**CITATION:** Kalu v. His Majesty The King, 2023 ONSC 6623
**COURT FILE NO.:** CV-22-74-CP
**DATE:** 2023/11/22

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| Elsie Kalu<br>Plaintiff/Respondent | T. David Marshall, Matthew Marshall, and Matthew Jarret, for the Plaintiff/Respondent |
| **– and –** | |
| His Majesty The King in Right of the Province of Ontario represented by The Attorney General of Ontario<br>Defendant/Moving Party | Sarah Pottle, and Bhavini Lekhi, for the Defendant/Moving Party |
| | **HEARD:** September 22, 2023 |

Proceeding under the Class Proceedings Act, 1992.

**THE HONOURABLE JUSTICE M.J. VALENTE**

**Reasons for Decision on Motion to Strike**

[1] His Majesty the King in right of the Province of Ontario as represented by the Attorney General of Ontario (the "Crown") requests that this court strike the statement of claim of the plaintiff without leave to amend for the following three reasons:

(a) the statement of claims discloses no reasonable cause of action pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the '*Rules*');

(b) in the alternative, pursuant to Rule 21.01(1)(a), as a question of law, the proceeding is a nullity because of the plaintiff's failure to deliver the requisite notice to the Crown as mandated by section 18(1) of the *Crown Liability and Proceedings Act, 2019,* SO 2019, c. 7, Sch17 (the 'CLPA'); and

(c) in the further alternative, the statement of claim does not comply with the requirements of Rule 25.06(9) of the *Rules* by reason of its failure to specify the nature of the relief claimed and the amount of damages sought, thereby prejudicing, or delaying the fair trial of the action pursuant to Rule 25.11.

Background

[2] The plaintiff is a landlord of a property located in Ottawa. On May 10, 2022, the plaintiff filed an application before the Landlord and Tenant Board (the 'LTB') to evict the tenant living at the property. The statement of claim pleads that as of December 22, 2022, the LTB had yet to hear the matter. The LTB order, properly incorporated by reference into the pleading by way of the plaintiff's response to the Crown's demand for particulars confirms, however, that the LTB heard the plaintiff's application on February 1, 2023 (the 'LTB Order') (see: *Darmar Farms Inc. v. Syngenta Canada Inc.,* 2019 ONCA 789, at para 44*)*.

[3] The plaintiff pleads on her behalf, and on behalf of all Ontario residential landlords who were or are party to eviction proceedings before the LTB "within the relevant limitation period" (the "Class") that the Crown has expropriated the property of the Class by enacting the *Residential Tenancies Act, 2006,* SO 2006, c. 17 (the 'RTA') and permitting "perpetual

delay by the LTB". The plaintiff claims compensation in a sum to be determined for the Crown's alleged *de facto* expropriation of the lands owned by the Class.

[4] This proposed class proceeding is at the pleadings stage. The statement of claim, as amended on December 30, 2022, was served on January 5, 2023 without any notice of the proceeding having been delivered to the Crown. The Crown has yet to deliver its statement of defence.

De Facto Expropriation as a Cause of Action

[5] The Crown moves for an order striking the statement of claim without leave to amend pursuant to Rule 21.01(1)(b) on the ground that it discloses no reasonable cause of action.

[6] The Supreme Court of Canada in *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 ('*Imperial Tobacco'*), emphasized the importance of resolving issues where possible at an early stage of the proceeding:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost… (at paras 19 and 20).

The Test

[7] The parties agree on the approach to a Rule 21.01(1)(b) motion. The facts alleged in the statement of claim are taken to be true unless they are patently incapable of proof, bald conclusory statements of fact or allegations of legal conclusion unsupported by material facts (see: *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 ('*Beaudoin Estate*'), at para 14; *Das v. George Weston Limited*, 2018 ONCA 1053 ('*Das*'), at para 74). The motions judge is also entitled to examine documents that form part of the pleading as a part of the material facts that are plead and accepted for purposes of the motion (see: *Das*, at para 74).

[8] The statement of claim is to be read generously and err on the side of permitting a novel but arguable claim to proceed to trial (see: *Imperial Tobacco*, at para 21). The question to be answered is whether it is plain and obvious, assuming the facts as plead to be true, that each of the plaintiff's claims disclose no reasonable cause of action (see: *Beaudoin Estate*, at para 14; *Leroux v. Ontario*, 2023 ONCA 314, at para 38).

