

Case Name:

Yordanes v. Bank of Nova Scotia

Between

Constantino Yordanes, Martin Heisecke Rivarola,
Cecilia Alegria, Adelqui Antonio Carmelino and Isabel
Fiore, plaintiffs, and
The Bank of Nova Scotia and Scotia International Ltd.,
defendants

PROCEEDING UNDER the Class Proceedings Act, 1992

[2006] O.J. No. 280

Court File No. 04-CV-264256 CP

Also reported at:

78 O.R. (3d) 590

Ontario Superior Court of Justice**M.C. Cullity J.**

Heard: November 16-18, 21-22 and December 13-14,
2005.

Judgment: January 25, 2006.

(159 paras.)

Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Statement of claim struck with leave to amend — Plaintiffs commenced class proceeding on behalf of purchasers of bonds issued by an Argentine bank with alleged ties to Bahamian and Canadian corporations — Lengthy and complex statement of claim failed to adequately plead foreign law — Resulting uncertainty required that entire pleading be struck

International law and conflict of laws — Conflict of laws — Torts — Occurring outside jurisdiction — Evidence and proof — Proof of foreign law — Sufficiency of proof — Statement of claim struck with leave to amend — Plaintiffs commenced class proceeding on behalf of purchasers of bonds issued by an Argentine bank with alleged ties to Bahamian and Canadian corporations — Lengthy and complex statement of claim failed to adequately plead foreign law — Resulting uncertainty required that entire pleading be struck

Motion to strike a statement of claim — Plaintiffs commenced a class proceeding in Ontario on behalf of purchasers of bonds issued by a bank incorporated in Argentina — Bank defaulted on bonds issued to public in Argentina — Argentine bank was alleged to have been controlled by a Bahamian corporate subsidiary of a Canadian chartered bank, with the three corporations operated as a single economic entity — Lengthy and complex statement of claim referred to numerous provisions of Argentine statutes with varying degrees of detail — Pleading also sought remedies under the Canada Business Corporations Act, the Bank Act, the Competition Act, and referred to consumer protection legislation in Ontario — Defendants moved to strike the statement of claim as disclosing no reasonable cause of action — HELD. Motion allowed — Many of the references to foreign law were not sufficiently particular — Any foreign laws, decrees and resolutions on which defendants intended to rely had to be translated and

pleaded — Plaintiffs had to indicate clearly whether they intended to rely on foreign law or Ontario law — Significant interaction between the various references to foreign law produced an unacceptable lack of certainty such that entire claim was struck rather than individual provisions — Plaintiffs were given leave to file a fresh statement of claim — Leave withheld for claim for an oppression remedy under the Canada Business Corporations Act, which did not apply to a Canadian chartered bank — Leave also withheld for a claim under the Bank Act

Statutes, Regulations and Rules Cited:

Bank Act, 1991, S.C. 1991, c. 46, s. 79(4), s. 485

Bankruptcy Law,

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 2, s. 2(2), s. 24(2), s. 238, s. 241

Civil Code, Article 1109

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(a)

Commercial Companies Act,

Competition Act, R.S.C. 1985, c. C-34, s. 1.1, s. 36, s. 52, s. 61.6

Consumer Protection Law, Article 40, Article 65

Corporate Bonds Act,

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 121

Evidence Act, R.S.O. 1990, c. P.23, s. 25

Interpretation Act, R.S.C. 1985, c. I-21, s. 8(3)

Ontario Rules of Civil Procedure, Rule 20, Rule 21.01(1)(a), Rule 21.01(1)(b), Rule 25, Rule 25.06, Rule 25.06(4), Rule 25.06(8)

Statute of Westminster, 1931,

Stock Exchanges and Securities Markets Act,

Counsel:

Theodore P. Charney and Rachel Hepburn Craig -- for the plaintiffs

Harry C.G. Underwood, Dana M. Peebles and Andrew Faith -- for the defendants

[Editor's note: A corrected version was released by the Court January 30, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

REASONS FOR DECISION

¶ 1 **M.C. CULLITY J.**— The defendants launched an elaborate challenge to the plaintiffs' pleading in this action. They moved to strike numerous parts of the Amended Consolidated Statement of Claim (the "statement of claim") under rule 21.01(1)(b) as disclosing no reasonable cause of action or, pursuant to Rule 25, as failing to comply with the rules of pleading. In addition, the defendants take serious issue with the manner in which foreign law has been pleaded throughout the statement of claim.

¶ 2 The action was commenced by the plaintiffs under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). They seek to represent a class (the "Class") consisting of the purchasers of approximately US \$190 million of corporate bonds (the "notes") issued by Scotiabank Quilmes S.A. ("SBQ") in 1999 and 2001. SBQ is, or was, a commercial bank incorporated under the laws of Argentina, and the notes were offered to the public and issued there. It defaulted in its payments under the notes, became bankrupt and was placed in liquidation. At the material times it is alleged to have been controlled, directly or indirectly, by the defendant, Scotia International Ltd ("SIL"), a Bahamian corporation that is a subsidiary of The Bank of Nova Scotia ("BNS"). BNS is a Canadian chartered bank with its headquarters in Halifax, Nova Scotia and, it is pleaded, its corporate headquarters in Toronto. It is an essential part of the plaintiffs' case - and of considerable relevance to the issues in this motion - that these three corporations were managed and operated as single economic entity under the control, and at the direction of, BNS.

¶ 3 As well as difficult issues of fact that are likely to be raised when statements of defence are delivered, the action gives rise to complex questions of the conflict of laws as well as those involving the interpretation and application of Argentinean securities law, the extra-territorial application of Canadian statutes, and the laws of England, the Bahamas and New York. There are also threshold questions relating to the requirements of pleading in a case such as this, and the appropriateness of the procedure under rule 21.01(1)(b) for determining some of the issues raised in the motion.

The Statement of Claim

¶ 4 The statement of claim is lengthy. In addition to its 228 paragraphs extending over 100 pages, it incorporates five schedules consisting of extracts, in Spanish, from the prospectuses for the public offering of the notes, and English translations of what are alleged to be the relevant terms and conditions attached to them, and of extracts from Rating Reports of Standard & Poor and Fitch IBCA, respectively. The notes are not attached and neither their form nor their contents are described.

¶ 5 As well as seeking certification under the CPA, paragraph 4 of the pleading contains claims for declarations that:

- (a) pursuant to the Argentine Consumer Protection Law, BNS is a party to the prospectuses and the notes and is jointly and severally liable with SBQ to repay them;
- (b) SBQ, BNS and SIL are one economic unit, that SBQ acted as an agent for BNS and SIL, and that the corporate veil should be lifted to the extent of holding BNS and SIL liable to repay the debts owed to class members;
- (c) BNS and SIL conspired with SBQ to make uniform fraudulent and negligent misrepresentations to class members;
- (d) BNS is liable for damages pursuant to section 36 of the Competition Act, R.S.C. 1985, c. C-34 for breaching section 52 of that statute by its direct, or indirect, representations in promoting the sale of the notes;
- (e) BNS has engaged in oppressive conduct within the meaning of section 241 of the Canada Business Corporations Act, R.S.C. 1995, c. C-44 ("CBCA");

- (f) BNS committed a fraudulent preference against class members by stripping SBQ of its assets;
- (g) BNS breached section 485 of the Bank Act 1991, S C 1991, c. 46 and Argentine laws by failing to sufficiently capitalise and provide liquidity to SBQ; and
- (h) BNS, SBQ and SIL hold the benefits generated from the sale of the notes on a constructive trust for the benefit of the class

¶ 6 In addition to an order for an accounting and a disgorgement of benefits derived by BNS, SIL and SBQ from the sale of the notes, the plaintiffs seek general, special, consequential, punitive and exemplary damages, compound interest, specific performance or an order compelling BNS to purchase the notes, and rescission of an agreement under which certain of the class members assigned their rights against BNS to a trust (the "FRN trust"). The damages claimed are in excess of US \$1 billion.

¶ 7 Further claims are pleaded against BNS and SIL later in the statement of claim. These include breaches of disclosure obligations pursuant to Argentine securities laws, negligence, inducing breach of contract and unlawful interference with contractual obligations.

The Motion

¶ 8 While the defendants do not deny that the complexity of the issues complicates the task of pleading the plaintiffs' case, they submit that it does not detract from the importance to be attributed to the defendants' ability to discern the case they have to meet before they are required to plead. It is, their counsel submitted, imperative that the rules of pleading be observed. They submit that the statement of claim falls far short of the mark. They point to the plaintiffs' apparent intention to rely on numerous causes of action under the several different legal systems I have mentioned. They submit that many are deficient because of inadequacies in the pleading of foreign laws, or a failure to plead other material facts. Some, in their submission, are obviously untenable in law in that, for example, they are based on Canadian statutes that are not intended to have extra-territorial application, while the existence of others is said to be contrary to - or contradicted by - the contents of documents incorporated into the statement of claim, or by the plaintiffs' responses to a demand for particulars delivered by the defendants. They describe the statement of claim as fragmented and confusing, and replete with allegations devoid of context, and conclusions devoid of particulars.

¶ 9 The defendants' objections to the pleading are so numerous, and comprehensive, that their counsel submitted that the appropriate order would be to strike the statement of claim in its entirety. I intend to make such an order not only because many of counsel's specific objections appear to me to be well-founded but, also, because the paragraphs of the pleading tend to be inter-related. To strike them - or parts of them - individually would not be satisfactory because of the effect this would have on other parts of the pleading. Words would need to be inserted and this would involve an exercise in redrafting the statement of claim that the court cannot properly undertake. More fundamentally, the pleading is confusing in its unfocussed and overlapping references to different legal systems, concepts and causes of action, and its failure to identify clearly and precisely the material facts relevant to each. The following criticism, and conclusion, of Low J. in *Lysko v. Braley*, [2004] O.J. No. 4727 (S.C.J.) is, in my opinion, equally applicable to the statement of claim in this case:

The pleading in its present form is monstrously unwieldy and does not coherently set out the case the defendants have to meet. It does not properly serve the purposes of a pleading.

In light of the foregoing, I am of the view that the most appropriate disposition of the motion is to strike the pleading in its entirety and grant leave to the plaintiff to deliver a fresh statement of claim in accordance with these reasons. (at paras 66-67)

¶ 10 Many of the difficulties that would confront the defendants if they were expected to plead to the statement of claim in its present form relate to the manner in which foreign law has been pleaded. The extent to which details of the foreign laws have been provided varies enormously. In some instances - such as in the references to the Consumer Protection Law of Argentina in paragraphs 51-56 - a considerable amount of detail has been provided. In other instances, a particular statute, or decree, has been relied on to support a conclusion that the defendants had, or breached, a duty without any description of the provisions of the governing law. In several paragraphs the alleged effect of the laws of a number of different jurisdictions are referred to indiscriminately with the intention - nowhere indicated in the pleading - that whichever law is found to be applicable will be presumed to be the same as the laws of Ontario. Even where the intention to rely on the laws of Argentina as applicable to aspects of certain claims is evident, it is, at times, not clear whether such laws are intended to govern all aspects of the same claims. The problems created for the defendants when attempting to understand the case they have to meet with respect to particular claims on the basis of the descriptions of foreign law are exacerbated because of the necessity to cross-refer to other parts of the very lengthy pleading to identify the material facts, including the relevant rules of foreign law.

¶ 11 Provisions of foreign law referred to in a statement of claim are generally pleaded as material facts on which the plaintiff relies. Material facts must be pleaded with sufficient certainty to enable a defendant, and the court at trial, to identify the issues to be decided. The degree of detail and precision required can, obviously, be determined only on a case-by-case basis. In this case, the plaintiffs have referred to more than 50 provisions - Articles and sections - of numerous Argentine statutes identified by name, and more than 25 from other sources referred to variously as Decrees, General Resolutions, Laws and Acts with, usually, a number and year attached. In my judgment, even if it is sufficient to plead only the tenor and effect of the provisions - a question that I will consider - a significant number of these references would fall short of an acceptable degree of particularity and, as many of them interact and are relied on in combination, they - and other aspects of the pleading of governing laws - produce an unacceptable lack of certainty.

¶ 12 The principal deficiencies in the pleading of foreign law can be summarised as follows:

- (a) inadequate, and sometimes inconsistent, citations of foreign laws;
- (b) excessive generality of descriptions of the contents of some foreign laws and a failure to describe the contents of others;
- (c) a failure to plead inconsistent allegations relating to the choice of governing laws in the alternative;
- (d) references to the laws of multiple jurisdictions in connection with the same issue without identifying the appropriate jurisdiction;
- (e) where the relevance of a foreign law is asserted, a failure to indicate whether it is intended to rely on the presumption of similarity with Ontario laws;
- (f) where it is pleaded that the laws of Ontario apply, a failure to indicate whether this is as the governing law or, or the law to be applied in default of a sufficient, or any, pleading and proof of an applicable foreign law; and
- (g) pleading that the laws of Ontario, or those of a foreign law - and, notably, the laws of the Bahamas - apply where no factual basis for the application of such laws has been pleaded.

