



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Shoal Point Energy Ltd. v. Newfoundland and Labrador (Attorney General)*, 2026 NLSC 91

Date: July 30, 2026

Docket: 202301G5978

2026 NLSC 91 (CanLII)

BETWEEN:

SHOAL POINT ENERGY LTD.

PLAINTIFF

AND:

**HIS MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR**

RESPONDENT

Before: Justice Peter N. Browne

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

May 25, 2026

Summary:

The Respondent, His Majesty in Right of Newfoundland and Labrador (“the Province”), applied to strike a statement of claim issued by Shoal Point Energy Ltd. (“SPE”) on the basis that the causes of action pled were legally untenable.

The Court granted the Province’s motion to strike in part. SPE’s claims for constructive taking and negligent misrepresentation are struck with leave to amend while SPE’s claim for unjust enrichment survives. Given the mixed result there were no costs ordered.

Appearances:

Andrew Pozzobon and
Aidan N. Paul

Appearing on behalf of the Plaintiff

Suzanne M. Orsborn

Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *9095900 Canada Ltd v Baikoghli*, 2026 BCSC 839; *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227; *Kindylides v. Does*, 2020 BCCA 330; *Chiasson v. Nalcor Energy*, 2021 NLCA 34; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36; *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6; *Chain Lakes Logging Corp v. Abitibi-Price Inc.*, 2005 NLCA 13; *Resler v. Anglin*, 2026 SCC 23; *Nelson (City) v. Marchi*, 2021 SCC 41; *Hinse v. Canada (Attorney General)*, 2015 SCC 35

STATUTES CONSIDERED: *Canada-Newfoundland and Labrador Atlantic Accord Implementation and Offshore Renewable Energy Management Act*, S.C. 1987, c. 3; *Court Rules Act*, R.S.B.C. 1996, c. 80

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, s. 42, Sch. D; *Supreme Court Civil Rules*, B.C. Reg 168/2009

TEXTS CONSIDERED: *Halsbury's Laws of England*, 4th ed., vol. 14 (London: Butterworths, 1980)

REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] The Defendant, His Majesty in Right of Newfoundland and Labrador (“the Province”), applies pursuant to Rule 14.24(1)(a) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, s. 42, Sch. D to strike the Statement of Claim filed by Shoal Point Energy Ltd. (“SPE”).

[2] SPE pleads constructive taking (or “*de facto*” expropriation), negligent misrepresentation, unjust enrichment, and misfeasance in public office arising from the Province’s announcement of, and the continuation of, a moratorium on hydraulic fracturing. In its Memorandum of Fact and Law SPE concedes that the pleading in misfeasance in public office is not sustainable.

[3] The Statement of Claim alleges that SPE holds exploration rights under Licence 1070 (“the Licence”), granted pursuant to the *Canada-Newfoundland and Labrador Atlantic Accord Implementation and Offshore Renewable Energy Management Act*, S.C. 1987, c. 3 (the “Accord Act”).

[4] The pleadings continue by alleging that SPE expended significant funds in reliance on the regulatory environment in existence after it obtained the Licence, and that it was deprived of all reasonable uses of those rights by the Province’s temporary pause/moratorium on the use of hydraulic fracturing.

[5] In response, the Province argues that each cause of action as currently pleaded is legally untenable; whereas SPE says its claims are highly fact driven and novel.

[6] For the reasons that follow, the pleadings of constructive taking and negligent misrepresentation are struck in their entirety on a without prejudice basis, as neither cause of action, as currently pled, discloses a reasonable prospect of success.

[7] SPE shall have leave to amend its pleadings on these two causes of action in accordance with the reasons set out below. The application to strike the pleading of unjust enrichment should be addressed in the context of a full evidentiary record and, therefore, is dismissed.

ISSUES

[8] The issues that this Court must consider are as follows:

1. Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for constructive taking, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?
2. Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for negligent misrepresentation, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?
3. Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for unjust enrichment, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?

POSITION OF THE PARTIES

SPE

[9] SPE has an Exploration Licence (“Licence 1070”) under the *Accord Act* to explore 103,040 hectares of land situated in the extensive Humber Arm oil-in-shale play known as the Humber Arm Project (“the Project”) located off the west coast of Newfoundland and Labrador.

[10] Before and after it obtained Licence 1070, the Province, through its representatives and statutory decision makers, advised and actively encouraged SPE to develop the Project using hydraulic fracturing. On this basis SPE alleges it expended at least \$60 million to acquire, invest in, and take steps to explore and develop the Project.

[11] In November 2014, the Province announced a “pause” on all hydraulic fracturing operations. As a result, SPE pleads it has been unable to take further steps to develop the Project causing deleterious effects and economic harm to its proprietary rights. It argues that the “pause” is tantamount to constructive taking because it eliminates all reasonable uses of Licence 1070.

