# SUPREME COURT OF YUKON

Citation: *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKSC 3

Date: 20210120
S.C. No.: 17-A0002
Registry: Whitehorse

BETWEEN:

NORTHERN CROSS (YUKON) LTD.

PLAINTIFF

AND

THE GOVERNMENT OF YUKON, DEPARTMENT OF ENERGY MINES AND RESOURCES (OIL AND GAS BRANCH), AND THE MINISTER OF ENERGY, MINES AND RESOURCES

DEFENDANTS

Before Madam Justice E.M. Campbell

Appearances:
Raymond Chartier and
Oz Douglas — Counsel for the Plaintiff
I.H. Fraser,
Laurie Henderson and
Megan Seiling — Counsel for the Defendants

**RULING**
**(Application to Strike)**

**INTRODUCTION**

[1] This is an application by the defendants to strike a number of the plaintiff's claims.

[2] The plaintiff's action stems from a Moratorium on the use of hydraulic fracturing in the territory (except for the Liard Basin) announced by the Government of Yukon in April 2015. The Moratorium is still in effect.

[3] A number of years prior to the Moratorium, the plaintiff, Chance Oil and Gas Ltd. (formerly Northern Cross (Yukon) Ltd) ("Chance"), acquired a number of oil and gas

permits in the Eagle Plain Basin in Yukon. Prior to the Moratorium, the plaintiff secured an investment from a third party and invested money in exploration work that it performed. It appears that the data obtained from the exploration work revealed a large area of shale holding a considerable amount of oil equivalent (unconventional resources) in the lands covered by the plaintiff's exploration permits. It also revealed the presence of conventional resources in the area covered by the permits. According to the plaintiff, these conventional and unconventional resources can only be extracted by way of hydraulic fracturing. The plaintiff pleads that the government's Moratorium has deprived it of these resources or from accessing these resources, to which it is entitled under its permits. The plaintiff pleads that the Moratorium effectively expropriated its property and interests and/or its *profit à prendre*[1]; that the defendants unlawfully damaged its commercial interests, and that, as a result of the defendants' Moratorium and/or actions and/or misrepresentations, it has suffered and continues to suffer economic losses, and is entitled to damages. The plaintiff also seeks an order in the nature of *mandamus* to compel the Minister to exempt its permits from the application of the Moratorium.

[4] The defendants, the Government of Yukon and the Minister of Energy, Mines and Resources ("the Minister") deny any liability and apply to strike all of the plaintiff's claims against the Minister. In addition, the defendants seek to have five of the plaintiff's claims and some of the remedies sought struck from the Fresh Statement of Claim ("FSOC") on the basis that they disclose no reasonable prospect of success.

[5] The defendants seek costs, in any event, of the cause of this application.

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[1] *Profit à prendre*- [Law French "profit to take"] A right or privilege to go on another's land and take away something of value from its soil or from products of its soil (as by mining, logging or hunting). B.A. Garner et al, eds, *Black's Law Dictionary*, 9th ed., (St. Paul, MN: Thomson Reuters, 2009) sub verbo "profit à prendre".

**ISSUES**

[6] The issues on this application are as follows:

i. Whether the documents that are part of the applicants' record are referentially incorporated in the FSOC, and, if so, the extent to which they have been incorporated in the FSOC and constitute material facts that can be considered in this application.

ii. Should the following claims and corresponding remedies against the applicants be struck:

(a) Unlawful *de facto* cancellation of disposition;
(b) Nuisance;
(c) Unlawful interference with economic relations;
(d) Unjust enrichment;
(e) *De facto* expropriation.

iii. a) Should the order in the nature of *mandamus* sought by Chance against the Minister be struck?

b) Does the order in the nature of *mandamus* constitute the only claim against the Minister? If so, should all the other claims be struck against the Minister?

iv. Whether Chance's claim for costs and judgment interest pursuant to the *Judgment Interest Act* should be struck?

**A. The test for striking out a claim for failure to disclose a reasonable claim**

[7] The defendants bring this application pursuant to Rule 20(26)(a) of the Supreme Court of Yukon *Rules of Court*, ("*Rules of Court*") which states:

> (26) At any stage of a proceeding the court may order to be struck or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> …
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs. (my emphasis)

[8] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ("*Imperial Tobacco*") at para. 17, the Supreme Court of Canada reiterated the test applicable for striking out claims for failure to disclose a reasonable cause of action or claim:

> [17] … A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: [citations omitted]. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: [citations omitted].

[9] More recently, the Court of Appeal of Yukon reviewed the applicable test for striking a claim under Rule 20(26)(a) in *Wood v. Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16, at para. 9, as follows:

> [9] The test for striking a claim as disclosing no reasonable claim, set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, is whether it is "plain and obvious", assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail". If there is a chance that a claimant might succeed, then she should not be "driven from the judgment seat" (at 980).

[10] In *North America Construction(1993) Ltd. v. Yukon Energy Corporation,* 2019 YKSC 42, Duncan J., as she then was, referred to the test to strike out a claim as summarized in *McDiarmid v. Yukon (Government of),* 2014 YKSC 31, at para. 14:

> [14] …The essential elements are: (i) that a claim should be struck out only if it is plain and obvious that the claim is bound to fail; (ii) the mere fact that the case is weak or not likely to succeed are not grounds to strike; (iii) if the action involves serious questions of law or fact then the rule should not be applied; and (iv) the court, at this stage, must read the statement of claim generously, with allowances for inadequacies due to deficient drafting.

[11] In *Imperial Tobacco*, the Supreme Court of Canada also addressed the purpose of the test and its underlying principles. The Court described the power to strike a claim as a "valuable housekeeping measure essential to effective and fair litigation", and as a measure that allows litigants as well as judges and juries to focus their attention on the claims that have a reasonable chance of success and, ultimately, on the real issues between the parties (para. 19).

[12] However, the Court also emphasized that the power to strike a claim must be used with care and caution, as the law is not static. As such, a judge seized with an application to strike must approach the pleadings in a generous manner and "err on the side of permitting a novel but arguable claim to proceed to trial" (*Imperial Tobacco, at* para. 21). Therefore, it is not determinative that the law has not yet recognized a particular claim (para. 21). The question to answer remains "whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed" (para. 21).

[13] Another important rule is that an application to strike for failure to disclose a reasonable claim proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven (para. 22 of *Imperial Tobacco*).

[14] Rule 20(29) of the *Rules of Court* clearly states that "[n]o evidence is admissible on an application under sub-rule (26)(a)."

[15] This rule is important because, as indicated in *Imperial Tobacco*, an application to strike is not about evidence, it is about the pleadings:

> [22] … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The

> facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

The Supreme Court of Canada further stated on that issue:

> [23] … The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[16] However, it is also well established that a judge need only accept as true material facts that are capable of being proven. Allegations based on speculation or assumptions, bare allegations or bald assertions without any factual foundation, pleading of law, or allegations that are patently ridiculous or incapable of proof do not have to be accepted as true (see: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at p. 455; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Al-Ghamdi v. Alberta*, 2017 ABQB 684 at para. 110; *David Brooks v. Canada*, 2019 FCA 293, at para. 8; *Grenon v. Canada Revenue Agency*, 2017 ABCA 96 at para. 6; *Das v. George Weston Limited*, 2018 ONCA 1053, ("*Das*") at para. 74).

[17] The parties agree that the test and principles set out in *Imperial Tobacco* apply to this application. They also agree that the bar is high on an application to strike.

[18] However, as stated previously, they disagree on the extent to which documents may be incorporated by reference into pleadings and the extent to which their content constitutes material facts that a judge can consider on an application to strike.

(i) **Documents incorporated by reference**

**The applicants (defendants)**

[19] The applicants submit that a statement of claim is deemed to include any documents incorporated in it by reference, whether explicitly or implicitly. The applicants submit that referentially incorporated documents, along with any documents that may affect their interpretation, do not constitute evidence but form part of the material facts plead. As such, the applicants submit that, on this application to strike, the Court is entitled to consider the content of those documents as material facts plead and accept them as true, as long as they are capable of proof.

[20] More specifically, the applicants submit that Chance expressly incorporated by reference a number of documents in its FSOC; that those documents form part of the material facts plead, and that, as such, the Court is entitled to examine them and consider them to make a determination on this application.

[21] The documents are:

i. Chance's Oil and Gas permits;

ii. the Calls for Work Bids related to Chance's permits;

iii. Chance's Permit Grouping Proposal;

iv. the Grouping Applications;

v. the Well licences;

vi. Yukon government webpages entitled: "Active Disposition"; "Oil and gas dispositions"; "Pre-Dispositions"; and "Considering public interests and the benefits of development";

vii. Schlumberger Resource Evaluation; and

viii. Chance's refusal letter of December 14, 2016; and

ix. Chance's presentation to Select Committee.

[22] The applicants submit that Chance has expressly referred to the above-mentioned documents in its FSOC, and that they form an integral part of the factual matrix of many of Chance's claims.

[23] The applicants submit that the most recent jurisprudence on this issue does not require that referenced documents be an integral part of the factual matrix of the claim to be incorporated into pleadings. However, the applicants submit that all the documents they ask this Court to consider on this application are part of the factual matrix of Chance's claims.

[24] The applicants submit that Chance's representations to Yukon about what it intended to do with its permits (pursuit of unconventional resources and use of hydraulic fracturing), as well as Yukon's alleged knowledge of what the representations meant and its silence on the issue of hydraulic fracturing, are an essential part of several of Chance's claims and of the factual matrix of this case.

[25] The applicants submit that Chance's claim, as plead, is not that hydraulic fracturing was one of the many things they were considering doing, but that it was the only thing. According to the applicants, Chance pleads that, in certain circumstances, silence constitutes a representation, and that, in this case, it was entitled to rely on the Government of Yukon's silence on the issue of hydraulic fracturing as a representation. According to the applicants, this is explicitly plead at many points in Chance's FSOC (see paras.: 16, 17, 28, 31, 32, 38.1, 39, 66, 84 and 88).

[26] In addition, the applicants submit that the essence of Chance's expropriation claim is that hydraulic fracturing is absolutely necessary to the extraction of any resource in the lands covered by its permits; that Yukon was aware of that situation; that without hydraulic fracturing there is no value to its rights; and that, as a result of the Moratorium, all the commercial value of its rights have been taken away.

[27] The applicants submit that documents that are referred to in the FSOC that relate to the scope of Chance's rights and its representations to Yukon about its intentions with respect to exploration activities and the use of hydraulic fracturing, are clearly essentially tied into the factual matrix of the claims. As such, the Court has to consider those documents in their entirety.

[28] The applicants deny that they are seeking to rely on a few selected pieces of evidence. They submit that they did not pick and choose the documents that they are asking the Court to consider; that it is Chance who expressly referred to them in its FSOC.

[29] In addition, the applicants submit that they are not asking the Court to make findings of credibility or to decide any matters of fact. They submit that the Court has to accept, that if it is stated in those documents and if the statement is capable of proof, then it must be accepted as being as true as other statements appearing in the FSOC. The applicants submit that they are not "picking and choosing" and are simply asking the Court to "look at it all".

[30] The applicants acknowledge that interpretation of statements or documents is outside of the realm of an application to strike. However, they submit that none of the documents included in their application record requires interpretation.

[31] The applicants submit that the court has to consider all of the statements contained in the referentially incorporated documents as well as in the FSOC and accept them all as true, if they are capable of truth. According to the applicants, if there are contradictory facts on essential elements of the claim, then it is clear the claim cannot succeed. The applicants submit that this is not a matter of weighing the evidence or preferring one fact to an other; it is the logical result of accepting all these facts as true.

[32] Finally, the applicants state that the court's determination on the issue of referentially incorporated documents is not determinative of their application, as the documents listed are supportive but not essential to the position they advance on this application to strike.

**The respondent (plaintiff)**

[33] Chance agrees that a document may be referentially incorporated in a pleading.

[34] As such, it does not dispute that its oil and gas permits are expressly incorporated in its FSOC and may be considered on this application.

[35] However, Chance submits that in order to be referentially incorporated in the pleadings, a document must be referred to with specificity and must relate to an integral part of the factual matrix of the claim.

