Court File No. CV-12-444388

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

EPOCH'S GARAGE LIMITED, COOK SCHOOL BUS LINES LIMITED,
678928 ONTARIO INC. and
ROBERT DOUGLAS AKITT O/A DOUG AKITT BUS LINES

Plaintiffs

and

UPPER GRAND DISTRICT SCHOOL BOARD, THE WELLINGTON CATHOLIC DISTRICT SCHOOL BOARD, SERVICE DE TRANSPORT DE WELLINGTON-DUFFERIN STUDENT TRANSPORTATION SERVICES and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

# FACTUM OF THE PLAINTIFFS

July 16, 2013

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## I. OVERVIEW

1. This case is about a specific procurement process consisting of two Requests for Proposal ("RFPs") that the Crown directed and controlled in Wellington and Dufferin Counties – the Pilot RFP issued in February 2009 and the 2nd RFP issued in November 2009. It is not about general questions of competitive procurement or RFPs in the student transportation industry. The Plaintiffs are small, rural school bus operators whose businesses were destroyed by two RFPs that were designed and imposed by the Ministry of Education ("Ministry") and the defendant transportation consortium Service de Transport de Wellington-Dufferin Student Transportation Services (the "Consortium"). The Ministry and the Consortium deliberately excluded evaluation criterion that were designed and recommended by the Ministry's consultants and the Auditor General to ensure fairness for small, vulnerable operators and in so doing unlawfully discriminated in favour of large companies. The RFPs were designed to wrongfully remove, and did remove, small rural operators from the market in favour of large multi-national and regional operators.

2. In 2008, the Government of Ontario directed school boards (and the 'transportation consortia' they had formed to contract with operators) to use "competitive procurement" to procure student transportation services. The Plaintiffs do not challenge this decision. In recognition of their unique vulnerability, the Ministry made specific representations to small, rural operators that the procurement process to be imposed by the Ministry would be fair to operators of all sizes, would give local boards discretion to tailor the model to the unique local circumstances and market conditions of rural Ontario, and that the Ministry would provide training to small, rural operators to ensure they could participate and compete fairly. After

promising it would leave the choice of competitive procurement model to local boards, the Ministry became *directly* involved in the Consortium's process. It directed which type of procurement model the Consortium would use, designed a template RFP, and then became *directly* involved in implementing its Template RFP.

3. The Template was, to the knowledge of the Ministry, seriously flawed. It discriminated in favour of large operators. It deliberately excluded local evaluation criteria recommended by its consultant and the Auditor General to ensure that the process would be fair for small, rural operators.

4. The Ministry asserts that it is immune from the Plaintiffs' claims. It relies on the *Broader Public Sector Accountability Act*. But the statute was not in force at the time of the events that give rise to this claim and it has no retroactive application. The Ministry asserts that its role in directing the School Boards to use an RFP that it had designed and which, to its knowledge, ignored the recommendations of its own consultants and the Auditor General and violated its assurances to small, rural operators, amounted to "core policy decisions". The Ministry asserts that there is no relationship of proximity. Yet the case law is clear that proximity arises from the kind of conduct here pleaded.

5. The Ministry's design and implementation of a particular RFP on a unique local market for a particular set of routes is not a core policy decision. The Statement of Claim alleges that the Ministry designed and imposed, with knowledge of the harm that would ensue, a discriminatory RFP that deliberately excluded the evaluation criterion and other features that its own consultants and the Auditor General recommended for inclusion in order to ensure fairness to small, vulnerable operators. There is no radical defect in this Claim. The Plaintiffs are not

certain to fail. The Statement of Claim presents a strong *prima facie* case and these vulnerable plaintiffs should not be driven from the judgment seat.

6. While the Ministry seeks to extricate itself from this action, it has been eager to insert itself into related proceedings across Ontario. In an action brought by small, rural operators in eastern Ontario seeking an injunction against a similar RFP process (the "STEO Action") and following an unsuccessful motion to strike, the Ministry sought and was granted full party intervener status. That case is being case managed by Justice Tranmer in Kingston at the direction of RSJ Hackland. It has been fixed for trial in Perth in November.

7. In a similar action in southwestern Ontario, another group of small, rural operators won an interlocutory injunction in April 2013 restraining an unfair RFP issued by their consortium (the "STS Action"). The Ministry participated in that injunction motion opposing the operators on all aspects of the *RJR-MacDonald* test. In granting the injunction this Court referred to the Ministry's direct involvement in the pilot process that is the subject of this action. It noted that the Ministry chose to "experiment with the contract and RFP templates." The Court specifically referred to the Ministry's "acknowledgment of the concerns [of small operators] and commitment to institute a process that would be fair to all."[1]

8. In summary, this action pleads specific facts grounded in the Ministry's direct involvement in a particular RFP process that it chose to impose and direct. In such circumstances it is accountable for the consequences of its actions. Far from being plain, obvious, and beyond doubt that the Plaintiffs' claims are so radically flawed as to make failure certain, they have considerable merit and this motion ought to be dismissed.

[1] Decision of Nolan J. dated April 2, 2013, at paras. 10-11.

## II. FACTS

### 1. Student Transportation in Rural Ontario is a Unique Industry

9. Student transportation in rural Ontario is a unique industry and has been recognised as such by the Auditor General and the Ministry.[2] As Justice Nolan observed:

> The feature of small rural bus lines and the manner in which they are tied to their individual communities has been recognised by Deloitte, the Ministry, as well as the honourable Mr. Osborne in comments in his Task Force Report.[3]

10. First, student transportation requires specialised equipment and expertise. Operators cannot use their equipment and employees for anything other than transporting students – they are locked into their industry.

11. Second, unlike the provision of other daily services, such as maintenance or cleaning, student transportation requires significant and ongoing capital expenditures.[4] Companies must constantly purchase new buses in order to modernise their fleets and keep the average age of vehicles in line with school boards' requirements. These capital costs can only be recouped over a period of 10-12 years, making the relationship with school boards a long-term one.[5]

12. Third, the large geographic areas covered by operators in rural regions make it impossible for them to provide service to anyone other than their local schools and school boards.[6] Driver wages and fuel expenses are a significant part of rural operators' costs and they are not paid for the time it takes a bus to arrive at the first stop on a route. This makes it financially impossible for small, rural operators to provide service to school boards outside their local area.

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[2] Statement of Claim ["SOC"] paras. 10, 16, 24, 78(e).
[3] Decision of Nolan J. at para. 42.
[4] SOC para. 13.
[5] SOC para. 13.
[6] SOC para. 10.

13. Fourth, the student transportation industry has a mix of very large and very small operators. There are hundreds of small, rural operators across the province in a similar position to the plaintiffs in this case, who had between two and nineteen routes.[7] But there are also several large national and multi-national operators.[8] These include Stock and STC, both North America-wide companies with thousands of buses, and First Student, a subsidiary of a UK-based international transportation conglomerate. The Template RFP and the Consortium's two RFP processes were anti-competitive because they were biased in favour of these large, multi-national operators and discriminated against small, rural ones.

14. These features of student transportation in rural Ontario have been known to the School Boards and the Ministry of Education for many years.[9] Moreover, the School Boards and the Ministry have benefitted from the structure of the industry as it has provided them with safe, efficient, and reliable student transportation companies to service rural areas across the province.

15. The continuity and security provided by rural operators has been particularly important to school boards and the Ministry given the unique features of transporting students in these areas, including the importance of local knowledge concerning the routes and communities, the lack of proper infrastructure, and the remoteness of some routes from population centres where maintenance and other facilities are available.[10]

**2. Long-Standing Relationships**

16. The Plaintiffs are small, rural operators in southwestern Ontario whose facilities and employees are located in the communities they serve.[11] The School Boards and their Consortium

[7] SOC para. 40.
[8] SOC paras. 22(b), 24, 54, 93.
[9] SOC paras. 10-13, 16, 24.
[10] SOC paras. 20, 32, 33.
[11] SOC paras. 10-14.

are effectively the Plaintiffs' only customers and the Plaintiffs have been providing student transportation to them for more than 50 years. They are captive vendors to the School Boards and the Consortium.

17. This unique and long-standing relationship generated a power imbalance in which the Plaintiffs were completely dependent on the School Boards, the School Boards exercised a significant degree of control over the Plaintiffs' businesses, and the Plaintiffs were vulnerable to any unilateral changes to this long-standing relationship made without regard for the unique features of the industry.

18. The Ministry has acknowledged the unique nature these long-standing relationships and, as described above, benefitted from them by having safe, efficient, and reliable student transportation in rural communities.[12]

### 3. Government Directs Changes to Procurement of Student Transportation

19. In late 2008, the Government of Ontario made a decision to change the way school boards and their transportation consortia procure student transportation by requiring them to implement "competitive procurement."[13] The Plaintiffs do not challenge this decision.

20. From the beginning of the new process, concerns were expressed from various quarters including small operators and Chambers of Commerce about the impact on small operators in primarily rural areas of changes that did not reflect the unique local market conditions and the vulnerability of small operators.[14] The Ministry recognised these concerns and directly assured small, rural operators that it was using a "phased approach", incorporating "lessons learned"

[12] SOC para. 20.
[13] SOC para. 14.
[14] Decision of Nolan J. at para. 11.

from pilot projects to be conducted, and that the Ministry understood the importance of "supporting the sector."[15]

21. By letters dated December 9 and December 31, 2008, then Minister of Education Kathleen Wynne specifically responded to the concerns of small, rural operators by assuring them that the Ministry would take a "careful and prudent approach", that any procurement process adopted by the Ministry would be "fair for operators of all sizes", and that the Ministry would provide "comprehensive training to consortia and operators to ensure their familiarity with the process."[16]

22. The Plaintiffs reasonably relied on these representations by continuing to make investments in their businesses. This continued reliance was encouraged by the Ministry, which needed a safe, efficient, and reliable source of student transportation in rural areas.[17]

**4. Ministry Implements Competitive Procurement Policy Using RFPs**

23. The Ministry decided not to leave the implementation of competitive procurement to the School Boards. It decided to direct the process itself. The Ministry directed the Consortium to use an RFP it had developed as the means of implementing competitive procurement.[18] In doing so, the Ministry deliberately ignored:

(i) a large body of evidence (discussed below) that RFPs could be unfair to small, rural operators and inappropriate for this industry;

(ii) warnings from school boards, transportation consortia and operator associations, that RFPs could unfairly favour large operators and make it impossible for small operators to fairly compete; and

[15] SOC para. 16.
[16] SOC para. 18.
[17] SOC paras. 19-20.
[18] SOC para. 21.

