



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

To: City of Prince George
And to: its solicitor

TAKE NOTICE that an application will be made by the applicants by telephone to the presiding judge or master at the courthouse at 250 George Street in the City of Prince George, in the Province of British Columbia in the Assize commencing November 22nd, 2021 at 9:45 am for the orders set out in Part 1 below.

Telephone number for Applicants' solicitor: 250-960-2175
Email: stewart@courtyardlane.bc.ca
Telephone number for Respondent's solicitor: 250-590-1840
Email: Troy DeSouza <troy.desouza@govlaw.ca>

Part 1: ORDERS SOUGHT

1. A declaration that the Province of British Columbia has exclusive jurisdiction over all activities authorized by a mining permit that fall within the definition of "mine" and "mining activity" under the *Mines Act*, RSBC 1996, c.293 (the Act);
2. A declaration that City of Prince George (CPG) Bylaw 9030, 2019 (the Bylaw) enacted pursuant to a power under the *Community Charter*, SBC 2003, c.26 (Charter) to regulate, prohibit and impose requirements in relation to the removal of soil and the deposit of soil or other materials do not apply to activities of Rolling Mix Concrete (B.C.) Ltd, carried out on, in or upon the Land which are authorized by a mining permit and that fall within the definition of "mine" and "mining activity" under the Act, *supra*;
3. A declaration that bylaws of the CPG enacted pursuant to any power granted to the CPG pursuant to the Charter or *Local Government Act*, SBC 2015, C. 1 (LGA), and which regulate, prohibit or impose requirements in respect of any activity of the plaintiff, Rolling

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Mix Concrete (B.C.) Ltd. authorized by a mining permit and that fall within the definition of "mine" and "mining activity" under the Act are inapplicable to such activities;

4. An order that the cease work or stop work order issued by the CPG on October 16, 2020 which prohibited the plaintiffs from carrying on any activity on the Land because "the Removal or Deposit Operations of the plaintiffs must be separated by a minimum setback of 100 meters from the boundary of any land which is zoned for any residential, rural residential or institutional use" is quashed in so far as it relates to any activity of the plaintiff, Rolling Mix Concrete (B.C.) Ltd. that falls within the definition of "mine" and "mining activity" under the Act..

Part 2: FACTUAL BASIS

THE PARTIES

1. The plaintiff, Rock 'N' Roll Aggregates Ltd. (RRA) is a corporation duly incorporated pursuant to the laws of the Province of British Columbia, and has its registered office at #614 1488 Fourth Avenue, Prince George, BC, V2L 4Y2.
2. The plaintiff, Rolling Mix Concrete (B.C.) Ltd (RMC) is a corporation duly incorporated pursuant to the laws of the Province of British Columbia, and has its registered office at #614 1488 Fourth Avenue, Prince George, BC, V2L 4Y2.
3. The defendant, City of Prince George (CPG) is a municipal corporation created pursuant to the Community Charter, SBC 2003, c. 26, and has its offices at 1100 Patricia Blvd, Prince George, British Columbia, V2L 3V9.

THE MINE

4. The plaintiff RRA owns lands located on Foothills Blvd in the City of Prince George, otherwise known and described as title number CA7043902:

PID: 016-188-641

The South 1/2 of District Lot 4050 Cariboo District Except Plans 15885, 16145, 21495, 22431, 23072, 25854, 26342, 25344, 26384, 30383, 30446, 34889, PGP35829 and PGP36045

(herein called "the Land")

5. The plaintiff, RMC owns an interest in the Land in the form of a *Profit a Prendre* registered against title to the Land under no. BB553672.
6. The plaintiff RRA was previously known as 406286 British Columbia Ltd. and it changed its name to RRA on July 23, 2018

7. The plaintiff RMC has a mining permit issued by the Ministry of Energy and Mines under no. G-11-44 in respect of the Land, pursuant to s. 10 of the *Mines Act*, RSBC 1996, c293 (the Permit).
8. Under the *Mines Act*, a mine is defined as follows:
 - “includes
 - a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce...sand or gravel”
9. Under the *Mines Act*, owner is defined as “includes every person who is the immediate holder, proprietor, lessee, occupier or permittee of a mine or any part of it...”
10. Under the *Mines Act* section 11.1 provides:
 - “If a person acquires a mine, before that person engages in mining activity the person must apply to the chief permitting officer to
 - a) Obtain a permit, or
 - b) Amend an existing permit for the mine to identify the applicant as the holder of the permit
11. The mining activity of the plaintiff, RMC commenced on or about November 21, 1995 under permit G-11-44 issued under the *Mines Act* (Original Permit)
12. The Original Permit specified that “Buffer zones and/or berms shall be established between the mine and the property boundary unless exempted in writing by the District Inspector.” The Original Permit did not specify the horizontal dimension of any buffer zone.
13. At or about the time that RMC commenced mining activity pursuant to the Original Permit, it fenced the boundary of the Lands to prevent unauthorized access to surface excavations created during mining activity on the Land.
14. Subsequently, after the Original Permit was issued by the Government, and after a residential development was created along the West boundary of the Lands, the fence created by the owner, RRA on the West boundary was, in part, torn down or removed by third parties, and some residences on the West boundary have stored materials, created sheds or allowed others to enter on to the Land without the consent of RRA, the owner of the Land.
15. RRA, the owner of the Land has subsequently taken steps to ensure that new fencing is established as required by section 6.24.1 of the Health, Safety and Reclamation Code for Mines in British Columbia.
16. The Permit was renewed by the Ministry of Energy and Mines on April 2, 2015 under Permit G-11-44 permitting sand and gravel mining on the Land by the plaintiff, RMC for the period April 1, 2015 to December 31, 2025 (the Renewed Permit).

