Court File No. CV-20-00644545-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ISKATEWIZAAGEGAN NO. 39 INDEPENDENT FIRST NATION

Plaintiff/Moving Party

- and -

CITY OF WINNIPEG and HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants/Responding Parties

FACTUM OF THE DEFENDANT (ONTARIO)

DATE: November 1, 2023

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PART I: OVERVIEW

1. This motion arises in an action for damages by the Plaintiff against the City of Winnipeg ("Winnipeg") and His Majesty the King in right of Ontario ("Ontario"), as a result of Ontario's issuance of a 1913 Order in Council authorizing the construction of an aqueduct in Ontario by Winnipeg for the taking of water from Shoal Lake. Ultimately, the aqueduct was constructed in and operates in Manitoba.

2. The Plaintiff is seeking to expand the scope and character of the claim from one based on proving and quantifying damages arising as a result of the taking of water by Winnipeg through the aqueduct constructed in Manitoba, to a claim that also includes damages in relation to Ontario's alleged interference with the Plaintiff's alleged reserve land entitlement to the headlands in Shoal Lake.

3. The Plaintiff incorrectly states that the Hybrid Motion has been brought by joint agreement of the parties that this Court is best situated to bring clarity to the unresolved question of the role of the "headlands issue" in this claim.[1]

4. Ontario opposes the Plaintiff's motion on all grounds because:

    a. **any questions related to the headlands claim were properly refused**. The statement of claim and response to demand for particulars did not contain any reference to the headlands issue, therefore the questions were not relevant and out of scope;

1 Plaintiff's Factum at para 54.

b. **the scope of the compensation provision cannot be determined on a Rule 21 motion and absent evidence.** The scope of the provision in the 1913 Order in Council authorizing Winnipeg to construct an aqueduct in Ontario is a material issue to be determined on the hearing of the merits and requires expert evidence and archival documents; and

c. **the proposed amended claim as it relates to the headlands issue is not tenable and will result in an abuse of process**. The proposed amendment should not be allowed because the headlands claim is doomed to fail. The defendants do not have any authority over allocation of reserve lands. The federal government is not named as a party and is the only entity that has exclusive jurisdiction over reserve lands pursuant to section 91(24) of the *Constitution Act.*[2] The proposed amendment will result in an abuse of process because the Plaintiff commenced another claim against Canada and Ontario. Based on the information provided to date, the amendment would and impact other Treaty No. 3 communities.

PART II: FACTS

5. Ontario adopts Winnipeg's statement of the facts set out in Winnipeg's Factum. Ontario further relies on the additional facts set out below.

2 *Constitution Act, 1867 (UK),* 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s. 91(24).

A. The Headlands Issue

6. Ontario expressly asked the Plaintiff for particulars of the lands or real property that were alleged to have been taken as well as the mechanism used to take the land.[3] Ontario's question 15 and Plaintiff's response are set our below.

> 15. With respect to paragraphs 66 and 67, please provide particulars of any lands or real property that are alleged to have been taken separate and apart from any claim for loss of use or enjoyment of those lands or real property. Please include particulars of how the lands or real property were taken and details of the mechanism used to take the land, as alleged?
>
> A: The damages suffered by the plaintiffs are as detailed in paragraphs 66-73 of the amended claim and referred to at paragraph 8(a). The plaintiff asserts its claim for compensation as damages which arise from "lands or properties that may be taken, injuriously affected or in any way interfered with". The interference and injuries suffered by the plaintiff include, but are not limited to, the loss of use of their lands as a consequence of the damages alleged in paragraphs 66-73.

7. In its Response on December 15, 2020, the Plaintiff did not particularize any harms related to headlands or interference with reserve entitlement claims. The Plaintiff essentially relied on the existing pleadings in the statement of claim.[4]

8. On September 23, 2022, less than a week prior to the start of the examinations for discovery in this matter, the Plaintiff forwarded several documents related to the confirmation of reserve lands as between Ontario and Canada from 1894 to 1915 to the defendants.[5] Counsel indicated that these documents had been identified in the course of their expert historian's work and as such were not in the productions.[6] At discovery, the Plaintiff's advanced a new theory that these documents demonstrated

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3 Affidavit of Ella Leishman, sworn on October 31, 2023 ("Leishman Affidavit"), at para 2, Responding Motion Record of the Defendant, Ontario ("RMRO"), Tab 1.
4 *Ibid* at para 2, RMRO, Tab 1; Exhibit A, RMRO, Tab 1.
5 *Ibid* at para 3, RMRO, Tab 1; Exhibit B, RMRO, Tab 1.
6 *Ibid*.

Ontario "stole" the headlands from the Plaintiff to facilitate Winnipeg's water taking.[7] This was the first time that the Plaintiff introduced the headlands claim in this action.

9. Ontario objected to questions regarding the headlands issue on the basis that the headlands issue is not relevant or within scope of the claim, that expert evidence would be required and that Canada's participation as a party would be necessary as Ontario has no jurisdiction over reserves.[8] During examination of the Plaintiff's witness, the Plaintiff was asked for details about any litigation or settlements concerning the headlands issue.[9]

10. On March 30, 2023 the Plaintiff served its expert report prepared by historian Kenton Storey.[10]

11. On April 20, 2023, counsel for Ontario sent correspondence to the Plaintiff and confirmed its position that the headlands issue had arisen for the first time in discovery and should the Plaintiff wish to advance such a claim, an amendment would need to be addressed before the court, and that a change to the scope of the claim would also affect "the research and productions completed to date and impact the selection of experts and preparation of a historical report". Ontario pointed out once again that Canada, a necessary treaty partner, was not a party to the claim.[11]

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7 *Ibid* at para 4, RMRO, Tab 1; Exhibit C, RMRO, Tab 1, page 149, line 25.
8 Transcript of the Examination of Scott Lockhart, September 29, 2022, Motion Record of the Plaintiff, Tab A, p. 99, line 11.
9 Transcript of the Examination of Chief Gerald Lewis, November 15, 2022, Motion Record of the Plaintiff, Tab C, p. 319, line 5.
10 Leishman Affidavit at para 6, RMRO, Tab 1.
11 *Ibid* at para 7, RMRO, Tab 1; Exhibit D, RMRO, Tab 1.

12. On April 21, 2023, counsel for Winnipeg responded to the same letter and indicated its agreement with Ontario's position, including that Canada would be a necessary party should the Plaintiff's advance a headlands claim.[12]

13. Counsel for Ontario followed up by email on May 1, 2023 and June 1, 2023. In these emails, the Plaintiff was advised once again that research and other timelines would be affected by such an amendment.[13]

14. On July 13, 2023, counsel for the Plaintiff responded and restated its position that the headlands issue was properly a part of the claim.[14] On July 28, 2023, counsel for the Plaintiff advised that the Plaintiff was willing to amend the Statement of Claim to include the headlands issue.[15]

15. On August 21, 2023, the parties attended a case conference to schedule the motion for leave to amend the pleadings.[16] At that time, the Plaintiff also indicated it would be seeking a determination from this Court regarding the scope of the compensation provision in the 1913 Order in Council. Ontario expressed concern that such a motion would not be suitable absent historical evidence.[17]

16. Ontario indicated that the delivery of an expert report was contingent on the scope of the proceedings and the outcome of the motion.[18] At this time, the anticipated date to

12 *Ibid* at para 8, RMRO, Tab 1; Exhibit E, RMRO, Tab 1.
13 *Ibid* at para 9, RMRO, Tab 1; Exhibit F, RMRO, Tab 1.
14 *Ibid* at para 10, RMRO, Tab 1; Exhibit G, RMRO, Tab 1.
15 *Ibid* at para 11, RMRO, Tab 1; Exhibit H, RMRO, Tab 1.
16 *Ibid* at para 12, RMRO, Tab 1; Exhibit I, RMRO, Tab1.
17 *Ibid.*
18 *Ibid* at para 13, RMRO, Tab 1; Exhibit J, RMRO, Tab 1.

