Date: 20070829
Docket: CI 05-01-42765
and CI 06-01-46955
(Winnipeg Centre)
Indexed as: Bellan v. Curtis et al.
Cited as: 2007 MBQB 221

COURT OF QUEEN'S BENCH OF MANITOBA

File No. CI 05-01-42765

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- and -	)	Nelson
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INVESTMENT FUND,	)	Robert L. Tapper, Q.C. and
	)	Jason D. Kendall
Defendants,	)	for defendant Umlah

Proceedings under *The Class Proceedings Act*, C.C.S.M. c. C130

AND BETWEEN:	)	J. Kenneth McEwan, Q.C.
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File No. CI 06-01-46955	)	
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- and -		)
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	Defendant.	) Burns Inc.
		)
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		) West Capital Inc.
		)
		) William S. Gange and
		) Jacqueline G. Collins
		) for defendant Manitoba
		) Securities Commission
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		) E.W. Olson, Q.C.
		) and Robert W. Olson
		) for defendant Government
		) of Manitoba
		)
		) Robert A. Dewar, Q.C. and
		) Karen R. Wittman
		) for the Receiver of The
		) Crocus Investment Fund
		)
		) JUDGMENT DELIVERED:
		) August 29, 2007

Proceedings under *The Class Proceedings Act*, C.C.S.M. c. C130

HANSSEN J.

BACKGROUND

[1] The Crocus Investment Fund (referred to as the “Crocus Fund” or “Crocus” or the “Fund”) is a labour sponsored venture Capital Corporation

created by *The Crocus Investment Fund Act*, C.C.S.M. c. C308 (the "*Crocus Act*").

[2] Following its incorporation on March 21, 1992, Crocus engaged in a continuous offering of its Class A common shares to the public under a series of prospectuses which were generally issued annually.

[3] On December 10, 2004, trading in shares of Crocus was halted.

[4] On June 28, 2005, the Crocus Fund was placed into receivership.

[5] On July 12, 2005, Bernard Bellan commenced a proposed class action ("Bellan No. 1") against a number of former officers and directors of the Crocus Fund, two of its financial advisors, its auditor and the Manitoba Securities Commission. Among other things, the statement of claim alleges the prospectuses for the Crocus Fund did not contain proper disclosure and they overstated the value of its assets.

[6] On May 8, 2006, Bellan and Robert Nelson commenced a related proposed class action ("Bellan No. 2") against the Government of Manitoba (the "Province"). Many of the allegations in Bellan No. 1 have been repeated in Bellan No. 2, but additional allegations have been made in an attempt to establish a cause of action against the Province.

[7] Bellan and Nelson bring these actions on their own behalf and on behalf of a proposed class of shareholders who owned Class A common shares in the Crocus Fund on December 10, 2004. The proposed Class period is from March

21, 1992, the date Crocus was incorporated, until trading in its shares was halted on December 10, 2004.

[8] Bellan bought 350 Class A shares in the Crocus Fund in September, 1993. He redeemed these shares and purchased new shares in January/February, 2001. Nelson bought 237.1541 Class A shares in 2003.

[9] Bellan, Nelson and the other putative class members have been unable to recover any of their investments since trading in Crocus shares was halted.

[10] Bellan and Nelson seek to have Bellan No. 1 and Bellan No. 2 consolidated and certified together. Their motions to consolidate and certify are tentatively scheduled to be heard September 24 to 28, 2007.

[11] A number of the defendants have brought preliminary motions for particulars and/or to strike portions of the amended amended statement of claim in Bellan No. 1 and the amended statement of claim in Bellan No. 2. (For simplicity, I will refer to these two documents simply as statements of claim.)

MOTIONS FOR PARTICULARS IN BELLAN NO. 1

[12] There are three motions for particulars in Bellan No. 1 – one by all of the defendant directors other than David Friesen, one by David Friesen and one by Wellington West Capital Inc. ("Wellington West").

[13] Since the particulars being sought in all three motions are similar and the issues are essentially the same, it is convenient to deal with them together.

[14] An order for particulars is a discretionary remedy. Particulars should be ordered where they are necessary:

(a) to inform the defendant of the nature of the case they have to meet as distinguished from the mode in which it is to be provided;

(b) to prevent the defendants from being taken by surprise;

(c) to enable the defendants to know what evidence they ought to be prepared with and to prepare for trial;

(d) to limit the generality of the plaintiff's claim;

(e) to limit and decide the issues to be tried, and as to which discovery is required; and

(f) to tie the hands of the plaintiffs so they cannot, without leave, go into any matters not included in their claim.

See *Dumont v. Canada (Attorney General) et al.* (1992), 75 Man. R. (2d) 273 at para. 29.

