*Case Name:*

# Sex Party v. British Columbia (General Manager, Liquor Control and Licensing Branch)

**Between**
**The Sex Party, appellant (petitioner), and**
**The General Manager, Liquor Control and Licensing Branch, respondent (respondent)**

[2006] B.C.J. No. 1210

2006 BCCA 252

226 B.C.A.C. 195

150 A.C.W.S. (3d) 1106

Vancouver Registry No. CA033338

British Columbia Court of Appeal
Vancouver, British Columbia

**Newbury, Hall and Mackenzie JJ.A.**

Oral judgment: May 15, 2006.
Released: June 1, 2006.

(11 paras.)

*Administrative law -- Judicial review and statutory appeal -- When available -- Matters not subject to review -- Appeal from chambers decision that struck the appellant's application for judicial review of an opinion expressed by the Liquor Branch dismissed -- The appellant had inquired of the Liquor Branch whether a proposed event in a licensed establishment would be prohibited by the establishment's license -- There was no actual application by a licensed venue to hold the fund-raiser that required the Liquor Branch to determine whether it was permissible under the terms of its license -- Therefore, there was no foundation for a judicial review application.*

Appeal by Sex Party, a registered political party, from a decision by a chambers judge to strike their petition for judicial review. Sex Party planned a fundraising activity at a licensed venue. It sought to determine whether conditions to the venue's license would prohibit Sex Party if it wanted to include

sexually explicit aspects of an arts show at the fundraiser. Sex Party made a general inquiry to the Liquor Control and Licensing Branch as to whether the proposed erotic arts show would offend the regulations that governed a liquor license, and received a reply that the proposed erotic arts show appeared to be prohibited in a licensed establishment. The fundraiser was held as an unlicensed event. Sex Party then applied for judicial review, and asserted that the response to the inquiry was an exercise of statutory power. The chambers judge struck the application on the grounds that no decision had been made that was amenable to judicial review.

HELD: Appeal dismissed. There was no application by a licensed venue to hold the fundraiser that required the Liquor Branch to determine whether it was permissible under the terms of its license. Therefore, there was no foundation for a judicial review application.

**Statutes, Regulations and Rules Cited:**

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, s. 12

**Counsel:**

J.G. Ince: Counsel for the Appellant

B.A. Mackey: Counsel for the Respondent

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The judgment of the Court was delivered by

1 **MACKENZIE J.A.** (orally):-- The appellant, The Sex Party, is a registered political party under the B.C. ***Election Act***, R.S.B.C. 1996, c. 106.

2 Prior to the 2005 provincial election, the appellant planned a fundraising activity featuring a "facilitated discussion of sexual politics and sexuality" and an "erotic arts show" consisting of several installations. The appellant wished to host the event in a licensed venue where alcoholic beverages could be served. Its president, John Ince, became aware that licensed establishments had certain conditions placed on their licences and he wished to determine whether those conditions would prohibit the appellant from including the sexually explicit aspects of the arts show as part of the fundraising event. He began an exchange of correspondence with employees of the provincial Liquor Control and Licensing Branch (the "Liquor Branch") in which he described the proposed erotic arts show and enquired whether they would offend the regulations governing the liquor licence of the establishment under the ***Liquor Control and Licensing Act***, R.S.B.C. 1996, c. 267. Mr. Ince received replies from the deputy general manager and the manager stating that the proposed erotic art installations appeared to be prohibited in a licensed establishment.

3 Mr. Ince then enquired of the deputy general manager about a special event liquor licence of an unlicensed venue. She responded, noting s. 12 of the Act which provides that the general manager may impose terms and conditions on a special occasion licence, and stating that the sexually explicit acts as described by Mr. Ince would not be permitted. The reply discussed other aspects of

the proposed event that could come within the description of contact sports. It concluded by indicating the details that would be required in an application for a special occasion licence.

**4** The appellant did not submit an application for a liquor licence to the Liquor Branch and the appellant's fundraiser proceeded as an unlicensed event.

**5** The appellant's petition for judicial review followed. The Attorney General applied to strike the petition under Rule 19(24) of the Supreme Court Rules on the ground that no decision had been made that would be amenable to judicial review. The chambers judge granted the application and struck the petition. She concluded that there had been no exercise of a "statutory power" or "statutory power of decision" as required for judicial review pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, relying on ***Hayes v. British Columbia (Minister of Labour)***, [2000] B.C.J. No. 2423, paras. 16 to 22, and ***Thorne's Hardware Ltd. v. The Queen*** (1983), 143 D.L.R. (3d) 577 (S.C.C.) at 580.

**6** The appellant submits that the chambers judge erred by limiting her consideration to the correspondence related to the special occasion licence and failed to address the earlier correspondence related to holding the fundraiser at an already licensed establishment. It submits that the Liquor Branch's response to that earlier inquiry was the exercise of a statutory power of decision amenable to judicial review.

**7** In my view, that submission involves the same fatal weakness, namely that there was no application by a licensed establishment to hold the fundraiser that would require the Liquor Branch to decide whether it would be permitted under the terms of its licence and thereby establish a foundation for judicial review. The appellant's inquiry was general and not made on behalf of any particular establishment. The general manager of the Liquor Branch clarified the position explicitly: "As a decision of the General Manager is specific to Licensees, my letter to you does not constitute a decision. The letter was intended to clarify the terms and conditions that apply to Licensees." That letter stated:

> ... a licensee must ensure that any event held within a licensed establishment complies with the *Liquor Control and Licensing Act*, regulations, and terms and conditions of the licence. Two of the specific events you proposed appear to be prohibited in a licensed establishment. Licensees who are considering hosting your proposed event will need to ensure they are in compliance with both their terms and conditions of the licence and with the relevant municipal bylaws regarding entertainment.

[Emphasis added.]

The correspondence moved on to the inquiry about a special occasion licence and the appellant did not further pursue holding the event at a licensed establishment.

**8** In my view, there was no statutory power of decision exercised at any stage of the correspondence between Mr. Ince and the Liquor Branch and there was therefore no foundation for judicial review. I would therefore dismiss the appeal.

**NEWBURY J.A.**:-- I agree.

**HALL J.A.**:-- I agree.

**NEWBURY J.A.**: Thank you, gentlemen. The appeal is dismissed.

MACKENZIE J.A.

cp/i/qw/qlemo

*Case Name:*

# Stephen v. British Columbia (Ministry of Children and Family Development)

**Between**
**Garnet Stephen, Plaintiff**
**Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Children and Family Development, and as represented by the Ministry of the Attorney General and British Columbia Human Rights Tribunal and British Columbia Human Rights Coalition and Heather MacNaughton, Judy Parrack, Barbara Humphreys, Lindsay M. Lyster, Toney Beharrel, Catherine Hunt, Lisa Lee, Linda Thayer, Christopher Cox, Mona Woodfine, Wanda Smith, Colleen Johnson, James MacNamera, Bruce McNeill, Audrey Lieberman, Les Boon, Amarjit Sahota, Kehmal Kahn and Alison MacPhail, Defendants**

[2008] B.C.J. No. 2347

2008 BCSC 1656

Docket: S18607

Registry: Chilliwack

British Columbia Supreme Court
Chilliwack, British Columbia

**B.M. Joyce J.**

Heard: June 17, 2008.
Judgment: December 1, 2008.

(81 paras.)

*Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Frivolous, vexatious or abuse of process -- Application by the defendants for dismissal of Stephen's action allowed -- Stephen filed several complaints with the Human Rights Tribunal, all of which were de-*

*cided against him -- Stephen then commenced an action against the defendants, including the Tribunal, alleging many Criminal Code offences -- However, the defendants could not have responded in any meaningful way to Stephen's prolix statement of claim -- Also, it was plain and obvious that Stephen's claims could not succeed -- Furthermore, the action was frivolous, vexatious and an abuse of process -- Rules of Court, Rule 19(24).*

*Human rights law -- Enforcement and procedure -- Human rights tribunals and boards of inquiry -- Miscellaneous issues -- Application by the defendants for dismissal of Stephen's action allowed -- Stephen filed several complaints with the Human Rights Tribunal, all of which were decided against him -- Stephen then commenced an action against the defendants, including the Tribunal, alleging many Criminal Code offences -- However, the defendants could not have responded in any meaningful way to Stephen's prolix statement of claim -- Also, it was plain and obvious that Stephen's claims could not succeed -- Furthermore, the action was frivolous, vexatious and an abuse of process -- Rules of Court, Rule 19(24).*

Application by the defendants for dismissal of Stephen's action. In January 2001, Stephen and his wife applied to the Ministry of Children and Family Development to adopt or foster children. However, they were ultimately unsuccessful at qualifying. In February 2005, Stephen began filing complaints with the British Columbia Human Rights Tribunal. In the complaints, Stephen alleged that the defendants discriminated against him. All of the Tribunal's decisions went against Stephen. Rather than seeking judicial review of any of the decisions, Stephen commenced an action against the defendants for a declaration of remedies and compensation for damages, mitigation and costs of the action. Stephen listed 20 causes of action, including a large number of Criminal Code offences such as fabricating evidence, conspiracy and obstructing justice. All of the defendants applied for dismissal of the action on the basis that the statement of claim did not disclose a reasonable cause of action and was frivolous, vexatious or an abuse of process.