deliver a historical report is November 2024 due to the small pool of experts with appropriate background and capacity to take on new assignments.[19]

17. On August 30, counsel for the Plaintiff committed that their materials for this motion would only address the undertakings, refusals, and advisements relating to the headlands issue.[20]

B. Inclusion of Canada as a Party

18. The Defendants have repeatedly indicated their position that Canada must necessarily be a party to a claim regarding headlands as neither defendant have any authority over reserve allocation, which is within the exclusive jurisdiction of the federal government.[21]

C. Related actions, applications, and specific claims

19. As indicated above, during discoveries, the Plaintiff was asked whether any other actions had been commenced that might overlap with or relate to this action.[22] The Plaintiff indicated that there were Specific Claims before the specific Claims Tribunal against Canada and undertook to advise of their status and any other claims.[23]

20. In the months that followed, to determine whether the parties could agree to any proposed amendments, counsel for the Defendants continued to follow up on the issue. Counsel for Ontario asked that this question be answered in advance of the

19 *Ibid* at para 14, RMRO, Tab 1.
20 *Ibid* at para 15, RMRO, Tab 1; Exhibit K, RMRO, Tab 1.
21 *Ibid* at para 16, RMRO, Tab 1; Exhibit L, RMRO, Tab 1.
22 Transcript of the Examination of Chief Gerald Lewis, November 15, 2022, Motion Record of the Plaintiff Tab C p. 319, line 5.
23 Transcript of the Examination of Chief Gerald Lewis, November 15, 2022, Motion Record of the Plaintiff Tab C p. 320, line 21.

timeline for responding to undertakings, due to its significance for the amendment of the claim and the motion at hand.[24]

21. On September 6, 2023, counsel for the Plaintiff provided its answer to the undertaking that was insufficiently responsive.[25] In response, counsel for Ontario sought clarification as to whether there were any open proceedings or settlements bearing on the headlands issue.[26] Counsel for the Plaintiff declined to answer.[27]

22. On October 10, 2023, counsel for Winnipeg advised the parties that based on its own investigation of the other proceedings advanced by the Plaintiff, the proposed amendments in this matter were "an attempt to advance the same (or at the very least substantially similar) claims that have already been made by IIFN #39 to other courts and tribunals."[28]

23. In addition, Ontario is aware of at least one active claim by the Plaintiff against Ontario and Canada regarding the headlands issue.[29] The statement of claim was issued in 2000 by the Ontario Superior Court of Justice and sought a declaration that the islands located in the Indian Bay of Shoal Lake are Indian reserve lands.[30] The Plaintiff averred that in 1891, due to a federal-provincial dispute concerning Indian reserves under Treaty No. 3 within Ontario, Canada ceased surveys of Indian reserves.[31] It alleged that Canada is under a continuing duty to protect the plaintiff's interest in the

24 Leishman Affidavit at para 18, RMRO, Tab 1; Exhibit M, RMRO, Tab 1.
25 *Ibid* at para 19, RMRO, Tab 1; Exhibit N, RMRO, Tab 1.
26 *Ibid.*
27 *Ibid.*
28 *Ibid* at para 20, RMRO, Tab 1; Exhibit O, RMRO, Tab 1.
29 *Ibid* at para 21, RMRO, Tab1; Exhibit P, RMRO, Tab 1.
30 *Ibid* at para 1.
31 *Ibid* at para 16.

land and is under positive duties to manage the lands, including lands under water, for the plaintiff's use and benefit.[32] The aforesaid duty included a duty to complete a proper survey of the land.[33]

PART III: ISSUES

24. The issues for this Court to determine are:

    a. Were the questions asked by the Plaintiff to Ontario's witness properly refused as they related to the headlands issue on the basis that they are not relevant and within the scope of the existing statement of claim?

    b. Can the Court determine whether the headlands issue fall within the scope of the claim and the compensation provision as a question of law and without evidence pursuant to Rule 21.01(1)(a) of the *Rules*? and

    c. Can leave to amend the statement of claim be granted to add a new claim, where the proposed new claim is not tenable and will result in an abuse of process?

PART IV: LAW AND ARGUMENT

A. All questions related to the headlands issue were properly refused as the questions are not relevant or within the scope of the claim

25. Under rule 31.06(1), a person examined for discovery shall answer to the best of her or his knowledge, information and belief, any proper question that is relevant to any matter in issue in the action.[34]

32 *Ibid* at para 21.
33 *Ibid* at para 22.
34 *Rules of Civil Procedure,* R.R.O. 1990, REG 194, r. 31.06(1).

26. In *Ontario v. Rothmans Inc. (Rothmans),* Justice Perell considered in detail the principles concerning the scope of questioning on examinations.[35] Some of the important principles that emerged from his decision are:

    (a) Discovery questions must be relevant to any matter in issue, as defined by the pleadings.

    (b) An examining party must not go beyond the pleadings to find a claim or defence that has not been pleaded. This is known as a "fishing expedition" and is not permitted.

    (c) Under the former case law, where the rules provided for questions "relating to any matter in issue," the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy. The amended rule changed "relating to any matter in issue" to "relevant to any matter in issue," which suggests a narrowing of the scope of examinations for discovery.

    (d) The extent of discovery is not unlimited, and the court has an obligation to keep it within reasonable and efficient bounds to avoid it becoming oppressive and uncontrollable.

27. The case law makes it clear that the pleadings of the parties help to identify the issues in dispute between them.[36] Once these issues have been identified, a determination can then be made regarding whether a document or any question posed is relevant to a matter in issue in the action.

35 2011 ONSC 2504 at para 129.

36 *Ibid.*

28. The headlands issue is not part of the pleadings and is not within the relevant scope of the claim. There is no reference in the claim to the headlands or the factual underpinnings that have now been framed in the Plaintiff's materials for this motion. Further, in its Demand for Particulars at question 15, Ontario asked for particulars of any lands or real property that were alleged to have been taken as well as the mechanism used to take the land.[37] The Plaintiff's response made no reference to the headlands issue.[38]

29. The Plaintiff first raised the headlands issue in the present proceedings just prior to the examinations for discovery, when it served on the defendants correspondence between Ontario and Canada confiming and setting aside reserve lands for the benefit of Treaty No. 3 First Nations.

30. During the examinations for discovery, questions that related to the headlands issue were refused by Ontario on the basis that the issue was not relevant or within the scope of the claim.

31. The Court can decide on the relevance of the questions refused by Ontario in the absence of evidence. Ontario contends that the questions were rightly refused as the headlands issue is not relevant or part of the existing claim.

32. The Plaintiff has now framed the headlands issue by alleging that the headlands were "taken away from it, without its knowledge, in apparent contravention of Treaty No 3, the 1894 Agreement, and the Plaintiff's reserve allocation under the *Indian Act,* by

37 Leishman Affidavit at para 2, RMRO, Tab 1; Exhibit A, RMRO, Tab 1.
38 *Ibid.*

way of an alleged scheme by the Defendants".[39] However, there can be no doubt that any issues about a potential breach of Treaty No. 3 concerning reserve allocation, including headlands, are new and were not part of the existing claim.

33. Implicitly, the Plaintiff seems to recognize that the headlands claim is beyond the scope of the claim as it is now seeking leave to amend the claim. As set out below, this request must also be dismissed.

