COURT OF APPEAL OF YUKON

Citation: *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources),* 2021 YKCA 6

Date: 20211207
Docket: 20-YU873

Between:

Northern Cross (Yukon) Ltd.

Respondent
(Plaintiff)

And

**The Government of Yukon,
Department of Energy, Mines and Resources (Oil and Gas Branch) and
The Minister of Energy, Mines and Resources**

Appellants
(Defendants)

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of Yukon, dated January 20, 2021 (*Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKSC 3, Whitehorse Docket 17-A0002).

Counsel for the Appellants (via videoconference):	I. Fraser
Counsel for the Respondent (via videoconference):	J.R. Chartier
Place and Date of Hearing:	Vancouver, British Columbia September 13, 2021
Place and Date of Judgment:	Vancouver, British Columbia December 7, 2021

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

Summary:

The respondent brought numerous claims against the Government of Yukon after the government announced a moratorium on hydraulic fracturing in areas where the respondent held oil and gas permits. The government applied to strike most of these claims. The chambers judge refused to strike the claims for de facto expropriation, unlawful de facto cancellation of a disposition, nuisance and two unjust enrichment claims. The chambers judge also refused to consider certain documents as being referentially incorporated into the fresh statement of claim and awarded costs against the government. The appellants challenge each of these determinations. Held: Appeal allowed in part. The claim for unlawful de facto cancellation is struck as it essentially mirrors an application for judicial review. Moreover, the claim for unjust enrichment, with respect to the work product the respondent generated, is struck as it discloses no reasonable cause of action. All other aspects of the appeal are dismissed.

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Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The respondent, Chance Oil and Gas Limited, formerly known as Northern Cross (Yukon) Ltd., holds numerous exploration permits in the Eagle Plains Basin of the Yukon. On April 9, 2015, the appellant Yukon Government ("Yukon") announced a moratorium (the "Moratorium") on hydraulic fracturing in all areas where Chance holds its permits. Chance thereafter commenced an action against the appellant and The Minister of Energy, Mines and Resources, in which it advanced various causes of action. The appellant filed an application to strike most of these claims on the basis that they disclosed no reasonable cause of action. The application was, in large part, unsuccessful. Yukon now appeals most of the chambers judge's orders.

I. BACKGROUND

[2] The Fresh Statement of Claim (the "FSOC") filed by Chance is nearly 100 paragraphs long. Many of the matters it addresses are not directly relevant to this appeal. The following background, which arises from the FSOC, is intended to provide context for the claims that Chance advances. I intend to deal with other more specific background or material facts in the context of the specific issue to which they relate.

[3] In 1994, Chance began exploration activities for oil and gas in the Eagle Plains Basin of the Yukon. The legal framework for issuing and managing oil and gas rights is, in large measure, regulated under the *Oil and Gas Act*, R.S.Y. 2002, c. 162 [*Act*], and the *Oil and Gas Disposition Regulations*, O.I.C. 2016/168 [*Regulations*].

[4] In 2006–2007, Chance, upon making capital spending commitments totaling $21 million, became the successful bidder on 13 exploration permits within the Eagle Plains Basin. In or about 2009 or 2010, Chance obtained two additional exploration permits. These 15 exploration permits were numbered 0005–0017, 0019 and 0020 (collectively, the "Permits"), and they granted Chance certain oil and natural gas rights over an area comprising approximately 1.3 million acres.

[5] In June 2011, Chance secured a major investor in order to enable it to fulfil work commitments under the Permits. That third party invested more than $115 million in Chance. That money was then invested in exploration work undertaken by Chance.

[6] In the FSOC, Chance asserts that this exploration work was undertaken with the intention of pursuing unconventional resources. These are resources that can only be extracted by hydraulic fracturing. It asserts that this intention was made manifest and known to Yukon through, among other things, its application to group various individual exploration permits and the depth of the exploration drilling it undertook.

[7] Chance further asserts that the seismic data it collected, together with other data, gave rise to a resource evaluation that was prepared by Schlumberger Oilfield Services—an entity that is described as a leader in unconventional resource identification and evaluation. That evaluation revealed a large area of shale holding approximately 8.6 billion barrels of oil within the area of the Permits. Chance pleads that these resources can only be extracted by way of hydraulic fracturing. It pleads that hydraulic fracturing is also required as a well-stimulation technique in order to commercially extract conventional resources and that these facts were disclosed to or known by Yukon. Finally, it pleads that it has expended more than $140 million in good faith to pursue unconventional resources.

[8] In May 2013, the Select Committee Regarding the Risks and Benefits of Hydraulic Fracturing was established by Order of the Yukon Legislative Assembly. The purpose of the Select Committee was to conduct reviews and to determine both whether the use of hydraulic fracturing could be undertaken safely and whether the process should be allowed in the Yukon. In January 2015, after a year of hearings, the Select Committee prepared a report and issued recommendations. None of those recommendations included a ban or moratorium on hydraulic fracturing. Rather, the Select Committee recommended that further study be undertaken.

[9] On April 9, 2015, Yukon announced the Moratorium on hydraulic fracturing in all areas of the territory, except for the Liard Basin in the southeast corner. It is of note that none of the parties, either in the record or in their factums, has explained the

jurisdictional basis for the Moratorium. However, the chambers judge noted that Yukon "argue[s] that the establishment of the Moratorium constitutes the exercise of a statutory or prerogative authority."

[10] Chance has pleaded that it has, on account of the Moratorium, requested various concessions from Yukon. It asserts that it was granted some extensions of time on some of the Permits and that it was reimbursed for some of its work deposits. The requests for extensions on other permits were not approved and those permits have since expired.

[11] Chance filed its initial statement of claim in April 2017. It filed the FSOC on February 28, 2020. Yukon did not file a statement of defence. Rather it brought its application to strike Chance's claims.

II. THE REASONS OF THE CHAMBERS JUDGE AND THE ISSUES ON APPEAL

[12] The reasons for judgment of the chambers judge are nearly 75 pages and 340 paragraphs long. Once again, significant parts of the reasons are not engaged by the issues raised on appeal. I again intend, in the main, to address the reasons within the context of the specific issue to which they are relevant.

[13] At the outset the judge described the issues before her and said:

> [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?

[14] The judge ultimately made the following orders:

> [339] …
>
> 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.

[15] Yukon does not appeal the judge's order granting Chance leave to amend its pleading with respect to its intended claim of unlawful interference with economic interests or an order for mandamus. Instead, it raises the following issues on appeal:

i) The judge erred in failing to "incorporate by reference" certain documents that were referred to in the FSOC.

ii) The judge erred in failing to strike the following causes of action advanced in the FSOC:

a. unlawful *de facto* cancellation of disposition;

b. *de facto* expropriation;

c. nuisance; and

d. unjust enrichment.

iii) The judge erred in the costs order she made.

III. THE TEST FOR STRIKING A CLAIM FOR FAILURE TO DISCLOSE A REASONABLE CAUSE OF ACTION

[16] I have addressed the legal framework that governs an application to strike a claim for failure to disclose a reasonable cause of action at the outset because that framework informs the result of all of the issues raised on appeal other than the costs order made by the judge.

[17] Rule 20(26)(a) of the Supreme Court of Yukon *Rules of Court* provides:

> (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.

[18] The judge referred to a number of the leading decisions that set out the relevant test:

> [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).

[19] The judge also said:

> [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).
>
> …
>
> [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 [citations omitted].

