CITATION: Goyal v. Niagara College of Applied Arts and Technology, 2018 ONSC 2768
COURT FILE NO.: CV-15-534310CP
DATE: 20180430

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ANISH GOYAL and CHINTAN ZANKAT	)	
Plaintiffs	)	
– and –	)	
NIAGARA COLLEGE OF APPLIED ARTS AND TECHNOLOGY	)	*John C. Field* and *Dianne E. Jozefacki* for the Defendant
Defendant	)	
- and –	)	
THE ATTORNEY GENERAL OF CANADA	)	*Negar Hashemi* and *Susan Gans* for the Third Party
Third Party	)	
	)	**HEARD**: April 17, 2018
Proceeding under the *Class Proceedings Act, 1992*	)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] Anish Goyal and Chintan Zankat commenced a proposed class action against the Niagara College of Applied Arts and Technology. Messrs. Goyal and Zankat were international students at the College, and they alleged that Niagara College misrepresented that it's General Arts and Science Program would qualify for a work permit under Immigration Canada's Post-Graduation Work Permit Program ("PGWP Program").

---

[1] S.O. 1992, c. 6.

[2] Niagara College defended, and relying on the *Crown Liability and Proceedings Act*,[2] it commenced a Third Party Claim against Immigration Canada, more precisely, the Attorney General of Canada; *i.e.*, against the Government of Canada for contribution and indemnity. (I shall hereafter refer to the Attorney General as Immigration Canada.)

[3] In its Third Party Claim, Niagara College alleged that Immigration Canada owed it a duty of care and that its negligence caused harm to the College. Niagara College's claim was limited to contribution and indemnity for the international students' damages and for the costs of defending the proposed class action. Niagara College also sued Immigration Canada for misfeasance in public office, once again, limited to a claim for contribution and indemnity.

[4] Immigration Canada now moves to have the Third Party Claim struck for not disclosing a reasonable cause of action. For the reasons that follow, I strike the negligence claim, but I grant leave to Niagara College to deliver a Fresh as Amended Third Party Claim to plead its claim of misfeasance in public office.

B. Facts

[5] Niagara College is a corporation without share capital established pursuant to the *Ontario Colleges of Applied Arts and Technology Act, 2002*.[3] It was established in 1967, and it operates as a community college. It is subject to the directives of the Ontario government's Ministry of Training, Colleges and Universities and its successor, the Ministry of Advanced Education and Skills Development.

[6] Niagara College offered a General Arts and Science Program that it promoted to international students as means to qualify for a three-year work permit under Immigration Canada's PGWP Program.

[7] Mr. Goyal and Mr. Zankat were international students and are graduates of Niagara College's General Arts and Science Program. In this proposed class action, they propose to represent a class of persons consisting of all international students registered in Niagara College's General Arts and Science Program during the school semesters of September 2013, January 2014, May 2014, September 2014, and January 2015.

[8] Mr. Zankat was an international student from India who had a commerce degree and who had completed a one-year financial planning program at George Brown College in Toronto. In May 2014, he enrolled in Niagara College's General Arts and Science Program. He took six courses, five of which were online. He graduated in September 2014. He applied for but was refused a work permit by Immigration Canada.

[9] Mr. Goyal was an international student from India who had a B.A. in engineering and who had completed a one-year project management program at Centennial College in Toronto. In September 2014, he enrolled in Niagara College's General Arts and Science Program. He took six courses, five of which were online. He graduated in January 2015 and at the time of the

---

[2] R.S.C., 1985, c. C-50.
[3] S.O. 2002, c. 8, Sch. F.

commencement of the proposed class action had been unable to obtain a work permit from Immigration Canada.

[10] Under the Canadian Constitution, the federal government has jurisdiction over immigration. Immigration Canada, more precisely Immigration, Refugees and Citizenship Canada, formerly Citizen and Immigration Canada, is the federal government ministry responsible for immigration and citizenship.

[11] For some time, pursuant to the *Immigration and Refugee Protection Act* and its regulations,[4] Immigration Canada has had a program known as the Post-Graduation Work Permit Program ("PGWP Program"). Under this Program, qualifying students who have graduated from a participating Canadian post-secondary school institution are issued an open work permit for any type of employment without the prerequisite of an existing job offer. This work permit has a term from eight months up to a maximum of three years.

[12] Immigration Canada's Operational Bulletin 194 dated June 2010 provided information about the PGWP Program. The Bulletin stated:

> Revised program criteria
>
> Students holding a one-year graduate degree, diploma or certificate from a participating institution in Canada after having obtained, within the prior two years, a certificate, a diploma or degree from a participating institution in Canada may qualify for a three-year work permit. This exception also applies to students who have left Canada temporarily between programs of study.
>
> ...
>
> Example 2: A student who obtained a one-year diploma or certificate from a participating institution in Canada after having obtained a degree in Canada at the same or in a different participating institution within the previous two years would be allowed to cumulate both educational credentials and therefore would be eligible for a three-year post-graduation work permit.

[13] From at least 2010, up until early 2015, Immigration Canada issued permits under the PGWP Program to international students at Niagara College who had completed its General Arts and Science Program. However, near the end of 2014, Immigration Canada began advising applicants who had graduated from Niagara College that the majority of courses offered under the Niagara College's General Arts and Science Program were taken online and, thus, the Program was regarded as a distance learning program that did not qualify for a work permit under the PGWP Program.

