

CITATION: 2387282 *Ontario Inc. et al. v. Ontario (Ministry of Energy, Northern Development and Mines) et al.*, 2026 ONSC 1098
COURT FILE NO.: CV-20-00652443-0000
DATE: 20260226

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
2387282 ONTARIO INC., 2467260)	<i>Won J. Kim and Megan B. McPhee, for</i>
ONTARIO INC., 2503072 ONTARIO)	Plaintiffs
INC., 2503225 ONTARIO INC., 2503903)	
ONTARIO INC., NORTHERN)	
DEVELOPMENT SOLAR 2016 INC.,)	
SUNSHINE SOLAR ONTARIO 2016)	
INC., AND 2467264 ONTARIO INC.)	
)	
Moving Parties (Plaintiffs))	
)	
– and –)	
)	
ONTARIO (MINISTRY OF ENERGY,)	<i>Christopher A. Wayland and Timothy Gindi,</i>
NORTHERN DEVELOPMENT AND)	for the Defendant Ontario (MOE)
MINES), INDEPENDENT ELECTRICITY)	
SYSTEM OPERATOR, AND JANE A/O)	<i>Melanie Ouanounou, for the Defendant</i>
JOHN DOE)	IESO
)	
Respondents (Defendants))	
)	
)	
)	HEARD: August 28, 2025

CALLAGHAN J.

REASONS FOR DECISION

1. The Plaintiffs seek leave to bring a claim against the defendant, Ontario’s Ministry of Energy, Northern Development and Mines (“Ontario (MOE)”)¹ under s.17(7) of the *Crown*

¹ The proper defendant is “His Majesty the King in Right of Ontario”, per *CLPA* at s. 14. No issue was taken with the misnomer.

Liability and Proceeding Act, 2019, S.O. 2019, c. 7, Sched. 17 (“*CLPA*”), for misfeasance in public office. The matter was heard on August 28, 2025 followed by two rounds of written submissions.

Overview

2. This case concerns “Feed-in-Tariff” (“FIT”) renewable energy contracts (“Claimed Contracts”) between the Plaintiffs and the Independent Electricity System Operator (“IESO”).² The Claimed Contracts arose out of the Ontario Liberal government’s green energy policy and its FIT Program.

3. During the 2018 election, the Progressive Conservative (“PC”) party campaigned on ending the FIT Program. The Plaintiffs allege that, after the PC party won the election but before the new government was sworn in, Ontario (MOE) took steps on behalf of the incoming government’s transition team to have the IESO postpone certain contractual steps. Once the new government was sworn into office, it issued an Order-in-Council (“OIC”) ending the FIT Program and terminating the contracts under the FIT Program. It is alleged that by postponing the contractual steps and then terminating the contracts, including the Claimed Contracts, Ontario (MOE) avoided paying increased compensation to the Plaintiffs. The Plaintiffs seek, among other things, that Ontario (MOE) pay the increased compensation and damages.

4. The Plaintiffs allege Ontario (MOE) acted in “bad faith” and “deliberately acted in a manner contrary to its statutory and legal obligations.” It is further alleged that Ontario (MOE) “unlawfully took instruction from the unsworn incoming government” and acted outside the capacity of a government during the “caretaker period” of the election.

5. Ontario (MOE) responds by asserting, among other things, that its actions were not taken in bad faith and were not, in any way, unlawful. It asserts that the Plaintiffs cannot meet the threshold to continue this action under s. 17(7) of the *CLPA*.

6. This motion only relates to Ontario (MOE). The allegations against the IESO will continue.

7. For reasons that follow, I am dismissing the motion.

Background

FIT Contracts

8. The IESO is an independent not-for-profit non-share capital corporation. The IESO operates within a legislative, regulatory and public policy framework. The IESO is not an agent of the Crown. However, the Minister of Energy, Northern Development and Mines is responsible for the public policy framework within which the IESO operates. The Minister has the power to formally direct the IESO to undertake, or refrain from undertaking, a particular course of action in respect of specific matters identified in the *Electricity Act, 1998*, S.O. 1998, c. 15. The IESO’s

² The IESO merged with the Ontario Power Authority (“OPA”) in 2015. The OPA had initial responsibility for the program. For sake of ease, I have referred to only the IESO which includes the OPA prior to 2015.

mandate includes the power to enter contracts for the procurement of electricity, as long as it is done in a manner that is consistent with the purposes of the *Electricity Act, 1998* and with the energy policy of the provincial government.

9. In 2009, the legislature introduced the *Green Energy Act, 2009*, S.O. 2009, c. 12 which amended the *Electricity Act*, and other statutes. The *Electricity Act* included what were then new “Feed-in Tariff” provisions, which created the FIT Program. The objective of the FIT Program was to procure renewable energy capacity.

10. Pursuant to this legislation, the Government directed the IESO to create the “Feed-in-Tariff” Program or FIT Program. To do so, the IESO created a standardized contracting process (“FIT Contracts”), rules (“Fit Rules”) and pricing schedule for suppliers who developed and provided eligible renewable energy facilities (“FIT Projects”).

11. The FIT Rules are incorporated into the FIT Contracts and govern to the extent of any inconsistency between the terms of the FIT Contracts and the FIT Rules. The FIT Rules provide the IESO with authority to “cancel all or part of the FIT Program at any time and for any reason or to suspend the FIT Program in whole or in part for any reason for such period of time as the IESO shall determine in its discretion, in each case without any obligation or any reimbursement ...”

