

**CITATION:** Luo v. Fulton Development Inc., 2023 ONSC 6262  
**COURT FILE NO.:** CV-22-3095-00  
**DATE:** 2023 11 03

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Charles Luo, in his personal capacity and on behalf of 9477322 Canada Inc. and Pepture Inc., Plaintiffs

**AND:**

Fulton Development Inc., 2580867 Ontario Corp., Yang Li, Siyuan Weng a.k.a. Stephen Weng, Qiang Wang a.k.a. Jason Wang, and Vikranth Nyalakonda, Defendants

**BEFORE:** Doi J.

**COUNSEL:** Sarah Spitz and Leah Cummings, for Moving Defendant Fulton Development Inc.

Tina Yang, for Moving Defendant, 2580867 Ontario Corp.

Calvin Zhang, for Plaintiffs

Trung Nguyen, for Defendant Siyuan Weng a.k.a. Stephen Weng

Karan Khak, for Defendant Vikranth Nyalakonda

**HEARD:** August 18, 2023

**ENDORSEMENT**

**Overview**

[1] The Moving Defendants, Fulton Development Inc. (“Fulton”) and 2580867 Ontario Corp. (“258”), seek to strike all or portions of the statement of claim pursuant to Rules 21.01(3)(d) and 25.11, without leave to amend, for being prejudicial, scandalous, frivolous, vexatious or an abuse of the court’s process.

[2] For the reasons that follow, the motion to strike is dismissed. On consent, the crossclaim and counterclaim in the 2019 action (CV-19-5171) shall be consolidated in the within action (CV-22-3095) pursuant to Rule 6.01(1)(d), and the balance of the 2019 action shall be stayed.

## Legal Principles

[3] A defendant may move before a judge under Rule 21.01(3)(d) to have an action stayed or dismissed for being frivolous, vexatious or an abuse of the court's process. Similarly, a party may move under Rule 25.11(b) and (c) to strike out or expunge all or part of a pleading, with or without leave to amend, for being scandalous, frivolous, vexatious, or an abuse of the process of the court. These rules allow for an early and expeditious determination of claims that cannot succeed. As these rules deny a litigant a full trial on the merits of the claim, they are only exercised in the clearest of cases: *Salasel v. Cuthbertson*, 2015 ONCA 115 at para 8; *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 OR (3d) 124 (CA) at para 12, leave to appeal denied 2000 SCCA No 98. The analysis on a motion under these rules considers whether it is plain and obvious that the claim cannot succeed: *Miguna v. Toronto Police Services Board*, 2008 ONCA 799 at para 21.

[4] On a motion under Rules 21.01(3)(d) or 25.11, the facts pleaded in the statement of claim must be taken as true and assumed to be proven unless patently ridiculous or incapable of proof: *Guergis v. Novak*, 2013 ONCA 449 at paras 7 and 21; *Ang v. Premium Staffing Ltd.*, 2015 ONCA 821 at para 5; *Miguna* at para 20. Evidence is admissible on whether the claim is frivolous, vexatious, or an abuse of process, but the court is not to weigh evidence going to the merits: *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141 at para 28; *Baradaran v. Alexanian*, 2016 ONCA 533 at para 15, citing *Miguna* at para 34.

[5] An order made by a court with jurisdiction is binding and conclusive unless set aside or lawfully quashed: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para 33, citing *Wilson v. The Queen*, [1983] 2 SCR 594 at 599. A challenge to an order that is brought other than by appeal or appropriate review process is an impermissible collateral attack that will constitute an abuse of process: *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311 at para. 57; *Trimove Inc v Servus Credit Union Ltd*, 2017 ABCA 320 at para 9; *De Bousquet v. Jarrett*, 2023 ONSC 3545 at para 11.

## The Parties

[6] The parties to this action are companies, partnerships and persons that acted individually and collectively to engage in real estate investments.

[7] The corporate parties include the Defendants, Fulton and 258, and the corporate Plaintiffs 9477322 Canada Inc. (“947”), a federal corporation, and Pepture Inc. (“Pepture”), which is provincially incorporated. Fulton is a federal corporation. 258 is a provincial corporation that was created as a nominee company for Fulton. Fulton, 258, 947 and Pepture were each created to carry on business in the field of real estate development.

