

Citation: Levy v. Crawford & Company, 2026 ONSC 3581
Court File No. CV-25-00100497
Date: 2026/06/17

SUPERIOR COURT OF JUSTICE

DAVID LEVY

Plaintiff

- and -

CRAWFORD & COMPANY

Defendant

PROCEEDINGS AT MOTION

R U L I N G S O N M O T I O N A N D C O S T S

BEFORE THE HONOURABLE MR. JUSTICE P. ROGER
on June 10, 2026
at OTTAWA, Ontario

APPEARANCES:

R. Caza and R. Ruddock

Counsel for the Plaintiff

A. Tardif and E. Champagne

Counsel for the Defendants

WEDNESDAY, JUNE 10, 2026

R U L I N G O N M O T I O N

ROGER, J. (orally)

Background Information:

The defendants bring a motion to strike the plaintiff's claims for negligent misrepresentation and oppression on the basis that the plaintiff fails to disclose a reasonable cause of action. The defendants argue that the claim for negligent misrepresentation fails to plead sufficient facts to establish a duty of care, and that it relies on promises of future conduct, which are only enforceable if incorporated in a contract. The defendants argue that the oppression claim is entirely duplicative of the breach of contract case, and that an oppression claim is inappropriate where the wrongdoing is a breach of contract.

The parties were involved in a share purchase transaction in August 2021. The plaintiff is the representative of the former shareholders of edjuster Inc., a provider of technology-enabled contents claim handling services or contents insurance.

On August 23, 2021, the defendants acquired the shares of edjuster Inc. pursuant to the terms of a share purchase agreement. The price included cash upfront plus possible earnout payments based on post-acquisition performance in each of 2022 and 2023. A dispute arose about the 2022 earnout as the performance target was not reached. Negotiations followed in 2023, and the parties

settled that issue by entering into an amending share purchase agreement on August 15, 2023. Representations were made during these negotiations, and the amendment to share purchase agreement contains a release for claims relating to the 2022 earnouts, redefines the performance target, and contains additional contractual obligations.

The outstanding performance target, revised to 2024, was also not reached, and no other amount was payable to the former shareholders for the purchase of their shares.

This action was started or issued on July 14, 2025. It alleges various breaches of contract by the defendants, allegedly frustrating the attainment of the revised 2024 earning target. The plaintiff also sues for negligent misrepresentation and oppression. The plaintiff was served with this motion in October 2025. The motion was returnable yesterday, on June 9, 2026. On December 16, 2025, without seeking leave of the court, the plaintiff amended the statement of claim, essentially adding a claim for fraudulent misrepresentation, with negligent misrepresentation now pleaded in the alternative.

Analysis:

A motion to strike is decided on the “plain and obvious” test. It must be plain and obvious that a pleading discloses no reasonable cause of action or that it has no reasonable prospect of success.

Perfection is not required, and a statement of claim must be read generously to allow for drafting deficiencies.

I deal first with the defendants' arguments that the claim for negligent misrepresentation fails to disclose a reasonable cause of action. While I agree with the defendants that a previously established or analogous category of case establishing a duty of care has not been brought to my attention, I note first that this is not the kind of cases where it is plain and obvious that proximity and a duty of care cannot be established.

Proximity is determined by the defendants' undertaking and the plaintiff's reliance. However, in a case involving this degree of factual complexity, this assessment, or a finding that it is plain and obvious, cannot be conducted in the absence of a better record. As noted by many decisions addressing proximity, including 1688782 *Ontario v. Maple Leaf Foods Inc.*, 2020 SCC 35, at paragraph 66, a full proximity analysis requires the Court to examine all relevant factors present in the relationship. Furthermore, when risks could have been addressed by contract, this also includes an assessment of the plaintiff's ability to foresee and provide for the damage in question and, finally, the analysis includes whether it would be just and fair to impose a duty of care in these circumstances. Such assessments, in the specific circumstances of this case, require a better or more fulsome factual record than what is available

on this procedural motion. Paragraph 24 of the *Maple Leaf Foods* decision does not assist the defendants as it deals with the applicable standard of review. Moreover, and in any event, a duty of care has not been barred and is sufficiently pleaded by the plaintiff, as explained below, such that the plain and obvious test has not been met.

The defendants argue that the plaintiff has not pleaded that the defendants undertook to provide any representation, nor that the plaintiff relied on such undertakings. However, these arguments are premised on perfection, not on what is plain and obvious, allowing for inadequacies by reading the claim generously, as we must on such motions: *Frank v. Legate*, 2015 ONCA 631 at para. 36.

As indicated in *Maple Leaf Foods*, at paras. 33 and 34, an undertaking and reliance may be established "When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance...it is the intended effect of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff". This citation illustrates that the plaintiff has sufficiently pled the defendants' undertaking, and the plaintiff's reliance.

