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Docket: 12/04
Citation: *Andrews v. Canada (Attorney General)*, 2014 NLCA 32

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

GLEN ANDREWS, IVAN BURTON,
RICK KEAN AND RICHARD THOMAS ROSE APPELLANTS

AND:

THE ATTORNEY GENERAL OF CANADA RESPONDENT

Coram: Green C.J.N.L., Welsh and Barry JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
 Trial Division (G) 200601T1519

Appeal Heard: May 8, 2014

Judgment Rendered: September 5, 2014

Reasons for Judgment by Green C.J.N.L.

Concurred in by Barry J.A.

Dissenting Reasons by Welsh J.A.

Counsel for the Appellants: John R. Sinnott Q.C.

Counsel for the Respondents: Jessica Harris

Green C.J.N.L.:

[1] This appeal engages the question of when it might be appropriate to allow a litigant to avoid a striking out of pleadings and instead proceed to trial on the ground that he or she should be permitted to argue that there is a reasonable prospect of a different result than in a previous appellate decision on similar facts, but based on law that is evolving, uncertain or subject to thoughtful criticism.

Background

[2] In this case the appellants sued the Attorney General of Canada for damages, alleging that the Minister of Fisheries and Oceans was in breach of a contract made with the appellants whereby the Minister allegedly agreed that he would not exercise his statutory discretion to reduce crab quotas below certain levels during the years 2001 to 2005.

[3] In previous litigation, different fishers had made virtually identical claims which, on application by the Attorney General, had been struck as disclosing no reasonable cause of action: *Andrews v. Canada (Attorney General)*, 2009 NLCA 70, 292 Nfld. & P.E.I.R. 175; leave to appeal denied (2010) 298 Nfld. & P.E.I.R. 288 [hereinafter, *Bert Andrews*, after the name of the lead plaintiff in the case]. An applications judge had held, amongst other things, that the Minister could not by contract fetter his discretion to set crab quotas and that the claim should be struck out as not disclosing a reasonable cause of action.

[4] On appeal, the decision on this point was upheld by a majority. The majority held, relying in large part on *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 [*Pacific National #1*] as well as several previous decisions of this Court, that the anti-fettering doctrine extended to indirect fetters on the exercise of statutory discretion and that the potential of the government being held liable in damages for breach of contract, or liable in tort for negligence, constituted such an indirect fetter on the ability of the Minister to exercise his discretion in accordance with his duty. Accordingly, the majority concluded no reasonable cause of action existed and upheld the striking out of the statement of claim.

The Current Application

[5] Relying on the majority's decision in *Bert Andrews*, the Attorney General applied to strike out the current claims on the same basis. The applications judge held that the claim should be struck out on the basis that *Bert Andrews* was "on all fours an identical case" (2012 NLTD(G) 3 at paragraph 26) and that, contrary to the appellants' argument, the *Telezone* line of cases¹, which had been decided subsequently to *Bert Andrews*, were not relevant because they dealt with jurisdictional matters, not striking out. He also concluded that those cases did not overturn the anti-fettering doctrine and that indirect fettering was still recognized as included within the doctrine.

The Appeal

[6] At first blush, the case would appear to be a simple one of following the previous decision of this Court, *Bert Andrews*, which was decided on the basis of essentially the same pleaded facts.

[7] The appellant submits, however, that the implication from the *Telezone* line of cases and the academic criticism and analysis of the principles that underlined the reasoning in *Bert Andrews*, particularly in relation to *Pacific National #1*, leaves open the possibility that a different result would now occur if the matter proceeded to trial and were fully argued on a complete record. Because, he says, the proceeding is not therefore bound to fail, at least at the appellate level, the applications judge erred in his application of the test for striking out under rule 14.24 of the *Rules of the Supreme Court, 1986*.

[8] I would allow the appeal, refuse to strike the claim and permit the case to proceed to trial. What follows are my reasons for these conclusions.

Principles

[9] Rule 14.24(1) provides in pertinent part:

¹ *Canada (Attorney General) v. Telezone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657; *Parrish Heinbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64, [2010] 3 S.C.R. 639; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648; *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626.

14.24(1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that

(a) it discloses no reasonable cause of action or defence;

...

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[10] The test for striking out a pleading on the ground that it discloses no reasonable cause of action is whether, assuming the facts as pleaded are true, it is plain and obvious that the claim is nevertheless bound to fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at pages 978-979, *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17; *Walsh v. TRA Co.*, 2007 NLCA 50, 268 Nfld. & P.E.I.R. 111 at paragraphs 11-16; *Canada (Attorney General) v. Anderson*, 2011 NLCA 82, 315 Nfld. & P.E.I.R. 314 at paragraphs 27-30. Put another way, the question is, as stated in *Hunt*, can the plaintiff present “a question ‘fit to be tried’?” (pages 978-979). As stated by McLachlin C.J. in *Imperial Tobacco*:

[17] ... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial...

[11] The Court in *Hunt* recognized that a case may nevertheless be “fit to be tried” even though it involves “complex or novel” questions (pages 978-980). Wilson J. also observed:

... It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff’s chances of success. As the law that spawned the “plain and obvious” test makes clear, it is enough that the plaintiff has some chance of success.

...

The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in

particular will continue to evolve to meet the legal challenges that arise in our modern industrial society.

(Pages 989-991.)

[12] One of the themes running through the judgment in *Hunt* is that the Court ought to be cautious to strike out claims, even novel ones that may not be currently embedded in existing legal rules, lest it may stunt the growth of the law. That does not mean, of course, that claims based on fanciful or wishful thinking should always be allowed to go to trial. Where, however, the claim is based on rational argument that involves an extension, development or reasonably arguable reversal of some existing legal rule or principle, the situation may be otherwise.

[13] It must be remembered that rule 14.24 does not require a court in all cases to strike out a claim even if a case falls within the rule. The applications judge is given discretion (“may”) to strike. That means that even though the conclusion, *based on an assessment of the current law*, is that there is no cause of action disclosed, the court may, for other good reasons nevertheless refuse to strike and allow the matter to proceed to trial. While the policy of promoting judicial economy of resources will obviously be a major factor pointing in favour of striking, the competing policies of allowing access to justice and not unduly stultifying the development of the law might, in a special case, overbalance other considerations.

