2018 PESC 9, 2018 CarswellPEI 20

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Prince Edward Island Supreme Court

CMT et al v. Gov't of PEI et al.

2018 CarswellPEI 20, 2018 PESC 9

Capital Markets Technologies, Inc. and 7645686 Canada Inc. (Plaintiffs) and Government of Prince Edward Island, Wes Sheridan, Steve MacLean, Allan Campbell, Chris LeClair, Brad Mix, Cheryl Paynter, Paul Jenkins, 7628382 Canada Corporation (Defendants)

Gordon L. Campbell J.

Heard: January 31, 2018
Judgment: March 29, 2018
Docket: S1-GS-27636

Counsel: John W. McDonald, for Capital Markets Technologies, Inc. and 7645686 Canada Inc.
Jonathan M. Coady, for Government of Prince Edward Island, Wes Sheridan, Steve MacLean, Allan Campbell, Chris LeClair, Brad Mix, Cheryl Paynter, Melissa MacEachern, Robert Ghiz, Neil Stewart
Kenneth L. Godfrey, W. Alex Baird, for Paul Jenkins, 7628382 Canada Corporation
Gavin J. Tighe, Stephanie Clark, for William Dow, Gary Scales, Tracey Cutcliffe
Greg Temelini, Janice Wright, for Steven Dowling

Subject: Civil Practice and Procedure; Torts

Headnote
Civil practice and procedure

Torts

Gordon L. Campbell J.:

Introduction

1 The plaintiffs originally filed a statement of claim with respect to these matters in April 2015, under court file number S1-GS-26550. After the statements of defence were filed, the plaintiffs filed a notice of motion seeking to strike parts of the various defences and to strike a counterclaim filed by one of the defendants. The defendants, in turn, filed motions seeking to strike out parts of the plaintiffs' statement of claim, and seeking security for costs.

2 A decision was issued on February 3, 2016, (*CMT v. Gov't of PEI*, 2016 PESC 4), striking out the statement of claim in its entirety, but allowing the plaintiffs to re-commence the action provided it complied with the directions set out in that decision.

The plaintiffs were also ordered to provide security for costs before filing a new statement of claim. A subsequent decision awarding costs on the motion to strike the original statement of claim can be found at *CMT v. Gov't of PEI*, 2016 PESC 18.

3 On March 29, 2017 the plaintiffs issued a new statement of claim in court file S1-GS-27636, being the matter under which this current motion proceeds. The statement of claim named the Government of Prince Edward Island, seven individuals, and one private corporation as defendants. Service on the various defendants was not completed until September 20, 2017. A defence and counterclaim was filed on behalf of one individual defendant, Paul Jenkins and his company, 7628382 Canada Corporation. A defence to the counterclaim was then filed by the plaintiffs. No defence has yet been filed by the Government or the six individuals related to Government.

4 On November 29, 2017, eight months after filing their revised statement of claim, the plaintiffs filed a notice of motion seeking an order to have an "*Amended* Statement of Claim" issued by the Supreme Court of Prince Edward Island. By way of the proposed amended statement of claim, the plaintiffs wish to name seven additional individuals as defendants and have set out various claims against them. The claims against some of the individuals include allegations for misfeasance in public office, breach of confidentiality, breach of security regulations, misrepresentation, conflict of interest, and spoliation of evidence.

5 Three of the seven additional defendants proposed, namely Melissa MacEachern, Robert Ghiz, and Neil Stewart, are represented by Jonathan Coady who also represents the Government of Prince Edward Island and six of the individual defendants already named. On behalf of MacEachern, Ghiz, and Stewart, Mr. Coady expressed his consent to the order requested by the plaintiffs. MacEachern, Ghiz, and Stewart will therefore be added as defendants to this action.

6 Counsel on behalf of the proposed defendant Steven Dowling also indicated their consent to the order requested on the motion, meaning Dowling will be added as a defendant.

7 However, counsel for William Dow, Gary Scales, and Tracey Cutcliffe opposes the motion by the plaintiffs to add these three individuals and amend the pleadings. Counsel submits the proposed claims against Dow, Scales, and Cutcliffe are not tenable in that there is no reasonable cause of action disclosed. In the alternative, counsel argues that if the court grants the plaintiffs' motion, then the court should exercise its discretion and conclude that it would be "just" for the new defendants to be given the same security for costs as was provided to the other defendants in *CMT v. Gov't of PEI*, 2016 PESC 4, which was in the range of $300,000 to $350,000 for each defendant group.