A duty of care is pled at paragraph 43 of the

statement of claim. This paragraph is not perfect, but it references representations made by the defendants to induce the plaintiff. This is supported by the other relevant paragraphs, at paragraphs 40 to 46 of the statement of claim. As indicated by the Court of Appeal in *Rausch v. Pickering (City)*, 2013 ONCA 740, at para. 95, on such motions the focus must be on substance, not form, and in some cases, depending on the circumstances, we can look to what is implicit in the rest of the pleadings.

The defendants also argue the availability of adequate contractual provisions, but as indicated earlier that assessment requires a better factual record. The same is applicable to the contractual release and entire agreement clause, which, it is not disputed, both require a better factual record to be properly assessed.

Consequently, a duty of care has been sufficiently pleaded and it is not plain and obvious that it will fail.

With regards to paragraphs 13 and 26 of the statement of claim, these are not standalone paragraphs. These paragraphs are not frivolous or vexatious and will not delay the fair trial of this action. They provide parts of the factual matrix and must be read with the rest of the statement of claim. This was made clear in the response to demand for particulars delivered by the plaintiff.

A claim for negligent misrepresentation may not be about promises for the future. It may not be about statements of future intent, about future opinions, forecast, or expectations.

Here, the alleged representations are not only about the future. As a result, it is not plain and obvious that this claim has no reasonable prospect of success.

In *Queen v. Cognos, Inc.*, [1993] 1 RSC 87, at page 128, the Supreme Court notes that the representations made in that case did not “relate solely to future events or expectations”.

Similarly, in *Kelly v. Lundgard*, 2001 ABCA 185, at para. 105, the Alberta Court of Appeal notes that “a past or present factual foundation underlying a future forecast or an untrue or misleading statement of the factual foundation may be sufficient”. Similarly, a statement of future intent will not support a finding of misrepresentation unless at the time the statement is made the speaker did not possess the indicated intent: *Toronto-Dominion Bank*, 2023 ONSC 1050 at para. 39. The same is provided in *Argyle v. Dickinson*, 2025 ONSC 7003, relied upon by both parties.

In *Argyle*, the court notes that “statements concerning the future may contain an implicit representation of a current objective fact”, and that the defendant’s belief or intention at the

time the representation about the future is made can also be a current objective fact. At paragraph 31 of that decision, Justice Myers notes that a pleading motion is not the time to determine whether a statement concerning the future contains an implicit statement of current fact because this will be informed by an assessment of all the relevant evidence. However, he notes that this must at least be pleaded.

Here, the representations are set out at paragraph 41 of the statement of claim. At paragraph 42, the plaintiff pleads that these representations were untrue, that the defendants did not have a genuine or settled intention of carrying them out. These are statements of present intention. Similarly, at paragraphs 42(a) and (b), the plaintiff pleads that the defendants "had no concrete plan" and "had failed" to take meaningful steps. At paragraph 43, the plaintiff pleads that the defendants "possessed unique knowledge" obviously at the time, and, similarly, at paragraph 45 that such representations were made "without a concrete plan or genuine intention", also obviously at the time.

Consequently, it is not plain and obvious that these claims have no reasonable chance of success.

This brings us to the claim of oppression under s. 241 of the *Canada Business Corporations Act*. At paragraph 1(d) of the amended statement of claim, a declaration is sought that the defendants' conduct was oppressive and relevant paragraphs pleading

oppression are found at paragraphs 51 to 54 of the amended statement of claim.

The Ontario Court of Appeal has noted that oppression is not intended to give after-the-fact protection when parties entered into an agreement in which they provided or could have provided what their reasonable expectations were: *J.S.M. v. The Brick*, 2008 ONCA 183. However, the Court of Appeal has not held that the availability of a contract precludes a claim for oppression in all circumstances: *Fedel v. Tan*, 2010 ONCA 473, at para. 56. In *Tan*, the Court of Appeal notes that oppression may be available when the plaintiff's interests are compromised or "harmed by conduct that is protected by s. 248 of the *OBCA*" the Ontario equivalent. As well, in *F.N.F. Enterprises*, 2023 ONCA 92, the Court of Appeal did not bar an oppression claim in circumstances where a contract existed.

F.N.F. Enterprises outlines the two requirements of an oppression claim. It states that the plaintiff must identify the expectations it claims were violated and show that the expectations were reasonably held. As well, the plaintiff must show that these reasonable expectations were violated by corporate conduct which was oppressive or unfairly prejudicial or unfairly disregarded the interests involved.

Here, the plaintiff pleads the above, such that I cannot say that it is plain and obvious that an

oppression claim may not be made out.

The plaintiff has pleaded what would fall in the second situation described in *J.S.M.* The plaintiff alleges that the defendants used its exclusive control over the corporation's internal operation to make it effectively impossible for the earnout targets to be achieved. This is broader than what might be provided by the party's contract, see paragraphs 51 to 54 of the amended statement of claim. The plaintiff pleads its expectations at paragraph 52 and alleges that these expectations were reasonable. The plaintiff then alleges that these expectations were breached by corporate conduct that is alleged to have been oppressive.

