

**SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)**

B E T W E E N:

CAPITAL MARKETS TECHNOLOGIES, INC. and 7645686 CANADA INC.

Plaintiffs

and

GOVERNMENT OF PRINCE EDWARD ISLAND, WES SHERIDAN,
STEVEN MACLEAN, ALLAN CAMPBELL, CHRIS LECLAIR, BRAD MIX,
CHERYL PAYNTER, PAUL JENKINS and 7628382 CANADA CORPORATION

Defendants

PLAINTIFFS' RESPONDING FACTUM

(Issuance of Amended Statement of Claim)

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2. **DEFINITIONS**

3. The definitions are partially set forth in the Maines Affidavit and this Responding Motion Factum also utilizes the following definitions:

“Maines Affidavit” means the affidavit of Mr. Paul Maines sworn November 17, 2017.

“CMT v. PEI” means *Capital Markets Technologies, Inc v. Prince Edward Island*.

“MOU” means the Memorandum of Understanding.

“E-gaming Initiative” means the PEI e-gaming initiative.

“Financial Services Platform” means the Simplex/CMT financial services platform.

“Loyalty Card Program” means the PEI loyalty card program.

4. **MISFEASANCE IN PUBLIC OFFICE**

5. The misfeasance in public office involves numerous factual issues, for example:

- a. the breach of MOU more specifically the exclusivity provision;
- b. the breach of MOU more specifically the confidentiality provision;
- c. the destruction of evidence by Ghiz related to LeClair and Beck emails;
- d. the inference is that LeClair, Sheridan and Scales involvement covered up;
- e. the destruction of evidence by Stewart related to MacEachern emails;
- f. the inference is that Dow and Cutcliffe involvement covered up;
- g. the unlawful conduct of Scales, Dow and Cutcliffe;
- h. the awareness of the unlawful conduct of Scales, Dow and Cutcliffe;

- i. the bad faith conduct of Scales, Dow and Cutcliffe;
- j. the damages caused to the plaintiffs by the bad faith conduct;
- k. the false allegations related to the “fictitious lady with cancer”;
- l. the breach of section 7 of *Archives and Records Act*;
- m. the misuse of section 15. (1) of the *Freedom of Information and Privacy Act*;
- n. the misuse of section 36. (1) of the *Securities Act*;
- o. the false statements made by senior PEI officials while in public office; and
- p. the breach of the good faith doctrine.

6. **THE NOTICE OF MOTION**

7. The Notice of Motion deals only with the issuance of the Amended Statement of Claim and contains no reference to any other motions:

“The Plaintiffs, CAPITAL MARKETS TECHNOLOGIES, INC. and 7645686 CANADA INC., will make a motion to a judge on January 31, 2018 at 9:30 am, or so soon after, at 42 Water Street, Charlottetown, Queens County, Prince Edward Island.

THE MOTION IS FOR:

1. An order to have the Amended Statement of Claim issued by the Supreme Court of Prince Edward Island (General Section).

THE GROUNDS OF THE MOTION ARE:

1. Rule 5.03 (4) of the Rules of Civil Procedure states which states:

“The court **may order** that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding **shall be added as a party.**”

2. Rule 26.01 of the Rules of Civil Procedure states:

“On motion at any stage of an action the court **shall grant leave to amend**

a pleading on such terms as are **just**, unless prejudice would result that could not be compensated for by costs or an adjournment.”

THE FOLLOWING DOCUMENTARY EVIDENCE:

1. The Affidavit of Paul Maines attached to Motion Record as Tab B; and
2. Such other material as the Court may approve, on notice, if required.”

8. **THE RESPONDING FACTUM**

9. Ms Shelley Young Brennan, PEI Supreme Court Trial Coordinator, confirmed in writing the agreement reached during the first case conference held November 27, 2017:

“I would like to confirm that January 31, 2018, at 9:30 am will be the date for the **motions to add parties and security for costs.**”

10. Scales, Dow and Cutcliffe, represented by Mr. Tighe, filed no motion record on or before December 31, 2017 and conducted no cross examination of Maines related to the Maines Affidavit on or before January 15, 2018.

11. During the second case conference held January 11, 2018, Mr. Tighe confirmed that, for the January 31, 2018 amendment motion hearing pursuant Rule 5.03 (4) and Rule 26.01 that, he has abandoned the security for cost motion.

12. Mr. Tighe shall request as a term of any amendment order pursuant to Rule 56.09 that security for costs be ordered as such an order would be just despite the additional facts disclosed since the Justice Campbell judgment dated February 03, 2016.

13. **THE LAW RELATED TO RULE 5.03 (4) AND RULE 26.01**

14. The amendment of pleadings is settled law and the principles are summarized as follows:

- a. the general rule is that amendments are presumptively approved;
- b. under either rule the moving party must show no prejudice;
- c. if prejudice, it can be compensated by costs or an adjournment;
- d. use of mandatory language has reduced the court's discretion;
- e. the facts pleaded are to be taken to be true and provable;
- f. evidence not be required to support allegations in amended claim rule 26.06 (1);
- g. the court has residual discretion under both rule 5.03 (4) and rule 5.04 (2);
- h. residual discretion allows court to give leave to hear evidence; and
- i. affidavit evidence can be considered with respect to residual discretion.

15. **THE SUMMARY JUDGMENT MOTION**

16. Rule 20.01 (3) of the Rules of Civil Procedure provides:

“20.01 (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.”

17. Mr. Tighe has indicated that he intends to bring a summary judgment motion, for example, Gardiner Roberts letter addressed to Mr. Spencer Campbell/Mr. Jonathan Coady dated October 20, 2017 stated:

“In our view, the addition of our clients is completely without merit and if you are granted leave our instructions are to vigorously defend the action and in all likelihood immediately seek to have it summarily dismissed.”

18. Mr. Tighe, at this time, has not served any summary judgment motion but may bring such a motion as soon as the statement of defence is served.

19. **DETERMINATION OF AN ISSUE BEFORE TRIAL**

20. Rule 21 of the Rules of Civil Procedure provides:

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

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

- (a) under clause (1)(a), **except with leave of a judge** or on consent of the parties;
- (b) under clause (1)(b).”

21. Mr. Tighe, at this time, has not served any Rule 21 motion but is arguing for the application of Rule 21 in his factum. ¹

22. **DEMAND FOR PARTICULARS**

23. Rule 25.10 of the Rules of Civil Procedure provides that:

“25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time.”

24. Mr. Tighe was retained on or about October 20, 2017 and never requested particulars of any allegation in the plaintiffs’ proposed Amended Statement of Claim.

¹ Tighe Factum, paragraphs 06, 24, 25, 28

25. **REQUEST TO ADMIT**

26. Requests to Admit were served to attempt to verify the authenticity of the 100 exhibits filed with the Maines Affidavit and to verify the truth of certain facts required to argue the motion to issue the Amended Statement of Claim.

