

COURT OF KING'S BENCH OF MANITOBA

Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C130

B E T W E E N:

NELLIE TAPTAQUT KUSUGAK, MALAYA	)	<u>Tim Dickson</u>
QAUNIRQ CHAPMAN, ISABELLE MARK	)	<u>Jessica Black</u>
CHAPADEAU, and DARRYL KELLY	)	<u>Brodie Noga</u>
WASTESICOOT,	)	<u>Alex Dimson</u>
	)	<u>Tyler Planeta</u>
plaintiffs,	)	<u>Linda Visser</u>
	)	<u>Harold Cochrane, K.C.</u>
- and -	)	<u>Shawn C. Scarcello</u>
	)	<u>Alyssa Cloutier</u>
THE NORTH WEST COMPANY LP, NWC GP	)	<u>Angela Bessflug</u>
INC., and THE NORTH WEST COMPANY INC.,	)	<u>Janelle O'Connor</u>
	)	<u>Paige Marvel</u>
defendants.	)	<u>Steven L. Cooper, K.C.</u>
	)	<u>Mary Grzybowska</u>
	)	for the plaintiffs
	)	
	)	<u>Michael Rosenberg</u>
	)	<u>Alexandra Cocks</u>
	)	<u>Adam H. Kanji</u>
	)	<u>Gregory Ringkamp</u>
	)	for the defendants
	)	
	)	<u>Judgment Delivered:</u>
	)	September 14, 2026

JOYAL C. J.

OVERVIEW

[1] This is a motion to strike brought by the defendants pursuant to Rule 25.11(1)(d) of the Court of King's Bench Rules, M.R. 553/88.

[2] Also before the Court is a motion brought by the plaintiffs who, in the context of their yet to be certified proposed class proceeding, seek to amend an already amended statement of claim.

[3] The defendants (collectively "North West") operate retail grocery stores in the northern parts of Canada. In view of the high cost of food, the federal government funds an initiative known as the Nutrition North Canada program ("NNC"). The federal government and The North West Company LP enter into funding agreements through which the government provides the defendants with funds to administer NNC. The defendants use the funds to partially offset the cost of certain goods in its stores.

[4] The plaintiffs are individuals who say that they have purchased goods at defendants' retail grocery stores. The plaintiffs allege that these goods were eligible for a subsidy through NNC. The plaintiffs complain that the defendants did not just improperly administer NNC, but that they knowingly "deprived" the class members by retaining a portion of the subsidy as profit. The plaintiffs suggest that the defendants did this by imposing a higher profit margin on subsidy-eligible products (either directly or indirectly) and by reducing the "pass through" of the subsidy. In other words, the plaintiffs assert that the defendants, despite its representations (to the federal government and its proposed class), did not pass on (or fully pass on) funds to the consumers that the defendants received from the federal government. Specifically, the

plaintiffs say that the defendants did not sufficiently reduce the price of certain products in its retail stores. In turn, the plaintiffs say that they (and not the federal government, which provides the defendants with the funds to administer NNC) are entitled to damages for what they characterize as the defendants' alleged acts of "wrongdoing".

[5] On this basis, the plaintiffs in the Fresh as Amended Statement of Claim, filed September 3, 2025, (the "Claim"), plead causes of action in:

- (a) Breach of contract;
- (b) Unjust enrichment;
- (c) Breach of s. 52 of the **Competition Act**, R.S.C. 1985, c. C-34, and damages pursuant to s. 36 of the **Competition Act**, and
- (d) Breach of **The Business Practices Act**, C.C.S.M. c. B120, and equivalent consumer protection legislation in other provinces and territories.

[6] The defendants insist that at its simplest, this case is about the plaintiffs' belief that they paid too much at the grocery store. The defendants argue that the plaintiffs seek to turn that grievance into a civil action. The defendants submit that such a grievance does not fit within the doctrine and governing law applicable to this case. The defendants maintain that even on the plaintiffs' own formulation, there can be no doubt that they (the plaintiffs) are claiming against a third party that administered a government program that was intended to reduce the price they paid for groceries. While indicating clearly that if this matter were to proceed to certification, they will absolutely dispute any allegation of wrongdoing or administrative deficiency, the defendants, for the purposes of this motion, also underscore that there is no applicable remedy in law that can be

stretched so as to permit members of the public to sue the administrator because they are dissatisfied with the impacts of a program.

[7] Put simply, the defendants contend that taking the Claim at its highest, with all material facts assumed to be true, there is no tenable legal theory that grounds any liability against the defendants. They say that this action is destined to fail.

[8] In addition to its distinct foundational and doctrinal arguments respecting specific parts of what they say is the plaintiffs' untenable claim in law, a theme running throughout the entirety of the defendants' position on this motion is that if the defendants had in fact improperly retained NNC funding, the federal government might or should itself seek recovery of those funds. It would do so under its funding agreements with the defendants. However, the defendants note that those are the same funds that the plaintiffs now seek as damages, raising the prospect of double recovery. It is the defendants' view that the plaintiffs' problem is that they never had any right to the subsidy in the first place. Accordingly, the plaintiffs cannot compel these funds from the defendants any more than they could from the government itself.

[9] The plaintiffs respond by saying that contrary to the assertion of the defendants, this case is not a complaint about high grocery prices. The case is about the defendants' alleged failure to pass through the full subsidy to their customers. They did so in breach of both of their agreements with Canada and their representations to the class. As a result, the defendants allegedly retained millions of dollars in government funding and class members suffered further impoverishment and food insecurity.