[20] Yukon does not suggest that the judge erred, in any respect, in her description of the principles that govern an application to strike brought under Rule 20(26)(a). It does

argue, however, that the judge should have adopted a "robust" approach and that she was too "cautious" in her approach to the applications before her. It relies primarily on *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, in aid of that submission.

[21] In *Atlantic Lottery*, the plaintiffs argued that a claim based on waiver of tort as an independent cause of action for disgorgement had at least a reasonable chance of succeeding at trial. Justice Brown, for the majority, disagreed and struck the action. He did so for the four reasons that he described at paras. 17–22. Three of those reasons were case specific and are not directly relevant. One of them, however, advanced a broader proposition. Specifically, Brown J. referred to *Hryniak v. Mauldin*, 2014 SCC 7, and its exhortation at para. 2, to shift to a culture of "timely and affordable access to the civil justice system." He said: "Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial …. This includes resolving questions of law by striking claims that have no reasonable chance of success": *Atlantic Lottery* at para. 18.

[22] I do not consider, however, that *Atlantic Lottery* modified the lens through which applications to strike for failing to disclose a reasonable cause of action are to be reviewed. This is so for several reasons. First, Brown J. referred to *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, several times without suggesting that he was proposing any change to the legal framework that had been established by that decision. Second, he relied on *Imperial Tobacco* itself for the proposition that "the power to strike hopeless claims is 'a valuable housekeeping measure essential to effective and fair litigation'": *Atlantic Lottery* at para. 18, citing *Imperial Tobacco* at para. 19. It is noteworthy that the judge in this case referred to that same guidance from *Imperial Tobacco*. Finally, Brown J. said: "It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings": *Atlantic Lottery* at para. 19 (emphasis in original).

[23] The proposition that a claim, including a novel claim, that is "hopeless" or that is "doomed to fail" should be struck does not advance a new proposition or suggest any change in the existing guidance provided by *Imperial Tobacco* and other relevant

authorities. A claim that is "hopeless" or "doomed to fail" is necessarily a claim that "discloses no reasonable cause of action" and that has "no reasonable prospect of success". Accordingly, I am of the view that the judge properly described and applied the lens through which the application before her was to be viewed.

IV. DID THE JUDGE ERR IN REFUSING TO "INCORPORATE BY REFERENCE" DOCUMENTS THAT WERE REFERRED TO IN THE FSOC?

A. The relevant standard of review

[24] With regard to this issue, the judge reviewed several authorities to which she had been referred and then summarized the principles that governed the exercise before her. Thereafter, and with that summary in hand, the judge addressed each of the documents that Yukon suggested should be referentially incorporated into the FSOC.

[25] In my view, this issue raises questions of mixed fact and law and the judge's conclusions are entitled to deference. A question of mixed fact and law involves applying a legal standard to a set of facts: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 26. Absent an extricable error in principle, or a palpable and overriding error, such questions are entitled to deference: *Housen* at paras. 31–32, 36; *Kareway Homes Ltd. v. 37889 Yukon Inc.*, 2013 YKCA 4 at paras. 15–16.

B. Analysis

[26] Yukon initially sought to have nine different documents incorporated into the FSOC. Both parties agreed that the Permits are incorporated into the FSOC and could be considered as part of the pleadings. The judge concluded that Chance's well licenses were also referentially incorporated into the FSOC. She did not accede to Yukon's submissions in relation to the remaining seven documents. Yukon now asserts that she erred in relation to two of those documents or groups of documents. The first group of documents is Chance's permit grouping proposal and applications. The second is Chance's presentation to the Select Committee.

[27] There is virtually no jurisprudence in this territory that explains when it is appropriate to referentially incorporate a document into a pleading. The same is largely

true, for example, in British Columbia. There is, however, a well-developed body of law that addresses the issue in both Ontario and the Federal Courts.

[28] The judge considered several decisions of both the Court of Appeal for Ontario and the Federal Court of Canada in some detail. She then summarized the principles arising from those cases in the following terms:

> [55] …
>
> 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. …
> 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.

Yukon does not challenge these principles as stated by the judge.

[29] One of the decisions the judge referred to at some length was *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, leave to appeal to SCC ref'd, 38915 (10 December 2020), where the Court said:

> [45] But this does not completely deal with the concern that was expressed in *Pearson*. 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 Rule 21 motion.

1. The permit grouping proposal and application

[30] The judge described the permit grouping proposal and grouping application:

> [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.
>
> [Emphasis in original.]

[31] Yukon says that the judge erred in "telescop[ing]" two distinct questions into one. The first question, it argues, is whether a document has been referentially incorporated into a statement of claim because it is expressly referred to in that pleading. The second question is what use may be properly made of the content of that document on an application to strike.

[32] Yukon further argues that because Chance pleaded that Yukon knew that hydraulic fracturing was required for it to exercise the rights it had been granted "[a]ny statement by Chance in any document that contradicted this all-encompassing, absolute, and unqualified assertion might properly be considered by the court, … in the context of determining if any one of Chance's claims should be struck (because an allegation was manifestly incapable of proof)".

[33] In my view, neither aspect of this submission has merit. The distinction between declining to incorporate a document and incorporating a document into a pleading but then being unable to rely on or use the document is largely artificial. Furthermore, the case law does not appear to support the distinction advanced by Yukon. Thus, for

example, a document that is referred to in a pleading but that contains or constitutes evidence does not form a part of that pleading: *Darmar* at paras. 44–46; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 35.

[34] Moreover, the fact that some statement in some document may be inconsistent with Chance's pleading that Yukon knew hydraulic fracturing was required for it to exercise its rights does not mean that Chance's allegation would be "manifestly incapable of proof". Instead, the point made by the judge, that "the oral exchanges surrounding the grouping applications necessarily informs the nature and scope of the statements contained in the two documents" is both apt and sound.

[35] Finally, the proposition advanced by Yukon is inimical to the nature of the exercise a court undertakes in an application to strike. Such applications are primarily concerned with whether the elements of a cause of action, based on the material facts pleaded, have been made out or whether it is plain and obvious that the pleading discloses no reasonable cause of action. The court does not, however, engage in a nuanced consideration of whether different, and arguably competing, statements in different documents establish the material facts pleaded.

2. Chance's presentation to the Select Committee

[36] The judge said:

> [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.

[37] Yukon, in its factum, again argued that the judge's analysis "telescoped" two questions into one and it further argued that although "[i]t might be a plausible speculation" that there was an oral presentation to the Select Committee, the FSOC does not allege that fact. I have earlier dealt with the first part of this submission. In relation to the second submission, the pleading at para. 52 of the FSOC that "Chance … presented to the members on January 31, 2014", supports the reasonable inference that Chance's presentation had an oral component.

[38] Indeed, at the hearing of the appeal Yukon announced that its subsequent inquiries had confirmed there was a transcript of Chance's oral presentation to the Select Committee. That transcript was not made available and Yukon did not apply to adduce fresh evidence. Instead, it suggested that we might access the transcript online. Furthermore, counsel for Chance only learned of the existence of the transcript at the appeal hearing. In such circumstances I do not consider there to be any principled basis for the Court to access or consider the transcript.

[39] In my view, the judge committed no error in principle, nor any palpable and overriding error, in declining to incorporate either of the foregoing groups of materials into the FSOC.

V. DID THE JUDGE ERR IN REFUSING TO STRIKE VARIOUS CAUSES OF ACTION FROM THE FSOC?

A. Standard of review

[40] The case law that addresses the standard of review for Rule 20(26)(a) applications or for identical provisions in the rules of court in other provinces, is inconsistent.