27. Rule 1.03 (1) of the Rules of Civil Procedure provides that:

“1.03 (1) In these rules, unless the context requires otherwise, ... (dd) “responding party” means a person against whom a motion is made.”

28. Mr. Tighe in his Response to Request to Admit related to authenticity stated:

“Refuse to admit the authenticity of the documents 1 - 100 on the grounds that the Non-Parties are not parties to Court File no. S1-GS-27636.”

29. Mr. Tighe in his Response to Request to Admit related to authenticity stated:

“Refuse to admit the truth of facts numbered 1 - 80 on the grounds that the Non-Parties are not parties to Court File no. S1-GS-27636.”

30. **MISFEASANCE IN PUBLIC OFFICE**

31. **Law related to Misfeasance in Public Office**

32. In 2003, the Supreme Court of Canada, per Justice Iacobucci in *Odhavji Estate v. Woodhouse* stated:

“32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate

unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law.”²

33. In 2012, the Superior Court of Ontario, per Justice Grace in *Weninger Farms v. Minister of National Revenue* stated:

“17 The tort applies to a "broad range of misconduct" whether it arises from an act or omission. An element of "bad faith" or "dishonesty" is essential. As Iacobucci J. wrote: The tort is not directed at a public officer who is *unable* to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do otherwise.”³

34. In 2015, the Superior Court of Ontario, per Justice Gordon in *Grand River Enterprises Six Nations v. AG (Canada)* stated:

“69 The Required elements of the tort of misfeasance are:
 (a) public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer;
 (b) public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff; and
 (c) the unlawful conduct caused the damages.”⁴

35. In 2015, the Ontario Court of Appeal, per Justice Epstein in *Grand River Enterprises Six Nations v. AG (Canada)* stated:

“On my reading of the relevant paragraphs from *Odhavji*, there is no requirement for a breach of a statutory duty to make out a claim for misfeasance in public

² 2003 CarswellOnt 4852

³ 2012 CarswellOnt 9749

⁴ ONSC 5256

office. Conduct by a public officer may be unlawful even where there is no positive duty to act, provided that the conduct was done with intent to harm. Similarly, a refusal to exercise a power with a specific intent to injure might satisfy the test for misfeasance in public office.”⁵

36. In 2016, the research article “Misfeasance in Public Office: The New Tort of Choice Against Public Officials?” by Ms Varjacic and Ms Yolles commented on the words “public office” as follows:

“While those in public office (initially viewed only as traditional politicians, expanded now to include those exercising legislative, administrative or quasi judicial powers of decision) were previously immune from liability, the development of the intentional tort of misfeasance in public office has overcome that hurdle for plaintiffs looking for redress.”;

“Traditional negligence claims posed the additional burden on plaintiffs of establishing elements of the tort, including duty of care and proximity elements. ... While those hurdles are overcome by pursuing actions in the now emerging intentional tort of misfeasance in public office, the plaintiffs are faced with new and different obstacles. Plaintiffs will have the evidentiary burden of establishing bad faith on behalf of those who committed the tort.”;

“ ... We have seen preliminary motions to strike pleadings or early dispositive motions like summary judgment fail repeatedly, with the courts instead allowing these case to proceed to be dealt with fully on the merits.”; and

“ ... This concern also likely motivates much of the reluctance from the bench to dismiss claims in misfeasance in public office at the pleadings stage, demonstrated in so many cases discussed above.”⁶

⁵ ONSC 5256

⁶ *Pouget v. Hynes*, obiter on “public official” and “plain and obvious” language, see article pages 682/683, action allowed to proceed;

Freeman-Maloy v. Marsden, issue is whether president of York University is a “public official”, see Oca reasoning pages 689/690; and

Ahmed v. Dalhousie University, again issue of “public official” of university officials discussed and action allowed to proceed, see pages 690/691.

37. **The Facts related to Misfeasance in Public Office**

38. Mr. Tighe argues in his factum that the Amended Statement of Claim is “devoid of the required particulars”.⁷ The Amended Statement of Claim contains numerous particulars related to the claims against Scales, Dow and Cutcliffe as summarized below, paragraphs with defendant named directly are bolded and with paragraphs with defendant named indirectly are not bolded:

Scales particulars at paragraphs 4(n1), 67, 68, 69, 71, 73, 76, **77, 78, 79** 81, **85, 89, 91**, 97, 98, **99**, 100, **162, 165, 194, 196(x), 196(y), 196(z)**, 198, and 200;

Dow particulars at paragraphs **4(d3)**, 73, **94, 115**, 116, **117, 118, 134** ,135, **138, 150, 187(q), 187(s), 187(u), 194, 196(e), 196(k), 196(t), 196(u), 197**, 198, 199, and 200; and

Cutcliffe particulars at paragraphs **4(d1), 73**, 92, 124, **127, 128, 194, 196(aa), 197**, 198, and 200.

39. Mr. Tighe also argues in his factum that the Amended Statement of Claim fails to properly plead bad faith.⁸ The Amended Statement of Claim contains numerous particulars that are specifically related to the bad faith of Scales, Dow and Cutcliffe as summarized below:

Scales particulars at paragraphs 91, 99, 162, 165, 194, 198, and 200;

Dow particulars at paragraphs 127, 128, 129. 134 ,135, 138, 150, 181, 187(q),

⁷ Tighe factum, para 43, se also paras 44, 45, 48, and 52

⁸ Tighe factum, paras 35, 41, 43, 45, 48, and 52

187(s), 187(u), 194, 196(e), 196(k), 196(t), 196(u), 197, 198, 199, and 200; and

Cutcliffe particulars at paragraphs 127, 128, 129, 133, 135, 137, 138, 151, 187 (g), 194, 196(aa), 197, 198, and 200.

40. The Amended Statement of Claim must be read and interpreted as one document and the claim should not be bifurcated in the fashion argued by Mr. Tighe in his factum.
41. The Amended Statement of Claim, specifically related to Scales, Dow and Cutcliffe, states:

“2. The plaintiffs, Capital Markets Technologies, Inc. and 7645686 Canada Inc., claim against Wes Sheridan, Steve Maclean, Allan Campbell, Chris LeClair, Brad Mix, Cheryl Paynter, Steven Dowling, William Dow, Melissa MacEachern, Robert Ghiz, Gary Scales, Tracey Cutcliffe, Neil Stewart and the Government of Prince Edward Island, **jointly and severally**, ... ; (a) damages for misfeasance in a public office in the amount of \$50,000,000;”

- all of the named person played a role in the misfeasance in public office;

“194. The plaintiffs state that the course of conduct of Sheridan, MacLean, Campbell, LeClair, ~~Mix and Paynter Mix~~, Paynter, Dowling, Dow, MacEachern, Manago, Scales and Cutcliffe (herein collectively referred to as the "Government Agents"), as set out above, was deliberate and unlawful in the exercise of their public functions and that they knowingly acted for the improper purpose of denying the plaintiffs of the benefits of establishing the Simplex Global Transaction Platform in Prince Edward Island.”

