Case Name:

Quadrangle Group LLC v. Canada (Attorney General)

RE: Quadrangle Group LLC, QCP CW S.A.R.L. and Data & Audio-Visual Enterprises Investments Inc., Plaintiffs, and Attorney General of Canada, Defendant

[2015] O.J. No. 1185

2015 ONSC 1521

125 O.R. (3d) 144

39 B.L.R. (5th) 321

252 A.C.W.S. (3d) 67

2015 CarswellOnt 3256

Court File No.: CV-15-10824-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: March 4, 2015.
Judgment: March 6, 2015.

(56 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Motion by the defendant Attorney General to strike the statement of claim dismissed -- The plaintiffs claimed that they invested over $350 million with a view to acquiring spectrum for use in Canada's wireless industry, and that the subsequent actions of Industry Canada destroyed the ability of Mobilicity to compete in the Canadian market -- The Attorney General submitted that the claims of the plaintiffs were derivative claims -- The claims of the plaintiffs as pleaded were not derivative claims -- They were claims for civil wrongs done to the plaintiffs and not to Mobilicity.

Government law -- Crown -- Actions by and against Crown -- Practice and procedure -- Pleadings -- Motion by the defendant Attorney General to strike the statement of claim dismissed -- The plaintiffs claimed that they invested over $350 million with a view to acquiring spectrum for use in Canada's wireless industry, and that the subsequent actions of Industry Canada destroyed the ability of Mobilicity to compete in the Canadian market -- The Attorney General submitted that the claims of the plaintiffs were derivative claims -- The claims of the plaintiffs as pleaded were not derivative claims -- They were claims for civil wrongs done to the plaintiffs and not to Mobilicity.

Motion by the defendant Attorney General to strike the statement of claim. The defendant Industry Canada was responsible for and had complete control over the Canadian wireless telecommunications market. The plaintiffs sued the Attorney General of Canada for damages allegedly caused by various civil wrongs done to them by Industry Canada. The plaintiffs asserted that they invested over $350 million with a view to acquiring spectrum for use in Canada's wireless industry, and that the subsequent actions of Industry Canada destroyed the ability of Mobilicity to compete in the Canadian market. The Attorney General took the position that the claims of the plaintiffs were derivative claims.

HELD: Motion dismissed. The claims of the plaintiffs as pleaded were not derivative claims. They were claims for civil wrongs done to the plaintiffs and not to Mobilicity. The damages claimed could be asserted by the plaintiffs in the action.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 6(8)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106

Department of Industry Act, S.C. 1995, c. 1,

GST Act,

Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 246

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 5

Telecommunications Act, S.C. 1993, c. 38,

Counsel:

Jonathan C. Lisus and Matthew R. Law, for the plaintiff, Quadrangle Group LLC and QCP CW S.A.R.L.

Robert A. Centa, for the plaintiff, Data & Audio-Visual Enterprises Investments Inc.

J. Sanderson Graham, Jacqueline Dais-Visca and Joseph Cheng, for the defendant.

ENDORSEMENT

1 F.J.C. NEWBOULD J.:-- The plaintiffs sue the Attorney General of Canada for damages they say were caused by various civil wrongs done to them by Industry Canada that led the plaintiffs to create Data & Audio-Visual Enterprises Wireless Inc. ("Mobilicity") and invest over $350 million with a view to acquiring spectrum for use in Canada's wireless industry. They assert that the actions of Industry Canada after their investments were made destroyed the ability of Mobilicity to compete in the Canadian market and caused them damage.

2 The defendant Attorney General moves to strike the statement of claim on the grounds that the claims of the plaintiffs are derivative claims. The Attorney General in its factum said that the claims and losses belong to Mobilicity and that the plaintiffs have failed to obtain leave under section 246 of the OBCA permitting them to bring a derivative claim in the name of or on behalf of Mobilicity. This position changed somewhat during argument.

3 In my view the claims of the plaintiffs as pleaded are not derivative claims. They are claims for civil wrongs done to them and not to Mobilicity and the damages claimed can be asserted by them in this action. The motion by the Attorney General should be dismissed.