12. The FIT Contracts provide a staged process with various steps leading to the completion of a project. During the election period, the Plaintiffs allege the Claimed Contracts were at a standard procedural step in the FIT contracting process known as Notice to Proceed (“NTP”). By the time a contract arrives at the NTP stage, a supplier, such as the Plaintiffs, will have performed the required specified pre-requisite work and incurred expenses.

13. Once this pre-requisite work is completed, the supplier can apply for an NTP (“NTP Request”). This is outlined in s. 2.4(g) of the FIT Contracts. Once a supplier submits an NTP Request, the IESO is on the clock. Pursuant to the FIT Contract, the IESO is required, within 20 business days, to (1) grant the NTP (allowing the project to go forward), (2) terminate the FIT Contract (bringing the project to an end), (3) request particulars in respect of a deficient application, or (4) issue a “Deferral Notice” which preserved the status quo by extending the deadline to respond to the NTP Request by 365 days.

14. The choices are reflected in s. 2.4(g) which sets out the options as to how the IESO is to respond to the NTP Request. The key portion reads:

The Sponsor shall be required to either issue Notice to Proceed, deliver an NTP Deferral Notice to the Supplier, or terminate this Agreement in accordance with Section 2.4(a), by the later of: (A) the NTP Response Date; and (B) 20 Business Days following the Sponsor’s receipt of the Supplier’s completed NTP Request.

15. Of note, FIT Contracts contain no restriction on when or for what purpose the IESO may issue an NTP Deferral Notice.

16. If a FIT Contract is terminated before receiving an NTP, the supplier is only entitled to recover certain pre-construction development costs incurred prior to the termination date, which were capped at a prescribed limit. NTP Deferral Notices triggered an additional payment, but it was modest. After receiving an NTP, however, the amounts due to the supplier upon contract termination increased significantly.

17. The FIT Contracts contain an entire agreement clause at s. 1.9. The entire agreement clause contains customary language that there were no warranties, conditions, or representations, other than what is contained in the signed agreement and that there was no reliance by either party on any representation or opinion, beyond what was in the agreement. Section 1.10 of the FIT Contracts contains a clause indicating that no amendment to the FIT Contracts is binding unless executed in writing by both parties.

18. The Plaintiffs raise certain pre-contractual comments made by the IESO. For example, the Plaintiffs rely on a September 27, 2010, document whereby the IESO provided a set of questions and answers. One question addressed the NTP Deferral Notices. The answer refers to the “possibility” that an NTP Deferral Notice may be issued if the planned transmission capacity is not on schedule or the cost to connect is more than planned. The document was prefaced as being a guidance document which “does not amend the [FIT] Contract in any way.”

The Claim

19. Ontario (MOE) is not a party to the FIT Contract. As such, there is no breach of contract claim against Ontario (MOE). The claims against Ontario (MOE) are for “misfeasance of public office, inducing the IESO’s breach of contract, and conspiracy.” It is alleged that Ontario (MOE) “unlawfully took instruction from the unsworn incoming government to direct the IESO to defer the Claimed Contracts so that they could be subsequently terminated at minimized cost by the incoming government after its swearing in”.

20. The misfeasance claim asserts that Ontario (MOE), through its staff, agents and/or representatives, “deliberately acted unlawfully” by taking instructions from the “unsworn PC government”

21. The inducing breach of contract claim asserts that Ontario (MOE) induced the IESO’s breach of contract by requesting strategies to terminate the contracts followed by the “improper blanket issuance of NTP Deferral Notices” prior to the swearing in of the new government and the subsequent issuance of the OIC which is alleged to have been issued unlawfully as it is said to be contrary to the *Electricity Act*. Nonetheless, the Plaintiffs acknowledge that the FIT Contracts could be cancelled “for any reason by the government in power by following the proper process”.

22. The conspiracy claim alleges Ontario (MOE), the IESO and unknown members of the PC transition team conspired to induce the breach of contract by having IESO issue “blanket NTP Deferral Notices prior to the Swearing In”. It is further alleged that these parties conspired to delay the issuance of NTP, terminate the Plaintiffs’ FIT Contracts and limit and/or eliminate the IESO’s liability by acting unlawfully in implementing the campaign promises of the unsworn PC government and not following the Liberal government’s directives.

23. A factual thread runs through each claim. As stated in the Plaintiff's factum "the issue in this action is Ontario (MOE) is alleged to have taken instructions from representatives of the incoming PC government to have the IESO delay the processing of NTP Requests to the Plaintiffs' detriment, knowing that under normal FIT administrative processes and governing policies and directives they had no power to do so". This conduct was described as unlawful in the statement of claim.

24. The Plaintiffs claim \$240 million in lost profits and \$17.8 million in development costs.

25. There is a separate claim against the IESO for "misfeasance of public office, breach of contract, breach of the duty of good faith and fair dealing, and conspiracy." This motion does not address the claims against the IESO.

The Deferral Notices

26. As already noted, the key facts in this case occurred after the 2018 provincial election was called and prior to the new PC government being sworn in. The writ of general election was issued on May 9, 2018, and the general election occurred on June 7, 2018. On June 29, 2018, Premier Doug Ford and his cabinet ministers were sworn in. Four business days later, on July 5, 2018, the OIC was issued, directing the IESO to take all necessary steps to wind down all FIT Contracts.

27. As is customary, the operation of government was subject to the Caretaker Convention during the period between the issuance of the writ and the swearing-in of the new government. In a nutshell, the Caretaker Convention provides that during an election the government would restrict itself to activity that is: (a) routine, or (b) non-controversial, or (c) urgent and in the public interest, or (d) reversible by a new government without undue cost or disruption, or (e) agreed upon by the Opposition. However, the incumbent government retains all its powers until the newly elected government is sworn in. A memo was sent by the Secretary of Cabinet to the Deputy Ministers at the outset of the election reminding them of their role during the caretaker period.