[14] This issue was also discussed in the *Imperial Tobacco* case, where McLachlin C.J.C. observed:

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

...

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. ... Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

...

[25] ... The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

(Underlining added.)

[15] How do these ideas operate where the existing legal rule is represented by an appellate decision in the same jurisdiction of the court that is hearing the application to strike? In other words, how is the motion to strike to be squared with the doctrine of *stare decisis*?

[16] In *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, the Supreme Court recognized that the application of the doctrine of *stare decisis* can be fatal to the ability to proceed with an action where a previous decision of the Supreme Court of Canada has “settled the law on the legal issues [the] action raises,” (paragraph 2). LeBel and Wagner JJ., writing for the Court observed, however, that the procedure for striking out must be used cautiously and sparingly:

[1] ... The courts must be cautious in exercising this power, however. Although the proper administration of justice requires that the courts’ resources not be expended on actions that are bound to fail, the cardinal principle of access to justice requires that the power be used sparingly, where it is clear that an action has no reasonable chance of success.

[24] Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford* [2013 SCC 72, [2013] 3 S.C.R. 1101], the precedential value of a judgment may be questioned “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (para. 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (*Bedford*, at para. 46)...

[17] Several things in these passages should be noted. First, the Court recognizes that even where a controlling precedent exists, there is room for

not striking out a claim if there is a justifiable basis for questioning the precedential value of the previous judgment and the “parameters of the debate” have shifted. It will be otherwise where the law appears settled and, I would suggest, there does not appear that potential change may be on the horizon through subsequent developments, changing circumstances, academic criticism or predictions of change on revisitation of the issue by the Supreme Court.

[18] Secondly, the policy of husbanding scarce judicial resources for true matters of dispute may have to give way in some cases to the importance of providing access to justice to enable advocacy of change in and refinement of the law.

[19] Thirdly, the Court emphasizes that the touchstone for striking out, even in the case of an existing precedent, is “no reasonable chance of success” and not that “the current law does not recognize the action”. Thus, if it can be said that even though the claim does not fit under the current legal rules, and if there is a basis for saying that there is a rational possibility that on further argument, based on change in judicial thinking or academic criticism or otherwise, the decision might realistically be different, it would be open to an applications judge to refuse to strike because it could not be said that, with a possible change in the law, there is “no reasonable chance of success.” In other words, a litigant may have a “reasonable chance of success” within the test if based on reasonable legal argument there is a reasonable possibility that the law might change.

Application of Principles to this Case

[20] In this case, the precedent under consideration is *Bert Andrews*, a recent decision of this Court on almost the same pleaded facts, although the parties were different. The appellant in that case sought leave to appeal to the Supreme Court of Canada but leave was denied. Because the test for granting leave by the Supreme Court does not address merits, the fact that leave was sought and denied does not invest the case with any greater authority than if the matter had ended at the intermediate appellate level: *R. v. Hinse*, [1995] 4 S.C.R. 597; *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 282 at paragraph 31; Lorne Sossin (2005), 30 Queen’s L.J. 900.

[21] We are not therefore faced in this case – unlike the situation in *Confédération des syndicats* – with a precedent representing law settled by

the Supreme Court of Canada. What is at issue here, therefore, is whether *Bert Andrews* in this Court represents “settled law” at the intermediate appellate level that has no reasonable prospect of being reconsidered or changed.

[22] From a purely formalistic point of view, decisions of this Court are subject to review and revision by the Court. The Court from time to time will sit in a panel of five judges expressly for the purpose of reconsidering a previous decision. In that sense, there is always a theoretical possibility that the law as enunciated by this Court may change.

[23] For the purpose of the current exercise, however, something more than that must be relied on. It is necessary to consider whether the appellants in this case have put forward a credible argument that there is a reasonable possibility that the legal principles underpinning the decision in *Bert Andrews* could change or be interpreted and applied differently to the case at hand. It is not necessary that the appellants show that a different result “must” occur, only that there is a reasonable basis for a contrary argument such that one cannot say there is “no reasonable chance of success”. Furthermore, even if the law is regarded as settled based on an assessment of the current law, the judge must go on and decide whether it is a better exercise of his or her discretion to strike out the claim at the pleading stage or let it proceed to trial.

[24] The applications judge in this case did not consider this second part of the analysis. Having decided what the applicable law was and that it worked against the appellant’s claim, he did not go on to consider whether he should nevertheless exercise his discretion to allow the matter to proceed to trial. The applications judge described the purpose of rule 14.24 as being to advance the policy that “a defendant ought not to be put to the expense of defending the claim and engaging in a lengthy and expensive litigation process” where the claim was bound, on the applicable law, to fail (Judgment, at paragraph 32). While this policy is, as I have already indicated, of fundamental importance in the analysis, there are competing policies, such as ensuring appropriate access to justice, that must also be considered and which were not.

[25] The applications judge therefore erred in principle in his analysis. His decision must be set aside and this Court must now exercise the discretion in accord with principle.

[26] It is true that none of the *Telezone* line of cases dealt with an application to strike out a pleading on the basis that no reasonable cause of action was disclosed. But that is beside the point. The appellants' argument, as I understand it, is that the implication of the decisions is indicative of a change in thinking that, when consistently applied, in other contexts, would have the effect of questioning the rationale for the decision in *Bert Andrews*. The appellants point out that the *Telezone* cases effectively involve the question of whether the defence of statutory authority or the application of Crown immunity – matters essentially the same as the application of the anti-fettering doctrine – can be raised and whether those issues should go to trial. He also points out that the appellants in this case are also raising these issues. The fact, therefore, that the Supreme Court of Canada has said in those cases that these issues should go to trial is relevant, though, I would agree, not determinative.

