IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Hynes v. Professional Diving Contractors Limited*, 2024 NLSC 13
Date: January 23, 2024
Docket: 201201G3477

BETWEEN:

JAMES HYNES

FIRST PLAINTIFF

AND:

BARRY HYNES

SECOND PLAINTIFF
(DISCONTINUED)

AND:

SEAFORCE TECHNOLOGIES INC.

THIRD PLAINTIFF
(DISCONTINUED)

AND:

SEAFORCE DIVING LIMITED

FOURTH PLAINTIFF
(DISCONTINUED)

AND:

PROFESSIONAL DIVING CONTRACTORS LIMITED

FIRST DEFENDANT

AND:

DAVID SQUIRES

SECOND DEFENDANT

Before: Justice Peter A. O'Flaherty

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: August 23 and September 8, 2023

Summary:

The Defendants applied under Rule 12.02(1) of the *Rules* for a declaration that they have leave to file a third party notice without the normal leave of the Court, or alternatively for leave to issue a third party notice.

Held: The application was dismissed.

Appearances:

Gregory M. Smith, K.C. & Shane R. Belbin	On behalf of the Plaintiff
Kevin F. Stamp, K.C.	On behalf of the Defendants
Douglas B. Skinner	On behalf of the proposed Third Party

Authorities Cited:

CASES CONSIDERED: *Ryan v. Dew Enterprises Ltd.*, 2014 NLCA 11; *First Canadian Group Limited v. St. John's (City)*, 2022 NLSC 5; *Economical Mutual Insurance Co. v. Bank of Nova Scotia*, 2015 NLCA 29; *R v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Exploits Valley Air Services Ltd. v. College of the North Atlantic (Board of Governors)*, 2005 NLCA 54 (CanLII); *Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 S.C.R. 27; *Mil-Davie Inc. v. Hibernia Management & Development Co.*, 2003 FCT 297; 2020 SCC 35; *Hryniak v. Mauldin*, 2014 SCC 7; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), [1977] 2 All E.R. 492; *Cooper v. Hobart*, 2001 SCC 79; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Hedley Byrne & Co. v Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), [1963] 2 All E.R. 575; *Birmingham and District Land Co. Ltd. v. London & North Western Rly Co.*,(1886) 34 Ch. D. 261, [1886-90] All E.R. Rep. Ext. 1618 (C.A.)

STATUTES CONSIDERED: *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c. 3; *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2; *Judicature Act*, R.S.N.L. 1990, c. J-4; *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

O'FLAHERTY, J.:

OVERVIEW

[1] The Plaintiff, James Hynes ("Hynes"), is suing the Defendants, Professional Diving Contractors Limited ("Pro-Dive") and David Squires ("Squires"), in tort for defamation, causing loss by unlawful means and inducing breach of contract.

[2] The action was commenced on June 12, 2012. Nine versions of the Statement of Claim have been filed. The first of four Statements of Defence was filed on October 31, 2016. The case has remained at the pleadings stage for the extraordinary period of 11 years while a series of procedural applications have been decided.

[3] On September 28, 2022, the Defendants applied for a declaration under Rule 12.02(1) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D ("the *Rules*") that they have leave to file a third party notice ("the Third Party Notice") without the normal leave of the Court required by the rule, or alternatively for leave.

[4] The Third Party Notice sets out proposed claims by the Defendants against Technip FMC Canada Ltd. ("Technip") based on causes of action for breach of statutory duty, negligence, indemnification and contribution. Technip was granted leave to appear and be heard on the Defendants' application.

[5] For the following reasons, the Defendants' application is dismissed with costs.

BACKGROUND

[6] Hynes and Squires were partners in a commercial diving business, Pro-Dive, from 1983 until 2000 when Squires acquired Hynes's interest. Squires is the sole owner and director of the Second Defendant, which currently operates Pro-Dive.

[7] Beginning in 2003, Hynes was engaged by Technip on contracts it obtained for work or activity in the local offshore oil industry. Between 2006 and 2012, the Second Defendant corresponded with Technip about relationships among Hynes, his brother Barry Hynes, and senior officials at Technip's St. John's office. Squires raised concerns that the relationships might give rise to a conflict of interest, or the appearance of a conflict of interest, in Technip's tendering process and limit the First Defendant's right to a fair opportunity to participate in Technip work.

[8] The Defendants plead they were raising legitimate concerns and enquiries and requesting assurances that Technip would look into the issue and determine whether there was an actual or apparent conflict of interest in the awarding of Technip work by its St. John's office. The Defendants' concerns about the conflict of interest issue were escalated over time to employees and the board of Technip's parent company.

[9] On December 9, 2013, Technip wrote to Hynes informing him that it would no longer require his services at the conclusion of its 2013 operations. Technip had concluded there was no actual conflict of interest but informed Hynes there was a continuing perception of the potential of conflict surrounding his services leading to concerns which prejudiced the smooth running of the relationship and added costs.

[10] A Statement of Claim was filed on June 12, 2012, by Hynes, his brother, and two corporations claiming against the Defendants in defamation, and alleging an unlawful interference with Hynes' contractual and economic relations with Technip.

[11] Two applications to strike the pleadings were brought. Ultimately, five Amended Statements of Claim were filed before a Statement of Defence was filed by the Defendants on October 31, 2016, and the pleadings were first closed.

[12] The Defendants filed an Amended Statement of Defence on October 27, 2017, and a Further Amended Statement of Defence on March 9, 2018. Two further Amended Statements of Claim were filed before the Second, Third and Fourth Plaintiffs filed a Notice of Discontinuance on October 1, 2021.

[13] On January 22, 2022, Hynes, by that time the sole Plaintiff, filed the Eighth Amended Statement of Claim with leave of the court. In this latest version of the Statement of Claim, which amounted to a wholesale reorganization and redraft of the Statement of Claim, Hynes pleaded the torts of defamation, causing loss by unlawful means, and a new cause of action, inducing breach of contract.

[14] In raising the tort of inducing breach of contract the Plaintiff alleged that the contract between Technip and Hynes was terminated by Technip without reasonable notice as a result of the Defendants' correspondence, and the conduct, means and manner with which Squires acted.

[15] On September 6, 2022, the Defendants forwarded the Third Party Notice to the registry for filing. Because three Statements of Defence had already been filed by the Defendants the Registry of the Supreme Court returned the Third Party Notice to the Defendants unfiled. This application was then brought on September 28, 2022.