[10] The plaintiffs assert that the relief sought as set out in the Claim is grounded in viable causes of action. To the extent that the defendants argue to the contrary, they are relying on alleged technical defences to argue that it is plain and obvious that the law offers the proposed class no remedy. The plaintiffs say that the defendants' arguments are themselves contrary to settled law and common-sense principles of equity. Such arguments, insist the plaintiffs, are based on mischaracterizations of the Claim and on an incomplete foundation of the relevant contracts that, in any event, cannot be interpreted on this motion in the manner the defendants require.

[11] Simply put, the plaintiffs remind the Court that claims must be determined on a full evidentiary record at trial. Only claims that are plain and obviously doomed to failure should be struck at the pleadings stage. This motion they say falls far short of that high standard and should be dismissed.

ISSUES

[12] The issues before the Court on this motion are:

- (a) Should all or some of the causes of action in the Claim be struck?
- (b) If so, should the plaintiffs be granted leave to amend?

[13] For the reasons that follow, I have determined that all of the causes of action in the plaintiffs' Claim should be struck.

[14] Respecting the second issue, and for the reasons discussed and agreed to by all parties at the hearing, any further argument and my decision on the plaintiffs' motion for leave to amend will await the plaintiffs' opportunity to consider these reasons supporting my decision to strike.

BACKGROUND AND CONTEXT

[15] In setting out certain background facts which contextualize the more limited legal determinations I must make on this motion, I remain mindful that on a motion such as this one (a motion to strike), I must accept the facts pleaded by the plaintiffs as true. Only the facts pleaded may be considered; the Court cannot consider what the evidence might or might not later show, nor the possibility that new facts might turn up as the case progresses.

[16] As earlier noted, the defendants operate grocery stores in northern Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and Newfoundland and Labrador, as well as the Yukon, the Northwest Territories, and Nunavut. It is the largest provider of goods and services in the markets that it serves. In many northern communities, the defendants have a monopoly or near-monopoly control over the retail grocery market. Because of Canada's geography, the defendants' customers are primarily Indigenous.

[17] The plaintiffs, Nellie Kusugak, Malaya Qaunirq Chapman, Isabelle Chapadeau, and Chief Darryl Wastesicoot, are all Indigenous residents of northern Canada communities with stores owned and operated by the defendants. Each regularly makes purchases from the defendants. Each has experienced and/or witnessed food insecurity in their community.

[18] The plaintiffs assert the Claim on behalf of all persons and entities who purchased goods eligible for the subsidy from the defendants and their subsidiaries during the class period (April 1, 2011, to the present day).

The NNC and the Subsidy

[19] Canada's northern communities face a food insecurity crisis. Healthy food staples are significantly more expensive in Canada's northern regions, with the result that members of northern communities are often unable to afford adequate amounts of nutritious foods. Indeed, in 2022, 36.4% of people living in the territories experienced marginal, moderate or severe food insecurity. Nunavut experienced the highest rate, with 62.6% of residents experiencing food insecurity.

[20] Food insecurity has negative consequences on health and overall wellbeing, and is associated with higher levels of malnutrition, infections, chronic diseases, obesity, distress, social exclusion, depression, and suicidal ideation.

[21] To ameliorate this crisis, the federal government implemented the NNC, through which it provides the subsidy. The NNC provides the subsidy directly to northern retailers pursuant to the terms of funding agreements entered into between the Department of Crown-Indigenous Relations and Northern Affairs (the "Department") and retailers, including the defendants. A condition of the funding agreements is that the retailers pass the full subsidy to consumers by reducing the prices of eligible foods in an amount equal to the amount of funds received (i.e., the sales price must be reduced by the full amount of the subsidy).

[22] The defendants have received subsidy payments under the NNC since its inception in 2011. They make claims and receive payments for the subsidy pursuant to funding agreements, as described above.

[23] In order to administer the NNC, the defendants enter into contractual funding and administration agreements with the federal government. The defendants and the government are the only parties to these agreements and they do not contemplate rights for any third parties.

[24] The plaintiffs' Claim alleges two separate categories of acts of wrongdoing, each of which relate to different causes of action. First, the plaintiffs claim that the defendants have misappropriated some of the subsidy as profit. Second, the plaintiffs claim that the defendants have falsely represented to the federal government and the class that they pass on the entire subsidy to consumers.

[25] In relation to the alleged wrongdoing and, specifically, the alleged acts of misappropriation and misrepresentation, the plaintiffs have, as earlier noted, formulated their claim grounded in causes of actions in breach of contract, unjust enrichment and breaches of the ***Competition Act*** and ***The Business Practices Act***.

LEGAL FRAMEWORK

[26] Under Rule 25.11(1)(d), the Court may strike all or part of a pleading for failing to disclose a reasonable cause of action. The test is whether it is "plain and obvious" that, assuming the facts pleaded to be true, the cause of action is "certain to fail" (see ***Grant v. Winnipeg Regional Health Authority et al.***, 2015 MBCA 44, at paras. 34 and 36; ***OwniCloud Inc v Shared Health Manitoba***, 2025 MBCA 38, at paras. 7 and 8; ***Dennis v The Attorney General of Canada et al.***, 2020 MBCA 118, at paras. 7-10, citing ***Edell v. Canada***, 2010 FCA 26, at para. 5; ***Trillium Power Wind Corporation v. Ontario (Natural Resources)***, 2013 ONCA 683, at para. 46; and ***Castrillo v. Workplace***

Safety and Insurance Board, 2017 ONCA 121, at paras. 13 and 65). In performing my task on this motion, I remain mindful that the purpose of Rule 25.11(1)(d) is to ensure the effectiveness and fairness of the litigation process by weeding out hopeless claims, without the necessity and cost of the full civil process. I remind myself, however, that the remedy of striking out a pleading is to be used sparingly. It is reserved only for the “clearest of cases”, where it is plain and obvious that the cause of action as pleaded is “certain to fail” (see **Winnipeg (City) v. Caspian Projects Inc. et al.**, 2020 MBQB 129, at para. 23, citing **Vitacea Company Ltd. et al. v. The Winnipeg Combination Inc. et al.**, 2016 MBQB 180, affirmed 2016 MBCA 126).