[27] It matters not that the *Telezone* cases “do not stand for the proposition that, without exception, the Crown’s liability for damages must be determined on evidence adduced at trial” (Welsh J.A. at paragraph 75). The cases do indicate, however, that where the defences of statutory authority and Crown immunity are engaged, it is usually expected that the matters will proceed to trial because the cases are so fact specific. Thus, it is easier to argue now, than it was at the time of *Bert Andrews*, that before the types of issues that are being raised can be effectively determined, there should be an actual evidentiary base laid down before the decision is made.

[28] In *Bert Andrews*, three judgments were written. Welsh J.A. concluded that the decision of the Supreme Court of Canada in *Pacific National # 1*, a case dealing with the application of the anti-fettering doctrine in the context of legislative powers exercised by a municipality, as well as this Court’s decision in *Terra Vista Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2006 NLCA 61, 260 Nfld. & P.E.I.R. 344, a case dealing with the application of the doctrine in the context of ministerial discretion under provincial fisheries legislation, meant that the executive power of the federal Minister of Fisheries should be treated the same with respect to the application of the anti-fettering doctrine, thereby requiring a conclusion that the appellants in *Bert Andrews* could not have a cause of action in contract or tort on the facts pleaded.

[29] Barry J.A. agreed with Welsh J.A. with respect to her conclusion relating to the contract claim. With respect to the tort claim, however, he rested his decision on the fact that no duty to the appellants had been

pleaded and he did not see how, in the circumstances, one could have been pleaded, given the existing state of the law.

[30] Wells C.J.N.L. dissented. He identified the argument of the Attorney General to be – as did Welsh J.A. – that because it was an action against the Crown seeking damages for consequences alleged to flow from the exercise by the Minister of statutorily conferred discretion, the action could not be maintained, either in contract or tort, because the Minister could not contract or act in a manner that would fetter that statutorily conferred discretion and that therefore the statement of claim disclosed no reasonable cause of action, either in contract or in tort. As to the claim in contract, he expressed disagreement with the reasoning of the majority in *Pacific National #1*. He would have adopted the minority position in the case and the criticism of the application of the anti-fettering doctrine to indirect fetters expressed by Hogg and Monaghan in their text, *Liability of the Crown*, 3rd edition, (Toronto: Carswell, 2000) at pages 358-360 where they argue that the Crown should be bound in contract properly and lawfully entered into and should be liable to compensate the other party if a breach were to be committed.

[31] As to the tort claim, he concluded that the anti-fettering doctrine could not be applied, at the stage of an application to strike, to lead to a conclusion that no reasonable cause of action could exist.

[32] He concluded, however, that neither the contract nor tort claim should be struck out, reasoning:

[49] With respect to both the claim in contract and the claim in tort, there is a possibility that a trial judge could conclude, on the evidence presented, that the actions of the Minister were such that the anti-fettering doctrine should not be applied in the circumstances. ...

(Emphasis added.)

Wells C.J.N.L. noted that the anti-fettering doctrine was not absolute in its application; it was not applicable where arbitrariness, bad faith or acting on irrelevant considerations were shown. He reasoned that if the anti-fettering doctrine was in issue – as it certainly was in that case – the question of good faith or arbitrariness was also *ipso facto* in issue (at paragraph 50). He therefore concluded that the facts as pleaded were sufficient to enable the appellants to argue bad faith (at paragraph 51).

[33] This analysis was not addressed by Welsh and Barry JJ.A. except to say that bad faith was not expressly pleaded. That left open the point made by Wells C.J.N.L. that it was not necessary to plead bad faith or arbitrariness expressly; it was necessarily and implicitly engaged once the issue of anti-fettering was raised (although by virtue of the decision reached by Welsh and Barry JJ.A., it must be concluded that their decision rejected implicitly the idea that issues of bad faith and arbitrariness were in play in the case).

[34] The decision in *Pacific National # 1*, which was applied in *Bert Andrews*, has since been the subject of considerable criticism. The Court held by a 4-3 majority, upholding an appellate judgment, that a claim against a municipality for breach of an alleged implied term in a contract not to rezone certain development property was precluded by the anti-fettering doctrine. The majority concluded that the municipality had no statutory powers to agree to an implied term of the type alleged and that the possibility of being held liable in damages for breach of contract would constitute an indirect fettering of municipal power, which was the same in legal effect as direct fettering. The majority also referred to the Court's previous decision in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 and distinguished it solely on the basis that it "did not deal with a contract governing the exercise of municipal legislative powers" (paragraph 61).

[35] The minority held that the municipality had the authority to agree to the alleged implied term under the general business and contracting power of municipalities. They further held, drawing a distinction between direct and indirect fettering, that the ability to claim damages for breach of the contract was not precluded by the anti-fettering doctrine. Holding that the decision in *Wells* was "strong recent support for [the developer]'s position" (paragraph 121), Bastarache J. commented:

[119] The finding that the implied term is not contrary to public policy is consistent with the modern approach to Crown liability for breach of contract as this Court recently set out in *Wells*, *supra*. I cannot agree with my colleague that the situation here can be distinguished from *Wells* because the [agreement] is not a business contract of a type similar to the one at issue in that case. The artificial creation of categories of business contracts is unjustified and unworkable. In *Wells*, this Court recognized that the government cannot glibly avoid responsibility for breaches of contract....

[120] *Wells* identifies important matters of policy fundamental to the analysis of the City's liability in this case. At para. 46, the Court recognized that in "a nation

governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to”....

...

[127] ... the doctrine that the Crown may not enter into a contract that might fetter future councils has been criticized in the literature. In describing it as “intolerably vague”, Hogg [P.W.Hogg, *Liability of the Crown* (2nd ed. 1989)] points out, at p. 171, that the doctrine unfairly provides the Crown with a means of escape from many of its seemingly straightforward contractual obligations. ... In this case, there is no direct fettering of the municipality’s legislative power and there is no reason to fear that the duty to pay damages will affect in a detrimental way the public interest in preserving the legislative independence of all municipal governments.

[36] While these remarks were made as part of the minority judgment, they highlight the important differing philosophical and policy points of view on whether the anti-fettering doctrine should include indirect fettering caused by the threat of liability for damages for breach of contract. Depending on how widely or narrowly one interprets the scope of *Wells*, it also sets up a potential conflict between *Pacific National #1* and *Wells* as to the principles applicable in differing fact situations. It is also worth noting that the discussion of the scope of the anti-fettering doctrine in both *Pacific National #1* and *Wells* occurred *following trial* where the application of the principles could be made (and distinctions drawn, if necessary) after a full and precise factual record had been established.

