CITATION: Wei v Ontario, 2026 ONSC 1782
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SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: Betty Wei and Lawrence Vanderklei, Plaintiffs

AND:

His Majesty the King in Right of Ontario, Brian Mills, and Anatol Monid, Defendants

BEFORE: Justice Ranjan K. Agarwal

COUNSEL: Mitchell Wine, for the plaintiffs

Shahana Kar, Stacey Hsu, and Lara Zarum, for the defendants

HEARD: March 30 and 31, 2026

ENDORSEMENT

I. INTRODUCTION

[1] In 2016, the Financial Services Commission of Ontario took significant regulatory action against Tier 1, which marketed and sold risky syndicated mortgage investments (**SMIs**). The representative plaintiffs, who invested with Tier 1, allege that FSCO's failure to take regulatory action earlier was an act of bad faith. Under the *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sched 17, s 17(2), the plaintiffs need to show that there's a reasonable possibility the claim will be resolved in their favour before they can proceed with this class action.

[2] For the reasons discussed below, I grant leave to the plaintiffs to proceed with an action for misfeasance in public office. Based on the evidence before me, the plaintiffs may be able to show that the defendants' conduct was so inexplicably and seriously careless that a trial judge should infer that they acted in bad faith. That said, the plaintiffs have failed to show that they have a reasonable chance of success in proving misconduct by a public authority or negligence.

II. BACKGROUND

A. Facts

1. FSCO

[3] The *Mortgage Brokerages, Lenders and Administrators Act, 2006*, SO 2006, c 29, requires mortgage brokers, brokerages, administrators, and agents to comply with prescribed standards and duties around (a) public and customer relations, (b) information about fees payable and receivable, (c) disclosure of potential conflicts of interest, and (d) disclosure of material risks. Until 2019, licensees under the *MBLAA* were regulated by FSCO. Its mandate was to "provide regulatory services that protect the public interest and enhance public confidence in the sectors it regulates."

[4] FSCO's regulatory scheme was complaint-driven. If consumers had a complaint, mortgage brokerages responded in writing; unsatisfied complainants were directed to FSCO. Mortgage brokerages also had to report particulars about the complaints in

their Annual Information Return. See *Mortgage Brokerages: Standards of Practice*, O Reg 188/08.

[5] FSCO's Market Regulation Branch handled consumer complaints. A Compliance Officer reviewed complaints, gathered supporting information, and assessed potential unlawful activity. Serious non-compliance was referred to a Regulatory Discipline Officer for further analysis, including desk reviews of licensee-reported information to identify elevated risk. Where higher non-compliance risk was identified, the RDO could request a detailed on-site examination by a Senior Compliance Officer. If the SCO concluded that the licensee's activities were at a high risk of non-compliance, the matter could be referred to an investigator, who assists with enforcement proceedings and prosecutions.

[6] The defendant Brian Mills was FSCO's Superintendent and CEO. The defendant Anatol Monid was FSCO's Director (Licensing and Market Conduct Division) and, later, Executive Director (Licensing and Market Conduct Division). They were both Crown employees.

2. Tier 1

[7] A syndicated mortgage is when a pool of people invests in a single mortgage against one property. SMIs are often used by developers to raise funds for large-scale real estate projects. In 2016, there were around 16,000 individual SMI investors in Ontario, and the market was worth $6b.

[8] First Commonwealth Mortgage Corporation and Tier 1 Mortgage Corporation were licensed mortgage brokerages. They raised funds through SMIs to support the early stages of several real estate development projects.

[9] Tier 1 Advisory was not licensed by FSCO, but it had applied to be a mortgage brokerage. It operated as a marketing and project development consultant for the Tier 1 projects.

[10] Bhaktraj Singh, Dave Balkissoon, and Jude Cassimy were licensed mortgage brokers or agents. Mr. Singh was an officer and director of Tier 1 Mortgage, and a mortgage agent for First Commonwealth. He was also the owner of Tier 1 Advisory, a shareholder in several Tier 1 projects, and the owner of several trustee corporations that acted as unlicensed mortgage administrators for the SMIs. Mr. Balkissoon owned Tier 1 Mortgage. Mr. Cassimy owned First Commonwealth.

[11] The investments generally worked as follows:

- each investor granted authority to a designated lawyer to invest with one of the Tier 1 project developers
- the investor directed that a trustee corporation administer the loan
- the trustee corporation held the mortgage in trust for the investor—as the mortgage administrator, the trustee corporation had certain duties, including enforcing the mortgage on behalf of the investor in the event of default

- if the investor was investing funds from a registered account, they directed Olympia Trust Company, an Alberta-based company, to invest the registered funds in the mortgage

3. The Representative Plaintiffs

[12] The plaintiffs Betty Wei and Lawrence Vanderklei are spouses. They are senior citizens. In 2016, their financial advisor recommended that they invest in an SMI. They attended several presentations about SMIs, which were organized by Tier 1 or its project developers. They also did their own due diligence, including researching the companies involved in the project and reading FSCO's website. But there's no dispute that the plaintiffs were unsophisticated investors.

[13] The plaintiffs eventually decided to invest in Textbook Student Suites (445 Princess St.), which was a student housing project in Guelph. They were advised that they would receive eight percent interest annually on their investment, and the mortgage was for a three-year term. The plaintiffs transferred their retirement savings to Oympia Trust to fund the investment. Altogether, they invested around $220,000.

[14] When they invested, they were provided some disclosure by First Commonwealth. The disclosure is on a FSCO Form 1 – Investor/Lender Disclosure Statement for Brokered Transactions. The blank form has FSCO's logo and is printed by FSCO. That said, the form states that FSCO hasn't "reviewed or approved" the completed disclosure statement.

