

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Besler v. What the Fungus*,  
2025 BCSC 1813

Date: 20250917  
Docket: S45001  
Registry: Penticton

Between:

**Vicki J. Besler, Bradley H. Besler, Darren W. Besler**

Plaintiffs

And

**What the Fungus, Thorsten Clausen, Brian Callow, King Campbell,  
Faith Arroyo Callow, Arlene Fenrich, Clayton Fenrich,  
Garnet Valley Holdings Ltd., Agricultural Land Commission,  
The Corporation of the District of Summerland**

Defendants

Before: The Honourable Justice Hardwick

## Reasons for Judgment

Appearing on his own behalf and on behalf  
of the Plaintiffs Vicki J. Besler and  
Darren W. Besler:

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Place and Date of Hearing:

Kelowna, B.C.  
November 5 – 8, 2024

Place and Date of Judgment:

Kelowna, B.C.  
September 17, 2025

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**Introduction**

[1] This is the third, and final, set of reasons for judgment in a trilogy resulting from a multi-day interlocutory hearing involving numerous applications in two separate, but closely related, actions. The underlying conflict ultimately started with a neighbourly dispute that has very significantly escalated and now involves multiple parties.

[2] The two relevant actions are:

- a) Supreme Court of British Columbia, Penticton Registry, Action No. 45001 (the “Primary Action”); and
- b) Supreme Court of British Columbia, Penticton Registry, Action No. S49713 (the “MP Action”).

[3] As I will further articulate, these reasons address certain fundamental pleadings related issues in the Primary Action which shall set the path forward for that proceeding.

[4] Going back to the above referenced trilogy for necessary context:

- a) My first reasons for judgment, addressing an application to dismiss the MP Action in its entirety, are indexed at 2025 BCSC 1353 (the “MP Striking Reasons”). I shall refer back to the MP Striking Reasons as required herein to avoid, if possible, unnecessary repetition; and
- b) My second reasons for judgment, addressing a limited portion of the relief sought in the Primary Action, including but not limited to an application to sever certain claims and the proposed addition of multiple new defendants, are indexed at 2025 BCSC 1454 (the “Severance Reasons”). I will again refer back to the Severance Reasons as required to avoid, if possible, unnecessary factual repetition.

[5] As I also did in the MP Striking Reasons and the Severance Reasons, I will refer to certain individual parties by their first names only and certain individual parties with reference to their surnames. I mean no disrespect in this regard. Given the number of parties involved, it is simply most practicable to adopt the naming nomenclature most commonly used in the materials before the court.

**Summary Overview of the Parties and Stakeholders**

[6] A fulsome overview of the individuals and entities involved in the Primary Action is set out in the Severance Reasons: see paras. 4 to 25.

[7] I will concisely summarize the parties and relevant stakeholders for the purpose of these reasons for judgment as follows:

- a) Vicki Besler (“Ms. Besler”) is the sole registered owner of the lands and premises civically known as 18816 Garnet Valley Road, Summerland, British Columbia (the “Besler Property”);
- b) Bradley Besler (“Brad”) and Darren Besler (“Darren”), are the sons of Ms. Besler;
- c) Garnet Valley Holdings Ltd. (“Garnet Valley”) is a company incorporated pursuant to the laws of British Columbia. The shareholders of Garnet Valley are the defendants, Brian Callow (“Mr. Callow”) and Thorsten (“Thor”) Clausen. Garnet Valley does business under the trade name “What the Fungus Mushrooms” (“WTFM”);
- d) WTFM operates a boutique mushroom growing business on the lands and premises civically known as 18420 Garnet Valley Road, Summerland, British Columbia (the “WTFM Property”). It has done so since in or about 2014;
- e) Thor is the sole registered owner of the WTFM Property;

- f) The Besler Property and the WTFM Property are adjoining and share a property line;
- g) The Besler Property and the WTFM Property are located within the municipal boundaries of the district locally governed by the Corporation of the District of Summerland (the “District”);
- h) King Campbell (“Mr. Campbell”) was an investor in WTFM between 2016 and 2019;
- i) Faith Arroyo Callow (“Ms. Callow”) is the spouse of Mr. Callow and lives on the WTFM Property with Mr. Callow. Ms. Callow assists, or at least had assisted previously, with WTFM operations from time to time;
- j) Clayton Fenrich (“Mr. Fenrich”) is an employee of WTFM and has been since 2016;
- k) Bartlett Tree Experts (“Bartlett”) is a federally incorporated company with global operations. Bartlett’s involvement in the factual matrix is addressed in both the MP Action and the Severance Reasons. Notwithstanding my dismissal of the plaintiffs’ application to add Bartlett as a defendant in the Primary Action and subsequent order granting the plaintiffs’ application to discontinue any claims against Bartlett in the MP Action (which decision is not reported), Bartlett still forms part of the underlying narrative because its business operations in the southern Okanagan region of the province are conducted from the WTFM Property;
- l) Arlene Fenrich (“Ms. Fenrich”) is an employee of Bartlett. Ms. Fenrich is an administrative assistant and has held such a position with Bartlett since in or about 2015. Ms. Fenrich is Mr. Fenrich’s mother;
- m) WTFM, Thor, Mr. Callow, Mr. Campbell, Ms. Callow, Ms. Fenrich, Mr. Fenrich, and Garnet Valley are collectively referred to the “WTFM defendants” herein. In this regard, I recognize that not all of the claims

