Court File Number: T-1924-14

FEDERAL COURT

PROPOSED CLASS ACTION

BETWEEN:

NEIL DODSWORTH

PLAINTIFF/RESPONDENT

-and-

HER MAJESTY THE QUEEN

DEFENDANT/MOVING PARTY

MOTION TO STRIKE

MEMORANDUM OF FACT AND LAW

OF THE MOVING PARTY/DEFENDANT, HER MAJESTY THE QUEEN

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OVERVIEW

1. The claim does not disclose a reasonable cause of action. At its core, it asserts that the Crown must indemnify Canadian Forces members who invest in real property. It challenges an economic policy decision of government to limit the amount of reimbursement paid to members who sell their private homes at a loss. Such a policy decision cannot ground a lawsuit. When the causes of action are examined, it is apparent that none are viable. The claim has no reasonable prospect of success and should be struck.

2. In the alternative, the claim is not an action, but rather a public law claim dressed up in the guise of tort law. The essential character of the claim is wholly grounded in public law. It is a claim for judicial review with only a thin pretense to a private wrong. Accordingly, this "action" should be stayed.

STATEMENT OF FACTS – PART I

3. The proposed class action was filed on September 8, 2014. The Amended Statement of Claim ("claim") was filed on October 20, 2014.

4. The claim alleges negligent misrepresentation, *quantum meruit* and unjust enrichment in relation to a proposed class defined as "all current or former members of the Canadian Armed Forces ["CF"], who sold their homes for a loss following a posting, but were not provided 100% reimbursement of the difference between the original purchase price and the sale price". The claim seeks indemnification for any class member who sold their private home for a loss under any circumstances following a posting.

5. The claim alleges three impugned representations made by the CF to its members:

   - on its website and in its recruiting materials, CF indicated that most CF members will have to move at some point during their career and "to make the process as easy as possible, moving expenses are paid for by the Forces";[1]

[1] Amended Statement of Claim, Motion Record, Tab 2, paras. 13 and 39.

- in CANFORGEN 130/09, CF made the representation, "In short, the policy was designed to ensure that you do not go out of pocket for expenses that are the responsibility of the CF";[2] and

- the Home Equity Assistance Program ("HEA") will compensate members for 100% of their home equity loss if they sell in a "depressed market" as designated by the Treasury Board Secretariat.[3]

6. The HEA provisions are part of the Canadian Forces Integrated Relocation Policy ("CFIRP"). The CFIRP policy provides that CF will pay for a door-to-door move when a member is authorized to relocate at public expense. The CFIRP provides for reimbursement of members' relocation expenses in accordance with the policy. Under the CFIRP, a CF member who is relocating because of a posting receives complete reimbursement for (among other things): packing, shipping and unpacking all household goods and effects, shipping a motor vehicle, utility connection and disconnection fees, and travel expenses associated with moving. If a CF member decides to buy a private home, they receive reimbursement under the CFIRP for real estate commission fees (without limit), legal fees, deed transfer taxes and other closing costs for the purchase or sale of a home. If a CF member wants to rent accommodation, they receive full reimbursement for rental-finding services and lease liability expenses if they have to terminate the lease early for a posting.

7. The claim criticizes the scope of the home equity portion of the CFIRP. Under the current policy, CF members who sell their home at a loss in any market will receive 80% of the loss to a maximum of $15,000. The claim complains that this $15,000 maximum has not increased since the policy was introduced in 1998, despite rising real estate values in Canada.[4]

8. The current policy also provides that a CF member will receive 100% of the home equity loss, without limit, if the member sells in a housing market designated as "depressed" by

[2] Amended Statement of Claim, Motion Record, Tab 2, paras. 14 and 39.
[3] Amended Statement of Claim, Motion Record, Tab 2, paras. 17 and 39.
[4] Amended Statement of Claim, Motion Record, Tab 2, paras. 17 and 19.

the Treasury Board Secretariat. A "depressed market" is defined in the current version of the CFIRP as one where real estate values in the community dropped more than 20%. The claim complains that there is no explanation or basis to support the 20% figure.[5]

9. The claim alleges that from 2008 to 2013, there were 118 applications for home equity losses greater than $15,000.[6] However, the proposed class is not confined to this group. The class is defined much more broadly: any current or former CF member who sold their home for a loss in any place, at any time, in any market, regardless of the policy limits.

