See paras. 17-20

Case Name:

Lysko v. Braley

Between
Michael Lysko, plaintiff (appellant), and David Braley, David Asper, Sherwood Schwarz, Lyle Bauer, John Tory, Jeffrey Giles, David MacDonald, George Grant, Hugh Campbell, Robert Ellard, Robert Wetenhall, Sig Gutsche, B.C. Lions Football Club Inc., Vancouver Football Operations Ltd., 431966 B.C. Ltd., Calgary Stampeder Football Club Ltd., Edmonton Eskimo Football Club, Montreal Alouettes (1997) Limited Partnership, 9032-9756 Quebec Inc., 1493044 Ontario Limited, carrying on business as the Ottawa Renegades, Saskatchewan Roughriders Football Club, Argos N.S. Corporation, Toronto Argonauts Holding Inc., and Winnipeg Blue Bombers Football Club, defendants (respondents)

[2006] O.J. No. 1137

79 O.R. (3d) 721

212 O.A.C. 159

2006 CanLII 9038

2006 CarswellOnt 1748

146 A.C.W.S. (3d) 925

Docket: C42807

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, M. Rosenberg and H.S. LaForme JJ.A.

Heard: November 1-2, 2005.

Judgment: March 27, 2006.
Amended judgment: April 13, 2006.

(151 paras.)

Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Appeal by Lysko from a decision reported at [2004] O.J. No. 4727 striking his statement of claim, resulting in the claim being dismissed in its entirety, allowed in part -- While the Court reached a different conclusion from the motions judge with respect to some of the causes of action, it agreed with the conclusion that the statement of claim offended the requirements of Rule 25.06(1) of the Ontario Rules of Civil Procedure and needed to be struck in its entirety with leave to amend.

Civil procedure -- Appeals -- Appeal by Lysko from a decision reported at [2004] O.J. No. 4727 striking his statement of claim, resulting in the claim being dismissed in its entirety, allowed in part -- While the Court reached a different conclusion from the motions judge with respect to some of the causes of action, it agreed with the conclusion that the statement of claim offended the requirements of Rule 25.06(1) of the Ontario Rules of Civil Procedure and needed to be struck in its entirety with leave to amend.

Appeal by Lysko from a decision striking his statement of claim, resulting in the claim being dismissed in its entirety. Lysko was hired for a three-year term as Commissioner of the Canadian Football League, commencing on December 1, 2000. He was terminated from his employment on March 19, 2002, but continued to receive salary and benefits for the balance of the term of his employment. Lysko claimed that he was entitled to a discretionary bonus and other forms of remuneration. He brought an action for $5.2 million seeking extended notice and compensation, plus aggravated damages due to the manner of his dismissal and bad faith on the part of the League. He also sought damages for defamation, injurious falsehood, negligent misrepresentation, intentional interference with contractual relations and breach of confidence. The Canadian Football League Clubs, the Governors of the League, and the other defendants brought a motion for orders striking Lysko's statement of claim and dismissing the claim against them. The motions judge struck out the claim against nine individual defendants without leave to amend. Regarding the other defendants, Lysko was granted leave to deliver a fresh statement of claim in accordance with the judgment.

HELD: Appeal allowed in part. The Court agreed with the motions judge that Lysko should be required to serve a new amended statement of claim. The appeal was allowed in part in order for a number of claims to proceed in addition to those that the motions judge permitted to proceed. In that regard, the court allowed five further claims concerning negligent misrepresentation including misrepresentation by omission. One claim was permitted based simply on negligent misrepresentation. Finally, three other claims concerning allegations of defamation were permitted to proceed once an amended statement of claim was filed. While the Court reached a different conclusion from the motions judge with respect to some of the causes of action, it agreed with the

conclusion that the statement of claim offended the requirements of Rule 25.06(1) of the Ontario Rules of Civil Procedure. Therefore, the Court agreed with the motions judge that although certain of the causes of action were to go forward, the appropriate remedy was to strike the pleading in its entirety and grant Lysko leave to deliver a fresh statement of claim.

Statutes, Regulations and Rules Cited:

British Columbia Rules of Court, Rules 19(24)(a)

Libel and Slander Act, R.S.O. 1990, c. L.12, s. 17

Ontario Rules of Civil Procedure, Rules 5.02(2)(b), 5.02(2)(c), 21.01(1)(b), 25, 25.06, 25.06(1), 25.06(4), 25.06(8), 25.11

Appeal From:

On appeal from the order of Justice Wailan Low of the Superior Court of Justice dated November 18, 2004.

Counsel:

J. Gardner Hodder and Marlo K. Shaw for the appellant

Geoffrey B. Shaw for the respondents David Bradley and Hugh Campbell

Mark J. Freiman for the respondents David Asper and Lyle Bauer

P. Jock C. Climie for the respondent Robert Wetenhall

John C. Field and Jason Green for the corporation respondents and other individual respondents

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[Editor's note: A corrected version was released by the Court April 13, 2006. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

1 M. ROSENBERG J.A.:-- In October 2000, the Canadian Football League hired the appellant, Michael Lysko, to be the League's Commissioner. His contract with the CFL was to be for three years. However, in March 2002, approximately halfway through the term, the appellant was dismissed. While the appellant continued to receive his salary, car allowance and medical benefits for the balance of the three-year term, he was dissatisfied with the manner in which his employment was terminated and the statements allegedly made by persons associated with the CFL about his

management of the League. Accordingly, he launched an action claiming almost $19 million in damages. The various corporate and individual defendants brought motions either to strike out the entire claim or at least some of the causes of action. Low J., in reasons reported at 39 C.C.E.L. (3d) 282, allowed some of the actions to proceed but in the end she struck out most of the claims and required the appellant to file an amended statement of claim for those that remained.

2 While I agree with the motions judge that the appellant should be required to serve a new statement of claim, I would allow the appeal in part and allow the following claims to proceed, in addition to those that the motions judge would permit to proceed:

The corporate defendants:	Negligent misrepresentation including misrepresentation by omission.
Lyle Bauer:	Defamation paras. 152(e) and 153(j).
David Braley:	Negligent misrepresentation including misrepresentation by omission.
Sherwood Schwarz:	Defamation paras. 153(b) and (d).
John Tory:	Negligent misrepresentation in paras. 44 and 46 (but not misrepresentation by omission).
David MacDonald:	Negligent misrepresentation including misrepresentation by omission.
Hugh Campbell:	Negligent misrepresentation including misrepresentation by omission.
Bob Ellard:	Negligent misrepresentation including misrepresentation by omission.

I would dismiss the appeal as against David Asper, Robert Wetenhall and George Grant. While Sig Gutsche is referred to as a respondent, the motions judge did not strike the only paragraphs of the statement of claim that relate to him and there was no cross-appeal.

THE FACTS

(1) Introduction

3 On a motion to strike a claim as disclosing no cause of action, "the court must accept the facts alleged ... as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies" (*Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) at 6). The facts set out below are accordingly taken from the statement of claim. The defendants did not file statements of defence and no discoveries have taken place.

(2) The Parties

(a) The plaintiff

4 When he was hired by the CFL, Michael Lysko was an executive with The GEM Group, a marketing company. Lysko was based in Chicago and states that he was earning US $150,000 annually with periodic bonuses. He focused on sports teams and sporting events. He says he was lured away from this lucrative and satisfying career with The Gem Group by the CFL.

(b) The defendants

5 The CFL is an unincorporated association. Lysko has, therefore, claimed against the incorporated football clubs that make up the CFL. The actions against the Hamilton and Toronto clubs have been stayed by receivership orders. He has also brought an action against individuals associated with the League and the member football clubs. A Board of Governors comprised of governors and alternate governors governs the CFL. Many of Lysko's complaints concern the activities of the Search Committee, which was set up by the Board of Governors to find a new Commissioner, and which ultimately recommended that he be hired.

6 Below is a brief description of the various defendants and their relationship to each other:

* B.C. Lions Football Club Inc., Vancouver Football Operations Ltd., 431966 B.C. Ltd. [B.C. Lions]

  * David Braley, Governor and member of the Search Committee, became Chair of the Board of Governors

* 1097694 Ontario Limited [Hamilton Tiger Cats (action stayed)]

    * David MacDonald, Governor and member of the Search Committee
    * George Grant, alternate Governor

* Edmonton Eskimo Football Club [Edmonton Eskimos]

    * Hugh Campbell, Governor and member of the Search Committee

  * Saskatchewan Roughriders Football Club [Saskatchewan Roughriders]

    * Bob Ellard, Governor and chair of the Search Committee

  * Argos N.S. Corporation, Toronto Argonauts Holding Inc. [Toronto Argonauts (action stayed)]

    * Sherwood Schwartz, described in the claim as Toronto Argonaut owner

  * Calgary Stampeder Football Club Ltd. [Calgary Stampeders]

  * Sig Gutsche, described in the claim as "owner"

  * Montreal Alouettes (1997) Limited partnership, 9032-9756 Quebec Inc. [Montreal Alouettes]

  * Robert Wetenhall, Governor

* 1493044 Ontario Limited [Ottawa Renegades]
* Winnipeg Blue Bombers Football Club [Winnipeg Blue Bombers]

    * David Asper, Governor and became vice-chair of the Board of Governors
    * Lyle Bauer, President and C.E.O.

* CFL Management

    * John Tory: Chairman of the Board of Governors and acting Commissioner in 2000
    * Jeffrey Giles: CFL Chief Operating Officer [all the claims against Giles were struck out by the motions judge and the appellant has not appealed that part of her ruling]

(c) Others involved in the action but not defendants

7 The names of many other persons come up in the pleadings. Thus, reference is made to employees of tmp Worldwide, an executive recruitment firm retained by the CFL to assist in the search for a commissioner to replace John Tory. The claim also refers to The GEM Group, Lysko's former employer, and to Christopher Lang and Rick Jones, the Chairman and C.E.O. of The GEM Group, respectively. The claim also refers to many members of the media who were said to have been the recipients of defamatory and false statements by the individual defendants.

