NOVA SCOTIA COURT OF APPEAL

Citation: *Canada (Attorney General) v. Geophysical Services Incorporated*, 2022 NSCA 41

Date: 20211203
Docket: CA 504896
Registry: Halifax

Between:

Attorney General of Canada and Chris Hanham
Appellants/Respondents by Cross-Appeal

v.

Geophysical Services Incorporated, a body corporate
Respondent/Appellant by Cross-Appeal

and

Fugro Canada Corp., a body corporate
Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	December 3, 2021, in Halifax, Nova Scotia
Subject:	Summary judgment
Summary:	GSI sued the AG Can, Ms. Hanham and Fugro for damages caused by their alleged commission of a variety of torts and that Fugro had been unjustly enriched. The defendants' motions for summary judgment on evidence were partially successful. The motion judge dismissed GSI's claims for unjust enrichment, unlawful interference with economic relations, interference with contractual relations and negligent infliction of economic loss, but refused summary judgment on the torts of misfeasance in public office and conspiracy. The AG Can and Ms. Hanham applied for leave to appeal the refusal to grant summary judgment on all of the claims, and GSI cross-appealed to reinstate the dismissed claims

Issues: (1) Did the motion judge err in law by granting summary judgment on GSI's various tort claims?

(2) Did the motion judge err in law in refusing summary judgment on the claims of misfeasance in public office and conspiracy?

Result: GSI's cross-appeal was dismissed. The motion judge correctly articulated and applied the governing principles of summary motion on evidence. There were no genuine issues of material fact to be resolved at a trial, and GSI had not demonstrated it had a real chance of success on the claims of unjust enrichment, unlawful interference with economic relations, interference with contractual relations and negligent infliction of economic loss.

The application for leave to appeal and the appeal by the AG Can and Ms. Hanham were allowed. The motion judge erred in her application of the summary judgment principles. She ought to have analyzed the essential elements of the torts of misfeasance in public office and conspiracy and concluded there was a complete absence of evidence that could substantiate either of these torts. There were no genuine issues of material fact to be resolved at trial, and GSI had no real chance of success.

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Respondent

Judges:	Beveridge, Farrar and Derrick JJ.A.
Appeal Heard:	December 3, 2021, in Halifax, Nova Scotia
Written Release	May 19, 2022
Held:	Leave granted, appeal allowed, and the cross-appeal dismissed per reasons for judgment of Beveridge J.A.; Farrar and Derrick JJ.A. concurring
Counsel:	Patricia MacPhee, for the appellants Matti Lemmens, for the respondent Geophysical Services Incorporated Ahmed Shafey, for the respondent Fugro Canada Corp.

Reasons for judgment:

[1] What can only be described as a tortuous lawsuit ended on December 3, 2021. That was the date we heard the appellants' application for leave to appeal, allowed their appeal, and dismissed the respondent's cross-appeal with reasons to follow. The result was the motion judge's summary judgment dismissal of the respondent's actions was upheld, and we granted summary judgment on the actions she had declined to dismiss. These are our reasons.

[2] Central to the respondent GSI's claims is whether it was wronged by the actions of the appellants and suffered damages as a result of Canada's use of a foreign-flagged vessel to carry out a seismic survey of the Labrador Sea in 2009.

THE BACKGROUND

[3] The United Nations *Convention on the Law of the Sea* (UNCLOS) recognizes coastal states' sovereign rights over the natural resources of the seabed and subsoil of the continental shelf as well as jurisdiction over other activities. UNCLOS provides that states can extend their sovereign rights beyond the 200 mile nautical limit that constitutes its exclusive economic zone if it can establish an Extended Continental Shelf.

[4] The uncontested information is that Canada started its project to define the outer limits of its continental shelf in the Atlantic and Arctic Oceans in 2003. In 2013, it filed its submission to the United Nations with respect to its Atlantic Ocean continental shelf. Apart from historical hydrographic data, it relied on four seismic surveys conducted from 2006 to 2012 for the Grand Banks, the Scotian Shelf and the Labrador Sea.

[5] Geophysical Services Incorporated (GSI) does onshore and marine seismic surveys. At the relevant times, it owned and operated two ships, the *GSI Admiral* and the *GSI Pacific*, both equipped to do marine seismic surveys. The *GSI Admiral* is a Canadian-flagged but non-duty paid vessel; the *GSI Pacific* was registered in Panama. The relevance of these distinctions will became apparent later when I discuss the provisions of the *Coasting Trade Act*, S.C. 1992, c. 31 (*CTA*).

[6] GSI submitted a bid to perform the seismic survey of the Scotian Shelf in 2007. Its bid proposal said this:

> Canada ratified the UN Convention on the Law of the Sea (UNCLOS) during November 2003 and has until 2013 to submit a claim to extend the existing 200 nautical mile Exclusive Economic Zone (EEZ). To prepare the Canadian claim, the federal departments of Fisheries and Oceans (DFO) and Natural Resources Canada (NRCan) require information pertaining to bathymetry, sediment thickness, and geological structure along specific regions of the Canadian margin.

[7] The Department of Public Works and Government Services (PWGSC) has responsibility to contract for goods and services required by the Government of Canada. In other words, it contracts for goods and services needed by other government departments.

[8] In May 2007, PWGSC entered into a contract with GSI. It adopted by reference GSI's bid proposal and various email exchanges between Ms. Chris Hanham, Supply Specialist with PWGSC, and Mr. Paul Einarsson, Chairman of GSI. The contract identified Natural Resources Canada (NRCan) as the "destination" of the services. The contract stipulated the total estimated cost to be $6,903,088.74.

[9] In July 2008, Ms. Hanham was assigned as the Supply Specialist for the proposed 2009 Labrador Sea seismic research. She understood the research was a joint project involving NRCan, the Department of Fisheries and Oceans (DFO), and the Department of Foreign Affairs Trade and Development (DFAIT).

[10] Ms. Hanham received the technical requirements from NRCan, obtained the necessary approvals, and issued a Request for Proposals (RFP) for the Labrador Sea seismic research project. She posted the RFP on the MERX system, an electronic tendering service used by the federal government and other entities, both private and public, to publicly advertise available tender opportunities.

[11] Ms. Hanham received two proposals in response to the RFP. Both involved the use of foreign-flagged ships to do the work. GSI did not submit a bid proposal.

[12] Ms. Hanham did not evaluate the proposals. She was told the best overall bid was from the respondent by cross-appeal, Fugro Canada Corp. Over several months, Ms. Hanham worked with Fugro's representative, Barry Ryan, on numerous issues, including cost.

[13] Ms. Hanham sent an electronic version of the contract to Mr. Ryan on March 11, 2009. Prior to the contract being finalized, Mr. Ryan called Ms. Hanham. Fugro planned on using an Italian-flagged vessel, the *OGS Explora*. He raised the

issue that if a coasting trade licence under the *Coasting Trade Act* was required, it could take up to 140 days to complete that process. This kind of delay would impede completion of the work as planned.

