Court File No. CV-11-439656-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLOTTE PERRENOUD and RAJESH BEDI

Plaintiffs

- and -

eHEALTH ONTARIO
and HER MAJESTY THE QUEEN in right of Ontario
as represented by the MINISTER OF HEALTH AND LONG-TERM CARE

Defendants

Proceedings under the *Class Proceedings Act, 1992*,
S.O. 1992, c. 6, as amended

REPLY FACTUM OF THE PLAINTIFFS RAJESH BEDI AND CHARLOTTE PERRENOUD

November 9, 2012

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AS REPRESENTED BY THE MINISTER OF HEALTH AND LONG-TERM CARE,
RAJESH BEDI AND CHARLOTTE PERRENOUD

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REPLY FACTUM OF THE PLAINTIFFS RAJESH BEDI AND CHARLOTTE PERRENOUD

PART I -- OVERVIEW

1. The Defendants argue that there is no question for the Court to determine in regard to bonus payments. It submits that it is entitled to rely on a term in its Performance Incentive Plan Policy (at section 3.8) ("Incentive Policy") that states eHealth Ontario ("eHealth") can "suspend, amend or terminate," its plan without liability.

Defendants' Factum, paras. 43-44

2. Courts have previously considered and determined that a unilateral and non-beneficial change to an employee benefit (including in a policy) that was not communicated to the employee at the time of hiring is not able to be relied upon by the employer.

3. In the Representative Plaintiff Charlotte Perrenoud's offer of employment, it states as follows:

> *"In addition to your base salary, your total compensation package will include:*
>
> - *3 weeks of paid vacation a year; Pro-rated in accordance with SSHA vacation policy*
> - *Participation in the SSHA pension plan;*
> - *Enrollment in our comprehensive employee benefits plan;*
> - *Both short and long term sick leave*
> - *Eligibility to earn an additional annual "Pay for Performance" one time pay of up to 15% of salary, Pro-rated in accordance with SSHA policy."*

Certification Motion Record, Perrenoud Affidavit Exhibit "A", p. 36

4. In the Representative Plaintiff Rajesh Bedi's offer of employment, it states as follows:

> *"In addition to your base salary, your total compensation package will include:*
>
> - *3 weeks of paid vacation a year; Pro-rated in accordance with SSHA vacation policy*
> - *Participation in the SSHA pension plan;*
> - *Enrollment in our comprehensive employee benefits plan;*
> - *Both short and long term sick leave*
> - *Eligibility to earn an additional annual" Pay for Performance" one time pay in accordance with SSHA policy."*

Certification Motion Record, Bedi Affidavit, Exhibit "A", p. 90

5. Courts have noted the special (non-commercial) relationship between an employee and employer and recognized that there are special considerations beyond the

employment contract which require deliberation when determining the obligations of one to the other.

6. Courts have noted that a bonus can, depending on the practices and *circumstances* between the parties, become an integral part of the employee's salary and as such is payable despite a contact not being in place.

7. Courts have found, where a bonus is discretionary, that an employer's discretion must be exercised reasonably, fairly and in good faith.

8. It seems reasonable then to assume that if indeed eHealth is able to terminate, suspend or amend its Performance Incentive Plan Policy without liability, this refers to future liability and does not somehow eradicate a current liability.

9. It also seems reasonable to presume that any amendment, suspension or termination of such an important benefit would have to be made with notice to the employee or at minimum communicated definitively and not "in substance".

10. Beyond this, the factual contention submitted by eHealth, that it "in substance" suspended its Incentive Policy, is contrary to the comments of the eHealth's employee, Kerry Abbott, an HR specialist.

11. On cross-examination, Ms. Abbott confirmed the following, in regard to the bonus decision:

"Q. So am I correct that in every other year, aside from the Toronto Star year, we'll call it, when I receive my rating as an employee in May, I likewise received a bonus if I qualified in the categories you have said?

. . .

A. Prior to the Toronto Star year we received a bonus every year."

Abbott Transcript, p. 47, question 201

"Q. Every year, okay, and this year that we're here to discuss, am I correct that there has not yet been a bonus decision made?

A. That's correct."

Abbott Transcript, p. 47-48, question 203

"Q. Have you heard any, or have any employees come to you and said, "I don't understand this. I received my rating," and you're smiling, so I guess this has happened, "I received my rating, but I haven't...I don't understand why I haven't received my compensation statement like in previous years"?