The Elements of De Facto Expropriation

[9] The parties also agree that the recent 2022 decision of the Supreme Court of Canada in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 ('*Annapolis*'), is the leading authority on the elements of the *de facto* expropriation cause of action. The Supreme Court in *Annapolis* refers to *de facto* expropriation as "constructive taking." The parties agree, as do I, that the terms "constructive taking" and *de facto* expropriation" can be used interchangeably.

[10] Pursuant to *Annapolis*, the test to establish *de facto* expropriation by the Crown requires a finding that:

(a) the Crown has acquired a beneficial interest in the property or flowing from the property (i.e., an advantage); and

(b) state action on the part of the Crown has removed all reasonable uses of the property (at para 44).

[11] Each of these elements are necessary to establish a *de facto* expropriation claim.

(a) Does the statement of claim plead the Crown has acquired a beneficial interest in the property?

[12] Based on my review of the plaintiff's statement of claim, there is a *prima facie* failure to plead any acquisition by the Crown. The claim focuses squarely on the negative consequences and loses suffered by the Class members because of the Crown's enactment of the *RTA* and its "operational decision to permit perpetual undue delay by the LTB". These detrimental consequences are alleged to include the abolishment of "the private rights of Elsie and the Class members, resulting in a near-complete loss of their interests… and "significant financial burden." Nowhere does the pleading allege squarely an acquisition by the Crown.

[13] However, because I am mindful that in considering the Crown's motion, the statement of claim is to be read liberally and the Supreme Court in *Annapolis* directs me to "undertake a realistic appraisal of matters in the context of the specific case" (at para 45), a generous

reading of the statement of claim may suggest two examples of an advantage having been acquired by the Crown. In *Annapolis*, the Supreme Court suggests that an advantage may take the form of a permanent or indefinite denial of access to property as well as the conversion of private land uses to public purposes, such as conservation, recreational, or institutional uses (at para 45(c)).

[14] There are two allegations in the statement of claim which, read liberally, may allege an advantage having been acquired by the Crown...At paragraph 18 of the claim, the plaintiff pleads that her LTB hearing was cancelled "pending an indeterminate period" and at paragraph 33, the plaintiff alleges that the application of the RTA regulating scheme "eliminates all reasonable uses of the leased properties by their owners for an indefinite period of time".

[15] Notwithstanding these allegations, the LTB Order, incorporated by reference into the pleading, confirms that the plaintiff's application was heard on February 1, 2023 and that the plaintiff was given access to her property on or before July 31, 2023. Accepting these facts as true, then albeit there may be delays in the process, LTB hearings are proceeding, and orders are being issued. Accordingly, in my opinion, the statement of claim fails to establish any factual basis for a "permanent or indefinite denial of access to property" by the Crown.

[16] Furthermore, the allegation that the Crown's actions eliminate "all reasonable uses of the leased lands" cannot be considered as equivalent to an allegation that the Crown has confined the uses of private land to public purposes such as those referenced in *Annapolis*. Rather, at paragraph 35, the claim alleges that Class members' rental properties are being

expropriated "in the public interest". Furthermore, at paragraph 30, the plaintiff alleges that "[t]he regulatory scheme for residential tenancies in Ontario is intended to further the public purposes laid out in section 1 of the RTA".

[17] If the allegations in the claim are true, then the RTA restricts the use of private property in the public interest. This, in my opinion, is very different from an allegation that describes that RTA as "confining the uses of private land to public purposes" as was the case in *Annapolis* where the regional municipality allegedly enjoyed the advantage of having the subject lands "reserved for its purposes" as a public park (*Annapolis*, at para 70).

[18] Regulating in the public interest is not confining land use to a public purpose. If the facts as plead are true, then the statement of claim establishes that the RTA advances a public policy objective which, as the Supreme Court points out in *Annapolis*, is inconsistent with de facto expropriation (at para 45(a)). Indeed, it is common for the state to regulate private property in the public interest. As the Nova Scotia Court of Appeal observed in *Mariner Real Estate Ltd v. Nova Scotia (Attorney General)*, 1999 NSCA 98, "[i]n modern Canada, extensive land use regulation is the norm, and it should not be assumed that ownership carries with it any exemption from such regulation" (at para 49). In short, regulating in the public interest does not result in a *de facto* expropriation.