[14] Immigration Canada told a student who had completed courses by distance learning that he or she was not eligible for a work permit under the PGWP Program. Immigration Canada did not advise the student that he or she had a right of appeal. Rather, they advised the student that he or she was required to leave Canada within a month of the issuance of a refusal letter.

[15] In early March, 2015, Niagara College communicated in writing and by telephone messages to Immigration Canada. It was seeking to assist its international students who were applying for work permits. The College advised Immigration Canada that its online courses were

---

[4] S.C. 2001, c. 27. *Immigration and Refugee Protection Regulations*, SOR/2002-227.

not distance education. It complained that it had never received any notice from Immigration Canada that it had changed its operational policy with respect to Niagara College's courses. The College pointed out that its students had previously been granted permits based on the General Arts and Science Program diploma. There was no response or follow up by Immigration Canada.

[16] On August 13, 2015, Messrs. Goyal and Zankat commenced this proposed class action against Niagara College. They claimed damages of $50 million and punitive damages of $5 million for unfair practices under the *Consumer Protection Act, 2002*,[5] negligence, negligent misrepresentation, and fraudulent misrepresentation.

[17] In the fall of 2015, Immigration Canada resumed granting work permits to Niagara College's international students under the PGWP Program who had taken a mix of online and in-class courses in the General Arts and Science Program.

[18] In their proposed class action, Messrs. Goyal and Zankat allege Niagara College misrepresented that students who graduated from the General Arts and Science Program would be eligible for the three-year PGWP Program.

[19] After the commencement of the proposed class action, on December 7, 2015, the Federal Court released its decision in *Appidy v. Canada (Citizenship and Immigration)*.[6] Mr. Appidy was an international student and a graduate of Niagara College's General Arts and Science Program. Before his admission to Niagara College, he had studied at Fanshawe College in London, Ontario, and he had received transfer credits when he enrolled at Niagara College. Mr. Appidy sought judicial review of Immigration Canada's denial of his application for a work permit under the PGWP Program. Mr. Appidy's judicial review application was successful. The Federal Court held that Immigration Canada's decision had been unreasonable because it had considered only the courses that had been taken at Niagara College and did not take into account courses that Mr. Appidy had taken at Fanshawe College.

[20] After the release of the *Appidy* decision, on July 15, 2016, Niagara College delivered its Statement of Defence, and on July 18, 2016, Niagara College issued its Third Party Claim against Immigration Canada for negligence and misfeasance in public office, the details of which, I shall describe below.

[21] The gist of the Third Party Claim in negligence was that Immigration Canada had breached a duty of care it owed to the international students and to Niagara College. Further, it was alleged that regardless of whether the policy analysis takes place at the proximity stage or at the residential policy factors stage, Immigration Canada's duties are to the public and the imposition of a duty of care on Niagara College would interfere with Immigrations Canada's duties to the administer the immigration scheme in the public interest.

[22] After the *Appidy* decision, on October 17, 2016, Immigration Canada issued a new operational bulletin. Operational Bulletin 631 stated:

---

[5] S.O. 2002, c.30, Sch. A, s. 18.
[6] 2015 FC 1356.

Conditions (Eligibility criteria)

Foreign nationals are eligible for consideration under the public policy if they meet the following conditions (eligibility criteria):

- they were refused a Post-Graduation Work Permit (PGWP) between September 1, 2014 and March 15, 2016;
- the reason for the refusal of the application was because the applicant completed the majority of their coursework by distance learning, and
- the entirety of their program of study, including transfer credits, was not considered when the determination was made that the majority of their coursework was by distance learning.

Please note that foreign nationals will be required to self-identify themselves as eligible for consideration under the public policy based on the above conditions (eligibility criteria).

...

In-Canada applications

Foreign nationals residing in Canada must:

...

- Include documentary evidence that the majority of their coursework, including transfer credits, was done in-class and not by distance learning.

  ...

Outside of Canada applications

Foreign nationals residing outside of Canada must:

...

- Include documentary evidence that the majority of their coursework, including transfer credits, was completed in-class and not by distance learning.

[23] On November 3, 2016, Immigration Canada brought a motion to have the Third Party Claim dismissed for failure to show a reasonable cause of action. The motion, however, was not argued, and the parties rather engaged in an unsuccessful mediation.

[24] After issuing Operational Bulletin 631, Immigration Canada allowed international students who had been denied a work permit under the PGWP Program to re-apply before the deadline of March 17, 2017. To qualify, applicants had to demonstrate that the entirety of their program of study, including transfer credits, was not considered when the determination was made that the majority of their coursework was by distance learning.

[25] On January 22, 2018, Niagara College amended the Third Party Claim.

[26] In its Third Party Claim, Niagara College alleged that Immigration Canada in establishing the PGWP Program stood in a sufficiently proximate relationship to Niagara College such that it was foreseeable that failure to take reasonable care might cause damage and loss to Niagara College.

[27] Niagara College pleads that Immigration Canada owed it and the international students: (a) a duty of care to take reasonable steps to avoid causing foreseeable economic hardship to Niagara College and its international students who graduated from the General Arts and Science

Program; (b) a duty of care not to determine eligibility for the PGWP Program solely based on whether or not the international student took a majority of his or her courses online, as opposed to in-class; (c) a duty of care to take into account all of the courses taken by the international students at a post-secondary institution before enrollment at Niagara College; and (d) a duty of care not to allow local offices of Immigration Canada to make an operational decision, based on an improper and inaccurate assessment of the taking of online courses.