HELD: Application allowed. The defendants could not have been expected to respond in any meaningful way to Stephen's statement of claim, as it was so prolix. Also, it was plain and obvious that Stephen's claims could not succeed. Furthermore, the action was frivolous and vexatious as well as an abuse of process. Therefore, Stephen's action was dismissed as against all of the defendants.

**Statutes, Regulations and Rules Cited:**

Administrative Tribunals Act, SBC 2004, CHAPTER 45, s. 9, s. 30, s. 50(4), s. 56(1), s. 56(2), s. 56(3), s. 57, s. 61(2)(f)

Criminal Code, R.S.C. 1985, c. C-46,

Freedom of Information and Protection of Privacy Act, RSBC 1996, CHAPTER 165,

Human Rights Code, RSBC 1996, CHAPTER 210, s. 7, s. 7(2), s. 8, s. 22, s. 27(1)(a), s. 27(1)(b), s. 27(1)(c), s. 27(1)(d), s. 27(1)(g), s. 31(1), s. 32, s. 43

Judicial Review Procedure Act, RSBC 1996, CHAPTER 241, s. 2(1)

Rules of Court, Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(c), Rule 19(24)(d)

**Counsel:**

The plaintiff appearing in person.

Counsel for Her Majesty the Queen in Right of the Province of British Columbia and Catherine Hunt, Lisa Lee, Linda Thayer, Christopher Cox, Mona Woodfine, Wanda Smith, Colleen Johnson, James MacNamera, Bruce McNeill, Audrey Lieberman, Les Boon, Amarjit Sahota, Kehmal Kahn and Alison MacPhail: K.A. Horsman.

Counsel for the Human Rights Tribunal and Heather MacNaughton, Judy Parrack, Barbara Humphreys, Lindsay M. Lyster and Toney Beharrel: D.E. Paluck.

Counsel for the British Columbia Human Rights Coalition: E.J.A. Stanger.

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**Reasons for Judgment**

B.M. JOYCE J.:--

## I. INTRODUCTION

1 In or about January 2001 the plaintiff and his wife applied to the Ministry of Children and Family Development ("MCFD") to adopt or foster children who were in the custody of MCFD. Ultimately, they were unsuccessful in qualifying to adopt or foster children through MCFD.

2 Starting in February 2005, the plaintiff filed a number of complaints with the British Columbia Human Rights Tribunal (the "Tribunal") and brought a number of applications in connection with these complaints. The Tribunal released eight decisions in total dealing with the plaintiff's complaints and applications, all of which went against the plaintiff.

3 The plaintiff did not seek judicial review of any of the Tribunal's decisions. Instead, on January 24, 2008 he commenced this action. In his writ of summons, the plaintiff describes his claim as one for "declaration of remedies and compensation for damages, mitigation costs and costs of this action".

4 The defendants fall into three categories as described below:

(a) The "Crown Defendants", comprised of:

(i) Her Majesty the Queen in Right of the Province of British Columbia;

(ii) Catherine Hunt, Lisa Lee, Linda Thayer and Audrey Lieberman, who are all lawyers who are or were employed by the Ministry of the Attorney General and who were involved with the plaintiff's various complaints and applications to the Tribunal;

(iii) Christopher Cox, who was a legal assistant employed by the Ministry of the Attorney General and who also was involved in the Tribunal matters; and

(iv) Mona Woodfine, Wanda Smith, Colleen Johnson, James MacNamera (properly spelled MacNamara), Bruce McNeill, Les Boon, Amarjit Sahota, Kehmal Khan and Alison MacPhail, who are or were employees of MCFD and who had some involvement in the events that underlay the plaintiff's human rights complaints;

(b) The "Tribunal Defendants", comprised of:

(i) the British Columbia Human Rights Tribunal;
(ii) Heather MacNaughton, who was the chair of the Tribunal at all relevant times; and
(iii) Judy Parrack, Barbara Humphreys, Lindsay Lyster and Toney (properly spelled Tonie) Beharrel, who were members of the Tribunal and were involved in dealing with the plaintiff's various complaints and applications.

(c) The British Columbia Human Rights Coalition, referred to as the "Coalition Defendant"

**5** All three sets of defendants apply for dismissal of the plaintiff's action. The Crown Defendants apply under Rule 19(24)(a), (b) and (d) on the basis that the statement of claim does not disclose a reasonable claim, is frivolous and vexatious and is otherwise an abuse of process. The Crown Defendants also seek costs.

**6** The Tribunal Defendants also apply under Rule 19(24)(a), (b) and (d). Further, they rely on s. 56(2) of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 ("***ATA***"). The Tribunal Defendants do not seek costs.

**7** The Coalition Defendant seeks dismissal under Rule 19(24)(a) on the ground that the statement of claim discloses no reasonable claim and also seeks costs.

## II. FACTUAL BACKGROUND

### A. The Complaints and Corresponding Applications

#### *1. Complaint #1 (Case #2557)*

**8** The plaintiff filed his first complaint with the Tribunal on February 25, 2005. The named respondents included the defendants Bruce McNeill, Mona Woodfine and Wanda Smith. The plaintiff alleged that the respondents discriminated against him based on his ancestry, place of origin, marital status, family status, physical disability, mental disability and sex in the provision of a service, contrary to s. 8 of the ***Human Rights Code***, R.S.B.C. 1996, c. 210 (the ***Code***). He also filed a representative complaint on behalf of all persons who applied to MCFD to adopt or foster children and who

were subject to a Structured Analysis Family Evaluation Tool ("SAFE Tool") as a part of the assessment of such application.

**9** On April 14, 2005 the plaintiff filed another complaint form, amendment forms and further particulars, in which he asserted that he had been discriminated against in respect of a publication of certain documents circulated amongst employees at MCFD, contrary to s. 7 of the ***Code***.

**10** On June 29, 2005 the respondents filed an application to dismiss the complaint under s. 27(1) of the ***Code***. Section 27(1) provides, in part:

> (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
> (c) there is no reasonable prospect that the complaint will succeed;
> (d) proceeding with the complaint or that part of the complaint would not
>
> ...
>
> (ii) further the purposes of this Code;
>
> ...
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

**11** The defendant Audrey Lieberman was counsel for the respondents with respect to the application to dismiss Complaint #1.

**12** On January 25, 2006, [2006] B.C.H.R.T.D. No. 41, the defendant Judy Parrack, the Tribunal member who had been designated to hear the application, issued her decision dismissing Complaint #1. She concluded that there was no reasonable prospect that the complaint under s. 7 of the ***Code*** would succeed because the documents and correspondence complained of did not fall within the description of the material that must not be published and, even if it did, it constituted a private communication under s. 7(2) and was exempt from the prohibition.

**13** Ms. Parrack concluded that the plaintiff's allegations did not constitute an act of discrimination prohibited under s. 8 of the ***Code*** and that there was no reasonable prospect that his complaint would succeed.

**14** With respect to the use of the SAFE Tool, which is the subject matter of much, but not all, of the plaintiff's complaints, Ms. Parrack said:

> [70] The MCFD is charged with placing children in foster care and to find adoptive parents for children. It is in the best position to determine which tools are appropriate in making such decisions and it has chosen to use the SAFE Tool. The questions asked in the SAFE Tool are extensive and used to identify issues that the MCFD may want to canvass further with a prospective parent. I accept, as asserted by the respondents that when the SAFE Tool identifies a concern, it is discussed with the prospective parent. This was the process undertaken with Mr. Stephen ...
>
> ...
>
> [76] The fact that Mr. Stephen does not like the SAFE Tool or believes that there are other better methods for screening potential parents, does not lead to the conclusion that the SAFE Tool is discriminatory. It is not open to the Tribunal to decide which screening tool will be used by MCFD. MCFD is entitled to pick those tools and administer them in a manner that is not discriminatory, and which ensures that the appropriate individuals are chosen to foster and/or adopt children. This is a serious and difficult task and the MCFD is best situated to determine the tools that it will use in that process.

