Court of Queen's Bench of Alberta

Citation: Genesis Land Development Corp. v. Alberta, 2009 ABQB 221

Date: 20090409
Docket: 0303 11865
Registry: Edmonton

Between:

Genesis Land Development Corp., Spray Lake Resort Corporation and Kananaskis Pathways Corporation

Respondents
(Plaintiffs)

- and -

Her Majesty the Queen In Right of Alberta and the Honourable Gary Mar, Q.C.

Applicants
(Defendants)

Reasons for Judgment of the Honourable Mr. Justice Don J. Manderscheid

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I. Introduction

[1] This is an application by Her Majesty the Queen In Right of Alberta ("the Government of Alberta") and the Honourable Gary Mar, Q.C. ("Mar") for summary judgment dismissing the action against them pursuant to Rule 159 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. The Applicant Mar also applies to strike the Respondents' Statement of Claim pursuant to Rule 129 of the *Alberta Rules of Court*.

II. Facts

[2] The Applicant Mar was the Minister of Environment for the Government of Alberta from May 26, 1999 to June 6, 2000.

[3] Genesis Land Development Corp. is a company in the business of land development. By way of a share purchase agreement executed in September 1998, Genesis Land Developers Ltd. acquired Spray Development Corporation and indirectly acquired its subsidiary, Kananaskis Pathways Corporation Genesis Land Developers Ltd., Spray Development Corp and Kananaskis Pathways Corporation jointly pursued the development of recreational and tourist facilities at the Spray Lakes Reservoir in Alberta. Genesis Land Developers Ltd. amalgamated with Genesis Land Development Corp. to form Genesis Land Development Corp. on January 1, 2002. Spray Development Corporation is now Spray Lake Resort Corporation.

[4] The Respondents Genesis Land Development Corp., Spray Lake Resort Corporation and Kananaskis Pathways Corporation were the proponents of a major development in Kananaskis Country, in an area at the south end of the Spray Lakes Reservoir, approximately 40 kilometres south of Canmore. This area is now part of the Spray Valley Provincial Park. The Park presently comprises 27,471 hectares in the valley and provides an area of protected north-south wildlife movement which is free of land-based industrial activity other than that associated with hydroelectric facilities in the area.

[5] The Respondents' proposed development included a four season resort with 400 units of overnight guest accommodation ("the Resort"), a heli-cat ski operation ("the Heli-Cat Operation"), and a tour boat operation ("the Boat Operation") (collectively, "the Projects"). The Projects initially were proposed by Harry Connelly in the late 1960s. Mr. Connelly was one of the former shareholders of Spray Lake Resort Corporation and Kananaskis Pathways Corporation.

[6] The Projects were brought forward in various forms, shapes and permutations, and proceeded in "fits and starts" until May 31, 2000. The first formal written proposal for a resort was submitted to the Alberta Cabinet in October 1987. It was not accepted and no approvals were granted. As a result, the Respondents broke the project into three smaller packages, being the Resort, the Heli-Cat Operation, and the Boat Operation.

[7] The Government of Alberta had a four-stage Commercial Tourism Recreation Lease ("CTRL") regulatory process, which consisted of:

(1) a preliminary check to ensure the proposal met government policy;

(2) the submission of a detailed description of the proposal for circulation within government departments, which would then canvas possible problems and concerns;

(3) the issuance of a conditional letter of intent; and

(4) the issuance of leases and other land tenancy with stated conditions for the lease and annual fees.

[8] Depending on the size and scope of the project, an environmental impact assessment report ("EIA report") might be required under the CTRL process.

[9] On November 3, 1989, the Boat Operation passed Stage 1 of the CTRL process as it was determined the proposal met government policies current at the time of the application. On December 9, 1989, Kananaskis Pathways Corporation submitted a detailed information package which complied with Stage 2 of the process. On April 17, 1990, the Boat Operation passed Stage 3 of the process when the Government of Alberta issued a conditional letter of intent approving it in principle.

[10] A lease and a license of occupation were issued to Kananaskis Pathways Corporation, each for a 25-year term commencing April 13, 1994, which completed Stage 4 of the CTRL process. The lease and licence were not put into evidence on this application by the Respondents or the Government of Alberta. The Respondents indicate in their Statement of Claim that the licence was "subject to a condition that the demised lands may be used for the following activities: Tour Boat Facilities (including boat docks and ramps, lodge, washroom and toilet facilities, access and parking, service and storage yard, power plant and picnic sites, etc.)." They claim that the lease conferred on Pathways the right to enter on and occupy certain lands "for the purpose of the Boat Operation."

[11] On December 15, 1999, the Respondents paid security deposits in the amount of $11,000 for the lease and of $33,000 for the licence. As at the date of trial, these security deposits have not been returned to the Respondents.

[12] Before the Boat Operation could proceed, it required a Roadside Development Permit from Alberta Transportation and Utilities, a written agreement from TransAlta Utilities for access to shore land subject to a Water Development Lease, and renewal of Development Permit Number 94/02 from Alberta Municipal Affairs Improvement District Number 5. Furthermore, approval under the *Water Act*, S.A. 1996, c. W-3.5 to construct within the bed and shore had to be obtained before the Boat Operation could proceed.

[13] Notwithstanding the approvals granted, none of the additional permits, approvals and authorizations were obtained and, as at the date the Ministerial Orders were issued, no facilities or infrastructure had been constructed and no steps had been taken by the Respondents to develop and operate the Boat Operation.

[14] The Heli-Cat Operation passed Stage 1 of the CTRL process on November 3, 1989. On December 29, 1989, Kananaskis Pathways Corporation submitted a detailed information package, thus completing Stage 2 of the process. On March 30, 1990, the Heli-Cat Operation reached Stage 3 of the process when the Government of Alberta gave approval in principle for the project and the issuance of a 25-year lease, subject to completion of a number of conditions. By letter dated June 25, 1991, the Department of Environment required Kananaskis Pathways

Corporation to complete an EIA of the project. The conditions were met or completed by June 19, 1997.

[15] On March 1, 1995, the Resort proposal completed Stage 1 of the CTRL process. The Government of Alberta then requested a detailed information package from Spray Lake Resort Corporation The information package was submitted on June 17, 1996, which completed Stage 2 of the process. Given the size and scope of the Resort proposal, it was clear that an EIA would have to be conducted.

[16] The area involved in the Respondents' proposed development was subject to the Government of Alberta's *Kananaskis Country Policy*, which had been developed and had evolved over approximately 30 years. On May 18, 1999, the Government of Alberta announced a new recreation policy for Kananaskis Country. The new policy provided there would be no new development proposals for major recreation facilities in Kananaskis Country and no development would be permitted in the wildland park and ecological reserve portions of Kananaskis Country. There was to be no development in Kananaskis Country's provincial parks other than to supplement traditional camping accommodation or day use infrastructure and services, as identified in approved management plans developed with public input.

[17] Six proposals that had received some degree of approval prior to the recreation policy review, including the Respondents' Projects, would continue to be eligible for consideration under the policy, but would be subject to stringent environmental review, deadlines and sunset clauses.

[18] The new policy was largely based on the results of an extensive public survey commissioned by the Government of Alberta and conducted by an independent consultant ("the Praxis Report"). The findings of the Praxis Report included the following:

(a) Albertans viewed themselves as stewards of this unique area and wanted to promote the wilderness aspect over all others. Albertans expressed that this should take priority over recreation development;

(b) 76 percent of the respondents to the survey agreed that Kananaskis Country was a delicate ecosystem and may be at risk with further development;

(c) Albertans place a high premium on the wilderness character of Kananaskis Country. They supported additional protected areas and opposed large-scale facilities. Hiking opportunities and an increased number of small lodges and rustic accommodation were preferred over hotels, golf courses, and off-road vehicle use;

(d) 78 percent of respondents felt additional overnight accommodations should be placed outside Kananaskis Country; and

(e) 88 percent of respondents felt the greatest priority should be given to environmental protection even if this meant fewer recreational opportunities for people.

[19] On May 31, 1999, Mar received a memorandum from the Deputy Minister of the Environment, Douglas Radke, outlining two alternate plans for addressing the six outstanding proposals in Kananaskis Country. Both action plans involved establishing a timeline for the steps to be taken by December 31, 1999 by the respective proponents. One option was to advise the proponents of these steps and if the steps were not complied with by December 31, 1999, any current dispositions and approvals would be cancelled. The second option was to ask each proponent to confirm it intended to proceed with a department approved development plan detailing all of the applicable time lines regarding the proposed development. The failure to comply with the request by December 31, 1999 would result in a detailed review of the steps that the Department of Environment would take in potentially cancelling the proponent's current disposition or approval. This second option was recommended by Douglas Radke and adopted by Mar.

[20] On July 26, 1999, Mar wrote to the Respondents advising that cancellation of all applications and approvals would take place unless a written commitment was provided by them by August 31, 1999 and a detailed development plan in a form acceptable to the Department of Environment was provided by December 31, 1999.

[21] On August 5, 1999, Mar received a letter from Jeffrey Blair, Manager of Planning for Genesis Land Development Corp., advising that it and its subsidiaries intended to move ahead with the Projects.

[22] On December 8, 1999, Mar wrote to the Respondents advising that he had reviewed the information provided by them and by staff of the Department of Environment. He confirmed that an EIA report would have to be prepared and approval obtained from the Natural Resources Conservation Board ("NRCB"). Mar advised that in accordance with s. 45 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 [*EPEA*], he was ordering that a single EIA report respecting the Heli-Cat Operation and Resort be provided, that also was to cover elements that were for the joint use of the Boating Operation and Heli-Cat Operation. Mar advised that the EIA report was to be prepared in accordance with Part 2, Division 1 of the *EPEA* and that the Department of Environment awaited the Respondents' proposed terms of reference for the EIA report and its plans for public notice of the proposed terms of reference pursuant to s. 46 of the *EPEA*.

[23] Mar informed the Respondents that the detailed regulatory and construction scheduling of the Projects along with the proposed terms of reference and plans for public notice were to be provided by December 31, 1999. The Respondents complied with these requirements by December 31, 1999.