Intended claims against proposed defendants, Dow, Scales and Cutcliffe

8 In the following paragraphs I have set out the relevant amendments the plaintiffs wish to have incorporated into their statement of claim. It is critically important to bear in mind that, at this stage, in this proceeding under Rule 26.01, subject to certain limitations, the court is required to treat all statements of fact pleaded by the plaintiffs as being true and provable. The starting point is that any such amendment ought to be accepted, with the defendants being granted an adjournment if necessary and/or being compensated for costs if deemed appropriate. Other terms "as are just" can also be imposed by the court.

9 A portion of the plaintiffs' proposed amended statement of claim reflecting their editing and changes is reproduced here.

The plaintiffs describe the three proposed defendants under the "Definitions" section at paras. 4(d1), (d3), and (n1), as follows:

> DEFINITIONS
>
> 4. In this Amended Statement of Claim:
>
> . . .
>
> (d1) "Cutcliffe" is Tracey Cutcliffe who is a Government Relations Specialist with KCM Strategy Group (now Group M5) and was contracted by both the Government of Prince Edward Island and CMT to provide government relations services;
>
> . . .
>
> (d3) "Dow" is William Dow and was counsel to Innovation PEI;
>
> . . .
>
> (n1) "Scales" is Gary Scales, a lawyer with McInnis Cooper, who was contracted by the Province of Prince Edward Island to provide management services to the PEI Gaming Committee;

10 The specific claims related to each of Scales, Dow and Cutcliffe, are set out in the proposed amended statement of claim at paras. 2, and 194-200, as follows:

> CLAIMS
>
> . . .
>
> 2. The plaintiffs, Capital Markets Technologies, Inc. and 7645686 Canada Inc., claim against Wes Sheridan, Steve Maclean, Allan Campbell, Chris LeClair, Brad Mix, Cheryl Paynter, Steven Dowling, William Dow, Melissa MacEachern, Robert Ghiz, Gary Scales, Tracey Cutcliffe, Neil Stewart and the Government of Prince Edward Island, jointly and severally, ...;
>
> (a) damages for misfeasance in a public office in the amount of $50,000,000;
>
> . . .
>
> MISFEASANCE IN PUBLIC OFFICE OF GOVERNMENT AGENTS
>
> 194. The plaintiffs state that the course of conduct of Sheridan, MacLean, Campbell, LeClair, ~~Mix and Paynter~~, Mix,Paynter, Dowling, Dow, MacEachern, Managо, Scales and Cutcliffe (herein collectively referred to as the "Government Agents"), as set out above, was deliberate and unlawful in the exercise of their public functions and that they knowingly acted for the improper purpose of denying the plaintiffs of the benefits of establishing the Simplex Global Transaction Platform in Prince Edward Island.
>
> 195. The plaintiffs state that the Government Agents knew that their conduct was unlawful and likely to injure the plaintiffs.

196. Without limiting the generality of the foregoing, particulars of these deliberate and unlawful acts are as follows:

. . .

(t) Dow received information that had been obtained from the plaintiffs that he knew was subject to the confidentiality provisions of the MOU and used this information to approach potential clients of the plaintiffs for the purpose of discrediting the plaintiffs and preventing the potential clients from contracting with the plaintiffs;

(u) Contrary to s 36 of the *Securities Act*, Dow unlawfully received information regarding the plaintiffs that he had obtained from an investigation purportedly conducted under the *Securities Act* and used this information for the purpose of discrediting the plaintiffs at meetings of potential clients and strategic partners of the plaintiffs, specifically HSBC and Holland College;

. . .

(x) Scales, while under retainer to provide management services on behalf of the Government of Prince Edward Island to the PEI Gaming Committee, unlawfully misled Simplex, whom he knew was being funded by CMT, into providing consulting services and inducing them to invoice the Government of Prince Edward Island;

(y) Scales, while he was retained to provide management services to the PEI Gaming Committee unlawfully made promises of payment to Simplex on their invoices at a time when he knew that all of the funding that had been allocated to the PEI Gaming Committee had been fully dispersed to his law firm, McInnis Cooper;

(z) Scales, while he and Sheridan were negotiating with another competitor to 7645686 under the MOU, contacted and met with Walsh for what he represented to Walsh was for the purpose of discussing strategies with Sheridan to move forward with the MOU, but in fact was used to illicit confidential information from Walsh that he used to undermine the completion of the MOU in contravention of the terms of the MOU;