(iii) warnings from school boards and the Auditor General as well as chambers of commerce that RFPs could have an unfair impact on small, rural operators such as the Plaintiffs and the members of the community that they employed.[19]

**5. Auditor General and Deloitte Advise Against RFP Model**

24. In his 1991 report, Ontario's Auditor General identified the creation of monopolies as one of the primary risks of imposing a conventional RFP procurement process on the student transportation industry.[20] An unsuccessful proponent cannot transfer its services elsewhere. Large operators can undercut small operators, run at a loss, and when competition has been removed raise prices.[21]

25. The Auditor General identified additional serious issues with conventional RFPs:

(i) the uniqueness of student transportation as compared with the procurement of other products and services;

(ii) the lack of any study indicating that RFPs for student transportation achieve better value for taxpayers in the long term; and

(iii) service levels, safety and the various problems dealing with a low bidder must be considered when designing a procurement strategy.[22]

26. In further reports in 2006 and 2008, the Auditor General examined the procurement processes used by school boards and suggested the use of RFPs for many supplies and services, but in recognition of the unique nature of the student transportation industry, the vulnerability of local operators, and the cost efficient service they provided, *excluded student transportation* from these recommendations.[23]

[19] SOC para. 22.
[20] SOC para. 23.
[21] SOC para. 24.
[22] SOC para. 25.
[23] SOC para. 26.

27. The Ministry engaged Deloitte and Touche LLP to study student transportation in Ontario.[24] Deloitte made the following key recommendations:

(i) there is a significant risk of monopolies in the student transportation industry;

(ii) local market conditions should be considered at all points in the procurement process;

(iii) value should be placed on local experience as part of the evaluation criteria; and

(iv) cost must not be the 'overriding factor' as it will encourage low-cost proponents without ensuring service is maintained or improved.[25]

28. The Ministry was aware that there were many competitive procurement alternatives to RFPs and represented that it was open to school boards to adopt their own process, including non-negotiated fixed price contracts, benchmarking, and value for service audits (the "Alternative Approaches").[26]

### 6. Ministry Retains PPI to Design Template RFP

29. Rather than leaving implementation of the government's competitive procurement policy to the School Boards, the Ministry directed them to use an RFP process.[27] The Ministry went further. Instead of leaving the design of RFPs – that is, the evaluation criteria, structure, and price weighting used – to the Consortium it retained consultants, PPI, to assist in the design of a Template RFP.[28] The Template RFP, designed by the Ministry and PPI, set out in detail the evaluation criteria to be used, the points to be awarded to each category, the scoring matrix, *and the form of contract* the School Boards would enter into with successful bidders.

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[24] SOC para. 28.
[25] SOC para. 28.
[26] SOC para. 35.
[27] SOC para. 21.
[28] SOC para. 21.

30. The Ministry deliberately ignored the Auditor General's and Deloitte's recommendations and chose to direct the School Boards to implement competitive procurement using the Template RFP it designed. The Ministry assured operators that any process imposed by the Ministry would be 'fair for all operators of all sizes'. The Ministry knew that the Template RFP it designed would have a devastating impact on small, rural operators and favour large multi-national and regional companies.[29]

**7. Template RFP Fails to Include Local Evaluation Criteria**

31. In light of the Ministry's assurances to small, rural operators that it would take a cautious approach and that any procurement process would be fair to operators of all sizes, the Template RFP was supposed to contain evaluation criteria and other safeguards that would ensure small operators could compete fairly.[30]

32. PPI recommended several criteria to the Ministry that would have balanced the Template RFP to reflect the unique vulnerability of small operators by addressing local market conditions and local experience.[31] These included:

(i) Remoteness of operators;

(ii) Lack of good infrastructure;

(iii) Driver and employee satisfaction;

(iv) Rates of calls, incidents and complaints; and

(v) Morale and relationships with students, parents, and schools.

33. In addition, one of the Auditor General's key recommendations was that operators be permitted to submit proposals on specific routes they wished to service.[32] This recommendation

[29] SOC para. 30.
[30] SOC para. 31.
[31] SOC para. 32.
[32] SOC para. 24.

recognised the unique local market conditions and would allow small, rural operators to focus on the routes that they could service most efficiently.

34. The Ministry deliberately excluded all the local market evaluation criteria recommended by PPI. It ignored the Auditor General's recommendation to permit operators to bid on specific routes, the unique nature of the industry, the importance of local market conditions, and the vulnerability of small, rural operators.[33] The Template RFP had numerous other deficiencies, as described below, and discriminated in favour of large operators.

35. The RFP process directed by the Ministry and the Template RFP it designed with PPI created an unfair process that the Ministry knew would make it impossible for small, rural operators to compete fairly.[34]

**8. Ministry Directs the School Boards to Pilot the Template RFP**

36. Having directed that the School Boards would implement competitive procurement using an RFP and having designed the Template RFP for that purpose, the Ministry directed the School Boards and the Consortium to begin the process of putting all of their routes to RFP.[35]

37. The process had two stages; the Consortium would put an initial 25% of their routes to RFP (the "Pilot RFP"), followed by the remaining 75% shortly afterwards (the "2nd RFP").[36]

38. The Ministry directed and controlled this two-part process and required the Consortium to use its Template RFP for both stages.[37] The Ministry also directed that along with Ministry representatives, its consultants, PPI, would run the RFP processes.[38]

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[33] SOC para. 32.
[34] SOC para. 34.
[35] SOC para. 37.
[36] SOC paras. 39, 47.
[37] SOC paras. 37, 52, 75, 77, 78(b)
[38] SOC paras. 75, 77.

39. At the same time, the Ministry assured operators, including the Plaintiffs, that consortia staff and local operators would be properly trained to ensure that the competitive procurement process would be fairly structured and fairly implemented.[39]

40. In January 2009, the Consortium issued the Pilot RFP for the initial 25% of its routes. The Plaintiffs Epoch's and Cook's had 2 and 4 routes, respectively, put to RFP in this initial round. The Plaintiffs 678928 Ontario and Akitt were too small to have routes put to RFP at the first stage of the process and did not participate.[40]

**9. Deficiencies in the Pilot RFP**

41. The Ministry required the Consortium to use the Template RFP it had produced for both its procurement processes.[41] The processes were fundamentally unfair and grossly mismanaged by the Ministry and its agent, PPI. The deficiencies are set out in detail at paragraph 42 of the Statement of Claim and included:

(i) The Pilot RFP, which was the Template RFP, excluded criteria to reflect local market conditions and was biased against small, rural operators;

(ii) Operators were not permitted to bid on individual routes as had been recommended by the Auditor General and as the Ministry knew was essential for small, rural operators to be able to compete fairly;

(iii) Operators whose existing routes were included in the RFP were not told which of their routes were being put to tender, making it impossible for them to know whether they stood to lose their most profitable routes, or even whether they were bidding on their own routes when they submitted proposals;

(iv) The bid documents contained arbitrary, irrelevant and inappropriate evaluation criteria. The evaluation criteria were ambiguous and the points allocated to sub-criteria were not indicated. Scoring of responses was largely subjective;

[39] SOC para. 18.
[40] SOC para. 40.
[41] SOC paras. 37, 52, 77.

(v) The process lacked transparency. The School Boards and PPI refused to disclose the winning rates and provided little information in de-briefing sessions with unsuccessful bidders;

(vi) The Ministry failed to provide adequate training to either consortia staff or operators, as it had represented it would; and

(vii) The process failed to recognize the unique character of the industry, whereby the majority of school bus operators have only one customer – the school board – and when they lose one round they are out of business.

42. At this first stage of the process the Plaintiffs Epoch's and Cook's lost 1 and 3 routes, respectively. This was 50% of the Epoch's routes that were put to RFP and 75% of the Cook's routes that were put to RFP.[42]

**10. Ministry Acknowledges Deficiencies and Promises Moratorium**

43. In April 2009 the Ministry acknowledged serious deficiencies in its Pilot RFP. Minister Kathleen Wynne publicly represented to operators that the Ministry was imposing a moratorium, until at least 2010, on any further use of RFPs until lessons could be learned from the mistakes that had occurred with the Pilot RFP (the "Moratorium").[43]

44. As part of the Moratorium, the Ministry represented to operators, including the Plaintiffs, that, prior to any further changes being implemented including conducting additional RFPs:

(i) the results of the Pilot RFP would be properly and fairly evaluated;

(ii) the Ministry would consult with all sector stakeholders including operators such as the Plaintiffs to ensure that it had a comprehensive understanding of the results of the Pilot RFP and the mistakes that had occurred; and

(iii) refinements to tools and processes would be made to address the deficiencies identified in the Pilot RFP.[44]

[42] SOC para. 43.
[43] SOC para. 45.
[44] SOC para. 46.

### 11. Ministry Directs School Boards to Issue 2nd RFP

45. In November 2009, after representing that it had carefully evaluated the Pilot RFP, the Ministry directed the School Boards and the Consortium to issue the 2nd RFP. The Ministry again actively managed the process with PPI.[45]

46. The 2nd RFP was the continuation of the Ministry's pilot process that had begun with the Pilot RFP and covered the remaining 75% of the School Boards' routes. Faced with the potential loss of their remaining business, the Plaintiffs had no choice but to participate.[46] Epoch's and Cook's submitted bids in the 2nd RFP. 678 Ontario and Akitt, the smallest, least sophisticated and most vulnerable of the Plaintiffs, attempted to participate in the 2nd RFP but given the lack of training and support, which had been promised to operators by the Ministry, were unable to submit bids.[47]

### 12. Repeated Deficiencies and Serious Procedural Flaws in the 2nd RFP

47. Contrary to the assurances of the Ministry the 2nd RFP had the same deficiencies as the Pilot RFP as well as serious additional procedural flaws.[48]

48. Like the Pilot RFP, the 2nd RFP contained a "competition quota", which limited the number of routes that could be awarded to an operator in each geographic area, as well as overall. At an RFP information session held after the bid documents had been issued, the representative of a large, multi-national bus operator expressed the view that these quotas should be increased or eliminated to allow larger companies to bid on all the routes available. The

[45] SOC paras. 47, 77.
[46] SOC para. 50.
[47] SOC para. 51.
[48] SOC para. 52.