[37] In subsequent litigation to determine whether the developer was entitled to restitution for the benefits conferred on the municipality pursuant to the contract held to be unenforceable in *Pacific National #1*, the Court unanimously held that restitution was available to prevent unjust enrichment. The Court unanimously rejected the argument that awarding restitution would constitute an indirect fetter on the exercise of the City’s legislative power: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 [*Pacific National #2*].

[38] As noted by the minority in *Pacific National #1*, the notion of indirect fettering as a defence to a contract claim against government has been criticized. Peter Hogg has maintained, and expanded on, this criticism since the *Pacific National* cases were decided. In the fourth edition of *The Liability of the Crown*, (Toronto: Thompson Reuters Canada Limited, 2011), a text not available to the Court in *Bert Andrews*, Hogg and his co-authors,

Patrick Monahan and Wade Wright, reiterate that although a contract entered into by the Crown cannot validly impose a direct fetter on legislative power, the principle does not, notwithstanding *Pacific National #1*, extend to indirect fettering:

... although the legislative branch cannot be directly compelled to perform a contract to enact or repeal or not repeal a particular law, the contract may nevertheless be valid and enforceable by the remedy of damages against the Crown (the executive branch)...

While a contract entered into by the Crown (or anyone else) cannot validly impose a *direct* fetter on legislative power, an exercise of legislative power in breach of contract will give rise to an obligation on the Crown to compensate the private contracting party for any loss suffered by the breach of contract. That obligation is an *indirect* fetter on legislative power, but it is not forbidden by the rule against fettering; on the contrary, it is required by the rule of law.

...

What *Wells* makes clear is that a statute that causes a breach of contract gives rise to an obligation on the part of the Crown (or other contracting party in breach of the contract) to pay damages to the party who has suffered the loss as the result of the breach. No doubt, the obligation to pay damages is a disincentive to any exercise of legislative power that would cause a breach of contract. The obligation to pay damages is in that sense an indirect fetter on legislative power. But the rule against fettering of legislative power applies only to a direct fetter. ...

...

The wisdom of *Wells* was forgotten rather quickly when, in the following year, the Supreme Court decided [*Pacific National #1*]. ... To the argument that an obligation on the municipality to pay compensation for its breach of contract did not fetter its legislative power, LeBel J., who wrote for the majority, replied that an indirect fetter was no different from a direct fetter...

In *Wells*, of course, compensation for breach of contract caused by a legislative decision was not merely treated as “acceptable”, but as a governmental obligation required by the rule of law. ... Surely, Bastarache J. was right in his dissenting view that *Wells* was the governing authority for [*Pacific National #1*]... As in *Wells*, all that was claimed was that compensation should be paid for the breach of contract. In [*Pacific National#1*], that claim should have been accepted by the Court.

LeBel J. provided a second reason to distinguish *Wells*. He said that the contract in *Wells* did not engage “the exercise of *municipal* legislative powers”, suggesting that the no-indirect fettering rule applies only to the municipal level of

government. ... [T]he narrower interpretation of the decision (applicable only to municipalities) is, in our view, the better interpretation of the majority opinion – and it has the advantage of limiting the harm that the decision can do. However, in our view, the decision is wrong, even if it is limited to the exercise of municipal legislative powers... (pages 324-328).

(Citations omitted; italics in original.)

[39] Hogg and his co-authors also commented on the significance of the subsequent decision in *Pacific National #2* to this issue:

...The City argued that damages for unjust enrichment, although not as high as damages for breach of contract, would still constitute an indirect fetter on its legislative power. That argument, although without moral appeal, was plainly correct, since the obligation to pay for the amenities would impose a cost on the enactment by the City of the down-zoning by-law. But now the reaction of the Supreme Court was completely different. ... The Court awarded the plaintiff the damages it claimed for the unjust enrichment of the City. The tenor of the opinion in [*Pacific National #2*] is a striking contrast to that of the majority opinion in [*Pacific National #1*]. In the first place, Binnie J. in referring to the earlier decision, always referred to municipalities and statutory powers, giving no suggestion of any wider application of the no-indirect-fettering rule. Secondly, Binnie J. said: “I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but to allow them to scoop a financial windfall at the expense of those who contracted with them in good faith.” It is hard to read that dictum without discerning some criticism of the majority decision in [*Pacific National #1*] ... [*Pacific National #2*] gives reason to hope that the majority ruling in [*Pacific National #1*] will be narrowly interpreted and may even have a short life (pages 328-329).

(Citations omitted.)

[40] Finally, after discussing policy reasons for permitting indirect fettering, Hogg et al. conclude as follows as to the state of the law:

We conclude that contracts that provide for or assume the enactment of new legislation or the maintenance of existing legislation are valid and enforceable, provided that the only remedy is an award of damages to any party to the contract that suffers loss from legislative action or inaction that is inconsistent with the contract. ... With respect to contracts entered into by the Crown, this position is firmly established by *Wells*, and is not limited to “business” or “proprietary” contracts. ... [I]n our view, [*Pacific National #1*] is inconsistent

with *Wells* and is wrongly decided as a matter of legal principle. The narrow four-three majority, the force of the dissent, and the implicit criticism in [*Pacific National #2*] make it unlikely that *Pacific National #1* is the last word on the indirect fettering of legislative power by municipalities, (page 331).

(Underlining added.)

[41] Hogg et al. therefore not only argue that *Pacific National #1* is in conflict with the principle in *Wells*, and that *Wells* should prevail, but also say that in any event, *Pacific National #1* is limited to municipal contracts. They further argue that *Pacific National #1* is not “the last word” on the scope (or perhaps even the existence) of the indirect fettering doctrine.