Parties as pleaded

4 The plaintiff Data & Audio-Visual Enterprises Investments Inc. ("DAVE") is one of two principal shareholders in Data & Audio-Visual Enterprises Holdings Inc. ("DAVE Holdings"). DAVE Holdings wholly owns Data & Audio-Visual Enterprises Wireless Inc. ("Mobilicity"), a Canadian-controlled telecommunications company incorporated in Ontario on March 6, 2008.

5 The principal and ultimate majority owner of DAVE is John Bitove, a Canadian businessman. Mr. Bitove is the founder, Chairman and CEO of Canadian Satellite Radio Holdings Inc., which offers the XM satellite radio service in Canada. Since 2008, DAVE has invested a total of $44 million in Mobilicity.

6 The plaintiff QCP CW S.a.r.l. is the second principal shareholder in DAVE Holdings. The plaintiff Quadrangle Group LLC is a private investment firm based in New York City. Quadrangle Group LLC, through QCP CW S.a.r.l (collectively, "Quadrangle") invested $217 million dollars of equity and $95 million dollars of debt in Mobilicity.

7 The defendant, Industry Canada, is responsible for and has complete control over the Canadian wireless telecommunications market. It owns Canada's radio frequency spectrum and it determines

who may use that spectrum, for what purposes, and on what conditions. It is pleaded in the statement of claim that Industry Canada acts through its agents in the public service and elected representatives and is responsible for their acts, omissions, representations, and other conduct.

The claims as pleaded

8 The statement of claim is lengthy, some 57 pages. A claim for approximately $1.2 billion plus pre-judgment and post-judgment interest is made for damages for negligence, negligent and/or reckless misrepresentation, breach of contract, intentional interference with economic relations, abuse of public office, unjust enrichment and loss of reputation and goodwill.

9 In its simplest form, the claim of the plaintiffs is that they suffered losses that were caused by a promise by Industry Canada, not fulfilled, that it the plaintiffs formed a company and invested in it to permit it to bid on spectrum and build out a network, Industry Canada would see that the business survived. The basic outline of the claim is pleaded at the beginning in an overview, as follows:

> 2. In the fall of 2006, a representative of Industry Canada solicited Mr. John Bitove. Mr. Bitove agreed to meet the representative in Toronto. Mr. Bitove was known to Industry Canada as a result of his successful development of Canadian Satellite Radio and Sirius XM. The representative informed Mr. Bitove that Industry Canada wanted to encourage new entrants into the Canadian wireless communications industry. In particular, the representative said that Industry Canada wanted to create viable competitors to the Big 3 Incumbent companies -- Rogers Wireless, Bell Mobility, and Telus Mobility. The representative told Mr. Bitove that Industry Canada intended to hold an auction for spectrum and to set aside spectrum specifically for new entrants. The Incumbents would be barred from bidding on this set aside spectrum. The Industry Canada representative and Mr. Bitove discussed the need to find investors to partner with in capitalizing a new entrant that would bid for wireless spectrum in the auction in 2008.
>
> 3. To the knowledge of Industry Canada, Mr. Bitove did not have any experience in the wireless industry. He expressed concern about capitalizing a new entrant and competing in an industry dominated by the Incumbents and which was capital intensive with very high barriers to entry. The Industry Canada representative acknowledged that it would be very difficult for a new company to compete against the Incumbents given their significant resources, aggressive posture towards competition, and well-developed infrastructure. The Industry Canada representative told Mr. Bitove that the Government was committed to the introduction and long-term sustainability of new entrants into the wireless market and assured Mr. Bitove that if he and his partners invested in a new company, purchased spectrum, and built out a new network, it would prevent unfair

competition from the Incumbents and create market conditions in which new entrants could establish themselves and compete effectively.

4. Over the course of the next few months, throughout several meetings and phone calls, Industry Canada representatives specifically assured Mr. Bitove, in order to induce him to invest, that the investment would not be lost as any spectrum licenses acquired could be transferred to an Incumbent after five years. The Industry Canada representatives referred to the history of the Department in allowing such transfers and confirmed that Ministerial approval was always granted and would be granted provided that conditions of the license had been satisfied.