[14] To understand the perspectives of Ms. Hanham and Mr. Ryan and why GSI claims it was wronged, it is necessary to set out the relevant provisions of the *Coasting Trade Act*.

[15] The *Act* was introduced in 1992 to give priority to Canadian-flagged vessels to carry out carriage of goods or passengers by ship in Canadian waters. It attempts to accomplish this goal by prohibiting any foreign ship from engaging in the "coasting trade" except in accordance with a licence issued by the Minister of Public Safety and Emergency Preparedness. If a ship contravenes the *Act*, it is liable to a fine not exceeding fifty thousand dollars on summary conviction. The relevant provisions of the *Act* in force at the time were:

> **Prohibition**
>
> 3 (1) Subject to subsections (2) to (5), no foreign ship or non-duty paid ship shall, except under and in accordance with a licence, engage in the coasting trade.
>
> **Application**
>
> (2) Subsection (1) does not apply in respect of any foreign ship or non-duty paid ship that is
>
> ...
>
> (b) engaged in any ocean research activity commissioned by the Department of Fisheries and Oceans;
>
> …
>
> **Offence**
>
> 13 (1) Where a ship contravenes subsection 3(1), the ship is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty thousand dollars.

[16] If a licence is required, the Minister shall issue one if satisfied no Canadian or non-duty paid ship is available, applicable taxes will be paid, and the ship meets all safety and pollution prevention requirements. The relevant provisions were as follows:

> **Issuance of license: foreign ship**
>
> 4 (1) Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a foreign ship, the Minister of Public Safety and Emergency

> Preparedness shall issue a licence in respect of the foreign ship, where the Minister is satisfied that
>
> (a) the Agency has determined that no Canadian ship or non-duty paid ship is suitable and available to provide the service or perform the activity described in the application;
>
> (b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships;
>
> (c) arrangements have been made for the payment of the duties and taxes under the *Customs Tariff* and the *Excise Tax Act* applicable to the foreign ship in relation to its temporary use in Canada;
>
> (d) all certificates and documents relating to the foreign ship issued pursuant to shipping conventions to which Canada is a party are valid and in force;
>
> (e) the foreign ship meets all safety and pollution prevention requirements imposed by any law of Canada applicable to that foreign ship.

[17] The *Act* provides for a similar regime for proposed coasting trade to be carried on by a "non-duty paid ship" under s. 5. In both instances, it is the "Agency" that makes the determinations to permit the Minister to issue a licence to a foreign or non-duty paid ship:

> **Function of Agency**
>
> 8 (1) In relation to an application for a licence, the Agency shall make the determinations referred to in paragraphs 4(1)(a) and (b) and 5(a) and (b).
>
> **Regulations**
>
> (2) The Governor in Council may make regulations prescribing the criteria to be applied by the Agency for the making of the determinations referred to in subsection (1).

[18] The *Act* also provides for several important definitions. "Agency" is defined as the Canadian Transportation Agency. Canadian waters means the inland and internal waters of Canada and its territorial sea. The *Act* sets out a complicated definition of what constitutes "coasting trade". The relevant sections are:

> **coasting trade** means
>
> 2(1) (a) the carriage of goods by ship, or by ship and any other mode of transport, from one place in Canada or above the continental shelf of Canada to any other place in Canada or above the continental shelf of Canada, either directly or by way of a place outside Canada, but, with respect to waters above the

> continental shelf of Canada, includes the carriage of goods only in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada,
>
> …
>
> (f) the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters and, with respect to waters above the continental shelf of Canada, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada;

[19] Barry Ryan, the Nova Scotia manager of Fugro understood Fugro was responsible to determine if the *CTA* applied to the seismic research in the Labrador Sea such that a licence would be required. On March 19 and 20, 2009, Mr. Ryan and Ms. Hanham exchanged emails and spoke on the phone on whether the *CTA* might apply. Ryan also communicated with Fugro's customs broker and agent, Raymond Collins of PF Collins International Trade Solutions (PF Collins), to discuss the question.

[20] PF Collins forwarded a 2006 email exchange with representatives of Transport Canada (TC) and others in which TC confirmed a licence would not be required for UNCLOS survey work because it was ocean research activity commissioned by the DFO and therefore outside the *CTA*'s purview, pursuant to s. 3(2)(b). Mr. Collins had also taken the position with TC that no licence would be required as the work would not be covered by the *CTA* in any event as it would be outside the 12 mile limit of Canada's territorial sea.

[21] On Ms. Hanham's part, she knew from previous experience (not UNCLOS related) that the *CTA* exempted foreign ships doing ocean research activities in Canadian waters for the DFO. On March 19, 2009, she went online and found a government website from NRCan that said:

> The UNCLOS project is led by the Department of Foreign Affairs and International Trade, with the mapping component jointly managed by Natural Resources Canada and Fisheries and Oceans Canada.

[22] In addition, she had been the Supply Specialist for the 2007 UNCLOS seismic research on the Scotian Shelf, and the requisition for that project had also been classified as ocean research.

[23] Ms. Hanham discussed her views with Terry Hayes (the Procurement Officer at NRCan who had sent the project requirements to PWGSC) that the

project was one jointly commissioned by NRCan and DFO. She announced her intention to change the destination of the services to include DFO.

[24] On March 20, 2009, Mr. Ryan told Ms. Hanham his opinion that the *CTA* did not apply because of the location of the planned seismic research. She decided that regardless of the soundness of Fugro's position, she would propose a contract amendment to properly reflect her view that the research was jointly commissioned by NRCan and DFO. She sent the suggested amendment to Mr. Ryan at Fugro. It read as follows:

> This amendment serves to provide the following as clarification:
>
> The Work under the Contract, i.e. an ocean research activity, has been commissioned, through Public Works and Government Services Canada, by the Department of Fisheries and Oceans (DFO), as referred to as Fisheries and Oceans Canada, jointly with Natural Resources Canada (NRCan), as part of the mapping component, jointly managed by NRCan an DFO (see attached[1]), for the United Nations Convention on the Law of the Sea (UNCLOS) project led by the Department of Foreign Affairs and International Trade.

[25] Fugro signed the amended contract on March 27, 2009, and Ms. Hanham then executed it on behalf of PWGSC.

[26] Paul Einarsson came to learn of the contract for Fugro to do the 2009 UNCLOS survey work. To say he was upset would be an understatement. While Mr. Einarsson's affidavit is silent on what followed, Ms. Hanham's affidavit sets out Einarsson's queries, entreaties and threats at what he perceived to have been an injustice by GSI's omission from the opportunity to bid on the UNCLOS survey work. Ordinarily, such details are of little relevance to the outcome of litigation. However, in this instance they highlight who decides if the *CTA* applied to the 2009 UNCLOS seismic survey and why GSI's claims could not survive a summary judgment motion.