- law settled that “public officer” is inclusive term;
- Scales is a “public officer” retained as a consultant to E-gaming Committee;
- Dow is a “public officer” retained by Innovation PEI;
- Cutcliffe is a “pubic officer” retained as a consultant by CMT and PEI;

“195. The plaintiffs state that the Government Agents knew that their conduct was unlawful and likely to injure the plaintiffs.”

- Scales refusal to cooperate documented by PEI Auditor General;
- Dow knowledge related to breach of MOU documented;
- Cutcliffe knowledge related to breach of MOU documented;

“196. Without limiting the generality of the foregoing, particulars of these deliberate and unlawful acts are as follows: ...

(t) Dow received information that had been obtained from the plaintiffs that he knew was subject to the confidentiality provisions of the MOU and used this information to approach potential clients of the plaintiffs for the purpose of discrediting the plaintiffs and preventing the potential clients from contracting with the plaintiffs;

(u) Contrary to s. 36 of the *Securities Act*, Dow unlawfully received information regarding the plaintiffs that he had obtained from an investigation purportedly conducted under the *Securities Act* and used this information for the purpose of discrediting the plaintiffs at meetings of potential clients and strategic partners of the plaintiffs, specifically HSBC and Holland College; ...

- rule 25.06 (1) provides the evidence should not be pleaded;
- the pleading directly addresses the bad faith of Dow;
- therefore facts are proven including exhibits in a motion record;
- the Motion Record index organizes the 100 exhibits;
- Maines affidavit briefly highlights the various exhibits;
- for Dow important evidence is developed below;

(x) Scales, while under retainer to provide management services on behalf

of the Government of Prince Edward Island to the PEI Gaming Committee, unlawfully misled Simplex, whom he knew was being funded by CMT, into providing consulting services and inducing them to invoice the Government of Prince Edward Island;

(y) Scales, while he was retained to provide management services to the PEI Gaming Committee unlawfully made promises of payment to Simplex on their invoices at a time when he knew that all of the funding that had been allocated to the PEI Gaming Committee had been fully dispersed to his law firm, McInnis Cooper;

(z) Scales, while he and Sheridan were negotiating with another competitor to 7645686 under the MOU, contacts and meets with Walsh for what he represents to Walsh for the purpose of discussing strategies with Sheridan to move forward with the MOU, but in fact in he used it to illicit confidential information from Walsh that he uses to undermine the completion of the MOU in contravention of the terms of the MOU;

- again, rule 25.06 (1) provides the evidence should not pleaded;
- therefore facts are proven by the 100 exhibits submitted;
- Scales lack of cooperation with the PEI Auditor General is bad faith;
- for Scales important evidence is developed below;

(aa) Cutcliffe, while contractually bound to provide government services advice to both the Government of Prince Edward Island and the plaintiffs, unlawfully obtained information about the plaintiffs from the investigation under the *Securities Act* and contrary to s. 36 of the *Securities Act* conveyed this information to other Government Agents knowing that dissemination of this information would be detrimental to the plaintiffs.”

- again, rule 25.06 (1) provides the evidence should not pleaded;
- therefore facts are proven by the 100 exhibits submitted;
- for Cutcliffe important evidence is developed below;

“197. The defendants, Sheridan, LeClair, Maclean, Campbell, ~~Mix and Paynter~~ Mix and Paynter, Dowling, Dow, MacEachern, Manago, Scales and Cutcliffe all knew that their conduct would injure the plaintiffs and prevent the plaintiffs, through 7645686, from establishing the Simplex Global Transaction Platform in PEI and delaying or preventing the plaintiffs from establishing the Simplex Global Transaction Platform in another jurisdiction.”;

- deliberate unlawful conduct in the exercise of public functions;
- awareness that the conduct is unlawful and likely to injure the plaintiffs;

“198. The Government Agents engaged in this unlawful conduct for the purpose of preventing the plaintiffs from being able to establish the Simplex Global Transaction Platform in Prince Edward Island or any other jurisdiction.”;

- deliberate unlawful conduct in the exercise of public functions;
- awareness that the conduct is unlawful and likely to injure the plaintiffs;

“199. Further, the Government Agents engaged in this unlawful conduct to wrongfully terminate the MOU and enable another provider to establish a financial transactions platform for a contemplated Crown agency or commission that would have personally benefitted one or more of them as managers or employees of the agency or commission.”; and

- deliberate unlawful conduct in the exercise of public functions;
- awareness that the conduct is unlawful and likely to injure the plaintiffs;

“200. As a result of the deliberate and wrongful acts of the Government Agents, the plaintiffs suffered the damages set out in ~~paragraphs 216 and 217~~ below.”

- the unlawful conduct caused the damages.

42. **Breach of the MOU**

43. The breach of the MOU is a complex issue that involves numerous individuals and numerous documents generated in the period commencing July 06, 2012 and terminating October 04, 2012.⁹

44. In order to fully appreciate the roles played by the numerous persons involved a detailed examination of the roles played by each person must be examined and understood. In this factum the roles played by Scales, Dow and Cutcliffe are examined first and then followed by examining the roles played by other persons.

45. **Roles played by Scales, Dow and Cutcliffe**

46. Mr. Gary Scales: At all material times Scales was a partner and regional manager of McInnis Cooper and the project manager for PEI Minister of Finance and a member of the PEI Gaming Committee.

47. Scales is an important witness to prove: (i) the misfeasance in public office; (ii) the initial promotion of the Financial Services Platform; (iii) the failure to cooperate with the PEI Auditor General; (iv) the cover up of the facts required to prove the various claims; and (v) the non payment of accrued fees owed to Simplex/CMT by the PEI Government.

48. Since the evidence is extensive to prove the misfeasance in public office by the conduct of the PEI Gaming Committee and Scales as the project manager and the breach of the

⁹ The PEI Auditor General fixed the MOU termination date as October 10, 2016, at section 5.3, Audit Report page 20 / Maines Affidavit page 579

MOU only four examples are set forth for Scales in this factum:

- a. Exhibit 24: January 30, 2012: Scales email to Walsh Subject: PEI Gaming Roundtable:

“Hi Philip...It was great to see you in London. I trust that you had a good meeting with Michael Tobin as well. We’re going to have our roundtable next week on Thursday and Friday (Feb 9-10). The Premier and Mi’Kmaq Chiefs will also be taking in part of the session. I believe that Wes had discussed this with you briefly. The goal is to have some input from key strategic advisors so that we have a clear direction from the Premier and Chiefs to move forward. I apologize for the short notice, however if you’re available we would very much like to have your involvement. Please let me know at your earliest convenience if you can attend.”;

- b. Exhibit 30: July 11, 2012: Scales email to Walsh re: PEI:

“Hi Philip [Walsh], Let me know if you have some time to get together while you’re on PEI. It would be great to connect. We’ve also had recent discussions with Wes [Sheridan] on strategies to move forward.”;

- c. Exhibit 42: September 18, 2012: Walsh/Scales email exchange re scheduling PEI meeting:

“Walsh: “Gary [Scales] ... I will be on PEI on Thursday 20 September. Do you have time to meet up either early morning or late afternoon. Scales: “That would be great ... how about 8:30 am”

- d. Exhibit 53: December 12, 2012: Email from Scales to Walsh and Nick Warden RE: Simplex invoice numbers 2702 and 2712; and

“Hi Philip ... We hope to receive payment from government before month end. I’ll keep you advised. We’re still in strategic discussions around the best way to move forward. We expect to be making a trip to visit Mike Tobin and other

operators early in the new year. There have been advances in Canada which are interesting, particularly first nation online gaming in Saskatchewan (based on their constitutional and inherent rights – sound familiar!).”