5. The representative specifically assured Mr. Bitove that Industry Canada would:

(a) Enforce foreign ownership rules in the manner it always had;

(b) Require the Incumbents to provide roaming at commercial rates and on reasonable terms;

(c) Require the Incumbents to provide access to cell towers and other infrastructure at reasonable rates and on reasonable terms;

(d) Prevent the Incumbents from engaging in unfair and anti-competitive practices;

(e) Allow spectrum to be transferred to Incumbents after five years;

6. Industry Canada understood and acknowledged that the barriers to entry into the wireless market are very high and competition from the Incumbents extremely aggressive, such that any new entrant would be highly vulnerable and would not survive unless these assurances were honoured. When Industry Canada made these representations, it did so negligently or recklessly and/or with indifference to, without regard to, or without belief in their truth. Industry Canada represented it had developed plans to implement these assurances when it in fact had not.

7. On the strength of these assurances, Mr. Bitove and his partners did exactly what Industry Canada asked them to do. They invested hundreds of millions of dollars in a new company branded as Mobilicity in order to compete with the Incumbents. They gave up other opportunities. They participated in Industry Canada's spectrum auction, increasing the auction revenues received from the $650 million dollars projected to a total of more than $4 billion dollars. And they built out their network, bringing competition to the Canadian wireless market, creating thousands of jobs, and benefitting Canadian consumers. DAVE and Quadrangle were not spectrum speculators, but committed investors in a new Canadian wireless provider.

8. In return, Industry Canada ignored all of its promises. It disregarded its own foreign ownership rules, refused to require roaming and tower-sharing at commercial rates, and allowed Incumbents to engage in anti-competitive practices, including loss-making "flanker" brands to undercut the new entrants.

9. Industry Canada's conduct was irrational and capricious. It applied different ownership and control requirements to Wind, another wireless provider, than it did to Mobilicity, and it failed to implement changes to the Incumbents' licence conditions that it knew were essential to the assurances and representations it had given.

10. Industry Canada's breach of its promises rendered Mobilicity unable to compete in exactly the way that the Plaintiffs were assured would not happen. Having caused the Plaintiffs to lose substantially all of their investment, Industry Canada broke its final promise by refusing to allow a sale of the business after five years. Its refusal was a breach of its assurance made for the irrational and unlawful purpose of punishing the Plaintiffs for trying to sell Mobilicity to Telus and for the wrongful purpose of intimidating and retaliating against Telus for speaking out against Industry Canada's conduct. Its refusal had nothing to do with bona fide policy considerations or the interests of Canadian consumers.

11. Industry Canada's actions throughout, from 2006 to 2014, have been taken in bad faith and are in breach of its assurances and duties to the Plaintiffs. As a result, the Plaintiffs have been deprived of the entire benefit of their investment, lost the opportunity to invest in other profitable ventures, and suffered harm to their reputations and goodwill. Industry Canada has been enriched by its conduct and by the Plaintiffs' investments while the Plaintiffs have suffered a

> corresponding deprivation. There is no juristic reason for this enrichment and corresponding deprivation.

10 It is pleaded that the representations and assurances of Industry Canada were made to DAVE and Quadrangle. It is pleaded that these representations and assurances and the contract that resulted between DAVE and Quadrangle on the one hand and Industry Canada on the other all took place before Mobilicity was incorporated.

Test on a rule 21 motion

11 There is no dispute as to the test and associated principles that apply to a motion to strike pleadings for not disclosing a reasonable cause of action. The test is stringent, and the moving party must satisfy a very high threshold in order to succeed: *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155, at paras. 32-33. Unless it is "plain and obvious" that there is no chance of success, a claim, even a novel one, ought to be allowed to proceed: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980; and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15. The motion proceeds on the basis that the facts pleaded are true unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. While the facts pleaded are the basis upon which the possibility of success must be evaluated, the pleading must be read as generously as possible, erring on the side of permitting an arguable claim to proceed to trial: *Rausch v Pickering (City)*, 2013 ONCA 740 at para 34.

Analysis

12 A derivative claim is by its very nature a claim brought by one for a wrong done to another. In a corporate context, it is often a claim by a minority shareholder against a majority shareholder or directors or management controlled by the majority shareholder for wrongs done by the defendants to the corporation. Such a claim could be brought by the corporation. However, that would not happen if it were controlled by the wrongdoers, and thus the development of a derivative claim brought by a complainant to restore the corporation to its position prior to the wrongdoing. See section 246 of the OBCA.