A. Yes, I have had people come to me. "

Abbott Transcript, p. 48, question 208

"Q. And what have you said to them in response?

A. I have said exactly what the information has been given to me, is that they're still working on it, "We haven't received any information on it. I have nothing to share at this time."

Abbott Transcript, p. 49, question 209

"Q. Okay.

A. And to be quite honest, that is the message that has been communicated in any town halls."

Abbott Transcript, p. 50-51, question 212

"Q. Okay, and the consistent message is, "We don't know"?

A. Right. "

Abbott Transcript, p. 50-51, question 214

"Q. "So we consistently haven't made a decision yet," is that correct? You're nodding, but you have to say yes.

A. Yes."

Abbott Transcript, p. 51, question 215

PART II – LAW AND ANALYSIS

1.) Cause of Action

12. The test to establish a "reasonable cause of action" under section 5 of the Class *Proceedings Act* is the same as under Rule 21.01(b) of the Rules of Civil Procedure.

Section 21.01(b), *Rules of Civil Procedure*, R.R.O., Reg. 194

13. Matters of law that are not fully settled should not be disposed of under Rule 21. The moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been dealt with and rejected by the court.

***Stitt v. Ontario*, [2001] OJ No 1337 (Sup Ct), para. 13, Defendants' Book of Authorities, tab 18**

14. Courts should be loathe to construe a contract in the absence of evidence as to the surrounding circumstances. In *TransCanada Pipelines* v. *Pottery Station Power Limited*, for example, the Court dismissed a motion brought under Rule 21 on the basis that:

> *[I]t is inappropriate to attempt to construe and allegedly ambiguous contract in the absence of evidence as to the surrounding circumstances and business context in which it was negotiated and entered into, and no such evidence is admissible. I cannot say that it is plain and obvious that the plaintiff's interpretation cannot succeed without construing the contract in that context.*

ArcelorMittal Dofasco Inc. v. US Steel Canada Inc.*, [2008] OJ No 4412 (Sup Ct), Defendants' Book of Authorities, Tab 20, at para. 20 *[Arcelor]

***TransCanada Pipelines Ltd.* v. *Pottery Station Power Limited Partnership* (2002), 22 B.L.R. (3d) 210 (Ont. S.C.J.), Plaintiff's Book of Authorities, Tab 5, at para. 15**

i.) Contract Interpretation in an Employment Law Context

15. The admonition to avoid construing a contract in the absence of evidence as to the surrounding circumstances is even more important in an employment law context.

16. The Ontario Court of Appeal and Supreme Court of Canada have repeatedly recognized that judicial interpretation of employment contracts between employers and employees must be informed by the relationship's power imbalance and the importance of employment to a person's dignity and self-worth. As MacPherson J.A stated in *Ceccol v. Ontario Gymnastic Federation*:

> (T)he Supreme Court of Canada has discussed often, with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationship and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees....
>
> ***Ceccol* v. *Ontario Gymnastic Federation*, [2001] 11 CCEL (3d) 167; 149 OAC 315 (OCA), Plaintiff's Book of Authorities, Tab 6, at para. 47**

17. In *Machtinger v. HOJ Industries*, Justice Iacobucci, writing for the majority of the Supreme Court quoted with approval the following passage that deals with the fundamental difference between an employment contact and a commercial agreement and the need to :

> ...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer....[Swinton]

***Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, Plaintiffs' Book of Authorities, Tab 7, at para 30**

18. Consideration of the employment contract between Charlotte and Raj, the proposed Class Members, and eHealth must be informed by the employment relationship between the parties and the practices that have developed in regard to that relationship.

ii.) eHealth's Interpretation of Incentive Policy Commercially Unreasonable, Would lead to an Absurd Result

19. Even if this Court could determine whether the plaintiffs have a reasonable cause of action based solely on the wording of section 3.8 of the Incentive Policy, it is unreasonable to suggest that eHealth could terminate or amend the Incentive Policy without notice and after eHealth obtained the benefit from the Incentive Policy.

20. eHealth relies on *ArcelorMittal Dofasco Inc. v. U.S. Steel Canada Inc.* ("*Arcelor*") for its proposition that it can terminate, suspend or amend the Incentive Policy, even retroactively, without liability.

