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CANADA / JUDGMENT

## Leighton v. Canada (Attorney General)

2012 BCSC 961

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COURT

Supreme Court of British Columbia

DECIDED

29 June 2012

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2012 BCSC 961 Leighton v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leighton v. Canada (Attorney General),

2012 BCSC 961

Date: 20120629

Docket: S-112339

Registry: Vancouver

Between:

Robert D. Leighton

Plaintiff

And

Attorney General of Canada

Defendants

Before: The Honourable Justice Fisher

Reasons for Judgment

Plaintiff: Robert Leighton

In person

Counsel for the Defendants:

R.S. Whittaker

Place and Date of Hearing:

Vancouver, B.C.

May 7, 8, 2012

Place and Date of Judgment:

Vancouver, B.C.

**June 29, 2012**

- [1] The plaintiff, Robert Leighton, brings this action against the Attorney General of Canada and three employees of the Canada Revenue Agency (CRA) alleging abuse of process and estoppel. He also alleges that the defendant Carl Januszcak, a lawyer employed by the Department of Justice, defamed him during proceedings before the Tax Court of Canada.
- [2] The defendants apply under Supreme Court Civil Rule 9-5(1)(a) to strike all of the claims as disclosing no reasonable cause of action. Mr. Leighton sought to prohibit the defendants from bringing this application on the basis that particulars he provided in his Amended Notice of Civil Claim contain evidence and the court is precluded from hearing evidence on such an application. I determined that this was not a proper basis to prohibit the defendants from bringing their application.
- [3] The defendants say that all statements made by Mr. Januszcak are protected by absolute privilege because they were made in the course of his role as litigation counsel for CRA in an appeal before the Tax Court of Canada. They say that the remaining claims must fail because it is clear and plain on the facts pleaded that neither abuse of process nor estoppel arise, and also because the claims relate to alleged wrongs committed against a corporation and Mr. Leighton, as the sole shareholder of that corporation, has no separate cause of action for any such wrongs.
- [4] Mr. Leighton challenges the application of absolute privilege in the circumstances, asserts that abuse of process and estoppel do arise and says that he has suffered a separate wrong from the corporation.

Striking a claim

- [5] Rule 9-5(1)(a) of the Supreme Court Civil Rules provides:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a 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 pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [6] The test for striking a claim under this rule, set out in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and reiterated recently in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, is whether it is "plain and obvious," assuming the facts pleaded are true, that the claim discloses no reasonable cause of action or if the action is "certain to fail." If there is a chance that the plaintiff might succeed, then he or she should not be "driven from the judgment seat." No evidence is admissible on an application under Rule 9-5(1)(a).
- [7] Where a claim is brought by a self-represented plaintiff, the court should consider whether defective pleadings can be corrected by way of an amendment. However, it is not the court's role to give advice to plaintiffs about how to cure deficiencies in their pleadings or how to properly present their legal claims: see *Pimentel v British Columbia*, [1998] B.C.J. No. 788 (SC).

### The plaintiff's claim

- [8] Mr. Leighton is the president, director and sole shareholder of On-Line Finance & Leasing Corporation (On-Line). From 1995 to 2003, On-Line administered and operated a leasing program under leasing program agreements with the Municipal Finance Authority of British Columbia (MFA). In 2004, CRA audited On-Line and determined that lease payments made under the leasing program agreements constituted income to the company, resulting in taxes owing for 2003 in the amount of \$2,299,692. On-Line appealed this determination, alleging that the payments were interim loans, not revenues attributable to the company, resulting in cumulative non-capital losses to On-Line of over \$30 million up to and including 2003. In 2006, the matter went to the Tax Court of Canada and on September 21, 2010, On-Line's appeal was allowed. By that time, the cumulative non-capital losses up to 2003 had become statute barred.
- [9] Mr. Leighton seeks damages in the amount of \$13,496,367 for "loss of economic opportunities and the destruction of the economic value" of shares he holds in On-Line as a result of these losses being statute-barred. The legal basis for his claim is stated to be "abuse of process, estoppel and defamation." He also seeks damages from the defendant Januszcak for alleged damage to his "business reputation and business prospects."
- [10] The essence of Mr. Leighton's claim for abuse of process, as I understand it, is that CRA and its employees improperly and incompetently maintained their position and acted in a manner that delayed a final determination of On-Line's appeal until it was too late. He alleges that in 2004, he was "engaged in discussions with a view to exchanging his On-Line shares for shares in a merged entity that could use On-Line's non-capital losses going forward" and that he advised the defendants Morris, Nathwani, Asher and Januszcak of this. He also alleges that he advised Asher and Januszcak that time was of the essence to complete the negotiation of a merger and acquisition in order for the new entity to realize the future tax reduction value of his On-Line shares.

