KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 122**

Date: **2025 07 31**
Docket: KBG-SA-01416-2023
Judicial Centre: Saskatoon

BETWEEN:

YELLOW QUILL PROPERTY MANAGEMENT CORP.

PLAINTIFF

- and -

SASKATOON DAWAH AND COMMUNITY CENTRE INC., RYAN JAMES GRIEVE, MCDOUGALL GAULEY LLP, MICHAEL GRANT DERBOWKA, CUELENAERE LLP, CARWAY HOLDINGS LTD. and TRAVIS NUTTING

DEFENDANTS

Counsel:

Scott R. Spencer	for the plaintiff
Tristan N. Culham and Michael W. Marschal	for the defendant, Saskatoon Dawah and Community Centre Inc.
Timothy P. Hawryluk, K.C.	for the defendant, Michael Grant Derbowka and Cuelenaere LLP

FIAT — ELSON J.
July 31, 2025

Introduction

[1] In this action, the corporate plaintiff, Yellow Quill Property Management Corp. [YQPM], seeks remedies arising from the alleged unauthorized sale and transfer

of nine parcels of land it previously owned in west central Saskatoon. Presently, there are seven named defendants in the action, all identified in the amended statement of claim [amended claim]. After receiving an application to strike the amended claim as against three defendants, the plaintiff now seeks leave to serve and file a proposed further amended statement of claim [further amended claim], which – if approved by the Court – will include additional causes of action.

[2] According to the amended claim, the plaintiff was the registered owner of all nine parcels when the impugned sale arrangement took place. It contends that the true owner of the land, Yellow Quill First Nation [YQ First Nation], did not properly authorize its sale and subsequent transfer. In asserting this allegation, the plaintiff claims that the purchaser, the real estate sales agents, and all the lawyers who participated in the transaction are responsible for the unauthorized sale and transfer. All are named as defendants. Curiously, and for reasons not disclosed to the Court, the individuals who are said to have improperly authorized the sale and transfer are not named as defendants.

[3] The relief sought by the plaintiff includes orders revoking the transfer and directing that title be vested back in its name. The plaintiff also seeks damages, either as an additional or alternative remedy.

[4] As mentioned, three defendants have applied to strike the amended claim insofar as it asserts liability against them. These defendants include the purchaser, its solicitor, and that solicitor's law firm. The stated grounds for the application are that the amended claim fails to disclose reasonable causes of action against the applying parties. The three applicants also contend that the further amended claim similarly fails to disclose reasonable causes of action and should not be allowed. None of the other defendants have taken formal positions on these issues.

[5] I am satisfied that the applications to strike must be allowed. As for the further amended claim, I am not prepared to grant leave for it to be served and filed in the form presented. While some of the proposed additional amendments are satisfactory, others are not. The reasons for my conclusions follow.

Background: Amended Claim and Further Amended Claim

Pleaded Material Facts

[6] In describing the background to this application, I will generally confine my observations to the pleadings as described in the amended claim and the further amended claim. Given the grounds of the applications, the parties wisely did not present affidavit evidence to support their respective positions.

[7] At the outset, I am compelled to note that the amended claim does not comply with Rule 13-8(1)(c) of *The King's Bench Rules*. It is heavily laden with references to evidence as opposed to summarized material facts. Moreover, the allegations YQPM asserts are not set out in chronological order, which did not allow the narrative to flow in an easily readable way.

[8] The initial statement of claim was issued out of this Court on December 5, 2023. It was subsequently amended by consent in July 2024, resulting in the amended claim being filed on July 30, 2024. At the time the applications to strike were heard, the Court also heard the plaintiff's application for leave to serve and file the further amended claim.

[9] The plaintiff is described in the amended claim simply as a Saskatchewan corporation. In the further amended claim, YQPM seeks to add particulars of its relationship with the YQ First Nation. Specifically, YQPM wishes to plead that it is the general partner in a limited partnership, known as Yellow Quill Property Management

LP and that YQ First Nation is the limited partner. Although not described in any of the pleadings, I take judicial notice of the fact that YQ First Nation is an Indigenous reserve located in east central Saskatchewan, near the town of Kelvington.

[10] Before describing the defendants, it should be noted that YQPM pleads that, on April 2, 2020, it became the registered owner of nine regular surface parcels of land in west central Saskatoon, consisting of a commercial building and an adjacent parking lot. For the purposes of this fiat, I will collectively describe these parcels as the "Property". The civic address for the Property is 1236 - 20th Street West. While the legal descriptions of the parcels are pleaded in the amended claim, I need not repeat them here.

[11] The amended claim identifies seven defendants. At this stage of the fiat, I will begin with only a brief description of each defendant and the alleged roles they played in this dispute.

[12] The defendant Saskatoon Dawah and Community Centre Inc. [Dawah] is a Saskatchewan corporation with its registered office in Saskatoon. In the statement of claim, Dawah is described as the purported purchaser of the Property.

[13] The defendants Ryan James Grieve and McDougall Gauley LLP are described as the solicitors who purported to represent YQPM in the sale and transfer of the Property.

[14] The defendants Michael Grant Derbowka and Cuelenaere LLP, collectively described simply as [Mr. Derbowka], are described as the solicitors who represented Dawah in the purchase and transfer of the Property.

[15] The defendants Travis Nutting and Carway Holdings Ltd., carrying on business under the name "Realty Executives" [Realty Executives], are respectively

described as the real estate salesperson and broker that participated in the sale and purchase.

[16] Summarizing the pleaded material facts in chronological order, they begin with YQPM's allegation of an unauthorized brokerage contract with Realty Executives on April 27, 2023. Specifically, YQPM alleges that a person, whom I will identify with the initials "D.P.", executed a brokerage contract with Realty Executives to list the Property for sale, albeit with a misdescription of the registered owner's name as "Yellow Quill Holdings Inc.". The terms of the contract called for the Property to be listed at the asking price of $1,350,000. YQPM expressly pleads that D.P. was neither a director, officer, shareholder nor employee of YQPM and had no authority to sign the brokerage contract on its behalf.

[17] The amended claim goes on to describe details that led to an agreement to sell the Property. YQPM pleads that, in early June 2023, Dawah made an offer to purchase the Property for the purchase price of $800,000 and a closing date of August 31, 2023. This offer was met with a counteroffer, signed by D.P. purportedly on behalf of YQPM, for a purchase price of $850,000, which counteroffer Dawah accepted. Although not expressly pleaded, there are passages in the amended claim that make it apparent that the possession date was eventually changed to July 31, 2023.

[18] The next series of pleaded material facts surround discussions said to have occurred between the date of the sale agreement and the transfer of the Property to Dawah. In this regard, YQPM pleads that, on July 26, 2023, Mr. Grieve sent an email message to Bruce Slusar – described in the pleadings as "YQPM's solicitor" – during which he disclosed that he represented YQPM in a "land/building sale" and inquired about the limited partnership. I pause the narrative at this point simply to note that YQPM's pleadings do not include material facts to explain Mr. Slusar's specific role with YQPM and how that role compared with Mr. Grieve's role.

[19] The claim goes on to allege that Mr. Grieve's disclosure led to an email response from Mr. Slusar later that day, saying he would seek "direction and instructions" as well as "ensure that appropriate protocols are followed". Mr. Slusar also asked Mr. Grieve to tell him who provided him with his instructions. Mr. Grieve responded to that message on July 27, 2023, advising that he received his instructions from a person I will identify with the initials "N.K.", who was copied with the message.

[20] The claim alleges that Mr. Slusar responded again on July 28, 2023, advising Mr. Grieve and N.K., among other things, that there were proper procedures to be followed in relation to the disposition of YQ First Nation's capital assets. He added that there would be follow-up "to determine whether such procedures have been undertaken and completed." The claim goes on to say that, nine minutes later, N.K. sent an email message to both lawyers, advising that his role was to connect Mr. Grieve with three persons he identified by name. Again, identifying them by their initials, the three persons are "J.M.", "A.W." and "T.P.".

[21] The claim alleges that the final email message that day came from Mr. Slusar to Mr. Grieve, copied to J.M., A.W., and T.P. In it, Mr. Slusar told Mr. Grieve that no disposition of any land/building "involving this Yellow Quill First Nation entity" should take place pending further inquiry.