[28] Niagara College pleads that because Immigration Canada communicated regularly with Colleges and Universities, including Niagara College, to provide information about the PGWP Program, Immigration Canada acknowledged that it stood in a sufficiently proximate relationship with and owed a duty of care to international student graduates and their post-secondary institutions including Niagara College.

[29] Niagara College pleads that Immigration Canada knew or ought to have known that Niagara College and its international students relied on the information provided by Immigration Canada, including its June 2010 Operational Bulletin with respect to eligibility under the PGWP Program. It notes that Immigration Canada never indicated that international students were ineligible under the Program if they took online courses.

[30] Niagara College pleads that Immigration Canada made a negligent and unreasonable operational decision to equate online course with a distance learning program, which decision was made without any inquiries of Niagara College about the nature of its online courses.

[31] Niagara College pleads by Immigration Canada issuing Operational Bulletin 194 in June 2010 and Operational Bulletin 631 on October 17, 2016, and by changing the provisions of the PGWP Program in December, 2017, Immigration Canada acknowledged that it stood in a sufficiently proximate relationship and had a duty of care to international student graduates and their post-secondary institutions, including Niagara College.

[32] Niagara College pleads that Immigration Canada breached its duty of care by, among other things: (a) denying post-graduation work permits based on a negligent, operational decision that was not based on the terms of the PGWP Program or the terms of the Operational Bulletin; (b) denying permits to international students from Niagara College solely on the basis of the taking of online courses; (c) by basing its decision on inaccurate information, including equating online courses with distance learning; (d) by failing to conduct any inquiry or to seek any information from Niagara College about the nature of its General Arts and Science Program; and (e) by ignoring Niagara College's responses.

[33] Niagara College's pleading of misfeasance in public office is set out in paragraphs 50 to 65 of the 2018 Amended Third Party Claim, which state:

> 50. In addition, Niagara College pleads that [Immigration Canada] is liable to Niagara College for misfeasance in public office.
>
> 51. Niagara College pleads and relies upon the allegations set out above and, in addition, pleads as follows.
>
> 52. The decision taken by [Immigration Canada's] local offices, in particular its officers in ... [the] Etobicoke office to deny post-graduation work permits to international students who graduated from Niagara College's GAS (General Arts and Science) Program was made on an unlawful and capricious basis. [Immigration Canada's] operational decision to equate the taking of online courses to a distance learning program was made knowingly in the face of the terms of the

PGWP Program and [Immigration Canada's] Operational Guidelines Bulletin which contained no such provision.

53. The Federal Court in *Appidy* determined that the actions of [Immigration Canada] were unreasonable. Niagara College pleads that in addition to being unreasonable, [Immigration Canada's] operational decision was unlawful and improper. There was no basis to [Immigration Canada's] attempt to deny post-graduation work permits based on an indefensible determination that the taking of online courses amounted to a distance learning program.

54. The officers in [Immigration Canada's] Etobicoke office engaged in a deliberate and unlawful course of conduct in denying post-graduation work permits to international students who had graduated from Niagara College's GAS Program.

55. [Immigration Canada's] officers in its Etobicoke office engaged in a repeated unlawful course of conduct by identifying and wrongly singling out and treating differently than other post-secondary institutions in Ontario and in Canada Niagara College and its international student graduates. They knowingly equated the taking of online courses with a distance learning program and only focused on courses taken by international students in the GAS Program and ignored all of the other Canadian post-secondary courses taken by those international students. They did so when they knew that no such decision had been made previously and was not being made with respect to other post-secondary institutions and their international student graduates.

50. In addition, [Immigration Canada's] officers in its Etobicoke office, in singling out Niagara College and its international students with these unlawful decisions did so without any statutory or regulatory guideline or operational direction.

57. At no time did [Immigration Canada's] officers in its Etobicoke office contact Niagara College to make any inquiries with respect to the way in which Niagara College's international students select and take courses offered in its campus-based GAS Program. Nor did [Immigration Canada] make any efforts to inquire and understand from Niagara College that the taking of an online course was in the context of a campus-based program and did not constitute a distance learning program. Upon being advised in late February and early March 2015 by its international students of some denials of their applications for the post-graduation work permit, Niagara College contacted [Immigration Canada]. In particular, in early March 2015, Niagara College contacted [Immigration Canada's] Etobicoke office by telephone and left voicemail messages to speak to representatives with respect to its concerns on behalf of Niagara College and its international students. However, Niagara College did not receive a response to its telephone inquiries.

59. On March 13, 2015, Niagara College wrote to [Immigration Canada's] Etobicoke office to seek assistance with respect to its international students' applications for post-graduation work permits. Niagara College did not receive a response from [Immigration Canada's] Etobicoke office.

60. [Immigration Canada] was aware that this conduct was unlawful and likely to cause harm to Niagara College and to the international students who graduated from Niagara College's GAS Program.

61. [Immigration Canada], in making its operational decision, demonstrated clear bias and pre-determination against Niagara College and its international students who graduated from Niagara College's GAS Program.

62. [Immigration Canada], in denying post-graduation work permits to a number of the international students who graduated from Niagara College's GAS Program, relied on erroneous and unlawful determinations in denying the post-graduation work permits.