Consortium's representative responded that this issue was being considered by the Ministry and its lawyers were reviewing the quotas.[49]

49. Thereafter, the Ministry decided that the maximum route allocation in any one region was to be changed from 50% of the routes to 100% of the routes (i.e., no quota by region), and the overall quota increased from 25% to 35%. This change was made by the Consortium and the Ministry on the basis of secret consultations with certain unidentified operators and revealed a clear bias against small, rural operators in favour of large, multi-national ones.[50]

50. The Plaintiffs and other small, rural operators were not consulted concerning these changes and the Ministry's and Consortium's discussions with select operators was a breach of the RFP's rules.[51]

51. Operators, including the Plaintiffs, submitted questions concerning the nature and origin of these changes multiples times using the RFP's prescribed process and within the prescribed time period for questions. Despite their legal obligation to do so, the Consortium and PPI failed to respond to these questions and in fact completely ignored them. They again refused to answer questions relating to these changes during the debrief session held with operators after the awards were complete.[52]

52. The results of the 2nd RFP, announced on January 20, 2010, were devastating to the Plaintiffs:[53]

[49] SOC para. 53.
[50] SOC para. 54.
[51] SOC paras. 54.
[52] SOC para. 55.
[53] SOC para. 59.

| Operator | Routes covered by the Contracts put to 2nd RFP | Routes Awarded | % Loss of Remaining Routes |
|---|---|---|---|
| Epoch's | 8 | 0 | 100% |
| Cook's | 15 | 0 | 100% |
| 678 Ontario | 3 | 0 | 100% |
| Akitt | 2 | 0 | 100% |

53. The Plaintiffs lost these routes in the 2nd RFP because of the negligence of the Ministry and its agent PPI and the serious irregularities in the bidding process. Because five year contracts (with options to extend) were awarded in the 2nd RFP, the loss of these routes left Epoch's and Cook's with just one route. 678 Ontario and Akitt were completely wiped out.[54]

54. There were also frequent incidents of bid-repair and bid-enhancement in the 2nd RFP. Certain proponents were permitted to alter or improve their bids after the deadline for submissions had expired, in clear violation of the rules of the RFP.[55]

55. Moreover, after the routes had been awarded, the Ministry permitted to 'swap' routes with one another in order to distribute those routes more favourably amongst themselves. This was encouraged and facilitated by the Ministry and the Consortium and was in clear breach of the RFP's rules concerning contract awards. It allowed the large, successful operators to effectively choose the routes they wanted to service, despite the fact that operators had not been permitted to bid on specific routes from the outset and were told they were not permitted to decline routes assigned to them by the Consortium. This breach of the RFP's rules was a double-

[54] SOC para. 60.
[55] SOC para. 56.

standard that unfairly and unlawfully discriminated against small, rural operators, and demonstrated a clear bias in favour of larger operators.[56]

**13. Ministry Recognises Deficiencies with Entire RFP Approach**

56. Faced with the destruction of small, rural operators across the province, by letter dated June 23, 2011, Minister of Education Leona Dombrowsky imposed another moratorium on competitive procurement, "in recognition of the concerns and issues expressed by both school boards and operators." The Ministry also established a Task Force, chaired by the Honourable Coulter Osborne and comprising representatives from across the industry, to investigate competitive procurement in student transportation, paying specific attention to fairness, transparency, accountability, and value for money.[57]

57. Mr. Osborne released the Task Force's Final Report on January 25, 2012. The Report specifically noted the Moratorium and then Minister Wynne's representations to operators and concluded that:[58]

(i) there are problems with imposing RFPs as a "one size fits all" approach;

(ii) these problems had caused "casualties", especially amongst small, rural operators;

(iii) the risk of monopolies created by imposing RFPs was not in the public interest, and would cause costs of student transportation to inevitably rise (the risk of monopolies was previously identified by the Auditor General);

(iv) value for money is an important, but certainly not the only, consideration in student transportation procurement, and RFPs had not established that they can provide this to taxpayers;

[56] SOC para. 57.
[57] SOC para. 64.
[58] SOC para. 65.

(v) additional study of the industry and alternatives was required to limit, or eliminate, unfairness, particularly as related to mainly smaller, rural service providers such as the Plaintiffs; and

(vi) the Ministry should extend its 2011 moratorium and commission an independent third party review of alternatives to RFPs for the student transportation industry.

58. The Task Force reached consensus on a number of important recommendations, including:[59]

(i) competitive processes could and should be improved;

(ii) operators must be consulted before RFPs, or any other new procurement processes, are implemented;

(iii) critical issues such as route bundling had to be carefully considered and discussed with operators; and

(iv) evaluation criteria must be clear and objective.

59. These conclusions and recommendations represented industry standards for competitive procurement in student transportation. The Ministry, the School Boards, and PPI had not complied with any of them in creating the Template RFP and conducting the Pilot RFP and the 2nd RFP.[60]

60. As a result, the Superior Court has intervened on three separate occasions to stop the continued use of the Template RFP.

**14. Ministry Involvement in Related Actions Across the Province**

61. There are currently four other outstanding actions concerning the use of RFPs for the procurement of student transportation in Ontario. With all other avenues exhausted, school bus

[59] SOC para. 66.
[60] SOC para. 67.

operators across the province have been forced to ask the Courts to intervene against unfair RFPs that discriminate against small rural operators.

***(i) The Tri-Board Action***

62. On October 12, 2012, an action was commenced in Belleville by fifteen small, rural operators serving the Tri-Board consortium.[61] The operators sought an interlocutory injunction restraining the closing of Tri-Board's RFP until trial.[62] The Crown was not named in that action because, unlike here, it did not directly involve itself in the RFP process.

63. Tri-Board brought a motion to strike out the operators' action based on its alleged blanket immunity under the *Broader Public Sector Accountability Act* (the "*BPSAA*"). During the course of argument Tri-Board agreed to cancel its RFP and negotiate contracts with operators for the 2013/14 school year.[63]

***(ii) The STEO Action***

64. On November 16, 2012, seven small, rural operators serving the STEO consortium[64] commenced an action to challenge an unfair RFP. The Crown was not named in that action because, unlike here, it did not directly involve itself in the RFP. The operators sought an interlocutory injunction restraining the closing of STEO's RFP until a trial could be held on the merits of their claims.[65]

65. STEO brought an unsuccessful motion to strike out the operators' lawsuit on the basis that s. 22 and 23 of the *BPSAA* precluded a Court from granting injunctive relief. This is the same statutory authority that the Ministry relies on in this motion.

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[61] Tri-Board Student Transportation Services ("Tri-Board").
[62] Tri-Board Action Statement of Claim.
[63] Order of Justice Scott dated October 18, 2012.
[64] Student Transportation of Eastern Ontario ("STEO").
[65] STEO Action Statement of Claim.

66. STEO's motion to strike was heard on November 30, 2012 and Ministry representatives were in attendance. On December 3, 2012, Justice Tranmer released his decision dismissing STEO's motion, ruling:

> The dispute between the parties in regard to this section arises in the situation where the directive requires the Defendant to do something, but it does not do it. The Defendant's position is that that conduct is protected under the phrase "not done in accordance with this Act … or the directives." In my view, it is not plain and obvious that the Defendant is correct in this interpretation such that the Plaintiffs' claims must fail.[66]

67. STEO's RFP was suspended pending the outcome of a trial scheduled for November in Perth. The Ministry has intervened with full party status, made productions, and a Ministry witness has been discovered. No relief is sought against the Ministry. At trial the Ministry will present evidence and argument on two issues:

(i) Allegations that the Crown directed or influenced school boards or consortia that RFPs are the "approved" or "preferred" approach to the procurement of student transportation contracts to the exclusion of other procurement methods; and

(ii) Allegations that the Crown ignored or failed to properly respond to the Task Force.[67]

68. Many of the factual issues in this case concerning the Ministry's involvement in implementing the government's competitive procurement policy at school boards across the province will be addressed at the STEO trial.

***(iii) The STS Action***

69. On February 5, 2013, two small, rural operators serving the STS consortium[68] commenced an action to challenge an unfair RFP. The Crown was not named in that action

[66] Decision of Tranmer J. dated December 3, 2012 at para. 28.
[67] Intervention Order of Tranmer J. dated February 8, 2013.
[68] Southwestern Ontario Student Transportation Services ("STS").

because it was not directly involved in the RFP. The operators sought an interlocutory injunction restraining the closing of the RFP until trial.[69] Unlike other consortia, STS refused to suspend its RFP and the operators' injunction motion was fully briefed and heard.

70. The Ministry intervened in the injunction motion. It filed a factum and made submissions. It asserted that there was no serious issue to be tried, that the plaintiffs would not suffer irreparable harm, and that the balance of convenience favoured the Consortium and the Ministry.[70]

71. Justice Nolan granted the plaintiffs' injunction. STS subsequently agreed to suspend its RFP pending final disposition of the STEO Action. Significantly for the purposes of this motion, Justice Nolan found, *inter alia*:

> …the Ministry released a resource package consisting of procurement guidelines, a template for contracts, as well as an RFP template. … **The Ministry also set up three pilot projects in various areas of the province to experiment with the contract and RFP templates.**
>
> **From the beginning of the new process, concerns were expressed from various quarters including small bus lines, Chambers of Commerce and others as to the ability of small bus lines that had historically provided bus service to students in primarily rural areas to compete under the new system. In December 2008, the then Minister of Education, Kathleen Wynne, sent a letter to the concerned parties, expressing both an acknowledgment of the concerns and a commitment to institute a process that would be fair to all.**
>
> **Transportation consortia were told by the Ministry not to enter into renegotiated contracts** beyond the 2011-2012 school year with the expectation that transportation consortia would be initiating competitive procurement procedures by the 2012-2013 school year.[71] [Emphasis added.]

[69] STS Action Statement of Claim.
[70] Decision of Nolan J. at para. 41.
[71] Decision of Nolan J. at paras. 10-12.

72. Numerous consortia have suspended their RFPs pending the outcome of the full trial process unfolding in the STEO Action that will deal with central issues of unfairness in the RFP processes that have been rolled out across the province.[72] The Ministry is an intervener in that action, has made extensive productions, and will present evidence and argument at trial.

