



Form 33
(Rule 8-1(10))

No. S-2260982

Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Kewal Bagri, Steve Sager, Heather Sager, Nanine Bjornson, Teresa Whittet,
Paula Redden, Candice Halliday, Robert Ross, Krystal Rawles, Deanna Dunphy

Plaintiffs

AND:

Corporation of the City of Quesnel, ~~Byron Johnson, City Manager~~ and
His Majesty the King in Right of the Province of British Columbia

Defendants

Application Response

APPLICATION RESPONSE OF: Kewal Bagri, Steve Sager, Heather Sager, Nanine Bjornson, Teresa Whittet, Paula Redden, Candice Halliday, Robert Ross, Krystal Rawles, Deanna Dunphy (the "Respondents")

TO: The Defendant, Corporation of City of Quesnel
c/o Lana Tsang
Harris & Company LLP
14th Floor, 550 Burrard St.
Vancouver, BC V6C 2B5
Attention: Lana Tsang

TO: The Defendant, His Majesty the King in Right of the Province of British Columbia
c/o Ministry of the Attorney General, Legal Services Branch
1301-865 Hornby Street
Vancouver, BC V6Z 2G3
Attention: Emily Lapper and Alex Choi

THIS IS A RESPONSE TO the notice of application (the "Notice of Application") of the Province of British Columbia (the "Applicant") filed September 8, 2022, adjourned to assize week of October 17, 2022.

Part 1: ORDERS CONSENTED TO

The Respondents do not consent to any of the orders set out in Part 1 of the Applicant's Notice of Application.

Part 2: ORDERS OPPOSED

The Respondents oppose the granting of the orders set out in paragraphs 1 through 3 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Respondent takes no position on the granting of the order set out in paragraph 4 of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. The Respondents agree with paragraphs 1-7 set out in Part 2 of the Notice of Application.
2. The Respondents filed a notice of civil claim on June 22, 2022 (the "**Original Notice of Civil Claim**").
3. The Respondents filed an amended notice of civil claim on September 6, 2022 (the "**Amended Notice of Civil Claim**").
4. This Amended Notice of Civil Claim sought the same declarations and remedies as the Original Notice of Civil Claim, but addressed new factual circumstances showing that the City of Quesnel (the "**City**") implemented its mandatory COVID-19 vaccination policy to protect the broader community and public health. This was in collaboration with the Province of British Columbia (the "**Province**").
5. The Amended Notice of Civil Claim states that in effect, the Province and City desired to have an increased level of vaccination for British Columbia. The Province enabled and directed employers such as the City to implement mandatory vaccination policies through its public service employees. In effect, the Province got the City to do what it would not do itself, i.e. to implement public health and economic policy to protect British Columbia's healthcare system, residents and economy (Affidavit of Teresa Whittet sworn on September 29, 2022 at paras 3-24).
6. The Province desired to improve vaccination rates for British Columbia. By implementing a vaccine mandate for its public sector employees, the Province pursued a public policy objective, which in turn was followed by the City (Affidavit of Teresa Whittet sworn on September 29, 2022 at paras 3-24).
7. The Amended Notice of Civil Claim provides that the City implemented its mandatory vaccination policy for COVID-19 not just to protect the workplace, but to protect the greater community. A major factor in this was the City's concern over the lower vaccination rates for Northern British Columbia compared to the rest of the Province (Affidavit of Teresa Whittet sworn on September 29, 2022 at para 5). The Province's broad policy goal of vaccinating all British Columbians influenced the City to implement its own vaccine mandate.
8. The steps and timeframe towards implementing of the City's vaccine mandate followed in lock-step with the Province's vaccine mandate for its public service employees (see Affidavit of Teresa Whittet sworn on September 29, 2022 at paras 3-9; note also the City's discussions around the vaccine mandate coincided with the timeframe of the Province's at paras 10-22).

9. The Notice of Application states that it is a response to the Amended Notice of Civil Claim (at Part 2, para 2).
10. The Amended Notice of Civil Claim provides further facts that place the essential character of the dispute outside the ambit of the Respondents' collective agreements.

Part 5: LEGAL BASIS

11. The Respondents rely on Rules 1-3, 8-1, 9-5(1), 14-1 and 21-8 of the *Supreme Court Civil Rules*, relevant case law discussed, and the inherent jurisdiction of the Court.