49. Mr. William Dow: At material times Dow was the lawyer for Innovation PEI.
50. Dow is an important witness required to prove: (i) the misfeasance in public office, (ii) the breach of the MOU; (iii) the breach of the good faith doctrine; (iv) Dow’s knowledge related to corporate structure; and (v) the fact that Dow acted in conflict of interest.
51. Since the evidence is extensive to prove the misfeasance in public office by the breach of the MOU only four examples are set forth for Dow in the factum:
 - a. Exhibit 33: August 07, 2012: MacEachern email to Roach and Sheridan:

“Ministers ... By way of email, an update on Simplex - Global Transactions Platform for PEI: 1). IPEI executed a confidential MOU with Trinity Bay (TBT North American Simplex) several weeks ago in order to enter into discussions on the nature of a relationship between IPEI and TBT. 2). Our lawyer **Bill Dow**, myself and Cheryl Paynter met with TBT subsequent to signing of the MOU to discuss next steps. 3). There is a working group of technical and business development folks established to create the business plan. 4). **Bill Dow** and I will meet later this week with TBT to review the work plan. 5). Within 3 weeks we will determine feasibility and next steps on the nature of the hub and prospective companies. Hope that suffices for now - any further information needed please let me know.”
 - b. Exhibit 40: September 10, 2012: MacEachern email to Cutcliffe re MOU extension with a copy delivered to Dow and Paynter:

“Yes Tracey - we agree to this extension.”;
 - c. Exhibit 51: October 23, 2012; Jessop email to Dow re Trinity Bay-PEI

“Hi Bill ... as you know Gary Evans and I met with Allan Campbell and Steve MacLean from the Province last Wednesday October 17, 2012. I appreciate you setting this meeting up. The purpose of the meeting was to try to get the negotiations between Trinity Bay and PEI back on track.”;

see also section 5.4 of PEI Auditor General Report:

“In early July 2012, there were discussions between Innovation PEI’s legal counsel (who was also a CMT investor) [Dow], and the former Deputy Minister of Innovation and Advanced learning [MacEachern] regarding a MOU with CMT subsidiary, TBT.”;

see also 5.7 of PEI Auditor General Report:

“We noted, through interviews conducted and review of e-mail documentation, that the concept of the MOU agreement was initiated by Innovation PEI’s external legal counsel based on his discussions with a local CMT investor”;

- d. Exhibit 82: July 05, 2012; According to PEI Government defence page 11, paragraph 45 (e):

“on July 5, 2012 legal counsel to Innovation PEI [Dow] emailed Jessop to confirm that Innovation PEI would proceed with the memorandum of understanding with TBT”.

52. Ms Tracey Cutcliffe: At material times Cutcliffe was a consultant to CMT and 7645686 and the PEI Government.
53. Cutcliffe is an important witness required to prove: (i) misfeasance in public office; (ii) the breach of the MOU; (iii) the breach of the good faith doctrine; (iv) to prove the contrived termination of the CMT consulting arrangement; and (v) the conflict of interest issues and resulting damages.
54. Since the evidence is extensive to prove the misfeasance in public office and the breach of the MOU only two examples are set forth for Cutcliffe in this factum:

- a. Exhibit 34: August 08, 2012: Cutcliffe email to Jessop re 30 day extension:

“Confirming dinner for Thursday evening at 7:30 pm at Lot 30 restaurant. Along with yourself, attending will be - Melissa MacEachern, Bill Dow and myself [30 day extension negotiated and confirm later at exhibit 40].”

- b. Exhibit 44: September 25, 2012: Email string from Sheridan to Cutcliffe re meetings:

“Cutcliffe: “On behalf of Group M5, and our Cape Consulting Group folks, I want to extend a huge thank you for the generous acknowledgement at the Sunday reception last week. Congratulation on hosting an excellent event. ... This is our new contact information with Group M5. The local announcement should be out in the next week ... I would love the opportunity to pop in to see you or take you to lunch to catch up.” Sheridan via assistant: “Minister Sheridan would be available to meet with you, in his office, on either of these two dates; Oct.3 or Oct. 11” Cutcliffe: “Oct 3rd sounds great”

55. **Roles played by Other Persons**

56. The MOU was outstanding for a 90 day period and MOU confirmed as a term of the agreement that the exclusivity/confidentiality agreement did not terminate at the end of the 90 day period. The breaches of the exclusivity provision and the confidentiality provision are documented below.

57. Mr. Robert Ghiz: Ghiz, at material times, the Premier of PEI and the person who ordered the destruction of LeClair’s email’s on October 09, 2011 and Beck’s emails on September 04, 2012. The destruction of the emails raises various inferences related to the breach of the MOU:

- a. to destroy the Financial Service Platform to proceed with Newcourt/Newco;
- b. to prevent Maines from negotiating with the Nova Scotia Government; and

- c. to seriously impair the financial ability of Maines to seek justice.
58. Mr. Neil Stewart: Stewart, at material times, Deputy Minister of Innovation and Advance Learning and the person who ordered the destruction of MacEachern emails on October 13, 2013. Again, the destruction of the emails raises various inference related to the breach of the MOU:
- a. to hide from public view the success of the Loyalty Card Program;
 - b. to cover up the breach of the MOU by PEI Government employees; and
 - c. to cover up the involvement of MacEachern, Paynter, Dow and Cutcliffe.
59. Mr. Chris LeClair: LeClair, at material times, the Chief of Staff to Premier Ghiz and a member of PEI Gaming Committee, and his involvement included:
- a. the destruction of the Financial Services Platform offered to PEI; ¹⁰
 - b. the promotion of Newcourt/Newco and Laslop as an alternative platform; ¹¹
 - c. the breach of insider investment rule re LeClair wife's investment; and ¹²
 - d. breach of exclusivity/confidentiality provisions proven by documents. ¹³
60. Mr. Wes Sheridan: Sheridan, at material times, Minister of Finance and Municipal Affairs, and his involvement included:

¹⁰ Maines affidavit, exhibit 31, page 143

¹¹ Maines affidavit, exhibit 39, page 173

¹² Maines affidavit, exhibit 12, page 30

¹³ Maines affidavit, exhibit 31, page 143, exhibit 37, page 163 , exhibit 45, page 183

- a. the negotiation with Walsh to implement the Financial Services Platform;¹⁴
- b. the publication of numerous false and misleading statements; and¹⁵
- c. breach of exclusivity/confidentiality provisions proven by documents.¹⁶

61. Ms Melissa MacEachern: MacEachern, at material times, the Deputy Minister of Innovation PEI and her involvement included:

- a. the negotiation with Walsh to implement the Financial Services Platform;¹⁷
- b. breach of exclusivity/confidentiality provisions proven by documents; and¹⁸
- c. resort to cover up tactics after her retirement from the PEI Government.