B. The motion under subrule 21.01(1)(a) is misapplied and not appropriate to determine the scope of the compensation provision

34. Subrule 21.01(1)(a) confers jurisdiction on the Court to decide a question of law before trial where the determination of the question may dispose of all or part of the action.[40] A motion brought under subrule 21.01(1)(a) will only be granted in narrow circumstances where the determination of the issue is "plain and obvious".[41]

The motion will not dispose of all or part of the claim

35. The legal test under 21.01(1)(a) is: assuming the facts pleaded to be true, does the claim have a reasonable prospect of success[42] or should it be struck because it discloses no reasonable cause of action or defence.[43] This rule has no application

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39 Plaintiff's Factum at paras 58 and 59.
40 *Noram Building Systems Inc. v. Zurich Insurance Company Ltd.*, 2023 ONSC 5088 [*Noram*] at para 30; *Fowlie et al. v Wrestling Canada Lutte et al.*, 2023 ONSC 2680, at para 18.
41 *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376 at para 24; *Alafi v. Lindenbach*, 2023 ONSC 831, 84 R.F.L. (8th) 456 at para 35; *MacDonald v. Ontario Hydro*, 1994 CanLII 7294 (ON SC), 26 O.R. (3d) 401 (Prov. Ct.), aff'd (1995), 26 O.R. (3d) 401 (Div. Ct.).
42 *Fowlie et al. v Wrestling Canada Lutte et al.*, 2023 ONSC 2680 at para 20; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para 17; *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587 at para 14.
43 *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587 at para 14; *Kawa v. 1Plus 12 Corporation*, 2022 ONSC 6527 at para 21.

here as the outcome cannot result in a declaration that the category of harm allegedly caused to the Plaintiff by the removal of the "headlands" portion of its lands and properties and related rights therein – falls within the ambit of the Compensation Provision and is therefore within the scope of this claim.[44]

If the headlands issue is not part of the pleadings, the motion is moot

36. If the Court agrees that the questions relating to the headlands were properly refused because they were not relevant or within the scope of the existing claim, then the motion under subrule 21.01(1) (a) becomes moot. Similarly if the Court doesn't allow the proposed amendments, the subrule 21.01(1)(a) motion becomes moot. The Plaintiff would be attempting to have the court determine an issue not contained in the existing claim. The court cannot make determinations on issues not properly within the pleadings.

An interpretation of the compensation provision goes to the ultimate issue

37. Contrary to the Plaintiff's assertion, a determination of what may be included in the compensation provision of the 1913 OIC requires evidence.[45]

38. At para 55 of its factum, the Plaintiff submits that allowing the motion under subrule 21.01(1)(a) will clarify a contested point of law, allowing the headlands issue to proceed with clear definition to a merits consideration, rather than leaving the Parties

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44 Plaintiff's Factum at para 117 (a); *Montreal Trust Co. of Canada v. Toronto Dominion Bank*, [1992] O.J. No. 1274 (Ont. Prov. Ct.), [*Montreal Trust*] at paras. 10 and 14 (See Appendix A); *TransCanada Pipelines Ltd.* v. *Pottery Station Power Limited Partnership* (2002), 2002 CanLII 49642 (ON SC), 22 B.L.R. (3d) 210 at paras 14-15 (Sup Ct.).
45 Plaintiff's Factum at paras 52 and 56.

to litigate various alternatives at trial. At para 56, the Plaintiff submits that the motion does not rely on evidence. However, in support of its motion, the Plaintiff relies on the transcripts of discoveries.[46] The Plaintiff also acknowldges "there may be" facts in dispute.[47]

39. As stipulated in subrule 21.01(2), no evidence is admissible on a motion under (1)(a), except with leave of a judge or on consent of the parties. The parties did not consent to admit evidence, nor did the Plaintiff seek leave of the motion judge to do so. As a result, this Court is not in a position to make binding determinations of fact in relation to the factual dispute.[48]

40. Although Ontario submits that the headlands issue is not in the existing claim and should not be included in any subsequent amendments, even if it was, it would not be appropriate for the court to determine whether the headlands claim could fall within the scope of the compensation provision as it requires evidence and goes to the ultimate issue.

41. This assessment is more than a question of law, as it would require the Court to consider the factual matrix surrounding the compensation provision and to asertain whether the headlands claim could be captured within it. Interpreting the compensation provision, the meaning of "headlands", and whether "lands" might

46 *Ibid* at paras 24 and 25.
47 *Ibid* at para 67.
48 *Montreal Trust, supra* note 44 at paras. 3-4.

include headlands in the absence of a sufficient evidentiary base on which to assess the factual matrix amounts to a reversible error.[49]

42. Attempts to construe statutes and contracts on motions under rule 21.01(1)(a) without evidence of context and surrounding circumstances the parties may be able to bring have rejected by the courts.[50] In *Moriarty*, White J. refused to exercise his discretion under subrule 21.01(1)(a) to resolve a question of law that depended on the construction of a statute where its meaning was far from clear. In *Montreal Trust*, Borins J referring to *Moriarty* adopted the same approach:

> In my view, the court should take the same approach where the question of law depends on the construction of a contract where its terms are unclear and capable of more than one meaning. The interpretation is best dealt with by the trial judge, who will have the benefit of considering the relevant provisions of the agreements in the context of the evidence.[51]

43. Under rule 21.01(1)(a) no evidence is admissible except with leave of a judge or on consent of the parties. Ontario has not consented to evidence being admitted on this motion.

44. In any event, the Court can determine whether the headlands claim is relevant to and within the scope of the existing pleading when determining whether the questions pertaining to headlands were properly refused. However, if the headlands issue is found to be part of the existing pleadings or the amendment is permitted, Ontario does

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49 *Ibid* para 14; *Vale Canada Limited v. Solway Investment Group Limited et al.,* 2021 ONSC 7562 [*Vale*] at paras 100 and 101.
50 *Montreal Trust,* supra note 44 at para 14; *Moriarty v. Slater*, 1989 CanLII 4141 (ON SC), 67 O.R. (2nd) 758 (H.C.) [*Moriarty*].
51 *Ibid* at para 14.

not concede that the headlands issue is within the scope of the compensation provision.

C. The proposed amendments to the pleading regarding the headlands issue is not tenable and would result in an abuse of process

45. Ontario opposes paragraphs 5, 6, 8, 35-38, 54-59, 74, 80, 86d, 98b, 101, 103-105, and 108-110 of the Plaintiff's proposed amendments relating to the headlands reserve entitlement claim. Rule 26.01 requires the court to grant leave to amend unless it is plain and obvious there is no tenable cause of action, the proposed pleading is scandalous, frivolous or vexatious, or there is non-compensable prejudice to the defendants.[52] A proposed amendment must be capable of surviving a rule 21 motion.[53] Further, the court has a residual right to deny amendments where appropriate.[54]

46. The proposed amendments should not be allowed. They go beyond particularizing a claim, and instead attempt to graft on a new claim with a new cause of action on the existing one.[55] The existing claim does not contain the facts necessary to support the claim in respect of the headlands issue.[56] In fact, through the proposed amendments, the Plaintiff is bringing forward issues for which Canada would be the proper

52 *McHale v. Lewis*, 2018 ONCA 1048 at paras 6 *and* 22*;* *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180 at para. 25; *Fernandez Leon v. Bayer Inc*., 2023 ONCA 629 at para 5; *Mitchell v. Lewis*, 2016 ONCA 903 at para 21.
53 *Spar Roofing & Metal Supplies Limited v. Glynn*, 2016 ONCA 296 at paragraph 43; *Jourdain v Ontario (Attorney General),* 2010 ONSC 6315 at para 14.
54 *Avedian v. Enbridge Gas Distribution Inc*., 2023 ONCA 289 (CanLII) at para 6, citing to *Marks v. Ottawa (City),* 2011 ONCA 248 at para 19.
55 Plaintiff's Factum at para 84; *Faridani v. Stubbert*, 2013 ONSC 1233 at para 15.
56 *Noram* at para 67.

respondent. It is noteworthy that in its Statement of Claim issued in 2000, the Plaintiff properly named Canada as a defendant to address these issues.[57]

The proposed Amended Claim is not Tenable against the Defendants

47. Through its proposed amendments, the Plaintiff intends to bring to the fore allegations that the headlands were taken away from it, without its knowledge, in apparent contravention of Treaty No. 3, the 1894 Agreement, and the Plaintiff's reserve allocation under the *Indian Act*.[58] These allegations are very specific and are not part of the Statement of Claim.