[27] On May 1, 2009, Mr. Einarsson wrote to Jacob Verhoef of NRCan to ask how the UNCLOS bid was distributed and why GSI was not offered the opportunity to bid on the project. Mr. Verhoef responded the RFP was put on MERX. Einarsson then wrote to Ms. Hanham to ask the work be retendered. He claimed GSI had the only Canadian ship capable of doing the work and could do so at substantially less cost than Fugro.

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[1] The attachment was the printout of the NRCan website that described the mapping component of the UNCLOS project as jointly managed by NRCan and DFO.

[28] Mr. Einarsson and Ms. Hanham spoke on May 6, 2009. In her view, Einarsson appeared angry and wanted to take his complaint to the highest level. She noted that according to Einarsson, the GSI employee responsible for monitoring MERX had been fired.

[29] Einarsson followed up with a request to Ms. Hanham's superiors that Ms. Hanham be terminated or for information on how he may pursue her termination.

[30] Mr. Einarsson then filed a complaint with the Canadian International Trade Tribunal. It declined to investigate GSI's complaint on the basis it failed to disclose a reasonable indication the procurement was not carried out in accordance with the applicable trade agreement.

[31] In July 2009, Mr. Einarsson complained to Transport Canada that an Italian-flagged vessel doing the UNCLOS seismic survey did not have a coasting trade licence and "GSI did not have the opportunity to bid on this work". Transport Canada replied that it was aware of this situation and a reply would be forthcoming. Its reply of July 17, 2009 provided:

> Mr. Einarsson,
>
> Thank you for your enquiry regarding the Coasting Trade Act. I've reviewed the documents you provided to the Canadian Transportation Agency and other documentation associated with the ongoing research activities related to mapping Canada's continental shelf.
>
> I've confirmed that the OGS Explora was contracted by the department of Public Works and Government Services Canada on behalf of the departments of Natural Resources and Fisheries and Oceans Canada to conduct scientific research in the preparation of data for the determination of the extent of Canada's Continental Shelf. Under paragraph 3(2)(b) the Coasting Trade Act does not apply in respect of a foreign ship that is: engaged in any ocean research activity commissioned by the Department of Fisheries and Oceans, as is the case with respect to the work performed by the OGS Explora under the contract agreement identified in the documents provided.
>
> Best Regards,
>
> Louise Laflamme
> Senior Policy Advisor / Conseillère principale en politiques
> Seaway and Domestic Shipping Policy / Politique, Voie maritime et transport intérieur
> Transport Canada/Transports Canada|Place de Ville (ACFS)
> Ottawa, Ontario K1A ON5

[32] Undeterred, Mr. Einarsson replied to Transport Canada the same day. He asserted the work had nothing to do with the DFO, and the *CTA* had been intentionally circumvented. Einarsson requested TC immediately stop the work or deny entry to the foreign ship and commence the *CTA* application process as GSI had a suitable and available ship to carry out the work.

[33] Transport Canada was unconvinced. Ms. Laflamme wrote on August 12, 2009 and gave Mr. Einarsson the contact information for the Directors at NRCan and DFO who were in charge of the UNCLOS project:

> Mr. Einarsson,
>
> Again I thank you for bringing this file to my attention. Unfortunately there has been no new information provided to me since our last correspondence. Transport Canada will continue to look into this.
>
> In the meantime and as requested, you can contact the following two persons in charge of the UNCLOS project (I have copied them so you have their email address):
>
> Dr Jacob Verhoef – Natural Resources Canada, Director UNCLOS Program (902-426-3448)
>
> Julian Goodyear – Department of Fisheries and Oceans, Director Law of the Sea Project (902-426-6951)

[34] Mr. Einarsson wanted to meet with the responsible Ministers, or at least the responsible decision makers, before going to the media. Ms. Laflamme's final response was on September 2, 2009:

> Mr. Einarsson,
>
> I would just like to confirm that in the circumstances of this project (to conduct scientific research in the preparation of data for the determination of the extent of Canada's Continental Shelf) the work of the OGS Explora is not subject to license requirements as per section 3 of the *Coasting Trade Act*.

THE LITIGATION

[35] In 2012, GSI sued. Its original Statement of Claim had one cause of action. It pleaded that the Departments of PWGSC, NRCan and DFO had committed the tort of unlawful interference with economic relations because GSI had a valid business expectancy it would be awarded or have a reasonable opportunity to seek the contract for seaborne seismic exploration.

[36] On behalf of the Federal Crown, the Attorney General of Canada (AG Can) moved for summary judgment on the pleadings pursuant to Rule 13.03(3). Justice Glen McDougall granted the motion and dismissed GSI's claim (2013 NSSC 240). Justice McDougall, as required, assumed all of the allegations in the Statement of Claim to be true. He applied the law on the tort of interference with contractual relations by unlawful means set out by Robertson J.A. of the New Brunswick Court of Appeal in *A.I. Enterprises and Schelew v. Bram Enterprises and Jamb Enterprises*, 2012 NBCA 33. McDougall J. granted summary judgment because there was no allegation of a valid business relationship between GSI and Fugro. They were competitors.

[37] GSI appealed. The week before the hearing in this Court, the Supreme Court of Canada released its decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12. Cromwell J. explained that the existence of a valid business relationship between the plaintiff and the third party and the defendant's knowledge of that relationship are no longer essential elements of the tort so long as the defendant's conduct was unlawful and it intentionally harms the plaintiff's economic interests:

> [93] **I do not agree with the Court of Appeal that the existence of a valid business relationship between the plaintiff and the third party and the defendant's knowledge of that relationship are essential elements of the unlawful means tort.** The inclusion of these elements in my view flows from confusion between the unlawful means tort and the tort of inducing breach of contract. It is now commonly accepted that for the latter, the plaintiff must prove that the defendant actually understood that he or she was procuring a breach of contract: see, e.g., *OBG*, at para. 39, *per* Lord Hoffmann. The position is different, however, in the unlawful means tort, the focus of which is unlawful conduct that intentionally harms the plaintiff's economic interests. **There need be no contract or even other formal dealings between the plaintiff and the third party so long as the defendant's conduct is unlawful and it intentionally harms the plaintiff's economic interests.** In this case, it was more than sufficient that the appellants were shown to know that "various persons were negotiating with the majority of investors" (C.A. reasons, at para. 75) for the purchase of the premises and that the allegedly unlawful acts were committed with the intention to cause economic harm to the respondents.
>
> [Emphasis added]

[38] Oland J.A., on behalf of the Court, delivered an oral decision to allow the appeal and reinstate GSI's Statement of Claim (2014 NSCA 14). However, as her

reasons carefully point out, the Court did not endorse the viability of GSI's pleadings:

> [12] We would allow the appeal and order the reinstatement of Geophysical's Statement of Claim. Our disposition of this appeal is not to be taken as in any way suggesting that its pleadings have a reasonable chance of success; we were not required and did not address that matter. The appellant indicated that it may seek instructions regarding amendments to that pleading in the court below. It is aware that the respondent may challenge any such attempt. These of course are matters for the parties to address in the court below.