[41] In the Yukon, though the case law is not explicit, courts appear to apply a correctness standard: see *Wood v. Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16, leave to appeal to SCC ref'd, 38493 (9 May 2019), at paras. 22, 32–38; *Ausiku v. Hennigar*, 2011 YKCA 5 at paras. 20–33.

[42] The Court of Appeal of Alberta in *Al-Ghamdi v. College and Association of Registered Nurses of Alberta*, 2020 ABCA 81, recently said:

> [10] In striking a claim under r 3.68(2)(d) as disclosing no reasonable claim or for abuse of process the standard of review is correctness: *Waquan v Canada (Attorney General)*, 2017 ABCA 279, para 16, [2018] 4 WWR 361; *Vanmaele v Maryniak*, 2018 ABCA 179, para 6, [2018] AJ No 601. However, assessment of the facts, application of the law to the facts, and ultimate determination as to whether to strike a claim, is discretionary and subject to reasonableness: *Grenon v Canada Revenue Agency*, 2017 ABCA 96, para 4, 49 Alta LR (6th) 228; *Nammo v Canada (Justice and Attorney General)*, 2015 ABCA 389, para 7, 609 AR 189; *O'Connor*, paras 11 and 13.

[43] In Ontario, the Court of Appeal has consistently determined that the standard of review for striking a claim as disclosing no reasonable claim is correctness: see *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618 at para. 19; *McCreight* at para. 38.

[44] Although the Court of Appeal for British Columbia has generally determined that the applicable standard of review on an application to strike a claim as disclosing no reasonable claim is correctness, the case law is not entirely consistent: see the discussion in *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at paras. 38–44.

[45] I do not consider it necessary for me to resolve whatever inconsistency may exist in the relevant authorities. I am of the view that the questions that arise in this case are extricable questions of law to which the standard of correctness would apply.

B. The claims advanced by Chance

[46] Before turning to the specific claims that Yukon argues the judge ought to have struck, it is important to understand the underlying thesis of Chance's various claims. As I understand it, Chance accepts that it was open to Yukon to "cancel" the Permits under the *Act* and *Regulations*.

[47] Section 1 of the *Act* establishes that an oil and gas permit and an oil and gas lease is a "disposition" under the *Act* and its *Regulations*. Dispositions under the *Act* may only be revoked or cancelled in specific circumstances as set out in ss. 23 and 28 of the *Act*. There is no suggestion that s. 23 of the *Act* is engaged as it pertains to

grounds for cancellation that arise from the breach of a term or condition of a disposition or from the failure to comply with a notice given under the *Act* or a disposition.

[48] Section 28(1)(a) of the *Act*, however, authorizes the Minister to 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". Section 58 of the *Regulations* prescribes the compensation payable when the Minister cancels a disposition under s. 28(1) of the *Act*.

[49] Chance did not, however, receive any notice from the Minister, in accordance with s. 60 of the *Regulations*, of the Minister's intention to cancel its dispositions pursuant to s. 28 of the *Act*. Nor does Chance know, because Yukon has yet to file a Statement of Defence, whether Yukon will rely on the cancellation provisions of the *Act*. Nevertheless, Yukon conceded before the chambers judge that Chance's position that the Moratorium constitutes a cancellation of the Permits was arguable. Accordingly, it did not seek to strike the portions of the FSOC that rely on the cancellation provisions of the *Act* and *Regulations*. Chance describes this aspect of its claim as "de facto statutory cancellation".

[50] If Yukon does ultimately rely on the cancellation provisions of the *Act* and *Regulations*, Chance would not, as I understand it, rely on the remaining causes of action that are advanced in the FSOC and that are at issue in this appeal. Instead it relies on those additional causes of action in anticipation that Yukon will rely on defences that do not engage the formal cancellation provisions of the *Act* and *Regulations*.

1. Unlawful *de facto* cancellation of a disposition

[51] Chance pleads that the Moratorium is an "unlawful de facto cancellation" of its oil and gas rights: FSOC at paras. 65.1–67. There are two parts to this claim. First, that the Moratorium amounts to a cancellation of Chance's rights; and second, that the cancellation is unlawful in that it does not adhere to the cancellation requirements of the *Act* and *Regulations*.

[52] Yukon concedes, as I have said, that it is arguable that the Moratorium constitutes a cancellation of Chance's interests. It asserts, however, that Chance cannot claim damages on the basis that the cancellation was undertaken unlawfully. The judge explained Yukon's position in the following terms:

> [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.

[53] The judge ultimately determined:

> [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).
>
> …
>
> [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.

[54] On appeal, Yukon reasserts that if the Moratorium was unlawful, it was open to Chance either to apply to set aside the Moratorium on an application for judicial review or to advance a claim for damages against the Minister personally. It asserts, however, that a claim in damages against Yukon has no reasonable prospect of success. In my view, these submissions miss the central difficulties with the "unlawful de facto cancellation" claim advanced by Chance.

[55] In *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, the plaintiff company brought a civil action against the federal Crown in the Ontario Superior Court of Justice, claiming damages for breach of contract, negligence and unjust enrichment. These claims arose from a decision of the Minister of Industry that rejected TeleZone's application for a licence to provide telecommunication services. The Attorney General challenged the jurisdiction of the Superior Court, arguing that TeleZone's action was a collateral attack on the Minister's decision and that it was barred by the exclusive jurisdiction granted to the Federal Court in relation to the decisions of federal boards and tribunals.

[56] Justice Binnie, for the Court, dismissed the appeal and considered that the appeal was "fundamentally about access to justice" and that "[p]eople who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize necessary cost and complexity": at para. 18. He observed that the public purposes served by judicial review are fundamentally different from the purposes that underlie private causes of action such as contract and tort cases: at para. 24. He further commented that the validity of an administrative decision and the Crown's liability in tort, or otherwise, present separate justiciable issues, some of which may overlap: at para. 30. He concluded:

> [76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.
>
> …

> [78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

[57] *TeleZone* was followed in a series of companion cases: see *Canada (Attorney General) v. McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66; *Manuge v. Canada*, 2010 SCC 67.

[58] In my view, aspects of the blunt propositions that are advanced by Yukon do not accord with *TeleZone*. Nevertheless, there are two interrelated difficulties with Chance's "unlawful de facto cancellation" claim. First, an "unlawful de facto cancellation" is not an existing cause of action. In *TeleZone*, and in, for example, *Nu-Pharm*, *Parrish* and *Manuge*, the Court permitted various civil actions to proceed without first requiring the plaintiffs in those actions to seek judicial review, but these were all based on existing causes of actions. I have earlier identified the causes of action that were advanced in *TeleZone*. In *Nu-Pharm*, the plaintiff sought damages for illegal interference with economic interests, abuse of authority, misfeasance of public office and negligence. Similar causes of action were advanced in *Parrish*. In *Manuge*, the plaintiff brought a class action seeking constitutional remedies, declarations, damages or restitution and a claim for breach of fiduciary duty.

[59] In this case, the judge was alive to this difficulty, though she did not consider it "fatal", when she recognized that: "Chance has not plead[ed] nor does it appear to rely on any specific tort to seek damages for the alleged unlawful cancellation of its disposition."

[60] Chance did not, and it does not now, argue that an "unlawful de facto cancellation" is a novel cause of action. To the extent an "unlawful de facto cancellation" might constitute a novel claim, a different but related difficulty arises. In *TeleZone*, the

Court expressed a caution about damage claims that were in their "essential character" claims for judicial review with "only a thin pretense to a private wrong": at para. 78.