62. Ms Cheryl Paynter: Paynter, at material times, was the CEO of Innovation PEI, and her involvement included:

- a. the execution of the MOU;¹⁹
- b. the general supervision of the MOU negotiation; and²⁰
- c. breach of exclusivity/confidentiality provisions proven by documents.²¹

63. Mr. Brad Mix: Mix, at material times, Senior Director of Innovation PEI, and his

¹⁴ Maines affidavit, exhibit 33, page 145

¹⁵ Maines affidavit, exhibit 80, page 447

¹⁶ Maines affidavit, exhibit 33, page 145, exhibit 39, page 174, exhibit 44, page 181

¹⁷ Maines affidavit, exhibit 13, page 35

¹⁸ Maines affidavit, exhibit 33, page 145

¹⁹ Maines affidavit, exhibit 29, page 140

²⁰ Maines affidavit, exhibits 33, page 145, exhibit 34, page 147, exhibit 40, page 176

²¹ Maines affidavit, exhibit 37, page 163

involvement included:

- a. breach of exclusivity/confidentiality provisions proven by documents; and ²²
- b. effort to misappropriate the CMT/Simplex Business Plan. ²³

64. Mr. Allan Campbell: Campbell, at material times, the Chief of Staff to Premier Ghiz, and his involvement included:

- a. breach of exclusivity/confidentiality provisions proven by documents; ²⁴
- b. to assist Ghiz with the cover up of the breach of the MOU; and
- c. to cover up the motive for the interference with the CMT/Simplex Business Plan.

65. Mr. Steven MacLean: MacLean, at material times, the Clerk of the Executive Council and Secretary to the Cabinet, and his involvement included:

- a. breach of exclusivity/confidentiality provisions proven by documents. ²⁵

66. Mr. Steven Dowling: Dowling, at material times, a lawyer for the PEI Government, with the title General Counsel for the Consumer, Labour and Financial Services Division within the PEI Department of Environment, Labour and Justice, and his involvement included:

- a. the promotion of the false story related to the “fictitious lady with cancer”;
- b. Dowling’s investigation based on false allegation from Mr. Hashmi; and

²² Maines affidavit, exhibit 37, page 163

²³ Maines affidavit, exhibit 49, page 195

²⁴ Maines affidavit, exhibit 31, page 143, exhibit 37, page 163

²⁵ Maines affidavit, exhibit 31, page 143, exhibit 37, page 163

- c. Dowling never contacted either Maines or Jessop during investigation.
67. Mr. Paul Jenkins: Jenkins, at material times, was an investor in CMT and a director of 7645686, and his involvement included:
- a. cover up of the facts related to and his resignation from 7645686;
 - b. the assist the PEI Government and Dowling in the securities investigation; and
 - c. to impair the reputation of Maines and his ability to seek a judicial remedy.
68. Mr. Allan Roach: Roach while not a defendant but, at material times, the Minister of Finance and Roach shall be an important witness at the trial of the action, and his involvement included:
- a. breach of exclusivity/confidentiality provisions proven by documents. ²⁶
69. **COMPLIANCE WITH TESTS FOR MISFEASANCE IN PUBLIC OFFICE**
70. Test One: “deliberate unlawful conduct in the exercise of public functions”:
- “Public official or public functions”: Scales, Dow and Cutcliffe are all qualified as “public officials. “Scales”, at material times, partner and regional manager of McInnis Cooper, and the Project Manager for the PEI Gaming Committee reporting to the PEI Minister of Finance Sheridan and others. “Dow”, at material times, the lawyer for Innovation PEI and reporting to MacEachern the Deputy Minister of Innovation PEI in charge of the Loyalty Card Program and the MOU and therefore a “public official”. Cutcliffe”, at material times, a consultant to the PEI Government and CMT/7645686.

71. Test Two: “awareness that the conduct is unlawful and likely to injure the plaintiff”:

- awareness since numerous disclosures related to function of CMT/Simplex:
- directly caused the business plan of CMT/Simplex to fail;
- Scales, Dow and Cutcliffe are all lawyers knowledgeable in the law;
- Scales, Dow and Cutcliffe would all be aware of the various statutes involved;

72. Test Three: “a plaintiff must prove bad faith or dishonesty”:

- *R. v. Livingston*, unlawful use of a computer is a criminal act; ²⁷
- *R. v. Livingston*, attempt to commit mischief to data is a criminal act;
- Scales failure to cooperate with PEI Auditor General is evidence of bad faith; ²⁸
- Dow’s bad faith is partially document by PEI Auditor General; ²⁹
- Cutcliffe conflict and relationship with Sheridan is extreme bad faith; ³⁰

73. Test Four: “the unlawful conduct caused the damages”:

- damages shall be documented by PWC report

²⁷ Plaintiffs authorities brief, tab 05, page 63

²⁸ Maines Affidavit, PEI Auditor General Report, exhibit 87, page 553, para 1.15, para 3.17, para 3.27, para 3.20

²⁹ Maines Affidavit, PEI Auditor General Report, exhibit 87, page 553, para 5.4, para 5.7

³⁰ Maines Affidavit, PEI Auditor General Report, exhibit 87, page 553, para 5.14, para 5.15, para 6.24

74. **RULE 56.09 SECURITY FOR COST ORDER**

75. Rule 56.09 of the Rules of Civil Procedure provides:

“56.09 Notwithstanding Rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under Rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief, and where such an order is made, Rules 56.04 to 56.08 apply, with necessary modifications.”

76. Rule 1.05 of the Rules of Civil Procedure provides:

“When making an order under these rules the court may impose such terms and give such directions as are **just**. [emphasis added].”

77. Rule 56.07 of the Rules of Civil Procedure provides:

“The amount of security required by an order for security for costs may be increased or decreased at any time.”