[24] The terms of reference for the EIA report were to be a comprehensive guideline for review and assessment of the Projects that were being proposed. The terms of reference would

identify a framework in which issues such as the environmental impact would be discussed, specifically the ecology of the territories that were being impacted or affected by the Projects, the social and cultural impact of the Projects, the economic impact and the business development impact of the Projects, and various other concerns such as historical, highways, municipal government, federal requirements, and concerns under the *Water Act*. The terms of reference would not decide those issues, but would be the framework for the EIA report, which ultimately was to be reviewed by the NRCB. In order to establish the final terms of reference for the EIA report, it was necessary to obtain public input. Once public input was received, the Respondents were required to advertise the final terms of reference.

[25] With respect to the remainder of the approval process (which ultimately did not proceed), once the terms of reference for the EIA report were finalized, the EIA studies would proceed, all of which were to be paid for by the Respondents. The EIA report arising out of the EIA would be made public, and the Projects would be subject to public hearings before the NRCB. At the conclusion of the hearing process before the NRCB, a recommendation would be made by that Board to Cabinet for consideration as to whether or not the Projects would be allowed to proceed. Cabinet could either accept, reject, or modify the NRCB recommendation. If Cabinet approval had been obtained, the Respondents would have been able to proceed with their applications for various outstanding licences, permits, and approvals that the Projects required. In addition to the Government of Alberta's requirements, the Projects also would have had to meet the requirements for approval by the Federal Government pursuant to the *Canada-Alberta Agreement for Environmental Assessment Cooperation* (2005).

[26] On December 20, 1999, Dr. Annette Trimbee, Director of the Environmental Assessment & Strategy Division, wrote to the Respondents advising that public notices should be placed in the Calgary Herald, Calgary Sun, Canmore Leader, and Banff Crag & Canyon in accordance with the Respondents' advertising plan for public notice of the proposed terms of reference for the EIA report.

[27] The Respondents published their proposed terms of reference for the EIA report on January 11, 2000 and comments on the proposed terms of reference were received. Between September 1999 and May 30, 2000, the Government of Alberta received approximately 1,000 or more letters and other communications from Albertans in response to the request for public input into the terms of reference and in regard to the Projects themselves. The letters were from individuals as well as from organized groups such as the Alberta Wilderness Association, the Canadian Parks and Wilderness Society, the Canadian Rockies Alpine Group, the Bow Valley Naturalists, the Bragg Creek Environmental Coalition, and municipalities including the Town of Canmore and the Town of Cochrane. The majority of the letters registered opposition to the Projects proceeding in any way, shape or form.

[28] Mar replied to the authors of certain of these letters in February and March 2000 outlining the process that would be followed after the terms of reference were finalized and indicating that the NRCB would determine whether the Projects were in the public interest.

[29] Once the input from the public on the terms of reference was received, there were two meetings held with the Respondents. The first of these meetings, which took place on either May 2 or 3, 2000, was held between officials from the Department of Environment, including Deputy Minister Douglas Radke, and representatives from Genesis Land Development Corp., specifically Gobi Singh, Percy Alexander, and Jeffrey Blair. Deputy Minister Radke sent a memorandum to Mar on May 3, 2000 indicating that the Respondents had been advised at the meeting that:

(a) While the draft terms of reference were more or less completed, the Department of Environment wished to discuss the next steps in an open and frank manner;

(b) The Department of Environment believed that the pursuit of approvals for the Projects would be a very difficult task, and a detailed list of some of the necessary departmental approvals was provided to the Respondents;

(c) As a result of public submissions, internal department advice, and environmental considerations, the Minster was concerned that the Projects were not in the public interest;

(d) If the Minister decided that the development was not in the public interest, two options would arise: the proponent could withdraw its interest in any applications related to pursuing the development or the Minister could issue orders under s. 62 of the *EPEA* and s. 34 of the *Water Act*, the *Public Lands Act*,, the *Forestry Act*, and other legislation;

(e) If the development was found to be contrary to the public interest, the Respondents might be expending very large sums to proceed with the EIA report and NRCB application for little useful purpose;

(f) The Minister was under an obligation to form an opinion of the public interest associated with the Project and that decision would be made in the near future; and

(g) The Province did not have the power to stop the Respondents from doing the EIA and would not attempt to do so but the Respondents should consider whether the expenditure was wise given the issues surrounding the application.

[30] Deputy Minister Radke's memorandum also stated that the Respondents' representatives were given an opportunity to respond and he summarized their response as follows:

(a) They did not understand how a decision on the public interest could be made without full information, which they believed would only be available following the completion of the EIA report;

(b) If the Minister had information which clearly demonstrated that the Projects were not in the public interest then that should be shared with the Respondents;

(c) They believed that environmental impacts could be mitigated or avoided;

(d) They believed there were positive impacts for the Alberta economy; and

(e) They were prepared to invest significant dollars to prove the value of the development and to demonstrate how environmental impacts could be mitigated.

[31] The public input received in response to the proposed terms of reference was reviewed by the Department of Environment and the final terms of reference were prepared. On May 16, 2000, and pursuant to s. 46(3) of the *EPEA*, the Department of Environment issued the final terms of reference for the Projects. In a press release, the Department stated that the final terms of reference fully captured the concerns of over 1,000 Albertans and would ensure that a comprehensive review of the environmental, social, economic, and cultural impacts of the Projects was undertaken. On May 19, 23, and 24, 2000, public notices advising of the final terms of reference for the EIA report were published in the Calgary Sun, the Canmore Leader, and the Banff Crag & Canyon, respectively.

[32] On May 26, 2000, a second meeting was held between Mar, other officials from the Department of Environment, and representatives of the Respondents to allow the Respondents an opportunity to express their position on whether the Projects were in the public interest. In cross-examination on his affidavit, Mar testified that one of the purposes of the meeting was to determine "whether or not the economic interest of the plaintiffs... [had been] sufficiently expressed to provide the balance against all of the other relevant considerations pursuant to the legislation about whether or not a decision would be made to proceed or not proceed with the process that was in place."

[33] According to Mar, he formed the opinion by May 31, 2000 that the Projects were not in the public interest having regard to the purposes of both the *EPEA* and the *Water Act*. His evidence was that he based his opinion on information obtained from input from the public and from personnel within the Department of Environment. The factors that led him to form this opinion included:

(a) The negative public response to further large-scale recreational development in Kananaskis Country and the Spray Valley; and

(b) The significant ecological and environmental issues raised by the proposed Projects' location in the environmentally-sensitive area, including:

(i) The area in question was a relatively narrow wildlife corridor that animals would have to pass through;

(ii) The impact on fauna in the area generally;

(iii) The ecological values of flora that were in the area;

(iv) The removal of trees; and

(v) The emission of gas and engine oil into Spray Lake.

[34] Mar said that he also considered the economic dimensions of the Projects, including relevant business and commercial considerations and the interests of the Respondents' shareholders.

[35] In forming his opinion of what was in the public interest of Albertans pursuant to s. 62(1) of the *EPEA*, Mar considered he was obliged to consider s. 2 of the *EPEA*, which provides that one of the purposes of the *EPEA* is to support and promote the protection, enhancement and wise use of the environment while recognizing the opportunities made available through the *EPEA* for citizens to provide advice on decisions affecting the environment.

[36] After Mar made his decision that the Projects were not in the public interest, he met with Premier Ralph Klein and briefed him on his decision not to allow the Projects to proceed. He also informed the Premier of his intention to designate the Spray Lakes area as a provincial park.

[37] On May 31, 2000, Mar issued two Ministerial Orders. Ministerial Order 37/2000, issued under s. 62 of the *EPEA* (now s. 64 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12), indicated that Mar had formed the opinion that the Projects were not in the public interest having regard to the purposes of the *EPEA*, and ordered that no approval or registration be issued in respect of the Projects. Ministerial Order 38/2000 was issued under what was s. 34 of the *Water Act*, S.A. 1996, c. W-3.5 (now s. 34 of the *Water Act*, R.S.A. 2000, c. W-3), indicating that Mar had formed the opinion that the Projects were not in the public interest and ordering that (1) no application for an approval, licence, registration or transfer of an allocation of water, or an amendment of an approval or licence, be accepted; and (2) no approval, preliminary certificate or licence be issued or no registration be effected, and no amendment of an approval, preliminary certificate or licence be made in respect of the Projects.

[38] On May 31, 2000, Mar wrote to the Respondents advising that he had considered their comments but had determined that the Projects were not in the public interest. He enclosed copies of the Ministerial Orders that he had executed that day.

[39] The areas described in the Ministerial Orders fell within the area comprising the future Spray Valley Provincial Park, which was proposed on June 1, 2000 by Mar and formally came into existence in September 2000.

[40] On May 31, 2000, it was announced publicly that Mar would no longer be the Minister of Environment and would switch ministries with then Minister of Alberta Health, Halvar Johnson.

[41] The Respondents did not seek judicial review with respect to either of the Ministerial Orders. Rather, they commenced the present action against the Applicants, alleging abuse of public office, expropriation, breach of contract, and tortious interference with business relations.

III. Issues

[42] This Application raises the following issues to be determined by this Court:

A. Should the Statement of Claim be struck pursuant to Rule 129 for failure to disclose a cause of action; for being scandalous, frivolous or vexatious; or for being an abuse of the process of the Court?

B. Should summary judgment be granted in favour of the Applicants pursuant to Rule 159 as a result of the Respondents' failure to raise a genuine issue for trial?

IV. Legislation

[43] The relevant provisions of the *Alberta Rules of Court* are outlined below:

> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> ...

> 159. ...
>
> (2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> (3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[44] The relevant provisions of the *EPEA* under which Ministerial Order 37/2000 was issued include the following:

> 2. The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
>
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
>
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

(j) the important role of comprehensive and responsive action in administering this Act.

...

62(1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purposes of this Act, the Minister may at any time by notice in writing to the proponent, with a copy to the Director, order that no approval or registration be issued in respect of the proposed activity.

(2) Where the Minister has made an order under subsection (1) in respect of a proposed activity, the Director may not issue an approval or registration in respect of that proposed activity.