[12] As for the pleading regarding unjust enrichment, while secondary to the claims for constructive taking and negligent misrepresentation, the Province is unable to meet the heavy burden needed to strike this cause of action.

The Province

[13] The *Accord Act* does not provide a provincial minister with any legal authority to unilaterally impose a ban on hydraulic fracturing. SPE’s Statement of Claim does not provide particulars as to how the Province’s decision to announce the temporary

pause on hydraulic fracturing impacted SPE's ability to explore in the offshore area under an exploration licence.

[14] In making this application, the Province accepts for the purpose of pleading that the temporary pause has impacted SPE's ability to explore the area covered by Licence 1070. The Province makes this concession based on the requirement that a Rule 14.24 application to strike must be decided on the pleadings.

RELEVANT LEGISLATION, RULES OF COURT AND JURISPRUDENCE

Legislation

Canada-Newfoundland and Labrador Atlantic Accord Implementation and Offshore Renewable Energy Management Act, S.C. 1987, c. 3, (the "Accord Act")

Rights under exploration licences-ss. 65- 66

Exploration Licences

Rights under exploration licences

65 An exploration licence confers, with respect to the portions of the offshore area to which the licence applies,

- (a) the right to explore for, and the exclusive right to drill and test for, petroleum;
- (b) the exclusive right to develop those portions of the offshore area in order to produce petroleum; and
- (c) the exclusive right, subject to compliance with the other provisions of this Part to obtain a production licence.

Shares

66 A share in an exploration licence may, subject to any requirements that may be prescribed, be held with respect to a portion only of the offshore area subject to the exploration licence.

...

Declaration of significant discovery-ss. 71-73

Significant Discoveries

Application for declaration of significant discovery

71 (1) Subject to section 124, where a significant discovery has been made on any portion of the offshore area that is subject to an interest or a share therein held in accordance with section 66, the Regulator shall, on the application of the interest holder of the interest or the share thereof made in the form and manner and containing such information as may be prescribed, make a written declaration of significant discovery in relation to those portions of the offshore area in respect of which there are reasonable grounds to believe that the significant discovery may extend.

Declaration on initiative of Regulator

(2) Where a significant discovery has been made on any portion of the offshore area, the Regulator may, by order subject to section 124, make a declaration of significant discovery in relation to those portions of the offshore area in respect of which there are reasonable grounds to believe the significant discovery may extend.

Description of offshore area subject to declaration

(3) A declaration made pursuant to subsection (1) or (2) shall describe the portions of the offshore area to which the declaration applies.

Amendment or revocation of declaration

(4) Subject to subsection (5), where a declaration of significant discovery is made pursuant to subsection (1) or (2) and, based on the results of further drilling, there are reasonable grounds to believe that a discovery is not a significant discovery or that the portions of the offshore area to which the significant discovery extends differ from the significant discovery area, the Regulator may, subject to section 124 and as appropriate in the circumstances,

(a) amend the declaration of significant discovery by increasing or decreasing the significant discovery area; or

(b) revoke the declaration.

Idem

(5) A declaration of significant discovery shall not be amended to decrease the significant discovery area or revoked earlier than

(a) in the case of a significant discovery area that is subject to a significant discovery licence issued pursuant to subsection 73(1), the date on which the exploration licence referred to in that subsection expires; and

(b) in the case of a significant discovery area that is subject to a significant discovery licence issued pursuant to subsection 73(2), three years after the effective date of the significant discovery licence.

Notice

(6) A copy of a declaration of significant discovery and of any amendment or revocation thereof made under this section in relation to any portion of the offshore area subject to an interest shall be sent by registered mail to the interest owner of that interest. 1987, c. 3, s. 712015, c. 4, s. 42(F)2024, c. 20, s. 101

Significant Discovery Licences

Rights under significant discovery licence

72 A significant discovery licence confers, with respect to the portions of the offshore area to which the licence applies,

(a) the right to explore for, and the exclusive right to drill and test for, petroleum;

(b) the exclusive right to develop those portions of the offshore area in order to produce petroleum; and

(c) the exclusive right, subject to compliance with the other provisions of this Part, to obtain a production licence.

Significant discovery licence in relation to areas subject to exploration licences

73 (1) Where a declaration of significant discovery is in force and all or a portion of the significant discovery area is subject to an exploration licence or a share therein held in accordance with section 66, the Regulator shall, on application of the interest holder of the exploration licence or the share made in the form and manner and containing such information as may be prescribed, issue to the interest holder a significant discovery licence in respect of all portions of the significant discovery area that are subject to the exploration licence or the share.

