preclinical work based on the work's ability to demonstrate a competitive advantage for Seroquel. If the preclinical work risked results that were not clearly advantageous to Seroquel, funding was denied; and,

g) In April 2001, the Defendants considered the removal of the descriptor "limited" before "weight gain" in the Seroquel CDS. The Defendants' commercial team successfully resisted the amendment on the basis that it might damage Seroquel, despite the concerns raised by the Defendants' corporate representative, Dr. Arnold.

331 The remaining four pieces of evidence as set out in the plaintiffs' factum appear to talk about concealment. The evidence is described as follows:

a) As set out above, the evidence indicates that the Defendants may have violated s. 9 of the Food and Drugs Act through their off-label marketing of Seroquel and in failing to warn of the health risks associated with the use of Seroquel;

b) As set out above, the Defendants' internal documents reveal that they acted together to conceal unfavourable studies, cherry-pick data, reject research that could result in unfavourable findings and downplay significant negative data;

c) In 1997, the Defendants used a "smoke and mirrors job" to conceal a "cursed study" from U.S. and Canadian regulators;

e) The Defendants' internal emails confirm that the Defendants buried a number of trials that yielded unfavourable results, including Trials 15, 31, 56, and a trial called "COSTAR", and cherry-picked and suppressed data;

332 It is important to look at the actual evidence that points a, b, c and e refer to. There are two documents that the plaintiffs rely on as some evidence of concealment. Both documents were obtained from the files of AZ US in the US Seroquel litigation.

333 The first is an "Internal Memorandum" from Richard Lawrence dated February 12, 1997. The plaintiffs assert that this document is some evidence that the defendants concealed a study (Study 15) from Health Canada. The memorandum states as follows:

Subject: US/Canada Investigator Meeting and Study 15

I am not 100% comfortable with this data being made publically available at the present time...however I understand that we have little choice.... Lisa has done a great "smoke and mirrors" job!

Adopting the approach Don has outlined should minimize (and dare I venture to suggest) could put a positive spin (in terms of safety) on this cursed study.

Athena, with Mark Sahl having left I am not certain who is replacing him. Whoever it is... ought they speed a reserve press release through?

Richard

334 The "cursed study" is Study 15 noted in the reference line. The memorandum was sent to eight people. Plaintiffs' counsel marked the Internal Memorandum as an exhibit on Dr. Arnold's cross-examination but did not ask him any substantive questions about it. This memorandum makes no reference whatsoever to concealing information from Health Canada.

335 The second document that the plaintiffs rely on is an email chain which contains an email from John Tumas to a group of people in December 1999. He uses the word "buried" in relation to three studies. The relevant excerpt is as follows:

There has been a precedent set regarding "cherry picking" of data. This would be the recent Velligan presentations of cognitive function data from Trial 15 (one of the buried trials). Thus far I am not aware of any repercussions regarding interest in the unreported data.

That does not mean that we should continue to advocate this practice. There is growing pressure from outside the industry to provide access to all data resulting from clinical trials conducted by industry. Thus far we have buried Trials 15, 31, 56 and are now considering COSTAR.

The larger issue is how do we face the outside world when they begin to criticize us for suppressing data. One could say that our competitors indulge in this practice. However until now, I believe we have been looked upon by the outside world favorably with regard to ethical behavior. We must decide if we wish to continue to enjoy this distinction. The reporting of COSTAR results will not be easy. We must find a way to diminish the negative findings. But in my opinion we cannot hide them.

336 In the chain of emails is a response from Jim Gavin who talks about the data from COSTAR. He states that selectively using data from COSTAR "is pushing it too far in my opinion and might prove extremely damaging in the long term...and would destroy our current high standing in the publishing community."

337 Dr. Arnold was not asked if any of the people referred to in these documents worked for AZ Canada. He was not asked any substantive questions about the content of these documents.

338 There is no question that these two documents talk about the studies being buried and suppressing data. However there is no evidence about the nature of the information that was buried or concealed. These documents do not say that the studies were concealed from Health Canada. Further these documents do not talk about concealing information relating to the "safety and efficacy of Seroquel, as it relates to weight gain, diabetes" which is the focus of this common issue. Further there is no evidence that AZ Canada was involved or that any of the matters referred to in the documents occurred in Canada.

339 The defendants' evidence from Dr. Arnold and Ann Tomalin (that is not challenged) refutes the plaintiffs' position that these documents offer some evidence of conspiracy. While the above memorandum and emails talk about study 15 being buried, it is the evidence of Dr. Arnold and Ann Tomalin that this study was given to Health Canada.

340 Dr. Arnold was the global Head of Drug Safety for the defendants for the majority of the period of time in question. Dr. Arnold expressly states that AstraZeneca at all times acted in the interests of patient safety in relation to its consideration of Seroquel's safety. He also states that AstraZeneca "at no time misinformed or failed to inform Health Canada, Canadian physicians or patients of the true safety profile of Seroquel as known and understood by AstraZeneca based on... evaluation of the currently available scientific knowledge and data." Ann Tomalin, the Canadian pharmaceutical regulatory specialist reviewed all of AstraZeneca's submissions to Health Canada. In her opinion, AstraZeneca Canada complied fully with its regulatory obligations. Ms. Tomalin was not cross-examined.

341 Dr. Arnold explains that the trials 15, 31, 53 and 56 were schizophrenia related efficacy studies. Study 15, the one that is described as being buried, was in fact given to Health Canada. It is listed in the table of contents that accompanied the New Drug Submission to Health Canada for Seroquel in September 1996. Dr. Arnold and Ann Tomalin both confirm that study 15 was part of this submission to Health Canada. Additionally, AZ Canada filed an Integrated Summary of Safety Information with Health Canada as part of the New Drug Submission for Seroquel and this contained efficacy and safety data from Trial 15.

342 The evidence from Dr. Arnold and Ms. Tomlin explains that trials 31, 53 and 56 were not part of the pre-registration clinical trial program. They were efficacy studies not designed to support a new indication, so there was no requirement to submit these reports to Health Canada. In any event, AZ Canada submitted: (a) an interim report for and weight gain data from Study 31 to Health Canada; (b) weight gain data from Study 53 to Health Canada; and (b) the full clinical Study 56 to Health Canada. Therefore, as Ms. Tomalin states, these studies, including Study 15, were not concealed from Health Canada. In addition, the serious suspected adverse drug reactions that occurred in these trials were shared with Health Canada.

343 The evidence also establishes that the defendants' decision to not submit these four studies for publication in journals was appropriate and consistent with industry standards at the time. It is Ms. Tomalin's opinion that there was no requirement at the time to publish all clinical studies in Canada, and it was not industry practice to do so. Dr. Arnold's evidence is that Trials 15, 31, 53 and 56 were not submitted to journals for publication because the studies failed to prove their hypotheses, or suffered from design flaws. This was consistent with the pharmaceutical industry practice at the time.

344 In summary, the Internal Memorandum and emails that the plaintiffs rely on for the conspiracy common issue do not provide some evidence to support common issue 6. Lastly the plaintiffs provided no evidence that any of the defendants' conduct was unlawful in that it violated the Food and Drugs Act or the Food and Drug Regulations.

Common issues # 8 - 13 Remedial Issues

8 - Can the Class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of Seroquel?

9 - If so, in what amount and for whose benefit is such accounting to be made?

10 - Should one or any of the Defendants pay special, aggravated and/or punitive damages to the Class?

11 - Can damages be determined on an aggregate basis on behalf of the Class?