63. As pleaded in paragraphs 43 and 44 above, [Immigration Canada] in issuing Bulletin 631 on or about October 17, 2016, recognized that its local Etobicoke office had engaged in a deliberate and unlawful course of conduct in denying post-graduation work permits to international students who had graduated from Niagara College's GAS Program by removing consideration of any further

> applications pursuant to Operational Bulletin 631 from its officers in [Immigration Canada's] Etobicoke office and requiring that those applications only be processed out of its Vegreville, Alberta location and specifically addressed to the Case Processing Centre in Vegreville for expedited post-graduation work permit processing.
>
> 64. Niagara College pleads that [Immigration Canada's] conduct also amounts to bad faith and misfeasance in public office.
>
> 65. Niagara College further pleads that, as a result of [Immigration Canada's] misfeasance in public office, the alleged damages claimed by the Plaintiffs in the main action are the sole responsibility of [Immigration Canada] and not Niagara College.

[34] On March 28, 2018, Immigration Canada reinitiated its motion to have the Third Party Claim dismissed for failure to show a reasonable cause of action.

C. Discussion

1. Jurisdiction

[35] Where a defendant (in the immediate case, Immigration Canada, a Third Party defendant) submits that the plaintiff's pleading (in the immediate case, the contribution and indemnity claim of Niagara College as a Third Party claimant) does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim.[7]

[36] The plain and obvious test is derived from what historically was known as a demurrer pleading and what in Ontario was Rule 126 of the former *Rules of Practice* and what is now rule 21.01 (1)(b) of the *Rules of Civil Procedure*, which states:

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

[37] No evidence is admissible on a motion under rule 21.01 (1)(b), and the factual context is taken from the pleadings. Under rule 21.01(1), the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof.[8] The pleading is to be read generously with allowance for inadequacies due to drafting deficiencies.[9] The pleading is deemed to include any statement or documents incorporated in it by reference and which form an integral

---

[7] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.); *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.).

[8] *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (CA); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.)

[9] *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.).

part of a plaintiff's claim and the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings.[10]

[38] Matters of law that are not fully settled should not be disposed of on a motion to strike,[11] and the court's power to strike a claim is exercised only in the clearest cases.[12] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[13] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[14]

[39] In *R. v. Imperial Tobacco Canada Ltd.*,[15] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[40] On motions brought under the procedure to strike a claim or defence as untenable in law, leave to amend the pleading may and usually will be given, and leave to amend will only be denied in the clearest cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged and there is no reason to suppose that the party could improve his or her case by any amendment.[16]

2. Does Immigration Canada have a Duty of Care to Niagara College?

(a) Duty of Care Analysis

[41] The legal test for determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions[17] adapting and explaining the House of Lords'

---

[10] *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.); *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, 2012 ONSC 4544 at paras. 11-12; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32.

[11] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[12] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[13] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

[14] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

[15] 2011 SCC 42 at paras. 17-25.

[16] *Mitchell v. Lewis*, 2016 ONCA 903 at para. 21; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72 at para. 16; *South Holly Holdings Ltd. Holdings Ltd. v. Toronto-Dominion Bank (c.o.b. TD Canada Trust)*, [2007] O.J. No. 2445 at para. 6 (C.A.); *Miguna v. Ontario (Attorney General)*, [2005] O.J. No. 5346 (C.A.).

[17] *Haig v. Bamford*, [1976] 1 S.C.R. 466; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Ingles v. Tutkaluk*, 2000 SCC 12; *Cooper v. Hobart*, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Childs v. Desormeaux*, 2006 SCC 18; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Design Services Ltd. v. Canada*, 2008 SCC 22; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Holland v. Saskatchewan*, 2008 SCC 42; *Fullowka v.*

decision in *Anns v. Merton London Borough Council*,[18] and derived from the seminal cases of *Donoghue v. Stevenson*[19] and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[20]

[42] The negligence claim in the immediate case is a claim for a pure economic loss, which is a diminution of financial worth incurred without any physical injury to the plaintiff or his or her property.[21] In 1874, in *Cattle v. Stockton Waterworks Co.*,[22] the English court recognized the general principle that compensation for pure economic losses, losses not connected to personal injury or property damage, are not generally recoverable in negligence.

[43] As the law developed in Canada, the Supreme Court has recognized that there are categorical exemptions to the general principle that purely economic losses are not compensable in negligence. In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,[23] the Court recognized five established categories where recovery for pure economic losses was permitted; namely: (1) negligent misrepresentation; (2) negligence of public authorities; (3) negligent performance of a service; (4) supply of shoddy goods or structures; and (5) relational economic losses. Second, the Court recognized that the categories were not closed, and new exceptions were possible. Third, the Court envisioned that a duty of care analysis and principled approach could be used to identify new exceptions to the general principle that pure economic losses were not recoverable in negligence.

[44] If a negligence case does not come within an established category, it is necessary to undertake a duty of care analysis. There is a four-step analysis. The first step is to determine whether the case falls within a recognized category of negligence. If the relationship between the plaintiff and the defendant does not fall within a recognized class of negligence where the defendants have a duty of care to others, then whether a duty of care to another exists involves satisfying the requirements of the next three steps: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity. Thus, in a new category of case whether a relationship giving rise to a duty of care exists depends on foreseeability, moderated by policy concerns.[24]

[45] To determine the foreseeability element, the court asks whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act.[25] A reasonable foreseeability analysis requires only that the general harm, not its manner of incidence, be reasonably

---

Pinkerton's of Canada Ltd., 2010 SCC 5; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Saadati v. Moorhead*, 2017 SCC 28; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.

[18] [1978] A.C. 728 (H.L.).