Significant discovery licence in relation to Crown reserve areas

(2) Where a declaration of significant discovery is in force and the significant discovery area extends to a Crown reserve area the Regulator may, after making a call for bids in relation to that Crown reserve area or any portion thereof and selecting a bid submitted in response to the call in accordance with subsection

59(1), issue a significant discovery licence to the person who submitted that bid in relation to the Crown reserve area specified in the call.

Fundamental decision

(3) The making of a call for bids and the issuance of a significant discovery licence by the Regulator pursuant to subsection (2) is subject to sections 31 to 40.

Terms and conditions of significant discovery licence

(4) A significant discovery licence shall be in the form prescribed and may contain any other terms and conditions, not inconsistent with this Part or the regulations, as may be agreed on by the Regulator, subject to sections 31 to 40, and the interest owner of the significant discovery licence. 1987, c. 3, s. 732024, c. 20, s. 1012024, c. 20, s. 102(E)

Reduction of area subject to significant discovery licence

74 (1) Where a significant discovery area in relation to a declaration of significant discovery is decreased pursuant to an amendment made under subsection 71(4), any significant discovery licence that was issued on the basis of that declaration shall be amended by decreasing accordingly the portions of the offshore area subject to that licence.

Increase in area subject to significant discovery licence

(2) Where a significant discovery area in relation to a declaration of significant discovery is increased pursuant to an amendment made under subsection 71(4), any significant discovery licence that was issued on the basis of that declaration shall be amended to include all portions of the amended significant discovery area that are subject to any exploration licence held by the interest owner of that significant discovery licence at the time the significant discovery area is so increased.

Exploration licence ceases to have effect

75 (1) On the issuance of a significant discovery licence pursuant to subsection 73(1) with respect to a significant discovery area, any exploration licence ceases to have effect in relation to that significant discovery area.

Effective date of significant discovery licence

(2) The effective date of a significant discovery licence is the date of application for the licence.

Term of significant discovery licence

(3) Subject to subsection 85(1), a significant discovery licence continues in force, in relation to each portion of the offshore area to which the licence applies, for a term of 25 years.

Automatic extension of term

(3.1) If the interest owner has made an application for a declaration of commercial discovery referred to in subsection 78(1) or for the issuance of a production licence referred to in subsection 81(1), the term of the significant discovery licence is extended until the Regulator makes a decision respecting that application.

Cancelling automatic extension

(3.2) The extension to the term of the significant discovery licence remains in force after the Regulator makes a declaration of commercial discovery, but the Regulator may cancel the extension if the interest owner fails to submit an application for the issuance of a production licence within a reasonable time.

Crown reserve area on expiration of licence

(4) On the expiration of a significant discovery licence, any portion of the offshore area to which the significant discovery licence related and that is not subject to a production licence becomes a Crown reserve area.^{1987, c. 3, s. 752024, c. 20, s. 36}

...

Production regime-ss. 80-81- Issuance of Production Licences**Rights under production licence**

80 (1) A production licence confers, with respect to the portions of the offshore area to which the licence applies,

- (a) the right to explore for, and the exclusive right to drill and test for, petroleum;
- (b) the exclusive right to develop those portions of the offshore area in order to produce petroleum;
- (c) the exclusive right to produce petroleum from those portions of the offshore area; and
- (d) title to the petroleum so produced.

Exception

(2) Despite subsection (1), the Regulator may, subject to such terms and conditions as the Regulator deems appropriate, authorize any interest holder of a petroleum-related interest or a share in such an interest to produce petroleum on the portions of the offshore area subject to the interest or share for use in the exploration or drilling for or development of petroleum on any portion of the offshore area. 1987, c. 3, s. 80/2024, c. 20, s. 37

Issuance of production licence

81 (1) Subject to section 87, the Regulator, on application made in the form and manner and containing such information as may be prescribed,

(a) shall issue a production licence to one interest owner, in respect of any one commercial discovery area or portion thereof that is subject to an exploration licence or a significant discovery licence held by that interest owner; and

(b) may, subject to such terms and conditions as may be agreed on by the Regulator and the relevant interest owners and to sections 31 to 40, issue a production licence to

(i) one interest owner, in respect of two or more commercial discovery areas or portions thereof that are subject to an exploration licence or a significant discovery licence held by that interest owner, or

(ii) two or more interest owners, in respect of one or more commercial discovery areas or portions thereof that are subject to an exploration licence or a significant discovery licence held by any of those interest owners.

Production licence in relation to Crown reserve areas

(2) Where a declaration of commercial discovery is in force and the commercial discovery area extends to a Crown reserve area, the Regulator may, after making a call for bids in relation to that Crown reserve area or any portion thereof and selecting a bid submitted in response to the call in accordance with subsection 59(1), issue a production licence to the person who submitted that bid in relation to the Crown reserve area specified in the call.