## III. LAW AND ARGUMENT

73. The Court must decide four issues on this motion to strike:

1) Is it plain and obvious that the *prima facie* duty of care alleged by the Plaintiffs contains a radical defect making it impossible to establish that duty at trial;

2) Is it plain and obvious that the *prima facie* duty asserted by the Plaintiffs is negated by policy considerations;

3) Is it plain and obvious that the Ministry cannot be responsible for the actions of its agent, PPI; and

4) Is it plain and obvious that the Crown enjoys immunity from the Plaintiffs' claims under the *Broader Public Sector Accountability Act* – a piece of legislation that was not in force at the time of the events giving rise to this claim and that has already been the subject of an unsuccessful motion to strike in a related proceeding in which Justice Tranmer held that the very immunity asserted by the Crown in this case could not be determined at the pleadings stage.

### 1. Test on a Motion to Strike

74. The Crown must demonstrate a "radical defect" in the Plaintiffs' claim that makes it "certain to fail". The Supreme Court has set out the following principles:

1) the power should only be used in plain and obvious cases;

2) if there is a chance that the claim might succeed, then the plaintiff should not be "driven from the judgment seat";

3) the facts as pleaded by the plaintiff are assumed to be true; and

[72] Decision of Nolan J. at para. 34.

4) neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.[73]

75. In *1597203 Ontario Ltd. v. Ontario*, a case in which the Crown unsuccessfully sought to strike claims against it in negligence and negligent misrepresentation, Justice Conway noted that one of the "governing principles" on a Rule 21 motion is that:

> The threshold for sustaining a pleading is not high – a "germ" or "scintilla" of a cause of action will be sufficient.[74]

76. Ontario courts have repeatedly applied these principles to permit all but the most frivolous and unmeritorious claims to proceed. The nature of the radical defect and the 'plain and obvious' requirement was described by Justice Epstein, as she then was, in *Dalex Co. v. Schwartz Levitsky Feldman*:[75]

> In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of **a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our Courts**. [Emphasis added.]

77. This approach is well-established. It has been followed numerous times in Ontario[76] and other jurisdictions, including the Federal Court in a decision affirmed by the Federal Court of Appeal. In that case, an action was brought by a group of fishermen against the federal government for cutting their quotas after providing assurances it would not do so.[77] The allegations included negligence, breach of contract, and misfeasance in public office.

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[73] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980, para. 33.
[74] *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 at para. 12 (Sup. Ct.) [*1597203 Ontario Ltd.*].
[75] [1994] O.J. No. 1388 (Gen. Div.) [*Dalex*].
[76] See, for example: *Mondor v. Fisherman*, [2001] O.J. No. 4620 (Sup. Ct.) at para. 69, per Cumming J.; *Research in Motion Ltd. v. Atari Inc.*, [2007] O.J. No. 3146 (Sup. Ct.) at para. 20, per Spiegel J.
[77] *Arsenault v. Canada*, 2008 FC 299; aff'd 2009 FCA 242.

78. Martineau J. refused to strike the claims. He conducted an extensive review of the authorities concerning the standard on a motion to strike, noting that the threshold is very high and that the statement of claim "must be found to be certain to fail as it contains a radical defect".[78] Citing *Dalex*, he concluded that:

> It is only by restricting successful attacks of this nature to the narrowest of cases that the common law can have a full opportunity to be refined or extended.[79]

**2. Duty of Care**

79. In *Taylor v. Canada*, a recent decision of the Court of Appeal, a unanimous five-member panel comprehensively reviewed the analysis a court must undertake to determine, on a motion to strike, whether a claim in negligence against the government can proceed.

80. There are two principal steps in the analysis:

1) does the pleading establish a *prima facie* duty of care; and

2) if it does, is that *prima facie* duty negated by policy considerations.[80]

81. The Plaintiffs' claim will only be struck if the Crown has demonstrated that the pleaded duty contains a radical defect, or if it can establish that it is plain and obvious that the duty is negated by policy considerations. If there is any uncertainty the claim should proceed to trial.[81]

***(i) Prima Facie Duty***

82. The first stage of the analysis has two components: foreseeability of harm and proximity between the parties.[82] The Ministry has not contested, in either its Notice of Motion or Factum, that harm to the Plaintiffs was a reasonably foreseeable consequence if the Ministry acted

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[78] *Arsenault*, FC at para. 22.
[79] *Arsenault*, FC at para. 27. See also: *Dalex* at para. 4.
[80] *Taylor v. Canada*, 2012 ONCA 479 at paras. 71-72[*Taylor*].
[81] *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 70 [*Imperial Tobacco*].
[82] *Taylor* at para. 68.

negligently in the implementation of its competitive procurement policy.[83] This is understandable in light of the clear acknowledgment of the potential for harm by Ministers Wynne and Dombrowsky. It is also understandable in light of the warnings of the Auditor General and the Ministry's procurement consultant that specific evaluation criteria were needed to allow small, rural operators to compete fairly. This leaves only the proximity inquiry.

83. In *R. v. Imperial Tobacco* the Supreme Court explained that proximity between a plaintiff and a governmental agency can arise in two ways – from a duty imposed by the applicable legislative scheme, or from the conduct of the agency and its interactions with the plaintiff:

> Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.[84]

84. While an analysis of the legislative scheme is the first step, in *Taylor* the Ontario Court of Appeal explained that this can yield one of three conclusions: (i) the legislation creates a private law duty of care; (ii) the legislation forecloses a private law duty of care; or (iii) the legislation is not determinative one way or the other.[85]

**Legislative Scheme Silent and Not Applicable**

85. In its factum, the Crown relies almost exclusively on legislation that is either irrelevant or non-determinative in order to argue that no *prima facie* duty of care arises in this case. Its factum does not address the actual source of the duty of care pleaded in this case, namely the conduct and representations of the Ministry.

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[83] SOC paras. 34, 42(d), 78(h) and (i), and 81.
[84] *Imperial Tobacco* at para. 43
[85] *Taylor* at paras. 77-79.

86. In *Imperial Tobacco*, the Court concluded that the applicable legislative scheme was neutral on the existence of a private law duty of care, but found a *prima facie* duty did arise out of the Crown's conduct:

> These general duties to the public do not give rise to a private law duty of care to particular individuals. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. **Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.** [Emphasi added.][86]

87. In this case, the legislative scheme is neutral and does not speak to the private law duty of care alleged by the Plaintiffs.

88. In its factum, the Crown asserts that the applicable legislative scheme comprises the Supply Chain Guideline (the "Guideline"), the *Broader Public Sector Accountability Act* (the "*BPSAA*"), and the *Broader Public Sector Procurement Directive* (the "*BPS-Directive*").[87]

89. Neither the *BPSAA* nor the *BPS-Directive* can be part of the legislative scheme because they were not in force at the relevant time.

90. The *BPSAA*'s procurement provisions, on which the Crown relies, did not come into force until April 1, 2011, more than a year after the events that give rise to the Plaintiffs' claim.[88] Moreover, s. 21(4) of the *BPSAA* states:

> A directive issued under Part V does not apply to a procurement process where a designated broader public sector organization has issued a request for proposal **before the directive applied to the organization.** [Emphasis added.]

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[86] *Imperial Tobacco* at para. 50.
[87] Crown Factum at paras. 17-22.
[88] Ontario Gazette, January 1, 2011.

91. The Crown does not refer in its factum to either s. 21(4) of the *BPSAA* or to the date on which the legislation came into force. The Crown also does not include this provision in the excerpt of the *BPSAA* attached to its factum.[89]

92. Similarly, the *BPS-Directive* was not issued by the Management Board of Cabinet until July 1, 2011, also more than a year after the events giving rise to this claim.

93. The Supply Chain Guideline was introduced in April 2009, after the Pilot RFP had concluded, but before the 2nd RFP was issued. The Guideline was issued by the Ministry of Finance and required government departments to incorporate its requirements into their funding agreements with public sector organisations, including school boards.

94. The Guideline is not legislation and does not have the force of law; its only authority derives from the contracts into which it is incorporated. There is no evidence or pleading before the Court on this motion as to whether the Guideline was incorporated into the funding agreements with the defendant School Boards in time to apply to the procurement processes at issue, or at all. This question cannot be resolved until evidence is presented at trial.

95. Moreover, even if the Guideline had been incorporated into the School Boards' funding agreements prior to the 2nd RFP, it is irrelevant to the Plaintiffs' claims against the Ministry. To the extent that it sets out requirements on organisations, they are purely contractual obligations and only apply to the public sector organisations themselves, not to government departments such as the Ministry. The Guideline is therefore not a "legislative scheme" in the sense relevant to the proximity inquiry.

[89] Included in the Plaintiffs' Book of Authorities is a complete copy of the *BPSAA*.

96. In any event, the Guideline does not create or impose any public duties on the organisations subject to it. It consists of a number of "mandatory requirements", none of which concerns acting in the public interest.

97. The Guideline similarly does not create or foreclose the private law duty of care asserted by the Plaintiffs. Returning to the three possibilities set out in *Taylor*, this is a case in which, to the extent there is any legislative scheme at all, it is silent on the question of the duty asserted by the Plaintiffs.

**Proximity Grounded in Conduct of the Crown**

98. Both the Supreme Court in *Imperial Tobacco* and the Ontario Court of Appeal in *Taylor* have made clear that proximity can arise either from the legislative scheme *or* from the conduct of the Crown.

99. In *Imperial Tobacco*, the Supreme Court explained that when proximity is alleged to arise from interactions between the plaintiff and the government, the question is whether:

> …the government has, **through its conduct**, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.[90] [Emphasis added.]

100. Only one paragraph of the Ministry's factum addresses whether a relationship of proximity exists between the Ministry and the Plaintiffs based on the Ministry's conduct. It states:

> A special relationship may be created where the Crown or the Minister ought reasonably to foresee that the Plaintiff will rely on the representation, and where such reliance would in the circumstances of the case be reasonable.[91]

101. The Ministry does not take issue with the Plaintiffs' pleadings that:

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[90] *Imperial Tobacco* at para. 45.
[91] Crown Factum at para. 39.

(i) the Ministry made specific representation to small, rural operators, including the Plaintiffs, in response to the concerns they had raised;

(ii) the Plaintiffs relied on the Ministry's representations to them;

(iii) the Plaintiffs' reliance was reasonable; or

(iv) the Ministry was aware of and encouraged the Plaintiffs' reliance.

102. Moreover, the Ministry does not contest that the facts pleaded in the Statement of Claim disclose a relationship of proximity sufficient to give rise to a *prima facie* duty of care. Instead, the Ministry focuses on an irrelevant legislative scheme and the second or policy step in the duty of care inquiry.