[15] In the course of argument, counsel for the plaintiffs agreed to provide a letter to the defendants' counsel clarifying the following:

(a) Bellan is alleging a director is only responsible for losses of shareholders who purchased shares during the currency of a prospectus the director signed or consented to being signed on his or her behalf;

(b) Bellan is adopting as part of his statement of claim the allegations in the Auditor General's Report which are set out at paragraphs 29(a), (d) and (e) of the statement of claim;

(c) the "statutory obligations" referred to in paragraph 70(d) of the statement of claim are those set out in Part VII and s. 141 of *The Securities Act*, C.C.S.M. c. S50, and s. 15 of the *Crocus Act*;

(d) Bellan is only alleging Nesbitt Burns Inc. ("Nesbitt Burns") is liable with respect to the shares which were purchased under the prospectuses dated December 22, 1999 and January 11 and July 13, 2001.

Counsel for Bellan also consented to an order striking the phrase "participating and consenting to" in paragraph 27 of the statement of claim.

[16] The defendant directors and Wellington West say that the statement of claim is still deficient because it does not adequately particularize the claims against them. I agree with them that Bellan should also be required to provide the following particulars:

(a) what are the "business activities or interests" of the insiders and the financial advisor referred to in paragraph 52 of the statement of claim;

(b) what are the "immediate pecuniary interests" referred to in paragraph 67 of the statement of claim.

They need to know precisely what "business activities or interests" and what "pecuniary interests" Bellan is referring to, in order to properly prepare for the certification motion.

[17] In addition to these particulars, however, the defendant directors and Wellington West are seeking voluminous and detailed information regarding the claim. They are, in effect, demanding full discovery of the plaintiffs' case prior to the certification hearing and before filing their statements of defence.

[18] I am dismissing the remainder of their requests. While there is no doubt room for improvement in the pleading, it does not fall as short of the mark as these defendants suggest. It contains a concise statement of the material facts upon which Bellan is relying. Anyone reading it will understand what the case is about.

[19] Much of the information these defendants are seeking with respect to specific paragraphs in the statement of claim is set out elsewhere in the statement of claim or documents referred to in the statement of claim.

[20] In many instances, the particulars being requested are with respect to details which Bellan probably does not have and couldn't be expected to have until the discovery process has been completed. In fact, at this time, these defendants likely have more knowledge of many of the details they are requesting than Bellan does. They were actively involved in the matters which are the subject of the action. As well, they have as much access as Bellan does to the large volume of information which is in the public domain.

[21] The balance of the information they are requesting is not necessary at this stage of the proceedings. There is a substantial difference between the particulars they require for the certification hearing or to file their statements of defence and the information they may later require for the purposes of trial.

[22] The level of detail they are requesting is not required for the certification process. Any additional information required for the certification motion can be provided by affidavits filed in support of the motion and any cross-examinations on them. If Bellan fails to provide sufficient information, the class action will simply not be certified.

[23] Although defendants in a class action proceeding often defer filing their statements of defence until the action is certified, once the particulars I have ordered have been provided, the defendants will have sufficient information to file their defences should they choose to do so.

[24] Under the circumstances, at this stage of the proceedings, it would not be in the interest of judicial economy to put Bellan through the extensive effort and

expense of providing the voluminous particulars these defendants are requesting. Indeed, if the action is not certified the result would simply be a waste of time and money.

[25] If the class action is certified, the defendants will have ample opportunity to obtain any additional information they require for the purposes of trial through the discovery process.

MOTIONS TO STRIKE

[26] The main ground being alleged with respect to the motions to strike is that the impugned pleadings disclose no cause of action. Some of the defendants also allege the statements of claim are scandalous, frivolous or vexatious.

(a) Effect of Documents Referred to in the Statements of Claim

[27] Prior to argument on any of the motions, a dispute arose amongst some counsel as to what use could be made of documents referred to in the statements of claim on a motion to strike for failure to disclose a cause of action.

[28] The Province and the defendant directors argue a document referred to in the statement of claim can only be utilized if it is one upon which the plaintiff must rely for the establishment of his claim. In support of their position, they rely on the following comment by Disbery J. in *Balacko v. Eaton's of Canada Ltd.* (1967), 60 W.W.R. 22 at p. 26:

> In light of these authorities I am of the opinion that the only documents which are properly to be considered on an application to strike out a

> statement of claim on the ground that it discloses no reasonable cause of action are the notice of motion, the attacked statement of claim, the particulars furnished pursuant to a demand therefor, and any document which is referred to in the statement of claim upon which the plaintiff must rely for the establishment of his claim; for such a document is to be considered for the purposes of the application as forming part of the pleading: *Hogan v. Brantford (City)* (1909-10) 1 OWN 226. Other documents referred to in a statement of claim which are merely evidential and from which the plaintiff's claim does not arise should not, in my opinion, be considered; for to do so would be to admit evidence to support the attacked pleading, which is not permissible.
> (underlining added)

[29] The plaintiffs take the position that the statements of claim are substantially adequate and that the court doesn't need to consider any of the documents referred to in them in order to determine whether they disclose good causes of action against each of the defendants.

[30] Nesbitt Burns and Pricewaterhouse Coopers LLP ("PWC") both argue that the totality of the documents referred to in the statement of claim should be considered. They wish to rely on the documents to demonstrate that contrary to what is pleaded in the statement of claim in Bellan No. 1, Bellan and/or other members of the putative class do not have a good cause of action against them.