12- Should one or any of the Defendants pay the costs of administering and distributing the amounts to which the Patient Class and Family Law Class are entitled?

13 -Should one or any of the Defendants be ordered to pay prejudgment interest?

345 Common issues 8 -13 are remedial. Given the lack of evidence to support any of the liability common issues, there is no evidence that grounds the remedial common issues. It follows that there is no reason to certify these remedial issues: see *Kafka v. Allstate Insurance Co. of Canada*, [2011] O.J. No. 1683 (Ont. S.C.J.) at para. 199 aff'd [2012] O.J. No. 1520 (Ont. Div. Ct.). In these circumstances, I will briefly comment on these common issues.

346 Common issues 8 and 9 deal with the remedy of an accounting and disgorgement of the proceeds of the sale of Seroquel. The plaintiffs refer to these issues as waiver of tort. They say that this common issue addresses the question of whether the class has the right to elect between compensatory tort damages and a restitutionary remedy of disgorgement.

347 The plaintiffs argue that where, on a class-wide basis, there exists a sufficient causal connection between the wrongful conduct and the amount for which the defendant could be ordered to account, waiver of tort may appropriately be certified as a common issue.

348 The statement of claim only pleads two forms of wrongdoing in connection with the plaintiffs' reservation of their right to elect disgorgement through the remedy of waiver of tort:

(a) deliberately withholding and/or concealing information about the Health Risks and harmful side-effects of Seroquel in order to gain approval from Health Canada and to market and sell Seroquel to the Plaintiffs in Canada; and

(b) deliberately and aggressively promoting, marketing, advertising, recommending, merchandising, and selling Seroquel for Off-label Use when they knew or ought to have known that such use was not approved by Health Canada.

349 As discussed, there is no basis in evidence for the assertions that the defendants wrongfully concealed information from Health Canada, or wrongfully promoted Seroquel for off-label uses. Accordingly, there is no basis in fact for any remedy of disgorgement for wrongdoing. For this reason alone, this common issue is rejected.

350 Common issue 10 asks if one or any of the defendants should pay special, aggravated and/or punitive damages to the class. Whether the defendants should pay special damages will depend on what special damages are being claimed. This is an individual matter. The statement of claim seeks different types of such special damages, including medical testing and monitoring, "hospital accounts, x-ray accounts, doctors' accounts, drugs, transportation, clothing, personal effects and other related expense." Determining whether the class members are entitled to any such damages is an inherently individual exercise and requires an examination of each type of special damage sought by each class member. Entitlement to aggravated damages in this case is not a common issue. As Strathy J. said in *Banerjee v. Shire Biochem Inc.*, 2010 ONSC 889, 88 C.P.C. (6th) 328 (Ont. S.C.J.) at para. 35:

...the issue of aggravated damages cannot form a common issue. Aggravated damages are assessed on an individual basis as part of general non-pecuniary damages: see *Carom v. Bre-X Minerals Ltd.*, above, at para. 83, and *Kotai v. The Queen of the North*, 2007 BCSC 1056, [2007] B.C.J. No. 1573, at paras. 40-42. Accordingly, the word "aggravated" should be removed from common issue (g).

351 As framed this common issue focuses on whether punitive damages should be awarded and not the quantum. The question of whether a defendant's conduct justifies an award of punitive damages has been accepted as a common issue in many class actions: see *Boulanger*, at para. 22; *Cloud; Heward; Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd [2008] O.J. No. 1916 (Ont. Div. Ct.); *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Ont. S.C.J.) at para. 81, leave to appeal ref'd [2005] O.J. No. 269 (Ont. Div. Ct.); *Serhan Estate v. Johnson & Johnson*, [2004] O.J. No. 2904 (Ont. S.C.J.), aff'd [2006] O.J. No. 2421 (Ont. Div. Ct.), leave to appeal to C.A. ref'd, leave to appeal to S.C.C. ref'd, (2007), [2006] S.C.C.A. No. 494 (S.C.C.); and *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463 (Ont. S.C.J.), leave to appeal ref'd, 2010 ONSC 1899 (Ont. Div. Ct.).

352 A punitive damage claim does not always have the commonality necessary for a common issue. The case of *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd 2010 ONSC 3777 (Ont. Div. Ct.) is an example. This was a product liability claim against the manufacturer of a medical device used to treat heart disease. The court refused to certify punitive damages as a common issue. The common issues associated with the negligence and conspiracy claims were not going to be dispositive of the defendant's liability because proof of causation and proof of damages depended on individual trials. The potential entitlement to punitive damages was therefore inextricably linked to the effect of the defendant's conduct on individual plaintiffs. The same problem arises in his case which makes this issue unsuitable for certification.

353 I accept that common issues 12 and 13 have been certified in other cases. However, they fail here because there is no underlying liability common issue that has been accepted.

5(1)(d) - Preferable Procedure

354 Subsection 5(1)(d) of the *Class Proceedings Act*, requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

355 The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: see *Cloud* at para. 73; *Hollick* at paras. 27-28; and *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.) at para. 69.

356 In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

357 The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

358 In this case there is no single *common* issue that will significantly advance the litigation for the class. Consider what is left having reviewed each of the common issues: there is some evidence that common issue 1 exists. There is no benefit to certifying this common issue because the defendants concede that Seroquel can cause weight gain and diabetes. This point is obvious since the product monographs warn of these risks. Such a concession does nothing to move the class members' claims ahead. There is no commonality to the question. An individual inquiry is required to decide if Seroquel caused weight gain and/or diabetes for each class member.

359 The rest of the liability common issues collapse because they do not have a basis in fact and lack commonality. As well, the conspiracy common issues only deal with two elements of this cause of action and in any event fail to satisfy the some evidence test. The remaining elements are left for individual trials.

360 In this situation, there is simply no reason to conclude that a class action would be a fair, efficient and manageable method of advancing the claim.

5(1)(e) - A Representative Plaintiff with a Workable Litigation Plan

361 The final requirement for certification is that there be a representative plaintiff who will fairly and adequately represent the interests of the class, has produced a suitable litigation plan and does not have a conflict of interest on the common issues with other class members. The capability of the proposed representative to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class..." *Western Canadian Shopping Centres Inc.* at para. 41.

The Representative Plaintiff

362 There are several concerns regarding the proposed representative plaintiffs in this action.

363 Their level of interest and ability to vigorously and capably prosecute this action is questionable given the following evidence. When the representative plaintiffs were cross-examined they conceded that they have not read any

of the product monographs that ground the duty to warn allegations against the defendants. This leads me to seriously question their level of interest and commitment. In *Singer* the representative plaintiff demonstrated the same lack of interest. He was not aware of the existence of the product monograph for the sunscreen product in question. This was one of many reasons why the representative plaintiff was rejected.

364 There is further evidence of the representative plaintiffs' lack of interest. When cross-examined Ms. Martin stated that she does not know the difference between the three defendants and she thought they were all the same. Ms. Middleton knew that she had sued more than one defendant but does not know the difference between them.

365 More serious is the lack of evidence to show that the claims of the representative plaintiffs are anchored in the class action. Ms. Martin alleges that as a result of taking Seroquel in 2005 she experienced transient weight gain, balance problems and involuntary movements. The last two of these complaints have been eliminated from the revised common issues. This leaves weight gain which in her case was transient. The statement of claim alleges that Ms. Martin gained approximately 55 pounds while taking Seroquel. There is no evidence that her weight gain was as a result of taking Seroquel. Ms. Martin states in her affidavit that she gained 90 pounds while taking Seroquel. However, her medical records state that she actually gained 100 pounds in the year *before* she started taking Seroquel and while she was taking Zyprexa (another second generation antipsychotic). Ms. Martin, claimed during her cross-examination that her doctor made a mistake in her chart and that she gained the weight the following year her use of Seroquel. However, there is no evidence from her doctor who made the notations on the medical chart. More serious is the following evidence. As detailed earlier in this judgment, the product monograph in place in 2005, when Ms. Martin took Seroquel, contained a warning for weight gain and the plaintiffs have not provided any evidence that the warning for weight gain was inadequate.