48. If the headlands reserve claim becomes an issue in this case, the practical result is that the trial judge will have to determine the Plaintiff's reserve land entitlement under Treaty No. 3. Inevitably because of its exclusive jurisdiction under 91(24) of the *Constitution Act* over reserve lands, Canada is a necessary party in respect of this issue. However, the Plaintiff has not added Canada as a party to the claim, and therefore the reserve entitlement issue cannot be adjudicated *vis a vis* Ontario and Winnipeg, who do not have any jurisdiction regarding reserve lands creation or allotment (not now or at time of entering into Treaty no. 3).[59]

Granting Leave to Amend would result in an Abuse of Process

57 Exhibit P, RMRO Tab 1.
58 Plaintiff's Factum at para 59.
59 *Aseniwuche Winewak Nation v. Greenview (Municipal District No. 16),* 2000 ABQB 839, para 57; see also *Chippewas of Saugeen First Nation v Town of South Bruce Peninsula et al.,* 2023 ONSC 3928 (CanLII) at para 9, *Constitution Act*, s. 91(24). Canada's exclusive jurisdiction under s. 91(24) existed as of Confederation through to present.

49. Granting leave to amend the Plaintiff's pleadings to include the headlands issue would constitute an abuse of process because the Plaintiff is actively pursuing the headlands claim in other proceedings against Canada and Ontario.[60]

50. Section 138 of the *Courts of Justice Act* provides that, "As far as possible, multiplicity of legal proceedings shall be avoided."[61] In line with this objective, courts have dismissed new actions, including in the context of claims brought by members of Indigenous communities, on the basis that the new claim would duplicate or be concurrent to an already existing legal proceeding, and would constitute an abuse of process.[62]

51. Courts have similarly refused amendments to pleadings on the basis that the new pleading would be duplicative of an existing action. For example, in *Strathan Corporation*, the plaintiff attempted to amend their statement of claim to include claims based on the same facts as had been included in a separate, ongoing proceeding. The judge noted the identical claims and refused the amendment, finding it would be an abuse of process.[63]

52. In the instant case, it is an abuse of process and prejudicial to Ontario to defend more than one proceeding on the same subject matter by the same plaintiff involving claims for lands and billions of dollars.[64] The Plaintiff is already seeking redress on the

60 Leishman Affidavit, at para 21, RMRO, Tab 1; Exhibit P, RMRO, Tab 1.
61 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 138.
62 *Dixon v Canada (Attorney General)*, 2015 ABQB 565 at para 85; *Bidal v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 4257 at para 16.
63 *Strathan Corporation v. Khan*, 2018 ONSC 6278 (*Strathan Corporation*) at paras 97-98, aff'd in *Strathan Corporation v. Khan*, 2019 ONCA 418.
64 *Howlett v. Northern Trust Company*, 2023 ONSC 4531 (CanLII), at paras 62 and 63; *Strathan Corporation* at paras 92-97.

headlands issue through the Specific Claims process and before this Court in the Statement of Claim bearing court file no. 00-0263. Denying the amendment will not limit their rights to pursue their headland claims in the other proceedings.

53. The Court should not grant leave as it would result in duplicative proceedings which may lead to inconsistent findings on the same issues.

Other Considerations regarding the Consequences of Amending the Claim

54. Importantly, this Court dismissed the motion to intervene of Shoal Lake No 40 ("No. 40") in the present action on the basis that the Plaintiff's compensation claim could not adversely affect the rights of No. 40.[65]

55. The Court held that granting intervenor status to No.40 would not assist the Court or offer a perspective that is useful to the issues for determination by the Court in the claim by No. 39.[66]

56. These issues would be reopened if the Plaintiff succeeds with the motion for leave as the headlands claim is not imited to the Plaintiff's interests alone.

65 *Iskatewizaagegan No. 39 v. The City of Winnipeg,* 2022 ONSC 535 at para 23.
66 *Ibid* at para 22.

There is no reason to depart from the jurisprudence under the Rules of Civil Procedure

57. The Plaintiff has asserted that the honour of the Crown, the goal of reconciliation, and the Crown's fiduciary relationship with Aboriginal peoples should be factors in the Court's assessment of their hybrid motion.[67]

58. It is well established in case-law that the principle of honour of the Crown and reconciliation should inform the dealings between the Crown and Aboriginal parties.[68] However, it is also important to keep in mind that the honour of the Crown is not a cause of action in itself, it speaks to how the Crown's specific obligations must be fulfilled. This principle exists alongside the established procedural rules. For example, in *Fort McKay First Nation*, the Court followed the established evidentiary rules and did not allow the admission of affidavit evidence on a judicial review application, despite the applicants pleading that the honour of the Crown gave reason to make an exception to the rule.[69] Similarly, in *Meekis v. Ontario,* while giving significant consideration to the principles of the honour of the Crown, the Court allowed the Crown's rule 21 motion and dismissed the plaintiff's action for lack of cause of action.[70]

67 Plaintiff's factum at para 101.
68 *Manitoba Metis Federation Inc. v. Canada (Attorney General*), 2013 SCC 14 at para 66; *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para 13.
69 *Fort McKay First Nation v Alberta (Environment and Sustainable Resource Development)*, 2014 ABQB 32 at para 26.
70 *Meekis v. Ontario (AG)*, 2019 ONSC 2370 at paras 144 and 163.

59. There is no justification for the principles of the honour of the Crown to alter the application of the rules to this motion to secure the just, most expeditious and least expensive determination of every civil proceeding.[71]

PART V – ORDER REQUESTED

60. The Defendant requests that the Plaintiff's motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 1, 2023

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71 *Rules of Civil Procedure,* RRO 1990, Reg 194**,** r.1.04(1).

SCHEDULE A – LIST OF AUTHORITIES

1. *Ontario v. Rothmans Inc.,* 2011 ONSC 2504.
2. *Noram Building Systems Inc. v. Zurich Insurance Company Ltd.,* 2023 ONSC 5088.
3. *Fowlie et al. v Wrestling Canada Lutte et al.,* 2023 ONSC 2680.
4. *Macdonald v. Ontario Hydro,* 1994 CanLII 7294 (ON SC).
5. *Alafi v. Lindenbach,* 2023 ONSC 831.
6. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42.
7. *Frank v. Legate,* 2015 ONCA 631.
8. *Taylor v. Hanley Hospitality Inc.*, 2022 ONCA 376.
9. *Beaudoin Estate v. Campbellford Memorial Hospital,* 2021 ONCA 57.
10. *Transamerica Life Canada Inc. v. ING Canada Inc.*, 2003 CanLII 9923 (ON CA).
11. *Kawa v. 1Plus 12 Corporation,* 2022 ONSC 6527.
12. *Montreal Trust Co. of Canada v. Toronto Dominion Bank*, [1992] O.J. No. 1274 (Ont. Prov. Ct.) (included as Appendix A).
13. *TransCanada Pipelines Ltd.* v. *Pottery Station Power Limited Partnership* (2002), 2002 CanLII 49642 (ON SC), 22 B.L.R. (3d) 210
14. *Vale Canada Limited v. Solway Investment Group Limited et al.,* 2021 ONSC 7562.
15. *Moriarty v. Slater*, 1989 CanLII 4141 (ON SC), 67 O.R. (2nd) 758 (H.C.)
16. *McHale v. Lewis*, 2018 ONCA 1048.
17. *Klassen v. Beausoleil,* 2019 ONCA 407.
18. *Fernandez Leon v. Bayer Inc.,* 2023 ONCA 629.