[8] Fulton, Mr. Weng, Qiang Wang a.k.a. Jason Wang, Mr. Li, and/or Vikranth Nyalakonda created 258 on behalf of Fulton for the sole purpose of purchasing a property on Lyons Lane in Oakville (the “Property”), as further described below. 947 is the general partner of Puccini New Homes Ltd. (“Puccini Homes”), a real estate investment limited partnership, which was created solely for the benefit of its limited partners under the terms of a limited partnership agreement. Pepture was, at all material times, a limited partner of Puccini Homes. Several non-parties, namely Wai Sum Liu, Mei Ying Huang, Orite Ingredient Ltd. and Yudo Inc. were, at all material times, limited partners of Puccini Homes after being admitted to the partnership on Pepture’s referral and with 947’s consent.

[9] The following are key individuals:

- a) Charles Luo is one of three directors of 947, one of seven shareholders of Fulton, and at the relevant times served as an officer, director and/or shareholder of 258. Mr. Luo is also a shareholder and the sole directing mind of Pepture and, until May 2019, was a signing officer of Fulton with access to its funds;
- b) Siyuan Weng a.k.a. Stephen Weng, is one of three directors of 947, one of seven directors/shareholders of Fulton, and a director of 258. Until May 2019, He was President of Fulton with signing authority over its bank accounts;
- c) Yang Li is the third and final director of 947 and also a director of 258.

[10] At all material times, Mr. Luo, Mr. Weng and Mr. Li were the only directors of 947. In this capacity, they controlled Puccini Homes which has numerous limited partners, each of whom was admitted to the partnership through 947’s express and/or implied agreement.

[11] The underlying basis of this action relates to a conflict between Mr. Luo, Mr. Weng and Mr. Li, and their related companies, over the consequences of a failed agreement of purchase and sale for the Property.

### **Background**

[12] Since about 2015, Puccini Homes and 947 have been engaged in the business of investing in real estate. In or around 2017, Fulton was established to pursue new opportunities to purchase and develop commercial real estate in the Greater Toronto Area.

[13] When Fulton was founded on May 31, 2017, its board of directors consisted of the following individuals:

- a. Mr. Wang;
- b. Mr. Weng;
- c. Junfeng (David) Xie;
- d. Xiangtao (Sam) Huang;
- e. Di (Dean) Li;
- f. Ze-Qiang (Walter) Zhou; and
- g. Mr. Luo.

Two days after Fulton was incorporated, its board of directors was changed to remove Mr. Wang and replace him with his daughter, Jiawen (Jia) Wang.

### **The Property Purchase and Deposit Loan**

[14] Around June 2017, Fulton's directors expressed interest in purchasing the Property. In or around that month, Fulton as instructed by Mr. Wang directed the purchase of the Property through a nominee company to be incorporated. Mr. Weng suggested his friend, Mr. Nyalakonda, to serve as the sole officer and director of the nominee company, which became 258.

[15] On June 5, 2017, 258 was incorporated as Fulton’s nominee corporation for the purchase of the Property. Mr. Nyalakonda was named as 258’s sole officer and director, but Mr. Weng and Mr. Li are said to have been controlling minds of the company.

[16] On June 5, 2017, 258 entered into an agreement of purchase and sale (“APS”) to purchase the Property from Emerald Group Inc. (“EGI”).

[17] Fulton, as directed by Mr. Weng, Mr. Wang and/or its other directors, approached 947 for a \$500,000.00 loan for the purpose of purchasing the Property as Fulton did not have the necessary funds to pay the \$500,000.00 deposit under the APS. On or about July 4, 2017, Fulton and 947 (i.e., as general partner for Puccini Homes) entered into a loan agreement by which 947 agreed to lend \$500,000.00 to Fulton to be used for the deposit under the APS (the “Loan Agreement”). The Loan Agreement was drafted by Mr. Weng, executed by Mr. Weng on behalf of Fulton and by Mr. Luo on behalf of 947, and circulated to Fulton and its directors. Around that time, Mr. Wang represented to the directors of Fulton that the Property’s purchase price was \$35 million, although the actual price was \$30 million.

[18] The statement of claim pleads that Mr. Weng had both actual and ostensible authority as a director and officer of Fulton to enter into the Loan Agreement and bind Fulton. The claim pleads the indoor management rule.

[19] Pursuant to section 4 of the Loan Agreement, Fulton was required to repay the loan to 947 by December 31, 2017. Section 5 of the Loan Agreement provides that if the borrower defaults on the performance of any obligation under the contract, the lender may then declare the principal amount owing to be immediately due and payable.