[15] Under the disclosure statement, the plaintiffs were advised that:

- the appraised "as is" value of the development project was $15.45m
- the purchase price of the property was $9.3m
- there was a first mortgage for $7m
- the total amount of the SMI was $8.45m

[16] As a result, the loan-to-value ratio was 100 percent, making this project a high-risk investment.

[17] The plaintiffs weren't provided a copy of the appraisal. They also weren't told that their investment was subordinated to $75m in construction financing, or that they couldn't act on the security without the first mortgagee's consent. They did receive legal advice, but it was from a lawyer retained by Tier 1.

4. Regulatory Proceedings Against Tier 1

[18] In October 2016, FSCO alleged that not only did Mr. Singh fail to prevent the misappropriation of SMI funds by some of the Tier 1 developers, but he benefitted from those misappropriations. FSCO issued a cease-and-desist order against Tier 1 Advisory and suspended the licenses of Tier 1 Mortgage, First Commonwealth, Mr. Cassimy, Mr. Balkissoon, and Mr. Singh.

[19] FSCO also applied for and was granted an order appointing Grant Thornton Limited as a receiver for several of Tier 1's trustee corporations. KSV Kofman Inc. was appointed as a receiver for land underlying 11 of the projects.

[20] The SMI for the Textbook project had raised $8.4m. KSV concluded that only $29,000 was spent on development. Almost $5m was used for non-development purposes: $2.1m to shareholders, $1.5m in referral and commission fees (including to First Commonwealth and Tier 1 Mortgage), $500,000 in legal fees, and $672,000 for an undisclosed reserve fund.

[21] KSV eventually sold the 445 Princess St. property for $7.5m—all the proceeds were used to pay off the first mortgagee, leaving none for SMI investors like the plaintiffs.

[22] In October 2018, Grant Thornton sued Tier 1, its principals, and the Tier 1 developers. It alleged that Tier 1 raised over $130m, but almost $40m was diverted to shareholders, professionals, mortgage brokers, and commissioned sales agents. According to Grant Thornton, Tier 1 looked like a Ponzi scheme—the investments from later investors, like the plaintiffs, were necessary to pay interest to earlier investors.

[23] As of June 2020, Grant Thornton had recovered around $32m and distributed $24m to investors.

5. Fortress Real Developments

[24] The dominant player in Ontario's SMI market was Fortress Real Developments Inc. At its peak, it had raised $920m from retail investors. Tier 1 adopted its business model and structure.

[25] In May 2025, Fortress's principals, Jawad Rathore and Vince Petrozza, were found guilty of fraud. See *R v Rathore*, 2025 ONCJ 291.

B. Law

[26] Under the *CLPA*, any proceeding against the Crown or its officers or employees that includes a claim for "a tort of misfeasance in public office or a tort based on bad faith" may proceed only with leave of the court. See *CLPA*, ss 17(1), (2).

[27] The plaintiffs' claim sounds in misfeasance in public office, misconduct by a public authority, and negligence. In an earlier decision, I held that the plaintiffs need leave to prosecute all of these claims. Even though bad faith isn't an element of negligence, the statutory immunity for regulatory decisions made in good faith means plaintiffs can only sue in negligence if they can establish that the impugned regulatory decision was done in bad faith. See S Mathai and B Kettles, *The Annotated Ontario Crown*

Liability and Proceedings Act, 2019 (Thomson Reuters Canada: Toronto, 2024), at 80-81; *Wei v Ontario*, 2025 ONSC 3580, at paras 8-11.[1]

[28] The court shall not grant leave unless it's satisfied that (a) the proceeding is being brought in good faith (which isn't disputed here), and (b) there's a reasonable possibility that the claim would be resolved in the claimant's favour. See *CLPA*, s 17(7). The leave requirement creates a "screening process", which is intended to weed out unmeritorious claims. See *Poorkid Investments Inc. v Ontario (Solicitor General)*, 2023 ONCA 172, at para 37, leave to appeal ref'd, 2023 CanLII 115642 (SCC).

[29] To satisfy the reasonable or realistic chance of success standard, the plaintiff must offer: (a) "a plausible analysis" of the relevant legal test; and (b) "some credible evidence in support of the claim". See *2387282 Ontario Inc. v Ontario (Ministry of Energy, Northern Development and Mines)*, 2026 ONSC 1098, at paras 56-57, citing *Lundin Mining Corp. v Markowich*, 2025 SCC 39, at para 120; *Botosh v Ontario (AG)*, 2026 ONSC 1541, at para 15.

[30] But that alone isn't enough. The record must also show that there's a "realistic or reasonable chance that the action will succeed." See *2387282 Ontario Inc.*, at para 56. As a result, I must review and weigh all the evidence introduced by both parties. The

[1] In *Manoharan v Taylor*, 2025 ONSC 7013, Eckler AJ held that negligence isn't a tort "based in bad faith" so it doesn't need to be screened under the *CLPA*, s 17. The plaintiffs didn't advance this argument, so I need not consider it.

"credibility and reliability of the evidence as a whole are material considerations" in deciding whether the plaintiff has established a realistic or reasonable chance that their claim will succeed. See *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v Barrick Gold Corporation*, 2024 ONCA 105, at para 32, leave to appeal ref'd, 2024 CanLII 90831 (SCC).

[31] If the defendants' evidence is "so compelling that there is no reasonable possibility that the [plaintiff] would succeed at trial", leave may be denied. But the leave motion isn't a "mini trial". It's not my role, as the motion judge, to determine whether the matters in issue have been proven. The "realistic or reasonable chance of success" test is a "relatively low merits-based threshold" that doesn't require proof on a balance of probabilities that the action will succeed at trial. I also can't "resolve realistic and contentious issues arising from conflicting credible evidence", unless it can be established that there is no reasonable possibility that the evidence would be accepted by a trial judge. And I must inquire "whether the record is capable of determining the issue" before me. See *2387282 Ontario Inc.*, at para 59; *Botosh*, at para 15; *Drywall Acoustic*, at paras 33-39.

