

Court File No.: CV-22-00683933-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**ROCCO GALATI**

Plaintiff

- and -

**SHARON GREENE, THE DIRECTOR OF INTAKE AND RESOLUTION,  
THE LAW SOCIETY OF ONTARIO (“LSO”)**

Defendants

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**FACTUM OF THE DEFENDANTS / MOVING PARTIES  
(Motion returnable September 21, 2023)**

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June 30, 2023

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## **PART I - OVERVIEW**

1. The Plaintiff, Rocco Galati, is a lawyer licensed by the Law Society of Ontario (“LSO”). The Plaintiff has sued the LSO and two of its staff members for damages in connection with its response to various complaints made against him. The Plaintiff has also challenged the constitutionality of a provision of the *Law Society Act* (the “LSA”) authorizing LSO investigations.

2. In his Statement of Claim, the Plaintiff pleads that he and one of his associates have been the subject of nine complaints to the LSO over the past two years. Eight of the complaints were against the Plaintiff and one was against his associate.

3. With respect to six of the nine complaints, the LSO closed their file without requiring a response. The Plaintiff pleads that the LSO required him to respond to three complaints. The Plaintiff further pleads that eight of the nine complaints have been dismissed.

4. The Plaintiff’s claim challenges decisions by the LSO to notify him of the nine complaints against him, and to require a response in respect of three complaints. The Plaintiff claims that he suffered damages as a result of the LSO’s conduct in notifying him of the complaints and, in three instances, requiring him to respond.

5. The Plaintiff claims \$500,000.00 in damages. He has pleaded numerous causes of action: conspiracy, abuse of process, interference with economic interest, breach of fiduciary duty, negligence, negligent investigation, intimidation, and breach of sections 7 and 15 of the *Charter of Rights and Freedoms* (“*Charter*”). The Plaintiff has also challenged the constitutionality of section 49.3 of the *LSA* based on sections 7 and 8 of the *Charter*.

6. The Plaintiff’s claim should be struck without leave to amend on the following grounds, alone or taken together:

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- (a) The elements of each cause of action are not adequately pleaded, such that the claim discloses no reasonable cause of action and should be struck pursuant to Rule 21.01(1)(b);
- (b) The claim fails to plead material facts, required under Rule 25.06(1);
- (c) The claim is barred by section 9 of the *LSA* which immunizes the LSO from liability for actions taken in good faith. In respect of each cause of action, the claim fails to adequately plead bad faith, and/or fails to plead full particulars of bad faith required under Rule 25.06(8), such that the claim is barred; and
- (d) The claim is scandalous, frivolous or vexatious, pursuant to Rule 25.11(b).

7. Following the delivery of the Defendants' motion to strike, the Plaintiff sought to file an Amended Statement of Claim. This is not permitted. The motion is to be determined based on the original Statement of Claim. The Amended Statement of Claim is relevant to the question of whether leave to amend should be granted, if some or all of the original claim is struck.

8. The Defendants submit that the amended Statement of Claim fails to cure the deficiencies in the original claim. The claim should therefore be struck without leave to amend.

## **PART II - THE FACTS**

### **A. Statement of Claim**

9. The Plaintiff is a senior lawyer practicing in Toronto. He was called to the bar in 1989.<sup>1</sup>

10. The Defendant, LSO, is statutorily charged with the regulation of lawyers in Ontario under the *LSA*. The Defendant, Sharon Greene, is an Intake and Resolution Counsel with the LSO. The

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<sup>1</sup> Statement of Claim, para 2.

Defendant, the Director of Intake and Resolution, is an employee of the LSO.<sup>2</sup> The Defendants in this action are collectively referred to as the “LSO Defendants”.

11. The Plaintiff has been the subject of complaints to the LSO throughout his career. This has included nine complaints against the Plaintiff and one of his associates since the commencement of the COVID-19 pandemic. These complaints relate to proceedings brought by the Plaintiff’s firm in connection with the COVID-19 pandemic.<sup>3</sup>

12. Of the nine complaints, eight were dismissed. However, the LSO required the Plaintiff to respond to three of the complaints.<sup>4</sup> The nine complaints were brought between December 2020 and February 2022.<sup>5</sup>

13. One of the nine complaints was brought by a non-client named Donna Toews (the “Toews Complaint”). The LSO required the Plaintiff’s response to this complaint. The Plaintiff pleads that he was required to respond to the complaint “under threat of the powers in s. 49.3 of the *Law Society Act*.”<sup>6</sup>

14. The Plaintiff attached his response to the LSO in respect of the Toews Complaint at Schedule “A” to his Statement of Claim.<sup>7</sup>

15. The Plaintiff commenced a civil claim against Ms. Toews and others who allegedly conspired with Ms. Toews. The Statement of Claim in the related action, Court File No. CV-22-00683322-00, is attached at Schedule “B” to the Statement of Claim (the “Related Claim”).<sup>8</sup>

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<sup>2</sup> Statement of Claim, paras 9-11.

<sup>3</sup> Statement of Claim, paras 16-19.

<sup>4</sup> Statement of Claim, para 20.

<sup>5</sup> Statement of Claim, para 21.

<sup>6</sup> Statement of Claim, para 24.

<sup>7</sup> Statement of Claim, para 24 and Schedule “A”.

<sup>8</sup> Statement of Claim, para 25 and Schedule “B”.

16. Broadly stated, the events giving rise to the Related Claim concern a lawsuit the Plaintiff brought in British Columbia challenging COVID-19 measures. The Plaintiff's clients in that lawsuit included Action4Canada and others. Ms. Toews, a non-client, filed a complaint to the LSO alleging, among other things, that she donated to the lawsuit and that the Plaintiff "misled" her and "failed to act with integrity". The Plaintiff pleads that Ms. Toews was directed and encouraged by others, notably Kipling Warner, and that she parroted defamatory remarks made by others whom the Plaintiff named as co-defendants in the Related Claim.<sup>9</sup>

17. The allegations against the LSO Defendants in this claim relate to the Plaintiff's allegations against non-party defendants in the Related Claim. The Plaintiff pleads the following torts:

(a) *Conspiracy*: In alleging conspiracy, the Plaintiff refers to conduct by the defendants in the Related Claim, and asserts that the LSO "jumped on a co-conspirator bandwagon" and "joined the actionable conspiracy" by forwarding the complaint to the Plaintiff;<sup>10</sup>

(b) *Abuse of process*: In alleging abuse of process, the Plaintiff pleads that the defendants in the Related Claim committed an actionable abuse of process, and the LSO Defendants "magnified and augmented" that abuse of process by "putting the Plaintiff through the process of a response";<sup>11</sup>

(c) *Interference with economic interest*: The Plaintiff states that the defendants in the Related Claim committed the tort of "interfering with economic interest", and the LSO Defendants "augmented this interference";<sup>12</sup>

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<sup>9</sup> Statement of Claim, paras 27-58.

<sup>10</sup> Statement of Claim, paras 59-62.

<sup>11</sup> Statement of Claim, paras 63-66.

<sup>12</sup> Statement of Claim, paras 67-68.