sought to be advanced by the plaintiffs are the same as against all of the WTFM defendants. However, given that all are represented by the same counsel, I find it unnecessary, and indeed cumbersome, to particularize on each occasion which of the WTFM defendants are specifically being referred to for the purposes of these reasons;

- n) The Agricultural Land Commission (the “Commission”) is a corporation established pursuant to s. 4 of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36 [*ALC Act*] and its predecessor statutes. Section 7 of the *ALC Act* provides that the Commission is an agent of the government. The Commission administers the Agricultural Land Reserve (the “ALR”). Further details of the Commission’s statutory authority are set forth in the Severance Reasons; and
- o) Both the Besler Property and the WTFM Property are located within the ALR and are therefore subject to restrictions imposed by the *ALC Act* and its regulations.

**District Development Variance Permit: DVP19-010**

[8] Stepping back into the core history of the underlying neighbourly dispute I alluded to in the opening paragraph of these reasons, it is necessary to understand some basic background facts concerning a development variance permit (generally known as a “DVP”) approved in respect of the WTFM Property. This particular DVP is commonly referred to as “DVP19-010” in most of the Primary Action materials.

[9] Specifically, pursuant to an application by Thor, brought pursuant to s. 498 of the *Local Government Act*, R.S.B.C. 2015, c. 1, a DVP was sought to vary certain sections of the District’s Zoning Bylaw 2000-450 (the “Zoning Bylaw”) in respect of the WTFM Property. The application for DVP19-010 effectively acknowledged that certain uses of the WTFM Property were not in compliance with the Zoning Bylaw. This is, I recognize, a simplistic summary of a more complicated issue but, stated as plainly as possible, if the WTFM Property had been in complete compliance with the

Zoning Bylaw in 2019, there would have been no need for the application by Thor for DVP19-010.

[10] DVP19-010 was passed unanimously by the District’s elected council, as it then existed, back on June 24, 2019. The language of the approving resolution provided as follows:

**THAT Development Variance Permit DVP19-010 to vary the following at 18420 Garnet Valley Road, legally described as [redacted], be approved:**

- a) Reduce the minimum side setback (interior) for a mushroom growing facility from 30.0 metres to 4.0 metres as shown on Schedule “B” and Schedule “C” of Permit DVP19-010;
- b) Reduce the minimum Lot area for an Additional Dwelling for Farm Help from 2.0 hectares to 1.6 hectares; and
- c) Increase the maximum height for an Additional Dwelling for Farm Help from the lesser of 4.5 metres or one storey to two storeys if located above an existing farm building.

[11] The plaintiffs were strongly opposed to DVP19-010. Although Brad and Darren were obviously interested parties, it is legally significant in certain key respects that Ms. Besler is the sole owner of the Besler Property.

**Procedural History**

[12] A summary of the procedural history of the Primary Action is set out in the Severance Reasons: see paras. 26 to 58. I will further condense that summary for the purpose of these reasons for judgment as follows:

- a) The original Notice of Civil Claim initiating the Primary Action (the “NOCC”). was filed on October 24, 2019;
- b) The District, the WTFM defendants and the Commission all filed responses to the NOCC;
- c) Shortly thereafter, in December 2019, Brad and Darren were charged with two offences in the Provincial Court of British Columbia (the “Criminal Proceedings”);

- d) Ultimately, the Criminal Proceedings concluded on March 25, 2022, following a successful summary conviction appeal by Brad and Darren;
- e) A case planning conference was conducted by Mr. Justice Gomery on February 22, 2021. The plaintiffs were ordered to amend the NOCC by June 1, 2021;
- f) The deadline for filing the amended NOCC was extended, by consent, on multiple occasions while the Criminal Proceedings were ongoing;
- g) On November 10, 2021, the plaintiffs filed their amended NOCC (the “ANOCC”). This was some two years after the NOCC was filed;
- h) The District, the WTFM defendants and the Commission all filed amended responses to the ANOCC;
- i) On November 30, 2021, the WTFM defendants served the plaintiffs with a demand for particulars pursuant to the *Supreme Court Civil Rules* [*Rules*];
- j) The plaintiffs provided a response to the demand for particulars from the WTFM defendants on February 3, 2022;
- k) On March 21, 2022, the WTFM defendants delivered an application to strike the ANOCC (the “Original Striking Application”);
- l) Between March 21, 2022 and November 15, 2022, there were multiple filings in the Primary Action;
- m) I heard the Original Striking Application in Penticton over the course of two days in late November 2022. Neither the District nor the ALC appeared at the hearing of the Original Striking Application as no relief was being sought as against them;
- n) I dismissed the relief sought in Original Striking Application in oral reasons for judgment originally delivered on January 4, 2023, and subsequently

