

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

2145850 ONTARIO LIMITED o/a Highland Bus Services,
BARR BUS LINES LIMITED, CLARK BUS & MARINA LIMITED,
HEALEY TRANSPORTATION LIMITED, PREMIER BUS LINES INC.,
VALLEY BUS LINES LIMITED, and WHITTEKER BUS LINES LIMITED

Plaintiffs

and

STUDENT TRANSPORTATION OF EASTERN ONTARIO
and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by
the Ministry of Education

Defendants

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date _____ Issued by _____
Local Registrar
Address of court office: 43 Drummond St. East
Perth, Ontario
K7H 1G1

TO: STUDENT TRANSPORTATION OF EASTERN ONTARIO
104 Commerce Drive, RR #3
Prescott, ON
K0E 1T0

AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the
Ministry of Education
c/o Ministry of the Attorney General – Crown Law Office (Civil)

CLAIM

1. The Plaintiffs claim:

- (a) as against the Defendant, Student Transportation of Eastern Ontario (“STEO”):
 - (i) An interim, interlocutory and permanent injunction restraining the closing of a request for proposal (“RFP”) RFP 12-01 issued by STEO on September 24, 2012 and closing November 26, 2012 on behalf of the school boards, Upper Canada District School Board (“UCDSB”) and the Catholic District School Board of Eastern Ontario (“CDSBEO”) (collectively the “School Boards”) for the procurement of student transportation services (the “STEO RFP”) until the disposition of the trial of this action or such further Order of this Court on the basis of breaches of duties owed by STEO to the Plaintiffs as described herein, including breach of contract, negligence, negligent misrepresentation, and breach of the duty of fairness;
 - (ii) A declaration that the terms of the STEO RFP breach common law duties of care owed by STEO to the Plaintiffs, breach the contracts between STEO and the Plaintiffs including the duty to act in good faith, and breach the warranties and representations made by STEO to the Plaintiffs;
 - (iii) A declaration that STEO has engaged in acts that contravene and are not in accordance with mandatory procurement requirements of the Broader Public Sector Procurement Directive issued by the Management Board of Cabinet (“BPS-Directive”) pursuant to section 12 of the *Broader Public Sector Accountability Act, 2010*, S.O. 2010, c. S-25; and

- (iv) In addition and/or in the alternative to the relief set out in (i)-(iii)above:
 - (1) an Order in the nature of certiorari and prohibition prohibiting the closing of the STEO RFP because of denial of natural justice and breach of procedural fairness and the duties specified in (i); and
 - (2) an order for leave pursuant to section 6(2) of the *Judicial Review Procedure* permitting the Plaintiffs to have this relief determined by the Superior Court of Justice on the grounds or urgency;

- (b) as against the Defendant, Her Majesty the Queen in Right of Ontario (the “Ministry”):
 - (i) A declaration that the Ministry owes small and medium sized school bus operators in Ontario, including the Plaintiffs, common law and statutory duties, described herein, and that it breached said duties;
 - (ii) A declaration that the Ministry has directed school boards and their transportation consortia to use RFPs, or in the alternative, influenced, school boards and their transportation consortia that RFPs are the “approved” and/or “preferred” approach to the procurement of student transportation contracts to the exclusion of other procurement methods;
 - (iii) A declaration that the Ministry ignored or failed to properly respond to the Task Force Report (defined herein);
 - (iv) A declaration that RFPs are not an appropriate method to procure student transportation contracts in markets serviced by small and medium sized rural operators;
 - (v) An order prohibiting the Ministry from directing consortia to use RFPs in markets served by small and medium sized rural operators; and

- (vi) An order that the Ministry indemnify the Plaintiffs for the costs of this action, including paying costs incurred to date plus costs going forward on an ongoing basis, as determined by the court;
- (c) as against all Defendants:
 - (i) Costs of this proceeding on a substantial indemnity basis, plus all applicable taxes; and
 - (ii) Such further and other relief as this Honourable Court deems just.

The Plaintiffs

2. The Plaintiffs are corporations who are independent school bus operators. They have been providing student transportation services to the School Boards for many years, in some cases for decades.

3. The Plaintiffs transport students to and from school safely, punctually, and efficiently. They service urban and rural school bus routes. They care for the students in their custody, which is sometimes as long as three hours per day. They maintain their buses to the highest safety standards. Their facilities, drivers, mechanics and support staff, and their suppliers, are based in the communities that they serve.

4. At all times material to this action the Plaintiffs have been entirely dependant upon STEO and STEO has exercised complete control over their businesses. As a result the Plaintiffs are in a unique position of vulnerability and, in addition to the contractual duties owed by STEO, a special relationship exists between STEO and the Plaintiffs giving rise to a duty of care.

5. 2145850 Ontario Ltd. o/a Highland Bus Services (“Highland”), is a family business owned by Donald and Susanne Hough. Established in 1990, Highland operated one van transporting students for almost 17 years. In 2007, Highland purchased a bus and slowly started to expand. It now owns 9 buses servicing 7 STEO routes in the Ompah, Ontario area. Highland employs 14 people in the communities that it serves.

6. Barr Bus Lines Ltd. is a family owned company with roots going back to 1950 when Elswood and Marion Barr purchased a bus to service the Almonte High School in Lanark County. Their son, John Barr, and his wife Karen, purchased the company in 1998. Throughout the years, Barr has slowly grown and now owns 14 buses and operates 10 routes for STEO. Barr employs 15 members in the communities that it serves.

7. Clark Bus and Marine Ltd. (“Clark”) is a family business that was started in the early 1950s by Ed Clark to transport students by van to schools in Leeds and Grenville Counties. Over the past 60 years, the company has grown. It is now owned by Ed’s son, Bruce Clark. Ed’s grandson, Mike, is the operations manager. Clark operates 11 bus routes and 1 van route for STEO. Clark employs 25 members in the communities that it serves.

8. Healey Transportation Ltd. is owned by Frank Healey (“Healey”). The Healey family has been in the bus business since the late 1940s when Frank’s father, Raymond Healey, was hired to transport students by car to Athens High School in Athens, Ontario. Raymond Healey was one of the first people in Ontario to be issued a licence to operate a school bus. Over the past 60 years, Healey has grown and now operates 46 routes for STEO transporting students in Lanark, Leeds and Grenville Counties. Healey employs 80 people in communities that it serves.

9. Premier Bus Lines Inc. (“Premier”) is a family business owned by Colleen and Eric Hochgeschurz. Established in 1996, Premier has grown slowly over the years. It now operates 18 routes for STEO in Lanark County near Carleton Place, Ontario. Premier employs 60 members in the communities that it serves.

10. Valley Bus Lines Ltd. (“Valley”) was first established over twenty years ago in the Kemptville area. It operates 54 routes for STEO and employs over 100 people.

11. Whitteker Bus Lines Ltd. (“Whitteker”) is a family business owned by Kevin and Elaine Whitteker, who are third generation school bus operators. In the late 1940s, Lloyd Whitteker started transporting students to school in a panel truck. In 1964, Lloyd’s son, Ron, started transporting disabled students to school by car. Ron’s son, Kevin, joined the family business in 1984. Kevin and his wife, Elaine, purchased the family business in 1999. Whitteker has grown

slowly. It now operates 26 routes for STEO transporting students in Stormont and Dundas counties. Whitteker employs 35 members in the communities that it serves.