366 Ms. Middleton took Seroquel in 2005 for stress and obsessive compulsive behavior, both of which are off-label uses. She took Seroquel at a low dose for six months. Ms. Middleton says that as a result of taking Seroquel, she gained 25 lbs and was diagnosed with diabetes. However, the product monograph in place in 2005 warned about these two side effects and as already noted there is no evidence that this warning was inadequate. As a result, there is no evidence that anchors Ms. Middleton's claim in this action.

367 A class action must have a representative plaintiff who has a real interest in the dispute and will provide fair representation to the class. The representative plaintiff must be able to instruct counsel and to exercise independent judgment concerning the important issues that will arise during the progress of the litigation. There must be an informed representative plaintiff with a genuine claim that is supported with some evidence and anchored in the claim. Both representative plaintiffs fail to satisfy these requirements.

368 For the reasons set out above, the representative plaintiffs are not adequately informed about this action and do not have a real interest in this action. They are not suitable representative plaintiffs.

The Litigation Plan

369 The production of a workable litigation plan serves two purposes. First, it assists the court in determining whether the class proceeding is the preferable procedure and second it allows the court to determine if the litigation is manageable: see *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Ont. Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (Ont. C.A.).

370 The amount of detail in a litigation plan will vary according to the circumstances and complexity of each case. However, a plan that simply sets out the usual steps that occur in any litigation is not acceptable: see *Bellaire*, at para.52.

371 The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: see *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) ("*Caputo*") at para. 76.

372 As stated in *Caputo*, at para. 78, the plan should contain "details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined."

373 While the plaintiffs litigation plan provides much of the usual detail that the court expects to see in a plan, it becomes a work of fiction because there are no common issues that have been accepted.

374 The plaintiffs have not satisfied s. 5(1)(e) criterion.

Conclusion

375 In summary, I make the following orders:

(1) The plaintiffs are granted leave to delete Bernard Van Kerrebroeck as a plaintiff in this action and to amend the Amended Fresh as Amended Statement of Claim

(2) The plaintiffs' motion seeking certification of this action as a class proceeding is dismissed.

376 If the parties cannot agree on costs, they must deliver written submissions to the court by June 15, 2012, in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply.

Motion dismissed.

Footnotes

* Additional reasons at *Martin v. Astrazeneca Pharmaceuticals PLC* (2012), 27 C.P.C. (7th) 135, 2012 ONSC 4666, 2012 CarswellOnt 9934 (Ont. S.C.J.).

1999 CarswellOnt 3463
Ontario Superior Court of Justice

J.G. Young & Son Ltd. v. TEC Park Ltd.

1999 CarswellOnt 3463, [1999] O.J. No. 4066, 48 C.P.C. (4th) 67, 92 A.C.W.S. (3d) 198

J.G. Young & Son Ltd., Kapbern Holdings Limited and Garyray Developments Limited, Plaintiffs and TEC Park Ltd., 1031824 Ontario Limited, Gath Limited, Gelleny Corporation, Gel Investments Limited, Joseph John Gelleny, Susan Gelleny, Wendy Maclachlin Reddy and Elizabeth Reddy, Defendants

Nordheimer J.

Heard: October 20, 1999
Judgment: October 26, 1999
Docket: 99-CV-171071

Counsel: *R. Macdonald*, for Plaintiffs.
K. Prehogan and *K. Snell*, for all Defendants except TEC Park Ltd.
B. Teplitsky, for Defendant, TEC Park Ltd.

Nordheimer J.:

1 The defendants move for an order striking out the statement of claim pursuant to rules 21.01 and 25.11 of the *Rules of Civil Procedure* on the grounds that the statement of claim discloses no reasonable cause of action against them or is frivolous or vexatious or an abuse of the process of the court.

2 The action alleges, in essence, that the defendants together with others orchestrated a series of corporate transfers and transactions that had the effect of removing all of the assets from Kingbrook Group Ltd. ("Kingbrook"), between the time that each of the plaintiffs had commenced litigation against that company and the time that each of the plaintiffs obtained judgment against that company. The result of these actions was that the plaintiffs were prevented from realizing on those assets in payment, or partial payment, of their judgments. The plaintiffs further allege that the two principals of Kingbrook against whom the plaintiffs also obtained judgments are related to the individual defendants who are, in turn, the principals of the defendant companies.

3 The statement of claim alleges four distinct causes of action: (i) damages for conspiracy; (ii) damages for fraud; (iii) damages for intentional interference with contractual relations and (iv) a declaration that the impugned transactions offend the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 and the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33. I will deal with each of the alleged causes of action in turn.

Conspiracy

4 It is alleged that the defendants conspired with each other and with other entities to intentionally defraud and injure the plaintiffs. It is alleged that this conspiracy took the form of "causing, directing, assenting to or acquiescing in" the wrongful acts by which the assets were removed from Kingbrook.

5 The requirements for a proper pleading of conspiracy are set out in the Court of Appeal's decision in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.) in which Mr. Justice Finlayson said at p. 104:

In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's Precedents of Pleadings, 12th ed. (London: Sweet & Maxwell, 1975), as follows 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.

The above is still good law.

6 In this statement of claim, the parties are described as is their relationship to each other. Further, the agreement to conspire is alleged as are the objects of the conspiracy, that is, to "strip" the assets out of Kingbrook to make it judgment proof and thereby frustrate any attempt by the plaintiffs to recover on their judgments. This latter aspect also satisfies, albeit perhaps implicitly, the required allegation of injury and damage occasioned to the plaintiffs. However, there is nothing in the statement of claim which satisfies the requirement that the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy must be pleaded. While there are a number of overt acts alleged, they are not specifically identified to any particular defendant, that is, no specific defendant could know from the statement of claim what it is that the plaintiffs say that that particular defendant did as part of the conspiracy. Rather, all of the defendants, both corporate and individual, are simply lumped into the general allegation that they caused, directed, assented to or acquiesced in the alleged activities.

7 Counsel for the plaintiffs contends that to require the plaintiff to be that specific in its pleading imposes an impossible burden on the plaintiff. He relies on the decision of *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (September 9, 1999), Doc. CA C30879 (Ont. C.A.) in Madam Justice Molloy made the following observation at paragraph 9:

A conspiracy by its very nature is undertaken in secrecy and while its victim may discover some of the acts carried out in furtherance of the conspiracy and through that come to know the identity of some of the actors, it is almost impossible for the victim to know at the outset such details as who met with whom, when, and what specifically was discussed.

However, Madam Justice Molloy said later, in the same paragraph:

This is not a situation in which vague allegations of conspiracy have been made without any factual basis whatsoever. Rather, there are extensive references in the pleadings to specific actions undertaken, including references in some cases to the dates and some of the individuals and groups directly involved. There is enough information provided to satisfy me that the plaintiff is not asserting a wild hypothesis with no air of reality or that this is nothing more than a fishing expedition. The plaintiff has some, but not all, of the information it needs to set out all of the elements of the conspiracy plea.