[27] In **Atlantic Lottery Corp. Inc. v. Babstock**, 2020 SCC 19, Karakatsanis J. noted the following:

[88] ...At times, a proposed cause of action is so obviously at odds with precedent, underlying principle, and desirable social consequence that regardless of the evidence adduced at trial, the court can say with confidence that it cannot succeed. But this is not often the case, and our common law system generally evolves on the basis of the concrete evidence presented before judges at trial.

[28] Although in **Babstock** Karakatsanis J. was writing in dissent for herself and three others, her statement of the test was not in dispute. The above paragraph has since been relied on by appellate courts, including in **Nazeer v Fink**, 2025 SKCA 112, at para. 16(f); **PMC York Properties Inc. v. Siudak**, 2022 ONCA 635, at para. 31; and **Price v. Smith and Wesson Corporation**, 2025 ONCA 452, at para. 19.

[29] I accept that on a motion to strike, claims must be read generously notwithstanding any imprecision of language. Pleadings generally, “should be read as a whole and be given a liberal interpretation, with a view to accommodating any

inadequacies in the allegations and without fastening onto matters of form” (see ***Lin v. Airbnb, Inc.***, 2019 FC 1563, at para. 46).

[30] Factors such as the novelty of the claim, the length and complexity of the issues raised by it, with the likelihood that the opposing party has a strong position that will likely defeat the claim are not reasons alone to strike out the pleading. If a claim has a reasonable prospect of success, it should not be struck out (see ***Caspian Projects***, at para. 23, citing ***Vitacea***). Where, however, it can be shown - without the presentation of evidence and on the basis of the pleadings - that it is plain and obvious the cause of action is certain to fail, an order striking the claim is appropriate.

[31] In ***Jordan v. CIBC Mortgages Inc.***, 2019 ONSC 1178, the Court provided the following convenient summary of the principles that apply on a motion to strike:

[66] ...

- No evidence is admissible.
- The facts pleaded are accepted as true and accurate unless they are patently ridiculous or incapable of proof.
- The pleading should be read generously with allowance for technical deficiencies.
- Matters of law that are novel or unsettled in the jurisprudence should be allowed to proceed.
- For a claim to be dismissed, it must be plain and obvious that the plaintiff has no chance of success.

[32] While the plain and obvious test does indeed set a low bar, the requirement that the pleadings disclose a reasonable cause of action requires nonetheless, a careful review of the pleadings in question. As noted in ***Jordan***, it is not a perfunctory exercise.

[33] Given the nature of much of what is plead in the present case, I remind myself that a Court must be cautious in the striking of claims. That said, it is equally important to remember that novelty alone will not cure a hopeless claim (see ***Babstock***, at para. 19).

THE BEAULIEU AFFIDAVIT

[34] As part of the argument in respect of the positions advanced by each party, a preliminary issue arose respecting the potential use of the affidavit of Mr. Michael Beaulieu, a Vice-President of The North West Company Inc., the “Beaulieu affidavit”.

[35] In support of their motion, the defendants have led the Beaulieu affidavit which, amongst other things, attaches as an exhibit, “a true copy of the funding agreement between [the North West Company] and the federal government for the period of April 2024 to March 2027”. Respecting the subject funding agreement and any previous such agreements incorporated by reference in the plaintiffs’ pleadings, Mr. Beaulieu in his affidavit confirmed that from his review, there was, in none of the funding agreements, any language that expressly or explicitly grants any contractual rights to third parties to the agreements.

[36] The plaintiffs object to any use being made of the Beaulieu affidavit and they exhort the Court to disregard it in its entirety.

[37] The plaintiffs acknowledge that the Claim is deemed to include any documents incorporated by reference into the pleading and that form an integral part of the plaintiffs’ claim. They stipulate, however, that courts have expressed wariness about going too far

in their interpretation of a document on a motion to strike. In this regard, they make reference to the judgment in ***Mowi Canada West Inc. v Canada (Attorney General)***, 2025 BCSC 634, where the British Columbia Supreme Court noted that courts “may determine whether the references made are accurate, but may not consider the documents in detail to determine whether or not the plaintiff has correctly interpreted them” (at para. 99).

[38] The plaintiffs argue that the 2024 agreement on its own is a particularly “frail and improper foundation” on which to determine the merits of the causes of action in this claim. They say that amongst other things, the class period spans over 14 years, and that the 2024 agreement applies to less than two years of that period. They note that Mr. Beaulieu provides a single sentence opinion as to the content of the prior agreements with the federal government. According to the plaintiffs, this fact should cause the Court to disregard the affidavit (and the evidence attached) insofar as it deserves no weight and more foundationally, it appears to run afoul of the rule that no evidence is admissible on a motion to strike.