103. The Court is not in a position to make a final determination of whether a *prima facie* duty in fact exists between the Plaintiffs and the Crown. At this preliminary stage, the Plaintiffs need only demonstrate that, taking the pleaded facts as true, the conduct of the Crown "could potentially establish the requisite proximity to give rise to a duty of care."[92] It must be plain and obvious that no duty of care could be found to exist at trial.[93]

104. A claim *must* contain a radical defect before it will be struck. The Court must take a cautious approach at this early stage of a proceeding. In *Heaslip Estate v. Mansfield Ski Club* the Court of Appeal reversed a lower court decision striking out a claim for negligence against the Crown, noting that:

> …the motion judge applied an unduly narrow interpretation of the test for proximity, especially in relation to a motion to dismiss the action at the pleading stage.[94]

105. The Ontario Court of Appeal has said the following regarding proximity:[95]

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[92] *1597203 Ontario Ltd*. at para. 61.
[93] *Heaslip Estate v. Mansfield Ski Club*, 2009 ONCA 594 at para. 18 [*Heaslip*].
[94] *Heaslip* at para. 15.
[95] *Taylor* at paras. 65-69.

1) Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether **the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.**

2) Certain factors routinely take a central role in the proximity analysis including:

   (i) **any representations made by the defendant, especially if made directly to the plaintiff, and reliance by the plaintiff on the defendant's representations;**

   (ii) the nature of the plaintiff's property or other interest engaged;

   (iii) **the specific nature of any direct contact between the plaintiff and the defendant; and**

   (iv) the nature of the overall relationship existing between the plaintiff and the defendant

3) **Where proximity is grounded in specific conduct, interactions, and representations, as it is in this case, ruling a claim out at the proximity stage may be difficult. Courts should not "close the courtroom door", but allow the matter to proceed to trial.**[96] [Emphasis added.]

106. This Court can take comfort from Justice Nolan's finding in the STS injunction proceedings that:

> … the Ministry also set up three pilot projects in various areas of the province to experiment with the contract and RFP templates.[97]

107. All of the considerations identified in *Heaslip* are satisfied on the pleaded facts in this case and point to a relationship of proximity between the Ministry and the Plaintiffs:

(i) The Ministry chose to involve itself in implementing the government's policy that school boards adopt competitive procurement;

(ii) The Ministry was fully aware of the existing long-term relationships between the Plaintiffs and the School Boards;

[96] *Taylor* at paras. 103 and 118-20.
[97] Decision of Nolan J. at para. 10.

(iii) The Ministry knew that if changes to the procurement process were not made fairly and with regard for the unique nature of the student transportation industry, small, rural operators would suffer significant harm;

(iv) In response to concerns raised by small, rural operators the Ministry specifically represented to those operators that:

a) it would take a "careful and prudent approach";
b) any changes to the procurement process would be "fair for operators of all sizes"; and
c) the Ministry would provide "comprehensive training to consortia and operators to ensure their familiarity with the process."

(v) The Ministry knew that small, rural operators, including the Plaintiffs, were relying on those representations by continuing to purchase new equipment and make investments in their businesses. The Ministry encouraged that reliance and benefitted from the continued provision of safe, efficient, and reliable student transportation in rural communities;

(vi) The Ministry required the School Boards and the Consortium to implement the government's competitive procurement policy using the Template RFP it had designed;

(vii) The Ministry failed to investigate any of the Alternative Approaches to an RFP that it knew were available and made no attempt to asses the benefits and drawbacks of these processes relative to RFPs;

(viii) The Ministry chose to further involve itself in implementing the government's policy by designing the Template RFP, rather than leaving the selection of evaluation criteria and other matters to the Consortium;

(ix) The Ministry knew that the Template RFP contained serious flaws, discriminated against small, rural operators, and would cause significant harm to those operators if implemented;

(x) The Ministry directed that it would actively manage and control the Consortium's two RFP processes together with its consultant, PPI;

(xi) As a result of deficiencies in the Pilot RFP, the Ministry represented to operators that it would impose a moratorium on any further RFPs until at least 2010;

(xii) The Ministry represented to operators including the Plaintiffs that it would:

d) properly and fairly evaluate the results of the Pilot RFP;
e) consult with operators, including the Plaintiffs, to ensure it understood the mistakes that had occurred; and
f) refine the tools and processes to address the deficiencies in the Pilot RFP.

(xiii) The Ministry knew that small, rural operators, including the Plaintiffs, were relying on the representations it made to them and that they continued to invest in their businesses on the basis of those representations;

(xiv) In breach of the moratorium and its representations, the Ministry directed the School Boards and the Consortium to issue the 2nd RFP, which was again based on the Template RFP and actively managed by the Ministry's agents, PPI; and

(xv) The Ministry, together with the Consortium, engaged in secret discussions with certain operators during the 2nd RFP that resulted in the route allocations caps being adjusted upward so that large operators could secure a greater percentage of the available routes. This blatantly discriminated against small operators and was unlawful.

108. In similar circumstances, courts have readily found a *prima facie* duty of care on the part of the Crown. In *1597203 Ontario Ltd.*, two businesses that had recently purchased private physiotherapy clinics brought an action against Ontario in, *inter alia*, negligence and negligent representation. The clinics sought damages for the loss of business they suffered when the government reduced the availability of OHIP coverage for their services.

109. The Crown brought a motion to strike the claims arguing that there was no proximity between the parties and therefore a duty of care could not be established.

110. The plaintiffs argued that proximity arose out of the Ministry of Health's representations to them that no changes to OHIP coverage were imminent and out of the moratoria on the

purchase and sale of clinics that had previously been imposed when changes to OHIP coverage were pending.

111. In dismissing the motion to strike, the Court noted that the alleged duty was not one owed to the public at large, but rather to the specific individuals the Ministry of Health knew were interested in purchasing physiotherapy clinics and therefore could be harmed by changes to the OHIP coverage criteria.[98]

112. Justice Conway concluded:

> If the facts pleaded are taken to be true, I find that the circumstances of the relationship established between the plaintiffs and the Ministry personnel through their discussions and the Ministry's knowledge of the plaintiffs' plans could potentially establish the requisite proximity to give rise to a duty of care.[99]

113. In the present case, the Plaintiffs have pled that in recognition of the potential harm to them the Ministry specifically represented to small, rural operators that any new procurement process would be fair to operators of all sizes and that the Ministry would provide training and support to them.

114. The Plaintiffs have also pled that at all material times the Ministry was aware that they were relying on the Ministry's representations in continuing to purchase new equipment and make investments in their business. The Plaintiffs have pled that the Ministry encouraged the Plaintiffs' reliance because it benefitted the Ministry to have a reliable source of student transportation in rural Ontario.

115. These pleaded facts are more than sufficient to give rise to a *prima facie* duty of care.

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[98] *1597203 Ontario Ltd*. at para. 60.
[99] *1597203 Ontario Ltd*. at para. 61.

116. In *Taylor*, damages were sought against Canada in negligence for the government's failure to properly regulate dental implants. Canada brought a motion to strike arguing that it owed no duty of care.

117. Unlike the Plaintiffs in this case, the plaintiff in Taylor did not allege she was aware of, much less relied upon, any specific representations made by the Crown.[100] The Court noted that such representations and reliance are a strong indication of a *prima facie* duty:

> No doubt, specific representations by a regulator to an individual, and reliance by that individual on those representations, will go a long way toward establishing a *prima facie* duty of care.

118. Nevertheless, the Court held that a relationship of proximity could arise even in the absence of such representations on the basis of "the entirety of the circumstances said to constitute that relationship."[101]

119. The Court concluded:

> It is not clear to me that Ms. Taylor will at the end of the day succeed in making out a private law duty of care owed to her by Health Canada. However, **bearing in mind that at this stage the allegations must be assumed to be true and must be read generously, and also having regard to the dynamic nature of the jurisprudence, it is not plain and obvious that the claim as pleaded is bound to fail for want of a private law duty of care.** The courtroom door cannot be closed to Ms. Taylor and the other members of the class at this stage. [Emphasis added.]

120. The Plaintiffs in this case plead specific representations by the Ministry upon which they were intended to rely and did rely. Significantly, these representations have been identified and referred to by this Court in companion proceedings. As described at paragraph 71, above, in related proceedings Justice Nolan of this Court has found, on an evidentiary record, that the

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[100] *Taylor* at para. 115.
[101] *Taylor* at para. 117.

Ministry made specific representations to small, rural operators about the fairness of the process it was going to implement.

121. There are significantly stronger indicators of a proximate relationship in this case than were present in *Taylor*. Moreover, the Plaintiffs' claim is not, as it was in *Taylor*, that they were injured by a third party and the Crown is liable for failing to properly regulate that third party.

122. The Plaintiffs plead they were directly harmed by the Ministry's negligence. A finding of proximity will be more readily made in cases where the actions of the Crown directly impact the plaintiffs and cause the harm alleged.[102]

123. Far from containing a radical defect, the *prima facie* duty of care alleged by the Plaintiffs finds strong support in the principles outlined by Justice Conway in *1597203 Ontario Ltd.* and by the Court of Appeal in *Taylor*.

***(ii) Policy Considerations***

124. If the Ministry fails to demonstrate a radical defect in the Plaintiffs' pleading of a *prima facie* duty of care, then the second step of the *Taylor* analysis addresses whether it is plain and obvious that residual policy considerations negate the *prima facie* duty.

125. The Ministry alleges only one such consideration – that the Ministry's impugned actions constituted "core policy decisions" that are immune from the Plaintiffs' claims.

[102] *Taylor* at para. 87.

**The Law**

126. The Supreme Court of Canada has recently described policy decisions as a "narrow subset" of government decision-making that are based on social, economic, or political considerations:

> Policy, used in this sense, is not the same thing as discretion. … Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations.[103]

127. While true policy decisions are immune, the Crown does not enjoy immunity for actions taken in the implementation of those policy decisions. In *1597203 Ontario Ltd.*, the Crown argued that its impugned actions were policy decisions and therefore immune. Justice Conway rejected this argument and found the Crown had failed to show it was plain and obvious that the *prima facie* duty was negated by policy considerations:

> There is authority which recognizes the distinction between the making of policy decisions and the implementation of such decisions, and holds that **government agencies, once having made a policy decision, can be liable for failure to execute that decision with reasonable care**: *Just v. British Columbia* [1989] 2 S.C.R. 1228. [Emphasis added.]
>
> The facts as pleaded, which are taken to be true, are that it was the failure to carry out the Ministry's Private Physiotherapy Plan and impose moratoriums under that plan which constitutes negligence. **Given the authority of the cases which recognize that liability can be found for failure to implement a policy decision with reasonable care, I cannot say that it is plain and obvious that any duty would be negated under the second stage of the *Anns/Cooper* tests**.[104] [Emphasis added.]