[19] Perhaps in an implicit acknowledgement that the statement of claim fails to plead an acquisition of a beneficial interest by the Crown, plaintiff's counsel submits in argument that evidence will be proffered at trial to show the advantages accruing to the Crown through its regulation of rental properties: These benefits are said to include: (i) a reduction in the cost of providing public housing due to the barriers faced by landlords in obtaining

eviction orders; (ii) alleviation of spending on public health due to reductions in persons living on the street; (iii) a reduction in the total cost of welfare programs because tenants are not required to pay rent during the periods in which parties are waiting for eviction hearings to be scheduled and orders issued; and (iv) improved political reputation as governments prioritize the rights of tenants due to the calculus of there being more voting tenants than voting landlords.

[20] Apart from the well accepted principle that a claimant responding to a motion to strike "is not entitled to rely on the possibility that new facts may turn up as the case progresses" (*Imperial Tobacco*, at para 22), these submissions are based on speculation, or at a minimum, bald conclusory statements unsupported by material facts. Therefore, they are not to be taken as true for the purpose of this or any future motion to strike; or in other words, they do not support a finding that the Crown has acquired a beneficial interest in the Class members' rental properties or a beneficial interest flowing from them.

[21] Plaintiff's counsel also submits that the case before me is akin to the facts before the Supreme Court of Canada in *Manitoba Fisheries Ltd v. The Queen*, 1978 CanLII 22 ('*Manitoba Fisheries*'), and *R v. Tener*, 1985 CanLII 76 ('*Tener*'), and that I should be guided by the Supreme Court's findings in those decisions. I disagree. Both cases are clearly distinguishable on their facts.

[22] In *Manitoba Fisheries*, the federal government granted a Crown corporation a commercial monopoly on the export of fish from Manitoba and delegated power to that corporation to grant licences to private enterprises to continue operation. No such licence was granted to the plaintiff corporation notwithstanding its many years of prior operation. In those

circumstances, the Supreme Court determined that the plaintiff's goodwill, as acquired by the Crown corporation, resulted in an advantage flowing to the state.

[23] In *Tener*, the registered owners of mineral claims on lands located within a provincial park were denied the necessary park use permits by the provincial Crown to explore and work their claims. The Supreme Court found that the denial of the permits resulted in the rights of the owners of the mineral claims being reduced in law and recovered in part by the Crown.

[24] In both cases the government acquired an advantage: either through the acquisition of a statutory monopoly that entitled it to benefits that it would not otherwise have or by the removal of a significant encumbrance from its lands. Based on the facts as plead in the plaintiff's statement of claim, or for that matter, the alleged facts that counsel submits might have been plead, there is no factual foundation to conclude that the Crown has acquired a beneficial interest in or flowing from the Class members' properties.

[25] To my mind this proposed class action is much more akin to the claims that were at issue before the Ontario Court of Appeal in *A & L Investments Ltd. v. Ontario*, 1997 CanLII 3115 ('*A & L Investments*'), leave to appeal denied. *A & L Investments*, like *Manitoba Fisheries* and *Tener*, was decided prior to *Annapolis* but focused on the Crown's acquisition of a beneficial interest in or flowing from property. In *A & L Investments*, the Court of Appeal considered two actions brought by a large number of plaintiff landlords seeking compensation from the Crown for alleged loses caused by the passage of rent control legislation. The claims arose from the effects of rent control legislation which

voided previously issued orders giving landlords the right to charge future rent increases. The plaintiffs claimed this to be a statutory taking of their property requiring compensation.

[26] The Court of Appeal rejected the argument that rent control legislation could be said to be an expropriation. Instead, the Court concluded that it was plain and obvious that these claims could not succeed because no property rights were acquired by the Crown. The Court stated:

> While the property rights of the plaintiffs voided by the [prevailing rent control legislation] may, in one sense, be said to have been taken from the plaintiffs, in no sense can they be said to have ben acquired by the Crown. The Crown transferred no property from the plaintiffs to itself by means of this legislation (at para 28).

[27] At para 30 the Court of Appeal went on to state that:

> …while the [rent control legislation] voids orders obtained by landlords and in that sense takes their property, that property is not transferred to tenants. At most, the legislation creates economic advantages for tenants. The 1991 Act does not effect an expropriation but rather regulates in a way that affects both landlords and their tenants.

[28] In the end, the Court concluded the rent control legislation did not amount to an act of expropriation but rather an exercise of the Crown's regulatory powers.

[29] Likewise, based on the allegations as plead in the statement of claim, I find it is plain and obvious that this proposed class action cannot succeed. Although it may be argued that

certain property rights have been limited or even eliminated by the RTA, in no sense can they be said to have been acquired by the Crown. As with the 1991 rent control legislation, I also find that the enactment of the RTA is an exercise of the Crown's regulatory authority and not an act of *de facto* expropriation.

