

**CITATION:** Botosh v. Ministry of the Attorney General, 2026 ONSC 1541  
**COURT FILE NO.:** CV-23-00093840-0000  
**MOTION HEARD:** 2026-01-16

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** MICHELLE BOTOSH, Plaintiff/Moving Party

-and-

MINISTRY OF THE ATTORNEY GENERAL, Defendant/Responding Party

**BEFORE:** Associate Justice Kamal

**COUNSEL:** Michelle Botosh, Self-represented  
Jack Douketis, for the Ministry of the Attorney General

**REASONS FOR DECISION**

**Nature of this Motion**

1. This decision focuses on applying the legal test of section 17 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17, (“CLPA”) to the facts and circumstances of this case. I am sympathetic to Ms. Botosh’s circumstances, and I am sensitive to the significant challenges she has faced. The record reflects a history of hardship that understandably evokes compassion, and I acknowledge the effort she has made in pursuing this matter.
2. This action relates to Ms. Botosh’s employment with the Ministry of the Attorney General (“MAG”) Court Services Division (“CSD”) within the Court Support Office at the Ottawa Courthouse. The Plaintiff was employed at the Ottawa Courthouse from 2007 until June 3, 2014, when she was deemed to have abandoned her position. In 2021, the Plaintiff alleges that she discovered that certain MAG employees made fraudulent misrepresentations during the Ontario Grievance Settlement Board (“OGSB”) grievance process, as well as to her insurer Manulife Insurance Canada (“Manulife”), and were operationally negligent in the handling of certain court documents pertaining to her action against Manulife. The Plaintiff also alleges other unspecified torts outlined in her Statement of Claim.
3. Ms. Botosh is a skilled individual. She worked at the Court. She has a law degree. She has suicide intervention training. During her attendances before me, she emphasized that she is going to the Supreme Court of Canada. But because of the circumstances that led to this lawsuit, she believes that her life has been held hostage. She has been unemployed for 14 years.

4. While I have compassion for Ms. Botosh's circumstances, the role of the Court is not to decide cases based on compassion alone. I am required to apply the law (particularly the specific legal test) to the facts as established by the evidence. Despite the difficult circumstances described by Ms. Botosh, she has not met the legal test required for the relief sought on this motion. Accordingly, and with full appreciation of Ms. Botosh's situation, the motion shall be dismissed.

### **Issues:**

5. The main issue in this motion is whether leave should be granted under section 17(2) of the *CLPA* for the claims that include allegations of bad faith or misfeasance in public office.
6. The Defendant raised the issue that the Plaintiff improperly named the Ministry of the Attorney General; the correct party is "His Majesty the King in Right of Ontario".

### **Analysis**

#### **Section 17 of the *CLPA* – Legal Principles**

7. When a plaintiff alleges misfeasance in public office or "a tort based on bad faith", the plaintiff "may proceed only with leave of the court". Until leave is granted, the entire proceeding is stayed.
8. The automatic stay and leave requirement at issue are set out in section 17 of the *CLPA*. The relevant portions of that section 17 for this motion are as follows:

#### **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.

#### **Leave to proceed required, automatic stay**

(2) A proceeding to which this section applies [...] 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.

### **Documents on motion for leave**

(3) On a motion for leave under subsection (2), the claimant shall [...] 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.

### **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.

[...]

### **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.

9. The key consideration on this motion is the two-part test set out in subsection 17(7) of the *CLPA*: in order to grant leave, this Court must be satisfied that (a) the proceeding is being brought in good faith, and (b) that there is a reasonable possibility that the claim would be resolved in the claimant's favour.
10. The Crown did not challenge that the Plaintiff is bringing this claim in good faith. Therefore, only the second prong of the test is engaged on this motion.
11. Section 17 creates a robust screening mechanism aiming to preserve scarce resources and weed out baseless claims against the Crown, claims pursued with an ulterior motive, and claims brought with the intention to harass or to generate negative publicity for a defendant. See *Phixaykounne v. Ontario*, 2024 ONSC 3860, at para. 12; *Poorkid Investments Inc. v.*

*Ontario (Solicitor General)*, 2023 ONCA 172, 479 D.L.R. (4th) 469, at para. 37, leave to appeal refused, [2023] S.C.C.A. No. 188; *His Majesty the King in right of Ontario v. Dell*, 2024 ONSC 613, at paras. 34-35.