ANALYSIS

(1) Introduction

8 This appeal raises two distinct types of issues. The first is whether the motions judge was right to strike out the various parts of the pleading for failing to disclose causes of action. Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that a party may move "to strike out a pleading on the ground that it discloses no reasonable cause of action." Wilson J. sets out the test relating to rule 21.01(1)(b) in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 considering rule 19(24)(a) of the *British Columbia Rules of Court*, the equivalent of Ontario's rule 21.01(1)(b):

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

9 As Iacobucci J. said in *Succession Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 15, the test is a stringent one:

> The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there [sic] it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

10 I will deal with each of the causes of action below in accordance with this test.

11 The second set of issues concerns compliance with Rule 25. While I have reached a different conclusion from the motions judge with respect to some of the causes of action, I agree with her conclusion that the statement of claim offends the requirements of rule 25.06(1). Rule 25.06(1) requires that the pleading contain a "concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." Rule 25.06(8) provides that where fraud, misrepresentation or malice are alleged, the pleading must contain full particulars. The motions judge found that many of the paragraphs of the statement of claim offended rule 25.06. Therefore, she struck them out under rule 25.11. Under rule 25.11, the court may strike out or expunge all or part of a pleading on three grounds: (1) the pleading may prejudice or delay the fair trial of the action; (2) the pleading is scandalous, frivolous or vexatious; or (3) the pleading is an abuse of the process of the court. I agree with the motions judge's statement at para. 63 that the statement of claim "includes a plethora both of evidence and of irrelevant material and fails to be concise to the point that the defendants are hindered in developing a responsive pleading." Thus, I agree with the motions judge that although certain of the causes of action are to go forward, the appropriate remedy is to strike the pleading in its entirety and grant the appellant leave to deliver a fresh statement of claim.

12 I will deal with each of the causes of action by setting out the nature of the claim, the reasons for decision by the motions judge followed by reasons in respect of that claim.

(2) Breach of Confidence [paras. 23 to 33 of the Claim; paras. 58 to 60 and 62 of the Reasons for Judgment]

(a) The claim

13 Lysko alleges that the "CFL" promised that all discussions and negotiations would be held in strict confidence so as not to jeopardize his relationship with The GEM Group. Lysko does not identify who in the CFL made this promise. He alleges that George Grant contacted his employer, Christopher Lang, asking for Lang's opinion of Lysko and disclosing that the CFL was negotiating with him. Lysko learned of this conversation on October 26, 2000, while negotiating with the "CFL Board of Governors" in Toronto. Grant was not alleged to have been a member of the Search Committee and was an Alternate Governor. Lysko alleges that the "CFL" is responsible for Grant's actions which severely damaged his position with The GEM Group.

14 Lysko further alleges that it was a condition of the negotiations that if an agreement was made with the CFL, his hiring would not be made public until he could speak to his former employer. "[E]ither, Giles, Tory or a member of the Board of Governors, whose identity is unknown," leaked "to the media" that an agreement in principle had been reached on October 26, 2000. This breach of confidence is alleged to have caused Lysko "considerable personal anguish, humiliation and embarrassment" and ended his relationship with Rick Jones, C.E.O. of The GEM Group.

15 Lysko claims general, special, aggravated and punitive damages from Tory, Giles, Grant and the CFL corporate defendants in the amount of $200,000, for these breaches of confidence.

(b) The reasons of the motions judge

16 The motions judge held that since Lysko obtained the job of Commissioner and did not plead any loss or damage, the cause of action of breach of confidence was not made out. The motions judge also struck out a large number of paragraphs of the claim, including paras. 23 to 33 for being scandalous, vexatious and an abuse of process, contrary to rule 25.06. The motions judge was of the view that Lysko's claim was really for wrongful dismissal as against the corporate defendants and for defamation as against some of the individual defendants.

(c) Analysis

17 A claim for breach of confidence requires proof of three elements:

(1) that the information conveyed was confidential,
(2) that the information was conveyed in confidence, and
(3) that the confidential information was misused by the party to whom it was communicated to the detriment of the confider.

See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 635-639, *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999], 1 S.C.R. 142 at paras. 52-54, and *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1993), 13 O.R. (3d) 229 at 259-260.

18 In *Cadbury*, Binnie J. suggests that the court has a very broad range of remedies for breach of confidence. For example, at para. 24 he interpreted the result in *Lac Minerals* as confirming "jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations." He also appeared to approve of a very broad definition of detriment at paras. 52-53:

> La Forest J. said in *Lac Minerals* that if the plaintiff is able to establish that the defendant made an unauthorized use of the information to the detriment of the party communicating it, the cause of action is complete (at pp. 635-36 and 657; see also *ICAM Technologies Corp. v. EBCO Industries Ltd.* (1991), 36 C.P.R. (3d) 504 (B.C.S.C.), affirmed (1993), 52 C.P.R. (3d) 61 (B.C.C.A.), per Toy J.A.,

> at pp. 63-64; *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1993), 13 O.R. (3d) 229, 103 D.L.R. (4th) 158 (C.A.); 655 *Developments Ltd. v. Chester Dawe Ltd.* (1992), 42 C.P.R. (3d) 500 (Nfld. S.C.).
>
> The issue of detriment arises in this case because the trial judge made a specific finding that the respondents had not suffered financial loss, yet she proceeded to find liability and award damages "in the interest of fairness". While La Forest J. in *Lac Minerals* considered detriment to be an essential element of the breach of confidence action (Sopinka J. did not express a view on this point in his discussion of the applicable principles), *it is clear that La Forest J. regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information* (see, e.g., *Argyll (Duchess) v. Argyll (Duke)*, [1967] Ch. 302. In the *Spycatcher* case, supra, Lord Keith of Kinkel observed, at p. 256, that in some circumstances the disclosure itself might be sufficient without more to constitute detriment:
>
> So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.
>
> [Emphasis added.]

19 In this case, the appellant seeks a monetary remedy for the two breaches of confidence. However, he must be able to show some detriment or loss as a result of those breaches. As broad as the concept of detriment may be, in my view the appellant has not pleaded facts that show a compensable detriment. The bald allegation that Grant's contacting Lang, the Chairman of The GEM Group, severely damaged the appellant's position with The GEM Group, without any facts to show any loss or detriment, is not sufficient.

20 The appellant alleges that the breach of confidence caused him "considerable personal anguish, humiliation and embarrassment" apparently because he lost the personal relationship with Jones, C.E.O. of The GEM Group. As the motions judge pointed out, however, the appellant obtained the employment he was seeking, despite the alleged breach of confidence. He does not plead any facts to show any other kind of detriment flowing from the breach of confidence, such as loss of bargaining advantage, that is compensable in law. The pleading also fails to disclose the kind of emotional or psychological distress that would result from the disclosure of intimate information referred to in *Cadbury*. I agree with the motions judge that on this ground alone, the cause of action for breach of confidence must be struck out. That said, I should not be taken as holding that the

appellant pleaded the other requirements for breach of confidence, such as the requirement that the party to whom it was communicated misused the confidential information.

(3) Negligent Misrepresentation [paras. 34 to 85 of the claim; paras. 43 to 57 and para. 62 of the Reasons for Judgment]

(a) The claim

21 Lysko alleges that before he accepted the job as Commissioner, the "CFL" made representations to him concerning the profitability of the League. He alleges that "the Search Committee members" made representations about the League's profits and revenues. He alleges that he met with John Tory. During that meeting, he alleges Tory represented that the League office was making annual distributions to the member clubs and that the League's financial position had significantly improved since the mid-nineties. Lysko alleges that all of these representations were untrue. According to Lysko, had he known the truth, he would not have taken the job or would have insisted upon "very different terms of employment and a longer term of employment." He says that "The CFL, as employer, is liable for the misrepresentations ... and for the damages caused to the Plaintiff." He alleges that the persons who made the misrepresentations knew or ought to have known of the falsity of the statements and that Lysko would rely upon them. He claims that the people who made the statements were negligent in failing to inform themselves of the truth or, alternatively, in failing to communicate the truth to Lysko.

22 Lysko also alleges misrepresentation by omission on the basis that he had a reasonable expectation that certain information would be communicated to him. He names "the CFL as employer, the members of the Search Committee, Tory and Giles" as being liable for these misrepresentations by omission. Later in the claim he also names the Board of Governors, the CFL Corporate Defendants, Tory and Giles ("the misrepresentors") for another series of omissions. In general, these omissions concern certain financial arrangements and difficulties experienced by the League.

23 Lysko alleges that Tory and Giles provided inaccurate financial information to the Board of Governors in the form of various reports, financial statements and other communications. He claims that the Board of Governors knew or ought to have known that the financial information from Giles was incorrect and misleading. He says that Tory, Giles and "the CFL Board of Governors" should have foreseen that he would rely on financial information provided to him in deciding whether or not to accept the position of Commissioner. Lysko does not, however, indicate what reports, financial statements and other communications made to the Board of Governors, if any, were given to him while he was considering taking the job.

24 Lysko claims $4.5 million in general, special, aggravated and punitive damages for negligent misrepresentation from the CFL Corporate Defendants; from Braley, Macdonald, Campbell and Ellard (members of the Search Committee); and from Tory and Giles.

(b) The reasons of the motions judge

25 The motions judge struck out paras. 34 to 38 of the statement of claim, providing background information regarding the decision to hire a new commissioner, for failing to allege material facts. She struck out para. 40 concerning the representation about league profits because it was unclear who made the representation, and the CFL, as an unincorporated body, could not make actionable representations. She struck out paras. 41 and 43 concerning representations by the Search Committee because Lysko does not say which individual made the misrepresentations. She struck out paras. 44 to 48 concerning representations by Tory because there were no facts pleaded that showed Tory was in a special relationship with Lysko.