(b) Does the statement of claim plead state action on the part of the Crown has removed all reasonable uses of the property?

[30] Having found that the statement of claim does not plead the first element of *de facto* expropriation, I will address whether the claim adequately, or at all, pleads the second element of the cause of action as stated in *Annapolis*. I engage in this enquiry while recognizing that both elements are necessary to defeat the Crown's motion to strike pursuant to Rule 21.01(1)(b).

[31] The statement of claim pleads, and for purposes of this motion, it is assumed true, that the average wait time for the scheduling of an eviction application before the LTB is 10 months and the average wait time for receiving a decision of the LTB is 2.5 months. Based on this alleged fact, the statement of claim pleads in several paragraphs that the plaintiff and the Class members are unable to make any reasonable use of their property. The Crown submits that because the facts as plead stipulate that Class members may apply to the LTB for orders authorizing the uses they wish to make of their residential rental properties, they cannot be said to be deprived of the use of their property in any substantial way. I disagree. That determination will turn on the Court's ultimate findings with respect to what constitutes reasonable uses of the Class members' property in the context of this specific case. While I concede that in this instance the proposition that the Crown has removed all

reasonable uses of the Class members' property may be novel given precedent decisions where, for example, Canadian courts have declined to find *de facto* expropriation in circumstances where property owners may apply for a license permitting the desired use of their property (see: *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382 as well as *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, 1999 NSCA 98 for another example), it is arguable that a court may find that in the circumstances of this case that the Class members have been denied all reasonable uses of their property.

[32] Having reached this conclusion, I am also of the mind, however, that the claim fails to plead the state action element of the cause of action. Whereas the claim references the harms suffered because of proceeding delays before the LTB, it does not plead facts that would make the Crown liable for the alleged delays. In the circumstances of this case where the passage of the LTB's governing legislation is an appropriate exercise of the Crown's regulatory authority, it is not sufficient to rely on the enactment of the legislation as the state action responsible for the Class members' alleged deprivation of the reasonable use and enjoyment of their property.

[33] Scheduling, adjournments, rescheduling and the consideration of requests for the extension or abridgment of time lie squarely within the administrative functions of the LTB (see *RTA; Statutory Powers Procedures Act*, R.S.O. 1990, c. S. 22, *Landlord and Tenant Board Rules of Procedure*). Because, as this Court recently stated in *Daly v. Ontario (Landlord Tenant Board)*, 2022 ONSC 2434 ('*Daly*'), affirmed 2023 ONCA 152, the LTB is an independent, quasi-judicial tribunal, its members act independently of the Crown, and the Crown cannot be vicariously liable for anything done by the LTB, the statement of claim not only fails to

plead the state action element of the cause of action but also, the claim has no likelihood of success against the Crown.

[34] In *Daly*, at para 35, the court found:

> Even accepting the allegations in the statement of claim to be true, it is plain and obvious that the plaintiff's action has no chance of success against the Crown. The Crown cannot be vicariously liable for anything done by the LTB or its tribunal members as it is an independent, quasi-judicial tribunal and its tribunal members are independent, quasi-judicial officials. The LTB and its tribunal members act independently of the Crown. This is a necessary legal conclusion resulting from an analysis of the statute that creates the LTB, and not a conclusion that might be influenced by other evidence.

Should Leave to Amend be Granted

[35] The Court of Appeal confirmed in *Fernandez Leon v. Bayer Inc*, 2023 ONCA 629 that leave to amend a statement of claim should be denied in only the clearest of cases; in those cases where it is plain and obvious that there is no tenable cause of action. This test is to apply even where it is determined that the statement of claim should be struck on a motion pursuant to Rule 21.01(1)(b). As the Court stated, "the fact that allegations are bald and lack supporting material facts is not itself a reason for refusing leave to amend" (at para 5).

[36] I have already found that the statement of claim fails to plead the essential elements of *de facto* expropriation. I have also found that the defects in the pleading cannot be improved by amendment. Specifically, were this court to permit the plaintiff to amend her pleading

to allege facts that may turn up as the case progresses, those facts would not support a finding that the Crown acquired a beneficial interest in the Class members' property and under no circumstances can the Crown be found to be responsible for anything done by the LTB. Accordingly, in my view it is plain and obvious that there is no tenable cause of action and the "radical defect" in the statement of claim cannot be cured by amendment (see: *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191, at para 36). I am also mindful of the Court of Appeal's direction in *FNF Enterprises Inc v. Wag Train Inc*, 2023 ONCA 92, that striking a claim, even a novel one, that is doomed to fail is "beneficial, and indeed critical to the viability of civil justice and public access thereto" because it avoids protracted and expensive proceedings (at para 30).