78. ***Capital Markets Technologies v. Prince Edward Island***

79. On February 03, 2016, the Supreme Court of Prince Edward Island per Justice Campbell in *CMT v PEI* stated:

“109 If a plaintiff is not found to be impecunious, it may be able to avoid an order for security for costs if it can show its claim has a **good chance of success**. However, the evidence filed does not allow the court to draw that conclusion. The action appears to be complex, involving numerous individuals and corporations, and raising significant issues of credibility. It is not possible to **weigh the**

evidence, assess credibility, or draw inferences such that I could determine the plaintiffs have a good chance of success and therefore should be relieved of posting security for costs. [emphasis added]³¹

80. Justice Campbell did not have the advantage of the facts set forth in: (i) the PEI Auditor General Report, (ii) the Standing Committee of Public Account Transcripts, and (iii) the Affidavit of Paul Maines sworn November 17, 2017.
81. Further, Justice Campbell also does not have the advantage of the allegations that shall be set forth in the statements of defence: (i) for the PEI Government, Sheridan, MacLean, Campbell, LeClair, Mix, Paynter, MacEachern, Ghiz and Stewart to be filed by Stewart McKelvey; (ii) for Jenkins and 7628382 to be filed by Campbell Lea; (iii) for Dowling to be filed by Wright Temelini; and (iv) for Scales, Dow and Cutcliffe to be filed by Gardiner Roberts.
82. The courts have not articulated a clear definition of a “good chance of success” or the evidentiary requirements the plaintiff must demonstrate to satisfy a court that the threshold has been met.
83. Justice Campbell has expanded on the evidentiary foundation required by developing the three part test set forth in paragraph 109 of his judgment. The table set forth below develops twelve examples for each test.

³¹ Maines Affidavit, exhibit 84, page 521

Weigh the Evidence	Assess Credibility	Draw Inferences
<p>1. Scales email to Walsh re PEI Gaming Committee roundtable meeting confirms the working relationship between Walsh and Scales. Exhibit 24, Jan 30, 2012</p>	<p>1. Walsh letter to Scales re Feasibility & Solution Design Proposal confirms the early June 2011 involvement of Scales in the PEI Financial Services Platform. Exhibit 11, Jun 03, 2011</p>	<p>1. The PEI Auditor General Report established that PEI Government had numerous dealings with the Mi'kmaq Confederacy of PEI, CMT, Simplex, and related companies. Exhibit 87, Oct 05, 2016, page 550</p>
<p>2. MacEachern email to Walsh re the PEI Financial Services Platform confirms the working relationship between Walsh and MacEachern. Exhibit 23, Jan 27, 2012</p>	<p>2. The PEI Auditor General Report, section 3.17, confirms that McInnes Copper and Scales refused to cooperate with the Auditor General citing solicitor client privilege. Exhibit 87, Oct 05, 2016, page 564</p>	<p>2. Mix email to Walsh with a copy to MacEachern and Stewart confirms the working relationship between Walsh, Mix, MacEachern and Stewart the re Loyalty Card Program. Exhibit 19, Nov 24, 2011</p>

<p>3. Walsh email to Scales re invoice payment confirms the working relationship between Walsh and Scales. Exhibit 27, Apr 12, 2012</p>	<p>3. The PEI Auditor General Report, section 3.22, confirms that Scales was working with Sheridan and other members of the “PEI Gaming Committee” but refused to cooperate with the Auditor General. Exhibit 87, Oct 05, 2016, page 565</p>	<p>3. Ghiz announcement with respect to LeClair resignation was set forth in release published October 11, 2011. Exhibit 15, Oct 11, 2011</p>
<p>4. The PEI Auditor General Report, section 1.9, confirms the breach of the <i>Conflict of Interest Act</i> and the Conflict of Interest Policy. Exhibit 87, Oct 05, 2016, page 552</p>	<p>4. Sheridan’s statement that: “ ... Capital Markets Technologies ... has no affiliation with Simplex International whatsoever, no affiliation with our gaming initiative” is a false statement. Exhibit 77, Nov 23, 2014</p>	<p>4. Ghiz ordered destruction of LeClair’s emails on October 19, 2011. Ghiz by ordering the destruction of the LeClair’s emails violated the <i>Archives and Records Act</i>.</p>
<p>5. The PEI Auditor General Report, section 1.9, Cutcliffe reference:</p> <p>“another former Deputy Minister [Cutcliffe], through a consulting company, secured various contracts within weeks of leaving her position with government.”</p> <p>Exhibit 87, Oct 05, 2016, page 552</p>	<p>5. Scales email to Walsh confirms the interaction between Walsh and Scales with Scales requesting assistance from Walsh. Exhibit 14, Oct 07, 2011</p>	<p>5. Campbell email to LeClair which refers to section 15. (1) of the <i>Freedom of Information and Protection of Privacy Act</i> confirms the breach of both sections 4 and 6 of the MOU. Exhibit 31, Jul 23, 2012</p>

<p>6. The PEI Auditor General Report, section 5.4, confirms the conflict of interest of Dow as counsel to Innovation PEI and as an investor in CMT. Exhibit 87, Oct 05, 2016, page 552</p>	<p>6. Sheridan's statement that Maines walked away from the MOU, as reported in <i>The Guardian</i>, is a false statement. Assessment- an effort to destroy the reputation of Maines</p>	<p>6. MacEachern email to Roach and Sheridan confirms the involvement of Sheridan, MacEachern, Roach, Dow, and Paynter in the breach of both sections 4 and 6 of the MOU. Exhibit 33, Aug 07, 2012</p>
<p>7. Email string from Sheridan to Cutcliffe confirms working relationship between Sheridan and Cutcliffe. Exhibit 44, Sep 25, 2012</p>	<p>7. Ms Christine DaPrat is the wife of LeClair and Ms Daprat invested \$1,500 in Revolution Technologies Inc. Exhibit 12, Jun 06, 2011. Assessment - Reason for LeClair resignation</p>	<p>7. LeClair email to Paynter re: Laslop proposal confirms breach of both sections 4 and 6 of the MOU by Campbell, Paynter and Laslop. Exhibit 37, Aug 29, 2012</p>
<p>8. Email from Scales to Walsh and Warden re: Simplex invoice numbers 2702 and 2712 confirms the non payment of outstanding invoices. Exhibit 53, Dec 12, 2012</p>	<p>8. Walsh email to MacEachern confirms the interaction between Walsh and MacEachern re PEI pre-paid card. Exhibit 13, Sep 26, 2011</p>	<p>8. Ghiz ordered destruction of Beck's emails on September 04, 2012. Ghiz by ordering the destruction of the Beck's emails violated the <i>Archives and Records Act</i>.</p>