12. In interpreting this provision, courts have referenced the similarities between s. 17 of the *CLPA* and s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5. See *Balla v. John Doe #1 et al.*, 2025 ONSC 294, at p. 5; *Deveaux v. Cornwall Community Hospital et al.*, 2025 ONSC 2143, at para. 8.
13. The leave requirement under s. 138.8 of the *Ontario Securities Act* is intended to be more than a “speed bump”, and a court hearing such motions must undertake a “reasoned consideration of the evidence” to ensure that the action has some merit. See *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 120-23; see also *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 38.
14. A “reasoned consideration of the evidence” includes scrutiny of the evidence proffered by both sides, and some weighing of the defence evidence against that adduced by the plaintiff. On a motion for leave under the *Ontario Securities Act*, a motion judge is required to critically evaluate all the evidence, which necessarily requires some weighing of the evidence, drawing appropriate inferences and making findings of facts. See *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at para. 43-45.
15. With reference to decisions interpreting the *Ontario Securities Act*, such as *Theratechnologies* and *Vecchio Longo Consulting Services Inc.*, 2021 ONSC 5405, 157 O.R. (3d) 92, the courts have set out the following principles in s. 17 *CLPA* cases:
  - a. The court should undertake a reasoned consideration of the evidence to ensure that the action has some merit, and the claimant must offer a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim
  - b. The authorization stage should not be treated as a mini-trial, and a full analysis of the evidence is not required
  - c. The leave test is a meaningful but low threshold, merit-based test that operates as a meaningful examination of the evidence to ensure that the action has some merit; it is meant to create a robust deterrent screening mechanism with a reasoned consideration of the evidence from both parties.<sup>1</sup>
16. The plaintiff is to bring forth an affidavit setting out a concise statement of the material facts and an affidavit of documents detailing all evidence relating to the matter. See

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<sup>1</sup> See for example *Ray v. Ontario*, 2025 ONSC 5562, at paras. 12-14; *Aboagye v. Ontario*, 2025 ONSC 4950, at para. 18.

*Aboagye v. Ontario*, 2025 ONSC 4950, at para. 20. The court may accept the material facts in the affidavit and may presume that the affidavit sets out all material facts and documents on which the plaintiff intends to rely. See *Aboagye*, at paras. 21-22. In my view, this means that the court should not speculate that new or better evidence would be available later in the proceeding, including through discovery or at trial.

17. On the other hand, there is no requirement that the defendants file affidavits setting out the facts on which they intend to rely, and the plaintiff is not entitled to cross-examine the defendants on their affidavits. See *Ray v. Ontario*, 2025 ONSC 5562, at para. 15. As well, the plaintiffs are not entitled to documentary or oral discovery at this stage. See *Wei v. Ontario*, 2025 ONSC 5597, at para. 6.
18. The party must tender sufficient credible evidence and a plausible legal argument to persuade the court that they have a reasonable possibility of succeeding at trial. Bald allegations are not sufficient to establish a reasonable possibility of success, and material facts sufficient to support the essential elements of the asserted torts must be outlined in the affidavit. See *Aboagye*, at para. 21; *Yadeta v. The Regional Municipality of Peel Police Services Board*, 2023 ONSC 6387, at para. 41, aff'd, 2024 ONCA 341, leave to appeal refused, [2024] S.C.C.A. No. 328; see also *Deveaux*, at paras. 9-16.
19. Material facts, sufficient to support the essential elements of these torts, must be pleaded in the affidavit. See *Yadeta* at para. 41.
20. In claims for bad faith, the plaintiff needs to present more than a reasonable possibility of mere negligence. See *R. v. Campbell*, [2022] O.J. No. 1585, at paras. 35-37.
21. A case with a reasonable possibility of success requires the plaintiffs to offer both a plausible analysis of the applicable legislative provisions or legal principles as well as some credible evidence in support of their claim. See *Makris v. Endo International PLC*, 2020 ONSC 3930, at para. 29, citing *Theratechnologies*, at para. 39.
22. It is not sufficient for the party to claim that they will provide material facts after discovery. It is improper for the plaintiff to rely on the discovery process to uncover new facts, as the Crown is entitled to sufficient notice of the facts supporting the claim, and the plaintiff cannot simply engage in a fishing expedition to find the basis for their claim. See *Yadeta*, at para. 45.
23. However, a motion judge must be cognizant of the fact that full production has not been made. While the court is entitled to weigh the evidence of both parties having regard to the affidavits and cross-examinations, the court must also consider that a leave motion “involves merely a paper record and that the statutory leave test sets a low evidentiary threshold”. See *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470, 142 O.R. (3d) 421, at para. 89.