[31] The relevant Queen's Bench Rules are 25.06(1) and (9). They read:

> **25.06(1)** Every pleading shall contain a concise statement of material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.
>
> **25.06(9)** The effect of a document ..., if material, shall be pleaded as briefly as possible, but the precise words of the document ... need not be pleaded unless those words are themselves material.
>
> (Emphasis mine)

[32] By virtue of Rule 25.06(9), a material document may be incorporated into a pleading by merely referring to it. The purpose of the rule is to avoid the need

to plead lengthy documents in the body of a pleading and/or provide particulars of them.

[33] The documents which are referred to in the statements of claim in both Bellan No. 1 and 2 include the prospectuses, the auditors' reports, an agreement with Fonds de Solidarité, FTQ (Solidarité) dated November 15, 2002 and the Auditor General's report. The statement of claim in Bellan No. 2 also refers to a Cabinet memo dated November 27, 2000 and a Finance Department memo dated September 13, 2004.

[34] I am satisfied that the prospectuses, the auditors' reports and the agreement with Solidarité are integral to both statements of claim. I am also satisfied the Cabinet and Finance Department memos are integral to the statement of claim in Bellan No. 2. Accordingly, these documents constitute material facts which the court may consider in assessing the substantive adequacy of the statements of claim. See *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.) at paras. 3 and 4; also see *Clitheroe v. Hydro One Inc.*, [2002] O.J. No. 4383 at para. 10(e); and *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 526 (Ont. C.A.).

[35] The Auditor General's report, on the other hand, does not appear to be a material document with respect to either of the statements of claim but the issue with respect to it is moot since none of the parties purported to rely on it in regard to any of the motions to strike.

(b) Test for Striking Pleadings for Showing No Cause of Action

[36] A statement of claim should not be struck out unless it is "plain and obvious" that it discloses no reasonable cause of action. Nor should it be struck because it is novel or complex or the law is uncertain. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 33. The motion is decided on the pleadings alone and any document incorporated into them by reference. The statement of claim must be read generously. The court must accept the facts alleged in the statement of claim as true unless they are patently ridiculous or incapable of proof. See *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.).

(c) Test for Determining if a Pleading is Scandalous, Frivolous or Vexatious

[37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious. Epstein J. dealt with the meaning of "scandalous, frivolous or vexatious" in *George v. Harris*, [2000] O.J. No. 1762. At para. 20, he stated:

> The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is

> based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety.

(d) Motion by Wellington to Strike Last Sentence of Para. 62 of Statement of Claim in Bellan No. 1

[38] Wellington West moves to strike out the last sentence of para. 62 of the statement of claim in Bellan No. 1 which reads:

> In addition, Wellington West, as a recipient of investment funds from the Crocus Fund, was in a conflict of interest.

[39] It submits that whether it was a recipient of investment funds and whether it was in a conflict of interest are entirely irrelevant to any cause of action pled against it.

[40] Bellan takes the position that the allegation is a material fact which has been properly pled. He points to the fact that one of the causes of action he is alleging against Wellington West is based on a breach of s. 52(1) of the *Competition Act*, R.S.C. 1985, c. C-34, which reads in part as follows:

> No person shall, for the purpose of promoting, ... directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

He says the fact Wellington West was a recipient of investment funds from Crocus shows it had an indirect business interest in the promotion of the sale of Crocus shares and as such is a material fact with respect to his claim under the *Competition Act*. He also says that the allegation it was in a conflict of interest is a material fact that may support an award of punitive damages.

[41] As I am satisfied this plea constitutes a material fact for the reasons advanced by Bellan, I am dismissing Wellington West's motion.

(e) Motions by Nesbitt Burns and Wellington West in Bellan No. 1 to strike claims against them other than those relating to Mr. Bellan's personal claim

[42] Nesbitt Burns and Wellington West are both requesting an order striking out the facts and claims asserted against them in Bellan No. 1 other than the facts and claims as to Bellan's alleged "reinvestment" of 350 shares of the Crocus Investment Fund in January/February, 2001 which was made under the Crocus Prospectus dated January 12, 2001.

[43] For the purposes of their motions, they concede that Bellan has pleaded a personal cause of action against each of them with respect to his purchase of the 350 shares in January/February, 2001.

[44] The real issue is whether Bellan can assert causes of action which he does not personally have on behalf of the putative class of plaintiffs. Nesbitt Burns and Wellington West maintain he cannot. They argue, there are separate and distinct causes of action under each of the prospectuses based on separate and distinct purchases of shares. They say it would open the floodgates if Bellan were allowed to assert claims for investors under each of the prospectuses over the twelve-year period Crocus was in the market-place. I do not agree.

[45] I am satisfied that to the extent Nesbitt Burns and Wellington West focus their attacks on the personal claim of Bellan, they are engaging in the wrong inquiry under *The Class Proceedings Act*, C.C.S.M., c. C130 ("*CPA*").