Fundamental decision

(3) The making of a call for bids and the issuance of a production licence by the Regulator pursuant to subsection (2) is subject to sections 31 to 40.

Terms and conditions of production licence

(4) A production licence shall be in the form prescribed and may contain any terms and conditions, not inconsistent with this Part or the regulations, as may be agreed on by the Regulator, subject to sections 31 to 40, and the interest owner of the production licence. 1987, c. 3, s. 81 1993, c. 47, s. 62 2024, c. 20, s. 101 2024, c. 20, s. 102(E)

Rules of Court - Rule 14 Pleadings

Documents or conversations

14.07. The effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the documents or conversation need not be stated except in so far as those words are themselves material

Striking out pleadings, etc.

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;
- (b) it is false, scandalous, frivolous or vexatious;

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

Jurisprudence

The Doctrine of Incorporation by Reference and the Application of Rule 14.07

[15] Neither party was able to direct this Court to jurisprudence from this jurisdiction interpreting Rule 14.07. Nevertheless, they agreed that on an application to strike no evidence is typically considered. The Province then invited the Court to

adopt a position that Rule 14.07 gives effect to what is known as the doctrine of incorporation by reference.

[16] A cross-jurisdictional scan of provincial civil procedure rules reveals that Rule 3-7(2) of the *Supreme Court Civil Rules*, B.C. Reg 168/2009, *Court Rules Act*, R.S.B.C. 1996, c. 80, contains similar, if not identical, wording to Rule 14.07.

[17] The most recent analysis of Rule 3-7(2) occurred in 9095900 *Canada Ltd v. Baikoghli*, 2026 BCSC 839, at paragraph 97, where the Court held the wording of the rule permitted the application of the doctrine of incorporation by reference. In doing so, it referenced the following decisions; (see *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257, at paragraphs 29 to 34; and *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, at paragraph 39).

[18] In effect, the doctrine allows a Court to refer to a document, including a contract, incorporated by reference in the pleadings for the purpose of “illuminat[ing] the substance of the pleadings” as long as that document was explicitly referred to in the pleadings; (see *Montaigne Group Ltd.*, at paragraphs 29 and 33).

[19] The circumstances where a court is permitted to refer to documents incorporated by reference in a pleading include an application to strike as it may assist the court in ensuring that a party does not use “artful” pleading in support of its claim for an interest in land because such documents can be used to “illuminate the substance” of the pleading.

The Test on an Application to Strike under Rule 14.24

[20] Rule 14.24(1)(a) empowers the Court to strike a pleading on the basis that it discloses no reasonable cause of action. In considering such an application, the Court must consider the following factors:

- the material facts pleaded are assumed to be true;
- bald allegations, legal conclusions, and speculation are not entitled to that assumption;
- it must be plain and obvious that the claim cannot succeed; and
- if an amendment can salvage an otherwise questionable claim, the Court should permit the plaintiff an opportunity to amend

(see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras. 17, 21-24).

[21] For a cause of action to be properly advanced the elements of the cause of action must be set out; the material facts that ground those various elements of the cause of action must be concisely stated; and, the relief that is sought must be available for the specific cause of action advanced.

[22] As explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at paragraph 54: “[t]he pleading must tell the defendant who, when, where, how and what gave rise to liability”; (see *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227, at para. 19, referred to with approval in *Kindylides v. Does*, 2020 BCCA 330, at para. 34).

The Plain and Obvious Test-Rule 14.24(a)

[23] The test to be applied when considering whether there is a cause of action under Rule 14.24 is the “plain and obvious test”.

[24] This test was described by our Court of Appeal in *Chiasson v. Nalcor Energy*, 2021 NLCA 34, at paragraph 8, citing the Supreme Court of Canada decisions in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, and *R. v. Imperial Tobacco Canada Ltd.*

[25] In *Imperial Tobacco* the Court added at paragraph 22 that: “... [I]t is incumbent on the claimant to clearly plead the facts upon which it relies in making

its claim. ... The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated”.

[26] The Statement of Claim must therefore plead the constituent material facts necessary to support each essential element of the cause of action; (see *Imperial Tobacco*, at para. 22).

[27] As a consequence, discovery is not available to rescue an otherwise deficient pleading. The sufficiency of the cause of action must appear on the face of the claim itself. A plaintiff may not commence litigation in the hope that facts necessary to complete the claim will later emerge through compulsory processes; (see *Imperial Tobacco*, at paras. 22–25).

[28] That said, Courts must remain mindful of novel or evolving claims, but at the same time they are equally obliged to prevent claims that are legally doomed from proceeding to costly and protracted litigation.

ANALYSIS

Issue #1: Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for constructive taking, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?