26 The motions judge also struck out paras. 49 to 70 concerning the misrepresentations by omission. She struck out the misrepresentations as against Tory because there was no allegation of any special relationship. She also held this claim was insufficient as against the other defendants because there was no allegation as to from whom Lysko expected to receive the information, no facts and circumstances upon which Lysko formed that expectation, no facts and circumstances that made the expectation a reasonable one or that the information was within the defendants' knowledge. She struck out the paragraphs relating to alleged misrepresentations to the Board of Governors by Tory and Giles because there was no allegation of these misrepresentations being made to Lysko.

27 Further, the motions judge held that these allegations of pre-contractual misrepresentations were inconsistent with other parts of his claim and, therefore, should have been pleaded in the alternative in accordance with rule 25.06(4). In other words, in the negligent misrepresentation part of the claim, Lysko sought damages because he would have negotiated a different contract. However, in other parts of the claim he sought to enforce the contract, especially those parts of the claim relating to the performance bonuses, to which I will refer below.

28 Finally, the motions judge struck out paras. 34 to 85 as being scandalous, frivolous, vexatious and an abuse of process.

(c) Analysis

(i) Introduction

29 The part of the pleading concerning negligent pre-contractual misrepresentations raises several different issues. An action in tort lies for alleged negligent misrepresentations made in the course of a hiring interview by the representative of the employer to the prospective employee: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 109 and 112. The elements of the tort are summarized at p. 110 of *Cognos* as follows:

(1) there must be a duty of care based on a "special relationship" between the

representor and the representee;

(2) the representation in question must be untrue, inaccurate, or misleading;

(3) the representor must have acted negligently in making said misrepresentation;

(4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

30 The issues in this case not only concern the elements of the tort but the manner in which those elements must be pleaded. In *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Gen. Div.) at 350, Greer J. adopted the following requirements for pleading negligent misrepresentation from *Rahn v. McNeill* (1987), 19 B.C.L.R. (2d) 384 (S.C.) at 392:

> The pleading, even of innocent misrepresentation, must set out with careful particularity the elements of the misrepresentation relied upon, that is:

1. the alleged misrepresentation itself,
2. when, where, how, by whom and to whom it was made,
3. its falsity,
4. the inducement,
5. the intention that the plaintiff should rely upon it,
6. the alteration by the plaintiff of his or her position relying on the misrepresentation,
7. the resulting loss or damage to the plaintiff.

31 I will now turn to the defects found by the motions judge.

(ii) Failing to identify the person making the representations

32 The motions judge found the statement of claim deficient as against Braley, MacDonald, Campbell and Ellard because it did not specify who made the representations and because the appellant pleaded that the Search Committee "included" these four persons and thus it was possible that the committee included other individuals. The motions judge relied upon *Lana International, supra*, and particularly for the statement at p. 351 of that case that, "It is not sufficient to simply lump a number of the defendants together in one paragraph of the pleading and say that they all made material misrepresentations and innuendos."

33 It is important to identify the nature of the representations made in order to decide whether the motions judge properly applied this statement from *Lana International.* In short, the allegation is that the Search Committee misrepresented the financial state of the League and, in particular, the size of annual distributions to its member football clubs. The appellant has identified the date

(October 17, 2000) and place (Sheraton Airport Hotel in Toronto) where the representations were made. He identifies the individuals with whom he met, not only Braley, MacDonald, Campbell and Ellard, but named senior executives from tmp Worldwide, described in the statement of claim as the CFL's agent. The appellant states that the Search Committee, whose membership he has identified, made the impugned representations. This statement must be taken as true, that is that all members of the committee made the representations. If, as alleged by the appellant in this case, all of the members of the Search Committee at the meeting made the representations, it is not improper to place them together in the same paragraph.

34 The motions judge erred in principle in applying a highly technical approach to this part of the pleading, especially to the use of the word "included". First, if there were other members of the Search Committee, they are not alleged to have been at the meeting. The appellant has identified the members of the Search Committee at the October 17, 2000, meeting and they are the only individuals sued for negligent misrepresentation. Second, in my view, the pleading is reasonably open to the interpretation that by using the word "included" the appellant was in fact describing the entire membership of the Search Committee. Finally, if there is a defect, the remedy is not to strike out the plea but merely to require an amendment or the delivery of particulars, provided the pleading otherwise discloses a reasonable cause of action. That was the remedy adopted by Greer J. in *Lana International, supra*.

35 In my view, this claim is different from the claim in *Lana International* where it was unclear which of the various defendants, some of whom were corporations, made the misrepresentations. In *Lana International*, some of the corporations stood in different relationships to the plaintiff and one of the individuals, Cybulski, occupied different positions in relation to two of the corporations. In any event, if there is a deficiency, the appropriate remedy is to allow for an amendment or require delivery of particulars.

(iii) The claim against John Tory

36 The motions judge struck the negligent misrepresentation claim against Tory because there were no facts pleaded that would place the appellant and Tory in a special relationship. She characterized the relationship at para. 49 as, "One is simply a candidate for the other's job." This is not an accurate description of Tory's relationship with the appellant. It is important to set out the relevant portion of para. 44 of the statement of claim:

> At the request of tmp and Ellard, Lysko also agreed to meet with Tory, who was not officially involved with the search for a new commissioner but was at the time the acting commissioner and Chairman of the CFL Board of Governors.

37 The claim had earlier identified tmp as the CFL's agent and Ellard as the chair of the Search Committee. The paragraph goes on to identify the specific representation made by Tory concerning the distributions made to the clubs. It is apparent that Tory was not simply the person whose job the appellant was seeking. In my view, he fell within the category of persons in a special relationship

with the appellant. He was the chairman of the CFL's Board of Governors, the appellant's proposed employer. It seems to me that given the Supreme Court's decision in *Cognos, supra*, at p. 117, it cannot be doubted that in cases of alleged pre-employment negligent misrepresentations, a special relationship exists between the prospective employer through its representatives and the proposed employee so as to give rise to a duty of care. The occasion of the meeting between the appellant and Tory was not an idle meet and greet. It is reasonable to assume that the tmp personnel and Ellard arranged the meeting so that Tory could confirm the representations made by the members of the Search Committee.

38 The appellant should provide particulars of the express misrepresentations, including whether they were oral or in writing or both.

(iv) Misrepresentation by omission

39 The motions judge struck out paras. 49 to 70, which allege misrepresentations by omission because the claim does not set out:

(1) from whom the appellant expected to receive the information;
(2) the facts and circumstances upon which the plaintiff formed the expectation;
(3) the facts and circumstances that made the expectation a reasonable one; and
(4) that the information was within the knowledge of the defendants (para. 52).

40 In para. 49 of the statement of claim, the appellant says that the CFL as employer, the members of the Search Committee, Tory and Giles[1] are liable to him for having made misrepresentations by omission. In para. 50, the appellant states that "these individuals" failed to discharge a duty to communicate important information to him. In para. 53 and following, he alleges that the "Board of Governors, the CFL Corporate Defendants, Tory and Giles ("the misrepresentors") failed to advise him of various pieces of information. He previously identified the Search Committee as empowered by the Board of Governors to hire a new commissioner. This sufficiently identifies the Search Committee as agent of the CFL corporate defendants. Thus, contrary to the holding by the motions judge, he has identified the persons from whom he expected to receive the information, namely the Search Committee members and Tory and Giles.

41 The motions judge also erred in holding that the appellant failed to set out the facts and circumstances upon which he formed the expectation. In para. 51, the appellant alleges that he "specifically invited the Search Committee to tell him what he needed to know about taking the position of commissioner." While I think it can be inferred that this request took place on October 17, 2000, the appropriate remedy for the defect is to order particulars be delivered. Since there are no facts alleged against Tory in this regard, however, the claim against Tory for misrepresentation by omission must be struck.

42 The motions judge erred in holding that the claim fails to state the facts and circumstances that made the expectation a reasonable one. Paragraph 43 of the statement of claim states that the "Search Committee members stressed to Lysko that the distribution to the member football clubs of league office profits was central to what the Board expected of the new commissioner." In paras. 77 to 85, the appellant gives further particulars as to the importance he placed on the representations concerning the financial information. The majority of the alleged omissions relate to the ability of the League office to generate the profits that would be necessary to maintain the distributions. While it would have been preferable for the statement of claim to make the link between para. 43 and the alleged omissions, to highlight the reasonableness of the expectation, and to state the allegations in paras. 77 to 85, in a more concise manner, these defects can be cured by an amendment.

43 Finally, the motions judge erred in holding that the claim fails to state that the information was within the knowledge of the defendants. The members of the Search Committee are all identified as members of the Board of Governors. In para. 50, the appellant alleges that information "was known to these individuals."

44 The motions judge also held at para. 55 of her reasons that the alleged omissions could not be the basis for a claim of negligent misrepresentation. She distinguished *Cognos, supra,* from the claims made by the appellant in these terms:

> In my view, there is a significant difference between making no representation, which is the complaint in this pleading, and making a representation or set of representations that reasonably leads or is calculated to mislead the recipient of the information to an inference which is not true. The latter is what occurred in *Queen v. Cognos.*

45 In my view, the motions judge has misapprehended the allegations in the statement of claim. This is not a case where no representations were made. To the contrary, the appellant has made allegations of express positive misrepresentations of the financial state of the League. The alleged misrepresentation by omission should be understood in that context and, as such, fall within *Cognos*, at p. 123:

> In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.
>
> There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made. [Citations omitted.]

(v) Failing to plead in the alternative

46 Finally, at para. 57, the motions judge held that the appellant had pleaded inconsistent causes of action by claiming damages for both negligent misrepresentation and breach of contract. She held that in accordance with rule 25.06(4), the causes of action should have been pleaded in the alternative. The motions judge relied upon the decision of Swinton J. in *Foodcor Services Corp. v. Seven-Up Canada Inc.*, [1998] O.J. No. 2576 (Gen. Div.). Swinton J. held as follows at para. 43:

> The claim of misrepresentation in paragraphs 128 and 134 is inconsistent with the thrust of the breach of contract and wrongful dismissal claims. Here, it is alleged that if the plaintiffs had been aware of the untruth of various statements, they would not have entered into the sales agreement. Yet they are seeking to enforce that agreement elsewhere in the pleadings. They also rely elsewhere on some or all of these representations to found a collateral contract with Seven-Up. Rule 25.06(4) requires that inconsistent pleadings be made in the alternative.

