No. 2159023
Prince George Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN**

ROCK 'N' ROLL AGGREGATES LTD.
ROLLING MIX CONCRETE (B.C.) LTD

**PLAINTIFFS**

**AND**

CITY OF PRINCE GEORGE

**DEFENDANT**

## NOTICE OF APPLICATION

Name of Applicant: The defendant, City of Prince George (the "**City**")

To: The plaintiffs, Rock 'N' Roll Aggregates Ltd. and Rolling Mix Concrete (B.C.) Ltd.

TAKE NOTICE that an application will be made by the Applicant to the presiding Judge at the courthouse at 250 George Street, Prince George, British Columbia, on the assize week of July 10, 2023 at 9:45 a.m.

**Part 1: RELIEF SOUGHT**

1. An order pursuant to Rule 9-5(1)(a) and (d) of the Supreme Court Civil Rules that the following paragraphs contained in the Amended Notice of Civil Claim, filed December 10, 2021, be struck:

   Part 1, Paragraphs 34 and 35;

   Part 2, Paragraph 7; and

   Part 3, Paragraph 16

2. That the action be dismissed

3. Costs of this application

**Part 2: FACTUAL BASIS**

4. In its Amended Notice of Civil Claim filed February 18, 2021 ("**ANOCC**"), the plaintiffs allege the following:

    a. The plaintiffs each own an interest in lands located in the City of Prince George bearing property identifier (PID) of 016-1858-641 (the "**Land**"): ANOCC, Part 1, paras 1 and 2.

    b. The plaintiff, Rolling Mix Concrete (B.C.) Ltd. ("**RMC**") holds a mining permit issued by the Ministry of Energy and Mines permitting sand and gravel mining on the Land (the "**Mining Permit**"), and which permit requires a setback of mining operations of at least 5 m from adjoining land boundaries: ANOCC, Part 1, paras 7, 12 and 13.

    c. Pursuant to its statutory authority to regulate the removal and deposit of soil, the City has adopted a series of "Soil Removal" bylaws, including Bylaw No. 9030 ("**Bylaw 9030**"), which was adopted on April 29, 2019: ANOCC, Part 1, paras 21-25.

    d. Bylaw 9030 contains a term requiring, *inter alia*, that if the removal or deposit of soil [on a parcel] exceeds 25,000 $m^3$, the removal or deposit operations must be set back at least 100 m from boundaries of land which is zoned for any residential, rural residential or institutional use: ANOCC, Part 1, para 26.

    e. Certain properties which adjoin the Land are zoned for residential uses: ANOCC, Part 1, para 29.

    f. On October 16, 2020, the City informed the plaintiffs that, by virtue of Bylaw 9030, soil removal and deposit operations on the Land must be set back a minimum of 100 m from the boundaries of applicable properties and, furthermore, directed the plaintiffs to stop work prohibited by Bylaw 9030 (the plaintiffs describe this instruction as a "**Cease Work Order**" and, while the City does not necessarily agree with this characterization, for simplicity, it adopts this term for the purpose of this application): ANOCC, Part 1, paras 28 and 30.

    g. The plaintiffs claim to have thereafter abided by the Cease Work Order and further claim to have incurred loss and damage in consequence of such compliance: ANOCC, Part 1, paras 31, 32 and 34.

5. In the ANOCC, the plaintiffs plead as follows:

    a. the City does not have the jurisdiction "to regulate mining activity in respect of the mine operated by the plaintiffs pursuant to the [Mining Permit]" and, as such, is entitled to an order quashing the City's purported exercise of such authority and damages for losses incurred, and

    b. alternatively, if the City does have the power to regulate in this manner, then the plaintiffs should be compensated for injurious affection to the Land.

6. By Order made by consent on April 24, 2023, Mr. Justice Tindale approved an order (the "**Declaratory Order**") granting relief including:

    a. A declaration that the City's power to regulate, prohibit and impose requirements in relation to the removal of soil and the deposit of soil or other material under Division 1 (Purposes and Fundamental Powers) of Part 2 (Municipal Powers and Purposes) of the *Community Charter*, SBC 2003, c. 26 do not extend to regulation that has a prohibitory effect on the operation of a quarry in respect of the activities authorized under a mines permit and the conditions under which such authorized activities are to be carried out; and

    b. A declaration that the Cease Work Order is quashed.

7. In consequence of the Declaratory Order, the sole issue remaining to be adjudicated in the action is whether the City is liable to compensate the plaintiffs for any provable loss or damage incurred by the plaintiffs in consequence of the bylaw enforcement efforts taken by the City and, namely, the issuance to the plaintiffs of the Cease Work Order.