28. It is not disputed that the PC party campaigned on ending the FIT Program. This was known to the Plaintiffs and, indeed, motivated their actions in filing NTP Requests.

29. The Plaintiffs submitted only nine NTP Requests in the three years prior to May 2018, and they submitted no NTP Requests before that. They then submitted 111 NTP Requests in the few weeks from May 18, 2018, until the FIT Program was cancelled. The Plaintiffs were seeking the NTP as the issuance of NTPs would result in enhanced compensation if the FIT Program were cancelled, a certainty after the election results on June 7, 2018.

30. After the election, with a new incoming government, there were transition meetings to ensure the smooth transfer of power. A memo from the Secretary of Cabinet to the Deputy Ministers addressing the transition to the new government reminded them that the current Premier and Executive Council retained all their rights, privileges and responsibilities until the new Premier and his Executive Council were sworn in. As during the election period, the Deputy Ministers were reminded that the government continued to operate in a caretaker role "where only routine or very urgent business is conducted." It went on to state that when dealing with the new government's

transition team, it was “critical that all written material effectively capture the new government’s policies and priorities.”

31. There was one such transition meeting with IESO. The meeting was attended by the then Deputy Minister and Assistant Deputy Minister of Energy. There were representatives of the newly elected, but not yet sworn in, PC government in attendance. A presentation was provided on the FIT Program which included the financial exposure for cancelling the program, including the enhanced amounts due after NTPs are issued.

32. After that meeting, there were no NTPs issued, but rather approximately 18 NTP Deferral Notices were issued prior to the new government being sworn in and 59 in total. As members of the PC transition team were present, the Plaintiffs infer that direction was given to Ontario (MOE) by the PC transition team to issue Deferral Notices, rather than NTPs. There is presently no direct evidence that that was the case.

33. After July 5, 2018, the FIT Contracts were terminated in accordance with the directive which was authorized by the OIC. Even after the program was cancelled, the Plaintiffs continued to file NTP Requests. As conveyed in one email, the Plaintiffs still had their foot “on the gas” in the hopes that their NTP Requests would be granted, thereby entitling them to increased compensation on termination.

34. The Plaintiffs made several Freedom of Information requests, and they received some documents. Other documents were refused because of various privileges and statutory exemptions from disclosure. An appeal was launched but had not concluded by the time this motion was heard. This motion was scheduled on the agreement of the parties.

Issue

35. The sole issue on this motion is whether the Plaintiffs should be granted leave under s. 17(2) of the *CLPA* to bring this action.

Section 17 of the *CLPA*

36. Section 17 came into force in 2020. It provides a screening mechanism to address claims against the Crown. The operative provisions are:

Proceedings re misfeasance, bad faith

17 (1) This section applies to proceedings brought against the Crown or an officer or employee of the Crown that include a claim in respect of a tort of misfeasance in public office or a tort based on bad faith respecting anything done in the exercise or intended exercise of the officer or employee’s powers or the performance or intended performance of the officer or employee’s duties or functions. [2020, c. 11](#), Sched. 7, s. 1.

Leave to proceed required, automatic stay

(2) A proceeding to which this section applies that is brought on or after the day section 1 of Schedule 7 to the [Smarter and Stronger Justice Act, 2020](#) comes into force may proceed only with leave of the court and, unless and until leave is granted, is deemed to have been

stayed in respect of all claims in that proceeding from the time that it is brought. 2020, c. 11, Sched. 7, s. 1.

Documents on motion for leave

(3) On a motion for leave under subsection (2), the claimant shall, in accordance with [section 15](#) if applicable, serve on the defendant and file with the court,

(a) an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the claimant intends to rely; and

(b) an affidavit of documents, or such other document as may be prescribed, disclosing, to the full extent of the claimant's knowledge, information and belief, all documents relevant to any matter in issue in the proceeding that are or have been in the claimant's possession, control or power. [2020, c. 11](#), Sched. 7, s. 1.

Response by defendant

(4) On a motion for leave under subsection (2), the defendant may serve on the claimant and file an affidavit, or such other document as may be prescribed, setting out a concise statement of the material facts on which the defendant intends to rely for the defence, but is not required to do [so. 2020, c. 11](#), Sched. 7, s. 1.

Limit on examinations

(5) No person may be examined or summoned for examination on the contents of an affidavit or prescribed document referred to in subsection (3) or (4) or in relation to the motion for leave, other than the maker of the affidavit or prescribed document. [2020, c. 11](#), Sched. 7, s. 1.

No discovery of defendant

(6) The defendant shall not be subject to discovery or the inspection of documents, or to examination for discovery, in relation to the motion for leave. [2020, c. 11](#), Sched. 7, s. 1.

Requirements for leave

(7) The court shall not grant leave unless it is satisfied that,

(a) the proceeding is being brought in good faith; and

(b) there is a reasonable possibility that the claim described in subsection (1) would be resolved in the claimant's favour. [2020, c. 11](#), Sched. 7, s. 1.

Costs

(8) Each party to the motion for leave shall bear its own costs of the motion. [2020, c. 11](#), Sched. 7, s. 1.