[22] Despite this communication, the amended claim pleads to the circumstances surrounding the transfer of the Property to Dawah. In this respect, YQPM pleads that, on July 27, 2023, the person I identified as T.P. swore a transfer authorization prepared by Mr. Grieve. YQPM expressly acknowledges in the amended claim that T.P. "was one of three Directors of the Plaintiff YQPM". YQPM further pleads that the transfer authorization included the necessary affidavit in which T.P. swore that he was authorized to sign the document without affixing the corporate seal. While YQPM expressly pleads that T.P. lacked the authority to which he averred, it did

not plead any particulars to support that assertion. The claim then alleges that, on July 28, 2023, Mr. Grieve sent to Mr. Derbowka all the documents necessary to transfer the Property to Dawah, including the transfer authorization.

[23] YQPM also pleads that, in a final effort to stop the transfer of title, Mr. Slusar wrote to both Mr. Grieve and Mr. Derbowka on August 1, 2023, advising them that the purported sale had not been authorized or approved by the appropriate authorities, none of whom are identified, either by name or office, in the amended claim. It is further alleged that both lawyers were told that the transfer is not to be completed until further notice. Despite this correspondence, the amended claim acknowledges that the Property was transferred to Dawah.

[24] I think it should also be noted that none of YQPM's pleadings set out any material facts about efforts made within YQPM's governance structure to stop or prevent the sale and transfer from proceeding.

Remedies Sought and Pleaded Causes of Action

[25] Based on the allegations in the amended claim, YQPM pleads that the transfer of the Property is void *ab initio*. Among the remedies sought, YQPM asks for specific relief under s. 15(2)(c) and s. 109 of *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*LTA*], including orders that the transfer be revoked, and the Property be vested back to YQPM as the registered owner. It also seeks damages in an amount to be proven at trial and costs on a solicitor and client basis.

[26] The pleaded causes of action in the amended claim and the further amended claim have become somewhat of a moving target. In the amended claim the only cause of action alleged against Mr. Derbowka is for negligence in causing or permitting the transfer of the Property to Dawah. In this regard, YQPM pleads that Mr. Derbowka owed it a duty of care not to cause the transfer authorization to be

registered when they "knew or ought to have known that the Transfer Authorization was void *ab initio* and without authority and that the Transfer was void *ab initio* and invalid at law."

[27] As for the claim against Dawah, the alleged cause of action in the amended claim is indiscernible. In that pleading, YQPM alleges no wrongful conduct on Dawah's part. Instead, it simply names Dawah as a defendant in the context of its request for revocation of the transfer and the revesting of title to the Property.

[28] In the further amended claim, YQPM wishes to add two more causes of action that are directed against certain named defendants, including Mr. Derbowka and Dawah. One cause of action is curiously identified as a "statutory cause of action" under the *LTA*. The other cause of action is identified as a claim for injurious falsehood.

[29] The statutory cause of action purports to engage s. 95(1) of the *LTA*. As pleaded in paragraph 37.1 of the further amended claim, YQPM asserts this cause of action against all named defendants. Insofar as it is asserted against Dawah and Mr. Derbowka, the proposed pleading reads as follows (in all of YQPM's pleadings, Dawah is described as "SDCC"):

> 37.1 Further, or in the alternative, the Plaintiff states that each Defendant is responsible, in whole or in part, for the Loss suffered by the Plaintiff pursuant to s. 95(1) of *The Land Titles Act, 2000*. Without limiting the generality of the foregoing, the particulars of the Defendants' responsibility for the Loss includes:
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> …
>
> (c) With respect to the Defendants Derbowka and Cuelenaere:
>
> (i) Submitting the Transfer Authorization to the Land Titles Registry as part of an application for transfer of the Property when they knew or

> ought to have known the Transfer Authorization was invalid; or
>
> (ii) In the alternative, failing to cancel, revoke, rescind, or otherwise stop the application for transfer of the Property even after learning that the Transfer Authorization was invalid; and
>
> (d) With respect to the Defendant SDCC:
>
> (i) Instructing Derbowka and Cuelenaere to submit the Transfer Authorization to the Land Titles Registry knowing that it was invalid; or
>
> (ii) In the alternative, failing to instruct Derbowka and Cuelenaere to cancel, revoke, rescind, or otherwise stop the application for transfer of the Property even after learning that the Transfer Authorization was invalid.

[30] YQPM's pleaded claim for injurious falsehood is directed at Dawah and all the solicitors who were directly involved in the disposition of the Property. As set out in paragraphs 37.2, 37.3 and 37.4, the claim for injurious falsehood reads as follows:

> 37.2 Further, or in the alternative, the Plaintiff states that the Defendants Grieve, McDougall Gauley, SDCC, Derbowka and Cuelenaere are jointly and severally liable to the Plaintiffs for the tort of injurious falsehood for sending, submitting, registering, or instructing others to submit or register the Transfer Authorization to or with the Land Titles Registry as part of an application for transfer of the Property. More particularly:
>
> (a) Grieve and McDougall Gauley sent the Transfer Authorization to Derbowka and Cuelenaere and failed to recall, retract, rescind, or demand return of it, or take steps to prevent the Transfer Authorization from being relied upon to transfer the Property in the Land Titles Registry;
>
> (b) SDCC directed or instructed Derbowka and Cuelenaere to submit the Transfer Authorization or to register the Transfer Authorization with the Land

Titles Registry, and/or failed or declined to instruct Derbowka and Cuelenaere to cancel, revoke, rescind, or otherwise stop the application for transfer of the Property even after learning that the Transfer Authorization was invalid; and

(c) Derbowka and Cuelenaere submitted the Transfer Authorization to or registered the Transfer Authorization with the Land Titles Registry

(hereinafter collectively referred to as the "Injurious Statements"), and these actions by Grieve, McDougall Gauley, SDCC, Derbowka, and Cuelenaere constitute statements within the meaning of the tort of injurious falsehood.

37.3 The Injurious Statements were made with the knowledge or constructive knowledge that:

(a) The Transfer Authorization was invalid, and the Injurious Statements were therefore false; and

(b) The Injurious Statements would harm YQPM, and the Defendants making the Injurious Statements intended to cause that harm without lawful justification, and/or for a dishonest or improper motive, that being:

(i) In the case of Grieve and McDougall Gauley, to cover up or failed to correct a mistake;

(ii) In the case of SDCC, to advantage itself and illegitimately obtain title to the Property when it knew or ought to have known the owner of the Property had not authorized the transfer of the Property; and

(iii) In the case of Derbowka and Cuelenaere, to wrongfully gain advantage for a client, and/or to cover up or fail to correct a mistake.

37.4 YQPM, as the owner of the Property, was identified as the subject of the Injurious Statements, and has suffered and will continue to suffer loss and damage as a result of the Injurious Statements.

Positions of the Parties

[31] The positions taken by the applicants are reasonably clear. Dawah's position specifically responds to YQPM's assertion that the transfer of the Property is void *ab initio*. On this point, Dawah contends that none of YQPM's pleadings, including the further amended claim, contain material facts which, if proved, would support such a finding. Indeed, it is argued that, by the material facts pleaded about the transfer authorization, there is no basis in law for YQPM to say that the transfer lacked essential validity. Dawah goes on to posit that the further amended claim fails to assert causes of action that are either known to law or are supported by the pleaded material facts. Accordingly, it is said that it would be improper for the Court to permit YQPM a further amendment in the proposed form.

[32] Mr. Derbowka joins with Dawah's submission on the further amended claim. That said, his central argument is that YQPM's claim for negligence is not borne out by the pleaded material facts. In this respect, Mr. Derbowka emphasizes that, by acknowledging his role as Dawah's solicitors, YQPM's pleadings make it plain and obvious that they did not owe a duty of care to YQPM in relation to either the sale or the transfer of the Property.

[33] Turning to YQPM's position, a central feature of its argument is that it served as the corporate alter ego of YQ First Nation, which was the true or beneficial owner of the Property. In this respect, counsel argued that but for YQ First Nation's legal incapacity to purchase the Property itself, YQPM need not have existed. YQPM goes on to say that all the defendants, including Dawah and Mr. Derbowka, knew or ought to have known of YQ First Nation's involvement in the ownership of the Property. From this perspective, it is contended that this actual or constructive knowledge translates to an understanding that YQ First Nation's formal consent to the sale and transfer of the Property was a prerequisite. At the very least, YQPM maintains

that the warnings given during the discussions leading to the transfer should have alerted Dawah and Mr. Derbowka to the likelihood that the transfer was not properly authorized.

