Court File No. CV-23-00032125-0000

***ontario***

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

Papp plastics and distributing limited

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

**STATEMENT OF DEFENCE**

# OVERVIEW

1. The Defendant, the Attorney General of Canada (“Canada”), admits the allegations contained in paragraphs 3, 4, 5, 8 and 29 of the Statement of Claim (the “Claim”).
2. Canada has no knowledge of the allegations contained in paragraphs 2, 16-17, 19-20 and 25 of the Claim.
3. Except where expressly admitted herein, Canada denies each and every allegation contained in the Claim and puts the Plaintiff to the strict proof thereof.
4. Innovation, Science and Economic Development Canada (“ISED”) is a federal department responsible for a number of functions in regulating industry and commerce, promoting science and innovation, and supporting economic development in Canada. Its mandate is set out under Part I of the *Department of Industry Act*, [SC 1995, c 1](https://laws.justice.gc.ca/eng/acts/I-9.2/index.html).
5. The National Research Council of Canada (“NRC”) is a body corporate incorporated pursuant to the *National Research Council Act*, RSC 1985, c N-15. NRC provides innovation support, strategic research, and scientific and technical services to the Government of Canada and industry.
6. The Industrial Research and Assistance Program (“NRC-IRAP”) is a program offered by NRC that provides innovation assistance for small and medium-sized businesses across Canada.
7. The Department of Public Works and Government Services, which is named Public Services and Procurement Canada (“PSPC”), is a federal department. It is responsible, among other roles, for the acquisition of goods and services for the Government of Canada, pursuant to the *Department of Public Works and Government Services Act*, SC 1996, c 16.
8. Health Canada (“HC”) is a federal department responsible for national health policy, which is overseen by the Minister of Health. The Minister of Health’s responsibilities under the *Department of Health Act,* SC 1996, c 8 include the protection of the Canadian public against risks to health and the spread of diseases, as well as investigation and research into matters of public health, including the monitoring of diseases.
9. The Minister of Health also presides over the Public Health Agency of Canada (“PHAC”). PHAC is a statutory federal agency established pursuant to the *Public Health Agency of Canada Act*, SC 2006, c 5 for the purpose of assisting the Minister of Health in exercising or performing his powers, duties, and functions in relation to public health.
10. Next Generation Manufacturing Canada (“NGen”) is an independent not-for-profit corporation with an independent board of directors. Canada states, with respect to paragraph 7 of the Claim, that NGen did not act as an agent for Canada in respect of the allegations contained in the Claim.

# THE COVID-19 PANDEMIC AND THE CPMI POLICY

1. The first presumptive case of COVID-19 was reported in Canada on January 25, 2020. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.
2. On March 20, 2024, Prime Minister Justin Trudeau publicly announced Canada’s CPMI Policy to Mobilize Industry to fight COVID-19 (“CPMI ”). CPMI was a core policy response by the Government of Canada to the pandemic. It was not directed at any particular entity, and it was not a promise to purchase any specific product from a particular company. The announcement was solely a means to inform domestic companies of the measures being taken to support businesses should they wish to increase their scale of production or re-tool their manufacturing lines to help in the fight against COVID-19.
3. The CPMI Policy informed the public of new measures taken to support Canadian businesses should they wish to rapidly scale up production or re-tool their manufacturing lines to develop products made in Canada that would help in the fight against COVID-19. These products could include critical health and safety supplies and equipment, including personal protective equipment (“PPE”), sanitization products, diagnostic and testing products, and disease tracking technology.
4. The CPMI Policy sought to create pathways to deploy resources to domestic manufacturers and businesses so they could help during this critical time. The CPMI was not directed at any particular businesses, nor did it contain commitments or promises with respect to the purchase or sale of any particular products. Canada denies the allegation, in paragraph 6 of the Claim, that the CPMI Policy purported to place any limits on the sale of domestically produced supplies outside of Canada.
5. ISED assisted in implementing the CPMI Policy by identifying businesses that had the potential to re-tool or scale up their production capacity to fight COVID-19. ISED would help support businesses by, for example, providing information to such businesses on how to locate HC regulatory requirements and assist in connecting these businesses to PSPC.
6. Following the CPMI Policy’s announcement, NRC-IRAP provided industrial technology advisors to triage the capabilities of businesses who expressed interest in re-tooling or scaling up production capacity to fight COVID-19. These advisers would assess companies’ readiness to pivot and capacity to satisfy obligations in respect of funding. NRC-IRAP would enter into written contribution agreements with companies determined to be eligible for support.
7. These NRC-IRAP contribution agreements were a means of providing support for companies’ efforts to re-tool or scale up capacity. They explicitly did not create a partnership, joint venture, or agency relationship between the recipient company and the NRC, nor did they constitute any form of procurement commitment or procurement contract.
8. Canada denies the allegation contained in paragraph 7 of the Claim that as part of the CPMI Policy, funds were awarded to “preferred” manufacturers. Rather, funds were awarded to manufacturers based on their capacities, including their potential ability to comply with HC’s regulatory requirements and PSPC’s procurement requirements.