***Arcelor*, Defendants' Book of Authorities, Tab 20**

Defendants' Factum, paras. 43-44

21. *Arcelor* is a commercial case involving a mining joint venture. The defendants, Stelco and Dofasco, relied on a termination right that clearly allowed it to terminate its offer to the plaintiff without liability, even if the offer had been accepted.

***Arcelor*, Defendants' Book of Authorities, Tab 20, at para 6**

22. The operative termination clause in *Arcelor* states:

> *If the circumstances referred to in subparagraph (ii) above occur, then Stelco or Cliffs, as the case may be, shall be entitled to give three business days notice to the Purchaser of termination and this*

> *offer, even if accepted, and the definitive agreement, if entered into prior to Closing, shall automatically terminate without liability to Stelco or Cliffs, as the case may be.*

***Arcelor*, Defendants' Book of Authorities, Tab 20, at para. 5(QL pg. 6)**

23. The court in *Arcelor* found that the termination clause was unambiguous and clearly contemplated that the agreement could be terminated even if the offer had been accepted.

***Arcelor*, Defendants' Book of Authorities, Tab 20, at paras. 40-43**

24. However, unlike section 3.8 of the Incentive Policy, the termination provision in *Arcelor* specifically contemplated that the offer could be withdrawn upon a certain condition being met, even if the offer had already been accepted. Thus, the issue of retroactivity was specifically dealt with in the wording of the termination provision.

25. The same cannot be said for section 3.8 of the Incentive Policy, which does not expressly contemplate that eHealth could refuse to pay bonuses that the employees had already earned.

26. Moreover, Charlotte and Raj's offers of employment, which pre-date the eHealth Incentive Policy, state simply that they are eligible "to earn annual 'Pay for Performance' one time pay up to 15% of salary, pro-rated in accordance with SSHA policy." The offers of employment do not state that eHealth may terminate, amend, suspend the incentive plan at all, much less retroactively.

Plaintiffs' Motion Record, Bedi Affidavit, Exhibit "A", p. 90

Plaintiffs' Motion Record, Perrenoud Affidavit, Exhibit "A", p. 36

27. The point of the Incentive Policy, as the name suggests, is to provide an incentive to employees to remain employed with the eHealth and to achieve set performance goals. It would defeat the purpose of the Incentive Policy if employees knew eHealth would not be held to its obligations under the Incentive Policy after they had performed the work that the Incentive Policy was designed to incentivize. eHealth's position, taken to its logical conclusion, could mean that employees could be forced to return performance awards already paid to them.

iii.) ***Bonuses as Salary*:**

28. The caselaw regarding bonuses demonstrates the employees' entitlement to a bonus is determined by examining the employment relationship as a whole as the bonuses can become an integral part of the employees' wage structure.

29. The general rule for whether an employee is entitled to a bonus was repeated by the Court in *Prins* v. *Lakeview Development of Canada Ltd.*:

> *The test to be applied in determining whether a wrongfully dismissed employee is entitled to damages for the loss of bonus is whether the bonus has become an integral part of the wage structure or whether it was merely an ex gratia payment.*

***Prins* v. *Lakeview Development of Canada Ltd.*, [1990] O.J. No. 1647 at (QL) (Ont. Sup. Ct.), Plaintiffs' Book of Authorities, Tab 8, at p. 5**

30. In *Leduc* v. *Canadian Erectors Ltd.*, the Court set out a useful summary of the jurisprudence regarding bonuses:

> *(a) The starting point is always to attempt to determine if there is any evidence of the intention of the parties regarding the entitlement to, and the quantification of, the bonus.*
>
> *(b) Bonuses probably can be classified into 3 categories:*