[34] Specifically addressing Mr. Derbowka's position, YQPM candidly acknowledges that he was Dawah's solicitor. Despite this acknowledgement, YQPM argues that the duty of care they owed to the transferee of the Property should also have extended to the transferor. YQPM's counsel specifically suggested that this was a case where the Court should carry out an analysis that revisits the relationship between a client's solicitor and third parties. Having said this, counsel did not articulate any jurisprudential basis for an alternative analysis.

Applicable Law and Analysis

Importance and Purpose of Pleadings

[35] In *Hollinger v SaskTel Centre*, 2024 SKKB 178, aff'd 2025 SKCA 40 [*Hollinger*], I expressed some minor discomfort about how the importance and purpose of pleadings had been neglected in recent years. While the gravity of that discomfort is not as apparent in this case as it was in *Hollinger*, I think a brief reference to some of the commentary may still be helpful.

[36] As noted in *Hollinger*, the words in statements of claim, statements of defence, third party claims, cross-claims and replies command considerable importance. As such, they must be penned carefully, with a view to meeting both the technical requirements of pleadings (see Rules 13-8 to 13-12 of *The King's Bench Rules*) and their overarching and substantive purpose. In addressing that substantive purpose in *Hollinger*, I adopted certain comments and observations drawn from one of the leading Saskatchewan authorities on the subject. In this regard, I wrote the following at paras. 23-24:

[23] In Saskatchewan, a frequently cited authority on the purpose of pleadings is the decision of the Saskatchewan Court of Appeal in *Ducharme v Davies*, [1984] 1 WWR 699 (Sask CA) [*Ducharme*]. There, the Court adopted the observations of another leading civil procedure text. Although these observations described the functions of pleadings in somewhat different language from that used by Abrams and McGuinness, I find the two descriptions complement each other. The Court's comments in *Ducharme* were penned by Cameron J.A. at page 718:

> While pleadings are no longer subject to the precise, complex, and occasionally oppressive requirements they once were, nevertheless they remain an important aspect of every law suit and must be framed with care. The following passage taken from The Law of Civil Procedure, Williston and Rolls, vol. 2 (1970), p. 637, illustrates why a careful pleading is still important:
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> > The function of pleadings is fourfold:
> >
> > 1. To define with clarity and precision the question in controversy between litigants.
> >
> > 2. To give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. A defendant is entitled to know what it is that the plaintiff asserts against him; the plaintiff is entitled to know the nature of the defence raised in answer to his claim.
> >
> > 3. To assist the court in its investigation of the truth of the allegations made by the litigants.
> >
> > 4. To constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties.
>
> [Emphasis added]

[24] Cameron J.A. went on, in *Ducharme*, to reference additional passages from the same text that directly pertained to the issues in that appeal. These issues, which are also engaged in the present application, related to: (1) the importance of properly pleaded material facts; (2) the presumption of construing pleadings against their author; and (3) the importance

of pleading something more than a simple conclusion of law. On these issues, Cameron J.A. wrote the following at page 718:

> I think it would be useful to refer to three additional passages from The Law of Civil Procedure (which appear respectively at pp. 651, 654, and 677):
>
> > In pleadings it is necessary that the material facts be stated clearly and definitely in a concise summary way ... The facts must be alleged with certainty and with precision and not left to be inferred from vague or ambiguous expressions or from statements of circumstances consistent with different conclusions. If vague and general language is used nothing is defined and the issue may become hopelessly confused.
> >
> > In construing a pleading, the presumption is always against the pleader because he is taken to have stated his own case in the best possible light and in the manner most favourable to himself.
> >
> > In an action for damages for negligence, the plaintiff must in his statement of claim specifically plead such facts as are intended to be relied upon as establishing negligence with sufficient particularity to enable the other party and the court to know on what allegations he bases his case. To plead merely that the defendant was negligent is to plead a conclusion of law. Such a plea is bad unless accompanied by a plea of the particular facts in respect of which the negligence is alleged.
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> [Emphasis added]

Application of Rule 7-9(2)(a): Disclosure of Reasonable Causes of Action

[37] Having addressed the law's expectation of a properly pleaded claim, I now turn to the way this expectation factors into assessing whether a statement of claim sufficiently discloses a reasonable claim or cause of action. While Dawah and Mr. Derbowka have confined their arguments to specific considerations of Rule 7-9(2)(a), it is perhaps appropriate to recite Rule 7-9 in its entirety. It reads as follows:

> **7-9(1)** If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
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> (a) that all or any part of a pleading or other document be struck out;
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> (b) that a pleading or other document amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).
>
> [Emphasis added]

[38] The wording of Rule 7-9 is much like former Rule 173 of *The Queen's Bench Rules*. As noted in multiple authorities, the fundamental principles underlying former Rule 173 remain generally applicable to Rule 7-9, subject only to the overarching impact of the Foundational Rules in Part 1 of *The King's Bench Rules*. See *Bell v Xtreme Mining & Demolition Inc.*, 2014 SKQB 177 at para 6, 448 Sask R 255; *Hope v R.M. of Parkdale #498*, 2014 SKQB 9 at para 15, 432 Sask R 18; *Rubbert v Boxrud*, 2014 SKQB 221 at para 35, 450 Sask R 147 [*Rubbert*].

[39] The purpose of Rule 7-9, and former Rule 173 before it, has been addressed in several Saskatchewan authorities. In *Rubbert*, I addressed three authorities that described the overall purpose of former Rule 173 before going on to apply that jurisprudence to the consideration of Rule 7-9. In this regard, I wrote the following at para. 34:

> [34] From a review of the relevant jurisprudence, it is apparent that the object of former Rule 173 was to prevent the delay and expense of a trial founded on an unreal claim or defence: *Montreal Trust Co. of Canada v. Jaynell Inc.* (1993), 111 Sask. R. 178, [1993] S.J. No. 274 (QL) (Q.B.), aff'd (1993), 116 Sask. R. 13, [1993] S.J. No. 548 (QL) (C.A.); *Ellis v. Canada (Office of the Prime Minister)*, 2001 SKQB 378, 210 Sask. R. 138, aff'd 2002 SKCA 35, [2002] S.J. No. 137 (QL); *RoyNat Inc. v. Northland Properties Ltd.*, [1994] 2 W.W.R. 43, 115 Sask.R. 272 (Q.B.). In the pursuit of this object, courts generally concluded that it was appropriate to strike a claim or defence where it was seriously defective or so devoid of merit that it could not inspire reasonable argument. While such remedies were never to be taken lightly, and were limited to exceptional cases, there were circumstances where the remedy is clearly justified.
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> [Emphasis added]

[40] The kind of "exceptional cases", understood to be incapable of inspiring reasonable argument, engage the aptly named "plain and obvious" test. This test was first articulated by the Supreme Court of Canada in *Attorney General of Canada v Inuit Tapirisat*, [1980] 2 SCR 735. In that case, Estey J. wrote, at page 740, that "… a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in *plain and obvious* cases and where the court is satisfied that 'the case is beyond doubt'" (emphasis added). See also *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441 at 449, and *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 (WL) at para 37. In Saskatchewan, the plain and obvious test was expressly adopted by the Court of Appeal in *Sagon v Royal Bank of Canada* (1992), 105 Sask R 133 (CA) at para 16.