# THE CONTRIBUTION AGREEMENT

1. In May of 2020, NRC-IRAP entered into a contribution agreement (the “Contribution Agreement”) with the Plaintiff for Project #949729 (the “Project”). Canada admits the allegations in paragraphs 11-14 of the Claim. Specifically, the Contribution Agreement with the Plaintiff was executed by the NRC-IRAP Regional Director, Kathy Keast, on May 19, 2020, and it contained terms including that NRC-IRAP would contribute up to $98,931 for costs incurred by the Plaintiff during the Project.
2. Under the Contribution Agreement, the Plaintiff’s objectives for the Project were to:
3. repurpose part of its existing auto parts manufacturing facility to include a swab manufacturing facility; and
4. establish the capability to manufacture 300,000 testing swabs per week beginning either June 2020 (for non-sterilized swabs) or September 2020 (for sterilized swabs).
5. Per the terms of the Contribution Agreement, the Plaintiff committed to “commercially exploit the results of this Project with the intent of creating economic and social benefits in Canada, for Canadians”. The Contribution Agreement contained no commitment on behalf of the Plaintiff to sell testing swabs to the federal government upon completion of the Project, nor any commitment on behalf of Canada to purchase swabs from the Plaintiff.
6. With respect to paragraph 27 of the Claim, Canada admits that it did not provide further funding to the Plaintiff beyond the $98,931 contemplated in the Contribution Agreement.
7. Canada denies the allegations in paragraphs 9-10 of the Claim that Canada, or any of its employees, agents, or servants, expressed an intention to “partner” with the Plaintiff on the development and production of testing swabs. The terms of the Contribution Agreement are clear:

25) Nothing in this Contribution Agreement shall be construed as creating a partnership, joint venture or agency relationship between NRC and the Firm.

# NO PURCHASE CONTRACT

1. Canada denies the allegations in paragraphs 18, 30-31, 35-39, and 43 of the Claim that it, or any of its employees, agents, or servants, entered into:
2. a contract with the Plaintiff for the purchase of swabs; or,
3. an agreement to negotiate for the purchase of swabs from the Plaintiff.
4. Canada did not, at any point, formalize a commitment to purchase swabs from the Plaintiff through a letter of intent (“LOI”). To the contrary, the Plaintiff was aware that an LOI was necessary to sell health and safety supplies and equipment, such as swabs, to Canada, and the Plaintiff requested that ISED provide it with an LOI. ISED expressly refused to do so.
5. Canada further denies the formation of any oral contract with the Plaintiff. Canada denies the allegation in paragraph 15 of the Claim that the Associate Assistant Deputy Minister at ISED informed the Plaintiff that Canada would procure 2 million swabs per week from the Plaintiff. Canada states that ISED, in conjunction with HC and PHAC, assisted the Plaintiff in understanding the potential market scope and providing projections regarding the weekly utilization of swabs. However, at no time did the Associate Assistant Deputy Minister at ISED make any commitment to the Plaintiff concerning swab procurement.
6. With respect to paragraph 30 of the Claim, Canada further denies that any contract was entered into between the Plaintiff and Defendant as a result of the CPMI Policy itself. The CPMI was part of Canada’s core policy response to the COVID-19 pandemic .It contained no terms or contractual commitments with respect to the purchase of products from any particular company.
7. Canada also denies the allegation at paragraph 30 of the Claim that it agreed to enter into future contracts with the Plaintiff for the purchase of swabs. THE PLAINTIFF’S AUTHORIZATION TO SELL ITS SWABS
8. In response to the allegations contained at paragraphs 21-24 and 32 of the Claim, Canada admits that the Plaintiff was authorized to sell the swabs produced at its re-tooled facility in Canada on or about February 11, 2021. However, by this time, the market demand that had previously existed for swabs in 2020 had significantly altered.
9. Canada denies liability for any alleged impediments or delays in the Plaintiff’s production of swabs. In response to paragraphs 23, 34, and 42 of the Claim, Canada denies that its regulatory requirements and/or approvals processes for swabs were unduly onerous. Canada states that all requirements were necessary and appropriate given the unprecedented circumstances surrounding the procurement of medical supplies in a global pandemic.

# NO BREACH OF CONTRACT OR BREACH OF DUTY OF GOOD FAITH

1. Canada denies any breach of contract or breach of duty of good faith on its part, or on the part of its employees, servants, or agents, that caused or contributed to the Plaintiff’s damages, if any.
2. With respect to paragraphs 31 and 36-38 of the Claim, Canada pleads that because there was no contract or agreement between Canada and the Plaintiff other than the Contribution Agreement, Canada had no contractual obligations to the Plaintiff to purchase swabs, including no express or implied contractual duty of good faith or honest performance.
3. Canada further denies the existence of any agreement obligating it to negotiate in good faith with the Plaintiff regarding the purchase of swabs. Canada denies the Plaintiff's allegations of unfair negotiation practices and asserts that, at all material times, Canada conducted its procurement processes in accordance with the applicable policies and procedures.