> *(i) formula bonuses (ii) quasi-formula bonuses (iii) non-formula bonuses.*
>
> *(c) A formula bonus is one that is determined by means of an arithmetical formula.*
>
> *(d) A quasi-formula bonus is one that is determined by means of certain factors, some or all of which are subjective in nature.*
>
> *(e) A non-formula bonus is one that is determined by the employer without the obligation to take into account specified factors or to weigh factors in a specified manner.*
>
> *(f) If, in the case of quasi or non-formula bonuses they are routinely awarded in a certain amount or in a certain range, they should be included in the assessment of damages, just like, any other fringe benefit.*
>
> *(g) In the case of quasi or non-formula bonuses, which, due to their very nature, require an element of discretion, that discretion must be exercised reasonably and, wherever possible, on the basis of objective criteria.*
>
> *(h) A bonus scheme that, historically, has become an integral part of an employee's wage or salary structure is a benefit that has a value and should form part of the calculation of the employee's damages.*
>
> *(i) If the historical conduct of the parties gives rise to a reasonable expectation of a bonus, then the bonus is a benefit that has a value and should form part of the calculation of the employee's damages.*
>
> *(j) A distinction must be made between the entitlement to a bonus and the quantification of the bonus. If the former is established the court will grapple with the latter.*

***Leduc* v. *Canadian Erectors Ltd.*, [1993] O.J. No. 895 (Ont. Ct. Gen. Div.), Plaintiffs' Book of Authorities, Tab 9, para. 46**

31. It is clear, therefore, that the judicial treatment of bonuses requires a contextual analysis of the employment relationship. That analysis is incompatible with eHealth's assertion that the issue can be decided based on a simple reading of one section of the Incentive Policy.

iv.) Bonuses Become Contractual Right

32. *Carabine* v. *Damm Galvanizing Inc.* is an Alberta case in which the employer tried to amend its profit sharing plan from a cash payout to share issuance. The court found that the employer had not in fact instituted the change to its policy by year end, and it could not do so retroactively with respect to bonuses that had already been earned:

> *Over the months from September, 1997 to August, 1998 input from the employees was sought in this case in an attempt to resolve concerns that the employees shared. Certainly concerns and changes were continually being discussed and contemplated up to and including August, 1998. As this was essentially the year end with any profit sharing already having accumulated to the benefit of each employee, the defendant could not maintain the position that the employees were not entitled to their respective bonuses. In the end result, I come to the conclusion that each of the plaintiffs is entitled to damages.*

***Carabine* v. *Damm Galvanizing Inc.*, 2000 ABPC 56 (Alta Prov. Ct., Civil Div.), Plaintiffs' Book of Authorities, Tab 9 at para. 23**

33. In *Antonello* v. *Algoma Steel Inc.*, the plaintiff employees had sued the company for payment of their employment bonus. The bonus plan had been implemented by the company in order to stem the losses of key personnel. Once the contents of the plan became known throughout the company, a "furor arose" and pressure was applied to management to rescind the plan. The court found that the employer was entitled to do so, however it could not escape its contractual obligations to the employees who had been operating under the plan:

> *[The Plan] was cancelled for one reason, and one reason only and that is the furor which arose from the general employee population. Management and the Board buckled under public pressure. [The employer has] a right to reconsider a decision. That is their prerogative. However, they must be prepared to face any ensuing consequences as a result of any change.*

> *Clearly the letter of September 14, 1992 was an offer or a promise to each recipient, to pay a set sum over three years in return for his continued employment, loyalty and hard work. By remaining on the job they accepted the offer or promise and that, I find, constituted the necessary consideration.*
>
> *The fact that it was a unilateral Plan does not make it less binding. They did what was asked of them up to the point of cancellation. Consideration is defined as a right, interest, profit or benefit or if one suffers some detriment, loss or forbearance.*
>
> ...
>
> *[A]n act done in return for a promise is sufficient consideration.*
>
> [emphasis added]

***Antonello v. Algoma Steel Inc.*, 1998 Carswell 5676, 99 C.L.L.C. 210-044 (Ont. Ct. Gen. Div.), Plaintiffs' Book of Authorities, Tab 11, at paras. 12-16 [*Antonello*]**

34. The Court in *Antonello* found that the plaintiff employees were entitled to the bonus owing under the Plan up to the point of termination.

***Antonello*, Plaintiffs' Book of Authorities, Tab 11, at para. 27**

v.) Discretionary Bonuses: Discretion Must be Exercised Fairly

35. Where a bonus plan gives an employer discretion as to the actual amount of the award, that discretion must be exercised fairly.