[36] Chance submits that the applicants seek to improperly rely on excerpts from documents that are not incorporated by reference in its FSOC and not part of the factual matrix before the Court on this application to strike.

[37] Chance also submits that the documents selected by the applicants do not constitute material facts pleaded but evidence, which the Court cannot consider on an application to strike.

[38] Chance further submits that the documents the applicants invite the Court to consider, only represent some of the evidence available with respect to the allegations of fact in the FSOC; that it would be misleading to rely only on those documents to determine the prospect of success of its claims; and that the Court ought not to rely on them in deciding this application to strike.

[39] According to Chance, the jurisprudence on this issue does not stand for the proposition that when a specific statement from a document is incorporated by reference in a pleading, it automatically renders the entire content of that document a pleading of fact.

[40] Instead, Chance submits that if it is plead that a document contains a specific statement or information, or if the pleading incorporates a quote from a document or paraphrases a document, then the Court is entitled to look at the document but only to determine if the document actually says what is plead. In the same vein, if it is plead that a document is silent on a specific issue, then the Court is entitled to look at the document to see if the pleading is accurate. However, this does not entitle the Court to consider the entire content of the document to be plead as a fact.

[41] Finally, Chance submits that the Court must be cautious about what is actually being plead, how a document relates to the claims, and what part of the document has been referentially incorporated, prior to considering it as a material fact pleaded.

**ANALYSIS**

[42] The applicants rely on three recent cases from the Ontario Court of Appeal (*Darmar Farms Inc. v. Syngenta Canada Inc*., 2019 ONCA 789 ("*Darmar*"); *Gaur v. Datta*, 2015 ONCA 15 ("*Gaur*"), and *Das*, cited above) in support of their position.

[43] In these cases, the Ontario Court of Appeal states that documents incorporated by reference in a pleading constitute pleaded facts that can be reviewed and considered on an application to strike for the purpose of assessing the claims.

[44] *Darmar*, the most recent decision referred to by the applicants on this issue, is an appeal of a motion judge's decision to dismiss the action on the basis that the statement of claim did not disclose a reasonable cause of action under Rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, which is the equivalent of our Rule 20(26). One of the appellant's arguments was that the motion judge had incorrectly refused to consider documents referred to in a response it had delivered to a demand for particulars.

[45] The Ontario Court of Appeal in *Darmar* stated that what may be considered beyond a statement of claim in a motion to strike must be informed by the rule that no evidence is admissible on such a motion. However, the Court also stated that this rule is not offended by "treating a document, incorporated by reference expressly or impliedly into the pleading, as part of the pleading itself, because documents incorporated this way are not evidence" (para. 44).

[46] More specifically, the Ontario Court of Appeal concluded that if a document is incorporated by reference into a response to a demand for particulars, it can be treated as part of the particulars and therefore as part of the pleading.

[47] Nonetheless, the Ontario Court of Appeal in *Darmar* recognized that the use of selected statements from documents in the context of an application to strike raises concern:

> [45] But this does not completely deal with the concern that was expressed in *Pearson* [*Pearson v. Inco Ltd*., 2001 O.J. No. 4990]. It is one thing to treat a document as incorporated into particulars when it is clear that the particulars are

> asserting and incorporating the whole document, such as an agreement, but doing so in a summary fashion. It may be quite another to pick out one statement, but not others, from a different kind of document referred to in particulars, and treat that statement as a fact alleged in the particulars, and therefore in the pleading, while not treating other statements in the same document the same way. The situation becomes more complicated when a statement in a document is subject to interpretative issues that cannot be resolved on a r. 21 motion.

[48] It is of note that the Ontario Court of Appeal determined that the specific documents appended to the particulars in that case had been advanced by the parties for points already appearing in the pleading and particulars. The court also noted that the documents contained statements that would require interpretation beyond the purview of a motion to strike to fully understand them. On that basis, the Court concluded that it was not necessary on appeal to further consider the propriety of using those documents.

[49] In *McLarty v. Canada*, 2002 FCA 206, ("*McLarty*") the Federal Court of Appeal also concluded that if a question is to be decided on the basis of the pleadings, the pleadings include documents incorporated by reference in them. *McLarty* is an appeal of a decision regarding a preliminary question of law before trial. One of the arguments on appeal was that the motion judge had erred in refusing to allow the appellant to rely on the content of a promissory note, which was referred to in the pleadings. The Federal Court of Appeal agreed with the appellant and concluded that the promissory note should have been considered because it was expressly referred to in the pleadings (para. 11). The Court expanded on the issue in stating that the motion judge should also have considered other documents, which he had found could affect the interpretation of the promissory note. However, the Court stated that once the documents revealed that there were disputed facts that were material to the question of law, the judge had to

dismiss the motion, as a preliminary question of law cannot be decided on contested facts.

[50] I note that the applicants, in this case, submit that the documents they ask the Court to consider are expressly referred to in the FSOC. Therefore, I need not weigh in on whether documents affecting the interpretation of documents expressly referred to in pleadings may be considered on an application to strike. Suffice it to say that questions of interpretation are outside the purview of an application to strike.

[51] Finally, the applicants also referred to the recent decision of *Canmar Foods Ltd*. *v*. *TA Foods Ltd*. (*Re*)*,* 2019 FC 1233, in which the Federal Court reiterated, in the context of a motion for summary judgment, that documents may be incorporated into the pleadings (para. 111). However, in the same paragraph, the court went on to say that "where those documents amount to evidence, they ought to be struck as pleading evidence."

[52] Chance relies on *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 ("*McCreight*"), to submit that in order to be referentially incorporated into the statement of claim, a document must relate to an integral part of the factual matrix of the plaintiff's claim:

> [32] As noted by Borins J. (as he then was) in *Montreal Trust Co.*, at para. 4, a statement of claim is deemed to include any documents incorporated by reference into the pleading and that form an integral part of the plaintiff's claim. Among other things, this enables the court to assess the substantive adequacy of the claim. In contrast, the inclusion of evidence necessary to prove a fact pleaded is impermissible. A motion to strike is unlike a motion for summary judgment, where the aim is to ascertain whether there is a genuine issue requiring a trial. On a motion to strike, a judge simply examines the pleading; as mentioned, evidence is neither necessary nor allowed. If the document is

> incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike.

[53] In *McCreight*, the Ontario Court of Appeal also provided guidance on the extent to which a document may be considered on an application to strike:

> [37] … the motion judge referred to the Tax Operations Manual of the CRA in considering whether a duty of care was owed to McCreight and Skinner. Specifically, the Manual provides that a taxpayer would be given an opportunity to make exculpatory submissions. Such an opportunity had not been accorded to McCrreight and Skinner. The underlying facts associated with this allegation were included in the amended statement of claim and the Manual could be relied upon by the motion judge for that purpose. In contrast, at para. 69 of his reasons, the motion judge reviewed the contents of the Manual to ascertain whether a fiduciary relationship was created between the CRA and the appellants. This constituted an improper use of the Manual because the appellants had not pleaded the factual underpinning for such a reference. That said, in my view, this error is immaterial in the context of this appeal as the motion judge struck out the appellants' claim for damages for a breach of fiduciary duty and they have not appealed that element of the motion judge's order.

[54] I note that in *Gaur*, one of the cases cited by the applicants, the Ontario Court of Appeal cited *McCreight* with approval. In addition, as noted earlier, the Ontario Court of Appeal in *Darmar* raised concern with the use of statements from documents that are not asserted and incorporated as a whole in the pleadings.

[55] I take the following from the decisions cited by the parties:

1. On an application to strike, a judge's task is to examine the pleadings. Evidence is neither necessary nor allowed.

2. A document, referred to expressly or impliedly in a pleading, may be treated in a summary fashion as being a part of the pleading itself, if it is clear that the pleading is asserting and incorporating the whole document, such as an agreement. (*Darmar*)

3. It is problematic to consider a selected statement from a document referred to in a pleading, and treat the statement as a fact in the pleading, while not treating other statements in the same document in the same manner.

4. A document referred to in the pleadings that is subject to interpretative issues that cannot be resolved on an application to strike need not be considered.

5. A document may be considered in its entirety for the purpose it was referred to in the pleading when the underlying facts associated with that document have been pleaded.

[56] I would add that since a judge's task on an application to strike is to accept the material facts as true and to consider them in order to assess the substantive adequacy of the claim in light of its essential elements, documents referred to in the allegations that relates to material facts would likely be considered as part of the factual matrix of the case in any event.

[57] I now turn to the specific documents that the applicants submit are referentially incorporated in Chance's FSOC.

**(i) Chance's oil and gas permits**

[58] As previously stated, both parties agree that Chance's permits are incorporated by reference in the FSOC and may be considered as part of the pleading.

**(ii) Calls for Work Bids**

[59] Chance refers to the Calls for Work Bids at para. 11 of its FSOC, as part of the oil and gas disposition process that led to Chance acquiring oil and gas permits in the Eagle Plain Basin.

[60] In addition, at para. 21 of the FSOC, Chance refers to a number of statements contained in the Calls for Work Bids as evidence in support of its legal conclusion that,

by virtue of its oil and gas permits, Chance possesses a bundle of rights in the nature of a *profit à prendre* described at para. 18 of the FSOC as:

> 18. … sub-surface rights to drill for and produce, subject to regulatory compliance, the oil and gas contained within the boundaries of the Subject Lands.

[61] At para. 25, of the FSOC, Chance pleads that neither the Calls for Bids nor the Permits contain any restrictions on hydraulic fracturing or limits on Chance's activities in its pursuit of resources.

[62] Paragraph 20 of the FSOC makes it clear that the statements quoted from the Calls for Work Bids constitute part of the evidence Chance intends to rely on to support its conclusion regarding the nature and scope of its rights:

> 20. The grant of such bundle of rights is evidenced by statements and representations made by the Defendants in various communications and documents. (my emphasis)

[63] As the Calls for Work Bids are clearly identified as constituting part of the evidence Chance intends to rely on to establish the nature of its rights pursuant to its permits, I am of the view that the bids are not incorporated by reference in the FSOC, as a part of the pleading, but that they constitute evidence.[2]

[64] Even if I am wrong in concluding that the documents constitute evidence and not pleaded facts, I note that the Calls for Work Bids contain an interpretative provision, which raises considerations that fall outside the purview of an application to strike:

> If there is a conflict or inconsistency between any provision of this Call for Work Bids and the Act, the OGDR [Oil and Gas Disposition Regulations] or the Permit, the provisions of the Act, the OGRD or the Permit prevail.

[2] Rule 20(1) provides that a pleading should not contain evidence by which the facts are to be proven. However, Rule 2(1) provides that generally a failure to comply with the rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or order made in the proceeding.

[65] As such, I am of the view that it would not be appropriate to consider the content of the Calls for Work Bids in assessing the plaintiff's claim on this application.

**(iii) The Government of Yukon's webpages**

[66] At para. 24 of its FSOC, Chance refers to specific statements contained in various Yukon government's webpages as evidence in support of its legal position with respect to the nature and scope of its oil and gas rights.

[67] The Government of Yukon's webpages are identified as containing some of the statements and representations made by the defendants regarding the nature of Chance's oil and gas rights in various communications and documents. It is clear that the government's webpages only constitute one of the sources of evidence that Chance intends to rely on to establish its position (para. 19 of the FSOC). In addition, there is no indication that Chance listed or referred to all the various communications and documents it intends to rely in its FSOC.

[68] Therefore, I am of the view that the Government of Yukon's webpages do not constitute documents incorporated by reference in the FSOC and, as such, pleaded facts as part of the pleading; but that they constitute evidence, which may not be considered on an application to strike.

**(iv) Grouping Applications, (v) Permit Grouping Proposal and (vi) Well Licences**

[69] The permit grouping proposal and the grouping application are expressly referred to at paras. 26 to 39 of the FSOC.

[70] At paras. 27 and 28 of the FSOC, Chance pleads that grouping of permits covering contiguous lands is permitted under the *Oil and Gas Act*, R.S.Y. 2002, c. 162 ("the *Act*"). Chance further states that "grouping is commonly done where the resources

expected to be found are unconventional ones, which must be extracted from shale rock through the use of hydraulic fracturing techniques." Chance states that the unconventional opportunities were the primary reasons for applying to group its Permits.