[61] Decisions that address this concern normally require an analysis of the pleadings in order to ascertain whether the claims being advanced raise issues that are distinct from those that would be addressed on judicial review. In *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214, the plaintiff concurrently sought judicial review of various decisions made by the Province and filed a notice of civil claim in which it advanced a claim for misfeasance in public office against the Province. The Court said:

> [57] Clearly, both proceedings arise from the same facts. Although Greengen's allegation of unlawfulness touches on issues of jurisdiction and process, it raises a fundamental issue about the substantive basis for the decisions rejecting its applications. Specifically, Greengen alleges that the decisions were made for "collateral political or otherwise improper reasons having no relation to the merits or legality of the Project", thus rendering them "unlawful" – not for the purpose of declaring them invalid – but rather for the purpose of asserting that the decision makers engaged in deliberate and unlawful conduct. These purposes are distinct. The unlawful conduct alleged in support of a misfeasance claim is of a different character than that alleged in support of a remedy on judicial review. As the Province acknowledges, a finding of invalidity is common to both proceedings but whether that invalidity constitutes misfeasance of a public office depends on other evidence.

[62] The Court in *Greengen* referred to several other decisions where a review of the pleadings confirmed that the civil claims being advanced were distinct from those that would arise on judicial review or in a statutory appeal process: at para. 55.

[63] Conversely, in *Stewart v. Clark*, 2013 BCCA 359, the appellant's claim arose from the reduction of his retirement pension following the bankruptcy of his former employer. He alleged that the Superintendent of Pensions had, in the context of proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, acted unlawfully in failing to direct the pension funds be distributed in accordance with priority provisions in the pension plan, causing the appellant and others loss of pension income. The appellant advanced different causes of action against different Crown respondents. The Crown respondents brought separate applications to strike the appellant's action as an abuse of process. The appellant argued that his civil

claim was not an attempt to challenge the validity of the Superintendent's decision, but rather it was a claim for damages resulting from tortious actions of the Superintendent in the course of administering the pension plan.

[64] The Court referred to various portions of *TeleZone* and it accepted that the appellant did not seek to set aside the Superintendent's decision. Nevertheless, the Court determined that the allegations in the pleadings "[were] more in the nature of allegations of unfairness and lack of process, which are fundamental questions for judicial review" and that an analysis of the claims led to the conclusion "that they [did] not raise any distinct or separate justiciable issues from those that would be addressed on judicial review": at paras. 75 and 77. The Court concluded that though the appellant claimed damages, which would be unavailable if he were successful on judicial review, "the essential nature of his claims is an attack on the lawfulness of the Superintendent's decision, raising issues of jurisdiction, limits of statutory authority, process, and fairness": at para. 77. Finally, the Court said that the appellant sought compensation "for allegedly unlawful conduct of the Superintendent in determining jurisdiction and process": para. 79. In the result, the Court struck the claim.

[65] In *Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2019 BCCA 302, the appellants similarly had their pleadings struck for failing to disclose a cause of action. The Court concluded, after referring to *TeleZone* and reviewing the pleadings, that all of the wrongs pleaded were directly related to the manner in which the Commission had performed its statutory powers and obligations: at paras. 16–17.

[66] In this case, the relevant parts of the FSOC state:

> 65.2 The Minister's decision to implement a Moratorium was an arbitrary and unreasonable one that was not based on any science or study, and therefore without legislative authority. As a result, the Moratorium is an unlawful de facto cancellation of the disposition.
>
> 66. The Defendants' knew that hydraulic fracturing was essential to the meaningful exercise of Chance's rights. Accordingly, the Defendants knew or ought to have known that the Moratorium constituted a de facto cancellation of the Disposition, since it has barred the very method by which Chance could extract the resources contained within the Subject Lands.

[67] The judge appears to have appreciated the essential nature of Chance's claim when she referred to para. 65.2 of the FSOC and said:

> [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*.
>
> [Emphasis added.]

[68] Nevertheless, the judge did not consider whether Chance's "unlawful de facto cancellation" claim "allege[d] the elements of a private cause of action" or whether the "essential character" of that claim mirrored an application for judicial review: *TeleZone* at paras. 76 and 78. In my view, that failure constitutes an error in principle. The relevant paragraphs of the FSOC do not advance the elements of any known or novel cause of action. There is, for example, no assertion that the Moratorium was imposed negligently, that it was imposed with an intention to harm, or that it was imposed knowing that it was unlawful. Further, the material facts in the paragraphs of the FSOC that address this claim do no more than assert that the Moratorium was imposed without authority. That pleading at its core, or "in its essential character", is directed to the legality of the Minister's decision and mirrors an application for judicial review.

[69] In my view, this claim has no reasonable prospect of success and I would strike it from the FSOC.

2. *De facto* expropriation

[70] In the FSOC Chance pleads:

> 73. The Defendants' Moratorium also constitutes a de facto expropriation of Chance's interests, which interests constitute a profit-à-prendre and qualify as an interest affecting land that is subject to the *Expropriation Act*, RSY 2002.

> 74. The Moratorium effectively expropriates the interests of Chance in the Subject Lands. Northern Cross does not own the oil and gas *in situ*; Chance owns the right to exploit the resources through extraction. The Moratorium effectively takes away Chance's right and ability to pursue development of the oil and gas resources that have been proven to exist on the subject lands, at all or in an economically feasible manner.
>
> 75. Based on the above, the Moratorium has, by disallowing Chance's sole means of extracting the resources, effectively confiscated all of its rights under the profit-à-prendre. This is a derogation by the Defendants from the grant of oil and gas rights to Chance and constitutes de facto expropriation. Chance is thereby entitled to compensation pursuant to the *Expropriation Act.*
>
> 76. Section 7 of the *Expropriation Act* provides that the Minister's discretion to expropriate a property right for a public purpose is subject to the requirement to make compensation as outlined in the act. In turn, section 8 holds that the compensation may be assessed on the basis of the reasonable cost of equivalent reinstatement.

[71] Before the judge, Yukon raised numerous concerns with this claim. The judge addressed and then dismissed each concern within the context of the specific application before her. On appeal, Yukon no longer raises several of these issues, and its written submissions are limited to two issues. Both issues arise from the twin requirements for a *de facto* expropriation that are set out in *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 at para. 30, and that the judge cites at para. 285 of her reasons: "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).

[72] Thus, Yukon argues that (i) it did not acquire a beneficial interest in any property as a result of the Moratorium, and (ii) the moratorium did not deprive Chance of "all reasonable uses" of the lands covered by the Permits.

[73] In its oral argument, Yukon raised a third issue. It accepted that the Permits might constitute an interest in the nature of a *profit à prendre*, but it argued that the rights granted to Chance under the Permits were limited to the right to drill for exploratory purposes and to keep the oil or gas it extracted through such exploratory drilling. Yukon argued that the Permits provided Chance with no further entitlement to the oil and gas under the lands covered by the Permits or to an oil and gas lease.

[74] This issue was raised before the judge who said:

> [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.

[75] Similar difficulties arise at this stage. Yukon orally advanced various propositions about the relevant regulatory framework without expressly identifying the provisions or the enactments that it relied on. Broadly speaking, in its factum and in explaining the regulatory regime, it simply refers to the *Act* and *Regulations*. Insofar as it relates to the *Act*, it identifies various sections that appear to have little to do with the specific issues before the court and it omits other sections that are patently relevant. In relation to the *Regulations*, it identifies no specific sections as relevant. Similarly, it identifies various other regulations, which are extensive in nature, without ever identifying which provisions within those regulations pertain to the issues before the court.