[39] GSI amended its pleadings. Ms. Chris Hanham and Fugro were added as defendants. GSI alleged the torts of: unlawful interference with economic relations against PWGSC, NRCan and Fugro; misfeasance in public office against Ms. Hanham; conspiracy by the Federal Crown, Ms. Hanham and Fugro; interference with contractual relations against Fugro; negligent infliction of economic loss against the Federal Crown, Ms. Hanham and Fugro; and, unjust enrichment against Fugro.

[40] Defences were filed by the AG Can on behalf of the Federal Crown and Ms. Hanham and by Fugro. The parties exchanged documents. Discoveries were held.

[41] The AG Can and Fugro moved for summary judgment on evidence pursuant to Rule 13.04. Justice Denise Boudreau heard the motions on January 6, 2021. She granted summary judgment and dismissed GSI's claims of unlawful interference with economic relations, interference with contractual relations, negligent infliction of economic loss, and unjust enrichment. She allowed the claims of misfeasance in public office and conspiracy to survive. Her reasons were released on March 1, 2021 and are reported as 2021 NSSC 77. I will reference her reasons in more detail later.

[42] The AG Can filed its application for leave to appeal the motion judge's refusal to grant summary judgment on the torts of misfeasance in public office and conspiracy. GSI followed with an application for leave to appeal from the motion judge's decision to grant summary judgment on the other four torts. GSI sought to have admitted as fresh evidence on the appeal a letter it received from Fugro's counsel after the appeal proceedings had been commenced. It says it qualifies as fresh evidence, relevant to the summary disposition of the tort of unlawful interference with economic relations.

[43] In these circumstances, it is convenient to first address GSI's cross-appeal and motion to adduce fresh evidence. Before turning to the specifics of those matters, I will comment on the principles of summary judgment on evidence and the applicable standard of review.

SUMMARY JUDGMENT

[44] I start with the clear statement of principles from *Burton Canada Company v. Coady*, 2013 NSCA 95, where Saunders J.A., for the majority, wrote:

> [26] The legal principles applicable to a motion for summary judgment are not complicated. The seminal case in Canada is *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 which has been applied in a long series of cases in Nova Scotia ever since. [authorities omitted]
>
> [27] In *Guarantee* the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
>
> > [27] The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, *supra*, at para. 15).
>
> [28] That statement was affirmed by the Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:
>
> > [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal 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. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *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. Each side must "put its best

> foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.
>
> [29] The Rules have not changed these well-established legal principles. Rather, they attempt to codify the legal principles that emerge from the case law into a workable, effective matrix of procedural directives and deadlines.

[45] On February 26, 2016, *Nova Scotia Civil Procedure Rule* 13.04 for summary judgment on evidence was amended. The new Rule explicitly re-introduced the long-established implicit requirement that to avoid summary judgment there must be a genuine issue of *material* fact. Importantly, it added the ability to grant summary judgment whether the question of fact was on its own or mixed with a question of law if there were no genuine issues of material fact. It became:

> **Summary judgment on evidence in an action**
>
> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[46] *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, was the first decision by this Court after the new Rule came into force. Fichaud J.A., for the Court, found no material difference from the framework Saunders J.A. had described in *Burton*. Fichaud J.A. wrote as follows:

> [33] The amended Rule 13.04 frames, but does not materially change *Burton*'s tests. On the first test, instead of the former Rule's "genuine issue for trial", the new Rule 13.04(1) speaks of a "genuine issue of material fact, whether on its own or mixed with a question of law". On the second, the amended Rule 13.04(3) repeats the former Rule 13.04(2), that the judge may grant judgment, dismiss a proceeding, and allow or dismiss a claim or defence. These provisions remain consistent with Justice Saunders' formulation in *Burton*.

[47] With respect to the specific provisions of Rule 13.04, Fichaud J.A. found the Rule posed five sequential questions:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton's* first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts,

and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind -- whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop

> over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

[48] With respect to the standard of review, the law is clear. Apart from situations where a motion judge exercised one or more of their discretionary powers under Rule 13.04, they must have articulated and applied the correct legal principles (see: *Burton v. Coady*, *supra*, at para. 19; *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3).

GSI'S APPLICATION FOR LEAVE TO APPEAL

[49] GSI's application for leave to appeal claims the motion judge erred when she declined to dismiss the entirety of the motions for summary judgment because all of its claims stand a real chance of success. Its sole ground of appeal reads as follows:

> The motions judge erred in declining to dismiss the entirety of the motions for summary judgment, as the claims of Geophysical Services Inc. for unlawful interference with economic relations, interference with contractual relations, negligent infliction of economic loss and unjust enrichment stand a real chance of success, based on the facts and the law, including the *Coasting Trade Act*, S.C. 1992, c 31.

[50] Although framed as an application for leave to appeal, I agree with Fugro; leave is not required for GSI to prosecute their cross-appeal since the decision and consequent order dismissing these claims was a final disposition (see: *Van de Wiel v. Blaikie*, 2005 NSCA 14; *Raymond v. Brauer*, 2015 NSCA 37, at paras. 17-21).

[51] GSI's factum offers a general complaint that the hearing was unfair because the motions were based entirely on the contention the *CTA* did not apply to the

2009 UNCLOS project, yet the motion judge refused to make that determination but still granted summary judgment on four of the causes of action.

[52] I find no merit to this complaint. It is accurate that the AG Can had strenuously argued that if the motion judge were satisfied the *CTA* did not apply, for whatever reason, to the 2009 UNCLOS seismic survey then all GSI's claims must fail. However, it also argued summary judgment was appropriate because there were no genuine issues of material fact, and GSI could not demonstrate it had a real chance of success in light of the essential elements of the pleaded torts. In fact, the AG Can's brief canvassed the elements of the individual torts and why GSI's claims ought to be dismissed. GSI's briefs also addressed the essential elements, and why, in its view, the claims had a real chance of success.

[53] I will turn to the claims that were dismissed.

Unlawful interference with economic relations

[54] This tort is also simply referred to as the "unlawful means" tort. As noted earlier, Cromwell J., in *A.I. Enterprises Ltd.*, *supra*, clarified the tort may be available in "three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff" (para. 5).