(d) *Breach of fiduciary duty*: The Plaintiff alleges that the LSO owed him a fiduciary duty and breached that duty through its decisions to notify him of complaints and (in some cases) require him to respond;<sup>13</sup>

(e) *Negligence / negligent investigation*: The Plaintiff alleges that the LSO Defendants owed him a duty of care and breached the applicable standard of care for a “reasonable investigator” giving rise to damages;<sup>14</sup>

(f) *Intimidation*: The Plaintiff alleges that the LSO Defendants committed the tort of intimidation. The Plaintiff states that the tort of intimidation is “most evident in the three (3) complaints the Plaintiff was required to respond to, which he should not have been required to respond to, but is further evident in his being notified of six other complaints upon which the LSO did not act upon”;<sup>15</sup>

(g) *Breach of sections 7 and 15 of the Charter*: The Plaintiff pleads, in a single paragraph, that the LSO Defendants violated his sections 7 and 15 rights.<sup>16</sup> Although he does not identify a ground of discrimination, earlier in the claim, the Plaintiff pleads his “Calabrian, Jewish heritage” and that he has been the subject of racist and anti-Semitic complaints.<sup>17</sup>

18. In addition to his claims for damages, the Plaintiff also seeks a declaration that section 49.3 of the *LSA* infringes section 7 of the *Charter* (alleging interference with the solicitor-client

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<sup>13</sup> Statement of Claim, para 69.

<sup>14</sup> Statement of Claim, para 70.

<sup>15</sup> Statement of Claim, paras 71-73.

<sup>16</sup> Statement of Claim, para 74.

<sup>17</sup> Statement of Claim, paras 12-14.



relationship and privacy interests) and section 8 of the *Charter* (alleging unlawful search and seizure). The constitutional challenge is pleaded in three paragraphs towards the end of the claim.<sup>18</sup>

## **B. Motion to Strike**

19. The Defendants delivered their Notice of Motion on September 6, 2022.<sup>19</sup>

20. The motion sought, *inter alia*, an order striking out and/or dismissing the Statement of Claim, without leave to amend, on the basis of Rule 21.01(1)(b) (no reasonable cause of action), section 9 of the *LSA* (statutory immunity clause), Rule 25.06(8) (requirement to plead full particulars in support of allegations of bad faith), Rule 25.06(1) (requirement to plead material facts), and Rule 25.11(b) (scandalous, frivolous or vexatious).

## **C. Proposed Amended Claim**

21. On October 9, 2022, the Plaintiff delivered a Proposed Amended Statement of Claim.<sup>20</sup>

22. Counsel for the LSO Defendants refused to consent to amendments to the Statement of Claim in the face of a pending motion to strike and took the position that the motion to strike should be determined based on the original Statement of Claim.<sup>21</sup>

23. The Plaintiff was apparently successful with the court clerk in filing the Amended Statement of Claim on October 26, 2022.<sup>22</sup>

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<sup>18</sup> Statement of Claim, paras 75-77.

<sup>19</sup> Plaintiff Motion Record, Tab 1.

<sup>20</sup> Proposed Amended Statement of Claim dated October 9, 2022 (Responding Motion Record, Tab 2).

<sup>21</sup> Responding Motion Record, Tab 4.

<sup>22</sup> Amended Statement of Claim issued October 26, 2022 (Responding Motion Record, Tab 6).

24. The LSO Defendants maintain their position that the motion to strike should be determined based on the original Statement of Claim, although the proposed Amended Statement of Claim may be relevant to the question of whether leave to amend should be granted.

25. The proposed amendments can be divided into two categories. First, the Plaintiff has made further attempts to plead bad faith throughout the claim.<sup>23</sup> Second, the Plaintiff has added an entirely new constitutional challenge to section 9 of the *LSA*, the statutory immunity clause, asserting that section 9 violates various sections of the constitution.<sup>24</sup>

### **PART III - ISSUES AND THE LAW**

26. This motion raises two issues:

- (a) Should the Plaintiff's Statement of Claim be struck, in whole or in part?
- (b) If so, should leave to amend be granted?

#### **A. General Legal Principles**

##### **i. Test under Rule 21.01**

27. The essential principles governing a motion to strike out a pleading as disclosing no reasonable cause of action are well-known. A pleading will be struck out if, assuming the facts pleaded to be true, it is plain and obvious that it discloses no reasonable cause action; that is, where it has no reasonable prospect of success.<sup>25</sup>

28. The Court of Appeal summarized principles applicable to a motion to strike as follows:

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<sup>23</sup> Amended Statement of Claim, paras 25A, 58A-58C, 61, 65, 69, 72, 73A, 73B.

<sup>24</sup> Amended Statement of Claim, paras 1, 73A.

<sup>25</sup> *Potis Holdings Ltd. v. The Law Society of Upper Canada*, [2019 ONCA 618](#), at para 18, citing: *R. v. Imperial Tobacco*, [2011 SCC 42](#), [2011] 3 S.C.R. 45, at para 17; *Hunt v. Carey Canada Inc.*, [1990 CanLII 90 \(SCC\)](#), [1990] 2 S.C.R. 959, at p 980.

- In the interests of efficiency and correct results, there is a need to weed out hopeless claims – this housekeeping dimension underlies rule 21.
- If the cause of action pleaded has been recognized, all of its essential elements must be pleaded.
- If the cause of action has not been recognized, this is not necessarily fatal. One must ask whether there is a reasonable prospect that the claim will succeed.
- The claim should not be struck merely because it is novel.
- Unless manifestly incapable of being proven, the facts pleaded are accepted as being true for the purposes of the motion.
- The pleading forms the basis of the motion; possible future facts that have not been pleaded may not supplement the pleading.
- No evidence is admissible on such a motion.
- The pleading must be read generously in favour of the plaintiff, with allowances for drafting deficiencies.
- A motion to strike should not be confused with a summary judgment motion which has a different test, a different purpose, and different rules relating to evidence.<sup>26</sup>

29. Although the court must accept as true the material facts as pleaded, this obligation does not extend to bald conclusory statements of fact, unsupported by material facts.<sup>27</sup>

**ii. Requirement for material facts and particulars of bad faith**

30. Rule 25.06(1) requires material facts in support of the claim:

25.06 (1) Every pleading shall 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.

31. Rule 25.06(8) requires “full particulars” in support of allegations of bad faith:

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be

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<sup>26</sup> *McCreight v. Canada (Attorney General)*, [2013 ONCA 483](#) at para [39](#); quoted in *Shaulov v. Law Society of Ontario*, [2022 ONSC 2732](#) at para [62](#), affirmed *Shaulov v. Law Society of Ontario*, [2023 ONCA 95](#) at para [11](#).

<sup>27</sup> *Shaulov v. Law Society of Ontario*, [2022 ONSC 2732](#) at para [63](#); quoting *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, [2013 ONCA 683](#) at para [31](#).

alleged as a fact without pleading the circumstances from which it is to be inferred.