13 The other side of that coin is the rule in *Foss v. Harbottle* which provides that individual shareholders have no cause of action in law for any legal wrong done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself or by way of a derivative action. See *Hercules Management Ltd. v Ernst & Young*, [1997] 2 SCR 165 at para 59 per La Forest J.

14 The plaintiffs say that they are not suing for a wrong done to Mobilicity but rather for a wrong done to them. Thus, they say, their action is not a derivative action requiring leave under section 246 of the OBCA.

15 In this case, there is no pleading that any legal wrong was done to Mobilicity by the actions of

Industry Canada. Rather, the claims pleaded are legal wrongs said to have been committed against the plaintiffs. Counsel for the Attorney General conceded in argument that based on the claims pleaded, Mobilicity could have no cause of action against Industry Canada.

16 The position of the Attorney General, however, is that if the damages suffered arose from losses suffered by Mobilicity, which it says is the case, the claim must be considered a derivate claim. The Attorney General asserts that the damages suffered by the plaintiff must be independent of the loss suffered by Mobilicity. If the Attorney General is right, it would mean that if a civil wrong was committed by Industry Canada against the plaintiffs, it would have no liability as Mobilicity has no claim. That is a startling proposition.

17 I do not agree with the position of the Attorney General and I do not read the authorities as requiring such a result where, as in this case, Mobilicity has no cause of action against Industry Canada for the wrongs pleaded in the statement of claim. It certainly cannot be said that it is plain and obvious that the claims cannot succeed.

18 Moreover, as pleaded, the losses suffered by the plaintiffs are not the loss suffered by Mobilicity. They plead that they have lost their investment in Mobilicity, that they have lost the return on capital they would have earned had the money they invested in Mobilicity been invested elsewhere and that they have suffered damage to their reputations and loss of goodwill as a result of Industry Canada's wrongdoing. They plead that DAVE has lost the confidence of potential strategic investors and Quadrangle has lost the confidence of existing investors, has been forced to postpone investments, and has lost several of its key investors.

19 In *Haig v. Bamford*, [1977] 1 S.C.R. 466 , the plaintiff invested in shares of a company on the basis of representations made in a report by the company's accountants. The company later failed. The accountants knew and intended that their report would be relied upon by those investing in the company. It was held that there was a duty of care owed by the accountants to the plaintiff that was breached when the report was negligently prepared. The plaintiff successfully sued for the amount of his initial investment in the company, which was made in reliance on the accountant's report. The plaintiff could not have succeeded if the argument of the Attorney General in this case is accepted, as the damages suffered by the investor in *Haig* were not "independent" of the loss to the company. The claim of the plaintiffs in this case is essentially the same claim as in *Haig*.

20 In *Hercules Management v. Ernst & Young* [1997] 2 S.C.R. 165, another case in which auditors of a company were sued for negligence, it was held that for policy reasons the auditors did not owe a duty of care to the plaintiff who had invested in the corporation as the purpose of the audit was not to assist investors in making their investment decisions. La Forest J. however discussed the issue of a shareholder suing for harm done directly to the shareholder and stated that the shareholders may have a cause of action in respect to a wrong done to them for the loss they suffered as shareholders through their investment even although the corporation may also have a claim. He also referred to *Haig*. He stated:

> **62** One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.
>
> **63** The facts of *Haig, supra,* provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a specified purpose, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour, just as one arose in favour of Mr. Haig. While the corporation would have been entitled to claim damages in respect of any losses it might have suffered through reliance on the report (assuming, of course, that the report was also provided for the corporation's use), the shareholders in question would also have been able to seek personal compensation for the losses they suffered qua individuals through their personal reliance and investment. (Underlining added).