8 While the exact allegations from the statement of claim that Molloy, J. considered in the *Meditrust* case are not set out in her reasons, it appears from the second of the above quotes that there were some specifics pleaded regarding each of the defendants. This also appears to be confirmed by a subsequent motion which Molloy, J. heard in which she struck out the claims against certain named individual defendants. This latter decision was appealed to the Court of Appeal and reversed — see [*Meditrust Healthcare Inc. v. Shoppers Drug Mart* (1999), 31 C.P.C. (4th) 260 (Ont. Gen. Div.)]. In the course of the Court of Appeal's decision, Mr. Justice Labrosse referred to the earlier decision of Madam Justice Molloy, and specifically to the second quote above, and observed in that regard at paragraph 16:

The amended statement of claim expressly alleges that the individual respondents carried out and participated in specifically pleaded tortious acts with the intent necessary for a court to find personal liability if the allegations are established at trial.

9 In the case at bar, which there are specific acts of the conspiracy pleaded, there is no attribution of those specifics to particular defendants. Therefore, any given defendant here cannot know whether he or she or it is being alleged to have actively participated in the conspiratorial actions or whether they were simply passive participants. In my view, the requirements quoted above from the *Normart* case require at least that degree of specificity. While it is true that such a requirement may place a heavy burden on the plaintiff, that is the consequence of seeking to plead such a serious cause of action as that of conspiracy. I fully agree with what Mr. Justice Cameron said in a similar context in *Balanyk v. University of Toronto* (June 11, 1999), Doc. 94-CQ-53555CM (Ont. S.C.J.) at paragraph 29:

If the plaintiff does not, at the time of pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.

Further, such a requirement seems the only reasonable interpretation that can be placed on the plain words, quoted from Bullen, Leake and Jacob's *Precedents of Pleadings* with approval by the Court of Appeal in *Normart*, to which I have referred above.

10 In my view, therefore, the pleading of conspiracy as it currently stands is defective in that it does not plead "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." As a consequence, the pleading of conspiracy in the statement of claim must be struck out but with leave to the plaintiffs to amend to address these deficiencies.

Fraud

11 As Montgomery, J. said in *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990), 75 O.R. (2d) 513 (Ont. Gen. Div.) at p. 538: "There is no exhaustive definition of fraud." However, in *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (3d) 50 (Ont. Gen. Div.), Madam Justice Wilson at p. 60 set out the elements that must be pleaded for a claim of fraudulent misrepresentation by quoting from the decision in *Saul v. Himel* (1994), 120 D.L.R. (4th) 432 (Ont. Gen. Div.); affirmed (1996), 133 D.L.R. (4th) 767 (Ont. C.A.). Adapting those elements to reflect ones required for a claim of fraud *simpliciter* would lead, in my view, to the following necessary elements having to be present in the pleading:

- (a) a false statement made by the defendant either by words or by conduct;
- (b) the statement was known when made to be false, or was made recklessly, that is without knowing whether it was true or false;
- (c) reliance by the plaintiff on the statement, and;
- (d) resulting damage to the plaintiff.

12 In this case, outside the allegations relating to the *Fraudulent Conveyances Act*, there are no specific allegations of fraud alleged. While I see no reason in principle why a claim for damages for fraud could not be made with a claim under the *Fraudulent Conveyances Act* (indeed one would seem to follow logically from the other), there is still a requirement to plead the specifics of the fraud alleged. It may be that certain defendants are necessary parties because of the alleged fraudulent conveyance while other defendants are joined to answer for the damages caused by the fraud or both. In this case, none of the defendants would be able to tell from the statement of claim as drafted which of those three categories they fell into.

13 Further, I do not consider it to be sufficient to merely plead the facts required for a claim under the *Fraudulent Conveyances Act* and then simply add a claim for damages for fraud to the prayer for relief. Yet that appears to be exactly

what the plaintiffs have done here. For one thing, the elements of the two causes of action are not the same. As noted above, for a claim of fraud there must be a false statement either by words or by conduct. By way of example only, it is not clear to me from the current pleading what statement is alleged to have been made and consequently on what basis the plaintiffs would have relied on any such statement.

14 In my view, therefore, the claim for fraud is also not properly pleaded and must, as a consequence, be struck out.

Intentional interference with contractual relations

15 The necessary elements for a proper pleading of inducing a breach of contract, or intentional interference with contractual relations, are set out in the decision of Madam Justice MacFarland in *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (Ont. H.C.) at p. 44:

The elements of this tort include the following: (1) an enforceable contract; (2) knowledge of the plaintiff's contract; (3) an intentional act on the part of the defendant to cause a breach of that contract; (4) wrongful interference on the part of the defendant, and (5) resulting damage.

16 In this case, the contracts, which the plaintiffs allege that the defendants intentionally interfered with, are the underlying contracts which gave rise to the debt claimed by the plaintiffs from Kingbrook and for which the plaintiffs eventually obtained judgment against Kingbrook.

17 The problem with this claim is that the actions giving rise to the alleged stripping of assets out of Kingbrook are pleaded by the plaintiffs to have started in May and June, 1993. However, the plaintiffs also plead, in paragraph 8 of the statement of claim, that "in 1992 or earlier, Kingbrook Group Ltd. went into default in repayment of the loans owing to the plaintiffs." The plaintiffs further plead that Kingbrook was insolvent "at all material times subsequent to at least 1992." It therefore appears on the plaintiffs' pleading that Kingbrook was in breach of the contracts prior to the alleged activities which give rise to the claim that assets were stripped out of Kingbrook. In those circumstances, I do not see how those alleged actions of the defendants could have intentionally interfered with contractual relationships of which Kingbrook was already in breach. The third factor quoted above from the *Ontario Store Fixtures* case requires the defendants to "cause" a breach of the contract but, in this case, the plaintiffs clearly plead that the contract was already breached. It seems axiomatic that one cannot subsequently cause a breach of a contract that has already been breached. Therefore, the fundamental factual foundation for a pleading of intentional interference with contractual relations cannot arise in this case.

18 In these circumstances, it is also difficult to discern what damages could have been caused by an interference by the defendants with the underlying contracts which the plaintiffs had not already suffered because of Kingbrook's breach. In either case, the debts had still not been paid. It seems to me that one has to draw a distinction between a breach of the underlying contracts and subsequent conduct which interferes with a judgment creditor's ability to enforce a judgment. In other words, once the judgments were obtained, the underlying contracts are, for all intents and purposes, disposed of and the issue then becomes whether the defendants have interfered with the plaintiffs' rights under the judgments as opposed to the plaintiffs' rights under the pre-existing contracts.

19 The plaintiffs rely on the decision of the Saskatchewan Court of Appeal in *Einhorn v. Westmount Investments Ltd.* (1970), 11 D.L.R. (3d) 509 (Sask. C.A.) in support of their contention that the claim for intentional interference with contractual relations is applicable to the facts of this case. I do not see that the *Einhorn* case assists the plaintiffs. In that case, the allegation was that the very contract upon which the plaintiff advanced its claim had been interfered with by the actions of certain directors of the defendant company. Here, as I have said, the problem with the claim is that the contract had already been breached by Kingbrook well before the alleged improper actions of the defendants occurred.

20 In my view, therefore, the claim for intentional interference with contractual relations is misconceived given the basic facts as pleaded. I would therefore strike that claim from the statement of claim. I would also not grant leave to

amend the statement of claim regarding this particular cause of action since I do not see how it is possible for this cause of action to have any application to the fundamental factual basis upon which this proceeding is advanced.