[41] More recently, the Supreme Court of Canada revisited the plain and obvious test in *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, [2020] 2 SCR 420 [*Babstock*]. Although the Court was divided in its final judgment, the justices agreed on the relevant principles to be applied in assessing whether it is plain and obvious that a claim does not disclose a reasonable cause of action. These principles were restated by Karakatsanis J. at paras. 87-90:

> [87] A pleading may be struck or amended on the ground that it discloses no reasonable cause of action or defence (*Rules of the Supreme Court, 1986*, r. 14.24(1)(a)). When considering whether to strike a pleading on this ground, the question is whether the claim has "no reasonable prospect of success" (*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17), or whether it is "plain and obvious" that the action cannot succeed (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959, at p. 980). This is a high standard that applies to determinations of fact, law, and mixed fact and law. The facts pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22).
>
> [88] On a motion to strike, the statement of claim should be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies" (*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at p. 451), because "cases should, if possible, be disposed of on their merits" (*Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, 204 Nfld. & P.E.I.R. 58, at para. 12). At times, a proposed cause of action is so obviously at odds with precedent, underlying principle, and desirable social consequence that regardless of the evidence adduced at trial, the court can say with confidence that it cannot succeed. But this is not often the case, and our common law system generally evolves on the basis of the concrete evidence presented before judges at trial.
>
> [89] This is why claims that do not contain a "radical defect" (*Hunt*, at p. 980) should nevertheless proceed to trial. Courts should consider whether the pleadings are sufficient to put the defendant on notice of the essence of the plaintiff's claim (*Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2008 SCC 42, [2008] 2 S.C.R. 551, at

> para. 15) and whether "the facts pleaded would support one or more arguable causes of action" (*Anderson v. Bell Mobility Inc.*, 2009 NWTCA 3, 524 A.R. 1, at para. 5). In *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, this Court explained that a cause of action is "only a set of facts that provides the basis for an action in court" (para. 27).
>
> [90] The threshold to strike a claim is therefore high. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial (*Imperial Tobacco*, at paras. 17 and 21). The correct posture for the Court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail (*Hunt*, at p. 978, quoting *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C. C.A.), at pp. 116 and 122).
>
> [Emphasis added]

See also *Reed v Dobson*, 2021 SKQB 252 at para 154.

[42] In Saskatchewan, a substantial body of case law has developed on the application of the plain and obvious test to a contested application under Rule 7-9(2)(a) and former Rule 173(a). In chronological order, and aside from cases already referenced, this body of case law includes *Milgaard v Saskatchewan*, [1994] 9 WWR 305 (Sask CA); *Saskatchewan Provincial Court Judges Association v Saskatchewan (Minister of Justice)* (1995), [1996] 2 WWR 129 (Sask CA); *Sandy Ridge Sawing Ltd. v Norrish*, [1996] 4 WWR 528 (Sask QB); *Collins v Saskatchewan Rural Legal Aid Commission*, 2002 SKQB 201 [*Collins*]; *Saskatchewan Power Corporation v Swift Current (City)*, 2007 SKCA 27, 293 Sask R 6; *Lawless v Conseil scolaire Fransaskois*, 2014 SKQB 23, 436 Sask R 196; *Smerek v Areva Resources Canada Inc.*, 2014 SKQB 282, 454 Sask R 217; *Reisinger v J.C. Akin Architect Ltd.*, 2017 SKCA 11, [2017] 8 WWR 532 [*Reisinger*]; *Thirsk v Public Guardian and Trustee of Saskatchewan*, 2017 SKQB 66; *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98; *Bhagaloo v M2 Construction & Development Ltd.*, 2021 SKCA 168, [2022] 3 WWR 179; *Wilson v Saskatchewan Water Security Agency*, 2023 SKCA 16, 478 DLR (4th)

170 [*Wilson*]; *Yashcheshen v Canada (Attorney General)*, 2024 SKKB 63; and *Graham Design Builders LP v Mod-panel Manufacturing Ltd.*, 2025 SKKB 87.

[43] Of the above authorities, one of the frequently cited cases, both in the context of Rule 7-9(2)(a) and former Rule 173(a), is the decision of this Court in *Collins*. There, at para. 11, Gunn J. concisely summarized the five principles to be considered in an application to strike a statement of claim under former Rule 173(a):

> [11] The principles which apply to an application to strike a plaintiff's claim under Rule 173(a) are the following:
>
> (i) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success. (*Sagon v. Royal Bank* (1992), 105 Sask. R. 133 (Sask. C.A.), at 140);
>
> (ii) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. (*Sagon*, at 140; *Milgaard v. Kujawa* (1994), 123 Sask. R. 164 (Sask. C.A.));
>
> (iii) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case (*Sagon*, at p. 140);
>
> (iv) The court can strike all, or a portion of the claim (Rule 173);
>
> (v) The plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (*Sandy Ridge Sawing Ltd. v. Norrish* (1996), 140 Sask. R. 146 (Sask. Q.B.)).

As noted in *Hollinger*, the five principles in *Collins* have been expressly followed and applied in the consideration of applications pursuant to Rule 7-9(2)(a). This includes Court of Appeal decisions in *Saskatchewan Power Corporation v Swift Current (City)* and *Wilson*. In my view, the five principles still apply and do not conflict with the principles articulated in *Babstock*.

[44] The fifth principle referenced in *Collins* reflects the law's expectation that, when preparing a statement of claim, a plaintiff shall plead sufficient material facts which, if proved, will establish all the essential elements of any asserted causes of action. It necessarily follows that where a statement of claim asserts a cause of action with insufficient material facts to meet this expectation, it will fail to disclose a reasonable claim or cause of action, and is liable to be struck unless a suitable amendment is permitted. Where an application under Rule 7-9(2)(a) challenges a statement of claim, the analysis a chambers judge must apply was described by Ottenbreit J.A. in *Reisinger* at para 20:

> [20] One of the tasks of a judge reviewing a pleading under Rule 7-9 is to determine whether sufficient facts to establish the required legal elements of the cause of action have been pleaded. The reviewing judge in discharging this task must have regard to the statement of claim as a whole. Specifically, he or she must review any recitation of allegations that appear to be customary formulations of the elements of specific causes of action as may be found, for example, in such texts as *Bullen & Leake & Jacob's Canadian Precedents of Pleadings*, 2d ed (Toronto: Carswell, 2013). The reviewing judge must also have regard to the non-formulaic allegations of fact contained in the statement of claim. It is for him or her to determine whether the combined effect of any technical pleading, together with other facts, properly plead the essential elements of the cause of action. ...
>
> [Emphasis added]

[45] As an important footnote to the application of Rule 7-9(2), it must be remembered that its potential application will also factor in the Court's decision whether amendments to a claim or defence should be allowed. In this respect, one of the applicable principles in the amendment of claims or defences focusses on whether the proposed amendment – especially if it adds a cause of action or defence – is a "proper pleading". By this principle, it is understood that, in the case of a statement of claim, an amendment should not be allowed if it results in a pleading that would be struck pursuant to one or more of the grounds identified in Rule 7-9(2). See *Roussy v*

Red Seal Vacations Inc., 2011 SKCA 116 at para 14, 342 DLR (4th) 395 and *Cupola Investments Inc. v Zakreski*, 2021 SKCA 86 at para 48.

[46] In the specific context of the present application, the "proper pleading" principle requires the Court to assess whether the additional claims in the further amended claim disclose reasonable causes of action.

Cause of Action in Negligence Against Solicitors

Solicitors' Duty of Care to Third Parties

[47] In assessing whether Mr. Derbowka might be liable to YQPM for negligence, the central issue turns on whether he owed YQPM a duty of care. In this regard, the law has long recognized the "general rule" that practicing lawyers owe no actionable duties of care to anyone other than their clients. Having said this, the law has also recognized limited exceptions to the general rule. Whether such an exception will apply to a given case will depend on the circumstances. These circumstances may include the nature of the relationship between a lawyer and the third party, as well as the foreseeability of harm that may arise from the lawyer's act or omission. For a general discussion of the subject, see Adam M. Dodek & Jeffrey G. Hoskins, *Canadian Legal Practice: A Guide for the 21st Century*, loose-leaf (Rel 82-10/2021) vol 2 (Toronto: LexisNexis Canada, 2009) at 11-31 to 11-45, where the relationship between lawyers and third parties, including liability and ethical considerations, is discussed.

[48] The strongest application of the general rule is especially apparent where the third party is adverse in interest or stands opposite to the lawyer's client. In claims arising from litigious proceedings, this understanding is virtually self-evident. It is based on the reality that, as advocates, a lawyer's primary duty is to act fearlessly in the pursuit of a client's interests. In this context, there is recognition of the risk that any duty of care to opposing parties, beyond what is ethically required, will detract from

the lawyer's primary duty. This understanding was aptly described by Allbright J. in *Babatunde v Bank of Canada*, 2017 SKQB 62 [*Babatunde*], where he wrote the following at paras. 90-91:

> [90] It is a further significant attribute of this matter that the defendant lawyers owed no duty of care to the plaintiff as the principle of "duty of care" is founded in Canadian jurisprudence. Throughout, the defendant lawyers acted for the defendant Bank of Canada. This was a defendant completely adverse in interest to the interests of the plaintiff. A lawyer must find herself or himself in a position of being able to act fearlessly when advocating on behalf of a client in a court proceeding without the threat of liability stemming therefrom.
>
> [91] I am unable to see any interpretation of the factual scenario before me which would suggest that in any way the defendant lawyers owed some manner of duty of care to the plaintiff or that it could be said in some fashion to have a duty to inferentially have due regard to the rights of the plaintiff in advancing the litigation. The principle in my view is clear that no duty of care arises between a litigant and counsel for the other side of the litigation.
>
> [Emphasis added]

[49] Other notable authorities in this regard, commended to the Court by defence counsel, include *Young v Borzoni*, 2007 BCCA 16 at para 52, 277 DLR (4th) 685; *Kumar v Korpan*, 2020 SKQB 256 at para 46; *Mitchell v Candle Lake (Resort Village)*, 2022 SKKB 283; and *J.L. v Shewchuk*, 2023 SKKB 253.