10. The plaintiff was posted from CFB Gagetown, New Brunswick to CFB Edmonton, Alberta in July 2007. As a result, he sold his home in New Brunswick. The claim does not indicate whether he made a profit on this sale. Under the CFIRP policy, the plaintiff could buy or rent personal accommodation in Alberta.[7]

11. The plaintiff chose to invest in the real estate market by buying a condo-style townhouse in Morinville, Alberta, on the outskirts of Edmonton. He purchased the home sight unseen.[8] A year later, in June 2008, the plaintiff was promoted and posted to CFB Kingston, Ontario.[9]

12. The plaintiff listed his home in Morinville but was unable to sell it before his Kingston posting date. He moved to Kingston under imposed restrictions which meant that CF paid the plaintiff's rent, meals and parking expenses in Kingston while his family remained in the Morinville home.[10]

13. The Morinville home was sold in 2009. The sale price was $72,400 less than the purchase price. The plaintiff applied for full reimbursement under the HEA policy and

[5] Amended Statement of Claim, Motion Record, Tab 2, para. 18.
[6] Amended Statement of Claim, Motion Record, Tab 2, para. 21.
[7] Amended Statement of Claim, Motion Record, Tab 2, paras. 13 and 25-27.
[8] Amended Statement of Claim, Motion Record, Tab 2, para. 29.
[9] Amended Statement of Claim, Motion Record, Tab 2, para. 30.
[10] Amended Statement of Claim, Motion Record, Tab 2, para. 31.

received $15,000. He was not reimbursed for 100% of the loss because Treasury Board determined the housing market was not depressed.[11]

14. The plaintiff grieved the Treasury Board depressed market decision to the Chief of Defence Staff in accordance with the internal military grievance scheme.[12] Although the claim implies the Treasury Board decision was unreasonable, the plaintiff did not seek judicial review.[13] Instead, he filed the within claim.

15. The defendant, Her Majesty the Queen, has not filed a Statement of Defence.

POINTS IN ISSUE – PART II

16. The motion to strike raises the following issues:

a) Does the claim disclose a cause of action for negligent misrepresentation?

b) Does the claim disclose a cause of action for unjust enrichment or *quantum meruit*?

c) In the alternative, should the claim be stayed because it is a guised judicial review?

SUBMISSIONS – PART III

17. Rule 221(1)(a) provides that a Court may order a pleading be struck out, with or without leave to amend, on the ground that it discloses no reasonable cause of action.

18. The test on a motion to strike is well established: assuming the facts pleaded are true, it must be "plain and obvious" that the claim discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success.[14]

19. To determine whether the claim raises a reasonable cause of action, the Court must look past the specific legal characterization to the facts giving rise to the dispute.[15] The claim

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[11] Amended Statement of Claim, Motion Record, Tab 2, paras. 32-33 and 37.
[12] Amended Statement of Claim, Motion Record, Tab 2, para. 37.
[13] Amended Statement of Claim, Motion Record, Tab 2, paras. 21-24 and 36.
[14] *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17, Book of Authorities, Tab 16.

must contain sufficient facts to support all the elements of the causes of action pleaded. Merely pleading the existence of a claim is not enough.

20. Although the claim is framed in negligent misrepresentation and equity, at its essence the claim seeks to re-write the CFIRP policy. This is clear from the prayer for relief: the damages sought are home sale losses resulting from a posting in every circumstance, without limit. In other words, the claim asserts that the Crown must indemnify CF members who invest in real property.

Issue A: Negligent Misrepresentation Claim Does Not Disclose Reasonable Cause of Action

21. In order to disclose a reasonable cause of action for negligent misrepresentation, the pleadings must allege the essential ingredients of that tort: (1) there must be a duty of care based on a special relationship between the parties; (2) the representation must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the representation; (4) the representee must have relied in a reasonable manner on the representation; and (5) the reliance must have been detrimental in the sense that damages resulted.[16]

22. Accordingly, the claim must establish that the CF owed its members a duty of care with respect to the information provided to them regarding moving expenses. If no duty of care exists, the claim is untenable at law and must be struck.

23. In *Imperial Tobacco*, the Supreme Court canvassed the purpose of motions to strike. Chief Justice McLachlin, on behalf of the entire Court, remarked:

> **The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation.** It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial. This promotes two goods – efficiency in the conduct of litigation and correct results. Striking out claims that have no reasonable prospect

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[15] *Roitman v R.*, 2006 FCA 266, at para. 16, Book of Authorities, Tab 23.
[16] *Queen v Cognos Inc.*, [1993] 1 SCR 87 (SCC), Book of Authorities, Tab 21.