[46] Pleadings in class actions differ from pleadings in other lawsuits in that they may assert causes of action on behalf of the class and join defendants on behalf of the class even where such causes of action extend beyond the personal claim of the proposed representative plaintiff.

[47] In *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 1960, Saunders J.A. speaking for the British Columbia Court of Appeal stated:

> ¶ 33 It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the Class Proceedings Act expressly provides that the Rules of Court apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.
>
> ¶ 34 I turn then to Rule 19(24). No doubt Rule 19(24)(a) can be invoked prior to a certification hearing. But what does it mean in the context of an action started under the Act? Obviously if the pleadings disclose no cause of action between any persons, whether or not named, the action may be dismissed. But that is not the case here. The statement of claim alleges a cause of action between members of the potential class and the defendants, even though those members have as yet no personal identity. Is this sufficient pleading to escape dismissal under Rule 19(24)?
>
> . . . . .
>
> ¶ 38 For the appellants to succeed on their Rule 19(24) application it must be plain and obvious that the action has no chance of success. In assessing the chance of success the action must be considered in the context of its stated ambition to be a class proceeding. On the authority of Campbell v. Flexwatt and Harrington, it is not plain and obvious that the action against the appellants has no chance of success. Those cases hold out the prospect that the action will be certified as a class action, and even that further representative plaintiffs may be appointed to represent a sub-class of persons who did have contractual dealings with the appellants.
>
> . . . . .

> ¶ 49 Considering that instruction, I find the flexibility in the Act supports the result of Campbell v. Flexwatt. While s. 2(1) displays an intention that, in ordinary cases, the representative plaintiff or plaintiffs themselves should have a cause of action, s. 2(4) shows that such a condition is not inherent to a class action. A representative plaintiff referred to in s. 2(4) is not a member of the class and would not be linked to the defendants by a cause of action. Rather the link would be between the defendants and the class, with the representative plaintiff simply the spokesperson of the class.
>
> ¶ 50 Although s. 2(4) only allows a nonmember of a class to be the representative plaintiff where it is necessary "to avoid a substantial injustice to the class", the fact that the Act allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.
>
> ¶ 51 I conclude that while the Act requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff.
>
> ¶ 52 The appellants urge upon us the reasoning in [*Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603]. However, that case concerns a different statute, one without the equivalent of s. 2(4). It may be distinguished simply on that basis.

The same conclusion was reached by the Saskatchewan Court of Queen's Bench in *Frey v. B.C.E.*, [2006] S.J. No. 453.

[48] The approach adopted by the courts in British Columbia and Saskatchewan is consistent with the recommendations made by the Manitoba Law Reform Commission in 1999. See Manitoba. Law Reform Commission. Report 100. Report on Class Proceedings. Winnipeg: The Commission, 1999. At p. 37, the Commission stated:

> **A. GENERAL OBJECTIVES**
>
> It must be kept in mind that there is little point in adopting a class proceedings law which appears to permit such actions but which,

> practically speaking, precludes them. The Ontario, British Columbia, and Uniform Acts take pains to ensure that barriers to class actions (particularly barriers identified in the American or Québec jurisprudence, or in decisions like that of the Supreme Court of Canada in [*Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3rd) 385 (S.C.C.)]) are removed or minimized. As discussed in more detail below, this objective is accomplished through liberal certification standards (including a specific enumeration of factors that are not bars to certification) and a careful consideration of financial arrangements, including the rules on costs, fee arrangements, and funding mechanisms.
>
> (Emphasis mine)

Further, at p. 57 it stated:

> We have considered the various recommendations discussed above, and are satisfied that the requirements set out in the British Columbia and Uniform Acts are reasonable, desirable, and adequate for Manitoba's purposes. A class proceeding ought not to be allowed to proceed if the representative party is not in a position to "fairly and adequately represent" the class, and the court must be empowered to ensure that this criterion is met prior to certification. At the same time, there are persuasive reasons not to require that the representative *necessarily* be an actual member of the class he or she has applied to represent.
>
> (Emphasis mine)

[49] In response to the recommendations of the Law Reform Commission, the Manitoba Legislature enacted the *CPA*. It is in all material respects identical to the British Columbia statute.

[50] I am satisfied the approach taken by the courts in British Columbia and Saskatchewan should be followed in Manitoba. Section 6 of *The Interpretation Act*, C.C.S.M. c. I80, provides:

> **Rule of liberal interpretation**
>
> **6** Every Act ... must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[51] As far as possible a multiplicity of proceedings should be avoided. The goal of the *CPA* is judicial economy and access to justice. The result should be that cases are handled in the most just, expeditious and inexpensive manner possible.

[52] A requirement that there be a separate plaintiff who purchased under each of the prospectuses for the class action to proceed would not serve the purpose of judicial economy.

[53] I am satisfied that allowing a representative plaintiff to assert causes of action he does not personally have will not open the floodgates to unfocused, sector wide litigation as the court has a gatekeeper role to play at the certification stage.