21 The Attorney General has referred to the case of *Meditrust Healthcare Inc. v Shoppers DrugMart* (2002), 61 OR (3d) 786 (CA). I read it as supporting the position of the plaintiffs rather than that of the defendant. In that case, a shareholder was not entitled to sue for damages for the loss in the value of its shares in its subsidiary, even although it claimed that the defendant has committed several actionable wrongs against it. It was said to be an application of the rule in *Foss v. Harbottle*. It was not a case in which a shareholder made its investment based on any actionable wrong, but rather a case in which an existing shareholder claimed to have suffered wronged because of the loss in value of the business. Even so, the dictum of Laskin J.A. would have permitted an action if the subsidiary did not have a claim, as is the case with Mobilicity. Laskin J.A. stated:

> [42] ...In other words, a shareholder in a company has no independent right of action based on an allegation of diminution in the value of its shares caused by damage to the company. The shareholder does not suffer a direct loss. Its loss merely reflects the loss suffered by the company.

> [43] Meditrust, nonetheless, submits that this principle, which was affirmed in *Martin v. Goldfarb , [1998] O.J. No. 34* , should be reconsidered in the light of recent English case law. I think that submission is untenable for two reasons. First, Canadian appellate jurisprudence has consistently invoked *Foss v. Harbottle* to reject this kind of claim. Second, the most recent English authority, the House of Lords' decision in *Johnson v. Gore Wood & Co.*, [2001] 1 All E.R. 481, does not support Meditrust's position. In *Johnson*, Lord Bingham admittedly put a gloss on the rule in *Foss v. Harbottle* when he stated the following proposition at p. 503 All E.R.: "Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder of the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding." But, to rely on this proposition to claim the loss in the value of its shares, Meditrust must at least show that it has a cause of action and the subsidiaries do not. This, Meditrust has failed to do. Therefore, in my view, Meditrust cannot maintain its claim for damages resulting from the loss in the value of its shares in its subsidiaries. (Underlining added).

22 In this case, it is admitted that Mobilicity does not have a claim for the wrongs pleaded in the statement of claim. Therefore the statement of Laskin J.A. would permit this action by the plaintiffs.[1]

23 None of the many cases cited by the Attorney General deal with a situation such as this. They deal with cases in which the wrong done was to the company rather than to the shareholders. I need deal only with one as it was emphasized by counsel for the Attorney General in argument.

24 In *Brack v. DaimlerChrysler Canada Inc.*, 2010 ONSC 2922, the personal shareholder of three car dealership that sold Jeeps sued Daimler Chrysler after it acquired the Jeep brand and started distributing Jeeps to other dealers that allegedly resulted in a loss of sales by the three dealerships. It was alleged that Daimler Chrysler induced the shareholder to inject capital into one of his dealerships and was in breach of a promise not to permit other dealers to sell Jeeps. The action was dismissed on a summary judgment motion. Justice Allen held that on the evidence, the plaintiff had failed to show that he had any relationship with Daimler Chrysler beyond his capacity as an officer of the dealership corporations. She further held that the plaintiff had failed to present facts that demonstrated that he had a personal claim against Chrysler separate from any claims that the corporations might have against Daimler Chrysler. Thus without a personal claim against Daimler Chrysler, the plaintiffs claim ran afoul of the rule in *Foss v. Harbottle*.

25 The Attorney General attacks certain of the claims as pleaded even if the claims are not held to be derivative. I will deal with them briefly.

26 The claim for breach of contract is properly pleaded. The Attorney General asserts that any

contract would have been between Industry Canada and Mobilicity and thus there could be no privity of contract between the plaintiffs and Industry Canada. I do not agree. The contract as pleaded is a contract between the plaintiffs and Industry Canada.

27 The plaintiffs have claimed that the actions of Industry Canada unlawfully interfered with their economic relations by coercing and intimidating Telus into withdrawing its offer to purchase Mobilicity's spectrum licenses. The attack on the pleading by the Attorney General is really based on the claim being a derivative claim. The claim in my view is properly pleaded. The Attorney General points to what is obviously a drafting error in paragraph 128 which states that in the course of the dealings with Telus, the plaintiffs restructured the transaction with Telus and concluded a deal with Telus for $350 million. It was Mobilicity and not the plaintiffs who did this. However, it is clear from the statement of claim as a whole that what is pleaded is that Mobilicity was the party dealing with Telus and the contracts with Telus were made by Mobilicity.