Although the facts of this case are different from those in the decisions cited earlier, and probably close to the line, oppression is sufficiently pleaded in circumstances where I cannot find that it is plain and obvious that this claim is without merit. It is pleaded that the defendants "unfairly disregarded the interests of the sellers as former security holders". That the plaintiff has not alleged "unlawful" corporate maneuvers is of no consequence because this is implicit given the allegations made in the relevant paragraphs of the amended statement of claim. There is presently no bar to such a claim and whether the plaintiff could have protected itself by contract will be determined at trial: *Brookfield*, 2012 ONSC 580.

Finally, leave to amend is disputed by the

defendants in their written materials, but this was not strenuously argued during the hearing of this motion yesterday. *Vale Canada Limited v. Solway Investment Group Limited*, 2021 ONSC 7562, is informative in such circumstances. As noted in that decision, the *Rules of Civil Procedure* should not get in the way of arriving at a reasonable solution to procedural problems. The statement of claim was amended in circumstances that were not abusive or not designed to avoid this motion. The amended statement of claim is therefore not a nullity and, if required, leave is granted for this amendment as there is no evidence of prejudice.

The defendants' motion is therefore dismissed.

R U L I N G O N C O S T S

ROGER, J. (orally)

Costs:

On the topic of costs, the plaintiff seeks costs in the amount of \$49,887 based on partial indemnity costs to May 15, 2026, the date of their offer, and on a substantial indemnity basis thereafter. In the alternative, the plaintiff seeks costs on a partial indemnity basis throughout in the amount of \$42,224. I note that the plaintiff's actual costs are in the amount of 69,626.

The defendants argue that costs should be in the cause because oppression was a close call, this motion was warranted, and they rely on the decision in *Argyle v. Dickinson*, 2026 ONSC 207, where this was awarded. They argue, as well, that the offer

was a limited compromise such that in fairness substantial indemnity costs should not be available.

The plaintiff was entirely successful on this motion. As such, it should generally be entitled to its costs of this motion unless a different order would be more just. The fact that the oppression claim is a close call and the possibility that the plaintiff is ultimately found to have over pled are not sufficient to displace this presumption or to warrant ordering costs payable to the plaintiff in the cause.

The circumstances of this case are very different from those in the *Argyle* decision where the defendant was the successful party in circumstances described by the judge as akin to a demand for particulars. In such circumstances, despite being successful, the usefulness of the motion in *Argyle* was nonetheless in question. The facts are different here. As a result, the reasoning in *Argyle* is not logically applicable to the circumstances of this case, where the plaintiff delivered a very detailed response to demand for particulars, yet still faced this motion on which the plaintiff was entirely successful. This cannot be described as a pyrrhic result for the plaintiff in the circumstances of this case as it could for the defendant in the circumstances of the *Argyle* decision.

Moreover, the fact that one of numerous arguments

was a close call does not change that the plaintiff was successful and that what is fair is to order costs payable within the ordinary period of 30 days. A close call does not necessarily mean that a procedural motion is warranted, particularly when, even if granted, the motion would have made little if any difference to the parties' discovery obligations considering the very specific factual matrix of this case. Our court system would struggle if all close-call procedural motions were brought. Rather, costs serve a useful purpose even in close-call motion situations, subject, of course, to the assessment of fairness required in the circumstances of each case.

For the above reasons, I see no sufficient reason to exercise my discretion differently than to order costs payable within the next 30 days.

On the scale of costs, I agree with the defendants that the offer that was made by the plaintiff is not a sufficient compromise such that it would not be fair to order costs on a substantial indemnity basis from the date of the plaintiff's offer.

On the question of the amount of costs, I note that this was a complex and important motion for the plaintiff as it could have impacted the plaintiff's damages. This is a significant action such that proportionality does not play a role as it did in the decision of *Celanese Canada Inc. v. C.N.R.*, 2005 CanLII 8663, relied upon by the defendants for another purpose, that of the Rule 49 issue.

Similarly, the decision in *Argyle* is not helpful as it is limited to its particular facts.

The defendants' actual costs total \$53,338, while the plaintiff's actual costs, as indicated above, are \$69,626. In their written submissions, unaware of the outcome of this motion, the defendants sought costs on a partial indemnity basis in the amount of \$32,138. By comparison, the plaintiff's partial indemnity costs total \$42,224, a comparable amount considering the importance of this motion to the plaintiff.

The defendants are sophisticated parties who are not surprised by these costs, considering their own costs. This was an important motion for the plaintiff, and one can understand their efforts at putting their best foot forward. We can always quibble on costs, but I struggle to see how the defendants could not have anticipated costs in this range, which I find reasonable, when their actual costs exceed \$50,000.

Considering the circumstances, what is fair is to order costs of this motion in the amount of \$40,000, all-inclusive, payable by the defendants to the plaintiff within the next 30 days.