# NO NEGLIGENT MISREPRESENTATION

1. Canada denies that it, or any of its employees, servants, or agents, made any negligent misrepresentations to the Plaintiff concerning commitments to place orders with the Plaintiff for swabs or with respect to the CPMI Policy. At no time did Canada or its employees, servants, or agents represent to the Plaintiff that Canada would award purchase orders to the Plaintiff or that Canada would negotiate in good faith with respect to purchasing swabs from the Plaintiff.
2. At all material times, Canada and its employees, servants, and agents acted within the scope of their duties in all interactions with the Plaintiff and carried out those duties in good faith and in accordance with all applicable policies and procedures.
3. Canada denies the claim in paragraph 39 of the Claim that it owed a duty of care to the Plaintiff. Canada pleads that the Plaintiff was not in a proximate relationship with Canada or any of its employees, servants, or agents sufficient to ground a duty of care.
4. In the alternative, if a relationship of sufficient proximity is found to exist, policy considerations exist that outweigh the recognition of a duty of care.
5. In the further alternative, even if Canada owed a duty of care to the Plaintiff—which is denied—Canada did not breach that duty. Canada denies that it, or any of its employees, agents, or servants, made representations to the Plaintiff that were untrue, inaccurate, or misleading.
6. In response to paragraphs 26, 28, 33 and 39-40 of the Claim, Canada denies that it misled the Plaintiff regarding swab procurement decisions. Canada admits the allegation in paragraph 26 of the Claim only insofar as that on or about May 5, 2021, its representatives informed the Plaintiff about the status of procurement pathways for testing equipment. Canada states that at that time, provinces and territories were the primary procurers of PPE and testing equipment, and Canada proactively worked to connect Canadian manufacturers with relevant provincial officers.
7. With respect to paragraphs 33 and 41 of the Claim, Canada denies that the Plaintiff reasonably relied on any representations or alleged misrepresentations made by Canada, or its employees, agents, or servants, to the Plaintiff’s detriment, and puts the Plaintiff to the strict proof thereof.
8. Canada also pleads and relies upon the limitation of liability provisions of the Contribution Agreement:

12) … The Firm shall not take action against NRC for failure or delay in the undertaking of the Project caused by circumstances beyond NRC’s reasonable control, or for incorrect data supplied, advice given, or opinions expressed in relation to the Project.

# NO ENTITLEMENT TO DAMAGES

1. Canada denies that the Plaintiff suffered any damages and puts the Plaintiff to the strict proof thereof.
2. Canada states that the damages pleaded in the Claim—which are denied—are excessive, exaggerated, and too remote.
3. Canada denies that any punitive, aggravated or special damages should lie in this action. Canada states that at all times, it acted reasonably, in good faith, and without malice.
4. In the alternative, Canada states that any damages pleaded in the Claim—which are denied—are the result of the Plaintiff’s own negligence, voluntary acts, or omissions, and that the Plaintiff has failed to mitigate those damages.

# APPLICABLE LAW

1. Canada pleads and relies upon the provisions of the following:
   1. *Crown Liability and Proceedings Act*, RSC 1985, c C-50;
   2. *Department of Health Act,* SC 1996, c 8;
   3. *Department of Industry Act*, [SC 1995, c 1](https://laws.justice.gc.ca/eng/acts/I-9.2/index.html);
   4. *Department of Public Works and Government Services Act*, SC 1996, c 16;
   5. *Public Health Agency of Canada Act*, SC 2006, c 5
   6. *National Research Council Act*, RSC 1985, c N-15; and
   7. *Negligence Act*, RSO 1990, c N.1.

# DISPOSITION

1. Canada requests that this action be dismissed with costs.

|  |  |
| --- | --- |
| Dated: December 19, 2024 | ATTORNEY GENERAL OF CANADA  Department of Justice Canada  Ontario Regional Office  120 Adelaide Street West, Suite 400  Toronto, Ontario M5H 1T1  Per: **Asad Moten** (63785G)  **Sahar Mir** (82289U)  **Emma Ryman** (82905O)  Tel.: 437-423-6426  437-286-4059  416-346-0594  Email: [asad.moten@justice.gc.ca](mailto:asad.moten@justice.gc.ca)  [sahar.mir@justice.gc.ca](mailto:sahar.mir@justice.gc.ca)  [emma.ryman@justice.gc.ca](mailto:emma.ryman@justice.gc.ca)      Lawyers for the Defendant |
|  |  |