> of success promotes litigation efficiency, reducing time and cost.[17] [emphasis added]

24. The question of whether a defendant owes a duty of care is one which may properly be addressed on a motion to strike. The Court can make this determination based on a review of the claim alone. A full evidentiary record is not required. In *Cooper*, *Edwards*, *Children's Aid Society*, *Imperial Tobacco* and *Elder Advocates*, the Supreme Court struck out claims because the pleadings alone did not disclose a duty of care.[18]

Novel Duty of Care

25. The first question to be determined is whether the facts pleaded in the claim bring the defendant within a settled category that gives rise to a duty of care. As the Supreme Court has noted, the question is not whether negligent misrepresentation is a recognized tort, but whether the relationship between the parties as pleaded in the claim has been recognized by the Courts as giving rise to liability for negligent misrepresentation.[19]

26. If the relationship alleged in the claim does not fall within a previously recognized category, this Court must consider whether to recognize a new duty of care in accordance with the two-stage *Anns/Cooper* test.

27. At the first stage of the test, the question is whether the facts disclose a relationship between the parties such that failure to take reasonable care might foreseeably result in harm to the plaintiff. Proximity and foreseeability are two aspects of the same inquiry into whether the facts disclose a relationship that establishes a *prima facie* duty of care. At the second stage of the test, the question remains whether there are policy considerations that may negate the duty of care.[20]

28. Here, the facts pleaded do not bring this claim within a recognized category of negligent misrepresentation. The law has not yet recognized a claim where CF has been held liable

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[17] *Imperial Tobacco, supra*, at paras. 19-20, Book of Authorities, Tab 16.
[18] *Imperial Tobacco, supra*, Book of Authorities, Tab 16; *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24, Book of Authorities, Tab 11; *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, Book of Authorities, Tab 9; *Cooper v Hobart*, 2001 SCC 79, Book of Authorities, Tab 8; *Edwards v Law Society of Upper Canada*, 2001 SCC 80, Book of Authorities, Tab 10.
[19] *Imperial Tobacco, supra*, at para. 37, Book of Authorities, Tab 16.
[20] *Imperial Tobacco, supra*, at paras. 39-41, Book of Authorities, Tab 16.

for negligent representations to its members through websites, recruitment materials or a policy about reimbursement for personal expenses. Imposing a duty of care in these circumstances represents a novel duty at law.

29. As the Supreme Court of Canada has noted, there is a clear benefit to determine the existence of a new duty of care on a motion to strike. Justice Abella, on behalf of the Court, commented:

> Both the majority and dissenting reasons acknowledge that imposing such a duty of care would represent a novel duty at law. **The benefit of making a determination on a Rule 21 motion [motion to strike] about whether such a duty of care should be recognized, is obvious**. If there is no legally recognized duty of care to the family owed by the defendants, there is no legal justification for a protracted and expensive trial. If, on the other hand, such a duty is accepted, a trial is necessary to determine, whether on the facts of this case, that duty has been breached.[21] [emphasis added]

30. As this claim does not fall within a recognized category, the Court must determine whether a new duty of care should be recognized. This involves applying the *Anns/Cooper* test to the claim to determine whether there is both foreseeability and proximity between the parties to establish a *prima facie* duty of care and whether that duty should be negated for policy reasons.

No Foreseeable Loss

31. When the claim is closely examined, it is clear that the loss is not foreseeable. Foreseeability is not determined from a plaintiff's subjective perspective, but rather from the objective perspective of whether a reasonable person would foresee harm in these circumstances.

32. Here, the claim is brought on behalf of every current and former CF member who lost any money on their private home sale following a posting in any market at any time. None of the impugned representations make this promise. The website representation merely says that moving expenses are paid by CF. Housing loses are not mentioned. The

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[21] *Children's Aid Society of Halton (Region), supra*, at para. 19, Book of Authorities, Tab 9.

representation in CANFORGEN 130/09 (that the moving policy is designed to ensure members do not go out-of-pocket for moving expenses that are CF's responsibility) is also silent about home equity reimbursement. The third impugned representation is that the current CFIRP policy provides full reimbursement to CF members only if their home equity loss occurred in markets declared "depressed" by Treasury Board.

33. None of these impugned representations say CF members would be fully indemnified for all posting-related housing losses in all circumstances. No reasonable person would expect such a thing on the basis of these representations. The alleged harm is not reasonably foreseeable. This aspect of the *Anns/Cooper* test is not met.