24. It is also important to note that a claim for misconduct in public office or other torts based on bad faith is not the exact same as the statutory causes of action covered by s. 138.8(1) of the *Ontario Securities Act*. Therefore, a motion under s. 17 of the *CLPA* may be subject to a different standard for leave under s. 138.8(1) of the *Ontario Securities Act*.
25. One example is that, in order to prove the tort of misfeasance in public office, the plaintiff must show that a public official intentionally participated in illegal behaviour while acting in that capacity and that the official knew that the behaviour was illegal and likely to cause harm to the plaintiff. See *Ontario (Attorney General) v. Clark*, 2021 SCC 18, [2021] 1 S.C.R. 607, at para. 160.
26. Similarly, fraudulent misrepresentation (which is a tort based on bad faith) requires evidence that the defendant knew the statement was false or was reckless to its truth.
27. Much of the evidence necessary to establish these torts will be in the possession of the defendant. Bearing in mind that section 17 does not require the defendant to lead any evidence on the leave motion, nor subject the defendant to any form of discovery, this puts the plaintiff in a difficult position, as bad faith is a state of mind which is difficult to prove without some evidence from the defendant.
28. In the absence of discovery of the defendant, the plaintiff will likely not have any direct evidence on a leave motion that establishes the key elements of misfeasance or a tort based on bad faith.
29. As a result, the plaintiff will likely be required to lead admissible and credible evidence that could lead to an inference that the defendant engaged in deliberate unlawful conduct and knew that their conduct was unlawful.
30. I adopt the approach suggested by Sunil S. Mathai and Brent Kettles, *The Annotated Ontario Crown Liability and Proceedings Act, 2019*, (Toronto: Thomson Reuters, 2024), at pp. 129-130, that the following principles should apply to s. 17:
  - a. The test for s. 17 must be rigorous. The section is intended to act as a screening mechanism to weed out unmeritorious claims of bad faith.
  - b. To establish a reasonable possibility of success, the plaintiff must establish the following:
    - (i) Assuming the facts pleaded in the claim are true, does the claim plead a tenable cause of action in misfeasance in public office or any tort based on bad faith; and
    - (ii) That there is some admissible and credible evidence that can, on a reasoned consideration, establish each element of the cause of action.

- c. Where the defence leads evidence, that evidence must be considered in determining whether there is some admissible and credible evidence in support of the claim. Where the claim alleges that the defendant's conduct is so inexplicable that it amounts to bad faith or establishes an inference of the defendant's knowledge of unlawful conduct, then the motion judge is required to consider any defence evidence filed on the motion that provides an explanation of the conduct at issue.
- d. In engaging in a reasoned consideration of the evidence, a motion judge may weigh the evidence, make limited credibility assessments, draw appropriate inferences, and make findings of fact established by the record.
- e. A reasoned consideration of the evidence must consider that productions and discovery have not yet occurred.

31. In *Yadeta*, at para. 40, Regional Senior Justice Ricchetti, as he was then, stated the following with respect to the sufficiency of evidence required to establish a reasonable possibility of success:

The essential question, related in both the leave motion or the motion to strike, is whether based and accepting on the material facts in Mr. Yadeta's pleading and affidavit: is there [sic] a reasonable prospect (or possibility in the leave motion) of success at trial?

#### The Statement of Claim

32. The Plaintiff's claim includes several allegations against MAG, which is the Crown. The Plaintiff is seeking general, aggravated and punitive damages totalling \$660,000, as well as unspecified special damages. The Plaintiff is alleging the following:
- a. That the Defendants made fraudulent misrepresentations to the Plaintiff's insurer, Manulife;
  - b. That the Defendants were operationally negligent in filing certain court documents; and
  - c. Other unspecified allegations.
33. At the hearing of the motion, the Crown confirmed that their position was that the allegations of fraudulent misrepresentation and all of the Plaintiff's other claims, except operational negligence, engage section 17. In other words, the Crown submitted that the operational negligence claim does not engage section 17 of the *CLPA* because it is not a tort of misfeasance in public office or one based in bad faith. Therefore, MAG's position is that this motion will not dictate whether or not the claim for operational negligence may proceed.

34. I am not saying that a claim for operational negligence, or even any claim involving negligence, will never engage section 17.<sup>2</sup>
35. However, in the present case, the Crown has waived the leave requirement for the claim of operational negligence. Section 17(11) of the *CLPA* allows the Crown to waive the requirement to obtain leave and lift the automatic stay.
36. Accordingly, this decision will focus on the Plaintiff's claims of fraudulent misrepresentation and all of the Plaintiff's other claims, except for operational negligence.