- [11] Although Mr. Leighton seeks to rely on estoppel, there is nothing pleaded that appears to relate to this doctrine.
- [12] Mr. Leighton's claim in defamation against the defendant Januszczyk is based on "slanderous remarks and libellous written assertions" made in submissions to the Tax Court of Canada to the effect that the leasing program agreements were a "sham" and were drafted in such a way as to allow the signatories to circumvent and contravene the applicable legislation. He alleges that these assertions and innuendos, which cast aspersions on his character, personal ethics and integrity, were published in the reasons for judgment of the Tax Court.

### Application to amend the claim

- [13] During the hearing of this application, Mr. Leighton was given the opportunity to seek leave to further amend his Amended Notice of Civil Claim to include allegations based on other causes of action. The defendants raised the possibility of claims in negligence, misfeasance in public office and breach of statutory duty, and counsel was prepared to argue that these were not claims that arise in any event. Mr. Leighton was given the opportunity to seek leave to amend his claim to add these claims. He initially declined to make such an application but later asked the court for leave to add a claim based on negligence.
- [14] Counsel for the defendants opposed this application on the basis that a claim in negligence is also bound to fail because the defendants do not owe the plaintiff a private law duty of care.
- [15] I will consider this application in the context of the defendants' application to strike the pleadings in their entirety.

### Defamation

- [16] The claim in defamation against the defendant Januszczyk is based on statements allegedly made in written submissions to the Tax Court in the course of a tax appeal, and reproduced (at least partially) in the Tax Court's reasons for judgment. The defendant submits that in these circumstances, the defence of absolute privilege completely answers the claim.
- [17] It is settled law that defamatory statements made by counsel in court are absolutely privileged. The purpose for this privilege is well stated in Halsbury's Laws of Canada - Defamation, 1st ed., "Absolute Privilege" (Online: LexisNexis Canada Inc., 2010) at HDE-78:

Counsel's statements are privileged because it is in the interests of the state that counsel should be able to speak freely, without being exposed to the risk of an action at the instance of a person he or she may have defamed. The purpose of this absolute privilege is not to protect malicious persons, but to protect persons acting in good faith from the vexation of actions.

- [18] The policy rationale was explained this way in *Hamouth v Edwards & Angell*, 2005 BCCA 172 at para. 37:

Granting absolute privilege to lawyers when they act in the course of their duties to their clients is for the public benefit. It frees lawyers from fear that in advocating their client's cause they will be sued if what they say on behalf of a client is found not to be true.

[19] The protection of absolute privilege extends to all communications, oral or written, made by counsel in the course of, or incidental to court proceedings. Its scope was described broadly in *Holland v Douglas*, 2010 BCSC 96, (aff'd 2010 BCCA 345) at para. 63:

As further explained in *Lawrence v. Sandilands*, 2003 BCSC 211, there is an absolute privilege for all communications made by counsel in the course of, or incidental to, the processing and furtherance of judicial and quasi-judicial proceedings, and this extends to the contents of all pleadings, documents, and testimony offered in evidence, and to all actions taken preliminary, but necessary to the institution or processing of the action or essential to the judicial review of or examination upon judgment or decision.