[20] On or about July 9, 2017, 947 directly paid the \$500,000.00 deposit against the purchase of the Property to EGI’s broker, which was to be held in trust. Fulton recorded receipt of these funds from 947/Puccini Homes on or about July 10, 2017 and went on to engage planning counsel and a commercial real estate software provider in anticipation of developing the Property.

### **258’s Action to Recover the Deposit**

[21] On or about November 5, 2017, the transaction to purchase the Property was terminated.

[22] After EGI refused to return the deposit, 258 brought an action (CV-17-4608) against EGI to recover the deposit. Fulton paid 258's legal fees for the action.

[23] On or about July 9, 2019, the action settled on terms by which \$327,500.00 of the deposit was to be returned. However, when the action settled, this refunded amount was paid to 258 which never returned the funds to 947 even though Mr. Weng and Mr. Nyalakonda both swore affidavits in which they deposed that the refunded amount ought to be returned to 947. To date, the refunded amount has not been paid to 947 and is said to remain in the possession of 258 under the control of Fulton, Mr. Weng, Mr. Wang, Mr. Li and/or Mr. Nyalakonda.

[24] On November 28, 2019, 947 declared that Fulton was in default and demanded immediate payment of the \$500,000.00 loan pursuant to section 5 of the Loan Agreement. To date, Fulton has not repaid the loan as required.

[25] In or around June 2020, the Plaintiffs learned that Mr. Weng and Mr. Li became directors of 258 on June 25, 2019. Around this time, Fulton, Mr. Weng, Mr. Wang, Mr. Li and/or Mr. Nyalakonda directed 258 to distribute funds from the \$327,500.00 refunded deposit in 258's bank account to 947's investors, shareholders and/or some of Puccini Homes' limited partners (i.e., but not to Mr. Luo or other limited partners) instead of paying the funds back to 947.

[26] The Plaintiffs claim that Fulton, Mr. Weng, Mr. Wang, Mr. Li and/or Mr. Nyalakonda knew or ought to have known that 258 was holding the \$327,500.00 refunded deposit in trust for 947, and acted to the detriment of Mr. Luo and other Puccini Homes limited partners by disbursing the funds to others instead of repaying 947. In addition, the Plaintiffs claim that Mr. Weng and Mr. Li breached agreements for handling and/or distributing Puccini Homes' assets and dissipated the \$327,500.00 without regard to the interests of the limited partners, which they assert was oppressive.

[27] The Plaintiffs assert that Fulton, 258 and Messrs. Weng, Wang, Li and/or. Nyalakonda did not distribute any shares of the \$327,500.00 refunded deposit to Mr. Luo, or others associated with him, without juristic reason, and directed those who received some of the funds to not reveal the distribution to Mr. Luo or the limited partners and to sign agreements to this effect.

[28] The Plaintiffs allege that Fulton, 258, and Messrs. Weng, Wang, Li and/or Nyalakonda refused to provide Mr. Luo and other limited partners with financial information to account for the \$327,500.00 refunded deposit.

[29] The Plaintiffs claim a possessory interest in the \$327,500.00 refunded deposit under the Loan Agreement with an entitlement to any assets or proceeds into which the funds may have been converted. They claim that 258, Mr. Weng Mr. Wang, Mr. Li and/or Mr. Nyalakonda induced a breach of the Loan Agreement, and that the Defendants' actions were high-handed, malicious, arbitrary and reprehensible.

### **The Loan Action**

[30] Due to the failure by Fulton and/or 258 to repay the \$500,000.00 deposit loan, 947 brought an action (CV-19-5171) on December 19, 2019 at Mr. Luo's direction (i.e., in his capacity as a 947 director and officer) to recover the loan from Fulton and/or 258 (the "Loan Action").

[31] After the Loan Action was commenced, Mr. Weng and Mr. Li repeatedly attempted to dismiss, discontinue or otherwise scuttle the action by pressuring Mr. Luo to abandon the claim. Mr. Weng and Mr. Li have confirmed that 258 received the refunded deposit and that the remaining undistributed balance of the \$375,500.00 refund is being held in 258's bank account.

[32] On January 31, 2021, Mr. Weng and Mr. Li passed a resolution of the board of directors for 947 requiring Mr. Luo to discontinue the Loan Action, among other things.