[37] I therefore exercise my discretion to refuse to grant the plaintiff leave to amend the statement of claim and strike the claim pursuant to Rule 21.01(1)(b).

The CLPA Notice Requirement

[38] If I am incorrect in my ruling that the statement of claim should be struck without leave to amend, I would also strike the claim pursuant to Rule 21.01(1)(a). In my view, as a question of law, this proceeding is a nullity because the plaintiff has failed to deliver the notice required by section 18(1) of the CLPA.

[39] Section 18(1) of the CLPA provides:

> No proceeding that includes a claim for damages may be brought against the Crown unless, at least 60 days before the commencement of the proceeding, the claimant

> serves on the Crown, in accordance with section 15, notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose.

[40] It is admitted that the plaintiff did not provide the Crown with the notice required by section 18(1).

[41] I agree with the Crown's submission that proper notice is a necessary pre-condition to the right to sue the Crown.

[42] For her part, the plaintiff submits that the section 18(1) notice requirement is an unconstitutional restriction on the inherent jurisdiction of the superior courts, and therefore, should not be a barrier to the claim being adjudicated in the normal course. The plaintiff relies on section 96 of the *Constitution Act,* 1867 which restricts the legislative competence of the provincial legislatures from enacting measures that infringe on the core jurisdiction of the superior courts. The plaintiff submits that where the legislature has removed the superior court's ability to waive a procedural barrier, such as a notice requirement, from a matter being adjudicated by it, the legislature has infringed on the superior court's inherent jurisdiction and must be declared unconstitutional.

[43] The plaintiff draws a parallel between the section 18(1) notice requirement and the constitutionality of the payment of hearing fees as a precondition to this court hearing legitimate claims. In the latter instance, the Supreme Court of Canada found that the hearing fee scheme imposed by the province of British Columbia placed an undue hardship on litigants and impeded the right of British Columbians to bring legitimate cases to court. For the reason, the *Court in Trial Lawyers Association of British Columbia v. British*

*Columbia (Attorney General)*, 2014 SCC 59 declared the hearing fee scheme as it then stood unconstitutional because the filing fee regime ran afoul of the constitutional protection for superior courts found in section 96 of the *Constitution Act*, 1867.

[44] I do not view the section 18(1) notice requirement of the CLPA and hearing fees in the same light. Unlike the British Columbian filing fees, the section 18(1) notice requirement is not a barrier to access to justice.

[45] Compliance with the notice requirement is not onerous, and more importantly, it does not prejudice one segment of society over another. Certainly, there is no evidence to suggest that compliance with section 18(1) would have prejudiced the plaintiff or any Class member. As the Crown submits, the plaintiff's failure to deliver the required notice does not create a legitimate constitutional issue.

[46] Perhaps, however, the Court of Appeal's recent ruling in *Poorkid Investments Inc v. Ontario (Solicitor General)*, 2023 ONCA 172, is a complete answer to the plaintiff's constitution challenge. In that decision the Court of Appeal held:

> …s. 96 immunizes neither the substantive content of the law nor the procedure governing litigation against legislative reform: the legislature may establish, amend, or repeal causes of action, and may establish various procedural requirements. Section 96 protects the core jurisdiction of the superior courts, but procedural requirements that must be met before particular claims may be brought cannot be equated with depriving the superior courts of the ability to hear disputes and so preventing them from fulfilling their constitutional role – especially given that

superior courts will determine whether those procedural requirements have been met (at para 48).

[47] Should this court find that the notice requirement in the CLPA is constitutional, as I have done, the plaintiff submits, in the alternative, that the section 18(1) notice requirement does not apply in this case because the plaintiff and Class members are not seeking damages from the Crown.

[48] The plaintiff's argument is founded in the definition of "damages" as contained in *Black's Law Dictionary*, 6th ed (St. Paul, MN: West Publishing Co., 1999) and approved by Kershman J. in *The Corporation of the City of Belleville v. Gore Mutual Insurance Company*, 2021 ONSC 3854 at para 64. "Damages" are defined in part as, "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another". The plaintiff submits that because the claim seeks compensation for the Crown's *de facto* expropriation through the enactment of the RTA and the creation of the LTB, something it is permitted at law to do, the section 18(1) notice requirement is not applicable to the circumstances of the case.