[54] The real issue is whether the representative party is in a position to fairly and adequately represent the proposed class. This is something which will be determined in the certification hearing.

[55] While it may ultimately be determined that there are different subgroups of investors that have different rights against the defendants, if such differences emerge they can be dealt with at a later point. For example, subclasses may be added or the action may not be certified.

[56] As Bellan has pleaded a cause of action by members of the putative class against Wellington West under each of the prospectuses and against Nesbitt Burns with respect to the prospectuses dated December 22, 1999 and January 11 and July 13, 2001, I am dismissing their motions to strike.

(f) Motion to Strike in Bellan No. 1 by PWC

[57] PWC is seeking an order dismissing the claim against it in Bellan No. 1 on the ground that the statement of claim fails to disclose a reasonable cause of action against it.

[58] PWC audited the financial statements of the Crocus Fund and in its audit reports expressed its opinion about the Fund's operation for the financial years in the class period. Bellan is asserting three causes of action against it. He is claiming damages for negligence, negligent misrepresentation and a breach of s. 52 of the *Competition Act*.

[59] Prior to argument on this motion, Bellan and PWC consented to an order striking out the last sentence of both paragraphs 88 and 93 of the statement of claim without leave to amend. These sentences both stipulated that Bellan was relying on s. 141(1) of *The Securities Act*. Bellan agreed that they should be struck as he is no longer alleging the investors who purchased Crocus shares are deemed, pursuant to s. 141(1) of *The Securities Act*, to have relied upon PWC's audit reports.

(i) Negligence

[60] Counsel for PWC stated he did not read the statement of claim as pleading a cause of action in negligence but if it did, there could be no breach of duty unless Bellan received the audit report.

[61] I do not agree. Bellan alleges PWC was negligent in performing its audits of the Crocus Fund and as a result he and other members of the putative class

suffered damages. He claims that if PWC had exercised due diligence in conducting the audits, the Crocus Fund either would not have continued trading as a public company or its shares would have been traded at a proper value. This claim by Bellan is not dependent on whether he saw or relied on the audit reports.

[62] Accordingly, I am not satisfied that it is plain and obvious that Bellan and the other putative class members do not have a cause of action against PWC in negligence.

(ii) Negligent Misrepresentation

[63] For the purposes of this portion of the motion, counsel for PWC indicated he was not going to argue that PWC did not owe a duty of care to investors under the principles set out in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

[64] However, he argued that actual reliance on the alleged negligent misrepresentation which is an essential element of a claim for negligent misrepresentation has not been pleaded or at least has not been pleaded with sufficient specificity. As a result, he submitted the claim for negligent misrepresentation should be struck.

[65] Again, I do not agree. There is a specific plea of reliance in both paragraphs 89 and 93 of the statement of claim. Paragraph 89 reads "The plaintiff and other class members suffered loss and damage as the result of relying upon the PWC opinion." Paragraph 93 reads "The plaintiff and other

class members relied upon the PWC audit opinions and the PWC opinion and purchased or held shares of the Crocus Fund and suffered loss and damage."

(iii) The Competition Act Claim

[66] Section 52 of the *Competition Act* creates an offence with respect to the making of certain false or misleading representations. It reads:

> **52(1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[67] Section 36 of the *Competition Act* provides a right to claim civil damages for a breach of s. 52(1).

[68] PWC takes the position that the claim against it pursuant to the *Competition Act* should be struck because:

(a) there is no pleading that Bellan received and relied upon the audited financial statements;

(b) the expression of an audit opinion is not the type of act or representation that is captured or engaged by s. 52(1) of the *Competition Act*.

[69] As stated above, I am satisfied that actual reliance has been pleaded in paragraphs 89 and 93 of the statement of claim.

[70] PWC argues that it was actually performing a service and not promoting a service and as a result there is no cause of action against it under s. 52(1) of the *Competition Act*. It claims that the audited reports it prepared were for the limited purpose of providing shareholders with information for the purpose of overseeing the management and affairs of Crocus.

[71] I am, however, satisfied that they had a dual purpose. A second and equally important purpose was for inclusion in the prospectuses to enable Crocus to offer its shares to the public. PWC knew Crocus was going to offer shares to the public. It knew its services were, in part, for the purpose of obtaining approval for that public offering. It consented to the audit reports being included in the prospectuses. In 1997, the audit report was incorporated directly into the prospectus and in the other years the reports were incorporated into the prospectuses by reference. Without the audited reports, the prospectuses would not have been approved by the regulator and Crocus would not have been able to offer shares to the public.

[72] In *Mondor v. Fisherman*, [2001] O.J. No. 4620, Cumming J. in a case similar to the case at bar stated at para. 85:

> ... I find that the [auditor's] alleged misrepresentations arguably may have been made for the purpose of promoting their "business interests" within the meaning of s. 52(1), even if that was only a subsidiary and indirect intention of the "representation". This novel cause of action of the plaintiffs advanced under the misleading advertising provisions of the *Competition Act* seems problematic and tenuous. However, in my view the s. 36 claim based on s. 52(1) of the *Act* should not be struck. I am not satisfied that it is plain and obvious that the claim advanced under ss. 36 and 52 of the *Competition Act* discloses no reasonable cause of action and that the plaintiffs' claim would necessarily fail.