[16] In their amended defence, filed on August 28, 2023, the Defendants deny all claims but admit that, starting on March 31, 2006, Squires communicated with Technip about whether Hynes' association with a competitor of Pro-Dive created an actual or perceived conflict of interest in Technip's tendering process. The Defendants' position is that at all times Hynes appeared to them to be an employee, or a contractor with Technip, and their communications to Technip were legitimate and proper enquiries seeking assurance that Technip was complying with the law.

[17] The Defendants further denied that the termination of the contractual arrangements between Technip and Hynes was a breach of contract. The Defendants pleaded that if such a breach of contract occurred, which was denied, or if any notice provided by Technip was unreasonable or inadequate, which was also denied, then in such circumstances Hynes had a duty to mitigate his damages by claiming against Technip for breach of contract or for termination without reasonable notice.

[18] The application under Rule 12.02(1) sets out that, in claiming for the tort of inducing breach of contract, the Plaintiff alleged for the first time that his contract was breached when it was terminated by Technip without reasonable notice in December 2013. The Defendants claim that these "new" allegations gave rise to the claims against Technip for contribution and indemnity.

[19] The Third Party Notice also sets out two separate "direct" third party claims against Technip for breach of statutory duty and negligence. Both claims are based on the factual assertion that Technip wrongfully and negligently interpreted the Defendants' legitimate inquiries about the potential conflict of interest as complaints about Hynes, or as demands to Technip that Hynes be terminated.

[20] The Defendants claim that, when it negligently interpreted their legitimate enquiries about Hynes, Technip breached a statutory duty owed to them under the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c. 3 and the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c. C-2 ("the *Implementation Acts*") in particular under section 45 to "receive, review, evaluate and respond to" their concerns and enquiries about the potential conflict of interest.

[21] Alternatively, the Defendants claim that having accepted and acted on the Defendants' enquiries pursuant to its statutory duty under the *Implementation Acts* Technip entered into a relationship with the Defendants such that a common law duty of care arose to take reasonable care to avoid injury to the Defendants in interpreting their concerns and enquiries, which was breached if Technip negligently interpreted their enquiries and then acted on their wrongful interpretation by terminating the contract with Hynes.

ISSUES TO BE DECIDED

[22] The first issue is whether, having filed a defence, the Defendants may file the Third Party Notice without the normal leave of the Court, or are required to obtain leave of the court under Rule 12.02(1) to issue the Third Party Notice.

[23] If leave is required, the second issue is whether I should grant the Defendants leave to issue the Third Party Notice under Rule 12.02(1).

THE FIRST ISSUE

The Applicable Law

[24] Rule 12.02(1) of the *Rules* applies to both issues raised. It provides as follows:

> **12.02.** (1) Where a defendant claims against any person, who is a co-defendant or who is not a party to the proceeding, that the latter is or may be liable to the defendant for all or any part of the plaintiff's claim against the defendant, the defendant may, before the defendant files a defence or appears on a hearing under an originating application, issue and serve a third party notice without the leave of the Court, and thereafter with leave. (Emphasis added)

[25] The legal principles to be applied on applications brought under Rule 12.02(1) are discussed in the leading case of *Ryan v. Dew Enterprises Ltd.*, 2014 NLCA 11.

[26] The Court of Appeal stated in *obiter* that issuance of a third party notice may be made as of right if the defendant does so before filing a defence. After a defence is filed however, leave must be obtained, which involves a judicially exercised discretion (see *Ryan v. Dew*, paragraphs 32, 70). This was the same approach

adopted by Stack, J. in *obiter* in *First Canadian Group Limited v. St. John's (City)*, 2022 NLSC 5.

[27] The Defendants have requested a declaration under Rule 12.02(1). The authority of this Court to grant a declaratory order is referred to in Rule 7.16 of the *Rules* which provides that the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[28] The Court's authority to grant a declaratory order is discretionary and it should be exercised with restraint. The Court may refuse to grant a declaration on a number of grounds, including where there is a more appropriate procedure for the Court to exercise its jurisdiction on a particular question.

The Positions of the Parties

[29] The Defendants argue that the ninth version of the statement of claim made the three defences they had filed meaningless, and it should effectively be treated as a "reset button" putting the pleadings back to square one. They argue that Rule 12.02(1), supported by a flexible reading of Rule 15.05, did not require that the Defendants obtain leave to issue the Third Party Notice on September 6, 2022.

[30] The Defendants claim that under these special circumstances they are entitled to a declaration under Rule 12.02(1) that they have leave to file the Third Party Notice without the "normal" leave that would be required after they have filed a Statement of Defence.

[31] The Plaintiff and Technip take the position that Rule 12.02(1) requires that leave of the court must be obtained before the third party notice is issued because the Defendants filed a defence, in fact three defences, by September 6, 2022.

Analysis

[32] The portion of Rule 12.02(1) that deals with the procedural question of when a defendant is required to obtain leave to issue a third party notice provides that "a defendant may, before the defendant files a defence … issue and serve a third party notice without the leave of the court, and thereafter with leave".

[33] I find that when read in its grammatical and ordinary sense, and in the context of Rule 12, the word "*thereafter*" means "*after the defendant files a defence*".

[34] Rule 12.02(1) does not provide for any circumstances, special or otherwise, in which leave to issue a third party notice is not required after a defence is filed.

[35] Rule 15.05 provides that the original defence filed by a defendant remains applicable after the plaintiff files an amended statement of claim. It does not address when leave is required to issue a third party notice. With respect, and whether or not it is read flexibly or otherwise, I find it has no relevance to the issue I must decide.

[36] On the question of when a third party notice may be issued, I interpret Rule 12.02(1) to mean that the defendant may, before filing a defence, issue a third party notice without the leave of the court, and after a defendant has filed a defence the defendant may only issue a third party notice with the leave of the court.

[37] This accords with the statement that issuance of a third party notice may be made *as of right* if the defendant does so before filing a defence and after a defence is filed leave of the court must be obtained (see *Ryan v. Dew*, paragraphs 32, 70).

[38] Applying this interpretation, I find that Rule 12.02(1) required the Defendants to obtain the "normal" leave required under the rule to issue and serve the Third Party Notice because a defence had already been filed by the Defendants.

[39] I find that a declaration would not have been available to the Defendants under Rule 12.02(1), or under Rule 7.16, that they are entitled to leave to file the Third Party Notice without the "normal" leave required under the rule.