[50] The general rule, together with the understanding of a lawyer's primary duty as described in *Babatunde*, also applies to most circumstances where lawyers act as solicitors in non-litigious matters. Having said this, the relevant jurisprudence suggests it would be a mistake simply to apply it as a blanket rule to all non-litigious matters. As will be seen in certain authorities cited in this fiat, there may be factors that call for a somewhat deeper analysis – one that calls for consideration of certain tort principles, even where the party asserting a duty of care is seen as adverse in interest to

the solicitor's client. Unfortunately, neither counsel who spoke to this issue addressed these principles in their respective submissions.

[51] Conceptually, I think the required discussion begins with consideration of two English cases that appear to have triggered the possible need for the deeper analysis. They are *Ross v Caunters*, [1979] 3 All ER 580 (Eng Ch) [*Ross*] and *White v Jones*, [1995] 1 All ER 691 (UK HL) [*White*]. Both cases are so-called "disappointed beneficiary" cases. This label is attributed to the fact that they dealt with the potential liability of solicitors for errors made in the handling of testators' wills. In each of the two English cases, tortious liability was found, albeit on different premises. While the circumstances of these cases obviously differ from the present matter, they give context to arguments made in subsequent Canadian cases. For that reason, I am persuaded that they should be addressed in the consideration of the present case.

[52] In *Ross*, the testator's solicitor failed to advise his client that a beneficiary's spouse should not witness his signing of the will. The Chancery Court held that, despite the absence of a solicitor/client relationship, the solicitor owed a duty of care to the beneficiary. Megarry V.C. premised this finding on principles applicable to the tort of negligence. Specifically, he applied the proximity and public policy tests, drawn from *Anns v London Borough of Merton*, [1977] 2 All ER 492 (HL) [*Anns*] and *McAlister (Donoghue) v Stevenson*, [1932] AC 562 (HL) [*Donoghue v Stevenson*].

[53] To give further context to Canadian cases that have considered the modern version of the tests applied in *Ross*, the proximity and public policy tests are now governed in Canada by the *Anns/Cooper* analysis, a label drawn from *Anns* and the Supreme Court of Canada judgment in *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537. The test is a two-stage exercise in which a court may be expected to make two determinations, the second of which depends on an affirmative answer to the first. These determinations are: (1) whether a *prima facie* duty of care exists between the

parties; and (2) if such a duty does exist, whether there are residual policy considerations, outside the parties' relationship, that should negate a duty of care. Each determination calls for specific inquiries. The plaintiff bears the ultimate legal burden at the first stage, while the defendant bears the evidentiary burden at the second stage.

[54] At the first stage, a court must answer two distinct, but related, inquiries: (1) whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct – as per *Donoghue v Stevenson*; and (2) whether there is a relationship of proximity between the parties such that a defendant might reasonably anticipate that failure to take care could cause harm to the plaintiff. In the second of these inquiries, a court is called upon to focus more specifically on the relationship between the parties and whether it was sufficiently "close and direct" as to fairly justify a legal duty of care. The relationship need not be a personal one. Rather, a court's inquiry will focus on factors arising from the relationship, such as expectations, representations, reliance and the nature of interests engaged by the relationship.

[55] In cases where a *prima facie* duty of care is found – and the case does not fall within, or is not closely analogous to, a recognized category of relationships where a duty of care has previously been recognized – a court must then turn to the second stage and assess the impact of residual policy concerns. This assessment calls for a court to broadly consider the potential consequences of fully recognizing the *prima facie* duty of care. Without setting out an exhaustive list, a court might reasonably assess: (1) whether the recognition will adversely impact other legal obligations or society as a whole; (2) whether the law already provides a remedy for the subject complaint; or (3) whether the duty of care might result in unlimited liability for an unlimited class of persons or entities.

[56] In *White*, the testator instructed his solicitor to prepare a new will to include his two daughters, who had been excluded in his earlier will. During a

prolonged delay in preparing the will, the testator died. Although the House of Lords affirmed the solicitor's liability to the disappointed beneficiaries, it declined to follow the analysis in *Ross*. Instead, and speaking for the majority, Lord Goff premised liability on an extension of the more stringent principle in *Hedley Byrne & Co. v Heller & Partners Ltd.*, [1963] 2 All ER 575 (UK HL) [*Hedley Byrne*]. As is generally understood, the *Hedley Byrne* principle – which primarily applies to claims of negligent misrepresentation – arises where four conditions are met. Those conditions are: (1) a fiduciary relationship of trust and confidence between the parties; (2) the party that prepared the advice or information has voluntarily assumed the risk; (3) the other party has relied on the advice or information; and (4) such reliance was reasonable in the circumstances. In *White*, the central condition related to the solicitor's assumption of risk/responsibility in fulfilling the testator's instructions in a timely way. This was said to have justified the extension of the *Hedley Byrne* principle to the two daughters.

[57] Despite the factual differences, the underlying analyses in *Ross* and *White* have been raised in considering liability of solicitors in various non-litigious matters, entirely unrelated to disappointed beneficiaries. The authorities I will address in this regard are: *Baypark Investments Inc. v Royal Bank*, (2002) 57 OR (3d) 528 (Sup Ct), aff'd 2002 CarswellOnt 4023 (WL) (CA) [*Baypark*]; *Dhillon v Jaffer*, 2012 BCCA 156, 348 DLR (4th) 712 [*Dhillon*]; *Robinson v Rochester Financial Ltd.*, 2010 ONSC 463, 89 CPC (6th) 91, application for leave to appeal denied, 2010 ONSC 1899 [*Robinson*]; and *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 380 [*Schneider*].

[58] *Baypark* was one of the first cases to consider any kind of tort analysis in assessing the liability of solicitors in commercial matters. There, the defendant solicitors had been retained by the defendant bank to represent it in relation to a loan advanced to one of its corporate customers. As part of the loan transaction, the bank took registered security over the customer's assets under a security agreement.

Eventually, the bank received information which led it to believe that the customer had sold its assets to the plaintiff. Based on this belief, the bank sought advice from its solicitors, who advised of the risk in not registering a financing charge statement against the plaintiff. The bank accepted the advice and instructed the solicitors to act accordingly. The plaintiff and its principal took the position that the registration was improper and had adversely affected their business affairs. They sued both the bank and their solicitors.

[59] In an application for summary judgment by the solicitors, the action was dismissed. The Court's analysis is instructive. Instead of simply applying the proposition drawn from litigation contexts, Lane J. conducted a concise but reasonably thorough review of the then applicable jurisprudence related to a solicitor's liability to third parties. A significant portion of the case review in *Baypark* was devoted to a discussion of *Ross* and *White*. Of these two judgments, the plaintiff had relied heavily on *White*. In addressing this aspect of the plaintiff's argument Lane J. opined, at para. 23, that it was "highly doubtful" that *White* would apply in Canada. More importantly, he also concluded that, even if applicable, *White* did not establish a broad exception to the general rule that solicitors owe no duties to persons other than their clients. Lane J. then followed with consideration of three other authorities that similarly reinforced the general rule, namely, *Kamahap Enterprises Ltd. v Chu's Central Market Ltd.*, (1989), 64 DLR (4th) 167 (BCCA); *Abacus Cities Ltd. (Trustee of) v Bank of Montreal* (1986), 48 Alta LR (2d) 247 (QB) and *Geo. Cluthe Manufacturing Co. v ZTW Properties Inc.* (1995), 23 OR (3d) 370 (Ont Ct J). Based on these authorities, he concluded, at para. 33, with an understanding not unlike the one applied in *Babatunde*:

> 33 In my view, these cases show that a suit against the lawyer for the opposite party for giving negligent advice to his client and thereby causing damage to the plaintiff is not tenable in law. That principle is not confined to litigation, buy is also applicable to the commercial world. To hold otherwise would place

> solicitors in untenable conflict between their duty to their client and their need to protect themselves against their client's adversary.