28 The elements of an action for intentional interference with economic relations (or causing harm by unlawful means as articulated by Justice Cromwell in *A.I. Enterprises v. Bram*, 2014 SCC 12) are not in dispute. They are:

(1) An intent to injure and cause loss to the plaintiff;

(2) Interference with the plaintiff's business or livelihood by illegal or unlawful means;

(3) The unlawful means are directed at a third party who has a civil cause of action or would have one if the third party had suffered loss as a result of that conduct; and

(4) The plaintiff suffers economic loss as a result of the unlawful means.

29 All of these elements have been pleaded in the statement of claim. With respect to the second element, the plaintiffs have pleaded that they had a beneficial interest in the spectrum licenses as well as an enforceable right to sell those licences pursuant to their contract with Industry Canada and Industry Canada's representations to them. How they say they had a beneficial interest in the licenses is not pleaded and I question whether that could be proven. Be that as it may, the plaintiffs have also pleaded that Industry Canada interfered with their interests in several ways. The second element has been sufficiently pleaded. The unlawful means pleaded is that Industry Canada unlawfully intimidated Telus into withdrawing its offer to purchase the licences. If proven, that would constitute unlawful means and give Telus the right to sue Industry Canada.

30 The plaintiffs have pleaded a claim in unjust enrichment. Again the elements of that tort are well known. A plaintiff must establish:

(a) an enrichment of the defendant;

(b) a corresponding deprivation of the plaintiff; and

(c) an absence of juristic reason for the enrichment.

31 The pleading of unjust enrichment is as follows:

> 152. Industry Canada was unjustly enriched by DAVE's and Quadrangle's participation in the Spectrum Auction. The Plaintiffs spent $243,159,000 in the Spectrum Auction and Industry Canada was enriched by a corresponding amount. There was no juristic reason for this enrichment as Industry Canada utterly failed to provide any of the benefits on the basis of which DAVE and Quadrangle spent the money. DAVE and Quadrangle suffered a corresponding deprivation for which there is no juristic reason.

32 The Attorney General says the second element cannot be established as it was Mobilicity and not the plaintiffs that bid on the spectrum. What is pleaded, however, in paragraph 152 is that the plaintiffs spent $243,159,000 in the spectrum auction and in paragraph 67 of the statement of claim it is pleaded that "The Plaintiffs, through Mobilicity, bid on the spectrum and ultimately purchased numerous blocks of spectrum in multiple provinces for a total of $243,159,000."

33 The claim of the plaintiffs is that they suffered losses that were caused by a promise by Industry Canada that it the plaintiffs formed a company and invested in it to permit it to bid on spectrum and build out a network, Industry Canada would see that the business survived. The plaintiffs claim that their investment in Mobilicity to permit it to bid on spectrum was their "corresponding deprivation". I cannot say that it is plain and obvious that on the basis of what is pleaded that the second element that the plaintiffs have been deprived could not be established.

34 The Attorney General says the third element cannot be established as there was juridical reason for Investment Canada receiving the funds in the spectrum auction, namely that Mobilicity bid for the spectrum was part of a valid spectrum auction conducted under the authority of s. 5 of the *Radiocommunication Act*, the *Telecommunications Act*, and the *Department of Industry Act*.

35 In *Garland v Consumers' Gas Co*., 2004 SCC 25 Iacobucci J. held that a plaintiff had to show that no juristic reason from an established category existed to deny recovery, in which case there would be a *prima facie* case requiring the defendant to rebut it. He stated that one of the categories of cases was "disposition of law" and referred to *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 as one example. In that case, it was argued that as the *GST Act* required a vendor to collect GST on behalf of the Government, the vendor had a restitutionary claim to be reimbursed for its costs in doing so. It was held however that the obligation created under the GST Act was a

juristic reason that precluded such a claim.