No Proximity

34. Even if foreseeability existed, which it does not, that alone is not sufficient to establish a duty of care. Foreseeability must be grounded in a relationship that is sufficiently close, or proximate, to make it reasonable to impose a duty of care on the defendant.[22]

35. Where the relationship between the parties is governed by a statutory scheme, the legislation provides a relevant context for the proximity analysis. There are two ways in which the statute plays a role: where the alleged duty of care arises explicitly or by implication from the statutory scheme, and where the duty of care arises from interactions between the parties and is not negated by the statute.[23] Here, the relationship between the parties is governed by the *National Defence Act* ("*NDA*").[24]

36. Section 35 of the *NDA* addresses pay and benefits for members. It states:

> 35(1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.
>
> (2) The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by

[22] *Imperial Tobacco, supra*, at para. 42, Book of Authorities, Tab 16.
[23] *Imperial Tobacco, supra*, at para. 43, Book of Authorities, Tab 16.
[24] RSC 1985, C.N-5.

> way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.[25]

37. An examination of the language of the *NDA* clearly shows there is no duty of care owed to the proposed class, either explicitly or by implication. Proximity between the parties does not arise from the statutory scheme.

38. Nor did proximity arise from interactions between the parties. The claim pleads that the representations were made through the CF website and policy. There are no facts pleaded that the representations were made through interactions between CF officials and the plaintiff or any proposed class members. The proximity branch of the *Anns/Cooper* test is not met.

Anns/Cooper Stage Two: Policy Reasons to Negate any Duty of Care

39. In stage two of the *Anns/Cooper* analysis, the Court is concerned with residual policy considerations that should negate or reduce the scope of duty.[26] Even if the plaintiff, on behalf of the proposed class, was able to establish that CF owed him a *prima facie* duty of care, which he cannot, the duty of care should be negated for two policy reasons: the decision to provide limited home equity indemnification is a core policy decision of government and cannot ground an action in tort. Moreover, the pure economic loss the plaintiff and proposed class seek to recover raises concerns of indeterminate liability.

Policy Decisions Are Not Actionable

40. Home equity assistance is part of the CFIRP policy concerning reimbursement of expenses incurred by CF members. All the impugned representations are part of a course of action based on economic public policy considerations. The CFIRP is an expression of economic policy and (among other things) sets limits on the scope of indemnification a CF member will receive when they sell their private home at a loss following a posting. The decision about the scope of home equity reimbursement is a core policy decision of government. As a core policy government decision, it cannot ground an action in tort.

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[25] *NDA*, s. 35, Book of Authorities, Tab 2.
[26] *Cooper*, *supra*, at paras. 37-39, Book of Authorities, Tab 8.

41. In the early 1990s, the CF began to encourage members to live in civilian communities.[27] Beginning in the 1990s, the government made a core policy decision based on economic considerations to reduce the number of residences on military bases and to encourage CF members to live in civilian communities. Currently, approximately 85% of the CF population lives in private market accommodations.[28]

42. Under the CFIRP, CF members have a personal choice whether to purchase or rent private accommodations. If a member wants to purchase a home, the CFIRP provides complete reimbursement for all transaction costs relating to the purchase and sale of a home (real estate commission fees, legal fees, appraisal fees, home staging fees, etc.).[29] If a member does not want to invest in the real estate market by owning their own home, the CFIRP provides complete reimbursement for costs associated with rental accommodations (rental finding services, liability for early termination of a lease in the event of posting, cleaning fees, rental advances, etc.).[30]

43. Under the current policy, CF members are protected from an equity loss arising from a house sale in any type of market up to $15,000. Home equity loss is fully compensated only if the sale took place in market designated depressed by the Treasury Board Secretariat. If the member makes a profit from a house sale, the policy does not require them to disgorge this profit. The member keeps that benefit.

44. In this context, the question under stage two of the *Anns/Cooper* test is: assuming the facts pleaded in the claim are true, is it plain and obvious that any duty of care should be negated because the impugned representations are a core policy decision and not capable of giving rise to liability in tort?[31]

45. In *Imperial Tobacco*, Chief Justice McLachlin defined a core policy decision as one where social, economic and political considerations are weighed to arrive at a course of action for government. She stated:

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[27] Amended Statement of Claim, Motion Record, Tab 2, para. 7.
[28] Amended Statement of Claim, Motion Record, Tab 2, para. 7.
[29] CFIRP, Section 8, Motion Record, Tab 3, p. 80.
[30] CFIRP, Section 7, Motion Record, Tab 3, p. 78.
[31] *Imperial Tobacco, supra*, para. 70, Book of Authorities, Tab 16.

> The decision is considered a decision that represents a 'policy' in the sense of a general rule or approach, applied to a particular situation. It represents 'a course or principal of action adopted or proposed by a government': *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. **The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.**[32][emphasis added]

46. In *Imperial Tobacco*, the Supreme Court considered a class action against the Crown alleging negligent misrepresentation. In that case, tobacco companies and consumers alleged that Canada negligently misrepresented the health benefits of low-tar cigarettes through public statements, advice and direction to tobacco companies and development of a low-tar tobacco strain. The Court found there was insufficient proximity between Canada and consumers, but found the close working relationship between Canada and the tobacco companies gave rise to a *prima facie* duty of care.