Fraudulent Conveyances Act/Assignments and Preferences Act

21 With respect to this cause of action, whether one looks at section 2 of the *Fraudulent Conveyances Act* or section 4(1) of the *Assignments and Preferences Act*, the necessary elements of the claim are essentially the same. There must be a conveyance of real or personal property with "intent to defeat, hinder, delay or defraud creditors."

22 In this case, the plaintiffs plead that they are creditors, both pursuant to the original contracts and under their subsequent judgments, and that the steps taken by Kingbrook to divest itself of its assets were done with the intent and effect of defeating the plaintiffs' rights to obtain payment, or partial payment, of the legitimate debts due to them by Kingbrook. The plaintiffs consequently seek an order setting aside these transactions and also claim the right to trace the assets transferred or, alternatively, the proceeds of those assets.

23 The principal, if not only, asset that Kingbrook had, and of which it divested itself, was its shareholding in the defendant TEC Park Ltd. ("TEC"). The plaintiffs claim that Kingbrook transferred those shares to the defendant, 1031824 Ontario Limited ("1031824") and that 1031824 subsequently transferred the shares to Kingscross Developments Limited ("Kingscross"), which is not a defendant in this action. The plaintiffs then claim that the proceeds received from Kingscross by 1031824 were distributed by 1031824 to the other defendants, either in their capacity as shareholders of 1031824 or in payment of alleged debts that were owed to them.

24 While the defendants move against these claims as well, they were unable to express with any clarity the failings which they say are evident in these particular claims and I am unable to identify any. It appears to me that the plaintiffs have alleged all of the essential elements necessary to found a claim under either statute. The plaintiffs have also alleged that the defendants ultimately received the proceeds of these assets and thus the need for the tracing remedy. While at one point the defendants argued that it was necessary for the plaintiffs to plead specifically what each separate defendant received out of the proceeds, I believe that submission takes the requirement for particularity to a point beyond that which is reasonable. It is highly unlikely that any plaintiff advancing such a claim would ever have that type of detailed knowledge regarding such conveyances prior to the examinations for discovery. Further, I don't consider it necessary for the defendants to have that information in order to plead. Each of the defendants either received part of the proceeds or they did not. The inability to allege the precise amount received does not prejudice the defendants in advancing their defence which presumably would be either that they did not receive any proceeds, or that they did but the receipt of such proceeds was legitimate.

25 I conclude, therefore, that the plaintiffs' claims under the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* are properly pleaded and the motions, insofar as they seek to strike out those claims, are dismissed.

Conclusion

26 In the end result, I would strike out the claims based on conspiracy and fraud but would grant leave to the plaintiffs to amend the statement of claim to properly plead those claims, if so advised. Any such amendments are to be made within 30 days of the date of release of these reasons. I would also strike out the claim based on intentional interference with contractual relations but I would not grant leave to amend that claim. As I view the claims under the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* to be sufficiently pleaded, the motions, insofar as they seek to strike out those claims, are dismissed.

27 Unless the parties have special considerations to bring to my attention (in which case they may make written submissions to me within 10 days of the date of these reasons), in my view, the defendants, having been largely successful in their motions, are entitled to their costs of the motions which I fix at \$1,500.00 each payable by the plaintiffs forthwith.

Order accordingly.

2009 CarswellOnt 5530
Ontario Superior Court of Justice

Rare Charitable Research Reserve v. Chaplin

2009 CarswellOnt 5530, [2009] O.J. No. 3893, 180 A.C.W.S. (3d) 411, 52 E.T.R. (3d) 170

Rare Charitable Research Reserve, Keith Ainsworth, Michael Barnstijn, Sheila O'Donovan and 1258703 Ontario Limited v. Jan Chaplin, Mark Fretwurst, The Cruickston Park Company Limited, John Stirling, Ogilvy Renault LLP, Thomas LeBrun and Gowling Lafleur Henderson

D.M. Brown J.

Heard: August 31, 2009
Judgment: September 21, 2009
Docket: 07-003/06

Counsel: T. O'Sullivan, T. Wynne for Plaintiffs / Moving Parties
J. Morse, N. Daube for Defendants / Responding Parties, Jan Chaplin, Mark Fretwurst

D.M. Brown J.:

I. The Motion

1 The plaintiffs moved to strike out extensive portions of the Statement of Defence and Counterclaim (the "Defence") of Jan Chaplin, Mark Fretwurst and The Cruickston Park Company Limited (the "Defendants"), on the basis that portions of the Defence pleaded irrelevant facts, evidence, and argument.

II. The dispute

2 This action involves a dispute concerning the Cruickston Park Lands (the "Lands"), a parcel of ecologically valuable land approximately 913 acres in size immediately adjacent to the City of Cambridge. The Lands abut a 53 acre parcel of land on which sits a property known as the Manor House Lands.

3 Prior to 1996, both the Lands and the Manor House Lands were owned by the University of Guelph. That year the defendant, Jan Chaplin, purchased the Manor House Lands. Jan Chaplin, her husband, the defendant, Mark Fretwurst, and their children, resided in the Manor House.

4 In 2000, Chaplin and Fretwurst agreed with the plaintiff, Michael Barnstijn, and others, to acquire the Lands. To that end The Cruickston Park Company Limited ("CPCL") was incorporated; it was controlled by Jan Chaplin and Mark Fretwurst. On October 17, 2000, CPCL acquired the Lands from the University of Guelph. Barnstijn, and his related company, 1258703 Ontario Limited, provided much of the financing for the acquisition.

5 There appears to be no dispute that Chaplin, Fretwurst and Barnstijn planned for CPCL to transfer the Lands into a charity and that for this purpose in December, 2001, they created the plaintiff, Rare Charitable Research Reserve (the "Charity"). Fretwurst served as the Charity's chief executive officer, and the directors included Chaplin and Barnstijn.

6 On February 12, 2002, CPCL transferred the Lands to the Charity. Prior to that transfer, CPCL had granted Encumbrances on the Lands in favour of Chaplin and Fretwurst. They included restrictive covenants on a parcel adjacent to the Manour House, and options to purchase several parcels of the Lands.

7 Following the transfer of the Lands to the Charity disputes arose between Chaplin and Fretwurst, on the one side, and Barnstijn and others, on the other, about the Encumbrances placed on the Lands by CPCL. At the heart of the dispute lies the parties' disagreement over the intended use of the Lands: Barnstijn contends that it was always understood that all of the Lands would be dedicated to public purposes and that the granting of the Encumbrances violated that understanding; Chaplin and Fretwurst argue that it was always known that some encumbrances would be placed on the Lands immediately adjacent to the Manour House and the Land's use would be of a mixed public and private nature.

8 The plaintiffs commenced this proceeding by way of application for a variety of relief, including declarations that the Encumbrances are invalid and that Chaplin and Fretwurst do not have any interest in the Lands. The plaintiffs, Keith Ainsworth and Sheila O'Donovan, are founding members of the Charity.

9 The plaintiffs have sued two lawyers, John Stirling and Thomas LeBrun, and their firms, Ogilvy Renault LLP and Gowling Lafleur Henderson LLP, who were involved in various aspects of the conveyance of the Lands to the Charity.

III. The proceedings to date

10 This pleadings motion must be understood in the context of what has transpired to date in this proceeding. The matter commenced by way of an application in 2006. An effort to convert the application into an action was dismissed by Spies J. on October 19, 2006 as premature: *Rare Charitable Research Reserve v. Chaplin* [2006 CarswellOnt 8774 (Ont. S.C.J.)], 2006 CanLII 50901. The two lawyers, Stirling and LeBrun, were added as parties by order of Lederer J. made December 24, 2007: *Rare Charitable Research Reserve v. Chaplin* [2007 CarswellOnt 8406 (Ont. S.C.J.)], 2007 CanLII 57083.