[73] I share that view in this case. Given the very broad language in s. 52(1), I am not satisfied it is plain and obvious that Bellan's claim under the *Competition Act* will necessarily fail.

[74] PWC also takes the position that if the claim against it is not struck, it should be limited to the 2000 year-end audit opinion as this is the only opinion

that could have had any impact on Bellan's 2001 share purchase. For example, it says, that by the time the Solidarité transaction was reported on the September 30, 2003 financial statements, Bellan had already purchased his shares and was subject to the hold period and therefore could not have acted on anything represented in the 2003 financial statements. This argument is identical to the one which I already rejected at paragraphs 42-56, when dealing with the motions by Nesbitt Burns and Wellington West. Under the circumstances, it is unnecessary for me to deal with it again.

[75] PWC also argues that the documents incorporated into the plaintiffs' statement of claim by reference clearly show that the Solidarité transaction was not misclassified by PWC as Bellan maintains. However, the statement of claim alleges it was. Under the circumstances, I agree with Bellan that this is a question of fact for the trier of fact to determine.

[76] Accordingly, I am dismissing PWC's motion to strike the statement of claim against it.

(g) Motion to Strike in Bellan No. 1 by MSC

[77] MSC is seeking an order striking out the claim against it in Bellan No. 1 on the ground that the statement of claim fails to disclose a reasonable cause of action against it.

[78] Relying primarily on *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, it argues that a statutory regulator such as the MSC does not owe a private law duty of care to members

of the investing public for negligence in failing to properly oversee the conduct of an investment company subject to its regulation. Both of these cases involved negligence actions against regulators – in one case a registrar of mortgage brokers and in the other a law society. The actions were brought by investors who alleged their losses were caused in part by the failure of the regulator to take reasonable steps to protect them from parties who were subject to their regulation. The Supreme Court of Canada struck out both claims on the ground that there was no duty owed by the regulators to members of the investing public to protect their interests due to the absence of a sufficient degree of proximity between them.

[79] Bellan argues that this case is distinguishable from *Hobart* and *Edwards*. He points to the fact that *The Securities Act* charges the MSC with the responsibility of administering that Act and empowers it to conduct an investigation. In this case, Bellan made a specific complaint to the MSC in about 2002 with respect to the alleged misleading valuation in the Crocus Fund. On April 28, 2003, the MSC publicly announced it was going to conduct a review of the Crocus Fund. Bellan alleges it completely botched this review and that this was an operational failure. He argues *The Securities Act* does not immunize the MSC from such failures. He points to s. 142(1) of that Act which provides:

> **142(1)** No person may commence or maintain an action or other proceeding against ... the [Securities] Commission ... for any act done in good faith, or any neglect or default, in the performance or intended performance in good faith of a responsibility or in the exercise or intended exercise in good faith of a power or discretion
>
> (a) under this Act or the regulations; ...

[80] This provision, Bellan maintains, implies that the MSC may be civilly liable for conduct done in bad faith, or for conduct that goes beyond mere "neglect or default".

[81] Bellan further argues a regulator can be civilly liable for its failure to conduct a proper investigation into complaints made by a clearly identified plaintiff. He relies on *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17; *McClelland v. Stewart*, [2004] B.C.J. No. 1852 (C.A.), leave to Supreme Court denied [2004] S.C.C.A. No. 492; and *Myles-Leger Ltd. (Trustee of) v. 755165 Ontario Inc.*, [2006] N.J. No. 224 (T.D.), leave to appeal refused [2006] N.J. No. 294.

[82] *Finney* concerned complaints made by a plaintiff regarding the conduct of a lawyer. The Barreau was found to be grossly incompetent in responding to these complaints. The Supreme Court of Canada affirmed an award of damages to the plaintiff and gave an expansive reading to the concept of "bad faith". At para. 39 it stated:

> ... [T]he concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness.

It went on at para. 46 to state:

> ... [T]he Barreau would have been no less liable in the circumstances of this case if the analysis adopted by this Court in *Edwards v. Law Society of Upper Canada* ... and *Cooper v. Hobart* ... had been applied. The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. ...
>
> (Emphasis mine)

[83] *Finney* was applied by the British Columbia Court of Appeal in *McClelland* and by the Newfoundland and Labrador Supreme Court – Trial Division in *Myles-Leger*. Both of these cases involved claims against statutory regulators. In both cases, the courts refused to strike the claims, finding that the actions were arguable in light of *Finney*.

[84] In *McClelland*, the court refused to strike the claims of a group of patients who were suing the College of Physicians and Surgeons for its failure to act on information that a doctor was sexually abusing his female patients.