[32] I must also be mindful that this motion is being decided before the plaintiffs have had the benefit of documentary production and oral discovery. The *CLPA* contemplates that a plaintiff's motion for leave may be decided in the complete absence of evidence from the Crown defendants, whereas the plaintiff must adduce evidence and produce all the relevant documents in its possession, control, or power.

As a result, I must consider evidence that is not before the court. See *2387282 Ontario Inc.*, at paras 48, 61; *Lundin Mining Corp.*, at para 114.

C. Litigation History

[33] The *CLPA* came into force in July 2019. The plaintiffs started this proceeding in October 2019, but their claim didn't seek leave under the *CLPA*, s 17(1). In July 2021, the plaintiffs started a fresh proceeding to plead the leave requirement. In the meantime, Baltman J was assigned as the case management judge under the *Class Proceedings Act, 1992*, SO 1992, c 6, s 34(1).

[34] In February 2022, Broad J declared the leave requirement unconstitutional. See *Poorkid Investments Inc. v Ontario (Solicitor General)*, 2022 ONSC 883. As a result, this action was paused while Ontario appealed the decision. In August 2022, the Court of Appeal overturned that decision. The Supreme Court of Canada denied leave to appeal in March 2023.

[35] This proceeding resumed in 2024. In support of their motion for leave, the plaintiffs relied on their affidavits and affidavits from Peter Lantos (a former licensed mortgage broker who sold SMIs), Ben Rabidoux (a market analyst), and Krista Zingel (a former FSCO Compliance Officer). They also filed expert reports from William Vasiliou (former Assistant Superintendent of Financial Institutions) and Ronald Butler (a licensed mortgage broker).

[36] The defendants filed an affidavit from Monid. Mr. Vasiliou, Mr. Butler, and Monid were all cross-examined. The plaintiffs have also delivered an affidavit of documents as required by the *CLPA*, s 17(3)(b).

[37] The defendants moved to strike Ms. Zingel's affidavit on the grounds that she's not a compellable witness under the *Public Service of Ontario Act, 2006*, SO 2006, c 35, Sched A. In response, the plaintiffs challenged the constitutionality of that statute under the *Canadian Charter of Rights and Freedoms*, s 2(b). The defendants also moved to strike Mr. Vasiliou's and Mr. Butler's affidavits on several grounds.

[38] Meanwhile, Baltman J retired. I was appointed as the case management judge in March 2025. See *CPA*, s 34(2).

[39] In June 2025, I endorsed an order striking Mr. Vasiliou's affidavit and several paragraphs of Mr. Butler's affidavit. See *Wei v Ontario*, 2025 ONSC 3580. Following Monid's cross-examination, the plaintiffs withdrew Ms. Zingel's affidavit. In December 2025, I granted the plaintiffs' motion for leave to file Mr. Vasiliou's affidavit as a fact witness.

D. Preliminary Issue: Admissibility of the Plaintiffs' Evidence

[40] An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. See *Rules of Civil Procedure*, r 39.01(4).

[41] Mr. Vasiliou's affidavit makes several bald, conclusory statements. For example, Mr. Vasiliou deposes that someone at CRA "contacted FSCO employees to warn that syndicated mortgages being sold in Ontario had the attributes of a Ponzi scheme." He doesn't specify the source of the information. As a result, the evidence is inadmissible. See *McCracken v Canadian National Railway Company*, 2012 ONCA 445, at para 110. I have disregarded those portions of his affidavit.

[42] That said, in some cases, Monid confirms Mr. Vasiliou's evidence. In those cases, I've relied on Mr. Vasiliou's evidence. For example, Mr. Vasiliou deposes that a further examination of Tier 1 was scheduled for August 2014. The source of this information is unclear, which makes it inadmissible hearsay evidence. But, on cross-examination, Monid confirmed that he was aware of this examination. See *O'Brien v Bard Canada Inc.*, 2015 ONSC 2470, at para 105.

[43] Also, the plaintiffs repeatedly rely on a Reuters article from November 2017 by Matt Scuffham—"Special Report - Canada regulator ignored warnings on risky mortgage investments". This article is inadmissible hearsay or opinion evidence. Mr. Scuffham wasn't called as a witness. And the article also relies on unnamed sources and unidentified documents. Further, Mr. Vasiliou is cited as a source in the article. The result is that the evidentiary record in this case is circular—Mr. Vasiliou's evidence is the Reuters article, but he provided information to Reuters, meaning that he's the source of his own evidence. That might not be a problem if Mr. Vasiliou is the source

of the information. But in many cases, it's unclear who the source is. As a result, I have given this evidence no weight. See *O'Brien*, at paras 102-106.

[44] Finally, Mr. Vasiliou often cites the statement of claim as a source of his information. For example, Mr. Vasiliou deposes that senior FSCO employees had a meeting about SMIs. He points to the statement of claim as the source of the information. As I discussed in my earlier decision in this case, Mr. Vasiliou is an advocate for SMI investors. I don't know what role he played in drafting the statement of claim, but there's no dispute that he's pursued Tier 1 since 2016. On its face, his evidence is relevant and probative. But it's unreliable if the basis for his evidence is the statement of claim. As a result, I have given this evidence no weight.

III. ANALYSIS AND DISPOSITION

[45] All three of the plaintiffs' claims—misfeasance in public office, misconduct by a public authority, and negligence—require them to prove bad faith. As a result, I start by discussing whether the plaintiffs have a reasonable possibility of success of proving bad faith. Then, I turn to the defendants' alternative arguments about whether the plaintiffs' claims, leaving aside bad faith, have a reasonable possibility of success.