[45] The relevant provisions of the *Water Act* under which Ministerial Order 38/2000 was issued are also outlined below:

34(1) If the Minister is of the opinion that a proposed

(a) activity,

(b) diversion of water or operation of a works for the diversion of water, or

(c) transfer of an allocation of water under a licence,

should not proceed because it is not in the public interest, the Minister may order

(d) that no application for

(i) an approval, licence, registration or transfer of an allocation of water, or

(ii) an amendment of an approval or licence

is to be accepted in respect of the proposed activity, diversion, operation of a works for the diversion of water or transfer, or a class of proposed activities, diversions, operation of works for the diversion of water or transfers,

(e) that no approval, preliminary certificate or licence may be issued or that no registration may be effected in respect of the proposed activity, diversion or operation of a works for the diversion of water or in respect of a class of proposed activities, diversions, operation of works for the diversion of water or transfers,

(f) that no amendment of an approval, preliminary certificate or licence in respect of the proposed activity, diversion or operation of a works for the diversion of water or in respect of a class of proposed activities, diversions or operation of works for the diversion of water may be made, or

(g) that no transfer of an allocation of water may be approved in respect of the proposed transfer.

(2) If the Minister makes an order under subsection (1)(e), (f) or (g), the Director must give notice of the order to the applicant for the approval, licence, registration or transfer of an allocation of water if an application has been submitted.

(3) If the Minister makes an order under subsection (1)(d), the Director must provide notice in accordance with the regulations.

V. Analysis

A. Should Paragraph 43 of the Statement of Claim be Struck As Against Mar Pursuant to Rule 129?

1. Position of the Parties

[46] Paragraph 43 of the Statement of Claim states:

43. The Defendant Mar committed an intentional illegal act by foreclosing and preventing the Plaintiffs from developing the Projects, and did thereby intentionally use statutory authority for an improper purpose; or in the alternative did thereby commit an act that was beyond statutory authority or with reckless or willful indifference to the lack of statutory authority. Said act was committed with the intention to harm the Plaintiffs, either by way of an actual intention to harm, or in the alternative with actual knowledge that harm would result, or in the

> further alternative with reckless indifference or willful blindness to the foreseeable harm to the Plaintiffs.

[47] Mar submits that the Statement of Claim fails to set out any facts or to describe any actions alleged to have been taken by him which, if proven to be true, would constitute acting for an improper purpose pursuant to his statutory authority under the *EPEA* or the *Water Act*.

[48] Mar also contends that there are no facts pleaded which, if proven to be true, would amount to him acting in excess of his statutory authority. He maintains that the claim of abuse of public office is made without a factual basis and amounts to a fishing expedition by the Respondents. He asks that the Court strike paragraph 43 of the Statement of Claim pursuant to Rule 129.

[49] The Respondents submit that the Statement of Claim, when read as a whole, discloses the causes of action it asserts. They argue that if the allegations made in the Statement of Claim are assumed to be true, they support the causes of action pleaded. They contend that it is obvious the wrongful act which they rely on is Mar's issuance of the Ministerial Orders. They state that the facts which give rise to the causes of action are disclosed but the details of "when, where, and how" may be missing. They argue that the concerns raised by Mar can be addressed by a request for particulars. They also note that Mar has filed his Statement of Defence, there has been extensive document production and examinations for discovery have taken place.

2. Case Law

[50] The applicable principles relating to Rule 129 were reviewed by the Northwest Territories Court of Appeal in ***Fullowka v. Whitford*** (1996), 147 D.L.R. (4th) 531 (N.W.T.C.A.), leave to appeal to S.C.C. ref'd [1997] S.C.C.A. No. 58 (*sub. nom* ***Fullowka v. Royal Oak Mines Inc.***). In the *Alberta Rules of Court Annotated 2009* (Scarborough, Ont.: Carswell, 2008) at 197-98, Provincial Court Judge Fradsham summarized those principles as follows:

> (1) It is well settled that the impugned pleadings must be read generously;
>
> (2) The pleading will not be struck out if the flaws in it are capable of amendment.
>
> (3) A pleading will not be struck out for want of a cause of action unless the flaw is plain and obvious and beyond doubt.
>
> (4) The claim advanced must be hopeless to be struck out.
>
> (5) The Statement of Claim should be struck out on a question of law only if it is a pure question of law requiring no evidence or no further pleadings.
>
> (6) Care must be exercised in striking out part of a Statement of Claim only.

(7) Facts pleaded must be taken to be true.

(8) The Court should consider allowing an amendment before an order for striking. ***Roasting v. Lee*** (1998), 63 Alta. L.R. (3d) 260 (Master), at 263, *per* Master Laycock.

[51] In ***Fullowka*** at para. 50, the court held that, "... a claim should be struck out only for clear want of a cause of action, or very clear very bad abuse of process. The remedy for want of particulars is a demand for particulars, and then (if that is not answered) a motion for particulars." It does not necessarily follow that a statement of claim discloses no cause of action simply because it does not provide the details of when, where or how (at para. 51).

[52] In ***Tottrup v. Alberta (Minister of Environmental Protection)***, 2000 ABCA 121, 255 A.R. 204, the Alberta Court of Appeal succinctly outlined the principles governing an application to strike a statement of claim for failure to disclose a cause of action (at paras. 8 and 9):

> In brief, the Court must assume that the allegations of fact made by the plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The test set out by the Supreme Court in ***Hunt v. Carey Canada Inc***., [1990] 2 S.C.R. 959 at 980 is whether it is " . . . 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action." Caution is required before concluding that the plaintiff has no chance of success. The plaintiff is entitled to a broad reading of the pleadings. In my view, this is particularly important where a question arises as to the expiry of a limitation period. Subject to limitation questions, the Court may grant leave to include further facts if an application is made. In addition, a determination that there is no cause of action on one set of pleadings is generally no bar to framing a new action on different facts.
>
> Although the pleadings should be liberally interpreted, the Court has a duty to apply the Rule as it is intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck. Needless litigation should be avoided.

[53] Further, in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, [2003] 3 S.C.R. 263, the Supreme Court of Canada held (at para. 15) that:

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

3. Application

[54] The Statement of Claim in the present case details the background and history surrounding the Projects, specifically noting the status of each Project at the time the Ministerial Orders were issued. It further sets out the communications between the Respondents and Mar. After providing the factual context, the Respondents set up the various causes of action alleged, one of which is abuse of public office.

[55] In paragraph 43, the Respondents allege that Mar foreclosed them from developing the Projects (by issuance of the Ministerial Orders) and that this act was committed with the intention to harm them. Although the paragraph is not all that clear, it appears that the Respondents are alleging this intention to harm them was an improper purpose, making Mar's conduct unlawful. In the alternative, they contend that Mar knowingly or recklessly acted beyond his statutory authority in issuing the Ministerial Orders, again with the intention to harm the Respondents.

[56] Assuming for purposes of this application that the factual background set out in the first 37 paragraphs of the Statement of Claim and the allegations made in paragraph 43 are true, I conclude that it is not plain and obvious that the pleading does not disclose the cause of action of abuse of public office (***Odhavji***; ***Tottrup***). The Respondents are entitled to a broad reading of the pleading (***Tottrup***).

[57] The concern raised by Mar, namely the lack of details of "when, where, and how," may be remedied by way of a request for further particulars (***Fullowka***). Accordingly, the Statement of Claim will not be struck pursuant to Rule 129 of the *Rules of Court*.

B. Should The Applicants Be Granted Summary Judgment Pursuant To Rule 159?

1. Parties Applying

[58] Both the Government of Alberta and Mar apply for summary judgment dismissing the claims of abuse of public office, breach of contract, and duty of good faith and fair dealing and tortious interference with business relations. The Government of Alberta alone seeks summary judgment dismissing the claim of expropriation.

2. Case Law

[59] In ***Canada (Attorney General) v. Lameman***, 2008 SCC 14, [2008] 1 S.C.R. 372 (*sub nom.* ***Papaschase Indian Band v. Canada (Attorney General)*** and ***Papaschase Indian Band No. 136 v. Canada (Attorney General)***, the Supreme Court of Canada commented (at paras. 10 and 11) that the summary judgment rule serves to prevent claims or defences from proceeding to trial if they have no chance of success. The bar is set high on this form of application. A defendant who seeks summary judgment bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial:" ***Guarantee Co. of North America v. Gordon***

Capital Corp., [1999] 3 S.C.R. 423, at para. 27. If the defendant manages to prove this, it is up to the plaintiff to refute or counter the defendant's evidence: ***Murphy Oil Co. v. Predator Corp.*** (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. As noted by the court in ***Papaschase***, citing ***Guarantee Co. of North America*** at para. 30, the chambers judge may make inferences of fact if they are strongly supported by the facts.

[60] In ***Suncor Inc. v. Canada Wire and Cable Ltd.***, [1993] 3 W.W.R. 630 (Q.B.), Forsythe J. explained that summary judgment should be granted against a plaintiff who is opposing the application in the mere hope that the discovery and trial process will produce evidence that assists it. He also commented that summary judgment should be granted if there is no dispute on the evidence, the law is settled and the conclusions inevitable, even if the matter is complex.

[61] In ***Georgian Glen Development Ltd. v. Barrie (City)*** (2005), 13 M.P.L.R. (4th) 194 at paras. 7 and 8 (Ont. Sup. Ct. J.), the court outlined the role of the motions judge on an application for summary judgment to dismiss a claim:

> The motion judge's present role ... [is] ... "narrowly limited to assessing the threshold issue of whether a genuine issue exists on the material facts requiring a trial." Assessment of credibility, weighing of evidence and finding the facts are not issues for the motion judge; they are for the trial judge only. Despite the onus on the parties to put forth their best cases and reliable sources for material evidence, the motion judge is not to assess credibility issues involving any material fact.
>
> What is a genuine issue for trial comes down to whether there are conflicts in the evidence on material issues of fact and that issue is in turn dependant on there being present evidence to prove the essential ingredients of the cause of action. Not all facts are material to the cause of action being pursued, and not all conflicts involve material facts. I must look at the necessary elements of the alleged cause of action in this case and determine whether there is evidence relating to those elements which is in dispute and requires a trial to resolve.