[55] Cromwell J. was careful to explain the tort of unlawful means does not create new actionable wrongs, but extends the possibility in limited circumstances for a plaintiff to seek redress for harm intentionally caused to it by a defendant's commission of an actionable wrong against a third party. These principles were quoted by the motion judge in para. 53 as follows [her emphasis]:

> [26] The scope of the unlawful means tort depends on the answers to three questions. First, does the unlawful conduct have to be actionable by the person at whom it is immediately directed? In my view, the conduct must be an actionable civil wrong or conduct that would be actionable if it had caused loss to the person at whom it was directed ... While the approach outlined by these answers leaves only a narrow scope for liability, my view is that it is most consistent with the history and rationale of the tort as well as with its place in the modern scheme of liability for causing economic harm.
>
> ...
>
> [43] This brings me to the rationale I prefer. The liability stretching rationale sees the tort as extending civil liability without creating new

> actionable wrongs. It thereby closes a perceived liability gap where the wrongdoer's acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff ...
>
> ...
>
> [45] This rationale of the tort supports a narrow definition of "unlawful means": the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offences and breaches of statute would not be *per se* actionable under the unlawful means tort, but the tort would be available if, under common law principles, those acts also gave rise to a civil action by the third party and interfered with the plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort. This approach avoids "tortifying" the criminal and regulatory law by imposing civil liability where there would not otherwise be any ... (emphasis is mine)

[56] GSI argued to the motion judge that the tort was made out when Ms. Hanham committed an unlawful act. The act in question? She amended the UNCLOS contract with Fugro to include DFO as a commissioning party in order to avoid the need for Fugro to obtain a coasting trade licence under the *CTA*. I will return later to the question whether there is any legitimate basis to say the contract amendment was an unlawful act.

[57] The motion judge summarized the tort's essential elements as:

> [49] The essential elements are easy to discern: a) a three party situation; b) an unlawful act by the defendant; c) that act committed against a third party; d) that act causing economic harm to the plaintiff; e) that harm being intentionally caused.

[58] The motion judge found the factual scenario just did not fit into the unlawful means tort framework. That is, there was no evidence the federal defendants had committed any act against Fugro; nor was there any evidence Fugro committed any act, let alone an unlawful one, against either of the federal defendants. She reasoned as follows:

> [56] The impugned act here (the amendment to the contract adding DFO), whether it was "unlawful" or not, was obviously not made "against" Fugro. This is an essential element of the tort of unlawful means. This act, whether unlawful or not, did not result in any independent, actionable civil wrong, committed by the federal defendant/Ms. Hanham, as against Fugro. There is simply no evidence from any source on that point before me in this motion. No other "act" has been alleged to have been committed by the federal defendants.
>
> [57] If I then move to an assessment of the same claim by the plaintiff against Fugro, it is even more clear that the tort of unlawful means has no applicability to the facts of this case. I have no evidence whatsoever of any "act" committed by Fugro, much less an unlawful one. Even if we were to assume that Fugro was involved in amending the contract, there still remains the third essential element of the tort for which there is a complete absence of evidence. In this scenario, using AGC/Hanham as the third party, clearly Fugro did not commit any "actionable civil wrong" against the federal defendants. None has been suggested to me and there is none in the evidence.

[59] The motion judge concluded the pleading did not have a real chance of success as an essential element of the tort was entirely absent.

[60] GSI now argues the motion judge was wrong to paraphrase the essential element to require an unlawful act be committed against a third party and to require evidence to show the conduct gave rise to a civil action against a third party. With respect, I am unable to agree.

[61] I see nothing untoward with the motion judge's description of the essential elements. It clearly captures the essence of the tort. Nor, as GSI suggests, did the motion judge implicitly require an action to have been filed or tolled. She correctly found no evidence the acts of the defendants were committed against a third party. I would add, I entirely fail to see any evidence the acts of the federal defendants or Fugro intended to cause harm to GSI.

[62] The spurious nature of GSI's claim for unlawful means tort is evident from their submission how they say the tort was established:

> 93. In relation to the Appellants, GSI submits that unlawful interference with economic relations is established as follows:
>
> a) there are at least three parties – GSI, Fugro, and the AGC/Ms. Hanham;
>
> b) the Appellants' unlawful act was the breach of the Act through the Amendment to the Contract;

> c) the breach of the Act **gave rise to claims by Fugro against the Appellants as a result of their negligent or fraudulent misrepresentation that the Act did not apply and caused Fugro damage, at least as a result of the costs of this Action.**

[63] First, it hardly needs to be said: an amendment to a contract cannot amount to a breach of the *CTA*. The *CTA* says nothing about how contractants decide to arrange their affairs. Second, the uncontested facts are that Fugro itself believed the *CTA* did not apply to the UNCLOS seismic survey because the work would not be carried out in Canada's territorial waters, and it was ocean research for DFO and other government departments. They learned from their agent, PF Collins, that Transport Canada had decided in 2006 UNCLOS seismic research was not subject to the requirements of the *CTA*. Third, the flawed logic of GSI's submission is this: we have made out the tort because GSI caused Fugro damage (always an essential ingredient to sustain any cause of action) in the form of incurring costs by having to defend GSI's action.

The motion to adduce fresh evidence

[64] In support of its appeal on the tort of unlawful means, GSI seeks introduction of a letter from Fugro's counsel. More than two months after GSI filed its appeal, its counsel wrote to the AG Can and Fugro on June 2, 2021 seeking further production of documents. The letter specifically mentioned production of any agreement by which the parties had agreed to not pursue or toll claims against each other.

[65] On behalf of both Fugro and the AG Can, Mr. Shafey responded on June 24, 2021. GSI says the relevant part of the letter is:

> Despite this, and without waiving any claim to common interest or litigation privilege, we can confirm that the Defendants entered into a basic tolling agreement that tolls the limitation period for any cross-claims for contribution and indemnity. The agreement expires 30 days from the date on which a trial date is set by the Court or upon notice in writing from either party. There are no terms that speak to evidentiary agreements as between the defendants.

[66] GSI claims this letter fills in the evidentiary gaps identified by the motion judge. It says the letter qualifies as admissible fresh evidence:

> 49. The Letter is that exact evidence which Justice Boudreau was seeking, and it is reasonable to conclude that it would have affected the result, as it

> confirms the existence of a Tolling Agreement and by extension confirms the existence of claims between the Defendants.

[67] *R. v. Palmer*, [1980] 1 S.C.R. 759, sets out a four-part test to admit fresh evidence on appeal:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> p. 775

[68] The parties agree this test has been repeatedly adopted and applied in Nova Scotia (see: *Thies v. Thies* (1992), 110 N.S.R. (2d) 177 (SC AD); *Ross Ritchie Ltd. v. Sydney Steel Corp.*, 2001 NSCA 100; *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26).

[69] The information about the existence of the tolling agreement between the defendants was available to GSI by the exercise of due diligence. Not only did GSI not exercise due diligence to obtain that information, its existence is not relevant and would not have affected the result.

[70] AG Can and Fugro filed affidavits in response. They demonstrate that GSI asked the government defendants on discovery for a copy of any agreements between them and Fugro in relation to the litigation. The government defendants refused to produce any such agreements on the basis they were not relevant. They were not asked if any existed.

[71] GSI never asked Fugro about the existence of agreements between the defendants on discovery or at all. If such an agreement were important for trial or for putting its best foot forward on the summary judgment motion, a simple letter would have provided that information.