[40] The express requirement in Rule 12.02(1) for "leave" is incompatible with the argument that any legal "right" existed to file the Third Party Notice. There is also no proper contradictor to the Defendants' position. The question of leave to file a third party notice therefore cannot be subsumed into a declaratory proceeding.

[41] Assuming however that such a declaratory order was available, I would have refused to grant a declaration because an application for leave to issue a third party notice under Rule 12.02(1) is the accepted, and more appropriate, procedure for the Court to exercise its jurisdiction on the question of when leave is required.

THE SECOND ISSUE

The Applicable Law

[42] In *Ryan v. Dew*, the Court of Appeal discussed the proper approach on an application for leave to issue a third party notice under Rule 12.02(1) and summarized what is necessary where leave is required under Rule 12.02(1).

[43] The parties agree that the current approach on an application for leave to issue a third party notice, as set out in *Ryan v. Dew*, involves a three-part analysis:

1) The third party claim must fall within the scope of allowable third party claims under the *Rules* and the *Act*, R.S.N.L. 1990, c. J-4;

2) The facts and allegations relied on in the third party claim must ground a cause of action, to the standard of an arguable case; and,

3) The third party claim must be able to be accommodated within the existing litigation.

[44] The Defendants bear the onus to justify the issuance of the Third Party Notice.

[45] In *Ryan v. Dew* the Court of Appeal confirmed that to fall within the scope of allowable third party claims, the claim must arise out of, in the sense of being "related to or connected with" the original litigation, as required by section 94(1)(b) of the *Judicature Act*. The Court of Appeal held that the provisions of section 94 are controlling and should inform the interpretation of Rule 12.02.

[46] The Court of Appeal confirmed that neither the wording of section 94 nor the wording of Rule 12.02(1) requiring that a third party claim must be "for all or any part of the plaintiff's claim against the defendant" limited a defendant to only raising traditional claims for indemnity or contribution from a non-party or a co-defendant. Prior to the enactment of the *Rules* this was the approach that was followed.

[47] *Ryan v. Dew* established that a "direct" cause of action can now be initiated against a third party under Rule 12.02(1) provided that the claim is "related to or connected with" the original litigation, which is satisfied if it arose out of the same general factual and/or legal matrix of the extant issues between the plaintiff and the defendant, and as long as the defendant claimed damages from the third party which were in whole or in part the same damages that were claimed by the plaintiff.

[48] The question now, as a practical matter, is "can the defendant, by asserting a separate claim arising out of the same factual circumstances and by recovering damages from the third party on the basis of the third party's involvement in those circumstances, effectively making the third party ultimately answer in whole or in part for the losses that have occurred?" (See *Ryan v. Dew*, paragraph 68).

[49] In analyzing the substantive basis of the proposed third party claims, the Court of Appeal confirmed in *Economical Mutual Insurance Co. v. Bank of Nova Scotia*, 2015 NLCA 29, that what must be disclosed by the Defendants in their application is "the foundation for a cause of action, that is, an arguable case" against the proposed third party (see *Economical*, at paragraph 20). The merits of any arguable claims are to be determined at trial on the evidence and the submissions on the law.

[50] Finally, *Ryan v. Dew* confirmed that I must consider whether it is fair and just to all parties to accommodate the third party claims in the existing case. This involves factors such as whether there has been delay in bringing the application for leave, whether the claims would unduly complicate the disposition of the main action, and whether any substantial prejudice may result from adding a third party.

The Positions of the Parties

[51] The Defendants submit that the claims in the Third Party Notice fall within the allowable scope of third party claims as they all arise from the same factual matrix as the Plaintiff's claims against the Defendants.

[52] The Defendants submit that the facts and allegations in the Third Party Notice set out an arguable case against Technip on separate causes of action for breach of statutory duty, common law negligence, indemnity and contribution.

[53] The Defendants submit that the Third Party Notice is timely, and its issuance would not be unfair to Technip or the Plaintiff as no trial date has been set.

[54] The Plaintiff and Technip submit that there is no arguable case pleaded by the Defendants for negligent breach of statutory duty, common law negligence, indemnity, or contribution.

[55] The Plaintiff and Technip further argue that the direct claims as pleaded are not within the scope of allowable third party claims and they are in substance and in legal effect defences to the Plaintiff's claim.

[56] On the third part of the analysis, the Plaintiff and Technip argue that the issuance of the Third Party Notice was not timely, and that the issuance of third party proceedings would result in significant additional delay and unwarranted expense.

Analysis

[57] All three parts of the analysis in *Ryan v. Dew* are engaged on this application.

[58] Given the nature of the proposed third party claims for breach of statutory duty and common law negligence, I will examine their substantive basis first, and then consider whether they can make Technip answer for all or part of the Plaintiff's claims against the Defendants.

[59] I will then address the third party claims for indemnity and contribution.

[60] Finally, I will consider whether it would be fair and just to all parties to accommodate the third party claims within the existing litigation.

The Direct Third Party Claims

[61] The Defendants have pleaded a direct third party claim against Technip for breach of a statutory duty "to receive, review, evaluate and respond to (the Defendants') concerns or enquiries" under the *Implementation Acts*, and in particular section 45. In the alternative, the Defendants have pleaded a direct third party claim

against Technip for breach of a common law duty of care arising from the relationship of proximity entered into between Technip and the Defendants.

[62] The "direct" third party claims are both, as a matter of law, pleading a cause of action in common law negligence. This is because there is no nominate tort of breach of statutory duty and the *Implementation Acts* do not by their express provisions give the Defendants any private cause of action against Technip for breach of a statutory duty (see *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205).

Breach of Statutory Duty

[63] The law provides that the "negligent" or careless breach of a statutory duty can ground a cause of action in negligence provided there is a corresponding common law duty of care, but the existence of a statutory duty does not create a presumption of a private law duty of care. Consequently, the Defendants must establish the existence of a common law duty which corresponds to the statutory duty which has been breached (See *Exploits Valley Air Services Ltd. v. College of the North Atlantic (Board of Governors)*, 2005 NLCA 54 (CanLII), paragraph 26).