[39] The plaintiffs further object on the basis that Mr. Beaulieu has not attached what they say is a complete agreement. They contend that most of the 2024 funding agreement consists of what appears to be boilerplate clauses. They note that the only reference to any substantive program delivery requirements is set out in Schedule 4, which reads amongst other things: “The recipient shall administer the Nutrition North Program in accordance with the Nutrition North Canada Program – National Manual” (the Beaulieu affidavit, Exhibit 1, Schedule 4, Section 2). The plaintiffs complain that

Mr. Beaulieu has not attached the manual to his affidavit. They say that without the operative manual, the 2024 funding agreement is effectively meaningless for the purpose of this motion. In addition to the broader objection, the plaintiffs insist that the absence of the operative manual renders the Beaulieu affidavit and the attached agreement a fundamentally unsound basis on which to assess the sufficiency of the claim.

[40] I have considered carefully the objections of the plaintiffs. In the circumstances of this case, I am not persuaded by their argument.

[41] Despite the obvious restrictions that attach to what can be considered on a motion to strike, it is nonetheless worth remembering that on a motion to strike, the Court may rely on documents that are incorporated by reference in the pleadings, insofar as they form an integral part of the factual matrix. In ***McCreight v. Canada (Attorney General)***, 2013 ONCA 483, at para. 32, and cited with approval in ***Named Person v. Champagne et al***, 2024 MBKB 186, at para. 28, the Court observed as follows:

[32] ...If the document is incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike.

[42] In the present case, the claim relies on and expressly references, the funding agreement signed by the defendants with the federal government. Given the particular legal issues that the Court need examine in the application of the test respecting the viability of the plaintiffs' claim, this Court should have reference to the funding agreements when determining the sufficiency of the pleadings. For that purpose, the

copy of the most recent funding agreement that was placed in the record by the defendants, sets out what I believe are the relevant sections of the agreement:

- a) The agreement is between His Majesty the King in right of Canada and The North West Company;
- b) The purpose of the agreement is for the federal government to provide funding to the defendants for use in administering the NNC;
- c) The agreement provides certain rights to the federal government in the event that the defendants do not comply with the terms of the agreement, including withholding funding (Section 15);
- d) The agreement also requires amongst other things, for the defendants to take any reasonably necessary actions to remedy default or risk termination of the agreement (Section 24);
- e) The agreement allows the defendants themselves to terminate the agreement (Section 30); and
- f) The agreement provides no right to any other party, including the plaintiffs.

[43] That which is set out above is part of the agreement referenced by the plaintiffs and it forms an integral part of the pleadings. Those and other specific and identified sections of the agreement are integral reference points that need inform in part, any assessment of the legal viability of the plaintiffs' claims and specific causes of action. Those identified sections of the agreement constitute relevant facts which to some extent are foundational reasons for why the defendants say the plaintiffs' causes of action are certain to fail.

[44] Insofar as the plaintiffs also contend that the evidence of Mr. Beaulieu and the attached agreements are incomplete, I find that argument to be similarly unpersuasive. Mr. Beaulieu affirms that he has conducted a review of other funding agreements as between the defendants and the federal government. He confirms, specifically, that “in none of the funding agreements is there any language that expressly or explicitly grants any contractual rights to third parties to the agreements.” Having determined that the 2024 agreement has been incorporated by reference into the pleadings and that it forms an integral part of the factual matrix of the Claim, I have, in the absence of anything more specific from the plaintiffs’, no reason to believe those relevant sections and facts identified by the defendants are incomplete, misleading or distortative of what it is that the defendants say are the foundational and uncontested basic elements of the agreement. It was open to Mr. Beaulieu to make the affirmation that he did and to extend it to the other agreements he reviewed.

[45] As it relates to any other documents that would be properly part of the 2024 (or any other) agreement integrally connected to the Claim, it was open to the plaintiffs to bring forward those documents if such documents provided necessary clarification or contextualization of what it is the defendants are asserting with reference to the 2024 agreement. No such documents were ever brought forward on this motion. The plaintiffs were aware of the defendants’ position, their reliance on the 2024 agreement, and the high stakes attached to a motion to strike. The plaintiffs’ objection to the use of the Beaulieu affidavit and the attached agreement for reasons relating to incompleteness,

rings hollow in the face of their own inaction assuming other relative agreements or manuals were relevant and of assistance to their position on this motion.

[46] In light of my determination as to the use that can be made of the Beaulieu affidavit and the attached agreement, and given the absence of any other evidence respecting other relevant agreements or connected manuals, the Court is left to conclude that the plaintiffs' arguments respecting completeness are at best, conjectural and speculative.

[47] Given my determination that the 2024 agreement is incorporated by reference to the pleadings, to the extent that such reference may be relevant to the defendants' position that it is plain and obvious that the plaintiffs' causes of action cannot succeed, my limited reference to the agreement on this motion does not violate the otherwise strict understanding that the Court must accept as true the facts pleaded by the plaintiffs. Neither does such a limited reference by the Court run afoul of the principle that on a motion to strike, only the facts pleaded may be considered.

ANALYSIS

[48] The plaintiffs insist that their claim pleads viable causes of action in unjust enrichment, breach of the ***Competition Act***, liability pursuant to provincial and territorial consumer protection legislation, and breach of contract. The defendants disagree and argue that the entirety of the claim should be struck.

[49] Mindful of the earlier set out legal framework and governing principles, what follows is my analysis in respect of each of the identified causes of action with a view to determining whether it is plain and obvious that any or all of the claims are certain to fail.

The Breach of Contract Claims are Certain to Fail

[50] For the reasons that follow, I have determined that the plaintiffs' claims in breach of contract should be struck.

[51] The claim alleges that the funding agreements required the defendants to pass through the subsidy to class members, who are the sole intended beneficiaries, and that the defendants are thus liable to them for breach of that contract. In so arguing, it is the position of the class members that they are simply asking the Court to hold the defendants to their bargain.