STEO

12. The Defendant, STEO, is a corporation without share capital incorporated pursuant to the *Corporations Act*, R.S.O. 1990, c. C.38. It procures student transportation contracts on behalf of the School Boards. Pursuant to Section 190(6) the *Education Act*, the School Boards have the power to make agreements with any persons to provide student transportation services.

13. STEO was established by the School Boards as an unincorporated association on or about 2009. STEO was incorporated on October 25, 2011 in response to a directive by the Ministry that formal consortia for procurement of student transportation services be established.

14. STEO's membership is comprised of the School Boards. STEO's General Manager and Chief Administrative Officer is Ron Cotnam. STEO's directors are Greg Pietersma (UCDSB Chair), David McDonald (UCDSB 2nd Vice-Chair), Ron Eamer (CDSBEO Trustee) and Robin Reil (CDSBEO Trustee). STEO's officers are Rick Gales (UCDSB Superintendent of Business) and Gordon Greffe (CDSBEO Associate Director of Education).

15. Following STEO's establishment, it took over as agent for the School Boards in negotiations. When it was incorporated, STEO replaced the School Boards as the sole party with whom the Plaintiffs would contract.

The Ministry

16. The Ministry, annually, provides school boards with funding for student transportation and is the sole source of such funding. Pursuant to the *Education Act* and funding agreements between the Ministry and school boards, the Ministry regulates almost all aspects of how school boards and their consortia provide student transportation.

17. The School Business Support Branch ("SBSB") is the office in the Ministry primarily responsible for directing school boards and their consortia with respect to student transportation, including procurement matters. Cheri Hayward is the Director of SBSB. Sandy Chan is Manager of the Transportation and Cooperative Services Unit, which is a unit within SBSB.

Gabriel Sékaly is the Assistant Deputy Minister of the Elementary/Secondary Business and Finance Division in the Ministry. SBSB is an office within this Division.

18. At all times material to this action the actions of the Ministry that are the subject of this claim were primarily carried out by Ms Hayward, Ms. Chan, Mr. Sékaly, and their staff.

Student Transportation - Unique Procurement for a Unique Industry

19. School boards in Ontario annually procure services, supplies and equipment from a variety of different vendors for a variety of different supplies and services such as basic construction, accounting, staff development services, and school supplies. In most cases, school boards are not these vendors' only customers and they can supply their goods and services to a wider range of other school boards and other customers across the province and beyond.

20. The procurement of student transportation contracts is a unique exception to this general rule. The Plaintiffs' busses and personnel are in the regions encompassed by the School Boards. STEO requires the Plaintiffs to be completely available to them at all times. The Plaintiffs are, of necessity, based in the communities they serve. STEO controls the Plaintiffs' investments, profit margins, receives and uses their confidential business information and exercises significant control over their employees. The Plaintiffs, and operators like them, cannot simply offer their services to any school board in the province. Student transportation is therefore procured in an "artificial market". The Plaintiffs are a captive vendor of STEO.

21. Another important feature of the student transportation industry is the existence of very large, international companies with hundreds, and in some cases thousands, of busses. These companies, some of which are publicly traded, provide transportation services across the country, and in some cases internationally. These companies are able to substantially undercut prices thereby eliminating competition and then subsequently raise prices to market level.

22. As described below, this practice has occurred and has been identified as a significant risk of RFP procurement in this industry by the Auditor General of Ontario and the Honourable Coulter Osborne in his 2012 Student Transportation Task Force Report.

Existing Relationship

23. Prior to the imposition of the STEO RFP, operators servicing the School Boards including the Plaintiffs collectively negotiated with the School Boards and later with STEO the terms of annual agreements (“Contracts”).

24. The Contracts, which were automatically renewed annually, created a long term relationship. The negotiations of the Contracts took place between representatives of the School Boards (and later STEO) and operators’ associations comprised of small group of operators acting on behalf of the operator community.

25. The negotiations established how much profit operators would earn that year and set a schedule of remuneration for expenses including wages paid to drivers, fuel and equipment. They also regulated when operators had to purchase new busses and other equipment, and over how many years that they could expect to recoup such investments.

26. As part of the negotiations, the Plaintiffs provided the School Boards and later STEO with significant amounts of confidential business information including:

- (a) financial statements;
- (b) details of agreements with lenders;
- (c) copies of invoices for the purchase of vehicles and equipment;
- (d) detailed information regarding ongoing fixed and variable costs;
- (e) vehicle fleet reports describing the age, mileage and size of their vehicles;
- (f) confidential information about their employees such as a copies of their Vulnerable Sector Check, a screening they must pass before working with children; and
- (g) confidential studies on driver wages.

27. The School Boards and STEO used this information to their advantage by:

- (a) creating bus route efficiencies;
- (b) capping rates paid to operators;
- (c) extending the demanded life of school buses;
- (d) having an up-to-date and complete financial picture of operators' businesses; and
- (e) ensuring that taxpayers received maximum value for money.

28. Because the School Boards and STEO had access to such broad range of the Plaintiffs' confidential business information, the Plaintiffs were vulnerable to the School Boards and STEO. It was agreed and understood by STEO and the School Boards that the Plaintiffs' confidential information was only to be used to enhance the safety and efficiency of the ongoing service provided by operators. The Plaintiffs did not give permission to STEO and the School Boards to disclose their confidential information to third parties or to use it for any purpose other than *bona fide* contract negotiations.

29. The negotiations were informal. In many years, changes were implemented and services provided without new formal contracts being drawn up. This practice reflected a relationship of trust and co-operation between operators and the School Boards.

30. Although the language of some of the agreements were for a fixed term, there were extended periods of time when the operators continued to provide services without agreements in place. For example, there were many occasions over the last ten years when operators would continue providing services without an agreement until near or at the end of a school year. The written agreements that were in place reflected only part of the business relationship between the parties. This reflected a relationship of trust and co-operation between operators and their only customer, the School Boards.

31. The focus of negotiations and resulting contractual arrangements was on a fair balance being struck between allowing operators to earn a reasonable return while ensuring that the School Boards receive safe, cost effective and reliable student transportation.

32. The results have been an efficient use of taxpayers' money, with operator remuneration over the last ten years rising well below the rate of inflation while their fixed costs including fuel, labour and maintenance have risen by amounts well in excess of inflation.

33. Decisions on what type of vehicles to purchase, where to hire staff, and where to locate facilities are primarily dictated by the routes that are serviced by an operator. The School Boards establish routes. There is significant variation amongst routes in terms of distance, number of and type of students transported and geographical location. Vehicles and drivers that are suitable for one route may be completely inappropriate for another route. Costs to operators to service different routes can vary dramatically.

34. In recognition of the fact that operators do not have the flexibility to change their vehicles or where their drivers and facilities are based, the assignment of routes to operators by the School Boards has generally remained fixed. Route assignment has not changed except in cases of underperforming operators or when routes have been re-drawn by the School Boards.

35. Security of tenure for operators' routes has played a very important role in establishing goodwill in operators' businesses. When an operator wants to retire, they can sell their business knowing that they will receive value for their equipment and for the goodwill associated with their routes. Many of the Plaintiffs have expanded over the years by purchasing businesses from retiring operators to acquire their routes.

36. This feature of the school bus industry is well known to and has been encouraged by the Defendant as it creates stability and continuity in the provision of service especially in rural areas. For example, in recognition of this long-standing practice, STEO and the School Boards have policies recognizing that when an operator sells its business, a contract with the purchaser can be entered into by STEO on the same terms and conditions and for the same routes as STEO had with the vendor who is selling. Further agreements are to be negotiated with the purchaser as if the sale had not taken place.