The Leave Test

Tort based on bad faith

37. The CLPA came into force in 2019. The authors of the *Annotated Ontario Crown Liability and Procedure Act, 2019*, (Mathai, Sunil and Kettles, Brent, Toronto: Thompson Reuters: 2024) state that this preliminary hurdle in s. 17 was imposed in response to case law which made it

difficult to strike out such claims. The authors state that the high threshold set by the Supreme Court in *Odhavji Estate v. Woodhouse*, [2003 SCC 69](#), [2003] 3 S.C.R. 263 for misfeasance claims had been eroded in subsequent cases where motions to strike were dismissed and unmeritorious claims were allowed to proceed. The result of the erosion was said to be increased legal and administrative costs for the government which had to defend unsuccessful misfeasance claims, thus prompting the amendments: at pp. 124-125.

38. Whatever the origins of these amendments, s. 17(7) sets a new mandatory gatekeeping process whereby a plaintiff has the obligation to establish not only that the action was brought in good faith but that there is a reasonable possibility that the claim will be successful.

39. Section 17 applies to a claim in respect of “a tort of misfeasance in public office or a tort based on bad faith”: s. 17(1). The legislation plainly addresses actions other than misfeasance of public office. However, there is no tort of “bad faith”: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 78. As the Supreme Court stated: “In tort, [bad faith] is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable “.

40. In *Odhavji Estate v. Woodhouse*, at para. 32, Iacobucci J. summarized the tort of misfeasance as follows:

To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

41. Iacobucci J. also observed at para. 28:

[M]isfeasance in a public office requires an element of "bad faith" or "dishonesty". . . . In order for the conduct to fall within the scope of the tort, the [public] officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

42. If “bad faith” is only an element of the tort of misfeasance, the issue then is what is being referenced when the *Act* refers to a “tort based on bad faith”. Of course, there are torts and claims where it may be said the wrongdoer acted in “bad faith”, such as malicious prosecution where the tort requires malice or a statutory claim which has the absence of “good faith” as an element of the actionable conduct: *Nelles v Ontario*, 1989 CanLII 77 (SCC) , [1989] 2 S.C.R. 170; *Yadeta v. Peel (Municipality) Police Service Board*, 2024 ONCA 341 (CanLII), at para. 9; *Conway v. The Law Society of Upper Canada*, 2016 ONCA 72 (CanLII), at para. 22.

43. The broader concept of bad faith was discussed in *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17. In that case, the Supreme Court addressed the concept of bad faith in relation to the *Civil Code of Québec*, S.Q. 1991, c. 64 (“CCQ”). The Court stated:

39 Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised. [Citations omitted.]

44. The description in *Finney* of bad faith arose in the context of the *CCQ*. The definition was later applied in *Enterprise Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at para. 25 where the court stated that “bad faith is flexible and its content will vary from one area of the law to another”: The Court went on to say that “bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds with the classic concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith”: at para. 26. In *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] S.C.R., the court explained that bad faith can be established by proving that the official acted deliberately with the specific intent to harm another person. It can also be established by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamentally that absence of good faith can be deduced and bad faith presumed. As stated, in *Enterprise Sibeca Inc. v. Frelighsburg*, the content of bad faith is flexible, and its content will vary from one area of the law to another.

45. It is not necessary for me to provide an exhaustive definition of a “tort based on bad faith” to resolve this motion. However, I am satisfied that a “tort based on bad faith” would include an intentional tort involving an allegation of fault where the official acted unlawfully or deliberately acted contrary to their legal obligation for an improper purpose. This is what is alleged in each claim in this case.

46. In my view, the Plaintiffs require leave to pursue any of their claims.

Procedural Requirements

47. The *CLPA* sets out procedural requirements for a motion under s. 17. Pursuant to s. 17(3) of the *CLPA*, the plaintiff must put forward an affidavit or other prescribed evidence setting out material facts on which the claimant intends to rely in support of the leave motion, as well as provide an affidavit of documents setting out all relevant documents known or reasonably believed to be in its possession. In contrast, the Crown defendant is permitted, but not required, to put forward affidavit evidence in opposing the motion: s. 17(4). Examination of witnesses is limited to only those who file an affidavit: s. 17(5). Section 17(6) of the *CLPA* specifies that a Crown defendant “shall not be subject to discovery or the inspection of documents, or to examination for discovery, in relation to the motion for leave.”

48. Taken together, ss. 17(4) through (6) provide that the Crown has no obligation, and cannot be compelled, to give any evidence for use on the motion if it chooses not to put forward an

affidavit. The *CLPA* thus contemplates that a plaintiff's motion for leave may be decided in the complete absence of evidence from the Crown defendant whereas the plaintiff must adduce evidence and an affidavit of documents in support of the claim.

49. As set out in s. 17(7), the test for granting leave is a two-part test. In respect of the first part, being the issue of good faith, Ontario (MOE) does not contest this part of the test. Accordingly, I will turn to the second part of the test to consider whether the Plaintiffs have established there is a reasonable possibility that the action will be decided in their favour.

The Leave Test for Reasonable Possibility

50. The leave provision in s. 17(7) is modelled on s. 138.8 of Ontario's *Securities Act*, R.S.O. 1990, c. S. 5 (the "*Securities Act*"): *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172, 479 D.L.R. (4th) 469, at para. 44. Section 138.8 sets out the same two criteria: an action must be "brought in good faith" and with a "reasonable possibility" of success.

51. Justice Côté in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, stated that the *Securities Act* leave requirement serves the purpose of "screening out unmeritorious actions *as early as possible* in the litigation process" (italics in original): at para. 68. The leave requirement in the *Securities Act* was said to be enacted in response to the ease with which class proceedings in securities litigation were approved by courts: at para. 76. To meet the "reasonable possibility" test, the action must have a reasonable or realistic chance of success: at para. 121.