¶ 13 I do not discount the degree of difficulty involved in pleading foreign law to the extent required by the facts and the nature of the plaintiff's claims. Nor do I intend to disparage the quantity, or the quality, of the efforts made by plaintiffs' counsel to produce an acceptable pleading in this complex case. The plaintiffs have, however, chosen to pursue in this court their claims under foreign laws, with all the complications and difficulties created by the rule that such laws must be pleaded and proven as facts, and

not in the courts of Argentina - the jurisdiction with which the claims have the most obvious factual connection and where judicial notice could be taken of the laws on which, for the most part, the plaintiffs rely. The correct resolution of some of the issues raised by defendants' counsel is by no means obvious and I have not found clear answers in the authorities. The issues include, but are not confined to, the particularity with which foreign law is to be pleaded in a case such as this. They extend, also, to the manner in which the plain and obvious test in *Hunt v. Carey Canada Inc* (1990), 74 D.L.R. (4th) 321 (S.C.C.) is to be applied to determine whether a pleading discloses a reasonable cause of action under a foreign law. These questions are not answered by a simple recitation of the established rule that foreign law must be pleaded and proven as a matter of fact.

¶ 14 It is, I think, clear that special difficulties can arise if the plain and obvious test under rule 21.01(1)(b) is to be applied to a pleading that relies heavily on the contents of foreign laws. The pleading and proof of foreign law have been described as "the crux" and "at the fulcrum of private international law": Fentiman, *Foreign Law in English Courts*, (Oxford University Press, 1998), at pages 1 and 6. The rules for choice of law presuppose that foreign law can be satisfactorily pleaded and proven. The court cannot, however, take judicial notice of foreign law; it must be pleaded, and proven, as a matter of fact. It follows that, in applying rule 21.01(1)(b), and in determining whether a reasonable cause of action has been disclosed, the court must treat the contents of the foreign law, as pleaded, as the material facts relied on for this purpose. Unless, however, the court must accept, as a fact presumed to be correct, a plaintiff's assertion that a cause of action arises under foreign law - and, on that ground alone, dismiss a motion under rule 21.01(1)(b) - such material facts must be applied as prescriptive rules that are asserted to be - though at trial may be found not to be - the determinative rules of the foreign law. The question for the court would then be whether a reasonable cause of action is disclosed under the supposed rules when they are applied to the other facts pleaded. For this purpose the court must, in a sense, apply the supposed rules. This is a significantly different exercise than that performed by a court on a motion under rule 21.01(1)(b) when the existence of a cause of action is to be determined by an application of the laws of this jurisdiction, and no questions of foreign law are involved. This aspect of the proof of foreign law has prompted the comment that "the question of foreign law, although a question of fact, is a question of fact of a peculiar kind ...": *Parkasho v. Singh*, [1968] P. 233 (P.D.A.), at page 250. As the issues raised on this motion illustrate, all of the implications of the rule that foreign law must be pleaded and proved as a fact are by no means obvious.

¶ 15 Other special features of motions to strike under rule 21.01(1)(b) where foreign law has been pleaded relate to the choice of law and the application of the rules of pleading. The rules governing the choice of law are part of the common law of Ontario and I believe they cannot be ignored on a motion under rule 21.01(1)(b). If the plaintiffs have, for example, pleaded a cause of action under a foreign law and it is plain and obvious that the facts pleaded would not justify the application of such law, the pleading must be struck. For this purpose, material facts that could justify the plaintiffs' choice of such laws under the conflicts rules of Ontario must, in my opinion, be pleaded and any other relevant requirements of rule 25.06 must be observed. The fact that evidence might throw light on, and determine, the correct choice of law is not to the point. The question on this threshold pleadings motion is whether the plaintiffs' choice could be established by the facts pleaded on the assumption that they will be proven at trial.

¶ 16 In this connection, I should mention that, at the commencement of the hearing, I denied Mr Charney's request that certain of the issues raised by the defendants should be deferred to be dealt with at the hearing of the motion to certify the proceedings under the CPA. As it is accepted that the test to be applied under section 5(1)(a) of the CPA is the "plain and obvious test" applicable on motions under rule 21.01(1)(b), I saw no reason why all of the defendants' submissions on the application of the rule should not be heard together. It also appeared to me that, in view of the number and the nature of the defendants' objections to the statement of claim, and their counsel's submission that it should be struck in its entirety,

it would be undesirable to proceed to the certification stage until the status and contents of the pleading were clarified.

¶ 17 The other point is that, although the Rules of Civil Procedure must be applied for the purpose of a motion to strike, the manner of their application must reflect the substantive elements of the foreign law and not those of the forum. If, for example, liability in tort for negligent misrepresentation under a foreign system of law is pleaded, the substantive rules of that law as set out in the pleading - and not those of the law of Ontario - might well affect decisions on what the pleading must contain. The nature, and degree, of the difficulty of the exercise that the court has to perform, without the assistance of evidence - or, as on this motion, the text - of the foreign law must, I believe, increase the difficulty of obtaining an order to strike under rule 21.01(1)(b) by an application of the plain and obvious test. The question whether the text of a foreign law must be set out, or incorporated, in a pleading is considered later in these reasons.

¶ 18 The difficulties in adapting the plain and obvious approach to causes of action that are said to arise under foreign law are such that, while preparing these reasons, I have more than once doubted whether motions under rule 21.01(1)(b) - in which evidence is inadmissible - provide an appropriate procedure for determining whether a reasonable cause of action under foreign law has been disclosed in a pleading. A motion to determine a question of law under rule 21.01(1)(a), with leave to adduce evidence of foreign law, would be an alternative if the question can be distinguished from the one of fact involved in determining the contents of such law. Motions under this rule have been made in the past to determine whether a foreign law is applicable and, in some cases, the court has taken the next step and determined the effect of a foreign law on an agreed statement of facts: see, for example, *Craig v Allstate Insurance Co. of Canada* (2002), 59 O.R. (3d) 590 (C.A.) where the court construed a statute of the State of Florida and concluded that it did not negate a cause of action that had been pleaded. The procedure under Rule 20 could provide a further alternative.

¶ 19 I note, again, that if an express, or implied, plea that a cause of action existed under a particular foreign law is to be treated as itself a statement of fact that must be presumed to be correct, there would appear to be no room for an application of rule 21.01(1)(b) to determine whether a cause of action existed under such law. It would seem to follow that the procedures under rule 21.01(1)(a) or Rule 20 would have to be utilized if a party wished to have the question determined before trial. Whether or not that is so, it would, I believe, be preferable, as a general rule, to have such questions decided on the basis of evidence of the foreign law - rather than on the court's conclusion from a possibly erroneous, or incomplete, description pleaded - and, in consequence, I believe either of the alternative procedures would usually be more appropriate.

¶ 20 In what follows I have not found it necessary to address the submissions of defendants' counsel that particular causes of action, or particular legal consequences, are not supported by the description of foreign law pleaded - as distinct from their objections to pleas under the laws of Ontario, those relating to choice of law and those based on an inadequate, or improper, pleading of foreign law, which do not give rise to the special difficulties I have mentioned. The validity of such submissions may have to be determined in the future in the event that any revisions that may be made to the pleading do not, in the opinion of defendants' counsel, satisfactorily meet the objections they have made on this motion.

¶ 21 Contrary to the submissions of defendants' counsel, I am satisfied that the plaintiffs should be given leave to file a fresh statement of claim that addresses most of the deficiencies in the present pleading. For that purpose, I will consider the objections that defendants' counsel have levelled at it - other than those that I consider should be dealt with, if at all, when a further statement of claim has been delivered.

¶ 22 The hearing of this motion extended over six days and into a seventh. Further written submissions were received. In approaching its adjudication, I accept completely the following statements in *Touche Ross Ltd. v. McCardle, and Lysko*:

The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the defendant, or each defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. He must not be left to speculate or guess the particulars of the case alleged against him and of the remedy sought from him. He must not be left to ascertain this through some esoteric process of divination. (*Aristocrat*, at para. 27 per Epstein J.).

The purpose of pleadings is to define the issues for the parties and for the court. The pleadings govern the trial and the interlocutory proceedings. A case properly pleaded permits an efficient use of judicial resources and the parties' resources. Bad pleadings do the opposite and more. They are instruments of potential mischief in the litigation process (*Lysko*, at para. 64 per Low J.)

¶ 23 At the same time, I must remember the general principle that, on a motion such as this, pleadings are to be read generously. Moreover, in complex litigation it would be unreasonable to require the degree of clarity or simplicity that might readily be achieved in other cases. In *Hunt et al. v. Carey Canada Inc.*, at page 336, in the course of enunciating the "plain and obvious" test to be applied on a motion to strike, Wilson J. emphasised that the complexity of a proceeding should not be influential in denying a party the right to litigate a claim. The facts alleged must be assumed to have been proven and, in addition, it has been insisted repeatedly that questions of law that are novel, or unsettled in the jurisprudence, are not properly determined on a motion such as this. Each of these considerations is, I believe, apposite in this case.

Request for Particulars

¶ 24 Before considering the defendants' numerous objections to the statement of claim, there is one preliminary point that was referred to, but not pursued at any length at the hearing. This is whether the fact that the defendants demanded, and received, particulars with respect to a number of the allegations in the pleading estops them from now moving to strike.

¶ 25 In the course of his helpful - and often cited - discussion of the rules of pleading, Master Sandler stated in *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586 (S.C.) as follows:

Rule 25.06(1) mandates a minimum level of material fact disclosure and if this level is not reached, the remedy is not a motion for "particulars", but rather, a motion to strike out the pleading as irregular. It is only where the minimum level of material fact disclosure has been reached, that the pleading becomes regular. Thereafter, the discretionary remedy of "particulars" under rule 25.10 becomes available,

¶ 26 I do not believe it follows from that statement that a party must opt with finality whether to move to strike, or to demand particulars. A defendant might, for example, have concerns about the plaintiff's allegations and claims but be unsure whether they can be removed by particulars. The latter may serve to do this or, alternatively, to confirm the validity of the concerns. This is particularly likely where, as here, the style and structure of the pleading reflects the complexity of the issues on which the legal justification of the claims depends.

¶ 27 I have no reason to doubt the statements of defendants' experienced counsel that they have had difficulty in pinpointing, and separating, the different claims, and in identifying the allegations of

material fact relevant to each of them in the statement of claim in its original form, and as it passed through successive amended versions before the consolidated amended pleading was delivered. Having received some clarification in response to their demand for particulars, they determined that the pleading was deficient and that certain paragraphs should be struck without leave to amend, and others with such leave. In these circumstances, I do not believe they can be criticised for now bringing the motion, unless, of course, their claims are held to be entirely, or substantially, unfounded. Nor do I think it would be in the interests of the administration of justice to accept as a rule of practice that a motion to strike can never be brought after a demand for particulars has been made and a response provided. Parties should be encouraged, rather than deterred, from resolving matters of pleading without having recourse to the courts. The fact that, in the two cases to which Mr Peebles referred - *Hughes v Sunbeam Corp (Canada)* (2000), 2 C.P.C. (5th) 335 (Ont. S.C.J.) and *Lana International Ltd v. Menasco Aerospace Ltd* (1996), 28 O.R. (3d) 343 (G.D.) - the point was not addressed is, I believe, much more likely to be an indication that the courts, and counsel, were of the opinion that there is no such rule of practice, than an oversight.

Defendants' Objections to the Pleading

¶ 28 The defendants' challenge to the pleading extends to each of the claims for declarations and virtually all of the claims based on other causes of action, and for other remedies.

¶ 29 In considering the defendants' objections to the statement of claim I will, in general, follow the order in which they are set out in the skeleton outline used at the hearing.

A. Claims against SIL

¶ 30 Mr Peebles submitted that the statement of claim contains no material facts to support the causes of action pleaded against SIL and that it merely "lumps together" BNS and SIL as the subject of generalized allegations. Particulars of the representations allegedly made by SIL are, however, provided in paragraph 23 and those of the claim for conspiracy against BNS and SIL are provided in some detail in paragraphs 164A through 164F. In other parts of the statement of claim factual allegations are made expressly against the defendants, in the plural, and the basis on which SIL is said to be liable is described in various paragraphs.

¶ 31 It is, as I have already mentioned, an essential part of the plaintiffs' case that, in fact, the three corporations were controlled, managed and directed by BNS as one economic unit. It is also pleaded that, in law, SBQ was an agent of SIL which, in turn, was an agent of BNS. The existence of these pleas distinguishes the case from the authorities on which Mr Peebles relied. The particulars of the control exercised by BNS and SIL over the affairs of SBQ are provided in paragraph 22 and, although these point to the ultimate control of BNS, I do not think it was necessary to plead details of the manner and extent, if any, to which at particular times this was exerted directly, or indirectly through SIL.