**iii. Statutory immunity under the *Law Society Act***

32. Section 9 of the *LSA* creates statutory immunity for actions taken in good faith:

Liability of benchers, officers and employees

9 No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

33. The Defendants Sharon Greene and the Director of Intake and Discipline are each officials of the LSO and therefore protected by the immunity clause. In *Robson*, the Court of Appeal confirmed that the immunity clause extends to the Law Society itself (rejecting Mr. Robson's argument that section 9 applied only to Law Society officials, and not the Law Society itself).<sup>28</sup>

34. Taken together, section 9 of the *LSA* and Rule 25.06(8) of the *Rules* require that Plaintiff's claim against the LSO must not only plead bad faith, it must also contain full particulars in support of its allegations of bad faith, otherwise the claim is barred.

35. In *Potis Holdings*, the Court of Appeal upheld a motion judge's decision to strike a claim against, *inter alia*, the Law Society, confirming that pleading full particulars of bad faith pursuant to Rule 25.06(8) is necessary to overcome the immunity clause:

[23] Here, the unanswerable defence is that it is settled law that s. 9 of the *Law Society Act* provides the Law Society with statutory immunity from civil claims for damages for the exercise of statutory duties and powers made in good faith: *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, at paras. 14-17; *Robson v. Law Society of Upper Canada*, 2017 ONCA 468, 26 Admin. L.R. (6th) 133, at paras. 4-7; and

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<sup>28</sup> *Robson v. The Law Society of Upper Canada*, [2017 ONCA 468](#).

*Conway v. Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100, at paras. 21-22.

[24] While a claim against the Law Society alleging that it engaged in bad faith conduct may not be subject to the immunity provided by s. 9 of the *Law Society Act*, such a claim must still be pleaded with precision and with full particulars, as required by the Rules of Civil Procedure: *Conway*, at para. 39; r. 25.06(8).<sup>29</sup>

36. The often-cited case of *Deep v. Ontario* concerned a similar statutory immunity clause protecting the College of Physicians and Surgeons from liability for actions taken in good faith. In striking the claim, the Court commented on the requirements when pleading bad faith:

[64] Bad faith is a legal conclusion. It has been held to involve an allegation of an intent to deceive or to make someone believe what is false. It has been said to be equivalent to an allegation of dishonesty. Where a plaintiff's claim includes an allegation of bad faith, the pleading must be supported by sufficient particulars that support a legal conclusion of bad faith. If it does not, the pleading should be struck.<sup>30</sup>

37. The Court held that the plaintiff cannot merely “state legal conclusions unsupported by any particulars of the conduct of that constitutes bad faith.”<sup>31</sup>

38. In *Montgomery v. Seiden*, the Court similarly found that allegations of bad faith against the College of Physicians and Surgeons were bald allegations: “I agree that this lack of full particulars and failure to plead bad faith properly is contrary to Rule 25.06(8) and as such, the College is protected by the immunity of section 38.”<sup>32</sup>

39. In *Khanna v. Royal College of Dental Surgeons of Ontario*, the Court similarly dismissed “broad and blanket allegations of bad faith... and malice” as “conclusions” lacking adequate allegations of fact to support them: “In the result, the claim does not plead facts which, if true,

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<sup>29</sup> *Potis Holdings Ltd. v. The Law Society of Upper Canada*, [2019 ONCA 618](#) at paras [23-24](#).

<sup>30</sup> *Deep v. Ontario*, [2004 CanLII 14527](#) (ON SC), at para [64](#).

<sup>31</sup> *Deep v. Ontario*, [2004 CanLII 14527](#) (ON SC), at paras [66-67](#).

<sup>32</sup> *Montgomery v. Seiden*, [2012 ONSC 6235](#) at para [54](#).

would satisfy a necessary element of the cause of action advanced to the extent it is based upon alleged bad faith or malice.”<sup>33</sup>

## **B. No Viable Claim**

40. The Plaintiff’s claim discloses no reasonable cause of action. Each of the causes of action suffers from one or several of the following defects: failure to plead required elements of the tort or cause of action; failure to plead material facts; and failure to plead bad faith, and/or full particulars of bad faith. The following paragraphs will address each cause of action in turn.

### **i. Conspiracy (paras 59-62)**

41. The conspiracy claim is pleaded at paragraphs 59-62 of the Statement of Claim. The claim is primarily directed against non-party defendants to the Related Claim. The Plaintiff alleges that non-party defendants filed complaints against him with the goal “to undermine his solicitor-client relationship with his clients” and “to interfere with the Plaintiff’s economic interests with his clients” (para 59). As against the LSO Defendants, the Plaintiff alleges that they “joined” the conspiracy by forwarding the complaint to him:

61. The Plaintiff states that the Defendant, Sharon Greene, in the within statement of claim jumped on a co-conspirator bandwagon with Donna Toews, Kipling Warner, and CSASPP, which conspiracy should have been evident to the Defendant, Sharon Greene, if she had carefully read Donna Toews’ complaint form and attached documents, and if Shannon [sic] Greene conducted embryonic research and/or investigation of the complaint in a fair and reasonable manner.

62. The Plaintiff states that the LSO Defendants joined the actionable conspiracy against the Plaintiff when they adopted the complaint by forwarding the complaint and threatening the use of search and seizure powers under s. 49(3) of the *Law Society Act*.

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<sup>33</sup> *Khanna v. Royal College of Dental Surgeons of Ontario*, [1999 CanLII 14802](#) (ON SC).

42. The conspiracy claim is barred by section 9 of the *LSA*. The Plaintiff alleges that the LSO Defendants became part of the conspiracy because they failed to “carefully read” the complaint or conduct research or investigation “in a fair and reasonable manner”. Such allegations, even if they are proven, constitute allegations of negligence, not bad faith, and are statutorily barred.

43. The conspiracy claim also fails to plead material facts in support of the required elements of the tort, as set out in *Hunt v. Carey Canada Inc.*:<sup>34</sup>

(a) The claim does not adequately plead ‘predominant purpose conspiracy’. The LSO is not alleged to have combined with complainants with the predominant purpose of injuring the Plaintiff. Alternatively, insufficient material facts are pleaded in support of such an allegation. Full particulars are required in support of a pleading of predominant purpose conspiracy, since it amounts to an allegation of bad faith and

(b) The claim also does not adequately plead ‘unlawful means conspiracy’. The claim does not specify the ‘unlawful means’ being alleged, nor does it provide material facts in support of the LSO Defendants’ knowledge of harm, both of which are elements of the tort.

44. The allegation that the LSO Defendants are somehow liable for conspiracy on the basis that they forwarded complaints to the Plaintiff and, in some instances, required his response to the complaints, is a frivolous allegation and is bound to fail.

**ii. Abuse of process (paras 63-66)**

45. The abuse of process claim is pleaded at paragraphs 63-66. Once again, the primary target of this claim is non-parties to the action. In paragraphs 63-64, the Plaintiff alleges that non-parties

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<sup>34</sup> *Hunt v. Carey Canada Inc.*, [1990 CanLII 90 \(SCC\)](#), [1990] 2 SCR 959.

initiated complaints to the Law Society in bad faith and for improper purposes, thereby committing the tort of abuse of process.