(aa) Cutcliffe, while contractually bound to provide government services advice to both the Government of Prince Edward Island and the plaintiffs, unlawfully obtained information about the plaintiffs from the investigation under the *Securities Act* and contrary to s. 36 of the *Securities Act* conveyed this information to other Government Agents knowing that dissemination of this information would be detrimental to the plaintiffs;

197. The defendants, Sheridan, LeClair, Maclean, Campbell, Mix, ~~and Paynter~~ Paynter, Dowling, Dow, MacEachern, Scales and Cutcliffe all knew that their conduct would injure the plaintiffs and prevent the plaintiffs, through 7645686, from establishing the Simplex Global Transaction Platform in PEI and delaying or preventing the plaintiffs from establishing the Simplex Global Transaction Platform in ~~an~~other jurisdictions.

198. The Government Agents engaged in this unlawful conduct for the purpose of preventing the plaintiffs from being able to establish the Simplex Global Transaction Platform in Prince Edward Island or any other jurisdiction.

199. Further, the Government Agents engaged in this unlawful conduct to wrongfully terminate the MOU and enable another provider to establish a financial transactions platform for a contemplated Crown agency or commission that would have personally benefitted one or more of them as managers or employees of the agency or commission.

200. As a result of the deliberate and wrongful acts of the Government Agents, the plaintiffs suffered the damages set out ~~in paragraphs 216 and 217~~ below.

[Emphasis added]

11 As is shown in paragraph 2 of the proposed amended statement of claim, the plaintiffs claim "damages for misfeasance

in a public office in the amount of $50,000,000", together with interest, costs and such other relief as may seem just. That claim is separate from three other specific claims of $50,000,000 against other defendants, and is the only monetary claim proposed against Dow, Scales, and Cutcliffe.

12 Under the heading, "Misfeasance in Public Office of Government Agents", the plaintiffs state that these "Government Agents", deliberately and unlawfully exercised their "public" functions and that they knowingly acted for improper purpose to harm the plaintiffs.

13 Their deliberate and unlawful acts are alleged to include receiving confidential information arising from a *Securities Act* investigation, attempting to discredit the plaintiffs, misleading the plaintiffs into providing services, and sharing information with others knowing the dissemination of that information would harm the plaintiffs.

14 Counsel for Dow, Scales, and Cutcliffe submit that their clients' names ought to be struck from paragraph 2 of the proposed amended statement of claim referencing misfeasance in public office, and from paragraph 4 identifying the parties and purporting to describe their roles, and from various other paragraphs (including paras. 194-200), in which their alleged individual conduct is outlined.

Grounds for the motion

15 In their notice of motion to amend, the plaintiffs list the grounds for their motion as being Rule 5.03(4) (incorrectly identified as 5.04(4)), and Rule 26.01 of the *Rules of Civil Procedure*. The relevant Rules state:

> 5.03(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.
>
> 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.

16 The plaintiff could also have made reference to Rule 5.04(2) which is almost identical to Rule 26.01. Rule 5.04(2) reads:

> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

17 Much of the plaintiffs' factum has been rendered moot with respect to the issue before the court by the fact the proposed defendants MacEachern, Ghiz, Stewart, and Dowling, all consented to be added as parties. There are only limited portions of the factum applicable to the claims being made against Dow, Scales, and Cutcliffe.

18 As I stated above, the starting point is that the amendment, as proposed, is presumptively to be allowed, on terms "as are just". That is true unless prejudice would result that could not be compensated for by costs or an adjournment. The fundamental rationale for that rule is that an individual has the right to commence an action against the defendants of their choice, for claims they choose to make. Once an action is commenced, the named defendants have certain rights which include the right to file a defence, apply to strike the statement of claim, apply for summary judgement, apply for security for costs, add third parties, etc.

19 None of Dow, Scales or Cutcliffe were named as defendants in the first statement of claim filed by the plaintiffs in April, 2015. Neither were any of them named in the second, re-issued, statement of claim filed on March 29, 2017. It is that second statement of claim the plaintiffs are now seeking to amend. Therefore, unlike various other defendants named in the original statement of claim, this is the first time Dow, Scales and Cutcliffe have been engaged in this matter and have been required to respond. They have not yet filed statements of defence, applied to strike the statement of claim, applied for summary judgement, applied for security for costs, applied to add third parties, etc. They are simply at the stage of opposing the plaintiffs' attempt to amend their statement of claim to include them as defendants, with their alternate position being that if they are to be added as defendants, then it is "just" that they be provided the same security for costs as provided for the other defendant groups.