3. Application

(a) *Immunity for policy decisions and collateral attack*

(i) Position of the parties

[62] Both Applicants refer to the government's broad discretion to make policy decisions and the immunity of public officials from tort liability in that regard.

[63] The Government of Alberta argues that the powers granted to the Minister under s. 62 and s. 34 of the *EPEA* and the *Water Act* are to be exercised in the public interest, which

indicates that the Minister is exercising a policy function, rather than conducting a simple technical analysis. As such, the decision is immune from tort liability.

[64] Mar also submits that policy decisions of the government are immune and do not attract liability and damages, even if a plaintiff suffers damages because of such policy decisions. Mar argues that the Ministerial Orders as well as the decision to announce the creation of a proposed provincial park are properly characterized as policy decisions. He states that it is fundamental that the Minister of Environment must be free to govern and exercise his authority to make policy decisions without fear of being subject to tort liability.

[65] The Applicants argue that the Respondents' claim is a collateral attack on Mar's decision to issue the Ministerial Orders. The Government of Alberta notes that the Respondents could have, but did not, challenge Mar's decision by way of judicial review. It refers to ***Stephen v. British Columbia (Ministry of Children and Family Development)***, 2008 BCSC 1656 at para. 72, in which the court agreed with the tribunal defendants that the claims against them were a collateral attack on the tribunal's decision and an abuse of process. The plaintiff was alleging bias, breach of the duty of fairness and errors in decision-making. The court expressed the view that the plaintiff's issues with the defendants' actions rested on alleged errors that were judicially reviewable.

[66] The Respondents suggest that the Applicants have raised two red herrings. First, they note that the Applicants' distinction between "policy" and "operational" decisions is inherent to the analysis of whether a duty of care is owed by a defendant and arises in the context of a claim in tort for negligence, which is not the cause of action in the case at bar. Second, they submit that this action is not barred by the doctrine of collateral attack. This is not an administrative law claim, but rather a claim for damages arising from a decision made in abuse of public office. The Respondents state that they attack the decision maker, not the decision. They argue that to suggest that the tort remedy depends on having already obtained the administrative law remedy clearly misapprehends the different functions of the two legal regimes and places an artificial and insurmountable barrier to the tort action.

(ii) Analysis

[67] I agree with the Respondents that this is not a negligence action in which distinctions need to be drawn between "policy" and "operational" decisions. While the government must be free to govern, it cannot do so with complete immunity. I note that the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25 states that:

> 5 (1) Except as otherwise provided in this Act and notwithstanding section 14 of the *Interpretation Act*, the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
>
> (a) in respect of a tort committed by any of its officers or agents,
>
> . . .

> (2) No proceedings lie against the Crown under subsection (1)(a) in respect of an act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or that officer's or agent's personal representative.
>
> (3) When a function is conferred or imposed on an officer of the Crown as such, either by a rule of common law or by statute and that officer commits a tort in the course of performing or purporting to perform the function, the liability of the Crown in respect of the tort is such as it would have been if the function had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.
>
> . . .

[68] The tort of abuse of public office is one example of the way in which the government is subject to tort liability. However, as indicated by the authorities, the threshold for the tort of abuse of public office is high, and reflects the sentiments expressed in ***Just v. British Columbia***, [1989] 2 S.C.R. 1228 that the government should be held liable for its actions only in exceptional circumstances.

[69] Although the spark that ignited these legal proceedings was a policy decision by the Government of Alberta to prevent further development in the Spray Lake area, any analysis surrounding the policy decision is not directly relevant to the torts alleged. The two essential elements of the tort of abuse of public office are whether or not there was some deliberate unlawful conduct by an official in the exercise of his public functions, and whether that official was aware that the conduct was unlawful and likely to injure the plaintiffs. Similarly, the tort of interference with business relations requires an intention to injure the plaintiff and interference with the plaintiff's business by illegal or unlawful means.

[70] The collateral attack argument is raised in relation to the claims of abuse of public office, inducing breach of contract and tortious interference with business relations. In my view, the Respondents are entitled to advance those claims given that they are seeking damages as a remedy. While a Ministerial decision can be quashed on judicial review, if a party has suffered damages as a result of that decision, those are not recoverable except by way of action.

(b) *Abuse of public office*

(i) Position of the parties

[71] The Government of Alberta submits that all of the evidence in this case suggests that Mar issued the Ministerial Orders because, in his opinion, they were in the public interest. It contends that there is no evidence that Mar issued the Ministerial Orders for the purpose of injuring the Respondents. Further, there is no evidence that his conduct was unlawful or that he was aware it was unlawful. The Government of Alberta maintains that the Ministerial Orders were issued

lawfully pursuant to s. 62 of the *EPEA* and s. 34 of the *Water Act*. It notes that both provisions confer broad authority on the Minister and that the only precondition to the exercise of the Minister's powers under these sections is that the Minister must be of the opinion that the proposed activity is not in the public interest. The Government takes the position that Mar met the condition for the exercise of his power. Also, it notes that these sections do not place any restriction on the Minister with respect to the timing of ministerial orders.

[72] The Government of Alberta argues that Mar reached his opinion based on the proper considerations; namely, the public opposition to the Projects, the ecological and environmental concerns raised by the proposed Projects' location in an environmentally-sensitive area, the economic dimensions of the Projects and the relevant business and commercial considerations and interests of the Respondents' shareholders. It says that the Respondents were aware of the concerns of the Department of Environment, which were relayed to them during the meetings held on May 2 and 26, 2000.

[73] The Government of Alberta asserts that there is no evidence to suggest that Mar did not have an honest belief in the legality of the Ministerial Orders.

[74] Mar submits that the allegation that he abused his public office by acting without statutory authority or, alternatively, for an ulterior purpose, is without merit. He argues that he acted lawfully and within his statutory authority, specifically under s. 62 of the *EPEA* which outlines that the Minister can halt the approval process of a proposed activity at any stage of the review or approval process. Mar notes that the Minister's powers under s. 62 of the *EPEA* are not subject to the completion of an EIA report, nor must the Minister consider a decision of the NRCB under the *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5 (*NRCBA*). Section 62 of the *EPEA* expressly authorizes the Minister to exercise his or her authority at any time where the Minister is of the view that the proposed activity is not in the public interest having regard to the purposes enumerated in s. 2 of the *EPEA*. Furthermore, Mar submits that s. 9 of the *NRCBA* makes it clear that notwithstanding the approvals of the NRCB and Lieutenant Governor in Council, the proponent is still required to obtain the necessary approvals or registrations pursuant to the *EPEA*.

[75] Similarly, Mar contends that he acted lawfully and within his statutory authority under the *Water Act*. Section 34 of the *Water Act* provides that the Minister may order that no application for an approval of a proposed activity proceed where the Minister is of the opinion that a proposed activity is not in the public interest.

[76] Further, Mar maintains that there is no evidence that the Ministerial Orders were issued for an ulterior motive, that he considered any extraneous factors, or that he acted with an improper purpose in any other way. He argues that he issued the Ministerial Orders after having formed the opinion that the Projects were not in the public interest having regard to the purposes of the *EPEA* and the *Water Act*. He notes the specific factors he considered when forming his opinion that the Projects were not in the public interest; namely, the negative public response, ecological and environmental issues, business and commercial considerations, and the interests of the shareholders of the Respondents.

[77] The Respondents agree that at the time the Ministerial Orders were issued, Mar was acting within his capacity as a public officer and that he did so deliberately. They state that it is clear he knew that by signing the Ministerial Orders the Respondents likely would suffer harm, as evidenced by his comments to the press shortly thereafter.

[78] The Respondents submit that Mar did not exercise his statutory authority lawfully by forming the opinion that the Projects were not in the public interest. Rather, they argue that he signed the Ministerial Orders for ulterior motives that were inconsistent with the obligations of his office. Specifically, they submit that he signed them in a bow to public pressure, without any adequate consideration of the public interest and for the purpose of establishing his reputation and that of the Government of Alberta as sympathetic and responsive to popular causes. The Respondents state that Mar sought to project the public image of a populist, and therefore a more humane Minister of Health who would thereby be in a position to rescue the Government of Alberta from the public's reaction against Bill 11. They assert that there is ample circumstantial and testimonial evidence to place Mar's testimony about the factors he took into consideration in determining that the Projects were not in the public interest in serious doubt.

[79] The Respondents argue that Mar's intentions in signing the Ministerial Orders were not within the ambit of the applicable legislation and, as such, his credibility is squarely at issue. In order to resolve this issue of credibility, the Respondents submit that the Court must have the opportunity to hear Mar's direct testimony, to see his response to cross-examination, to observe and judge his evidence as a whole, in light of his demeanor on the stand and all of the circumstances of the case. The Respondents submit that such an analysis cannot be achieved on the basis of affidavits and paper transcripts.

(ii) Case law

[80] In ***Odhavji Estate***, the Supreme Court of Canada articulated the two ways in which the tort of misfeasance in or abuse of public office can arise: "Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff" (at para. 22, citing ***Powder Mountain Resorts Ltd. v. British Columbia***, 2001 BCCA 619, 94 B.C.L.R. (3d) 14; ***Alberta (Minister of Public Works, Supply and Services) v. Nilsson***, 2002 ABCA 283, 220 D.L.R. (4th) 474, aff'g 1999 ABQB 440, 70 Alta. L.R. (3d) 267, leave to appeal to S.C.C. den'd [2003] S.C.C.A. No. 35; and ***Granite Power Corp. v. Ontario***, [2002] O.J. No. 2188 (QL), aff'd in part (2004), 72 O.R. (3d) 194 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 409).