11 Earlier this year Cameron J. made a consent order converting the application (and cross-application) into an action and established a timetable for further steps in the proceeding. The order included a provision that cross-examinations conducted to date would stand as part of the examinations for discovery in the action.

12 I conducted a case management conference on August 25, 2009, at which time the parties advised that they had already completed about 10 days of cross-examinations. A further two weeks of examinations have been scheduled with a target completion date of mid-January, 2010.

IV. The pleadings in this proceeding

13 In accordance with the timetable set by Cameron J., the plaintiffs delivered a Statement of Claim in April, 2009. In early May the defendant lawyers and law firms delivered their defences. The Statement of Defence, Counterclaim and Crossclaim of Jan Chaplin, Mark Fretwurst and The Cruickston Park Company Limited was not delivered until late June, some two months late. That pleading runs to 67 pages and 219 paragraphs.

14 Just prior to the hearing of this motion the Defendants filed an amended Statement of Defence, Counterclaim and Crossclaim which, they submitted, addressed any legitimate deficiencies identified in their original pleading by the plaintiffs. Although the Defendants have not styled their pleading as an amended one, I will treat it as such in order to avoid further delay in this already far too old proceeding. Accordingly, I order that the Statement of Defence, Counterclaim and Crossclaim contained in the Responding Motion Record of the Defendants, Chaplin, Fretwurst and Cruickston Park, stand as their Amended Statement of Defence, Counterclaim and Crossclaim, and I will determine this motion by reference to that amended pleading.

15 Although I will consider the plaintiffs' objections by reference to the Amended Defence, I must express my disapproval of the way the Defendants have dealt with this pleadings motion. It is not fair to the opposing parties, nor to the Court, to dump on their laps an amended version of a pleading literally on the eve of the argument of the motion. Apart from the difficulty in dealing with an amended pleading on short notice, significant changes were made to the paragraph numbering in the amended pleading, yet the Defendants did not provide the opposing parties or the Court

with a copy of the pleading which cross-referenced the new paragraph numbers to the old. Such an omission increases the work that all must perform, and I will take such conduct into account when dealing with the issue of costs.

16 For ease of reference I have appended to this endorsement Schedule "A" which cross-references the paragraph numbering between the Original and Amended Defence.

V. Analysis

A. General principles governing pleadings

17 As has oft been said, pleadings in a civil proceeding perform several functions: (i) they define with clarity and precision the question in controversy between the parties and, in so doing, set the "foul lines" for the determination of issues of relevance; (ii) they give fair notice of the precise case to be met and the remedies sought, in order to prevent "trial by ambush"; and (iii) they assist the court in its investigation of the truth and the allegations made: *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div. [Commercial List]), para. 9; *Senechal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (Ont. S.C.J.), paras. 50 to 52. In civil cases the pleadings often are the only source of knowledge about a case available to the trial judge prior to the commencement of the trial.

18 Rule 25 of the *Rules of Civil Procedure* sets out the minimum requirements for pleadings. Compliance with the rules will not guarantee the creation of a persuasive pleading - that falls to the artistry of the lawyer drafting the document - but it will ensure the adequacy of the pleading in relation to its functions.

19 Brevity is a key characteristic of all proper pleadings. Rule 25.06(1) mandates that all pleadings contain a "concise" statement of the material facts. Courts continuously emphasize the need for brevity. As pithily put by Ferguson J. in *Cadillac Contracting & Developments Ltd. v. Tanenbaum* (1953), [1954] O.W.N. 221 (Ont. H.C.), a pleading "ought to be a concise statement of the facts, and not a rambling, diffused, mixed-up mass of facts, evidence, arguments and law."

20 To achieve the goal of concise pleadings, Rule 25.06(1) limits the content of all pleadings to a "concise statement of the material facts on which the party relies", "but not the evidence by which those facts are to be proved". This requirement reflects the place of pleadings in the overall scheme of an action. As the first stage in an action the pleadings serve to define the issues. Questions of evidence are left to the second and third stages of an action - production and discovery ensures the reciprocal pre-trial disclosure of relevant evidence, and the trial deals with the consideration of admissible evidence. To inject evidence into a pleading undermines its purpose and conflates the pleadings stage of an action with the subsequent evidentiary-focused parts of the proceeding.

21 The rule against pleading evidence is not absolute. Even the Rules permit some exceptions, such as the inclusion of the precise words of a document or conversation where the words are material (Rule 25.06(7)) and the need for a defence to plead "any matter" which, if not pleaded, might take the opposite party by surprise (Rule 25.07(4)). As a matter of practice, pleadings often contain some references to the evidence to provide context, particularity, or a narrative background to a claim or defence: *K. (H.V.) v. Children's Aid Society of Haldimand-Norfolk*, [2003] O.J. No. 1572 (Ont. S.C.J.), paras. 40 and 41. And, of course, no bright line distinguishes material facts from evidence; the difference tends to be one of degree, rather than of kind: *Sauer v. Canada (Attorney General)*, [2005] O.J. No. 4237 (Ont. Master), para. 13; *Dionisio v. El Popular*, [2007] O.J. No. 4792 (Ont. S.C.J.), para. 23. Nevertheless, in order for pleadings to achieve their stated purpose of conciseness, references to the evidence necessarily must be kept to a minimum.

22 Finally, the facts pleaded in a statement of claim or defence must relate to the elements of the claim or defence. Portions of a pleading that are irrelevant, argumentative, speculative, inserted merely for colour, or that constitute bare allegations or unfounded and inflammatory attacks on the integrity of a party are treated as scandalous and struck out under Rule 25.11(b) as offending the basic principles of pleadings: *George v. Harris*, [2000] O.J. No. 1762 (Ont. S.C.J.), para. 20. So, too, unnecessary historical recitation which is irrelevant to the cause of action or defence in issue should be struck: *Lac des Mille Lacs First Nation v. Canada (Attorney General)*, [2002] O.J. No. 1977 (Ont. S.C.J.), para. 51.

23 The whole point of these restraining rules is to keep pleadings focused on their major purpose - to identify the key issues in dispute and the material facts relating to those issues. Put another way, counsel should strive to write a pleading as a short story, not as an effort to match the length of *War and Peace*.

24 Let me now turn to examining the plaintiffs' complaints about the Defence in light of these general principles.

B. Recitation of the history of the Chaplin's family philanthropy

25 The opening section of the Defence sets out a lengthy history of the Chaplin family's philanthropic efforts over the generations. Most of it is irrelevant, dealing as it does with members of the family other than the defendant, Jan Chaplin. All of it is evidence, inserted, no doubt, to support the very simple allegation of fact contained in the opening words of paragraph 14 of the Amended Defence:

The Chaplin family's extensive history of leadership and participation in endeavours to further the interests of preservation and conservation of lands in Ontario was embraced by Chaplin and Fretwurst when they agreed in 1996 to purchase from the University the Manor House...

While I see nothing objectionable in that language providing, as it does, some historical context for the Defendants' involvement in the acquisition of the Manor House and their subsequent interest in the Lands, the preceding paragraphs are irrelevant, as they deal with the past conduct of non-parties to the action, do not relate to the transactions in dispute, and constitute an extensive pleading of evidence which the trial judge may or may not admit at trial.