47 However, there is an important difference between this case and *Foodcor*. The appellant does not simply say that he would not have entered into the contract but for the misrepresentations. Rather, at paras. 46 and 83 he alleges that had he known the true state of affairs, he would either not have entered into the contract or sought different terms. In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 30, the court held that "actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise." See also *Cognos, supra*, at pp. 110-115. Based on the statement of claim, there is nothing to indicate that the tort for negligent misrepresentation was precluded by any terms of the contract. The allegations of negligent misrepresentation and breach of contract are inconsistent only to the extent that the appellant has alleged that he would not have taken the job. The appropriate remedy is to permit the appellant to amend the statement at claim in order to remedy that defect and bring the claim into line with rule 25.06(4).

(vi) Liability of the Corporate Defendants

48 The motion judge did not deal specifically with the pleading of negligent misrepresentation as against the corporate defendants. It may be that because she struck out the claim against the individuals, it followed that the corporate defendants could not be liable. Also at para. 47 of her reasons, she notes that para. 40 of the claim alleges that "the CFL, an unincorporated entity, represented that the league was generating a profit." Since an unincorporated entity can only speak through natural persons, and since those persons were not identified, she held that the paragraph must be struck out. I agree with the motions judge that this paragraph of the pleading is defective.

49 However, other parts of the pleading allege, in effect, that the Search Committee was acting as agent for the corporate defendants. For example, para. 42 of the statement of claim states that, "[t]he

Search Committee was empowered by the Board of Governors to hire a new CFL commissioner." In para. 46, the appellant has also expressly pleaded that, "[t]he CFL, as employer, is liable for the misrepresentations described above and for the damages caused to the Plaintiff." The misrepresentations referred to in para. 46 are positive misrepresentations, not the misrepresentations by omission. In paras. 7 and 13 of the statement of claim, the appellant describes the CFL Corporate Defendants as comprising the CFL. To be consistent with the obligation to read the statement of claim generously with allowance for inadequacies due to drafting deficiencies, the term CFL in the claim must be read in that manner. In this context, the term "CFL" can be taken to refer to the Corporate Defendants. The fresh amended statement of claim should, however, make this clear.

50 In respect of the misrepresentations by omission, the appellant alleges in para. 78 that:

> The misrepresentations, as described, were untrue, inaccurate and misleading, and the CFL, Tory and Giles acted negligently in making them.

51 While I think it likely that the appellant intended that "CFL" in this context also referred to the Corporate Defendants, this allegation is defective in failing to expressly allege that the Corporate Defendants are liable for the misrepresentations by omission allegedly made by the members of the Search Committee. In my view, this omission is a mere drafting deficiency that can be cured by an amendment. The earlier parts of the claim make it clear that the appellant holds the corporate defendants liable for the misrepresentations by the members of the Search Committee.

52 To conclude, the Corporate Defendants would be liable for the misrepresentations allegedly made by their agents, the individual members of the search committee and by Tory. See *Cognos, supra* at pp. 110 and 115.

(vii) Miscellaneous paragraphs of the statement of claim

53 The motions judge struck out various parts of the statement of claim because they were irrelevant or otherwise breached rule 25.06. For example, she struck out paras. 34 to 38 because they do not allege material facts but only evidence. I do not agree. Those paragraphs identify Tory, Giles, and tmp Worldwide, their roles in the CFL and in recruiting Lysko. These are facts necessary for the claim of negligent misrepresentation. Paragraph 38 alleges the appellant's knowledge of the history of the CFL and its marketplace strengths and weaknesses. The facts in para. 38 provide context demonstrating that the appellant relied upon the alleged misrepresentations.

54 I agree with the motions judge that paras. 71 to 76 should be struck out. These paragraphs, concerning alleged prior misrepresentations by Tory and Giles to the Board of Governors, are irrelevant to any cause of action and are properly characterized as scandalous or vexatious pleading.

(viii) Conclusion on negligent misrepresentation

55 To summarize, the following claims for negligent misrepresentation can go forward, subject to

delivery of particulars or amendment in conformity with these reasons:

* The claim against Braley, Macdonald, Campbell and Ellard for misrepresentation and misrepresentation by omission.
* The claim against Tory for misrepresentation as set out in paras. 44 and 46.
* The claim against the Corporate defendants for misrepresentations by Tory and misrepresentations and misrepresentations by omission by Braley, Macdonald, Campbell and Ellard.

(4) Breach of contract including refusal to pay the performance bonus and wrongful dismissal [paras. 86 to 149 and 170 to 176 of the claim, paras. 61 and 62 of the Reasons for Judgment]

(a) The claim

56 The claim for breach of contract is found in two parts of the claim. The first part is found in paras. 86 to 149. The notices of motion did not seek to strike out any of paras. 86 to 93. Paragraphs 94 to 98 set out the alleged results of a forensic audit that according to Lysko, shows poor management by Tory and Giles. Paragraphs 99 to 104 allege that the "CFL Board of Governors and the member teams" interfered with Lysko's performance of his contract, "by defying and undermining the authority of the league office." He alleges that these actions compromised his ability to earn performance bonuses and his "career expectations, thereby causing him further damage" and "dramatically" impairing his subsequent employability.

57 Paragraphs 105 to 109 under the heading, "Lysko's Performance of the Employment Contract" set out in detail the many League issues the appellant had to deal with. He alleges that many of the decisions he had to make during his tenure "would often conflict with the personal agendas of various individual Governors."

58 Paragraphs 110 to 149 fall under the heading "Performance Bonuses". The corporate defendants sought to strike out paras 113 to 149. In paras. 110 and 111, Lysko claims entitlement to the performance bonuses and denotes the CFL's refusal to pay them. In paras. 112 to 149, he describes at length the many things that he did as Commissioner, presumably in support of his claim of entitlement to the performance bonuses.

59 Paragraphs 170 to 176 describe the dismissal, allege bad faith, and claim damages for loss of salary, cost of living allowance and other benefits and allowances.

60 Lysko claims damages of $5.2 million against the corporate defendants for breach of contract. This amount includes their failure to pay the performance bonuses and other forms of remuneration, aggravated damages arising out of the manner of his dismissal and bad faith.

(b) The reasons of the motions judge

61 The motions judge struck out paras. 94 to 104 and paras. 113 to 149 under rule 25.11, presumably as being scandalous, frivolous, vexatious or an abuse of process. She reasoned at para. 65 of her decision that the case was "primarily a wrongful dismissal action wherein the main point of contention is the discretionary bonus." While it was open to Lysko to plead that claim, the criteria for earning the bonus, and that he fulfilled the criteria, the statement of claim was really a "billboard for his accomplishments" or "an apologia for the shortcomings in his performance" (para. 65). The motions judge held that it was open to Lysko to claim for aggravated damages pursuant to *Wallace v. United Grain Growers Ltd.*, [1997], 3 S.C.R. 701, but he had to do so in a concise fashion, alleging the aggravating factors. As pleaded, the claim was "monstrously unwieldy and does not coherently set out the case the defendants have to meet" (para. 66).

62 The motion judge struck out the claim in its entirety with leave to deliver a fresh statement of claim in accordance with her reasons. The formal order gives Lysko leave to bring a fresh amended statement of claim against the corporate defendants "for wrongful dismissal and any alleged failure to pay a discretionary bonus."

(c) Analysis

63 The statement of claim is so long and unwieldy, it is difficult to understand the nature of the appellant's claim for breach of contract, who he claims against and what his real complaint is on the appeal. The appellant's principal concern seems to be that by striking out paras. 99 to 104, the motions judge deprived him of his claim for an unpaid signing bonus. If that was the intention from the pleadings in paras. 99 to 104, it is completely obscure. I would grant the appellant leave to amend to concisely plead against the corporate defendants only, the claim for breach of contract including failure to pay the signing bonus. I agree entirely with the motions judge that paras. 94 to 98, which refer to the forensic audit, should be struck out as they are scandalous and vexatious.

64 With respect to the balance of the claim for breach of contract, namely, wrongful dismissal and *Wallace* damages, that claim must be amended as ordered by the motions judge to comply with rule 25.06.

(5) Defamation [paras. 150 to 153 and 154 to 165 of the claim, paras. 8 to 12, 17 to 42 and 62 of the Reasons for Judgment]

(a) Introduction

65 There are several claims for defamation that fall into different categories. Lysko has divided the claims into two separate groups, namely, paras. 150 to 153 and 154 to 165. The latter group of defamatory comments are set out under a heading that includes allegations of "Injurious Falsehood, Contractual Interference, Further Defamation". However, in para. 153(k) Lysko refers to statements made in paras. 154 to 165. Then, in paras. 166 to 169 are a number of allegations under the heading "Defamation Claims Generally". I will review all of the defamation claims in this part.

66 While the motions judge struck out the entire claim, she gave Lysko leave to file a fresh statement of claim including claims for defamation against three of the individual defendants: Asper, Gutsche and Schwarz. I will deal with the allegations and then the motions judge's decision in relation to each individual defendant.

67 The motions judge struck out paras. 150 and 154 to 169 as being frivolous, vexatious and an abuse of process. She also held that paras. 154 to 157 are not facts material to any of the causes of action, were at best evidence, and should be struck. These paragraphs describe some of the activities leading up to Lysko's dismissal.

(b) David Asper

68 Paragraphs 152(a) and (c) concern statements made by Asper to named members of the media. The paragraphs set out the exact words. The motions judge gave leave to amend to set out the extrinsic facts in support of the plea of a true innuendo.

69 Paragraph 153(e) sets out that on or about March 13, 2002 "a representative of the Winnipeg Blue Bombers, identity unknown, but believed to be Asper or Bauer" falsely stated to members of the media, including a named member of the media, that disbursements to the teams would be down from what Lysko had promised. The motions judge struck out this paragraph because it did not identify the speaker nor did it set out the words complained of.