published and indexed at 2023 BCSC 2590 (the “Original Striking Reasons”). In the Severance Reasons, I specifically quoted from certain particularly relevant paragraphs of the Original Striking Reasons: see para. 40;

- o) The plaintiffs filed the Second Amended Notice of Civil Claim on February 22, 2023 (the “SANOCC”). It is, excluding the required appendix, 73 pages long. Part 1 of the SANOCC, the Statement of Facts, contains 359 paragraphs;
- p) All of the defendants filed further amended responses to the SANOCC. The Commission filed first on March 9, 2023, the WTFM defendants filed on March 21, 2023, and the District filed last on April 3, 2023;
- q) The plaintiffs’ demands for document disclosure were the focus of the proceedings in the spring/summer of 2023 with the plaintiffs filing three separate disclosure applications in May of 2023;
- r) On October 3, 2023, the WTFM defendants filed a notice of application to strike specific portions of the SANOCC (collectively, the “WTFM New Striking Application”). The application for severance included in the WTFM New Striking Application was, as noted, addressed and dismissed in the Severance Reasons;
- s) Although it opposed severance, the Commission consents to the remaining relief sought in the WTFM New Striking Application;
- t) On October 12, 2023, the District filed a notice of application to strike portions of the SANOCC (the “District Striking Application”);
- u) The Commission consents to the relief sought in the District Striking Application. In its application response to said application and the WTFM New Striking Application, the Commission took the position that the plaintiffs should not be permitted to further amend their pleading to try and

cure the alleged defects unless the parties and court had before them a draft proposed pleading;

- v) On November 6, 2023, the plaintiffs filed a notice of application seeking, *inter alia*, to further amend the SAN OCC. In the Severance Reasons, I independently defined this portion of the relief sought as the “Further Amendment Application”: see para. 51;
- w) The Further Amendment Application appends as Appendix “A” the proposed Third Amended Notice of Civil Claim (the “PTANOCC”). The PTANOCC is 55 pages long. Part 1, the Statement of Facts, includes 358 paragraphs, excluding various subparagraphs;
- x) The WTFM Defendants, the District and the Commission all oppose the Further Amendment Application. The written submissions provided by the Commission’s counsel most succinctly articulate, in my view, the defendants’ collective position in this regard:

The [PTANOCC] fails to remedy the plaintiffs’ extensive and repetitive pleading of evidence that obscure material facts. Rather than attempting to address this continuing problem with their pleadings, the plaintiffs seek to file a 55-page [PTANOCC] adding still more detailed evidence rather than limit themselves to material facts, in breach of Rule 3-1(2)(a) and (c) and Rule 3-7(1)-(2).

- y) For the purposes of submissions in respect of the Further Amendment Application, the plaintiffs proffered a proposed Fourth Amended Notice of Civil Claim (the “PFANOCC”). It is 57 pages in length. Part 1, the Statement of Facts, still includes 358 paragraphs – some paragraphs are simply longer. The PFANOCC does, importantly, remove various paragraphs from the relief sought in Part 2, including, but not limited to, all declaratory relief;
- z) The remaining relief sought in Part 3 of the PFANOCC, excluding costs, is for general damages, special damages (including, but not limited to, loss of property value and development options), aggravated damages and

punitive damages tied to the following causes of action, as quoted directly from Part 3 of the SAN OCC:

- i. “negligence and gross negligence”;
- ii. “misfeasance in public office”;
- iii. “harassment and intentional infliction of emotional distress”; and
- iv. “defamation and conspiracy”.

aa) Despite having been initially commenced almost six years ago, the Primary Action has yet to reach the examination for discovery stage of the litigation.

**The Law Regarding Striking Pleadings**

[13] I reviewed the law regarding striking pleadings in the MP Striking Reasons. Given the significance to the remaining issues left for determination, I am going to repeat some of that review below as opposed to simply referring back to the MP Striking Reasons and add certain additional authorities which are particularly relevant to the issues which I must determine herein.

[14] Rule 3-1(2)(a) of the *Rules* requires that a notice of civil claim set out a concise statement of the material facts giving rise to a claim (emphasis added).