19. *Mitchell v. Lewis,* 2016 ONCA 903.

20. *Spar Roofing & Metal Supplies Limited v. Glynn,* 2016 ONCA 296.

21. *Avedian v. Enbridge Gas Distribution Inc.*, 2023 ONCA 289.

22. *Marks v. Ottawa (City),* 2011 ONCA 248.

23. *Jourdain v Ontario (Attorney General),* 2010 ONSC 6315.

24. *Faridani v. Stubbert,* 2013 ONSC 1233

25. *Polla v. Croatian (Toronto) Credit Union Limited,* 2020 ONCA 818.

26. *Aseniwuche Winewak Nation v. Greenview (Municipal District No. 16),* 2000 ABQB 839.

27. *Chippewas of Saugeen First Nation v Town of South Bruce Peninsula et al.,* 2023 ONSC 3928.

28. *Dixon v Canada (Attorney General),* 2015 ABQB 565.

29. *Bidal v. Her Majesty the Queen in Right of Ontario,* 2019 ONSC 4257.

30. *Strathan Corporation v. Khan*, 2018 ONSC 6278.

31. *Strathan Corporation v. Khan*, 2019 ONCA 418.

32. *Howlett v. Northern Trust Company*, 2023 ONSC 4531.

33. *Iskatewizaagegan No. 39 v. The City of Winnipeg,* 2022 ONSC 535.

34. *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14.

35. *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56.

36. *Fort McKay First Nation v Alberta (Environment and Sustainable Resource Development),* 2014 ABQB 32.

37. *Meekis v. Ontario (AG),* 2019 ONSC 2370.

SCHEDULE B – LEGISLATION CITED

Rules of Civil Procedure, RRO 1990, Reg 194

To Any Party on a Question of Law

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

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

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

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

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

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

General Power of Court

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.

Scope of Examination

General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 138.

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

Legislative Authority of Parliament of Canada

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

24. Indians, and Lands reserved for the Indians.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Appendix A

1992 CarswellOnt 1131
Ontario Court of Justice (General Division)

Montreal Trust Co. of Canada v. Toronto Dominion Bank

1992 CarswellOnt 1131, [1992] O.J. No. 1274, 40 C.P.C. (3d) 389

MONTREAL TRUST COMPANY OF CANADA (plaintiff) v. TORONTO-DOMINION BANK, CITIBANK CANADA and CHASE MANHATTAN BANK OF CANADA (defendants)

BANK OF TOKYO CANADA (plaintiff) v. TORONTO-DOMINION BANK, CITIBANK CANADA and CHASE MANHATTAN BANK OF CANADA (defendants)

Borins J.

Heard: June 1 and 2, 1992
Judgment: June 17, 1992*
Docket: Docs. B 19/92, B 20/92

Counsel: *Peter F.C. Howard*, for moving party in each action (defendant) Citibank Canada.
Robert Morris, for responding party in action B 19/92 (plaintiff) Montreal Trust Company of Canada.
Paul S.A. Lamek, Q.C., for responding party in action B 20/92 (plaintiff) Bank of Tokyo Canada.
Caroline Zayid, for responding party (defendant) Toronto Dominion Bank.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.h Pleading evidence

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.iii Need for clearly unsustainable claim

Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.c Miscellaneous

Civil practice and procedure
XVI Disposition without trial
XVI.1 Preliminary determination of question of law or fact
XVI.1.a Question of law alone

Headnote

Practice --- Pleadings — General requirements — Pleading evidence

Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Need for clearly unsustainable claim

Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications

Practice --- Disposition without trial — Preliminary determination of question of law or fact — Question of law alone

Disposition without trial — Preliminary determination of question of law or fact — Question of law alone — Questions for determination must be raised in pleading — Not proper to pose questions which required same determination on motion to strike out statement of claim — Ontario, Rules of Civil Procedure, r. 21.01(1)(a).

Pleadings — General requirements — Pleading evidence — Statement of claim deemed to include any statement or documents incorporated in it by reference and which form integral part of claim — Rule 25.06(7) not requiring plaintiff to reproduce provisions of agreement or other document upon which it must rely to establish its claim — Ontario, Rules of Civil Procedure, r. 25.06(7).

Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Need for clearly unsustainable claim — Not necessary for plaintiffs to show that they are going to win, merely that case being fit to be tried — Ontario, Rules of Civil Procedure, r. 21.01(1)(b).

Practice on interlocutory motions and applications — Evidence on motions and applications — Statement of claim incorporating documents by reference — For purposes of motion under r. 21.01(1), such documents constituting facts not evidence — Ontario, Rules of Civil Procedure, r. 21.01(1)(a), (b).

The defendants in each of two actions were three banks who, together with five other financial institutions, agreed to provide B with certain credit facilities pursuant to the terms of a loan agreement. Under the terms of the agreement, the defendant C, in addition to being a lender, was also the agent for the other lenders and, as such, undertook certain duties and obligations as stipulated in the loan agreement. The loan agreement permitted any lender to assign or grant participation in all or part of that lender's portion of the credit facility to another approved financial institution. The plaintiffs in the two actions, MT and BOTC, were each assigned a share of the defendant TD's portion of the credit facility. The agreement of MT and BOTC to accept a portion of the credit facility was based on information and assurances concerning B's financial performance.

After the agreement by MT and BOTC to participate in the credit facility, but before the advance of funds, B advised C that it was forecasting a financially more difficult year than it had originally forecasted and that it would be necessary for the lenders to relax and amend certain financial covenants in the loan agreement. Neither MT nor BOTC were advised by C of this information. B ultimately defaulted and went into receivership. MT and BOTC incurred significant losses through their participation in the credit facility.

It was alleged by MT and BOTC that once C received the information material to an assessment of the creditworthiness of B, C owed a duty to the lenders to ensure that they were made aware of any new information about B. It was alleged that C failed to take any steps to fulfil its duty.

Following the receipt of statements of claim, C moved in both actions for an order determining two questions of law, either of which it submitted would dispose of the action against it. Alternatively, C moved for an order striking out the statements of claim on the ground that they failed to disclose a reasonable cause of action.

Held:

The motion was dismissed.

In order to determine the basis of the claims of MT and BOTC, it was necessary to consider the terms of the loan agreement to which neither plaintiff was a party, and the assignment and assumption agreement entered into by each plaintiff with TD and B. Neither statement of claim contained the precise wording of any provision of either agreement. However, the two agreements were sufficiently pleaded within the meaning of r. 25.06(7) and therefore formed an integral part of each statement of claim. The purpose of the rule was to avoid unnecessary verbosity in pleading and, therefore, it was neither expected, nor required, that the plaintiffs would reproduce the provisions of the agreements upon which they must rely to establish their claims.

On a motion under r. 21.01(1)(*a*), no evidence was admissible without leave of the judge or on consent. Under r. 21.01(1)(*b*), no evidence was admissible. The agreements referred to within the statements of claim did not constitute evidence intended to prove facts. The provisions of the agreements relied upon by the plaintiffs constituted the facts just as if they were reproduced as part of the statements of claim. Therefore, the agreements were not evidence and could be considered on the motion.