47. The Supreme Court negated that duty of care for policy reasons. The Chief Justice, on behalf of the Court, found the representations were "part and parcel" of a government policy to encourage people to smoke low-tar cigarettes. This was a core policy decision, and the representations to tobacco companies reflected that policy. As a result, the representations could not support tort liability and the claim was struck out. [33]

48. Here, the impugned representations also reflect a core government policy decision: to reduce military housing and encourage CF members to live in civilian communities. This course of action was adopted at the highest level in the government and involved economic and social considerations.

49. The impugned representations clearly reflect the government policy decision to encourage CF members to live in civilian communities. The website and CANFORGEN 130/09 indicate that moving expenses are paid by CF. The CFIRP policy gives CF

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[32] *Imperial Tobacco*, *supra*, para. 87, Book of Authorities, Tab 16.
[33] *Imperial Tobacco*, *supra*, at para. 95, Book of Authorities, Tab 16.

members the opportunity to invest in the real estate market if they choose (by fully reimbursing the transaction costs) or rent private accommodations if they choose (by reimbursing rental-finding services and lease termination penalties). The representations cannot ground a claim for negligent misrepresentation.

Indeterminate Liability

50. Any duty of care should also be negated because the loss sought is a pure economic one and raises the specter of indeterminate liability to an indeterminate class for an indeterminate time.

51. If indeterminate liability is present, the Court will reject a duty of care. In *Elder Advocates*, a class of nursing home residents in Alberta initiated a class action alleging the provincial government artificially inflated their accommodation charges to subsidize the cost of medical expenses. The Supreme Court found that any duty of care to the class should be negated for policy reasons: the specter of unlimited liability to an unlimited class. In this regard, the Chief Justice on behalf of the full Court held:

> Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions [citation omitted]. **Related to this concern is a fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention.** It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by any patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the specter of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp v. Touche* [citation omitted, emphasis added].[34]

52. Here, in the prayer for relief, the claim seeks losses for the plaintiff and every current and former CF member who sold any private home for a loss under any circumstances following a posting.

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[34] *Elder, supra,* para. 74, Book of Authorities, Tab 11.

53. This is a pure economic loss. The Supreme Court has recognized that indeterminate liability is a greater risk in pure economic loss cases, as there is no personal or property damage to limit the claim.[35]

54. If CF was responsible to fully indemnify every member in every situation where home equity loss was incurred following a posting, CF would be exposed to an indeterminate liability. While there is a finite number of CF members and a finite number of postings, the amount of potential home equity loss has no determinate limit.

55. Moreover, if a duty of care was recognized, CF would be unable to limit its exposure to damages. CF has no control over its members' decisions to buy or sell their private homes. The CFIRP policy limits reimbursement of expenses to a 1.25-acre lot size but provides no limits or parameters on the style, value or condition of the home a member buys. Indeed, a member can purchase a home sight unseen, as the plaintiff did, and receive reimbursement from CF if they sell it at a loss.[36] Accordingly, the claim should fail because CF is not in control of the extent of its potential liability.[37]

56. For all these reasons, if a *prima facie* duty of care exists (which it does not), it should be negated for policy reasons.

No Facts Plead to Support "Reliance" Element

57. Aside from the problem with the duty of care, the "detrimental reliance" element of negligent misrepresentation is also missing from the claim.

58. It is not enough to make a bare assertion that the plaintiff relied on the impugned representations to his detriment. Merely pleading reliance does not make it so. The facts pleaded in the claim must demonstrate that reliance occurred.

59. Here, there are no facts pleaded at all to show how the plaintiff and the proposed class members relied upon the impugned representations to their detriment. This silence is fatal to the negligent misrepresentation claim.

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[35] *Imperial Tobacco, supra*, at para. 100, Book of Authorities, Tab 16.
[36] Amended Statement of Claim, Motion Record, Tab 2, para. 29.
[37] *Imperial Tobacco, supra*, para. 101, Book of Authorities, Tab 16.

60. Moreover, detrimental reliance cannot be based on the impugned representations. None promise full reimbursement for all housing losses in all markets. Reasonable reliance cannot be based upon vague and ambiguous information.[38] The CF website representation that "moving expenses are paid for" by CF is too generic to support the claim. Similarly, CANFORGEN 130/09 that "the policy was designed to ensure that you do not go out of pocket for expenses that are the responsibility of the CF" is also too generic. The plaintiff and class members could not reasonably rely on these representations for full reimbursement for home equity losses in all circumstances.