[15] Specifically, the statement of facts section of any notice of civil claim thus must set out, at part 1, the material facts which a plaintiff must prove in order to support their claims to ground the relief sought in this court. It is not sufficient for a plaintiff to state a legal conclusion. A plaintiff must plead the facts that constitute the required elements of the cause of action and inform the defendant of the “outline” of the case they must meet: see *Basyal v. Mac’s Convivence Stores Inc.*, 2018 BCCA 235 at para. 39.

[16] Rule 3-7 contains certain requirements and prohibitions regarding the drafting of civil pleadings which are important to remember and, unfortunately, sometimes

overlooked. For the purposes of these reasons, I am going to make specific note of the following portions of R. 3-7:

- (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
- (2) The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or conversation must not be stated, except insofar as those words themselves are material.
- ...
- (6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
- ...
- (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
- ...
- (17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

[17] As helpfully articulated by Justice Voith on behalf of the Court of Appeal in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362:

- a) Pleadings are foundational. They guide the litigation process: see para. 21;
- b) The formal and content-based requirements in the *Rules* are neither anachronistic nor technical – they are necessary and serve to further the purposes of the *Rules*: see para. 20;
- c) Pleadings give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties. They enable the parties and the court to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus, arrive at certain clear issues on which both parties desire a judicial decision: see para. 22;

- d) Drafting pleadings is not a mathematical exercise. It involves the exercise of judgment and requires some degree of flexibility. “Nonetheless, none of a notice of claim, a response to civil claim and a counterclaim is a story”: see para. 44 (emphasis added). Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances by mandatory terms, by the *Rules* and the relevant authorities: see para. 44; and
- e) Pleadings are not permitted to contain evidence or argument: see, again, para. 44.

[18] Rule 9-5(1) of the *Rules* provides that at any stage of the proceedings, this court may order pleadings be struck out in whole or in part and make certain ancillary permitted orders (including as to costs) on the grounds that the pleadings:

- a) Disclose no reasonable claim or defence, as the case may be;
- b) Are unnecessary, scandalous, frivolous or vexatious;
- c) May prejudice, embarrass or delay the fair trial or hearing of the proceeding; or
- d) Are otherwise an abuse of the process of the court.

[19] With respect to an application brought pursuant to R. 9-5(1)(a), the court must:

- a) Assume the facts in the pleading can be proven;
- b) Ask the question, is it plain and obvious that the plaintiff’s claim discloses no reasonable cause of action in the sense that it is certain to fail because it contains a radical defect;
- c) Consider if there is a chance a plaintiff might succeed? If so, a plaintiff should not be driven from the judgment seat; and

- d) Not let length and complexity of the issue, the novelty of the cause of action, and the potential strength of the defendant's case prevent the claim from proceeding. Rather the approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

See: *Kindylides v. Does*, 2020 BCCA 330 at para. 34; *Frazier v. Kendall*, 2021 BCSC 1791 at para. 14; and *Sahyoun v. Ho*, 2015 BCSC 392 at para. 57.

[20] While no evidence is admissible on an application to strike pursuant to R. 9-5(1)(a), it is important to appreciate that:

- a) Allegations based on assumptions and speculation do not necessarily be taken as true. Such allegations may be subject to a more skeptical analysis to determine their true character: see *Owimar v. Warnett*, 2018 BCSC 2310 at para. 22 citing *Young v. Borzoni*, 2007 BCCA 16 at paras. 25-32; and
- b) Pursuant to R. 9-5(2), evidence is admissible for limited purposes under the other sub-paragraphs of Rule 9-5. Indeed, applications seeking relief under these rules are contextually driven and that context is usually provided through evidence: see *Krist v. British Columbia*, 2017 BCCA 78.

[21] In *Willow v. Chong*, 2013 BCSC 1083, Justice Fisher summarized the test for striking pleadings under Rule 9-5(1)(b) on the basis that the pleading in question is unnecessary, scandalous, frivolous or vexatious as follows:

[20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, 1999 CanLII 5860 (BC SC), [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

[22] Stated another but similar way, a pleading is frivolous if it is without substance, groundless, fanciful, “trifles with the court” or wastes time: see *Borsato v. Basra*, 2000 BCSC 28 at para. 24.

[23] A vexatious action also includes proceedings commenced for an improper purpose, including the harassment of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights: see *Owimar* at para. 24 citing *Re Lang Michner et al v. Fabian et al.*, [1987] O.J. No. 355. The above also includes situations where a plaintiff is using the court system as a plaything to harass others they do not like: see *Young* at paras. 64-65 and 95.

[24] An abuse of process in the context of R. 9-5(1)(d) derives from a flexible doctrine whereby the court can prevent a claim from proceeding where to do so would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice: see *Sahyoun* at para. 60. Rule 9-5(1)(d) engages the court’s inherent jurisdiction to prevent the misuse of its procedures: see *Sahyoun*, again, at para. 60.