[64] The facts and allegations supporting the negligent breach of statutory duty claim are set out in paragraphs 7-17 of the proposed third party statement of claim:

> 1. Canada and Newfoundland and Labrador entered into the Atlantic Accord on Feb 11, 1985 (paragraph 7);
>
> 2. Canada and Newfoundland and Labrador enacted the *Implementation Acts*, and in particular section 45 (paragraphs 8-9);
>
> 3. Under the *Implementation Acts*, the First Defendant, as a supplier of goods and services to the Newfoundland and Labrador offshore oil sector, is to be provided with "a full and fair opportunity to participate in the supply of goods and services" (paragraph 10).

4. Technip, as a provider of products and services, was under a statutory duty to "to comply with the *Implementation Acts*" (paragraph 11).

5. The combined effects of the Atlantic Accord and the *Implementation Acts* imposed a statutory duty on Technip "to ensure the First Defendant would enjoy a full and fair opportunity to participate in the supply of products and services to Technip, whenever Technip was engaged in the supply of products and services to the Newfoundland and Labrador offshore oil and gas sector" (paragraph 12).

6. The Defendants had a right to expect that Technip's tendering and subcontracting processes would provide the First Defendant with a full and fair opportunity to participate in the provision of goods and services to Technip, and Technip has a corresponding duty "to provide the First Defendant with a full and fair opportunity to participate in the supply of products and services associated with that work (paragraph 13).

7. The Second Defendant's concerns of possible conflict of interest addressed to Technip were, in law, a legitimate inquiry by the Second Defendant seeking assurances that the subcontracting processes were compliant with the *Implementation Acts* (paragraph 14).

8. In the event the Defendants raised such concerns, Technip had a statutory duty to the First Defendant "to receive, review, evaluate and respond to such concerns and enquiries" (paragraph 15).

9. The Defendants assert that, in his Statement of Claim, Hynes claims he was dismissed by Technip because of the Defendants' demands (paragraph 16). The Defendants claim that if, having received and evaluated the Defendants' inquiries and concerns, Technip wrongfully and negligently treated them as complaints or demands that Hynes be terminated, then Technip's wrongful and negligent treatment of them was "a breach of a statutory duty to which Technip was bound" (paragraph 17).

10. By reason of the negligent breach by Technip of its statutory duty, the Defendants were exposed to claims by the Plaintiff for damages for which the Defendants have a right of recovery against Technip (paragraph 17).

[65] The Defendants have not pleaded a statutory breach of a duty found in section 45 of the *Implementation Acts*. Instead, in paragraphs 10 and 12 it is pleaded that statutory obligations were owed to the Defendants which were triggered by the "full and fair opportunity provisions of the Atlantic Accord", and in paragraphs 11 and 13 it is pleaded that corresponding "statutory duties" were owed to the Defendants by Technip under the "full and fair opportunity" provisions of section 45.

[66] Flowing from the pleaded statutory duties and obligations to ensure the Defendants had a "full and fair opportunity", the Defendants plead in paragraph 14 that, at law, the concerns about conflict of interest which the Defendants addressed to Technip were a legitimate and proper enquiry by the Defendants seeking assurance from Technip that its subcontracting processes were compliant with the "full and fair opportunity provisions" of the *Implementation Acts*.

[67] In paragraph 15 the Defendants plead that in the event a supplier such as the First Defendant raised such a legitimate and proper enquiry with Technip, then Technip had a statutory duty to the First Defendant to "receive, review, evaluate and respond to" its concerns and enquiries. Again, this statutory duty is not found in section 45 or elsewhere in the *Implementation Acts*.

[68] Finally, the Defendants plead in paragraph 17 that, if Technip negligently treated the First Defendants' lawful enquiries and concerns as complaints or demands to terminate Hynes, then Technip's wrongful and negligent interpretation of the Defendants' enquiries was a "breach of statutory duty to which Technip was bound", and by reason of such wrongful and negligent breach of the statutory duty the Defendants suffered loss when they were exposed to the Plaintiff's tort action.

[69] The Defendants have not pleaded a separate statutory duty of care in the interpretation of the Defendants' concerns and enquiries.

[70] For the following reasons I find that the facts and allegations pleaded by the Defendants do not disclose an arguable case against Technip for a cause of action in negligence for breach of statutory duty.

[71] First, I find that the facts and allegations pleaded by the Defendants do not establish there was any express or implied statutory duty on Technip to "review, evaluate and respond to (the Defendants') concerns or enquiries" which could have been wrongfully and negligently breached by Technip as alleged.

[72] The existence of a statutory duty in the *Implementation Acts* depends upon the intention of the legislature and Parliament. The modern rule of statutory interpretation is confirmed in *Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 S.C.R. 27:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[73] Section 45 of the *Implementation Acts* is reproduced below:

> **45.** (1) In this section "Canada-Newfoundland and Labrador benefits plan" means a plan for the employment of Canadians and, in particular, members of the labour force of the province and, subject to paragraph (3)(d), for providing manufacturers, consultants, contractors and service companies in the province and other parts of Canada with a fair opportunity to participate on a competitive basis in the supply of goods and services used in a proposed work or activity referred to in the benefits plan.
> (2) Before the board approves a development plan under subsection 135(4) or authorizes a work or activity under paragraph 134(1)(b), a Canada-Newfoundland and Labrador benefits plan shall be submitted to and approved by the board, unless the board directs that it is not necessary to comply with that requirement.
> (3) A Canada-Newfoundland and Labrador benefits plan shall contain provisions intended to ensure that
>
> (a) before carrying out any work or activity in the offshore area, the corporation or other body submitting the plan shall establish in the province an office where appropriate levels of decision-making are to take place;
>
> (b) consistent with the Canadian Charter of Rights and Freedoms, individuals resident in the province shall be given 1st consideration for training and employment in the work program for which the plan was submitted and a collective agreement entered into by the corporation or other body submitting the plan and an organization of employees respecting terms and conditions of employment in the offshore area shall contain provisions consistent with this paragraph;

> (c) expenditures shall be made for research and development to be carried out in the province and for education and training to be provided in the province; and
>
> (d) 1st consideration shall be given to services provided from within the province and to goods manufactured in the province, where those services and goods are competitive in terms of fair market price, quality and delivery.

[74] The "full and fair opportunity" provisions of section 45 relied upon by the Defendants are mainly those found in section 45(1) which provides that a Canada-Newfoundland and Labrador benefits plan means a plan, subject to paragraph (3)(d), for providing manufacturers, consultants, contractors and service companies in the province and other parts of Canada with a "*fair opportunity to participate on a competitive basis in the supply of goods and services*".