61. Nor can the third representation support the detrimental reliance element. The CFIRP policy clearly limits the indemnification for home equity loss to markets designated "depressed" by Treasury Board. The representation is not a promise that every home equity loss will be fully compensated every time. It cannot reasonably support the "detrimental reliance" element of the negligent misrepresentation claim.

Claim Cannot Be Cured By Amendment

62. The negligent misrepresentation claim cannot be cured by amendment because the pleaded facts do not give rise to a viable cause of action. The allegations relating to the home equity policy cannot give rise to liability in tort.

63. At its essence, the claim asks the Court to redraft the home equity policy. They want the policy expanded beyond losses incurred in depressed markets. They want full reimbursement for every posting-related housing loss in every circumstance. In other words, they want the Crown to fully indemnify their real property investment decisions. This is not a justiciable matter.

64. If the claim was read narrowly and confined to the plaintiff's circumstances (that the defendant committed a tort by rejecting the plaintiff's home equity application), this cannot ground a tort claim. Mere errors in decision-making do not create liability. For liability to be imposed respecting the conduct of an official in the exercise of his duties, something more than a simple error or misinterpretation of policy is required.

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[38] *Charlton v Canada Post Corp*, 2009 CanLII 1647 (ON SC), at paras. 116 and 123, Book of Authorities, Tab 7.

65. In *Benaissa*, this Court struck a claim for failure to process an immigration application in a timely fashion.[39] The Court found that a government decision made in good faith cannot be the subject of an action in negligence. Even if a *prima facie* duty of care existed, it would be negated on the basis that there are viable alternative remedies in the form of judicial review.[40]

66. Indeed these cases are simply a reflection of a longstanding principal that breach of a statute, without more, does not give rise to tort liability[41] and that the mere breach of a statutory duty does not constitute negligence.[42]

67. Whether the claim is read broadly or narrowly, it does not disclose a tort claim.

Issue B: No Claim for Unjust Enrichment or *Quantum Meruit*

68. The claim also asserts that the plaintiff and proposed class members are entitled to home equity losses pursuant to the equitable principles of unjust enrichment and *quantum meruit*.[43] The claim alleges CF was enriched because it was not required to pay home equity losses it would have otherwise incurred. These equitable claims are advanced because, as the claim acknowledges, CF members do not have a contractual relationship with CF.

69. Unjust enrichment and *quantum meruit* are related equitable principles based on an implied promise to pay where one party has performed work for another without remuneration, and the other party has thereby unjustly gained the benefit of services rendered. Three elements are required: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.[44]

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[39] *Benaissa v Canada (Attorney General)*, 2005 FC 1220, Book of Authorities, Tab 3.
[40] *Benaissa, supra*, paras. 37 and 40-43, Book of Authorities, Tab 3. See also *Farzam v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1659, at para. 102, Book of Authorities, Tab 12.
[41] *R. v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 (SCC), Book of Authorities, Tab 22.
[42] *Holland v Saskatchewan Minister of Agriculture, Food and Rural Revitalization*, 2008 SCC 42, Book of Authorities, Tab 14.
[43] Amended Statement of Claim, Motion Record, Tab 2, paras. 41A and B.
[44] *Garland v Consumers' Gas Co.*, 2004 SCC 25, at para. 30, Book of Authorities, Tab 13.

70. The "lack of juristic reason" element is missing from the claim. With respect to the class members, there are no facts pleaded at all to demonstrate an absence of juristic reason.

71. The problems with these pleadings become clear when they are compared with a properly pleaded claim for unjust enrichment like the one in *Elder Advocates*.[45] In that case, a class of nursing home residents pleaded breach of fiduciary duty, negligence, unjust enrichment, bad faith and breach of s. 15 of the *Charter* in relation to accommodation fees. The Supreme Court considered whether the pleadings disclosed a cause of action.

72. The Supreme Court found unjust enrichment was made out on the pleadings. The statutory scheme imposed fees upon the proposed class. There was a clear deprivation to that proposed class and a corresponding clear benefit to the provincial government. Moreover, the claim set out a detailed explanation why there was no juristic reason for their deprivation in relation to the fees.[46] They pleaded that the regulatory scheme that imposed the fees was *ultra vires* and breached the *Charter*.

73. Here, the claim contains the bald assertion that there was no juristic reason for the alleged enrichment and deprivation. There are no facts explaining why. This bare pleading is insufficient to support a restitution claim of unjust enrichment or *quantum meruit*.