[81] According to the court in ***Odhavji Estate*** at para. 23, the two constituent elements that are common to each of these two forms of the tort are: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff." The court indicated (at para. 23) that Category A and B are distinguished in the manner in which the plaintiff proves each ingredient of the tort:

> In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[82] With respect to the first constituent element of the tort, i.e. the nature of the misconduct, the essential question to be determined is whether the alleged misconduct was deliberate and unlawful. The unlawful act (or omission) may arise "from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose" (***Odhavji Estate*** at para. 24, citing ***Three Rivers District Council v. Bank of England (No. 3)***, [2000] 2 W.L.R. 1220 at 1269 (H.L.)). The deliberate unlawful act is the focal point of the inquiry, which consists of (i) an intentional illegal act, and (ii) an intent to harm an individual or class of individuals (***Odhavji Estate*** at para. 25, citing ***Nilsson*** at para. 108 and ***Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)***, 2001 MBCA 40, 156 Man. R. (2d) 14). The unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff (***Odhavji Estate*** at para. 25).

[83] The Supreme Court of Canada outlined the restrictions placed on the ambit of the tort. It is not directed at a public officer who inadvertently or negligently fails to adequately discharge the obligations of his or her office, nor is the tort directed at a public officer who fails to adequately discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control (***Odhavji Estate*** at para. 26). Further, a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against self-incrimination, may remove the official's conduct from the scope of the tort of misfeasance in a public office (***Odhavji Estate*** at para. 27).

[84] The Supreme Court of Canada in ***Odhavji Estate*** at paras. 28, 29 and 38 held that the second constituent element of the tort, the mental component, reflects the well-established principle that misfeasance in a public office requires an element of bad faith or dishonesty. For the conduct to fall within the scope of the tort, the officer must intentionally engage in conduct that he or she knows is inconsistent with the obligations of the office. There must be a subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, the defendant must have been subjectively reckless or wilfully blind to the possibility that harm was likely to occur as a result of the alleged misconduct.

[85] In sum, the tort of abuse of public office is an intentional tort which has two distinguishing elements: (i) deliberate unlawful conduct in the exercise of a public function; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff (***Odhavji Estate*** at para. 32). In addition to proving the deliberate unlawful conduct and the requisite knowledge, a plaintiff also must prove the other requirements common to all torts, i.e. that the tortious conduct

was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law (at para. 32).

[86] In ***Martineau v. Ontario (Alcohol and Gaming Commission)***, 2007 ONCA 204 at para. 8, 156 A.C.W.S. (3d) 354, the Ontario Court of Appeal held that the trial judge had applied the proper test for the tort of abuse of public office. He had indicated that even though the defendants' conduct may have been negligent, it was not conduct that would support a finding of misfeasance in public office as it was not conduct carried out with an ulterior motive and an intention to injure the appellants, nor was it the conduct of a public officer acting without an honest belief that her actions were lawful and likely to injure the plaintiffs. The second branch of the test for abuse of public office was not satisfied.

[87] In ***Powder Mountain***, the British Columbia Court of Appeal considered a case similar to the case at bar. The plaintiffs had alleged they had been wrongly deprived of an opportunity to pursue a ski resort development proposal. The court upheld the trial judge's dismissal of the plaintiff's claims for breach of contract, negligent representations and/or unlawful interference with economic interests and contractual relations, and for the tort of abuse of public office. The court commented (at para. 2) that the tort of abuse of public office must be used cautiously as otherwise courts risk straying into the arena of political decision-making. It advised that a balance must be sought between curbing unlawful behaviour on the part of governmental officials and protecting officials charged with making decisions for the public good from unmeritorious claims by persons adversely affected by those decisions. The court noted at para. 36 that "[i]t was to the Province, not to either proponent, that [the public officials] owed their primary duty."

[88] In ***Entreprises Sibeca Inc. v. Frelighsburg (Municipality)***, 2004 SCC 61, [2004] 3 S.C.R. 304, the Supreme Court of Canada dealt with the rules governing the extra-contractual liability of municipalities, and more specifically the circumstances in which damages may be awarded against a municipality following the exercise of its power to make by-laws (at para. 1). The plaintiff developer purchased a 1500 acre lot from the municipality and submitted a proposal for a recreational and real estate development. The municipality gave its approval in principle, which was contested by advocates of conservation of the mountain. Subsequently, the advocates were elected to the municipal council and a notice of motion to amend the zoning bylaw was filed. The amended bylaw was adopted. It required the developer to submit a comprehensive development program for its land and to erect its buildings on land adjacent to a public road. The developer subdivided its land, sold it off piece by piece, and sued the municipality for loss of profits. The Court of Appeal overturned the award granted to the plaintiff at trial. The Supreme Court of Canada upheld the Court of Appeal's decision.

[89] Deschamps J. cautioned (at para. 15) against confusing the rules of administrative law, which allow for judicial review of a public body's decision, with those governing the extra-contractual liability of a public body. Setting aside the decision of a public body will not necessarily lead to a public body being found civilly liable. Deschamps J. made it clear that the issue in ***Entreprises Sibeca*** was that of civil liability of a municipality and not that of judicial review of a municipal decision.

[90] The court in ***Entreprises Sibeca*** noted that ***Wellbridge Holdings Ltd. v. Greater Winnipeg***, [1971] S.C.R. 957 continues to be one of the leading cases that outlines the public law rules applicable to public bodies exercising a legislative power. In ***Wellbridge Holdings***, a real estate developer sued a public body claiming that it had breached its duty of care in making a bylaw. The Supreme Court of Canada in ***Wellbridge Holdings*** emphasized (at para. 966, 968-970) that a duty of care would not arise solely because economic loss would foreseeably result to the plaintiff if the bylaw in question proved invalid. There is a difference between a municipality at the operating level and the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. A court may determine that a municipality exercising such authority has acted beyond its powers, but "[i]nvalidity is not the test of fault and it should not be the test of liability." The risk of loss from the exercise of legislative or adjudicative authority is a general public risk that does not support compensation on the basis of a private duty of care.

[91] In ***Entreprises Sibeca*** at para. 2, the Supreme Court of Canada held that the adoption, amendment, or repeal of a zoning bylaw does not in itself trigger a municipality's liability even if the effect of that action is to reduce the value of the lands affected. In exercising its regulatory power, a municipality enjoys broad discretion in public laws and it may not be held liable for the exercise of its regulatory power unless it acts in bad faith or irrationally (at paras. 23 and 24). A municipality is protected by relative immunity in public law because it performs a function which requires that it take into consideration multiple and sometimes conflicting interests. If there are no constitutional issues at play, the courts may intervene only if there is evidence of bad faith. The concept of bad faith may go beyond intentional fault to also encompass acts that are so markedly inconsistent with the relevant legislative context that they serve as circumstantial evidence of bad faith.

(iii) Analysis

[92] The Government of Alberta and Mar bear the evidentiary burden of showing that there is no genuine issue of material fact requiring trial with respect to the two elements of the tort of abuse of public office: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Evidence of an intention to injure the Respondents would be evidence of both elements of the tort.

[93] Section 62(1) of the *EPEA* states: "[w]here the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purposes of this Act, the Minister may ... order that no approval or registration be issued in respect of the proposed activity." Section 62(2) of the *EPEA* states: "[w]here the Minister has made an order under subsection (1) in respect of a proposed activity, the Director may not issue an approval or registration in respect of that proposed activity."

[94] In forming his opinion under s. 62(1) of the *EPEA* that a proposed activity should not proceed because it is not in the public interest, the Minister must have regard to the purposes of

the *EPEA* as set out in s. 2 of the Act. These include supporting and promoting the protection, enhancement and wise use of the environment.

[95] Section 34(1) of the *Water Act* specifies that the Minister may order that approval not be given for an activity if he or she is of the opinion that it should not proceed because it is not in the public interest.

[96] It is evident from these statutory provisions that Mar had the statutory authority to order that no approval or registration be issued with respect to the Projects. As noted by the Government of Alberta, the only precondition to the exercise of his authority under s. 62 of the *EPEA* and s. 34 of the *Water Act* was that he must have formed the opinion that the proposed activity was not in the public interest. As a result, the only questions that arise are whether he did in fact form that opinion and in doing so had "regard to the purposes of [the] Act" (*EPEA*, s. 62(1)), and whether he intended to injure the Respondents in issuing the Ministerial Orders.

[97] There is no evidence that Mar, in issuing the Ministerial Orders, intended to injure the Respondents (***Roncarelli v. Duplessis***, [1959] S.C.R. 121) .

[98] There is evidence that Mar formed his opinion based on input from the public and from personnel within the Department of Environment. He deposed that the factors that led him to form this opinion included the negative public response to further large-scale recreational development in Kananaskis Country and the Spray Valley, and the significant ecological and environmental issues raised by the proposed Projects' location in an environmentally-sensitive area. He further deposed that it was not until the public input stage (between September 1999 and May 30, 2000) that he began to seriously consider cancellation of the Projects.

[99] There is also evidence that Mar considered the economic dimensions of the Projects, including relevant business and commercial considerations and the interests of the Respondents' shareholders.

[100] The factors which Mar says he considered clearly fall within the ambit of s. 2 of the *EPEA*. The legislation does not specify how the particular criteria are to be weighed by the Minister in making an informed decision that would permit him to exercise his power under s. 62 of the *EPEA*. However, at a minimum, the factors considered by Mar clearly indicate a general concern for the "protection, enhancement and wise use of the environment" (*EPEA*, s. 2).

[101] The evidence, therefore, supports the Applicants' position that Mar engaged in lawful conduct in the exercise of his public function, in accordance with the *EPEA* and the *Water Act*.

[102] Further, there is no evidence that the Minister's powers under s. 62 of the *EPEA* or s. 34 of the *Water Act* are limited with respect to the timing of the issuance of ministerial orders. Nor are the Minister's powers limited in any way by the four-stage CTRL process that was in place for the Projects. The Minister's powers under s. 62 of the *EPEA* are not subject to the completion of an EIA report or consideration of a decision by the NRCB. Rather, s. 62 specifically provides

that the Minister can halt the approval process of a proposed activity at any stage of the review or approval process.

[103] There is nothing in the evidence which directly establishes that Mar exercised his statutory authority unlawfully. The Respondents challenge Mar's credibility. They contend that there is "ample circumstantial and testimonial evidence to place in serious doubt the avowals of Mr. Mar in his affidavit." They submit that an inference should be drawn that Mar issued the Ministerial Orders for the ulterior motive of fostering his reputation as being sympathetic and humane in order to counter public outrage against recent private health care legislation. They maintain that this inference is reasonable given the evidence that Mar worked with the Respondents in advancing the Projects through the EIA process and that he communicated to them and to the public that the EIA process would determine whether the Projects would be in the public interest.