[25] Continuing in this regard, the discretion provided by the codification of inherent jurisdiction under R. 9-5(1)(d) affords the courts the authority to dismiss actions on the ground of abuse of process, however the categories of abuse of process are open. In this regard, (then) Chief Justice Hinkson in *Chernen v. Robertson*, 2014 BCSC 1358, at para. 29, cited Madam Justice Baker in *Babovic v. Babowech*, [1993] B.C.J. No. 1802, 1993 CarswellBC 2950, at para. 18:

[18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression...

[26] While each subsection of R. 9-5(1) provides a basis to strike pleadings, subsections (a) to (d) should not be considered entirely discrete grounds on which to dismiss a claim. They are capable of being read together. That is, a claim that

discloses no reasonable cause of action contrary to R. 9-5(1)(a) could also be unnecessary, or frivolous or vexatious within the meaning of R. 9-5(1)(b): see *Willson v. British Columbia*, 2012 BCSC 1256 at para. 17.

**WTFM New Striking Application: Overview of Remaining Relief Sought**

[27] The WTFM New Striking Application was filed first in time of the remaining applications currently before the court.

[28] In the Severance Reasons, I specifically addressed the issue of the interpretation of my January 4, 2023 Order. This effectively dispensed with the relief sought at paragraph 1 of the WTFM New Striking Application. In these reasons, I expressly order that the relief sought in paragraph 1 of the WTFM New Striking Application, namely the wholesale dismissal of SANOCC as it relates to the WTFM defendants for claims grounded in harassment, intentional infliction of mental distress, negligence and conspiracy, is dismissed.

[29] Paragraph 2 of the relief sought in the WTFM New Striking Application, namely severance, was also dismissed on July 29, 2025: see para. 67 of the Severance Reasons.

[30] That leaves the following relief, apart from costs, to be determined in the WTFM New Striking Application:

- a) Paragraph 3 – “In the alternative, paragraphs 1, 5, 14, 17, and 217-235 of Part 1 the SANOCC, paragraphs 1, 9, 10, 12, and 13 of Part 2 of the SANOCC, and paragraphs 4-6 of Part 3 of the SANOCC be struck as they relate to the WTFM Defendants and any claims against them based in negligence”;
- b) Paragraph 4 – “In the alternative, paragraphs 1, 12, and 284-307 of Part 1 of the SANOCC, paragraphs 12 and 16 of Part 2 of the SANOCC, and paragraphs 12 of Part 3 of the SANOCC be struck as they relate to the

WTFM Defendants and any claims against them based in harassment and/or intentional infliction of emotional distress”;

- c) Paragraph 5 – “In the alternative, paragraphs 1 and 19 of Part 1 of the SAN OCC, paragraphs 12 and 17 of Part 2 of the SAN OCC, and paragraphs 14-26 of Part 3 of the SAN OCC be struck as they relate to the WTFM Defendants and any claims of conspiracy against them”; and
- d) Paragraph 6 – “In the alternative, paragraphs 20, and 349-359 of Part 1 of the SAN OCC, and paragraphs 27-30 of Part 3 of the SAN OCC be struck as they relate to the WTFM Defendants and any claims associated with a claim of negligence, conspiracy, harassment and/or intentional infliction of mental distress”.

**The District Striking Application: Overview of Remaining Relief Sought**

[31] The District Striking Application was filed second in time amongst the remaining applications currently before the court.

[32] As noted above, I specifically addressed the issue of the interpretation of my January 4, 2023 Order in the Severance Reasons. This effectively dispensed with the relief sought at paragraph 1 of the District Striking Application. In these reasons, I expressly order that the relief sought in paragraph 1 of the District Striking Application, namely the wholesale dismissal of the SAN OCC as it relates to the District for claims grounded in negligence, gross negligence, bad faith, misfeasance in public office and conspiracy, is dismissed.

[33] The remaining relief sought in the District Striking Application, excluding costs, is as follows:

- a) Paragraph 2 – “In the alternative, paragraphs 1, 4, 7, 9, 16, 17, 19, and 33 to 201, and 359 of Part 1 the SAN OCC, paragraphs 14 and 15 of Part 2 of the SAN OCC, and paragraphs 1-3 of Part 3 of the SAN OCC be struck as they relate to the [District] and any claims against it based in negligence”;