70 Paragraphs 153(g) and (h) allege that Asper and Bauer made false statements to members of the Canadian media, including a named journalist, concerning distributions to the Blue Bombers by the League office. The motions judge struck these paragraphs out because they did not set out the words complained of.

71 Paragraph 153(k) alleges that some time shortly before March 12, "one or more of the Governors, believed to be either Asper, Bauer, Braley, Schwartz, or the Defendant Robert Wetenhall, who was governor on behalf of the Montreal Alouettes, communicated false information to the media about Lysko's performance, as further described below under the heading of injurious falsehood." This allegation, therefore, leads the reader to look to paras. 154 to 165. In paras. 158 and 159, Lysko has coined the phrase "the Unidentified Source" to refer to Braley, Asper, Schwartz and Wetenhall and he alleges that they disseminated false information to the media, particularly, to two broadcast journalists. In para. 161, Lysko lists the falsehoods complained of, however, no specific words are set out. For example, para. 161(n) states "Lysko was responsible for fiscal malfeasance and incompetence." The motions judge struck out paras. 153(k) and 154-164 on the basis that it was not sufficient to plead that the defendant is a member of a class and that an unidentified member of the class committed a tort. She also held that these paragraphs do not set out material facts.

(c) Sig Gutsche

72 Paragraph 152(b) and (d) allege that Gutsche stated to members of the media, including named journalists, specific words said to be defamatory. While the motions judge struck out the statement of claim, she gave the appellant leave to bring a fresh amended statement of claim against Gutsche limited to these paragraphs. Therefore, there is no issue with respect to Mr. Gutsche on this appeal.

(d) Lyle Bauer

73 Paragraph 152(e) alleges that on November 21, 2001, Bauer spoke to members of the media, including a named journalist, and "compared Lysko to the notoriously evil fictional character, Lord Voldemort". The claim alleged this was defamatory since the plain and ordinary meaning of the words was that Lysko was evil. The motions judge struck out this plea because it does not set out the words alleged to have been published and "[i]t is not a tort to make comparisons" (para. 27).

74 Paragraph 153(e) sets out that on or about March 13, 2002, "a representative of the Winnipeg Blue Bombers, identity unknown, but believed to be Asper or Bauer," falsely stated to members of the media, including a named member of the media, that disbursements to the teams would be down from what Lysko had promised. The motions judge struck out this paragraph against Bauer for the same reason she struck it out against Asper: it did not identify the speaker nor did it set out the words complained of.

75 Paragraphs 153(g) and (h) allege that Asper and Bauer made false statements to members of the Canadian media, including a named journalist, concerning distributions to the Blue Bombers. The motions judge struck these paragraphs out for the same reasons she struck them out against Asper because they do not set out the words complained of.

76 Paragraph 153(i) states that on a specified day Bauer stated falsely to members of the Canadian media, including a named journalist, that Lysko did not engage in discussions about distribution levels. Paragraph 153(j) states that on the same day Bauer suggested that Lysko was not honest about League distributions. The motions judge struck out these paragraphs because they do not set out the words complained of. Although not mentioned by the motions judge, para. 153(j) also fails to name the recipient of the statement.

77 Paragraph 153(k) states that "Asper, Bauer, Braley, Schwarz or the Defendant Robert Wetenhall" communicated false information to the media about Lysko's performance "as further described below". Bauer is not referred to again in the claim. The motions judge held that the paragraph does not set out material facts and should be struck. The appellant concedes that Bauer should not have been included in this paragraph.

(e) Sherwood Schwarz

78 Paragraph 153(a) alleges that Schwarz stated on March 9, 2002, to members of the media, including a named journalist, that Lysko was a person of questionable integrity. The paragraph goes

on to quote the actual words used. The motions judge held that the paragraph contained the "bare bones of a cause of action" and that any defects could be corrected through particulars. The formal order grants leave to bring a fresh amended statement of claim against Schwarz alleging the claim set out in this paragraph, other than the first sentence, which merely alleges Lysko to be a person of questionable integrity and that the CFL had just cause to dismiss him.

79 Paragraph 153(b) sets out three allegations of defamation. The first allegation names two journalists as recipients of the statement by Schwarz that Lysko "disqualified himself from being able to continue in the Office of commissioner." The motions judge struck this plea because the words are not capable of a defamatory meaning. The second allegation merely says that Schwarz, "speaking to other media", said Lysko was "off the wall". The motions judge struck this plea because it does not name the recipient of the statement. The third allegation states that Schwarz, "speaking to other media", stated that Lysko had caused more harm to the CFL than anyone else. The motions judge struck this plea because it does not set out the words complained of or the recipient.

80 Paragraph 153(c) sets out specific words that were said by Schwarz to a named journalist. The formal order grants leave to bring a fresh amended statement of claim against Schwarz alleging the claim set out in this paragraph.

81 Paragraph 153(d) alleges that Schwarz stated to a named journalist on a specified day that Lysko's continuing as Commissioner would have a horrendous effect on the CFL. It goes on to state that two days later, Schwarz said that Lysko was not good for the League. The motions judge struck this paragraph because it fails to set out any words complained of. Although not mentioned by the motions judge, the second allegation does not name the recipient of the statement.

82 Schwarz is also referred to in para. 153(k) and is one of the members of "the Unidentified Source" referred to in the paragraphs under the heading "Injurious Falsehood, Contractual Interference, Further Defamation". These pleas against Schwarz were struck for the same reasons the similar pleas against Asper were struck.

(f) George Grant

83 Paragraph 153(f) alleges that on a particular day, Grant publicly lent credence to defamatory statements to the media made by other members of the Board of Governors "further described below". The plea alleges that Grant made his statements to a named journalist and other members of the media. The motions judge struck this plea because it does not set out the words complained of.

(g) Robert Wetenhall

84 Wetenhall is referred to in para. 153(k) and is one of the members of "the Unidentified Source" referred to in the paragraphs under the heading "Injurious Falsehood, Contractual Interference, Further Defamation". These pleas against Wetenhall were struck for the same reasons

the similar pleas against Asper and Schwarz were struck.

(h) David Braley

85 Braley is referred to in para. 153(k) and is one of the members of "the Unidentified Source" referred to in the paragraphs under the heading "Injurious Falsehood, Contractual Interference, Further Defamation". These pleas against Braley were struck for the same reasons the similar pleas against Asper, Schwarz and Wetenhall were struck.

(i) The corporate defendants

86 In para. 150, Lysko alleges that the "CFL, as employer, is liable" for the defamations by the individual defendants. The motions judge held, at para. 42 of her reasons that the allegations of defamation against the corporate defendants must be struck because Lysko failed to set out facts that would serve as a foundation for vicarious liability for the acts of the individuals. She also struck this paragraph as being frivolous, vexatious and an abuse of process.

(j) Analysis

(i) Identifying the defendant

87 This case raises an important issue for pleading defamation claims: whether or not the plaintiff can plead that the person who is alleged to have made the defamatory statements is a member of a class of persons who may have made the statements. This case also raises the application of rule 5.02(2)(c), which allows a plaintiff to join two or more persons as defendants where "there is a doubt as to the person or persons from whom the plaintiff ... is entitled to relief." The motions judge struck out many of the defamation claims because the appellant was unable to identify who allegedly made the defamatory statements.

88 For example, the motions judge struck out paras. 158 to 164 of the statement of claim. The appellant alleged that the defamatory remarks were made by "one or more" of the four Governors who were in favour of terminating his employment. These four were Braley, Asper, Schwartz and Wetenhall and are referred to in this part of the claim as "the Unidentified Source". The appellant alleges that the Unidentified Source disseminated false information to two broadcast journalists. The dates and occasions when these falsehoods were stated are not identified nor are the exact words set out.

89 The motions judge held at para. 10 that, "it is not sufficient to plead that the defendant is a member of a class, however defined, and that an unidentified member of the class committed a tort against the plaintiff."

90 Publication by the defendant is an essential element of a defamation action and any person

who participates in the publication of the defamatory expression in furtherance of a common design will be liable to the plaintiff. See *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 75-76. The appellant, however, does not allege that the four members of the Unidentified Source were acting in concert, only that they shared the common goal of his removal as commissioner.

91 Both courts and leading authors on the law of defamation repeatedly state that pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts. A summary of the necessary material facts to allege a complete cause of action for defamation is found in Patrick Milmo and W.V.H. Rogers, ed., *Gatley on Libel and Slander* 10th ed. (London: Sweet & Maxwell Limited, 2003) at 806:

> *These facts are the publication by the defendant*, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these facts by those to whom the words were published, and, where the words are slander not actionable *per se*, any additional facts making them actionable, such as that they were calculated to disparage the plaintiff in an office held by him or that they have caused special damage. [Emphasis added.]

92 Since the appellant has not pleaded which of the members of the Unidentified Source published the defamatory words, there would seem to be a fatal defect in the pleading. The appellant has offered no authority that would permit him to plead defamation against an unidentified source. Instead, the appellant relies upon rule 5.02(c), which provides as follows:

> Two or more persons may be joined as defendants or respondents where,
>
> (c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief[.]

93 In my view, this rule does not assist the appellant. It is a rule regarding joinder of parties not pleading. The appellant must still plead a *prima facie* case of defamation against the defendant. While some recent decisions suggest that the rules of pleading in defamation cases can be relaxed in certain circumstances, those decisions still insist that at a minimum, the pleading allege a *prima facie* case against the defendant. For example, in *Paquette v. Cruji* (1979), 26 O.R. (2d) 294 (H.C.J.), Grange J. had to consider a pleading in a defamation case. He held at p. 296 that there are "limitations to the strictness of pleading" in defamation cases and that the courts "have always refused to strike out a claim where the plaintiff has revealed all the particulars in his possession and has set forth a *prima facie* case in his pleading." At p. 297 he applied this rule to the case before him:

> The plaintiff maintains he was slandered by the defendant by communication to

> persons unknown (but associated with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. He has stated everything he knows. *If he proves the facts pleaded he will have established a prima facie case*. The law will always protect a defendant from a frivolous action but *it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant*. [Emphasis added.]