20 Again, part of the rationale for such amendments presumptively being allowed is that a plaintiff is allowed to commence an action against whomever they believe has wronged them. In the context of this particular case, if the three defendants had simply been named in the re-issued statement of claim, they would now be required to respond and file a defence or to pursue one of the other avenues available to them, including making a motion to strike the statement of claim if they were so inclined. They would not have the option of opposing a move by the plaintiffs to name them as defendants.

21 Motions to amend a statement of claim to add new parties are often prompted by the plaintiffs or their counsel gathering new information or, in the course of further preparing for their case, gaining new insight into the matter which leads them to reconsider the direction of their action. The plaintiffs in this case have formed a new view of the role of Dow, Scales, and Cutcliffe, and are seeking to present that view.

What is the role of the court in examining the merits of the action at this stage?

22 Counsel for Dow, Scales and Cutcliffe, submits that the court should examine the merits of the proposed action against the new defendants to determine whether the proposed claim is tenable and discloses a "reasonable cause of action" against the defendants. He argues that the court ought not to condone what he states would be a breach of the Rules by allowing an amendment which does not otherwise comply with the Rules. In his submissions, he cites the case of *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. 4496, 1998 CarswellOnt 4285, 41 O.R. (3d) 780, in which Winkler J. outlined the procedure he believed ought to be followed in considering a motion brought pursuant to Rule 26 for the amendment of a pleading. At para. 10 of his decision Winkler J. stated:

> 10. The proper approach on a motion of this nature is to grant the amendment unless there is prejudice which cannot be compensated for by costs or an adjournment. However, where the amendment would merely result in another proceeding to strike it out as being "plain and obvious" that it discloses no reasonable cause of action, or lacks a legal foundation, the amendment should be refused. Lax J., relying on *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 stated the appropriate criteria in *Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada* (1997), 1997 CanLII 12125 (ON SC), 33 O.R. (3d) 12 (Gen. Div.) at pp. 17-18:

There are numerous cases which have considered the test to be applied under Rule 21.01(1)(b) ... and notably, *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. There, Madam Justice Wilson, speaking for a unanimous court and considering British Columbia's equivalent to Ontario Rule 21.01(1)(b), stated at p. 980:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) is ...: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff "should not be driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

The authorities establish that in applying the test, caution and prudence are to govern the exercise of the court's discretion. It is a power which must be used sparingly. The statement of claim must be read generously with allowance for deficiencies due to drafting and only in the clearest of cases should a party be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy or defence ... In my view the combined effect of the tests which have been propounded under rules 26.01 and 21.01(1)(b) require that the amendments in this case be granted unless it is shown that it is beyond all doubt that the claim is one that is clearly impossible of success. [Emphasis added]

In *Keneber Inc. v. Midland (Town)* (1994), 1994 CanLII 7221 (ON SC), 16 O.R. (3d) 753 (Gen. Div.), Howden J. held that "legal soundness" was required when an amendment was sought under rule 26.01. He stated at p. 758:

> In other words, amendments, like any other pleading, are subject to the normal rules as to form, relevance and basis in law. Therefore it is not only proper but in the interests of sound judicial process that leave to amend under rule 26.01 not be granted unless the amendment sought is tenable in law.

The approaches taken by Lax J. in *Atlantic Steel* and by Howden J. in *Keneber* were followed in *Mastercraft Group Inc. v. Confederation Trust Co*. (1997), 15 C.P.C. (4th) 48, [1997] O.J. 3451 (Gen. Div.) (QL). Swinton J. states at para. 7:

> ... if an amendment would violate the rules of pleading, or if it raises an issue that would not constitute a reasonable cause of action within Rule 21.01(b), the amendment should not be allowed.
>
> [Emphasis added throughout]

23 Counsel for Dow, Scales, and Cutcliffe also cited *Simrod v. Cooper*, [1952] O.W.N. 720, 1952 CarswellOnt 358, at para. 4 wherein the Ontario High Court of Justice set out the general rules the court followed in assessing applications for leave to amend. The Ontario Court of Appeal recently updated the summary of principles to be considered in motions to amend pleadings under Rule 26. In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, at para. 25, the court stated:

> [25] The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:

• The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: *Iroquois Falls Power Corp. v. Jacob Canada Inc.*, 2009 ONCA 517 (CanLII), 75 C.C.L.I. (4th) 1, at paras. 15-16, leave to appeal to SCC refused, 2010 CarswellOnt 425, and *Andersen Consulting v. Canada (Attorney General)* (2001), 2001 CanLII 8587 (ON CA), 150 O.A.C. 177 (C.A.), at para. 37. (Emphasis added)

• The amendment may be permitted at any stage of the action: *Whiten v. Pilot Insurance Co.* (1996), 1996 CanLII 8109 (ON SC), 27 O.R. (3d) 479 (Gen. Div.), rev'd on other grounds (1999), 1999 CanLII 3051 (ON CA), 42 O.R. (3d) 641 (C.A.), aff'd 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595.

• There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: Iroquois, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 2001 CanLII 8620 (ON CA), 56 O.R. (3d) 768 (C.A.), at para. 65.

• The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 1995 CanLII 7105 (ON SC), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.

• Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 1996 CanLII 1762 (ON CA), 95 O.A.C. 297 (C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.

• At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (ON CA), 2006 CanLII 5135 (Ont. C.A.), at para. 6.

• The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 1996 CanLII 36 (ON CA), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 2003 CanLII 64295 (ON SC), 66 O.R. (3d) 74 (Master), at para. 21.

• The onus to rebut presumed prejudice lies with the moving party: *Family Delicatessen*, at para. 6.

What are the essential elements to be pleaded in respect of the tort of misfeasance in public office?

24 The proposed defendants cited a number of cases which identified the essential ingredients of the tort of "misfeasance in a public office". In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, the Supreme Court of Canada set out the "defining elements of the tort". I quote Iacobucci J. from paras. 17 to 25:

B. The Actions for Misfeasance in a Public Office

. . .

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

unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

(1) The Defining Elements of the Tort

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

19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although Roncarelli was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619 (CanLII); and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283 (CanLII). In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

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

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

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

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

22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on

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

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

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

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

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

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

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

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

25 The elements of the tort are similarly expressed in *Fragomeni v. Greater Sudbury Police Service*, (See 2015 ONSC 3934 at para. 114). In summary, that case held that the tort required that the plaintiff prove that:

(a) The defendant is a public officer;

(b) Who exercised that public office in the actions complained of;

(c) Such actions were a wrongful exercise of that officer's power of office;

(d) Those actions caused the harm to the plaintiff.

Does the plaintiffs' proposed amendment plead a tenable cause of action?

26 In the proposed amended statement of claim, the plaintiffs plead that the three proposed defendants were "Government Agents" and that their "course of conduct ... was deliberate and unlawful in the exercise of their public functions and that they knowingly acted for improper purposes ...". They additionally plead that the defendants caused them to suffer significant monetary damages, loss of opportunity, and loss of reputation.

27 While the pleading in regard to identifying the proposed defendants as "public officers" could have been stated with more precision, I am satisfied that, for the purposes of this stage of the proceedings during which amendments are to be presumptively granted, the plaintiffs have alleged enough particulars with respect to each of the elements of the tort to allow the opposing parties to prepare an answer to the claim.

Is the plaintiffs' amended claim "incapable of proof"?

28 The Ontario Court of Appeal addressed a motion by plaintiffs to amend their statement of claim to add new defendants and new grounds of relief in *Schembri v. Way*, 2012 ONCA 620. The motions judge assessed the viability of the proposed claims against the proposed defendants for conspiracy to injure. After concluding the claim was sufficiently pleaded and particularized, the motions judge denied the plaintiffs' motion because he felt there was an insufficient factual basis to ground the claims against the defendant in her personal capacity.

29 On another proposed claim for breach of contract, the motions judge again found that while it lacked some particulars, the pleading was adequate to sustain the claim, but that sufficient facts were not pleaded for the defendant to be sued in her personal capacity. In reversing the motion judge's decision, Feldman, J.A., speaking for the Court of Appeal stated, starting at para. 26:

[26] There is neither an allegation of prejudice nor a limitation period issue here, and the action is at an early stage. The

plaintiffs could commence a new action against the proposed defendants and then seek to join it with the existing action. The procedure of adding parties to the existing action circumvents the costly and time-consuming process involved in that procedure.

[27] Because this is a motion to amend pleadings, the allegations in the pleading are taken to be true and provable. The only issue, therefore, is whether the allegations, as pleaded, plead all of the necessary components of an identifiable cause of action.