[33] On July 15, 2021, 947 held a meeting of its board of directors. Mr. Weng, Mr. Li and Mr. Luo were present. During the meeting, Mr. Weng and Mr. Li passed the following resolutions:

- a. that Mr. Luo had lacked authorization from 947 to retain Pallett Valo LLP to bring the Loan Action against Fulton and 258;
- b. for 947 to retain other counsel, who were representing Mr. Weng and Mr. Li in their personal capacity, as well as representing 258, to file a notice of change of lawyers to represent 947 and remove Pallett Valo LLP as lawyers of record for 947 in the Loan Action; and

- c. to dismiss the Loan Action against Fulton and 258 on a without cost basis.

[34] In addition, Mr. Weng and Mr. Li passed a resolution to prevent Mr. Luo and 947 limited partners from: a) bringing a derivative action on 947's behalf against 258 and Fulton for repayment of the \$500,000.00 deposit loan; or b) commencing an action against Mr. Weng and Mr. Li for breach of their fiduciary duties as directors of 947, Fulton and 258, respectively.

[35] As Mr. Weng and Mr. Li are directors with 947, the Plaintiffs assert that both directors owe the following duties, among others, to Mr. Luo and Puccini Homes limited partners:

- a. a duty of loyalty;
- b. a duty of confidentiality;
- c. a duty to avoid conflicts of interest;
- d. a duty to disclose;
- e. a duty to avoid secret profits or commissions;
- f. a duty of honest and good faith; and
- g. a duty to exercise their powers as directors with reasonable prudence, care and skill.

[36] The Plaintiffs further claim that Mr. Weng and Mr. Li breached their duties to 947, Mr. Luo and/or the limited partners of Puccini Homes by, among other things:

- a. failing to direct 258 to return the \$327,500.00 refunded deposit to 947;
- b. in the alternative, preferring the interests of the other limited partners to the exclusion of Mr. Luo and Peptide;
- c. disclosing the confidential information of 947 and Puccini Homes to Fulton, 258, MR. Wang and/or Mr. Nyalakonda;
- d. becoming directors of 258 whose interests in respect of the \$500,000.00 loan were in conflict with 947's interests;
- e. acting against 947's interests as directors of 258;

- f. failing to advise the Plaintiffs that they had become directors of 258 and by also failing to disclose that they were dissipating 947's funds through 258;
- g. failing to advise the Plaintiffs that they were working with Mr. Wang, Fulton, 258 and/or Mr. Nyalakonda against 947's interests;
- h. paying themselves or other third parties out of the funds held in trust by 258 for 947; and
- i. acting to dismiss the Loan Action when funds had not been reimbursed to 947.

[37] The Plaintiffs claim that Mr. Weng and Mr. Li acted in bad faith and failed to exercise their duties as 947 directors with reasonable prudence, care and skill by refusing to demand a return of the \$327,500.00 refunded deposit to 947. Moreover, the Plaintiffs claim that the refunded deposit and any profits or revenues that Fulton, 258, Mr. Weng, Mr. Wang, Mr. Li and/or Mr. Nyalakonda earn as a result of their breaches are being held in trust for the Plaintiffs' benefit.

[38] The Plaintiffs claim that Messrs. Weng, Wang, Li and/or Nyalakonda misappropriated the \$327,500.00 refunded deposit for themselves and/or for their own purposes, without right, by directly transferring the proceeds to 258 and themselves by, among other things, using the funds to pay for 258's legal fees and meals for Fulton directors, and by knowingly retaining the refunded deposit within 258 despite acknowledging that the funds should be returned to 947. By retaining the refunded deposit in this manner, Mr. Weng and Mr. Li are said to have committed acts of oppression for which they are liable to the Plaintiffs in damages. The Plaintiffs further claim that the refunded deposit is impressed with a trust, including a trust in favour of 947, for which the Plaintiffs seek a tracing of the funds for their return to 947.

[39] As Mr. Weng and Mr. Li passed a resolution to prevent Mr. Luo from continuing to pursue the Loan Action, Mr. Luo sought leave to commence a derivative action on behalf of 947.

[40] On December 31, 2021, Mr. Luo, Pepture and other limited partners brought an application (CV-21-4614) for leave to bring a derivative action on behalf of 947. By order dated October 11, 2022, McSweeney J. granted leave for Mr. Luo and Pepture to bring the derivative action, and also approved in part the form of a draft statement of claim for the derivative action (i.e., after ordering that other limited partners be removed as plaintiffs from the derivative action).

[41] On October 26, 2022, the Plaintiffs brought this proceeding (CV-22-3095) which included the derivative action on behalf of 947 for which McSweeney J. granted leave, along with an oppression remedy claim for which leave was not required. The Plaintiffs are seeking punitive and aggravated damages against the Defendants, and claim that the Defendants should be held jointly and severally liable for any damages that are awarded.