52. In a decision released just before *CIBC v. Green*, the Supreme Court considered a similar leave provision in Quebec's security legislation. In *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, the Court recognized that the leave provision was intended to reset the test for commencing a securities proceeding, particularly considering the lower test in class proceedings. The Court held that the test was to be more than a "speed bump". Instead, the leave "threshold requires that there be a reasonable or realistic chance that the action will succeed": at para. 38. This requires the plaintiff to bring forth "credible evidence in support of the claim": at para. 39. Of course, the evidence must be applied to a legal test which, in the case of a securities violation, is whether the evidence demonstrates a breach of the applicable provision in the statute. However, the intent is not for the leave process to devolve into a "mini trial." As such, a full analysis of the evidence is unnecessary. As the Court stated: "[w]hat *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour" (italics in original), at para. 39.

53. In the very recent case of *Lundin Mining Corp. v. Markowich*, 2025 SCC 39, the Court again considered the leave provisions in the *Securities Act*. The Court considered several cases that had developed the test further since *CIBC v. Green*, such as *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, 2024 ONCA 105.

54. The Court reiterated that the leave test was intended to be more stringent than the class proceeding test. However, it was said that this was a "relatively low merits-based threshold" that does not require proof on the balance of probabilities that the action will succeed at trial: at para.

110. In the context of securities legislation, the purpose of the test is to deter meritless litigation brought to coerce unjust settlements.

55. In *Lundin Mining Corp.*, the Supreme Court held at para. 110 that, on a leave motion, the court must conduct:

.....a “qualitative evaluation of the proposed action”. The action must have “more than a mere possibility of success”. There must be a “reasonable or realistic chance that the action will succeed”. This is a “relatively low merits-based threshold” that does not require proof on the balance of probabilities that the action will succeed at trial. [Citations omitted.]

56. The evidence in support of the action must not only be “credible” but must also demonstrate a realistic or reasonable chance that the action will succeed at trial. It was pointed out that “even credible evidence may not be sufficient to show that there is a realistic or reasonable chance that a claim will succeed”: at para. 111. The Court further noted that assessing whether evidence is credible will require a weighing of the evidence and an assessment of whether the testimony is reliable or credible. However, as the leave motion is not being conducted on a full record, the court must be mindful of the “evidentiary limitations at the leave stage” and, to some extent, the Court is to “consider evidence that is *not* before the court” (italics in original): at para. 114.

57. There must be a ““plausible analysis’, or a plausible *application*” (italics in original), of the relevant legal test, based on the limited evidence available at this early stage of the proceeding: at paras. 118 and 119. In *Lundin Mining Corp.*, the legal test involved an alleged statutory breach. The Court, at para. 120, summarized the test as follows:

The leave motion involves a preliminary merits test, but does not require proof on a balance of probabilities that the action will succeed at trial. The plaintiff must establish a reasonable or realistic chance, and not merely a possibility, that the action will succeed at trial, based on a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim.

58. Ultimately, the Supreme Court upheld the Court of Appeal which found that there was a “reasonable possibility” that the plaintiff could demonstrate the factual elements needed to succeed when applying the statutory test. In doing so, the Court of Appeal had regard to the uncontested facts that were proven on the motion, the contested expert evidence and evidence that would be available “at a later stage of the action.” With what was described by the Court of Appeal as “the benefit of better evidence” at trial, both courts concluded there was “a reasonable possibility” of the plaintiff establishing the facts needed to meet the statutory test to succeed in its claim: at para. 125; see also *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359, 166 O.R. (3d) 732, at paras. 86-89.

59. In *Lundin Mining Corp.*, the Supreme Court cited with approval the Ontario Court of Appeal case of *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*. In that case, the Court of Appeal discussed how to weigh the evidence on a leave motion such as this. The court noted that a motion judge is to keep in mind the relatively low

merits-based threshold of a realistic chance of success. As noted above, this standard is reflective of the fact that this is not a mini-trial where the plaintiff must prove its case on a balance of probabilities: at para. 37. A motion judge may fall into error where they attempt to resolve “realistic and contentious issues arising from conflicting credible evidence”, at para. 38. A motion judge must also consider whether the lack of a complete record leaves uncertainty about whether a realistic or reasonable chance of success exists: at para. 39. While the absence of evidence on a leave motion may be rectified later in the proceeding, a motion judge is not to “operate on speculative assumptions that missing evidence would favour the plaintiff”: at para. 40. Nonetheless, a motion judge must be equally mindful not to impose too exacting a standard such that it could work a prejudice to the plaintiff and deny a meritorious claim: at para. 40. A motion judge is permitted to draw inferences in assessing whether the low standard has been met or not: at para. 47. Of course, this will depend on the state of the record and whether the inferences are warranted.

60. Returning to the *CLPA*, the provisions of s. 17 are clearly patterned on s. 138 of the *Ontario Securities Act*. Like the *Ontario Securities Act*, s. 17 was introduced to provide a more robust screening mechanism than the “narrow window of opportunity” test that had been applied using r. 21 in respect of misfeasance claims: *Granite Power Corp. v. Ontario* (2004), 72 O.R. (3d) 194 (Ont. C.A.), at para. 40; *Trillium Power Wind Corporation v. Ontario (National Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at paras. 59-61. As commented by the Court of Appeal in *Poorkid Investments Inc. v. Ontario (Solicitor General)*, at para. 45, the section makes it more difficult for some torts to proceed against the Crown than the previous legislation.