36. The Courts have held there is a contractual basis for awarding bonuses to employees who have been wrongfully dismissed. In this situation, there is an implied contractual term that the employer will exercise its discretion fairly and in good faith, as set out in *Chann v RBC Dominion Securities*:

> *The Executive Committee retains the sole discretion to award the discretionary cash bonus. However, it is also clear, and I believe acknowledged by the defendant's counsel on behalf of his client, that this discretion must be exercised in a fair and reasonable manner. In other words, it is an implied term of the employment*

> *agreement between RBCDS and its investment banking professionals that this discretion will be exercised in a fair and reasonable manner. While issues of enforcement of this provision would, typically, be raised by employees only in the context of allegations of constructive dismissal or actual termination of employment, it is a provision which exists throughout the employment relationship.* [Emphasis Added]

***Chann* v. *RBC Dominion Securities Inc.* [2004] O.J. No. 5340 (Ont SCJ), Plaintiffs' Book of Authorities, Tab 12, at para. 48 [*Chann*]**

37. The court in *Mathieson v Scotia Capital Inc.* adopted the concept of fairness set out in *Chann*. The plaintiff claimed that the defendant, Scotia Capital, exercised bad faith in awarding him a significantly lower bonus than in previous years. The bonus was based on his performance and was therefore discretionary. The Court found no evidence of bad faith, but agreed with the general approach in *Chann* that:

> *an employer must apply fair and reasonable criteria, when awarding discretionary bonuses, and there must be a fair and reasonable process. These are implied terms of the employment contract.*

***Mathieson* v. *Scotia Capital Inc.*, [2009] O.J. No. 4879 at para. 59 [Ont S.C.J.], Plaintiffs' Book of Authorities, Tab 13 at para. 57**

38. The Plaintiffs submit that the evidence in the action will demonstrate that, based on the context of the employment relationship including the offer of employment and the past practices, the bonus was an integral part of their wage structure that could not be terminated without reasonable advance notice.

vi.) eHealth Did Not Provide Advance Notice of Termination of Incentive Plan for Either 2010/2011 or 2011/2012 Fiscal Years

39. eHealth failed to provide Charlotte and Raj with reasonable notice that it was going to terminate, suspend or amend the Incentive Policy for either the 2010/2011 or 2011/2012 fiscal years.

40. With respect to 2010/2011, Charlotte and Raj and other members of the proposed Class were evaluated under the Performance Management Plan and, in May 2011, notified of the amounts of their Merit Increases and Performance Awards.

Certification Motion Record, Tab 5, Perrenoud Affidavit, p. 27, Exhibit "G", paras. 12-13

Certification Motion Record, Tab 6, Bedi Affidavit, p. 113, Exhibit "F", paras. 10-11

41. eHealth has also never provided Charlotte and Raj with any notice that the Incentive Policy is terminated, suspended or amended for 2011/2012 fiscal year.

42. To the contrary, eHealth has continued to lead its employees to believe that Performance Awards may indeed be paid.

43. In a town hall meeting on May 31, 2012, eHealth CEO Greg Reed told eHealth employees that eHealth was "working behind the scenes" to get them some additional compensation.

Plaintiffs' Supplementary Motion Record, Tab 2, Perrenoud Affidavit, Exhibit "A", p. 8, para 5

44. On cross-examination of her affidavit in support of the motion to amend, Kerry Abbott confirmed that the eHealth has not terminated, amended or suspended the Incentive Policy. As Abbott stated:

> *Q. So my question was and your counsel has objected to asking you anything before the Toronto Star year we'll call it, but is where anywhere for this year that there has been something posted saying the Incentive Policy has been terminated, suspended or amended?*
>
> *A. Not that I'm aware of.*

Abbott Transcript, p. 56, question 247

45. Ms. Abbott also stated:

> *Q. Okay, and I'm going to ask you, since that's kind of relevant to why we're here today, I presume someone would have brought that to your attention?*
>
> *A. If it has been suspended?*
>
> *Q. Yes, terminated or amended in a significant way?*
>
> *A. Yes.*

Abbott Transcript, p. 58, questions 251-252

2. Class Definition

46. The Defendants suggest that active employment needs to be a limiting criterion for the class definition. They state that, under the terms of the Incentive Policy, an employee must be actively employed at the time the Performance Award is paid (Section 3.7), which according to the Incentive Policy, will be no later than the May 31 (Section 3.2) following the end of the plan year.