[52] It is the position of the plaintiffs that the defendants overstate the case law in arguing that it is settled law in Canada that a third party cannot sue on a contract.

[53] Despite the plaintiffs' characterization of the defendants' position, in my view, the defendants do not inaccurately represent the state of the law concerning the foundational frailties of the plaintiffs' position as it relates to their claims for breach of contract.

[54] The defendants are correct to suggest that the plaintiffs do not advance direct claims for breach of contract. Indeed, they could not, since the defendants' funding agreements are with the federal government and not the plaintiffs. What the plaintiffs are instead alleging is that they are entitled to sue because they are the agreements' "intended beneficiaries".

[55] In my view, the plaintiffs' third-party beneficiary claims are certain to fail. The limitations surrounding the third-party beneficiary doctrine make it clear that third-party beneficiaries have no right to sue the parties to an agreement to enforce their own preferred interpretation of its terms. The common law third-party beneficiary doctrine

permits only that a third party can rely on a contract defensively, not offensively. In other words, if they are able to satisfy certain criteria, third-party beneficiaries may be able to rely on defensive contractual provisions which may act as a shield in order to protect themselves in a lawsuit brought by one of the contracting parties. As suggested, such limitations of liability provisions, providing the sort of shield they may sometimes provide, do not and cannot transform the doctrine such that rights are asserted under the contract as a “sword” for the purposes of suing the contracting parties and for enforcing terms to their benefit. That principle is well established and as the defendants persuasively argued, there are significant reasons of law, policy, and good sense to apply that principle as it currently exists in the present case.

[56] The Supreme Court of Canada set out the defensive nature of the parameters of the third-party beneficiary doctrine in ***London Drugs Ltd. v. Keuhne & Nagel International Ltd.***, 1992 CanLII 41 (SCC), [1992] 3 SCR 299, and ***Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.***, 1999 CanLII 654 (SCC), [1999] 3 SCR 108. The doctrine has been understood and was intended to address unfairness in certain insurance contracts where a third-party beneficiary would be “made to support the entire burden of liability” under the contract, and where nonetheless, it would not be able to rely on the contract’s limitation of liability clause in the event it was sued by one of the contracting parties (see ***London Drugs***, at p. 423; the same principle is cited in ***Fraser River***, at para. 25).

[57] In both ***London Drugs*** and ***Fraser River***, the Court dealt with the specific limited relaxation of privity in order to allow a third party to rely on a contract defensively. The

defendants are correct in their position that Canadian courts have consistently rejected the offensive use of the third-party beneficiary doctrine to compel benefits from contracting parties in the way the plaintiffs propose to do in the present case.

[58] The British Columbia Court of Appeal has held that permitting a third-party beneficiary to sue on a contract would be “a monumental change” to the law of contract and that would in fact, go well beyond anything contemplated by ***London Drugs*** or ***Fraser River*** (see ***Holmes v. United Furniture Warehouse GP***, 2012 BCCA 227, at para. 22; and ***District of Kitimat v. Alcan Inc.***, 2006 BCCA 75, at para. 71). Since those judgments from the British Columbia Court of Appeal, courts in British Columbia have consistently refused to permit third-party beneficiaries to sue to enforce terms (see ***Bhangu v Honda Canada Inc.***, 2021 BCSC 794, at para. 68).

[59] In 2013, the Ontario Court of Appeal in ***Arora v. Whirlpool Canada LP***, 2013 ONCA 657, confirmed the third-party beneficiary principle exists “to *protect* a party from liability, not to permit a party to sue” [emphasis in original] (at para. 39). Some Ontario courts have occasionally attempted to relax the third-party beneficiary principle on the basis of certain obiter comments made by Cronk J.A. in ***Brown v. Belleville (City)***, 2013 ONCA 148. Those comments, however, were made prior to the Ontario Court of Appeal’s decision in ***Arora***. Indeed, recent Ontario decisions continue to hold that the third-party beneficiary doctrine is restricted to “defensive provisions” and cannot support a third-party beneficiary suing to enforce contractual terms (see ***Stevens v. Nexterra Substructures Incorporated***, 2022 ONSC 370, at para. 27).

[60] The application of the principle in Manitoba has been consistent. The obiter in **Brown** has never been treated favorably. For example, in **Moss v. BMO Nesbitt Burns Inc.**, 2013 MBQB 127, this Court confirmed that third-party beneficiaries may assert “a defence to a claim by one of the contracting parties” but they may not sue “to invoke a contractual benefit” (at para. 49, affirmed in the Court of Appeal at 2013 MBCA 86, leave to appeal to the Supreme Court of Canada, referred 2014 CanLII 4541 (SCC)). I note that the decisions of this Court and the Manitoba Court of Appeal and the decision of the Supreme Court of Canada to deny leave, were all rendered following the decision of **Brown**.

[61] Insofar as this Court held in **Moss** (relying on the Ontario judgment of **Coast-to-Coast Industrial Development Co. v. 1657483 Ontario Inc.**, 2010 ONSC 2011, at para. 44), that the third-party beneficiary may only sue to enforce a contract in the rare circumstance in which the contract contained “explicit” and express language making one of the contracting parties liable to the third party, that rare circumstance has no application in the present case. Here, the plaintiffs do not plead any express language that would make the defendants liable to the plaintiffs for the breach of a funding agreement. In fact, no such express language exists or is available to the plaintiffs. In any event, it is the position of the defendants that even express language would not be enough on the basis of the current jurisprudence, to support the sort of claim that is being advanced by the plaintiffs. As was suggested in **Stevens**, the Ontario Superior Court of Justice noted that **Coast-to-Coast** has now been overtaken and that the law now is seemingly categorical. That law suggests that the third-party beneficiary

doctrine can only be used defensively such that third-party beneficiaries cannot sue to enforce terms against a contracting party (see ***Stevens***, at para. 27).