17. The Renewed Permit provides (in paragraph 27) that a minimum of 5 metres (horizontal) buffer of undisturbed land shall be maintained between the property boundaries pursuant to part 10.5.8 of the Health, Safety and Reclamation Code for Mines in British Columbia.
18. The owner, RRA submitted with the application to renew the Original Permit, a set of plans required by the Notice of Work form which was submitted April 2, 2015 (the Site Plans).
19. The site plans show a 50 metre buffer area on the West boundary next to the residential area, and a 50 metre buffer area on the East boundary next to the Foothills Boulevard, and on the North East boundary next to the North Nechako Road.
20. Other than such 50 metre buffer areas, the plans show a 10 metre buffer area on the South Boundary and the South West boundary of the Land.
21. The plaintiff, RMC pays a royalty or fee to the plaintiff RRA in respect of the volume of sand and gravel mined by the plaintiff, RMC.
22. The plaintiff, RMC annually extracts in excess of 100,000 cubic metres of sand and gravel from the Land.

CPG REGULATORY BYLAWS

23. The CPG has authority under section 8 of the *Community Charter* SBC 2003, C.26 where it provides:

“(3) a council may, by bylaw, regulate, prohibit and impose requirements in relation to the following: ...

(m) the removal of soil and the deposit of soil or other materials”
24. This power of a municipality to regulate, prohibit and impose requirements in relation to the removal of soil and the deposit of soil or other materials existed in predecessor Acts governing the delegation of legislative authority by the Province to Municipalities.
25. Pursuant to the power of a municipality to regulate, prohibit and impose requirements in relation to the removal of soil and the deposit of soil or other materials, the CPG enacted Soil Removal Bylaw 9030, on April 29, 2019 (Bylaw 9030).

SOIL REMOVAL REGULATION BY CPG

26. Bylaw 9030 contains the following provision:

“12.2 (g) Where the total amount of Soil proposed for Removal or Deposit exceeds 25,000 cubic metres, the Removal or Deposit Operations, except for the Buffer, Berms, Erosion or siltation control devices, and the access route, must be separated by a minimum set back of 100 metres from the boundary of any land which is zoned for any residential, rural residential or institutional use.”

JURISDICTION

27. The Provincial Government exercises jurisdiction over all activities authorized by a mining permit that fall within the scope of the definitions of "mine" and "mining activity" under the Act, including:
- a) Any activity related to the exploration and development of...sand, gravel or rock is mining activity (s.1 Act definition of mining activity);
 - b) Any activity related to the production of...sand, gravel or rock is a mining activity (s.1 Act definition of mining activity);
 - c) Any activity related to the reclamation of a mine is mining activity s.1 Act definition of mining activity)
 - d) All activities including exploration drilling, excavation, processing, concentrating, waste disposal and site reclamation is a mine (s. 1 Act definition of mining)
 - e) A place where mechanical disturbance of the ground or any excavation is made to explore for or to produce...rock...sand or gravel is a mine (s. 1 Act definition of mining)
 - f) Mining activity includes the following prescribed requirement: "All trees and other vegetation, clay, earth, sand, gravel, loose rock, or other unconsolidated material lying within 2 m of the rim of a working face or wall in a surface mine shall be removed, and beyond this distance all unconsolidated material shall be sloped to an angle less than the natural angle of repose" (s. 6.22.2 Health, Safety and Reclamation Code for Mines in British Columbia)
 - g) Mining Activity includes the following prescribed requirement: "Surface excavations shall be securely fenced against inadvertent access when fencing is considered necessary by an inspector" (s. 6.24.1 Health, Safety and Reclamation Code for Mines in British Columbia)
 - h) Mining Activity includes the following prescribed requirement: "The excavation of soil material such as clay, silt, earth, sand or gravel, in a surface mine shall not be carried out within a setback distance of at least 5 metres horizontal from the vertical plane of the property boundary, and
 - a) There shall be no excavation of soil material below a surface sloping downwards into the property from the inside edge of the setback no steeper than 1.5 horizontal to 1 vertical, and
 - b) Material that sloughs from within this distance shall not be removed without the written approval of the inspector."
(s. 10.5.8 Health, Safety and Reclamation Code for Mines in British Columbia)
 - i) "Notwithstanding sections 10.5.8 and 10.5.9 of this code, the chief permitting officer may approve a mine plan, prepared by a Professional Engineer, with alternative setbacks and slopes that ensure that the Property boundary will be adequately

protected” (10.5.10 Health, Safety and Reclamation Code for Mines in British Columbia)