**PART 3: LEGAL BASIS**

1. This application is brought pursuant to Rule 9-5(1)(a) and (d) of the Supreme Court Civil Rules, which provides, in part:

    (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that provides, inter alia, that if the Plaintiff's claim discloses no reasonable claim or is otherwise an abuse of the process of the court, it may be struck.

        (a) it discloses no reasonable claim or defence, as the case may be

        ….

(d) it is otherwise an abuse of the process of the court.

2. The principles applicable to applications to strike pleadings are well-established, and are summarized as follows:

> a) A claim will only be struck under R. 9-5(1)(a) if it is plain and obvious, assuming the facts pleaded to be true, and read in their most advantageous light, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.
>
> b) Evidence may not be considered on an application under R. 9-5(1)(a), but is admissible for applications brought under R. 9-5(b)(d): *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 20.
>
> c) Pleadings should be read generously, or most advantageously in favour of the plaintiff, when considering any application to strike them: *Holland v. Saskatchewan*, 2008 SCC 42 at paras. 7 and 15.

**Rule 9-5(1)(a) - No Reasonable Claim**

3. More specifically, the Court of Appeal recently considered the application of Rule 9-5(1)(a), in *Canada (Attorney General) v. Frazier*, 2022 BCCA 379:

> [18] For the defendant to succeed on an application to strike, it must be plain and obvious that the pleadings disclose no reasonable cause of action. Courts are generous to plaintiffs at this stage so as not to foreclose the development of the law through novel claims. The facts pleaded (or as the pleadings could reasonably be amended) are assumed to be true unless they are manifestly incapable of being proven.
>
> [19] Striking claims that have no reasonable chance of success allows legal disputes to be resolved promptly, rather than at a full trial, and the court's ability to do so is "a valuable housekeeping measure essential to effective and fair litigation". The power to strike a claim serves to "wee[d] out … hopeless claims and ensur[e] that those that have some chance of success go on to trial". When unmeritorious claims are weeded out, resources can be fully devoted to the claims that have a reasonable chance of success, which in turn results in litigation efficiency and contributes to better justice. However, courts should be careful when exercising the power to strike a claim in order to "guard against frustrating the development of the common law in the pursuit of gaining trial efficiencies". Therefore, when determining a motion to strike application, judges are limited to deciding whether the claim as pled was bound to fail.
>
> [Citations omitted.]

4. For the reasons that follow, the plaintiffs claim in this action has no reasonable chance of success, and does not stand to advance the development of the common law.

**No Private Law Duty of Care**

5. The plaintiffs have not pleaded any specific cause of action or basis in law to support their claim of liability for the "Additional Damages" (as defined in ANOCC, Part 1, para 34).

6. On the most generous reading of the pleadings, the plaintiffs' claim is an articulation of an undefined private law duty of care flowing from the enforcement of a bylaw intended to regulate, prohibit or impose requirements in relation to matters which included the mining activities of the plaintiff Rolling Mix Concrete (BC) Ltd. permitted under the Mining Permit, which bylaw was ultimately declared inapplicable to the extent that it prevented the plaintiff Rolling Mix Concrete (BC) Ltd. from carrying out the activities authorized by the Mining Permit.

7. No such duty or analogous duty has been recognized amongst the limited private law duties of care which have been recognized as being owed by local governments (examples of such limited recognized private law duties include: negligent misrepresentation, building inspection duty, duty to keep roads in repair).

8. The test for establishing a private law duty of care, first set out in *Cooper v. Hobart*, 2001 SCC 79, was tailored for application to government bodies in *Carhoun & Sons Enterprises v. Canada (Attorney General)*, 2015 BCCA 163 at para 50 and recently confirmed in *Waterway Houseboats Ltd. v. British Columbia*, supra. Put briefly, the test is:

> Step One: Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances?
>
> Step Two: If not, was the harm suffered by the plaintiff reasonably foreseeable?
>
> Step Three: If yes, was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances? If yes, a *prima facie* duty arises.
>
> Step Four: Are there any residual policy reasons for negating the *prima facie* duty of care established in Step Three, aside from any policy considerations that arise naturally out of a consideration of proximity? If not, then a novel duty of care is found to exist.

*Step 1: Analogous Precedents*

9. There is no precedent establishing a private law duty of care in the context of the enforcement of a lawfully-enacted municipal bylaw which was not applicable as the result of inconsistency with an authorization granted under a Provincial enactment.

10. There does exist, however, a body of decisions, beginning with *Welbridge Holdings v. Greater Winnipeg,* 1970 CanLII 1 (SCC) ("***Welbridge***"), in which courts have held that civil liability does not arise simply because damage has flowed from the exercise of statutory powers in a manner which is later found to have been *ultra vires*.