[19] [1932] A.C. 562 (H.L.).

[20] [1964] A.C. 465 (H.L.).

[21] *A.G. (Ont.) v. Fatehi*, [1984] 2 S.C.R. 536, at p. 542.

[22] (1874), L.R. 10 Q.B. 453.

[23] [1992] 1 S.C.R. 1021.

[24] *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 4.

[25] *Cooper v. Hobart*, 2001 SCC 79 at para. 30.

foreseeable.[26]

[46] Proximity focuses on the type of relationship between the plaintiff and defendant and asks whether this relationship is sufficiently close that the defendant may reasonably be said to owe the plaintiff a duty to take care not to injure him or her.[27] Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests.[28] The proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff.[29] The focus of the probe is on the nature of the relationship between victim and alleged wrongdoer and the question is whether the relationship is one where the imposition of legal liability for the wrongdoer's actions would be appropriate.[30] The proximity focuses on the connection between the defendant's undertaking, the breach of which is the wrongful act, and the loss claimed.[31]

[47] The proximity analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved.[32] Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.[33] The proximity analysis is intended to be sufficiently flexible to capture all relevant circumstances that might, in any given case, go to seeking out the close and direct relationship that is the hallmark of the common law duty of care.[34]

[48] It needs to be emphasized that the proximity analysis of the first stage of the duty of care test involves policy issues because it asks the normative question of whether the relationship is sufficiently close to give rise to a legal duty.[35]

[49] When the defendant is a statutory actor, the allegation of negligence must be analyzed in the context of the statutory scheme.[36] A duty of care may arise from an express or implied statutory duty or it may arise as a matter of the common law.[37] In addition to a statutory duty of care set out in the governing legislation, there may be a common law duty of care that arises by

---

[26] *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd.*, 2009 ONCA 319 at para. 24.
[27] *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.); *Eliopoulos v. Ontario (Minister of Health & Long-Term Care)* (2006), 82 OR (3d) 321 (CA), leave to appeal to SCC ref'd [2006] SCCA No 514.
[28] *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 49; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 SCR 165 at para. 24.
[29] *Syl Apps Secure Treatment Centre v. D. (B.),* 2007 SCC 38 at para. 26.
[30] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 23.
[31] *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63.
[32] *Cooper v. Hobart,* 2001 SCC 79 at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 23; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 50.
[33] *Hill v. Hamilton-Wentworth Regional Police Services Board,* 2007 SCC 41 at para. 29.
[34] *Saadati v. Moorhead*, 2017 SCC 28 at para. 24.
[35] *Cooper v. Hobart,* 2001 SCC 79 at paras. 25-30.
[36] *Rausch v. Pickering (City)*, 2013 ONCA 740.
[37] *Rausch v. Pickering (City)*, 2013 ONCA 740.

virtue of interactions between the statutory actor and a private individual.[38] Where the defendant is a statutory actor, the proximity inquiry will focus initially on the applicable legislative scheme and secondly, on the interactions, if any, between the regulator or governmental authority and the putative plaintiff.[39] Once the statutory actor has direct interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk.[40]

[50] The focus of the analysis as to whether a public body or statutory actor has a duty of care is proximity and the statutory scheme is the core of the proximity analysis.[41] The statutory scheme must be examined as to whether it establishes a direct relationship between the public body and the plaintiff and whether the statutory scheme forecloses the existence of a common law duty of care claim against the statutory actor or public body; other relevant factors are reliance, whether the statute provides adequate alternative remedies for a person injured by his or her interaction with the public authority,[42] and whether the recognition of a duty of care would conflict with an overarching statutory or public duty.[43]

[51] When a statutory actor or public authority is alleged to owe a duty of care, the court must consider whether the impugned conduct was a policy decision dictated by financial, economic, social or political factors or constraints, for which statutory actors or public authorities are accountable to the electorate, or operational conduct based on administrative direction, expert or professional opinion, technical standards or general standards of reasonableness, for which the public authority may be liable for negligence.[44] A public authority may be liable for a negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so will cause physical harm to the plaintiff.[45]

[52] Moving on to the final stage of the duty of care analysis, if the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.[46] Policy concerns raised against imposing a duty of care must be more than speculative, and a real potential for negative consequences must be apparent.[47]

---

[38] *R. v. Imperial Tobacco*, 2011 SCC 42 at paras. 43-45; *Rausch v. Pickering (City)*, 2013 ONCA 740.
[39] *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, at para. 75; *Williams v. Toronto (City)*, 2016 ONCA 666 at para. 18; *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, leave to appeal to the S.C.C. ref'd [2015] S.C.C.A. No. 227; *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2017 ONCA 526.
[40] *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17; *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454; *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, leave to appeal to the S.C.C. ref'd [2015] S.C.C.A. No. 227.
[41] *Cooper v. Hobart*, 2001 SCC 79 at para.43; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para.9;
[42] *Rausch v. Pickering (City)*, 2013 ONCA 740.
[43] *Cooper v. Hobart*, 2001 SCC 79 at para. 43; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38 at para. 28.
[44] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 at p. 434.
[45] *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594.
[46] *Childs v. Desormeaux*, 2006 SCC 18 at para. 13.
[47] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras. 47-48; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 57.