### Fraudulent Misrepresentation

37. The Plaintiff must demonstrate that their claim of fraudulent misrepresentation and any other claim that includes allegations of bad faith or misfeasance in public office has a reasonable likelihood of being resolved in their favour.
38. In *Manoharan v. Taylor*, 2025 ONSC 7013, at para. 149, Associate Justice Eckler determined that "deceit", another word for the tort of fraudulent misrepresentation, engaged section 17 of the *CLPA* as it includes elements of bad faith.
39. There is an abundance of case law that outlines that the elements of fraudulent misrepresentation are:
  - a. The defendant made a false representation of fact;
  - b. The defendant knew the statement was false, or was reckless to its truth;
  - c. The defendant made the representation with the intention that it would be acted upon by the plaintiff;
  - d. The plaintiff relied on the statement and acted upon it; and

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<sup>2</sup> While bad faith is not an element of the tort of negligence and a pleading of bad faith does not create a duty of care, there may be cases in which a negligence claim engages section 17. The Court of Appeal noted that a determination of whether the relevant standard of care was breached may engage concepts of bad faith See *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198, leave to appeal refused *Y.M., et al. v. Her Majesty the Queen in Right of Ontario, et al.*, 2020 CanLII 74015, leave to appeal refused *J.B. v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Child and Youth Services and the Minister of Health and Long-Term Care, et al.*, 2020 CanLII 74017 (SCC). See also *R. v. Campbell* [2022] O.J. No. 1585 (Ont. S.C.J.) and *His Majesty the King in Right of Ontario v. Dell*, 2024 ONSC 613. In both of these cases, the plaintiff agreed that s. 17 applied to their negligence claim.

e. The plaintiff suffered damage as a result of his so acting.<sup>3</sup>

40. The Plaintiff must establish each of these elements. See *Wang v. Shao*, 2019 BCCA 130, at para. 24.
41. A finding of fraud cannot be made lightly, and in order to succeed, strict proof is required. See *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.*, 1992 ABCA 211, at para 38, citing G.H.L. Fridman, *The Law of Contract*, 2nd ed. (Toronto: Carswell, 1986), at p. 278.
42. The evidence must be “clear and convincing and cogent”. See *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 46.
43. Proof of fraud, and nothing short of that, will suffice. See *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 18.
44. In reviewing the Statement of Claim and the submissions in this motion, the Plaintiff alleges the following false representations of fact were made by the Crown:
  - a. By making false statements to the Plaintiff’s insurer, Manulife, and by failing to provide three reference letters written by members of the judiciary who had allegedly worked with the Plaintiff and would attest to her competency and by omitting an alleged accommodation plan drafted by her former supervisor, Richard MacAndrew; and
  - b. By making false statements in a “Job Information Questionnaire” dated June 28, 2012, provided by Manulife to be “completed by the employee's immediate supervisor” for the purpose of determining total disability.

*A. Omissions: Reference Letters and Accommodation Plan*

45. The Plaintiff alleges bad faith conduct by the current Manager of Operations at the Ottawa Courthouse. The allegations are that the Manager of Operations filled out the forms for the Plaintiff’s Long-Term Income Protection (“LTIP”) application and made false representations and a false declaration to the Plaintiff’s insurer Manulife, which included

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<sup>3</sup> *Mariani v. Lemstra* (2004), 246 D.L.R. (4th) 489 (Ont. C.A.), at para. 12, leave to appeal refused, [2004] S.C.C.A. No. 355; *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONCA 610, 500 D.L.R. (4th) 639, at para. 24; *Chaba v. Khan*, 2020 ONCA 643, at para. 15, leave to appeal refused, [2020] S.C.C.A. No. 442; *Midland Resources Holding Ltd. v. Shtaiif*, 2017 ONCA 320, 135 O.R. (3d) 481, at para. 162; *Amertek Inc. v. Canadian Commercial Corp.* (2005), 76 O.R. (3d) 241, at para. 63, leave to appeal refused, [2005] S.C.C.A. No. 439; *P. (P.) v. D. (D.)*, 2017 ONCA 180, 137 O.R. (3d) 138, at para. 41; *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21.

sending an incomplete employment file omitting the Plaintiff's three reference letters that demonstrate her competency in her position of Court Clerk Registrar.

46. The Plaintiff also alleges that the Manager of Operations omitted "many communications sent to the Defendant by the Plaintiff requesting accommodation", as well as the attendance plan and attached temporary accommodation plan drafted in December 2011.
47. The Plaintiff claims that these omissions amount to fraudulent misrepresentation.

*B. False Statements: Job Information Questionnaire*

48. The Plaintiff also alleges that the Manager of Operations made false statements in a "Job Information Questionnaire" dated June 28, 2012.
49. Ms. Botosh confirmed it was the answers to questions 18, 19 and 20 of the Job Information Questionnaire that included the alleged false declarations of fact.
50. Question 18 asked: "In what way did performance on the job change as a result of the disability?"
51. The answer to the question in the Job Information Questionnaire was:

Michelle found it extremely difficult in sitting in one location for more than an hour at a time. She would therefore have to move around or get up from her chair periodically which at times would cause distractions in the court proceedings. The judiciary had some concerns with her situation which would result sometimes in complaints to the immediate supervisor. Michelle has limited mobility in the use of her arms which caused her to take longer to process the files. Unfortunately, with her taking longer it had an effect on operations. Michelle was also unable to move files to and from the court without a buggy (cart) which was supplied to her. In summary, Michelle was still able to perform her duties but not as efficiently as the judiciary required.