[75] As may be seen, there is no reference in section 45 of the *Implementation Acts* to a duty on a contractor to "receive, review, evaluate and respond to" any enquiries about potential conflicts of interest or about compliance with the "full and fair opportunity provisions". More broadly, there is nothing in the statute to suggest that Parliament or the legislature ever intended to elevate the status of such enquiries to "statutory" enquiries, to impose any duty on a contractor to "receive, review, evaluate and respond to" such enquiries, or to address the harm that could result if a contractor failed to respond or, as alleged, carelessly responded to such enquiries.

[76] I find therefore it is not arguable that receipt of an enquiry from the First Defendant as a potential supplier raising concerns about the compliance of Technip's tendering process with the "full and fair opportunity provisions" of section 45 could have given rise to a statutory duty on Technip under the *Implementation Acts* to "receive, review, evaluate and respond to" the Defendants' concerns and enquiries.

[77] The law is clear. For a cause of action to lie in negligence the Defendants must establish the arguable existence of a statutory duty *and* the arguable existence of a common law duty which corresponds to the statutory duty which has been breached. In absence of an arguable statutory duty, it follows that a corresponding common law duty to take reasonable care to prevent harm to the Defendants in interpreting their enquiries could not arguably arise and be breached by Technip.

[78] The Defendants also referred me to the decision of the Federal Court in *Mil-Davie Inc. v. Hibernia Management & Development Co.*, 2003 FCT 297 as authority for the proposition that an arguable case may be established based on a cause of action for breach of statutory duty under section 45 of the *Implementation Acts*.

[79] With respect, I find that the decision of the Federal Court in *Mil-Davie* has no possible application to the arguable validity of Defendants' proposed cause of action for negligence based on a breach of a statutory duty under the *Implementation Acts*.

[80] In *Mil-Davie*, a shipyard claimed damages for loss of profit from a defendant oil company arising from its failure to provide an opportunity to bid on and obtain a completion contract for a drilling module. The defendant awarded the initial contract on a competitive basis, and the plaintiff submitted an unsuccessful bid, but the completion contract was sole sourced by the defendant.

[81] On an application by the defendant for summary judgment dismissing the plaintiff's claim, the Federal Court concluded that in order to be successful the plaintiff must be able to show that the defendant had a legal and enforceable obligation to award it the completion contract, or at least to provide it with the chance to participate as a bidder in the competition to obtain the completion contract.

[82] The plaintiff argued that the legal and enforceable obligation it sought to enforce by private right of action was based on the failure of the defendant to comply with its statutory obligation to provide the bidder with a "fair opportunity" to participate under section 45 of the *Implementation Acts*, and/or the Benefits Plan.

[83] The cause of action as pleaded in *Mil-Davie* engaged a tendering law analysis, and a claim for damages arising from the wrongful award of the contract to another bidder. While expressing serious doubts as to the success of such a claim, the judge denied the motion for summary judgment on the basis that even an appearance of a real legal argument raised a genuine issue that should be left for trial.

[84] The Defendants' claim against Technip however is in negligence based on Technip's breach of the statutory duty "to receive, review, evaluate and respond to (the Defendants') concerns or enquiries" claiming damages for exposure to an action in damages. The Defendants are not pleading a failure on the part of Technip to comply with its statutory obligation under section 45 to provide the First Defendant with a "full and fair opportunity" to bid on or participate in the supply or goods and services to Technip, nor are they claiming damages from Technip based on any loss of profit or loss of a fair opportunity.

[85] *Mil-Davie* is therefore not applicable to the Defendants' proposed cause of action. Furthermore, *Mil-Davie* is not binding on this court, and the currently applicable authorities direct me to take a closer look at a novel cause of action for breach of statutory duty (see *Hryniak v. Mauldin*, 2014 SCC 7, paragraphs 23-33).

[86] Accepting the facts as pleaded by the Defendants, they do not disclose an arguable case against Technip for a cause of action in breach of statutory duty.

[87] The Defendants also plead a cause of action in negligence for breach of a common law duty of care arising out of the relationship entered into by Technip with the Defendants when it accepted and evaluated the Defendants' enquiries.

[88] The facts and allegations in support of the Defendants' claim based on the alternative cause of action in common law negligence against Technip are set out in paragraph 18 of the proposed third party statement of claim:

> 18. In the alternative, Defendants plead that having accepted the Second Defendants enquiries and acted on those enquiries, including from time to time, requesting additional information from the Second Defendant, Technip received and accepted the Second Defendants enquiries as being made bona fide, and having embarked on a review and evaluation of those submitted enquiries by the Second Defendant, Technip entered into a relationship with the Defendants in which the Defendants had a reasonable expectation that Technip's review and evaluation would be carried out in a fair and prudent manner, and if, having received, reviewed and evaluated the Second Defendants enquiries, Technip wrongfully and negligently treated these enquiries by the Defendants as complaints against

> Hynes, or as demands by the Defendants that Hynes should be terminated from his position with Technip, then such wrongful and negligent treatment by Technip constituted a breach of the standard of care owed by Technip to the Defendants in relation to Technip's review and evaluation, and if, as Hynes has pleaded, Technip dismissed him from his contractual position with Technip without proper notice, the [sic] Technip's negligence has exposed the Defendants to claims for damages by Hynes, and for which the Defendant have a right of recovery against Technip.

[89] A cause of action in common law negligence requires that the claimant show: (i) the defendant owed the plaintiff a duty of care in the circumstances; (ii) the defendant breached that duty; (iii) the claimant suffered damage; and (iv) the damage was caused by the defendant's breach (see *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, paragraph 18).

[90] The focus in this application is on the first step, the existence of a duty of care.

[91] A two-stage legal analysis was developed to determine when it is just and fair to impose such a duty of care on a plaintiff (see *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), [1977] 2 All E.R. 492). The Supreme Court of Canada has confirmed that the *Anns* approach, as refined by its later decisions, is still considered good law (see *Cooper v. Hobart*, 2001 SCC 79).

[92] Where a case falls within an established category of negligence, a relationship of sufficient proximity to justify imposing a common law duty of care has already been recognized. In *Cooper v. Hobart* the categories of cases where proximity has already been recognized are enumerated. It is not contested that this case does not fall within those categories, and no recognized or analogous situation was argued.

[93] At the first stage of the *Anns/Cooper* analysis the Court must therefore determine whether there was a relationship of sufficient proximity between a plaintiff and a defendant such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff.