46. As against the LSO Defendants, the Plaintiff pleads that they “magnified and augmented that actionable abuse of process and, that putting the Plaintiff through the process of a response, constitutes not only adding to the actionable abuse of process, but further is a separately actionable tort of abuse of process” (para 65). He further alleges that “the Law Society Defendants in the within action are further augmenting and inflicting mental anguish and distress” (para 66).

47. There is no cause of action for “magnifying” or “augmenting” or “adding to” an abuse of process committed by another party. On this basis, the abuse of process claim should be struck.

48. The tort of abuse of process, which may give rise to damages, is narrower than procedural fault abuse of process, which may give rise to remedies in the litigation. The elements were set out in *Harris v. Glaxosmithkline Inc.*: (1) the plaintiff must be a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted.<sup>35</sup>

49. The Plaintiff has failed to adequately plead the elements of the tort against the non-parties in the Related Claim, let alone against the LSO Defendants. The Plaintiff appears to implicitly concede that the LSO Defendants have not themselves committed abuse of process, through his suggestion that they, instead, “augmented” or “magnified” an abuse of process committed by others. The abuse of process claim also lacks particulars of bad faith required under the *Rules* and is therefore barred by section 9 of the *LSA*, in addition to disclosing no reasonable cause of action.

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<sup>35</sup> *Harris v. Glaxosmithkline Inc.*, [2010 ONCA 872](#) at paras 27-28.



**iii. Interference with economic interest (paras 67-68)**

50. The ‘interference with economic interest’ claim is pleaded at paragraphs 67-68. The claim is, once again, directed at defendants to the Related Claim, who are alleged to have interfered with the Plaintiff’s economic interests. In a single sentence, the Plaintiff adds, at paragraph 68, “the Law Society Defendants in the within action further augmented this interference with the Plaintiff’s interest through their actions executed in bad faith and in the absence of good faith.”

51. The claim for ‘interference with economic interest’ is bound to fail. There is no tort for “augmenting” an interference with economic relations committed by another party. In any event, the claim fails to plead the required elements of the tort as against the non-party defendants, let alone against the LSO Defendants.

52. The tort of interference with economic relations is an intentional tort with very specific elements defined by the Supreme Court in *A.I. Enterprises Ltd.*<sup>36</sup> The tort “captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)’s use of unlawful means against B (the third party).”<sup>37</sup> The “unlawful means” used by the defendant against the third party must constitute an actionable civil wrong: “the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.”<sup>38</sup> There is no ambiguity with respect to this requirement.

53. Since the Plaintiff does not allege that the LSO Defendants caused him harm through the use of unlawful means *against a third party*, the tort has no application to the circumstances of this claim. The failure to plead an actionable civil wrong committed by the LSO Defendants against

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<sup>36</sup> *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#).

<sup>37</sup> *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#) at para 23.

<sup>38</sup> *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#) at paras 74-76.

a third party is fatal. There is simply no unlawful means within the meaning of the tort. Even if there was a valid claim for interference with economic relations against the third parties (which there is not), the claim that the LSO Defendants “augmented” the interference is still bound to fail.

**iv. Breach of fiduciary duty (para 69)**

54. The Plaintiff’s fiduciary duty claim is pleaded in a single paragraph in paragraph 69 of the claim. The Plaintiff pleads that the LSO owed him a fiduciary duty and that this duty was breached. The fiduciary duty claim is bound to fail.

55. The Plaintiff’s relationship with his regulator is not a traditionally recognized fiduciary relationship. The question therefore turns on whether an *ad hoc* fiduciary relationship ought to be recognized. The requirements for the recognition of *ad hoc* fiduciary duties were outlined by the Supreme Court in *Elder Advocates*.<sup>39</sup> The first element states that the alleged fiduciary must have given “an undertaking of responsibility to act in the best interests of a beneficiary.” Moreover, “what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her.”<sup>40</sup> The Court confirmed that “The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.”<sup>41</sup>

56. In *Elder Advocates*, the Supreme Court affirmed its earlier finding in *Guerin* that “Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.”<sup>42</sup> Further, “the requirement of an undertaking to act in the alleged

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<sup>39</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#).

<sup>40</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) at para [30](#).

<sup>41</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) at para [31](#).

<sup>42</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) at para [37](#).

beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion."<sup>43</sup>

57. The Plaintiff's fiduciary duty claim fails at the first step. The LSO does not owe a fiduciary duty to the Plaintiff because its overriding duty is to protect the public interest.

58. In order to establish that the LSO owes him a fiduciary duty, the Plaintiff would have to prove that the LSO has "forsaken...the interests of all others in favour of [his interests]."<sup>44</sup> Yet the LSO's overriding duty is to the public interest, not the private interests of members. As the Supreme Court noted in *Edwards*, "The *Law Society Act* is geared for the protection of clients and thereby the public as a whole... Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties."<sup>45</sup>

59. The Plaintiff's pleading, in paragraph 69(d), acknowledges the role of the "public interest", contradicting any suggestion that the LSO owes a duty of loyalty to members alone.

60. Section 4.2 of the *LSA* states: "In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles... 3. The Society has a duty to protect the public interest."<sup>46</sup> The Supreme Court has commented on role of the public interest in professional regulation: "The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not

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<sup>43</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) at paras [42-43](#).

<sup>44</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#) at para [31](#).

<sup>45</sup> *Romano v. Law Society*, Unreported, Court File No. SC-13-026405-00, April 28, 2014 at para 23; citing *Edwards v. Law Society of Upper Canada*, [2001 SCC 80](#) at para 14.

<sup>46</sup> *Law Society Act*, [R.S.O. 1990, c. L.8](#), s. 4.2.

be forgotten that in the client-professional relationship, the client is often in a vulnerable position.”<sup>47</sup>

61. Courts across the country have consistently dismissed fiduciary duty claims against professional regulators:

(a) In *Conway*, the Ontario Court of Appeal struck out a fiduciary duty claim against the Law Society and refused leave to amend, noting the absence of particulars to support the claim.<sup>48</sup> The Plaintiff’s claim in this case suffers from a similar absence of particulars.

(b) In *Rogers*, the Ontario Court of Appeal dismissed a fiduciary duty claim against the Royal College of Dental Surgeons of Ontario and the College of Dental Hygienists of Ontario, finding: “Since the College’s overriding duty is, as discussed above, to the public interest, they cannot owe a duty, especially one at the high level of fiduciary, to an individual client of a dentist or dental hygienist.”<sup>49</sup>

(c) In *Sultan*, the Law Society Tribunal found that Law Society investigators owed no fiduciary duty to the licensee in that case.<sup>50</sup>

(d) In *Romano*, the Small Claims Court applied *Elder Advocates* to find that the Law Society owed no duty of care or fiduciary duty to the licensee. The Court also cited the passage in *Edwards* confirming that the *LSA* is geared for the protection of clients and thereby the public as a whole, not the private law interests of members.<sup>51</sup>

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<sup>47</sup> *Pharmascience Inc. v. Binet*, [2006 SCC 48](#) at para 36. See also *Finney v. Barreau du Québec*, [2004 SCC 36](#) at para 16.