A. Bad Faith

[46] The plaintiffs make several allegations to argue that the "absence of good faith can be deduced and bad faith presumed." As a result, I start by discussing the law of bad

faith. Next, I discuss the evidence that shows that the plaintiffs have a "realistic or reasonable chance of success" in proving bad faith. Finally, I discuss the evidence for which I believe there's no reasonable possibility a judge would accept.[2] The plaintiffs acknowledge that, in most cases, the individual allegations can't show bad faith on their own. But they argue that, taken together, there is a reasonable possibility of the trial judge inferring bad faith.

[47] The defendants submit that FSCO worked as a "diligent regulator" to manage risk in the SMI market. It acted to protect the public and punish the bad actors when it collected sufficient evidence in 2016. At bottom, the defendants argue that the plaintiffs' evidence can't support a claim for bad faith.

[48] I agree with the plaintiffs that some of the allegations, standing on their own, could reasonably lead the trial judge to infer bad faith. I also agree that some of the allegations, when taken together, could reasonably lead the trial judge to infer bad faith. Thus, the plaintiffs have shown a reasonably possibility of success of proving bad faith. That said, there are several allegations that are based on plainly inadmissible evidence and, thus, there's no realistic chance of success for those claims.

[2] The plaintiffs make several allegations about FSCO's actions in 2016. Given that FSCO took regulatory steps against Tier 1 that year, I don't find this evidence probative of whether FSCO's failure to prosecute Tier 1 earlier was done in bad faith.

1. Law

[49] Bad faith, of course, includes intentional fault. For example, where a regulator cancels an entity's license for discriminatory reasons. See *Roncarelli v Duplessis*, [1959] SCR 121; *Finney v Barreau du Québec*, 2004 SCC 36, at para 39; *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61, at para 25.

[50] But bad faith can also include "serious carelessness or recklessness". If the defendants' actions are "inexplicable and incomprehensible" or "so markedly inconsistent with the relevant legislative context" to the point that they are an abuse of power, bad faith may be presumed. For example, where police officers act so negligently that there's no explanation for their conduct. See *Chaput v Romain*, [1955] SCR 834; *Finney*, at para 39; *Entreprises Sibeca*, at para 26.

2. Allegations Supporting Bad Faith

i. FSCO ignored warnings from RBC

[51] Tier 1 banked with RBC. In 2014, RBC's fraud department contacted the OSC, who then connected it to FSCO. At a meeting in August 2014, RBC advised FSCO that it believed that several mortgage brokers and brokerages were involved in a Ponzi scheme—offenders were soliciting illegitimate investments and then using the funds to pay commissions and referral fees. RBC identified Tier 1 Advisory as being at "the top of the scam". It offered to share information with FSCO, like its relationships with the OSC and other securities regulators.

[52] Ms. Zingel, who was at the meeting on FSCO's behalf, made an initial recommendation to allocate resources to investigate the matter, and communicate with licensees about the risks of SMIs.

[53] FSCO understood the risk to the public of Ponzi schemes in the mortgage sector. For example, FSCO had issued a "Public Alert" in December 2012 describing Ponzi schemes and reminding investors to check if their broker was licensed and that they had received disclosure of any material risks. Another example: for 2013-2014, Monid identified three types of cases that were "high priority" for compliance and enforcement: product suitability, fraud, and non-compliant advertising.

[54] In addition, Mr. Butler spoke to Monid about his concerns around SMIs in 2011 and 2012. According to Mr. Butler, Monid said he didn't have any concerns about SMIs, but they were under review. On cross-examination, Monid couldn't recall the conversations, but he "never would have said I don't have concerns about the sales." Mr. Butler also participated in a conference call in 2013 with several people, including FSCO employees, where concerns about SMI fraud were raised. Monid wasn't on this call, but no one from FSCO denies this call happened or Mr. Butler's recollection. Given Monid's admission that Mr. Butler's recollection was better than his, I find Mr. Butler's evidence on this issue to be credible.[3]

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[3] Mr. Butler also deposes that Monid knew, in 2011, that SMIs were "being advertised widely and aggressively by non-licensed parties" through trade shows, direct marketing, and online.

[55] Also, CRA contacted FSCO in 2013. The plaintiffs say it was to "warn that the [SMIs] had the attributes of a Ponzi scheme." Monid didn't know the particulars but acknowledged that the communication "was to make a point about Ponzi schemes." In cross-examination, Monid seemed dismissive of this outreach because there was "no official correspondence from CRA".

[56] Inexplicably, FSCO took no steps to obtain further information from RBC, even though RBC offered to "establish a collaborative agreement which will foster exchanging information in the future." Though Monid acknowledged that RBC had shared some information with FSCO, he says that this knowledge was insufficient to pursue Tier 1 at that time. His affidavit seems to blame RBC: "RBC did not provide FSCO with a copy of its evidence." In cross-examination, Monid dissembled, which undermines the credibility of his evidence:

- he wouldn't agree that RBC made a "serious allegation"—only that it was "an allegation"
- he repeated his evidence that RBC didn't provide "any evidence to proceed"
- FSCO couldn't investigate "based on a conversation"

This claim is a bald assertion. The plaintiffs also assert that Monid wasn't "concerned" about high commission rates in the SMI market—FSCO doesn't regulate commissions, so its only interest is ensuring that rates are properly disclosed. As a result, these claims aren't supported by credible evidence.