STEO Owes the Plaintiffs a Common Law Duty of Care

37. The Plaintiffs, as discussed above, are entirely dependant and reliant upon STEO. This unique, long-standing special relationship has created a significant power imbalance. As a captive vendor, the Plaintiffs are vulnerable to unilateral changes made by STEO to the long standing relationship. STEO has detailed knowledge of the Plaintiffs' cost structure and operational abilities. As such, STEO owes the Plaintiffs a duty of care to ensure that any changes made to the relationship are made in a fair and transparent manner.

38. The Plaintiffs and STEO are in a unique, special relationship of proximity because:

- (a) The Plaintiffs are a captive vendor of STEO;
- (b) STEO requires, and the Plaintiffs have provided STEO on an ongoing basis with their confidential business information;
- (c) The Plaintiffs have been in a long term contractual and economic relationship with STEO;
- (d) STEO requires the Plaintiffs to be completely available to them at all times;
- (e) STEO exerts control over all material aspects of the Plaintiffs' businesses;
- (f) STEO has required the Plaintiffs to make substantial capital investments to purchase busses and equipment in furtherance of their long standing relationship and to service STEO's plans and objectives;
- (g) STEO represented that the Plaintiffs would recover these investments and earn a reasonable return; and
- (h) The representations (described herein) made by STEO and the School Boards to the Plaintiffs that their investments were secure, that the new procurement process would treat operators fairly and equitably, and that Plaintiffs' interests would be considered when changes were made.

39. The Plaintiffs plead that it is reasonably foreseeable that any unilateral changes made by STEO to this relationship implemented in an unfair manner without due regard for the dependence and vulnerability of the Plaintiffs, and their legitimate interests in and expectations of a long term relationship.

40. As such, the Plaintiffs plead that STEO owed a duty of care to the Plaintiffs. This includes:

- (a) the duty to take the Plaintiffs' legitimate interests and reasonable expectations into account when fundamentally changing the procurement process that has always been in place and that the Plaintiffs depend on for their survival;
- (b) the duty to consult with the Plaintiffs regarding the unique features of their businesses, created by the historic demands and requirements of STEO and the School Boards, such as routes, capital investments and which the STEO RFP, as described herein, entirely disregards;
- (c) the duty to fully consider alternative competitive procurement methodologies that also comply with government procurement directives and procurement best practices and that would not cause irreparable harm to the Plaintiffs;
- (d) the duty to comply with the recommendations or at least to meaningfully and in good faith consider the recommendations of the Student Transportation Task Force, as described herein;
- (e) the duty not to implement an RFP that it knows or ought to know will cause the demise of the Plaintiffs; and
- (f) the duty to comply with the representations made to the Plaintiffs as described below and upon which the Plaintiffs reasonably relied.

Ministry Changes Procurement Process and Makes Representations to Operators

41. In late 2008, Ontario decided to change the way that school boards procure student transportation. The Ministry directed that school boards implement different procurement processes. The stated objectives were to ensure that the process was competitive and to facilitate safe, effective and efficient student transportation.

42. In recognition of the unique nature of the school transportation industry and the vulnerability of small and medium sized rural operators such as the Plaintiffs, the Ministry represented to operators, especially small and medium sized rural ones, that it would design a procurement process that was open, objective, transparent and fair to small and medium sized rural operators.

43. By memorandum dated December 10, 2008, then Assistant Deputy Minister of Education, Nancy Naylor, in recognition of the economic vulnerability of small and medium sized rural operators across the province, specifically assured operators that the Ministry's would use a "phased approach", incorporating "lessons learned" from pilot projects to be conducted, and that the Ministry understood the importance of "supporting the sector".

44. By letters dated December 9 and December 31, 2008, then Minister of Education, Kathleen Wynne, in recognition of the vulnerability of small and medium sized rural operators, assured operators that the Ministry would take a "careful and prudent approach", that any changes to the procurement process would be "fair for operators of all sizes", and that the Ministry would provide "comprehensive training to consortia and operators to ensure their familiarity with the process."

45. In making these assurances, Minister Wynne acknowledged that local market conditions must be considered in the design and implementation of procurement processes, and that markets served by small and medium sized rural operators are unique. Minister Wynne promised these operators that any procurement process designed by the Ministry would enable them to compete fairly.

46. Small and medium sized rural operators, including the Plaintiffs, reasonably relied on these representations. They continued to make investments in their businesses and to commit

their resources to the service of the School Boards and later STEO. This continued reliance was encouraged by the School Boards and the Ministry, who needed a secure, reliable source of student transportation.

47. As a result of these assurances and the Ministry's direct involvement in the design and implementation of the RFP process in markets served by small and medium sized rural operators, including the plaintiffs, a relationship of proximity arose between these operators and the Ministry and gave rise to duties of care owed by the Ministry.

Contracts Already Procured in an Open, Fair, Competitive and Transparent Manner

48. In deciding to change the way that school boards procure student transportation services, the Ministry failed to properly analyze, or in the alternative analyze at all, whether such services were already being procured in an open, fair, competitive and transparent manner in markets served by small and medium sized rural operators.

49. In fact, student transportation services were already being procured in an open, fair, competitive and transparent manner in these markets. They had been procured in such manner for a very long time. As a result, Ontario taxpayers were receiving value for money.

50. Importantly, at all times material to this action, the Ministry was aware that small and medium sized rural operators, including the plaintiffs, were providing transportation at rates that were at or below the rates the government had identified, with the assistance of its consultant Deloitte, as the minimum cost to provide safe, efficient and reliable student transportation.

Ministry Creates Template RFP and Directs RFPs Ignoring Evidence of Harm

51. Instead of conducting a fair and comprehensive assessment of appropriate forms of procurement for this unique industry, the Ministry decided to use an RFP process and developed template RFP documents to be used by school boards and consortia (the "Template RFP"). The Template RFP was developed by the Ministry with the assistance of its consultants, PPI Consulting Inc. ("PPI").

52. At all times material to this action, the Ministry was aware of and deliberately ignored specific information, evidence and warnings from the Auditor General and its consultant Deloitte

as well as other stakeholders including school boards, trustees, consortia, operators' associations, municipal governments and chambers of commerce, that RFPs of the kind that it was designing and implementing were:

- (a) unfair to small and medium rural operators;
- (b) designed to discriminate in favor of large companies; and
- (c) not an appropriate form of competitive procurement for markets served by small and medium sized operators.

53. The Ministry was aware that RFPs of the kind it was designing would destroy small and medium sized operators and lead to monopolies.

54. In his 1991 report, the Auditor General identified the creation of monopolies as one of the primary risks of imposing RFPs on the student transportation industry. The Auditor identified the uniqueness of student transportation as compared with the procurement of other products and services. Recognizing that operators are captive vendors to school boards, the Auditor noted the lack of any study indicating that RFPs for student transportation achieve better value for taxpayers in the long term. The Auditor recommended that service levels, safety and the various problems dealing with a low bidder must be considered when designing a procurement strategy.

55. In his 2006 and 2008 reports, the Auditor examined school boards' procurement processes and suggested the use of RFPs for many supplies and services, but in recognition of the unique nature of student transportation, and the vulnerability of small and medium sized rural operators, *excluded student transportation* from these recommendations.

56. In order to assist in designing a fair procurement process, the Ministry engaged Deloitte to study student transportation practices across Ontario. Deloitte agreed with the Auditor that the RFP process carried a significant risk of removing small and medium sized rural operators from the market and creating monopolies or concentrating services in the hands of large companies.