74. In the plaintiff's particular circumstances, the pleaded facts show a clear juristic reason why the plaintiff did not receive home equity assistance: he did not meet the CFIRP policy criteria. Treasury Board determined there were no depressed housing markets when his home sale occurred.[47] The juristic reason for his "deprivation" is clear.

75. The plaintiff has not challenged this juristic reason by judicial review of Treasury Board's decision and his failure to do so is fatal to his equity claims. As the British Columbia Supreme Court recently noted:

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[45] *Elder Advocates, supra,* Book of Authorities, Tab 11.
[46] *Elder Advocates, supra,* at para. 81, Book of Authorities, Tab 11.
[47] Amended Statement of Claim, Motion Record, Tab 2, para. 37.

> A plaintiff's failure to protect his interests in a timely fashion and the ensuing interests that arise as a result can both constitute a juristic reason for a court to exercise its discretion to deny equitable relief.[48]

76. Similarly, the Federal Court of Appeal refused an unjust enrichment claim because the plaintiff did not use remedies available under the *Customs Act*. The same result was reached in *International Forest Products*: where the plaintiff failed to pursue remedies available under the *Forestry Act*, the Court had no jurisdiction to provide collateral equitable relief. [49]

77. In this regard, the plaintiff's circumstances contrast sharply with *Brauer v. Canada*, a judicial review of a home equity assistance decision.[50] In *Brauer*, the CF member sought full indemnification of his housing loss under the HEA portion of the CFIRP policy because his home was sold in a depressed market. Treasury Board rejected his application. He challenged this decision by way of judicial review. Justice Mosely allowed the judicial review and directed Treasury Board to reconsider its decision with specific directions.

78. Unlike *Brauer*, the plaintiff has not sought judicial review. The juristic reason for his "deprivation" is clear. Accordingly, the bare unjust enrichment and *quantum meruit* claims must fail.

Issue C: Claim is a Guised Judicial Review

79. In the alternative, if there is a viable claim here, it must be stayed under ss. 50(1) of the *Federal Courts Act* because it is a guised judicial review.[51]

80. On a motion to strike, the role of the Court is to look past the legal characterization of the claim to the facts that underpin it. As the Federal Court of Appeal directed:

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[48] *Sturm v Sprott Resource Lending Corp.*, 2014 BCSC 190, at para. 120, Book of Authorities, Tab 24. See also: *Caterpillar Financial Services Ltd. v 360networks Corp.*, 2007 BCCA 14, at paras. 65-66, Book of Authorities, Tab 6.

[49] *Neles Controls Ltd. v R.*, 2002 FCA 107, leave to appeal denied 2002 CarswellNat 3265, SCC, Book of Authorities, Tab 18. See also: *International Forest Products Ltd. v British Columbia*, 2004 BCSC 387, Book of Authorities, Tab 15.

[50] *Brauer v Canada*, 2014 FC 488, Book of Authorities, Tab 4.

[51] R.S.C., 1985, c. F-7, ss. 50(1), Book of Authorities, Tab 1.

> A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court.[52]

81. Subsection 50(1) of the *Federal Courts Act* gives this Court the discretion to stay proceedings in any cause or matter where it is in the interest of justice that the proceedings be stayed. A stay in this context should be granted where a plaintiff has failed to plead a reasonable private cause of action. [53]

82. The Supreme Court has recognized discretion to stay an action if it is premised on public law considerations that "in its central character, it is a claim for judicial review with only a thin pretense to a private wrong."[54] To make this determination, the Court must identify the essential character of the claim as public law rights (i.e. judicial review of an unreasonable government decision) not private law rights (i.e. a tort or equity claim).

83. In *Manuge*, the Supreme Court examined the pleadings, which they characterized as "far from models of legal clarity", to determine whether the claim disclosed a private or public law claim. The Court found that, at their core, Manuge's claims were less about assessing the exercise of delegated statutory authority or the decision-making process and more about his allegation that the impugned pension scheme infringed s. 15 of the *Charter*.[55] The Court also observed that the Crown had not challenged private law claims for breach of fiduciary duty and unjust enrichment.[56] On the basis of the constitutional remedies and the unchallenged private wrongs, the Court declined to exercise its discretion to stay Manuge's claim.

84. Tort claims are fundamentally different from applications for judicial review. When the claim is closely examined, it is apparent it falls wholly within the public law sphere.

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[52] *Roitman, supra,* at para. 16, Book of Authorities, Tab 23.
[53] *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62, at para. 78, Book of Authorities, Tab 5.
[54] *TeleZone, supra*, at para. 78, Book of Authorities, Tab 5.
[55] *Manuge v R.*, 2010 SCC 67, at para. 21, Book of Authorities, Tab 17.
[56] *Manuge, supra*, at para. 20, Book of Authorities, Tab 17.