[76] In relation to this issue, that being the rights granted to Chance under the Permits, the judge at para. 293 noted that each of the Permits contained 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.
>
> [Emphasis in the judge's reasons.]

[77] The judge also referred to paras. 37 and 38 of the *Act* which provide:

> **37 Conversion to lease**
>
> (1) Subject to the regulations and this section, the permittee, at any time during the term of an oil and gas permit, may apply for an oil and gas lease granting oil and gas rights in the location of the permit.

> (2) If the permittee does not apply for a lease under this section before the end of the term of the permit, the Minister shall determine the location of the lease in accordance with subsection (3) and issue the lease accordingly.
>
> (3) The location of a lease issued under this section
>
> (a) subject to paragraph (b), shall consist of those portions of the permit location within
>
> (i) a spacing area containing one or more productive zones, or
>
> (ii) a partial spacing area if any part of the spacing area contains one or more productive zones; and
>
> (b) in respect of each spacing area or partial spacing area referred to in paragraph (a), shall extend down to the base of the productive zone that is stratigraphically the deepest in the spacing area.
>
> …
>
> **38 Rights granted by lease**
>
> Subject to this Act and the regulations, an oil and gas lease grants, in accordance with the terms and conditions of the lease, the right to oil and gas in the location of the lease.
>
> [Emphasis added.]

[78] Based on these provisions, the judge concluded "that Chance's rights as they appear on Chance's Permits, and most importantly the right to obtain 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*."

[79] I see no error in principle in this conclusion. This is based in part on how the issue was advanced before the judge and on appeal, and in part on the fact that the application before the judge was an application to strike on the basis that the pleadings did not disclose a cause of action, with all of the caution that attends such applications. To be clear, I do not question that an oil and gas lease would contain numerous regulatory and environmental requirements that would dictate, and potentially limit, how Chance could conduct its commercial activities. That, however, is a different question from whether the Permits, *Act* and *Regulations* arguably provided Chance with the right to oil and gas leases.

[80] An aspect of this distinction was addressed in *R. v. Tener*, [1985] 1 S.C.R. 533, 1985 CanLII 76, a case referred to by the judge. In *Tener*, the respondents were the registered owners of mineral claims, granted in 1937, on lands located within a

provincial park. The conditions governing the exploitation of natural resources within the park gradually became more onerous and, for several years prior to the action, the respondents were denied the park-use permits they required to explore or work their mineral claims. The respondents were finally advised by letter that no new exploration or development work would be permitted under current park policy. The action was commenced because the respondents considered that their ability to explore or work their mineral claims had been conclusively denied. The central issue was whether these actions by the Crown gave rise to a statutory right to compensation. The Court delivered two judgments that concurred in result.

[81] Justice Estey, who wrote the majority opinion, drew a distinction between regulatory requirements that were relevant to valuation of the claims and government conduct, such as the Moratorium in this case, that were relevant to a taking. At 563 he said:

> There have been, in the result, two clouds of regulation hanging over these lands. The original grant was subject to mineral regulations. Thereafter, these lands became subject to the *Park Act* and its regulations. In my view of the law, in these factual circumstances, only the former regulations are to be taken into account in the valuation process and only the latter regulations in the taking process.

[82] Similarly, there appears to have been some argument in *Tener* that the Crown's policy with respect to the park might change. This is akin to arguing in this case that the Moratorium may, at some point, be lifted. Yukon makes the submission that the Moratorium, now in place for more than six years, is "temporary." In relation to this issue Estey J., at 564, said:

> … [I]n this case, the respondents are left with the minerals. The value of the minerals in such a state depends upon one's assessment of the chances of a reversal of executive policy in the issuance of a removal permit under the *Park Act*. This is relevant to the valuation process and particularly if and when the Crown takes the last step and expropriates the minerals themselves. … It has, however, an importance now because the value of the loss of access, the interest which in my view has now been taken from the respondents, must represent the total value of the minerals less whatever value may be attributed to the future possibility of the issuance of a removal permit. All this is for the tribunal charged with determination of compensation, to decide.

[83] Another aspect of *Tener* is relevant to Chance's *de facto* expropriation claim. In separate reasons, Justice Wilson addressed the nature of the interest that the respondents held. It was common ground that the mineral claims in issue constituted an interest in land. I similarly understand that Yukon accepts, at least for present purposes, that the Permits and an oil and gas lease constitute an interest in land. Justice Wilson, at 540–542, said:

> A profit à prendre is defined in *Stroud's Judicial Dictionary* (4th ed.), vol. 4, at p. 2141, as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In *Black's Law Dictionary* (5th ed.), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for exercise of the profit".
>
> …
>
> 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. This may be significant when attempting to answer the questions: what constitutes the expropriation of a profit à prendre? what constitutes injurious affection in the case of a profit à prendre?
>
> …
>
> It seems to me that the effect of the refusal of the permit (and for purposes of this litigation the refusal must be viewed as absolute as opposed to temporary) was, in lay terms, to prevent the respondents from exercising their right to go upon the land for the purpose of severing the minerals and making them their own. They were prevented, in other words, from realizing on their mineral claims.
>
> [Emphasis in original.]

[84] With these principles in hand, I return then to the two requirements that are identified in *Canadian Pacific Railway* and that Yukon raises on appeal.

a) Acquisition of beneficial interest

[85] Yukon argues that the Moratorium did not transfer any beneficial interest in the lands covered by the Permits to it. Once again, *Tener* is directly relevant. In addressing this specific issue, Estey J., at 563, said: "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."

[86] Similarly, Wilson J., at 551–552, said:

> 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 its land. It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense.

[87] The judge quoted portions of both of the foregoing passages and concluded that it was not plain and obvious, with respect to this first requirement of the cause of action, that Chance's claim had no reasonable prospect of success. I see no error in principle in that conclusion. I also observe that Chance has pleaded that, on account of the Moratorium, several of the individual Permits have expired. The interest in those specific permits would again have reverted to Yukon.

[88] Yukon also argues that "[r]egulation that enhances the value of public land does not constitute the acquisition of an interest in land." In aid of this submission, it relies on each of *Canadian Pacific Railway* at para. 33; *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98 at paras. 93–99 and 105–107; and *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3 at para. 61, 88–95, leave to appeal to SCC granted, 39594 (24 June 2021). Though the broad proposition Yukon advances is correct, these authorities do not assist Yukon. First, each of the foregoing cases, unlike the present case, is a rezoning case. In *Tener*, Estey J., at 557, noted: "Zoning illustrates the process. Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down." See also *Annapolis* at paras. 41–42 and 56; *Canadian Pacific Railway* at para. 12, citing *Vancouver Charter*, S.B.C. 1953, c. 55, *s.* 569; *Mariner Real Estate* at para. 42.

[89] Second, and more specifically, in *Mariner Real Estate*, Cromwell J.A., as he then was, addressed the specific submission that "*Tener* stands for the proposition that

where regulation enhances the value of public land, the regulation constitutes the acquisition of an interest in land": at para. 93. He disagreed and said:

> [94] … When the judgments in *Tener* are read in their entirety and in light of the facts of the case, there is no support for the proposition on which the respondents rely. It is clear in the judgments of both Estey, J. and Wilson, J. in *Tener* that what was, in effect, acquired in that case was the reversion of the mineral interest which had been granted by the Crown.