¶ 32 I do, however, accept Mr Peebles' submission to the extent that he referred to the failure to distinguish claims made against SIL as an alleged alter ego of BNS from those for its own breaches of contractual or tortious duties. These claims are, indeed, lumped together and, as they are inconsistent, rule 25.06(4) requires that they be clearly pleaded in the alternative. In addition, although the claim for restitutionary remedies is made against SIL as well as BNS, it is not pleaded that the plaintiff suffered damages as a result of all of the contractual and tortious breaches of duty alleged against SIL. In paragraph 192 of the statement of claim, for example, allegations that damages and loss was suffered by class members are related solely to certain of the causes of action pleaded against BNS. To the extent that it is intended to claim damages from SIL for losses caused by its acts or omissions, the fact that such losses occurred must be pleaded. To the extent that this has not been done, the pleading against SIL is materially deficient.

B. Pleading Foreign Law.

¶ 33 The statement of claim contains numerous references to the laws of Argentina, including specific statutes such as the Civil Code, the Corporate Bonds Act, the Stock Exchanges and Securities Markets Act, the Commercial Companies Act, the Consumer Protection Law and the Bankruptcy Law. There are also general references to Argentine securities laws and Argentine jurisprudence, as well as to the laws of England, the Bahamas and New York.

¶ 34 Counsel were agreed that the content of foreign law must be pleaded and proven as a matter of fact. They disagreed on the requirements of pleading for this purpose. Two particular issues arise. The first concerns the manner in which the statutory, or codified, laws of a foreign jurisdiction must be pleaded; the second is whether it is permissible to plead that the laws of a foreign jurisdiction apply without more - on the assumption that this court will then apply the laws of Ontario.

¶ 35 On the first question, the decision of Senior Master Marriott in *The Bryant Press Ltd. v. Acme Fast Freight Inc. et al.*, [1951] O.W.N. 665 (H.C.) was that a particular statute, or code, and the sections relied on, should be cited with a statement of their tenor and effect added. The learned master referred to the apparent absence of decisions in Ontario and England and to the lack of uniformity in approach in decisions of courts in the United States. He referred also to the requirement that pleadings shall contain a concise statement of material facts, and he concluded that the standard he approved:

... is the method that would most likely be approved by our Courts, and if practicable should be the one to be used as it will give the defendants sufficient information as to the law relied upon to enable it to answer and at the same time it will be a concise statement of a material fact.

¶ 36 The views of the learned authors, Castel and Walker, in *Canadian Conflict of Laws* (5th edition, loose-leaf) are, I believe, essentially the same as those applied in *Bryant*. At para. 7.2, they state:

The party relying on the foreign law must set forth the effect of that law in the pleadings and adduce evidence to prove that law as a fact. In pleading a foreign statute it is necessary to state with reasonable certainty the particular provisions relied upon. Since in many provinces pleadings must contain a concise statement of the material facts upon which the party pleading relies but not the evidence by which they are to be proved, by analogy, a pleading of foreign law should contain a concise statement of the provision of foreign law relied upon, so that, with the facts pleaded, its effect upon the issue before the court is clearly shown. In *Ontario Stone Corp v. R.E. Law Crushed Stone Ltd.*, [[1964] 1 O.R. 303 (H.C.)] it was held that in Ontario the proper way to plead non-statutory foreign law is to set out affirmatively and in summary form a statement of that law without citations or references to particular authorities, followed by a recital of the facts related thereto.

¶ 37 The approach supported by *Bryant*, and Castel and Walker, is, also, I believe consistent with the reasoning and the order of the court in *Ascherberg, Hopwood & Crew Ltd v. Casa Musicale Sonzogno di Pietro Ostrali*, [1971] 1 W.L.R. 173 (Ch. D.), at 180-1; affirmed, [1971] 1 W.L.R. 1128 (C.A.) - although I note that there - in contrast to *Ontario Stone* (also a decision of Senior Master Marriott) - it was said that a reference to the foreign "legal authorities" was required. It is not apparent whether this is to be understood as referring to statutory sources, or case law jurisprudence, or both. If the latter was intended, I prefer the approach in *Ontario Stone* which, in effect, would regard the actual decisions of courts and tribunals as matters of evidence that are not to be pleaded. However, where material reliance is to be placed on jurisprudence that is alleged to establish a specific non-statutory rule or principle - as distinct

from decisions that reflect only a straightforward application of statutory provisions - its tenor and effect should be pleaded; cf., *MacDonald v. Travellers Indemnity Co of Canada* (1993), 101 D.L.R. (4th) 8 (Ont. C.A.) where judicial decisions of a foreign court tendered on an appeal were admitted on the basis of the rules governing the admission of fresh evidence.

¶ 38 In *Bryant*, the issue concerned the pleading of a statute and it was not suggested that different rules apply to statutes and other sources of law. Nor is any such distinction referred to by Castel and Walker. Mr Peebles, however, submitted to the contrary. In his submission, the authorities that I should follow require the parties to set out in their pleading the words of the statutes on which they intend to apply. For this purpose, he cited the decisions in *Hands v. Stampede International Resources Ltd., et al.*, [1971] 3 O.R. 44 (H.C.) and *Boulanger v. Johnson and Johnson Corp.* (2003), 32 C.P.C. (5th) 203 (Ont. Div. Ct.).

¶ 39 *Hands* - which is described in the defendants' factum as the leading Canadian case on the pleading of foreign law - was an oral decision on an appeal from a master's decision to deny an application for particulars. No previous decisions were cited and, apart from a reference to apparently generalized allegations of conspiracy, the facts of the case, and the contents of the pleading, are not disclosed. Three paragraphs of the latter evidently referred to a foreign statute but the particularity, if any, with which this was done is not indicated in the brief reasons for judgment. Richardson J. stated:

With respect to paras. 26, 27 and 28 I do not think it is sufficient to plead a foreign statute in this manner.

The rule requires a concise statement of the material facts. His pleading these paragraph did not tell me anything. If the plaintiff says the foreign statute applies he should set out that part of the statute and section in detail, and if he is alleging there has been a breach then specify in what manner and the application of the statute so that the court and the defendant will understand what he is pleading.

This application is granted and paras. 21, 26, 27 and 28 will be stricken out with leave to the respondent to amend if so advised. (at page 44)

¶ 40 In *Boulanger*, the question concerned the manner of pleading statutes of other provinces. After holding that such legislation must be proven at trial and that, for this purpose, section 25 of the Evidence Act, R.S.O. 1990, c. P.23 permitted copies to be admitted as evidence, Macdonald J. continued:

In my opinion it follows that, for pleadings purposes, the out-of-province statutes in issue are like allegations of material fact which must be stated concisely in the amended statement of claim, pursuant to rule 25.06(1).

An out-of-province statute should be pleaded by providing its name, its statutory citation, the province in which it is in force (if that is not otherwise apparent), the section numbers relied upon and the wording of those sections. While the identifying particulars of an out-of-province statute should appear in the amended Statement of Claim it may be helpful to provide the wording of the various sections in an appendix to the pleading. Reference should be made to such an appendix in the body of the amended Statement of Claim. (at page 215)

¶ 41 Like those in *Hands*, the reasons in *Boulanger* contain no citation of authorities, or discussion of possible alternative approaches, and the court did not address the situation where a foreign statute is in a language that will require translation in proceedings in this court. It can hardly be the case that the text of the statute must be set out in its original language. If the translation of the relevant provisions of the statute must be pleaded, the party pleading would, presumably, be unable to resile from, or vary, it without amending the pleading. If this is the effect of *Hands* and *Boulanger*, it offers a contrast with the

position adopted in English courts which I believe to be consistent with the principles applied in Bryant. In *Ascherberg*, the defendants were ordered to serve a re-re-re-amended defence

"... raising all points of the Italian law upon which they seek to rely, whether to explain the meaning of terms used in such of the agreements in the agreed bundle as were in the Italian language in the original or to state the effect under Italian law of such agreements, such pleading to include full particulars of the statements and propositions of Italian law including rules of construction relied on, with reference in each case to the Italian legal authorities relied on in support of it, and of any agreement and any passage or terms therein to which they are directed (at pages 180-181)

¶ 42 I do not understand this order to require the defendants to set out in their defence the actual text of the Italian statutes that were relied on. Earlier in his judgment, *Ungoed-Thomas J.* referred to the English practice of having translations agreed between counsel:

Agreed translations are designed to avoid translations by oral evidence and fall within Lord Esher M.R.'s observations that translations should themselves convey in English what the parties agreed to be the true meaning of the words. In the ordinary course, translations are agreed, as in our case, after the pleadings have been closed and they conform with the pleadings as they stand and do not run counter to them. If a party were contending for a meaning which is not that to be incorporated in the translation, then he should not agree to its being so incorporated. It would be misleading to the other side to do so. But the agreements under which translations are made are administrative arrangements with a view to assisting the trial of the issues between the parties and saving costs. They are not in my view of the nature of legally binding agreements from which the parties may in no circumstances be allowed to resile. In particular, they do not preclude, on the application of a party to the agreed translation, such amendments of the pleadings as are designed to ensure a trial of the real issues between the parties. And if, even apart from the amendment of pleadings, a party sought to resile from an agreed translation of some particular passage or meaning in it, the court should be concerned to ensure that the other parties were not prejudiced by being put in a worse position than they would have been if the applicant had not agreed to the translations and, if advisable, to ensure that the differences should be clarified, as should have been done in the course of producing the translations. (at pages 178-179)

¶ 43 In that passage, the learned judge was referring to translations of documents in Italian and not, specifically, to the words of the Italian statutes that were arguably applicable. However, just as the translations of documents would be evidence so, too, might the translations of statutes be considered to be evidence to be given in proof of the foreign law.

¶ 44 As, on a motion under rule 21.01(1)(b), the court must assume that the facts pleaded will be proven - and is not concerned with whether they are accurately described - one might wonder why a plaintiff should ever be required to plead the actual text of a foreign law. If, under the rule, the court is generally only concerned with the facts as they are asserted to be, why should it not apply the same approach when foreign law is pleaded? An answer, I believe, must be that the text of foreign laws will be required when this is necessary to achieve an adequate degree of certainty to enable the opposing party to plead. Moreover, if as the decision of the Court of Appeal in *Craig - and that in Croteau*, [2006] O.J. No. 158, 4049705 *Canada Inc., v Federal Trade Commission* (Court of Appeal, January 19, 2006) - suggest, the court can interpret the provisions of a foreign statute in some cases, it may be that in order to determine whether a cause of action under such a statute has been disclosed, it should require the text, and not merely a plaintiff's assertion of its tenor and effect.

¶ 45 Whether or not there is an inflexible rule that the text of all relevant statutory provisions must be set out - or annexed to - a pleading, it appears to me that, in some cases, this will be the most appropriate - as well as the most prudent and the simplest - approach for counsel to adopt.

¶ 46 I accept the submissions of defendants' counsel that, in order to enable their clients to plead in defence to the claims pleaded in this case, a translation of the text of the provisions of all statutes and other written laws, decrees and resolutions on which they intend to rely must be pleaded - and, preferably, incorporated by reference, rather than inserted in the statement of claim. In my judgment, this is the only way in which an acceptable degree of certainty can be achieved for the purpose of permitting the defendants to plead. The number of the references to foreign law and the interaction between them when they are relied on in combination, presents an unacceptably confusing picture. I doubt whether the burden this will impose on plaintiffs' counsel will be any greater than that which would be involved in ensuring that a description of the contents of the laws - one that would be binding on the plaintiffs at trial - was both an accurate and adequate recitation of their tenor and effect. Particulars of foreign jurisprudence are to be provided only where the plaintiffs have pleaded reliance on it. In such cases, it will be sufficient to identify it and to describe the principles or propositions it is alleged to establish.

¶ 47 The other preliminary issue on which counsel disagreed is whether it is permissible for the plaintiffs to plead reliance on the laws of particular jurisdictions without identifying particular laws or legal propositions. They have, for example, referred in different parts of their pleading to the laws of England, the Bahamas and New York without further detail or elaboration. Mr Charney explained that this was done on the assumption, and with the intention, that, in the absence of evidence of such laws, the laws of this jurisdiction will be applied.

¶ 48 Such references do not satisfy the rules for pleading of foreign law that I have mentioned. The defendants are entitled to insist that the plaintiffs' position with respect to foreign law is indicated clearly in their pleading. If the plaintiffs intend to rely on the laws of Ontario, they should not plead that the laws of other jurisdictions apply without, at least, also pleading that they are the same - or will be assumed by the plaintiffs at trial to be the same - as the relevant laws of Ontario.