[72] Further, GSI took the position in its Request for a Date Assignment Conference of February 12, 2020 there were no outstanding requests to be satisfied or litigated before trial. This position was repeated in its letter to Justice Boudreau of December 10, 2020:

> It is the Plaintiff's view that the priority in this Action is trial. As noted in the Plaintiff's request for a trial date assignment conference dated February 12, 2020, from the Plaintiff's perspective, the parties have completed their evidence in this matter and are ready for trial. Oral discovery examinations were completed in this matter on November 30, 2017, and undertakings given during discovery have been fulfilled.

[73] The June 24, 2021 letter specifies the Tolling Agreement is limited to claims of contribution and indemnity as between the defendants. This does not constitute evidence of an actionable wrong against each other. Fugro's factum puts it aptly:

> 39. A tolling agreement is not evidence that a cause of action exists, nor is it evidence of acts that would give rise to a cause of action. A tolling agreement is simply an agreement to preserve rights as between the parties. Further, claims for contribution and indemnity between defendants relate only to the re-allocation of responsibility for harm caused to the plaintiff and have nothing to do with any harm, potential harm, or causes of action arising, between defendants.
>
> [Emphasis in original]

[74] The motion judge was correct to conclude the uncontested facts did not give rise to any actionable wrong as between the defendants. Accordingly, the motion to adduce fresh evidence and this ground of appeal are dismissed.

Interference with contractual relations

[75] This tort is also known as inducing breach of contract. The motion judge set out the essential elements of this tort:

> [79] The essential elements of the tort are: the existence of a contract between the plaintiff and a co-contractant; the knowledge on the part of the defendant that the contract exists; and the intention on the part of the defendant to cause a breach of that contract.

[76] She then turned to the facts and concluded the tort cannot be made out as there was no agreement or contract between the federal defendants and GSI. She reasoned as follows:

> [80] In the case at bar, therefore, the tort would require a fact scenario where there existed a contract between the plaintiff and the federal defendant, which Fugro would have known about and would have interfered with.
>
> [81] This tort simply cannot be made out on the facts before me. There simply was no contract or agreement whatsoever (either express or implied) between the federal defendant(s) and the plaintiff. This essential element of this tort is entirely absent in the evidence. The claim must and will fail.

[77] GSI says the motion judge misapplied the law to the facts. It says this because the priority provisions in the *CTA* for Canadian-flagged ships amount to a right of first refusal—which it characterizes as essentially a contractual right for GSI or amounts to a "public contract". Fugro is liable because it interfered with GSI's right of first refusal when it advised Ms. Hanham the *CTA* did not apply and ultimately induced the AG Can to breach its public contract with GSI.

[78] GSI cites no authority for any of these propositions. They are, with respect, without merit. The *CTA* does not give a right of first refusal to owners of Canadian-flagged ships. Section 4 of the *CTA* is only engaged when a resident of Canada applies on behalf of a foreign ship to the Minister for a licence to engage in the coasting trade. There was no application.

[79] There was no application because Fugro believed, and was assured by its investigation, that Transport Canada, the agency responsible for enforcement of the *CTA*, took the view the *CTA* did not apply. If it turned out Fugro was wrong, and Transport Canada changed its position, enforcement officers designated by the Minister of Transport might search or even detain the *OGS Explora* (ss. 12, 15, 16). She could be liable to a fine on summary conviction of up to $50,000.

Negligent infliction of economic loss

[80] The motion judge meticulously set out the principles by which a duty of care can arise; it requires both reasonable foreseeability of harm and sufficient proximity between the parties. She cited this Court's decision in *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4, which recognized, absent a duty of care, a negligence claim cannot succeed and must be dismissed on a summary judgment application.

[81] GSI cannot point to any flawed articulation of the governing legal principles that guided the motion judge's determination there was no duty of care. Instead, GSI claims the law was misapplied to the facts. In particular, GSI repeats its

contention that Canada granted GSI and all Canadian ship owners a right to have their ships used for government projects in cases where a *CTA* licence is required.

[82] The motion judge reasoned:

> [99] Keeping those principles in mind, I repeat the salient facts here: the RFP relating to the 2009 UNCLOS work was advertised on the usual government website. The plaintiff did not respond. The defendant Fugro did. Fugro was the successful bidder.
>
> [100] In my view, no proximate relationship exists, in a government tendering process, between the government and those entities who do not respond to the public tendering advertisement. Further, no proximate relationship exists between those who do respond and those who do not. Having regard to the authorities as to "proximity", such parties have no connections, no assumed or implied obligations, and no relationship. A finding of a "proximity" in such situations would impose, in the words of the Supreme Court, "indeterminate and unreasonable liability" in situations where none should exist.

[83] Contrary to GSI's submissions, the motion judge did not ignore the existence of the *CTA*. She observed:

> [102] Let us recall that the *CTA* provides a process by which, if a foreign ship wishes to effect work to which the *CTA* applies, that ship must seek a license.
>
> [103] The *CTA* does not impose any obligations on tendering processes. The *CTA* does not grant a right of first refusal to Canadian-flagged ship owners. The *CTA* does not grant the right to such entities to be advised in advance of any tendering process that might be captured by the *CTA*. The *CTA* does not impose obligations upon contracting parties to determine, at any given moment in time, the identity of any and all Canadian-flagged ship owners, nor the obligation of then providing those parties with some sort of advance notice of any process.
>
> [104] Frankly, if I were to find that proximity exists in this case as a result of the *CTA*, it seems to me that such would give to the *CTA* powers which it simply does not have, and that were not given to it by the legislator.

[84] Fugro and GSI had no relationship or expectation between them. Fugro was a competitor who bid on the project. GSI did not. With respect to an alleged duty of care by Fugro, the motion judge's analysis was terse:

> [108] […] There was no relationship or expectation whatsoever between it and the plaintiff. I see no justification in finding that a bidder on a tendering project has a relationship of proximity with a third party non-bidder, thereby putting them in the position of having to consider the "rights" of a competitor who has not even expressed interest in the project. Clearly, that would not be "just and fair". The

> existence or applicability (or not) of the *CTA* is, once again, immaterial in this context.

[85] GSI complains the motion judge improperly relied on additional submissions filed by the parties when she had indicated she would not do so. In particular, the evidence about whether GSI had submitted tenders on MERX and whether an objection to a *CTA* application did not mean that GSI would always get the work.

[86] GSI points to the motion judge's references to the facts GSI did not submit a proposal and even if an objection were made under the s. 4 provisions of the *Act*, GSI would not be assured of being awarded the work.

[87] However, the fact that GSI was unaware of Ms. Hanham's posting of the RFP on MERX and had not bid on the 2009 UNCLOS seismic survey were non-issues at the hearing. Furthermore, there was ample uncontested evidence in Ms. Hanham's original affidavit about these facts and that GSI had not always been successful in being awarded work when GSI had objected to a coasting trade licence for a foreign ship.

[88] There is no merit to GSI's complaints.