57. Deloitte recommended that local market conditions should be considered at all points in the procurement process, value should be placed on local experience, and costs must not be the 'overriding factor' as it will encourage low-cost proponents without ensuring service is maintained or improved.

58. PPI provided the Ministry with evaluation criteria that focused on local market conditions and local experience. If included in the Template RFP, these criteria would have mitigated against risks identified by the Auditor and Deloitte and reduced the unfairness experienced by small and medium sized rural operators.

59. The Ministry deliberately excluded these criteria from the Template RFP with knowledge that doing so would be unfair to and cause harm to small and medium sized rural operators. None of these criteria were even considered for STEO's RFP.

60. The Ministry deliberately ignored the warnings and recommendations of the Auditor General, Deloitte and PPI. Instead, it designed and imposed an RFP process which included all of the features it knew would destroy small and medium sized rural operators.

Alternative Approaches Available But Not Implemented

61. At all times material to this action the Ministry was aware that alternative procurement approaches other than RFPs when an analysis of local market conditions revealed that an RFP process was not feasible or not cost effective. The Ministry publically represented that it was open to school boards to consider a full range of alternative competitive procurement approaches, including non-negotiated fixed price contracts, benchmarking, and value for service audits (the "Alternative Approaches").

62. At all material times, the Ministry was aware of Alternative Approaches to RFPs, but failed to investigate or implement any of them.

63. Given the Ministry's position on non-RFP procurement, the special relationship between STEO and the Plaintiffs, and the unique vulnerability of transportation companies, *it was incumbent upon* STEO to properly and fully consider a full range of Alternative Approaches and to consult with those who would be most directly affected.

Ministry Directed Pilot Projects Fail Causing Procurement Casualties

64. The Ministry directed pilot projects whereby three consortia were to secure new contracts with operators using the Template RFP (the “Pilot Projects”).

65. The Pilot Projects took place in 2009 and were disastrous for small operators. No small operators gained any routes. All small and medium sized rural operators lost routes, some substantially all of the routes they had serviced for decades. As a result, many small and medium sized rural operators that had provided safe and cost effective service for years and, in many cases decades, were destroyed or rendered non-viable.

66. Although it knew that the process had proven to be unfair and harmful to small and medium sized rural operators the Ministry deliberately represented that the pilots of its RFP process had been a success and that small and medium operators had won routes. The Ministry made these representations knowing that they were false and for the improper purpose of justifying an RFP process that it had designed implemented and which it had been told would cause harm to small and medium operators.

Deficiencies Acknowledged and Representations of a Moratorium

67. As a result of the unfairness of the RFPs in the Pilot Projects and the harm caused to small and medium sized rural operators, and after pressure from rural municipalities, chambers of commerce, politicians and other stakeholders, on April 21, 2009, Minister Wynne represented to operators at the annual general meeting of the Ontario School Bus Association that the Ministry was imposing a moratorium, until at least 2010, on any further RFPs or other changes to procurement practices.

68. The Minister and Ministry officials represented that the moratorium would continue until all stakeholders had been consulted, lessons had been learned from the Pilot RFPs, and corrective action had been taken to remedy deficiencies with the Template RFP.

69. These representations were made to the operator community with the intention that they be relied upon and they were relied upon. In reliance on these representations, small and

medium sized rural operators, including the Plaintiffs, continued to make investments in their businesses.

Ministry Officials Ignore Consultants' Reports on Pilot Projects

70. While Minister Wynne was making the public representations described above, senior Ministry officials, including Ms Hayward and Ms Chan, continued to direct the use of RFPs across the province knowing that they would cause harm to small and medium sized rural operators.

71. Following the Pilot Projects, in April 2009, the Ministry's consultant, MPS, conducted de-briefing meetings with operators, operators' associations, and consortia managers who had participated in the Pilot Projects. During these meetings, serious concerns were raised by stakeholders, including how the Pilot Projects had been mismanaged, how the Template RFP was deficient, the significant loss of local autonomy, and the fact that RFPs were not appropriate for markets served by small and medium sized rural operators.

72. MPS reported these concerns to Ms Hayward and Ms Chan, who ignored them. In fact, on September 25, 2009, Ms Hayward issued a public communication declaring the use of the Template RFP in the Pilot Projects a success.

73. The Ministry, through Ms Hayward and Ms Chan, began to direct transportation consortia to implement the template RFP.

Ministry Biased Against Small Operators In Favour of Large Operators

74. While Minister Wynne was making the public representations described above, Ms Hayward, Ms Chan and their staff, had already concluded that the Ministry would direct the use of the Template RFPs, knowing that doing so would provide a significant advantage to large operators who could afford to cut prices in the short term and would be unfair to small and medium sized rural operators who could not afford to drop their prices in the same way.

75. In September 2009, with knowledge of the impact of the pilot RFPs on small and medium sized rural operators, Ms Hayward and Ms Chan noted that the Template RFPs were attracting the attention of large multi-national non-Ontario companies to enter student transportation and

specifically observed that: (i) small operators do not have the same capacity as large operators to undercut on price and therefore compete in the Template RFPs; (ii) the “only option” for smaller operators to fairly compete in an RFP was by growing as big as large operators, which they knew is an impossibility; and (iii) the chances of small operators competing fairly in RFPs would be enhanced if they were permitted to make joint submissions as unincorporated associations, an approach that is permitted by law.

76. Knowing of the harm that would ensue, the Ministry directed that the Template RFP and STEO’s RFP prohibit joint submissions from unincorporated groups of operators.

Ministry Breaches Moratorium and Ignores Concerns While Directing RFP Roll-Out

77. Notwithstanding the moratorium, in November 2009, one of the pilot consortia, STWDSTS, announced that the Ministry had directed it to RFP its remaining routes. As with the Pilot Projects, the majority of the consortium’s small and medium sized operators lost most or all of their remaining routes.

78. Additional RFPs were directed by the Ministry in 2010 in Northern Ontario and in 2011 in Waterloo, Simcoe and London-Middlesex. They had the same devastating results as the Pilot Projects: the victims were primarily small and medium sized rural operators. To date, more than 18 small and medium sized rural operators have wrongfully been put out of business as a result of RFPs. Many more have been devastated and are no longer viable.

79. During this time, the Ministry:

- (a) continued ignoring warnings from numerous stakeholders about the unfair impact that RFPs were having on small and medium sized rural operators, and communities that they served; and
- (b) warned consortia managers who inquired about using Alternative Approaches that the Template RFP was the “preferred” or “authorized” approach and failure to use an RFP could result in funding clawbacks or audits by the Auditor General.

80. Instead of addressing deficiencies with the Template RFP, senior Ministry Officials including Ms Hayward, Ms Chan, and Associate Deputy Minister Gabriel F. Sékaly, devoted

Ministry resources to tracking, coordinating and eliminating opposition to RFPs from small and medium sized operators and their industry association. This included:

- (a) tracking all communications from and disparaging the Independent School Bus Operators' Association ("ISBOA"), who was raising legitimate concerns about how RFPs were not an appropriate form of competitive procurement for markets serviced by small and medium sized rural operators;
- (b) identifying consortia to implement RFPs on the basis of political considerations, including geographic areas represented by the Premier and the Opposition's education critic, or where there were large numbers of small operators or ISBOA members;
- (c) directing consortia when to announce an RFP's results in order to minimize expressions of concerns expressed by operators and ISBOA;
- (d) directing consortia manager's and school board directors' responses to concerns about unfair RFPs raised by trustees, operators and their associations;
- (e) terminating public access to the Ministry run Student Transportation Website;
- (f) distributing misleading marketing materials to MPPs and other government officials to answer concerns raised about the unfairness of the Template RFP, particularly on small and medium sized rural operators such as the Plaintiffs;
- (g) undermining a Task Force chaired by the Honourable Coulter Osborne, former Associate Chief Justice of Ontario and former Integrity Commissioner for the Province of Ontario (discussed below); and
- (h) financing and actively assisting consortia, including STEO, STWDSTS, STS and Tri-Board, to defend injunctions sought and obtained by small and medium sized rural operators against unfair and unlawful RFPs, including this action (discussed below).