[60] Before leaving the judgment in *Baypark*, it is of interest to note that Lane J. did not mention the Saskatchewan Court of Appeal's decision in *Earl v Wilhelm*, 2000 SKCA 1, 183 DLR (4th) 45 [*Wilhelm*], a disappointed beneficiary case that had been decided two years before. Contrary to the doubt expressed in *Baypark*, the Court in *Wilhelm* expressly affirmed the trial judge's adoption of *White*. It did so despite its expressed misgivings about logical difficulties in extending the *Hedley Byrne* principle to the specific circumstances of the case.

[61] The *Dhillon* case is interesting because it took a perspective that is arguably different from that in *Baypark*. It might also be said to be the closest example of a case in which a solicitor was found to owe a duty of care to a party that was arguably adverse in interest to that solicitor's client. In *Dhillon*, the plaintiff owned the home where he and his family lived. While he was away in India, and without his knowledge, his wife used a forged power of attorney to enter into an agreement to sell the home. Later, with the plaintiff still in India, his wife thought better of her actions and refused to complete the sale. The purchasers commenced an action for specific performance and soon obtained a default judgment. When they sought a vesting order, the plaintiff's wife retained the defendant lawyer to oppose the motion. Despite her opposition, the vesting order was issued. The home was later sold, and the net proceeds were paid to the lawyer who, in turn, remitted them to the plaintiff's wife. After the plaintiff returned to Canada and learned what had transpired, he successfully sued his wife and son for fraud. In that action, the trial judge expressed an *obiter* comment that the lawyer had acted competently in the transaction and owed no duty of care to the plaintiff. Despite this observation, the plaintiff also sued the lawyer for negligence. In the trial of that action, the trial judge agreed with the earlier *obiter* comment and dismissed the action.

[62] On appeal, the trial decision was reversed, primarily on the finding that the lawyer owed the plaintiff a duty of care. In arriving at this conclusion, the Court, speaking through the judgment penned by Donald J.A., carried out an *Anns/Cooper* analysis, with particular attention to the first stage's proximity inquiry. In doing so, Donald J.A. discussed an understanding of proximity drawn from *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 SCR 165 at para 24, where La Forest J. identified it having circumstances that "are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs." Applying that description to the case under appeal, Donald J.A. wrote the following at paras. 33-34:

> [33] So in carrying out his solicitor/client duties to Mrs. Dhillon, was the respondent required, in the words of *Hercules Management Ltd.* …, under an obligation to be mindful of the appellant's interests?
>
> [34] It would be difficult to find a case with a closer proximity than this. While the respondent's mandate for Mrs. Dhillon was to undo the deal to sell the house, when he failed in that endeavour, he was left with the responsibility of handling the appellant's property. The sale proceeds came into his hands. They derived from the exercise of a Special Power of Attorney which he believed to be genuine. The sale was effected by Mrs. Dhillon on the appellant's behalf as sole registered owner. As far as the respondent knew, the appellant wanted all the proceeds for himself and was not prepared to share them with Mrs. Dhillon; after all, that was her principal motive in trying to collapse the sale. The respondent had to know that paying the proceeds to Mrs. Dhillon was contrary to the appellant's wishes.
>
> [Emphasis added]

[63] In *Robinson*, the issue of a solicitors' liability to third parties arose in certification proceedings for a class action. The plaintiffs had participated and invested in a charitable gift program that had been promoted with the expectation of tax benefits. Most of the plaintiffs had also borrowed money from the company behind the program.

After the Canada Revenue Agency deemed the program a sham and disallowed the claims for tax benefits, the plaintiffs commenced the action against the program's promoters and Fraser Milner Casgrain [FMC], the law firm that had rendered the required tax opinion letters. The claim against FMC was framed in negligence. Among the allegations to support the claim, the plaintiffs pleaded that: (1) all class members were advised of the existence of the opinion letters; (2) some class members had received copies of these letters; (3) the letters were referred to in the promotional material for the program; and (4) the letters were an express term of the loan arrangements between the participants and the company that financed the investment. When the plaintiffs sought certification, FMC asserted that the claim did not disclose a cause of action against it.

[64] Lax J. rejected FMC's argument. After reviewing various authorities that applied the *Anns* analysis, including *Baypark*, she found that the plaintiffs' claim, as pleaded, included sufficient material facts to raise a *prima facie* duty of care. In this respect, Lax J. wrote the following at para. 31:

> [31] Whether or not the plaintiffs and proposed class members are akin to disappointed beneficiaries, it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.
>
> [Emphasis added]

[65] A somewhat similar fact pattern arose in *Schneider*, which was a common issues trial for a certified class action. In *Schneider*, the plaintiffs had become entangled in a fraudulent scheme that convinced investors to purchase gold mining claims

purportedly owned by Royal Crown Gold Reserve Inc. [Royal Crown]. As it turned out, Royal Crown owned none of the mining claims it purported to have sold.

[66] Aside from a multi-cause claim against Royal Crown and the promoters of the scheme, the plaintiffs also advanced a claim in negligence against a lawyer and his firm for opinions given to the promoters. These opinions related to possible tax benefits investors might be entitled to receive through deductions of Canadian Development Expenses. In an earlier unregistered offering memorandum, not shared with the lawyer, the promoters represented the possibility of a deduction as an inducement to invest in the scheme. The opinions were sought with the instruction that the information given to the lawyer was correct and accurate (which it was not). When the opinions were given, they expressed the view that investors would probably be eligible for the deduction. That said, the opinions also contained specific limitations and an important caution. One limitation stipulated that the opinion was intended solely for the benefit of Royal Crown and limited to the issues specifically dealt with in the letters. More importantly, the caution stipulated – in bold type – that investors should consult their own tax advisors to ensure there were no circumstances that might preclude them from claiming such a deduction.

[67] In the action taken against the lawyer and his firm, the plaintiffs argued, among other things, that the opinions gave the investment scheme a certain legitimacy that helped induce the investors to participate in the scheme.

[68] While the action was allowed against most of the remaining defendants, it was dismissed against the lawyer and his firm. In addressing the liability of the lawyer, Scherman J. carefully conducted an *Anns/Cooper* analysis and was satisfied that the circumstances did not give rise to a *prima facie* duty of care. While the lawyer acknowledged having foreseen the possibility that the opinions might be shared with investors, Scherman J. nevertheless found, at paras. 94-95, that proximity between the

plaintiffs and lawyers was limited:

> 94 By stating the limitations and cautions McMillan did in the Opinions they have addressed, for both Royal Crown and other potential readers, when and where their Opinion was operative. The existence of such limitations and cautions in the Opinions are factors which should have informed readers and must necessarily be assessed in deciding whether there was proximity or a sufficiently close relationship to justify imposing a duty of care.
>
> 95 The degree of proximity between McMillan and the investors is limited. The Opinion was requested by and given to Royal Crown for its benefit. The investors referred to were not identifiable persons but rather a potential class of unknown individuals who might see or use the Opinions. While Friedman foresaw that the Opinions might be shared with such investors the limitations expressed in the Opinions on:
>
> a. The intended benefit of the Opinion;
>
> b. The circumscribed nature of the Opinion expressed; and
>
> c. The warnings placed in the Opinion that it did not constitute an opinion as to what might arise in a particular case or from a particular transaction and that deductibility for individual taxpayers was dependent on individual and independent factors;
>
> all operated so as to minimize the degree of proximity between McMillan and the potential investors.