- he suggested that because TD Bank had been "subject to billions of dollars in fines for failing to follow their anti money laundering procedures", it didn't matter that the allegation came from a major financial institution

- he then tried to shift responsibility to Ms. Zingel ("the compliance officers that were involved could have pursued this matter the way they felt"), even though he later admitted that he didn't know what steps she took

- he concluded by calling it a fishing expedition—we "would not have any reason to go to all of these or even the licensed entities and try to figure out that there's a Ponzi scheme going on"

[57] Based on the totality of the evidence, I find that there's a reasonable possibility that a trial judge could find that the defendants' failure to follow up on RBC's claims was inexplicable and incomprehensible to the point that they could infer that the defendants acted in bad faith.

[58] FSCO's lack of a response to RBC's disclosure is credible evidence of serious carelessness. RBC, Canada's largest bank and its largest public company, alerted FSCO to possible fraud by several regulated individuals and entities. Though RBC had no legal obligation to do so, its internal investigator met with FSCO. She shared damning information about Tier 1 and offered to share more. But there's no evidence that FSCO followed up.

[59] Monid's explanation for this lack of regulatory action is incomprehensible. Monid's attempt to shift the blame on Ms. Zingel suggests that FSCO didn't do anything. Further, it's inexplicable that Monid keeps suggesting that FSCO didn't have sufficient information. RBC's oral disclosure alone should have prompted further investigation. At the very least, FSCO could've asked RBC for the documents supporting its allegations.

ii. FSCO didn't use its enforcement powers despite the risk to the public

[60] FSCO's "Regulatory Framework" describes the principles it used to guide its regulator activities:

- a "risk-based approach allows FSCO to focus its regulatory efforts in an efficient and effective manner"
- "FSCO is also guided by the principle of proactivity to address risks and prevent non-compliance"
- it "makes evidence-based decisions using research and data to best identify high-risk areas which require more proactive regulation"

[61] FSCO had the power to make inquiries or conduct examinations of licensees to ensure they're complying with the *MBLAA*. See *MBLAA*, s 30.

[62] The SMI market had grown rapidly by 2014—it had almost doubled in size, from $2b to $3.7b, in just two years. The number of complaints to FSCO about SMIs also grew—there was only one complaint in 2012, but 22 complaints by 2014 and 32 complaints by 2015. In 2012, that single complaint was one of 326 complaints in the mortgage-brokering sector. But by 2014, SMI complaints were almost seven percent of all mortgage-brokering complaints, and almost nine percent in 2015.

[63] Monid's affidavit deposes that FSCO's "SMI strategy" at this time involved:

- collecting "high-level" information about the SMI market from licensees' Annual Information Returns
- cautioning the public about the risks of SMIs
- fostering a "culture of compliance" among licensees by issuing guidance on disclosure requirements and assessing investor suitability

[64] On cross-examination, Monid advised that FSCO used this power to do random examinations ("done for compliance purposes just to test the market") or investigate "higher risk entities". Even though SMIs are high-risk products, FSCO didn't view all entities brokering the investment to be at a "higher risk of non-compliance". Monid acknowledged that around 2014, FSCO wasn't contemplating examinations of SMI promoters or brokerages only because they were involved in SMIs.

[65] That said, FSCO did investigate First Commonwealth that year. The examination consisted of reviewing documents for five mortgage transactions. The examiner found seven violations of the *MBLAA* or its regulations. FSCO then sanctioned First Commonwealth. The penalty was upheld by the Financial Services Tribunal. See *First Commonwealth Mortgage Corporation v Ontario (Superintendent Financial Services)*, 2015 ONFST 13.

[66] Even though FSCO found regulatory contraventions in every file it examined, it didn't investigate further. Monid described that decision as an "optional approach" that was made by the senior compliance officer and their manager.

[67] At the same time, FSCO discovered that Tier 1 Advisory's "back office" agreement with First Commonwealth violated several regulations. FSCO advised First Commonwealth about the requirements, and First Commonwealth amended its agreement with Tier 1 Advisory.

[68] There was supposed to be a more thorough examination of Tier 1 in August 2014. The examination was cancelled. The defendants have never explained why this examination didn't proceed.

[69] In 2015, FSCO released a new checklist for mortgage brokers and lenders to help detect and prevent fraud. Monid was interviewed at the time: "Mortgage fraud is big business so anything we can do to prevent fraud from victimizing investors, lenders, borrowers or mortgage brokers is important."

[70] Based on this evidence, much of which is uncontradicted, I find that there's a reasonable possibility that the plaintiffs can prove that FSCO's failure to use its statutory powers against Tier 1 in 2014 was an act of bad faith, especially if combined with the plaintiffs' other allegations of bad faith.

[71] Even though FSCO had broad powers to investigate and examine mortgage brokers and brokerages in the SMI market, it took little or no steps to do so. Its strategy didn't use any of these powers. Instead, it relied on consumers protecting themselves, and licensees self-regulating their actions. For example, FSCO seemed satisfied by First Commonwealth simply amending its agreement with Tier 1 Advisory—there was no examination of either party's records to see if they were, in fact, complying. That approach is inexplicable given RBC's disclosure to FSCO about possible fraud in the marketplace involving Tier 1, the rise in SMI-related complaints to FSCO, and Monid's description of mortgage fraud as "big business".

[72] The defendants aren't obligated to produce information at this stage. But the lack of evidence about these complaints and FSCO's investigations, or its rationale for not investigating these complaints, could reasonably lead to an inference of bad faith.

iii. The failure to sanction Olympia Trust

[73] Olympia Trust acted as a custodian for client funds used in various real estate projects connected to Tier 1. It was registered and licensed in Alberta. In 2015, FSCO contended that Olympia Trust was in violation of the *Loan and Trust Corporations Act*,

RSO 1990, c L.25. In response, Olympia Trust denied that it was doing business in Ontario.