***2. Complaint #2 (Case #2595)***

**15** The plaintiff filed a second complaint with the Tribunal on March 8, 2005. The named respondents included the defendants Colleen Johnson, Wanda Smith and James MacNamara. The grounds for this complaint also related to the manner in which the plaintiff's application to adopt or foster children was dealt with by MCFD.

**16** MCFD raised a preliminary objection to the complaint on the ground that it was filed out of time. The plaintiff alleged that the acts of discrimination occurred in February, March and April 2003 and in April and May 2004, more than six months before the complaint was made. Under s. 22 of the ***Code*** a complainant must file his complaint within six months of the alleged acts of discrimination. The Tribunal has the discretion to accept late-filed complaints if it determines that it is in the public interest to do so and that no substantial prejudice will result to anyone because of the delay.

**17** The plaintiff applied to have his complaint accepted for filing even though it was filed out of time. The defendant Lisa Lee was counsel for the respondent on that application.

**18** On June 20, 2005 Tribunal member Lindsay M. Lyster issued a decision in which she concluded it would not be in the public interest to accept the late filed complaint.

***3. Complaint #3 (Case #2928)***

**19** On June 23, 2005 the plaintiff filed a third complaint, along with a representative complaint, raising allegations that were essentially the same as those contained in Complaint #2. The plaintiff also alleged retaliation by the respondents contrary to s. 43 of the ***Code*** asserting that the fact that the respondents in the complaint were represented by lawyers employed in the Legal Services Branch of the Ministry of Attorney General amount to retaliation against him. The named respondents included the defendants Colleen Johnson, Wanda Smith and James MacNamara.

**20** The respondents applied for an order that the complaint not be accepted for filing on the ground, amongst others, that it was *res judicata*. The defendant Audrey Lieberman was counsel for the respondents on that application.

**21** On March 2, 2006, [2006] B.C.H.R.T.D. No. 123, Tribunal member Abraham R. Okazaki issued a decision in which he concluded that, with the exception of the retaliation claim, the complaint was barred on the ground of *res judicata*.

**22** On July 18, 2006, [2006] B.C.H.R.T.D. No. 343, Tribunal member Tonie Beharrel issued a decision dismissing the retaliation claim under s. 27(1)(b) on the basis that the complaint did not allege any acts or omissions that could contravene the ***Code***.

### *4. Complaint #4 (Case #3357)*

**23** The plaintiff filed a fourth complaint on November 14, 2005. On December 19, 2005, Tribunal Chair Heather McNaughton advised the plaintiff in writing that the Tribunal refused to accept the complaint because it did not allege facts that, if proven would amount to a breach of the ***Code***.

### *5. Decisions regarding other applications by the plaintiff and respondents*

**24** The plaintiff filed three applications in connection with Complaint #1. On July 27, 2005 he filed an application for costs against the respondents on the ground that they had engaged in improper conduct. On August 4, 2005 he filed a further application for costs, together with an application that the Tribunal initiate contempt proceedings against the respondents based on his assertion that they committed perjury and disclosed privileged information. On September 1, 2005 the plaintiff filed a further application seeking costs and an order initiating contempt proceedings.

**25** On January 25, 2006, [2006] B.C.H.R.T.D. No. 42, Tribunal member Judy Parrack issued a decision dismissing each of these applications. She found that there was nothing before her that would suggest that the respondents engaged in the type of conduct that would attract an order for costs. In dealing with this issue, she said:

> [12] First, the respondents are entitled to set out their versions of the events and to make submissions in support of their application to dismiss. Mr. Stephen's disagreement with those submissions does not mean that they were made in bad

> faith or for improper motives. They were made to support an application and the *Rules* entitle them to make such applications.
>
> [13] Second, Mr. Stephen alleges that the respondents filed "perjured affidavits". This is a very serious allegation. The affiants filed sworn statements in support of the respondents' application to dismiss. Because Mr. Stephen takes issue with the version of events set out in those affidavits and/or the statements made with respect to the processes followed by the MCFD, does not made (sic) those statements perjured statements. Mr. Stephen is entitled to his version of events but this does not mean that the version put forward by the affiants is based on misleading or false information. If Mr. Stephen had concerns about the content of those affidavits he could have filed an application to have those affiants cross-examined pursuant to Rule 19(5)(d). He did not do so and he cannot now rely on what he perceives to be misinformation or what he says are "perjured affidavits" to support his claim for costs.
>
> [14] Mr. Stephen carefully reviewed the statements and submissions of the respondents in their application to dismiss the complaint. He was provided with full opportunity to set out his version of what happen (sic) and to correct and/or clarify what he understood to be inaccurate statements. It is clear that the parties have a different version of the events, a different interpretation of the meaning and application of the SAFE Tool, as well as many other disagreements. However, such disagreements are a common feature of litigation processes and do not constitute improper conduct.

**26** Tribunal member Parrack found nothing further in the application of August 4, 2005 in support of an application for costs.

**27** With regard to the application to initiate contempt proceedings, Tribunal member Parrack said:

> [27] ... Mr. Stephen says that contempt proceedings should be initiated because the respondents have committed perjury and have disclosed information exchanged between the parties in the course of settlement discussions.
>
> [28] Contempt proceedings are very serious and should only be considered in the clearest of circumstances. There is nothing before me that suggests that the respondents have engaged in contemptuous conduct. I am not prepared to rely on Mr. Stephen's bald assertions that they have. I do not accept that the respondents have provided perjured statements to the Tribunal or that they have disclosed information containing settlement discussions. I am not prepared to entertain any application to commence contempt proceedings based on such unsubstantiated information.

**28** Finally, Tribunal member Parrack found nothing additional in the plaintiff's application filed September 1, 2005 to justify an order for costs or an order initiating contempt proceedings.

**29** At one point in the proceedings the respondents in Cases #2557 and #2595 applied for an extension of time to file submissions. On August 15, 2005, Tribunal member Barbara Humphreys granted those applications.

**30** The plaintiff at various times requested assistance from the Coalition but these requests were denied.

## III. THE PLEADINGS

**31** The endorsement on the plaintiff's writ of summons issued January 24, 2008 states that the plaintiff's claim is for "declaration of remedies and compensation for damages, mitigation costs and costs of this action". It goes on to list twenty "causes of action", consisting primarily of a number of ***Criminal Code*** offences the defendants were alleged to have committed, including:

(a) fabricating evidence;
(b) misconduct of officers executing process;
(c) being an accessory after the fact;
(d) being a party to an offence (not specified);
(e) conspiracy;
(f) uttering forged documents;
(g) fraud;
(h) publishing a libel;
(i) wilfully disobeying a number of specified statutes;
(j) obstructing justice;
(k) perjury;
(l) committing fraud upon the government;
(m) breach of trust by public officers;
(n) bribery of officers; and
(o) negligence by an organization.

**32** In addition, the plaintiff alleged the following causes of action:

(a) making findings of fact based on no evidence or that are otherwise unreasonable in light of all the evidence;
(b) exercising discretion in a patently unreasonable way by exercising it arbitrarily, in bad faith or for improper purpose and basing decisions entirely or predominantly on irrelevant factors or by failing to take statutory requirements into account;
(c) unfairly applying the rules of natural justice and procedural fairness;
(d) negligence; and
(e) wilfully concealing material facts.

**33** In a draft amended writ of summons, dated May 20, 2008 and not yet filed, the plaintiff has elaborated somewhat on the nature of his claims, alleging that he and his spouse were:

subjected to years of extensive (documented, provable and/or confessed) acts and omittions (sic) of gross: breaches of duty, breaches of trust, negligence, incompetence (sic), bad faith, misconduct, corruption, scandal, torts and criminal conduct by defendants: which resulted and/or continues to result in wrongful:

a) losses of income and benefits, damages to livelihood and lifestyle, unwarrented (sic) and/or unfair expenses, and
b) losses of right or privilage (sic) and benefit to adopt children and/or foster children and/or otherwise care for children through programs of defendants, and
c) losses and/or contraventions of plaintiff rights and fundamental freedoms guaranteed by: the Canadian Charter of Rights and Freedoms, Rule of Law, legislated enactments, statutes and codes, and
d) losses and/or alienation of affection and/or disruption of plaintiff: family, friends, social circles, and
e) long term emotional distress to plaintiff and spouse, and
f) damages to health, welfare and dignity of plaintiff and spouse.