11. This principle was most recently considered in *British Columbia (Minister of Public Safety) v. Latham*, 2023 BCCA 104 where the Court considered whether the Province could be held liable in tort "on the sole basis that statutory powers had been found to have been exercised unlawfully" (at para. 71). The Court held that no such liability exists, and that to allow such a claim would "effectively create a new species of tort liability for governments arising from regulatory interferences with the use of private property that are subsequently found to be unlawful in an administrative law sense" (at para. 92).

12. These decisions are analogous to the plaintiffs' claim because, if there is no liability flowing from the *ultra vires* exercise of statutory authority then, *a fortiori*, there can be no liability flowing from an *intra vires* exercise of statutory authority which has been enforced in circumstances where the statutory authority is found to be inapplicable as the result of subsequent statutory interpretation.

13. If the *Welbridge* line of cases is not sufficiently analogous, a full Anns/Cooper analysis must follow.

*Step 2: Foreseeability*

14. For the purposes of this application, the City concedes that it was foreseeable that compliance with the Cease Work Order could result in economic loss to one or both of the plaintiffs.

*Step 3: Proximity*

15. Step 3 of the test set out in *Carhoun* was refined in *Waterway Houseboats*, wherein the Court of Appeal broke down the test for proximity into two stages of consideration: (i) the legislative scheme and, (ii) the interactions between the parties. Here, "when the issue is whether a duty of care is owed by a government regulator, there is an important additional layer to the analysis. The analysis must start with a consideration of the underlying statute."

*Proximity Stage One: Underlying Statute*

16. Under *Community Charter* section 8(3)(m), a municipal council may, by bylaw, regulate and impose requirements pertaining to "the removal of soil and the deposit of soil or other material". The City exercises this authority through Bylaw 9030.

17. The purpose of the legislative scheme in this case is, *inter alia*, to regulate soil extraction operations in the City and to balance the interests of entities engaged in such activity with the interests of residents living in the immediate vicinity of such activity. As set out in the preamble, Bylaw 9030 seeks to "protect and enhance the well-being of its community".

18. This is not an authority by which a municipality has a positive duty to act in the private interests of the class of parties which may be subject to soil removal or deposit regulation.

*Proximity Stage Two: Interactions between the Parties*

19. As noted in *Wu* (at para. 64), factors which are "generic and inherent in the regulatory framework" are not indicative of a relationship of proximity.

20. The interactions alleged by the plaintiffs to have caused damage in this case – specifically, the issuance of the Cease Work Order – was in furtherance of achieving the purposes of Bylaw 9030. This was not a "specific interaction" in which the City "assumed duties separate and apart from its governing statute": *Flying E Ranche Ltd. v. Attorney General of Canada*, 2022 ONSC 601, quoting paras. 45 and 53 of R. v. *Imperial Tobacco Ltd.,* 2011 SCC 42.

21. To conclude, neither Bylaw 9030 nor the City's effort to enforce its provisions support a finding of proximity sufficient to ground a private law duty of care between the plaintiffs and the City. In the absence of sufficient proximity, the City did not owe a private law duty of care in its enforcement of Bylaw 9030. As such, the plaintiffs claim cannot proceed past this stage of the *Anns/Cooper* test and must be dismissed.

*Step 4: Policy Reasons*

22. If the court is persuaded to identify a new private law duty of care in these circumstances, it then will consider whether there any residual policy reasons for negating such a *prima facie* duty of care

23. In *Wu*, supra, the Court declined to recognize a private law duty "to make a decision on a development permit application within a reasonable time" where it replicated an existing public law duty (at para. 1). This conclusion is equally applicable to the plaintiffs' claims – subsequent to the October 16, 2020 issuance of the Cease Work Order the Court of Appeal, in *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12, recognized a specific public law prohibition against the enforcement of a bylaw intended to regulate, prohibit or impose requirements in relation to matters and which include, in the case at bar, the mining activities of the plaintiff Rolling Mix Concrete (BC) Ltd. permitted under the Mining Permit, to the extent that it prevented the plaintiff Rolling Mix Concrete (BC) Ltd. from carrying out the activities authorized by Mining Permit.

24. The available remedy to address such an unlawful bylaw application is to seek a remedy of *certiorari* though a judicial review of the application of such a bylaw. Indeed, by virtue of the Declaratory Order quashing the Cease Work Order, this remedy was sought and granted to the plaintiffs in this action.

25. The existence of an alternative remedy is a policy reason not to recognize a new private law duty of care.

**No Liability for the Enforcement of Legislation**

26. The crux of the plaintiffs' argument is that the City ought to be held liable for the enforcement of a validly adopted bylaw which was ultimately found to be inapplicable insofar as it had a prohibitory effect on the operation of any valid and subsisting mines permit issued to the plaintiff, Rolling Mix Concrete (BC) Ltd.