[90] The judge correctly relied on this narrow point from *Tener*.

b) Removal of all reasonable uses

[91] Yukon argues that an owner must be deprived of "all reasonable uses of the property", evaluated not in relation to the highest and best use of the property, but having regard to the range of reasonable uses to which it has actually been put: *Canadian Pacific Railway* at para. 34; *Mariner Real Estate* at paras. 42, 47–49. Further, Yukon says that the loss of "virtually all economic value" in the property is not a taking, citing *Mariner Real Estate* at paras. 47–48, 63, 71–79.

[92] The judge, in addressing this particular submission said:

> [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).

[93] I see no error in principle in these conclusions. Chance pleaded at paras. 38.1 and 39 of the FSOC that hydraulic fracturing is required for it to extract both conventional and unconventional resources identified within the area subject to the Permits. It does not own the land nor the oil and gas that exist under the surface of those lands. It claims that the only interest it is granted, under either the Permits or an oil and gas lease, is the right to extract oil and gas for either exploratory or commercial purposes. It says that the only mechanism by which it can exercise the rights it has

been granted is through hydraulic fracturing. A prohibition on hydraulic fracturing is, in essence, no different than a prohibition on its being able to access the lands covered by the Permits.

[94] Based on the facts alleged in the FSOC, this is not a case of Chance's interests having been rendered less valuable. Instead, its pleadings allege that it has been deprived of all reasonable uses of its property interest. In saying this, I recognize that aspects of those pleadings are ambiguous or inconsistent. For example, at some points Chance pleads that the Moratorium "effectively expropriate[d]" or "effectively confiscated" its rights: FSOC at paras. 74, 75. Notwithstanding such ambiguity or potential inconsistency, the conclusions of the judge reflect a generous interpretation of the FSOC consistent with the proper approach in *Imperial Tobacco.*

[95] Furthermore, Yukon's concession that it is arguable the Moratorium cancelled Chance's interests in the Permits, and I would say its right to oil and gas leases, is again directly relevant. A recognition that the Moratorium arguably had the effect of "cancelling" such interests is a full answer to any submission that the Moratorium did not have the effect of "removing all reasonable uses" of the legal interests Chance now holds or that it earlier held.

[96] Finally, the judge noted that though Chance's counsel had argued before her that hydraulic fracturing was required to enable Chance to continue its exploration work, that allegation was not expressly pleaded in the FSOC. Accordingly, she granted "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." This was a discretionary decision that was open to the judge and that was consistent with her obligation to read the pleadings "generously".

[97] I would dismiss this ground of appeal.

3. Nuisance

[98] In the FSOC Chance pleads:

> 89. In the further alternative, if Chance's interests have not been cancelled or revoked, the Moratorium constitutes a nuisance.

> 89.1 The 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. Notably, the Liard Basin in the south east corner of the Yukon is not subject to the Moratorium.
>
> 89.2 The Moratorium is a discretionary measure; it was neither mandated by the legislation, nor a necessary consequence of an action required by the legislation. As such, the Minister was obligated to exercise his discretion in strict conformity with private rights. He failed to do so, and therefore acted outside the scope of his authority.
>
> 90. The Moratorium unreasonably interferes with Chance's ability to exercise its proprietary interests, namely the profits-à-prendre granted by the Permits, in an economically feasible and efficient manner by effectively blocking access to those interests.

[99] Yukon raised several issues in relation to this cause of action that were not accepted by the judge and that are not pursued on appeal. Yukon's appeal rests on two somewhat related propositions. First, it argues that the tort of nuisance requires a defendant to engage in, or permit, some use of land that "spills over", causing harm to the plaintiff's property or otherwise interfering with the plaintiff's use of property. It says the Moratorium cannot constitute a "use of land." Second, Yukon argues that an essential element of the tort of nuisance is that the interference caused by the use must be indirect. Direct interference constitutes a trespass. It argues that the Moratorium applies directly to, and is intended to have regulatory effect directly on, "the affected land."

[100] In relation to the first issue, the judge, relying on *Chingee v. British Columbia*, 2017 BCCA 250, concluded that interference with a *profit à prendre* "by the exercise, on the same land, of someone else's competing interest in land, may … be an arguable claim." In *Chingee*, the plaintiff, the holder of a trap line and guiding territory certificates on Crown land, sued a number of forest companies in nuisance and trespass. The plaintiff claimed that the forest companies' logging activities on that same land had caused harm to his business and negatively impacted the forest and wildlife. The motions judge in *Chingee* struck the plaintiff's claim in nuisance on the basis that it was plain and obvious that the pleading lacked various material facts and that the plaintiff could not establish the interference he complained of was unreasonable in all the circumstances. The Court of Appeal upheld the decision to strike on the basis of the

defective pleading: at para. 55. The Court observed, however, that if necessary material facts had been pleaded there was "no doubt that such a claim in nuisance capable of surviving a motion to strike could be pleaded": at para. 53.

[101] The judge said:

> [206] … 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[d] 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.

[102] In relation to the second issue, that being the requirement that the interference complained of must be indirect in nature, the judge said:

> [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.

[103] In order to address these issues, several core propositions are relevant.

[104] A nuisance is defined as "a substantial and unreasonable interference with the use and enjoyment of land": Allen M. Linden et al., *Canadian Tort Law*, 11th ed. (Toronto: LexisNexis, 2018) at 548; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 18–19. It is a cause of action that is available to landowners. It is also available, for example, to persons who hold mineral rights or a *profit à prendre*: Linden et al. at 549; Karen Horsman & Gareth Morley, *Government Liability: Law and Practice* (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021, release 2), ch. 7:4 at 7-10, and the authorities that are referred to therein.

[105] Nuisance can also take "a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier": *Antrim* at para. 23, citing *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1190–91, 1989 CanLII 15.

[106] In this case, there is no suggestion that the Moratorium caused any damage to land. Interferences with the use or enjoyment of land often include such things as unpleasant smells, noise, vibration and smoke. They can, however, include interferences with a landowner's access to their property, as in *Antrim*; see also Horsman & Morley, ch. 7:13 at 7-39, and the cases that are referred to therein. A fence or gate that prevents a landowner from accessing their property can constitute a nuisance: *Smith v. Balen*, 2018 BCSC 918; *Moyer v. Mortensen*, 2010 BCSC 1528. So too can a blockade that prevents the holder of a *profit à prendre* from exercising their rights: *Husby Forest Products Ltd. v. Jane Doe*, 2018 BCSC 676 at para. 39; *MacMillan Bloedel Ltd. v. Simpson* (1993), 106 D.L.R. (4th) 556 at 562, 1993 CanLII 9424 (B.C.S.C.), aff'd 118 D.L.R. (4th) 1, 1994 CanLII 943 (C.A.).

[107] Chance argues the Moratorium is akin to a fence in that it prevents Chance from exercising its rights under the *profit à prendre* it holds. At para. 90 of the FSOC, it pleads that the Moratorium is "effectively blocking access" to its interests. It accepts, as it did before the judge, that the proposition it advances is novel. The question then becomes whether there is a principled difference, for the tort of nuisance, between Yukon constructing a fence that prevents Chance from engaging in certain activities and Yukon issuing a Moratorium—or for that matter a direction—that prevents Chance from engaging in activity necessary for it to exercise the *profit à prendre* it holds. I emphasize that the precise basis for the Moratorium has not been addressed and that, at this stage, no issue of either statutory authority or statutory immunity arises.