[42] Given the facts that:

- (a) The facts as pleaded in the current case do not relate to municipal contracts;
- (b) The majority in *Bert Andrews* purported to rely on and apply the criticized *Pacific National #1*;
- (c) The scope of the anti-fettering doctrine, even as expressed in *Pacific National #1*, may be limited to municipal contracts but at the very least is unclear;
- (d) The possible impact of *Pacific National #2*, as possibly indirectly questioning the efficacy and scope of *Pacific National #1*, was not considered in *Bert Andrews*;
- (e) Thoughtful extra-judicial analysis of *Pacific National #1* is highly critical of it and suggests that it is not likely to be the last word on the subject;
- (f) The critical analysis of *Pacific National #1* in the 4th edition of by the Court in *Bert Andrews*;
- (g) *Bert Andrews* involved three separate judgments, indicating no unanimity of approach to the issues even within the judgments constituting the majority;
- (h) The dissenting judgment in *Bert Andrews* purported to rely on a ground for not striking out that was not expressly rejected by the two majority opinions;

- (i) The *Telezone* line of cases places emphasis on resolving statutory immunity issues by reference to specific evidentiary backdrops,

I conclude that it cannot be said that it is plain and obvious that on a reconsideration of these issues by the Supreme Court of Canada, or even by a five-judge panel of this Court, the same result as in *Bert Andrews* would occur.

[43] The better exercise of discretion in this case is to allow the case to go to trial where an evidentiary context can be established, thereby enabling the appellants to make submissions in relation to specific factual trial findings and allowing them to then raise the legal issues on appeal if not successful at trial. This is not a case where it can be said the law would be treated as fully settled if the matter were to reach the appellate level again. There is certainly a reasonable possibility that the courts may interpret *Pacific National #1* as not applicable in the context of the current case, thereby undermining the basis of *Bert Andrews*. The appellants should be given the opportunity to make the argument. It is not merely wishful thinking on the part of the appellants that is not grounded in a realistic assessment of the state of the law. On the current state (or the possible development) of the jurisprudence, a credible argument can be made that *Pacific National #1* is not controlling and that *Bert Andrews* should not be followed. In these circumstances, access to justice trumps judicial economy in this case.

[44] It is clear from *Pacific National #1* that possible distinctions that may affect the application of the anti-fettering doctrine may depend on the factual context. The distinctions between municipal contracts and other governmental contracts, or between business contracts and high level contracts involving public servants are some examples. The discussion of the principles in *Pacific National #1* and *Wells* took place following the establishment of an evidentiary record. Further, as noted by Wells C.J.N.L. in dissent in *Bert Andrews*, the issue of bad faith and arbitrariness as limits on the anti-fettering doctrine may well be raised in the context of the general consideration of that issue without the necessity of them being expressly pleaded. If so, it would be necessary to have the evidence before the court to determine whether, on the specific established facts (not just those constituting a general pleading), those issues are engaged.

[45] Furthermore, it must be remembered that when considering whether it is plain and obvious that a claim cannot succeed, the Court is not permitted

to anticipate defences that might be raised by the party seeking the striking out, as part of the consideration as to whether the claim cannot succeed: *Walsh, supra*, at paragraph 14. As Wells C.J.N.L. stated in that case:

[16] ... [I]f there is any possible basis whatsoever on which a plaintiff might successfully argue entitlement at law, it is inappropriate to anticipate any defence a defendant may plead...

(Underlining added.)

[46] In essence, the plea of the anti-fettering doctrine is a defence to the appellants' asserted contract claim. It is up to a Crown defendant to raise the anti-fettering doctrine as an excuse for non-performance and liability in damages for breach. If it is not raised by the Crown, the contract claim would normally proceed. In that sense, therefore, anti-fettering is a defence that must be pleaded. Even if it is, the questions of whether it can be relied on (because of possible bad faith or arbitrariness) or whether it applies to the type of contractual relationship in issue (because it may not be a municipal contract, if the narrow interpretation of *Pacific National #1* applies) are all matters that must still be decided against the specific evidentiary backdrop. That being so, such a plea should not be anticipated or taken into account when considering an application to strike.

[47] It is all very well to say, as does my colleague, at paragraph 81, that "[w]hile legal articles and texts have criticized the law regarding indirect fettering of ministerial discretion, the law applies until the Supreme Court of Canada adopts a change in this or an analogous context". But that begs the question as to how the issue may be brought before that Court so that the matter could be revisited. Absent a reference, the Court can only pronounce on or revisit the law by way of appeal from lower courts. To do that, one must allow, in an appropriate case, a matter such as the present to go to trial where the factual record can be established and the argument for a different result can be made, with a view to providing an opportunity for the issues to be raised on appeal. Allowing a case always to be struck out on the basis of the "current settled law", while turning a blind eye to a good faith desire to challenge the development of the law, in circumstances where there may be doubt as to the scope of its application, can result in a complete ossification of the law in its present form without possibility of future development. If the lower courts do not allow a party to make the argument in their courts following the establishment of a full record, how will the matter ever properly get to the Supreme Court of Canada for future adjudication?

[48] It is not enough, therefore, to consider whether the law “has changed” or whether the law has been “altered” (past tense) – the test includes a consideration of whether there is a reasonable possibility that the existing law may be regarded as uncertain and may develop or change when the court is confronted with the actual evidence, i.e. the legal result contended for *could* (not necessarily *would*) reasonably result. This is one of those cases where the litigants should be allowed to make their argument.

[49] It must be remembered that in refusing to strike out a claim on the basis of the application of a previous appellate precedent, an applications judge is not demonstrating a lack of fidelity to the existing law but is merely exercising a discretion, after considering all relevant considerations, to allow a case to proceed to trial. It is following trial where the extent, application and controlling nature of the previous precedent will be debated and decided.

Conclusion and Disposition

[50] For the foregoing reasons, I would not strike out the statement of claim. The matter should proceed to trial. I would allow the appeal and remit the case to the Trial Division. I would award costs in favour of the appellants on a party and party basis both here and in the Trial Division.

J. D. Green C.J.N.L.

I Concur: _____

L. D. Barry J.A.

Dissenting Reasons by Welsh J.A.:

[51] The appellants, who are crab fishers, claim damages based on an alleged agreement regarding the allocation of quota by the federal Minister of Fisheries and Oceans. The Crown brought an application to strike the statement of claim for failure to disclose a reasonable cause of action. The application was granted based on an earlier decision of this Court regarding the same matters. The fishers appeal, submitting that the applications judge did not properly assess and apply subsequent decisions of the Supreme Court of Canada.