[20] Mr. Leighton submits that written defamatory statements are not subject to absolute privilege simply because they find their way into a Crown brief, relying on *Teskey v Toronto Transit Commission*, [2003] O.J. No. 5314 (SCJ). I cannot accept this submission. In *Teskey*, the issue was whether the defense of absolute privilege should extend to the investigative stage of a criminal proceeding. On the topic of absolute privilege in the context of the protection it affords lawyers and judges in court proceedings the court stated, at para. 45:

Absolute privilege exists to protect freedom of speech in court proceedings. If absolute privilege applies, a person making a deliberate false statement is protected from civil suit. The recognized core of absolute privilege applies to everything that is said in a judicial proceeding by witnesses, prosecutors and by judges. Core absolute privilege is recognized and enforced in Canada ...

[emphasis added]

[21] There is no question that a lawyer is protected by absolute privilege regarding oral and written statements made in a court proceeding. The statements alleged to have been made in the claim here are precisely those. Absolute privilege provides immunity against suit. Therefore, the notice of civil claim discloses no reasonable claim and the claim against Mr. Januszcak in defamation must be struck.

## Claims of the corporation

[22] The defendants submit that the remaining claims relate to alleged wrongs committed against the corporation, On-Line, and not to Mr. Leighton personally. On this basis alone, the defendants say that these claims are bound to fail and should be struck.

[23] The well established rule in *Foss v Harbottle* (1843), 67 E.R. 189, is that only a company can sue for a wrong done to it. An individual shareholder may not sue for a loss that is a consequence of a wrong committed against the company. A shareholder may only sue for a loss resulting from some wrong committed against him in his personal capacity. This rule is one of the consequences of the fact that a company is a separate legal entity. This underlying

principle was discussed in *Prudential Assurance Co. v Newman Industries Ltd.* (No. 2), [1982] 1 All E.R. 354 (CA) at 367:

... Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting...

[24] Generally, it is only where a shareholder has a relationship with the wrongdoer that is independent from the company and has suffered a loss separate from that of the company that the rule in *Foss v Harbottle* will not apply: see *Haig v Bamford*, [1977] 1 SCR 466 and *Hercules Management Ltd. v Ernst and Young et al.*, [1997] 2 SCR 165.

[25] In *Robak Industries Ltd. v Gardner*, 2007 BCCA 61, the plaintiff shareholders sought damages for wrongful conduct relating to the control and management of a public company, claiming in part for loss in value of their shares in the company. These claims were struck on the basis that the damages were a consequence of damage to the company, not the result of direct damage to the shareholders. In upholding the chambers judge, the Court of Appeal agreed with these comments in *Meditrust Healthcare Inc. v Shoppers Drug Mart* (2002), 61 OR (3d) 786 (CA) at para. 42:

... a shareholder in a company has no independent right of action based on an allegation of diminution in the value of its shares caused by damage to the company. The shareholder does not suffer a direct loss. Its loss is merely the loss suffered by the company.

[26] In this case, Mr. Leighton is seeking damages for "loss of economic opportunities and the destruction of the economic value of his shares in On-Line." He calculates the loss as \$13,496,367, which is 32.4% (marginal tax rate) of On-Line's total losses of \$41,665,455. These damages are clearly a consequence of damage to On-Line and Mr. Leighton has no independent right to claim this loss.

[27] At the hearing, Mr. Leighton articulated his loss slightly differently. He suggested that he was claiming the loss of value of his shares in a merged entity. This is not in his pleadings. In any event, it is difficult to distinguish this from the loss of value of his shares in On-Line, considering the basis for the calculation of \$13,496,367 in damages.

[28] It is my opinion that Mr. Leighton does not have an independent right of action for the damages he is claiming, which is the loss of value of his shares in On-Line. On this basis alone, these claims must be struck.

[29] I have considered the possibility that Mr. Leighton could have an independent loss of a business opportunity, in that he was unable to use On-Line's non-capital losses to negotiate a merger with another company. However, even if he had a loss that was independent of On-Line, he would still have to establish that he has a cause of action independent of the relationship he has through his interest in On-Line and in my view he does not. I will address his claims in abuse of process and estoppel, and a possible claim in negligence.