[108] The tort of nuisance is normally concerned with the physical world. The tort generally deals with damage or interference that can be seen or sensed. The harm suffered typically has its genesis in either positive conduct or a failure to act. Nevertheless, three further propositions are relevant.

[109] First, we have seen that the threshold for an application to strike brought under Rule 20(26)(a) requires that the cause of action have no reasonable prospect of success or be "certain to fail".

[110] Second, the Supreme Court of Canada has confirmed that the categories of nuisance are not fixed or closed: *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906 at 915, 1987 CanLII 60; *Antrim* at para. 22. The judge made this same point when she relied on *Joyce et al. v. Government of Manitoba*, 2018 MBCA 80 at para. 13, leave to appeal to SCC ref'd, 38363 (28 March 2019). Erika Chamberlain & Stephen G.A. Pitel, eds., *Fridman's The Law of Torts*, 4th ed. (Toronto: Thomson Reuters, 2020) at 192 comment that "the scope of [the] tort can be stretched to cover novel problems" and give harassing phone calls as an example, as in *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 at 76–78, 1976 ALTASCAD 155 (Alta. C.A.). On its face, a harassing phone call has little do to with the use of land.

[111] Third, and importantly, the focus in nuisance is on the harm suffered by the plaintiff, rather than on the nature of the conduct giving rise to that harm: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77; *Antrim* at para. 28; *Baker v. Rendle*, 2017 BCCA 72 at para. 39. In Linden et al. at 535, the authors succinctly express this proposition: "The essence of the nuisance tort is the interference with a plaintiff's rights in or arising from property. Nuisance is, accordingly, plaintiff-focused—'a field of liability that focuses on the harm suffered rather than on prohibited conduct'."

[112] Here, however, Yukon seeks to reverse this focus. It emphasizes the specific nature of its conduct. But it does not, for present purposes, question the primary and true focus of the tort, that being that the Moratorium "substantially and unreasonably interferes with [Chance's] enjoyment of rights in land." Having regard to the foregoing principles and considerations, in my view the judge was correct when she refused to strike this cause of action on this basis.

[113] Yukon also again emphasizes that the Moratorium is "temporary". I have earlier, at para. 83, dealt with aspects of this submission. Often, a temporary or fleeting occurrence will not constitute a nuisance. However, in *Antrim* the Supreme Court of Canada observed that "temporary interferences may certainly support a claim in nuisance in some circumstances" and that "interferences that persist for a prolonged period of time will be more likely to attract a remedy": at para. 42.

[114] Finally, Yukon argues that the Moratorium is "not something that 'spills over' onto the affected land from some other location". It argues the Moratorium applies "directly" to Chance's interests and it relies on *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd*., 2007 NSCA 92 at paras. 127–132, in support of its submissions.

[115] It is true that in most instances nuisance is concerned with an unreasonable interference with a plaintiff's enjoyment of land resulting from the defendant's conduct elsewhere. In *W. Eric Whebby*, the defendant dumped soil directly onto the plaintiff's lands. The Court properly identified that that conduct constituted a trespass and said: "Trespass is direct entry onto another's land while nuisance is the infringement of the plaintiff's property interest without direct entry by the defendant": at para. 130.

[116] Nevertheless, we have seen, and the judge identified, that nuisance can be based on interference with a *profit à prendre*. In such circumstances, the holder of the right does not own property, but merely has the right to enter upon the land of another and take therefrom "a profit of the soil". In such circumstances, the requirement that something "spill over" from one piece of property onto another breaks down. Thus, a blockade on Crown land that interferes with harvesting rights on that same land can constitute a nuisance. Had Yukon erected gates or fences on its land that prevented Chance from exercising its rights on that same land, under the Permits or otherwise, its conduct might well constitute a nuisance.

[117] I acknowledge that a cause of action based on nuisance is an awkward lens through which to consider a claim for damages arising from the loss of the ability to use land, or an interest in land, where the act causing the alleged nuisance is the implementation of a government policy and the damage suffered arises directly from that act of government. However, at this stage of the proceeding and without Yukon having filed a statement of defence, in the absence of authority that addresses the specific concern I have described, and in light of the additional considerations I have described, I would dismiss this ground of appeal.

4. Unjust enrichment

[118] In the FSOC Chance pleads:

> 92. By their representations, the Defendants induced Chance into undertaking exploration activities with a view to developing the unconventional resources contained within the Subject Lands. As discussed above, Chance did so through great effort and at significant financial costs.
>
> 93. The Defendants have gained the benefit of Chance's exploration efforts through the exchange of information over the years. They have gained a much clearer picture of the locations and scale of the unconventional resources found in the Eagle Plains basin for their or others' future use, at no cost to themselves.
>
> 93.1 The Defendants have also received the benefit of work deposits and rentals paid over the years, including accrued interest. While some small portion of these have been reimbursed, the vast majority have not.
>
> 94. There is no juristic reason for the Defendants to benefit from Chance's efforts without compensating Chance, who has lost the opportunity to exploit the resources it identified and is entitled to.

[119] Thus, Chance alleges that Yukon has been enriched in two ways. First, through its receipt of work deposits and rentals and, second, through its receipt of information that identifies the location and scale of unconventional oil and gas resources within the area of the Permits. The judge properly identified and distinguished these two claims.

[120] The judge also properly identified the general legal framework for the consideration of these claims. That framework is clear and well established. The doctrine of unjust enrichment applies when a defendant receives a benefit from the plaintiff in circumstances where it would be "against all conscience" for them to retain that benefit: *Moore v. Sweet*, 2018 SCC 52 at para. 35. The cause of action has three elements: i) the defendant has been enriched; ii) the plaintiff suffers a corresponding deprivation; and iii) there is an absence of a juristic reason for the defendant's enrichment at the plaintiff's expense: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30; *Moore* at para. 37; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 784, 1992 CanLII 21.

a) The work deposits and rental payments

[121] Yukon concedes that it has gained the benefit of the work deposits and rental payments and that Chance suffered a corresponding deprivation. However, it argues the *Act* provides a complete code, and thus a clear juristic reason, for these payments.

[122] The judge did not address the issue in detail but said that "considering the effects of the Moratorium on Chance's interests, as plead[ed] by Chance, I am of the view that the presence or absence of a juristic reason is an arguable issue".

[123] The third step in the unjust enrichment test requires that the benefit received and corresponding detriment suffered occur without a juristic reason. This means that there must be "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances": *Kerr v. Baranow*, 2011 SCC 10 at para. 40, cited in *Moore* at para. 54.

[124] Following *Garland*, this third step now proceeds in two stages. First the plaintiff must demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any established category of juristic reason. These categories include: contract, disposition of law, donative intent, and other valid common law, equitable or statutory obligations: *Garland* at para. 44; *Kerr* at para. 41; *Moore* at para. 57. If the plaintiff successfully demonstrates that none of the established categories of juristic reason applies, then the analysis proceeds to stage two. At stage two, the defendant can rebut the plaintiff's case by showing there is some residual reason to deny relief: *Garland* at para. 45; *Moore* at para. 58. At this second stage, the court should have regard to two considerations: i) the parties' reasonable expectations, and ii) public policy: *Garland* at para. 46; *Kerr* at paras. 43–44; *Moore* at para. 58.