[71] At paras. 29 and 30 of the FSOC, Chance refers to the geographical differences between shale formations and conventional resources opportunities. Chance then states that "[t]he technical requirements of drilling, evaluating and completing wells for unconventional resources locked in shale are quite different from those for conventional resources." Chance also states that it was well known to the defendants that the exploration wells that Chance wanted to drill, and did drill, were at such a depth that they could only be for the purpose of identifying unconventional resources.

[72] At paras. 32 of the FSOC Chance pleads that:

> Based on the discussions surrounding the Permit grouping applications, and the application forms themselves, there is no doubt that the Defendants knew that Chance was pursuing unconventional opportunities. Hydraulic fracturing was a permitted and recognized method associated with the pursuit of unconventional resources, as well as a stimulation technique used with the conventional wells. Although there was every opportunity, at no time did the Defendants ever indicate any concern with the use of hydraulic fracturing.

[73] This paragraph makes it clear that, on their own, the Permit Grouping Applications and the Application Forms provide only an incomplete picture of the representations made at the time, as the content of the oral exchanges surrounding the grouping applications necessarily informs the nature and scope of the statements contained in the two documents.

[74] On that basis, I am of the view that I may not consider the content of these two documents, even though Chance expressly refers to them in its FSOC.

[75] The same cannot be said of the Well Licences. Chance expressly refers to them and to their content at para. 33 of its FSOC. The Well Licences are part of the narrative of Chance's claim. In addition, these documents stand on their own.

[76] As such, I am of the view that the Well Licences are incorporated by reference in Chance's FSOC and may be considered as pleaded facts, accepted as true for the purpose of this application.

**(vii) Schlumberger Resource Evaluation**

[77] Chance specifically refers to the Schlumberger Resource Evaluation prepared by Schlumberger Canada Limited and to its content at para. 38 of the FSOC.

[78] Chance pleads that it submitted historical data as well as data it obtained from its exploration work to Schlumberger Oilfield Services for interpretation. The Resource Evaluation they prepared revealed a large area of shale holding a considerable amount of oil equivalent (unconventional resources) in the lands covered by the plaintiff's exploration permits.

[79] However, it is unclear whether the following pleadings of fact refer solely, in part or not at all to the Schlumberger Resource Evaluation:

a) that conventional resources can also be found on some of the land covered by its permits; and

b) that hydraulic fracturing is required to extract the conventional and unconventional resources uncovered on the lands subject to Chance's permits.

[80] In addition, the report contains many statements of a technical nature that may impact the interpretation of other more general statements made in it. As such, I am of

the view that this document contains interpretative issues that render it unsuitable for consideration on this application.

**(viii) Chance's refusal letter of December 14, 2016**

[81] At para. 48 of its FSOC, Chance pleads that, in or about November 2016, it communicated to the defendants a formal refusal to pay Accrued Rentals on the lands associated with its permits, on the basis that its exploration rights had been impaired as a result of the Moratorium.

[82] However, nowhere in the FSOC does Chance explicitly refers to a refusal letter dated December 14, 2016.

[83] In addition, the FSOC does not specify whether Chance communicated its refusal to pay the Accrued Rentals verbally or in writing to the Yukon government. As such, it is difficult to conclude that Chance implicitly refers to the December 14, 2016 letter in its FSOC when it pleads that it communicated its refusal to pay in or about November 2016.

[84] Furthermore, a cursory review of the December letter reveals that it had been preceded by a letter Chance had apparently received from a Government of Yukon representative on October 6, 2016; and by a meeting with the Yukon government on November 22, 2016.

[85] Flowing from that, it appears that para. 48 of the FSOC refers to a verbal refusal Chance would have communicated to the government of Yukon at the meeting of November 22, 2016, rather than to the letter of December 14, 2016.

[86] In addition, I note that the defendants are not asking me, in the context of this application, to consider the content of the October 6, 2016 letter, or of the November 22, 2016 meeting.

[87] As such, I am of the view that Chance's letter of December 14, 2016 is not expressly or implicitly incorporated by reference in Chance's FSOC.

[88] If I am wrong on this point, considering the oral and written communications that preceded the letter of December 14, 2016, I am of the view that the letter is subject to interpretative issues that renders it unsuitable for consideration on this application.

**(ix) Chance's presentation to the Select Committee**

[89] Chance's pleadings of fact with respect to the purpose of the Select Committee Regarding the Risks and Benefits of Hydraulic Fracturing (the "Select Committee"), the Select Committee's process, its resulting Report, and the Yukon government's Moratorium are found at paras. 51 to 55 of its FSOC.

[90] Chance expressly refers to its presentation to the Select Committee at para. 52 of its FSOC:

> 52 The Select Committee spent more than a year conducting hearings at the legislature and in communities around the territory. Chance participated in the Select Committee's process and presented to the members on January 31, 2014.

[91] It is clear from the pleading that Chance's presentation to the Select Committee was not only comprised of the Power Point document that the defendants want me to consider as referentially incorporated in the pleading, but also of an oral presentation, for which no paper record was provided.

[92] As such, I am of the view that the Power Point presentation of January 31, 2014 constitutes only part of the presentation that Chance made to the Select Committee on that date, and as such, I do not find it appropriate to consider the Power Point document on its own on this application.

**Conclusion on this issue**

[93] I find that Chance's Oil and Gas Permits and Chance's Well licences are the only referentially incorporated documents that may be considered as pleaded facts on this application.

[94] I now turn to the pleaded facts, which constitute the factual matrix on this application.

**FACTS**

[95] The material facts, as alleged in the FSOC, which include Chance's Oil and Gas Permits and the Well Licences, are as follows.

[96] The plaintiff, Chance, formerly known as Northern Cross (Yukon) Ltd., is a corporation, which carries on business in the area of energy exploration and development. It is on April 12, 2017, that Northern Cross (Yukon) Ltd. changed its name to Chance Oil and Gas Limited.

[97] In 1994, Chance acquired the majority working interest and operatorship of the Chance, Blackie and Birch Significant Discovery Licenses (the "SDLs"), representing, according to the FSOC, the largest discoveries of crude oil or natural gas at the Eagle Plain Basin to date. The tenure of the SDLs is for an indefinite period.

**Chance's Permits and Exploration Activities**

[98] In 2006-2007, following a competitive process, Chance was the successful bidder on 13 Permits in the Eagle Plain Basin, issued by the Government of Yukon pursuant to the regulatory process provided by the *Act* and the *Oil and Gas Disposition Regulation,* in exchange for capital spending commitments totalling over $21,000,000.

[99] In or about 2009 and 2010, following a competitive process, Chance obtained two additional Permits in the Eagle Plain Basin.

[100] In total, Chance became the 100% working interest owner and operator of 15 Permits covering approximately 1.3 million acres in the Eagle Plains Basin.

[101] All of Chance's 15 Oil and Gas Permits state the following:

> Subject to the *Oil and Gas Act* and the provisions of this Permit, the Commissioner of Yukon grants to the Permittee
>
> (a) the right to explore for, and the right to drill and test for, oil and gas in the Location;
> (b) the right to recover and remove from the Location any oil and gas recovered as a result of testing for oil and gas; and
> (c) the right to obtain an oil and gas lease with respect to all or part of the Location pursuant to the *Oil and Gas Act*.
>
> Subject to the *Oil and Gas Act*, the Permittee is entitled to a renewal of this Permit.

[102] Chance's 15 Oil and Gas Permits (0005 to 0017, 0019 and 0020) were valid for an initial term of six years with a renewal term of four years. The Permits can be extended for a longer period.

[103] Under its Permits, Chance shall pay the royalty on oil and gas recovered as a result of testing for oil or gas in the Location pursuant to this Permit, as well as rentals in respect of the renewal term and renewal term extension.

[104] In addition, a Work Deposit, which is replaceable and refundable or returnable in accordance with the provisions of the Permit and is subject to forfeiture in accordance with the provisions of the Permit, is due.

[105] Chance's Permits were obtained with the defendants knowledge and understanding that Chance expected the lands subject to its Permits ("Subject Lands") to contain unconventional resources, which would require hydraulic fracturing to extract.

[106] In June of 2011, CNOOC Ltd. ("CNOOC") invested over $115,000,000 in Chance on the understanding that they would be pursuing unconventional resources.

[107] On June 30, 2011, Chance attended a meeting in the offices of the Oil and Gas Branch of the Government of Yukon and presented to the representatives of the defendants a plan to focus on evaluating unconventional resources based on CNOOC's interest and investment objectives.

[108] At no time during these discussions or prior to these discussions did the defendants indicate that hydraulic fracturing might not be permitted.

[109] At no time during the bidding process or the issuance of the permits did the defendants indicate any concern regarding the use of hydraulic fracturing.

[110] Chance's Permits do not contain indications regarding any restriction on hydraulic fracturing or that the Permits are limited to the pursuit of conventional resources.

[111] In addition, there was never any indication on the part of the defendants that such a restriction would be imposed in the future.

[112] In or about 2011, Chance applied for and was granted the right to organize its 15 Permits into five groupings of contiguous land.

[113] Chance applied for these groupings in anticipation of a major exploration program for unconventional geographical opportunities. The unconventional opportunities identified by Chance were the primary reason for applying to group the Permits.

[114] Grouping is commonly done where the resources expected to be found are unconventional ones, which must be extracted from shale rock through the use of hydraulic fracturing techniques.

[115] Also, shale formations tend to be geographically pervasive with reasonably common characteristics, which makes evaluation in a given well relevant over a broader region. By contrast, conventional resource opportunities tend to be more geographically constrained.

[116] According to the FSOC, in 2012 and 2013, Chance drilled four wells in the Eagle Plain Basin. Each of these were granted a license to drill to a depth of between 2800 and 3800 metres. In addition, two of the licenses were for directional well types rather than vertical.

[117] According to the four Well Licences, which are incorporated by reference in the FSOC, two licences were issued in 2012, one licence in 2013 and one licence in 2014. One of the wells was directional and three were vertical. The first licence was for a depth of 1025 metres. The three others allowed Chance to drill at a depth of between 2500 and 3850 metres.

[118] The technical requirements of drilling, evaluating and completing wells for unconventional resources locked in shale are quite different than those for conventional resources. The exploration drilling undertaken by Chance to evaluate several shale formations required wells drilled to a significantly greater depth: approximately 3500 metres rather than 2000 metres. Each well also serves a much larger area than it would for conventional resources.

[119] It was well known to the defendants that wells drilled to such a depth are only for the purpose of identifying unconventional resources. Discussions surrounding the Permit grouping applications took place between Chance and the defendants during the application process.

[120] The positioning and sequencing of wells drilled as part of Chance's exploration program were directed at locating unconventional resources.

[121] Chance undertook the explorations activities at a cost of approximately $115,000,000.

[122] The drilling program allowed Chance to acquire, during the winter of 2013-2014, 325 square kilometres of 3D seismic data and 25 kilometres of new 2D seismic data, ("seismic data") at a cost of approximately $20,000,000.

[123] The seismic data collected and interpreted by Chance, together with data obtained from legacy wells drilled historically from other operators and the data obtained from wells drilled by Chance were sent for interpretation to Sclumberger Oilfield Services, a company recognized in that field. The resource evaluation revealed a large area of shale holding approximately 8.6 billion barrels of oil equivalent in place in Chance's lands. These resources can only be extracted by way of hydraulic fracturing.

[124] Conventional resources opportunities can be found on some of the Subject Lands. However, hydraulic fracturing is required as a well stimulation technique in order to extract conventional resources.

[125] The defendants were aware of that information as it either formed part of the application materials or were disclosed as part of Chance's reporting requirements.

**The Moratorium on Hydraulic Fracturing**

[126] On May 6, 2013, the Select Committee Regarding the Risks and Benefits of Hydraulic Fracturing was established by Order of the Legislative Assembly. Over a one-year period, the Select Committee conducted hearings across the Yukon.