Moratorium on RFPs Imposed Because of Unfairness

81. As the damage to operators across the province increased, operators, individually and through ISBOA, mobilized and held educational sessions and protests to make Government, school boards, transportation consortia and the public aware of the damage caused by RFPs.

82. In the spring of 2011, ISBOA also retained the Honourable Coulter Osborne, to review the suitability of the RFP process for the school bus industry and the fairness of the manner in which these changes to procurement were being imposed.

83. Mr. Osborne was to release an interim report on these issues in September 2011, identifying concerns about the imposition of the RFP process on the school bus industry, the disparate impact on small, rural operators, the significant risk of creating monopolies and the need to undertake a proper study of alternative procurement.

84. In response to the significant harm caused by RFPs and the pending report by Mr. Osborne, on June 23, 2011, the Minister imposed a six month moratorium on RFPs for the procurement of student transportation contracts.

Task Force Chaired by the Honourable Coulter Osborne

85. At the same time that the moratorium was imposed, the Minister also convened a Cabinet approved task force (the "Task Force"). The Task Force's mandate was to report on the serious problems that had occurred with RFPs to date and to review RFPs as a competitive procurement process paying specific attention to their fairness, transparency, accountability and whether taxpayers' receive value for money. The Task Force is the first and only in-depth study of the fairness and appropriateness of RFPs for the student transportation industry.

86. The Minister approached ISBOA and asked if it would release Mr. Osborne from his engagement to chair the Task Force. ISBOA agreed to have Mr. Osborne chair the Task Force on the basis that the Government and school boards would participate in and abide by the recommendations of the Task Force. The Minister also promised ISBOA that it would be reimbursed for expenses incurred in participating in the Task Force.

87. The Task Force had representatives from school boards, the Ministry, operators, ISBOA, the Ontario School Bus Association (“OSBA”) and transportation consortia. It also had its own procurement advisor.

88. Through the fall of 2011, the Task Force heard evidence about the following problems with RFPs conducted to date:

- (a) they were not straightforward or easily comprehensible;
- (b) there was little control of the processes, practices, accountability and transparency;
- (c) safety programs were not specified in a comprehensive, understandable way;
- (d) evaluation was arbitrary, inconsistent and discriminatory;
- (e) costs savings were not achieved;
- (f) there was a loss of valuable collaboration benefits and coordination amongst operators;
- (g) there was a real concern about the creation of monopolies; and
- (h) small and medium size operators and those with significant rural routes disproportionately suffered.

The Task Force also heard evidence about Alternative Methods of procurement which would alleviate the problems encountered with RFPs. The Alternative Methods included RFPs with Multiple Awards, Supply Arrangements, Benchmarking to Market and the Subcontractor model.

Ministry Undermines Task Force’s Work

89. Ministry officials, including Ms Hayward, Ms Chan, Mr. Sekaly, and their staff, actively undermined the Task Force’s work. This included:

- (a) characterizing Mr. Osborne as biased and resolving to reject his recommendations before the Task Force process had started;

- (b) directing non-Ministry Task Force members (such as consortia chairs and the member from the Ontario Public School Board Association) to scuttle attempts by the Task Force to review the outcomes of the Pilot Projects and other RFPs, including determining whether the prices proposed by winning bidders were lower than the minimum rates set by the Ministry's own benchmark study for safe and effective transportation;
- (c) advising consortia managers to ignore ISBOA communications reminding them of the moratorium; and
- (d) encouraging consortia to release RFPs in violation of the moratorium and before the Task Force Report was released.

Task Force Identifies Serious Problems with RFPs

90. Mr. Osborne released the Task Force Report to the Minister on January 25, 2012. The Report was not released to the public at this time. The Report concluded that:

- (a) there are serious problems with imposing RFPs as a "one size fits all" approach;
- (b) as a result of these problems there have been significant "casualties" caused by the RFP process especially amongst small rural operators;
- (c) the risk of monopolies created by imposing RFPs is not in the public interest, and will cause costs of student transportation to inevitably rise (the role of monopolies was previously identified by the Auditor General);
- (d) value for money is an important, but certainly not the only, consideration in student transportation procurement, and RFPs have not established that they can provide this to taxpayers; and
- (e) additional study of the industry and alternatives are required to limit, or eliminate, unfairness, particularly as related to mainly smaller, rural service providers such as the Plaintiffs.

91. Mr. Osborne recommended:
- (a) a moratorium on RFPs be extended beyond the current deadline of September 2013;
 - (b) an independent, third party expert be retained by the Ministry to review the RFP process, examine the issues described in paragraph 90, and provide specific advice to the Ministry, school boards and transportation consortia, to ensure that the process is fair, transparent, accountable and that taxpayers receive value for money; and
 - (c) the review must be independent and comprehensive.
92. Although the Task Force was not able to reach consensus on many issues there was consensus on a number of very important issues including the importance of consulting with operators before RFPs or new procurement methods are imposed especially on critical issues such as route bundling and route allocation.
93. As discussed below, none of these recommendations has been followed by STEO.

Ministry Delays Release of Task Force Report

94. The Ministry delayed its public release of the Task Force Report while Ministry officials:
- (a) resolved to reject “each and every one” of Mr. Osborne’s recommendations;
 - (b) described the Report as having a “significant bias” and Mr. Osborne’s recommendation that the Ministry hire an independent, third party expert to review the RFP process as a “game”; and
 - (c) finished working on a so-called “Transition Strategy” to implement further RFPs. The Ministry intended to misrepresent this strategy as a response to the Report when in fact it had been formulated prior to the Report’s release;

Task Force Recommendations Ignored by STEO

95. On March 29, 2012, the Minister released her response to the Task Force Report wherein she instructed school boards to comply with the BPS-Directive. She refused to have an independent third party expert be retained to further study the RFP process. The Minister also reneged on her agreement to reimburse ISBOA for its expenses associated with the Task Force.

96. Although the Task Force Report's primary recommendations were ignored, the Ministry did send a directive setting out best practices that school boards and transportation consortia are expected to follow when modifying procurement processes (the "B8 Memo") including:

- (a) a requirement that school boards and transportation consortia have a comprehensive understanding of local market conditions and awareness of risks and opportunities before selecting a procurement process;
- (b) selection of the most appropriate procurement option must be an informed decision;
- (c) advanced notice be provided to operators of procurement activities; and
- (d) the procurement process chosen should be well-managed and ensure that operators have sufficient time to learn and participate.

97. In particular, the Ministry made it clear in the B8 Memo that school boards and transportation consortia are not required to procure student transportation contracts through an RFP process and that alternative methods are acceptable.