<p>9. The PEI Auditor General Report, section 3.27, confirms the breach of the <i>Financial Administration Act</i>. Exhibit 87, Oct 05, 2016, page 567</p>	<p>9. Sheridan’s statement that: “At no time did the Government of Prince Edward Island ever contract with Simplex to do any kind of report, Madam Speaker.” is a false statement. Exhibit 65, May 01, 2013</p>	<p>9. Laslop email to Roach with subject: “Letter re payment processing in PEI” confirms breach of both sections 4 and 6 of the MOU by Sheridan, Roach, and Laslop. Exhibit 39, Sep 06, 2012</p>
<p>10. The PEI Auditor General Report, section 3.45, confirms the breach of the <i>Financial Administration Act</i>. Exhibit 87, Oct 05, 2016, page 571</p>	<p>10. Email shows Jenkins organizing FMT visit to PEI with Dow as one of the participants playing golf at Crowbush. Exhibit 08, May 15, 2011</p>	<p>10. Email string from LeClair to Sheridan which refers to section 15. (1) of the <i>Freedom of Information and Protection of Privacy Act</i> confirms the breach of both sections 4 and 6 of the MOU. Exhibit 45, Sep 26, 2012</p>
<p>11. The PEI Auditor General Report, section 3.46, confirms the breach of the <i>Financial Administration Act</i>. Exhibit 87, Oct 05, 2016, page 572</p>	<p>11. The PEI Auditor General Report, section 5.4, confirms the conflict of interest of Dow as counsel to Innovation PEI and as investor in CMT. Exhibit 87, Oct 05, 2016, page 579</p>	<p>11. Stewart ordered destruction of MacEachern’s emails on October 13, 2013. Stewart by ordering the destruction of MacEachern’s emails violated the <i>Archives and Records Act</i>.</p>

<p>12. The PEI Auditor General Report, section 7.1, confirms the breach of the <i>Archives and Records Act</i>. Exhibit 87, Oct 05, 2016, page 588</p>	<p>12. The destruction of evidence by Ghiz and Stewart is very similar to the destruction of evidence in <i>R. v. Livingston</i> as studied in case comparison table in Schedule “A”.</p>	<p>12. Dowling Affidavit avoids all discussion of the “fictitious lady with cancer”. Exhibit 57, Feb 21, 2013. The reference to a “fictitious lady with cancer” who was allegedly defrauded by Maines and others is a false allegation.</p>
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84. In our submission, Mr. Tighe cannot rely on the Justice Gordon Campbell’s judgment dated February 03, 2016 for the following principal reasons:
- a. the initial statement of claim for the court file number S165-26550 was struck in its entirety with leave to issue a completely new statement of claim with court file number S1-GS-27636;
 - b. additional facts have been discovered since February 03, 2016 as set forth in various documents, for example: (i) the PEI Auditor General Report dated October 05, 2016; (ii) the Standing Committee of Public Account Transcripts commencing November 02, 2016; (iii) the Affidavit of Paul Maines sworn November 17, 2017; and (iv) the consent of 13 of 16 defendants;
 - c. in order to argue the “good chance of success” statements of defence must be filed on behalf of the 13 defendants who have agreed to the issuance of the Amended Statement of Claim on consent by their respective counsel; and

- d. The Statement of Defence filed by the PEI Government and others dated April 09, 2015 was essentially a blanket denial of any knowledge related to the first action; for example:

“Simplex Consulting Inc. and Philip Walsh Paragraph 27. The Defendants have no knowledge of the allegation made in paragraphs 25, 26, 37, 38, 45, 47, 49, 50, 51, 52, 54, 57, 60, 61, 71, 72, 74, 79, 80, 81, 93, 147, 148, 149, 150, 151, 152, 161, 162, 163, 165, 178, 185, 214 and 215 of the Statement of Claim other than as alleged by the Plaintiffs.”; and

Melissa MacEachern and Loyalty/VIP Program Payment Program Paragraph 32. The Defendants have no knowledge of the allegation made in paragraphs 126, 127, 131, 138, 146, 147 and the Statement of Claim other than as alleged by the Plaintiffs.”

85. **DESTRUCTION OF EVIDENCE**

86. Spoliation or destruction of evidence is an act of commission conducted for a purpose. The **rebuttable presumption of fact** is that destroyed evidence would not assist the spoliator and therefore the evidence was destroyed.

87. In this case the onus of reversing the presumption is on Ghiz and Stewart. All that the plaintiffs can do at this time, since the evidence has been destroyed, is attempt to make logical and reasonable inferences.

88. October 19, 2011 Ghiz Spoliation of LeClair Emails

Inference: Ghiz ordered destruction of the LeClair’s emails to hide from public view the

fact that LeClair after his forced resignation set out to destroy the Financial Services Platform and promote an alternative business service platform designed to enrich Ghiz, Sheridan and LeClair personally.

Inference: Ghiz and LeClair never stopped their activities to destroy the Financial Services Platform and promote an alternative business service platform through the service of LeClair as an outside consultant employed by Policy Intel with favoured PEI Government contracts.

Inference: LeClair became that principal contact with Newcourt/Newco and Laslop, the proposed replacement for the Simplex Financial Services Platform, and attempted to hide from public view the names of Newcourt/Newco and Laslop by misusing of section 15. (1) of the *Freedom of Information and Protection of Privacy Act*.

Inference: Ghiz and LeClair, knew or should have known from the very beginning, that Sheridan was prepared to issue false statements and Sheridan in order to “win” would attempt to destroy other persons reputations with a series of false statements.

89. September 04, 2012 Ghiz Spoliation of Beck Emails

Inference: Ghiz ordered destruction of the Beck’s emails to hide from public view the fact that Beck was involved in the E-gaming initiative (Sheridan initiative) from the very beginning as Clerk of the Executive Council and Secretary to the Cabinet.

Inference: Ghiz ordered destruction of the Beck’s emails to hide from public view the fact that Beck favoured the Financial Services Platform and that Beck was involved in the

Loyalty Card Program (MacEachern initiative) from the very beginning as Clerk of the Executive Council and Secretary to the Cabinet.

Inference: Ghiz ordered destruction of the Beck's emails to hide from public view the direct involvement of Sheridan, Roach and Paynter in the breach of the MOU when these individuals dealt directly with Newcourt/Newco and Laslop.

90. October 21, 2013 Stewart Spoliation of MacEachern Emails

Inference: Stewart ordered destruction of the MacEachern's emails to hide from public view the fact that MacEachern strongly favoured the Financial Services Platform to promote the Loyalty Card Program.

Inference: Stewart ordered destruction of the MacEachern's emails to hide from public view the direct involvement of MacEachern, Paynter, Dow, and Cutcliffe in the breach of the MOU when these individuals dealt directly with Newcourt/Newco and Laslop.

Inference: Stewart ordered destruction of the MacEachern's emails to hide from public view the fact that Ghiz ordered Stewart to assume the carriage of the destruction of the Maceachern in an attempt to protect the reputation of Ghiz.