**34** The plaintiff goes on to allege in the amended writ that the Tribunal breached its duty under s. 30 of the ***ATA*** and that the Chair of the Tribunal breached her duty under s. 9 of the ***ATA***. He also alleges that, in bad faith or through gross negligence, the Ministry of Attorney General, the Tribunal, its members and its chair "breached their duties, responsabilities (sic) and legal obligations through intentional and/or negligent use of some or all of" the various offences that I have set out in paragraph 31 above.

**35** In his amended writ the plaintiff further alleges that the Coalition Defendant breached its duty and obligations by:

(a) judging the merits of complaints;
(b) acting in a conflict of roles through creation of bias insecurity;
(c) dismissing meritorious complaints;
(d) duplicating processes, such as deciding the *prima facie* case of discrimination on intake after the Tribunal has already made that decision in accepting a case for filing;
(e) disregarding the importance of tribunal interpretation;
(f) inflicting unwarranted delays in processing; and
(g) failing to provide assistance and representation to those who need help with provincial human rights complaints, including those who meet intake criteria.

**36** The amended writ goes on to repeat allegations of breach of various provisions of the ***Criminal Code*** by "the Ministry of Attorney General and named crown staff", and "the Ministry of Children and Family Development, deputy minister and named crown staff".

**37** On February 26, 2008 the plaintiff filed a statement of claim consisting of 158 numbered, single spaced paragraphs running 57 unnumbered pages. The statement of claim is prolix, exceedingly difficult to follow and largely incomprehensible. The plaintiff begins by referencing Case #2557. He alleges that on January 25, 2006 the Tribunal Defendants "in bad faith, negligently, without cause, and in contravention of Tribunal Directives: wrongfully dismissed" his complaint.

The plaintiff then alleges that on January 25, 2006 the Tribunal Defendants "in bad faith, negligently, without just cause and wrongfully" dismissed, covered up, and lied about the various applications that were dealt with by the decision issued on that date. The plaintiff alleges this wrongdoing was carried out by a number of different means, including:

* Fabrication of evidence, which he details in 50 "counts";
* Being accessories after the fact or parties to offences, which he details in 3 "counts";
* Conspiracy;
* Uttering a forged document;
* Fraud;
* Libel, which he details in 8 "counts";
* Disobeying statutes, namely

    o the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165 ("***FOIPPA***") which is detailed in 3 counts, and

    o the ***Code***, which is detailed in 6 counts;

* Making findings of fact "based on no evidence and that is otherwise unreasonable in light of all the evidence";
* Exercising discretion in patently unreasonable way;
* Breach of the rules of natural justice and procedural fairness.

**38** Still dealing with Case #2557, the plaintiff next makes allegations against Crown Defendants, including allegations of perjury, conspiracy to commit perjury and fabrication of evidence and alleges that Tribunal defendants are guilty of these acts as accessories after the fact. The plaintiff's statement of claim goes on for pages detailing these alleged wrongdoings.

**39** At paragraph 120 of the statement of claim the plaintiff turns to Case #3357 and his allegations against the defendant MacNaughton, including breach of duty, failure to perform a legal obligation, fraud and professional negligence, exercising her discretion in a patently unreasonable way and breach of the rules of natural justice and of the obligation of procedural fairness.

**40** At paragraphs 141 to 148 the plaintiff sets out his claim against the Coalition Defendant, alleging that it breached a duty owed to him to provide assistance in the conduct of his complaints to the Tribunal.

**41** At paragraphs 149 to 152 the plaintiff refers to Case #2928 and alleges that certain of the Crown defendants "in bad faith, negligently, without just cause, and in contravention of tribunal directives" wrongfully dismissed his complaint and "in bad faith, negligently, without just cause" wrongfully dismissed his application for costs.

**42** At paragraphs 153 to 155 the plaintiff refers to Case #2595 and alleges that the Tribunal Defendants "in bad faith, negligently, without just cause and in contravention of Tribunal directives" wrongfully dismissed his complaint.

**43** Finally, at paragraphs 156 to 158 the plaintiff claims that certain of the Crown defendants at the MCFD conspired to persuade his spouse to leave him, thereby inflicting emotional distress to the plaintiff and his spouse.

**44** The prayer for relief in the statement of claim seeks, amongst other things

* Various declarations pursuant to the ***Judicial Review Procedure Act***; R.S.B.C. 1996, c. 241 ("***JRPA***");
* Orders under the ***ATA*** and the ***Criminal Code*** for "contempt relief" against a number of the defendants;
* An order under the ***JRPA*** setting aside the decisions of the Tribunal in Cases #2557, #2928, #2595 and #3357;
* An order against the Tribunal under the ***Code*** awarding the plaintiff the sum of $25,000 as compensation for injury to dignity, feelings and self-respect;
* An order under the ***ATA*** that the appointing authority terminate the appointments of the defendants MacNaughton and Parrack to the Tribunal;
* A declaration that the defendant Tribunal and the defendants MacNaughton and Parrack contravened ***FOIPPA***;
* An order under ***FOIPPA*** awarding the plaintiff the sum of $25,000 for offences by "service providers";
* An order awarding the plaintiff costs as advanced in his applications to the Tribunal;
* Various declarations of breach of duties owed by the defendants;
* An order awarding the plaintiff costs of mitigating losses relating to child care and parenting in the amount of $570,456;
* An order to establish a witness protection program to protect plaintiffs and their witnesses in Tribunal complaints from "further intimidation and/or retaliation from Government Defendants";
* General damages; and
* Costs.

## IV. LEGAL PRINCIPLES

**45** Rule 19(24) of the ***Rules of Court*** provides that:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,
(c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
(d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**46** The test to be applied in an application under Rule 19(24) was dealt with recently by our Court of Appeal in ***Young v. Borzoni***, 2007 BCCA 16, 64 B.C.L.R. (4th) 157. The facts of that case are complicated. The Youngs rented an apartment in Victoria from The Region Housing Corporation. The Youngs' neighbours complained about the smell of marihuana smoke emanating from the apartment. (Mr. Young was legally entitled to smoke marihuana because of a medical condition.) The Youngs were served with a notice terminating their tenancy and brought arbitration proceedings. The defendant Borzoni acted for the Capital Region in the arbitration hearings. The arbitrator held that the Capital Region had cause to terminate the tenancy and the Youngs applied for a review of the decision, which was denied. The Youngs then sought judicial review of the decisions of the arbitrators. They also brought a separate action against the Capital Region and the police alleging breaches of their right to grow and use marihuana. These proceedings were heard together. Borzoni acted for the Capital Region and the police in those proceedings, which were dismissed. After an unsuccessful appeal, the Youngs sought an order prohibiting the Capital Region from proceeding with possession of their residence. These efforts were also unsuccessful. The Youngs then commenced a defamation action against several former tenants. They also commenced an action against Borzoni claiming he owed them a duty of care as non-client third persons.

**47** Borzoni applied to have the action against him dismissed on the grounds that the statement of claim disclosed no cause of action and that the action was frivolous, vexatious and an abuse of process. The chambers judge concluded that the action was merely an attempt to re-litigate the eviction issue and that the action was unnecessary, scandalous, vexation and frivolous. The Youngs' appeal was dismissed.