[85] In *Myles-Leger*, the court refused to strike a claim against a law society for its failure to act on information regarding a lawyer's abuse of trust accounts. Green C.J. T.D. wrote at para. 74:

> Given the foregoing factors, and reading the decisions in *Cooper* and *Edwards* in light of *Finney* and *McClelland*, I am not satisfied it is "plain and obvious" that the plaintiff's claim in this case cannot succeed. There is not such a deficiency in pleading on the proximity issue that should preclude the plaintiff from proceeding with its action. Instead as in *McLelland*, the question as to whether there is sufficient proximity should "turn on the factual underpinning" of the plaintiff's claims.

[86] I am satisfied that the same is true in this case. There are a number of factors which distinguish this case from *Cooper* and *Edwards*. In *Cooper* and *Edwards*, the parties were strangers to one another. In the present case, Bellan made a specific complaint to the MSC. The MSC publicly announced a review of the Crocus Fund. During its review, it failed to discover wrongdoing which Bellan alleges should have been obvious.

[87] Also, while in *Cooper* and *Edwards*, there was a statutory provision granting the regulator immunity for acts done in good faith, there was no allegation in either of those cases that the regulator acted in bad faith.

[88] Given the different factual circumstances in this case and the decisions in *Finney*, *McClelland* and *Myles-Leger*, it cannot be said that it is plain and obvious that the claim in Bellan No. 1 must fail.

[89] Accordingly, I am dismissing MSC's motion.

(h) Motions by Province in Bellan No. 2

[90] The Province has filed two motions.

[91] In its first motion it is seeking an order striking out the following parts of the statement of claim: the portions of paragraphs 1(c) and (d) relating to direct liability, paragraphs 10, 14, 16, 17, 18, 34, the portions of paragraphs 42, 49 and 50 relating to direct liability, paragraphs 51, 52, 53, 54, 55, 56, paragraph 57 as it pertains to direct liability, and paragraph 61, on the grounds that they do not disclose a reasonable cause of action or are scandalous, frivolous or vexatious.

[92] In its second motion, it is seeking:

(i) an order striking out the following words in the statement of claim:

In paragraph 11, in the 5th line, the word "including"

In paragraph 12, in the 2nd line, the word "included"

In paragraph 13, in the 2nd line, the word "including"

In paragraph 15, the words "or for other improper reasons"

In paragraph 49, in the 4th line, the word "include"

In paragraph 53, in the 4th line, the word “including”

or, in the alternative, an order deleting the words in question and requiring the plaintiffs to provide full particulars;

(ii) an order striking out the portions of paragraphs 1(c) and (d) relating to vicarious liability, paragraph 15, the portions of paragraphs 42, 49, and 50 relating to vicarious liability, on the grounds that they do not disclose a reasonable cause of action;

(iii) an order striking out paragraphs 38 and 53.1 through 53.10 on the grounds that they do not disclose a reasonable cause of action, are the pleading of evidence rather than material facts, are scandalous, frivolous or vexatious, or are irrelevant and an abuse of the process of the court;

(iv) an order striking out the words “the agreement was highly restrictive and one-sided in favour of Solidarité” in the first line and the word “onerous” in the third line of paragraph 34, and the phrase “the picture thus created was a sham” in paragraph 42, on the grounds that they are scandalous, frivolous or vexatious.

[93] I am ordering Bellan and Nelson to provide particulars with respect to the “other improper reasons” referred to in paragraph 15 of the statement of claim. I am satisfied these particulars may be of assistance to the Province with respect to the certification hearing and are necessary in order to enable it to file a statement of defence. I am not satisfied that the remainder of the particulars the Province is requesting are required for either the certification hearing or for the purpose of filing a defence.

[94] I am also making an order striking out paragraph 38 of the statement of claim on the ground that it is scandalous because the facts set out in it are irrelevant.

[95] I am dismissing the request to strike portions of paragraphs 34 and 42 as I am satisfied they constitute pleas of material facts.

[96] For the reasons which follow, I am also dismissing the remainder of the Province's motions.

[97] Bellan and Nelson are asserting three causes of action against the Province – negligence, a breach of s. 234 of the *Corporations Act* (oppression) and abuse of public office.

(i) Negligence

[98] The Province relies primarily on *Cooper* to argue it owed no duty of care to investors in the Crocus Fund. In *Cooper*, the Supreme Court of Canada confirmed that the principles set out in *Anns v. Merton London Borough*, [1978] A.C. 728 (H.L.) are still appropriate in the Canadian context. In *Cooper* and its companion case *Edwards*, the Supreme Court reformulated the two-stage *Anns* test. The reformulation is concisely summarized in *Edwards* by McLachlin C.J. and Major J. as follows:

> 9 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not

> enough to establish a *prima facie* duty of care. The plaintiff must also show proximity – that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> 10 If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[99] I am satisfied it is at least arguable that the Province was in such a close and direct relationship to investors in the Crocus Fund that it would be just to impose a duty of care upon it in the circumstances of this case.