52. The Plaintiff's position is that these statements are a false representation because it was a "blanket statement".
53. The Plaintiff also alleges that the following statement outlined in Question 18 of the Job Questionnaire was a false declaration: "She would therefore have to move around or get up from her chair periodically which at times would cause distractions in the court proceedings."
54. The Plaintiff stated during her cross-examination that this was a false declaration because there was only one instance where she got up during a court proceeding. However, the

evidence includes a Manulife “Activity Note” summarizing a phone call between Manulife and her former supervisor, Richard MacAndrew, dated August 7, 2012, which states:

However it was very tough for her as she had conflicts with the judiciary many times as she kept having to get up as she could not sit continuously. This was distracting for the Court proceedings and resulted in complaints to the EE’s supervisor.

55. The Plaintiff’s position is that she thinks Mr. MacAndrew was influenced by the Manager of Operations to make that statement. However, there is no evidence before me to support that allegation.
56. Furthermore, the Plaintiff confirmed that the judiciary had some concerns with her situation which resulted in complaints to her immediate supervisor. The Plaintiff’s view was that the complaints were fabricated.
57. The Plaintiff also alleged that the following statement outlined in Question 18 of the Job Information Questionnaire was a false representation: “Michelle has limited mobility in the use of her arms which caused her to take longer to process the files.” The Plaintiff believed this statement was “made [sic] up” but provided no evidence to support this allegation.
58. Finally, the Plaintiff alleged that the following statement was a false representation: “In summary, Michelle was still able to perform her duties but not as efficiently as the judiciary required”. The Plaintiff indicated that this was a false representation because her duties included things she was not trained to do, and that her employer kept increasing their expectations of her. The Plaintiff also stated that, “this is what they do with people that have disabilities to get rid of them”. However, Ms. Botosh provided no supporting evidence of these allegations.
59. During cross-examinations, the Plaintiff was asked whether the Defendant’s answers to questions 19 and 20 on the Job Information Questionnaire were false declarations.

Question 19 stated:

Were there any changes made in the employee’s job as a result of the disability?  
(Yes)

If yes explain:

The management team attempted to change her duties. We scheduled her in courts we thought would give her more mobility (standing and moving around) and court proceedings where she would not have to do as much writing or typing. It is very hard to accommodate her needs since the court operations could be very

demanding. The courts then attempted to provide her with administrative duties 2 times per week.

Unfortunately, we did need Michelle to return to court with the high demand of Registrar's. With the dynamics of the courts and her knowledge of specific areas, we were having major difficulties in placing her into a less demanding in-court environment.

Question 20 stated:

Please provide any additional information that you believe should be considered in assessing this claim:

As a registrar, Michelle seems to have many physical limitations to be able to complete her role. On many occasions the management team has tried to accommodate Michelle however never seemed to achieve a positive end result.

60. The Plaintiff indicated that "they didn't try to accommodate me".
61. However, the Plaintiff admitted during cross-examination that she was on a four-day accommodation plan. The Plaintiff also admitted that there was an accommodation plan in place but that it was not followed. The Plaintiff stated that the accommodation plan called for "alternative days in court and then I'd do admin work".
62. This is consistent with what the Defendant stated in the Job Information Questionnaire:

The courts then attempted to provide her with administrative duties 2 times per week.

Unfortunately, we did need Michelle to return to court with the high demand of Registrar's.

*C. Considering the Elements of Fraudulent Misrepresentation*

**a. The Defendant made a false representation of fact**

63. First, I will consider the omission of reference letters and the accommodation plan.
64. A misrepresentation can involve not only an overt statement of fact, but also certain kinds of silence: a half-truth or representation that is practically false, not because of what is said,

but because of what is left unsaid; or where the circumstances raise a duty on the representor to state certain matters, if they exist, and where the representee is entitled, as against the representor, to infer their non-existence from the representor's silence as to them. See *Midland Resources Holding Ltd. v. Shtaiif*, 2017 ONCA 320, at para. 163.