[28] In my view, having found that the causes of action for conspiracy to injure and inducing breach of contract were sufficiently pleaded against Ms. Patterson, the motion judge erred by not allowing her to be joined as a defendant in respect of those two causes of action.

. . .

[33] The motion judge also erred in suggesting that there must be evidence to sustain such a claim. It may be that because there was such an abundance of evidence already developed in the record in this matter, the motion judge expected sworn or documentary evidence to support the proposed new pleadings. However, that is not a requirement on a motion to add a party (subject to other considerations, such as prejudice or abuse of process). As Moldaver J.A. stated in Andersen Consulting Ltd. v. Canada (Attorney General), 2001 CanLII 8587 (ON CA), [2001] O.J. No. 3576, 150 O.A.C. 177 (C.A.), at para. 34: "[T]he law is clear that unless the facts alleged are based on assumptive or speculative conclusions that are incapable of proof, they must be accepted as proven and the court should not look beyond the pleadings to determine whether the action can proceed."

[Emphasis added]

30 Further, at paras. 43 and 45, the court succinctly summarized its findings on the law:

[43] In my view, Moldaver J.A.'s statement in Andersen, quoted above, is again applicable. Where a party wishes to amend a claim or add a new party within the limitation period, the facts pleaded are taken to be true and provable (subject to unprovable assumptive or speculative conclusions) and the court is to assess the tenability of the claim on that basis.

. . .

[45] Once the motion judge determined that the proposed pleadings adequately disclosed and pled the asserted causes of action, the fact that the plaintiffs did not produce evidence to support the allegations was not a reason to refuse the amendment.

31 It is not appropriate for a court, at this very early step in the litigation, to accept and weigh evidence in the process of assessing the tenability of the proposed amended claim. The court is to assume the facts alleged to be true and provable, and to assess the claim on that basis. Whether a claim is "scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action", as the Ontario Court of Appeal refers to in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, supra, at para. 25, is to be determined on a review of the proposed pleading only. I would further add that such a determination is more difficult when dealing with a case involving a "developing tort", which is alleged in this case.

32 The plaintiffs are still at the point of finalizing their originating document. They have not yet "gotten out of the gate", so to speak, with respect to Dow, Scales, and Cutcliffe. Rule 26.01, taken on its own, is a clear expression of the plaintiffs' right to frame the action. Limitations on that right should be very sparingly imposed.

33 The plaintiffs allege the three proposed defendants were acting as "Government Agents". The defendants' counsel submits they were not "public officers" and asks that the amendment be denied. While I harbour some level of doubt as to their status as public officers, I am not, on the face of the pleadings alone in respect of a motion which is presumptively to be granted, prepared to determine their status and conclude the plaintiffs' claim is untenable as a result. Such a determination may be sought at a later date and would be dealt with then in the context of any such motion.

34 In *Seaway Trust Co. v. Markle*, [1988] O.J. No. 164, 1988 CarswellOnt 343, at para. 48, the court cited *A.H.A. Automotive v. 589348 Ontarion Ltd.*, (1985) 3 C.P.C. (2d) 9, in which the plaintiffs were opposing a defendant's efforts to amend their statement of defence on the basis they felt the proposed statement of defence contained some false allegations. Master Clark rejected the plaintiffs argument, saying:

> The course upon which the plaintiff seeks to embark is not in keeping with the intention of the rule or the recently decide cases. If every party had to prove the truth of the allegations in his pleadings, *at the pleadings stage*, there would be no need for trials; and yet that is the professed objective of plaintiff's counsel.
>
> [Emphasis added]

35 The matter before the court is not a Rule 21.01 motion by the defendants to strike the statement of claim. Nor is it a motion for summary judgement. It is a motion by the plaintiffs to amend their statement of claim. While I accept and respect the decisions of other courts where, in the circumstances of those cases, they concluded the motion to amend should be dismissed, and while I embrace the tenets of *Hryniak v. Mauldin*, 2014 SCC 7, I believe in this circumstance, it would be an error to conflate this Rule 26.01 motion with a Rule 21.01 motion or allow one to morph into the other and by doing so deny the amendment. As I have stated earlier, there will be ample opportunity for a more in-depth assessment of the merits of the claim prior to trial should the defendants choose to follow that route.

36 For the foregoing reasons, I grant the plaintiffs' motion to amend their pleadings and add claims against the three proposed defendants. I now turn to the "terms" upon which the amendment shall be accepted.