The Law on the Striking of Pleadings

12. Rule 3-1(2) of the BC *Supreme Court Civil Rules*, [*Civil Rules*] states that a notice of civil claim "set[s] out a concise statement of the material facts giving rise to the claim." Material facts are those that are a disputed fact "...the resolution of which will, without more, have legal consequences as between the parties to the dispute" (*Jones (Litigation Guardian of) v Donaghey*, 2010 CarswellBC 3581, 2011 BCCA 6 at para 9). A material fact is essential to formulate the cause of action.
13. Rules 9-5(1)(a) and 9-5(2) of the *Civil Rules* give courts the authority to strike out part or the whole of a pleading.
14. However, *Lu v Shen*, 2020 BCSC 490, 2020 CarswellBC 838 [*Lu*] provides some context with regards to striking pleadings, as it is a high bar. The BCSC found that, despite numerous issues with a pleading, that was drafted by a lawyer, there was too much unfairness to the plaintiff to dismiss the pleadings on the basis of flaws in the civil claim (*Lu* at para 81). Pleadings must be looked at on a case-by-case basis.
 - a) *Plain and obvious a claim will not succeed*
 15. To determine if it is "plain and obvious" that a claim will fail, the guidelines are: 1) whether there is a question to be tried regardless of complexity or novelty; (2) whether the outcome of the trial is beyond a reasonable doubt; (3) whether serious questions of law or questions of general importance are raised or if facts should be known before rights are decided; (4) whether the pleadings may be amended; and (5) whether there is an element of abuse of process (*Cimaco International Sales Inc v British Columbia (Business Practices & Consumer Protection Authority)*, 2010 BCCA 342 at para 40).
 16. However, a motion to strike must be used with care. The SCC found that "actions that yesterday were deemed hopeless may tomorrow succeed" (*Knight v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [*Knight*] at para 21). It is not determinative that the law has not recognized a particular claim (*Ibid*). What is determinative is whether the claim has no reasonable chance of succeeding.
 - b) *Pleading evidence*
 17. In *Moneco Ltd v Commonwealth Insurance Co*, 2001 SCC 49 [*Moneco*] the SCC found that "extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope [of the claim]" (at para 35).
 18. Additionally, documents referenced to in pleadings can be considered particulars, which serve the purpose of providing more information to the other side in an action, so they are not taken by surprise at trial (*Sidhu v Hiebert*, 2018 BCSC 401, 2018 CarswellBC 578 (SC) [*Sidhu*] at para 33). If a document is material, that document must be identified (*Ibid* at para 53).

c) *Allegations of fact must be taken as true*

19. Allegations of fact in the pleadings must be taken as true in the context of an application under Rule 9-5(1)(a) (*Hunt v T & N plc*, [1990] 2 SCR 959, 1990 CarswellBC 216 (SCC) at para 57).
20. The Applicant states that allegations based upon assumption and speculation do not necessarily need to be taken as true in a pleading. The Respondents take no issue with this statement of the law. As will be discussed below, the Respondents' claims are not at all "bare allegations of wrongdoing supported by only assumptions and speculation" (Notice of Application at para 7).