BACKGROUND

[52] The appellants are licensed crab fishers who commenced an action against the Attorney General of Canada in 2006 claiming damages for breach of contract. They allege in their statement of claim that, from 2001 to 2005, the Minister of Fisheries and Oceans breached an agreement that their quotas would not be reduced below a certain level. The Attorney General applied to have the statement of claim struck on the basis that it failed to disclose a reasonable cause of action. The applications judge summarized the fishers' claim (2012 NLTD(G) 3, 318 Nfld. & P.E.I.R. 212):

[9] ... They allege that the Minister of Fisheries and Oceans for Canada made a commitment to them, barring concerns over conservation, to not reduce the quota of crab they and all members of the 3K crab fleet were entitled to catch below 3,100 tons, the long-term (1988-1993) allocation of 3K crab for those fishers.

[10] The [fishers] allege that in exchange for this commitment by the Minister, they (as part of the 3K crab fleet) agreed that they would not participate in any proportionate increases in the crab quota in the 1990's and would receive a reduced quota in 1995. They say the commitment of the Minister was reduced to writing in the 1995 Snow Crab Management Plan. The [fishers] allege that in breach of this agreement the 3K crab quota in each of the years 2001 to 2005 was set by the Minister below the 3,100 tons agreed to, resulting in them suffering damages.

[11] They allege further that, while acknowledging that the Minister was exercising a discretion in setting the 3K crab quota for the years in question, in having made the commitment referred to above, she had fully exercised her discretion for the years in question and the reductions in quota for the years in question constituted a breach of contract in respect of which the [fishers] are entitled to damages.

[53] In assessing the Attorney General's application to strike the fishers' statement of claim the applications judge referred to the decision in *Andrews v. Canada (Attorney General)*, 2009 NLCA 70, 292 Nfld. & P.E.I.R 175, leave to appeal refused (2010), 409 N.R. 381 (the "*Bert Andrews*" decision). The judge concluded that, in *Bert Andrews*, the Court had considered:

[20] ... the exact same commitment of the Minister of Fisheries and Oceans respecting the setting of quotas for crab in the 3K fishing zone as is before me. The pleadings in that case are virtually identical to the claim in contract in the instant case. The only real difference is that in [*Bert Andrews*], in addition to claiming relief in contract, the plaintiffs framed their claim in the alternative in negligence.

[54] In *Bert Andrews*, the majority of this Court affirmed the applications judge's order striking the statement of claim:

[84] Applying these principles to the appeal now before this Court leads to the conclusion that it is plain and obvious the appellant fishers' action cannot succeed. In accordance with the legislation, the Minister is clothed with discretion to issue crab licences, and to include a condition regarding quota, for "the proper management and control" of the fishery or for the "conservation and protection of fish" (see paragraph 66, above). Crab licences are issued annually resulting in yearly exercise of the Minister's discretion. That discretion must be exercised in the public interest and may not be fettered directly or indirectly. A claim for damages for failure to exercise the discretion in a particular manner amounts to an improper indirect fettering of the Minister's discretion. As a result, the fact that the Minister made a "commitment" to the appellant fishers some years earlier cannot ground a claim in damages. The same analysis applies and the same conclusion follows whether the claim is made in contract or tort. In either case, the effect is an indirect fettering of the ministerial discretion.

[85] Further, the appellant fishers have not alleged in the statement of claim that the Minister acted in bad faith or arbitrarily, or that he considered factors irrelevant or extraneous to the statutory purpose (decision of the applications judge, at paragraph 67). The essence of the claim is that the Minister did not exercise his discretion in accordance with his earlier "commitment". Finally, the appellant fishers make no claim based on unjust enrichment.

[86] In the result, it is plain and obvious that the appellant fishers' claim for damages based on reduced snow crab quotas and landings cannot succeed. Accordingly, the applications judge did not err in striking the statement of claim.

See also, *Bert Andrews*, at paragraph 97.

[55] In this case, the applications judge was satisfied that the *Bert Andrews* decision was determinative and that the statement of claim should be struck for failure to disclose a reasonable cause of action. He found that the decisions in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, and the five companion cases, discussed below, were not of assistance because they dealt, not with the issues raised by this case, but with the federal court's jurisdiction to decide the matters, to the exclusion of the provincial superior courts. Further, the applications judge commented on the Supreme Court of Canada's refusal to grant leave to appeal the *Bert Andrews* decision:

[29] It is interesting to note that at the time our Court of Appeal issued its decision in *Bert Andrews*, the *TeleZone* cases were before the Supreme Court of Canada as they were when the Supreme Court denied leave in *Bert Andrews*. ...

...

[32] ... [*TeleZone*] does not say anything about the statement of claim having to disclose a reasonable cause of action. That is a recognized legal principle of long standing which is reflected in Rule 14.24. If a plaintiff cannot possibly succeed on the allegations in the statement of claim even if proven, a defendant ought not to be put to the expense of defending the claim and engaging in a lengthy and expensive litigation process. This is the purpose of Rule 14.24.

[56] On this appeal the fishers submit that the applications judge erred in his analysis of the effect of *TeleZone* and the companion cases, and that the conclusion in *Bert Andrews* is not determinative.

ANALYSIS

[57] Striking a statement of claim is governed by rule 14.24 of the *Rules of the Supreme Court, 1986*, which provides, in relevant parts:

(1) The Court may at any stage of a proceeding order any pleading ..., or anything therein, to be struck out ... on the ground that

(a) it discloses no reasonable cause of action or defence;

...

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(2) Unless the Court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under rule 14.24 (1)(a).

[58] The applicable analytical approach under this rule is set out in *Bert Andrews*:

[60] ... In summary, an application to strike the statement of claim will be granted only if the judge is satisfied it is plain and obvious the action cannot succeed. The analysis must be conducted on the basis of the facts as pleaded in the statement of claim. It is not permissible to anticipate defences that may be pleaded.