[127] Chance participated in the Select Committee's process and presented to the members on January 31, 2014.

[128] The Select Committee issued its final report in January of 2015. The Select Committee did not recommend a ban or a moratorium on hydraulic fracturing.

[129] Instead, one of the Select Committee's recommendations was that further study of the potential economic impacts of developing a hydraulic fracturing industry was important and should be undertaken. No such study had been undertaken at the time Chance filed its original Statement of Claim on April 4, 2017.

[130] On April 9, 2015, the Government of Yukon issued its response to the Report of the Select Committee, formally adopting all of its recommendations.

[131] On the same day, the Government of Yukon announced the Moratorium on hydraulic fracturing in all areas of the territory, except for the Liard Basin in the southeast corner of Yukon.

[132] Beginning in April of 2015, Chance communicated its concerns relating to the Government of Yukon's acceptance of the Select Committee's recommendations, and the subsequent Moratorium. It also requested that the defendants grant it certain concessions.

**Tenure**

[133] On or about January 18, 2013, Chance requested tenure extension on seven of its Permits (Permits 0005-0011). The primary term for these would conclude on August 30, 2013. The basis for the request was that the snow pack was insufficient to commence construction on the winter road to gain access to the sites, thereby making it impossible for Chance to drill a qualifying well as planned.

[134] Ultimately, the primary term for these Permits was extended to the maximum time, which ended August 30, 2016. They were again extended for three years by ministerial order to August 30, 2019.

[135] On or about August 22, 2013, Chance requested a tenure extension for its other eight Permits (Permits 0012-0017 and 0019-0020) based on having satisfied the requirement to drill qualifying wells during the primary term. The initial tenure extension was granted

[136] Since the initial extensions, Chance has applied for and received further tenure extensions on Permits 0008-0011 and 0019. However, the extensions granted were for tenures less than requested. The extension of tenure on Permits 0006 and 0007 were not approved and have since expired.

**Work Deposits**

[137] On or about October 15, 2013, the Yukon government fully reimbursed Chance's work deposits on Permits 0005-0011, 0019 and 0020 for a total amount of $1,125,194.25. It partially reimbursed Chance's work deposit on Permits 0012-0017 in the amount of $3,544,061.73 from the principal amount of $4,401,230.24.

**Rent**

[138] Chance had to pay annual rent on the Subject Land.

[139] Following the imposition of the Moratorium, Chance obtained deferrals on payments of rent due in 2015 and 2016. In August of 2017, Chance paid a portion of the deferred payments on its rents (accrued rentals) under protest.

[140] As a result of an amendment to the statutory framework, the requirement for payment of annual rentals has been replaced with a requirement to provide a lease renewal deposit. As a result, no further annual rentals have accrued since 2016.

[141] From the time the Permits were granted, Chance has paid a total of $3,375,121.73 in rent on the lands subject to its Permits, as required by the *Oil and Gas Disposition Regulations*.

[142] I now turn to the claims subject to this application to strike.

(ii) Should the following claims and corresponding remedies against the applicants be struck?

(a) **Unlawful *de facto* cancellation of disposition (paras. 68 to 72)**

[143] At paras 68 to 72 of its FSOC, Chance pleads that the Minister's action in imposing a Moratorium constitute a cancellation of a disposition under s. 28 of the *Act*, and is therefore entitled to compensation under the *Act*. The applicants are not seeking to strike that claim as they concede that it is an arguable claim.

[144] However, the applicants submit that the unlawful *de facto* cancellation plead at paras. 65.1 to 67 of Chance's FSOC has no reasonable prospect of success and should be struck.

[145] According to the applicants, an unlawful cancellation of a statutory provision that gives a Minister a statutory discretion is an impossibility.

[146] The applicants submit that a discretionary statutory authority to cancel a disposition must be exercised lawfully, in accordance with the authorizing statute, or it is invalid and has no force and effect in law.

[147] The applicants contend that one can challenge the validity of the decision or the action of the government and have it reviewed. However, they argue that there is no liability in tort that flows simply from the fact that a government action or decision is illegal or *ultra vires*.

[148] The applicants submit that there may be personal liability involved when the government actor or the public officer acts outside the scope of its decision-making power, but that the government cannot be held civilly liable in damages for that reason.

[149] The applicants submit that, as a result, this claim raises no legal issue.

[150] Chance submits that the applicants have mischaracterized this claim in arguing that it constitutes an impossibility.

[151] Chance submits that this cause of action is an alternative to that of statutory cancellation (which has been plead at paras. 68-72 of its FSOC), and that it is ultimately a question of whether the Moratorium, which Chance argues constitutes a *de facto* cancellation, was *ultra vires* or unlawful.

[152] Chance submits that its claim is that the Minister, in invoking the Moratorium, acted unlawfully and arbitrarily, and outside of his statutory authority under the *Act.*

[153] Chance submits that it only relies on the decision of *Roncarelli v. Duplessis,* [1959] S.C.R. 121 ("*Roncarelli*"), to support its position that a Minister must act within their statutory power, in this case the *Act* and the *Oil and Gas Disposition Regulation*.

[154] Chance submits that the Moratorium has the effect of a cancellation and has an immediate impact on Chance's rights. Chance argues that hydraulic fracturing is essential to the meaningful exercise of its rights under its Permits; and that it cannot continue its exploration work and extract the resources contained within the lands covered by its Permits because they require the very technique that is prohibited by the Moratorium. In addition, Chance submits that its tenure is not indefinite, and there is no indication as to if and when the Yukon government may lift it.

[155] Chance submits that it is not seeking a declaration of invalidity, even though it may be the result that the Court reaches with respect to this claim. However, it is seeking an order of *mandamus* to compel the Minister to exclude from the application of the Moratorium those who have vested rights and have invested capital under their dispositions (I will consider the viability of the order of *mandamus* as a remedy in this case, later in my decision). Chance is also seeking damages for, among other things, loss of opportunity.

[156] Finally, Chance submits that its position is arguable and that it is not plain and obvious that this cause of action has no reasonable prospect of success.

**ANALYSIS**

[157] A finding that a decision or an action of a public officer is *ultra vires* or illegal does not necessarily attract civil liability in damages. However, courts have recognized that in certain circumstances civil liability may ensue. In addition, a plaintiff does not necessarily

have to seek a formal declaration of invalidity in order to pursue a civil action in damages for an action or a decision that falls outside a public officer's authority (see *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, at paras. 25 to 31).

[158] In addition, it is well established that the exercise of a discretionary power is limited by the statute under which it is authorized. As stated in *Roncarelli,* at para. 90: "[i]t is not proper to exercise [a power conferred under a statute] for reasons which are unrelated to the carrying into effect of the intent and purpose of [the enabling statute]."

[159] Dispositions under the *Act* may only be revoked or cancelled in specific circumstances, which are set out in ss. 23 and 28.

[160] Section 23 is not engaged in this case as it relates to grounds for cancellation that arise from a breach of a term or condition of the disposition, or a failure to comply with a notice given under the *Act* or a disposition. I note that it is not alleged or argued that Chance has breached any terms of its dispositions (Permits) or failed to comply with a notice.

[161] Pursuant to s. 28 of the *Act*, the Minister may cancel a disposition "when the Minister is of the opinion that any or any further exploration for or development of the oil and gas in the location or that part of the location is not in the public interest".

[162] Section 58 of the *Oil and Gas Disposition Regulation* sets out the compensation payable to the disposition holder when the Minister cancels a disposition under s. 28(1) of the *Act*. An oil and gas permit is a disposition under the *Act* and its *Regulations* (s. 1 of the *Act*).

[163] As conceded by the applicants, Chance's position that a Moratorium constitutes a cancellation is arguable.

[164] However, Chance goes further and pleads that by imposing a Moratorium on the use of hydraulic fracturing, the applicants have either:

(a) unlawfully cancelled Chance's dispositions through a process that falls completely outside their legislative authority under the *Act*; or

(b) unlawfully cancelled Chance's disposition by an arbitrary and unreasonable exercise of the Minister's discretion under the *Act*, as it is not based on the recommendations of the Select Committee, on any science or study; or

(c) unlawfully cancelled Chance's disposition by not following the process established under the *Act*, including s. 60 of the *Oil and Gas Disposition Regulation*.

[165] Chance has set out the factual and legal foundations of its claim as follow.

[166] At paras. 65.1 and 65.2 of the FSOC, Chance has plead that the Minister's decision to implement a Moratorium was arbitrary and unreasonable because:

> 65.1 … the Select Committee, which was established by Order of the Legislative Assembly to determine whether the use of hydraulic fracturing should be allowed in the Yukon, did not make such a finding. It did not recommend instituting a moratorium or cancelling dispositions …
>
> 65.2 … was not based on any science or study …

[167] At paras. 51 and 55 of its FSOC, Chance has plead the facts regarding the process that led to the imposition of a Moratorium on hydraulic fracturing, which could provide a basis for a determination that the Minister's decision was arbitrary or unreasonable; and/or that the process falls outside the purview of the *Act*.

[168] At paras 38.1, 39 and 66 of its FSOC, Chance has plead that hydraulic fracturing is required to extract both conventional and unconventional resources identified within the area subject to its Permits.

[169] In addition, Chance's counsel submitted at the hearing that hydraulic fracturing is required to allow Chance to continue its exploration work. However, I note that this allegation is not plead in the FSOC.

[170] At many points in the FSOC, Chance has plead that the applicants knew that hydraulic fracturing was essential to the exercise of its rights as stated at para. 66 of the FSOC.

[171] At paras. 60 to 65 of the FSOC, Chance has set out the process for cancelling a disposition under the *Act* and its *Oil and Gas Disposition Regulations*. At para. 65, Chance has plead that the applicants have not followed the cancellation process provided in the *Act*, in that Chance has not been given notice of an intention to cancel its permits, as required by s. 60 of the *Oil and Gas Disposition Regulation.*

[172] Chance has plead the costs of its exploration activities and capital expenditures, tenure, rentals and work deposits with respect to its Permits. It has also plead the expected value of the unconventional resources identified within the area covered by its Permits.

[173] However, I note that Chance has not plead nor does it appear to rely on any specific tort to seek damages for the alleged unlawful cancellation of its disposition. However, I am of the view that this is not fatal to Chance's claim.

[174] As noted previously, I must consider the pleadings in a generous manner and "err on the side of permitting a novel but arguable claim to proceed to trial" (*Imperial Tobacco*, at para. 21).

[175] Considering the limits of the Minister's discretionary power under the *Act*; the plaintiff's rights as a Permit holder under the *Act* (whether they constitute a bundle of rights in the nature of a *profit à prendre,* as submitted by Chance or simply exploratory rights as submitted by the applicants); the basis upon which Chance challenges the Yukon government's decision to impose the Moratorium; the factual allegations regarding the impact of the Moratorium on Chance's rights; and the fact that the plaintiff would have been entitled to compensation if its Permits had been formally cancelled under the *Act*; I am of the view that it is not plain and obvious that this claim has no reasonable prospect of success.

(b) **Nuisance (paras. 81 to 91)**

[176] The applicants submit that the facts plead by Chance in its FSOC do not establish the elements of the tort of nuisance, and therefore this claim has no reasonable prospect of success.

[177] The applicants submit that the Moratorium does not constitute a use of the Subject Lands to Chance's Permits or activity on that land, which indirectly causes harm to Chance's interests in the property or indirectly interferes with its use.

[178] More specifically, the applicants submit that a moratorium, as a government policy or Ministerial proclamation, temporarily prohibiting the use of certain industrial processes or techniques is not a use of land by government. The applicants argue that the establishment of the Moratorium constitutes the exercise of a statutory or prerogative

authority. In addition, the applicants submit that the Moratorium is the exact opposite of a use of land. It is a prohibition against a use of land.

[179] The applicants submit that to give rise to liability under the tort of nuisance, the disruptive activity at issue must constitute some use of land, somewhere. The applicants argue that this requirement cannot be met in this case, as a government policy or Ministerial proclamation has no geographic source.

[180] The applicants also submit that the claim in nuisance cannot succeed because the Moratorium directly affects and applies to the land subject to Chance's Permits, whereas the tort requires an indirect interference with the use of land.