[104] There is evidence that Mar met with Premier Ralph Klein a few days before signing the Ministerial orders and again afterwards. There is evidence that Mar was aware the Government of Alberta was trying to introduce a very controversial piece of health care legislation, Bill 11, which was intended to expand the use of private health care clinics in the Province. There is evidence that on the same day the Ministerial Orders were issued, it was publicly announced that Mar would no longer be the Minister of Environment but rather would be the Minister for Alberta Health. The Edmonton Journal reported that Mar's transfer to Alberta Health occurred in the aftermath of angry public protest against Bill 11. The Respondents contend that between May 26 and May 31, 2000, the only new information Mar received was in regard to the proposed change in Ministries.

[105] Although I am entitled to make inferences of fact, such inferences must be strongly supported by the facts. In this case they are not. The fact that Mar communicated with the Respondents and the public about the EIA process, that he had knowledge of the change in Ministries, that he was aware of the controversial Bill 11, that he met with the Premier, and that the Ministerial Orders were issued on the same day as it was publicly announced he would be Minister of Health does not lead to the inference that he did not exercise his statutory authority lawfully and that he did not consider the public interest. There is no evidence that he actually took those factors into consideration in deciding to issue the Ministerial Orders or that he failed to take into consideration relevant factors.

[106] In any event, the Respondents' suggestion that Mar issued the Ministerial Orders to foster his reputation as being sympathetic and humane appears to concede that the public was opposed to development in the area due to concern for the environment and that Mar was acting in response to public opinion. This supports rather than undermines Mars' evidence that he issued the Ministerial Orders as he felt the Projects were not in the public interest. Mar's announcement of the proposed Spray Valley Provincial Park a day after the Ministerial Orders were issued also is consistent with his evidence that he came to the view that development of the area was not in the public interest.

[107] I am unable to find that there is conflicting evidence on the issue of whether there was a deliberate, unlawful act in the exercise of Mar's statutory authority, or that there is evidence which puts Mar's credibility in issue.

[108] I conclude that there is no genuine issue for trial with respect to the tort of abuse of public office, as there is no evidence of an intentional illegal act. As there is no evidence of an unlawful act in Mar's exercise of his statutory authority under s. 62 of the *EPEA* and s. 34 of the *Water Act* in relation to the Projects, it is not necessary to proceed to the second element of the tort of abuse of public office.

[109] Summary judgment is granted to the Applicants with respect to this aspect of the Respondents' claim.

(c) *Tortious interference with business relations*

(i) Position of the parties

[110] The Applicants submit that Mar's acts were targeted at the public interest, in particular protection of the environment. Any injury to the Respondents resulting from the Ministerial Orders was an unfortunate incidental effect, not the purpose of Mar's actions.

[111] The Applicants contend that the Ministerial Orders were authorized by statute and were neither illegal nor unlawful. They were regulatory orders denying approval under the *EPEA* and the *Water Act*.

[112] The Respondents argue that although the Applicants were not malicious in their intent, they knew that they were taking away the rights of the Respondents. The Respondents reiterate their comments under abuse of public office with respect to the unlawful means used and the economic loss suffered in the context of unlawful interference with business relations.

(ii) Case law

[113] There are three elements to the tort of unlawful interference with economic relations: (i) an intention to injure; (ii) interference with the other party's business by illegal or unlawful means; and (iii) resultant economic loss (***Conway v. Zinkhofer***, 2008 ABCA 392 at para. 41, citing ***Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada*** (2003), 65 O.R. (3d) 30, 227 D.L.R. (4th) 458 at para. 44 (C.A.)).

[114] In order to satisfy the "intention to injure" requirement, the actions of the defendant must be targeted against the plaintiff (***Lineal Group Inc. v. Atlantis Canadian Distributors Inc.*** (1998), 42 O.R. (3d) 157 at para. 7 (C.A.); ***Cheticamp Fisheries Co-operative Ltd. v. Canada*** (1995), 139 N.S.R. (2d) 224 at paras. 40, 42, 45 (C.A.)). In ***Cheticamp Fisheries*** at para. 42, the Nova Scotia Court of Appeal held that knowledge or recklessness by the defendants as to whether their actions were unlawful is not sufficient evidence of intention to do harm. Nor is

mere foreseeability that damage may result from the unlawful conduct. The tort is not established by constructive intent to injure or foreseeable injury.

[115] In ***Edgeworth Helicopters Ltd. v. Salmon Arm (District)*** (1990), 1 M.P.L.R. (2d) 261 at para. 44 (B.C.S.C.) (referring to ***Dunlop v. Woollahra Municipal Council***, [1981] 1 All E.R. 1202), the court held that deliberate injury to the plaintiff is necessary for this tort. It also indicated that "unlawful means" refers to conduct which is forbidden by law, not mere invalidity.

(iii) Analysis

[116] The findings which I have made in my analysis of the claim for abuse of public office apply to this claim as well. There is no evidence before this Court to support the first element of the tort of interference with economic relations, as mere foreseeability that injury would result to the Respondents is not sufficient to establish an intention to injure. Nor is there evidence that Mar acted unlawfully in exercising his statutory authority. Given that the first two elements of the tort have not been met, there is no need to address the third element of economic loss.

[117] I conclude that there is no genuine issue for trial with respect to this claim. Accordingly, I grant the Applicants summary judgment, dismissing the Respondents' claim for unlawful interference with economic relations.

(d) *Expropriation*

(i) Position of the parties

[118] The Government of Alberta submits that all of the lands in question are Alberta Crown lands. It contends that, with the possible exception of the Boat Operation, for which the Respondents held a lease, they did not have any legal interest in the lands which could be taken by way of expropriation. The Government of Alberta states that the Respondents did not hold a lease, a licence, or any other interest in the lands associated with the Resort proposal and that any interest the Respondents had in terms of the lands proposed for the Heli-Cat Operation was expressly subject to their acquisition of the necessary permits from the Department of Environment, as well as Cabinet approval following an EIA and NCRB hearings.

[119] The Government of Alberta further argues that the Respondents never had an unimpeded property interest which could be taken; the interest was subject to obtaining the necessary permits. The denial of the permits did not constitute a "taking" but rather a "refusal to give." The Government of Alberta submits that the Respondents took a commercial risk and lost, which is not compensable in law.

[120] Even if the Respondents could show that they had an interest in land capable of supporting a "taking," the Government of Alberta submits that the question would be whether the interest actually was taken. The Respondents would have to demonstrate that their interest was "virtually extinguished" having regard to the nature of the land and the range of reasonable

uses to which it actually has been put. The Government of Alberta submits that the refusal to permit the Projects does not extinguish such reasonable uses to which the land actually has been put; rather it constitutes permissible regulation.

[121] The Government of Alberta argues that it did not acquire a beneficial interest in the lands, as they already belonged to it. Its refusal to grant the permits did not add to the Government of Alberta's already existing rights over the lands. Further, the Government of Alberta submits that a general benefit to the public does not satisfy the requirement for the acquisition of a beneficial interest.

[122] The Government of Alberta argues that there is no statutory basis for compensation under s. 62 of the *EPEA* or s. 34 of the *Water Act*.

[123] The Respondents claim that the Applicants' termination of the Projects has effectively deprived them of the full benefit of the lease and licence in relation to the Boat Operation and was an actual or *de facto* expropriation of their interest in the lands. They submit that *de facto* expropriation does not need to be based on any particular statutory authority.

[124] The Respondents acknowledge, however, that the causes of action in expropriation, breach of contract, and unlawful interference with business relations are inextricably linked to the tort of abuse of public office. They concede that the heart of this matter is whether Mar failed to lawfully exercise his public functions. If the tort of abuse of public office is summarily dismissed, the Respondents admit that the claim for expropriation likely will fail.

(ii) Case law

[125] As the Government of Alberta did not purport to expropriate any interest which the Respondents had in the lands associated with the Projects, the parties focussed their arguments on *de facto* expropriation.

[126] In ***Canadian Pacific Railway Co. v. Vancouver (City)***, 2006 SCC 5, [2006] 1 S.C.R. 227 at para. 29, the Supreme Court of Canada stated that: "...at common law, a government act that deprives a land owner of all reasonable use of its land constitutes a *de facto* taking and imposes an obligation on the government to compensate the landowner."

[127] *De facto* expropriation has two elements: (1) a complete taking of an interest in property or total extinguishment of rights without compensation; and (2) a corresponding benefit in favour of the expropriating authority (***British Columbia v. Tener***, [1985] 1 S.C.R. 533, [1985] 3 W.W.R. 673; ***Canadian Pacific Railway Co.*** at para. 30, citing ***Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*** (1999), 177 D.L.R. (4th) 696 at 716 (N.S.C.A.); ***Manitoba Fisheries Ltd. v. The Queen***, [1979] 1 S.C.R. 101).

[128] The first requirement for *de facto* expropriation; that is, a complete taking of property or removal of all reasonable uses of the property, "must be assessed 'not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of

reasonable uses to which it has actually been put'" (***Canadian Pacific Railway Co.*** at para. 34, citing ***Mariner Real Estate Ltd.*** at p. 717).

[129] With respect to the second requirement, it is not necessary to establish a forced transfer of property; acquisition of a beneficial interest relating to the property will suffice (***Canadian Pacific Railway Co.*** at para. 32, referring to ***Manitoba Fisheries Ltd.***). As noted by the Alberta Court of Appeal in ***Alberta (Minister of Infrastructure) v. Nilsson***, 2002 ABCA 283 at para. 48, 320 A.R. 88, *de facto* expropriation will be found even if title to the property nominally remains with the original owner, if "the degree of interference with the owner's property rights mandated compensation for loss of the property."

[130] Mere enhancement of the value of public land is not sufficient to meet this requirement (***Mariner Real Estate Ltd.*** at paras. 93 to 99).