<sup>48</sup> *Conway v. The Law Society of Upper Canada*, [2016 ONCA 72](#) at paras 34-35.

<sup>49</sup> *Rogers v. Fraught*, [2002 CanLII 19268](#) (ON CA) at para 29.

<sup>50</sup> *Law Society of Upper Canada v. Sultan*, [2017 ONLSTA 9](#) at paras 42-43.

<sup>51</sup> *Romano v. Law Society*, Unreported, Court File No. SC-13-026405-00, April 28, 2014 at para 23; citing *Edwards v. Law Society of Upper Canada*, [2001 SCC 80](#) at para 14.

(e) In *Stinchcombe*, the Alberta Court of King’s Bench considered an argument that the Law Society of Alberta owed a duty of care and fiduciary duty to its members “because of the pervasive power to discipline and punish its members granted to it under the *Legal Profession Act*.” The Court dismissed the argument, finding the applicant “appears to be misguided as to the main purpose of the Law Society. The main function of the Law Society is to regulate the profession of law and to protect the public.”<sup>52</sup>

(f) In *Rusnak*, the Alberta Court of King’s Bench dismissed a fiduciary duty claim against the custodian of his law practice appointed under the *Legal Profession Act*, on the basis that “there exists no undertaking of the Defendant to act in the best interests of the Plaintiff either expressly, by implication under the provisions of the *Legal Profession Act*, or the order under which he was appointed.”<sup>53</sup>

(g) In *Camgoz*, the Saskatchewan Court of King’s Bench held that a professional regulator’s “relationship to the plaintiff is not that of a fiduciary governed by the principles of equity, but, rather, analogous to that of a public authority governed by proper construction of the relevant statute.”<sup>54</sup>

62. The Plaintiff’s fiduciary duty claim against his regulator, whose function is to regulate in the public interest, discloses no reasonable cause of action. In the alternative, the claim lacks sufficient material facts in support of each element of an alleged *ad hoc* fiduciary duty and the alleged breach of that duty.

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<sup>52</sup> *Law Society of Alberta v. Stinchcombe*, [2009 ABQB 27](#) at paras [82, 84](#).

<sup>53</sup> *Rusnak v. Shafir*, [2015 ABQB 290](#) at para [8](#).

<sup>54</sup> *H. (D.M.) v. Camgoz*, [1996 CanLII 6816](#) (SK KB) at para 15; cited in *M.R.L.P. v Canada (Attorney General)*, [2020 SKQB 101](#) at para [72](#).

**v. Negligence / negligent investigation (para 70)**

63. The Plaintiff's pleading of negligence and negligent investigation, at paragraph 70, is squarely covered by the immunity clause in section 9 of the *LSA*.

64. In *Edwards*, the Ontario Court of Appeal said the jurisprudence “clearly establishes a judicial immunity from negligence for the Law Society’s discipline process, including the investigative function at the front end.”<sup>55</sup> The decision was affirmed by the Supreme Court.<sup>56</sup>

65. More recently, in *Robson*, this Court noted:

[40] The Supreme Court in *Edwards*, at para. 6, agreed with the Court of Appeal’s pronouncement in that case that imposing tort liability on the Law Society itself would, barring *mala fides*, be inconsistent with its “public interest” role: (2000) 48 O.R. (3d) 329.

[41] It is settled law that, while the wording of section 9 of the *Law Society Act* does not apply to the Law Society itself, disciplinary proceedings of the Law Society are judicial or quasi-judicial in nature. As a result, absent bad faith, the Law Society is immune from suit.<sup>57</sup>

66. Given the jurisprudence, the Plaintiff’s claims of negligence and negligent investigation against the Law Society and its agents are statutorily barred and bound to fail.

**vi. Intimidation (paras 71-73)**

67. The claim of ‘intimidation’ is pleaded at paragraphs 71-73. The claim states the elements of the tort of intimidation as set out in *McIlvenna v. 1887401 Ontario Ltd.*: (a) a threat; (b) an intent to injure; (c) some act taken or forgone by the plaintiff as a result of the threat; (d) as a result of which the plaintiff suffered damages.<sup>58</sup> However, the pleading amounts to a bald recitation of the elements of the tort, without material facts in support.

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<sup>55</sup> *Edwards v. Law Society of Upper Canada (No. 2)*, 48 O.R. (3d) 329 at para 30.

<sup>56</sup> *Edwards v. Law Society of Upper Canada*, [2001 SCC 80](#) at para 6.

<sup>57</sup> *Robson v. Law Society of Upper Canada*, [2016 ONSC 5579](#) at paras 40-41; affirmed [2017 ONCA 468](#).

<sup>58</sup> *McIlvenna v. 1887401 Ontario Ltd.*, [2015 ONCA 830](#) at para 23.

68. At paragraph 72, the Plaintiff pleads that the LSO Defendants required him to respond to three complaints “which he should not have been required to respond to” and also notified him of six complaints, which was done “to remind, and intimidate the Plaintiff as to the menacing presence over the Plaintiff’s professional (and personal) life. This is moreover pronounced in the threat to use the over-arching powers under s. 43.9 of the [Act].” Put differently, the Plaintiff alleges that by notifying him of complaints and (in some cases) requiring him to respond, the LSO Defendants committed the tort of intimidation. This is a frivolous claim that is bound to fail.

69. With respect to the first element of the tort, disclosing a complaint of professional misconduct to a licensee against whom the complaint was brought cannot be characterized as a “threat”, even if the claim is read generously.

70. With respect to the second element of the tort, the requirement of an “intent to injure” is a requirement of bad faith. Pursuant to Rule 25.06(8), the Plaintiff must plead full particulars. The Plaintiff has baldly pleaded that the complaints were disclosed to him “to remind, and intimidate the Plaintiff as to the menacing presence over the Plaintiff’s professional (and personal) life.” On its face, these facts do not disclose an “intent to injure”. Moreover, they are bald allegations of bad faith without particulars. Permitting such bald allegations to proceed to trial would nullify the purpose of the statutory immunity clause in the *LSA*.

**vii. Breach of sections 7 and 15 of the *Charter* (para 74)**

71. The claim seeks damages on the basis of purported violations of sections 7 and 15 of the *Charter*. The *Charter* damages claim, pleaded in a single paragraph, is based on conduct by the LSO Defendants. This is distinct from the challenge to the constitutionality of section 49.3 of the *LSA* (discussed below).

72. The *Charter* damages claim is bound to fail. The Plaintiff has failed to plead essential elements to make out violations of sections 7 and 15 of the *Charter*. In addition, he has failed to plead material facts in support of either *Charter* breach.

73. In *Mackay*, the Supreme Court held that “*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions.”<sup>59</sup> Permitting the *Charter* claims in this case to proceed to trial despite the absence of material facts would amount to adjudicating *Charter* claims in a factual vacuum.