[74] FSCO considered asking Olympia Trust to stop operating in Ontario. Because Olympia Trust was essentially the sole provider of registered accounts for SMI investors in Ontario, FSCO hoped that SMI investments would stop if Olympia Trust exited the market. Though FSCO outlined an action plan to investigate Olympia Trust, it decided not to proceed with any regulatory action at that time because it was unclear, legally, whether "an Alberta company doing business on the internet, taking business from Ontario investors, was conducting business in Ontario."

[75] In the meantime, FSCO sought voluntary disclosure from Olympia Trust and through its investigations of SMI brokers and promoters, including Fortress. In March 2016, a Fortress-related brokerage confirmed that Olympia Trust was performing a trustee and administrator function. In June 2017, FSCO finally issued a cease-and-desist order against Olympia Trust. Olympia Trust eventually agreed to stop accepting new registered accounts for Ontario residents for investing in SMIs or using funds held in an Ontarian's registered account for investment in an SMI.

[76] In cross-examination, Monid was asked why FSCO didn't move against Olympia Trust sooner. He repeatedly deferred to FSCO's lawyers—FSCO didn't want to "go to court and lose"; it wanted "sufficient evidence and a strong position". But Monid

also acknowledged that there would have been "no difficulty obtaining" information from any other SMI brokers through its regulatory powers.

[77] Based on this evidence, again, I find that there's a reasonable possibility that the plaintiffs can prove that the defendants' failure to pursue Olympia Trust in 2015 was an act of bad faith, particularly if joined with the other bad faith allegations.

[78] FSCO acknowledged that stopping Olympia Trust's operations would have a significant impact on the SMI market. FSCO ultimately issued a cease-and-desist order when it learned that Olympia Trust was performing a trustee/administrator function. It could've obtained this information long before mid-2017. The record doesn't disclose why FSCO didn't use its regulatory powers sooner. That's credible evidence of serious carelessness and could support an inference of bad faith.

iv. FSCO licensed Petrozza even though he was banned by the OSC

[79] In 2011, Petrozza and Rathore admitted to breaching the *Securities Act*, RSO 1990, c S.5. They were banned from trading and acquiring securities for 15 years and agreed to pay over $3m. The OSC's order and the settlement agreement were press released, making this information to be publicly available.

[80] In 2013, Petrozza's mortgage broker's license was due for renewal. Despite Petrozza's trading ban, FSCO approved the renewal. The Regulatory Framework states that

FSCO assesses licensees' integrity through "criminal background checks" and "histories of disciplinary actions taken by other regulators".

[81] Monid defended the decision to license Petrozza on the basis that FSCO didn't have "clear, convincing, and cogent" evidence that Petrozza would "not deal in mortgages in accordance with the law and with integrity and honesty."

[82] I find that, based on this evidence, there's a reasonable possibility that a trial judge could infer that the defendants' decision to renew Petrozza's license was an act of bad faith.

[83] The defendants haven't produced any information or documents about the decision to renew Petrozza's license. They're not obligated to do so at this stage. But the evidence that is available shows serious carelessness on the part of FSCO. Petrozza was regulated by the OSC. He broke the law. He admitted doing so. He was banned, for 15 years, from trading securities to protect the public. These are serious charges and a substantial penalty. If FSCO didn't know about Petrozza's ban, that's inexplicable given its regulatory framework and the information publicly available. If FSCO did know, it's incomprehensible how it concluded that Petrozza would deal with mortgages lawfully and with integrity. Monid says FSCO needed more evidence, but there's nothing in the record to show what steps it took to investigate Petrozza's actions. Though Petrozza and Rathore weren't involved in Tier 1, there's credible

evidence that the defendants were seriously careless about regulation of the SMI market generally.

3. No Reasonable Possibility of Proving Bad Faith

i. Mr. Rabidoux's online posts aren't probative

[84] Starting in 2012, Mr. Rabidoux, a financial analyst, began investigating SMI, in part because his brother was considering an investment. In 2013 and 2014, he made several social media posts about his concerns relating to SMIs. The plaintiffs argue that FSCO had an active presence on social media, so it's "probable" that FSCO employees saw Mr. Rabidoux's posts.

[85] There is no evidence that anyone at FSCO saw Mr. Rabidoux's posts, or that monitoring social media was part of its compliance and enforcement strategy. As a result, this evidence can't lead to the inference, even when combined with the other evidence, that FSCO acted carelessly or recklessly.

ii. The plaintiffs' evidence about the Collier Centre is inadmissible

[86] Mady-Collier Centre Ltd. was incorporated to develop a mixed-use development in Barrie. It borrowed around $17m from Fortress in July 2012. In December 2014, construction stopped. In January 2015, Mady-Collier filed for CCAA protection, and Grant Thornton was appointed as monitor.

[87] According to Mr. Vasiliou, Grant Thornton's report to the court disclosed "many improper financing practices" by Fortress. In particular, he says that Grant Thornton's report discloses that Fortress received 35 percent of all investor funds at the outset as an advance against its profits, and 16 percent of the investor funds were invested in a reserve fund. As a result, less than half the investors' funds were available for the construction project. Mr. Vasiliou further deposed that there was "intense media coverage" about Fortress's business practices and the regulation of SMIs, but FSCO's only step was a letter in late March 2015 cautioning Fortress about unlicensed activities.

[88] Though Monid doesn't agree that this matter got "a lot of press", he acknowledged it was in the news. Monid testified that he may have heard about the litigation, but he didn't review the statement of claim and only glanced at press reports. He was unaware that Fortress's commission was 35 percent.