[125] Yukon suggests that a claim for unjust enrichment requires a finding of *ultra vires*. Moreover, it argues that the existence of a statutory justification for receipt of the payments from Chance automatically justifies an enrichment. However, the Supreme Court of Canada rejected a similar argument in *Moore*, as this misses the point of the juristic reason analysis. In *Moore*, the Court concluded that the Court of Appeal had erred by inappropriately framing the issue as being whether the applicable statutory

provisions provided a reason for the receipt of funds. Justice Côté explained that this was "the wrong perspective from which to approach this third stage of the unjust enrichment analysis": at para. 77. Rather, "the court's inquiry should focus not only on why the defendant received the benefit, but also on whether the statute gives the defendant the right to retain the benefit against a correspondingly deprived plaintiff": at para. 77.

[126] Additionally, the Court explained that the right to bring an equitable claim can be ousted by legislation, but the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'": *Moore* at para. 70, citing *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 at 90, 1990 CanLII 152. Thus, statutes that may justify the retention of an enrichment are carefully interpreted to determine whether the language and policies of the statute require ousting redress for unjust enrichment: *Moore* at paras. 77–78. See e.g., *80 Mornelle Properties Inc. v. Malla Properties Ltd.*, 2010 ONCA 850 at paras. 32–44; *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 121 DLR (4th) 53 at 61–62, 1994 CanLII 1429 (Ont. C.A.).

[127] In *Moore*, the Court distinguished between the applicable provisions of the *Insurance Act*, R.S.O. 1990, c. I.8 and "other legislative enactments that have been found to preclude recovery, such as valid statutory provisions requiring the payment of taxes to the government": at para. 74. The Court ultimately determined that although the *Insurance Act* justified the payment of insurance proceeds to the defendant, it did not preclude the plaintiff from bringing an equitable claim for recovery of the monies they had paid: *Moore* at paras. 79–81.

[128] Thus, the juristic reason analysis focuses not only on whether there is a statutory justification for Yukon having collected work deposits and rental payments, but also on whether there is a statutory justification for its ongoing retention of such payments. In my view, it is not plain and obvious that the *Act* and *Regulations* prevent a party from bringing an equitable claim for unjust enrichment in circumstances where s. 28 of the *Act* is not engaged.

[129] A further factor is relevant. In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 1980 CanLII 22, the Court held that the absence of a juristic reason requirement will be met where one party prejudices themselves with the reasonable expectation of receiving something in return, and the recipient freely accepts the benefits conferred by the first person in circumstances where they ought to have known of that reasonable expectation: at 848–849; see also *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at 46, 1986 CanLII 23.

[130] Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont.: LexisNexis Canada Inc., 2014) refers to this principle as “qualified intention” or “free acceptance”. Professor McInnes explains that this can arise where the plaintiff’s intention “is perfectly effective at the time of transfer, but it carries a condition. If that condition subsequently fails, the basis for the enrichment falls away and restitution follows”: at 243. This includes situations where the plaintiff confers a benefit on the defendant in the expectation of receiving a counter benefit. Liability is imposed because the defendant freely accepted the benefit knowing that the plaintiff expected something in return: McInnes at 246. This principle has been widely applied in unjust enrichment claims in the family law context: see e.g., *Sorochan* at 46; *Pettkus* at 848–849; *Rawluk* at 97–98.

[131] The principle has also been extended, with some modification, to commercial settings: *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 DLR (4th) 161 (B.C.C.A.) at 171–172, 1990 CanLII 1312; *Jacobs v. Yehia*, 2014 BCSC 845 at para. 339; *Beller Carreau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd.*, 1999 ABCA 122 at paras. 36–39.

[132] In my view, based on the material facts advanced in the FSOC, it is arguable that Chance had a reasonable expectation that its payments for permits and rentals, and its ongoing performance under the Permits, would result in it being able to exercise its rights under the Permits and in its receipt of one or more oil and gas leases or, alternatively, that it would be compensated under the *Act*. Similarly, it is arguable Yukon did not reasonably expect to be able to retain these benefits without either providing

Chance with the expected oil and gas leases or making payment to Chance under the *Act* and *Regulations*.

b) The work product Chance shared with Yukon

[133] The focus of this part of Chance's claim is based on the assertion that Yukon has been enriched by the receipt of information through which it has "gained a much clearer picture" of the resources in the Eagle Plains basin "for their or others' future use, at no cost to themselves." Chance further claims that it suffered a deprivation as this work product was obtained "through great effort and at significant financial costs." Yukon argues that it did not receive any benefit as it has no proprietary interest in the information it received, that Chance did not suffer a corresponding deprivation because it still has the information and can use it, and that there is a juristic basis for Yukon's receipt of the information in question.

[134] Respectfully, the judge did not, analyse this aspect of Chance's claim in any meaningful way. She concluded that "Chance's pleading contain[ed] 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 [h]as no reasonable chance of success."

[135] The Supreme Court of Canada has consistently taken a "straightforward economic approach" to both the question of enrichment and corresponding deprivation: *Moore* at para. 41; *Kerr* at para. 37; *Garland* at para. 31. Moral and policy considerations come into play at the third stage, as part of the juristic reason analysis. To establish that a defendant has been enriched and the plaintiff correspondingly deprived, it must be shown that a "tangible benefit", or something of value, passed from the plaintiff to the defendant: *Garland* at para. 31; *Moore* at para. 41; *Kerr* at para. 38. A corresponding deprivation requires that there be a "causal connection" between the harm suffered and the benefits enjoyed by the defendant: *Moore* at para. 43; *Pettkus* at 852. In other words, enrichment and detriment must be "essentially two sides of the same coin": *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 1012, 1993 CanLII 126.

[136] There is a specific difficulty with this aspect of Chance's claim that obviates the need for me to address each of the issues that is raised by Yukon.

[137] Even if Yukon's receipt of information constitutes a benefit, and Chance's payment of money for that information constitutes a deprivation, the claim is nevertheless bound to fail because the benefit and deprivation relied on by the judge are not "two sides of the same coin".

[138] To be clear, Chance has not claimed that it was deprived of the physical work product which it obtained "through great effort and at significant financial costs." In the FSOC it claims that it has "lost the opportunity to exploit the resources it identified and is entitled to." In its factum Chance argues that its "claim of unjust enrichment rests on the fact that Chance obtained data and a Resource Evaluation through great effort and expense, and has been deprived of the ability to use it, or any value it held, as a result of the Moratorium." In other words, Chance says it spent money on a work product it still owns but is unable to use.

[139] That inability (or loss) does not, however, "correspond" to Yukon's gain. The work product and information generated by Chance presently has the same utility regardless of who holds it. Thus, even if Yukon received information at no cost to it, Yukon too is deprived of the ability to use the information by reason of the Moratorium. The alleged deprivation is felt by both parties. There is no correspondence between what is alleged to have been lost and what is alleged to have been gained. It cannot be said that Yukon has gained at the expense of Chance.

[140] In my view, this aspect of Chance's claim has no reasonable prospect of success and I would strike it from the FSOC.

VI. THE COSTS ORDER

[141] The judge, in making a costs order, said: "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."

[142] Yukon's appeal is premised on its assertion that the success enjoyed by the parties before the judge was "divided". In reality, success lay largely with Chance. The majority of the claims in the FSOC were upheld and a portion of what was struck was

done so with leave to amend. The order made by the judge fell squarely within her discretion and I would not interfere with that order.

VII. DISPOSITION

[143] In my view, Yukon's appeal in relation to the claim of "unlawful de facto cancellation" and the claim of unjust enrichment in relation to the information and work product it received should be allowed. All other aspects of its appeal should be dismissed.

VIII. COSTS OF THE APPEAL

[144] In my view, the success of the parties on appeal has been divided and each party should bear its own costs.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"