Unjust enrichment

[89] GSI's claim of unjust enrichment was against Fugro. Before the motion judge, GSI argued that unjust enrichment is established when:

> a) the defendant is enriched;
> b) there is no juristic reason for the enrichment;
> c) the plaintiff suffers a corresponding deprivation.

[90] There is no dispute this is a correct summary. It is taken from this Court's decision in *B2B Bank v. Shane*, 2020 NSCA 15, which in turn relied on the Supreme Court of Canada's decision in *Moore v. Sweet*, 2018 SCC 52. The Court in *Moore v. Sweet* had quoted with approval its earlier decision of *Kerr v. Baranow*, 2011 SCC 10.

[91] In *Kerr*, Cromwell J., for the Court, noted the wide variety of situations where the law of unjust enrichment has been used to provide redress for claims of inequitable distribution on the breakdown of domestic relationships. He

commented on the law's recognition of categories where retention of a conferred benefit had been considered unjust, but the Canadian law of unjust enrichment was not limited to those categories. He explained as follows:

> [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. **For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason**. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26.
>
> [32] Canadian law, however, does not limit unjust enrichment claims to these categories. **It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment**: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.
>
> [Emphasis added]

[92] The motion judge quoted from *Kerr* the following explanation of the elements of unjust enrichment:

> [38] For the first requirement – enrichment – the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
>
> [39] Turning to the second element – a *corresponding* deprivation – the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

> [40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.
>
> [41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455).

[93] The motion judge found no evidence to support the claim—the essential elements of the tort were entirely missing. She reasoned:

> [116] There is no evidence that the plaintiff gave anything to the defendant Fugro. There was, obviously, a payment by the federal government to Fugro, but that payment had an obvious and clear "juristic reason": the payment was for services rendered pursuant to contract. Fugro was not "enriched" in the sense of the tort; they were paid for work that they performed.

[94] GSI focusses on the motion judge's comment "[t]here is no evidence that the plaintiff gave anything to the defendant Fugro". I agree that in these circumstances, to have a real chance of success, GSI need not point to evidence that it "gave anything" to Fugro.

[95] Perhaps a more apt statement of the requirements for an unjust enrichment claim comes from *Moore v. Sweet*, *supra*:

> [35] **Broadly speaking, the doctrine of unjust enrichment applies when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff**. As recognized by McLachlin J. in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788, "At the heart of the doctrine of unjust enrichment . . . lies the notion of restoration of a benefit which justice does not permit one to retain."
>
> [36] Historically, restitution was available to plaintiffs whose cases fit into certain recognized "categories of recovery" – including where a plaintiff conferred a benefit on a defendant by mistake, under compulsion, out of necessity, as a result of a failed or ineffective transaction, or at the defendant's request (*Peel*, at p. 789; *Kerr*, at para. 31). Although these discrete categories exist independently of one another, they are each premised on the existence of

> some injustice in permitting the defendant to retain the benefit that he or she received at the plaintiff's expense.
>
> [37] In the latter half of the 20th century, courts began to recognize the common principles underlying these discrete categories and, on this basis, developed "a framework that can explain all obligations arising from unjust enrichment" (L. Smith, "Demystifying Juristic Reasons" (2007), 45 Can. Bus. L.J. 281, at p. 281; see also *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, and *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, per Laskin J., dissenting). **Under this principled framework, a plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason** (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland*, at para. 30; *Kerr*, at paras. 30-45). While the principled unjust enrichment framework and the categories coexist (*Kerr*, at paras. 31-32), the parties in this case made submissions only under the principled unjust enrichment framework. These reasons proceed on this basis.
>
> [Emphasis added]

[96] To survive summary judgment on the claim of unjust enrichment, GSI needed to demonstrate a real chance of success that GSI suffered a deprivation to the benefit of Fugro without juristic reason. With respect, there was a complete absence of any basis for GSI to claim entitlement to the monies paid to Fugro (in other words it cannot point to any deprivation), and there was a clear juristic reason for the payment to Fugro—it was for services rendered pursuant to the 2009 UNCLOS seismic survey contract.

[97] The motion judge correctly dismissed the claim for unjust enrichment.

AG CANADA'S APPLICATION FOR LEAVE TO APPEAL

[98] The AG Can and Ms. Hanham seek leave to appeal the motion judge's refusal to dismiss GSI's claims that Ms. Hanham committed the tort of misfeasance in public office and all three defendants committed the tort of conspiracy.

[99] Leave to appeal ought to be granted if the appellant raises an arguable issue—that is, an issue that could result in the appeal being allowed (see *Burton v. Coady*, *supra*, at para. 18). Despite GSI's opposition, leave is granted.

Misfeasance in public office

[100] The motion judge identified what she said were the elements of the tort from the leading Canadian case of *Odhavji Estate v. Woodhouse*, 2003 SCC 69, but with respect, erred in law when she found there were material questions of fact that she was not permitted to resolve on a summary judgment motion.

[101] She paraphrased the two elements that must be shown as "deliberate unlawful conduct in the exercise of public functions and an awareness that the conduct is unlawful and likely to injure the plaintiff" (para. 63).

[102] Iacobucci J., for the unanimous Court in *Odhavji*, explained the requirements of the tort:

> [22] What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. **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.** This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts*, *supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). **It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.**
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> [23] **In my view, there are two such elements. 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**. What distinguishes one form of misfeasance in a public office from the other is 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.
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> [Emphasis added]

[103] The motion judge focussed on the arguments of the respective defendants that the *CTA* simply did not apply to the 2009 UNCLOS seismic survey. She reasoned:

> [68] The defendants (in particular, Fugro) submit that within the present motion, I should make a finding that the *CTA* did not apply to the 2009 UNCLOS project. Were I to do so, they say, all of the plaintiff's claims (including the claim of misfeasance in public office) would be entirely unsustainable and doomed to fail. For example, the impugned act (the amendment to the contract) could not possibly be "unlawful" if the *CTA* never was applicable to the project in any event.

[104] She was not convinced she could resolve the question whether the *CTA* applied. To do so would be to enter the realm of weighing evidence, evaluating credibility, or drawing inferences (para. 70). She cited *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61.

[105] With respect, the circumstances in *Hatch* were completely different. There, a defendant had third-partied a contractor who had installed a wharf. The defendant claimed the contractor had done so negligently and had caused the wharf's collapse. The contractor moved for summary judgment on evidence. In response, the defendant filed, amongst other things, expert reports that identified deficiencies in the installation and opined that the deficiencies contributed or initiated the collapse. The motion judge nonetheless granted summary judgment on the issue of causation.