28. The CPG soil removal bylaw no. 9030, 2019 (the Bylaw) includes the following regulatory matters:
- a) “Soil” means “sand, gravel rock...” (s.1 definitions)
 - b) “Remove” means “the act of removing Soil from any lands in the City” (s.1 definitions)
 - c) “No person shall Remove...unless:
 - i. A Long Term or Short Term Permit has been issued for that Removal...pursuant to this Bylaw, or
 - ii. Removal...is allowed without a Long Term Permit or Short Term Permit by Section 6 of this Bylaw” (s.5.1)
 - d) Removal...is permitted without a Long Term Permit or Short Term Permit where Removal...(f) results in a net increase or decrease of less than 100 cubic meters of Soil per parcel per year” (s.6.1)
29. These provisions of the Bylaw place the limit on soil removal so low that no industrial-scale extraction is possible, without the owner of the profit a prendre obtaining a permit from the CPG, despite the fact that that industrial-scale extraction operation is authorized by Mining Permit issued under the Act. In effect the Bylaw gives the CPG a veto over the operation of a “mine” and “mining activity” authorized by a mining permit pursuant to the Act.
30. The Land is within a Designated Soil Removal Area specified in Schedule A to the Bylaw.
31. Under the Bylaw, the discretion to veto the operation of a mine or mining activity of a person holding a Mining Permit issued by the Provincial Government for the removal of sand, gravel and rock from land within the CPG has been delegated by the CPG to “the Authorized Person”.
32. Upon application for a Long Term Permit to the Authorized Person, the Authorized Person **may refuse to issue a Long Term Permit** if the plans, data and specifications do not meet satisfactory requirements of this Bylaw or **if the proposed Removal will or is reasonably likely to:**
- a) Damage, destroy, obstruct, divert or impede the flow of or **otherwise injuriously affect** any Watercourse, Public Service Corridor or Private Service Corridor, Highway, **structures or other improvements on the land or on any Abutting or Adjacent Land, whether privately or publicly owned;**
 - b) Contravene any bylaw of the city; ...
 - c) **Result in the use of the lands in a manner inconsistent with the current zoning** or the future land use as designated on Schedule B-6: Future Land Use the “Official Community Plan bylaw no. 8383, 2011”;
 - d) **Substantially** alter the appearance and nature of the surrounding area. (s.9.8)
33. These discretionary elements for the Authorized Person decision making, give a wide ranging and subjective basis for the denial of a soil removal permit despite their being a Mining Permit to operate a “mine” or the carrying on of “mining activity” under a Mining Permit issued by the Provincial Government.

34. The Bylaw contains the following prescribed restriction on removal of soil:

- "g) Where the total amount of Soil proposed for Removal...exceeds 25,000 cub I meters, the Removal, except the buffer, berms erosion or siltation control devices, and the access route, must be separated by a minimum setback of 100 meters from the boundary of any land which is zoned for any residential, rural residential or institutional use." (s. 12.2)

35. The Land is bounded on two sides by residential use.

36. The Mining Permit authorizes the mining activity within a 50 meter setback associated with residential areas.

ENFORCEMENT ACTIVITY OF CPG

37. On October 16, 2020 the CPG informed the plaintiffs that because of the setback provisions of Bylaw 9030, "the Removal or Deposit Operations of the plaintiffs must be separated by a minimum setback of 100 metres from the boundary of any land which is zoned for any residential, rural residential or institutional use."

38. The Land on the West boundary is adjacent to land with a residential zone and on the North Boundary is adjacent in part with land with a zone permitting a mobile home park, and to the East the Land is adjacent to Foothills Blvd and to the North, by North Nechako Road.

39. On October 16, 2020, in response to the activity of the plaintiffs in clearing a portion of the Land to facilitate mining activity, and the removal of trees located within the 100 meter setback requirements of Bylaw 9030, the CPG informed the plaintiffs to "advise immediately of all works taking place. If works are taking place within this buffer, please stop immediately..." (the Cease Work Order)

40. The plaintiffs ceased clearing activity in response to this order. The mining activity in the areas being cleared of surface vegetation has effectively ceased within the 100-metre setback specified by CPG pursuant to the Cease Work Order.