74. In *Mancuso*, the Federal Court of Appeal described the pleading requirements for *Charter* cases:

[21] There are no separate rules of pleadings for *Charter* cases. The requirement of material facts applies to pleadings of *Charter* infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each *Charter* right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, “rather, it is essential to the proper presentation of *Charter* issues”: *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357 at p. 361.<sup>60</sup>

75. With respect to the section 7 claim, “a plaintiff must plead facts to establish a deprivation of their right to life, right to liberty or right to security of the person. The claim must then set out facts to show that any deprivation of these rights was effected in a manner contrary to the principles of fundamental justice.”<sup>61</sup>

76. The Plaintiff has failed to adequately plead essential elements of section 7. Reading the claim generously, one is hard-pressed to discern how the LSO Defendants’ conduct is alleged to

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<sup>59</sup> *Mackay v. Manitoba*, [1989 CanLII 26](#) (SCC), [1989] 2 S.C.R. 357 at p. 361.

<sup>60</sup> *Mancuso v. Canada (Minister of National Health and Welfare)*, [2015 FCA 227](#) at para 21; citing *Mackay v. Manitoba*, [1989 CanLII 26](#) (SCC), [1989] 2 S.C.R. 357 at p. 361.

<sup>61</sup> *Shaulov v. Law Society of Ontario*, [2022 ONSC 2732](#) at para 69.



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have violated the Plaintiff's right to life or security of the person. The Plaintiff also fails to plead what principles of fundamental justice, if any, were violated.

77. At a general level, the Plaintiff's claim takes issue with the fact that the LSO Defendants decided to notify him of complaints against him and (in three cases) they required him to respond to the complaints. Even accepting these allegations as proven, the Plaintiff's section 7 interests are simply not engaged. There has been no deprivation of life or security of the person. There are no violations of fundamental justice. (To the contrary, providing notice of complaints to a licensee is a procedural benefit, not a deprivation, and certainly not a constitutional violation.)

78. With respect to the section 15 claim, such a claim "must contain sufficient material facts to support the allegation that: (1) on its face or in its impact, the state action creates a distinction based on a prohibited ground (either enumerated or analogous); and (2) the state action imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage."<sup>62</sup>

79. The section 15 claim is wholly lacking in material facts. Essential elements of the breach are not pleaded. The pleading does not specify what distinctions were made, if any, on the basis of an enumerated or analogous ground. Elsewhere in the claim, the Plaintiff pleads that he is Calabrian and Jewish, and has faced racism and anti-Semitism, but these pleadings are not connected to specific impugned conduct being challenged. The claim also does not plead how the LSO Defendants' conduct imposed burdens or denied benefits that had the effect of reinforcing, perpetuating or exacerbating disadvantage. These are radical defects in the pleading.

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<sup>62</sup> *Shaulov v. Law Society of Ontario*, [2022 ONSC 2732](#) at para [80](#).

**viii. Constitutional challenge to section 49.3 of the *Law Society Act* (paras 75-77)**

80. In addition to seeking *Charter* damages for LSO conduct, the Plaintiff also challenges the constitutionality of section 49.3 of the *LSA*. Section 49.3 is the provision that authorizes the LSO to conduct investigations. It confers certain powers to the LSO, including the power to require production of documents from licensees. The Plaintiff pleads that section 49.3 infringes sections 7 and 8 of the *Charter*. He devotes one paragraph to each *Charter* right.

81. In paragraph 76, the Plaintiff pleads his section 7 claim as follows:

76. It is submitted that s. 49.3 of the *Law Society Act* is a standardless sweep and violates s. 7, in violating, in an overly-broad and arbitrary fashion:

(a) The Solicitor-Client relationship protected by s. 7 of the *Charter* as set out in the Supreme Court of Canada decision of *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2005 SCC 7 (*CanLII*), [2015] 1 SCR 401;

(b) The privacy interests protected by both the solicitor and client in the Solicitor-Client relationship.

82. In paragraph 77, the Plaintiff pleads his section 8 claim as follows:

77. The Plaintiff further states that s. 49.3 of the *Law Society Act* further violates s. 8 of the *Charter*, in the absence of a client complaint, constituting an unreasonable search and seizure, which brings the administration of justice into dispute [sic] and which violation is not saved by s. 1 of the *Charter*, and for which it should be accordingly “read down” pursuant to ss. 24(1) and 52 of the *Constitution Act, 1982*.

83. The constitutionality of section 49.3 of the *LSA* under sections 7 and 8 of the *Charter* was previously determined by the Law Society Tribunal in the *Feldman* decision.<sup>63</sup> Unlike this case, the *Feldman* case arose in the context of a proceeding in which the Law Society actually exercised its powers under section 49.3 to require the production of documents, including solicitor-client privileged material. The Attorney General of Ontario participated in the hearing. In careful

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<sup>63</sup> *Law Society of Upper Canada v. Jodi Lynne Feldman*, [2012 ONLSHP 168](#).

reasons, the Tribunal concluded that the impugned provisions of the *LSA* do not infringe sections 7 and 8 of the *Charter*.<sup>64</sup>

84. The Plaintiff now asks this Court to reach a different conclusion, but without material facts to support his claim. The *Charter* challenge is wholly lacking in material facts.

85. Most notably, the Plaintiff is not alleging that the LSO Defendants actually exercised their powers under section 49.3 to require production of solicitor-client documents or invade his or his clients' privacy. Instead, he appears to complain that the LSO Defendants "threatened" to use the powers in section 49.3 (paragraph 72). He challenges the constitutionality of the powers enshrined in section 49.3 of the *LSA* based on speculation about the threatened potential use of the powers, rather than their actual use in his case.

86. The constitutionality of legislation cannot be determined based on speculation. Adjudicating the constitutionality of section 49.3 based on the Plaintiff's complaints about the potential threatened use of the powers would amount to making *Charter* decisions "in a factual vacuum." Doing so "would trivialize the *Charter* and inevitably result in ill-considered opinions."<sup>65</sup>

87. Simply put, the Plaintiff's *Charter* challenge is not properly constituted. It is so lacking in required elements and material facts that it should be dismissed.

88. The LSO Defendants also submit that the Plaintiff is in the wrong forum. As the *Feldman* case illustrates, the proper forum to raise a challenge to the constitutionality of section 49.3 of the *LSA* is the Law Society Tribunal. The Plaintiff must exhaust remedies at the Law Society Tribunal, including constitutional remedies, before turning to the courts. The LSO Defendants rely on the

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<sup>64</sup> *Law Society of Upper Canada v. Jodi Lynne Feldman*, [2012 ONLSHP 168](#) at para [179](#).

<sup>65</sup> *Mackay v. Manitoba*, [1989 CanLII 26](#) (SCC), [1989] 2 S.C.R. 357 at p. 361.

following comments by Justice Belobaba in the *DioGuardi Tax Law* case, in which he found a *Charter* challenge to another provision of the *LSA* to be premature:

[11] The only remedy that cannot be granted by the Law Society Tribunal is a formal declaration of invalidity under s. 52 of the Constitution Act.[16] However, as the Supreme Court made clear in *Okwuobi*,[17] the fact that the administrative tribunal cannot issue a formal declaration of invalidity “is not ... a reason to bypass the exclusive jurisdiction of the Tribunal.”[18] The expert administrative tribunal should hear the constitutional challenge and make its ruling. If the applicant loses, it can appeal or seek judicial review. And it is “at this stage of the proceedings” i.e. when the matter makes its way to the court, that a formal declaration of invalidity can be sought.