[131] In ***Mariner Real Estate Ltd.*** at para. 42, the Nova Scotia Court of Appeal re-affirmed that extensive and restrictive land use regulation is the norm, and that such regulation, without exception, is found not to constitute compensable expropriation. The court's task is to "determine whether the regulation in question entitles the respondents to compensation under the *Expropriation Act*, not to pass judgment on the way the Legislature apportions the burdens flowing from land use regulation" (***Mariner Real Estate Ltd.*** at para. 41).

[132] In ***Nilsson*** at para. 61, the Alberta Court of Appeal held that restrictions on land use, including down zoning or a development freeze, do not amount to *de facto* expropriation.

[133] *De facto* expropriations are very rare in Canada and they require proof of virtual extinction of an identifiable interest in land (***Mariner Real Estate Ltd.*** at para. 83). However, the Alberta Court of Appeal in ***Nilsson*** has not excluded "the possibility that in an exceptional case the nature or extent of restrictions imposed on land use might be so significant that a *de facto* taking of the property has occurred" (at para. 62).

[134] The right to compensation for expropriation must be grounded in statute (***Mariner Real Estate Ltd.*** at para. 41; ***Cream Silver Mines Ltd. v. British Columbia*** (1993), 99 D.L.R. (4th) 199 at paras. 14, 20 (C.A.), leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 154; ***Kingsway General Insurance Co. v. Alberta***, 2005 ABQB 662, 258 D.L.R. (4th) 507 at para. 83; ***Tener*** at para. 52). However, there is a recognized rule of statutory construction that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation" (***Manitoba Fisheries Ltd.*** at 118, citing ***Attorney-General v. De Keyser's Royal Hotel***, [1920] A.C. 508).

[135] In ***64933 Manitoba Ltd. v. Manitoba***, 2002 MBCA 96, 214 D.L.R. (4th) 37, the Manitoba Court of Appeal considered whether the government's refusal to grant authorization for the plaintiff's development plan amounted to a *de facto* expropriation of the plaintiff's lands, thereby entitling the plaintiff to compensation. The plaintiff had acquired approximately 100 acres of land within a provincial park. After acquiring the property, the plaintiff developed a plan to construct a four-season vacation resort with amenities on the property. The plaintiff applied to

the government department for permission to proceed and, although the plans appeared to conform with the *Manitoba Building Code*, the issuance of a permit was withheld pending receipt of Parks Branch approval for the project. The government then held public hearings respecting further development in the park, a background report was prepared, and a series of public meetings were held to elicit comments on a draft management plan, which eventually was approved by Cabinet in April 1987. Ultimately, the government advised the plaintiff that its development proposal was not compatible with the management plan, and the plaintiff's request was denied. The management plan was never promulgated by regulation, but was considered by the government to be a development plan within the meaning of the Act.

[136] The Court dismissed the plaintiff's appeal, Scott C.J.M. holding at para. 15:

> I find that I am unable to accept the plaintiff's bold assertion that the refusal of planning permission in circumstances such as this entitles a landowner to compensation. Were this court to accept the plaintiff's position, this would mean that almost any disappointed developer whose request of regulatory authority for a proposed development project was rejected would have a claim to compensation. This cannot be so in the absence of a finding of a wrongful exercise of ministerial discretion or bad faith. The plaintiff's position at best is analogous to a zoning change, and as Philp J.A. made clear in ***Harvard Investments Ltd. v. Winnipeg (City)*** (1995), 129 D.L.R. (4th) 557 (Man. C.A.), ordinarily zoning changes do not result in an entitlement to compensation by the property owner so long as the regulatory authority is not motivated by ulterior purposes.

[137] At para. 20, Scott C.J.M. concluded that the plaintiff had purchased lands in a park subject to significant statutory and regulatory restrictions. The plaintiff has not been deprived of its interest in land or of its property rights. It had taken a commercial risk and lost, which was not compensable.

(iii) Analysis

[138] The Government of Alberta has the onus to demonstrate that there is no genuine issue for trial with respect to the Respondents' claim for expropriation.

[139] The Respondents did not complete the four-stage CTLR process with respect to the Heli-Cat Operation or the Resort proposal. The Heli-Cat Operation reached Stage 3, at which point the Department of Forestry, Lands and Wildlife communicated approval in principle of the Heli-Cat Operation and of the issuance of a 25-year lease and 25-year licence of occupation, subject to a number of conditions. The Department of Environment advised in 1991 that an EIA report would be required for this development. The other conditions were completed in 1997, but as the EIA had not been undertaken, the lease and licence and necessary permits were not issued.

[140] The Resort proposal completed Stage 2 of the CTLR process, at which point the Department of Environment advised that a detailed single EIA report would be required.

[141] The Respondents did not hold a lease, a licence, or any other interest in the Heli-Cat Operation or Resort lands, both of which required an EIA.

[142] Given that no interest in the lands, either beneficial or legal, arose with respect to the Heli-Cat Operation or the Resort proposal, the Respondents are unable to claim compensation for expropriation of those lands (***Canadian Pacific Railway Co.***). Therefore, I grant summary judgment dismissing the claim of expropriation with respect to the lands for the Heli-Cat Operation and the Resort proposal.

[143] The terms of the lease and the licence for the Boat Operation were not put into evidence by the Respondents or the Government of Alberta. It is not in dispute, however, that a lease and a license of occupation were issued to Kananaskis Pathways Corporation, each for a 25-year term commencing April 13, 1994, which completed Stage 4 of the CTRL process.

[144] There was evidence presented that before the Boat Operation could proceed, it required a Roadside Development Permit from Alberta Transportation and Utilities, a written agreement from TransAlta Utilities for access to shore land subject to a Water Development Lease, and renewal of Development Permit Number 94/02 from Alberta Municipal Affairs Improvement District Number 5. None of these were obtained, although the Government of Alberta conceded that the outstanding requirements for the Boat Operation were perfunctory in nature and would not have been difficult for the Respondents to meet those requirements. However, as at the date when the Ministerial Orders were issued, none of these outstanding requirements had been met by the Respondents.

[145] In order to determine if there was a "taking" by the Government of Alberta of an interest of the Respondents in the lands relative to the Boat Operation, it must be ascertained whether or not the lease and the licence for the Boat Operation conferred on the Respondents a vested interest in such lands prior to the issuing of the Ministerial Order. It is therefore critical that this Court know the precise nature and effect that these outstanding requirements may have *vis-a-vis* any interest of the Respondents under the lease and the licence. In this sense, are these outstanding requirements in the nature of true conditions precedent or mere conditions of operation? There is a fundamental distinction between a condition relating to the existence of any contractual obligation and a condition that is precedent to performance of a contractual obligation, see ***Ponoka Savings & Credit Union Ltd. v. Urban Core Developers Ltd.***, [1988] 6 W.W.R. 321(Sask. Q.B.) at para. 25, and ***Makowecki v. St. Martin***, [1990] 107 A.R. 346 at para. 50? In the absence of evidence as to the precise terms and conditions of the lease and the licence, this Court is not in a position to ascertain what vested interest if any, the Respondents held in the lands relative to the Boat Operation.

[146] In my view, there is a genuine issue for trial in relation to the claim of expropriation with respect to the Boat Operation. Accordingly, this Court refuses summary judgment for that aspect of the Respondents' claim.

(e) *Breach of contract - the duty of good faith and fair dealing, and inducing breach of contract*

(i) Position of the parties

[147] The Respondents submit that the Applicants are liable for breach of contract as there was a general contract between the Respondents and the Applicants that the Projects would proceed, subject only to environmental assessment by the Government of Alberta and in accordance with applicable legislation. They assert that the refusal of the Applicants to allow the Projects to proceed was a breach of their duty under the contract to evaluate and consider the Projects *bona fide* and in accordance with applicable legislation.

[148] The Respondents also claim that Mar induced a breach of the lease and licence for the Boat Operation by issuing the Ministerial Orders which meant that the terms of the lease and licence and of the approval process could not be satisfied. They assert that he was aware of the terms of the contracts and intended to cause a breach of the same, without legal justification.

[149] The Government of Alberta submits that for purposes of this application the allegation in Singh's affidavit that Mar assured the Respondents the Projects would proceed through the approval process is true. However, they argue that this assurance does not give rise to a cause of action in contract. It submits that there was no contract between the parties as there was no consideration for this assurance. It contends that, at best, the alleged representation was a gratuitous promise, which cannot form the basis of a cause of action. It argues that it did not obtain any rights from the alleged contract and, as such, it would not have been entitled to a remedy if the Respondents had withdrawn their application. Further, it maintains that there was no intention to contract.

[150] The Government of Alberta submits that a public authority cannot be estopped from the performance of its statutory duty or the unfettered exercise of its statutory discretion. It also asserts that the Respondents have not alleged or provided evidence that they suffered any damages in reliance on the alleged assurance, which was supposedly given before the Ministerial orders were issued.

[151] The Government of Alberta advances two arguments to counter the allegation that the Ministerial Orders breached the terms of the Respondents' lease and licence. First, it contends the Respondents did not have an unconditional lease or licence for the Heli-Cat Operation or the Resort proposal. The Respondents had to obtain permits for the Heli-Cat Operation from the Department of Environment and there were no contractual guarantees that the permits would be issued.

[152] Second, the Government of Alberta notes that the lease and licence did not contractually provide for any regulatory approvals. Alberta Forestry, Lands and Wildlife, which dealt with the lease applications, did not have or represent that it had any authority over the approvals which ultimately were denied.

[153] The Government of Alberta contests the Respondents' allegation that it breached any duty of good faith and fair dealing. It says that a contract cannot be based on political goodwill, as argued by the Respondents. Further, it asserts that the evidence demonstrates that Mar exercised his discretion in good faith.

[154] Mar submits that the evidence establishes that he was a servant acting *bona fide* and within the scope of his authority under the *EPEA* and *Water Act*. As such, he is not personally liable to an action in tort for inducing breach of contract between his employer, the Government of Alberta, and the Respondents.