91. **PRIOR COURT ORDERS AND CASE CONFERENCES**

92. On February 03, 2016, Justice Gordon Campbell's order struck the plaintiffs' statement of claim in its entirety and ordered security for costs in the sum of \$383,382 for the PEI Government, \$348,716 for Jenkins, and \$300,152 for Mr. Garth Jenkins. The Rule 56.03

(1) order was complied with.

93. On May 20, 2016, Justice Gordon Campbell's order, having struck the plaintiffs' statement of claim in its entirety, ordered costs in the sum of \$35,036 for the PEI Government, \$31,684 for Jenkins and \$7,256 for Mr. Garth Jenkins. All costs as ordered were paid in full.
94. On November 27, 2017 the first case conference with Justice Gordon Campbell set the date for the amendment motion for January 31, 2018.
95. On January 11, 2018, the second case conference with Justice Gordon Campbell established a new timetable for submission of the factums by Mr. Tighe and this writer.
96. **ORDER REQUESTED**
97. An order to issue the Amended Statement of Claim.
98. An order for cost on the partial indemnity scale.

All of which is respectfully submitted.

January 26, 2018

John W. McDonald

Schedule “A”

Plaintiffs Authorities Brief

1. Article re: “Misfeasance in Public Office” 2016, Varjadic
2. Article re: “A Good Chance of Success” 2017, Lindsay
3. R. v. Livingston Sep 28, 2017
4. R. v. Livingston Nov 09, 2017
5. R. v. Livingston Jan 19, 2018

Schedule "B"

Comparison of *R. v. Livingston* and *CMT v. PEI*

<i>R. v. Livingston</i>	<i>CMT v. PEI</i>
Criminal Law	Civil Law
Proof: "beyond a reasonable doubt". para 171, 173, 174	Proof: "balance of probabilities".
Count #1, Criminal Code section 342.1 Unauthorized use of a Computer, Justice Lipson found Livingston guilty of unauthorized use of a computer.	Ghiz erased the LeClair/Beck emails and the Plaintiffs shall argue for the trial judge to make reasonable inference based on the spoliation of evidence.
Count #2, Criminal Code section 430 (5) (a), Justice Lipson found Livingston guilty of attempted mischief.	Stewart erased the MacEachern emails and, again, the Plaintiffs shall argue for the trial judge to make reasonable inference based on the spoliation of evidence.
400 deleted emails.	Quantity of emails deleted unknown.

<p>20 computers affected.</p>	<p>Number of computers involved unknown.</p>
<p>No Records Retention</p> <p>“ ... this was at the point of transition - that it would be very concerning, and I [Secretary Wallace] indicated to him [Livingston] that ... the only type of organization that didn’t keep records was a criminal organization.” The Secretary [Wallace] said he felt that Mr. Livingston did not find this observation to be “particularly helpful”.</p> <p style="text-align: right;">page 22, line 26</p>	<p>The PEI Auditor General Report, section 7.1, confirms the record retention is regulated by the <i>Archives and Records Act</i> but no records of LeClair, Beck or MacEachern were retained.</p> <p style="text-align: right;">Exhibit 87, Oct 05, 2016</p>
<p>“grim political backdrop”</p> <p>“This was the grim political backdrop that existed at the time Mr. Livingston sought Mr. Wallace’s permission to access multiple computers in the Office of the Premier. ... the Secretary remained very concerned about the willingness of Mr. Livingston and his OPO [Office of the Premier] colleagues to comply with their record retention obligations.”</p> <p style="text-align: right;">para 99</p>	<p>Ghiz, Sheridan, LeClair, Stewart, Scales, Dow and Cutcliffe at some point, based on self interest and bad faith decided to completely destroy CMT/Simplex with their vast political resources and thereby created a “grim political backdrop” to this law suit.</p>

<p>“compelling circumstantial case”</p> <p>“that he [Livingston] was neither justified nor authorized nor had colour of right to arrange for the wiping of the hard drives of employees of the Office of the Premier, including his own. He was clearly aware of his obligation to retain records with respect to the gas plant issues.”</p> <p>In <i>R. v. Livingston</i> no emails were recovered.</p> <p style="text-align: right;">para 174</p>	<p>In the <i>CMT v. PEI</i> action due diligence has discovered and partially disclosed numerous destroyed emails from various recipients of the emails erased by Ghiz and Stewart.</p>
<p>“dishonestly obtained ... rights”</p> <p>“he attempted to destroy data on the hard drives of colleagues who could have saved copies of e-mails or attachments on their computers at a time when FOI requests in relation to gas plant documents were still outstanding and when a Standing Committee Production Order was foreseeable in a new session of the Legislature.”</p> <p style="text-align: right;">para 175</p>	<p>Very similar fact situation with respect to knowledge related to Newcourt/Newco and Laslop and the FOI requests.</p>

<p>“scorched earth” strategy</p> <p>“Mr. Livingston’s plan to eliminate sensitive and confidential work-related data, in my view, amounted to a ‘scorched earth’ strategy, where information that could be potentially useful to adversaries, both within and outside of the Liberal Party, would be destroyed,”</p> <p>para 176</p>	<p>Identical inference could be made by the trial judge in <i>CMT v. PEI</i> with the even lower standard of “balance of probabilities”.</p>
<p>“delete personal information”</p> <p>“The defendant claims that he simply wanted to delete personal information and Liberal Party documents from the hard drives. While this is a possible inference arising from the evidence, it is not, in my view, a reasonable one. An inference of guilt drawn from the circumstantial evidence in this case is the only reasonable inference that such evidence permits.”</p> <p>para 177</p>	<p>Premier MacLauchlan’s explanation that destruction of emails is a routine exercise on retirement of a PEI Government employee is questionable.</p>

<p>“Liberal Party Caucus was paying”</p> <p>“Moreover, he deliberately omitted to tell Mr. Wallace that the Liberal Party Caucus was paying an outside consultant to indiscriminately wipe data from the hard drives of the computers in the Office of the Premier.”</p> <p style="text-align: right;">para 178</p>	<p>Mr. Tighe has refused to answer the simple question as to the source of his retainer.</p> <p style="text-align: right;">Maines Affidavit, Exh 98, 99 and 100</p>
<p>Premier Wynne’s Reaction</p> <p>A spokeswoman for Premier Wynne said:</p> <p>“We’ve been clear from the start that this is not how people in government should operate, and it is not how a Premier’s office should operate.”</p> <p style="text-align: right;">Globe and Mail, January 19, 2018</p>	<p>Premier MacLauchlan’s Reaction</p> <p>“The email accounts were removed and overwritten as part of the normal practice in government when individuals leave employment of the province.”</p> <p style="text-align: right;">The Guardian, January 11, 2017</p>
<p>Remedy Fine/Prison</p> <p>The remedy in <i>R. v. Livingston</i> is criminal sanction at the sentencing hearing scheduled for February 26, 2018.</p>	<p>Remedy Damages</p> <p>The remedy in <i>CMT v. PEI</i> is damages payable to CMT for the actions of the PEI Government and other persons.</p>