26 Accordingly, I strike out paragraphs 8 to 13 of the Amended Defence.

C. Quotations from documents

27 Paragraph 20 of the Original Defence contained a lengthy quotation from a schedule to the defendants' 1995 offer to purchase the Manor House. In the Amended Defence (para. 15), the quotation has been removed and replaced by a summary of the language previously quoted. Converting initially-pleaded quotations from documents into summaries of the contents of the quoted language is a technique that populates the Amended Defence, a tact undertaken no doubt in response to the plaintiffs' motion to strike.

C.1 Quotations from relevant documents

28 Let me deal first with the quotations from (now summaries of) documents which relate to the events surrounding the transactions, either transaction-type documents or communications with solicitors involved in the transactions and about its effects: Original Defence 20, 37, 41, 162, and 163; Amended Defence 15, 32, 36, 157 and 158. Our rules of pleading discourage quoting the precise words of a document unless "those words are themselves material": Rule 25.06(7). While the words quoted, or subsequently summarized, by the Defendants in these paragraphs may well be relevant, I question their materiality. They strike me more as the pleading of non-material evidence. That said, common sense dictates that I assess the impact of this improper pleading in the overall context of the Defence in question. Simply put, the Defence, whether in its original or amended form, is prolix in the extreme and could easily be cut by more than half to more closely approximate the length of the Claim. However, the plaintiffs have elected not to strike out the entire Defence as prolix. In light of that tactical decision, to strike out the quotation or summary of relevant, but non-material, documentary language might trim some fat from the Defence, but much fat would remain. Accordingly, I do not see the point of such minor surgery - the plaintiffs will suffer no prejudice at this stage of this lengthy proceeding, and the amount of reading imposed on the trial judge will not be significantly reduced: *Bowman v. Rainy River (Town)*, [2006] O.J. No. 4706 (Ont. S.C.J.), para. 14. I therefore do not accede to the plaintiffs' request to strike out these paragraphs.

29 For the same reason I decline to strike out the pleadings of evidence regarding the two memoranda prepared by David Stevens referred to in the following paragraphs: Original Defence, paras. 124, 125, 136, 138, 139, 141; Amended

Defence, paras. 117, 118, 129, 131 to 133, 135. Similarly, I decline to strike out the extract from the draft affidavit of Fretwurst: Original Defence, para. 148; Amended Defence, para. 142.

C.2 Deleted quotations

30 I should note that in response to the plaintiffs' motion the Defendants removed the quotations originally placed in certain portions of their Defence, thereby addressing the objections advanced by the plaintiffs: see Original Defence 36, 60 to 63; Amended Defence, 31,.

C.3 Quotations of irrelevant evidence

31 Finally, the Defence quotes from several communications from the Defendants to non-parties and from newspaper articles and columns not written by any party: Original Defence 42, 47, 48, 55, 56 and 71; Amended Defence 37, 43, 44, 52, 53 and 64. These portions of the Defence plead irrelevant evidence and I strike them out.

D. Defendants' efforts to recast the nature of the plaintiffs' claim

32 In many portions of the Defence the Defendants allege or imply that the essence of the plaintiffs' pleading against them is that the Defendants committed a fraud against the plaintiffs. For example, in paragraph 25 of the Original Defence (para. 20 of the Amended Defence), the Defendants plead:

...it is contended by the Plaintiffs what Chaplin and Fretwurst have done, revealed to their own lawyers and the lawyers for all interested parties noted, is to commit a fraud on Barnstijn, the Charity and the members of the public who donated to the Charity.

Similar pleadings are found elsewhere in the Defence: Original Defence, paras. 93 (third sentence), 98 (fourth sentence), 109 (second sentence), 116, 129 (second sentence), 132 (second sentence), 155 (portion of last sentence), and 168 (from the word "since" on); Amended Defence, paras. 87 (third sentence), 91 (fourth sentence), 102 (second sentence), 109, 122 (second sentence), 125 (second sentence), 149 (portion of last sentence), and 163 (from the word "since" on).

33 These portions of the Defence are highly improper. A plain reading of the Claim reveals that the plaintiffs' action sounds in breach of trust, not fraud. It is not proper for a defendant to attempt to misstate the nature of a claim by ratcheting up the severity of the allegations, thereby creating a straw-man to knock down at trial. What final arguments may be appropriate after all the evidence is adduced at trial is a matter to consider at that point of time. But at this, the front-end of the proceeding, the Defendants have crossed the line of proper pleading by trying to put words in the mouths of the plaintiffs that they have not uttered. I therefore strike out these portions of the Defence.

E. Unfounded allegations against the plaintiffs

34 In the second sentence of paragraph 26 of the Original Defence (para. 21 of the Amended Defence), the Defendants plead that:

Barnstijn and Ainsworth have breached their fiduciary duties to the Charity and the members of the public who have donated to the Charity since they have caused the Charity to solicit donations without revealing to the public there was an agreement with Chaplin, CPCL and the Charity that both the Charity's lawyer and Barnstijn's lawyer advised should be approved by an application to the Ontario Public Guardian and Trustee ("OPGT") or the Court.

35 The prayer for relief in the Defendants' Counterclaim does not seek any damages against Barnstijn or Ainsworth for breach of fiduciary duty, nor do the Defendants purport to advance a derivative claim of that nature on behalf of the Charity. Consequently, the allegation in their Defence of breach of fiduciary is a bald one and simply hangs in the air. As such, it is irrelevant and scandalous, and I strike it out.

F. Pleading regarding expectations surrounding communications with solicitors

36 The Defence pleads that neither Chaplin and Fretwurst could have had any expectation that their communications with the defendant lawyers, Stirling and LeBrun, would be kept confidential from Barnstijn or his lawyer, Schumacher: Original Defence, paras. 73 and 88; Amended Defence, paras. 66 and 81. These pleadings constitute pure argument and should be struck out.

G. Counterclaim: How the Charity should have proceeded

37 The plaintiffs object to the second and third sentences of paragraph 171 (Amended Pleading, para. 166) which, they contend, contains only argument:

The true nature of the concern should have been expressed as set out in the August 13, 2002 memo being the legal shortcomings at the time of the Transaction that is, failing to obtain OPGT or Court approval. The required course for the Charity was to proceed expeditiously with an Application to the OPGT or the Court to approve the Transaction and failing approval, to unwind the Transaction and have the disputed lands returned to CPCL with an accounting referable to relevant obligations concerning taxes, mortgage interest and the like.

38 The context in which these statements are pleaded is important. The first sentence of paragraph 171 pleaded that Barnstijn and Ainsworth acted in bad faith:

The circulation of the August 13, '02 memo and the events following manipulated by Barnstijn and Ainsworth amount to a bad faith effort to coerce Chaplin to forego her entitlement to Option E.

When the rest of the paragraph is read in light of the opening words, I regard the pleading as more in the nature of providing particulars of the allegation of bad faith, than as argument - i.e., "We allege you acted in bad faith; here's what you should have done; since you didn't take that course of action, what we allege you actually did amounted to bad faith conduct." Accordingly, I will not strike those sentences of paragraph 171.

H. Counterclaim: Allegation of conspiracy

39 The plaintiffs contend that the second sentence of paragraph 172 of the Defence (Amended Defence, para. 167) constitutes an improper pleading of argument:

The Directors never followed through on the Application owing to the conspiracy of Barnstijn and Ainsworth to undertake a course of action to hijack the Charity by coercing the resignation of Chaplin and Fretwurst, and the removal of Stirling as counsel for the Charity, who was replaced by Barnstijn's personal counsel Stevens.