The language used by the Supreme Court of Canada in *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, at paragraph 1, is that it is plain and obvious the action is “bound to fail” and the action “has no reasonable chance of success”.

[59] The fishers in this case submit that the decisions in *TeleZone* and the companion cases lead to the conclusion that the result in *Bert Andrews* is no longer good law and that a different conclusion must obtain here. The foundation of this submission is that improper indirect fettering of a minister’s discretion is a defence which requires the matter to go to trial, and that, therefore, striking the statement of claim is precluded.

[60] In addressing this submission, I begin with a review of *TeleZone* and the companion decisions. In those cases, as recognized by the applications judge here, at issue was whether the plaintiffs could, as a matter of law, bring a claim for damages without first challenging the decision by way of judicial review in the Federal Court. That issue is not relevant and is not discussed in this appeal.

[61] Rather, the fishers rely on *TeleZone* and the companion cases for the proposition that the issue of the Crown’s liability for damages must be determined on evidence adduced at trial. In those cases, the Court did not refer to rules of court regarding the striking of pleadings for failure to disclose a reasonable cause of action in the context raised by this appeal. It is necessary, then, to consider the scope of application of the Court’s comments on the requirement to proceed to trial.

[62] In *TeleZone*, the company, a cellular telephone network provider, claimed damages for losses suffered when Industry Canada failed to grant it a licence. Binnie J., for the Court, summarized the issue on appeal:

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[28] Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. ...

(Emphasis added.)

[63] Binnie J. also referenced statutory authority as an answer to a claim against the Crown:

[31] The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. ...

...

[69] It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

...

[71] However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the

outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. ...

[64] Binnie J. began by noting that, at this stage of the proceedings, the Crown was not relying on statutory authority to respond to the alleged breach of the claimed contract. He went no further than to state that, where statutory authority is relied upon, it will “not always provide a complete answer to a damages claim” (paragraph 71). He neither stated nor inferred that a response to a claim in damages on the basis of statutory authority must inevitably go to trial, and that it may not be considered under an application to strike the statement of claim for failure to disclose a reasonable cause of action.

[65] In *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657, three meat packing plants sought damages following a work stoppage by veterinarians that resulted in meat being declared inedible. LeBel J., for the Court, stated that applying the Quebec rules on civil liability in this context would not preclude the federal Crown from invoking its immunity from liability for damages:

[27] ... For example, it remains open to the federal Crown to argue that a particular decision was made by its agents acting in a policy rather than an operational capacity, which would not normally attract liability. However, such arguments are more appropriately dealt with at the hearing on the merits, not on a motion to dismiss at a preliminary stage.

[28] ... In *Montambault* [[2001] R.J.Q. 893], Deschamps J.A., as she then was, held that the issue of whether a government agency can invoke its immunity from civil liability for an administrative decision requires a thorough study of the case, including questions of fact, which can be completed, supported and argued only at the stage of the hearing on the merits. The ruling in *Montambault* represents a sound approach to determining whether government agencies are immune from civil liability in Quebec, and it remains open to the Agency to make further submissions on this point at trial.

[66] It is clear that this was not a situation in which it was plain and obvious that the action could not succeed. Whether immunity from liability for damages could be successfully argued required analysis of the particular circumstances and the extent of immunity applicable to an agency of the government.

[67] In *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64, [2010] 3 S.C.R. 639, an import licence issued by the Canadian Food Inspection Agency was revoked as the ship, loaded with wheat, approached its destination. A new licence with different conditions was issued about one month later. Parrish began an action claiming damages for economic losses. The Crown's application to have the statement of claim struck based on the court's lack of jurisdiction was dismissed. In addition, Rothstein J., for the Court, commented:

[20] The Crown may seek to defend against the action by relying on its statutory authority, under s. 47 of the *Plant Protection Act*, S.C. 1990, c. 22, and s. 34 of the *Plant Protection Regulations*, to revoke or amend import permits. If it does so, the merits of this defence will have to be determined at trial.

[68] On this point, Rothstein J. simply identified a possible position the Crown may take when the matter proceeds in the provincial superior court. In the result, the Court neither addressed nor analyzed the proposition that the statement of claim may be struck because it is plain and obvious the action cannot succeed.

[69] In *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648, the Director General prohibited the company from marketing a particular generic drug. Nu-Pharm commenced an action claiming, among other things:

[8] ... damages for misfeasance in public office, abuse of authority, illegal interference with Nu-Pharm's economic interests, and gross negligence, or alternatively negligence.

[70] The Crown sought summary judgment on the procedural ground that Nu-Pharm was required to proceed first by way of judicial review. This was ultimately rejected by the Supreme Court of Canada, citing the analysis in *TeleZone*. Regarding the issue of damages, Rothstein J., for the Court, wrote:

[19] It is true that the decisions by the Director General were made pursuant to federal legislation. Thus, it is expected that in the case on its merits, the Crown will argue the defence of statutory authority. However, that is an issue that will have to be resolved at trial.

[71] There is no indication that statutory authority was, in fact, argued at this preliminary stage. Indeed, the case is based on an application for

summary judgment, not an application to strike the statement of claim. This follows because there are allegations that the Director General acted in bad faith and arbitrarily. Such allegations require evidence, precluding the Crown from proceeding by way of an application to strike the statement of claim on the basis that it is plain and obvious the action cannot succeed.

[72] Similarly, the decision in *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672, is not of assistance in this appeal. That case involved, among other things, an application for certification of a class action arising from alleged discriminatory deductions related to disability pensions paid to Canadian Armed Forces veterans. Abella J., for the Court, concluded:

[20] ... Barnes J. has already addressed the question of whether the claims alleged reasonable causes of action (paras. 39-41). He concluded that the “allegations of unlawfulness, *ultra vires* and a breach of subsection 15(1) of the Charter easily meet the legal threshold of a reasonable cause of action” (para. 39). ... The Crown does not ask us to interfere with these findings. ...