27. The policy reasons for refusing to acknowledge a private law duty of care with respect to the enforcement of statutory instruments which are later found to be inapplicable or invalid have been extensively considered, including in *Welbridge*;. In that decision, Justice Laskin, writing for the Court at p. 969, noted that:

> "In exercising [a discretionary legislative] authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond

> its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability". [citation omitted, emphasis added.]

28. This reasoning was upheld and further developed in a number of subsequent decisions, including *Central Canada Potash Co. v. Government of Saskatchewan*, 1978 CanLII 21 (SCC) and *Guimond v. Quebec (Attorney General)*, 1996 CanLII 175 (SCC). All of these decisions addressed private law claims against government bodies, relating to legislation which was ultimately found to have been improperly adopted or enforced.

29. The public policy reasons for dismissing the plaintiffs' claim are clear: if municipalities are liable for damages arising from the enforcement of lawfully enacted bylaws which are subsequently found to be inapplicable (for reasons of jurisdiction, constitutionality or, as in this case, the evolution of the common law as it pertains to the interpretation of the relevant provisions of the *Community Charter*), the "spectre of unlimited liability" warned of in paragraph 37 of *Cooper,* supra, is embodied.

**Rule 9-5(1)(d) - Abuse of Process**

30. The entire basis of the remaining claim in this action, as described in the ANOCC, is founded "in the event that the defendant does not have jurisdiction to regulate mining activity…." (ANOCC, para 34). The damages claimed by the plaintiffs are alleged to have been incurred as the direct result of the Cease Work Order issued October 16, 2020. (ANOCC para 34(a)-(c)).

31. The plaintiffs' claim is, in essence, a private law claim for judicial review. Such a claim constitutes an abuse of process because it is a collateral attack on the decision of the City to enforce Bylaw 9030, and it is a "proceeding without a foundation which serves no useful purpose", as observed by the Court of Appeal in *Krist v. British Columbia*, 2017 BCCA 78 ("***Krist****")* at para. 50, citing *Babavik v. Babowech*, [1993] No. 1802 B.C.S.C.

32. The Court at para. 52 in *Krist* held that "Abuse of process is a flexible doctrine unencumbered by specific requirements. It is directed to prevent actions that violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."

**Collateral Attack**

33. A collateral attack is a species of abuse of process, and claims constituting a collateral attack are properly struck: *Stewart v. Clark*, 2013 BCCA 359 ("***Stewart***") at para. 77.

34. Not every claim that includes a challenge to a government decision is a collateral attack: *Stewart*, at para. 66. A claim will constitute a collateral attack if it is "in effect" an appeal of an order or administrative decision, and fails to raise justiciable issues which are "separate and distinct" from the administrative decision (see, for instance, *Leroux v. Canada (Revenue Agency),* 2012 BCCA 63; *Krist* at para. 47 and 48; and *0742848 B.C. Ltd. v Squamish (District)*, 2017 BCSC 2177 at para. 50*).*

35. Put differently, a claim will be a collateral attack if the plaintiff does not plead a valid private law cause of action for damages. This was described by the Supreme Court of Canada as a claim for damages which, at its "essential character" is "a claim for judicial review with only a thin pretense to a private wrong": *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 78, as cited in *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214. The plaintiffs advance such a claim in the ANOCC.

36. The Court of Appeal in *Stewart* found that "Though [the plaintiff] claims a remedy, damages, that would be unavailable if he were successful on judicial review, the essential nature of his claims is an attack on the lawfulness of the Superintendent's decision, raising issues of jurisdiction, limits of statutory authority, process, and fairness. These elements of the Superintendent's decision-making process and exercise of his authority are not simply essential underlying facts on which all the parties to the action may rely."

37. Similarly, the nature of the plaintiffs' claim is an attack on the lawfulness of the City's enforcement of a lawfully-enacted bylaw, which raises issues of jurisdiction and limits of statutory authority. There is not so much as a "thin veneer" of a private wrong. Thus, it is a proceeding which serves no useful purpose, and is properly struck pursuant to R. 9-6(1)(d).

**Part 4: MATERIAL TO BE RELIED ON**

1. Amended Notice of Civil Claim filed December 10, 2021

2. Order of Justice Tindale granted April 24, 2023

The Applicant estimates that the application will take 2 days.

☐ This matter is within the jurisdiction of a Master.

☒ This matter is not within the jurisdiction of a Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

a. file an Application Response in Form 33,

b. file the original of every affidavit, and of every other document, that

i. you intend to refer to at the hearing of this application, and

ii. has not already been filed in this proceeding, and

c. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

i. a copy of the filed Application Response;

ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: April 25, 2023

Signature of Jeffrey W. Locke
lawyer for the defendant and applicant,
City of Prince George

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application

☐ with the following variations and additional terms:

_____

_____

_

Date: [dd/mmm/yyyy] . _____

Signature of ☐ Judge ☐ Master

**APPENDIX**

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ experts

☒ other