61. It is no coincidence that s. 17(7) largely follows the wording of the leave provision in s. 138.8. In my view, the principles articulated in the above cases apply to s. 17(7). However, s. 17 provides even less opportunity for the plaintiff to ascertain evidence from the Crown defendant. The lack of mandated production under the *CLPA* heightens this concern and the court must be more attuned to what evidence might still be adduced later in the proceeding if leave were granted.

62. As such, the object of s. 17(7) of the *CLPA* is to ascertain if the Plaintiffs have established on credible evidence, giving due allowance to evidence that may yet be available, that there is a reasonable or realistic chance of success at trial. This then requires consideration of the application of the facts, both proven and which may realistically be forthcoming, to the legal test in regard to the claims in this case.

Good Faith Analysis

63. As noted, no issue was taken with the action being started in good faith.

Reasonable Possibility of Success Analysis

64. The Plaintiffs’ claims depend on the assertion that Ontario acted unlawfully by accepting direction from the PC transition team and directing the IESO to issue NTP Deferral Notices. This is the basis of the claims for misfeasance, inducing breach of contract and conspiracy. The conduct

is said to be unlawful because it was contrary to the Liberal government policy regarding NTPs and in violation of the Caretaker Convention.

65. The Plaintiffs' position was stated in their factum as follows:

The [Plaintiffs'] position is that Ontario (MOE) was legally bound to adhere to the standing directions of the Liberal government on the FIT Program until the PC Party has been sworn in, including the incumbent Liberal government's directions respecting the Caretaker Period, during most of which the IESO continued granting NTP as a matter of routine government business. Ontario (MOE) could not lawfully reverse or derogate from the standing policy of the Liberal Government at the behest of another party having no right to govern.

66. In response, Ontario (MOE) states that only by issuing the NTP Deferral Notices could the status quo be maintained which was in accordance with the Caretaker Convention. Indeed, Ontario (MOE) submits granting NTPs in the face of a new government which campaigned on unwinding the FIT Program would be disrupting to the status quo and would be irresponsible.

67. As noted earlier, the Caretaker Convention is a constitutional convention. The Caretaker Convention provides that after the dissolution of the legislature, in advance of an election through to the new legislature being sworn in, the government, while still retaining all the power of an operating government, is to act with restraint. The convention is an acknowledgement that the current government may not retain the confidence of the electorate. Indeed, it may be that an opposing party has the confidence of the electorate. For that reason, during this interim period, in matters of policy, expenditure and appointments, the government should restrict itself "to activity that is: (a) routine, or (b) non-controversial, or (c) urgent and in the public interest, or (d) reversible by a new government without undue cost or disruption, or (e) agreed upon by the Opposition (in those cases where consultation is appropriate)": Peter W. Hogg, Wade Wright, *Constitutional Law of Canada*, 5th ed., (Toronto: Thomson Reuters) at. s. 9:4.

68. The Caretaker Convention is a political, not a legal, construct. Professor Hogg states that the convention is observed because it is "well understood to be the only appropriate behaviour" in circumstances where the will of the people is in the midst of being determined by way of an election. Constitutional conventions are different from laws. They do not have legal force. As Professor Hogg notes, a clear breach of the Caretaker Convention may be politically damaging but does not give rise to a legal sanction.

69. While I was directed to no cases where the Caretaker Convention was subject to judicial comment, the Supreme Court has addressed the political nature of conventions. In *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, the Supreme Court explained at pp. 880-881:

Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the *Statute of Westminster, 1931*, or in the proceedings and documents of federal-provincial

conferences. They are often referred to and recognized in statements made by members of governments.

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

70. The Court later considered the concept of a constitutional convention in *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, where a party sought to invalidate a law as it conflicted with a supposed convention regarding the design of the public education system in Ontario. The Court rejected the submission that a convention as alleged existed. Nonetheless, the Court went on to cite the above quote from the *Patriation Reference* then commented, "... the remedy for breach of a constitutional convention must be found outside the courts, if a remedy is to be found at all": at para. 63.

71. The Plaintiffs accept that there can be "no legal sanction for breach of the Caretaker Convention, *taken on its own...*" (emphasis in Plaintiffs' Supplementary Submissions). However, they assert that they can ground an action on a breach of the policy memoranda from the Secretary of Cabinet that "explicitly formalized" the convention, which the Plaintiffs assert Ontario (MOE) breached by allegedly directing IESO to issue NTP Deferral Notices. In particular, the Plaintiffs assert that Ontario (MOE) acted contrary to a direction given to the Deputy Ministers on February 28, 2018, as to how the government was to act during the caretaker period. The referenced memo provides:

The essential element of the caretaker practice is that only routine, non-controversial, or urgent business is conducted. The caretaker role requires that there be no new policy or program initiatives, and restricts ongoing work, consultations, appointments, regulatory postings, public engagement, announcements and ministry events. Prior approval to engage in these activities does not provide authority to continue once the caretaker period has begun. Except for the normal implementation of routine government services and programs, any activity or action that would not reasonably be perceived as routine, non-controversial, urgent or time sensitive, should be suspended once the writ is issued.

In assessing whether ongoing work is consistent with the caretaker role of government, ask the following relevant questions:

Is the proposed work truly routine or urgent?

Is there a potential for the work to be raised as a political issue during the election?

Have all the necessary policy, funding and human resource approvals been received?

Is there a legislative or legal requirement to provide the program or service?

Do any of the next steps require further political decision or direction?

Is there any reason why the activity cannot wait?

Does the program or service need to be communicated to the public?

Would the work limit or impair the decision-making freedom of a future government?

Would any future government agree the work was necessary during the writ period?