### **Analysis**

[42] As set out below, I am satisfied that the statement of claim raises viable derivative and oppression claims that are not frivolous, vexatious or otherwise an abuse of the court's process.

[43] As stated earlier, McSweeney J. granted leave for Mr. Luo to bring the derivative action after finding on the evidence that he was acting in good faith and that the proposed action seemed to serve 947's interests. Finding that \$500,000.00 of 947's funds were provided to 258 as part of a real estate transaction that did not proceed, McSweeney J. found that the \$327,500.00 in returned funds was not repaid to 947 after the transaction fell through. McSweeney J. found that Mr. Weng and Mr. Li (i.e., who were directors of 947) added themselves as directors to 258 and then authorized a distribution from the returned funds to themselves and to select limited 947 partners. By diverting these returned funds away from 947, adding themselves as 258 directors, and deliberately excluding Mr. Luo from any distribution of the returned funds, McSweeney J. found that Mr. Weng and Mr. Li had preferred their own interests to those of 947 and had not acted in 947's best interests or in good faith to fulfill their obligations to 947 as its directors. In addition, McSweeney J. found that a derivative action to hold Mr. Weng and Mr. Li accountable to 947 for the return of funds that it had provided to 258 would appear to serve 947's interests. Accordingly, McSweeney J. found that Mr. Luo had met the test for granting leave to commence the proposed derivative action. The Moving Defendants did not seek to appeal or set aside McSweeney J.'s order granting leave for Mr. Luo to bring a derivative action on behalf of 947. Taking this all into account, I am satisfied that the derivative relief sought in the statement of claim to redress the harm to 947 is not frivolous, vexatious or otherwise an abuse of process. As McSweeney J. granted leave for Mr. Luo to bring the derivative action, I find that this motion to strike out the derivative action in the statement of claim raises an impermissible collateral attack by the Moving Defendants against the leave order which raises an abuse of process: *De Bousquet* at para 11. Accordingly, I decline to strike the entire the statement of claim or, in the alternative, paras 1, 13-14, 21-27, 30-

32, 35-36, 38, 40, 42-54, 57-65, and 79-103, or other parts, of the statement of claim, either in whole or in part.

[44] I am satisfied that the oppression remedy claimed by Pepture in the statement of claim does not improperly overlap with Mr. Luo's derivative action and, therefore, is not frivolous, vexatious or an abuse of process. An oppression remedy seeks to remedy the harm done to a complainant personally, not just to the body corporate or the collectivity of its shareholders as a whole. In contrast, a derivative action seeks to remedy a wrong done to the corporation. It follows that derivative and oppression claims may overlap where a wrong done to the corporation also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants: *Rea v. Wildeboer*, 2015 ONCA 373 at paras 29-33.

[45] In this case, McSweeney J. granted leave only to Mr. Luo to bring the derivative action on behalf of 947. But this decision did not prevent Pepture or other limited partners from bringing an action for an oppression remedy, which does not require leave. I would add that McSweeney J. seemed to accept that the conduct of Mr. Weng and Mr. Li was oppressive not only to Mr. Luo but also to other limited partners. Although the derivative claim brought on behalf of 947 is to remedy a breach of the Loan Agreement as mentioned earlier, 947 cannot seek an oppression remedy against its own directors which leaves Pepture, a limited partner, as a proper Plaintiff that is able to seek an oppression remedy in the statement of claim.

[46] To establish oppression, the claimant must show a breach of its reasonable expectations and that the conduct complained of, when considered in its commercial context, constitutes oppression, unfair prejudice or unfair disregard: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para 68. The oppression remedy is inspired by principles of equity, confers broad jurisdiction to enforce "*not just what is legal but what is fair*", applies business realities in judging whether oppression has occurred, and confers just and equitable remedies based on the reasonable expectations of the stakeholders in context and with regard to the relationships at play: *BCE* at paras 58-59; *Mennillo v. Intramodal inc.*, 2016 SCC 51 at para 8.

[47] Applying the foregoing principles to this case, I find that the Plaintiffs have shown an arguable if not persuasive claim that Mr. Weng and Mr. Li breached their reasonable expectations by diverting returned funds away from 947, by deliberately excluding Mr. Luo and Pepture from

receiving any of the returned funds which 258 distributed only to select limited partners, and by not acting in 947's best interests. In light of this, I am satisfied that the Plaintiffs have shown that Mr. Weng and Mr. Li put their individual interests and those of 258 ahead of and in conflict with their obligations as directors of 947 by engaging in conduct that was oppressive and unfairly prejudicial to the interests of the Plaintiffs and other 947 limited partners who also were excluded from 258's distribution of the returned funds. In the circumstances, I am not persuaded that the oppression claim in this case is either frivolous, vexatious or an abuse of the court's process.