Representations Made by STEO

98. Representations were made to the Plaintiffs by STEO and officials from the School Boards that: (i) their investments were secure, that any new procurement process implemented by STEO would treat operators fairly and equitably, and their interests would be considered when changes were made; and (ii) the Task Force Recommendations would be reviewed and carefully considered when STEO implemented a new procurement process.

99. The Plaintiffs reasonably relied on these representations. They continued to make investments in their businesses and to commit their resources to the service of STEO. This

reliance was encouraged by STEO who needed a secure, reliable source of pupil transportation. These representations were made negligently and/or recklessly as to their truth.

100. On November 18, 2010, STEO informed the Ministry it was going to use the “required Request for Proposal (RFP) process” to procure student transportation contracts. In late 2011, STEO retained PPI to prepare and administer an RFP process using the Template RFP. STEO and PPI completely ignored the Task Force Recommendations. STEO never had any intention of honoring its representations to the Plaintiffs that it would consider the Task Force Recommendations.

Refusal to Consider Reasonable Procurement Alternatives

101. STEO owes a duty to the Plaintiffs to reasonably consider and evaluate alternative procurement approaches that will not result in harm to the Plaintiffs.

102. Since the release of the Task Force Report, the Plaintiffs and ISBOA have continually asked STEO to consider the Alternative Approaches that comply with industry best practices and the BPS-Directive.

103. The Plaintiffs have provided detailed information on such practices including information and advice from eminent procurement experts. Mr. Cotnam and STEO have refused to consider this information, refused to meet and refused to discuss with operators changes to the procurement process.

104. STEO has been repeatedly told that imposing an RFP approach will destroy the businesses of the Plaintiffs and many others. Ministry officials directed Mr. Cotnam and STEO not to respond to such concerns and they have refused to do so.

105. In abandoning the existing procurement process and refusing to consider Alternative Approaches, STEO has given no consideration to its benefits as described above including operator co-operation, investments in the community and its achievement of value for money for taxpayers. All of these benefits will be lost if the RFP is permitted to proceed.

STEO RFP Announced and Lack of Transparency and Accountability

106. In early May 2012, STEO announced to operators that it had decided to use an RFP based approach and that it had hired PPI Consulting Inc. (“PPI”) as a consultant to design the RFP. PPI are the same consultants that the Ministry retained to develop the Template RFP and implement the Pilot Projects along with the Ministry.

107. On May 30, 2012, STEO and PPI provided an “information session” to operators on STEO’s upcoming RFP. Mr. Cotnam and Bob Barker from PPI were in attendance. Mr. Barker gave a presentation describing “competitive procurement” processes pursuant to the BPS-Directive. While the Ministry’s official position is that there are a variety of non-RFP BPS-Directive compliant competitive procurement approaches, Mr. Barker’s presentation only mentioned RFPs. His presentation provided little information about STEO’s upcoming RFP. Instead, Mr. Barker recommended that operators take classes and retain legal and writing assistance in order to respond to the RFP.

108. The degree of confusion surrounding the pending RFP process was evident in the number of questions asked by operators during the meeting. The confusion experienced by the operators was not alleviated because many of the questions asked did not receive a response. However, when asked whether STEO would consider alternatives to an RFP, the answer was no. When the meeting ended many operators left feeling bewildered, confused, frightened and overwhelmed.

STEO RFP Released with Serious Deficiencies

109. STEO released the STEO RFP on September 24, 2012. Despite the fact that contracts do not need to be in place until September 2013, the RFP closes on November 26, 2012. The RFP is fundamentally flawed. It is designed to remove and has already removed the smaller operators from the market. STEO has used its knowledge of the Plaintiffs’ financial and operational information to achieve this purpose.

110. In the STEO RFP and contrary to all prior practices, bus routes will not be allocated by STEO until after proposals on pricing and services are evaluated. This means that operators must blindly commit to pricing for five years in the hope that they will be allocated profitable routes and they may not.

111. This approach is fundamentally unfair to small operators and puts them at a highly prejudicial disadvantage. Large operators servicing multiple regions will cushion profitable routes with unprofitable routes. They also have the staying power to undercut smaller operators and take a loss on their operations until smaller operators are out of business.

112. The route bundling in the STEO RFP is confusing, inflexible and lacks transparency. The distribution of routes into geographical bundles was done without any known operator consultation. Certain regions contain substantially more routes than others and competition will not be uniform.

113. There are additional serious deficiencies with the STEO RFP which include:

- (a) the RFP contains numerous arbitrary or ill-defined evaluation criteria that make it impossible for operators to know what the consortium is actually looking for and make the evaluation process arbitrary and subject to unguided discretion;
- (b) despite its representations to the contrary, STEO's RFP is overwhelmingly weighted in favour of price at the expense of safety and quality. A proponent can score the minimum possible on the technical component of the RFP, but is nevertheless *guaranteed* to win if its price is just 10% lower than a proponent with a perfect technical score;
- (c) the method of allocating routes is arbitrary and disadvantages operators who bid on certain types of routes;
- (d) the RFP arbitrarily prevents operators from submitting joint proposals – such joint proposals are commonly used to alleviate the unfairness faced by smaller proponents in other RFP processes, and they are only way that the Ministry considers it possible for small and medium sized operators to fairly compete;
- (e) the RFP purports to give STEO the arbitrary authority to accept non-compliant proposals and to reject proposals *for any or no reason*;
- (f) despite purporting to retain a fairness commissioner, whose role is to substantively review the fairness of the RFP, STEO in fact retained a fairness

monitor, whose only concern is to ensure that the RFP's procedures are properly adhered to; and

- (g) many of the evaluation criteria are arbitrary and/or discriminate in favor of large operators, as does the structure of the RFP as a whole.

114. The STEO RFP favours larger bidders with deep pockets and denies small operators the financial flexibility necessary for them to survive. This is extremely problematic given that most of STEO's current operators are small or medium sized companies.

115. In addition, vehicle specifications in the RFP – for example, requirements for vehicles for providing disabled service – are not compatible with currently approved safe and reliable vehicles owned by the vast majority of STEO's small and medium sized operators. Because of operators' disclosure of their confidential information, STEO and PPI knew when drafting the RFP that most small and medium sized operators would have incompatible equipment. Large operators planning to bid on the RFP with no current STEO routes or fleet, have a distinct advantage over STEO's small and medium sized operators because they will not have to incur the costs of disposing of existing equipment at a loss and re-fleeting.

116. With the STEO RFP, STEO intends to eliminate most, if not all of its small operators and deliver a monopoly on student transportation in favour of large, financially powerful companies. This is exactly the concern expressed by the Auditor General in 1991 and Mr. Osborne in the Task Force Report.

Substantial Amendments to the STEO RFP

117. Subsequent to the issuance of the STEO RFP, STEO, without prior notice or discussion, has released seven different amendments.

118. This has caused significant confusion amongst operators and has compounded the lack of clarity and understanding already created by the process that has been followed. The impact of these amendments is particularly acute on the smaller operators, already placed at a significant disadvantage.

119. Notwithstanding these changes, STEO has refused to suspend or postpone the closing of the STEO RFP.

Refusal to Follow Ministry's Directive that RFPs are Not Required

120. STEO has not followed the Ministry's directive to school boards and transportation consortia regarding modifying procurement processes in the B8 Memo. In particular:

- (a) No BPS-Directive compliant procurement process other than an RFP was considered by STEO;
- (b) No analysis of local market conditions was conducted and no steps were taken to gain awareness of risks and opportunities to operators before STEO chose to use an RFP;
- (c) STEO's selection of an RFP based procurement approach was an uninformed decision based on private direction from Ministry officials;
- (d) No advanced notice was provided to operators and no operator input was sought before STEO chose to use an RFP; and
- (e) The STEO RFP has been mismanaged. The RFP has been rushed and operators have not been given sufficient time to learn and participate.