- b) Paragraph 3 – “In the alternative, paragraphs 9, 10, 14 to 19, 40, 64, 119, 133, 139, 163, 165, 181, 190, 196, 201, 203, 213 and 358 of Part 1 of the SANOCC, paragraphs 2, 3, 5, 8, and 15 of Part 2 of the SANOCC, and paragraphs 2, 3, 13, 14, 17 and 26 of Part 3 of the SANOCC be struck as they relate to the [District] and any claims against it based any claims against it based in bad faith and/or misfeasance of public office”;
- c) Paragraph 4 – “In the further alternative, paragraphs 1 and 19 of Part 1 of the SANOCC and paragraphs 3, 9, 14, 15, 20 to 24 and 26 of Part 3 of the SANOCC be struck as they relate to the [District] and any claims against it based on conspiracy”; and
- d) Paragraph 5 – “In the further alternative, paragraphs 20, and 349, 351, 352, and 355 to 357 of Part 1 of the SANOCC, paragraphs 4 and 11 of Part 2 of the SANOCC and paragraphs 10 and 27-30 of Part 3 of the SANOCC be struck as they relate to the [District] and any claims associated with a claim of undue hardship insofar as they relate to the Plaintiffs’ claims in negligence/gross negligence, bad faith/misfeasance in public office, and/or conspiracy”.

**The Further Amendment Application: Overview of Remaining Relief Sought**

[34] The Further Amendment Application was the last filed application currently before the court for determination.

[35] The relief sought in paragraph 1 of the Further Amendment Application, the Proposed Employee Defendants Application, was dismissed in the Severance Reasons: see paras. 112-125.

[36] As described above in my abbreviated summary of the procedural history of the Primary Action, paragraph 2 of the Further Amendment Application seeks leave to make the amendments to the SANOCC as proposed in Appendix “A”. Appendix “A” contains the PTANOCC, which, as noted, is some 55 pages long.

[37] As also described above, for the purposes of the hearing of the Further Amendment Application, the plaintiffs put forward the PFANOCC. I considered the PFANOCC, on a limited basis and to the benefit of the plaintiffs, in the Severance Reasons: see paras: 75 and 120.

[38] However, for the purposes of these reasons I am going to first consider the WTFM New Striking Application and the District Striking Application together based upon the causes of action identified therein and then consider the Further Amendment Application with reference to the PTANOCC and PFANOCC. This is clearly not the only way to approach the issues. However, having regard to the very significant volume of materials before the court, it is the approach which I conclude best fits the circumstances.

**Claims of Negligence/Gross Negligence**

[39] Much of the SAN OCC includes claims purportedly based in negligence and, to a lesser extent, gross negligence. Without being exactly precise due to the prolix nature of the pleading, I would estimate that approximately 26 pages of the SAN OCC is “intended” to be directed to these claims.

[40] The plaintiffs primarily rely on the “facts” plead at paragraphs 33-169 of Part 1 of the SAN OCC, under the heading “Negligence-District of Summerland” as the basis for their claims of negligence and/or gross negligence vis-à-vis the District. The crux of the legal basis of the claim is, very simply stated, that the District negligently failed to follow or enforce its own core policies, bylaws and other regulations in respect of the WTFM defendants: see paras. 1-3 of Part 3 of the SAN OCC.

[41] However, also somewhat buried in the “facts” plead in Part 1 of the SAN OCC is an allegation that a proximate relationship was created, resulting in a duty of care based on specific misrepresentation(s) made that invited reliance, which were relied upon. Nothing in Part 3 of the NOCC, however, ties those particular “facts” into the plaintiffs’ claim of negligence or gross negligence against the District as required by the *Rules*.

[42] In respect of the claims for negligence against the WTFM defendants, the plaintiffs primarily rely on the facts plead at paragraphs 217-235 of Part 1 the SAN OCC, under the heading “Negligence – What the Fungus”. The crux of the legal basis, again very simply stated, of the claims is that certain of the WTFM defendants owed a duty of care to Ms. Besler, as a neighbouring property owner, negligently breached through the construction of WTFM’s commercial mushroom operation, causing damage to Ms. Besler: see paras. 4-6 of Part 3 the SAN OCC.

[43] The elements of negligence are very well known at law and require a plaintiff to prove the following:

- a) The defendant owed the plaintiff a duty of care;
- b) The defendant failed to meet the appropriate standard of care;
- c) The plaintiff suffered a compensable loss or injury; and
- d) That loss or injury was caused by the defendant’s act or omission.

See: *Fowler v. Canada (Attorney General)*, 2012 BCSC 367 at para. 24 (there are countless other authorities which stand for this proposition but *Fowler* outlines the elements in a similarly challenging pleadings related application I shall refer to later in these reasons).

[44] Given the obvious ties between the plaintiffs’ purported claims in negligence and the allegations of failure to both comply with and enforce bylaws, it is necessary to review the law in this regard in some detail.