[53] The final stage of the analysis is not concerned with the type of relationship between the plaintiff and the defendant. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the plaintiff and the defendant such that the imposition of a duty would be fair.[48] The final stage of the analysis is about the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.[49]

[54] In cases of pure economic losses, a prominent policy factor is the avoidance of the imposition of an indeterminate liability.[50] However, if a proper proximity analysis is applied, it will rarely be the case that a *prima facie* duty of care could result in indeterminate liability.[51]

(b) Discussion

[55] At the outset, three points may be noted. First, Niagara College does not rely on a duty of care arising from an express or implied statutory duty under the *Immigration and Refugee Protection Act* and its *Regulations*. Second, the Amended Third Party Claim does not fall within, nor is it analogous to, any category of cases in which a duty of care has been recognized. Third, Niagara College's claim is for a pure economic loss, for which the law for a variety of policy reasons is more resistant to finding a duty of care in contrast to losses for or associated with physical injuries.

[56] In the immediate case, there is a short route argument and a long route argument to the conclusion that Immigration Canada does not have a duty of care to Niagara College.

[57] The short route argument is that since: (a) proximity is the legal measure of the relationship between a plaintiff and a defendant, (b) the relationship between Immigration Canada and Niagara College about eligibility for the PGWP Program is more remote (less proximate) than the relationship between Immigration Canada and the international students applying for a work permit; therefore, if there is no duty of care between Immigration Canada and the international students, then *a fortiori,* there is no duty of care between Immigration Canada and Niagara College. Since the existing jurisprudence is that immigration officers generally do not owe a private law duty of care to applicants under the immigration statutes; therefore, there is no duty of care to Niagara College.

[58] The short argument is consistent with the recognition that non-citizens do not have a right to be granted status in Canada and Immigration Canada's duties are duties to the public. The relationship between Immigration Canada and those subject to immigration decisions is not one of individual proximity, and no duty of care is owed by those responsible for the administrative

---

[48] *Cooper v. Hobart,* 2001 SCC 79 at para. 37; *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 51.
[49] *Cooper v. Hobart,* 2001 at para. 37; *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 51.
[50] *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 70
[51] *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63 at para. 22.

implementation of immigration decisions.[52]

[59] In my opinion, Niagara College does not have a proximate relationship with Immigration Canada. There is no direct relationship between Immigration Canada and Niagara College under the *Immigration and Refugee Protection Act* or its *Regulations*. The fact that educational institutions are mentioned in the statutory regime does not make the institutions part of the scheme. Designated learning institutions are defined in the *Regulations* for the limited purpose of describing the types of institutions that international students can attend on a study permit. The most common type (and the category in which Niagara College falls) is a learning institution that is "designated by the province...on the basis that the institution meets provincial requirements in respect of the delivery of education". The designation process is a provincial prerogative.

[60] The educational institutions are regulated by the province, not the federal government, and it is the students of the educational institutions that are the subjects applying for the work permits that are the object of the PGWP Program. That application process is between students and Immigration Canada. The educational institutions are not the subject, predicate, or the object of the work permit programs of Immigration Canada, and Niagara College's relationship to Immigration Canada is as a member of the public with a tangential interest.

[61] The relationship between Immigration Canada is not sufficiently close so that Immigration Canada may reasonably be said to owe Niagara College a duty to take care not to injure Niagara College's economic interests. Niagara College's interest is indirect and tangential. It is under no obligation to offer programs that may assist its students in obtaining work permits. Niagara College may, in its own interest, offer an education program that will assist the students that are the subject of the PGWP Program, but that does not create a proximate relationship between Immigration Canada and Niagara College. The *Immigration and Refugee Protection Act* and its Regulations do not impose consultation obligations on Immigration Canada with educational institutions nor does it create a specific role for them in the design, development and implementation of Immigration Canada's work permit programs. There is nothing in the statutory regime that suggests that Immigration Canada has an obligation to protect or enhance the economic interests of the educational institutions.

[62] That Niagara College, as a member of the public, obtains information from Immigration Canada, does not establish a proximate relationship sufficient to create a duty of care. The interactions between Niagara College and Immigration Canada were limited and not of the up-close-and-personal type that might establish foreseeability of harm or proximity. The limited interactions that Niagara College had with Immigration Canada were indirect, derivative, or collateral to the direct interactions between its students and Immigration Canada. That Immigration Canada responded to the Federal Court's decision is no acknowledgement of a duty of care to either the student applicants or to the more remote Niagara College. Immigration Canada's response was in the public sector of public law not in the private sector of negligence

---

[52] *Al Omani v. Canada*, 2017 FC 86; *Almacén v. Canada*, 2016 FC 300, aff'd 2016 FCA 296; *Zhang v Canada (Citizenship and Immigration)*, 2016 FC 1057; *Khalil v Canada*, [2007] FC 928, aff'd 2009 FCA 66; *Szebenyi v. Canada*, 2006 FC 602, aff'd 2007 FCA 118; *Paszkowski v. Canada (Attorney General)*, 2006 FC 198; *Premakumaran v. Canada*, 2005 FC 1131, aff'd 2006 FCA 213; *Farzam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659.

claims.

[63] Regardless of whether the policy analysis takes place at the proximity stage or at the residential policy factors stage, Immigration Canada's duties are to the public and the imposition of a duty of care to Niagara College would interfere with Immigration Canada's duties to administer the immigration scheme in the public interest.