Constructive Taking

[29] An allegation of constructive taking requires that there be an acquisition by the state of a beneficial interest and the subsequent removal of all reasonable uses of private property. Both elements are essential to the claim.

[30] The parties agree that the leading decision on the law of constructive taking is *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36. The doctrine does not extend compensation to every regulatory constraint or loss of economic value; rather, it requires a state acquisition corresponding to the claimant's loss, grounded in a cognizable property interest.

[31] SPE's pleadings rely on the material fact that it had an exploration licence which conferred exclusive rights to explore, develop, and ultimately obtain production rights; (see s. 65 of the *Accord Act*). They argue the *Accord Act* is designed to provide certainty and continuity of development thereby creating economic value through years of investment; (see paras.1, 10-14 and 44-47 of the Statement of Claim).

Novel or Incremental Development- Northern Cross

[32] SPE argues that the law of constructive taking has not been confined to traditional fee simple interests. Rather, courts have recognized a variety of intangible or statutory interests capable of being taken where they bear the hallmarks of property and confer meaningful economic rights.

[33] Further, this body of jurisprudence demonstrates that the existence and scope of a proprietary interest in the regulatory context is often fact-dependent and unsuitable for final determination on a motion to strike.

[34] Citing *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6, SPE says the Court of Appeal in *Northern Cross* declined to strike a constructive taking claim based on oil and gas exploration permits. Instead, the court recognized the characterization of the plaintiff's interest as potentially a claim in *profit à prendre*, making it an arguable pleading that should be assessed on a full evidentiary record rather than struck at an early stage.

Proprietary Interest/*Profit à prendre*

[35] The notion of *profit à prendre* was explored by Rowe, J.A., (as he then was) in *Chain Lakes Logging Corp. v. Abitibi-Price Inc.*, 2005 NLCA 13, at paragraph 16, where he described it as a “right to take something off the land of another person making it an interest in land” such that “[t]he owner of a *profit à prendre* has rights of a possessory nature, and can bring an action for trespass at common law for their infringement”.

[36] *Profits à prendre*, though sometimes called “licences”, must be carefully distinguished from mere licences, which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful.

[37] A mere licence is not transferrable, nor can it be perpetual; it is not binding on the tenement affected but is a personal matter between the licensor and the licensee; (see para. 252 of *Halsbury's Laws of England*, 4th ed., vol. 14 (London: Butterworths, 1980)).

Application of *Northern Cross* to the present pleadings

[38] SPE argues that Licence 1070 had value and was transferable, making it a commercial interest. That interest was rendered effectively useless by the pause on hydraulic fracturing. Its pleadings represent a logical extension of the existing doctrine recognizing non-traditional or contingent proprietary interests, particularly in regulated natural resource regimes; so, at the very least, it is a novel claim that should survive the threshold stage of an application to strike.

[39] In response, the Province argues that *Northern Cross* is distinguishable because the court found the legislative regime in the Yukon provided a direct pathway to obtaining a lease that conferred production rights. It was this unique

statutory structure that allowed the court to conclude a proprietary interest was arguable at the pleadings stage.

[40] By contrast, under the *Accord Act*, the rights under an exploration licence are contingent on further approvals and determinations as set out in the legislation. Simply put, an exploration licence does not convey a right to: (1) produce petroleum; (2) obtain title to petroleum; or (3) compel the issuance of a production licence. Instead, these rights are left to other statutory steps and determinations which require a separate application and issuance process for a production licence. Ultimately this legislative distinction makes SPE's interest contingent and incomplete in a way that is materially different from *Northern Cross*; (see ss. 65-66, 71-73 and 80-81 of the *Accord Act*).

[41] I agree with the Province's interpretation of the *Accord Act*. The relevant provisions governing an exploration licence are expressly contingent as outlined in the previous paragraph.

[42] Instead, the *Accord Act* establishes a staged, discretionary, and criteria-driven pathway from exploration to production making the obtainment of proprietary rights dependent on future regulatory determinations; (see ss. 71-73 and 80-81 of the *Accord Act*).

Absence of Acquisition by the Province

[43] The Province also argues that even if a proprietary interest could be established, the pleadings fail to disclose any acquisition by the Crown. Instead, SPE's pleadings are predicated on the statutory reversion of the lands to the Crown under the *Accord Act*. Consequently, such a reversion does not constitute an acquisition of a proprietary benefit but rather reflects the absence of any petroleum interest.

[44] The constructive taking doctrine requires a benefit corresponding to the claimant's loss and here such a benefit has not been pleaded. However, taken as true, SPE's allegations are capable, at least in principle, of engaging the analytical framework set out in *Annapolis Group Inc.* which requires the acquisition of a benefit in respect of private property, and the removal of all reasonable uses of that property.