[69] It is notable that, in his assessment, Scherman J. alluded to the decision of Lax J. in *Robinson*. While he voiced no disagreement with either the analysis or the outcome of that case, Scherman J. found notable distinctions between the facts of the two cases. In this regard, he wrote the following at paras. 104-105:

> 104 The distinctions between *Robinson* and this case are that in *Robinson*, the gift program defendants, who were the clients of FMC, disclosed the terms of their gift program and their intention to market it to the public to FMC and FMC knew that its opinion letters would be used in connection with such

> marketing. FMC accepted and fulfilled its retainer on that basis. Indeed, its opinion letter expressly stated that their opinion could be relied upon by the donors to the charitable giving program who were given a copy of the letter. FMC did not contest this point, which was held to give rise to sufficient proximity. Instead, it argued that in view of the admissions that the plaintiff and others had not read the tax opinions, there could be no reliance.
>
> 105 Here, the terms of the Royal Crown investment program were not communicated to McMillan. McMillan had no reason to believe or foresee that Royal Crown would use its Opinion letters as a tool to market into what was essentially a public offering. The McMillan Opinion letters were not a necessary prerequisite to any marketing or sales program, as no such program existed in the state of affairs known to McMillan. Unlike *Robinson*, the Opinions did not say investors could rely on their opinion. Rather it stated that the Opinions were for the benefit of Royal Crown and gave warnings that the details of specific transactions and the deductibility of individual investors were matters on which further opinion or advice was required.
>
> [Emphasis added]

[70] Finally, despite finding no *prima facie* duty of care, Scherman J. felt obliged to address the public policy considerations that might negate a duty of care if his first stage analysis was later found to be wrong. In that analysis, set out at paras. 125-128 of his judgment, my former colleague found multiple public policy reasons why a duty of care should not be imposed. They included:

a. the presence of a remedy against business and promoters (despite their being judgment proof);

b. an extension of the duty of care to a lawyer in a situation such as this would:

    i. raise significant concerns about unlimited liability;

ii. have a chilling effect on the way professionals act;

iii. have the effect of restricting access to legal services by compelling lawyers to provide much more extensive and detailed opinions than a specific situation would require, thereby increasing the cost of such services;

c. the imposition of a duty of care in this type of situation would diminish the expectation that participants in commercial transactions that take appropriate steps to protect their own interests and the principle of *caveat emptor*.

Application to the Present Case

[71] In his oral submissions, YQPM's counsel simply urged the Court to make new law by extending the duty of care owed by Mr. Derbowka, as Dawah's solicitor, to his client. While he acknowledged the existence of the "general rule" earlier referenced in this fiat, he offered no analytical pathway the Court could follow to depart from it. Having regard to the jurisprudence I have reviewed in this fiat, I am satisfied that, in the context of an application to strike under Rule 7-9(2)(a), a departure from the general rule cannot be justified without finding that the pleaded material facts are sufficient to support a duty of care according to the *Anns/Cooper* analysis. While I acknowledge that the judgments in *White* and *Wilhelm* raise the prospect of extending the *Hedley Byrne* principle, I am persuaded that the conditions for that principle, especially the voluntary assumption of risk, are not even remotely applicable to the circumstances before the Court.

[72] Turning to the inquiries at the first stage of the analysis, I am prepared to accept that the foreseeability of harm inquiry could be answered in the affirmative. In this respect, I think it would be difficult to argue that, having regard to the material facts

in the pleading, it was not foreseeable that YQPM would experience harm of some kind when the transfer documents were registered in the Land Registry. Having said that, the precise measure of that harm would obviously depend on further evidence at trial. Presumably, such evidence would clarify important issues, such as whether the transfer was actually unauthorized and whether the transfer documents were registered before or after Mr. Derbowka received Mr. Slusar's letter. Even then, I would find it difficult to believe that Mr. Derbowka's conduct in this regard would be anything more than mildly contributory.

[73] Despite the arguable foreseeability of some harm, I am not satisfied that the pleaded material facts, if proved at trial, would come anywhere close to supporting a positive answer to the proximity inquiry. The pleaded material facts do not reveal any kind of "close and direct" relationship between Mr. Derbowka and YQPM upon which a *prima facie* duty of care could be said to exist. In particular, the pleadings do not include any material facts to show that: (1) YQPM had any reasonably held expectations of Mr. Derbowka; (2) any representations were given by Mr. Derbowka; or (3) there were any circumstances upon which it could fairly be said that YQPM independently relied on Mr. Derbowka. On this last point, there is no suggestion that YQPM was especially vulnerable to the harm of which it now complains. This differs sharply from the situations in *Dhillon* and *Robinson*, where the trial evidence and the pleadings respectively showed a certain level of vulnerability and/or reliance on the lawyers involved.

[74] All things considered, I find it plain and obvious that YQPM's pleadings, to the extent that they assert negligence against Mr. Derbowka, fail to disclose material facts upon which a *prima facie* duty of care can be said to exist. As this is an essential element of the claim asserted against Mr. Derbowka, it follows that I must find that the pleadings fail to disclose that cause of action.

[75] Given my finding that YQPM's pleading fails to disclose a *prima facie* duty of care on the part of Mr. Derbowka, it is probably questionable for the Court to comment on the application of the policy considerations in the second stage of the *Anns/Cooper* test. While Scherman J. was not shy to express his opinion on this point in *Schneider,* I am mindful of the fact that his comments were made in the context of a trial judgment, not an application to strike a pleading.

[76] Having said all this, I am nevertheless compelled to say that, in the context of all the allegations made to support YQPM's claim against Mr. Derbowka, I find it difficult, if not impossible, to conceive of any policy consideration that would not negate the imposition of a duty of care. I will explain.

[77] Despite YQPM's counsel's valiant efforts to stress the combined interests of his client and YQ First Nation, none of those efforts detract from the reality that YQPM is a discrete legal entity with its own power and authority. To the extent it might have wished to constrain its own power and authority to serve the interests of YQ First Nation, there were corporate governance measures by which such constraints could have been in place and internally enforced. Curiously, there are no material facts in YQPM's pleadings to describe any specific constraints. At this stage of the proceeding, one can only presume there were none. With this presumption, Mr. Derbowka was faced with a situation in which he was representing the purchaser in a transfer of land from a party – represented by a solicitor – whose director signed a transfer of land with sworn authority to do so, all for substantial consideration. In my view, to impose a duty of care on Mr. Derbowka in such a circumstance comes perilously close to recognition of unlimited liability.

Cause of Action Under Section 95 of The Land Titles Act, 2000

[78] As earlier noted, the so-called "statutory cause of action" asserted by

YQPM is said to engage s. 95 of the *LTA*. As I read this allegation in the further amended claim, YQPM contends that the conduct of Dawah and Mr. Derbowka, in causing or permitting the transfer authorization to be submitted to the Land Titles Registry, after knowing or learning that it lacked validity, gives rise to a cause of action through which it would be entitled to revocation of the transfer or damages.

[79] It is important to note that s. 95 of the *LTA* is contained within Part XII of the statute, which pertains to assurance and compensation. It reads as follows:

> **Right of plaintiff to bring action against third party**
> **95**(1) Any person who sustains a loss or damage with respect to a matter governed by this Act may bring an action against a person responsible for the loss other than the Registrar.
>
> (2) A person who brings an action pursuant to subsection (1) must notify the Registrar of the action, in writing, at the time the action is commenced.
>
> (3) The Registrar may apply to the court to be joined as a party in any action commenced pursuant to subsection (1).

[80] Part XII of the *LTA* is principally devoted to dealing with circumstances in which persons can pursue compensation for errors and omissions made by the Registrar of Titles [Registrar]. After defining the type of compensation that can be claimed, Part XII sets out two different frameworks for such claims, namely: (1) an administrative framework under which claims are submitted to the Registrar pursuant to s. 89 and s. 90; and (2) a litigation framework through which actions in this Court can be brought against the Registrar as a defendant pursuant to s. 91 and s. 92.

[81] Within Part XII, s. 95 can be seen as somewhat of an outlier provision. Instead of focusing on compensation for errors and omissions by the Registrar, this provision recognizes the right to bring an action against a person, other than the Registrar, who is said to be responsible for "loss or damage with respect to a matter governed by this Act". The phrase "a matter governed by this Act" is not expressly

defined in the *LTA*. Even so, I think it is generally understood that the *LTA* governs the operations of the Land Titles Registry, which operations are based on the Torrens system of land registration. The objects of such a system have been described as follows in Victor Di Castri, *Registration of Title to Land*, loose-leaf (2012-Rel 10), vol 1 (Toronto: Thomson Reuters, 1987) at para 13:

> [13] The objects of the system are: the creation by the state of an indefeasible title in the registered owner; simplification in the transfer of land; certainty and facility in the proof of title by reference to a certificate issued by a government official and made conclusive by law; and finally, the saving to the community of the cost of a new examination of title in connection with each transfer or transaction affecting the land.