[94] If this question is answered in the affirmative, a *prima facie* duty of care arises. At the second stage of the *Anns/Cooper* analysis the Court must determine whether there are policy considerations which ought to negative or limit the scope of the duty of care, the class of persons to which it is owed, or the damages to which a breach of it may give rise**.**

[95] The nature of the damages claimed by the Defendants is relevant. In paragraph 18 the Defendants allege that Technip's negligence exposed them to a claim for damages by the Plaintiff, that is for a money judgment, for which they have a right of recovery against Technip. The law terms this a claim for pure economic loss.

[96] In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, the Court confirmed the five established categories of cases under which pure economic loss could be awarded. It is not argued by the Defendants that this case falls within any of these categories. No common law duty of care is currently recognized that could permit recovery for pure economic loss in this case.

[97] The issue becomes whether the Court should recognize a new common law duty of care that would permit recovery for pure economic loss. The duty of care question posed may be framed as follows: should the law recognize a duty on the receiver of information voluntarily provided to take reasonable care in interpreting the information to prevent harm to the economic interests of the provider?

[98] I note that tort law only recognized a common law duty of care resting on the *provider* of information to take reasonable care to prevent harm to the economic interests of the *recipient* in 1963, and then only where factors establishing a "special relationship" of proximity existed (see *Hedley Byrne & Co. v Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), [1963] 2 All E.R. 575). The factors which must exist to establish a special relationship of proximity are not alleged to exist in this case.

[99] In evaluating the relationship of the Defendants and Technip for sufficient proximity, such that in the reasonable contemplation of Technip carelessness on its part might damage the Defendants, I must have regard to the relevant considerations

of a factual nature arising from their relationship including the expectations of the parties, representations, reliance, and the nature of the property or interest involved (see *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at paragraph 50).

[100] On the first of the relevant considerations, the Defendants pleaded that, having accepted the Second Defendant's enquiries, the Defendants and Technip entered into a relationship in which they had a reasonable expectation that Technip's review and evaluation of their enquiries would be carried out in a fair and prudent manner.

[101] This is an allegation that there was an expectation by the Defendants that Technip's evaluation of the information they provided would be carried out "in a fair and prudent manner", which is to say the evaluation would be conducted to a certain qualitative standard. In argument, the Defendants submitted that the "fairness and prudence" standard would represent at law the applicable standard of care.

[102] Accepting that the Defendants expected Technip to evaluate their information on a qualitative standard of "fairness and prudence" does not establish an expectation that Technip would take reasonable care for their economic interests in the evaluation of the information they volunteered, let alone a reasonable expectation.

[103] In terms of representations, the Defendants pointed to their communications with Technip about the potential conflict of interest in its tendering process from 2006 to 2012. The Defendants say that the nature, extent and frequency of their communications supports the existence of a relationship of sufficient proximity.

[104] It is uncontested that the parties were in contact on dozens of occasions between 2006 to 2012 about the issue of conflict of interest raised by the Defendants. In terms of the commercial relationship between the parties during this time the Defendants allege that the First Defendant was a potential bidder, and the Second Defendant was communicating about the issue on behalf of a company or supplier that wished to avail of full and fair opportunities for contract work with Technip.

[105] The Defendants point to the fact that the First Defendant was at one time supplier of goods and services to Technip while it was engaged in the supply of products and services to the Newfoundland and Labrador offshore oil and gas sector. A prior contract for the provision of similar services does not aid in establishing proximity in this context. There is no allegation that the Defendant and Technip were involved in an existing contractual relationship or were engaged in the conduct of negotiations respecting the extension of an already existing agreement.

[106] It is not alleged that Technip made any representation to the Defendants which were interpreted as undertaking an express or implied responsibility to the Defendants to take care for their economic interests in interpreting the information which the Defendants volunteered. It is not alleged that this issue was ever raised.

[107] It is further not alleged that at any point between 2006 to 2012 Technip made any representations to the Defendants along those lines which could be interpreted as an inducement to raise their enquiries, or to volunteer further information, or that the Defendants reasonably relied upon any such representations by Technip.

[108] The Defendants also allege that Technip had an overriding statutory duty to ensure its tendering process provided the First Defendant with a full and fair opportunity. I have addressed the potential existence of implied statutory obligations and duties arising under the "full and fair opportunity provisions" of section 45 above. The statute does not assist me in determining either a reasonable standard of conduct or a duty of care *in respect of the conduct complained of*, which is in the interpretation of the Defendants' concerns and enquiries about conflict of interest.

[109] I find that the relevant considerations of a factual nature do not ground the potential existence of a relationship of proximity sufficient to establish a new common law duty on the recipient of information, here a commercial party receiving information about a potential conflict of interest in its tendering process from a potential bidder, to take reasonable care in interpreting the information to prevent harm to the economic interests of the voluntary provider of such information.

[110] It is not necessary to consider the second stage of the *Anns* approach. Were it necessary to do so I would find that the wide ambit of a duty on the recipient of volunteered information to take reasonable care in its interpretation of the words of the provider of information could raise the spectre of liability in an indeterminate amount to an indeterminate class of persons. Stating the issue more broadly, the policy considerations arising from imposing a common law duty of care upon one person in interpreting the words of another person are obvious.

[111] Accepting the facts as pleaded, I find that they do not disclose the potential existence of a common law duty to take reasonable care to prevent harm to the Defendants' economic interests in interpreting or acting on their enquiries. Therefore, there is no arguable case set out for a cause of action in negligence.

Are the direct claims allowable third party claims?

[112] I will briefly address the Plaintiff and Technip's argument that the Defendants' direct third party claims as pleaded are not allowable third party claims.

[113] To prove inducing a breach of contract, the Plaintiff must establish that the Defendants acted, by their communications with Technip, with an intention to harm his contractual arrangements with Technip and that the Defendants' communications caused Technip to breach their existing contract causing loss to the Plaintiff.

[114] In both their defence and proposed direct third party claims, the Defendants plead that their communications with Technip were in fact legitimate and proper enquiries seeking assurance that Technip's subcontracting processes were compliant with the *Implementation Acts* and were not intended to harm the Plaintiff's contractual arrangements with Technip. The Plaintiff and Technip submit that the Defendants' position is in substance a defence to the Plaintiff's claim because if it is accepted then the Plaintiff's claim fails and there is no need for a third party claim.