[106] This Court reversed because the situation was not one where there was "no evidence" to support the defendant's allegations against the third party contractor. The expert opinion evidence was admitted on the motion and spoke directly to causation (para. 43). The motion judge is correct—on a summary judgment motion, a judge is not permitted to weigh the evidence. Farrar J.A., on behalf of the Court, discussed what is meant by "weighing" the evidence:

> [26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does "weighing the evidence" mean?
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> [27] *Black's Law Dictionary* (10th ed.) defines weight as follows:

> **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.
>
> *Black's Law Dictionary*, 10th ed, sub verdo "weight of the evidence"

[107] Here, the motion judge declined to answer the question whether the *CTA* applied or the contract amendment was unlawful and immediately concluded there were material questions of fact, either pure or mixed with questions of law:

> [71] In my view, in order to substantively answer the question as to whether the *CTA* applied in these circumstances, or to substantively address whether the amendment to the contract was "unlawful", I would be going beyond what I am permitted to do as a motions judge hearing a request for summary judgment. I would need to make assessments of the evidence before me, make findings about that evidence, and/or reach conclusions on the basis of those findings. All of those are beyond my power as a motions judge making a decision under Rule 13.04.
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> [72] Therefore, in the case of the tort of misfeasance in public office, I find that there are material questions of fact, either pure or mixed with questions of law, that exist, and that I cannot resolve in the context of this motion. Summary judgment is not granted.

[108] In my view, there were no genuine issues of material fact that needed to be resolved at a trial. The facts were uncontested: the seismic survey took place outside of Canadian territorial waters; it did not involve the exploration, exploitation or transportation of the mineral or non-living natural resource of the continental shelf of Canada—it was a seismic survey to determine the location of the slope of Canada's continental shelf and used solely in Canada's UNCLOS application for an extended economic zone; NRCan and DFO had responsibility to manage the UNCLOS project (a fact acknowledge in GSI's own 2007 bid proposal that was adopted by reference in the contract for the 2007 UNCLOS Scotian Shelf survey conducted by GSI's foreign-flagged ship); GSI had an opportunity open to all qualified bidders to bid on the RFP for the 2009 UNCLOS seismic survey work, but did not; Transport Canada, the government department responsible for oversight and enforcement of the *CTA* had decided in 2006 that the *CTA* did not apply to UNCLOS seismic surveys; Ms. Hanham had no knowledge GSI had any interest in the 2009 UNCLOS work; Ms. Hanham's superiors were fully aware of the proposed amendment to the 2009 UNCLOS survey contract; TC affirmed its position that the *CTA* did not apply to the 2009 UNCLOS seismic survey.

[109] There may be situations where courts are called upon to determine if a ship has engaged in the coasting trade. One would be if a ship were charged, pled not guilty, went to trial, and the issue was whether the ship had engaged in the coasting trade. The other is where an individual with standing brings judicial review proceedings to challenge a decision by Transport Canada (see for example: *Global Marine Systems Ltd. v. Canada (Minister of Transport)*, 2020 FC 414). Neither of these circumstances are present.

[110] Transport Canada decided the *CTA* did not apply. There were no judicial review proceedings to challenge its determination. It stands.

[111] Even if it could be said the applicability of the *CTA* were a matter that could be adjudicated by the Nova Scotia courts in civil litigation, it is a question of law. Nothing precludes a motion judge on a summary judgment motion from deciding a question of law. Rule 13.04 does give a judge a discretion to decline to do so. This is not what happened.

[112] Furthermore, even if the applicability of the *CTA* were a matter more properly determined at a trial, there is a complete absence of evidence on the requisite elements of the tort of misfeasance in public office.

[113] The unlawful conduct is said to be the contract amendment. GSI has never articulated how an amendment between two contractants freely entered into can be unlawful as contrary to the *CTA*. The *CTA* contains no provisions that preclude or restrict the ability of PWGSC and Fugro from agreeing to an amendment. The motion judge ought to have granted summary judgment based on this alone.

[114] Further, GSI could point to no evidence that Ms. Hanham knew her conduct in amending the contract was somehow unlawful or that it was done with the knowledge it would hurt GSI. There is certainly no direct evidence on these issues, nor any evidence upon which an inference could be drawn. The amendment was completed in March 2009. GSI only voiced an interest in the 2009 seismic survey in early May 2009.

[115] The claim that GSI had the only Canadian-flagged (but not duty-paid) seismic ship, the GSI *Admiral*, that could do the work provides no evidentiary foundation for an inference Ms. Hanham would know the amendment would hurt GSI.

[116] As the motion judge did for the other alleged torts, she ought to have analyzed the essential elements and concluded there were no genuine material issues of fact, and GSI had no real chance of success at trial.

Conspiracy

[117] The motion judge took the same approach with respect to this tort. She succinctly explained:

> [75] Similar to my reasoning in the last section, I do not think those are questions that can be resolved by a motions judge hearing an application for summary judgment.
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> [76] I find there are material questions for trial in relation to this tort. I do not grant summary judgment in relation to it.

[118] There are two categories of civil conspiracy. Estey J., for the Court, in *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-472 identified them:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[119] The pleadings suggest the second category of conspiracy. That is, the Federal Crown, Ms. Hanham, and Fugro engaged in unlawful conduct by amending the contract and they knew or ought to have known their acts would harm GSI or other owners of Canadian ships available and suitable to perform the work. GSI says their pleadings should not be so narrowly interpreted.

[120] With respect, however they are interpreted, the motion judge erred in law in finding there existed material questions of fact. First of all, as I have already explained, the *CTA* did not apply, and even if its applicability might be more properly determined at trial, the contract amendment was not unlawful conduct.

[121] I agree with the AG Can's submissions :

> 64. There is no evidence that the Appellants and Fugro were acting together, that their actions were directed towards Geophysical, or that they acted with the knowledge that injury to Geophysical was likely to and did result. There is no evidence that they ever discussed Geophysical, or had any knowledge that it would be impacted by the contract amendment. Rather, it is clear from the evidence that the discussions that took place between the Appellants and Fugro were centered purely on whether a *CTA* licence was required.

[122] The motion judge ought to have analyzed the essential elements and concluded there were no genuine material issues of fact and GSI had no real chance of success at trial.

COSTS

[123] At the conclusion of the December 3, 2021 hearing, we announced the panel's unanimous view the cross-appeal be dismissed, the application for leave to appeal granted, and the appeal allowed with costs to the AG Can, Ms. Hanham and Fugro.

[124] We set dates for the filing of submissions on costs. The AG Can, Ms. Hanham and Fugro filed their submissions on January 20, 2022. GSI was to file its submissions by February 4, 2022.

[125] GSI's counsel wrote February 3, 2022 to advise the Court the parties had reached agreement on the amount of costs. It requested a one-week extension to finalize payment. On February 10, 2022, counsel confirmed costs were paid by GSI to Fugro, Ms. Hanham and the AG Can.

[126] For that reason, an Order of the Court will issue that the cross-appeal is dismissed, the application for leave to appeal is granted, and the appeal allowed with costs to the AG Can, Ms. Hanham and Fugro as stipulated by the parties.

Beveridge J.A.

Concurred in:

Farrar J.A.

Derrick J.A.