**48** In relation to Rule 19(24)(a), the Court said at paras. 18-19:

> [18] Rule 19(24)(a) provides that the court may strike out the whole or any part of a pleading on the ground that it discloses no reasonable claim and may order the proceedings to be dismissed. The appellants argue that Bouck J. erred when he dismissed their claims in tort against Mr. Borzoni.
>
> [19] The Supreme Court of Canada set out in ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 the test for striking out a statement of claim on the basis that it disclosed no reasonable claim:
>
> > [14] ... a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, rule 19(24)(a) of the *Rules of Court*, B.C. Reg. 221/90, states that

> a court may strike out a pleading on the ground that it discloses no reasonable claim.
>
> [15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ....
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether ... it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

**49** The principle that in an application under Rule 19(24)(a) the facts alleged in the statement of claim must be assumed to be true is not absolute and unqualified. In ***Borzoni***, the Court said at para. 30 that "it is not fundamentally wrong to look behind the allegations in some cases" and that in some cases it is necessary to subject the allegations in the pleadings to "sceptical analysis in order to determine their true character". Thus, in ***Borzoni***, at paras. 31-32 Thackray J.A., giving the judgment of the court, concluded with respect to the pleadings:

> [31] Therefore, in my opinion, considering the circumstances, litigation history and allegations in the case at bar it is appropriate to subject them to a sceptical analysis. Paragraphs 40, 41, 45, 46 and 47 of the statement of claim allege, against all of the defendants, intolerance, deceit, harassment, intimidation, writing malicious letters, falsifying documents and, in general, in disrupting the appellants' lives. They include an allegation that all of the defendants allowed, encouraged and influenced some of the Youngs' neighbours in "attempts to collide with the Plaintiffs' moving car, vandalism to the Plaintiff's property, uttering threats, trespassing, and watching of the Plaintiffs and their home." Paragraph 63 alleges that the "corporate" defendants, "under advice of Defendant Mr. Borzoni, fabricated and falsified documents destined" for the Tribunal and the Supreme Court.
>
> [32] Most of these wide and sweeping allegations would not, even if true, ground an action for intentional infliction of nervous shock or for negligence by way of a

> breach of duty. However, particularly in that they are directed at all defendants, which includes a police department, a Regional District, corporations and individuals, the allegations can only be viewed as wild speculation. As said by Mr. Justice McKenzie, they are "only language, not reality." More substantively it can be said, paraphrasing from ***Operation Dismantle*** [***v. The Queen***, [1985] 1 S.C.R. 441], that they are but speculation and it is not required that they be taken as true.

**50** In ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*** (1999), 36 C.P.C. (4th) 266 (BCSC) at para. 47, Romilly J. summarized what must be established in order to find that pleadings are "unnecessary, scandalous, frivolous or vexatious" under Rule 19(24)(b):

> Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (BCSC). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 (BCCA) at 147. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons (British Columbia) v. Cleland* (1968), 66 W.W.R. 499 (BCCA). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan* (December 2, 1991), Doc. Vancouver C913631 (BCSC). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber* (1920), 28 B.C.R. 39 (BCCA). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.* (July 3, 1992) Doc. Prince George 20714 (B.C. Master).

**51** In determining whether proceedings constitute an abuse of process, the court may consider whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression. In particular, it is an abuse of court process to use a civil action to collaterally challenge decisions of an administrative tribunal that are otherwise subject to a statutory right of appeal or review: ***Borzoni*** at paras. 65-66; ***Gemex Developments Corp. v. Coquitlam (City)***, 2002 BCSC 412; ***Varzeliotis (c.o.b.) v. British Columbia***, 2007 BCSC 620.

**52** In ***Berscheid v. Ensign***, [1999] B.C.J. No. 1172 (S.C.) at para. 51, the collateral principle was described in the following terms:

> As a result of this distinction between judicial review and civil litigation, a party cannot seek a remedy statutorily provided for by judicial review through civil proceedings. Such an evasion of the judicial review process is known as a collateral attack and is prohibited.

**53** In ***Varzeliotis (c.o.b.) v. British Columbia***, Mr. Justice Macaulay struck an action against the Province and Privacy Commissioner in which the plaintiff alleged he was denied various per-

sonal rights under ***FOIPPA***. In dismissing the action under Rule 19(24), Mr. Justice Macaulay stated at paras. 42-43:

> [42] Instead of invoking the judicial review procedure available to him, the plaintiff has chosen to commence an action against the commissioner in this court to achieve his result. Every substantive issue raised in the pleadings co have been addressed under the JRPA including any allegation that the comm sioner lacked impartiality in performing his statutory duties. As well, it is op a court on judicial review to order the commissioner to carry out his duty if h failed to do so.
>
> [43] This alone is sufficient, in my view, to strike the statement of claim as a abuse of process.

## V. DISCUSSION

**54** I am satisfied that the statement of claim is so prolix that it could not stand regardless of whether the plaintiff might have a reasonable cause of action against any of the named defendan In my view, the defendants could not possibly be expected to be able to respond to this documer any meaningful way. On the basis of the prolix nature of the document alone, it ought to be struc

**55** The defendants do not seek simply to have the statement of claim struck because it is so lix as to be incomprehensible. They submit that the proceedings should be dismissed in their en- tirety.

**56** For the reasons that follow, I am satisfied that the defendants are entitled to have the plai tiff's action dismissed. I will deal with the claims against each class of defendants separately.

### A. The Claim against the Crown Defendants

**57** In my view, the plaintiff's claims for relief under the ***JRPA***, including declarations that th decisions of the Tribunal contained errors of fact or law or both, were patently unreasonable and made in breach of the rules of natural justice and obligation of procedural fairness, must be dis- missed. They must be dismissed, firstly because it is not open to the plaintiff to seek relief under ***JRPA*** in an action. Under s. 2(1) of the ***JRPA***, an application for judicial review must be brought petition.

**58** Even if this Court were to allow the action to proceed, despite such a procedural flaw, the time limit for bringing such an application in respect of the decisions of the Tribunal has expired. Under s. 57 of the ***ATA***, which applies to the Tribunal by virtue of s. 32 of the ***Code***, an applicatio for judicial review must be brought within 60 days of the date the challenged decision was issued The Tribunal advised the plaintiff, in February 2006, of his right to seek judicial review from Tri- bunal decisions and put the plaintiff on notice of the 60 day time limit.

**59** I am also satisfied that the action must be dismissed as against the Crown Defendants for reasons that go beyond the matter of incorrect procedure and expiration of the limitation period. I my view, it is plain and obvious that the plaintiff's claim cannot succeed and that the action should be dismissed under Rule 19(24)(a). Furthermore, I am satisfied that the action is scandalous, frivo lous and vexatious within the meaning of those terms as they are used in Rule (19)(24)(b) and is a abuse of process within the meaning of Rule 19(24)(d).

**60** The plaintiff makes wide-sweeping, inflammatory accusations of criminal conduct against the defendants globally, including the Crown Defendants. These include allegations of conspiracy, forgery and perjury. In my view, the situation here is similar to that in ***Borzoni*** and given the history of these matters, I am of the opinion that I am entitled to subject them to a sceptical analysis. In my view, I am not required to assume that these bald allegations are true.

**61** Furthermore, I agree with counsel for the Crown defendants, who in her written submissions writes:

> ... even if the allegations in the Statement of Claim as a whole were presumed to be true, they do not disclose any comprehensible civil cause of action against the Crown Defendants, or any material facts that would support a cause of action. The crux of the Plaintiff's complaints is his dissatisfaction with the outcome of the Plaintiff's numerous complaints to the Tribunal. This dissatisfaction does not translate into viable civil cause of action against either the individuals to whom the Plaintiff's complaints were directed, or the legal staff who defended those individuals.

**62** The plaintiff submits that in this action he is not seeking to litigate matters that were determined in the applications. In his affidavit filed in response to the motion, the plaintiff says that his cause of action relates to:

> breaches of duty, failures to perform legal obligations, negligent supervision, violations or invasions of rights: (sic) and torts including: invasion of privacy, fraud, slander, libel, negligence, intentional infliction of emotional distress, alienation of affection, procedural unfairness and perjury

**63** In my opinion, the use of these words does not change the essential character of the plaintiff's complaint against the defendants. He believes that he was wronged by the decisions that were made against him in the proceedings in which the defendants participated in one way or another. There was another forum for challenging those decisions but the plaintiff did not avail himself of it. He now seeks retribution against the defendants because they were involved in a process that led to a result that he does not accept.

**64** I consider that his claim is bound to fail and that the defendants are entitled to have it dismissed at this stage.

**B. The Claim against the Tribunal Defendants**

**65** The Tribunal is an independent quasi-judicial tribunal constituted under s. 31(1) of the ***Code***. It has exclusive jurisdiction to adjudicate complaints of discrimination filed under the ***Code***. Its mandate encompasses all aspects of the intake, processing and adjudication of human rights complaints that are filed under the ***Code***. The Tribunal has the statutory power to make decisions whether to accept complaints that are filed with it and whether to dismiss complaints that do not merit the time and resources of a hearing.

**66** The Tribunal's involvement with the plaintiff was in respect of the discharge of its statutory mandate and the involvement of the chair and other members of the Tribunal was in respect of the discharge of their statutory duties.