[181] The applicants rely on the decisions of *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2011 ONCA 419 reviewed in 2013 SCC 13 and *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd*., 2007 NSCA 92, ("*Whebby*") in support of their position.

[182] Finally, the applicants submit that the legality or illegality of the objectionable activity at issue, in this case the Moratorium, is not a consideration under the tort of nuisance, and that by pleading the illegality of the Moratorium, Chance is anticipating a possible defence of statutory authority. The applicants submit that it is improper to anticipate a defence in a statement of claim, and, that para. 89. 2 of the FSOC should be struck for that reason alone.

[183] Chance indicates in its written submissions that the deliberate non-use of land, such as the Moratorium, is a recognized tool in land use planning and is often used to preserve land for environmental or recreational reasons. As such, it does constitute an arguable use of land.

[184] Chance argues that while the Moratorium may have no geographic source, it does have a specific geographic application.

[185] Chance submits that the applicants' argument that its claim cannot succeed on the basis that the Moratorium has a direct impact on the land whereas the tort requires an indirect interference with the use of land, mischaracterizes the issue. Chance states that what it advances in support of this claim is that the Moratorium interferes with Chance's ability to commercially extract any resources it is entitled to by banning the only technological tool available.

[186] Finally, Chance submits that its allegation at para. 89.2 of its FSOC that the Minister acted outside the scope of his authority is a pleading that is found earlier in the FSOC and is simply repeated in the context of this cause of action. Chance submits that it should not be struck.

[187] Chance submits that while its arguments may be novel, it has an arguable claim and it should not be struck.

[188] Chance has not provided any jurisprudence in support of its novel position with respect to the constitutive elements of the tort of nuisance.

**ANALYSIS**

[189] In the decision of *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, Cromwell J., for the Court, states at para. 18 that: "a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable".

[190] Cromwell J. then set out the two-part test applicable to a claim of private nuisance

as follow:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. …

[191] In the decision of *Chingee v. British Columbia*, 2016 BCSC 760, at paras. 35 and 36, Verhoeven J. reviewed and summarized the substantial and unreasonable component of the test as follow:

> [35] The reasonableness of the interference must be assessed in light of all the relevant circumstances: *Antrim*, para. 25. Traditionally, the courts have assessed whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: *Antrim* para. 26. While the focus of the reasonableness analysis is on the character and extent of the interference with the claimant's land (para. 28), the nature of the defendant's conduct is not irrelevant. Where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability (paras. 29, 30).
>
> [36] In *Antrim*, the plaintiff asserted claims based upon the tort of private nuisance when highway construction permanently harmed the plaintiff's truck stop business. The Supreme Court of Canada held that in the case of activities carried out by a public authority for the greater public good, as in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances, however the focus of that balancing exercise is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation (paras. 25, 38, 40).

[192] In the decision of *Grand Beach Management Services Inc. v. Manitoba,* 2018 MBCA 80, ("*Grand Beach*") (leave to appeal denied, *Manitoba v. Joyce* [2018] S.C.C.A. No. 482), at para. 13, Beard J., for the Court of Appeal of Manitoba, noted that the category of interests covered by the tort of nuisance is not fixed.

[193] However, the interest interfered with must be an interest in land. (*Grand Beach* at para. 15, citing Lewis N. Klar & Camron SG Jefferies, *Tort Law,* 6th ed (Toronto: Thomson Reuters, 2017) (at p.876-77).

[194] As such, rights in the nature of a *profit à prendre*, as pleaded by Chance in this case, or even oil and gas exploration rights conferred by permit may arguably constitute an interest in land, which, if interfered with in a substantial and unreasonable manner, could give rise to an action in nuisance.

[195] The applicants rely on the decision of the Court of Appeal of Nova Scotia in *Whebby* to submit that the interference with the interest in land must be indirect rather than direct, that the interference must originate from elsewhere.

> [127] However, these submissions overlook a more fundamental point which, in my view, is fatal to United's position: nuisance is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct *elsewhere.* The interference with the plaintiff's enjoyment of land must be indirect rather than direct [citations omitted] […] a person commits private nuisance when he or she "…is held to be responsible for an act indirectly causing physical injury to the land or substantially interfering with the use or enjoyment of land or of an interest inland…" (citation omitted). Here, the damage was direct not indirect; Whebby dumped the soil on United's land.
>
> [128] … Whatever the answer to that question may be, there is virtually no doubt that nuisance is concerned with indirect, not direct, interference with the plaintiff's enjoyment of his or

> her land in the sense that that the interference must originate elsewhere than on the affected land itself. …

And at paras. 130 and 131:

> [130] This view is also consistent with first principles going back to the old forms of action. That nuisance deals with indirect interference may be traced to the distinction between an action in trespass and an action on the case. Trespass is direct entry on another's land while nuisance is the infringement of the plaintiff's property interest *without direct entry by the defendant* (citations omitted).
>
> [131] However, it is not the dead hand of ancient legal technicality that justifies maintaining this distinction. Rather it reflects the role of the modern law of nuisance as a means of reconciling conflicting interests in connection with competing uses of land (citations omitted). Before there can be conflicting interests in connection with the use of land, there must be uses of different lands which come into conflict. (emphasis in original)

[196] However, the decision of the British Columbia Court of Appeal in *Chingee v. British Columbia*, 2017 BCCA 250 appears to open up the possibility that a claim in nuisance based on the interference of one's interest in land by the exercise, on the same land, of someone else's competing interest in land, may, if the material facts were pleaded "in concrete and specific terms" be an arguable claim.

[197] In *Chingee*, the plaintiff, who was the owner of traplines and guiding territory certificates on Crown's land, sued a number of forestry companies in nuisance and trespass. The plaintiff claimed that the forestry companies' logging activities on the same land, which were authorized under timber sale licences, had caused economic losses to his business, and had negatively impacted the forest and wildlife. The plaintiff also claimed that the forestry companies had failed to give him notice of their logging activities, failed to consult with him in a meaningful way and used unreasonable logging

practices. In addition, the plaintiff sued the Provincial Crown for negligence and breach of fiduciary duty. The Province of British Columbia and one of the forestry companies filed a motion to dismiss the action.

[198] The motion judge struck the plaintiff's claim in nuisance on the basis that it was plain and obvious that the plaintiff could not establish that the interference he complained of was unreasonable in all of the circumstances. The motion judge noted that the plaintiff asserted property interests were based upon the same legislative framework as the timber sales licences the defendants relied upon in conducting their logging activities (para. 60). The judge also noted that the plaintiff was not challenging the legislative scheme or the legality of the timber sales licences of the defendants (para. 61). The judge found that, in the circumstances of that case, the plaintiff challenged the timber activities themselves, as they relate to the licences, as opposed to anything specific done by a particular defendant or any specific breach of the terms of their respective licences. The judge noted that the claim as pleaded was centered on the effects of logging in general.

[199] Finally, the motion judge determined that the plaintiff's action, as pleaded, was bound to fail in establishing an unreasonable interference with his own interests as:

> [66] …In effect, the plaintiff would be seeking to have the court review and reconsider after the fact the decisions made by various statutory decision makers within a highly policy driven context, in order to seek to establish that the end result of the decisions is an unreasonable interference with his own licensed interests, when he made no timely objection to the activities. …

[200] The British Columbia Court of Appeal upheld the motion judge's decision to strike

the claim in nuisance on the basis of the defective pleading:

> [55] … As I read the judgment, articulating a cause of action with a reasonable prospect of success would require pleading sufficiently precise material facts capable of demonstrating the unreasonableness of the conduct of otherwise authorized activity and the consequences of that conduct in affecting the claimant's legally protected interests. This level of specificity was lacking in the pleadings. The judge concluded that it could not be provided. I cannot conclude that he was wrong.

[201] However, as previously noted, the British Columbia Court of Appeal also stated that, if the specific material facts had been plead, it would not have been plain and obvious that that type of claim in nuisance would fail.

> [53] In this case, the judge necessarily had to interpret the pleadings in order to assess the true nature of the claim. This is so because the pleading does not plead material facts supporting a claim in nuisance that, for example, might apply to the specific exercise of harvesting rights by a defendant on a particular [timber sales licence] which had particular consequences for the trapline that were capable of being described in concrete and specific terms. I have no doubt that such a claim in nuisance capable of surviving a motion to strike could be pleaded. I do not think the judge took a contrary view. But that was not the defining nature of the claim that was pleaded. (my emphasis)

[202] As such, I am of the view that even if the interference, as plead by Chance, may be strictly construed as relating to the use (or non-use) of the same land, this does not constitute a complete bar to Chance's claim in nuisance.

[203] I am also of the view that Chance's characterization of the issue (i.e. that the Moratorium indirectly interferes with its ability to commercially extract the resources it is entitled to, by banning the only technological tool available to Chance to do so) is arguable.

[204] In addition, I note, for example, that claims brought by tenants against their landlords, for decisions that allegedly impede their rights of quiet enjoyment of property, have been found to be arguable nuisance claims. I recognize that these claims are brought under a different factual, statutory and contractual framework than the case at bar. Nonetheless, I find that they illustrate that a decision (by the landowner) to restrict the use of their property by their tenants and therefore of their tenants' rights under their lease, have been found to be arguable claims of nuisance (see *Grand Beach*, at paras. 12 to 22).

[205] As such, I am of the view that a Moratorium that restricts the type of activities or techniques that Chance may utilize to uncover resources within the Subject Lands, may similarly be argued to constitute an interference on Chance's alleged property interests in the land.

[206] On that issue, I note as well that Chance has plead at para. 89.1 of its FSOC that: "[t]he Moratorium constitutes a use of land in that it seeks to preserve or maintain the recreational and environmental value of the surface of the Subject Lands for the benefit of the public." I am of the view that Chance's position that a deliberate prescribed non-use of land, such as a moratorium, used as a planning tool for environmental, social or recreational purposes constitutes a use of land that creates a nuisance by preventing the other property interests in land (*profit à prendre*) to be enjoyed and use in a meaningful way, is arguable in light of the elements of the tort of nuisance.

[207] Again, on a motion to strike, I need not determine whether the plaintiff's claim would succeed at trial, what I have to determine is whether it is plain and obvious that the claim as plead has no reasonable prospect of success.

[208] On the issue of whether the interference on the use or enjoyment of land is both substantial and unreasonable, Chance has plead at many points in its FSOC that:

1. In January 2015, the Select Committee did not recommend a ban on hydraulic fracturing, but instead recommended that further study of the potential economic impacts of developing a hydraulic fracturing industry was important and should be undertaken (paras. 51 to 53 );
2. that no such study was undertaken prior to the Moratorium being announced on April 9, 2015 (paras. 52 and 53);
3. that, soon after, in April of 2015, Chance communicated its concerns relating to the Moratorium to the Yukon government (para. 57);
4. the Moratorium unreasonably interferes with Chance's rights granted by its oil and gas permits in an economically feasible and efficient manner in that: hydraulic fracturing is essential to the extraction of both conventional and unconventional resources within the Subject Lands to Chance's permits (paras. 38, 38.1 and 90); and
5. Chance has specified its losses and damages relating to its inability to use hydraulic fracturing by pleading its foreseeable losses and damages related to the continuing delay in respect of its ability to develop unconventional resources on the land covered by its permits (paras. 91 and 96).

[209] As a result, I am of the view that Chance's pleading is sufficiently detailed with respect to the requirement that the interference in the use or enjoyment of land be both

substantial and unreasonable. Therefore, I conclude that it is not plain and obvious that this claim has no reasonable prospect of success.

[210] In addition, based on my review of the FSOC, I find that the allegations contained in para. 89.2 (that the Minister acted outside the scope of his authority and that the Moratorium is illegal) is simply a repetition of allegations found in other parts of the pleading, and, on that basis, that paragraph need not be struck.

(c) **Unlawful interference with economic relations (paras. 77 to 80)**

[211] The applicants submit that this claim has no reasonable prospect of success as Chance's FSOC does not satisfy the intentional requirement of the tort of unlawful interference with economic relations nor does it meet the requirement of an unlawful act committed against a third party.