¶ 49 The point was made clearly by Popplewell J. in *Glasgow University v. The Economist*, [1990] E.W.J. No. 777 (Q.B.). The learned judge was concerned with the requirements of pleading foreign law allegedly applicable to the tort of defamation but I believe the principle he stated has general application.

All a plaintiff has to do is to say that the tort is actionable in another country. He may if he so wishes, affirmatively set out what the law in that foreign country is in order to support that plea. If he chooses so to do of course he must plead the facts and matters upon which he relies. But he does not have to, because until and unless foreign law is shown by the defendant to be different by proper evidence the court will presume that English law applies and will apply it. ... The position is, in my judgment, abundantly clear now from the authorities to which I have referred; the plaintiff need only set out that it is actionable by the law of the foreign country and then say there is a presumption. If he chooses to do that, it is then for the defendant to raise the issue that the foreign law is different from English law.

¶ 50 The presumption to which Popplewell J. referred was that, unless foreign law is pleaded, it will be presumed to be the same as English law. The language of presumptions in this context is criticised by Dicey and Morris, *The Conflict of Laws* (13th edition, 2000), at para. 9-025 on the ground that there are exceptional cases in which English law has not been applied. This criticism is echoed in Castel and Walker but it is not, I think, one of any substance. Whether or not one speaks of a presumption of similarity, the general rule in this court is that if the contents of foreign law have not been pleaded, the

laws of Ontario will be applied unless the case falls within one of the exceptions that have been recognized in the decisions. The latter are more numerous than is suggested in Dicey and Morris: see Fentiman, *op. cit.*, at page 147 and *Shaker v. Al-Bedrawi*, [2002] E.W.J. No. 4521 (C.A.), paras 64 and 66-68. The necessity to indicate clearly whether the plaintiffs intend to rely on evidence of foreign law, or an application of the laws of Ontario, is particularly apparent in this case where the statement of claim is replete with references to different laws of Argentina described with significantly varying degrees of particularity, and general unparticularised references to the laws of Ontario, England, the Bahamas and New York. The defendants' difficulties in framing their statements of defence - difficulties that I believe are very real - are increased by the plaintiffs' failure to plead in the alternative. Liability for negligent misrepresentation is, for example, alleged indiscriminately to exist under the common law of Ontario and the Bahamas, as well as the Argentine Civil Code, without any preference for one system of law, or specific identification of the factual basis for choosing one system rather than another. It is the foreign law that is alleged to govern a particular issue that must be pleaded. In my opinion a plea that the laws of an unspecified one of a number of identified jurisdictions will be applicable falls short of an acceptable degree of certainty. A plea that the laws of more than one jurisdiction apply would be even more objectionable. As Castel and Walker state (at para. 35 8):

... in a choice of law determination, there can be only one applicable law for a particular issue.

¶ 51 In a case where the problems of choice of law may be crucial, and are undoubtedly complex, I do not believe it is sufficient simply to invite the defendants - and the court at trial - to select one of the competing jurisdictions identified in the statement of claim. The plaintiffs must, in my opinion, either plead that the laws of a particular jurisdiction apply - either without more, or in the alternative to those of other identified jurisdictions - as well as the factual basis for each such plea, or rely specifically on the presumption of similarity. Rule 25.06(4) permits a party to make inconsistent allegations in a pleading but only "where the pleading makes it clear that they are being pleaded in the alternative"

C. Contractual Claims

¶ 52 The contractual claims pleaded against BNS are essentially that:

- (a) it was a party to the offer and, when the offer was accepted by purchasers of the notes, BNS became bound by its terms and conditions - including those relating to the payment of interest and the repayment of principal; and
- (b) it had specifically agreed to ensure that SBQ would not default in its contractual obligations.

¶ 53 The statement of claim uses the words "notes" and "bonds" interchangeably and refers to "the bond agreement" as being "the terms and conditions of the loan which were attached to the bonds". As I have indicated, it does not disclose whether any terms or conditions were set out in the notes, or whether any were expressly incorporated in, or physically attached to, them. The terms and conditions pleaded are generally attributed to statements in the prospectuses and, to some extent and largely by implication, in the Rating Reports. In a response to a request to inspect documents, the plaintiff stated that "the documents forming the bond agreement are the prospectuses and the Rating Reports".

¶ 54 Although defendants' counsel submitted that the plaintiffs had pleaded the existence of three separate contracts - the notes, the bond agreement, a statutory contract imposed on the parties under the Consumer Protection Law of Argentina - as well as certain collateral contracts - I do not consider this to be a fair, let alone a generous, interpretation of the statement of claim. I believe it is sufficiently clear that the references to the bond agreement are simply a compendious method of referring to the contractual

obligations and rights created by the terms and conditions governing the sale of the bonds. These terms and conditions are, allegedly, to be found in the prospectuses and the Rating Reports as well as in certain overriding laws of Argentina on which the plaintiffs rely heavily, and on which the validity of their contractual claims very largely depends.

¶ 55 In the submission of defendants' counsel, it is plain and obvious that the "bond agreement"- in the sense in which I have explained that term - is governed by English law and not the laws of Argentina and, for that reason, that the claims based on contract must be struck from the pleading.

¶ 56 It is pleaded that "the terms and conditions attached to the notes" - that is, the bond agreement as defined in the statement of claim - contain both an English language clause and a choice of law clause. The latter is set out in a translation of a paragraph of the prospectuses and, although this is not stated, I believe the same is the case with the English language clause. In para. 49E of the statement of claim this is said to provide as follows:

Notwithstanding other public translations into other languages made for the approval of any supervisory authority, the original terms and conditions attached to the notes will be written in the English language, which will prevail in case of any possible translation discrepancy. However, for administrative purposes and as regards approvals by the CNV, the Spanish version of the prospectus, the note conditions and any other document related to the issue, will prevail

¶ 57 While the reference to the "original" terms and conditions appears to indicate the existence, or intended existence, of an authorised translation of the bond agreement, it is pleaded that the plaintiffs have not received any such translation. The following is the translation of the choice of law clause as set out in para. 49G of the statement of claim:

The law of corporate bond governs the requirements for the notes to qualify as corporate bonds under the same. The authorization in issue of the notes and the CNV approval as regards to the offer of the notes, as well as certain aspects related to the meetings of holders, will be equally governed by the Argentine law. Any other aspect related to the notes will be governed by, and will be construed in accordance with the laws of England or any other law which may be specified in the applicable pricing supplement. Noteholders will be entitled to institute the executive proceedings according to section 29 of the Law of Corporate Bonds.

¶ 58 In the submission of counsel for the defendants, the meaning of the paragraph is clear: all questions relating to the rights and obligations and the liability of BNS to make payments under the terms and conditions of the notes are to be governed by the laws of England. The only exceptions relate to the requirements for the notes to qualify as corporate bonds under Argentine law, regulatory approval in connection with the offering and certain matters relating to meetings of noteholders. It must follow, counsel submitted, that the plaintiffs' attempt to rely on any laws of Argentina to fix BNS with contractual liability to make payments under the notes could not possibly succeed. There is obvious force in the submission if, as I believe to be correct, the choice of law clause must be interpreted, on this motion, in accordance with the rules of construction that would be applied if Ontario's laws were applicable. It is not pleaded that, contrary to its plain meaning, the laws of any jurisdiction other than those of England govern its interpretation and, at least in the absence of admissible evidence of English rules of construction, the rules recognised under the laws of Ontario must, I believe, be applied. This was the approach adopted by Strayer J. in *Ontario Bus Industries Inc v. The Calumet*, [1991] F.C.J. 535 (F.C.T.D.), at paragraph 10 and note 9. The decision was affirmed by the Federal Court of Appeal: [1992] F.C.J. 1085. See, also, *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime*

S.A., [1971] A.C. 572 (H.L.), which suggests that English courts would apply the rules of construction of the *lex fori* in all cases. Lord Diplock stated (at page 603):

The first stage, therefore, when any question arises between parties to a contract as to the proper law applicable to it, is to determine whether the parties intended by their contract to exercise any choice at all and, if they did, to determine what was the system of law which they selected. In determining this the English Court applies the ordinary rules of English law relating to the construction of contracts.

¶ 59 Applying that principle, or the approach in *The Calumet*, I am satisfied that it is plain and obvious that the parties intended that their rights and obligations *inter se* under the bond agreement would be governed by the laws of England and not by those of Argentina. Such matters include the question whether BNS is bound by, and has obligations and liability under, the bond agreement.

¶ 60 Plaintiffs' counsel provided a number of grounds on which I should refrain from attempting to construe the choice of law clause. I do not accept that the absence of an authorised translation, and the possibility that the one provided by the plaintiffs is inaccurate, are sufficient. The pleading must stand or fall on the translation pleaded and, if it is imperfect, this would be a reason for amending the pleading and not a question that should appropriately be left to the trial to be decided on the basis of the evidence then adduced. Similarly, the submission that, to determine the meaning of the reference to "any other aspect relating to the notes", the court would first need to be apprised of the contents of the laws of Argentina relating to corporate bonds and securities, merits the short answer that if, and to the extent that, the plaintiffs assert that these are relevant to the interpretation of the clause, they should have been pleaded.

¶ 61 A more persuasive reason advanced by plaintiffs' counsel for deferring the question of choice of law to the trial is the existence of a supposed rule that, even an express selection of a governing law by contracting parties, will not be applied under the conflicts laws of Ontario if it was not *bona fide*, or motivated by an attempt to evade the mandatory laws of the jurisdiction with which the contract was objectively most closely connected.

¶ 62 In their *factum*, plaintiffs' counsel cited the following passage from *Castel and Walker*:

Where the parties have expressly selected a governing law, there is no difficulty in identifying the "law intended by the parties." That law will govern the contract provided the choice is *bona fide* and legal, and there is no reason for avoiding the choice on the ground of public policy. The law of a particular place may be selected to govern a contract unconnected with it, particularly when this occurs as an incidental effect of the inclusion of arbitration or choice of jurisdiction clauses. However, if the parties choose a legal system with which the transaction has no connection at all, the *bona fides* of their choice may be in doubt and the court may disregard it. ... Further, where the choice has been made to evade the mandatory provisions of the system of law with which the transaction, objectively, is most closely and really connected, the choice will be disregarded. (para. 31.2a)

¶ 63 The exceptions to the general rule of deference to an express choice of law in that passage are supported, for the main part, by citations of English and Australian decisions. Neither the learned authors, nor the very few Canadian cases, attempt to elaborate on, or analyse, the meaning of *bona fides* in this context.

¶ 64 There is nothing in the pleading here to connect England with the bond agreements and I have no doubt that, judged objectively, Argentina is the most closely connected jurisdiction. Moreover, it is

expressly pleaded that Article 65 of the Consumer Protection Law of Argentina provides that parties to an agreement entered into in Argentina cannot contract out of those laws when the agreement involves the regulation of consumers' rights that are matters of public policy. It is pleaded further that jurisprudence in Argentina treats a public offering of bonds to be a matter of public policy.

¶ 65 The statement of claim contains no allegation that the choice of English law was not made bona fide, or that it was made with an intent to avoid the consumer protection laws of Argentina. In my opinion, this omission is fatal to the contractual claims against BNS for the purposes of this motion. If the plaintiffs wish to put the bona fides of the defendants, or their intention to evade the laws of Argentina in issue, they must plead this so that the defendants can plead in response and adduce evidence of the reasons why English law was chosen. To the extent, therefore, that the contractual claims against the defendants rely on the laws of Argentina, the relevant paragraphs must be struck. I do not know whether the plaintiffs will wish to amend the statement of claim to plead the matters I have mentioned, but leave is granted for this purpose if they wish to do so.

¶ 66 It would not be appropriate to embark on a consideration of whether a simple amendment of the kind mentioned would satisfy the requirements of rule 25.06(8) and, if so, whether - by itself - it would be sufficient to resist a further motion to strike. I note, however, that there may be difficult questions of law and fact involved in determining whether a reason for choosing a foreign law was bona fide in the sense, for example, of engaging legitimate commercial, legal, political or economic considerations. Attention might also be required to the sense in which foreign laws should be characterized as mandatory and not merely rules of law that would be applied as part of the objectively determined proper law if no express choice of law had been made. I note, further, that in earlier editions of Dicey and Morris - before the subject was affected by international conventions to which the United Kingdom is a party - the learned editors suggested that an exercise of a residual judicial discretion may be involved in determining whether to give effect to a choice of law clause: see, for example, 9th edition, 1973, at page 731. The appropriateness of addressing these questions on a motion to strike would need to be considered: see the comments of Le Dain J. in *United Nations v. Atlantic Seaways Corp.*, [1979] 2 F.T.R. 541 (F.T.R.), at para. 27.