**67** In my opinion the plaintiff's claims against the Tribunal and its members ought to be dismissed under Rule 19(24) for the same reasons that I have discussed in relation to the Crown Defendants. The plaintiff has made bald assertions of violations of the ***Criminal Code*** and other statutes and then asserted that somehow they give rise to liability in tort. The plaintiff has not pleaded a proper factual basis for any known cause of action; rather, he has simply stated conclusions of law as if they were facts and claimed that he is entitled to various remedies.

**68** The plaintiff's claim that the Tribunal breached provisions of ***FOIPPA*** by publishing its decisions is answered by s. 50(4) and 61(2)(f) of the ***ATA***, which apply to the Tribunal by virtue of s. 32 of the ***Code***. Section 50(4) requires the Tribunal to make its decisions accessible to the public and s. 61(2)(f) provides, in essence, that the substantive provisions of the ***FOIPPA*** do not apply to its decisions to which public access is provided.

**69** In addition, it is my view that the plaintiff's claim against the Tribunal Defendants cannot be maintained by virtue of s. 56 of the ***ATA***, which is made to apply by s. 32 of the ***Code***. Section 56 of the ***ATA*** provides:

> 56(1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.
>
> (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted
>
> (a) in the performance or intended performance of any duty under this *Act* or the tribunal's enabling *Act*, or
>
> (b) in the exercise or intended exercise of any power under this *Act* or the tribunal's enabling *Act*.
>
> (3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

**70** The Plaintiff does not plead facts in support of his bare assertions that the Tribunal Defendants acted in bad faith. The Plaintiff has only speculated that the outcomes of quasi-judicial functions which are unacceptable to him are attributable to bad faith. I agree with counsel for the Tribunal Defendants that this is not enough to strip an adjudicator of their immunity to suit under s. 56(3) of the ***ATA***.

**71** Finally, to the extent that the plaintiff may be attempting to rely on abuse or misfeasance in public office as a cause of action, the plaintiff has not pleaded the facts required to establish the elements of the tort. In ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 32 the Supreme Court of Canada described the requirements of this tort as follows:

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the

conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

**72** I agree with counsel for the Tribunal Defendants that the claims against them are an abuse of process in that the plaintiff is attempting to collaterally attack the Tribunal's decisions. The essence of the plaintiff's claims against the Tribunal Defendants is that due to some bias favouring the respondents, unfairness or breaches of natural justice in the handling of the plaintiff's human rights complaints, or errors in decision-making, or both, the Tribunal's decisions and the exercise of statutory powers and duties by the individual Tribunal members produced outcomes that were wrong. Substantively, the plaintiff's issues with the actions of the Tribunal Defendants rest on alleged errors that are, or were, judicially reviewable under the ***JRPA***.

**C. The Claim against the Coalition Defendant**

**73** The claim against the Coalition Defendant is contained in paragraphs 141 to 148 of the statement of claim, which read:

> (141) The defendant BC Human Rights Coalition was repeatedly contacted by Plaintiff for aid and representation for BCHRT cases; 2557, 2928, 2595 and 3357.
>
> (142) The Defendant was also repeatedly contacted by CLAS for help in these cases, non (sic) of the calls from CLAS were ever returned.
>
> (142) Although plaintiff met the criteria of the time for services: Initially the defendant refused to look at a case citing:
>
> (a) indication of conflict of interest in that they are funded by the defendant HQ/MAG who were representing some of the respondent (defendants) in the case. This provides evidence to political interference by the Ministry of Attorney General.
>
> (b) an improper un objective (sic) bias in favour of respondent defendants. This provides evidence to political interference from MCFD.
>
> (c) Merit, but the defendant was unable to give particulars or explanation. This provides evidence of making a false return to the process.
>
> (143) When the requirement for merit was dropped and it was only necessary to have the case accepted by the Tribunal: Plaintiff resubmitted requests for aid to the Coalition.
>
> (144) Numerous contacts to the defendant were made (sic) by Plaintiff and LSLAP, but defendant failed to respond.
>
> (145) The head of CLAS also contacted defendant and assured Plaintiff that defendant would contact Plaintiff immediately, however defendant again failed to make contact.
>
> (146) Some time later: plaintiff forwarded the case material from a new case to defendant who then asked for follow up material, Plaintiff complied with the understanding defendant had taken the case. Plaintiff never received further communication from the defendant.

(147) Plaintiff later contacted the Tribunal to learn the case had been dismissed without the plaintiff's knowledge. The Tribunal informed plaintiff that notice was sent to the defendant, however the defendant failed to follow up on it or follow up with a judicial review.

(148) The defendant was in breach of duty, failing to perform a legal obligation and negligent in supervising it's (sic) staff: denying plaintiff right to legal counsel from the BC Human Right Coalition/clinic.

**74** The plaintiff seeks the following relief against the Coalition Defendant:

(m) A declaration that the Defendant: BC Human Rights Coalition are negligent in placing themselves in a conflict of interest, failed to perform a legal obligation, are in breach of duty and/or conspiracy in failing to represent Plaintiff in BCHRT cases.

**75** In summary, the plaintiff alleges the Coalition Defendant breached a duty owed by it to the plaintiff to represent him in connection with his complaints to the Tribunal.

**76** To establish a common law duty of care, the plaintiff would have to prove that the Coalition Defendant had a sufficient relationship of proximity to him and that there was foreseeability of damage to him: ***Cooper v. Hobart***, 2001 SCC 79, [2001] 3 S.C.R. 537.

**77** In my opinion, the Coalition Defendant is correct in its submission that the statement of claim does not plead facts that, if proven, would establish any legal duty or obligation on it to represent the plaintiff or assist him in any way in his proceedings before the tribunal. There is no pleading in contract and no other facts pleaded that create a duty. The Coalition Defendant says it can choose who it represents and who it will not represent.

**78** Declining to represent the plaintiff does not amount to negligence. There is no breach of a standard of care. Furthermore, the plaintiff fails to allege any loss or damage resulting from the alleged breach of duty.

**79** In my view, it is "plain and obvious" that the statement of claim fails to disclose any reasonable claim against the Coalition Defendant and must be dismissed.

## VI. DISPOSITION

**80** The plaintiff's action is dismissed as against all of the defendants.

**81** The Crown Defendants and the Coalition Defendant are entitled to their costs at Scale B. The Tribunal Defendants did not seek costs.

B.M. JOYCE J.

cp/e/qlaxs/qlmxb/qlltl/qlaxw

*Case Name:*

# Strata Plan LMS3259 v. Sze Hang Holding Inc.

**Between**
**The Owners, Strata Plan LMS3259, Plaintiff, and**
**Sze Hang Holding Inc. and Leon Lam, Defendants**
**And between**
**The Owners, Strata Plan LMS3259, Plaintiff, and**
**Sze Hang Holding Ltd. and Leon Lam, Defendants**

[2009] B.C.J. No. 694

2009 BCSC 473

178 A.C.W.S. (3d) 341

Dockets: L050030 and L052756

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

**J.A. Sinclair Prowse J.**

Heard: October 11, 2007; September 2-4, 2008.
Judgment: April 7, 2009.

(94 paras.)

*Civil litigation -- Civil procedure -- Pleadings -- Striking pout pleadings or allegations -- Grounds -- False, frivolous, vexatious or abuse of process -- Parties -- Capacity to sue or be sued -- Party types -- Corporations, partnerships and sole proprietorships -- Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions dismissed -- Motion by Strata Corporation to strike out the defences and for judgment allowed -- Strata Corporation sued defendants for failing to comply with various bylaws and for payment of fines levied -- Strata Corporation had standing to bring action as required resolution was passed -- Defences and counterclaims were confusing and prolix -- Allowing defendants to amend pleading would constitute abuse of process -- Rules of Court, Rule 19(24).*

Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions. Motion by the Strata Corporation to strike out the defences and for judgment. The plaintiff Strata Corporation sued the defendants to enforce various bylaws against them. The plaintiff was the strata corporation of a commercial development. The plaintiff alleged that the defendants failed to open these units for business as required under the bylaws resulting in unpaid fines and that the defendants stored items on the common property contrary to the bylaws. In the second action, the Strata Corporation alleged the defendants failed to grant it access to the units to check the repairs on a sewer line and to investigate the cause of steam coming from an adjacent unit. The defendants argued the Strata Corporations had not passed the required resolution to bring the actions.