65. An omission may constitute a false declaration for the purpose of establishing fraudulent misrepresentation. See *Wang v. Shao*, 2018 BCSC 377, at para. 205, rev'd on other grounds, 2019 BCCA 130.
66. However, the information withheld must be relevant, and the Defendant must have "intended to deceive the plaintiff by its failure to disclose the relevant information and intended to commit this fraudulent act through nondisclosure of the relevant information". See *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONCA 610, at para. 111.
67. There is no evidence before me that the Manager of Operations intended to deceive the Plaintiff by her omission to disclose the relevant information, and intended to commit this fraudulent act through nondisclosure of the relevant information.
68. Furthermore, neither the reference letters nor the accommodation plan referred to by the Plaintiff can be considered relevant documents to Manulife's queries to the MAG/the Crown.
69. In *Midland*, at para. 164, the Court noted:

The significance of silence (or omissions) always falls to be considered in the context in which it occurs. As explained by Professor Waddams: "Almost always something is said to induce the transaction and it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations". [Citations omitted.]
70. The evidence before me is that the only information Manulife requested from the Crown in relation to the Plaintiff's insurance claim was in the form of a Job Information Questionnaire. The Job Information Questionnaire asked twenty questions pertaining to the Defendant's ability to carry out her job and the Defendant's attempts to accommodate her.
71. None of the questions in the questionnaire asked the Defendant to provide supporting documentation.
72. There is no evidence before me to suggest that Manulife ever requested any further information.
73. In my view, the accommodation plan and/or reference letters were not relevant to answering the Job Information Questionnaire, and as such, omitting them does not amount to a false declaration or contribute to fraudulent misrepresentation.

74. Secondly, I will consider whether the Defendant made a false representation of fact in answering the questions in the Job Information Questionnaire.
75. It is appropriate for me to consider the cross-examination evidence of the Plaintiff on such a motion.
76. Section 17 of the *CLPA* specifically states the following:

**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.

**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.

77. Having considered the evidence before me, including the cross-examination evidence of the Plaintiff, there is no evidence to demonstrate that the defendant made any false declarations of fact.
78. I appreciate that the Supreme Court of Canada in *Theratechnologies* confirmed that the authorization stage should not be treated as a mini-trial. In this regard, the evidentiary requirements should not be so onerous as to replicate the demands of trial, and a full analysis of the evidence is not required. See *Theratechnologies*, at para. 39.
79. Although the threshold for meeting the “reasonable possibility of success” criterion is low, bald allegations of bad faith advancing various torts known and unknown in law are not sufficient. Material facts sufficient to support the essential elements of the torts must be pleaded. See *Yadeta*, at para. 41. The facts and documents supporting the allegations must still be set out in the affidavit. See *Aboagye*, at paras. 20-22.
80. The plaintiff must bring forth an affidavit setting out a concise statement of the material facts, and an affidavit of documents detailing all evidence relating to the matter. See: *Aboagye v. Ontario*, 2025 ONSC 4950, at para. 20. The court may presume that the affidavit sets out all material facts and documents on which the plaintiff intends to rely. See: *Aboagye v. Ontario*, 2025 ONSC 4950, at paras. 21-22. The court should not speculate that new or better evidence would be available later in the proceeding, including through discovery or at trial.

81. Part of the function of a section 17 motion is to serve as a screening mechanism aimed at preserving scarce resources by weeding out baseless claims against the Crown, claims pursued with an ulterior motive, and claims brought with the intention to harass or to generate negative publicity for a defendant.
82. While the Plaintiff takes the position that the answer to Question 18 was a blanket statement, she provided no evidence that the statement was false. In fact, that statement is supported by evidence in the record.
83. While the Plaintiff alleges that the answers to Question 19 were based on fabricated complaints, influenced by the Manager of Operations, and a plan to get rid of her, all of these allegations are unsupported by the evidence before me.
84. Finally, with respect to the questions about the Defendant's attempts to accommodate, it appears that the Plaintiff interpreted these answers to be a representation that they did accommodate her. The evidence is that there was an accommodation plan in place, and the Defendant did try to accommodate the Plaintiff. The Defendant did not state that it successfully accommodated Ms. Botosh. The answer to the questions just stated that they tried, but that due to the "high demands of the Registrar's" it was not possible.
85. Therefore, I am unable to see how the Plaintiff would succeed in establishing that the Defendant made a false representation of fact.

**b. The Defendant knew the statement was false, or was reckless to its truth**

86. The Plaintiff has not provided any evidence that the defendants knew their statements or omissions were false or were reckless in their truth.
87. The burden of establishing this element is high. Even a false statement that is made carelessly without reasonable grounds for believing it to be true does not amount to fraud if the individual believes it to be true.
88. In *Chu de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2024 ONSC 3541, at para. 208, citing *Chapman v. Warren*, [1936] 2 D.L.R. 157, at pp. 162-63, the Court stated,

[T]he law has been settled that carelessness, however gross, is not fraud. Where the word "careless" is used in the cases, the expression does not mean "without taking care" but "not caring". Very gross and culpable carelessness is not enough to constitute fraud: *Angus v. Clifford*, [1891] 2 Ch. 449. The element of moral turpitude must be present, as put by one learned Judge, to constitute fraud. The

statement must be made with a wicked indifference, immorally not caring whether the thing is true or not.