Defendants' Factum, para. 76

47. eHealth has not paid Performance Awards for either the 2010/2011 or 2011/2012 fiscal years, so it is impossible to set a date by which the employee had to be actively employed in the proposed class definition.

48. The Plaintiffs nonetheless agree that a revised class definition is required and submit the following:

> *All past and current full time employees for whom eHealth*
>
> *(a) completed a Compensation Details Statement in respect of the 2010/2011 fiscal year;*
>
> *and/or*

(b) completed an evaluation and awarded a performance rating of "2" or higher or the equivalent rating of "Developing" or higher for the 2011/2012 fiscal year

3. Litigation Plan

49. The Defendants' have raised a number of issues regarding the proposed Litigation Plan.

50. Regarding the service of the notice of certification, the Plaintiffs agree that service on current employees can be effected by email and past employees by email or mail at the last address eHealth has for the employee. The Plantiffs do not agree a general advertisement would be of any value in locating class members.

51. With respect to the assessment of damages, as eHealth had issued Compensation Details Statements to employees for the 2010/2011 plan year, the bonus amounts and merit increases are known for each class member.

52. With respect to 2011/2012, eHealth has already confirmed the employees' rating for the year. Moreover, eHealth has an established practice in place for determining how the bonus amount is determined based on the rating.

53. With respect to the distribution of the amounts recovered, the Litigation Plan, at paragraph 16(a), states that the distribution would be based on the actual amount owed to each class member. The reference to funds being distributed pro rata is stated as an alternative.

54. Contrary to the Defendants' assertion, the Litigation Plan does not require a separate plan for assessing damages for inducing breach of contract. There is no separate head of damages for inducing breach of contract.

55. With respect to the merit increase, an individual assessment of the reasonable notice period for each class member would be inefficient. The cost of doing so could exceed the likely merit increase damages for each class member. The plaintiffs will propose a formula to determine the reasonable notice period based on years of service and age.

56. With respect to the DCPP election, no procedure is required: if the common issues are resolved in favour of the class the plaintiffs have asked (at paragraph 1(f) of the Statement of Claim) for a Declaration that class members are entitled to file a DCPP election within 30 days of any declaration issued by the court, and to have that election matched by eHealth.

57. With respect to the timelines set out at paragraph 8 of the Litigation Plan, the Plaintiffs submit that the Defendants asked for extended timelines for the certification motion and then failed to avail themselves of the opportunity to file any materials in response. The Plaintiffs believe the Defendants' proposed timelines will unnecessarily delay the resolution of this action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Date: November 9, 2012

Per: Jacqueline L. King

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SCHEDULE A
LIST OF AUTHORITIES AS FOUND IN BOOK OF AUTHORITIES

Tab 5 *TransCanada Pipelines Ltd.* v. *Pottery Station Power Limited Partnership* (2002), 22 B.L.R. (3d) 210 (Ont. S.C.J.)

Tab 6 *Ceccol* v. *Ontario Gymnastic Federation* [2001]11 CCEL (3d) 167; 149 OAC 315 (OCA)

Tab 7 *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986

Tab 8 *Prins* v. *Lakeview Development of Canada Ltd.*, [1990] O.J. No. 1647

Tab 9 *Leduc* v. *Canadian Erectors Ltd.*, [1993] O.J. No. 895 (Ont. Ct. Gen. Div.)

Tab 10 *Carabine* v. *Damm Galvanizing Inc.*, 2000 ABPC 56 (Alta Prov. Ct., Civil Div.)

Tab 11 *Antonello v. Algoma Steel Inc.*, 1998 Carswell 5676, 99 C.L.L.C. 210-044 (Ont. Ct. Gen. Div.)

Tab 12 *Chann* v. *RBC Dominion Securities Inc.* [2004] O.J. No. 5340 at para. 48 (Ont SCJ)

Tab 13 *Mathieson* v. *Scotia Capital Inc.*, [2009] O.J. No. 4879 at para. 59 [Ont S.C.J.]

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

RULE 21DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

1. (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

2. (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

3. and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

4. (2) No evidence is admissible on a motion,

5. (a) under clause (1) (a), except with leave of a judge or on consent of the parties;

6. (b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

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PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF THE PLAINTIFFS RAJESH BEDI AND CHARLOTTE PERRENOUD

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