### Abuse of process

[30] Mr. Leighton submits that the essential elements of the tort of abuse of process are those described in *Border Enterprises Ltd. v Beazer East Inc.*, 2001 BCSC 17, where Tysoe J. (as he then was) referred at para. 14 to this statement in *Carnahan v. Coates* (1990), 47 BCLR (2d) 127 (SC) at 143:

The essential elements of the tort of abuse of process are a wilful misuse or perversion of the court's process for a purpose extraneous or ulterior to that the process was designed to serve, and some damage flowing therefrom

[31] In the broader context, the doctrine of abuse of process engages the Court's inherent jurisdiction to prevent the misuse of its procedure in ways that would bring the administration of justice into disrepute: see *Toronto (City) v CUPE Local 79*, 2003 SCC 63. It arises more commonly to prevent re-litigation of matters that have already been determined. In *Border Enterprises Ltd.*, it arose from an allegation that court proceedings had been brought against the plaintiff for an improper, collateral purpose.

[32] It is difficult to discern the basis for Mr. Leighton's abuse of process claim in his Amended Notice of Civil Claim. Essentially, he alleges that the defendants took an unreasonable position on On-Line's revenue for many years, knowing that Mr. Leighton needed On-Line's non-capital losses to negotiate a merger with another entity, resulting in the non-capital losses becoming statute barred. There is no allegation that any of the defendants wilfully misused the court's process for an ulterior, illegitimate purpose. There is one vague allegation that Mr. Januszcak made a motion in Tax Court that resulted in a lengthy adjournment. Otherwise Mr. Leighton's focus with respect to Mr. Januszcak is the alleged defamatory statements about "sham" agreements.

[33] In his Reply, Mr. Leighton alleges that

- (a) the defendant Nathwani, an auditor, "irresponsibly and incompetently failed to independently verify with the MFA that the MFA's income was not On-Line's income";
- (b) the defendant Morris, a team manager, "irresponsibly and incompetently failed to provide any management direction, quality assurance and control" to the activities of Nathwani; and

- (c) the defendant Asher, an internal appeals officer, "irresponsibly and incompetently conducted a dismissive and superficial review and evaluation of On-Line's letter of objection to the CRA audit."
- [34] He also alleges that the defendants are bound "to act upon obvious accounting errors in a timely fashion" and did not act in good faith in accordance with their duties under the Income Tax Act, R.S.C. 1985, c. 1. He appears to allege that it was unreasonable for the defendants to take seven years "to verify with the MFA whether or not the MFA lease revenue was attributable to On-Line."
- [35] Although there is reference to a lack of good faith, these allegations appear to be more akin to a claim in negligence. This is consistent with Mr. Leighton's submission that the CRA and its servants have a duty of care under the Income Tax Act to correct obvious accounting errors "with all due dispatch."
- [36] The only allegation that may have some relationship to abuse of process emerged in argument. In his written submission, Mr. Leighton alleged that Mr. Januszczak "knew that the CRA assessments were a complete fabrication and disingenuously ignored the fact with the ulterior motive of delaying the proceedings through frivolous, vexatious and irrelevant applications." I can find no similar allegations or material facts in the pleadings. Even if this were pleaded, I do not consider such an allegation sufficient to found a claim in abuse of process. The applications were heard and decided by a court of competent jurisdiction.
- [37] Accordingly, there are no material facts pleaded that would support a claim for abuse of process.

## Estoppel

- [38] Mr. Leighton relies on estoppel to preclude CRA from taking a position on interest expense deductions contrary to the position it took on this issue for the seven years leading up to the Tax Court judgment. His concern, as I understand it, is that the judgment, which ordered a reassessment, was silent about interest expense deductions. Mr. Leighton does not think that CRA should now be able to omit interest expense deductions when it had included them throughout the seven years it took for this matter to be decided.
- [39] In my view, this is a matter for the Tax Court. The issue of estoppel cannot arise in the context of the claim here, as there is no basis for this Court to make any orders arising from the reassessment ordered by the Tax Court.

## Negligence

- [40] Mr. Leighton's application to amend his pleading to include a claim in negligence depends on whether he can show that this is a reasonable claim that would withstand the test under Rule 9-5(1)(a). The defendants say that such a claim is bound to fail because the CRA and its employees do not owe a duty of care to shareholders of corporate taxpayers.