¶ 67 In addition to their objections based on the conflict of laws, the defendants advanced numerous other grounds for finding that the contractual claims do not adequately disclose a reasonable cause, or causes, of action. Several of their submissions are vitiated by what I consider to be an erroneous insistence that the pleading asserts the existence of three separate contracts - in addition to the alternative claim based on collateral contracts or warranties - of which the bond agreement is only one.

¶ 68 Other objections of the defendants appeared to be based on an assumption that the laws of Ontario, and not the laws of Argentina, govern matters such as the implication of contractual terms, the persons who may be bound by a contract, the matters that may properly be considered in construing contractual terms and the existence of collateral contracts.

¶ 69 For the purposes of this motion I can only decide whether reasonable causes of action have been disclosed by reference to the governing law as pleaded. The only way in which the laws of Ontario could apply would be in default of the pleading and proof of English law. The plaintiffs have, however, pleaded on the basis that the laws of Argentina apply to the contracts and the relevant parts of the statement of claim will be struck with leave to amend. I do not know what, if any, amendments will be made, or if the plaintiffs will be able to plead the application of Argentinean laws satisfactorily. This will require them not only to plead the text of the allegedly applicable statutes, but also to identify clearly the issues to which they will apply, and to do so in accordance with the rules of the conflict of laws applied in this court. I am satisfied that, unless and until this is done, it would be an inappropriate and a premature and, possibly, useless exercise to attempt to determine whether reasonable causes of action have been

disclosed under the laws of Ontario by default.

D. Collateral Contracts or Warranties

¶ 70 I reach the same conclusions with respect to the reliance on Argentine laws to support the plea of collateral contracts, or warranties, arising from alleged representations contained expressly, or impliedly, in the prospectuses and Rating Reports. As I read the statement of claim, this plea is made in the alternative to the claim that the representations constitute promises that are part of the bond agreement. On either view, it is an aspect or matter "related to the notes" within the meaning of the choice of law clause and, on the facts as pleaded, is governed by English law.

E. Claims Based on Canadian Laws

¶ 71 The statement of claim refers to provisions of three Canadian statutes: the CBCA, the Bank Act and the Competition Act. In addition, there is a reference to "consumer protection legislation in the province of Ontario". In the submission of the defendants, each of these references should be struck from the pleading on the ground that it discloses no cause of action. I will consider them in turn.

1. The CBCA: sections 238 and 241

¶ 72 The plaintiffs claim a declaration that they are complainants within the meaning of section 238 of the CBCA and that BNS has engaged in oppressive conduct within the meaning of section 241 of the statute. As the oppression remedy contained in section 241 applies only to conduct "in respect of a corporation" and section 2 of the Act defines a corporation as a body corporate that is incorporated, or continued under the CBCA, the defendants are, in my opinion, correct in their submission that it has no application to BNS - a chartered bank governed by the Bank Act: see *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd* (1997), 54 Alta. L.R. (3d) 183 (Q.B.), at pages 187-192.

¶ 73 Similarly, while SIL and SBQ may be "affiliates" of BNS within the meaning of section 2(2) of the CBCA, section 241(2) applies only to affiliates of a corporation. Accordingly, the claim in paragraph 4(f) of the statement of claim must be struck.

¶ 74 No authorities were cited by plaintiffs' counsel and I know of no principle that would permit me to legislate by reading into the Bank Act an analogous remedy based on equity and good conscience. I was invited to do just that - or to create such a remedy independently of the Bank Act - but it would, I believe, be to push judicial activism beyond permissible limits.

2. The Bank Act: sections 79(4) and 485

¶ 75 Para 117 of the pleading misstates the terms and effect of section 79(4) of the Bank Act and must be struck. Paragraph 4(h) claims a declaration that section 485 of the Act was breached by the failure of BNS to sufficiently capitalise, and provide liquidity to, SBQ. No other remedy is claimed for the alleged breach of the section and plaintiffs' counsel submitted at the hearing that its relevance lies in the light it throws on the defendants' standard of care.

¶ 76 While the existence of section 485 may have some evidential relevance to the standard of care imposed by Canadian law on a Canadian bank, I will indicate later in these reasons why, in my opinion, the laws of Argentina, and not those of Canada, govern the claims against the defendants for negligence. On that basis, the section lacks the minimum requirement of relevance to support the claim for a declaration in paragraph 4(h) and it, too, will be struck.

3. The Competition Act: sections 36 and 52

¶ 77 In paragraph 4(e) of the statement of claim, the plaintiffs claim a declaration that BNS breached section 52 of the Competition Act by making representations in promoting the sale of the notes, and, in consequence, is liable for damages pursuant to section 36 of the Act.

¶ 78 Section 36 creates a cause of action for loss or damage suffered as a result of conduct that is contrary to Part VI of the Act. Pursuant to section 52, such conduct includes making false or misleading representations to the public for the purpose of promoting any business interest or the supply or use of a product.

¶ 79 Counsel for the defendants submitted that the "public" referred to in section 52 is the Canadian public and not persons in Argentina, Paraguay or elsewhere where the notes were marketed. For this purpose, they relied on section 1.1 of the Act and the presumption against the extra-territorial application of Canadian statutes. Section 1.1 is as follows:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

¶ 80 Despite the reference to the Canadian economy, I do not believe the section necessarily indicates an intention to confine provisions such as section 52 to the public in Canada. The imposition of high standards of conduct on Canadian corporations and banks doing business outside Canada would not be inconsistent with the expansion of opportunities for Canadian participation in world markets and, conceivably, could enhance it.

¶ 81 More telling, I believe, is the presumption against extra-territoriality in the absence of any indication in the statute that section 52 was intended to apply to representations made to persons outside Canada and the express inclusion in other sections of indications that their extra-territorial application was intended. The defendants pointed to section 46 that makes it an offence for a corporation, wherever incorporated, that carries on business in Canada to implement in Canada a communication from a person outside Canada for the purpose of giving effect to a conspiracy entered into outside Canada that would have contravened another particular section of the Act if had been entered into in Canada. The defendants referred also to section 61(6) which makes it an offence for a person to attempt - as a condition of doing business with a supplier within or outside Canada - to induce the supplier to refuse to supply products to particular persons because of their low pricing policy. I note that, without reference to the presumption against the extra-territorial application of statutes, section 61(6) could be construed as applying to cases where all persons mentioned were at all material times outside Canada, and no connection with Canada existed.

¶ 82 The existence of the presumption is well-established in English and Canadian law although I note that Dicey and Morris (at para. 1-034) refer to it with somewhat muted enthusiasm. In *Jefferys v. Boosey* (1854), 4 H.L.Cas. 815, for example, Lord Brougham stated (at page 970):

Generally, we must assume that the legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners

in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments.

¶ 83 Similarly, in *Arcadi v. The King*, [1932] S.C.R. 158, at page 159, Rinfret J. stated:

... the principle is that general words in a statute refer only to persons or things within the territory, unless the contrary intention is shewn.

¶ 84 The principle was stated even more emphatically in *Attorney-General of Alberta et al. v. Huggard Assets Ltd. and Attorney-General of Canada et al.*, [1953] 3 D.L.R. 225 (P.C.) with respect to an Imperial statute in force in Canada:

An act of the Imperial Parliament today, unless it provides otherwise, applies to the whole United Kingdom and to nothing outside the United Kingdom ... (at page 233)

¶ 85 The question whether a contrary intention exists is one of statutory construction and, on general principles, it can be found an express words, or necessary or reasonable implication. This is reflected in the words of section 8(3) of the Interpretation Act, R.S.C. 1985, c. I-21, which addresses the construction of Canadian statutes enacted prior to the Statute of Westminster, 1931.

¶ 86 There is, of course, no doubt with respect to the legislative competence of the parliament of Canada to enact legislation having the effect for which the plaintiffs contend. BNS is, moreover, resident in Canada and, to that extent, the statute would not, on the plaintiffs' interpretation, have extra-territorial effect. The questions remain, however, whether it sufficiently disclosed an intention to confer rights and remedies on persons in a foreign country and whether it intended to do this where the conduct referred to in section 36 occurred there.

¶ 87 Counsel did not refer me to any decisions that are directly in point or, indeed, to any that bear on the application of the presumption in even remotely analogous circumstances. In these circumstances - and as the question is of some difficulty and its importance is unlikely to be confined to the facts of this case - I believe it is one that should not be disposed of at this stage of the proceedings: *R.D. Belanger and Associates Ltd. v. Stadium Corp of Ontario Limited* (1991), 5 O.R. (3d) 778 (C.A.), at page 782; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)

¶ 88 In making the above comments, I have assumed that, if the interpretation of the Competition Act advanced by the plaintiffs is correct, it would displace the normal rule that tortious liability is governed by the place where a tort was committed - the liability created by section 36 being, in my opinion, properly characterized as a tort for the purposes of the conflict of laws. A Canadian statute that is intended - expressly or impliedly - to apply to Canadian residents who make false or misleading representations abroad might well, I believe, override the choice of law rules otherwise applicable in this court in respect of such conduct: see *Boissevain v. Weil*, [1950] A.C. 327 (H.L.); and *Castel and Walker* (4th edition, 1997), para. 11c.

¶ 89 The defendants also raised issues with respect to the application of limitation periods to the claims made under the Competition Act. I believe that plaintiffs' counsel were correct in their submission that it would be premature to address these defences before the defendants have pleaded. If and when they plead that the claims are statute-barred, and the plaintiffs reply, issues of discoverability and concealment may be raised.

4. Ontario's Consumer Protection Laws.

¶ 90 Leaving no stone unturned, the defendants asked me to strike a statement to the effect that the Consumer Protection Law of Argentina "engages the same type of policy considerations and rules of interpretation as would legislation deemed to be consumer protection legislation in the province of Ontario". Counsel for the plaintiffs indicated at the hearing that this statement was inserted merely by way of a general explanation and that no reliance on the consumer laws of Ontario was intended. Although the statement is, in my opinion, rather innocuous, I believe the defendants are entitled to object that they should not be placed in a position where they will be compelled to decide whether to plead in response to it. Accordingly, it should be struck.

F. Promissory Estoppel

¶ 91 The defendants moved to strike paragraphs 58-58C of the statement of claim on the ground that they purport to plead a cause of action based on "promissory estoppel". These words appear only in the heading to this part of the pleading: "Defendants Contractual Liabilities/Promissory Estoppel".

¶ 92 The pleas in the four paragraphs rely on the laws of Argentina, and, alternatively, the common laws of Ontario and the Bahamas. As I read the pleading, paragraph 58 - which asserts the existence of promises and assurances - raises questions of contractual liability. Paragraphs 58A and 58B refer to representations allegedly made by the defendants, or by their agent, SBQ, that are stated to be binding on them. Under laws of this jurisdiction these paragraphs might well be understood as pleading promissory estoppel as a cause of action or, perhaps, as a defence.

¶ 93 If an adequate factual basis for applying the laws of Argentina to the contractual claims had been pleaded, I would consider these four paragraphs of the statement of claim to be unobjectionable to the extent that they rely on those laws. As the pleading stands, I would strike each of them as referring to matters "related to the notes" within the meaning of the choice of law clause. This conclusion applies equally to the allegations of representations in paragraphs 58A and 58B as to those that allege promises or assurances in paragraph 58. Compare the interpretation that Doherty J. placed on the words "in respect of the agreement" in *Fairfield v. Low et al.* (1990), 71 O.R. (2d) 599 (H.C.), at page 606, where the interpretation of a jurisdiction clause was in issue.

¶ 94 The defendants' submissions with respect to promissory estoppel were, for the main part, based on the laws of Ontario. To the extent that they assert that, absent a pre-existing legal relationship between the parties, the principle cannot be relied on under such laws, and certainly does not give rise to a separate cause of action, I believe the defendants are correct and that paragraphs 58A and 58B - but not paragraph 58 - must be confined to the laws of Argentina.

¶ 95 The pleading discloses no factual basis under Ontario's choice of law rules for applying the laws of the Bahamas and the reference to them must be struck.

G. Negligence

¶ 96 Claims in negligence simpliciter are raised in paragraphs 175-175C of the statement of claim. Paragraph 175 provides particulars of negligence, and paragraphs 175A and 175B assert the existence of a duty of care, a breach of the standard of care, and the basis on which each of the defendants is liable in damages for the acts and omissions of the other, and for those of SBQ. Paragraph 175C relates the foregoing paragraphs to Article 1109 of the Argentine Civil Code and pleads that liability arises under Argentine law.