89. The evidence before me does not demonstrate that the defendant knew the statement was false or was reckless to its truth.
90. I am unable to see how the Plaintiff will be able to establish this prong of the test.

**c. The Defendant made the representation with the intention that it would be acted upon by the Plaintiff**

91. The Plaintiff has not provided any evidence to demonstrate that any alleged false representations or omissions made by the Crown/MAG were made with the intention that they would be acted upon by the Plaintiff.
92. The statement and omissions that the Plaintiff characterizes as false representations were made to Manulife, not the Plaintiff. It is not logically plausible that MAG intended that the Plaintiff would rely on the relevant statements.
93. This may be a different conversation if Manulife were alleging fraudulent misrepresentation, but they are not.
94. I am unable to see how the Plaintiff will be able to establish this prong of the test.

**d. The Plaintiff relied on the statement and acted upon it**

95. The evidence also does not demonstrate that the Plaintiff relied on the statements and acted upon them.
96. Again, this may be a different conversation if Manulife were alleging fraudulent misrepresentation, but they are not.
97. The Crown submitted that the Plaintiff has not established that, but for the alleged fraudulent misrepresentations and omissions of MAG, the Plaintiff would not have suffered the harm that she did. It has not been established whether the reference letters or accommodation plan being provided to Manulife would have changed the decision to deem her totally disabled. It has also not been established that if the answers to the Job Information Questionnaire were different, Manulife's decision to deem the Plaintiff totally disabled would have changed.

98. In my view, the analysis does not need to go that far. It would not be logical that the Plaintiff would have acted on the statements. These statements were made in a questionnaire, and the information was sought by Manulife. The analysis ends because it was not the Plaintiff who would logically be relying on these statements.

**e. The Plaintiff suffered damage as a result**

99. The Supreme Court of Canada has consistently recognized that “fraud without damage gives . . . no cause of action”. See *Bruno Appliance*, at para. 20, citing *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330.

100. The Plaintiff submits that she suffered damages because her LTIP was cancelled. The Plaintiff states that because of the Defendant’s conduct, she has experienced vast financial damages from lost past, current and future income, and loss of competitive advantage. According to the Plaintiff, her damages include:

- a. She started losing income as of her return from medical leave in August 2010, due to the Defendants not implementing any accommodation or modification to her duties.
- b. The Plaintiff only received 66 and 2/3% of her pay while on leave.
- c. The Plaintiff has incurred significant out-of-pocket costs in relocating to Leeds, relocating back to Canada, and again relocating back to Ottawa in 2015.
- d. The Plaintiffs relocation back to Ottawa has caused serious financial hardship. As a result of the Defendants conduct the Plaintiff lost her job, her seniority (years of continuous service) merit increases, pension credits and the ability to be reassigned to another occupation in another Ministry within the OPS.
- e. The misrepresentations of the Defendant resulted in the Plaintiff receiving no financial compensation during the grievance process.
- f. The Plaintiff lost her LTIP with Manulife along with all other benefits under the policy.
- g. The Plaintiff suffered reputational damage because of the misrepresentations made by the Defendants during the grievance process particularly in relation to evidence of a personal, professional, and medical nature that was put into evidence and is part of the decision.
- h. The Plaintiff suffered incessant abuse and harassment by Lynn Dicaire, which contributed to further ill health.

- i. The litigation that dragged out for four years unnecessarily contributed to further ill health.
  - j. The Plaintiff incurred costs for a medical report in the amount of \$750.00 that was not reimbursed.
  - k. The Plaintiff incurred legal costs.
101. The Crown argued that the Plaintiff applied to Manulife for LTIP because she had been absent from work for more than three months and her Short-Term Sickness Plan (“STSP”) credits were going to run out.
  102. If the Plaintiff’s STSP credits ran out before her LTIP was approved, she would have been without income. It was the Plaintiff who applied to Manulife for LTIP so that she could retain 66 and 2/3% of her gross salary while not working.
  103. It was in the process of the Plaintiff’s application for LTIP that Manulife asked MAG certain questions about her ability to carry out her job. Manulife then determined the Plaintiff “totally disabled” and approved her LTIP on that basis.
  104. The Plaintiff, therefore, cannot assert that there was any harm that resulted from any alleged fraudulent misrepresentations made by MAG to Manulife.
  105. The Plaintiff was compensated by Manulife after being deemed totally disabled.
  106. The Plaintiff’s LTIP was only cancelled once the Plaintiff, on her own accord, decided to pursue her academic studies in the United Kingdom.
  107. I am not satisfied that the Plaintiff suffered harm or damages *as a result of the statements or omissions*.
  108. In my view, the Plaintiff has not established that her claim for fraudulent misrepresentation has a reasonable possibility of being resolved in her favour.