- [41] It is trite law that a claim in negligence requires a plaintiff to establish that the defendant owes the plaintiff a duty of care, that the defendant has breached that duty, and that damages resulted from the breach.
- [42] Mr. Leighton argues that the CRA and its employees have a duty of care to taxpayers under s. 152 of the Income Tax Act to correct obvious accounting errors "with all due dispatch." Section 152 requires the Minister to do a number of things in respect of a taxpayer's return "with all due dispatch", including examining and assessing taxes owing or refunds due, and determining losses.
- [43] In the absence of a proper pleading, it is difficult to assess this assertion. Mr. Leighton alleges a duty of care generally to all taxpayers but in this case, his allegation would have to extend to persons other than the taxpayer affected by a particular audit, as the taxpayer in this case was On-Line. In other words, he asserts that CRA owes a duty of care to him as the sole shareholder of a corporate taxpayer.
- [44] It is my opinion that a duty of care by CRA in respect of its statutory audit function to the shareholder of a corporate taxpayer has not been established within a category that has been recognized at law, nor is it a duty of care that can be given legal recognition under the test enunciated in *Anns v Merton London Borough Council*, [1978] AC 728 and *Cooper v Hobart*, 2001 SCC 79 (the *Anns-Cooper* test).

### No established category

- [45] I was referred to three cases where claims of negligence were made against the CRA: *Leroux v Canada Revenue Agency*, 2012 BCCA 63; *Canus v Canada Customs*, 2005 NSSC 283; and *Foote v Canada (Attorney General)*, 2011 BCSC 1062.
- [46] In *Leroux* and *Canus*, the courts were provided with no authorities or analogous cases where the CRA was found to owe a duty of care to a taxpayer. In *Foote*, the allegation was that the CRA and its employees were negligent in a criminal investigation and the court held that CRA owed a duty of care to the Crown, not the taxpayer.
- [47] The court in *Foote* referred to 783783 *Alberta Ltd. v Canada (Attorney General)*, 2010 ABCA 226. In that case, the issue was whether the government of Canada owed a private law duty of care to a taxpayer arising out of the way that CRA treated the deductibility of advertising expenses claimed by other taxpayers. The court analyzed the claim under the *Anns-Cooper* test.
- [48] In none of these cases did the court conclude that a duty of care to a taxpayer has been established within a category that has been recognized at law. If there is no established category in respect of a taxpayer, there is clearly no established category in respect of a duty of care to the shareholder of a corporate taxpayer.

[49] In these circumstances, the only way for a novel duty of care to be recognized is by applying the Anns-Cooper test.

### The Anns-Cooper test

[50] The Anns-Cooper test has two stages: (1) whether the relationship between the parties justifies the imposition of a duty of care on the defendant; and (2) whether there are residual policy considerations that militate against recognizing a novel duty of care. The test was described succinctly in *Wellington v Ontario*, 2011 ONCA 274 at paras. 37 and 38:

The first stage involves considering both foreseeability of the harm and proximity between the parties. Proximity is used "to characterize the type of relationship in which a duty of care may arise": *Cooper*, at para. 31. Two parties are proximate if their relationship is sufficiently close and direct that it is fair to require the defendant to be mindful of the plaintiff's legitimate interests: *Cooper*, at paras. 32-34. Factors such as the parties' expectations, representations, reliance, and the property or other interests involved, allow the court to evaluate the closeness and directness of the parties' relationship: *Cooper*, at para. 34. Proximity is not defined by any "single unifying characteristic", nor is there a clear test to be applied to determine whether proximity exists in any given case: *Cooper*, at para. 35.

Policy reasons are relevant at both stages of the test. At the first stage, the policy reasons must arise from the nature of the relationship between the parties, rather than any external concerns. At the second stage, the court is entitled to consider "residual policy considerations" that militate against recognizing a novel duty of care: *Cooper*, at para. 30. These are policy considerations that "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37 ...