[62] In my view, the defendants are correct when they argue and summarize their position with the assertion that there is now an absolute bar to the plaintiffs' claim. Thirty years of case law would confirm that this cause of action is destined to fail and the third-party beneficiaries cannot sue to compel an alleged benefit that arises under someone else's contract.

[63] In addition to their presentation of the state of the governing law, the defendants submit no less persuasively that there are overwhelming reasons of policy and common sense to prohibit non-parties from suing government funding contracts to enforce their own preferred interpretation of the terms. Given the enormous volume of funding agreements that exist, the federal government is required to contract to administer a wide variety of programs affecting every part of Canadian life. If the beneficiaries of these programs were permitted to bring private lawsuits to enforce their own view of the funding agreement, such litigation would frustrate the delivery of these programs and would, as was argued, create risks for the government beyond both what Parliament intended and what the law permits.

[64] There is no viable claim on the part of the plaintiffs for breach of contract. This cause of action is certain to fail and it should accordingly be struck.

The Unjust Enrichment Claims are Certain to Fail

[65] As I explain immediately below, in my view, it is plain and obvious that the plaintiffs' unjust enrichment claims are certain to fail.

[66] Unjust enrichment is available when a defendant has been enriched or benefitted, the plaintiffs have suffered a corresponding deprivation, and where, there is no juristic reason for the enrichment or benefit (see **6044698 Manitoba Ltd. carrying on business as Wallin Industries v. Diemo Machine Works Inc.**, 2014 MBCA 49, at para. 6., citing **Kerr v. Baranow**, 2011 SCC 10, at paras. 31 and 32).

[67] As is set out in the Supreme Court of Canada's judgment in **Moore v. Sweet**, 2018 SCC 52, the Court's analysis must proceed in two stages. At the first stage, the Court must evaluate on the basis of a rigid threshold requirement. At this first stage, the plaintiff must demonstrate that the enrichment or benefit was not conferred by "a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations" (at para. 57). As noted in **Moore**, "[i]f any of these categories applies, the analysis ends; the plaintiff's claim must fail" (at para. 57).

[68] In the present case, I have determined that the plaintiffs' claim for unjust enrichment plainly and obviously must fail at this first stage. It is clear that the plaintiffs themselves plead and rely on the funding agreements between the defendants and the federal government which can only be described as "contracts" under which the defendants received its supposed benefit (the NNC subsidy that it is said to have "retained"). As was noted by the Supreme Court of Canada in its judgment in **Babstock**, "[h]ere, I do not have to go beyond the first stage of the analysis. The plaintiffs' own pleadings allege that there was a contract" (at para. 71).

[69] Insofar as the plaintiffs allege that the defendants are not properly administering the funding agreements, the defendants are correct to respond that such an argument is

the basis of a claim for breach of contract (albeit by the federal government and not the plaintiffs) rather than a claim for unjust enrichment. To the extent that the funding agreements are valid, the plaintiffs' claim in unjust enrichment must fail. Where a defendant acquires a benefit pursuant to a valid contract, that defendant is justified in retaining that benefit even if the plaintiffs dispute the proper terms of the contract (see ***Maquinay v. Greatway Financial Inc. Et Al.***, 2021 MBQB 35, at para. 26; ***Dowd et al v Skip the Dishes Restaurant Services Inc. et al***, 2019 MBQB 63, at para. 84; and ***Farmers Edge Inc. v. Precision Weather Solutions Inc.***, 2020 MBQB 136, at paras. 62 and 63). In the present case, while the parties may differ as to some of the terms of the agreement, all parties plead and rely on the agreement (see ***Green Key Solutions Inc. v. Wiebe et al***, 2006 MBQB 225, at para. 11, affirmed in 2007 MBCA 46; as cited in ***Farmers Edge***, at paras. 62 and 63).

[70] Finally, in addition to the above, the defendants are well to underscore that the relationship between the defendants and the plaintiffs is itself governed by contract. The plaintiffs plead that they are persons who "purchase goods eligible for the subsidy from the defendants." In other words, any money that passed between the plaintiffs and the defendants did so pursuant to contracts for the purchase and sale of goods. In this connection, the plaintiffs would have agreed to pay the price on the shelf and would have received the items in their cart. The contractual relationship between the defendants and the plaintiffs is such that the plaintiffs' claim must fail at the first stage.

[71] There is no viable claim on the part of the plaintiffs for unjust enrichment. This cause of action is certain to fail and it should accordingly be struck.

The Competition Act Claims are Certain to Fail

[72] As I explain in the following paragraphs, it is plain and obvious that the plaintiffs' ***Competition Act*** claims do not represent viable claims and they cannot succeed.

[73] It is the position of the plaintiffs that the defendants have made false or misleading representations about the NNC subsidy contrary to Part VI (specifically s. 52) of the ***Competition Act***. The plaintiffs seek damages under s. 36 the ***Competition Act***, a section of the ***Act*** that requires them to plead three elements. Section 36 requires that the plaintiffs plead (i) actual loss; (ii) alleged conduct contrary to Part VI; and (iii) a causal link – detrimental reliance – between Part VI conduct and the actual loss.