Analysis on Striking Pleadings

21. The Applicant claims that there is no cause of action against the Province alleged in the Respondents' amended notice of civil claim. This is false. Various violations of the *Charter*, *Human Rights Code*, *Workers Compensation Act*, *Criminal Code* and the *Occupational Health and Safety Regulation* have been claimed by the Respondents.
22. The claims made by the Respondents are supported by material facts set out in the Amended Notice of Civil Claim. These include reference to documents and statements materially pertinent to such claims. Per *Moneco*, these material facts can be applied to determine the substance and true nature of the allegations.
23. The questions to be tried in the Amended Notice of Civil claim are complex and novel. A court will need to look into complex scientific evidence, some of which is controversial as it goes against one political narrative or the other. Novel and complex questions should not prejudice the Respondents' ability to have answer.
24. Because of the novelty of the claims arising from mandatory vaccination policies during an unprecedented pandemic, it is incorrect to assume that the outcome of a trial is beyond a reasonable doubt.
25. Serious questions of law of general importance have been raised. The Amended Notice of Civil Claim and Original Notice of Civil Claim both question the Constitutionality of government-initiated, public policy-oriented vaccine mandates cloaked as employer-vaccine mandates. To say that the Constitutionality of COVID-19 vaccine mandates, and damages to the Respondents (and countless other Canadians in a similar situation) do not touch on questions of general importance is fundamentally inaccurate.
26. Regardless of whether the City is acting as its agent, the Province remains liable for the implementation of employer vaccine mandates as an independent defendant. The claim shows that the Province enabled and initiated such vaccine mandates through its desire to increase vaccination rates in British Columbia, purporting to prevent healthcare collapse and allowing the economy to open up.
27. It is untrue that the Province had no involvement in the day-to-day affairs of the City, as stated at paragraph 12 of their Notice of Application. In fact, Canadian municipalities worked in tandem with provinces throughout the pandemic. The City's disputed vaccine mandate relied almost exclusively upon provincial direction, announcements, research and guidance.
28. Even if the *Local Government Act*, RSBC 2015 c.1 does not create a proper agency relationship between the City and the Province, such agency can be created by the factual circumstances. Such facts, which must be assumed true, have been pleaded in the Respondents. The City's vaccine mandate and policies were directly influenced and pursued through interaction and direction from the Province.

The Law Relating to the *Crown Proceeding Act*

29. Section 2 of the *Crown Proceeding Act*. RSBC 1996, c 89 [*CPA*] outlines when the government can be sued. Generally, there is no right to sue the Crown in tort or equity (*Skibinski v Community Living British Columbia*, 2010 BCSC 1500 at para 96).
30. Section 3(2)(d) of the *CPA* limits the Crown's liability for causes of action when they are "...enforceable against a corporation or other agency owned or controlled by the government".
31. However, cases that consider section 3(2)(d) of the *CPA* are founded in causes of action in tort, contract and equity, and do not deal with alleged breaches of *The Constitution Act, 1982, Schedule B to the Canada Act 1982(UK)*, 1982, c 11 [*Charter*].

Analysis on the *Crown Proceeding Act*

32. A plain reading of section 2(c) of the *CPA* puts the government in the place of a person at law, which exposes the government to liability. However, "persons" cannot be responsible for a breach of the *Charter*, and therefore the Province can be held liable.
33. The Respondents' claim against the Province is not, in whole, an action against the City acting as an agent of the government. The Province itself has committed alleged wrongs, in particular breaches of the *Charter*. These breaches enable the Respondents to seek damages pursuant to section 24 of the *Charter*, and the Province is subject to the *Charter*.
34. Courts have a "...broad remedial authority..." to seek damages as an appropriate remedy for *Charter* violations (*Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 27). The SCC has said that courts have a wide discretion to award damages pursuant to section 24(1) of the *Charter*.
35. The Amended Notice of Civil Claim and Original Notice of Civil Claim both disclose legitimate civil causes of action, including the claims directed to the Province for *Charter* breaches. Section 3(2)(d) of the *CPA* does not bar the Respondents from seeking their claims against the Province.

Conclusion

36. The Amended Notice of Civil Claim cannot be dismissed or struck as it discloses a reasonable cause of action against the Province and is not prohibited by section 3(2)(d) of the *CPA*.
37. The Respondents seek costs of this Application Response.

Part 6: MATERIALS TO BE RELIED ON

1. Affidavit of Teresa Whittet, sworn 29 September 2022;
2. Affidavit of Steven Sager, sworn 29 September 2022;
3. Affidavit of Eric T. Payne, sworn 3 October 2022;
4. The pleadings filed herein; and
5. Such further and other material as counsel may advise.

The Respondents estimate that the application will take 1.0 days.

- ☐ The application respondent has filed in this proceeding a document that contains an address for service.
- ☒ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Respondents' address for service:

Grey Wowk Spencer LLP
#200, 5110-51 Avenue, PO Box 1028
Cold Lake, Alberta T9M 1P3
Attn: Leighton B.U. Grey, K.C.


Fax number address for service:

(780) 594-0211

E-mail address for service (if any):

swhitehead@gwsllp.ca

Dated: October 3, 2022



Signature of lawyer for the Respondents
Stephen E. Whitehead