[212] More specifically, the applicants submit that there is no allegation in the FSOC that the defendants committed an unlawful act directed at a third party. The applicants submit that, in its pleading, Chance identifies the unlawful act as being the imposition of the Moratorium. However, Chance does not plead that the unlawful act was directed at the third party, CNOOC.

[213] In addition, the applicants submit that Chance's allegation that the Yukon government imposed the Moratorium on hydraulic fracturing with disregard to the impact on Chance (para. 55 of the FSOC) clearly does not meet the required intention for that tort. The tort requires an intention to cause economic harm to the plaintiff. The applicants submit that, as such, wilful blindness, recklessness, or disregard, as plead, do not meet the intentional component of the tort.

[214] Chance submits that it has plead all the required elements of the tort.

[215] Chance submits that it has identified the Moratorium in connection with the misrepresentations to CNOOC as the unlawful act(s) giving rise to this tort. Chance submits that it has properly plead that the Moratorium constitutes an unlawful act in that it was imposed outside the scope of the Minister's statutory authority and constitutes a *de facto* unlawful cancellation. The plaintiff also submits that there were misrepresentations made to Chance and CNOOC to the effect that the rights granted as part of Chance's dispositions (oil and gas permits) would be granted without some future restriction, the Moratorium, that would render them useless. Chance submits that the misrepresentations, on their own, constitute an unlawful act.

[216] Chance submits that it has identified a third party, CNOOC in its FSOC.

[217] In addition, Chance argues that the Moratorium in combination with the misrepresentations were directed at CNOOC and actionable by CNOOC as they directly harmed CNOOC's economic interests.

[218] Chance submits that paras. 15 and 16 of its FSOC explain the following:

- CNOOC's interest and CNOOC's decision, prior to the Moratorium, to join in as an investor to support Chance's exploration program under the permits as granted; and
- CNOOC's decision to abandon its investment when the Moratorium was announced because it took away all the economic opportunities that existed prior to the Moratorium, and that CNOOC thought existed as a result of the defendants misrepresentations regarding the nature of the interests granted under the *Act* (for example, the rights to explore

conventional and unconventional means and enjoy a *profit à prendre* without restrictions).

[219] Chance submits that it has plead the economic harm it has suffered as a result of the government's alleged tortious conduct (for example the loss of opportunity and right to exercise its *profit à prendre*, the loss of stranded capital and the loss of CNOOC as an investor).

[220] Chance concedes that disregard alone is not sufficient to meet the intentional element of this tort. However, it submits that a fair and generous reading of the pleading of indifference found at para. 55, in light of the other allegations plead in its FSOC, allows the Court to conclude that Chance has plead the necessary factual elements to reveal an intention to cause economic harm to the plaintiff as a necessary means of achieving an end that serves some ulterior motive. Chance submits that the ulterior motive was to preserve the lands in their natural state to accede to the interests of those who are opposed to hydraulic fracturing.

[221] Chance submits that it has very little information of what the government's intention was, at this stage of the proceeding, and that it is not clear what the government's rationale was in establishing the Moratorium, as the government has not provided an explanation for it. However, Chance submits that it has plead that the Moratorium does not apply to the Liard Basin. In addition, Chance submits that, in effect, its permits are the only ones affected by the Moratorium. Chance also submits that it has plead that the Select Committee did not recommend a Moratorium, but that, nonetheless, the Yukon government imposed one. Chance submits that, on that basis, it is open to the

court to conclude that Chance's pleading is sufficient with respect to the intention required for this tort.

**ANALYSIS**

[222] The tort of unlawful interference with economic relations is an intentional tort.

[223] The elements of the tort are set out in the decision of *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12, ("*A.I. Enterprises*") at para. 5:

> [5] …
>
> A. What is the scope of liability for the tort of causing loss by unlawful means?
>
> In light of the history and rationale of the tort and taking into account where it fits in the broader scheme of modern tort liability, the tort should be kept with narrow bounds. It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. … (my emphasis)

[224] The Supreme Court of Canada described the tort as follows:

> [23] The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party); … (my emphasis)

[225] The conduct of the defendant will only be found unlawful for the purpose of this tort, if it would be actionable by the third party, or would have been actionable if the third party had suffered loss as a result of it (*A.I. Enterprises*, at paras. 5 and 76).

[226] The Court also determined that the "unlawfulness" requirement is not subject to principled exceptions (*A.I. Enterprises*, at para. 5).

[227] The Court also stated that the tort of unlawful interference with economic relations only provides for a narrow scope of liability (*A.I. Enterprises Ltd.*, at para. 26). The Court expanded on its reasoning for adopting a narrow scope for this tort as follow:

> [29] The scope of the unlawful means tort should be understood in the context of the broad outlines of tort law's approach to regulating economic and competitive activity. Several aspects of that approach support adopting a narrow scope for the unlawful means tort: the common law accords less protection to purely economic interests; it is reluctant to develop rules to enforce fair competition; it is concerned not to undermine certainty in commercial affairs; and the history of the common law shows that tort liability, if unduly expanded, may undermine fundamental rights.

[228] The Court also set out parameters with respect to the intention required for this tort:

> [95] … It is the intentional targeting of the plaintiff by the defendants that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficicient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition. (my emphasis)

[229] As such, mere foreseeability of economic harm does not meet the intentional requirement of this tort (*A.I. Enterprises*, at para. 97).

[230] I will now review Chance's pleading in light of the first component of the tort, which is that the defendants committed an unlawful act or used unlawful means against a third party.

[231] As stated earlier, to meet the first component of the tort, the pleading must contain allegations that the defendants committed an unlawful act against an identified third party.

[232] There is no dispute that Chance identified CNOOC as the affected third party under this tort.

[233] With respect to the unlawful act, in its FSOC, Chance specifically identifies the Moratorium as the unlawful act giving rise to this claim (at paras. 77 to 80). However, at the hearing, Chance identified the Moratorium and the defendants' alleged misrepresentations to Chance and CNOOC, as constituting the required unlawful acts. I note that the alleged misrepresentations are not plead under the section of the FSOC that deals specifically with this tort. However, Chance has plead, in another section, that the defendants made false representations to Chance and CNOOC by remaining silent and not expressing any concerns regarding the use of hydraulic fracturing and Chance's and CNOOC's plan focusing on unconventional resources, thereby encouraging Chance and CNOOC to invest significant funds in this plan. However, I note that there is no allegation in the FSOC that Chance lost CNOOC as an investor, as advanced by Chance's counsel at the hearing.

[234] Also, the pleading contains no specific reference to the damages CNOOC is said to have suffered as a result of the combined impact of the defendants' alleged unlawful acts. However, Chance's allegation that CNOOC invested $115,000,000 in Chance on the understanding that Chance would be pursuing unconventional resources may be sufficient to ground an allegation of economic harm or loss (para. 15 of the FSOC).

[235] As such, I conclude that on a fair and generous reading of the pleading, Chance has sufficiently plead the material facts in relation to the first component of the tort.

[236] However, the same cannot be said about the intentional component of this tort.

[237] I agree with counsel for the applicants that wilful blindness, recklessness, or disregard, as pleaded by Chance at para. 55 of its FSOC, is not sufficient to meet the intention required by law for the commission of this tort.

[238] In addition, no matter how generously one looks at the pleading, there are no pleaded facts that could transform Chance's allegation that the defendants acted with disregard to the impact of their actions and/or decisions on Chance, into an allegation that they had an intention to cause economic harm to Chance, as it is a necessary means of achieving an end that serves some ulterior motive. Also, I note that the FSOC does not contain an allegation that Chance's Permits are the only one's affected by the Moratorium, as submitted at the hearing.

[239] On that basis, I find that it is plain and obvious that Chance has no reasonable prospect of success on this claim. However, based on the submissions made by Chance's counsel at the hearing, I am of the view that it is appropriate to grant Chance leave to amend its FSOC to attempt to address the deficiencies of its pleading.

(d) **Unjust enrichment (paras. 92 to 94)**

[240] The applicants submit that the material facts plead in the FSOC do not establish the elements of this cause of action.

[241] The applicants submit that Chance has plead that the Yukon government was enriched in two ways:

(a) by the information on the locations and scale of the unconventional resources in the Subject Lands; and

(b) the receipt of work deposits and rentals.

[242] The applicants submit that the FSOC does not contain any allegation that Chance has been or ever will be deprived of the information it developed. Chance still has that information and may continue to use it. Therefore, Chance cannot establish that it suffered a corresponding deprivation, which is one of the essential elements of the cause of action

[243] For the second claim of unjust enrichment made with respect to the rental payments and work deposits paid by Chance to the government, the applicants concede that they have gained the benefit of those payments and that Chance has suffered a corresponding deprivation. However, the applicants submit that the rental payments and the work deposits were paid, as required under Chance's Permits, the *Oil and Gas Disposition Regulation* and the *Act*, and that this constitutes a valid juristic reason for the government's enrichment.

[244] The applicants argue that if Chance is successful in proving that the Moratorium constitutes a cancellation, Chance would be entitled to compensation under the *Act*, and more specifically, Part 4 of the *Oil and Gas Disposition Regulation*. The applicants contend that the compensation scheme would provide a complete answer to Chance's claim and that Chance would only be entitled to receive what is provided under the compensation scheme.

[245] The applicants submit that if there is no lawful cancellation of Chance's disposition, then, the cancellation is not valid. Chance retains its dispositions, and has

the correlating obligation under its Permits, the *Act* and the *Oil and Gas Disposition Regulation*, to pay the work deposits and the rentals. The applicants submit that, in that set of circumstances, the juristic reason justifying the government's enrichment and Chance's correlating deprivation still applies.

[246] Chance states that the cause of action in unjust enrichment was plead in the alternative. As such, it recognizes that, if it is found that the Moratorium constitutes a *de facto* cancellation, then it agrees that the compensation scheme provided by the *Act* and its *Oil and Gas Disposition Regulation*, would occupy the field and leave no room for compensation for unjust enrichment.

[247] Chance also acknowledges that if the defendants were to be found liable with respect to one or more other causes of action plead in this case, then the rule against double recovery may apply.

[248] Chance submits that, considering the effects of the Moratorium on Chance's interests, there is no juristic reason for the Yukon government to benefit from Chance's investments and stranded capital.

[249] Chance does not concede that the *Act* and its *Oil and Gas Disposition Regulation* provide a juristic reason for the government's enrichment. Chance submits that the Moratorium was taken outside the authority of the *Act*, and, therefore, the *Act* cannot provide a juristic reason for the enrichment. It also submits that the Government of Yukon cannot put in place a Moratorium that prevents Chance from exercising its rights under its Permits and, at the same time, retaining the money it collected for the work deposits and the rentals.

[250] In addition, Chance submits that the Government of Yukon benefited from Chance's exploration efforts through the exchange of information over the years, at no cost to the government. Chance submits that the government obtained commercially valuable information, including seismic data, regarding the location and scale of the unconventional resources found in the Eagle Plain Basin, whereas Chance has invested considerable amounts of money in its exploration work to generate information it can no longer use due to the Moratorium. Chance submits that this clearly constitutes an enrichment for the government and a corresponding deprivation for Chance.

**ANALYSIS**

[251] The essential elements of a cause of action in unjust enrichment are:

> … (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason …

(*Moore v. Sweet*, 2018 SCC 52 ("*Moore*"), at para. 37)

[252] In the decision of *Moore*, at para. 38, Côté J., writing for the majority, stated that the principled approach to unjust enrichment adopted by the courts "is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another".

[253] In addition: "[t]o establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value – a "tangible benefit" – passed from the latter to the former" (*Moore*, at para. 41).

[254] A straightforward economic approach applies to the analysis of the first two essential elements: the enrichment and the corresponding deprivation, whereas:

"…moral and policy considerations instead coming into play at the juristic reason stage of the analysis" (*Moore*, at para. 41).

[255] The enrichment and the corresponding deprivation have been described as being "essentially two sides of the same coin" (*Moore*, at para. 41, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 at p. 1012).