STEO Further Breaches Duty of Fairness

121. On November 2, 2012, Plaintiffs' counsel wrote to STEO's Chief Administrative Officer identifying serious problems with the RFP and the process leading to STEO choosing an RFP. STEO was asked to suspend the STEO RFP to allow for meaningful consultation with operators.

122. On November 8, 2012, STEO's counsel responded refusing to suspend the RFP. Two letters were included with the response. The first letter is from PPI ostensibly defending the RFP and failing to substantively address the deficiencies identified. PPI states that:

- (a) it is a "niche consulting organization" suggesting that it has impressive credentials and self-qualifying itself as a "prominent expert" in RFPs;

- (b) it was retained by the Ministry to develop the template RFP documents used by the Ministry to run the failed pilot RFPs which caused many casualties amongst small and medium sized operators;
- (c) the contracts and processes used for the STEO RFP are substantially the same as were used in the failed pilot RFPs;
- (d) it is involved with approximately 20 other engagements with respect to the procurement of student transportation in Ontario; and
- (e) the value of a potential contract to operators is high and uses actual numbers, undermining a process by which pricing is supposed to be confidential.

123. The second letter is from P1 Consulting Inc., the Fairness Commissioner, who also provides a defense of the STEO RFP. Such a defence is not within the proper role of a Fairness Commissioner.

124. In an attempt to intimidate operators from challenging the fairness of the STEO RFP and to give the impression that no changes would be made, STEO posted the letters from PPI and P1 and the correspondence exchanged between counsel to the procurement website www.biddingo.com (“Biddingo”).

125. On November 9, 2012, Plaintiffs’ counsel wrote to STEO’s counsel demanding that these letters be removed. The letters remain on the website.

126. STEO’s, PPI’s and P1’s efforts to defend the STEO RFP were closely coordinated with officials at the Ministry.

Ministry Funds Challenges To Unlawful RFPs

127. Despite its public representations that it has no involvement in consortia’s choice of procurement methods, the Ministry actively assisted consortia (including STEO, STWDSTS, STS, and Tri-Board) to defend actions commenced by operators against unfair and unlawful RFPs, including this action. This assistance included day-to-day advice, funding litigation costs and paying adverse costs awards.

128. After STEO lost its November 30, 2012 motion to strike in this action, STEO advised the Ministry that it needed funding assistance because this lawsuit represented a “provincial, not local issue”. If such funding was not provided STEO advised the Ministry that it would consider withdrawing its defence and submitting to the judgment of the Court. In response to STEO’s advice, the Ministry intervened in this case.

STEO’s Breaches of Duty of Care

129. STEO and the School Boards breached common law duties of care that they owed the Plaintiffs by:

- (a) Moving to an RFP process without consulting with the Plaintiffs, knowing of the damages that it would cause them and in the face of false and misleading misrepresentations that the Plaintiffs’ legitimate interests would be properly considered;
- (b) Refusing to consider the Alternative Approaches to the RFP that provide value for taxpayers and would limit the harm to the Plaintiffs caused by an RFP, as permitted by the Ministry and recommended by the Task Force;
- (c) Issuing the STEO RFP skewed towards larger operators with flawed criteria, a short closing date and not in accordance with the Ministry’s best practices; and
- (d) Refusing to suspend and/or extend the closing of the STEO RFP in the face of extensive amendments and the massive confusion that this has caused.

STEO’s Breach of Duty of Good Faith

130. The long-standing contractual relationship between the Plaintiffs and STEO has special characteristics, including the following, such that it gives rise to a duty of good faith owed by STEO to the Plaintiffs:

- (a) the formation and renewal of the Contracts was not the result of the exercise of bargaining power between two equals. While operators including the Plaintiffs

have had some input into the terms of the Contracts (and much less so over the last few years), they are essentially contracts of adhesion created by STEO;

- (b) operators including the Plaintiffs lack the ability to achieve more favourable commercial terms in the Contracts because, unlike other types of vendors to school boards, they are a captive vendor of STEO who controls almost all aspects of their businesses; and
- (c) the power imbalance between operators including the Plaintiffs and STEO affects all aspects of their commercial relationship.

131. The duty of good faith owed by STEO to the Plaintiffs required that they have regard to the Plaintiffs' legitimate interests and to deal promptly, honestly, fairly and reasonably with the Plaintiffs' concerns.

132. STEO breached the duty of good faith that it owed to the Plaintiffs by acting in the manner set out in paragraph 129, above.

STEO's Breach of Duty of Fairness

133. STEO is funded solely with public funds, is owned by public corporations and has a publicly-oriented function: entering contracts for the transportation of students. As such, STEO owes express and/or implied duties of procedural fairness to those it contracts with for student transportation.

134. These duties require STEO to operate by the same or similar kinds of principles of natural justice applicable to a public authority or body in the discharge of its public or statutorily mandated obligations and that the results of the procurement process be reasonable.

135. STEO breached its duties of fairness and natural justice that it owed to its existing operators, including the Plaintiffs, by moving to an RFP process for the procurement of student transportation contracts, without having any input from or considering the deleterious effects that this would have on the Plaintiffs.

136. Because of STEO's breaches in this regard, the Plaintiffs are entitled to an order for certiorari and prohibition.

Duties Arise From Existing Relationship and the Common Law

137. The duties owed by STEO to the Plaintiffs described above arise because of the:

- (a) long-standing contractual relationship between STEO and the Plaintiffs;
- (b) the vulnerability and dependence of the Plaintiffs;
- (c) common law duties of confidence; and
- (d) common law procurement duties requiring bidders to be treated fairly, in good faith and without discrimination according to undisclosed preferences.

STEO Liable for Negligent Misrepresentation

138. As described above, STEO made representations to the Plaintiffs, which were reasonably relied upon in making business decisions. These representations were untrue, inaccurate or misleading.

139. STEO acted negligently and/or recklessly in making the representations it did. The representations made by STEO were specifically targeted at and intended to be relied upon by the Plaintiffs. The Plaintiffs, reasonably relied on those representations and made significant investments in their businesses.

STEO's Breaches of the BPS-Directive

140. Independent from STEO's breaches of its common law duties owed to the Plaintiffs, STEO has engaged in unlawful acts that are not in accordance with the mandatory requirements of Sections 7.2 and 8 of the BPS-Directive, including:

- (a) engaging in Supply Chain Activities that are not open, accountable and transparent;

- (b) ignoring information about Alternative Procurement Practices that are less destructive and will obtain best value for public money;
- (c) creating an RFP with discriminatory evaluation criteria;
- (d) failing to fully disclose the evaluation methodology that it plans to use;
- (e) using a procurement process that discriminates and/or exercises preferential treatment of large operators and operators with no current STEO routes;
- (f) retaining consultants involved in Supply Chain Activities, who have acted and have been seen to act without integrity and professionalism; and
- (g) failing to conduct procurement activities in accordance with the law in Ontario, including contract law and the law of competitive processes.

141. If STEO is allowed to proceed with the STEO RFP, these unlawful acts will cause irreparable harm to the Plaintiffs.

Ministry Breaches its Duty of Care

142. For the reasons set out above, the Ministry owes small and medium sized rural operators, including the Plaintiffs, a duty of care, and breached that duty on many occasions.