72. There were two further memos from the Secretary of Cabinet reminding the Deputy Ministers of the caretaker role: one on the date the legislature dissolved and one after the election (all three collectively, the “policy memoranda”).

73. In my view, the policy memoranda are nothing more than the Secretary of Cabinet reminding senior staff of the Caretaker Convention. As Professor Hogg notes, the “Clerk of the Privy Council [being the federal equivalent to the Secretary of Cabinet] would be expected to remind the Prime Minister and the senior ranks of the public service of these restrictions during the caretaker periods. A similar caretaker convention applies to the government of the provinces and territories.”: Hogg, at 9.4. I fail to see how reducing the convention to writing altered its status as a political directive. The way the government addresses its obligations during the election period and how it categorizes priorities is inherently part of the Caretaker Convention. An alleged breach of the policy memoranda is the same as a breach of the Caretaker Convention.

74. Even if the policy memoranda could set a standard of care by which an action of misfeasance or tort based on bad faith could be maintained, the facts adduced do not lead me to conclude that the Plaintiffs have a reasonable or realistic possibility of success. The Plaintiffs’ argument proceeds on the basis that the policy memoranda require the government to continue what it says is “*routine, urgent or time-sensitive business* until the swearing-in of a returning or new government” (italics in Factum of the Plaintiffs). The plaintiffs cite earlier directives which they submit demonstrate that the issuance of NTPs were *routine* during the past election and ought to have continued, notwithstanding the election of the PC government which was directly opposed to the program.

75. The Plaintiffs argue that the policy memoranda required the IESO to process “routine” work. The evidence from the Plaintiffs’ affiant, Mr. Wayrynen, is that filing an NTP Request is routine and contemplated by the FIT Contract. While that is true, the circumstances were far from routine. The evidence is that in the three years prior to the issuance of the writ, the Plaintiffs made a total of nine NTP Requests. In the month following the issuance of the writ, the Plaintiffs submitted 111 NTP Requests. The Plaintiffs were aware that the PC party was opposed to these contracts and the policy underpinning the *Green Energy Act*. They were aware that if elected, the new government would cancel the contracts. The email communication between various Plaintiffs’ representatives demonstrates that the filing of the NTP Requests was not routine.

76. Rather, the Plaintiffs were flooding the IESO with NTP Requests in an attempt to obtain NTPs in the expectation that the program would be cancelled and the higher compensation for termination would be owing. Mr. Wayrynen was told by a director of one of the Plaintiffs to “KEEP FILING NTP.” As one email put it, the Plaintiffs had one “Foot still on the gas” when it comes to filing NTP Requests. The Plaintiffs continued to file NTP Requests after the election because the Plaintiffs thought there was “a chance that they may accept NTP filings up to their date of announcement as to when they will shut down the program.”

77. In my view, even if the policy memoranda give rise to a duty, it is clear this was not a routine process and given the campaign and election of the new government, it was neither “non-controversial” nor “business as usual.” This was an extraordinary circumstance where a new government was elected, and the Plaintiffs were seeking a contractual advantage knowing the new government would cancel the FIT Program and the FIT Contracts.

78. The Plaintiffs were taking extraordinary steps to file NTP Requests to have the NTPs accepted prior to the program being cancelled. They did so knowing that the new government would cancel the program which it had the power to do. While findings of fact on the leave application should be made cautiously if additional evidence might be forthcoming on a specific issue, there was no suggestion that more evidence was forthcoming to address the circumstances of the Plaintiffs’ filing of NTP Requests. The evidence is clear that the circumstances were far from routine, and it was not business as usual.

79. It is further argued that the issuing of the NTP Deferral Notices was made at the direction of the PC transition team, being the proxy for the yet unsworn new government. The evidence at this stage is that the transition team attended a meeting where they were advised of the FIT Program and the province’s potential exposure to compensation associated with cancellation. Thereafter, NTP Deferral Notices were issued (although far fewer than alleged) and, after the swearing-in, the program was cancelled on July 5, 2018. There was a draft template letter that was never sent but was to enclose NTP Deferral Notices. That draft letter explained that the deferral of the NTP decision was made “pending the completion of the transition of government and receipt by the IESO of the new government’s energy policy priorities.” In the end, the letter forwarding the Deferral Notices referenced the entitlement under the FIT Contract to provide such a notice. The Plaintiffs suggest that this internal communication infers that the PC transition team improperly directed Ontario (MOE) to issue NTP Deferrals.

80. The alleged inference of political interference rests entirely on the prospect that additional evidence will emerge of some edict or direction given by the PC transition team to representatives of Ontario (MOE) to issue the NTP Deferral Notices. The Plaintiffs hope to prove that the PC transition team did not merely propose a course of action consistent with the PC party’s successful election platform but somehow compelled the sitting government to adopt that course of action. In short, it is suggested that the PC transition team was fettering the current government’s right to make the determination. Such a conclusion would require that I make a speculative assumption that the “missing evidence would favour the plaintiff.” Indeed, such evidence would be extraordinary, as it would need to establish that the Liberal government in some way ceded its right to govern to the PC transition team. As already noted, the governing authority remains with the sitting government until the new government is sworn in. The IESO’s action in issuing the

NTP Deferral Notices was entirely rational in the circumstances. Even the draft letter that was not sent sets out the intent to await the transition and receipt of the policy initiatives which is consistent with acting as a caretaker. In my view, it is beyond “speculation” to suggest that there will be evidence that the transition team usurped the sitting government’s power to act as it wished.