128. On a motion to strike, where only the plaintiff's pleading is before the Court, it will often be difficult to determine whether a decision was based on social, economic, or political

[103] *Imperial Tobacco* at para. 88.
[104] *1597203 Ontario Ltd*. at paras. 68-69.

consideration, or was instead merely operational. In those circumstances a full factual record is necessary.[105]

129. As stated by the Supreme Court in *Imperial Tobacco*:

> …if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the evidence should be resolved in favour of proceeding to trial.[106]

130. The burden is on the Crown to demonstrate that its acts were not simply discretionary, but were "core policy decisions" based on social, economic, or political considerations. In *Sauer v. Canada*, the Court of Appeal dismissed the federal Crown's appeal from a decision refusing to strike the plaintiff's claims against it. In addressing the argument that the decisions at issue were policy ones, not operational, the Court concluded:

> Given that the evidentiary onus at this stage is on Canada, and that at this early point in the proceedings it has brought forward nothing, I agree [that the plaintiff's claim survives the second stage of the duty of care analysis].[107]

131. In *Attis v. Canada*, the Court of Appeal again recognised the difficulty of distinguishing between policy and operational decisions on a motion to strike. Although the Court ultimately concluded that the lack of any representations to the Plaintiffs in that case foreclosed the possibility of a *prima facie* duty of care, the comments concerning the policy/operational issue are apposite here:

> Finally, I turn to the distinction between government policy and the execution or operation of that policy. It is often difficult to distinguish between the two. That is so in this case. The impugned conduct could possibly be characterized as either policy or operational conduct. At this early stage of the proceeding,

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[105] *Attis v. Canada (Minister of Health)*, 2008 ONCA 660 at para. 76; *Imperial Tobacco* at para. 90.
[106] *Imperial Tobacco* at para. 70.
[107] *Sauer v. Canada*, 2007 ONCA 454 at para. 63.

> when the only allegations are those contained in the statement of claim, it is unclear which is the more accurate characterization.[108]

132. The Ministry's factum baldly asserts that every action and decision impugned by the Plaintiffs was a "core policy decision" of the Ministry based on a balancing of social, economic, and political considerations. No particulars of any such considerations are identified and the Ministry does not refer to any of the Plaintiffs' pleadings in support its argument.

133. If the Ministry is to support these assertions it will need to lead evidence at trial concerning the grounds on which its decisions were made. It is premature to strike the Plaintiffs' pleadings at this stage.

**Ministry's Impugned Actions Not Policy Decisions**

134. As recognised by the Ontario Court of Appeal in *Sauer* and *Attis*, it is difficult to determine the grounds on which a government decision was made until a full factual record is before the Court. Only if it is plain and obvious that all of the Ministry's actions were core policy decisions and that the Plaintiffs' pleadings to the contrary contain a radical defect can the Plaintiffs be "driven from the judgment seat".

135. The chart at Appendix "A" to this factum sets out the key points in the series of events that give rise to the Plaintiffs' claims. It makes clear that the Plaintiffs do not challenge the government's decision to implement competitive procurement and agree that it was a protected policy decision. The remaining five actions, however, were operational matters undertaken by the Ministry and its agents, none of which is immune and any one of which is sufficient to ground the Plaintiffs' claims.

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[108] *Attis*, supra note 105, at para. 76.

136. The Ministry was under no obligation, statutory or otherwise, to decide how school boards would implement the government's competitive procurement policy. It chose to involve itself in operational decisions and is responsible for its actions in so doing. As Justice Nolan observed:

> …the Ministry also set up three pilot projects … to experiment with the contract and RFP templates.[109]

137. The Crown cannot now claim that by virtue of the Ministry's involvement, what would otherwise have been the School Boards' operational decisions in implementing the government's policy are transformed into policy decisions.

138. The decision to design the Template RFP was similarly one that could have been left to the School Boards, but which the Ministry instead decided to take upon itself, hiring a consultant, PPI, to assist it to carry out the work. Designing a particular RFP document, including the evaluation criteria used, the scoring methodology, and the overall structure, is a classic example of an operational decision. It is not based on social, economic, or political considerations, but rather would normally be carried out by school boards and consortia on the basis of the type of service they want and in light of their local market conditions.

139. Like the decision to require RFPs and to create the Template RFP, the Ministry's direction to the Consortium that it use the Template RFP was an operational action, not a policy decision. Again, the specific features of a bid document would normally be within the operational purview of school boards. The Ministry cannot elevate the nature of the decision to one of "core policy" simply by taking responsibility for it.

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[109] Decision of Nolan J. at para. 10.

140. Moreover, requiring the Consortium to use the Template RFP when the Ministry knew that it was unfair, discriminatory, and would cause significant harm to small, rural operators was in clear breach of the government's stated policy objectives. The government's stated policy was that procurement be conducted "through an open, objective and transparent competitive process"[110] and it assured operators it would implement this in a way that would be "fair for operators of all sizes."

141. The Plaintiffs also plead that the Pilot and 2nd RFP processes, which were managed and controlled by the Ministry and its agents PPI, were seriously flawed and knowingly discriminatory. The implementation of an RFP known to be flawed and in breach of express assurances cannot be a "core policy decision". It did not involve weighing social, economic, and political considerations and the Ministry cannot claim to be making a policy decision when it is in fact violating the government's stated policies.

### 3. Cases Cited by the Crown Are Distinguishable

142. In its factum, the Crown primarily relies on three cases to support its argument that no *prima facie* duty of care arises or, if it does, that the Ministry's impugned actions are immune because they are core policy decisions. These cases are: *Granite Power Corp v. Ontario*, *Sagharian v. Ontario (Minister of Education)*, and *R. v. Imperial Tobacco Canada Ltd.*[111]

143. None of these cases assists the Crown.

#### *(i) Granite Power Corp. v. Ontario*[112]

144. *Granite Power* concerned claims in negligence, expropriation, and misfeasance in public office brought by a private utility, Granite Power Corp. The claim alleged that the Minister of

[110] Crown Supplementary Motion Record, Tab 1, p. 3.
[111] Crown Factum paras. 12-13, 25-35, and 40-43.
[112] [2004] O.J. No. 3257, 72 O.R. (3d) 194 (C.A.) ["*Granite Power*"].

Energy breached a duty of care owed to Granite by taking almost five years to decide whether to exempt Granite from the deregulation of Ontario's electricity market.

145. Importantly, Granite did not allege that the Minister made any representations to it, nor that the Minister failed to do anything he said he would do. Granite's main complaint was that the Minister's equivocation had caused it harm. The Minister eventually told Granite it would receive an exemption from deregulation. There was no allegation that the Minister failed to follow through on that promise.

146. By contrast, in this case it is the Ministry's own conduct that gives rise to the duty of care. The Plaintiffs plead that the Ministry made numerous direct representations to them, was aware of their reliance on its representations in making investments in their businesses, and encouraged their reliance in order to maintain a safe, efficient, and reliable source of student transportation in rural communities.

147. As the Court of Appeal noted in *Taylor*:

> No doubt, specific representations by a regulator to an individual, and reliance by that individual on those representations, will go a long way toward establishing a *prima facie* duty of care.[113]

148. In *Granite* the plaintiff failed to plead any specific representations, or reliance on those representations, and it was therefore unable to establish a *prima facie* duty of care. In this case, both of these elements are pled by the Plaintiffs.

149. The Court in *Granite* also considered whether the Minister's impugned actions were properly characterised as policy decisions or operational ones. The decision in question was the

[113] *Taylor* at para. 115.

Minister's "recommendation as to the nature and extent of the exemption Granite should receive."[114] The Court concluded this was a policy decision:

> In making the recommendation he did (assuming it was not the product of misfeasance in a public office), the Minister was not carrying out a predetermined government policy but determining instead what that policy should be in relation to Granite.[115]

150. The Minister's recommendation was whether and to what extent Granite should be exempted from the government's policy of deregulation. That is different in kind from the impugned actions of the Ministry in this case.

151. The Plaintiffs do not challenge the government's decision to implement competitive procurement (which is equivalent to the decision in *Granite Power* whether the utility should be subject to deregulation). Instead, the Plaintiffs challenge the Ministry's direct involvement in the School Boards' implementation of the competitive procurement policy by designing their RFP bid documents and controlling the actual procurement processes in the Pilot and 2nd RFPs.

***(ii) Sagharian v. Ontario***[116]

152. In *Sagharian* the plaintiffs brought an action for damages against Ontario for its decision not to provide the Intensive Early Intervention Program (IEIP) to autistic children over five years old and not to provide it in the public education system. The plaintiffs alleged breaches of sections 7 and 15(1) of the *Charter*, as well as breaches of fiduciary duty and negligence.

153. Two years earlier, in *Wynberg v. Ontario*,[117] the Court of Appeal heard an appeal from a trial decision dealing with nearly identical claims related to alleged *Charter* breaches and

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[114] *Granite Power* at para. 25.
[115] *Granite Power* at para. 26.
[116] 2008 ONCA 411 ["*Sagharian*"].
[117] (2006), 82 O.R. (3d) 561 (CA) ["*Wynberg*"].

negligence in the limited provision of the IEIP. In that case, the Court found that neither the *Charter* breaches nor the negligence claim had been made out.

154. With respect to the negligence claim, the Court in *Wynberg* reviewed the factual findings of the trial judge and agreed with her conclusion that the impugned decisions were based on policy considerations:

> …the Deskin plaintiffs' real complaint relates to Ontario's failure to provide intensive behavioural intervention consistent with the IEIP Guidelines for autistic children as part of the transition to school and as part of the special education program and not, as they characterize it, a series of operational failures in the implementation of the IEIP.
>
> We conclude that, rather than being a claim for operational failures in the implementation of a government program, **the Deskin plaintiffs' claim relates to government decision-making about the scope of the IEIP and the services to be provided within the special education system.**[118] [Emphasis added.]