HELD: Motion by the defendants dismissed. Motion by the Strata Corporation allowed. The required resolution to commence these actions was passed by a vote at the 2006 annual meeting. The statements of defence were so prolix and confusing that it was difficult to understand the case to be met. These pleadings included arguments, opinions, and allegations against non-parties. The defendants should not be granted the opportunity to redraft their pleadings as to do so would constitute an abuse of process. Some of the proposed defences and counterclaims could not be redrafted as they were without legal foundation. The defendants had been given several opportunities to draft appropriate pleadings in other actions that raised essentially the same issues. The defendants also brought counterclaims prohibited by a prior court order and endeavoured to re-litigate matters that they knew had already been considered and decided.

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 19(24), Rule 57(9)

Strata Property Act, SBC 1998, CHAPTER 43, s. 3, s. 4, s. 26, s. 56, s. 129, s. 133, s. 147(1), s. 292(2)(g)

**Counsel:**

Counsel for the Plaintiff: R. Shore, P. Mendes.

Leon Lam: Appearing on his own behalf.

S.H. Lee: Appearing on behalf of Sze Hang Holding Inc.

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[Editor's note: A corrigendum was released by the Court April 16, 2009; the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

J.A. SINCLAIR PROWSE J.:--

## (I) NATURE OF THE HEARING

**1** The Plaintiff is the Strata Corporation of the strata development in which the Defendants own two units. In these two actions (which have been ordered to be heard together), the Strata Corporation is seeking to enforce various bylaws against the Defendants as owners of those units.

**2** In this hearing, the Defendants seek to have these actions dismissed on the ground that the Strata Corporation is without jurisdiction to bring them. The Strata Corporation, on the other hand, seeks, pursuant to R. 19(24), to have the Defendants' pleadings struck; to have the Defendants denied permission to redraft any of their pleadings; and to have Judgment entered on its behalf.

**3** Before addressing these applications, it became apparent upon reviewing the pleadings of all of the parties that a typographical error had been made in the style of cause in the second action (Vancouver Registry No. L0527856). Specifically, the Defendant Sze Hang Holding Inc. is mistakenly described as Sze Hang Holding Ltd. Because this is a typographical error, leave is granted to the Strata Corporation to amend its pleading to correct this error.

## (II) BACKGROUND CIRCUMSTANCES

**4** To put the issues raised in these applications in context, the Strata Corporation is the strata corporation for Pacific Plaza, a business as opposed to a residential strata development. Although there is a dispute as to whether the proper business designation of this strata development is "wholesale industrial" (the position of the Defendants) or "a combination of wholesale industrial and commercial retail" (the position of the Strata Corporation), there is no issue that it is a "business" as opposed to a "residential" strata development.

**5** This strata development was built by Ernest & Twins Ventures (PP) Ltd. and completed in 1998. The Defendants were not original owners. Rather, it was about 3 years after it was built that Sze Hang Holding purchased two units (namely, the North and South Units).

**6** It was not until 1 year after that (or 4 years after it was built) that Mr. Lam acquired any ownership interest in any of the strata units. This is the ownership that he continues to hold. Specifically, the South Unit is owned by him and Sze Hang Holding - Mr. Lam having acquired a 1% interest and Sze Hang Holding having a 99% interest. The North Unit is wholly owned by Sze Hang Holding.

**7** Although Mr. Lam did not acquire an ownership interest in any of the strata units until the summer of 2002, he has operated a business from those units from the time that they were acquired by Sze Hang Holding. For much, if not all, of this time, Extra Gift Exchange Inc. has been the tenant of these units. (Extra Gift Exchange is a company in which Mr. Lam and Ms. Sze Hang Lee are principals. Ms. Lee is also a principal in Sze Hang Holding.)

**8** In addition, to operating a business in this strata development from at least 2001, Mr. Lam has been actively involved in the affairs of the strata development and in particular of the Strata Council. (As with all strata developments, pursuant to s. 4 and s. 26 of the ***Strata Property Act***, S.B.C. 1998, c. 43 [***SPA***] the strata council is the mechanism through which the powers and duties of the strata corporation are exercised. Put another way, the strata council acts as the board of directors for the strata corporation.)

**9** Over the last 8 years, Mr. Lam has been involved in a number of actions pertaining to various aspects of this strata development. Although some of these matters have been completed, there are approximately 5 other outstanding actions in addition to the present actions. While some of these actions include claims of defamation and personal injury, for the most part these actions pertain to claims regarding the construction, sale, management, and governance of this development. (This was also the situation with the actions that are now completed.) I am the Case Management Judge for the present actions as well as the 5 other outstanding ones.

**10** As far as the present actions are concerned, as was set out earlier, the Strata Corporation is seeking to enforce various bylaws. Specifically, in the first action (Vancouver Registry No. L050030) which will hereinafter be referred to as the Fines Action, the Strata Corporation claims that for the last few years the Defendants have failed to open either of these units for business at all, let alone for the requisite number of business hours required under the bylaws; that as of December 2007, the Defendants had incurred fines in the amount of $91,571.58 with respect to the South Unit and $38,840.15 with respect to the North Unit because of these violations; and that to date the Defendants have neither paid these fines nor complied with the bylaws by opening their units for business.

**11** Moreover, the Strata Corporation claims that the Defendants have posted notices in the windows of their units, the purpose of these notices being to criticize and embarrass the members of the Strata Council.

**12** Further, the Strata Corporation claims that the Defendants stored items on the common property adjoining the South Unit contrary to the bylaws and that the Strata Corporation had to incur the costs of removing and then storing these items. (It still has these items and is still paying the costs of this storage.)

**13** With respect to the second action (Vancouver Registry No. L052756) which will hereinafter be referred to as the Access Action, the Strata Corporation claims that, contrary to the bylaws, the Defendants failed to grant it access to the North Unit to check that a sewer line that had backed up had been properly repaired (that is, in accordance with the building code); to the South Unit to investigate the cause of steam that was coming from it into an adjacent unit; and to the North Unit to investigate whether it was being used as a residence.

**14** As far as the present hearing is concerned, as is set out in an earlier decision in these proceedings (namely, 2008 BCSC 481), it was set at my direction for the purpose of clarifying the pleadings and specifically clarifying the claims, defences, and counterclaims to be made. The basis for this direction was that it had become apparent in pre-trial applications, pertaining to such matters as the extent of document production, the extent of examinations for discovery, and the period of time needed for trial, that the pleadings would have to be clarified sooner rather than later as the issues raised in these pre-trial applications could not be decided until that was done.

**15** As an example, in these pre-trial applications the Defendants took the position that their defences and claims raised issues requiring extensive document production from the Strata Corporation (approximately 600,000 documents) and a trial of at least a month in length. The Strata Corporation, on the other hand, took the position that the issues in these actions were simple matters, requiring modest document production, and a trial of two weeks at the very most. Specifically, the Strata Corporation took the position that most, if not all, of the Defendants' pleadings were without legal foundation and would have been struck when considered by the Court.

**16** It was in these circumstances that I directed this hearing. The parties were invited to make whatever applications that they considered appropriate regarding the clarification of the pleadings.

## (III) THE APPLICATION OF THE DEFENDANTS THAT THESE ACTIONS SHOULD BE DISMISSED BECAUSE THE STRATA CORPORATION DOES NOT HAVE THE AUTHORITY TO BRING THEM

**17** In this application, the Defendants submit that the Strata Corporation was not authorized to bring these actions as it had not passed the resolution required by s. 171 of the ***SPA***. This section of the ***SPA*** specifies that a resolution must be passed by a 3/4 vote at an annual or special general meeting before litigation may be commenced by a strata corporation.

**18** Included in their arguments, the Strata Corporation submits that the Defendants do not have standing to bring this application. Rather, it is only the other owners that have standing to bring this application as they will be required to finance these purportedly unauthorized actions.

**19** It was unnecessary to determine this issue as the evidence does not support this application of the Defendants. To the contrary, the evidence shows that the required resolution to commence these actions was passed by a 3/4 vote at the annual or special general meeting held on October 26, 2006.

**20** Given these circumstances, this preliminary objection is dismissed.

## (IV) THE APPLICATION OF THE STRATA CORPORATION TO STRIKE AND DISMISS THE PLEADINGS OF THE DEFENDANTS PURSUANT TO R. 19(24)

**21** The Strata Corporation brings this application pursuant to R. 19(24). Not only do the Defendants oppose this application, but they also contend that it should be dismissed on a preliminary basis as the Court is without jurisdiction to hear it.