[64] The case at bar is not like, for instance, *Paradis Honey Ltd. v. Canada (Attorney General)*[53] where there were direct interactions and assurances between the persons who were the subjects of the government's statutory regime and who were directly affected by the government's policy decisions and assurances. Niagara College's Amended Claim falls into the category of cases like *Cooper v. Hobart*,[54] *Edwards v. Law Society of Upper Canada*,[55] and *Attis v. Canada (Health)*,[56] where the regulator's duty was to the public and, absent direct engagement, did not give rise to a private law duty of care.

[65] I, therefore, conclude that Niagara College's claim in negligence for pure economic losses should be struck without leave to amend.

3. Has Niagara College Pleaded a Cause of Action for Misfeasance in Public Office?

(a) The Elements of the Tort of Misfeasance in Public Office

[66] The tort of misfeasance in public office is about intentional unlawful conduct by public officials in the exercise of their public powers and duties. The tort of misfeasance in a public office can be traced to 1703 and *Ashby v. White*,[57] where an elections officer maliciously and fraudulently deprived Mr. White of the right to vote. The officer had the authority to regulate who could vote, but he abused his power.

[67] In *Odhavji Estate v. Woodhouse*,[58] in a judgment written by Justice Iacobucci, the Supreme Court of Canada declined to restrict this tort to acts of commission, where a public official unlawfully exercises power for the purpose of harming an individual or corporation. Thus, under the tort of misfeasance in public office a public official or public authority can be liable for the harm caused by what it intentionally does and also by what it intentionally fails to do.

[68] In *Freeman-Maloy v. Marsden*,[59] in the Court of Appeal, Justice Sharpe described the nature of the tort of misfeasance in public office; he stated:

---

[53] 2015 FCA 89, leave to appeal to the S.C.C. ref'd [2015] S.C.C.A. No. 227.
[54] 2001 SCC 79.
[55] 2001 SCC 80.
[56] 2008 ONCA 660.
[57] (1703), 2 Ld. Raym. 938, 92 E.R. 126 (H.L.).
[58] [2003] 3 S.C.R. 263, rev'g (2001), 52 O.R. (3d) 181 (C.A.), which varied [1998] O.J. No. 5426 (Gen. Div.).
[59] (2006), 79 O.R. (3d) 401 (C.A.), rev'g (2005), 253 D.L.R. (4th) 728 (S.C.J.), leave to appeal to the S.C.C. refused [2006] S.C.C.A. No. 201. Justice Sharp repeated this passage in *L. (A.) v. Ontario (Minister of Community and Social Services)* (2006), 83 O.R. (3d) 512 (C.A.) at para. 35, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 36.

> The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220, at p. 1230 W.L.R.: "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." The "underlying purpose" of the tort of misfeasance in a public office "is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions:" *Odhavji, supra*, at para. 30.

[69] The core of the tort of misfeasance in public office is deliberate misconduct of official duty coupled with knowledge that the misconduct will injure the plaintiff. The essential elements of the tort of misfeasance in public office are: (1) the defendant must be a public official or public authority; (2) the defendant must have engaged in deliberate unlawful conduct in his or her capacity as a public official or public authority; (3) the defendant must have a culpable mental state; namely the public official must have been aware that: (a) his or her conduct was unlawful, and (b) that the conduct was likely to harm the plaintiff; (4) the conduct must cause the defendant harm; and (5) the harm must be of the type compensable under tort law.[60]

[70] Misfeasance in public office is an intentional tort; it is not directed at a public officer who inadvertently or negligently fails to adequately discharge the obligations of his or her office.[61] The requisite mental state is not established by mere negligence, which is an objective standard of what a reasonable person ought to have known.[62] Government action often involves making decisions where it will be foreseeable that there will be advantages to some citizens and disadvantages and even harm to others. Without more, it is not misfeasance in public office to make decisions that will foreseeably harm someone. Making such decisions may be consistent with and not an abuse of public office.[63]

[71] The tort of misfeasance in public office is an intentional tort distinct from the tort of negligence, and a public official will not be liable just because he or she ought to have known that the conduct was improper and that harm was foreseeable.[64] Illegality without more does not ground a cause of action for misfeasance of public office. For liability, the official must act maliciously or with knowledge about or reckless indifference to the likelihood of harm to the plaintiff.

---

[60] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras. 23 and 32.
[61] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 26; *Mitchell (Litigation Administrator of) v. Ontario*, (2004), 71 O.R. (3d) 571 (Div. Ct.), rev'g [2002] O.J. No. 2100 (S.C.J.).
[62] *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.), aff'g [1999] 9 W.W.R. 203 (Alta. Q.B.), leave to appeal to the S.C.C. refused [2003] S.C.C.A. No. 35.
[63] *Club Pro Adult Entertainment Inc. v. Ontario*, [2006] O.J. No. 5027 (S.C.J.), affd. on this point [2008] O.J. No. 777 (C.A.); *L. (A.) v. Ontario (Minister of Community and Social Services)* (2006), 83 O.R. (3d) 512 (C.A.) at para. 36, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 36; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras. 26, 28;
[64] *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2017 ONCA 526; *Pikangikum First Nation v. Nault*, 2012 ONCA 705 at para. 77, leave to appeal refused, [2013] S.C.C.A. No. 10; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras. 28.