36 The Attorney General relies on *Apotex Inc. v. Abbott Laboratories Limited*, 2013 ONSC 356. In that case, the plaintiff claimed unjust enrichment for disgorgement of the defendants' profits or revenues, notwithstanding that the parties had arrived at a settlement agreement that precluded such claim as the settlement provided that no damages other than calculated under the patent regulations could be awarded. The plaintiff argued that despite the patent regulations, it should be entitled to pursue an unjust enrichment claim for disgorgement of the respondent's profits or revenues. The Court of Appeal rejected this argument, saying:

> **6** In our view, the simple answer to that argument is that the profits or revenues earned by the respondents for which the appellant claims disgorgement are due to the operation of the regulatory scheme of the Patent Regulations. The respondents' right to be in the market to the exclusion of the appellant and therefore to earn its profits or revenues is that provided for by the Patent Regulations. Those Regulations constitute a valid juristic reason for the respondents' profits and revenues for the period in question. This precludes the appellant's claim for disgorgement.

37 The plaintiffs contend that there was no juristic reason for the defendant's enrichment because Industry Canada, having induced the plaintiffs to invest their money, proceeded to completely ignore its obligations in both tort and contract, in reliance upon which the money was spent. They have pleaded in the statement of claim that when Industry Canada made its representations to them, it did so negligently or recklessly and/or with indifference to, without regard to, or without belief in their truth and that Industry Canada represented it had developed plans to implement these assurances when it in fact had not. The plaintiffs contend that having obtained over $240 million on the basis of commitments it neither intended nor did in fact keep, Industry Canada cannot now claim there was a valid reason for the payment in the first place.

38 In essence, the plaintiffs contend that Industry Canada misused the regulatory process in inducing them to invest as they did, and thus Industry Canada cannot now rely on that process. This is different from the cases relied on by the Attorney General. The argument may be novel. But at this stage, I am reluctant to say that it is plain and obvious that the third element of a lack of juristic reason could not be established.

39 In the result, the motion to strike the statement of claim is dismissed.

Motion to stay

40 The Attorney General in the alternative moves to stay the action under section 106 of the *Courts of Justice Act* pending the resolution of the Mobilicity CCAA proceeding.

41 In *Artistic Ideas Inc. v. Canada* [2003] O.J. No. 3902, Justice Karakatsanis (as she then was)

referred to the limited circumstances in which a stay should be ordered. She stated:

> **10** The parties do not significantly dispute the principles that should be considered when deciding to grant a stay. The applicant must satisfy the Court that 1) continuing the action would work an injustice because it is oppressive or vexatious to the defendants or is otherwise an abuse of process, and that 2) the stay would not cause an injustice to the plaintiff. The court's power to stay should be exercised sparingly and only in the clearest of cases. Expense and inconvenience to a party are not special circumstances for the granting of a stay. [See *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd*. (1972), 25 D.L.R. (3d) 419 (F.C.T.D.) at 426; *Figgie International Inc. v. Citywide Machine Wholesale Inc.* (1993), 50 C.P.R. (3d) 89 (F.C.T.D.) at 92, *Canadian Express Ltd v. Blair*, 11 O.R. (3d) 221 at 223.]

42 The Attorney General claims that there is a substantial overlap of this case and the CCAA proceedings. I do not see any overlap at all. The issues raised in this action are not issues that have been raised in the CCAA proceeding.

43 The Attorney General says that the plaintiffs are seeking to recover indirectly their equity claim (as defined in ss. 2(1) of the CCAA) directly from the defendant and that depending on the outcome of the CCAA proceeding, value may be maximized to the extent that the plaintiffs' alleged losses are reduced or eliminated, potentially rendering this proceeding moot. The Attorney General claims that should this action not be stayed, it provides the plaintiffs with an opportunity to attempt to defeat Parliament's subordination of equity claims pursuant to subsection 6(8) of the CCAA. Specifically, rather than accepting whatever dividend is available to equity claimants pursuant to the CCAA compromise or arrangement, the plaintiffs are seeking recovery directly from the defendant, potentially competing with and defeating the Mobilicity group's efforts to maximize value, and obtaining payment in priority to the non-equity claimants in the CCAA proceeding.

44 This contention is completely miscast. An equity claim as dealt with in the CCAA is a claim by equity holders filed in the CCAA proceedings against the debtor, and subsection 6(8) provides that such claims can only be paid if all other claims are paid in full. The plaintiffs have not made any claim in this proceeding. No claims procedure has yet taken place.