94 In this case, if the appellant proves the facts pleaded, he will not have made out a *prima facie* case. Proving that one or more of a group of four people, not alleged to be acting in concert and not alleged to otherwise to be responsible for each other's actions, defamed the plaintiff, does not make out a case against any of them. Absent proof of vicarious liability or actions in concert, we do not make individuals liable for the anonymous acts of others.

95 The appellant also relied upon *Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575 (Gen. Div.) where Lane J. also suggested the need to relax the rules of pleadings in defamation cases in some circumstances. Lane J. insisted, however, that the plaintiff must show

> * that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience; [and]
> * that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff (p. 583).

96 As I have said, the appellant has not pleaded facts upon which to base a *prima facie* case nor a coherent body of fact showing a defamatory utterance emanating from the defendants. The cases that have considered the matter appear to uniformly require the plaintiff to identify the defendant alleged to have published the defamatory comments. See for example: *Cassagnol v. Pickering Automobiles Inc.*, [2001] O.J. No. 4117 (Sup. Ct. J.) at paras. 7 and 12; *Craig v. Langley Citizen's Coalition*, [2003] B.C.J. No. 141 (S.C.) at paras. 16-19 and *Lana International, supra.*

97 Accordingly, I agree with the motions judge's decision to strike out paras. 158 to 164. For similar reasons, para. 153(k), which alleges that "one of more of the Governors, believed to be either Asper, Bauer, Braley, Schwarz or the Defendant Robert Wetenhall, who was Governor on behalf of the Montreal Alouettes, communicated false information to the media about Lysko's performance as further described below under the heading of injurious falsehood" must be struck out. Since these paragraphs contain the only defamation allegations against Wetenhall, the claim of defamation was properly struck against him. While the paragraph also includes Bauer, no allegedly defamatory statements are thereafter attributed to him and the appellant concedes that Bauer's name

should not have been included in this paragraph. It follows that this paragraph was properly struck out in its entirety.

98 These reasons also apply to para. 153(e), which alleges that "a representative of the Winnipeg Blue Bombers, identity unknown, but believed to be Asper or Bauer" falsely stated to members of the media, including a named member of the media, that disbursements to the teams would be down from what Lysko had promised. That paragraph was properly struck out.

(ii) Failure to allege the exact words complained of

99 The motions judge struck out many of the defamation allegations because they failed to set out the words complained of. The following paragraphs (or parts of paragraphs) were struck for this reason:

* Paragraph 153(b) (third allegation): "Schwarz stated that Lysko had caused more harm to the CFL than anyone else that Schwarz had encountered."
* Paragraph 153(d): "Schwarz stated ... that Lysko's continuing as league commissioner would have a horrendous effect on the CFL. Schwarz said on March 13, 2002, that Lysko was not good for the league."
* Paragraph 153(f): "Grant publicly lent credence to defamatory statements made to the media by other members of the Board of Governors, further described below".
* Paragraph 153(g): "Asper and Bauer stated ... that their football club, the Winnipeg Blue Bombers, received only $650,000.00 as distribution from the league office, thus significantly understating the distribution level achieved by Lysko."
* Paragraph 153(h): "... Asper and Bauer stated ... that the Winnipeg Blue Bombers had received $930,000 in distributions the year before, despite their knowledge, as revealed by Lysko's preliminary report and the Forensic Audit, conducted in early 2001, that this figure had been shown to be false."
* Paragraph 153(i): "Bauer stated falsely ... that Lysko did not engage in discussions with CFL member clubs about distribution levels".
* Paragraph 153(j): "Bauer suggested that Lysko was not honest about league distributions".

100 The difficulty faced by the appellant in this case is that he believes defamatory comments were made about him to the media because of what is contained in the media accounts. He does not, however, except in some limited cases, know exactly what the defendants said to the media.

101 It would seem that under some of the older, stricter authorities, these pleadings were properly struck out on the theory that the actual words spoken are not merely evidence, but material facts. In my view, however, the strict rules requiring that the exact words be pleaded no longer represents the

law in this province. In the two decisions referred to above, *Paquette, supra*, and *Magnotta Winery, supra*, Grange J. and Lane J. respectively, have adopted a more nuanced approach, in circumstances such as these, where the plaintiff is unable to state the precise words with certainty. I agree with Lane J.'s summary of the applicable principles in *Magnotta Winery* at pp. 583-84:

> On these authorities, it is open to the court in a limited set of circumstances to permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. The plaintiff must show:
>
> - that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
> - that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
> - that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff;
> - that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

102 This modern rule is summarized by Raymond E. Brown in *The Law of Defamation in Canada* 2nd ed. (looseleaf, updated 1999) (Toronto: Carswell, 1994) at s. 19.3(2)(a)(i):

> The more modern rule is to permit a plaintiff to plead and prove words that are substantially but not precisely the same as those words which were spoken. It is not necessary for the plaintiff to plead or allege verbatim the exact words; it is sufficient if they are set out with reasonable certainty. Not every word must be proved if the variance or omission does not substantially alter the sense of the meaning of the words set out in the pleading. The test is whether the claim is sufficiently clear to enable the defendant to plead to it. The words must be pleaded with sufficient particularity to enable the defendant to understand whether the words have the meaning as alleged or some other meaning, and to enter whatever defences are appropriate in light of that meaning. It is impossible to require absolute precision in the pleading of oral communications; it is

> sufficient if there is certainty as to what was charged. If the words proved are substantially to the same effect as those used in the pleading, the pleading should stand. [Footnotes omitted.]

103 The motions judge did not refer to these more recent authorities. In my view, she erred in principle in taking an overly strict view of the requirement of pleading the exact words with respect to paras. 153(b), (d), (g), (h), (i) and (j). The words in these paragraphs were pleaded with sufficient particularity to enable the defendants to understand whether the words alleged are defamatory and to enter any defences.

104 Paragraph 153(f) raises a different problem and, in my view, was properly struck out. That paragraph alleges that, "Grant publicly lent credence to defamatory statements made to the media by other members of the Board of Governors, further described below." In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 176 Cory J. held as follows:

> It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, *and a third approves what is written, they all have made the defamatory libel*. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. [Emphasis added.]

105 Thus, by lending credence to defamatory comments by others, Grant could be liable to the appellant. The difficulty is that the appellant failed to identify any facts from which it could be inferred that Grant lent credence to the defamatory comments made by others. I would not give leave to amend para. 153(f). The appellant does not suggest that he can provide further particulars of the words complained of.

106 The motions judge struck out paragraph 152(e). That paragraph provides as follows:

> On or about November 21, 2001, Winnipeg Blue Bombers President and C.E.O. Lyle Bauer ("Bauer"), spoke to members of the Canadian media including Scott Taylor of the Winnipeg Free Press and compared Lysko to the notoriously evil fictional character Lord Voldemort. The plain and ordinary meaning of these words is the Lysko was evil.

107 The motions judge struck out this paragraph for the reason that:

> There is no plea of the words alleged to have been published. It is not a tort to make comparisons. In a claim for libel or slander, the cause of action is the words. In the absence of a plea of the words alleged to have been published, no cause of action is made out (para. 27).

108 In *Botiuk, supra*, at para. 62, Cory J. provided the following definition of defamatory meaning:

> For the purposes of these reasons, it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067 at 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1994), R.E. Brown stated the following at p. 1-15:
>
>> [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.

109 In my view, the motions judge took too technical an approach to para. 152(e). Comparing the appellant unfavourably to a notoriously evil, albeit fictional, figure would tend to expose him to contempt or ridicule. It would seem to me that Lord Voldemort, the villain from the immensely popular Harry Potter stories, is sufficiently well known in the community that ordinary persons without special knowledge would take a defamatory meaning from the comparison. However, the appellant should be required to provide particulars of the way in which Bauer allegedly made the comparison to make the defamatory meaning clear. I would strike the paragraph with leave to amend to correct this deficiency.

110 The motions judge struck the first sentence of para. 153(a) because there was no plea of the words complained of. The sentence provides as follows:

> On or about March 9, 2002, Toronto Argonaut owner, Sherwood Schwarz stated to members of the Canadian media including Bruce Arthur of the National Post that Lysko was a person of questionable integrity and that the CFL had just cause to dismiss him.

111 In my view, this allegation is capable of meeting the modern test. Since, however, there is no allegation that the words actually spoken were that the appellant "was of questionable integrity", the appellant must provide sufficient particulars to enable Schwarz "to understand whether the words have the meaning as alleged or some other meaning, and to enter whatever defences are appropriate

in light of that meaning": Brown, *supra*, at s-s. 19.3(2)(a)(i).

(iii) Failure to allege to whom the defamatory comments were made

112 The motions judge struck out several paragraphs because the appellant had failed to allege to whom the defamatory comments were made, for example, the second and third allegations contained in para. 153(b). The relevant part of the paragraph reads as follows:

> On the same day [March 9, 2002], speaking to other media, Schwarz stated that Lysko was "off the wall". On the same day, speaking to other media, Schwarz stated that Lysko had caused more harm to the CFL than anyone else that Schwarz had encountered.

113 In *Paquette, supra*, at p. 296, Grange J. held that the defendant is entitled "to be told the names of the person or persons to whom the slander was uttered". However, he qualified this proposition where the plaintiff has revealed all the particulars in his possession and has set forth a *prima facie* in his pleading. The appellant has not claimed that he has revealed all the particulars in his possession. To the contrary, he says that the motions judge misapprehended a concession he made in oral argument. The relevant part of the appellant's factum, para. 9, is as follows:

> During argument before the motions judge about the defamation claims, counsel for the McDowell Defendants suggested that the plaintiff should have submitted an affidavit that he had provided all particulars in his possession concerning the words complained of. The motions judge then invited plaintiff's counsel to state whether all particulars had been pleaded. Plaintiff's counsel answered in the affirmative, believing this to relate to the words complained of. In her reasons, the motions judge expanded this statement to encompass the entire claim:
>
> Counsel for the plaintiff stated in argument that all of the material facts within the plaintiff's possession in support of the various named causes of action have been pleaded.