[72] Generally speaking, a public official can engage in unlawful conduct in one of three ways: (1) the public official can intentionally exercise powers or intentionally refuse to exercise powers he or she has but for the improper purpose of harming another; (2) the public official can intentionally exercise powers he or she does not have for an improper purpose; or (3) the public official can intentionally contravene a statute for an improper purpose.[65]

[73] A public official does not have the authority to exercise power for an improper purpose, and if a plaintiff proves that a public official exercised his or her power with the actual intent of harming the plaintiff, then the plaintiff will have proven the first three elements of the tort (viz., status, misconduct, culpable state of mind).[66]

[74] The deliberate use of official power in order to injure another makes its use malicious and abusive. Historically, the mental element for the tort where a public official intentionally misuses his or her power to harm another was described as "targeted malice." The Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, the New Zealand Court of Appeal in *Garrett v. Attorney General*,[67] and the House of Lords in *Three Rivers District Council v. Bank of England (No. 3)*,[68] have recognized that the mental element of the tort can be satisfied without targeted malice when the defendant has a reckless disregard for causing harm.

[75] If the plaintiff proves that the defendant public official deliberately disregarded his or her official duty, which was the allegation in *Odhavji Estate*, then this will satisfy the first two elements of the tort, but the mental element of the tort will not be satisfied; the official will not be culpable for misfeasance in public office, unless the plaintiff proves that the public official knew that what he or she was doing was wrong and that the conduct would likely harm the plaintiff. The tort requires deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff; the defendant must know what he or she is doing is wrongful and have a conscious disregard for the interests of those who will be affected by the misconduct in question.[69]

[76] In *Gershman v. Manitoba Vegetable Producers' Marketing Board*,[70] a provincial marketing board had a history of legal feuding and unpaid accounts with the Gershman family. The board announced a policy to deny credit to any company that would associate with members of the family. The Manitoba courts concluded that in blacklisting the Gershmans, the marketing board had acted maliciously and vindictively to drive the Gershmans out of the food-produce

---

[65] *Castrillo v. Ontario (Workplace Safety and Insurance Board)*, 2017 ONCA 121; *Martineau v. Ontario (Alcohol and Gaming Commission)*, [2007] O.J. No. 1141 (C.A.); *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263; *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474 (Alta. C.A.), aff'g [1999] 9 W.W.R. 203 (Alta. Q.B.), leave to appeal to the S.C.C. refused [2003] S.C.C.A. No. 35; *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (B.C.C.A.); *Uni-Jet Industrial Pipe Ltd. v. Attorney General of Canada* (2001), 198 D.L.R. (4th) 577 (Man. C.A.); *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d) 114 (Man. C.A.); *McGillivray v. Kimber* (1915), 52 S.C.R. 146.

[66] *Jones v. Swansea City Council*, [1990] 3 All E.R. 737 (H.L.).

[67] [1997] 2 N.Z.L.R. 332 (C.A.).

[68] [2001] H.L.J. No. 17 and [2000] H.L.J. No. 32.

[69] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 29.

[70] (1976), 69 D.L.R. (3d) 114 (Man. C.A.), affg. (1975), 65 D.L.R. (3d) 181 (Man. Q.B.). See also: *Namusa Enterprises Ltd. v. Etobicoke (City)* (1990), 3 M.P.L.R. (2d) 227 (Ont. Gen. Div.).

business.

[77] Under rule 25.06 (8) of the *Rules of Civil Procedure,* the defendant's knowledge of wrongdoing may be alleged as a fact without pleading the circumstances from which it is to be inferred; however, full particulars of allegations of malice or intent must be pleaded. Therefore, while it is sufficient to plead that the public official defendant knew that his or her conduct was wrongful, it not sufficient to plead that the defendant intended to harm the plaintiff (targeted malice) or that the defendant's conduct was recklessly indifferent to the likelihood of injury to the plaintiff. The plaintiff must plead material facts supporting the allegation that the public official defendant, by its conduct, intended to harm the plaintiff or the plaintiff must plead material facts supporting the allegation that the defendant knew or was recklessly indifferent to the risk of harm to the plaintiff.

(b) Discussion

[78] In the case at bar, Immigration Canada did not, as it did with respect to the negligence claim, submit that Niagara College had no reasonable cause of action for misfeasance in public office; rather, Immigration Canada submitted that based on the pleaded facts, the requisite elements of the tort had not been adequately pleaded and that Niagara College would be unable to plead the requisite material facts. Neither branch of this submission is correct. In my opinion, Niagara College has adequately pleaded the material elements of a legally viable claim of misfeasance in public office.

[79] The 2018 Amended Third Party Claim describes a claim based on the officials of the Etobicoke office of Immigration Canada maliciously targeting Niagara College's students for the purpose of harming Niagara College. This may be a difficult claim to prove, but that is not the issue on this motion. The claim as pleaded is legally viable and, in my opinion, reading, the Third Party Claim generously, there is no need for further particulars or for the pleading of additional material facts.

[80] Therefore, I dismiss Immigration Canada's motion insofar as it concerns the pleading of misfeasance in public office.

D. Conclusion

[81] For the above reasons, I strike the negligence claim, but I grant leave to Niagara College to deliver a Fresh as Amended Third Party Claim to plead its claim of misfeasance in public office.

[82] Success being divided, I make no order as to costs.

Perell, J.

Released: April 30, 2018

CITATION: Goyal v. Niagara College of Applied Arts and Technology, 2018 ONSC 2768
COURT FILE NO.: CV-15-534310CP
DATE: 20180430

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANISH GOYAL and CHINTAN ZANKAT

Plaintiffs

– and –

NIAGARA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Defendant

– and –

THE ATTORNEY GENERAL OF CANADA

Third Party

REASONS FOR DECISION

PERELL J.

Released: April 30, 2018