[82] There are no reported authorities that have specifically considered s. 95 of the *LTA*. Moreover, I could not find comparable provisions to s. 95 in land registry legislation from other jurisdictions. The closest comparison I uncovered is in the Alberta statute. There, s. 171(2)(a) of the *Land Titles Act*, RSA 2000, c L-4, recognizes the right of a cause of action against a person, other than the Registrar and the Registrar's officials, "arising only from the fraud or wrongful act" of such a person. The provision also stipulates that, where such an action is brought, it must be brought against both the Registrar and the other person.

[83] I uncovered only one case authority that specifically addressed s. 171(2)(a). It provides only incidental guidance. In *Alberta (Registrar, South Alberta Land Registration District) v Clark & Associates Surveys*, 2004 ABCA 258, 50 CPC (5th) 54, the Court addressed the disposition for costs arising from a trial judgment in which surveyors were found jointly liable with the Registrar for damages resulting from the issuance of a title based on changed boundaries. Although the Court did not carry out a detailed discussion about s. 171(2)(a), it at least sets out the type of circumstance where a party other than the Registrar could be liable under that provision for a registry

error or omission.

[84] In my view, s. 95 of the *LTA* must be read in the context of the entire statute, with special attention to the objects of the *LTA* and other provisions in Part XII. Read in this way, I am persuaded that court actions against a party, other than the Registrar, can only be pursued under s. 95 if the third party is alleged to be responsible for an error or omission that occurs *within the registration process*. More specifically, I am satisfied that s. 95 does not create a cause of action pertaining to the actual authority of an individual to sign a registerable instrument that, when registered in accordance with *LTA* and *The Land Titles Regulations, 2001*, RRS c L-5.1 Reg 1, results in the issuance of an indefeasible interest in land.

[85] In sum, I find it is plain and obvious that the pleaded material facts in YQPM's further amended claim are not capable of asserting a cause of action under s. 95 of the *LTA*. It necessarily follows that this aspect of the further amended claim cannot be allowed.

[86] As a final observation to YQPM's assertion of a cause of action under s. 95 of the *LTA*, it is noteworthy that the only remedy for success in such an action is for sustained "loss or damage". I interpret this to mean an award for damages. It would not include a declaration that the transfer of the Property is void *ab initio*. This should be borne in mind in the event I am wrong in my interpretation of s. 95.

Cause of Action for Injurious Falsehood

[87] In Carolyn Sappideen & Prue Vines, *Fleming's The Law of Torts*, 10th ed, (Pyrmont, N.S.W.: Lawbook Co., 2011) at chapter 30, the editors identify the tort of injurious falsehood as one of the several tortious causes of action directed against wrongful interference with economic relations. In keeping with this theme, this tort has earned various labels, including "slander of goods or title", "trade libel", and

"disparagement".

[88] The references to words like "slander" and "libel" underscore what the editors of *Fleming's* describe as the tort's "marked resemblance" to the tort of defamation. This resemblance becomes especially clear when one considers the essential elements of injurious falsehood. In their text, Lewis N. Klar & Cameron S.G. Jefferies, *Tort Law*, 6th ed (Toronto: Thomson Reuters, 2017) at 965, the authors describe four essential elements: "(1) there must have been a statement made of and concerning the goods of the plaintiff, (2) the statement must have been false, (3) the statement must have been published maliciously, that is to say, dishonestly or with improper motive, and (4) the plaintiff must have suffered special damage." See *Frank Flaman Wholesale Ltd. v Firman, Patton, Stephens and S.F. Kennedy New Products Inc.* (1982), 20 CCLT 246 (Sask QB) at 257 and *Rust Check Canada Inc. v Young* (1988), 47 CCLT 279 (WL) (Ont H Ct) at para 62.

[89] A somewhat more abbreviated description of the tort's essential elements appears in the Ontario Court of Appeal judgment in *Lysko v Braley* (2006), 79 OR (3d) 721 (CA). There, at para. 133, Rosenberg J.A. cited and adopted the summary from Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed, loose-leaf (Toronto, Carswell, 1994) (updated 1999). In this regard, he wrote the following:

> **133** Brown summarizes the elements of the action for injurious falsehood at s. 28.1(1) as follows:
>
> > Actions for injurious falsehood involve the publication of false statements, either orally or in writing, reflecting adversely on the plaintiff's business or property, or title to property, and so calculated as to induce persons not to deal with the plaintiff. There must be a showing that the published statements are untrue, that they were made maliciously, that is without just cause or excuse, and that the plaintiff suffered special damages.

[90] For the further amended claim to reasonably disclose a cause of action for injurious falsehood, it must contain allegations of material fact which, if proved, will establish each of the above-described essential elements. For various reasons, I am satisfied that this aspect of the further amended claim does not plead such allegations. I will explain.

[91] As I read the further amended claim, YQPM's position is that, by causing or permitting an invalid transfer and transfer authorization to be registered in the Land Titles Registry, the defendants had published a false statement about its Property. There are two fundamental problems with this argument. First, the further amended claim does not plead specific material facts to show that either the transfer or the transfer authorization lacked essential validity. Indeed, by pleading that a director of YQPM signed the transfer and transfer authorization – and swore to his understanding that he had the authority to do so – YQPM has palpably diminished the force of that argument. At most, by pleading material facts relating to the pre-transfer (or post-transfer) discussions with Mr. Slusar, YQPM simply disclosed that there were concerns about validity. Having said this, it is notable that none of YQPM's pleadings, including the further amended claim, contain pleaded material facts to support the substantive merits of these concerns.

[92] Secondly, and perhaps more importantly, even if the transfer authorization is shown to have been improper, I am not satisfied that any resulting lack of validity necessarily translates into a false statement that disparages or reflects adversely on YQPM's business or property. Even if the registration of the transfer authorization could be seen as sufficient publication – which I very much doubt – there are no pleaded material facts to suggest that the transfer authorization contained any commentary or observations that could objectively be expected to induce others not to deal with YQPM.

[93] Thirdly, I find that YQPM's assertion of the essential element of malice in the further amended claim is misdirected. Instead of pleading malice in relation to the publication of disparaging content in the transfer authorization, the focus of the allegation is on the effect of its registration in the Land Titles Registry. In my view, that is not the kind of malice contemplated by a claim for injurious falsehood.

[94] Finally, it must again be emphasized that, if YQPM could prove all the essential elements of injurious falsehood, its only available remedy would be a judgment for damages, and possibly only special damages. It could not result in a declaration that the transfer of the Property is void *ab initio*.

Conclusion

[95] In the result, I am satisfied that the amended claim must be struck as against Dawah for failure to disclose any reasonable cause of action against it. With Dawah out of the action, I am also satisfied that there can be no basis for YQPM to assert that the transfer of the Property is void *ab initio*, or even voidable. Accordingly, I direct that all allegations in the amended claim, suggesting a claim against Dawah or alleging that the transfer of the Property is void, shall be struck pursuant to Rule 7-9 of *The King's Bench Rules*. This direction specifically applies to the allegations in paragraphs 2, 27, 28, and 38(a) of the amended claim.

[96] I am also satisfied that the allegations in the amended claim must be struck as against Mr. Derbowka and Cuelenaere LLP for failure to disclose a cause of action in negligence against them. More particularly, I direct that all allegations in the amended claim suggesting or alleging negligence against the said defendants shall be struck pursuant to Rule 7-9 of *The King's Bench Rules*. This direction specifically applies to the allegations in paragraphs 5, 33, 34, 35, 36, and 37 of the amended claim.

[97] Turning to YQPM's application for a further amendment to the amended

claim, I find the proposed amendments in paragraphs 1, 15, 21, and 29 of the further amended claim are acceptable and may be allowed. On the other hand, the proposed amendments in paragraphs 36, 37.1(c), 37.1(d), 37.2, and 37.3 of the further amended claim are not acceptable. To the extent they assert allegations against Dawah, Mr. Derbowka and Cuelenaere LLP, they are not allowed. To the extent the allegations in paragraphs 37.1, 37.2, 37.3, and 37.4 assert allegations against other defendants, YQPM's application is adjourned *sine die* to allow counsel for those defendants to consider this fiat and, subject to any appeal from it, assess their future course of action.

[98] Dawah, Mr. Derbowka and Cuelenaere LLP shall have their costs for both the application to strike and the action against them, taxable under Column 2 of the Tariff of Costs, provided that the latter two defendants collectively receive one set of costs.

[99] Finally, Rule 10-4 is *not* waived. If there are any issues related to the wording of the order(s) arising from this fiat, I shall seize myself with those issues.

J.
R.W. ELSON