45 Even if there were a claim against the debtor by a shareholder, there would be nothing to prevent that shareholder from suing any third party for damages. That would not in any way be defeating the purpose of the CCAA to subordinate claims of equity holders to the claims of all other claimants who have filed a claim against the debtor. A successful claim against a third party might reduce the equity claim against the debtor, but it would not in any way affect the claims of all other claimants.

46 It is complete speculation to suggest that the plaintiffs will get anything out of the CCAA process. I would not stay their action in the hope that their damages as claimed could be recovered

in the CCAA process. That would be fanciful.

47 I see no prejudice to the Attorney General for the action to proceed now. Rather the prejudice would be on the plaintiffs who for no apparent reason would have to await the outcome of the CCAA process. There is nothing abusive about the action proceeding.

48 The motion to stay the action is dismissed.

Motion to remove co-counsel

49 The Attorney General also moves for an order requiring all three plaintiffs to be represented by one solicitor of record. Quadrangle Group LLC and QCP CW S.a.r.l. is represented by Mr. Lisus's firm and Data & Audio-Visual Enterprises Investments Inc. is represented by Centa's firm.

50 The Attorney General relies on a decision of Cullity J. in *Lau v. Bayview Landmark Inc.*, [2004] O.J. No. 2788 who noted that the general rule is that plaintiffs in an action should have one counsel. He refused to permit more than one counsel to represent a class in a class action. There had been a dispute between the two co-counsel who originally acted for the class and a new counsel was appointed to represent all of the class.

51 The plaintiffs say that while the norm is for co-plaintiffs to be represented by a single solicitor of record, courts have specifically recognized their power to order separate representation, particularly where co-plaintiffs may have potentially diverging interests. See *Alvi v. Lal*, [1990] O.J. No. 739 in which Then J. stated:

> The power of this court to order separate representation has been recognized in *Regan v. Hoover* (1984), 45 O.R. (2d) 216 (Ont. H.C.); *Krolo v. Nixon* (1985), 50 O.R. (2d) 285 (Ont. H.C.); *755568 Ontario Ltd. v. Linchris Homes* (1989), 70 O.R. (2d) 35 (Ont. H.C.). It appears to me that there is good reason in the circumstances of this case to depart from the norm in that this order will more firmly protect the position of the co-plaintiff and will also in the circumstances ensure that "as far as possible multiplicity of proceedings shall be avoid" consistent with s. 148 of the Courts of Justice Act.

52 The plaintiffs say that they have different financial interests in the litigation and that there is the potential for this court to arrive at diverging findings of fact, which may impact each of the plaintiffs' interests in the litigation, including findings of fact in respect of:

(i) the nature and content of representations made by Industry Canada to each of the plaintiffs;

(ii) the extent to which Industry Canada's duty of care extends to each of the

plaintiffs; and

(iii) the nature and extent of damage to each plaintiff's reputation and goodwill.

53 The plaintiffs say that allowing DAVE and Quadrangle to be separately represented will not only safeguard the plaintiffs' distinct interests in the litigation, but will also ensure that none of the plaintiffs are deprived of its solicitor of choice and it will avoid the need for a multiplicity of proceedings.

54 It is not possible at this stage to say that what the plaintiffs are concerned about should not be listened to. In this case there is no evidence of inconsistent positions, duplication of efforts, or otherwise any evidence of plaintiffs' counsel's inability to cooperate. The problems that arose in *Lau* simply do not exist in this case. If problems were to arise in the future, which would surprise me given the two firms that are involved, they could be addressed.

55 I permit the two firms to continue to represent their respective clients as co-counsel.

Costs

56 The plaintiffs are entitled to their costs. If costs cannot be agreed, brief written cost submissions may be made within 10 days, along with a cost outline, and responding written cost submissions may be made within a further 10 days.

F.J.C. NEWBOULD J.

1 While it is not necessary to further consider the statement of Laskin J.A., his statement, based on what Lord Bingham said in *Johnston*, that it is only if the corporation does not have a cause of action that a shareholder may bring an action for a wrong done to the shareholder may be inconsistent with the later statement of La Forest J. in para. 63 of *Hercules* quoted in paragraph 20 above which stated that both a shareholder and the corporation could have causes of action.

---- End of Request ----
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Time Of Request: Sunday, June 12, 2016 14:45:17