155. In *Sagharian*, the issue before the Court was whether the decision in *Wynberg* disposed of the issues advanced by the Plaintiffs.[119] In finding that the negligence claim should be struck, the Court explicitly relied on the decision in *Wynberg*:

> This issue was specifically addressed in *Wynberg* at para. 255, where this court dismissed similar claims as relating not to operational failures, but rather to "government decision-making about the scope of the IEIP and the services to be provided within the special education system".
>
> I also agree with the motion judge's assessment that the allegations against Ontario regarding staffing and monitoring of the programs relate to policy decisions and not operational decisions. As found in *Wynberg*, these challenges relate essentially to the scope of the programs, rather than to their operation.[120]

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[118] *Wynberg* at paras. 254-55.
[119] *Sagharian* at para. 11.
[120] *Sagharian* at paras. 40-41.

156. In striking the plaintiff's negligence claim on the grounds that the impugned decision was based on policy, the Court in *Sagharian* was relying on its previous holding in *Wynberg*, which in turn was based on an assessment of the evidence that had been led at trial in that case.

157. In the words of Epstein J. in *Dalex*, there was a decided case directly on point from the same jurisdiction demonstrating that the very issue raised by the plaintiff had been squarely dealt with and rejected by the Courts.

158. The impugned decisions in *Sagharian* – not to provide the IEIP to children over five, not to provide the program in the public education system, and to devote limited resources to it – are fundamentally different from the Ministry's impugned actions in this case.

159. As the Court of Appeal held in *Wynberg* and *Sagharian*, whether or not to provide a service, the extent of the service provided, and the resources devoted to providing that service, are policy decisions. They are necessarily based on a weighing of social, economic, and political considerations. In neither case did the plaintiffs allege that the program itself caused them harm, for example by failing to properly care for autistic children. The alleged harm stemmed entirely from the government's failure to provide the program in the first place, or to harmonise it with the public education system.

160. By contrast, the Plaintiffs in this case do not challenge any failure to provide access to a program or service. Rather, they plead that the way in which the Ministry chose to implement, at the operational level of the School Boards, the government's competitive procurement policy caused them harm.

161. Designing the Template RFP and directly controlling the procurement processes of the School Boards bears no relation to the social and economic considerations at play in decisions regarding the provision of government services.

***(iii) R. v. Imperial Tobacco***[121]

162. In *Imperial Tobacco* the province of British Columbia brought claims against a number of tobacco companies seeking to recover health care costs for tobacco-related illnesses. The defendant tobacco companies brought a third party claim against the federal Crown in negligent misrepresentation for promoting the health benefits of low-tar tobacco over regular tobacco.

163. Based on the pleadings, the Court found that the Crown's representations to the tobacco companies, combined with the Crown's knowledge that the companies would and did rely on those representations, could establish a *prima facie* duty of care.[122] This was despite the Court's conclusion that the legislative scheme did not give rise to any private law duties owed by the Crown, only duties to the public at large.

164. The Plaintiffs in this case allege a *prima facie* duty owed by the Ministry arises for the same reasons as it did in *Imperial Tobacco* – direct representations to the Plaintiffs, coupled with their reasonable reliance on those representations and the Ministry's knowledge and encouragement of that reliance.

165. Turning to the policy stage of the analysis, the Court considered whether the Crown's actions were immune from liability on the basis that they were policy decisions based on social, economic, and political considerations. The conduct at issue was strictly limited to the

[121] 2011 SCC 42 [*Imperial Tobacco*].
[122] *Imperial Tobacco* at para. 52.

representation that low-tar tobacco was healthier than regular tobacco – the government's role in developing and marketing strains of low-tar tobacco was specifically excluded.[123]

166. The Court concluded that the Crown's representations concerning the health benefits of low-tar tobacco were immune from suit because they were part of a policy to promote public health by encouraging smokers to switch to low-tar cigarettes:

> … The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.
>
> In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes.[124]

167. In this case, the Ministry's representations are not expressions of the government's policy, but rather expression of how the Ministry was going to implement that policy.

168. The Plaintiffs have pled that the government's policy was that school boards adopt competitive procurement. The Ministry represented that when this policy was implemented at the school board level, it would be done in a manner that was fair to operators of all sizes. This representation was not an expression of pure government policy – it was an announcement that the Ministry would become involvement in the operational aspects of the competitive procurement policy.

### 4. Ministry Responsible for PPI's Actions

169. The Ministry requests that the Court strike out paragraph 84 of the Statement of Claim which pleads that the Ministry is responsible for the actions of PPI, its agent.[125] No argument is

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[123] *Imperial Tobacco* at para. 69.
[124] *Imperial Tobacco* at paras. 94-95.

advanced in the Ministry's factum as to why this pleading constitutes a radical defect that is certain to fail. In fact, this pleading is not addressed at all.

170. There are statutory provisions and common-law enabling a Court, at trial and with the benefit of a full factual record, to conclude that the Ministry is responsible for PPI's actions.

171. Section 5(1)(a) of the *Proceedings Against the Crown Act*[126] provides that the Crown can be liable, as if it were a person of full age and capacity, "in respect of a tort committed by any of its servants or agents". Section 1 defines "agent" to include "an independent contractor employed by the Crown".[127]

172. Liability of a person who employs an independent contractor for the negligence of the contractor can be founded in various legal theories:[128]

(i) **the person was negligent in hiring the contractor –** with the benefit of a full factual record at trial, a Court may conclude that the Ministry did not undertake due care in assessing the abilities of PPI to competently carry out its role in the Pilot and 2nd RFPs;

(ii) **the person was negligent in supervising the contractor –** with the benefit of a full factual record at trial, a Court may conclude that the Ministry did not undertake due care in supervising PPI during the Pilot and 2nd RFPs;

(iii) **the person hired the contractor to do something unlawful –** with the benefit of a full factual record at trial, a Court may conclude that the Ministry, by hiring PPI to carry out a seriously deficient RFP in direct violation of the Ministry's representations to operators, hired PPI to do something unlawful; and

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[125] Facts establishing PPI's liability are pleaded in multiple paragraphs. See for example paragraphs 21, 42, 47, 52-58 and 77 of the Statement of Claim.
[126] R.S.O. 1990, c. P.27 [*PACA*], ss. 1 and 5(1)(a).
[127] *Berendsen v. Ontario*, 2008 CanLII 1416 (Ont. Sup Ct.) at paras. 245-8.
[128] *Park Place Centre Ltd. v. Ultramar Ltd*., 2010 NSSC 39 at para. 59, discussing the reasons of McLachlin J. (as she then was) in *Lewis v. British Columbia*, [1997] 3 S.C.R. 1145 at para. 49 [*Lewis*].

(iv) **the person was under a non-delegable duty** – a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It stems from the rule that a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility by delegating it to an independent contractor.[129] The categories and situations where a non-delegable duty can arise are not closed.[130] Non-delegable duties can arise on public authorities as a consequence of statutory provisions or a special relationship between the authority and a vulnerable plaintiff.[131] In this case, with the benefit of a full factual record at trial, a Court may conclude that the Plaintiffs were vulnerable to the actions of the Ministry and that the Ministry cannot escape liability for PPI's actions by partially contracting out to PPI the running the Pilot and 2nd RFPs.

173. In light of the pleadings of PPI's wrongful conduct, the Ministry's close involvement in that conduct, and the various legal bases upon which a Court could conclude that the Ministry is responsible for PPI's conduct, it is far from plain and obvious that the Plaintiffs' claim alleging vicarious liability cannot succeed.

### 5. No Crown Immunity Under the *BPSAA*

174. At paragraphs 47-49 of its factum, the Ministry asserts that it is immune from liability for any of its impugned actions by virtue of s. 22 of the *BPSAA*. That section came into force, together with most of the *BPSAA*'s other provisions, on January 1, 2011, nearly a year after the events that give rise to the Plaintiffs' claim occurred.[132]

175. The provisions of the *BPSAA* also cannot have retroactive application. As explained in *Sullivan on the Construction of Statues*:

> **It is presumed that the legislature does not intend legislation to be applied retroactively** – that is, to be applied so as to change the past legal effect of a past situation. [Emphasis added.]

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[129] *Dalton v. Angus* (1881), 6 App. Cas. 740 (H.L.), at p. 829
[130] *Lewis*, supra note 128, at paras. 51-2.
[131] Elizabeth Adjin-Tettey, *Accountability of Public Authorities through Contextualized Determinations of Vicarious Liability and Non-Delegable Duties*, (2007) 57 U.N.B.L.J. 46 at pg 8. Also see *Park Place*, supra note 128.
[132] Ontario Gazette, January 1, 2011.

> This presumption is strong. **Normally it can be rebutted only if the statute or regulation in question contains language clearly indicating that it, or some part of it, is meant to apply retroactively**.[133] [Emphasis added.]

176. There is no such language in the *BPSAA* and it therefore cannot have retroactive application.

177. Even if the Court were convinced that the immunity provisions of the *BPSAA* did have retroactive application, the Ministry's conduct does not fall within them for two reasons. First, they provide immunity for "anything done or not done in accordance with this Act". The Ministry's actions that give rise to the Plaintiffs' claim were taken before the Act came into force, and therefore cannot have been done "in accordance with the Act".

178. Second, even if the Court were convinced that the Act was applicable at the relevant time, the Ministry's impugned actions were not prescribed by the Act or any associated regulations and therefore do not fall within the scope of the immunity provisions.

179. To be immune from liability, the actions in question must be done in accordance with the Act. There is nothing in the *BPSAA* or associated regulations requiring or even authorising the Ministry's involvement in School Boards' implementation of the government's competitive procurement policy. Moreover, the negligent and discriminatory way in which the Ministry implemented the policy would have been in violation of numerous provisions of the *BPSAA* and *BPS-Directive* requiring procurement processes to be fair, open, and transparent. Violating the *BPSAA* and *BPS-Directive* is manifestly not something "done in accordance with the Act or directives" and therefore cannot benefit from the immunity in s. 22.

180. Moreover, this very issue was addressed by Justice Tranmer on a Rule 21 motion brought by the school boards in the STEO Action. In dismissing the motion to strike, he held:

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[133] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis: 2008) at p. 669.

> In simple terms, if the directive required the Defendant to do something and the Defendant did it, then it would seem to be protected under this section. Similarly, if the directive required the Defendant to not do something, and the Defendant did not do it, then it would seem to be protected under this section. Arguably, this is the extent of the protection. **The dispute between the parties in regard to this section arises in the situation where the directive requires the Defendant to do something, but it does not do it. The Defendant's position is that that conduct is protected under the phrase "not done in accordance with this Act … or the directives." In my view, it is not plain and obvious that the Defendant is correct in this interpretation such that the Plaintiffs' claims must fail.**[134] [Emphasis added.]