¶ 97 I am satisfied that, on the basis of the facts pleaded - and the principles accepted by the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 - the law of Argentina - the *lex loci delicti* - governs the liability of the defendants for negligence and the other torts pleaded, with the possible exception of the tort of conspiracy to which I will refer below. It would extend not only to issues relating to substantive elements of particular torts but, also, to questions of vicarious liability, and any other legal basis for attributing liability to one of the defendants for the acts and omissions of the other, or those of SBQ. To the extent, therefore, that the defendants relied on authorities - such as *The Gramophone and Typewriter, Limited v. Stanley*, [1908] 2 K.B. 89 (C.A.) and *Kuwait Asia Bank EC v. National Mutual Life Nominees Ltd.*, [1990] 3 All E.R. 404 (P.C.) - in which the applicable law relating to the relationship between a corporation and its subsidiaries, and the extent to which the former could be liable in tort for the conduct of the latter, was the common law of the forum, their submissions were beside the point - unless they were made on an assumption that the plaintiffs intended to plead the application of the laws of Ontario.

¶ 98 Similarly, the principles governing the existence of a duty of care under the laws of Ontario are not, as such, of any relevance. It may be that the defendants will be able to contest successfully the pleas with respect to the content of Argentine law - and the effect under such laws of the factual control and participation of BNS and BIL in the affairs of SBQ - but these are questions that require evidence and cannot be decided on this motion. The governing principle must, as I have said, be whether the pleading sufficiently informs the defendants of the case they have to answer. The contents of what are stated to be the provisions of the Argentine Civil Code that govern the claim for negligence are set out in paragraph 168B. Without the text of the provisions, or expert evidence, I am, of course, unable to determine the extent to which they have been described accurately or comprehensively. I do not think, however, that the defendants can be in any real doubt with respect to the provisions of Argentine law on which the plaintiffs rely, the interpretation that they intend to place on them or, subject to the comments I will make with respect to the defendant's criticisms of the particulars pleaded in paragraph 175, the facts to which they are said to apply.

¶ 99 I should add that, if contrary to my reading of the pleading, the plaintiffs intended to assert liability under the laws of Ontario, as well as - or in the alternative to - the laws of Argentina, I do not consider that this is open to them.

¶ 100 The defendants object that each of the particulars in paragraph 175 does not satisfy the requirements of pleading. Those in sub-paragraphs (a), (b), (c) and, in part, (j) were said to be inconsistent with other pleas to a degree that they are incapable of being pleaded in the alternative. I do not accept that submission. I believe that they should properly be pleaded in the alternative and that, given the defendants objection, this must be done in order to satisfy the requirements of rule 25.06(4).

¶ 101 Further particulars are required of the allegations in sub-paragraphs (d), (e), (f) and (h). Subparagraphs (g) and (i) and the remaining part of subparagraph (j) are, in my judgment, satisfactory.

H Negligent Misrepresentation

¶ 102 In paragraphs 165-168A causes in action for negligent misrepresentation are pleaded under laws of Ontario and the Bahamas. For the reason given in connection with the claim for negligence, the reference to these laws should be struck.

¶ 103 The facts pleaded in paragraph 165-168A are also relied on in paragraph 168B to support a plea of liability for negligent misrepresentation under laws of Argentina. The defendants have not moved to strike this paragraph but, as paragraph 168B incorporates paragraphs 165-168A and, as the defendants have moved to strike those paragraphs, it is necessary to consider the objections to them. However,

although in their factum, counsel devoted 75 paragraphs to this question, their challenge to the claim for negligent misrepresentation at their hearing was, to a very large extent, limited to the submission that the representations on which the plaintiffs relied could not possibly have been made negligently. They relate to the intention of BNS to ensure that SBQ would discharge its obligations under the bonds. In the submission of defendants' counsel, these representations were either true or untrue. If the latter, they could not have been made negligently as the defendants must have known they were untrue. I do not think this argument is logically compelling. In paragraph 168 it is pleaded that the representations were misleading. A person may be negligent in making such a representation without realising that it conveyed a message that was not true.

I. Fraudulent Misrepresentation

¶ 104 Consistently with the pleading of negligent misrepresentation, the plaintiffs have pleaded fraudulent misrepresentation under the laws of Ontario and the Bahamas (paragraphs 170-173) and, then under the laws of Argentina (paragraphs 173A-174) without expressing a preference for or any of the three legal systems, and without pleading in the alternative. For the reasons already given, I do not believe the claims in tort under the laws of Ontario or those of the Bahamas could be sustained.

¶ 105 Articles of the Argentine Civil Code that relate to fraudulent misrepresentation, with a description of their tenor and effect, are set out in paragraph 173A and, in paragraph 173B, it is alleged that the facts pleaded in paragraphs 170-173 fall within those provisions of Argentine law.

¶ 106 At the hearing, the defendants confined their objections to the plea of fraudulent misrepresentation to the lack of particulars of the allegations in paragraph 171 of the statement of claim. This is as follows:

171. The Plaintiffs state that the defendants' silence and half truths misled the noteholders or implied something other than the truth and therefore constituted a fraudulent misrepresentation.

¶ 107 The defendants' demand for particulars of the half truths and the manner in which each plaintiff relied on them was refused by the plaintiffs on the grounds that they were sufficiently particularised in the statement of claim, read as a whole, that they were evidence and that, in any event, they were within the knowledge of the defendants. In my opinion, these responses are not satisfactory and particulars must be pleaded.

¶ 108 In this connection, I should mention that it was a recurring theme in the submission of defendants' counsel that the pleading does not distinguish between representations made by, or on behalf of, SBQ and representations made by BNS. This objection begs the question of the extent to which the acts, and omissions, of SBQ are to be attributed to BNS. The issue is fundamental to several of the plaintiffs' claims and, to the extent that it relates to the defendants' liability in tort - other than, possibly, the tort of conspiracy - it will be governed by the laws of Argentina.

J. Conspiracy

¶ 109 In paragraph 164A, the plaintiffs plead that in Ontario, Argentina, the Bahamas "and elsewhere", the defendants conspired unlawfully and maliciously to submit false, inaccurate and misleading information to a regulatory body in Argentina, to the Rating agencies, and to class members to induce them to purchase bonds. Other unlawful acts are referred to, the defendants' alleged purposes are described and it is said that the conspiracy was directed at the Argentine public, customers of SBQ, and consumers who might be potential investors - including the class members.

¶ 110 The pleading of this tort offers a contrast with other allegations in the statement of claim in that the laws of Argentina are not referred to. The only reference to applicable laws is in heading that precedes the sections. This refers to conspiracy under the common laws of Ontario and the Bahamas.

¶ 111 The pleading is not satisfactory. In the first place, as Castel and Walker indicate in a passage I have set out above, the choice of law rules presuppose that only the laws of one jurisdiction can govern any particular issue. Second, as it is pleaded that the conspiracy was directed at persons in Argentina and was implemented there and, as it is pleaded that it caused injury to such persons, Argentine law and not the laws of Ontario, or the Bahamas, would appear to be the *lex loci delicti commissi*. This, I believe, is a case of the kind referred to by La Forest J. in *Tolofson*, at page 1050, where he stated:

There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.

¶ 112 The plaintiffs would be entitled to plead that the laws of Ontario are relied on in default of pleading rules and principles of Argentine law - or, in the alternative in the event that, at trial, Ontario is found to be the locus of this particular tort - but as I indicated earlier in these reasons, I believe that in this case they should indicate in the pleading that this is their intention. It may be that, as a general rule, a plaintiff is able to plead liability for a tort committed outside Ontario - without any reference to actionability under the *lex loci delicti* - being content to have Ontario's laws applied by default. The question is apparently controversial in England - see *Fentiman*, *op. cit.*, at pages 101-103 - but this may possibly be affected by the continued application of the double actionability rule to such cases. In this case, however, I believe the reference to Ontario's laws and those of the Bahamas, and the absence of any reference to the laws of Argentina, is sufficiently confusing that fairness to the defendants requires the plaintiffs to indicate whether they are, or are not, asserting that there was an actionable conspiracy under the laws of Argentina and the basis - default, in the alternative or otherwise - on which they have pleaded the laws of Ontario.

¶ 113 Despite my belief that, on the facts pleaded, Argentina should be found to be the locus delicti, I have mentioned the possibility of the plaintiffs' reliance on the laws of Ontario in the alternative because, in the apparent absence of authority on the question, I would not consider the locus to be sufficiently plain and obvious to require such a plea to be struck.

¶ 114 The defendants' objections to the claim of conspiracy assume that it will be governed by the laws of Ontario. The first objection is that the pleading does not delineate with clarity and precision the overt actions taken by SBQ and each of BNS and BIL to implement it. When the statement of claim is read as a whole, I do not believe this is a telling objection. SBQ, BIL and BNS are pleaded to have acted as one economic unit in making certain negligent or fraudulent misrepresentations. It is pleaded that BNS provided the controlling and directing mind and that the liability should be attributed to it as if, in effect, the three corporations were a single entity. I do not see why, in the event that liability should not be attributed to BNS on that basis, the plaintiffs cannot plead conspiracy in the alternative if, in a further statement of claim they do so clearly. The conspiracy is alleged to have been directed to the making of particularised misrepresentations and a concealment of facts. To require the plaintiff to further particularise each corporation's participation in the decision-making process and its implementation would be tantamount to a requirement to plead who said what to whom and when. I do not think this is necessary: cf., *North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993 (G.D.), at paras. 22-23 where Cumming J. stated:

In truth, the very nature of a claim of conspiracy is that the tort resists detailed

particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlying agreement bringing the conspirators together, proof of which is a requirement borne by a plaintiff, often must be proven by indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the conspirators from which the prior agreement can be logically inferred. Such details would not usually be available to a plaintiff until discoveries. . . . The defendants are not put to any real disadvantage by the present form of the plaintiffs' amended statement of claim.

¶ 115 The defendants' second objection was that the pleading of conspiracy must be struck for a failure to plead special damages "separate from" those flowing from the other torts pleaded. To the extent that this suggests that a plea of conspiracy will be permitted only if the damages claimed relate to losses not covered by the damages claimed in respect of other torts pleaded, I do not believe it is correct. The argument is akin to that relating to the merger of a claim for conspiracy with other torts and I believe it should be rejected at this stage of the proceedings for the same reason given by Wilson J. in *Hunt v. Carey Canada Inc.*, (at pages 344-345) when refusing to strike a claim for conspiracy on the basis of merger.

¶ 116 The plaintiffs have described the losses for which special, general and consequential damages of US \$340 million are claimed without distinguishing between the three heads. The authorities cited by the defendants, including those referred to by Horkins J. in *Apotex Inc v. Plantey USA Inc.*, [2005] O.J. No 1860, (S.C.J.), at para. 62 - suggest that this must be done. However, in view of the fact that the plaintiffs seek to represent a class of investors, I see no purpose for requiring them to quantify the special damages at this stage of the proceedings.

K. Corporate Veil

¶ 117 Under the general heading "Cause of Action", a number of paragraphs of the statement of claim are grouped under sub-headings - "Corporate Veil/Ontario/England/Bahamas Common Law" and "Corporate Veil/Law of Argentina". These paragraphs relate back to paragraph 4(c) which, among other things, claims a declaration that this is an appropriate case "to lift the corporate veil, to hold Scotiabank and [SIL] liable to repay the debt owed to the noteholders." While I have reservations about the appropriateness of including such a metaphorical, general and vague term in an order making a declaration of the court, I understand that its use is intended to convey that the liability of BNS and SIL on the notes issued by SBQ is to be determined without reference to the separate legal personalities of the three corporations.

¶ 118 Once again, the plaintiffs have not pleaded which of the four legal systems governs the issue, and it is not indicated whether the laws of Ontario are to be considered relevant by default, or because the corporate offices of BNS are said to be located in Toronto.

¶ 119 For the reasons already given, I do not consider this method of pleading foreign law to be acceptable. The defendants are entitled to require the plaintiffs to nail their flag to the mast and identify the legal system whose laws they rely on. They may, of course, plead in the alternative but they must do this clearly so that the defendants have an assurance that the plaintiffs are not asserting simultaneous reliance on the laws of several legal systems. If they plead expressly that Ontario law applies, they must indicate whether this is qua the governing law, or by default of a pleading and proof of some other law.

¶ 120 I have already indicated, also, that, in my opinion - on the basis of the pleading in its present form and the facts pleaded - the laws of Ontario can only be applicable for the purposes of identifying the

persons bound by the notes in default of proof of the laws of England. If it is the intention of the plaintiffs to amend the pleading to sustain a claim that mandatory laws of Argentina must be applied, I do not know whether they will be able to do this successfully and, if so, whether such mandatory laws will extend to the identification of the persons who are bound by, and liable under, the notes. It is, of course, also possible that an amended pleading will assert reliance on English law in the alternative to a claim that Argentine law is to be applied. While these uncertainties exist, it is premature to consider whether the claim to lift the corporate veil has a chance of success under the laws of Ontario in default of proof of English law.

L. Vicarious Liability

¶ 121 The plaintiffs plead that BNS and SIL are vicariously liable for the acts and omissions of their employees, directors, officers and agents. This plea is, presumably, to be understood as made in the alternative to the claim that BNS is directly liable in tort but, if this is so, it should be indicated more clearly.