With respect to the motion under r. 21.01(1)(*b*) for an order to strike out the statements of claim on the grounds that they failed to disclose a reasonable cause of action, statements of claim should be struck out only in the clearest of cases. The plaintiffs should not be deprived of the opportunity of persuading a trial judge that the evidence and the law entitled them to a remedy. In these cases, each statement of claim described a factual situation which came within a class of instances that the substantive law recognized as entitling the plaintiffs to relief, assuming that the facts alleged could be proven. Each statement of claim contained facts which contained the elements of the tort of negligence committed by C. C's argument that even if the statements of claim pleaded all the required elements of a tort, the duty of care alleged was not one which has been recognized by the substantive law, was rejected. It was irrelevant that the defendant stated that the plaintiffs could not win their cases. It was not necessary for the plaintiffs to show that they were going to win. All they needed to show was a case fit to be tried, a case that would get them past the door to the courtroom. Therefore, the motion under r. 21.01(1)(*b*) was dismissed.

With respect to the motion under r. 21.01(1)(*a*) for an order determining two questions of law, the questions were that the facts alleged were not capable in law of: (1) supporting a duty of care, and (2) establishing the element of causation. Both of these questions presented the same issues that were presented under r. 21.01(1)(*b*), that the statements of claim failed to disclose a reasonable cause of action. Therefore, these questions were not questions of law raised by the pleadings within the meaning of r. 21.01(1)(*a*). Further, it was premature to bring a motion under r. 21.01(1)(*a*) before the pleadings were closed. C had raised the questions of law in its pleading. Resolving the questions of law posed by C depended on the construction of the agreements forming part of the statements of claim. Where the terms were unclear and capable of more than one meaning, the interpretation of the agreements was best dealt with by the trial judge who would have the benefit of considering the relevant provisions of the agreements in the context of the evidence. Accordingly, the motion under r. 21.01(1)(*a*) was also dismissed.

Table of Authorities

Cases considered:

Balacko v. Eaton's of Canada Ltd. (1967), 60 W.W.R. 22 (Sask. Q.B.) — *considered*

Barnes v. Kaladar, Angelsea & Effingham (Townships) (1985), 6 C.P.C. (2d) 75, 52 O.R. (2d) 283 (H.C.) — *referred to*

Canadian Plasmapheresis Centres Ltd. v. Canadian Broadcasting Corp. (1975), 8 O.R. (2d) 55 (H.C.) — *applied*

Hogan v. Brantford (City) (1909), 14 O.W.R. 1117, 1909 CarswellOnt 677, 1 O.W.N. 226 (Ont. K.B.) — *considered*

Hunt v. T & N plc, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 2 S.C.R. 959, 43 C.P.C. (2d) 105, 4 C.C.L.T. (2d) 1, 117 N.R. 321, [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321 — *followed*

Moriarity v. Slater (1989), 42 B.L.R. 52, 67 O.R. (2d) 758 (H.C.) — *applied*

Toronto Dominion Bank v. Deloitte Haskins & Sells (1991), 8 C.C.L.T. (2d) 322, 5 O.R. (3d) 417 (Gen. Div.) — *applied*

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (December 21, 1990), Doc. Toronto 51353/90, Lang J. (Ont. Gen. Div.), affirmed (1991), 40 C.C.E.L. 262, 51 O.A.C. 321, 4 B.L.R. (2d) 220 (Div. Ct.) — *considered*

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1991), 40 C.C.E.L. 262, 51 O.A.C. 321, 4 B.L.R.

(2d) 220 (Div. Ct.) — *considered*

Trendsetter Developments Ltd. v. Ottawa Financial Corp. (1989), 33 C.P.C. (2d) 16, 32 O.A.C. 327 (C.A.) — *considered*

Rules considered:

Ontario, Rules of Civil Procedure —

R. 20

r. 21.01(1)

r. 21.01(1)(*a*)

r. 21.01(1)(*b*)

r. 21.01(2)

r. 25.06(7)

r. 25.07(4)

r. 30.04(2)

r. 39.03

Ontario, Rules of Practice —

R. 33(1)

R. 124

R. 145

Words and phrases considered:

EVIDENCE

Relying on R. 25.06(7) [of the *Ontario, Rules of Civil Procedure*] . . . that a statement of claim is deemed to include any statement or documents incorporated in it by reference and which form an integral part of a plaintiff's claim. The purpose of R. 25.06(7) is to avoid unnecessary verbosity in pleading and . . . it is not expected, or required, that a plaintiff will reproduce the provisions of an agreement or other document, upon which it must rely to establish its claim . . . the agreements are not . . . evidence within the meaning of R. 21.01(2) . . . evidence is intended to encompass affidavits, transcripts of the evidence of a witness taken under R. 39.03, or other extraneous documents not referred to in the statement of claim and which would be appropriate, for example, to a motion for summary judgment under R. 20 . . . Because a motion under R. 21.01(1)(b) challenges the facts alleged on the face of a statement of claim, or, more accurately, the statements alleged in the statement of claim, when a statement of claim sufficiently pleads documents within the requirement of R. 25.06(7) it is necessary that the court have before it the relevant documents in assessing the substantive adequacy of the claim. In this regard it is necessary to keep in mind the distinction between a fact as pleaded and the evidence necessary to prove the fact, and to remember that R. 21.01(1) is concerned with facts only, and assuming that they can be proved, whether they raise a question of law determinative of the action or fail to disclose a reasonable cause of action. Viewed from this perspective, the agreements do not constitute evidence intended to prove facts and the provisions of the agreements relied on by the plaintiffs constitute facts just as if they were reproduced as part of the statement of claim.

REASONABLE CAUSE OF ACTION

. . . it is unnecessary to review the many cases referred to by all counsel in considering whether or not the statement

of claim contains a "reasonable" cause of action . . . under R. 21.01(1)(b) [of the *Ontario, Rules of Civil Procedure*]. Reference need be made only to those authorities which discuss the test which applies on a R. 21.01(1)(b) motion. The test was stated by the Supreme Court of Canada in *Hunt v. T & N Inc.*, [1990] 2 S.C.R. 959, and has been recently applied . . . As I read the authorities, it is only in the clearest of cases that a statement of claim should be struck out and a plaintiff be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy.

. . . . .

It is not necessary for the plaintiffs to show that they are going to win their case. All they need show is a case fit to be tried — a case which will get them past the door to the courtroom. The complexity or novelty of the case which the plaintiffs wish to bring to trial should not prevent the trial [from] taking place.

Motion by defendant for order under r. 21.01(1)(*a*) determining two questions of law and, alternatively, for order under r. 21.01(1)(*b*) for order striking out statement of claim for failing to disclose reasonable cause of action.

***Borins J.*:**

1 In each action the defendant Citibank Canada (Citibank) has moved under r. 21.01(1)(*a*) for an order determining two questions of law, either of which, it is submitted, will dispose of the action against it, and, in the alternative, under r. 21.01(1)(*b*) for an order to strike out the statement of claim on the ground that it fails to disclose a reasonable cause of action against it. As I understand them, the two questions of law are as follows:

> (1) The facts alleged in each statement of claim, including the contractual documents referred to and incorporated in them, are not capable in law of supporting a duty of care owed by Citibank to each plaintiff.
>
> (2) The facts alleged in each statement of claim are not capable in law of establishing the element of causation, which forms part of the tort of negligence.