[74] In the present case, the plaintiffs allege that the defendants' misrepresentation lies in the fact that the defendants told the federal government and the plaintiffs that it was complying with the NNC when, in fact, it was not. The plaintiffs further allege that the defendants allegedly told the federal government that it was adhering to terms of the funding agreements when it was not. In addition, the plaintiffs assert that the defendants allegedly told them (the plaintiffs) that it was passing on all funding from the federal government to consumers, when in reality, say the plaintiffs, the defendants were keeping part of the NNC funding as profit. In this connection, the actual loss that is alleged by the plaintiffs relates to the fact that they, the plaintiffs, paid higher prices for goods than they would have if NNC funds had been fully passed on to them.

[75] I note that a cause of action which seeks damages pursuant to s. 36 of the ***Competition Act*** is in need of a causal link between the false or misleading representation and the alleged loss. In this regard, causation can be established by

pleading material facts to support detrimental reliance, or by pleading that the representation caused the plaintiffs to spend more than they would have had the representation not been made. The British Columbia Supreme Court addressed this requirement in ***Vallance v DHL Express (Canada), Ltd.***, 2024 BCSC 140, at paras. 76-78 and:

[84] ... The question of loss is not whether the plaintiff got something for what he or she paid, it is whether the representation caused the plaintiff to pay what he otherwise would not, or to pay more.

[emphasis added]

[76] I am in agreement with the defendants that in the present case, the plaintiffs have not pleaded a viable theory of causation. For example, the plaintiffs do not plead detrimental reliance or other material facts to support causation. Neither do they plead that they would have made different purchases, bought less, or paid different prices, had the defendants not made its alleged representation that it was complying with the NNC. Instead, the plaintiffs plead that they all shopped at the defendants' retail stores because they had no viable alternative in their northern communities. On their own pleadings, the plaintiffs would have made the purchases anyway. As the defendants have noted, for the plaintiffs to have plead otherwise would have scuttled this class proceeding by calling for a hopelessly individualized analysis. In the end, the plaintiffs are left without a causal link between the alleged misrepresentation and their alleged losses.

[77] What the federal government may have been told or not told and what the government would have done or not done is not relevant to the plaintiffs' claim. Again, as the defendants have argued, the government is not a party and there is no allegation

that the government has taken any issue with the defendants' administration of the NNC. There is quite simply, no causal link that can conceivably be asserted in the present case.

[78] The defendants properly emphasize that this case stands in contrast to those where material facts have established causation (see ***Rebuck v. Ford Motor Company***, 2018 ONSC 7405; ***Vallance***; and ***Krishnan v Jamieson Laboratories Inc.***, 2021 BCSC 1396).

[79] In ***Rebuck***, the plaintiff alleged that he acquired a vehicle of lesser value because the alleged misrepresentations about fuel efficiency made him pay more for gas.

[80] In ***Vallance***, the plaintiff alleged that the defendant failed to disclose that it was pocketing fees that were described as taxes and duties and that she would have been able to arrange her affairs to avoid the fees if they had been properly explained.

[81] In ***Krishnan***, the plaintiff claimed that the product had been misrepresented as containing a particular ingredient and that she would not have purchased it had she known the truth.

[82] The plaintiffs agree that they must plead causation for their claims under both the ***Competition Act*** and consumer protection legislation. Despite this acknowledgement, the plaintiffs advance an odd and factually unsupportable theory of causation that, in my view, is certain to fail. This somewhat curious theory is not supported by material facts. In fact, the theory contradicts the plaintiffs' own pleadings and other statements in their written submissions where they assert that the purported class members paid a higher price not because of any misrepresentation but because the defendants "imposed a higher profit margin on subsidy-eligible products".

[83] The plaintiffs appear to be relying on two cases to suggest that they have pleaded a viable causal theory. I agree with the defendants that neither case assist them (see *Lin*; and *Zanin v. Ooma, Inc.*, 2025 FC 51, at para. 508).

[84] In *Lin*, the plaintiffs allege that the defendants violated the “double ticketing” provision of the *Competition Act* because they charged more than the price shown on the label and this overcharge caused them to pay more. Unlike the plaintiffs in *Lin* who alleged they paid more because the defendant charged more than the stated price, the plaintiffs in the present case allege that the defendants’ representations about price caused the higher price in the first place. The plaintiffs in the present case do not make any allegation that the defendants charged more than the stated price and in fact, it seems uncontested that the plaintiffs paid exactly what the price stated.

[85] In *Zanin*, the Federal Court struck out the s. 52 claim. The plaintiffs would seem to be relying upon *Zanin* for the Court’s discussion about whether causation could hypothetically be proven without showing detrimental reliance. A reading of *Zanin* suggests that the Court did not resolve this question. Again, as the defendants have argued, that discussion is irrelevant to the present case, for even if the plaintiffs had relied on the shelf labels, the plaintiffs pleaded no facts showing that the defendants’ alleged representations changed the prices the plaintiffs paid, which were in fact the prices on the shelf.

[86] The plaintiffs have not pleaded any viable causal link/detrimental reliance as between the Part VI conduct and the actual loss. In my view, any claims under the *Competition Act*, are certain to fail and accordingly, should be struck.

All Claims under Consumer Protection Legislation are Certain to Fail

[87] The plaintiffs have plead causes of action pursuant to the ***Consumer Protection Acts*** of Ontario (2002, S.O. 2002, c. 30, Sched. A), Alberta (RSA 2000, c C-26.3), Manitoba (C.C.S.M. c. C200), Saskatchewan (SS 2013, c C-30.2), Newfoundland and Labrador (RSNL 1990, c C-31), the Northwest Territories (R.S.N.W.T. 1988, c C-17), Yukon (R.S.Y. 2002 c. 40), and Nunavut (R.S.N.W.T. (Nu) 1988, c C-17). In all of the causes of action, except for the claims arising from the Yukon and Northwest Territories, it is asserted that there were unfair business practices. In that regard, it is alleged that there was misrepresentation about the amount of subsidy being passed through.