114 As presently written, these quoted parts of para. 153(b) cannot stand. However, I would give the appellant leave to amend to allege the names of the person or persons to whom the words were uttered. It may be that the appellant intended to refer to Dan Ralph and Damien Cox who are referred to earlier in the same paragraph. If so, this should be made explicit.

(iv) Not capable of defamatory meaning

115 The motions judge struck out the first allegation in paragraph 153(b) because it was not capable of a defamatory meaning.

> On or about the same day [March 9, 2002] Schwarz spoke to other media persons, including Dan Ralph of the Canadian Press and Damien Cox of the Toronto Star. He said that Lysko "disqualified himself from being able to continue in the Office of commissioner." ... The plain and ordinary meaning of these words is that Lysko was unqualified in his position and harmful to the league he was employed to serve and that he had acted indiscriminately.

116 It would appear that the motions judge was of the view that this passage could only have a defamatory meaning as a true innuendo. Accordingly, at para. 31 of her reasons, the motions judge struck the statement as the appellant had not pleaded "the facts giving rise to the words being understood to have the meaning in the innuendo pleaded." See *Laufer v. Bucklaschuk* (1999), 181 D.L.R. (4th) 83 (Man. C.A.) at para. 24. In *Mantini v. Smith Lyons LLP (No. 2)* (2003), 64 O.R. (3d) 516 (C.A.) at para. 10, Catzman J.A. speaking for the court approved of the following summary of principles by Lane J. in *Hodgson v. Canadian Newspapers Co.* (1998), 39 O.R. (3d) 235 (Gen. Div.) at 252-53, respecting whether allegedly libellous words are capable of a defamatory meaning:

> It is a question of law whether any imputation contained in the words complained of is capable of being defamatory.
>
> ...
>
> In deciding whether the words are capable of a defamatory meaning the trial judge will construe the words according to the meaning they would be given by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them.
>
> ...
>
> To determine the natural and ordinary meaning of the words it is necessary to take into account the context in which the words were used and the mode of publication.
>
> ...
>
> The natural and ordinary meaning of the words is to be determined according to the fair and natural meaning in which reasonable persons with the ordinary

> person's general knowledge and experience of worldly affairs, would be likely to understand them in the context in which they were used.
>
> The test to be applied by the court is whether the words complained of, in their natural and ordinary meaning, determined in accordance with the principles stated above, may tend to lower the plaintiff in the estimation of reasonable persons or to expose the plaintiff to hatred, contempt or ridicule.
>
> [Authorities and citations omitted.]

117 While the determination of whether the words pleaded are capable of bearing the defamatory meaning is a question of law, in order to strike the claim, it must be plain and obvious that the claim cannot succeed. In my view, it is not plain and obvious. The impugned words may be reasonably capable of the plain and ordinary meaning pleaded. Given the context, a flurry of media attention just prior to the appellant's termination as commissioner halfway through his contract, the words might tend to lower the appellant in the estimation of a reasonable person. Such a finding does not depend on a pleading of a true innuendo. The motions judge erred in striking out this part of the pleading.

118 The motions judge struck out para. 153(g) and (h) because the appellant had not pleaded the exact words. I have held that the motions judge erred in striking the paragraphs for that reason. Asper and Bauer, the targets of this allegation, submit that in any event, the words are not capable of a defamatory meaning. In these paragraphs, the appellant alleges that Asper and Bauer told named members of the media that their football club:

> ... received only $650,000 as distribution from the league office, thus significantly understating the distribution level achieved by Lysko. The plain and ordinary meaning of these words is that Lysko was incompetent in raising revenues and making distributions that were expected by the member clubs;
>
> ... received $930,000.00 in distributions the year before, despite their knowledge, as revealed by Lysko's preliminary report and the Forensic Audit, conducted in early 2001, that this figure had been shown to be false;

119 I agree with Asper and Bauer. In their plain and ordinary meaning, the words are not reasonably capable of having a defamatory meaning. Since the appellant has not pleaded a legal innuendo nor the facts that would support a legal innuendo, this paragraph must be struck out. See *Hodgson, supra*, at 250.

120 In my view, the same must be said about para. 153(i) where the appellant alleges that, "Bauer

stated falsely ... that Lysko did not engage in discussions with CFL member clubs about distribution levels." Without special knowledge, an ordinary person could not take a defamatory meaning from this statement. The appellant would have to plead this allegation as a legal innuendo. He would also have to plead extrinsic facts known to people exposed to the statement, such as the nature of the relationship between the commissioner and the member clubs. He has not done so in para. 153(i) or, so far as I can tell, in any other part of this prolix statement of claim.

121 Paragraphs 153(g), (h) and (i) were properly struck out.

(v) Liability of the CFL

122 The motions judge struck out para. 150 because it did not identify the person who made the publications. That paragraph, which immediately follows the heading "Defamatory Comments by the Defendants," reads as follows:

> From time to time, certain of the Defendants by letter, fax, spoken word or other communication injured Lysko's reputation and further interfered with his ability to carry out the terms of his contract of employment. The CFL, as employer, is liable for the said defamation of Lysko.

I agree with the holding of the motions judge and, in my view, there is another fundamental problem with the paragraph.

123 It would seem that the paragraph attempts to render the member clubs liable for the defamatory statements of the governors. In para. 13, the appellant states, in part:

> The CFL Corporate Defendants comprise the CFL, and together they comprised the Plaintiff's employer, as described below.

124 Pleading that the CFL, as employer, is liable for the defamation is not sufficient. A principal can be liable for defamatory comments by its agent if the agent was acting within the scope of the agency at the time of the publication. Similarly, an employer can be vicariously liable for the defamatory expression of an employee acting within the scope of his employment.

125 Alternatively, a corporation may be liable for publication by its operating mind. Paragraph 150 is not sufficient to plead any of these bases for liability. This paragraph, and para. 3 insofar as they relate to the CFL Corporate Defendants, were properly struck out. I agree with the reasons of the motions judge at para. 42 with respect to vicariously liability of the corporate defendants:

> In respect of those paragraphs pleading defamation that are not to be struck out, there is no allegation that the words complained of were published or authorized to be published by the corporate defendants. Any liability attaching to them must therefore arise vicariously in connection with the actions of individuals. The

> pleader has not, however, set out facts which would serve as a sufficient foundation upon which liability could attach to one or more of the corporate defendants for the acts of individuals.

126 The defamation claims against the corporate defendants were properly struck out.

(vi) Miscellaneous issues re defamation

127 The motions judge struck paras. 152(a) and (c) with leave to amend. I agree with that decision and I did not understand this part of the ruling to be in issue.

128 Paragraphs 166 to 169 of the statement of claim set out general allegations about the defamation claims. The motions judge struck out these paragraphs because they offended the requirements of rule 25.06. The paragraphs in issue provide as follows:

> 166. The words complained of injured Lysko's reputation in his trade and calling. They were calculated to bring him into hatred and ridicule. They were actuated by malice.
> 167. The words complained of have lowered Lysko in the eyes of the community and caused him personal anguish and torment.
> 168. In particular, the makers of the words complained of took advantage of Lysko's position as commissioner and inability to fight back without harming the very league which he was duty bound to protect.
> 169. The makers of the words complained of, and other representatives of the league and member clubs, have subsequently re-published the defamatory statements in various contexts, and they continue to do so.

129 I agree that para. 168 was properly struck. I also agree that para. 169 must be struck, as it is too vague. Further, to the extent that the appellant is alleging publication by persons other than the initial publisher, para. 169 ignores the general rule that the initial publisher is not liable for damage caused by the republication of his defamatory statement unless the initial publication falls under an exception to the rule and that exception is specifically pleaded. See *Jordon v. Talbot*, [1988] O.J. No. 1876 (Gen. Div.) at para. 3. I can see no reason for striking paras. 166 and 167.

(6) Injurious falsehood [paras. 154 to 162 of the claim; paras. 8 to 11, 15 to 18, and 62 of the Reasons for Judgment]

(a) The claim

130 The claims for injurious falsehood and contractual interference are set out in the same part of the statement of claim. The claim of injurious falsehood is founded on allegedly false statements made by the Unidentified Source, comprised of one or more of Braley, Asper, Schwarz and Wetenhall. These falsehoods are set out in para. 161. The statement of claim does not set out the

exact words used but alleges that the Unidentified Source made certain statements to the media. The statements included, for example, that Lysko failed to increase revenue for the CFL and that CFL sponsors had left or would be leaving the CFL because of Lysko. In para. 158, Lysko alleges that the Unidentified Source resolved to injure his reputation to create momentum for an "anti-Lysko sentiment" among the members of the Board of Governors and, thus, to injure Lysko. In para. 162, Lysko alleges that within a week of dissemination of the falsehoods, and as a direct result of the Governors' reaction to them, the Board terminated his employment.

131 Lysko claims against the corporate defendants and from Braley, Asper, Schwarz and Wetenhall, general, special, aggravated and punitive damages in the sum of $4.5 million for injurious falsehood, defamation and intentional interference with contractual relations. I have set out the defamation part of the claim above and will deal with the allegation of intentional interference with contractual relations below.

(b) The reasons of the motions judge

132 The motions judge struck out the claim of injurious falsehood against the individual defendants for the same reason that she struck out this part of the claim alleging defamation: it is not sufficient to plead that a defendant is a member of a class and that an unidentified member of the class committed a tort against the plaintiff. She also held that the claim failed against the corporate defendants. Since their liability depended on being vicariously liable for the acts of the individuals, and the claim was bad as against the individuals, it had to be struck against the corporations. She also held that in any event, no facts are pleaded that would establish a foundation for vicarious liability. These paragraphs of the claim were also struck for being frivolous, vexatious and an abuse of process.