2 Although the statement of claim of the Montreal Trust Company of Canada (Montreal Trust) and that of the Bank of Tokyo Canada (BOTC) were drafted by different counsel, they are very similar in regard to the facts and legal theories advanced. Each claim arises out of a similar, and in many respects identical, set of alleged facts. Considering the two pleadings together, these are the basic facts alleged in respect to Citibank:

> (1) On November 16, 1988, the defendants Citibank, the Toronto-Dominion Bank (TD), and the Chase Manhattan Bank, and five other financial institutions (the lenders) agreed to provide to Ball Packaging Products Canada, Inc. (Ball) certain credit facilities, including a term facility in the aggregate amount of $24,000,000, pursuant to the terms of a loan agreement (agreement).
>
> (2) Under the terms of the agreement Citibank, in addition to being a lender, was also the agent for the other lenders and, as such, undertook certain duties and obligations as stipulated in the agreement.
>
> (3) The agreement permitted a lender, upon notice to Ball, to assign or grant participation in all or part of that lender's portion of the term facility to any of the 63 financial institutions described in the agreement as permitted assignees. Montreal Trust and BOTC were permitted assignees.
>
> (4) TD's portion of the term facility was $40,000,000. Late in 1989 and early in 1990 TD approached BOTC and Montreal Trust, respectively, to assume a share of its term facility.
>
> (5) TD provided BOTC with information about the business and financial status of Ball, commented favourably on Ball's financial performance, and invited BOTC to ask TD for such additional information as it might require to enable it to consider and decide upon the proposed participation. On the basis of the information and assurances it received from TD, on January 22, 1990, BOTC advised TD that it would take a $5,000,000 participation in TD's portion of the credit facilities. On February 19, 1990, BOTC, TD and Ball executed an assignment and assumption agreement, and on February 23, 1990, BOTC advanced the funds.

(6) TD supplied Montreal Trust with financial information pertaining to Ball, including information prepared by Citibank. TD commented favourably on this material and represented that Ball's financial status was sound. On the basis of this information, on January 22, 1990, Montreal Trust agreed to acquire a $10,000,000 participation in TD's portion of the term facility. The assignment and assumption agreement recording this transaction was executed by Montreal Trust, TD, and Ball on February 19, 1990, and on February 23, 1990, Montreal Trust advanced the funds.

(7) On January 29, 1990, Ball advised Citibank that it was forecasting a financially more difficult year in 1990 than it had originally forecast and that it would be necessary for the lenders to relax and amend certain financial covenants in the agreement.

(8) Neither BOTC nor Montreal Trust [was] aware of the information received by Citibank adversely affecting the financial status of Ball at the time they advanced the funds to TD. As this information was material to an assessment of the commercial risk of participating in the term facility, neither plaintiff would have agreed to do so had it been aware of the information received by Citibank. Citibank did not convey the information to TD prior to the date of the two assignment and assumption agreements, which was February 19, 1990.

(9) On December 31, 1990, Ball defaulted under the agreement and on March 28, 1991, it went into receivership. Each plaintiff consequently incurred a significant loss, for which it holds TD and Citibank responsible.

(10) As a party to the agreement, and as agent for the lenders, Citibank knew that each lender had the right to assign all or part of its participation in the term facility to any of the permitted assignees. Having received the information material to an assessment of the creditworthiness of Ball, Citibank owed a duty to the other seven lenders, to the plaintiffs, and to the other permitted assignees to ensure that all would be made aware of the new information about Ball. Citibank failed to take any steps to fulfil its duty.

3 In each statement of claim reference was made to the terms of the agreement, to which neither plaintiff was a party, and the assignment and assumption agreement entered into by each plaintiff, TD, and Ball. However, neither statement of claim contains the precise wording of any provision of either agreement. In my view, the two agreements were sufficiently pleaded within the meaning of r. 25.06(7) and therefore form an integral part of the statement of claim. They constitute documents upon which each plaintiff must rely to establish its claim. I permitted Citibank to refer to and rely on certain sections of each agreement in its submissions in respect to the order requested under both r. 21.01(1)(*a*) and r. 21.01(1)(*b*). I did so mindful that rule 21.01(2) provides that no evidence is admissible on a motion under clause (1)(*b*) and that evidence is admissible on a motion under clause (1)(*a*) only with the leave of the judge or on consent.

4 I did so for two reasons. Relying on r. 25.06(7), it is my view that a statement of claim is deemed to include any statement or documents incorporated in it by reference and which form an integral part of a plaintiff's claim. The purpose of r. 25.06(7) is to avoid unnecessary verbosity in pleading and, therefore, it is not expected, or required, that a plaintiff will reproduce the provisions of an agreement or other document, upon which it must rely to establish its claim. The second reason is that the agreements are not, in my view, evidence within the meaning of r. 21.01(2). In my opinion, evidence is intended to encompass affidavits, transcripts of the evidence of a witness taken under r. 39.03, or other extraneous documents not referred to in the statement of claim and which would be appropriate, for example, to a motion for summary judgment under R. 20. *Trendsetter Developments Ltd. v. Ottawa Financial Corp.* (1989), 33 C.P.C. (2d) 16 (Ont. C.A.), is an example of a case in which the court improperly considered evidence on a r. 21.01(1)(*b*) motion. Because a motion under r. 21.01(1)(*b*) challenges the facts alleged on the face of a statement of claim, or, more accurately, the statements alleged in the statement of claim, when a statement of claim sufficiently pleads documents within the requirement of r. 25.06(7) it is necessary that the court have before it the relevant documents in assessing the substantive adequacy of the claim. In this regard it is necessary to keep in mind the distinction between a fact as pleaded and the evidence necessary to prove the fact, and to remember that r. 21.01(1) is concerned with facts only, and assuming that they can be proved, whether they raise a question of law determinative of the action or fail to disclose a reasonable cause of action. Viewed from this perspective, the agreements do not constitute evidence intended to prove facts and the provisions of the agreements relied on by the plaintiffs constitute facts just as if they were reproduced as part of the statement of claim.

5 The fact-evidence distinction is also significant in understanding why evidence is not permissible on a

21.01(1)(*b*) motion. If it is assumed for the purpose of such a motion that the facts can be proved, there is no need for the introduction of evidence, the only purpose of which, one assumes, is to prove the facts. Similar considerations are relevant to the determination of a question of law raised by a pleading under r. 21.01(1)(*a*). Indeed, there may be situations where it is appropriate to permit a defendant to rely on a document not referred to in a statement of claim in attacking its substantive adequacy where a plaintiff has deliberately omitted reference to it in a statement of claim in an attempt to avoid a successful attack on its substantive adequacy.

6 In deciding that it is permissible to consider the documents referred to in the statements of claim in respect to both of the motions under r. 21.01(1)(*a*) and (*b*) I have taken into consideration *Balacko v. Eaton's of Canada Ltd.* (1967), 60 W.W.R. 22 (Sask. Q.B.), and the case which it applied, *Hogan v. Brantford (City)* (1909), 1 O.W.N. 226 (Ont. K.B.). I am also aware that in *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, released December 21, 1990, on a motion under r. 21.01(1)(*b*), Lang J. declined to refer to documents produced by the plaintiff in response to a request to inspect. The decision of the Divisional Court in the *Leigh Instruments* case, released October 17, 1991 [reported at 40 C.C.E.L. 262], is silent on this point although I was advised by counsel for Citibank and Montreal Trust, who were also counsel in the *Leigh Instruments* case, that the court declined the request of counsel attacking the statement of claim to consider the documents. In this respect it is significant that under r. 30.04(2) a party may inspect documents referred to in the pleadings and that in this case Citibank has inspected the documents referred to in the statements of claim. One of the purposes of r. 30.04(2) is to enable a defendant to inspect documents referred to in a statement of claim to determine whether or not it discloses a reasonable cause of action. It is also significant to observe that in the analogous situation under the former *Rules of Practice*, where a special endorsement was attacked for failure to comply with R. 33(1), the court could consider a contract or other document referred to in the endorsement, but the plaintiff could not adduce evidence in an attempt to supplement the endorsement: W.B. Williston and R.J. Rolls, *The Law of Civil Procedure*, vol. 1 (Toronto: Butterworths, 1970) 283-284.