[73] Finally, in *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, a prison inmate who was held in solitary confinement for approximately three years sought compensation on the basis that such detention was unlawful, that it amounted to arbitrary and cruel and unusual punishment, contrary to sections 9 and 12 of the *Charter*, and that decisions were made “deliberately and maliciously, or, in the alternative, negligently” (paragraph 7). Binnie J., for the Court, commented:

[15] Clearly, an issue before the Superior Court is whether the Crown defendants are covered by a defence of statutory authority, i.e., that the administrative segregation orders were lawfully made and that the emotional and psychological trauma allegedly suffered by Mr. McArthur were an inevitable risk of his lawful detention in solitary confinement. Since this is the case, the Attorney General argues, the claimed losses are not actionable. However, with respect, the Superior Court can readily consider the validity of Mr. McArthur’s detention in the context of a damages claim, as well as the impact, if any, of a *valid* order on Crown liability.

(Italics in the original.)

[74] Again, this is not a case where it is plain and obvious that the action cannot succeed. The allegations of *Charter* violations and malicious actions by the Crown’s representative would require evidence, and, if proven, would require assessment as to the effect on Crown reliance on statutory authority.

[75] To summarize, the question of striking a statement of claim for failure to disclose a reasonable cause of action was not analyzed in any of the above decisions. References to statutory authority as a defence were made in the context of possible positions the Crown may take in responding to the claims. If argued, given the nature of the cases as discussed above, evidence would be required, thereby precluding the option of striking the statement of claim on the basis of it being plain and obvious the action cannot succeed. I hasten to add that the above decisions do not stand for the proposition that, without exception, the Crown's liability for damages must be determined on evidence adduced at trial. Whether a statement of claim may be struck for failure to disclose a reasonable cause of action, including situations where the Crown relies on statutory authority, will depend on the circumstances.

[76] As stated by the applications judge, the purpose of rule 14.24 is to provide litigants with a procedure that avoids a potentially lengthy and expensive process where it is plain and obvious that the plaintiff's claim has no possibility of success. Accordingly, subject to special circumstances where the court may order otherwise, rule 14.24(1)(a) is intended to apply where evidence is not required. For this reason, the assessment is conducted on the basis of the facts as pleaded and it is not permissible to anticipate defences that may be pleaded. However, care must be taken not to render rule 14.24 ineffective by applying an overly broad interpretation of "defence". Any response to a statement of claim may be described as a defence. What is critical is that, without the need for evidence, it is plain and obvious that the action cannot succeed.

[77] Characterizing principles such as "statutory authority" or "Crown immunity" as defences which must, without exception, be considered at trial, misstates the proposition at issue under rule 14.24 and in this appeal. The question here is whether the test for striking the statement of claim has been satisfied; that is, is it plain and obvious the action cannot succeed? None of the *TeleZone* and companion cases provides circumstances in which that test, having been analyzed, was satisfied.

[78] After this appeal was heard, the Supreme Court of Canada released the decision in *Canada (Attorney General) v. Confédération des syndicats nationaux*, *supra*, in which the Court discussed the principle of *stare decisis* in the context of striking a statement of claim because it is bound to fail. In that case, the Court concluded that an earlier decision of the Court had settled the law on the legal issues.

[79] Regarding *stare decisis*, LeBel and Wagner JJ., for the Court, explained:

[24] Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford* [2013 SCC 72, [2013] 3 S.C.R. 1101], the precedential value of a judgment may be questioned “if new legal issues are raised as a consequence of significant developments in the law or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (para. 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (*Bedford*, at para 46).

...

[26] In *Canada v. Imperial Tobacco* [2012 QCCA 2034, [2012] R.J.Q. 2046, leave to appeal refused, [2013] 2 S.C.R. ix], Gascon J.A., as he then was, explained this as follows:

...

Stare decisis is a less stringent basis for an argument than *res judicata*, since it requires only a similar or analogous factual framework. *Stare decisis* is a principle “under which a court must follow earlier judicial decisions when the same points arise again in litigation” [*Black’s Law Dictionary* (9th ed. 2009), at p. 1537]. It applies, of course, to decisions of the Supreme Court, particularly in the area of public law as here, where the parties were involved in earlier litigation on the specific question at issue. ...

[27] This being said, before granting a motion to dismiss an action because it has no basis in law, the judge must also be satisfied in light of the record and the alleged facts that the precedent relied on by the applicant actually concerns *the entire dispute* that it should normally resolve, and that it provides a *complete, certain and final* solution to the dispute. In case of doubt, the judge may not grant the motion to dismiss, but must instead give the parties an opportunity to argue the issues on the merits.

(Italics in original.)

[80] In *Bert Andrews*, this Court determined that it was plain and obvious that precisely the same claim as is made by the fishers in this case cannot succeed. Leave to appeal to the Supreme Court of Canada was refused. There is nothing in any of the *TeleZone* and companion cases that could be taken as altering the law as set out in *Pacific National Investments Ltd. v.*

Victoria (City), 2000 SCC 64, [2000] 2 S.C.R. 919, and applied in *Bert Andrews*.

[81] Fairness and justice require consistency in decisions of the Court. While this appeal does not engage the doctrine of *res judicata* because different fishers are named as plaintiffs in the action, the issues, foundation of the claims and the subject matter are the same as in *Bert Andrews*. Applying *stare decisis* as discussed in *Confédération des syndicats nationaux*, the conclusion follows that the decision in *Bert Andrews* resolves the entire dispute and provides a complete, certain and final answer to the fishers' claim in this case. The law that applies has been determined by this Court with leave to appeal being refused by the Supreme Court of Canada. While legal articles and texts have criticized the law regarding indirect fettering of ministerial discretion, the law applies until the Supreme Court of Canada adopts a change in this or an analogous context.

SUMMARY

[82] The decisions in *TeleZone* and the companion cases do not assist in analyzing the fishers' claim in this appeal. There is no basis on which to conclude that the law as applied in *Bert Andrews* has changed. In the result, the applications judge did not err in relying on the decision in *Bert Andrews* to strike the statement of claim and dismiss the fishers' claim.

[83] Accordingly, I would dismiss the appeal. Given the public policy nature of this appeal, the parties should bear their own costs of the appeal.

B. G. Welsh J.A.