Is SPE's pleading in Constructive Taking an Incremental or Transformative Interpretation of the Law

[45] The issue for my determination in this application is whether SPE's claim in constructive taking is a novel and arguable extension of recognized property interests in regulated resource contexts or a pleading that is well beyond the legal concept of property interests.

[46] I am particularly mindful of the Province's argument that this distinction is based on SPE's faulty reliance on the supporting facts in *Northern Cross*, and that the statutory regime in the present case does not provide a direct or automatic pathway to production.

[47] I find this aspect of the Province's argument does raise serious legal concerns because it points to a potential difficulty in pleading that SPE held a proprietary interest, rather than a purely contingent regulatory permission. These concerns are not trivial, as if the interest is properly characterized as exclusively regulatory, then the claim would fail as a matter of law.

[48] Further, I also note that during oral argument counsel for the Province pointed out several material deficiencies in the current pleading. In particular, SPE has not pleaded with sufficient precision:

- the legal basis upon which its exploration licence constitutes a proprietary interest;

- the specific attributes that give rise to such characterization; and
- the factual foundation necessary to support the assertion that its rights are analogous to recognized proprietary interests; (e.g. a *profit à prendre*).

[49] As presently framed, these pleadings rest in part on conclusory assertions rather than clearly articulated material facts. In the result, these deficiencies do not justify striking the claim outright, but they do warrant correction.

[50] In my view, this is not a case in which SPE's claim for constructive taking can be dismissed at the pleading stage on the basis that it is impermissibly novel. Nor is it one in which SPE has adequately articulated the factual and legal foundation necessary to sustain the claim in its current form.

[51] The Supreme Court recently reminded courts of the approach to be taken towards novel claims during a motion-to-strike. In essence, where a claim is grounded in a recognized cause of action, and the contested issue concerns an unsettled remedial doctrine or a developing area of law, the issue will usually be left for trial unless it is plain and obvious that the claim cannot succeed; (see *Resler v. Anglin*, 2026 SCC 23, concurring opinion of Rowe, J. at paras. 116 and 145).

[52] This proposition may prove particularly useful in class actions and public-law tort claims where defendants seek to strike claims as “novel” before a factual record exists.

[53] I conclude, therefore, that the appropriate course is to strike the claim of constructive taking on a without prejudice basis and require SPE to plead its case with greater precision.

[54] In particular, it remains open to SPE to attempt to plead:

- (a) a legally cognizable proprietary interest arising from its statutory rights; and
- (b) acts capable of supporting the conclusion that the impugned state conduct resulted in an acquisition of a corresponding benefit.

[55] I believe this is consistent with the established principle that a novel pleading which discloses at least a “skeleton” or “ghost” of a viable cause of action should not be struck without an opportunity to amend. However, the current pleading lacks the precision and factual grounding necessary to sustain that claim.

[56] The Province’s submission that the claim is an impermissible or non-incremental development of the law is not sufficient, at this stage, to justify striking the claim.

[57] Accordingly, SPE shall have leave to amend its Statement of Claim to:

- plead, with particularity, the legal and factual basis upon which its rights under the *Accord Act* are said to constitute proprietary interests;
- identify the specific attributes of those rights said to align with recognized forms of property; and
- provide material facts supporting its assertion that such interests are capable of being the subject of a constructive taking.

[58] The amended pleading shall not introduce new causes of action without leave of the Court.

Issue No. 2: Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for negligent misrepresentation, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?

Negligent Misrepresentation

[59] The elements of the tort of negligent misrepresentation are fairly straightforward. Namely, there must be: (1) a duty of care based on a special relationship; (2) an untrue, inaccurate, or misleading representation; (3) negligence in making it; (4) reasonable reliance; and (5) a resulting loss. While these elements are pled there still must be a factual foundation for each element; (see *Imperial Tobacco*, at paras. 22–25).

[60] SPE pleads that between 2010 and 2012 the Province encouraged hydraulic fracturing through the issuance of regulatory materials and the approval of activities contemplating such techniques. It further pleads reliance on those representations in undertaking its drilling and development work; (see paras. 48-52 of the Statement of Claim).

[61] SPE's reference to governmental publications, approvals, and general encouragement of offshore development may form a factual outline, but they are not, without proper particularization, actionable representations.

[62] Specifically, the pleadings fail to identify with sufficient precision who said what, when, to whom, and in what context. Without this minimum specificity, the Court cannot assess whether the alleged statements were representations of existing fact, statements of intention, or non-actionable policy messaging; (see para. 49(a)-(c) of the Statement of Claim).

[63] Such a deficiency bears directly on proximity and duty of care. Government does not owe a private law duty of care whenever it communicates publicly about regulation or development.