7 In my view, it is unnecessary to review the many cases referred to by all counsel in considering whether or not the statement of claim contains a "*reasonable* cause of action" (emphasis added) under r. 21.01(1)(*b*). Reference need be made only to those authorities which discuss the test which applies on a r. 21.01(1)(*b*) motion. The test was stated by the Supreme Court of Canada in *Hunt v. T & N plc*, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 2 S.C.R. 959, and has been recently applied by the Divisional Court in the *Leigh Instruments* case, supra, at pp. 25-26, and in *Toronto Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 (Gen. Div.). As I read the authorities, it is only in the clearest of cases that a statement of claim should be struck out and a plaintiff be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy.

8 Each statement of claim describes the particular conduct of the defendants TD and Citibank and the relevant events relied on by the plaintiffs as constituting a cause of action. Different claims are asserted against each defendant. The claim asserted against Citibank is based on the tort of negligence. Read as a whole, each statement of claim refers to a group of facts which, in the submission of plaintiffs' counsel, give rise to a remedy against Citibank. To state the proposition slightly differently, each statement of claim describes a factual situation which comes within a class of instances that the substantive law recognizes as entitling the plaintiffs to relief, assuming that the facts alleged can be proven. On the basis of the pleadings, I have no difficulty in concluding that in each statement of claim facts are set forth which allege a duty on the part of Citibank to use care to see that the adverse information received by it in respect to the creditworthiness of Ball was conveyed to its principal, TD, and through TD to any permitted assignee, including each plaintiff, with whom it was in negotiation, that the conduct of Citibank constituted a breach of the duty, that each plaintiff suffered economic loss, and that Citibank's breach of its duty was a cause of the loss. I have no doubt that the causal relation between the alleged breach of duty by Citibank and the economic injury to each plaintiff is spelled out in sufficient detail. Thus, analytically, each statement of claim contains facts which contain the elements of the tort of negligence committed by Citibank.

9 It is the position of Citibank, as I understand it, that even if the statements of claim plead all the required elements of the tort the duty of care alleged is one which has not been recognized by the substantive law. Counsel for Citibank goes on to say that even if the duty has been recognized by the substantive law, or if it should be accepted by the trial judge, there is no causal connection between the breach of the duty of Citibank and the plaintiffs' loss. In short, what Citibank says is that the plaintiffs cannot win their case. This is quite different, in my view, from saying that the statements of claim fail to disclose a *reasonable* cause of action. It is, of course, to the disclosure of a *reasonable* cause of action that the test stated in *Hunt v. Carey Canada Inc.*, supra, and the other cases is directed. It is not necessary for the plaintiffs to show that they are going to win their case. All they need show is a case fit to be tried —

a case which will get them past the door to the courtroom. The complexity or novelty of the case which the plaintiffs wish to bring to trial should not prevent the trial [from] taking place. The defendant Citibank must show that the statements of claim disclose no reasonable claim against it and that the plaintiffs' actions are certain to fail because they contain a radical defect. In my view, they have failed to do so.

10 I must now deal with Citibank's motion under r. 21.01(1)(*a*) and consider whether the two questions of law which Citibank says are raised by the statements of claim can be answered in favour of Citibank and thereby result in the dismissal of the plaintiffs' actions. Notwithstanding the questions framed by counsel for Citibank which are set out at the beginning of my reasons, I share the difficulty of counsel for Montreal Trust in understanding how these questions constitute "a question of law raised by the pleading" within the meaning of r. 21.01(1)(*a*). Although the first question includes reference to certain provisions of the loan agreement and the assignment and assumption agreements, in my view, both questions present the same issues relied on by counsel for Citibank in his submission that the statements of claim fail to disclose a reasonable cause of action.

11 There are two additional reasons why it is not appropriate to consider the questions raised by Citibank. No statement of defence has been delivered in either action. In a motion under the predecessor to r. 21.01(1)(*a*), it was held in *Canadian Plasmapheresis Centres Ltd. v. Canadian Broadcasting Corp.* (1975), 8 O.R. (2d) 55 (H.C.), that a motion to dispose of a point of law raised by the pleadings cannot be made prior to the close of the pleadings. The reason is that it is not until a statement of defence is delivered that a question of law can be determined properly and the effect of its resolution on the outcome of the case can be assessed. See, also, *Barnes v. Kaladar, Angelsea & Effingham (Townships)* (1985), 52 O.R. (2d) 283 (H.C.).

12 The *Canadian Plasmapheresis* case was concerned with R. 124 of the former *Rules of Practice*, which provided as follows:

> 124. Either party is entitled to *raise by his pleadings* any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial. (Emphasis added.)

Rule 21.01(1)(*a*), which is intended to be the counterpart of R. 124 of the *Rules of Practice*, reads:

> 21.01(1) A party may move before a judge,
>
> (*a*) for the determination, before trial, of a question of law *raised by a pleading* in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs. ... (Emphasis added.)

Rule 21.01(1)(*a*) must be considered together with r. 25.07(4), which requires a defendant to plead any matter on which it intends to rely to defeat the plaintiff's claim, just as Lieff J., in the *Canadian Plasmapheresis* case, considered former R. 124 together with former R. 145. Rule 25.07(4) is intended to be the counterpart of R. 145.

13 At pp. 57 and 58, Lieff J. pointed out that a motion under R. 124 is "founded on the pleadings" and "is in fact a motion for judgment on the pleadings." It is only after the pleadings are complete that the issues in a case, including issues of law, are clear. It is important to recognize that the pleadings are not complete until the plaintiff has delivered a reply, because the plaintiff may raise a further fact which might be a full answer to the defence raised by a defendant. In my view, a similar approach is to be taken in interpreting and applying r. 21.01(1)(*a*). By way of example, a defendant cannot properly move under r. 21.01(1)(*a*) to determine the legal question of whether an action is barred by a statute of limitation or, as in the *Canadian Plasmapheresis* case, by the plaintiff's failure to serve a notice required by a statute, until the defendant raises the defence in its statement of defence. In the present case the defendant Citibank's purpose in asking the court to consider the loan agreement and the assignment and assumption agreements is because, in the submission of counsel for Citibank, they contain provisions which provide Citibank with an absolute defence. However, as r. 21.01(1)(*a*) requires that the question of law must be "raised by a pleading" in order to move under the rule Citibank must raise the questions of law in its pleading. Without the completion of the pleadings Citibank lacks a proper foundation for a motion under r. 21.01(1)(*a*).

14 As for the second reason, even if it is considered appropriate to deal with the questions of law in the absence of a statement of defence, the questions as framed require the court to interpret certain provisions of the loan agreement

and the assignment and assumption agreement, which Citibank submits relieve it of any liability to the plaintiffs. These provisions, in my opinion, are far from clear and do not necessarily convey the meaning placed on them by Citibank. In *Moriarity v. Slater* (1989), 67 O.R. (2d) 758 (H.C.), White J. refused to exercise his discretion under r. 21.01(1)(*a*) and resolve a question of law depending on the construction of a statute where its meaning was far from clear. In my view, the court should take the same approach where the question of law depends on the construction of a contract where its terms are unclear and capable of more than one meaning. The interpretation is best dealt with by the trial judge, who will have the benefit of considering the relevant provisions of the agreements in the context of the evidence.

15 Accordingly, the motions are dismissed, with costs to the plaintiffs in any event of the cause.

Motion dismissed.

Footnotes

[*] Notwithstanding the date of this judgment, it has been increasingly referred to and is of significant merit to warrant being drawn to the attention of the profession.

Court File No: CV-20-00644545-0000

Iskatewizaagegan No. 39 Independent First Nation -and-	**His Majesty the King in Right of Ontario**

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced in TORONTO

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