[100] *The Mortgage Brokers Act*, R.S.B.C. 1996, c. 50, at issue in *Cooper* is distinguishable from the *Crocus Act*. *Cooper* involved a statute of general regulatory application. The *Crocus Act* relates only to the Crocus Fund. It is not a broad public duty statute.

[101] However, the Province submits that even if a *prima facie* duty of care can be established under the first branch of the *Anns* test, it would be negated at the second stage for overriding policy reasons. It argues that its role was limited to making policy decisions, not operational decisions, and as such its decisions are immune from attack under the second branch of the *Anns* test.

[102] I agree with the Province that there is a serious issue as to whether it owed a private law duty of care to investors in Crocus and, if so, the extent of

that duty. However, the distinction between policy decisions and operational decisions is not always easy to determine. In the circumstances of this case, I am satisfied a full factual record is necessary to determine if there was private law duty of care owed by the Province to investors in the Crocus Fund.

[103] The facts in *Cooper* were very different from the facts pleaded in this case. In *Cooper*, the regulator had no involvement with the mortgage broker – it held no shares in it, did not appoint any directors for it, did not provide it with start up capital, did not co-invest with it, did not have employees who signed any prospectus for it and did not promote the sale of its shares.

[104] In this case, the Province played a myriad of roles in regard to Crocus. It provided Crocus with start up capital and co-invested with it. Provincial government employees were involved in running, monitoring, regulating and promoting it. The Province was a Class G shareholder in Crocus and had the right to appoint and did appoint a director to the Crocus board. It appointed very senior employees to that directorship, including deputy ministers. Bellan and Nelson allege that this directorship was not just a personal posting for these individuals but was instead a position intended to represent the Province's interests on the board.

[105] Of particular importance is the fact that the Province was very prominent in promoting the Fund. Investors were buying an investment in which the government was playing an active role. Bellan and Nelson contend that, under the circumstances, the reasonable expectations of investors as to what the

government's responsibilities were would be quite different from a case like *Cooper* where the government had no role in the creation or operation of the mortgage fund.

(ii) Oppression Remedy (s. 234 Corporations Act)

[106] Bellan and Nelson allege that as a Class G shareholder, the Province unfairly disregarded the interests of the Class A shareholders contrary to s. 234 of *The Corporations Act*. The relevant portion of this section reads:

> **Grounds**
> **234(2)** If, upon an application ..., the court is satisfied that in respect of a corporation ...
>
> > (b) the business or affairs of the corporation ... have been carried on or conducted in a manner ...
>
> that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder ..., the court may make an order to rectify the matters complained of.
>
> (Emphasis mine)

[107] Bellan and Nelson claim the Province had specific knowledge of serious problems at the Crocus Fund on or before November 27, 2002 and did not take steps to protect or alert the Class A shareholders. Quite to the contrary, they say it continued to promote the sale of Class A shares to the public.

[108] Bellan and Nelson allege that the Crocus Fund had all the earmarks of a government promoted investment. Under the circumstances, they claim investors in the Fund had a reasonable expectation that material information about the Fund would not be given to and retained by only the Class G shareholder. This is especially true, they say, where the Class A investors were,

with the knowledge of the Province, being given false and misleading information through the prospectuses.

[109] Under all the circumstances, I am not persuaded that it is plain and obvious this claim will fail.

(iii) Abuse of Public Office

[110] The elements of the tort of abuse of public office are:

(a) deliberate, unlawful conduct in the exercise of public functions;

(b) awareness that the conduct is unlawful and likely to injure the plaintiff;

(c) causation; and

(d) damages.

See *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 32.

[111] The statement of claim in Bellan No. 2 alleges the Province was aware its employees were improperly shielding Crocus from compliance with the *Crocus Act* and from an adequate investigation, it was aware the actions of its employees were likely to injure investors in the Fund and the conduct of the Province's employees caused members of the putative class to suffer damages.

[112] Accordingly, I am satisfied the requisite elements of the tort of abuse of public office have been pleaded.

(iv) Vicarious Liability

[113] The Province argues that portions of the statement of claim which allege vicarious liability should be struck. It submits that Crocus was a stand alone corporation and that the government employees who became directors of it

owed a responsibility to it and not the Province. But this misses the point being made by Bellan and Nelson. They acknowledge that the directors appointed by the Province had a legal duty to act in the best interests of Crocus but they claim that this is not what happened. Instead, they say the Province was, in fact, involved in the governance of Crocus through these directors. They assert the directors appointed by the Province, as employees of the Province, had a conflict of interest and did not act exclusively in the interests of Crocus. They allege the Province was negligent in permitting these directors, as well as certain other employees, agents and officers of the Province who also had multiple and conflicting roles in the direction and supervision of Crocus, to exercise authority with respect to monitoring and investigating the Crocus Fund. Under the circumstances, they say, the Province is both directly and vicariously liable for the actions of all of these employees, agents and officers.

[114] Given all of the circumstances, I am not convinced that Bellan and Nelson's claim the Province is vicariously liable for the actions of its employees, agents and officers will necessarily fail.

COSTS

[115] If necessary, costs may be spoken to.

_____ J.