(c) Analysis

(i) Injurious Falsehood

133 Brown summarizes the elements of the action for injurious falsehood at s. 28.1(1) as follows:

> Actions for injurious falsehood involve the publication of false statements, either orally or in writing, reflecting adversely on the plaintiff's business or property, or title to property, and so calculated as to induce persons not to deal with the plaintiff. There must be a showing that the published statements are untrue, that they were made maliciously, that is without just cause or excuse, and that the plaintiff suffered special damages.

134 Unlike the claim for defamation, the plaintiff "must plead and prove that the words were false, that they were actuated by malice, and that the plaintiff suffered special damages" (Brown, *supra*, at s. 28.1(1)). Section 17 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 provides that in

an action for malicious falsehood, it is not necessary to allege special damages "(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form."

135 While the appellant claims for special damages for injurious falsehood, he has not particularized the actual damages. Since he does not allege that the defendants published the wordings in writing or some other permanent form, s. 17 of the *Libel and Slander Act* does not relieve him of this requirement. As was pointed out in *Haines v. Australian Broadcasting Corp.* (1995), 43 N.S.W.L.R. 404 (c. L. Div.) at 408: "The importance of actual damage as an element of the tort of injurious falsehood is that, because the tort is not concerned with injury to either reputation or feelings, damages for injurious falsehood would appear to be restricted to the recovery of that actual damage" [citations omitted]. The essence of Lysko's allegation is that because of the actions of the defendants, potential future employers will be reluctant to hire him.

136 In para. 179 the appellant alleges that the actions of the defendants have rendered him "unemployable" and that the defendants' "public destruction of [his] reputation has destroyed his career and his ability to find any employment". Brown writes at s-s. 28.1(9) that "where the comment by its very nature is intended and is likely to produce a general loss of business, evidence of a general loss of business as distinct from the loss of known customers, is admissible as evidence of damage to a person's trade." It follows that it is unnecessary for plaintiffs to plead more specifically in such circumstances. In this case, however, the appellant has not alleged that the comments were intended and likely to produce a general loss of business or employer interest.

137 The appellant's pleading of injurious falsehood is inadequate for an additional reason. It would appear that the requirement of identifying the words constituting the slander in pleading injurious falsehood is similar to the requirement for defamation. However, the appellant's claims for injurious falsehood are all made against the Unidentified Source. Given the similarity between defamation and injurious falsehood, I can see no reason for distinguishing my holding relating to the necessity of pleading the identity of the defendant. Like the motions judge I would strike out the claims for injurious falsehood against Braley, Asper, Schwarz and Wetenhall and against the corporate defendants.

(7) Interference with contractual relations [paras. 154 to 165 of the claim, paras. 9 to 11, 13 and 14, 17 and 62 of the Reasons for Judgment]

(a) The claim

138 The paragraphs of the claim for interference with contractual relations overlap with those setting out the claims of injurious falsehood and further defamation. In para. 163, Lysko alleged that, "[t]he Unidentified Source was aware of Lysko's enforceable employment contract, and he or they wrongfully interfered with it, intending to cause its breach and thereby causing damage to Lysko."

(b) The reasons of the motions judge

139 For the same reasons that she struck the claim for injurious falsehood, the motions judge struck this claim. In addition, in para. 13 she held that the claim could not succeed against the individuals because there was no allegation that they were acting other than in the course and scope of their positions as Governors and in the best interests of the CFL, the members of which were alleged to be the appellant's employer.

140 As against the corporate defendants, the motions judge held in para. 14 that the plea must be struck because since the corporate defendants were the employer, and thus the contracting party, they could not be said to have interfered with their own contract.

141 I agree with the motions judge's decision to strike out the claim against the individual defendants on the basis that the appellant failed to identify the defendant. The rules of pleading for the tort of intentional interference with contractual relations are not as strict as those for pleading defamation. See *Carson v. William W. Creighton Centre* (1990), 73 O.R. (2d) 755 (Dist. Ct.) at 757-58. However, this is an intentional tort and the pleadings must contain several elements, including an intentional act on the part of the defendant to cause a breach of a contract and wrongful interference on the part of the defendant. See *Unisys Canada Inc. v. York Three Associates Inc. et al.* (2001), 150 O.A.C. 49 (C.A.) at para. 13.

142 As with the defamation and injurious falsehood allegations, the appellant relies upon rule 5.02(2)(b) that, it will be recalled, allows a plaintiff to join two or more persons as defendants where "there is a doubt as to the person or persons from whom the plaintiff ... is entitled to relief". The appellant offers the following analogy. Through the negligence of someone in the operating room, a surgical instrument has been left in his body. As the plaintiff has no way of knowing who of all the physicians and nurses present left the instrument in his body he will join all those present in the action.

143 In my view, the analogy, although intriguing, is not apt. First, as I have said earlier, rule 5.02(2)(b) concerns joinder not pleadings. It would seem to me that the plaintiff would still have to plead that each of the persons joined in the action were negligent.

144 Second, whatever may be the case with a negligence action, since the tort of intentional interference with contractual relations requires proof of intentional and unlawful acts by the defendant, the plaintiff must be able to identify the defendant who committed those unlawful acts. The defendants in this case would be hard pressed to plead to the claim in this case. The intentional unlawful acts alleged in this case are set out in para. 161 of the statement of claim and consist of 23 different falsehoods. The occasions on which the alleged falsehoods were uttered and to whom they were uttered are not specified. It seems to me that the holding in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), although made in relation to conspiracy, should apply to intentional interference with contractual relations. At p. 104 of his reasons, Finlayson J.A. approved of the following statement from Bullen, Leake and Jacob's *Precedents of*

Pleadings, 12th ed. (London: Sweet & Maxwell, 1975):

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and *it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators* in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby. [Emphasis added.]

145 It would be unfair to require the four individuals, one or more of whom are said to be the unidentified source of these falsehoods, to plead to this claim. The claim for intentional interference with contractual relations against the individuals was properly struck out on this basis. Accordingly, I need not consider the other grounds upon which the motions judge struck out the claim against the individuals.

146 As against the corporate defendants, the motions judge held at para. 14 that as "they are collectively the contracting party and while they can breach the contract, they cannot be said to have interfered with it." I agree that the claim was properly struck out against the corporate defendants for the following reasons.

147 First, the appellant has not pleaded any facts that would make the corporate defendants liable for the acts of the Unidentified Source.[2] Second, the appellant's own pleading in para. 13, that the corporate defendants "together ... comprised the Plaintiff's employer" defeats his claim. As held by the motions judge, the contracting parties can be liable for breach of contract but not for intentional interference with the contract. See *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.) at 106.

(8) Costs

148 The motions judge awarded costs to the defendants on a partial indemnity basis on the theory that all the defendants were almost wholly successful even if some parts of the claim survived the motions. She awarded costs as follows:

Wetenhall	$8,500 [This was an agreed amount]
Schwarz et al.	$47,482 [represented by the same counsel]
Braley and Campbell	$34,942 [represented by the same counsel]
Asper and Bauer	$11,140 [represented by the same counsel]

149 The appellant seeks leave to appeal the costs award arguing that the costs order is inconsistent with this court's decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291. Irrespective of the impact of *Boucher* on this case, it can no longer be said that all of the defendants, other than Wetenhall and Grant, were largely successful. Accordingly, the parties, other than Wetenhall and Grant, may submit brief submissions respecting costs of the motion. The parties may also submit brief submissions respecting costs of the appeal. As Wetenhall was wholly successful on the appeal he should submit his bills of costs and brief submissions within ten days of release of the amended reasons. The appellant will have ten days to respond. Wetenhall may file a brief reply within five days. Asper was also wholly successful on the appeal. He is represented by Mr. Freiman, who also represents Bauer. Mr. Freiman and the appellant may make submissions with respect to Asper and Bauer on the same timetable as submissions on behalf of Wetenhall. Grant was also wholly successful on appeal. He is represented by Mr. Field and Mr. Green who also represent most of the other individual respondents and the corporate respondents. In respect of Mr. Grant and the other respondents, the appellant will serve and file his submissions and bills of costs for the motions and appeal within ten days of release of these amended reasons. The respondents will serve and file their submissions and bills of costs for the motions and appeal within ten days. The appellant may serve and file a brief reply within five days. There will be no costs order for or against Gutsche.

DISPOSITION

150 To conclude, I would allow the appeal in part and allow the following claims to proceed, in addition to those that the motions judge would permit to proceed:

The corporate defendants:[3]	Negligent misrepresentation including misrepresentation by omission.
Lyle Bauer:	Defamation paras. 152(e) and 153(j).
David Braley:	Negligent misrepresentation including misrepresentation by omission.
Sherwood Schwarz:	Defamation paras. 153(a), (b) and (d).

John Tory:	Negligent misrepresentation in paras. 44 and 46 (but not misrepresentation by omission).
David MacDonald:	Negligent misrepresentation including misrepresentation by omission.
Hugh Campbell:	Negligent misrepresentation including misrepresentation by omission.
Bob Ellard:	Negligent misrepresentation including misrepresentation by omission.

I would dismiss the appeal as against George Grant, David Asper and Robert Wetenhall. While Sig Gutsche is referred to as a respondent, the motion judge did not strike the only paragraphs that relate to him and there was no cross-appeal. Thus, no order is required with respect to Mr. Gutsche. As I have indicated, I agree with the motions judge that the claim should be struck out with leave to amend in accordance with these reasons and those reasons of the motions judge permitting certain of the claims to proceed.

151 The parties should make their costs submissions in accordance with para. 149 of these reasons.

M. ROSENBERG J.A.
J.I. LASKIN J.A. -- I agree.
H.S. LaFORME J.A. -- I agree.

1 The motions judge dismissed the claim against Giles and there is no appeal from that order.

2 Unlike the case with defamation where at para. 150 the appellant alleged that, "The CFL, as employer, is liable for the said defamation of Lysko." I have held that this paragraph was properly struck out for reasons set out above. But, there is, in any event, no comparable pleading relating to either injurious falsehood or intentional interference with contractual relations.

3 Except The Hamilton Tiger Cats and The Toronto Argonauts since the action has been stayed against them.