[115] Returning to *Ryan v. Dew*, they submit that only "flow through" direct liability claims are allowable under Rule 12.02(1) and, on the pleadings in this case, there are no direct claims that can make Technip answer for all or part of the Plaintiff's claim against the Defendants for the tort of inducing a breach of contract.

[116] To paraphrase the Plaintiff, the scenario in which Technip is potentially liable to the Defendants for "wrongfully and negligently" interpreting their words can only be established when it is found that the Defendants are not liable to Hynes.

[117] The Defendants' response to this argument is that, for the purpose of the Third Party Claim, the Court must assume the Plaintiff's version of the facts will be accepted, and if it is determined at trial that the Defendants' induced the termination of the contract then the Court will need to determine the extent of the inducement.

[118] I accept that if the Court finds the Defendants liable to the Plaintiff and awards damages for the tort of inducing a breach of contract, then based on the direct third party claims as pleaded by the Defendants the Court cannot also find that Technip "wrongfully and negligently" misinterpreted the Defendants' legitimate and proper enquiries as complaints or demands that Technip terminate the contract with Hynes, with or without notice. Both claims cannot succeed on the facts as pleaded.

[119] In the circumstances I conclude that the direct third party claims, as pleaded, are therefore not allowable flow through direct liability claims because they cannot potentially make Technip answer for all or part of the Plaintiff's claim against the Defendants for the tort of inducing a breach of contract.

[120] Therefore, even if the Defendants' direct claims as pleaded had disclosed an arguable case, they did not fall within the allowable scope of third party proceedings.

Indemnity by Implication of Law

[121] The Defendants claim they are entitled to indemnification by Technip against all loss or damage which they may incur at the hands of the Plaintiff arising from his claim against the Defendants for the tort of inducing breach of contract.

[122] *Ryan v. Dew* provides that a claim for indemnity does not arise on the basis of *ad hoc* discretion. For a claim for indemnity to be arguable it must fall within an established situation in which a right to claim indemnity may arise (see *Ryan v. Dew*, paragraph 54). Indemnity claims may arise by statute, by express contract or by implication of law. Only the last way is relevant to the Defendants' proposed claim.

[123] In *Ryan v. Dew* the Court of Appeal referred with approval to a passage from *Birmingham and District Land Co. Ltd. v. London & North Western Rly Co.*, (1886) 34 Ch. D. 261, [1886-90] All E.R. Rep. Ext. 1618 (C.A.) at p. 272, where Cotton, L.J., held that a claim for indemnity by implication of law may arise as follows:

> If A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequences of his doing it.

[124] The legal basis of the Defendants' claim for indemnification is that "acts" were done by the Defendants at the "request" of Technip which the Plaintiff claimed were injurious to him and were a cause of the losses for which the Defendants may now be liable at the hands of the Plaintiff for inducing breach of contract.

[125] The Defendants plead on the facts that, after Technip accepted the Defendants' initial enquiry about a potential conflict of interest, Technip "requested" additional information by emailing the Second Defendant on four occasions.

[126] The Defendants argue that because they "acted" by providing additional information to Technip at its "request" on four occasions, they are now potentially liable to the Plaintiff for inducing Technip to breach its contract with Hynes.

[127] Indemnity by implication of law involves the drawing of a true inference from the facts of an enforceable promise or undertaking by the requesting party to indemnify the acting party from all liability or loss the latter incurred because he acted as requested for the requesting party. If an indemnity is owed, Technip would be required at law to hold the Defendants' wholly harmless for all loss or damage which might be owed by the Defendants to the Plaintiff in respect of his tort claim.

[128] For the following reasons I find there is no possible basis for the Court to draw a true inference from the facts as pleaded of an enforceable promise or undertaking by Technip to indemnify the Defendants from all liability or loss in this case. Therefore, there is no arguable case pleaded for a claim for indemnification.

[129] An inference of an enforceable promise or undertaking sufficient to imply a contract to indemnify may only be drawn based on the facts and circumstances of the parties and their relations, here as pleaded.

[130] As in the duty of care analysis, the existence of representations of responsibility on the part of Technip and any reliance by the Defendants on such representations in providing information are potentially important considerations in the Court deciding whether it is possible to draw such an inference in this case. I have already addressed the complete absence of these facts in the pleadings.

[131] In terms of the genesis of the parties' correspondence, the Defendants admit that it was Squires who raised the concerns with Technip about a possible conflict of interest on March 31, 2006. They further admit that Squires contacted Technip and its parent company repeatedly over the next 6-7 years to provide further enquiries and concerns and to seek further assurances about the issue.

[132] Based on the facts as pleaded, the parties' dealings were all characterized by the transmission by Squires to Technip of the Defendants' concerns about relationships among Hynes, his brother Barry Hynes, and senior officials at Technip's St. John's office, and enquiries about the potential for conflict of interest.

[133] A "request", or four requests by Technip, to Squires for information in the factual context as pleaded cannot arguably be taken, as a matter of law, as implying a contract of indemnity, that is an enforceable promise or undertaking on the part of Technip, to indemnify the Defendants when such further information was provided.

[134] The delivery by Squires of additional information on four occasions over 6-7 years, was therefore not an "act" by the Defendants done at the "request" of Technip that could at law give rise to an implied contract to indemnify the Defendants within the meaning of the general principle stated in *Birmingham and District Land Co.*

[135] Further, the delivery by Squires of additional information on four occasions did not expose the Defendants to the liability for which Technip could be called on to hold the Defendants *wholly* harmless for all loss or damage claimed against them.

[136] The Defendants implicitly acknowledge this in their written submissions when they refer to these acts as "a cause" of the Plaintiff's alleged losses for which they may now be liable "in part" because they performed these acts.

[137] Accepting the facts as pleaded, they do not disclose an arguable case for a claim for indemnification by implication of law that can make Technip answer for all of the Plaintiff's claim for inducing breach of contract.

Contribution

[138] Finally, the Defendants claim contribution from Technip under section 3 of the *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33, ("*CNA*") on the basis that the Defendants and Technip may be jointly responsible for the Plaintiff's "loss".

[139] Section 3 of the *CNA* provides:

> **Degree of fault**
>
> **3.** Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each was at fault, and where 2 or more persons are found at fault they shall be jointly and individually liable to the person suffering damage or loss, but as between themselves, in the absence of a contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault. .