IMPACT

41. The impact on the business of the plaintiffs of such 100 meter setback provisions in CPG Bylaw 9030 is very significant, since it removes approximately 48% of the sand and gravel reserves of the plaintiffs from active mining based on the 5 metre horizontal buffer of undisturbed land required by the Mining Permit.

42. The preparation of the Land for mining activity is in phases, and the areas affected by the Cease Work Order are in Phases 2 and 3, where the plaintiffs have planned development of mining activity to ensure the continuation of supply for concrete manufacture by the plaintiff RMC at a manufacturing plant located at a different site.

Part 3: LEGAL BASIS

1. The Province has exclusive jurisdiction over all activities authorized by a Mining Permit that fall within the definition of "mine" and "mining activity" under the Act.

Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCCA 432

O.K. Industries Ltd. v. District of Highlands, 2021 BCSC 81

2. The mine and mining activity of the plaintiff RMC are captured by the definitions of "mine" and "mining activity" in the Act.
3. The extraction from the Land of sand and gravel is a mine and mining activity and it is clear that the Province has exclusive jurisdiction over the regulation of mines and their related site reclamation activities. *Cobble Hill supra*.
4. The definition of "land" for purposes of the Charter is found in the schedule to the Charter and provides:

...includes the surface of water, but does not include

- (i) Improvements
- (ii) Mines or minerals belonging to the Crown, or
- (iii) Mines or minerals for which title in fee simple has been registered in the land title office

5. The Provincial Legislature clearly intended to ensure that the Province's jurisdiction over the regulation of mines and mining activities is maintained because of the importance of mining to the provincial economy. That intention is apparent in the following legislative provisions: (i) the express exclusion of "mines" in the definition of land in the Charter; (ii) the express recognition of the provincial interest in mining in s.9(1) of the Charter that requires a council to obtain the approval of the minister responsible before a bylaw prohibiting the deposit of contaminated soil will be enforceable; and (iii) related legislative provisions and statutes that reserve control of mines and mining activities to the Province to ensure a unified provincial regulatory scheme, including the following: Health, Safety and Reclamation Code (the Code)... (*Cobble Hill, supra*)
6. A requirement by the CPG, under its various regulatory bylaws, that RMC obtain permits to engage in clearing land and creating berms or removing trees necessary for mining activity including a permit for extraction of sand and gravel would effectively give the CPG a veto over the entire project if it exercised its discretion to decline a permit.
7. The requirement of the CPG that RMC obtain a permit under the Bylaw does not apply to activities under the Mining Permit on the Land because:
 - (i) It is rendered inoperable by the issuance of the Mining Permit due to the Province's exclusive jurisdiction over mines and mining activities; and
 - (ii) The Bylaw as originally passed and/or amended in 2019 never received approval from the Minister of Mines, Energy and Petroleum Resources as required by ss. 9(1)(e) and (3) of the Charter and, as such, is invalid. The "pith and substance" of

the Bylaw is prohibitory in nature such that approval of the Minister is required. In the absence of such approval, the Bylaw is invalid.

8. In the circumstances, the on-site activities of RMC are not subject to the Bylaw. (OK Industries, supra)
9. The on-site activities include land clearing (including tree removal), construction of berms, excavation, screening, sorting, stockpiling, loading, and hauling of processed sand and gravel to off-site locations. The falling and removal of trees from the property, or the falling and chipping and removal of chipped timber from the property, is a necessary antecedent of the extraction of sand and gravel from the Land. This activity is clearly under the broad definitions of "mine" and "mining activity", bringing it within the exclusive jurisdiction of the Province.
10. The on-site processing activities are not subject to the Zoning Bylaw and the OCP.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of John Paolucci, made June 23, 2021.
2. Supreme Court Civil Rules: 9-7; 20-4
3. *Mines Act*, RSBC 1996, c.293
4. *Community Charter*, SBC 2003, c.26
5. *Local Government Act*, SBC 2015, c. 1
6. *Health, Safety and Reclamation Code for Mines in British Columbia* BC Reg 99/2013 and BC Reg 6/2021 made pursuant to s. 34 of the Mines Act

The applicant estimates that the application will take 1 day.

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 the 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: 29/07/2021

Signature of

applicant lawyer for applicant

Roy J. Stewart, Q.C., LLD (Hon)

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 [day/month/year]

Signature of Judge Master

[The following information is provided for data collection purposes only and is of no legal effect.]

Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- 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
- xsummary judgment

- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

No 2159023

PRINCE GEORGE REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Rock 'n' Roll Aggregates Ltd. and
Rolling Mix Concrete (BC) Ltd.

Plaintiffs

And:

City of Prince George

Defendant

NOTICE OF APPLICATION

File No. 2020025
Roy J. Stewart Law Corporation
1057 3rd Avenue, Prince George, BC, V2L 3E3
250-960-2175