Other Claims (not including Operational Negligence) – No Reasonable Possibility of Success

109. The Plaintiff has made additional allegations that include elements of bad faith or could be framed as misfeasance in public office.
110. During the hearing, I took time to go through each of the allegations outlined in the Statement of Claim. The crux of the Crown’s position is that all of the allegations, except for the allegation of operational negligence, include elements of bad faith or could be framed as misfeasance in public office and, therefore, engage section 17.

111. The Plaintiff did not directly address these allegations in her factum or oral submissions.
112. However, even if the “tenor” of the claim is one of bad faith conduct, it still engages s.17 of the *CLPA*. See *Aboagye*, at para. 16
113. The test for misfeasance in public office requires the following: (1) a public officer must have engaged in deliberate unlawful conduct in their capacity as a public officer, and (2) the public officer must have been aware that the conduct was both unlawful and likely to harm the plaintiff. See *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 23.
114. Based on the evidence before me, these claims are based on bald assertions with no material facts or evidence to support them.
115. Based on the pleadings and the evidence before me, there is no reasonable possibility of success to these allegations.

#### Limitation Period

116. As part of the claim, the Plaintiff disputed this decision to the OGSB, where her grievance was dismissed in full in 2018.
117. These allegations occurred in 2018. They are barred by the two-year general limitation outlined in section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.
118. Discoverability of the claim and impact of the *Limitations Act, 2002*, is a factor in considering the plaintiff's reasonable possibility of success. See *Aboagye*, at para. 34; *Goulbourne v. HMQ in Right of Ontario*, 2021 ONSC 7064, at para. 31.
119. Section 5(1) of the *Limitations Act, 2002*, states that a claim is “discovered” on the day the person with the claim first knew or ought to have known that the injury, loss or damage had occurred.
120. The OGSB arbitration process took place in 2018, and the Plaintiff was present at these hearings. She should have been aware of any alleged fraudulent misrepresentations made at the hearings.
121. Ms. Botosh filed her statement of claim on November 14, 2023. In my view, she was aware of the Defendant's alleged conduct during the OGSB arbitration process in 2018, and the limitation period expired on the second anniversary of the day on which the claim was discovered.

122. Accordingly, any allegations pertaining to conduct that occurred during the OGSB arbitration do not have a reasonable possibility of success.

### Improperly Named Defendant

123. The plaintiff has named the Ministry of the Attorney General as the Defendant in this action.
124. As the claim for operational negligence is proceeding, it is important to address the proper naming of the Defendant.
125. A Ministry is not a suable entity. Instead, the correct party is “His Majesty the King in Right of Ontario”. See section 14 of the *CLPA*; *Deep v. Ontario*, 2004 CanLII 14527 (Ont. S.C.), at para. 82; *Noddle v. The Ontario Ministry of Health*, 2019 ONSC 7337, at para 29.
126. Accordingly, the style of cause shall be amended so that the Defendant shall be His Majesty the King in Right of Ontario.

### Conclusion

127. Ms. Botosh is a skilled individual, who has experienced significant challenges during her life. Nothing in this decision should be seen as minimizing the difficulties Ms. Botosh has encountered over the years. Ms. Botosh said that her life has been held hostage as a result of the events that led to this litigation. It might not matter much to her, but it is important for me to note that I have a great deal of sympathy for the struggles she has faced over the years. However, as I said at the beginning of this decision, my job is to apply the law, especially the particular legal test, to the facts as demonstrated by the evidence, not to make decisions based solely on compassion.
128. For the foregoing reasons, I am not satisfied that the record supports a reasonable possibility of success on her claim of fraudulent misrepresentation and all other claims except operational negligence. Therefore, I deny leave for Ms. Botosh to continue these claims. Pursuant to s. 17(10)(b), the proceeding is rendered a nullity in respect of all of Ms. Botosh’s claims except for the allegation of operational negligence.
129. As a result of the Crown’s consent, the stay is lifted only with respect to the claim of operational negligence.
130. The style of cause shall be amended so that the Defendant shall be His Majesty the King in Right of Ontario.

131. Pursuant to s. 17(8), each party shall bear their own costs of the motion.

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Associate Justice Kamal

**DATE:** March 13, 2026