¶ 122 On the basis of the same choice of law rules that I have applied to the majority of the claims against BNS in tort, the issues relating to vicarious liability will be governed by the laws of Argentina as the *lex loci delicti*. Defendants' counsel submitted that the application of Argentine law to such issues is not pleaded expressly and counsel's objections to the claims of vicarious liability are made on the assumption that the laws of Ontario would, in default, be relied on by the plaintiffs. The plaintiffs have, however, identified statutory provisions of Argentine law that allegedly make directors and officers of SBQ personally liable for their breaches of due diligence obligations imposed by the statutes. They have pleaded that such persons were also employees of BNS and that their breaches of due diligence occurred while they were engaged in directing and controlling the business of BNS. They have also pleaded (para. 155O) that the acts alleged to have been done by such persons were done while they were engaged in the management, direction and control and transaction of the business of BNS and SIL. They have pleaded (para. 155D), further, that under Article 1113 of the Civil Code of Argentina, BNS is liable for the acts of SBQ and its employees and, agents, and others whose behaviour BNS controls.

¶ 123 Reading the pleading as a whole, and making allowance for drafting deficiencies - and on the assumption that the description of the relevant statutes accurately reflects their provisions - I believe the plaintiffs have sufficiently pleaded that, under Argentine law, BNS would be vicariously liable for the breaches of due diligence, or other torts, committed by officers and directors of SBQ. I do not believe it is necessary at this stage to identify particular directors or officers. It is sufficiently clear that those referred to were the ones responsible for monitoring SBQs disclosure obligations under Argentine law

¶ 124 The defendants also objected to the adequacy of the pleading of the Argentine statutes that impose a "personal liability" on officers or directors for breaches of their obligations to observe due diligence. They complain that neither the nature of the liability nor the persons who are entitled to enforce it has been pleaded. The plaintiffs have, however, pleaded that Article 1109 of the Civil Code provides that, where there is a duty of care, any one performing an act with fault or negligence which results in damage to someone else is liable for the damage. In these circumstances, I believe it is sufficiently clear that the plea of personal liability for breach of obligations of due diligence is a plea of liability to those who suffered damage. A reference to the claim based on vicarious liability should, however, be inserted in paragraph 192 which pleads that noteholders suffered damage in respect of the defaults of BNS. As I have indicated, the text of the statutory provisions must be provided.

M. Inducing Breach of Contract

¶ 125 Paragraphs 176-180 of the statement of claim assert that, under the common law of Ontario and

the Bahamas and England, the defendants induced SBQ to breach its obligations under the bond agreement and the alleged collateral contracts and warranties, and that it unlawfully interfered with SBQ's ability to perform such obligations. In addition, it is pleaded (para. 180A) that Argentine jurisprudence considers that liability for inducing a breach of contract may arise under Article 1109 of the Civil Code that imposes liability for fault or negligence. The defendants have moved to strike this paragraph

¶ 126 For the purposes of choice of law, these pleas are, in my opinion, to be characterized as alleging liability in tort and are governed by Argentine law. I do not accept the submission of plaintiffs' counsel that, depending upon where particular decisions were made, and by whom, the *lex loci delicti* might be the laws of one of the other three jurisdictions. The bond agreement was made, and breached, in Argentina and the consequences of the alleged interference and inducement occurred there. I do not consider there is any sound basis for treating the place where decisions to interfere, or induce, were made - as distinct from a place where the interference, or inducement, had effect - as the place where the torts were committed; cf., *Elguindy v. Core Laboratories Canada Ltd.* (1987), 60 O.R. (2d) 151 (Div. Ct.); *Hyundai Auto Canada v. Bordeleau*, [2002] 60 O.R. (3d) 641 (S.C.J.); *Canadian Commercial Bank v Carpenter*, [1989] B.C.J. No. 1789 (C.A.). Nor is there anything in the pleadings to suggest that the court might exercise its discretion to apply the *lex fori* in order to prevent injustice.

¶ 127 I have considered whether on this question the proposition that Argentine law is the *lex loci delicti* is sufficiently plain and obvious to be accepted on this motion rather than being left to be resolved on the basis of evidence at trial, on a motion for summary judgment or, with leave, on a motion under rule 21.01(1)(a). Motions under that rule have in the past been made for this purpose: see, for example, *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.). As I indicated earlier in these reasons, a plaintiff cannot resist a motion to strike simply on the ground that the application of a choice of law rule depends on material facts that have not been pleaded and on which evidence is not admissible. Such rules - like other rules of domestic law - must, on a motion such as this, be applied to the facts pleaded with an assumption that they will be proven at trial.

¶ 128 In consequence, paragraphs 176-180 of the statement of claim disclose no cause of action on which the plaintiffs can rely in this proceeding. If it is intended that the allegations of fact in paragraphs 176-180 are to be incorporated for the purpose of pleading liability under Argentine law, this should be clarified. The defendants' objection that some of the factual allegations in those paragraphs are contradicted by other factual allegations in the statement of claim can be met by pleading in the alternative.

N. Inadequate Pleading of Remedies

¶ 129 The defendants moved to strike various parts of the pleading because of a failure to plead any material facts that would support certain of the remedies claimed. In their submission, no such facts are pleaded in support of some of the remedies, and others would not be available on the facts on which the plaintiffs rely. At the hearing, defendants' counsel abandoned the objections raised in the notice of motion to some of the remedies. I will consider the remaining objections in turn.

1. Compound interest

¶ 130 Compound interest is claimed in para 4(p) of the statement of claim on the basis of equitable principles of Ontario law and, alternatively, "in accordance with the price supplement agreements, hereinafter particularized or in accordance with the Courts of Justice Act, R.S.O. 1990, Chapter C. 43". The claim is not referred to elsewhere in the pleading but its specific inclusion in paragraph 4 appears to indicate that it is intended to be separate from the claim for damages for breach of contract, or tort, and not an element in their calculation. It follows that it is intended to be an adjunct to the claim for specific

performance of the bond agreement. As such, the laws of Ontario would not be relevant otherwise than in default of the proof of English law (Somers, at page 237) or, perhaps, as part of the laws of the forum relating to post-judgment interest.

¶ 131 On either view, I believe it is premature to deal with the entitlement to compound interest at this stage. The inherent jurisdiction of the court, as a court of equity, to award compound interest can be exercised only in the discretion of the court in the light of all the facts proven at trial and it is not plain and obvious to me, on the facts pleaded, that such an award would not be made. The reference to the price supplement agreements relates to agreements that are referred to in the prospectuses as providing the rates of interest applicable to each class of the notes issued. Plaintiffs' counsel indicated that the word "particularized" was intended to refer to the notes and not to the methods for calculating the interest that they contained. Counsel frankly admitted that they have not been able to satisfy themselves on the question whether the agreements provided for interest to be compounded. If they do provide this, the reasoning of the Supreme Court of Canada in *Bank of America Canada v Mutual Trust Co.*, [2002] 2 S.C.R. 601, and its application to the facts of that case, suggests to me that, if the plaintiffs can establish their substantive claims, this might well be a case for compound interest under either the inherent jurisdiction, or the provisions of sections 128-130 of the Courts of Justice Act.

2. Loss of credit reputation, mental distress and consequential damages

¶ 132 Allegations that the plaintiffs suffered consequential damages - as well as a loss of credit reputation and mental distress - are pleaded in paragraphs 217-219 of the statement of claim. It is alleged that each has suffered changes in economic circumstances, has lost economic opportunities and has seen his or her credit Ratings go down. It is further alleged that they have suffered emotionally through their mental distress, anxiety and loss of financial reputation. The nature of such injuries is such that I do not believe the generality with which they have been pleaded would require the claims relating to them to be struck. However, particulars of the claims for consequential damages and loss of credit reputation must be pleaded, or otherwise provided on request.

¶ 133 I note also, that, at the hearing and in their factum, the submissions of defendants' counsel on these heads of damages were confined to the claim for aggravated damages for breach of contract and did not extend to the other causes of action for which such damages are claimed.

¶ 134 To the extent that damages for loss of credit reputation are recoverable under the laws of Ontario, I note, again, that those laws can, in my opinion, be applied only in default of proof of English law as the proper law of the bond agreement under the pleading in its present form.

¶ 135 I am not prepared to find that it is plain and obvious that, under the laws of Ontario, damages for loss of credit reputation are not recoverable for breach of contractual obligations: see Waddams, *The Law Of Contracts*, (5th edition), at page 538. Nor do I agree with the submission of defendants' counsel that a loss of credit reputation can necessarily involve no more than a pecuniary loss. It may, indeed, be difficult to distinguish from the claim for damages for mental distress but I do not believe that, as a matter of pleading - if, by default, the laws of Ontario are applicable to the contractual claims - the claim must be struck unless particulars of the manner in which such injury was inflicted have been pleaded.

¶ 136 My conclusion on the claim for damages for loss of credit reputation applies equally to the claim in respect of mental distress. Whether damages for this type of injury can be recovered for breach of contract under the laws of this jurisdiction would depend upon the evidence relating to the circumstances of each plaintiff and the claim should not be struck out at this stage of the proceedings even if, on some basis, the laws of Ontario should be found to be applicable.

¶ 137 For essentially the same reasons, I do not accept the submission that the claim for consequential damages must be struck. My belief in the correctness of those reasons is reinforced for this purpose in that the point of the extract from Waddams, *Law of Damages* (Loose-Leaf, at para. 7.430) - of which part is quoted in the factum of defendants' counsel - is to deny that there is an absolute rule that such damages cannot be recovered for breach of contract. In the view of the learned author, when such damages have been denied this has been on the ground of remoteness. It is recognised in parts of the same paragraph that, depending on the circumstances, damages may not be too remote.

3. Fluctuations in currency

¶ 138 In paragraph 194 of the statement of claim, the plaintiffs allege that they have sustained damages as a result of currency fluctuations due to the delay in repayment. The defendants objected that liability for such damages is governed by English law as the proper law of the notes. They submitted further that English law does not permit such damages to be recovered. For this purpose, they cited a decision of the House of Lords in which it was said that in awarding damages for breach of contract,

.... no account is taken of fluctuations in the relevant currency as against other currencies between the date of breach and the date of payment.

(Attorney-General of the Republic of Ghana and Ghana National Petroleum Corporation v. Texaco Overseas Tank Ships Ltd, [1994] 1 Ll. Rep. 473, at para 476)

¶ 139 Although English decisions are, of course, often relied on in this jurisdiction for the purpose of resolving questions of domestic law, when English law is to be applied as such it is a question of fact to be proven by expert evidence and not on the basis of research conducted by counsel, or by the court. My belief in the wisdom of this rule has been strongly fortified by my reading of the decision relied on by defendants' counsel and the English decisions and textual references cited in response by Mr Charney. Such belief hardened into a conviction when, out of interest, I consulted Dicey and Morris and found that after the principle in *Attorney-General of the Republic of Ghana* had been cited, the learned authors commented (at para. 36-013):

This does not, however, mean that a creditor cannot claim damages according to normal contractual principles where the debtor pays the debt late and the currency in which the debt is expressed depreciates between the date on which payment should have been made and the date on which it was in fact made, so that he suffers an exchange loss.

¶ 140 While I would not strike this aspect of the pleading on the ground of the defendants' general, unqualified proposition that damages for foreign currency fluctuations are never recoverable for breach of contract under English law - or, for that matter, under the laws of Ontario - I have had considerable difficulty in understanding how currency losses could have arisen on the facts as pleaded. The requirement that payments under the notes were to be made in US dollars would appear to me to shelter investors from the devaluation of the Argentine peso that is referred to elsewhere in the statement of claim. Defendants' counsel appeared to be similarly bemused and I believe that, if the plaintiffs wish to plead a claim for damages in respect of currency losses, they must provide particulars of the manner in which such losses are alleged to have occurred.

¶ 141 I note, also, that no basis has been suggested for applying English law, rather than the law of Argentina, to the question in connection with the claims for damages in tort. Nor was any reference made to the effect of section 121 of the Courts of Justice Act as a mandatory and overriding law of this forum. This section requires that orders to enforce an obligation in a foreign currency shall - unless it would be inequitable - provide for payment of an amount in Canadian currency sufficient to purchase the amount of

the obligation in the foreign currency. The exchange rate is to be determined, generally, as of the day before the payment.