81. While not yet proven, even if I accepted that the PC transition team, upon learning of the financial exposure associated with the FIT Program, expressed a desire or preference that the sitting government refrain from taking steps that exposed the province to more liability under a program that the incoming government had publicly committed to cutting, I fail to see how such a request could be unlawful or in bad faith. Nor, in my view, does such a request impermissibly encroach or usurp the authority of the sitting and soon to be outgoing government. This is precisely the circumstances in which the Caretaker Convention operates. While only one government holds office at a time, those administering the government need to be sensitive to the mandate expressed by the electorate, particularly in cases where the newly elected but unsworn government has proposed to cancel a program.

82. Here, the proposed cancellation of the FIT Contracts was well known. The obligation of the officials who allegedly have acted “unlawfully” was to manage the government affairs in accordance with the policy memoranda embodying Caretaker Convention which required the maintenance of the status quo. The issuance of NTP Deferral Notices was consistent with that obligation.

83. Returning to the causes of action and for the reasons set out above, there is no reasonable prospect that the Plaintiffs can establish bad faith or unlawful conduct, both of which are essential elements of a claim of misfeasance in public office. Ontario (MOE) officials acted responsibly as officials in a caretaker government, pending a transition to a new government. The issuance of the NTP Deferral Notices was neither unlawful nor done in bad faith. In my view, even having regard to the low threshold, there is no reasonable or realistic chance of establishing the dishonest or unlawful conduct required to establish misfeasance of public office.

84. With the respect to the claim that Ontario (MOE) induced a breach of contract, one part of the four-part test requires the Plaintiffs to establish that Ontario (MOE) intended to cause IESO to breach the contract: *Correia v. Canac Kitchens*, 2008 ONCA 506 at para. 99. Once again, the Plaintiffs allege that Ontario (MOE) caused the breach by improperly taking the instructions from the PC transition team and directing IESO to issue blanket NTP Deferral Notice. This is the same alleged unlawful conduct that grounds the misfeasance claim.

85. The Plaintiffs also allege that the OIC “was unlawful and was not authorized by the *Electricity Act*.” As pleaded, it is alleged that this induced the breach of contract. The Plaintiffs did not explain how the OIC was unlawful in either their factum or oral argument. However, it is pled that the unlawful OIC induced the breach of contract.

86. The OIC is a regulation. As a legislative instrument, the onus is on the Plaintiffs to establish on a “robust reasonableness review” that the Lieutenant Governor-in-Council failed to act within the scope of its lawful authority in issuing the OIC: *Auer v. Auer*, 2024 SCC 36, 497 D.L.R. (4th) 381, at para. 26. The OIC is entitled to a presumption of validity that “favours an interpretive

approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*”: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 25. In *Katz*, the Court went on to say at para. 28,

It is not an inquiry into the underlying “political, economic, social or partisan considerations”. Nor does the *vires* of regulations hinge on whether, in the court’s view, they will actually succeed at achieving the statutory objectives. They must be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose. In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, “it would take an egregious case to warrant such action”. [Citations omitted].

87. The purposes of the *Electricity Act*, are set out in s. 1 and include: promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario (s.1(d)); protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service (s. 1(f)); and, facilitating the maintenance of a financially viable electricity industry (s. 1(i)).

88. As noted, the Plaintiffs advanced no argument and filed no evidence and therefore have not rebutted the presumption that the OIC was lawful. On the contrary, the evidence of the government’s purpose in issuing the OIC is consistent with the purposes set out in the *Electricity Act*, including the financial viability for consumers and suppliers of electricity services in Ontario and was also aligned with the stated policy of the new government. There was no suggestion that further evidence might alter this analysis.

89. Having regard to the purpose of the legislation, the presumption of validity cannot be displaced. Nor can the regulation reasonably be characterized as “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose of the *Electricity Act*. In my view, the Plaintiffs have no reasonable or realistic chance of establishing that the presumption of validity will be ousted. Moreover, there was no evidence that any official or member of the executive council acted in bad faith in issuing the OIC. As such, to the extent the inducing breach of contract claim is grounded on the OIC being unlawful, and notwithstanding the low threshold, there is no reasonable possibility of that claim succeeding.

90. In respect of the conspiracy claim, it is alleged the conspirators both acted unlawfully and with the predominant intent to harm: *Cement LaFarge v. B.C. Lightweight Aggregate*, 1983 CanLII 23 (SCC), [1983] 1 SCR 452; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. The co-conspirators are Ontario (MOE), the IESO and unknown persons from the PC transition team, It is alleged that the co-conspirators entered a common agreement, after they attended the transition, to induce the breach of contract and act unlawfully to harm the Plaintiffs. Not surprisingly, the conspiracy claims reassert the same allegations from the inducing breach of contract claim and the misfeasance claim which have already been addressed above. In my view, the conspiracy claims have no reasonable possibility of succeeding for the reasons already stated.

91. Finally, the Plaintiffs' claim is against Ontario (MOE) directly. As discussed in *Ontario v. Madan*, 2023 ONCA 18, 165 O.R. (3d) 510, at para. 52, "Ontario's tort liability is vicarious and depends on the plaintiff's ability to prove the tortious conduct or omission of an officer, employee or agent of Ontario". There is no direct liability on the Crown: s. 8 of the *CLPA*; *Madan*, at para. 53. The pleading in this case alleges direct claims against Ontario (MOE) rather than claims of vicarious liability. If this Court were to have granted leave to proceed, it would have to be on the basis of an amended pleading.

92. For the above reasons, the motion for leave under s. 17(2) of the *CLPA* is denied. Given the provisions of s. 17(8), there is no order as to costs.

Callaghan J.

Released: February 26, 2026