[64] As the Supreme Court indicated in *Imperial Tobacco* at paragraphs 44 to 47, proximity in the context of government regulation depends upon the nature of the relationship and the specific interaction said to ground reliance. Public-facing conduct, without more, does not by itself establish the kind of special relationship required for negligent misrepresentation.

[65] The pleadings as currently framed do not allege specific advice, bilateral dealings, or any specific representational exchange that would move the relationship beyond the ordinary regulator-regulated sphere. Instead, SPE pleads in a very general manner that the Province encouraged investment and approved hydraulic fracturing activities. Even if accepted as true, those allegations do not, without material particulars, establish the proximity required to support a duty of care in negligent misrepresentation; (see *Imperial Tobacco*, at paras. 43-47).

[66] The claim is factually deficient in its pleading of falsity and knowledge. The assertion that the Province “knew or was reckless” as to a future moratorium is conclusory. It is unsupported by material facts identifying when the alleged policy decision was made, by whom, or how that decision rendered earlier representations false when made.

[67] It is not the role of the court to assume the truth of bare legal conclusions and pleadings; nor can it proceed on speculation. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding; (see *Imperial Tobacco*, at para. 25).

[68] SPE’s submission that the necessary particulars may emerge on discovery cannot cure that defect. The law is to the contrary. A plaintiff must first plead the factual basis of the claim; discovery cannot be used to search for one; (see *Imperial Tobacco*, at paras. 22–25).

[69] This problem is compounded by the nature of the alleged representations themselves. On the present pleadings, they appear to suggest, in substantial part, the future permissibility of hydraulic fracturing under a changing regulatory environment. Statements directed to future policy or future regulatory choices are especially difficult to translate into negligent misrepresentation, absent a clearly pleaded connection to existing facts.

Incorporation by Reference and Use of Documents

[70] SPE argues that documents referenced in pleadings cannot be considered on a motion to strike, as this would constitute an impermissible introduction of evidence contrary to Rule 14.24(2). Rather, documents may only be considered in exceptional cases, which this is not.

[71] The Province counters this proposition by relying on Rule 14.07 to adopt the doctrine of incorporation by reference. It argues this rule, like Rule 3-7(2) of the *Supreme Court Civil Rules-BC*, is a narrow exception to the rule that no evidence can be adduced on an application to strike.

[72] In making this argument it also concedes that the doctrine does not allow a court to resolve a contested meaning, to draw factual inferences, or to convert vague references into a properly pleaded cause of action.

[73] The Province notes that these restrictions are important to this application as SPE refers generally to government publications, reports, and regulatory criteria, but does not plead them with the specificity necessary to transform them into actionable representations; (see paras. 49 (a) and (b) of the Statement of Claim).

[74] Accordingly, even if some documents may properly be read as part of the pleading's factual matrix, they cannot be used to cure any deficiencies in the pleadings. In other words, they may explain the context of the dispute; they do not complete the causes of action.

Core Policy Immunity

[75] There is a further, though related, obstacle SPE faces. The pleading challenges governmental conduct in the spheres of natural resource regulation and environmental decision-making, thus raising the specter of core policy immunity.

[76] In *Nelson (City) v. Marchi*, 2021 SCC 41, the Supreme Court held that true core policy decisions are immune from negligence liability because they rest on social, economic, and political considerations that are not amenable to judicial supervision through the law of negligence.

[77] In order to settle the question as to whether something may constitute core policy, courts examine the nature of the decision, the level of the decision-maker, the process by which the decision was made, the extent of budgetary and public-interest balancing, and the degree to which objective criteria constrained the choice; (see *Marchi*, at para. 3).

[78] In reviewing SPE's Statement of Claim, I conclude that the pleading of negligent misrepresentation does not distinguish between allegedly actionable operational conduct and high-level governmental choices about whether, when, and on what terms hydraulic fracturing should be permitted.

[79] At the point where the court is asked to determine whether it is plain and obvious the pleading cannot succeed, this type of distinction matters. A pleading that collapses operational representation into a policy choice risks the approach of attacking decisions immune from negligence.

[80] Policy immunity determination is often fact-sensitive; the absence of any pleaded differentiation between the two reinforces the conclusion that the negligent misrepresentation claim lacks a coherent legal foundation; (see *Marchi*, at para. 53; and *Hinse v. Canada (Attorney General)*, 2015 SCC 35, at paras. 24-25, (recognizing qualified public law immunity in certain governmental decision-making contexts)).

[81] The lack of particularization of the alleged representations combined with the presence of conclusory allegations of knowledge, and the absence of pleaded proximity to distinguish operational conduct from potentially immune policy decision-making, casts a long shadow that it is plain and obvious the negligent misrepresentation claim cannot succeed as framed.