[45] In *Dusevic v. Columbia Shuswap (Regional District)*, [1989] B.C.J. No. 668, (1989), 44 M.P.L.R. 160 (B.C.S.C.), this Court held that it is a municipality alone who is entitled, absent an allegation of bad faith, to decide whether and how its bylaws are to be enforced. In so concluding, this Court relied on the principles established by the Supreme Court of Canada some 100 years ago in *Orpen v. Roberts*, 1925 CanLII 2 (SCC), [1925] S.C.R. 364 (S.C.C.): see *Rimmer v. North Cowichan (Municipality)*, 2018 BCSC 1750 at para. 14 citing *Dusevic*.

[46] *Rimmer* is a particularly relevant authority to the Primary Action. By way of brief background, the plaintiffs in *Rimmer* all lived near a business owned by the two corporate defendants, who operated within the Municipality of North Cowichan (the “Municipality”) as the Vancouver Island Motorsport Circuit (“VIMC”). The plaintiffs brought a claim in nuisance as a result of the noise coming from the vehicles at the VIMC. The Municipality took the position that the VIMC’s use of the subject property complied with both the Municipality’s zoning and noise control bylaws. Thereafter, an application was brought to amend the zoning bylaw to rezone the VIMC property and adjoining lands, and subsequently have them developed and used pursuant to a comprehensive development plan. Skipping forward, this resulted in the plaintiffs’ action which, *inter alia*, sought declaratory and injunctive relief (the latter only being in relation to VIMC and not the Municipality): see paras. 2 to 5.

[47] Mr. Justice Macintosh struck four primary paragraphs from the plaintiffs’ notice of civil claim (and some related ancillary paragraphs) relying on the case law in *Dusevic* and *Orpen*, holding that the plaintiffs, “as a matter of law, cannot seek to compel the enforcement of a municipal bylaw, absent bad faith” as only municipalities are legislatively empowered to bring civil proceedings to enforce their enactments: see paras. 10,12, 14 and 21. However, and importantly, Justice Macintosh also made clear that if bad faith is alleged, it is alleged against the authority enforcing the bylaws and judicial review is the appropriate method of procedure: see para. 10 citing *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342; and *Gulf Coast Materials Ltd. v. British Columbia (Minister of Jobs, Tourism and Skills Training)*, 2016 BCSC 980.

[48] Further, there is no common law duty of a local government to enforce its bylaws: see *Dusevic* at paras. 9-11 quoting from McIntyre J., in *Kamloops v. Nielson* (1984), 2 S.C.R. 2 at p. 12 and 13. Specifically, at p. 20 of *Kamloops*, McIntyre J. held as follows:

At common law, a municipality has no duty to enforce its by-laws by court proceedings. The matter is discretionary. Failure to exercise enforcement powers in court does not give rise to a private cause of action in negligence to those suffering harm from non-enforcement.

[49] The Supreme Court of Newfoundland and Labrador also considered the ratio in *Orpen* in *Newhook v. Colliers (Town)*, 2020 NLSC 88. The applicants in *Newhook* asserted that the manner in which the respondent was developing his farm interfered with the peace, quiet and beauty of their neighbouring recreational property. The issues before the Court were the applicability of certain provincial legislation addressing farm practices, whether to grant an interlocutory injunction prohibiting the respondent from interfering with a public right-of-way and whether the court could order an injunction requiring the respondent to comply with the town plan and another provincial statute, namely the *Urban and Rural Planning Act*.

[50] In relation to the last issue, which is the one relevant to my analysis herein, Justice D. Boone held that the applicants did not have the right to ask the court to issue an injunction requiring the respondent to comply with a municipal stop work order or the applicable section of the *Urban and Rural Planning Act*. In doing so, Boone J. made the following comments regarding *Orpen*:

[42] The decision by the Town whether to enforce compliance with section 45 or the stop work order is a discretionary decision with which the Court will not interfere through an order of mandamus against the Town: *Municipalities Act*, section 421; *Chafe v. Bay Bulls (Town)*, 2016 NLTD(G) 164.

[43] The question raised on this Application is a different one: can the Applicants ask the Court to enforce compliance with section 45 and the stop work order?

[44] That question was answered in Canadian law almost 100 years ago, and the answer has been consistently the same since. The answer is no. In *Orpen v. Roberts*, 1925 CanLII 2 (SCC), [1925] S.C.R. 364, the Supreme Court of Canada decided that a private citizen has no right to bring an action seeking damages or an injunction against another private citizen to enforce a contravention of a planning by-law unless the by-law expressly confers such a right. This is so even where the private party bringing the action alleges specific damage resulting to that party from the contravention of the by-law. Planning and development legislation and regulation is for the benefit of all within the Town. Therefore, the municipality has the discretion to bring an action to enforce compliance, and private citizens do not have the power to enforce legislation or regulation.