[89] Though it's somewhat inexplicable that Monid, a senior employee of FSCO, didn't know much about this issue, I don't find the plaintiffs' evidence reliable enough to ground this allegation. The plaintiffs and Mr. Vasiliou haven't produced the monitor's report or the news articles. Instead, they seem to be relying on the Reuters news article. As discussed above, that article is impermissible hearsay evidence.

iii. There's no admissible evidence about other warnings

[90] The plaintiffs submit that the PEI Securities Office and the OSC also warned FSCO. The evidence about PEISC's alleged warnings is inadmissible hearsay—Mr. Vasiliou didn't state the source of his information. And the OSC merely connected RBC to FSCO.

4. Conclusion

[91] On a leave motion, it's not my task to determine whether the defendants acted in bad faith. That's for the trial judge. My job is to decide whether, based on the evidence marshalled by the plaintiffs, they have a reasonable prospect of proving bad faith at trial.

[92] As discussed above, the plaintiffs' evidence, which includes Monid's own words in several circumstances, discloses a credible claim that FSCO was seriously careless or reckless to the point that a trial judge may infer that it and its senior employees acted in bad faith. In some cases, FSCO's failure to act is inexplicable, and Monid's explanations don't clarify the situation.

[93] That said, in some cases, the plaintiffs' evidence isn't credible. It's either not probative or it's based on inadmissible evidence. Some of the allegations aren't relevant to whether FSCO should've acted before 2016.

[94] Despite that though, the plaintiffs have shown that they may be able to prove bad faith, which is an essential element of their claims for misfeasance in public office, misconduct by a public authority, and negligence.

B. Misfeasance in Public Office

[95] The defendants argue that even if the plaintiffs can prove bad faith, they don't have a reasonable prospect of proving their claims otherwise.

[96] To succeed on a misfeasance claim, the plaintiffs must show:

(a) the individual defendants were public officials exercising public functions at the relevant time;

(b) the individual defendants deliberately engaged in an unlawful act in their public capacity;

(c) the individual defendants were aware both that their conduct was unlawful and that it was likely to harm the plaintiffs;

(d) the defendants' tortious conduct was the legal cause of the plaintiffs' injuries; and

(e) the injuries suffered are compensable in tort law.

See *Meekis v Ontario*, 2021 ONCA 534, at para 73; *Ontario (AG) v Clark*, 2021 SCC 18, at para 22.

[97] If a defendant is subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct, they may be liable for misfeasance. See *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 38; *Hartman v Canada (AG)*, 2026 ONCA 270, at para 24.

[98] The defendants argue that misfeasance claims are only likely to succeed where the defendants are known to the plaintiffs. See, for example, *Grand River Enterprises Six Nations Ltd. v Canada (AG)*, 2017 ONCA 526; *Granite Power Corp v Ontario*, 2004 CanLII 44786 (Ont CA), leave to appeal ref'd, [2004] SCCA no 409; *Capital Solar Power v Ontario Power Authority*, 2015 ONSC 2116; and *Goyal v Niagara College of Applied Arts and Technology*, 2018 ONSC 2768, aff'd 2019 ONCA 263.

[99] Here, the plaintiffs don't adduce any evidence of direct communications or specific interactions with the defendants. Thus, the defendants argue that there can't be misfeasance.

[100] The defendants' position ignores the theory of the plaintiffs' case. They're not arguing intentional fault. They're submitting that the court should infer misconduct from the defendants' carelessness. See *Entreprises Sibeca*, at para 26. That doesn't require direct communications between the plaintiffs and FSCO.

[101] As a result, the plaintiffs have a reasonable chance of success in proving misfeasance in public office.

C. Misconduct by a Public Authority

[102] The defendants' position is that the plaintiffs can't succeed on this claim because this tort doesn't exist in Ontario law. In oral submissions, the plaintiffs conceded this point. That was a reasonable concession to make.

[103] In *Paradis Honey Ltd. v Canada (AG)*, 2015 FCA 89, leave to appeal ref'd, 2015 CanLII 69423 (SCC), Stratas JA, in obiter, suggested that courts could grant relief where a public authority acts (a) unacceptably or indefensibly in accordance with public law principles, and (b) where, as a matter of discretion, a damages remedy against a public authority is appropriate (at para 132). In *Nelson (City) v Marchi*, 2021 SCC 41, at paras 40-41, the court expressly rejected that approach to negligence claims against government agencies. See also *Nagle v Canada*, 2025 FC 909, at paras 33-35; and *The Catalyst Capital Group Inc. v Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, at paras 104-105.

[104] Given the tort isn't part of our law, I find that the plaintiffs don't have a reasonable chance of proving misconduct by a public authority, even though they may be able to show bad faith. There's no need to "perpetuate an undesirable state of uncertainty" where the claim is doomed to fail. See *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19, at paras 19-21.

D. Negligence

[105] The defendants submit that they don't owe the plaintiffs a duty of care and, as a result, there's no reasonable possibility of this claim succeeding at trial.

[106] To advance a successful claim in negligence, a plaintiff must show that:

(a) the defendant owed them a duty of care;

(b) the defendant's behaviour breached the standard of care;

(c) the plaintiff sustained damage; and

(d) the damage was caused, in fact and in law, by the defendant's breach.

See *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, at para 3.

[107] The defendants' position largely relies on *Cooper v Hobart*, 2001 SCC 79, which is about whether a provincial mortgage regulator owes a duty of care to investors. The plaintiffs respond that: (a) *Cooper* is distinguishable; and (b) a duty of care arises from the interactions between the plaintiffs and the government, as discussed in *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

[108] Though the defendants haven't moved to strike the claim as disclosing no reasonable cause of action, the "reasonable possibility" test assumes that there's a viable legal claim. The Court of Appeal has described the question on a motion to strike as whether the action has "no reasonable prospect of success". See *PMC York Properties*

Inc. v Siudak, 2022 ONCA 635, at para 31, leave to appear ref'd, 2023 CanLII 31576 (SCC). The power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation". See *Babstock*, at para 18. As a result, even in the absence of a motion to strike, I can dismiss leave to proceed on this case. That said, though motions to strike assume the facts pleaded to be true, my view is that the court must consider the filed evidence when such an argument is made on a leave motion, keeping in mind the low standard.