[51] In *Canus*, a corporate plaintiff claimed that it suffered losses because of a negligently conducted audit. The audit resulted in a reassessment of a large tax liability, which in turn resulted in the company losing its financing. Hood J. concluded that it was reasonably foreseeable that a reassessment would have an effect on the taxpayer's ability to retain or obtain financing but there was insufficient proximity between CRA and the taxpayer to ground a duty of care. She noted that the auditor was an employee of CRA whose obligation was to his employer and that the relationship between the taxpayer and CRA was adversarial. At para 73:

The relationship arises from statute: The Income Tax Act. The interests of a taxpayer and CCRA are inherently opposing interests. The interest of a taxpayer is to pay as little in taxes as is legally possible and the interest of CCRA is to ensure all taxes legally owing are remitted.

- [52] She considered the case analogous to *Jones v Department of Employment*, [1998] 1 All ER 725 (CA), which involved an allegation of negligence against an unemployment benefits adjudicator who had dismissed a claim. There it was held that a government official charged with making decisions that were subject to a right of appeal owed no duty of care in private law.
- [53] In 783783 Alberta Ltd., the Alberta Court of Appeal held that there was no proximity of relationship arising out of CRA's treatment of advertising expenses to give rise to a duty of care to a taxpayer, and even if there was, policy considerations precluded the establishment of a private law duty in tort.
- [54] These cases demonstrate that proximity is not established where statutory duties are owed to the public. The income tax system relies on self reporting by taxpayers and the Income Tax Act gives the Minister and his delegates broad powers in supervising the scheme of assessing and auditing taxpayers. CRA and taxpayers have opposing interests. The relationship is not one where CRA auditors should be responsible for protecting taxpayers from losses arising from their assessments. In these circumstances, policy considerations would militate against a finding of proximity between CRA and individual taxpayers: see 783783 Alberta Ltd. at paras. 45-46; *Syl Apps Secure Treatment Centre v B.D.*, 2007 SCC 38 at para. 32.
- [55] In *Leroux*, the question was whether negligence in the course of the administration or enforcement of the Income Tax Act and the Excise Tax Act could give rise to a private law remedy. The chambers judge refused to strike the claim under Rule 9-5(1)(a) and the Court of Appeal was not persuaded that he was "plainly wrong" to leave the question of whether there was proximity sufficient to establish a *prima facie* duty of care for consideration following a trial. However, there were material facts pleaded and the court directed that the pleading be reformulated in a further amended statement of claim.
- [56] I do not consider that *Leroux* prevents me from assessing this pleading and this potential amendment to the pleading and determining whether it discloses a reasonable claim. Neither *Canus*, *Jones* nor 783783 Alberta Ltd. were considered. Moreover, this case involves consideration of a duty of care, not to a taxpayer directly but indirectly to the shareholder of a corporate taxpayer.
- [57] In my view, there is simply no basis to establish any proximity of relationship in these circumstances. I agree with the submissions of the defendants that it is plain and obvious that no proximity exists between the CRA and its employees and Mr. Leighton, and therefore there can be no private law duty of care.

[58] It is not necessary to consider the second stage of the Anns-Cooper test. However, it is my view that there are residual policy considerations that would militate against recognizing a duty of care in this case, one example being that the effect of recognizing a duty of care would conflict with the CRA's broad duties under the Income Tax Act to ensure that all taxes lawfully owing are correctly assessed and collected.

## Conclusion

[59] The pleadings in this case are difficult to follow and are improper in many ways. They do not set out material facts but rather describe details of evidence, purportedly as particulars, much of it irrelevant. This "evidence" is not something the court can consider in an application to strike under Rule 9-5(1)(a) and I have not done that.

[60] I certainly appreciate Mr. Leighton's frustration with how long it took to complete the audit, reassessment and appeal process in respect of On-Line's taxable income or loss. However, there is nothing in his entire Amended Notice of Civil Claim or in his Reply that discloses a reasonable claim, and there are no amendments that could be made to cure the defects.

[61] Mr. Leighton's application to amend his claim to include an allegation in negligence is dismissed.

[62] The defendants' application to strike to the Amended Notice of Civil Claim is allowed and the action is dismissed, with costs to the defendants at the ordinary scale.

"Fisher J."

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