[12] The fact that the tribunal-court process may take more time than a direct application to the court is beside the point. The additional time involved by starting in the appropriate forum does not amount to “exceptional circumstances” that would justify skipping the tribunal step altogether. Otherwise, the expert administrative tribunal could be skipped in every case by simply alleging a *Charter* breach and the well-established proposition affirmed in *C.B. Powell*[20] and *Volochay*[21] would be eviscerated.<sup>66</sup>

89. Finally, the LSO Defendants submit that the Plaintiff’s failure to serve a Notice of Constitutional Question is yet another reason why the claim should be dismissed. Given that the Plaintiff is challenging the constitutional validity of provincial legislation, he is required to give notice to the Attorney General of Ontario “as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.”<sup>67</sup> Such notice serves the critical function of ensuring presence by the Attorney General of Ontario where the validity of provincial laws is in question.

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<sup>66</sup> *DioGuardi Tax Law v. Law Society of Upper Canada*, [2015 ONSC 3430](#), aff’d [2016 ONCA 531](#), leave to appeal to SCC refused, 37222 (23 February 2017).

<sup>67</sup> *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), s. 109.

90. The Plaintiff was put on notice of his failure to satisfy this requirement in the Defendants' Notice of Motion, delivered September 6, 2022.<sup>68</sup> The Plaintiff has still not served a Notice of Constitutional Question.

### **C. Leave To Amend**

91. The case law is clear that parties are not permitted to unilaterally amend their pleading in the face of a pending motion to strike: "The alternative would be to let amendments be made as of right and then require multiple motions to strike that overlap with pre-existing motions to strike the original claim."<sup>69</sup>

92. The Plaintiff's Statement of Claim was issued on July 12, 2022. The motion to strike was brought on September 6, 2022. In the face of a pending motion to strike, the Plaintiff delivered an Amended Statement of Claim. The Amended Statement of Claim delivered by the Plaintiff is only relevant to the question of whether leave to amend should be granted, if some or all of the original claim is struck.

93. In *Potis Holdings*, the Court of Appeal affirmed the lower court's refusal to grant leave to amend a claim against the Law Society that was struck based on failure to plead bad faith, noting that "the appellants had already twice pleaded no allegations of bad faith against the Law Society."<sup>70</sup> In this case, the Plaintiff filed his original Statement of Claim and then delivered an Amended Statement of Claim purportedly responding to the deficiencies identified in the Notice of Motion. The LSO Defendants submit that the continued deficiencies in the Amended Statement of Claim illustrate why leave to amend should be refused. As the Court of Appeal held in *Potis*

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<sup>68</sup> Notice of Motion, para (w), Motion Record, Tab 1.

<sup>69</sup> *Riopelle v. Trucash Rewards Inc.*, [2014 ONSC 3414](#) at para 5; cited in *Robson v. Law Society of Upper Canada*, [2016 ONSC 5579](#) at para 18.

<sup>70</sup> *Potis Holdings Ltd. v. The Law Society of Upper Canada*, [2019 ONCA 618](#) at para 34.

*Holdings*, “there are no amendments that the [Plaintiff] could make that might resuscitate their claim.”<sup>71</sup>

94. The Plaintiff’s proposed amendments can be divided into two categories: (1) further attempts to plead bad faith, and (2) new constitutional challenge to section 9 of the *LSA*.

95. In making further attempts to plead bad faith in his amended claim to circumvent the statutory immunity clause, the Plaintiff has largely inserted bald, conclusory pleadings of bad faith, without the full particulars required by Rule 25.06(8). The following is a review of the additions (if any) made to each cause of action:

- (a) *Conspiracy*: The Plaintiff’s addition of a sentence at paragraph 61, baldly asserting bad faith, does not cure the defects in the pleading;
- (b) *Abuse of process*: The Plaintiff’s addition of a sentence at paragraph 65, baldly asserting bad faith, does not cure the defects in the pleading;
- (c) *Interference with economic interest*: The Plaintiff’s amended claim makes no additions to the interference pleading, underlining the deficiency of the original pleading;
- (d) *Fiduciary duty*: The Plaintiff’s addition of a sentence at paragraph 69, baldly asserting bad faith, does not cure the defects in the pleading;
- (e) *Negligence*: The Plaintiff’s amended claim makes no additions to the negligence claim, underlining the fact that negligence claims against the LSO are clearly barred;
- (f) *Intimidation*: The Plaintiff’s addition of a sentence at paragraph 72, baldly asserting bad faith, does not cure the defects in the pleading; and

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<sup>71</sup> *Potis Holdings Ltd. v. The Law Society of Upper Canada*, [2019 ONCA 618](#) at para [35](#).

(g) *Constitutional claims*: The Plaintiff's amended claim makes no additions to the paragraphs pleading constitutional violations, despite the opportunity to do so.

96. In addition to the foregoing, the Plaintiff has proposed two additional paragraphs at paragraphs 73A and 73B. In paragraph 73B, the Plaintiff makes generalized claims of bad faith:

73B. The Plaintiff further states that the Defendant's bad faith, and absence of good faith, is evident, in addition to what is pleaded in paragraphs 10, 43, 54, 61, 63, 64, 65, 68, 69, 72, 73, 73A, inter alia, by:

(a) forwarding, for response, of baseless and repugnant complaints laced with repugnant racial and ethnic over and under-tones as well as defamatory language;

(b) the harassment of notifying the Plaintiff of complaints, whose substance is undisclosed, which were summarily dismissed, with notification to the Plaintiff, whose only purpose is to harass and remind the Plaintiff that the clients he represents, and his imparted anti-covid measure views are not shared by the Law Society;

(c) the retaliatory triggering of another Law Society complaint again anchored on free speech, apparently self-triggered by the Law Society, merely four (4) weeks after the Plaintiff filed an action against the Law Society;

(d) the saturated, mere number of complaints, in such a short period of time;

(e) the history of the Law Society giving countenance to baseless complaints against the Plaintiff laced with racist and intolerant views of both the Plaintiff and his clients.

97. The LSO Defendants submit that such generalized assertions do not constitute full particulars of bad faith necessary meet the requirements of Rule 25.06(8). They fail to resuscitate the claims discussed in more detail above.

98. Finally, in an attempt to circumvent the statutory immunity clause and redress his own failure to adequately plead bad faith, the Plaintiff has now proposed to include an entirely new constitutional challenge to section 9 of the *LSA*. He included additional relief seeking:

A further Declaration, if necessary, that s. 9 of the Law Society Act violates ss. 7 and 15 of the Charter, emanating from the Rule of Law, in granting immunity from intentional and non-intentional tort, as well breaching the right to Independence of the Judiciary.

99. This constitutional claim is then particularized in a single paragraph as follows:

73A. The Plaintiff states that with respect to all the tortious conduct, and causes of action pleaded, that the Defendants acted in bad faith and absence of good faith and that, in any event, the purported immunity conferred under s. 9 of the Law Society Act, is of no force and effect as it violates ss. 2 (freedom of expression), s. 7 (psychological integrity), s. 15 (equality) of the Charter, as well as the constitutional right of judicial independence in the legislative interference of the judiciary in applying the law unequally, in that no-one is above the law, as emanating from the constitutional imperatives of constitutionalism and the rule of law.