Leave to amend pleadings shall be granted on such terms "as are just"

37 The defendants did not claim that if leave to amend was granted they would suffer prejudice that could not be compensated for by costs or an adjournment. Instead, they submitted that if leave is granted, they should be provided with the same level of security for costs as provided to the other defendant groups pursuant to *CMT v. Gov't of PEI*, 2016 PESC 4. The plaintiffs are opposed to any such security being provided, submitting they have a "good chance of success" against the three proposed defendants, given new information and evidence they say has become available since the last hearing and the decision on security for costs.

38 In the same way I felt the defendants were conflating Rule 26 and Rule 21, I feel the plaintiffs are conflating "such terms as are just", referred to in Rule 26.01, with a stand-alone application for security for costs. They are not the same.

39 In *CMT v. Gov't of PEI*, 2016 PESC 4, (see paras. 89-147), I reviewed the law of security for costs and how it related to the facts of the case before me.

40 My findings at that time reflect that CMT is a corporation incorporated under the laws of the State of Florida, with its registered head office in Boston, Massachusetts. None of the directors of CMT reside in Prince Edward Island. 7645686 Canada Inc. is incorporated under the laws of Canada, with its registered head office in Kensington, Prince Edward Island. It is owned by CMT and its sole director resides outside of Prince Edward Island. Neither corporation owns any real estate or personal property on PEI or elsewhere, according to the searches performed by the defendants. It was not denied by the plaintiffs that they have no assets on Prince Edward Island. Neither corporation provided any financial statements or other information that showed they were impecunious or that they had no income, no ability to borrow funds, and no access through its shareholders to the means to post security for costs.

41 The plaintiffs are now claiming various multiples of $50 million against numerous defendants. That has increased from the $25 million amounts claimed in the initial statement of claim. At para. 127 of *CMT v. Gov't of PEI*, 2016 PESC 4, I stated:

> [127] I find the estimate of costs submitted on behalf of the plaintiffs to be quite unrealistic. The allegations in the statement of claim are serious, the issues are complex, and the stakes are high. The claim is for $25 million dollars, or multiples thereof. The estimates that the trial would take 40 days, or even more, are reasonable. The amount of pretrial work required is proportionate to the length of the trial. The nature and breadth of the allegations, which include breach of good faith, failing to act honestly in the performance of contractual obligations, conspiring to intentionally interfere with economic relations, breach of confidentiality and breach of fiduciary duty, will lead the defendants to mount a thorough and vigorous defence designed to foreclose any opportunity for the plaintiffs' success. Allegations attacking the character of the defendant are likely to attract costs on a substantial indemnity basis if the allegations are proven to be unfounded. Defending allegations of negligent behavior is one thing. Defending allegations of inherently dishonest behavior is quite another.

42 After considering various precedents for amounts ordered as security for costs, I held, at paras. 136-7, as follows:

> [136] I have considered the submissions from counsel for the plaintiffs to the effect that imposing an order for security for costs against the plaintiffs would impose "some difficulty" on the companies. At the same time, it is necessary to provide some measure of protection to the defendants who will be spending substantial sums of money responding to the plaintiffs' claims. I have therefore decided that the order for security for costs should be based on the projected estimates covering the period to the completion of pretrial matters, leaving consideration of costs for the actual preparation for and attendance at court to a later date. I accept the submissions of defence counsel estimating that 60% of their total costs would be incurred in reaching that stage.
>
> [137] The partial indemnity costs for each of the defendants, together with the amount representing 60% of those costs, to the end of the pretrial stage, are as follows:

Party	Partial indemnity costs	60% of anticipated (partial) costs
1) Government	$638,970.	$383,382.

2) Paul Jenkins	$581,194.	$348,716.
3) Garth Jenkins	$500,254.	$300,152.
TOTAL		$1,032,250.

43 Prior to reissuing the statement of claim, the plaintiffs posted the necessary security for costs relating to the Government of Prince Edward Island and its officers, and the defendant Paul Jenkins and his company. They also paid the separate costs order of approximately $74,000 relating to the prior motions. The plaintiffs elected not to proceed any further against Garth Jenkins or his company.

44 After considering the nature of the claim set out in the revised and re-issued statement of claim, and after considering how the three proposed defendants will be involved in various aspects of the hearing, I am satisfied that the nature of the claim has not changed and, if anything, it may indeed have gotten more complex. I am certain the degree of involvement of each of the defendant groups will vary to some extent in this matter, much as I concluded it would vary in the initial matter.