[256] In addition, the element of corresponding deprivation of the plaintiff is explained as follow at para. 43 of *Moore*:

> 43 … Even if a defendant's retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant's gain. Instead, the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched *at the plaintiff's expense* (P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. … (emphasis in original)

[257] *Moore* confirms that a two-stage analysis applies to the juristic reason element of unjust enrichment:

> 57 The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. …

> 58 If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

[258] With respect to the statutory obligation invoked by the applicants as a juristic reason in this case, Coté J. stated at para. 63 of *Moore* that: "[t]he statutory obligations category operates in a substantially similar manner, precluding recovery where a legislative enactment expressly or implicitly mandates a transfer of wealth from the plaintiff to the defendant".

[259] I now turn to the specific circumstances of this case.

[260] I note that both parties agree that if the Court were to find that the Moratorium constitutes a cancellation under the *Act*, then Chance would be entitled to compensation under Part 4 of the *Oil and Gas Disposition Regulation*, and the compensation scheme would prevail over any claim Chance may have under this cause of action (*Moore*, at para. 65).

**(a) Claim of unjust enrichment with respect to the amounts payable under the *Act* to the Yukon government (Work Deposit and Rentals)**

[261] In situations other than the one mentioned at para. 260, considering the effects of the Moratorium on Chance's interests, as plead by Chance, I am of the view that the presence or absence of a juristic reason is an arguable issue, and as such, I find that it is not plain and obvious that Chance's claim has no reasonable prospect of success.

**(b) Claim of unjust enrichment with respect to the information and data that Chance shared with the Yukon government.**

[262] Chance has plead that it has shared information and data with the Yukon government as part of the disposition process, at no cost to the government.

[263] In addition, Chance has plead that both the information and data it shared with the Yukon government have value, as they provide information, among other things, about the locations and scales of unconventional resources in the Eagle Plain Basin, even though, Chance did not specifically plead that they have commercial value, as argued at the hearing.

[264] Chance has also plead that it incurred costs in order to conduct the exploration work that generated the seismic data. It also incurred costs to obtain the Resource Valuation (interpretation of the seismic date and other information obtained by Chance).

[265] Chance has plead that there is no juristic reason for the defendants to benefit from Chance's efforts, as Chance has lost the opportunity to exploit the resources it identified and has lost its ability to make use of that information.

[266] As such, in situations other than the one mentioned at para. 260, I am of the view, that Chance's pleading contains sufficient material facts with respect to all three elements of this cause of action to conclude that it is not plain and obvious that this cause of action as no reasonable chance of success.

(e) ***De facto*** **Expropriation (paras. 73 to 76)**

[267] The applicants submit that the claim in *de facto* expropriation has no reasonable chance of success because, on the material facts plead by the plaintiff, the Moratorium did not deprive Chance of any property rights or remove all reasonable uses of property;

and/or constitute an acquisition by the Government of Yukon of any property rights or any economic value flowing from any property rights.

[268] The applicants argue that Chance's allegation that it cannot access any resources of value on the Subject Lands without using hydraulic fracturing is a bald statement incapable of proof because it is pure speculation, as it relates to the future, to things that are not yet known. The applicants submit that the allegations contained in the FSOC reveal that, so far, Chance has only conducted exploration work on part of the Subject Lands. As such, the applicants submit that no one is in a position to state that hydraulic fracturing is necessary to access all conventional and unconventional resources of value on the Subject Lands because they have not been fully explored yet. Therefore, the applicants submit that Chance's allegation should not be accepted as true for the purpose of this application.

[269] The applicants submit that the explicit terms of the Permits, which are incorporated by reference in the FSOC, clearly state that Chance's Permits are exploratory permits only. They submit that the Permits do not grant the right to produce oil and gas contrary to what Chance's claim at para. 18 of its FSOC.

[270] The applicants recognize that, if the statutory requirements are met, and the applicants are not suggesting that there is any issue in that regard at this point, Chance would be able to move on to an oil and gas lease, and under that oil and gas lease, it may or may not have production rights to be exercised in particular ways and in particular places.

[271] However, the applicants submit that Chance has not yet acquired those production rights and cannot claim expropriation for what it does not already have.

[272] The applicants submit that Chance claims that by establishing the Moratorium, the government has nullified the commercial value of its rights. The applicants acknowledge that it may well be that the government's action has diminished the value of Chance's rights. However, the applicants submit that the law is clear on that issue; loss or destruction of economic value does not amount to expropriation, and, as a result, the claim cannot succeed.

[273] The applicants submit that the Government of Yukon has not acquired any beneficial interests in the plaintiff's rights by imposing a Moratorium on the use of hydraulic fracturing; that it has not taken any of Chance's rights away from it; and that nothing has passed from Chance to the government. As such, the claim in expropriation cannot succeed.

[274] The applicants submit that Chance has lost its rights to use a process, hydraulic fracturing. This, they submit, does not constitute expropriation.

[275] Finally, the applicants submit that nowhere in the FSOC is it plead that the Moratorium has deprived Chance of its exploration rights. Therefore, Chance has not been deprived of essentially all its rights under its Permits, and, as a result there cannot be expropriation.

[276] Chance submits that the essential elements of the claim of *de facto* expropriation have been plead, that the cause of action has been made out sufficiently and that it should not be struck out.

[277] Chance disagrees with the applicants that its allegation that it cannot access both conventional and unconventional resources without hydraulic fracturing is pure speculation and impossible to prove. Chance submits that this is a case about science,

geology and modern technology available to extract mineral resources, and that these questions regarding full taking or substantially full taking cannot be resolved without technical understanding and expert evidence to determine what is possible or not possible to do in order to enjoy a property right that has been taken away by the Moratorium. Chance further submits that science supports its allegation.

[278] Chance submits that the Oil and Gas Permits they hold coupled with the *Act* confer upon it a bundle of rights in the nature of *profit à prendre*. More specifically, Chance submits that its Permits and the *Act* require the government to issue oil and gas leases even if the permit holder fails to apply for such a lease. In addition, Chance submits, that oil and gas leases have long been recognized as a property interest in the form of a *profit à prendre*.

[279] Chance submits that its pleading with respect to the nature of its rights must be accepted as true for the purpose of this application[3], and that any determination of the full extent of its rights cannot be undertaken without evidence.

[280] Chance submits that by establishing the moratorium on hydraulic fracturing, the Government of Yukon has effectively revoked Chance's *profit à prendre* acquired through the disposition process under the *Act.* In addition, Chance submits that it cannot pursue any more exploration and/or seismic work without the use of hydraulic fracturing.

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[3] Paragraph 18 of the FSOC states: "[b]y virtue of the Permits, Chance was granted sub-surface rights to drill for and produce, subject to regulatory compliance, the oil and gas contained within the boundaries of the Subject Lands."

Paragraph 19 of the FSOC states: "[i]t was, and is, Chance's understanding that these rights are in the nature of a profit-à-prendre. A profit-à-prendre grants the holder the right to enter upon the land of another and take from it a profit from the soil. Along with the right of entry, a profit-à-prendre carries with it the right to remove and extract a resource from the land, and also includes the right to use the surface of the land as required to allow extraction."

[281] Chance submits that hydraulic fracturing is the only way by which it can access both conventional and unconventional resources, either at all or in an economically feasible manner, and that this constitutes a total denial of the interests granted to Chance.

[282] Chance contends that this case is similar to the case of *R. v. Tener*, [1985] 1 S.C.R. 533 ("*Tener*"), in that the interests at play (whether they be mineral rights or oil and gas rights) constitute a *profit à prendre* granting the right to capture a resource, to bring it to the surface and to realize the economic value of the right. Chance submits that, in that context, when a government takes away the right to the resource, it is not merely interfering with the use of the interests in land, it is essentially cancelling the right, even though the right to the resource (the mineral or in this case the oil and gas) still remains in the rights holder's possession.

[283] In addition, Chance submits that the law recognizes that a governing authority can benefit from revoking or cancelling an interest in land it has granted. Chance submits that the removal of an encumbrance upon the land is the benefit acquired by the government as a result.

[284] Finally, Chance submits that the issues raised by its claim cannot be determined without a trial. In addition, it submits that the fact that the applicants disagree with respect to the nature and scope of its rights as well as with the extent to which the Moratorium impacts its rights demonstrate that there are triable issues with respect to this claim.

**ANALYSIS**

[285] In *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, at para. 30, the Supreme Court of Canada set out the two requirements for a *de facto* expropriation:

> 30 For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (citations omitted).

[286] With respect to the first requirement, the Court stated that:

> 32 … To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. …

[287] In *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98, ("*Mariner*") at para. 48, Cromwell J. stated the following with respect to what is necessary to constitute a *de facto* expropriation:

> 48 In reviewing the de facto expropriation cases R.J. Bauman concluded, and I agree, that to constitute a de facto expropriation, there must be a confiscation of "…all reasonable private uses of the lands in question." R.J. Bauman, "Exotic Expropriations: Government Action and Compensation" (1994), 54 The Advocate 561 at 574. While there is no magic for determining (or describing) the point at which regulation ends and taking begins, I think that Marceau J.'s formulation in Nilsson is helpful. The question is whether the regulation is of "sufficient severity to remove virtually all of the rights associated with the property holder's interest." …

[288] In order to determine whether an expropriation has taken place, it is the effect of the regulation or the government action rather than the form that needs to be considered (*Mariner*, at para. 65).

[289] In *Marine*r, Cromwell J. indicated that loss of economic value in the land is not the loss of interest in land, and as such, a loss of economic value is not, in and of itself,

sufficient to constitute expropriation (para. 71). *Mariner* also stands for the proposition that the right to use property in a particular way is not, in itself property.

[290] As such, a regulation or government action prohibiting certain uses of the land does not amount to an expropriation unless it can be demonstrated that it amounts to the removal of all reasonable uses of the property.

[291] The applicants submit that Chance's allegation that the Moratorium has deprived it of its ability to access all conventional and unconventional resources in the Subject Lands, should not be accepted as true because it is a bald allegation based on speculation and, therefore, incapable of proof. This submission is appealing. One may wonder how Chance is in a position to assert that, without hydraulic fracturing, it is incapable of accessing any of the resource in the Subject Lands. However, I am reluctant and unable to draw that conclusion, as I agree with Chance's submission that this is an issue requiring evidence and possibly expert evidence on, among other things, the extent of the information and data available, the interpretation of that information and data, geology, and modern technology available to extract mineral resources. As such, I am of the view that Chance's allegation that, without hydraulic fracturing, it is unable to access both conventional and unconventional resources on the Subject Lands, may be accepted as true for the purpose of this application.

[292] Secondly, I agree with Chance that it is not possible on this application to determine the full extent of the interests granted to Chance by its permits, as I have not been referred to the full statutory framework applicable to dispositions under the *Act* and the *Regulations*. In addition, evidence regarding the legislator's intent may be required in order to make such a determination. I come to this conclusion on the following basis.

[293] Each of Chance's Oil and Gas Permits, which are incorporated by reference in the pleading contains the following provision:

> Subject to the *Oil and Gas Act* and the provision of this Permit, the Commissioner of Yukon grants to the Permittee:
>
> (a) The right to explore for, and the right to drill and test for, oil and gas in the Location;
> (b) The right to recover and remove from the Location any oil and gas recovered as a result of testing for oil and gas; and
> (c) The right to obtain an oil and gas lease with respect to all or part of the Location pursuant to the *Oil and Gas Act*;
>
> Subject to the *Oil and Gas Act*, the Permittee is entitled to a renewal of this Permit. (my emphasis)

[294] The rights under Chance's Permits clearly encompass exploratory rights for oil and gas.

[295] Also, the applicants concede that Chance, pursuant to the rights granted by its Permits and s. 37 of the *Act*, is entitled to obtain an oil and gas lease, subject to the regulatory framework. Section 37(2) states that the Minister shall issue an oil and gas lease if the permittee does not apply for one before the end of the term of its permit.

[296] In addition, I note that pursuant to s. 38 of the *Act*, an oil and gas lease grants, in accordance with the terms and condition of the lease, the right to oil and gas in the location of the lease.