[82] Therefore, the pleading of negligent misrepresentation is struck on a without prejudice basis, with leave to amend. Such amendments must address and identify:

- who made the alleged representations;
- what precisely was said;
- when and to whom the statements were made; and
- the context in which reliance arose.

[83] The amended pleading shall not introduce new causes of action without leave of the Court.

Issue #3: Do the material facts as pled in the Statement of Claim disclose a reasonable cause of action for unjust enrichment, or is it plain and obvious such a claim cannot succeed; and, if not, should I strike this pleading or should I grant leave to amend?

Unjust Enrichment

[84] SPE pleads substantial expenditures and the loss of economic opportunity as the result of the Province's conduct. The Province argues in response that no enrichment can arise because the resource remains *in situ* and always belonged to the Crown.

The Pleaded Claim

[85] The claim in unjust enrichment is based on two principal points.

[86] First, SPE pleads that the Province received payments in connection with the acquisition of Exploration Licence 1070 and that it suffered a corresponding deprivation following the announcement of the moratorium; consequently, there is no juristic reason for the Province to retain the benefit.

[87] Second, it pleads that as a result of the impugned regulatory measures, the Province has effectively acquired a benefit or interest flowing from the Exploration Lands or the underlying petroleum resources.

Licence Payments and Corresponding Deprivation

[88] The Province submits that the claim fails at the second stage of the test because SPE did not make any payments to acquire the licence; those payments were made by a third party, Canadian Imperial Venture Corp. (“CIVC”).

[89] The pleadings, however, assert that SPE subsequently acquired CIVC and its interest in the licence, including any associated rights and causes of action (see para. 12 of the Statement of Claim); and argues that any cause of action for unjust enrichment constitutes a “chose in action” capable of assignment and that such rights were transferred as part of a *bona fide* commercial transaction.

[90] As noted above, at this stage of the proceedings the Court must accept those pleaded facts as true. Whether the assignment is ultimately valid, or whether SPE can prove that any deprivation flowed to it through that acquisition, are questions that depend on evidence and are not amenable to determination on a motion to strike.

[91] In these circumstances, it cannot be said that it is plain and obvious that SPE is incapable of establishing a corresponding deprivation.

Alleged Acquisition of a Benefit by the Province

[92] SPE also pleads that the Province has obtained a benefit flowing from the Project, including through the reversion of the lands to Crown control and the effective loss of the ability to exploit its asserted interests.

[93] The Province submits that this claim is untenable because, upon reversion to “Crown reserve” status under the governing statute, no petroleum interest remains in force, and no compensable benefit is acquired.

[94] That submission turns on a particular legal characterization of the statutory regime and of the nature of SPE’s interest. It pleads that it has been deprived of an interest or advantage, and that the Province has correspondingly obtained a benefit flowing from that deprivation.

[95] Whether the effect of the statutory scheme is, in law, inconsistent with SPE’s theory of enrichment is not a question that can be conclusively resolved on the face of the pleadings alone.

[96] The determination of whether a cognizable “benefit” exists in these circumstances requires a full consideration of the statutory framework, the nature of the alleged interest, and the practical and legal consequences of the impugned measures. These are matters that extend beyond the proper scope of a Rule 14.24(1)(a) application.

Absence of Juristic Reason

[97] SPE further pleads that the Province's retention of the alleged benefit is without juristic reason, particularly in light of the removal of its ability to realize the expected value of its investment.

[98] The Province disputes that assertion and relies on the statutory regime as supplying a complete juristic reason.

[99] The presence or absence of a juristic reason, however, is a factually and legally contextual inquiry. At the pleadings stage, SPE's allegation that no juristic reason exists must be taken as true unless it is clearly untenable.

[100] In the present case, it cannot be concluded that SPE's position is so clearly foreclosed as to be incapable of success. That said, SPE's submissions raise serious issues concerning the legal viability of the unjust enrichment claim, including questions relating to:

- (a) the identity of the party suffering the deprivation;
- (b) the legal nature of any benefit said to accrue to the Crown; and
- (c) the operation of the governing statutory regime.

[101] Those issues, however, in my view, are ones that should be addressed as questions of mixed fact and law in the context of a full evidentiary record. Therefore, I am not satisfied that it is plain and obvious that the claim in unjust enrichment is bound to fail.

[102] Accordingly, the application to strike SPE's claim in unjust enrichment is dismissed.

DISPOSITION

[103] The Province is partially successful in establishing that the Statement of Claim should be struck pursuant to Rule 14.24 (a).

[104] The claims for constructive taking and negligent misrepresentation are struck on a without prejudice basis with leave to SPE to amend its pleadings within 90 days from the issuance of the formal order.

[105] SPE's claim for unjust enrichment survives the plain and obvious threshold but with the observations noted above.

[106] Given the results are mixed, there will be no order as to costs.

PETER N. BROWNE
Justice