45 The plaintiffs claim, based on new evidence to which they refer, specifically including an Auditor General's Report, and a transcript of Special Hearings of the Prince Edward Island Legislature, that their case now has a "good chance of success". In making this claim, they referred to para. 109 of my earlier decision (*CMT v. Gov't of PEI*, 2016 PESC 4) in which I wrote:

> Merits of the plaintiffs' case
>
> [109] If a plaintiff is not found to be impecunious, it may be able to avoid an order for security for costs if it can show its claim has a good chance of success. However, the evidence filed does not allow the court to draw that conclusion. The action appears to be complex, involving numerous individuals and corporations, and raising significant issues of credibility. It is not possible to weigh the evidence, assess credibility, or draw inferences such that I could determine the plaintiffs have a good chance of success and therefore should be relieved of posting security for costs. [Emphasis added]

46 As I have previously indicated with respect to the defendants' opposition to the plaintiffs' motion to amend their pleadings, this matter is to be determined based on the content of the pleadings only, and not on extraneous information or evidence. The defendants are not making a motion for security for costs. They are asserting that if they are to be added as defendants by way of the plaintiffs' amendment to their pleadings, then they ought to be treated the same as other defendants or defendant groups.

47 I find the defendants' argument to be compelling. Examining only the pleadings before me, I am lead to the same conclusion I reached previously. It is not possible to weigh the evidence, assess credibility, or draw inferences such that I could determine the plaintiffs have a good chance of success and therefore should be relieved of posting security for costs.

48 In terms of the quantum of costs ordered in the previous case, at para. 141 I wrote:

> [141] I have considered the totality of the order, the magnitude of the claims presented, and the fact that each defendant must maintain and pursue its own defence against claims which are a minimum of $25 million, but could be double or triple that amount. I am satisfied that orders for security for costs in the amounts of $383,382 in favor of the Government of Prince Edward Island, $348,716 in favor of Paul Jenkins, and $300,152 in favor of Garth Jenkins are just and reasonable. [Emphasis added].

49 In determining what terms are "just" with respect to granting the plaintiffs' motion to amend their pleadings, I find it to be "just" that the newly added defendant group be awarded approximately the same level of security for costs as that awarded to the previously named defendant groups. Therefore, I order security for costs in the sum of $300,000 be provided in favour of Dow, Scales, and Cutcliffe, collectively. I further order that the sum be provided in the manner set out in para. 142 of my previous decision and be subject to the terms set out in para. 143. For convenience I set out those paragraphs here:

> [142] Borrowing from the decision in Aluma at para.15, unless the parties agree otherwise, the form of security for costs shall be one of the following:
>
> 1) cash, or
>
> 2) bonds in sheet form issued by the Government of Canada or the Government of one of its provinces, or
>
> 3) a guaranteed investment certificate by a Schedule 1 Canadian Bank in the name of the Registrar of the Supreme Court of Prince Edward Island, or
>
> 4) a letter of credit issued by a Schedule 1 Canadian Bank in favor of the Registrar of the Supreme Court of Prince Edward Island and having an expiry date at least three years away and payable in Canadian funds in Charlottetown, Prince Edward Island on a simple demand by the Registrar of the Supreme Court of Prince Edward Island for payment, without need to satisfy any other formalities. The letter of credit must be unconditional and irrevocable.
>
> [143] In keeping with Rule 56.05, until the security has been provided, with the exception of filing an appeal of this decision, the plaintiffs are prohibited from taking any step in the proceeding, such as filing a new statement of claim.

Costs on the motion

50 Success on this motion was divided. The plaintiffs were successful in getting leave to amend their statement of claim. The three proposed defendants were successful in having that leave granted on terms they requested. As between the plaintiffs and the defendants Dow, Scales and Cutcliffe, there shall be no order for costs on this motion. The plaintiffs reached consent agreements with other defendants for their pleadings to be amended on the payment of a specified amount of costs.

51 On an administrative note, the security for costs which was ordered to be provided in *CMT v. Gov't of PEI*, 2016 PESC 4, under court file number S1-GS-26550, shall be transferred to court file number S1-GS-27636, which is the file number pertaining to the re-issued statement of claim and the current motion to amend the pleadings. Costs payable in conjunction with the agreements mentioned in the foregoing paragraph are payable from the security for costs funds to be transferred to the new court file.

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