100. The new constitutional challenge does nothing to remedy the deficiencies of the original claim. It suffers from all the same defects as the Plaintiff's other constitutional challenge. None of the *Charter* claims listed above are particularized. None of the elements of the alleged breaches are pleaded. Once again, the Plaintiff has brought a *Charter* challenge in a factual vacuum.

101. The Plaintiff had every opportunity to respond to the deficiencies in the Statement of Claim, following receipt of the motion to strike on September 6, 2022. The Notice of Motion was highly detailed and outlined the specific nature of the deficiencies for each cause of action. Given the opportunity to remedy the deficiencies, the Plaintiff served an Amended Statement of Claim. The continued deficiencies in the proposed Amended Statement of Claim illustrate why leave to amend should be refused. The pleaded causes of action contain radical defects that cannot be cured through amendments.



**PART IV - ORDER REQUESTED**

102. The Defendants / Moving Parties request an order striking the Plaintiff's claim without leave to amend.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2023.



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**Charles Sinclair / Louis Century**

Lawyers for the Defendants / Moving Parties

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Potis Holdings Ltd. v. The Law Society of Upper Canada*, [2019 ONCA 618](#)
2. *R. v. Imperial Tobacco*, [2011 SCC 42](#), [2011] 3 S.C.R. 45
3. *Hunt v. Carey Canada Inc.*, [1990 CanLII 90 \(SCC\)](#), [1990] 2 S.C.R. 959
4. *McCreight v. Canada (Attorney General)*, [2013 ONCA 483](#)
5. *Shaulov v. Law Society of Ontario*, [2022 ONSC 2732](#)
6. *Shaulov v. Law Society of Ontario*, [2023 ONCA 95](#)
7. *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, [2013 ONCA 683](#)
8. *Robson v Law Society of Upper Canada*, [2016 ONSC 5579](#)
9. *Robson v. The Law Society of Upper Canada*, [2017 ONCA 468](#)
10. *Deep v. Ontario*, [2004 CanLII 14527](#) (ON SC)
11. *Montgomery v. Seiden*, [2012 ONSC 6235](#)
12. *Khanna v. Royal College of Dental Surgeons of Ontario*, [1999 CanLII 14802](#) (ON SC)
13. *Harris v. Glaxosmithkline Inc.*, [2010 ONCA 872](#)
14. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#)
15. *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#)
16. *Pharmascience Inc. v. Binet*, [2006 SCC 48](#)
17. *Finney v. Barreau du Québec*, [2004 SCC 36](#)
18. *Conway v. The Law Society of Upper Canada*, [2016 ONCA 72](#)
19. *Rogers v. Fraught*, [2002 CanLII 19268](#) (ON CA)
20. *Law Society of Upper Canada v. Sultan*, [2017 ONLSTA 9](#)
21. *Romano v. Law Society*, Unreported, Court File No. SC-13-026405-00, April 28, 2014
22. *Law Society of Alberta v. Stinchcombe*, [2009 ABQB 27](#)
23. *Rusnak v. Shafir*, [2015 ABQB 290](#)
24. *H. (D.M.) v. Camgoz*, [1996 CanLII 6816](#) (SK KB)

25. *M.R.L.P. v. Canada (Attorney General)*, [2020 SKQB 101](#)
26. *Edwards v. Law Society of Upper Canada (No. 2)*, 48 O.R. (3d) 329
27. *Edwards v. Law Society of Upper Canada*, [2001 SCC 80](#)
28. *McIlvenna v. 1887401 Ontario Ltd.*, [2015 ONCA 830](#)
29. *Mackay v. Manitoba*, [1989 CanLII 26](#) (SCC), [1989] 2 S.C.R. 357
30. *Mancuso v. Canada (Minister of National Health and Welfare)*, [2015 FCA 227](#)
31. *Law Society of Upper Canada v. Jodi Lynne Feldman*, [2012 ONLSHP 168](#)
32. *DioGuardi Tax Law v. Law Society of Upper Canada*, [2015 ONSC 3430](#)
33. *DioGuardi Tax Law v. Law Society of Upper Canada*, [2016 ONCA 531](#)
34. *Riopelle v. Trucash Rewards Inc.*, [2014 ONSC 3414](#)

**SCHEDULE “B”  
RELEVANT STATUTES**

**Rules of Civil Procedure, RRO 1990, Reg 194**

**RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL**

**Where Available**

***To Any Party on a Question of Law***

**21.01** (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

***To Defendant***

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**Another Proceeding Pending**

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

### **Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

...

### **Rules of Pleading — Applicable to all Pleadings**

#### ***Material Facts***

25.06 (1) Every pleading shall 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. R.R.O. 1990, Reg. 194, r. 25.06 (1).

...

#### ***Nature of Act or Condition of Mind***

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

...

### **Striking out a Pleading or Other Document**

**25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, [r. 25.11](#).

## Law Society Act, RSO 1990, c L.8

### **Principles to be applied by the Society**

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

...

### **Liability of benchers, officers and employees**

9 No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power. R.S.O. 1990, c. L.8, s. 9; 1998, c. 21, s. 4.

...

### **Investigations**

#### **Conduct**

**49.3** (1) The Society may conduct an investigation into a licensee's conduct if the Society receives information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming a licensee. 2006, c. 21, Sched. C, [s. 43](#).

#### **Powers**

(2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,

- (a) enter the current or former business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or, in the case of a former business premises, by a person with the authority to allow entry into the premises;
- (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
- (c) require the licensee and people who work or worked with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, [s. 43](#); 2020, c. 11, Sched. 13, s. 7 (1).

### **Capacity**

- (3) The Society may conduct an investigation into a licensee's capacity if the Society receives information suggesting that the licensee may be, or may have been, incapacitated. 2006, c. 21, Sched. C, [s. 43](#).

### **Powers**

- (4) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section is satisfied that there are reasonable grounds for believing that a licensee being investigated under subsection (3) may be, or may have been, incapacitated, the person conducting the investigation may,
  - (a) enter the current or former business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or, in the case of a former business premises, by a person with the authority to allow entry into the premises;
  - (b) require the production of and examine any documents that relate to the matters under investigation, including client files; and
  - (c) require the licensee and people who work or worked with the licensee to provide information that relates to the matters under investigation. 2006, c. 21, Sched. C, [s. 43](#); 2020, c. 11, Sched. 13, s. 7 (2).

[Courts of Justice Act, RSO 1990, c C.43](#)

**Notice of constitutional question**

**109** (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

**Failure to give notice**

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

**Form of notice**

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

**Time of notice**

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

**Notice of appeal**

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

**Right of Attorneys General to be heard**

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

**Right of Attorneys General to appeal**

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).



## **Boards and tribunals**

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

Plaintiff

- and -

Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE DEFENDANTS /  
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(Returnable September 21, 2023)**

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