(ii) Case law

[155] In ***Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.***, 2003 ABCA 221 at paras. 8 and 9, 330 A.R. 353, the Alberta Court of Appeal reiterated that mutuality of agreement lies at the root of any legally enforceable contract; the parties must reach a *consensus ad idem* on essential terms of the contract, which can be determined with a reasonable degree of certainty.

[156] If a document has been created containing the agreement between the parties and the signatures of the parties, the plain wording of the document may reveal the clear and unambiguous intention of the parties (***Central Service Station Ltd. v. Nfld. Light & Power Co.*** (1991), 90 Nfld. & P.E.I.R. 118 (Nfld. T.D.). However, G.H.L. Fridman, Q.C. in *The Law of Contract in Canada* (Toronto: Thomson Carswell, 2006) at p. 16 notes the following:

> If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or agreement.

[157] Fridman indicates (at p. 16) that the court must look for "proof of an agreement between the parties involving the necessary exchange of acts and promises, promises and promises, or acts and acts." He states (at p. 16) that "a representation of intention, which has not been made into a promise, will not give rise to a contract merely because the one to whom it has been made has acted upon it." However, he recognizes that some courts have found that a contract can be formed out of such conduct, giving rise to an estoppel against the one whose expression of intention has led to the subsequent act (see ***Lawson v. Utan Enterprises Ltd.*** (1979), 10 B.C.L.R. 163 at 173 to 176 (S.C.). Fridman notes (at p. 17) that courts have been able to find a concluded agreement from the conduct of the parties, without recourse to estoppel. Nevertheless, mere reliance on the conduct of the other party to an alleged contract will not suffice to establish a contract *de novo*, i.e. where none existed before, in the absence of prior agreement (Fridman at p. 17).

[158] The court cannot construct a contract if it is not clearly created by the parties' language or conduct (Fridman at p. 17). However, once the parties have used such language or employed

such conduct, they will be bound by the contract, even if the result is unreasonable (Fridman at p. 18).

[159] There must be both offer and acceptance in order for an agreement to be found. As stated in ***Acme Grain Co. v. Wenaus*** (1917), 36 D.L.R. 347 at 348 (Sask. C.A.), "[t]o constitute a contract there must be an offer by one person to another and an acceptance of that offer by the person to whom it is made. A mere statement of a person's intention, or a declaration of his willingness to enter into negotiations is not an offer and cannot be accepted so as to form a binding contract." The Supreme Court of Canada in ***Charlebois v. Baril***, [1928] S.C.R. 88 at 89 advised that, "[t]o make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended, or to his authorized agent." Fridman states at p. 24 that, "[t]he parties will not be bound *unless* they intend to be bound, nor will they be bound *until* they intend to be bound" (emphasis in the original).

[160] The parties must expressly or implicitly intend that a contract be formed as a result of their language or conduct (Fridman at p. 27)

[161] Certain parties may be less prone to enter into legal contractual relations than others (Fridman at p. 27; ***Beaudoin v. Waters*** (1997), 52 Alta. L.R. (3d) 158 at 170 (Q.B.)). For example, the government cannot be taken to intend to contract if the arrangement purports to bind it to promote legislation or to limit its power to repeal or amend legislation. Further, statements of government policy are not offers which are capable of being accepted by members of any group affected by those statements.

[162] Fridman (at p. 33) notes that an "invitation to treat" may sometimes be perceived as an offer. An invitation to treat is simply a statement indicating a general commercial intent to contract with the party to whom it is addressed if a suitable arrangement can be reached.

[163] An offeree must signify acceptance of an offer in the manner required by the terms of the offer, or if no mode of acceptance specified, in any manner deemed reasonable, and may be inferred from the offeror's conduct (Fridman at pp. 50 to 52).

[164] In ***Webb & Knapp (Can.) Ltd. v. Edmonton***, [1970] S.C.R. 588, the plaintiff, a land development company, and the defendant municipality entered into an agreement under which the plaintiff was to spend an estimated $100,000 on the preparation of a plan for the city's proposed civic centre area. If the plan was accepted, the city was to make available to the plaintiff a large area of land for private development purposes. If the city council did not adopt the plan, then it and the plan material were, from the time of such decision, automatically to become the property of the city. A plan, as contemplated by the agreement, was prepared and delivered to the city, and the plaintiff incurred expenditures in its preparation which exceeded the amount contemplated in the agreement. Some three months later the plan was rejected at a meeting of the city council. At the same meeting, the council approved a plan of the city commissioners, in preparation of which use had been made of the plan and materials of the plaintiff. The plaintiff brought an action for breach of contract or, in the alternative, breach of copyright.

[165] The Supreme Court of Canada allowed the appeal, holding that the plaintiff was entitled to damages for breach of copyright, but not for breach of contract. There were two conditions that had to be fulfilled under the agreement before the plaintiff obtained any rights under the contract to undertake any development within the civic centre: (1) acceptance of the plan by the City and, (2) successful introduction of a development plan contemplated by *The Town and Rural Planning Act*. The court held that the contract could not be amended or varied without a resolution of council. That being so, the second condition was never fulfilled and the contract at that point became unenforceable by the plaintiff.

[166] Consideration is an essential element of a contract (***Esquimalt & Nanaimo Railway v. Attorney-General of British Columbia***, [1948] S.C.R. 403 at para. 21, var'd [1950] A.C. 87 (P.C.)). Gratuitous promises or assurances, without more, cannot be turned into positive binding obligations; further, promissory estoppel cannot create a cause of action (***Smoky River Coal Ltd. v. U.S.W.A., Local 7621*** (1985), 60 A.R. 36 at paras. 8-9 (C.A.); ***Harrison v. Mutual Assurance Co.*** (1994), 163 A.R. 152 (Master)). In ***Laker Airways Ltd. v. Department of Trade*** [1977] 2 All E. R. 182 at 211, the court noted the following:

> Whatever representations the Secretary of State in office between 1972 and 1974 may have made to the plaintiffs he made to them pursuant to his public duty and in good faith. If in 1976 his successor was of the opinion that the public interest required him to go back on those representations, he was in duty bound to go back on them. The fact that Laker Airways Ltd suffered loss as a result of the change is unfortunate: they have been the victims of a change of government policy. This often happens. Estoppel cannot be allowed to hinder the formation of government policy.

[167] Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions; rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into (***Transamerica Life Canada Inc. v. ING Canada Inc.*** (2003), 68 O.R. (3d) 457 at para. 53 (C.A.)).

[168] If a servant acting *bona fide* within the scope of his or her authority procures or causes the breach of a contract between his employer and a third person, that servant does not thereby become liable to an action in tort at the suit of the person whose contract has thereby been broken (***ADGA Systems International Ltd. v. Valcom Ltd.*** (1999), 43 O.R. (3d) 101, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 124, citing ***Said v. Butt***, [1920] 3 K.B. 497).

(iii) Analysis

[169] The Respondents allege in their Statement of Claim that they received an assurance from the Applicants that the Projects would proceed, subject only to environment assessment. The Government of Alberta concedes for purposes of this summary judgment application that this

assurance was given. However, there is no evidence before this Court of any consideration having been given for the alleged assurance by the Applicants.

[170] The alleged assurance, without more, cannot be turned into a positive binding obligation on the part of the Applicants. As noted above, estoppel cannot be allowed to hinder the formation of government policy (***Laker Airways Ltd.***).

[171] Further, intent to contract cannot be implied on the part of the Applicants where the alleged agreement is said to have bound them to approve the Projects. The Applicants could not contract out of their statutory duty to determine if the Projects were in the public interest.

[172] With respect to the Respondents' claim that the Applicants breached their duty of good faith and fair dealing in refusing to allow the Projects to proceed, I am of the opinion that such a claim must fail. First, any such duty must be found in the alleged contract. In this case, no such contract of assurance came into existence. As there is no contract, there cannot be any contractual term requiring good faith and fair dealing. It follows that there can be no breach of such a contractual term. Second, the evidence is clear that Mar exercised his discretion in good faith. He considered that the Projects were not in the public interest. There is no evidence that Mar acted other than *bona fide* and in accordance with his statutory authority under the *EPEA* and *Water Act*.

[173] Accordingly, in my opinion there is no triable issue with respect to this allegation of breach of contract and the duty of good faith and fair dealing. Summary judgment dismissing that aspect of the claim will therefore be granted.

[174] The only contractual relationship that came into existence was with respect to the lease and the licence for the Boat Operation. The Respondents provided deposit money for the lease and the licence, which were granted by the Government of Alberta.

[175] Without evidence as to the terms of the lease and the licence, this Court is unable to make a determination as to whether or not there was a breach of those contracts or of a duty of good faith and fair dealing in regards to such contracts. Accordingly, in my view, there is a genuine issue for trial in that regard. Therefore, summary judgment is not granted in relation to this aspect of the claim.

[176] Given that there was no evidence presented of *mala fides* on the part of Mar in issuing the Ministerial Orders and there is evidence that he was acting in the course of his statutory authority under the *EPEA* and *Water Act*, he is not personally liable to an action in tort for inducing breach of contract, if any, between the Government of Alberta and the Respondents. As there is no triable issue in this regard, summary judgment is granted dismissing the claim against Mar for inducing breach of contract.

VI. Conclusion

[177] The Statement of Claim will not be struck pursuant to Rule 129 of the *Rules of Court* for failure to disclose a cause of action. It is not scandalous, frivolous, vexatious, or an abuse of the process of the Court.

[178] Summary judgment is granted to the Applicants pursuant to Rule 159 of the *Rules of Court* dismissing the Respondents' claims of abuse of public office, tortious interference with business relations, expropriation with respect to the lands associated with the Heli-Cat Operation and Resort proposal, breach of the alleged contract of assurance and duty of good faith and fair dealing and, in relation to Mar, inducing breach of contract.

[179] The application is refused in terms of the Respondents' claims for expropriation of the lands associated with the Boat Operation and breach of contract and duty of good faith and fair dealing in relation to the Boat Operation lease and licence.

[180] If the parties cannot agree on costs, they can be spoken to within 30 days.

Heard on the 29th and 30th days of January, 2009.
Dated at the City of Edmonton, Alberta this 9th day of April, 2009.

Don J. Manderscheid
J.C.Q.B.A.

Appearances:

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