143. The Ministry made a decision to change the way student transportation contracts were procured. By being directly involved in how consortia implemented and operationalized that change, the Ministry is liable for its actions and those of its servants and agents.

144. The Ministry is in a relationship of proximity with small and medium sized rural operators, including the Plaintiffs, and owed them a duty of care because:

- (a) the Ministry represented to small and medium sized rural operators that the new procurement processes it developed and directed consortia to use would be fair for operators of all sizes and undertook to directly involve itself to ensure that this was the case; and

- (b) the Ministry made such representations and gave such undertakings with the intention and knowledge that small and medium sized rural operators, including the Plaintiffs, would rely upon them to continue investing in their businesses and providing safe and cost efficient student transportation, as they had done for many years.

145. It is reasonably foreseeable that small and medium sized rural operators, including the Plaintiffs, would be harmed by the Ministry's directing consortia (such as STEO) to use RFPs and the Template RFP because:

- (a) the Ministry received advice and recommendations from the Auditor General, Deloitte, PPI, and various sector stakeholders, concerning, among other things, the vulnerability of small and medium rural operators, the importance of local market conditions and the fact that RFPs were not an appropriate procurement method for markets served by small and medium sized rural operators;
- (b) the Ministry knew that if it directed consortia, such as STEO, to engage in procurement processes that were not properly designed, and did not take into account the unique features of the industry, the vulnerable position of captive small and medium sized rural operators, and the importance of local market conditions and route bundling, significant harm to operators would result;
- (c) the Ministry knew of the availability of Alternative Approaches other than an RFP that complied with applicable legislation, would ensure value for taxpayers and would mitigate against the harm to small and medium sized rural operators caused by RFPs based on the Template RFP; and
- (d) the Ministry knew it was not possible for small and medium sized rural operators to fairly compete against large operators in RFPs based on the Template RFP.

146. The Ministry's duty of care required it, among other things:

- (a) to properly analyze whether student transportation services were already being procured in an open, fair, competitive and transparent manner;

- (b) to design procurement processes that would be fair to operators of all sizes, as Minister Wynne and others had represented that the Ministry would;
- (c) to correct Minister Wynne's misrepresentations, including that the process would be "fair for operators of all sizes" when the Ministry knew that it was not;
- (d) to disclose to operators and the public the Ministry's biases in favor of large multi-regional, national and international operators, and its desire for market consolidation;
- (e) to warn small and medium sized rural operators that the only way they could fairly compete against large operators in RFPs based on the Template RFP was by making joint submissions, and to modify the Template RFP and allow consortia to accept such submissions;
- (f) to comply with the recommendations or at least to properly and in good faith consider the recommendations of the Auditor General, Deloitte, PPI, and the Task Force, as described above;
- (g) to investigate and meaningfully consider warnings about the impact of unfair RFPs (including the Pilot Projects) on small and medium sized rural operators, including the Plaintiffs, and the members of the community that they employed, and to implement meaningful improvements to the process; and
- (h) to investigate and meaningfully consider, and allow consortia to investigate and meaningfully consider, the Alternative Approaches.

147. The Ministry breached its duty of care by, among other things, designing and directing the use of a Template RFP that failed to take into account the unique nature of the industry, the importance of local market conditions, or the vulnerability of small and medium sized rural operators, and that discriminated in favour of larger operators.

148. The Ministry's Template RFP was designed, in breach of its assurances and representations, to eliminate smaller and medium sized rural operators from the industry without warning and without compensation. The Ministry knew or ought to have known that the

Template RFP, and the STEO RFP which was based on it, precluded small and medium rural operators from competing fairly.

149. In addition, the Ministry breached its duty of care by failing to investigate and meaningfully consider changes to the Template RFP and/or its direction to use RFPs as a result of warnings from boards, consortia, and operator associations that the Template RFP and using RFPs in general would destroy small and medium sized rural operators.

150. The Ministry further breached its duty of care owed by failing to take the steps described in paragraph 146 above.

151. The Ministry is liable for the actions of Ministry officials, its servants, and PPI and MPS, its agents, including for their negligence described above. In this regard, the Plaintiffs plead and rely on section 5(1)(a) of the *Proceedings Against the Crown Act*.

Ministry Liable for Negligent Misrepresentation

152. As described above, the Ministry made representations to small and medium sized rural operators, including the Plaintiffs, which were reasonably relied upon in making business decisions. These representations were untrue, inaccurate or misleading.

153. The Ministry acted negligently and/or recklessly in making the representations it did. The representations made by the Ministry were specifically targeted at and intended to be relied upon by small and medium sized rural operators, including the Plaintiffs.

154. Small and medium sized rural operators reasonably relied on those representations and made significant investments in their businesses. As a result, many operators lost their routes and went largely and/or completely out of business, and many more, including the Plaintiffs, are at imminent risk of the same thing happening to them.

Ministry's Breaches of the BPS-Directive

155. The Ministry has engaged in unlawful acts that are not in accordance with the mandatory requirements of Sections 7.2 and 8 of the BPS-Directive, including:

- (a) engaging in Supply Chain Activities that are not open, accountable and transparent;
- (b) ignoring information about Alternative Approaches that are less destructive and will obtain best value for public money;
- (c) designing RFPs that discriminate against small and medium sized rural operators and directing school boards and consortia to implement them;
- (d) involving Ministry staff in Supply Chain Activities, who have acted and have been seen to act without integrity and professionalism; and
- (e) failing to conduct procurement activities in accordance with the law in Ontario, including contract law and the law of competitive processes.

Ministry Directs Internal Review

156. Acknowledging deficiencies with the Template RFP and the harm its use has caused to small and medium sized rural operators, the Ministry has informed school boards and consortia that it intends to undertake an internal review of the RFP process. Instead of implementing the recommendations of its own Task Force to conduct an “independent review”, the Ministry is undertaking its own review. The scope of this review is improperly confined to the Template RFP and its purpose is to justify a process that the Ministry knows has caused great harm to small and medium sized rural operators.

157. The Ministry has intentionally excluded from the scope of its internal review any consideration of:

- (a) the fairness and appropriateness of RFPs in markets serviced by small and medium sized rural operators; and
- (b) Alternative Approaches that would not destroy the businesses of small and medium sized rural operators.

Damages Not a Sufficient Remedy

158. On October 18, 2012, a group of 15 small and medium sized operators serving a neighboring transportation consortium, Tri-Board Transportation Services (“Tri-Board”), obtained, on consent, an Order cancelling an RFP that Tri-Board had issued. Tri-Board’s RFP had similar problems and was created in a similar flawed environment as the STEO RFP.

159. The Plaintiffs are in the same position that the plaintiffs who brought an action against Tri-Board were in prior to commencing their action against Tri-Board. STEO refuses to engage with them and has refused to consider less destructive BPS compliant alternatives to an RFP.

160. All of the RFPs for student transportation contracts held in Ontario to date strongly suggest that the Plaintiffs stand to lose most, if not all of their businesses if the RFP is allowed to proceed. While damages may be able to partially compensate investments made, they cannot compensate the Plaintiffs for the loss of opportunity to compete for future contracts, the loss of employment in the community and irreparable damage to upstream suppliers.

161. The Plaintiffs request that trial of this action take place in Perth.

November 16, 2012

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Plaintiffs

-and-

STUDENT TRANSPORTATION OF EASTERN ONTARIO and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Defendants

Court File No. 842/12

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
PERTH

FRESH AS AMENDED STATEMENT OF CLAIM

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