### (A) *The Preliminary Application Of The Defendants To Dismiss The R. 19(24) Application Of The Strata Corporation*

**22** The Defendants submit that the Court has already approved all of their pleadings as presently drawn and, therefore, it is without jurisdiction to revisit the matter. The Defendants contend that the matter is *res judicata*.

**23** The record of these proceedings does not support this contention.

**24** As is set out in my earlier decision (namely, 2008 BCSC 481), in the fall of 2007 at the request of both parties I directed that issues that had been raised regarding the Defendants' pleadings be postponed until the trial. (That is, those issues would be determined at trial by the trial judge.) However, as was touched upon earlier in these Reasons for Judgment as well as being set out in the aforementioned decision, it became apparent in the course of subsequent pre-trial applications that those issues could not be deferred until trial.

**25** There was never a decision made that the Defendants' pleadings were valid pleadings. To the contrary, the earlier direction went no further than postponing that decision until trial.

**26** As the issues raised in this hearing have not been addressed by the Court, these applications are not *res judicata*.

**27** For these reasons, this application is dismissed.

### (B) *The R. 19(24) Application Of The Strata Corporation*

**28** The Defendants filed individual pleadings in each of these actions. In the Fines Action, they individually filed a Statement of Defence and Counterclaim and in the Access Action, they filed

individual Statements of Defence. Mr. Lam also filed a Counterclaim in the Access Action while Sze Hang Holding did not.

**29** With respect to the South Unit, because they are joint owners Mr. Lam and Sze Hang Holding do not have the standing individually to raise defences or to bring claims as owners: ***Extra Gift Exchange Inc., Lam and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd. et al***, 2007 BCSC 426. Rather, the standing to raise defences and to bring counterclaims as owners of the South Unit rests with the Defendants jointly.

**30** Although as the sole owner of the North Unit, Sze Hang Holding could file individual pleadings on behalf of that unit, it makes little sense to do so in this case, as for the most part (if not entirely) the Defendants bring the same defences and counterclaims for each of the units.

**31** For example, in the Fines Actions, with the exception of paragraphs 1-3, 38-40, 46, 55, 66, 83, and 96-98 in Mr. Lam's pleadings and paragraphs 1, 2, 38, 42, 51, 79, 92, and 93 in Sze Hang Holding's pleadings, the pleadings are essentially the same. In the Access action, with the exception of paragraphs 1, 30-36, 43, 60, 63-66, 68-70, 72-74, and 80-104 in Mr. Lam's pleadings and paragraphs 1, 30, 53, 54, 56, and 57 in Sze Hang Holding's pleadings, the pleadings are the same.

**32** During his submissions, Mr. Lam explained that, in addition to the defences and counterclaims that he is pursuing as an owner, he is also pursuing some individual claims as a tenant - that is, Sze Hang Holding is not pursuing these tenant claims. Because he has these individual claims, he argued that his pleadings should be individual.

**33** This argument is not sound in law. Rather, as was just set out, because neither Mr. Lam nor Sze Hang Holding has standing to individually defend or pursue any claims based as owners of the South Unit, their pleadings must be joint. Any claims made solely by one of the Defendants on grounds other than as owners should be set out as an individual claim within that joint pleading.

**34** However, even though these pleadings were not brought in the proper form for purposes of this hearing, I have proceeded as if they had been. Furthermore, as the parties did during the hearing, I have addressed the pleadings in both actions collectively. (Many of the defences and counterclaims are repeated in both actions.)

**35** As was set out at the beginning of this section of this Judgment, the application of the Strata Corporation to strike the Defendants' pleadings is brought pursuant to R. 19(24). That rule provides that:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
> (b) it is unnecessary, scandalous, frivolous or vexatious,
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**36** Pursuant to this rule, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck: ***Gittings v. Caneco Audio-Publishers Inc.*** (1987), 17 B.C.L.R. (2d) 38 (S.C.), rev'd (1988), 26 B.C.L.R. (2d) 349 (C.A.) but not on this point. The underlying rationale of this principle is that if causes of action (or defences for that matter) are not properly pleaded, it is impossible for a defendant (or a plaintiff) to know the case to meet: ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.).

**37** The Defendants' pleadings are lengthy. In the Fines Action, Mr. Lam's Statement of Defence and Counterclaim (including the Prayer for Relief) is 51 pages long with 120 paragraphs while Sze Hang Holding's Statement of Defence and Counterclaim (including the Prayer for Relief) is 48 pages and 115 paragraphs. In the Access Action, Mr. Lam's Statement of Defence and Counterclaim is 42 pages and 114 paragraphs long while Sze Hang Holding's Statement of Defence is 25 pages and 65 paragraphs long. (As was touched on earlier, Sze Hang Holding did not file a Counterclaim in the Access Action.)

**38** These pleadings are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met. In addition to the proposed defences and counterclaims being incomprehensible, these pleadings include arguments, opinions, and allegations against people and businesses which are not parties - for example, allegations against members of the Strata Council, the present property management company, and a lawyer who has provided legal services to the Strata Corporation.

**39** Given these facts, the pleadings must be struck. Thus, the next issue is whether the Defendants should be permitted to redraft these pleadings.

**40** Generally, if the problem with a pleading is that it is inadequately drafted, a party will be given the opportunity to redraft it. However, if it is plain and obvious that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft: ***Braun Investment Group Inc. v. Emco Investment Corp.*** (1984), 58 B.C.L.R. 396, 46 C.P.C. 85 (S.C.), aff'd (1985), 67 B.C.L.R. 247 (C.A.); and ***McNaughton v. Baker*** (1988), 25 B.C.L.R. (2d) 17, [1988] 4 W.W.R. 742 (C.A.).

**41** In addition to this ground for denying a party the opportunity to redraft a pleading, the Court may deny that opportunity on the ground that to grant it would constitute an abuse of process.

**42** That is, as explained in John W. Horn & Hon. Susan A. Griffin, ***Fraser Horn & Griffin, The Conduct of Civil Litigation in British Columbia***, 2d ed., looseleaf (Markham, Ont.: LexisNexis, 2007) at 25-5:

> A pleading or portion of a pleading may be struck out on any of the grounds set out in Rule 19(24)(b), (c) and (d). Though such an application is not usually made with the object of securing judgment in a summary way, the Rule in terms provides that this result may follow. If the ground of the application is that the entire proceeding is ... an abuse of process ... then the entire action may be stayed or dismissed or the entire defence struck out.

**43** As described in Frederick M. Irvine, ***McLachlin & Taylor British Columbia Practice***, 3rd ed., looseleaf (Markham, Ont.: LexisNexis, 3006) at 19-63(3):

Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

**44** Applying these principles to the circumstances of this case, for the reasons that follow I have concluded that the Defendants should not be granted the opportunity to redraft their pleadings. Given this decision, in turn, results in there being no Statements of Defences or Counterclaims field in either of these actions, I have also concluded that the Strata Corporation should be granted judgment.

**45** Some of the proposed defences and claims of the Defendants could not be redrafted in any event as they are without legal foundation. That is, no matter how they are redrafted, they are bound to fail because they do not raise an arguable issue.

**46** For example, as they explained in their submissions (because it could not be discerned in their pleadings) the Defendants contend that the bylaws which form the basis of the Strata Corporation's claims are invalid because they are *ultra vires*. In other words, those bylaws are beyond the authority of the Strata Corporation to pass, let alone enforce.

**47** This contention is not supported by the law. Pursuant to s. 3 of the ***SPA*** "... the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners." Moreover, as is set out in s. 119 of the ***SPA***, strata corporations "must have bylaws" and the bylaws "may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation."

**48** Under s. 129 and s. 133 of the ***SPA***, the Strata Corporation may impose fines to enforce bylaws and may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including doing work on or to a strata lot, the common property, or common assets; removing objects from the common property or common assets; and requiring that reasonable costs of remedying the contravention be paid by the person who may be fined.

**49** As the bylaws in the present actions fall within the scope of the statutory responsibilities of strata corporations and as strata corporations are statutorily required to exercise these responsibilities through the passage and enforcement of bylaws, the bylaws are not *ultra vires* the power of the Strata Corporation.

**50** Given the statutory provisions governing strata corporations, there is no legal foundation for this contention either as a defence or as a claim. It is bound to fail.