85. Justice Binnie described the differences between public and private law principles in *TeleZone*:

> Judicial review is directed at the legality, reasonableness and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the *Constitution*. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Quebec*, RSC, c.C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.
>
> Not all invalid government decisions result in financial losses to private persons or entities. **Not all financial losses that *do* will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages.** ....
>
> Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability."[57] [emphasis added]

86. In the present case, the close examination of the claim clearly shows it is a guised judicial review. It challenges the government's refusal to fully indemnify the plaintiff and class members for home equity losses under the CFIRP policy. No truly private wrong arises from the claim.

87. The claim also complains that the plaintiff should have received full indemnification for losses arising from the sale of his Morinville home. He implies that Treasury Board's decision to reject his home equity application was unreasonable. In the prayer for relief, he is effectively asking this Court to quash that decision.

88. As Justice Binnie noted in *TeleZone*, one of the indicia of a private law claim is that the claimant does not seek to impugn the decision at issue or have it set aside; they are

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[57] *TeleZone, supra*, at paras. 24-29, Book of Authorities, Tab 5.

content to take damages and "walk away leaving the order standing".[58] Here, in contrast, the plaintiff cannot let the Treasury Board decision stand. It must be quashed and Treasury Board must declare the market depressed so he can receive full reimbursement under the CFIRP.

89. These are pure public law claims. They are properly the subject of a judicial review application, not a claim for damages.[59] Accordingly, if the claim is viable, this Honourable Court should exercise its discretion to stay the claim.

ORDER SOUGHT – PART IV

90. For the reasons outlined above, the claim is fundamentally flawed. It cannot be cured by amendment. Accordingly, the defendant respectfully requests an order striking the plaintiff's claim without leave to amend. In the alternative, the defendant respectfully requests an order staying the plaintiff's action.

91. The defendant also seeks its costs of this motion. The motion has been brought before certification, so the class action rules with respect to costs are not yet engaged.[60]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 8, 2015

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[58] *TeleZone, supra,* at para. 75, Book of Authorities, Tab 5.
[59] *Tribute Resources Inc. v Parks Canada Agency*, 2012 ONSC 5480, Book of Authorities, Tab 25.
[60] *Pearson v Canada (Minister of Justice)*, 2008 FC 1367 at para. 52, Book of Authorities, Tab 20. See also *Paradis Honey Ltd. v Canada (Attorney General)*, 2014 FC 215, at para. 122, Book of Authorities, Tab 19.

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LIST OF AUTHORITIES – PART V

APPENDIX A – LEGISLATION

1. *Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 50(1).
2. *National Defence Act,* RSC 1985, C.N-5, s. 35.

APPENDIX B – JURISPRUDENCE

3. *Benaissa v Canada (Attorney General)*, 2005 FC 1220.
4. *Brauer v Canada*, 2014 FC 488.
5. *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62.
6. *Caterpillar Financial Services Ltd. v 360networks Corp.*, 2007 BCCA 14.
7. *Charlton v Canada Post Corp*, 2009 CanLII 1647 (ON SC).
8. *Cooper v Hobart*, 2001 SCC 79.
9. *D.(B.) v Children's Aid Society of Halton (Region)*, 2007 SCC 38.
10. *Edwards v Law Society of Upper Canada*, 2001 SCC 80.
11. *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24.
12. *Farzam v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1659.
13. *Garland v Consumers' Gas Co.*, 2004 SCC 25.
14. *Holland v Saskatchewan (Minister of Agriculture, Food and Rural Revitalization)*, 2008 SCC 42.
15. *International Forest Products Ltd. v. British Columbia*, 2004 BCSC 387.
16. *Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42.
17. *Manuge v R.*, 2010 SCC 67.
18. *Neles Controls Ltd. v R.*, 2002 FCA 107; leave to appeal denied 2002 CarswellNat 3265 (SCC).
19. *Paradis Honey Ltd. v Canada (Attorney General)*, 2014 FC 215.
20. *Pearson v Canada (Minister of Justice)*, 2008 FC 1367.

21. *Queen v Cognos Inc.*, [1993] 1 SCR 87 (SCC).

22. *R. v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 (SCC).

23. *Roitman v R.*, 2006 FCA 266.

24. *Sturm v Sprott Resource Lending Corp.*, 2014 BCSC 190.

25. *Tribute Resources Inc. v Parks Canada Agency*, 2012 ONSC 5480.