40 In their Counterclaim the Defendants seek damages against Barnstijn and Ainsworth for conspiracy. Paragraph 172 of the Defence falls within the section of the pleading headed, "The Barnstijn, Ainsworth Conspiracy". I regard the second sentence of that paragraph as a pleading of some of the particulars of the alleged conspiracy and therefore a proper pleading.

I. Counterclaim: Allegation that the Charity failed to derive revenue by exploiting gravel licences

41 The primary relief sought by the plaintiffs involves declarations regarding the Lands, and the validity of the Encumbrances thereon - the plaintiffs seek declarations that the Encumbrances are void or, alternatively, that Chaplin and Fretwurst hold the Encumbrances on constructive trust for the Charity. However, paragraph 1(f) of the Claim seeks "damages in lieu of or in addition to the relief claimed above." I do not see where later in the Claim the damages component of the action is developed but, as the Claim stands, damages are sought against the Defendants.

42 In the Counterclaim portion of their pleading, the Defendants alleged that the Charity could have ameliorated its financial situation had it extracted gravel from part of the Lands as permitted by a licence: Original Defence, paras. 196 and 197; Amended Defence, paras. 191 and 192. The plaintiffs contend that those pleadings are argument. I agree.

If the paragraphs had been placed in the Defence portion of the pleading one could perhaps view them as a pleading in mitigation of the damages claimed against the Defendants. But standing where they do in the Counterclaim, they are argument and I strike them out.

V. Summary of conclusions

43 The Defendants are granted leave to file their Amended Defence, but only after deleting those portions of that pleading which I have identified in the "Results" column of Schedule "A" as being strike out. Those portions are struck out, without leave to amend.

44 Further examinations are scheduled to resume on November 30, 2009. Accordingly, any Reply and Defence to Counterclaim or Crossclaim shall be delivered by October 13, 2009; any Reply to a Defence to Counterclaim or Crossclaim shall be delivered by November 6, 2009.

VI. Costs

45 I would encourage the parties to try to settle the costs of this motion. If they cannot, both parties may serve and file with my office written cost submissions, together with a Bill of Costs, by Wednesday, September 30, 2009. Both may serve and file with my office responding written cost submissions by Friday, October 9, 2009. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Schedule A — "": Objections by Plaintiffs to Statement of Defence, Counterclaim and Crossclaim of Chaplin, Fretwurst and Cruickston Park

ITEM	ORIGINAL STATEMENT OF DEFENCE (Para.)	AMENDED STATEMENT OF DEFENCE (Para.)	CONTENT OF PLEADING	RESULT (Amended Defence)
1.	8 - 19 (first sentence)	8 - 13; 14 (first sentence)	Chaplin family charitable history	Strike out 8 to 13
2.	20	15	Quotation from 1995 Offer to Purchase to University of Guelph; deleted from Amended Defence	Not struck
3.	25	20	Contention that plaintiffs are alleging defendants committed a fraud	Struck
4.	26	21	Allegation that Barnstijn and Ainsworth breached their fiduciary duties to the Charity	Struck
5.	36	31	Quotation from letter; removed in Amended Defence	Defendants deleted from pleading
6.	37	32	Quotation from the Vision Statement	Not struck
7.	41	36	Quotation from March 14, 2000 letter from plaintiffs to their counsel; modified in Amended Defence	Not struck
8.	42	37	Quotation from March 16, 2000 letter from Chaplin to two community members	Struck
9.	47	43	Quotation from March 20, 2000 letter from Chaplin and Fretwurst to City of Cambridge Council; in Amended Defence the quotation is changed to a summary	Struck

10.	48	44	Quotation from March 21, 2000, letter from Chaplin to President of Guelph University; in Amended Defence the quotation is changed to a summary	Struck
11.	55	52	Reference to and quotation from April 29, 2000 letter from a non-party to the Cambridge Reporter; in Amended Defence the quotation is changed to a summary	Struck
12.	56	53	Reference to a May 1, 2000, letter from a non-party to a local newspaper, the Record Online.	Struck
13.	59	56	Reference to and quotation from June 13, 2000 press release by Chaplin and Fretwurst; in Amended Defence the quotation is changed to a summary	Plaintiffs do not object to the— amended language
14.	60 - 63	Deleted	References to media articles; deleted from Amended Defence	Defendants deleted from pleading
15.	71	64	Reference to a media article in the Cambridge Times	Struck
16.	73	66	Statement regarding lack of expectation that communications with defendant Stirling would be kept confidential from Barnstijn	Struck
17.	88	81	Statement regarding defendants' expectations about what the lawyers, Stirling and LeBrun, would communicate to a non-party	Struck
18.	93 (third sentence)	87 (third sentence)	Contention that plaintiffs are alleging defendants committed a fraud	Struck
19.	98 (fourth sentence)	91 (fourth sentence)	Ditto	Struck
20.	109 (second sentence)	102 (second sentence)	Ditto	Struck
21.	116	109	Ditto, plus allegations that plaintiffs had not previously made the allegations against the plaintiffs they are now making	Struck
22.	124 and 125	117 and 118	Reference to August 13, 2002 memo from lawyer, David Stevens, including a statement of the opinion Stevens expressed and quotations from the memo	Not struck
23.	129 (second sentence)	122 (second sentence)	Contention that plaintiffs are alleging defendants committed a fraud	Struck
24.	132 (second sentence)	125 (second sentence)	Ditto	Struck
25.	136	129	Reference to and quotations from an October 25, 2002, letter from Barnstijn to Florenza regarding the Stevens memo; in Amended Defence the quotation is changed to a summary	Not struck

26.	138 and 139	131 to 133	Reference to and quotations from a November 20, 2002, memo from Stevens; in Amended Defence the quotation is changed to a summary	Not struck
27.	141	135	Reference to and quotations from a November 20, 2002, letter from Stevens to Barnstijn containing his recommendation; in Amended Defence the quotation is changed to a summary	Not struck
28.	148 (fifth sentence)	142 (fifth sentence)	Quotations from a draft affidavit for Fretwurst prepared by Stevens in respect of proposed application to the Public Guardian and Trustee	Not struck
29.	155 (portion of last sentence)	149 (portion of last sentence)	Contention that plaintiffs are alleging defendants committed a fraud	Struck
30.	162	157	Reference to and quotations from May 8, 2003, Directors' meeting; in Amended Defence the quotation is changed to a summary	Not struck
31.	163	158	Reference to and quotations from May 9, 2003 email from Barnstijn to Chaplin; in Amended Defence the quotation is changed to a summary	Not struck
32.	168 (from the word "since" on)	163 (from the word "since" one)	Contention that plaintiffs are alleging defendants committed a fraud	Struck
	COUNTERCLAIM			
33.	171 (Second and third sentences)	166 (Second and third sentences)	Statements as to how the plaintiffs should have expressed their concern and how they should have acted	Not struck
34.	172 (second sentence)	167 (second sentence)	Allegation of conspiracy against Barnstijn and Ainsworth	Not struck
35.	196-197	191-192	Allegation that RCRR failed to use a gravel extraction license for the Lands in order to generate revenue.	Struck

Motion granted in part.

SEARS CANADA INC., BY ITS COURT-APPOINTED LITIGATION TRUSTEE
Plaintiff

-and- ESL INVESTMENTS INC. *et al.*
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES OF THE DEFENDANTS
WILLIAM HARKER, WILLIAM CROWLEY,
DONALD ROSS, EPHRAIM J. BIRD,
JAMES MCBURNEY, AND DOUGLAS CAMPBELL**

**MOTION TO STRIKE
RETURNABLE APRIL 17, 2019**

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