[88] In pleading these claims under the consumer protection legislation as identified above, what is at issue are the same alleged misrepresentations discussed above respecting the plaintiffs' allegations in relation to the ***Competition Act***. As the defendants were well to emphasize, the consumer protection legislation causes of action require the plaintiffs to plead material facts to support causation, whether in respect to detrimental reliance or otherwise.

[89] In their submissions, the defendants persuasively identify that which is required in the relevant Provincial legislation. Those submissions provide an obvious reference point for assessing why the plaintiffs' consumer protection legislation claims cannot succeed.

[90] The plaintiffs point to the fact that the Nunavut, Yukon and Northwest Territories ***Acts*** do not allow a freestanding cause of action to remedy an unfair business practice. Instead, they imply certain terms into consumer contracts (see ***Hoy v. Expedia Group, Inc.***, 2024 ONSC 1462 (Div. Ct.), at paras. 30 and 114; ***Consumer Protection Act***,

R.S.Y. 2002 c. 40, at s. 58; **Consumer Protection Act**, R.S.N.W.T. 1988, c C-17, at s. 70; and **Consumer Protection Act**, R.S.N.W.T. (Nu) 1988, c C-17, at s. 70). Given what is set out in those Provincial **Acts**, the plaintiffs' claims appear not to be permitted and accordingly, should be struck.

[91] The defendants also note that while Ontario does not require detrimental reliance to establish a claim under the **Consumer Protection Act**, there must at least be a pleading that the plaintiffs could have purchased the same product elsewhere, from a competitor, for a different price, without the misrepresentation, or that they purchased a worthless product. This requirement informed the Court's decision in **Thompson-Marcial v. Ticketmaster Canada LP**, 2024 ONSC 2305, at paras. 236 and 237.

[92] In the present case, it must be noted that the plaintiffs do not plead and as the defendants emphasize, cannot plead, that they would not have purchased the products or could have purchased them elsewhere for less. Given the above, this would seem determinative.

[93] The defendants make reference to the fact that in Alberta, Saskatchewan and Newfoundland and Labrador, reliance is required for a cause of action under consumer protection legislation. I am persuaded by the defendants' submissions that for the same reasons set out earlier in the judgment respecting the **Competition Act** claims, there is in the present case, no legally tenable pleading of reliance.

[94] The defendants also examine the situation in Manitoba and note that detrimental reliance with some other form of causation is clearly required. In that connection,

s. 23(2)(a) refers to “loss suffered” and s. 23(3) puts an onus on the consumer to “minimize any damage” (see ***Mackinnon v. Volkswagen Group Canada Inc. et al.***, 2024 ONSC 4988, at para. 195). As submitted by the defendants, taken together, the Manitoba statute clearly requires a representation that caused a loss that otherwise would have been avoided. Given this requirement, and for the same reasons earlier identified, there is in the present case no legally tenable pleading of reliance or other form of causation.

[95] Finally, as it relates to Quebec, the defendants note that the Supreme Court of Canada has clearly expressed that Quebec requires an alleged misrepresentation that is “capable of influencing a consumer’s behaviour with respect to the formation, amendment or performance of the contract” (see ***Richard v. Time Inc.***, 2012 SCC 8, at para. 124). In that connection and in the context of the present case, I note once again that there is no allegation that any alleged misrepresentation influenced any plaintiffs’ behaviour in the sense that they would have either not purchased what they purchased or shopped elsewhere. The plaintiffs have not denied that they would have bought the very goods they allegedly bought on the various occasions they bought them. This fact - which must be taken as true on the claim itself – is fatal to causation under Quebec’s consumer protection legislation and indeed, in respect of the consumer protection legislation of all provinces.

[96] For the reasons explained above, all of the consumer protection legislation claims should be struck.

The Alleged Novelty of the Plaintiffs' Claim

[97] Novel claims only survive a motion to strike where they “have some elements of a cause of action recognized in law and [are] a reasonably logical and arguable extension of established law” (see ***Carcillo v. Canadian Hockey League***, 2023 ONSC 886, at para. 219; see also ***Babstock***). In the present case, the plaintiffs’ claim does not present as one that has some elements of a cause of action recognized in law that are a reasonably logical and arguable extension of established law.

[98] The plaintiffs’ claims in the present case are not, in my view, novel. Instead, while invoking the description of “novelty”, the plaintiffs are in fact pleading causes of action which, given the established legal tests, present prohibitive obstacles to success.

[99] “Novelty” in the judicial context, properly understood, is a description meant for new or unsettled areas of law. The mere description that something is novel cannot permit a pleading that plainly and obviously does not disclose a cause of action to proceed where the governing law otherwise renders such a claim as non-viable.

[100] For the foregoing reasons, notwithstanding the plaintiffs’ appeal to novelty, there is, in my view, no reason to allow what I have identified as non-viable claims to proceed further.

The Plaintiffs’ Motion Seeking Leave to Amend

[101] As earlier noted, respecting the above issue, and for the reasons discussed and agreed to by all parties at the hearing, any further argument and decision on the plaintiffs’

motion for leave to amend will await the plaintiffs' opportunity to consider these reasons supporting my decision to strike.

C.J.K.B.