[48] Based on the foregoing, I decline to strike paras 1(c), (e), (f), (j), (k), 2(b), 45, 51-57, 63, 70-77, 84, 94-97 or 99-105, or other parts, of the statement of claim, either in whole or in part, for being frivolous, vexatious or an abuse of process.

[49] The Moving Defendants submit that the statement of claim is seeking to recover the same \$500,000.00 from Fulton as was partially recovered in the Settled Action by 258 which amounts to an abuse of process. Respectfully, I am not persuaded by this submission. Although the Settled Action recovered \$327,500.00 of the original \$500,000.00 which was paid to 258, it is clear that none of the returned funds were ever repaid to 947, as set out earlier. Contrary to the assertions by the Moving Defendants that Mr. Luo was somehow involved in the disbursement of the returned funds, the Plaintiffs plead in the statement of claim that they and other 947 limited partners were deliberately excluded from having any of the returned funds. Based on this, I do not accept that the derivative and oppression claims in the statement of claim are effectively seeking a double-recovery of the same loss and, therefore, abusing the court's process. In my view, the oppression claim appears to disclose a reasonable cause of action that is not frivolous, vexatious, or an abuse of the court's process. Accordingly, I decline to strike paras 1(a), (b), (g), (i), (j), (k), (l), (m), (n), 84-88 or 96, or other parts, of the statement of claim, either in whole or in part.

[50] Taking everything into consideration, I am satisfied that the statement of claim discloses a reasonable cause of action in breach of trust, breach of fiduciary duty, oppression and conversion based on the actions of Mr. Weng and Mr. Li and others who seem to have been shown to have engaged in conduct that was oppressive to Mr. Luo, as a 947 director, and to Pepture as a limited partner of 947. I am not persuaded that it is plain or obvious that the action or the individual causes of action cannot succeed, or that they are otherwise frivolous, vexatious or an abuse of the court's

process: *Miguna* at para 21. In my view, this is not one of these clearest of cases where a full trial on the merits should be denied at this time: *Salasel* at para 8.

### **Costs Thrown Away**

[51] I am not persuaded that the Moving Defendants are entitled to costs thrown away for their motion under Rule 6.01(1)(d) to consolidate, as the Plaintiffs eventually consented to the motion (i.e., by agreeing to have the 2019 action stayed as well as Fulton’s counterclaim consolidated with this action). The Defendants first raised the issue of consolidation on March 6, 2023 and proposed a consent order on March 20, 2023 to resolve the multiplicity of proceedings. Without opposing the Defendants’ motion to consolidate, the Plaintiffs demanded the statement of defence (i.e., to consider it) before taking a position on the consolidation motion. Given the impending motion to strike, the Defendants’ decision to not deliver a statement of defence is understandable. That said, I accept that the Plaintiffs asked for the defence after taking the position that the motion to strike lacked merit. Ultimately, on or about May 26, 2023, the Plaintiffs consented to a consolidation of the crossclaim and counterclaim in the 2019 action with this action and to a stay of the balance of the 2019 action following some negotiations. Taking this all into account, I shall decline to award costs thrown away for the consolidation motion.

### **Outcome**

[52] Based on the foregoing, this motion to strike out all or certain parts of the statement of claim for being frivolous, vexatious or an abuse of process is dismissed. On consent, the crossclaim and counterclaim in the 2019 action (CV-19-5171) shall be consolidated with this action (CV-22-3095) pursuant to Rule 6.01(1)(d), and the balance of the 2019 action shall be stayed.

[53] If the parties are unable resolve the issue of costs for the motion, the Plaintiffs may deliver brief costs submissions of up to 2 pages (excluding any costs outline or offer to settle) within 15 days, and the Defendants may deliver responding submissions on the same terms within a further 15 days. Reply submissions shall not be delivered without leave.

**Date:** November 3, 2023

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M.T. Doi J.

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**BEFORE:** M.T. Doi J.

**COUNSEL:** Sarah Spitz and Leah Cummings, for  
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**ENDORSEMENT**

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M.T. Doi J.

DATE: November 3, 2023