4. Specific performance

¶ 142 Defendants' counsel submitted that the claim for specific performance in paragraph 4(j) of the statement of claim should be struck on the ground that there was no "sustainable pleading" that BNS is a party to the notes. The plaintiffs have, however, pleaded that, pursuant to Article 40 of the Consumer Protection Law, BNS became a party to the bond agreement between SBQ and the purchasers of notes. This, of course, is beside the point if, as the defendants submit, it is plain and obvious that the choice of law clause in the prospectuses is effective to make English law the proper law of the contract. I have held that the contractual claims are to be struck with leave to amend. The effect is that, unless the statement of claim is effectively amended to establish a basis for making the proper law the laws of Argentina - or to otherwise incorporate the provisions of the Consumer Protection Law as part of the governing law - the claim that BNS is a party to the bond agreement must be judged by reference to laws of Ontario in default of any pleading of the position under English law. In consequence, I believe that the claim that BNS is contractually bound to make payments on the notes could be justified only on the basis of the claim that the plaintiffs are entitled to lift the corporate veil - a claim I have declined to consider on the present state of the pleading.

O. The FRN Trust

¶ 143 The plaintiffs plead that, in March 2003, when payments under the notes had been in default for several months, a trust (the "FRN Trust") governed by the laws of the Cayman Islands made a tender offer to purchase the notes for 20 per cent of their principal amount. They plead further that the FRN Trust was funded by BNS, that it was either an agent of - or a trustee for - BNS and that it holds the notes purchased by it in one, or the other, of such capacities. It is alleged that two of the plaintiffs tendered, and subsequently assigned, their notes to the FRN Trust. They claim rescission of this transaction.

¶ 144 The first, and, in my opinion, a compelling, objection to this claim is that it is pleaded that the noteholders who tendered their notes pursuant to the offer signed a "beneficial owner letter" in which they agreed that it was exclusively to be governed by, and construed in accordance with, the laws of the state of New York and that the courts of the County of New York would have "exclusive jurisdiction to hear and determine any action or proceeding resulting from, relating to or arising under" the letter.

¶ 145 The plaintiffs pleaded that, notwithstanding the terms of the letter containing the conditions on which the notes would be purchased by the FRN Trust, neither the laws nor the jurisdiction of the courts of New York were applicable because:

- (a) claims based on breach of duty to make full and fair disclosure in the tender offer were governed by Argentine law;
- (b) the claim for rescission was governed by the laws of Argentina; and
- (c) the choice of law clause in the letter conflicted with the choice of law clause in the bond agreement.

¶ 146 No factual, or legal, basis is pleaded for the first two of these reasons for ignoring the choice of law and jurisdiction clause in the beneficial owner letter. They are simply assertions that the laws of Argentina, and not those of New York, govern the transaction. They beg the question of choice of law which must be resolved under the laws of Ontario. My conclusion on the question is the same as that set out above with respect to the choice of law clause contained in the prospectuses for the issue of the notes

¶ 147 In his oral and written submissions, Mr Charney referred to the mandatory nature of the provisions of Argentine law that were pleaded. These were said to be mandatory in the sense that, under that law, parties are precluded from contracting out of them. As I indicated when considering the effect of the choice of law clause in the prospectuses, I do not believe that characterisation of laws of Argentina as mandatory under those laws is, by itself, sufficient for the purpose of Ontario's choice of law rules. If it is intended to assert that the choice of the laws of New York was made solely in order to evade an application of such mandatory laws of Argentina as those of the jurisdiction with which the transaction should be considered to be most closely connected, this must be pleaded. The defendants would then have an opportunity to plead facts relating to such motivation if they chose to do so.

¶ 148 In my opinion, therefore, on the present state of the pleading, the pleas of Argentine law as the law governing the claim for rescission must be struck. When that is done, all that remains are general allegations in paragraph 147 and 148 that, under the laws of England, New York and Ontario, the "defendant" breached a contractual condition requiring full and fair disclosure and a claim that, under such laws, the agreement with the FRN Trust should be set aside on the basis of economic duress, or as an unconscionable transaction by which BNS took unfair advantage of the noteholders.

¶ 149 I do not believe the laws of England and Ontario have any direct relevance, although those of Ontario could be applied in default of evidence of laws of New York if the intention to rely on them for this purpose was indicated in the pleading. On that basis, the plea of breach of contract is unsatisfactory as there is nothing to indicate whether the alleged condition to make full and fair disclosure was expressed in some undisclosed documents, implied from undisclosed facts, or to be ascertained in some other manner. In my opinion, material facts in support of the plea have not been pleaded and it should be struck. The plea of economic duress, or unconscionability, is supported to some extent by facts set out in other parts of the pleading, but not sufficiently in my judgment. Particulars of this plea would need to be pleaded, or provided on request.

P. Miscellaneous Objections

¶ 150 As the final sally in their onslaught against the statement of claim, the defendants identified numerous paragraphs that, in their counsel's submission, contained irrelevant or scandalous allegations that should be struck on one, or the other, of such grounds. These were not addressed specifically at the hearing. Rather, I was invited to study the 59 paragraphs of the defendants' factum in which the objections were made, and the written responses to them provided by plaintiffs' counsel.

¶ 151 In my judgment, the great majority of the paragraphs identified by the defendants have sufficient relevance to be permitted to remain in the pleading.

¶ 152 The objections to the meaning to be attributed to the Spanish word "respaldo" are, I believe, unfounded. The plaintiffs claim, and intend to rely on, a special meaning of the word that would be applied by an Argentine court when construing prospectuses and other documents used for the purpose of soliciting financial investments in Argentina. The contents of the paragraphs in which they explain this meaning and indicate how it applies in the circumstances of this case, are, I believe, properly pleaded. This would clearly be the case if the plaintiffs are able to plead effectively that the laws of Argentina constitute the proper law of the contract and, as such, govern its construction: see the comments of Ungood-Thomas J. in *Ascherberg*, at page 178. Even if the laws of England - or, in default, the laws of Ontario - govern the contractual claims based on the contents of the prospectuses, the impugned paragraphs should, in my opinion, be considered to relate to the translation of those documents - as distinct from their construction. If it is material to the plaintiffs' case that the word "respaldo" has a special meaning that is not exactly conveyed by the English words used in the translations pleaded, they should in my opinion be permitted to indicate this in the pleading. It is in the interests of the defendants -

as well as those of the plaintiffs and the court - that they should do so

¶ 153 A number of the objections are, in my opinion, over-technical and some I would characterize as nit-picking. As an example of the latter, I instance the objection to the allegedly excessive use of time-honoured adjectives used to support the claim that the defendants' conduct merits an award of punitive damages. A number of the other paragraphs that the defendants submit are objectionable are relevant to this claim.

¶ 154 Of the paragraphs to which the defendants object, I would strike only para. 136 (SBQ the only foreign-owned Argentine bank to be declared bankrupt), para. 226 (reference to the 1940 Montevideo International Civil Law Treaty) and the reference in para. 191 to the worldwide profits of BNS.

Conclusion

¶ 155 This action is unusual not merely for the number of foreign jurisdictions whose laws may be applicable, but more particularly because of the degree of reliance placed on numerous statutes and laws of one such legal system. Although no jurisdictional challenge has been made, the difficulties of pursuing the claims in this court are formidable and, in my opinion, the plaintiffs have not succeeded in meeting the threshold requirements for pleading their case.

¶ 156 The end result is that I have accepted the defendants' submission that they should not be required to plead in defence to the statement of claim in its present form. I have also accepted many of what I consider to be their more fundamental - and a number of their more specific - objections to the pleading. Some of their criticisms I have rejected and there are others that I have found it neither necessary, nor appropriate, to address and on which I express no opinion. The great majority of those that I have not considered relate to possible deficiencies in pleading causes of action governed by the laws of Ontario. Such laws are of limited relevance otherwise than in default of an adequate pleading of the laws of Argentina. As the plaintiffs' intention to rely to a very large extent on Argentine laws is evident, I do not believe it would be a useful exercise to consider many of Mr Underwood's learned submissions while it is possible that the inadequacies in pleading Argentine law will be remedied. If the plaintiffs choose to file a fresh statement of claim they will, of course, have the opportunity to address these criticisms to the extent that they may have any application to its contents.

¶ 157 Defendants' counsel submitted that leave to amend should be denied in respect of many of the paragraphs of the statement of claim. Leave will, however, be withheld only with respect to the claims for declarations relating to the oppression remedy under the CBCA and the alleged breach of the Bank Act. In view of the complexity of the issues, the relative dearth of authorities that bear on those relating to the pleading of foreign law and the present stage of the proceedings - and notwithstanding the successive versions of the statement of claim that have been delivered in the past - I believe it is in the interests of justice, and its fair administration, to treat the present version to this extent as if it were still work in progress.

¶ 158 Accordingly, although there will be an order striking the Amended Consolidated Statement of Claim, leave is granted to deliver, within 90 days, a statement of claim that will address the deficiencies I have identified, other than those mentioned in the immediately preceding paragraph. The grant of leave is without prejudice to any further motions that the defendants may wish to bring.

¶ 159 The costs of this motion may be spoken to or, if counsel would prefer to make written submissions, those of the defendants should be provided to me within 21 days of the release of these reasons and those of the plaintiffs within a further 15 days.

M.C. CULLITY J.

* * * * *

Corrigendum
Released: January 30, 2006

A correction was made in para. 22, third line. The citation Aristocrat Restaurant was changed to Touche Ross Ltd. v. McCardle.

QL UPDATE: 20060202
cp/e/qw/qlnxd/qlrme/qlhcs

Case Name:

Yordanes v. Bank of Nova Scotia

Between

Constantino Yordanes, Martin Heisecke Rivarola,
Cecilia Alegria, Adelqui Antonio Carmelino and Isabel
Fiore, plaintiffs, and
The Bank of Nova Scotia and Scotia International Ltd.,
defendants

PROCEEDING UNDER the Class Proceedings Act, 1992

[2006] O.J. No. 280
[2006] C.C.S. No. 6747
Court File No. 04-CV-264256 CP
Also reported at:
78 O.R. (3d) 590

Ontario Superior Court of Justice
M.C. Cullity J.

Heard: November 16-18, 21-22 and December 13-14,
2005.

Judgment: January 25, 2006.
(159 paras.)

Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Statement of claim struck with leave to amend — Plaintiffs commenced class proceeding on behalf of purchasers of bonds issued by an Argentine bank with alleged ties to Bahamian and Canadian corporations — Lengthy and complex statement of claim failed to adequately plead foreign law — Resulting uncertainty required that entire pleading be struck.

International law and conflict of laws — Conflict of laws — Torts — Occurring outside jurisdiction — Evidence and proof — Proof of foreign law — Sufficiency of proof — Statement of claim struck with leave to amend — Plaintiffs commenced class proceeding on behalf of purchasers of bonds issued by an Argentine bank with alleged ties to Bahamian and Canadian corporations — Lengthy and complex statement of claim failed to adequately plead foreign law — Resulting uncertainty required that entire pleading be struck.

Motion to strike a statement of claim -- Plaintiffs commenced a class proceeding in Ontario on behalf of purchasers of bonds issued by a bank incorporated in Argentina -- Bank defaulted on bonds issued to public in Argentina -- Argentine bank was alleged to have been controlled by a Bahamian corporate subsidiary of a Canadian chartered bank, with the three corporations operated as a single economic entity -- Lengthy and complex statement of claim referred to numerous provisions of Argentine statutes with varying degrees of detail -- Pleading also sought remedies under the Canada Business Corporations Act, the Bank Act, the Competition Act, and referred to consumer protection legislation in Ontario -- Defendants moved to strike the statement of claim as disclosing no reasonable cause of action -- HELD: Motion allowed -- Many of the references to foreign law were not sufficiently particular -- Any foreign

laws, decrees and resolutions on which defendants intended to rely had to be translated and pleaded -- Plaintiffs had to indicate clearly whether they intended to rely on foreign law or Ontario law -- Significant interaction between the various references to foreign law produced an unacceptable lack of certainty such that entire claim was struck rather than individual provisions -- Plaintiffs were given leave to file a fresh statement of claim -- Leave withheld for claim for an oppression remedy under the Canada Business Corporations Act, which did not apply to a Canadian chartered bank -- Leave also withheld for a claim under the Bank Act

Statutes, Regulations and Rules Cited:

Bank Act, 1991, S.C. 1991, c. 46, s. 79(4), s. 485

Bankruptcy Law,

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 2, s. 2(2), s. 24(2), s. 238, s. 241

Civil Code, Article 1109

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(a)

Commercial Companies Act,

Competition Act, R.S.C. 1985, c. C-34, s. 1.1, s. 36, s. 52, s. 61.6

Consumer Protection Law, Article 40, Article 65

Corporate Bonds Act,

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 121

Evidence Act, R.S.O. 1990, c. P.23, s. 25

Interpretation Act, R.S.C. 1985, c. I-21, s. 8(3)

Ontario Rules of Civil Procedure, Rule 20, Rule 21.01(1)(a), Rule 21.01(1)(b), Rule 25, Rule 25.06, Rule 25.06(4), Rule 25.06(8)

Statute of Westminster, 1931,

Stock Exchanges and Securities Markets Act,

cp/e/qw/qlnxd/qlrme/qlhcs