[49] In my opinion, the plaintiff's submission distorts reality. The claim of the plaintiff and the Class members is based on *de facto* expropriation, or as the Supreme Court refers in *Annapolis*, on the doctrine of constructing taking, described by the Supreme Court as a forcible acquisition by the Crown of privately owned property for public purposes. This doctrine seeks to compensate claimants where the line between a valid regulation and a constructive taking is crossed, or where in other words, the effect of the regulatory activity

deprives a claimant of the use and enjoyment of its property. In short, the claim is founded on an unlawful act. Therefore, section 18(1) of the CLPA applies.

The Nature of the Relief Claimed is Not Specified

[50] Having decided that the statement of claim discloses no reasonable cause of action, striking the claim without leave to amend and determining that the proceeding is a nullity by virtue of the plaintiff's failure to comply with section 18(1) of the CLPA, I find that there is no need for me to consider whether the claim fails to specify the nature of the relief claimed for which leave to amend would normally be granted.

Costs

[51] Each of the parties have delivered cost outlines.

[52] The Crown delivered two cost outlines: one for its motion for leave to file evidence relative to the section 18(1) notice issue and a second with respect to the motion now decided by me. The CLPA notice issue was resolved on consent. The Crown's first cost outline seeks costs in the amount of $7,640 and its second cost outline seeks recovery in the amount of $48,540.28. Both amounts are calculated on a partial indemnity basis and are inclusive of disbursements and applicable HST in the sum of $900.49. The plaintiff's one cost outline seeks costs on a partial indemnity basis in the sum of $13,902.00. No disbursements are claimed by the plaintiff and the cost outline does not indicate whether the amount claimed includes HST. For purposes of my cost decision, I am proceeding on the basis that it does not include HST.

[53] Section 13(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, provides that "subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a stay in proceeding are in the discretion of the court, and that the court may determine by whom and to what extent the costs shall be paid".

[54] The factors to be considered by the court, in the exercise of its discretion on costs, are set forth in Rule 57.01(1). The Court of Appeal has observed that modern cost rules are designed to foster three fundamental purposes: (1) to indemnify successful litigants for the cost of the litigation; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants (see: Fong v. Chan [1999] O.J. No 4600 (ONCA) at Para 24).

[55] The usual rule in civil litigation is that costs follow the event and that this rule should not be departed from except for good reason (see: *Gonawate v. Teitsson* [2002] CarswellOnt 1007 (ONCA)).

[56] It is well known that the overall objective in dealing with costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful party. The expectations of the parties concerning the quantum of costs are also a relevant factor to consider. The court is required to consider what is fair and reasonable having regard to what the unsuccessful party could have expected the costs to be (see: *Coldmatic Refrigeration of Canada Ltd v. Level Tek Processing LLC*, 2005 CanLII 1042 (ONCA).

[57] I am of the opinion that the time spent by counsel in advancing the Crown's case is reasonable given that the Crown, as the moving party, bears the burden. On the other hand, I find the proposed hourly rates of Crown counsel to be somewhat higher than the reasonable rates for independent counsel of comparable experience (2008: $635 per hour; 2001 $350 per hour). I am also mindful of the importance of the issues for the parties and the reasonable expectations of what the plaintiff may have expected the costs to be.

[58] In consideration of these factors and those stipulated by Rule 57.01 not specifically referenced, I exercise my discretion to fix the costs of both Crown motions in favour of the Crown in the amount of $25,000.00 plus disbursements of $900.49 which latter amount is inclusive of HST.

Disposition

[59] For all the above noted reasons, it is ordered that:

(1) Pursuant to Rule 21.01(1)(a) and Rule 21.01(1)(b) the statement of claim is struck without leave to amend by reason that the claim discloses no reasonable cause of action and is a nullity; and

(2) The plaintiff shall pay the Crown's costs in the all-inclusive sum of $25,900.49 within 60 days of the release on this Decision.

M.J. Valente, J.

**Released:** November 22, 2023

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Elsie Kalu

**– and –**

His Majesty The King in Right of the Province of Ontario represented by The Attorney General of Ontario

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**REASONS FOR DECISION ON MOTION TO STRIKE**

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M.J. Valente, J.

**Released:** November 22, 2023