[109] I agree with the defendants—there's no duty of care and, as a result, there's no reasonable prospect of success on the negligence claim.

[110] There's "no doubt" that governments can be held liable in tort like private defendants. See *Nelson*, at para 1. There are three situations in which legislation may determine whether the government owes the plaintiff a prima facie duty of care:

- where the legislation gives rise to a duty of care explicitly or by implication
- where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant
- from the combination of the legislative scheme and the government's interactions with the claimant

See *Cooper*, at para 43; *Imperial Tobacco*, at paras 43-46; *Williams v Toronto (City)*, 2016 ONCA 666, at paras 17-18; *Hartman*, at paras 33-34.

[111] On the first basis, this case is analogous to *Cooper*. There, the Supreme Court of Canada held, at para 44, that B.C.'s *Mortgage Brokers Act*, RSBC 1996, c 313 didn't impose a duty of care on the Registrar of Mortgage Brokers to investors with mortgage brokers regulated by that statute:

- the Registrar's duty was to the public as a whole
- duties to individual investors would potentially conflict with that overarching duty

[112] The court then found, at para 52, that even if a prima facie duty of care existed, it would have been negated by overriding policy reasons—the Registrar's decisions involve both policy and quasi-judicial elements.

[113] So too here.

[114] Under the *MBLAA*, FSCO was responsible for regulating and supervising the mortgage brokerage industry (ss 2-5), to ensure professional standards (ss 7(4), 8(4), 9(4), and 10(4)), market integrity (ss 28-50), and consumer protection (ss 23-27). As in *Cooper*, I find that FSCO has a duty to the public, and not to individual investors.

[115] The plaintiffs submit that FSCO's inquiry and examination power distinguishes it from the regulator in *Cooper*. I disagree—these powers are intended to ensure that

licensees are complying with the statute and that consumers are protected from unfair practices, which is to protect the public at large, not individual investors. Also, the regulator in *Cooper* did have investigatory powers. See *Cooper*, at para 46. The plaintiffs also point to the fact that the B.C. statute in *Cooper* shielded the regulator from liability for anything done in the performance of its duties, unless it was done in bad faith. See *Cooper*, at para 48. That same exemption applied to FSCO. See *Financial Services Regulatory Authority of Ontario Act, 2016*, SO 2016, c 37, Sched 8, s 32.1.

[116] And, like in *Cooper*, even if a prima facie duty of care existed, the same policy issues that arose there are present here. FSCO's decisions about licensees involved both policy and quasi-judicial elements (see *MBLAA*, s 35), and there's no limit in the *MBLAA* or *FSRA Act* on FSCO's liability because it didn't control how many people invest in SMIs or other mortgages. The plaintiffs point to *Williams* as an example of regulator liability, but the claimants in that case were a discrete group of participants in a city-run pilot project.

[117] On the second and third basis, there's no pleading or evidence of "specific interactions between the government and the claimant" that would give rise to a duty of care. There's no evidence of the plaintiffs interacting with FSCO about this issue.

[118] The plaintiffs cite *Duffus v Ontario (Ministry of Financial Institutions)*, [1994] OJ no 3177 (Gen Div). As here, the plaintiffs in that case sued the regulator for negligence arising from its alleged failure to properly supervise a mortgage broker. McDermid J refused

to strike the action: the plaintiffs in that case pleaded that the Registrar of Mortgage Brokerages told investors that the broker at issue was "in sound financial condition and that there was no problem investing in it" before they did so. He also found that the combination of the legislation's investigation powers combined with regulator's exercise of that duty gave rise to a duty of care.

[119] But here, FSCO and the plaintiffs weren't in such a "close and direct" relationship that it would be "just and fair" to impose a duty of care on FSCO. See *Cooper*, at paras 32, 34. Again, there's no pleading, never mind evidence, that investors, for example, sought FSCO's view before investing in Tier 1, or that FSCO's investigation of Tier 1 arose because of those interactions. Further, *Duffus* was a pleadings motion before *Cooper* was decided, reducing its persuasive value.

[120] In sum, FSCO doesn't owe the plaintiffs, or SMI investors more broadly, a duty of care. There's no proximity between them. Thus, there's no reasonable prospect that the plaintiffs can prove this claim at trial.

IV. CONCLUSION

[121] There were numerous red flags warning FSCO that some of the players in the SMI market were really operating Ponzi schemes. Their victims were, too often, unsophisticated and vulnerable investors. In 2016, FSCO finally took regulatory action against Tier 1. Unfortunately, these steps haven't helped investors recover all of their losses.

[122] Those investors now ask whether FSCO should've done more and acted earlier to stop Tier 1 from preying on them. Because FSCO's officers are Crown employees and the plaintiffs' claim impugns regulatory decision, they can't be sued for mere negligence. The plaintiffs have to show that the defendants acted in bad faith, and they need the court's permission to proceed with the claim.

[123] The evidence adduced on this motion proffers a credible case that the defendants were so careless or reckless that a trial judge may infer that they were acting in bad faith. Again, it's not for me to decide whether the plaintiffs' claim has been proven. But there's enough here that they should be allowed to proceed.

[124] Under the *CLPA*, s 17(8), each party shall bear their own costs.

[125] The parties shall contact my assistant by May 29, 2026, to schedule case conference to timetable the next steps in this proceeding.

May 7, 2026

Agarwal J