[297] The determination of the extent and/or scope of the plaintiff's interests in oil and gas in the Subject Lands will require interpretation beyond the scope of this application. In addition, I am of the view that a generous reading of the pleading, including the Permits, which have been incorporated in the pleading by reference, does not necessarily lead to the conclusion that the Permits and the FSOC contain contradictory

allegations of fact with respect to the nature of Chance's interests. In addition, I am of the view that Chance's rights as they appear on Chance's Permits, and most importantly the right to obtain and oil and gas leases, are broad enough, for the purpose of this application, to arguably encompass Chance's allegation that its interests are in the nature of a *profit à prendre*.

[298] With respect to the requirement of removal of all reasonable uses of the property, I note that Chance does not rely on the loss of economic value of its alleged interests in land to argue that the Moratorium on hydraulic fracturing constitute a *de facto* expropriation. It relies on the decision of *Tener* to plead that by prohibiting the use of hydraulic fracturing, the Yukon government has essentially taken away all its rights to access and exploit the oil and gas located in the Subject Lands.

[299] I note that in *Tener*, it was the respondents' complete inability to exercise their right of access to, or withdrawal of, the minerals that was found to constitute the interest in land taken from them (*Tener*, at p. 550, see also *Mariner* at para. 67).

[300] In *Tener*, the respondents were the registered owners of 16 mineral claims granted by the Province of British Columbia. The owners of the mineral claims had the right to all minerals in the claims, the right to the use and possession of the surface for the purpose of getting the minerals out, and the right to take and use a right of way to the claims. If, however, the right-of-way was to cross Crown land, as would be necessary in this case, the consent of the Minister of Lands was required (*Tener*, at pp. 536-537).

[301] The Province created a provincial park, which encompassed the land subject to the respondent's mineral claims. At the time, no attempt was made by the government to expropriate the claims (*Tener*, at p. 537).

[302] The respondents were denied a park use permit to access their claims for a number of years prior to receiving a letter from the government indicating that under present park policy no new exploration or development work may be authorized within a provincial park. The respondents treated the letter as the event that conclusively denied them the opportunity to exploit their mineral claims, and turned to the courts to seek compensation (*Tener*, at pp. 537-538).

[303] When the case reached the Supreme Court of Canada, both the minority and the majority determined that the respondents were entitled to compensation for expropriation. Wilson J. writing for the minority, found that the respondents' interests were in the nature of a *profit à prendre*:

> … I believe that what the respondents had was one integral interest in land in the nature of a profit à prendre comprising both the mineral claims and the surface rights necessary for their enjoyment. (p. 540).

And at p. 541

> It is important to note that it is the right of severance which results in the holder of the profit à prendre acquiring title to the thing severed. The holder of the profit does not own the minerals *in situ*. They form part of the fee. What he owns are mineral *claims* and the right to exploit them through the process of severance. … (emphasis in original)

[304] Wilson J. found that the respondents had been expropriated on the following basis:

> In my view, this is a case of expropriation under s. 11(c) of the *Park Act* to which the *Highways Act* applies. I reach this conclusion on the basis that the absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their profit à prendre. Their interest is nothing without the right to exploit it. The minerals *in situ* do not belong to them. Severance and the right of severance is of the essence of their interest. (p. 550)

[305] Wilson J., also specifically addressed the issue of acquisition or taking of a beneficial interests or property interests as follow, at pp. 551-552:

> As pointed out earlier in connection with the nature of a profit à prendre and the means of its extinguishment, the owner of the fee cannot in law hold a profit à prendre in his own land. This, however, does not mean that the acquisition of an outstanding profit à prendre held by someone else does not enure to his benefit. By depriving the holder of the profit of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee has effectively removed the encumbrance from his land. …

[306] As indicated, the majority in *Tener* also found that the respondents had been expropriated in these terms, at p. 563:

> … The denial of access to these lands occurred under the *Park Act* and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow. …

[307] Again, the question to answer on a motion to strike is not whether I am of the view that the claim has been made out or will succeed, but whether if it is plain and obvious that the claim has no reasonable prospect of success.

[308] Based on the material facts alleged in the FSOC, which are:

1. that the interests granted to Chance in oil and gas in the Subject Lands under its dispositions, the *Act* and its *Oil and Gas Disposition Regulation* were in the nature of a *profit à prendre*; and
2. that as a result of the Moratorium on the use of hydraulic fracturing, which was established in 2015, Chance can no longer access both conventional and unconventional resources in the Subject Lands.

[309] I am of the view that there are sufficient arguable similarities between the circumstances of this case and those in *Tener* with respect to the two requirement of this cause of action to conclude that it is not plain and obvious that Chance's claim in *de facto* expropriation has no reasonable chance of success.

[310] I note that in *Tener,* Wilson J. determined that the owner of the land (the Province) had gained an interest (removal of the encumbrance from its land) from her assessment and analysis of the facts of the case. As such, while Chance has not set out in its FSOC what interests the government is purported to have gained by imposing the Moratorium, I am of the view, based on the reasoning in *Tener*, that it is not fatal to its claim.

[311] Finally, I note that counsel for Chance stated in his submissions that it cannot pursue any more exploration and/or seismic work without the use of hydraulic fracturing. This allegation does not appear in the FSOC and I did not consider it in reaching my conclusion. However, I am prepared to grant Chance leave to amend its FSOC to include this allegation as well as allegations relating to the issue of acquisition of a beneficial interest related to the property by the government, if requested.

(iii) **(a) Should the order in the nature of *mandamus* sought by Chance against the Minister be struck? (para. 97)**

[312] The applicants seek to strike the order in the nature of *mandamus* sought by Chance at para. 97 of its FSOC to compel "the Minister to grandfather Chance's Permits such that the Moratorium not apply to them, and granting an extension to the tenure of the Permits."

[313] The applicants submit that if this relief is struck, the Minister would no longer be a party to the action.

[314] The applicants submit that the eight requirements that must be plead and satisfied before *mandamus* will issue are set out in *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2019 FC 391, ("*Dhillon*") at para. 18, citing *Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100.

[315] The applicants submit that Chance has not plead the elements that must be satisfied for an order in the form of mandamus to be issued.

[316] More specifically, the applicants contend that Chance has not plead: that the Minister has a legal duty to exempt Chance from the application of the Moratorium; that Chance has specifically asked the Minister to exempt it from the Moratorium; and that the Minister explicitly refused. In addition, Chance has not plead that the Minister has an explicit duty to extend the tenure and for how long.

[317] The applicants submit that the pleading does not address the specific requirement of the relief sought, and, therefore it should be struck.

[318] Chance does not take issue with the criteria set out in the decision filed by the applicants.

[319] Chance submits that the pleadings of fact in the FSOC are sufficient to ground the relief sought with respect to an order in the form of mandamus that would provide that the Moratorium does not apply to Chance's oil and gas dispositions.

[320] Chance contends that, given the allegations in the pleading and the role of the Minister pursuant to the *Act* and as the representative of the Yukon, the Minister remains a proper party to this action even if the order in the nature of *mandamus* is struck.

[321] With respect to the specific requirements for an order of *mandamus* to issue, Chance submits that the public duty in this case is the duty to give effect to the rights that

are granted under the dispositions and the *Act*. Chance submits that the Minister has a positive duty to ensure that those vested rights are not interfered with and that the Minister owes this to Chance.

[322] Chance submits, that a generous reading of the pleading reveals that it has plead interactions between Chance and the Minister going back to the Moratorium.

[323] Chance submits that, at para. 48, it has plead that it sent to the Minister a refusal letter.

[324] Chance submits that the pleading sets out that Chance requested that the Moratorium not apply to it and it was denied.

[325] Chance submits that it has been unable to enjoy rights that were granted to it since the Moratorium.

[326] Chance submits that reading the pleading as a whole reveals that the order sought will be of some practical value or effect.

[327] Chance submits that there is no bar to the relief sought; and that on a balance of convenience, an order of *mandamus* should issue.

**ANALYSIS**

[328] In *Dhillon*, the Federal Court lists the eight requirements that must be satisfied before an order in the nature of *mandamus* is issued. They are as follows:

> 18 …
>
> (1) [t]here must be a public legal duty to act;
> (2) [t]he duty must be owed to the applicant;
> (3) [t]here must be a clear right to performance of that duty, in particular:
>  (a) [t]he applicant has satisfied all conditions precedent giving rise to the duty;
>  (b) [t]here was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply

with the demand unless refused outright; and
(iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

(4) [w]here the duty sought to be enforced is discretionary, the following rules apply: [omitted][;]
(5) [n]o other adequate remedy is available to the applicant;
(6) [t]he order sought will be of some practical value or effect[;]
(7) [t]here is no equitable bar to the relief sought; and
(8) [o]n balance of convenience, an order of mandamus should (or should not) issue.

In addition, the requirements for an order of *mandamus* are cumulative and must each be satisfied by the party seeking the order.

[329] Despite Chance's counsel efforts to point out to allegations in the FSOC that could address the specific requirements with respect to the issuance of an order in the nature of *mandamus*, I find that the FSOC lacks specifity and is clearly defective in that regard. For example, Chance not having plead the specific duty to act it relies on nor, with any specificity, the conditions precedent giving rise to the alleged duty.

[330] As such, I am of the view that, based on the pleading, Chance has no reasonable prospect of success with respect to the issuance of an order in the nature of *mandamus*. The relief sought at para. 97 shall be struck with leave to amend, considering the specific submissions made by counsel for Chance at the hearing.

(iii) **(b) Does the order in the nature of *mandamus* constitute the only claim against the Minister? If so, should all the other claims be struck against the Minister?**

[331] As I granted Chance leave to amend its pleading with respect to the order of *mandamus* sought, I turn to the applicants' request that all claims be struck in their entirety against the Minister. I agree with the applicants that the only relief personally sought against the Minister is the order of *mandamus*.

[332] I note that in *Losier v. MacKay, MacKay & Peters Ltd*, Lofchik J. struck the plaintiff's claim against the Minister of the Attorney General on the basis that there was no allegation in the statement of claim against the Minister personally, nor were there facts pleaded which would support such a claim (see paras. 41, 42 and 67).

[333] Lofchik J. stated at para. 42:

> 42. A claim against a Minister of the Crown is a claim against the Minister personally. Ministers are Crown servants for whom the Crown may be held vicariously liable. However, Ministers are not masters to other Crown servants, including their direct subordinates. Consequently, Minister may not be held vicariously liable for the tortious conduct of other Crown servants. A Minister of the Crown is not vicariously liable for the torts of Crown servants since Ministers are themselves servants of the Crown.

[334] As such, I am of the view that all of the plaintiff's claims against the Minister shall be struck.

**(iv) Whether Chance's claim for costs and judgment interest pursuant to the *Judgment Interest Act* should be struck? (para. 98)**

[335] Chance recognizes that, at para. 98 of the FSOC, it has plead inadvertently that it seeks costs and judgment interests pursuant to the *Judgment Interest Act*, whereas it should have plead the *Judicature Act*, R.S.Y. 2002, c. 128.

[336] The applicants are prepared to consent to the amendment.

[337] As such, Chance is granted leave to amend para. 98 of its FSOC to plead that costs and judgments interests are sought pursuant to the *Judicature Act*.

**COSTS**

[338] Costs of this application, in any event of the cause, are awarded to Chance, as it has been for the most part successful in defending this application to strike.

**CONCLUSION**

[339] I order as follows:

1. The Minister and the Government of Yukon's application to strike the plaintiff's claim in whole or in part is granted with respect to the claim of unlawful interference with economic interests and its corresponding remedies, with leave to amend.
2. The Minister and the Government of Yukon's application to strike the remedy sought by the plaintiff in the form of an order of *mandamus* is granted, with leave to amend.
3. The Minister and the Government of Yukon's application to strike the plaintiff's claims in unlawful *de facto* cancellation of disposition, *de facto* expropriation, nuisance, and unjust enrichment is dismissed.
4. The Minister and the Government of Yukon's application to strike all the plaintiff's claims against the Minister personally is granted, without leave to amend.
5. All proposed amendments will be delivered to the Government of Yukon and to the Court at a case management conference.
6. Costs in any event of the cause is awarded to the plaintiff.

_____
CAMPBELL J.