181. The Ministry has intervened in the STEO Action and while it had not intervened at the time of the motion before Justice Tranmer, it did have representatives in attendance at the hearing of the motion.

182. Justice Tranmer's decision is also the only one to consider s. 22 of the *BPSAA*, or indeed any provision of that Act. The Ministry's alleged immunity is therefore based on novel and untested legislation, and this alone makes it inappropriate to strike the Plaintiffs' claim.

183. In *Rizmi* Holdings *Ltd. v. Vaughan (City)*,[135] the city brought a motion to strike the plaintiff's claim on the basis of language that was nearly identical to that in section 22 of the *BPSAA*. In refusing to strike the claim – a decision that was upheld on appeal – O'Marra J. concluded:

> The provision has never been judicially considered. The plaintiff's claim of malfeasance and abuse of public office and the defendant's claim of immunity raise novel legal issues that require a complete evidentiary record.[136]

184. This decision was specifically relied on by Tranmer J. in dismissing the Rule 21 Motion in the STEO Action:

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[134] Decision of Tranmer J. dated December 3, 2012 at para. 28.
[135] [2009] O.J. No. 2088 (Sup. Ct.); aff'd 2010 ONSC 1563 (Div. Ct.).
[136] *Rizmi Holdings* at para. 58.

> **The Plaintiffs submit that the interpretation by the Defendant of sections 22 and 23 leads to the absurd result that would immunize the Defendant from unlawful acts.** Counsel submits that misusing confidential information to shape a bid, or deliberately failing to comply with the directive, by way of examples pleaded, are not acts "done or not done in accordance with this Act." …
>
> The Plaintiffs rely on the decision of the Ontario Court of Appeal in *PDC 3 Limited Partnership v. Bregman + Hamann Architects* [2001] O.J. No. 422 for the principle that **where issues raised are important, legally novel and complex, they should be decided based on a full factual record, which allows the judge to make findings, which form the basis for the legal analysis and conclusions.** …
>
> The Plaintiffs also rely on the decision of this court in *Rizmi Holdings Ltd. v. Vaughan (City)* [2009] O.J. No. 2088, **where the interpretation of similarly worded legislation was in issue.** O'Marra J. noted that a motion under rule 21 must meet a stringent test. He noted in that case that the impugned section did not apply to acts of negligence, malfeasance or bad faith conduct alleged to have been committed for reasons or purposes unrelated to the Act. He stated that if it can be established that the acts or conduct of the Defendant or its staff that gives rise to the Plaintiffs' claim had nothing to do with the Act then the section would provide no protection. **As in the present case, the provision in question in that case had never been judicially considered. He held that the Plaintiffs' claim raised novel legal issues that required a complete evidentiary record. He relied on previous authority that had held that matters of law which have not been settled fully in our jurisprudence should not be disposed of at the motion stage of the proceedings. Factual underpinnings which can only come from a full trial are necessary for a valid construction of statutory words. He concluded that whether the legislation in that case barred the Plaintiffs' claims could be determined only after a full evidentiary record had been provided at trial.**[137] [Emphasis Added.]

185. There is no basis for the Ministry's position that the Plaintiffs' claims should be struck out because it enjoys immunity under s. 22 of the *BPSAA*. Not only is the *BPSAA* inapplicable to the facts of this case because it was not yet in force, but the very issue raised by the Crown has already been rejected by this Court on a Rule 21 motion in the STEO Action.

[137] Decision of Tranmer J. dated December 3, 2012 at paras. 20-22.

### 6. Limitations Act Does Not Apply

186. The Ministry appears to have abandoned its position, set out in the Amended Notice of Motion, that the Plaintiffs' claims relating to the 2nd RFP are barred by the *Limitations Act, 2002*. In any event, this argument could not succeed because the results of the 2nd RFP were not announced until January 20, 2010[138] and the Plaintiffs' claim was commenced on January 18, 2012.

187. At paragraphs 50-51 of its factum, however, the Ministry maintains its position that the Plaintiffs' claims in relation to the Pilot RFP are out of time. Section 5 of the *Limitations Act* states:

> **5. (1)** A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> **(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;** and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1). [Emphasis added.]

188. In this case, a claim in damages did not become the appropriate proceeding for the Plaintiffs to seek a remedy for their losses in the Pilot RFP until the 2nd RFP process had finished.

189. The Pilot RFP and the 2nd RFP were two parts of a single, ongoing competitive procurement process initiated by the Ministry for all the Consortium's student transportation

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[138] SOC at para. 59.

routes. The first stage of that process, the Pilot RFP, resulted in losses to the Plaintiffs, but those losses were not debilitating in terms of their overall effect on the Plaintiffs' businesses and the Ministry assured the Plaintiffs that it would remedy the situation.

190. In particular, the Ministry assured the Plaintiffs and other small, rural operators that it would properly and fairly evaluate the results of the Pilot RFP, that it would consult with operators, and that it would refine the tools and processes before the Consortium's remaining routes were competitively procured.

191. The Plaintiffs, who were entirely dependent on the Consortium and the Ministry for their livelihoods, relied on the Ministry's assurances that the deficiencies would be addressed and the next procurement process would treat them fairly. Had the process been fair, the Plaintiffs may well have recovered the losses they sustained in the Pilot RFP, eliminating any actual harm to them.[139]

192. In these circumstances, and having regard to the nature of the losses they had suffered, it was reasonable for the Plaintiffs to conclude that an action for damages against the Consortium and the Ministry was not the appropriate means to seek a remedy. Instead, they relied on the Ministry's assurances that the remainder of the Consortium's procurement process would be fair to them and would provide its own remedy.

193. Contrary to those assurances, the Ministry in fact directed the Consortium to engage in exactly the same process it had with the Pilot RFP. No attempt was made to analyse the results of the Pilot RFP, to consult with operators, or to refine the process and remedy its deficiencies.

[139] The Pilot RFP and 2nd RFP were both for routes beginning in September 2010, thus if losses in one were made up for by gains in the other, there would be no net loss to an operator.

194. It was only after the Plaintiffs lost all of their routes in the 2nd RFP as a result of the Ministry's negligence and flagrant breach of its assurances that it became clear that court proceedings were the only way to seek a remedy.

195. Limitations arguments are normally brought on summary judgment motions or at trial where the Court is able to hear evidence from the parties and assess the question of discoverability on a full factual record. In this case, the Crown has prematurely raised this argument on a Rule 21 motion where the Court has only the pleadings to rely on.

196. The Plaintiffs submit that, pursuant to s. 5(1)(iv) of the Limitations Act, it was not appropriate for them to bring an action for their losses in the Pilot RFP in circumstances where the Ministry assured them that it would remedy the process and that they would have a fair opportunity to make up their losses in the Pilot RFP. The Ministry must demonstrate that this position contains a radical defect making it certain to fail. The Plaintiffs respectfully submit it has failed to do so and that their claims in relation to the Pilot RFP should be assessed at trial on a full evidentiary record.

## IV. Order Requested

197. The Plaintiffs respectfully request an Order dismissing the Crown's motion and granting the Plaintiffs costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16th day of July, 2013.

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## Appendix "A"

| No. | Event | Actor | Nature of Action | Date |
|---|---|---|---|---|
| 1. | Policy decision that school boards should implement competitive procurement processes. SOC para. 14. | Government of Ontario | Government policy decision **- not challenged.** | 2008 |
| 2. | Representations to small, rural operators that school boards' implementation of competitive procurement would be fair to operators of all sizes. SOC para. 18. | Ministry of Education | Operational – the manner in which the Ministry would implement competitive procurement policy. | 2008 and 2009 |
| 3. | Directive that the School Boards and the Consortium must use an RFP for the two procurement processes. SOC paras. 21, 47. | Ministry of Education | Operational - how the School Boards should implement policy decision. | 2009 |
| 4. | Design of flawed and discriminatory Template RFP. SOC paras. 21, 42. | PPI Consulting and bureaucrats at Ministry of Education | Operational – creation of a particular bid document. | 2009 |
| 5. | Directive that the Consortium must use the Template RFP in both its procurement processes. SOC paras. 37, 52. | Ministry of Education | Operational – how the Consortium's two procurement processes would be run. | 2009 |
| 6. | Serious procedural flaws in the Pilot and 2nd RFP that rendered them unfair and discriminatory. SOC paras. 42, 52-58. | The Ministry, its agents, PPI, and the Consortium | Operational – Ministry's agents directing a particular Consortium's procurement process. | 2009 |

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 (Sup. Ct.)
2. *Arsenault v. Canada*, 2008 FC 299; aff'd 2009 FCA 242
3. *Attis v. Canada (Minister of Health)*, 2008 ONCA 660
4. *Berendsen v. Ontario*, 2008 CanLII 1416 (Ont. Sup. Ct.)
5. *Dalex Co. v. Schwartz Levitsky Feldman*, [1994] O.J. No. 1388 (Gen. Div.)
6. *Dalton v. Angus* (1881), 6 App. Cas. 740 (H.L.)
7. *Granite Power Corp. v. Ontario*, [2004] O.J. No. 3257, 72 O.R. (3d) 194 (CA)
8. *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594
9. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
10. *Lewis v. British Columbia*, [1997] 3 S.C.R. 1145
11. *Mondor v. Fisherman*, [2001] O.J. No. 4620 (Sup. Ct.)
12. *Park Place Centre Ltd. v. Ultramar Ltd.*, 2010 NSSC 39
13. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
14. *R.D. Belanger & Associates Ltd. et al. v. Stadium Corp.*, [1991] O.J. No. 1962 (CA)
15. *Research in Motion Ltd. v. Atari Inc.*, [2007] O.J. No. 3146 (Sup. Ct.)
16. *Rizmi Holdings Ltd. v. Vaughan (City)*, [2009] O.J. No. 2088 (Sup. Ct.); aff'd 2010 ONSC 1563 (Div. Ct.)
17. *Sagharian v. Ontario (Minister of Education)*, 2008 ONCA 411
18. *Sauer v. Canada*, 2007 ONCA 454
19. *Taylor v. Canada (AG)*, 2012 ONCA 479
20. *Wynberg, et al v. Ontario* (2006), 82 O.R. (3d) 561 (CA)

EPOCH'S GARAGE LIMITED et al.
Plaintiffs

-and-

UPPER GRAND DISTRICT SCHOOL BOARD et al.
Defendants

Court File No. CV-12-444388

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

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