[140] At common law there was no right of contribution between tortfeasors and the existing right to claim contribution as between concurrent tortfeasors depends solely on the right granted under section 3 of the *CNA* (see *Ryan v. Dew*, paragraph 47). The Court of Appeal held that the *CNA* creates a right of contribution between two or more tortfeasors who cause damage by their joint "fault" under section 3 and a procedure under section 7 to have the right asserted and adjudicated if all potential tortfeasors are not before the court in the original action.

[141] In discussing what must be disclosed by a defendant to establish an arguable third party claim for contribution under the *CNA*, the Court of Appeal referred to the requirement, even in pleading contribution as an alternative claim, that there must be an issue raised "of some kind of potential joint responsibility for the tort alleged by the plaintiff" (see *Ryan v. Dew*, paragraph 49).

[142] The Defendants argue that the Court of Appeal was only referring to the principle of contribution applicable on the facts in *Ryan v. Dew*, and that section 3

of the *CNA* also permits a third party claim for contribution where the Defendants plead that Technip is potentially liable for the same "loss" suffered by the Plaintiff.

[143] In particular, they argue the *CNA* is potentially applicable in this case because the Plaintiff's "loss" was caused through "separate but concurrent and related" breaches of duty owed to the Plaintiff by the Defendants and Technip. They argue that shared liability for the "loss" of the expectation value of the Plaintiff's contract with Technip was caused by separate but concurrent and related breaches of 1) a tort duty owed to the Plaintiff by the Defendants under inducing breach of contract, and 2) a contract duty owed to the Plaintiff by Technip to provide reasonable notice of its termination of the contract.

[144] The Defendants also plead that the Plaintiff had a duty to mitigate his contract damages by claiming against Technip for breach of contract or termination without reasonable notice, thereby reducing any damages that may be claimed against them.

[145] For the following reasons, I find there is no arguable basis for a claim by the Defendants for contribution from Technip under section 3 of the *CNA*.

[146] By its express terms section 3 imposes shared liability to the person suffering damage or loss upon persons who are jointly at fault for the person's damage or loss. Section 3 permits a claim over by a tortfeasor against other persons who were jointly at fault for the damage or loss caused to the plaintiff to make them liable to make contribution to each other in the degree in which they were found at fault.

[147] The Defendants do not plead or argue however that Technip and the Defendants are jointly responsible or caused damage or loss to the Plaintiff by their joint "fault" and that liability should be apportioned between them on that basis. They argue instead that the Plaintiff's "loss" was caused independently by Technip and the Defendants through "separate but concurrent and related breaches" of duty and that the Defendants may recover contribution from Technip in respect of the loss on the basis that both are potentially liable for the same damage or loss.

[148] I find on a plain and ordinary reading of section 3 that apportionment of liability under the *CNA* only contemplates a circumstance of joint fault, that is joint responsibility for a person's damage or loss, and it does not apply to apportion a "loss" between persons who were not jointly at fault for the person's damage or loss. The legislature did not extend the right of contribution in section 3 beyond joint tortfeasors to any person liable for the same damage whether jointly or otherwise.

[149] In the words of *Ryan v. Dew*, a third party claim for contribution under section 3 must raise an issue of "some kind of potential joint responsibility" to the person suffering the loss or damage for the tort alleged by the plaintiff.

[150] I find that section 3 of the *CNA* therefore does not apply to apportion a "loss" arising from independent "separate but concurrent and related" breaches of a tort duty owed to the Plaintiff by the Defendants under inducing breach of contract, and a contract duty owed to the Plaintiff by Technip to provide reasonable notice of its termination of the contract.

[151] The Third Party Notice does not disclose an arguable case for contribution that can make Technip answer for all of the Plaintiff's claims against the Defendants.

[152] This does not leave the Defendants without a basis to claim entitlement to a reduction in the damages awarded if the Plaintiff is successful on his tort claim for inducing breach of contract. As noted, the Defendants have pleaded that the Plaintiff had a duty to mitigate his contract damages by claiming against Technip for breach of contract or termination without reasonable notice.

[153] In conclusion, the facts and allegations in the Third Party Notice do not set out an arguable case against Technip based on a cause of action for breach of statutory duty, negligence, indemnity or contribution.

[154] The Defendants' application for leave must be dismissed on this basis.

Can the third party claim be accommodated in the litigation?

[155] In the event I am wrong, and there are arguable third party claims, I must consider whether it is fair and just to all parties to accommodate the third party claims in the existing case.

[156] The Defendants claim that issuance of the Third Party Notice would not be unfair to Technip or the Plaintiff as no trial date has been set.

[157] On October 26, 2023, I ordered that this proceeding be placed on the list for trial. The trial has been set for two weeks commencing on February 10, 2025.

[158] In the circumstances of this proceeding, for the following reasons I would find it would not be just and fair to add Technip as a third party more than 11 years after the action was commenced.

[159] I am concerned that the issuance of third party proceedings would result in unfairness to the Plaintiff because of additional delay, complexity and unwarranted expense. The pre-trial applications in this case have resulted in six written judgments, five in this court and one in the Court of Appeal. I would also add that this application raised unnecessary issues and was unduly complex.

[160] The repeated delays in getting this proceeding past the pleading stage have been described by one judge as extraordinary. I agree with his observation and conclude that the delays to date and the complexity of the proceeding overall are disproportionate to the issues in dispute.

[161] If past conduct is the best predictor of the future conduct of the proceeding, I must conclude that there is a high likelihood of additional delay and unwarranted expense if another party and another claim is introduced into the mix.

[162] I further find that it is not necessary to have Technip joined as a third party in order to address the substance of either the direct claims raised in this proceeding or the claim for contribution. As a result, no unfairness would result to the Defendants.

[163] If the Defendants' position as pleaded is accepted, then the Plaintiff's claim for inducing breach of contract fails and there is no need for a direct third party claim. If the Plaintiff succeeds in proving that the Defendants induced Technip to breach his contract, then the third party claim as pleaded must fail. The claim for contribution is effectively mirrored by the plea in mitigation of damages.

[164] In the exercise of my judicial discretion, I would therefore decline to grant the Defendants leave under Rule 12.02(1) to issue the Third Party Notice.

DISPOSITION

[165] The Court orders the following:

1. The Defendants' application is dismissed; and

2. The Plaintiff, James Hynes, and the proposed Third Party, Technip, are entitled to their taxed costs and disbursements, on Column 4.

[166] Order to be filed accordingly.

PETER A. O'FLAHERTY
Justice