[51] Also instructive is the decision of Justice Watchuk in *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258, regarding a claim of negligence brought against the City of Kelowna. After setting out the trite proposition that the first stage of the

*Anns/Cooper* test requires the court to consider whether the relationship between the plaintiff and defendant gives rise to a *prima facie* duty of care by considering two questions, reasonable foreseeability and proximity, Watchuk J. then discussed the relationship between a public regulator and an individual member of the regulated public in her proximity analysis starting at para. 146:

[146] Proximity is a notoriously fluid concept. As explained in *Cooper* at para. 34:

Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[147] The relationship between a public regulator and an individual member of the regulated public does not generally give rise to sufficient proximity to ground a private duty of care. Although “public officials are under statutory duties to act in accordance with obligations imposed on them by statute”, these duties are public, rather than private in nature, and give rise to public law remedies: *Wu* at paras. 39-40. Subject to rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions inherent in the exercise of the public law duty: *Wu* at para. 58. A breach of such a duty does not in itself give rise to private liability: *Wu* at para. 43.

[148] This principle reflects the unique purpose, nature, and limitations of state regulation in the public interest. The state regulates different areas of society for various public purposes, including limiting or mitigating the societal harm that may be inherent in a given field of activity. Public regulators achieve this object by setting and enforcing legal standards for the benefit of the public as a whole. Although they owe a public duty to enforce these standards generally, they “are not liable for losses simply because a legislated standard was not enforced”: *Vlanich v. Typhair*, 2016 ONCA 517 at para. 30. Absent allegations of “bad faith”, they alone are entitled to decide whether and how their regulations are to be enforced: *Rimmer v. North Cowichan (Municipality)*, 2018 BCSC 1750 at para. 14.

[149] Something more is needed to give rise to a private duty of care. Such a duty will only arise when a public authority steps outside its strict regulatory role and engages with risk on an individual, rather than collective basis. To fall under a private duty of care, a public authority must assume responsibility for the private interests of specific individuals, as opposed to its responsibility to the collective interests of the public at large.

[150] Typically, a public regulator will assume such responsibility in one of two ways: see *Wu* at para. 59.

[151] First, a public authority’s governing statute may itself give rise to a duty of care. It may explicitly impose such a duty on the authority, or it may

give rise to such a duty indirectly by requiring the authority to assume specific responsibility over the implementation of a given law or regulation....

...

[153] Sufficient proximity may also arise out of specific actions or representations made by the public authority: *Wu* at para. 59. For example, proximity may arise where a regulator “steps outside the role of regulator and assumes the role of designer, developer or advisor to the regulated party”, “acquires knowledge of serious and specific risks to the person or property of a clearly defined group”, or “makes a specific misrepresentation to the regulated party – apart from a regulatory statement – that invites reliance, and the regulated party relies on the misrepresentation for the purpose for which it was made”: *Waterway Houseboats Ltd. v British Columbia*, 2019 BCSC 581 at paras. 223-225. In these circumstances, proximity may be inferred from the expectations, representations, reliance, and the property interests of the parties.

[52] Before returning to *Suncourt*, I must recognize that the above reference by Justice Watchuk at para. 153 was to the trial decision in *Waterways* as *Suncourt* was released prior to the subsequent decision of the Court of Appeal in that litigation: see 2020 BCCA 378. Whilst the lengthy appellative analysis of the complicated legal issues involved in *Waterways* is instructive in many respects, the remittance of this particular aspect of the decision to the trial court turned on the facts. The general legal propositions referred to by Justice Watchuk continue to accurately reflect the law in this regard.

[53] Applying the law to the facts in *Suncourt*, Justice Watchuk concluded that nothing in the City of Kelowna’s bylaws, or its specific administration of them can be said to give rise to a private duty of care. Simply stated, Watchuk J. found that the City owed no duty of care to the plaintiff to enforce the applicable bylaw because its relationship with the plaintiff was not sufficiently proximate: see para. 172.

[54] Lastly, in terms of relevant general legal principles relevant to both the WTFM New Striking Application and the District Striking Application on these particular impugned portions of the SAN OCC, gross negligence is defined as conduct that is a marked departure from the standard of care that elevates the risks by the conduct (emphasis added). It is conduct that has aggravated, flagrant or extreme characteristics: see *Minchin v. Movsessian*, 2023 BCSC 144 at para. 11, citing

*Hildebrand v. Fox*, 2008 BCSC 842 at para. 16 (rev'd on other grounds 2008 BCCA 434).

[55] As it relates to the WTFM defendants, I conclude that the law is clear. Unless a bylaw or regulation provide otherwise, a private citizen cannot advance a claim at law against another private citizen for violations of bylaws or regulations that the respective municipality or district, or other administrative body is required to enforce. No bylaw or regulation relied upon by the plaintiffs gives Ms. Besler (or quite obviously, Brad or Darren) a right of action against the WTFM defendants. Further, there is no sufficiently proximate relationship set forth on even the most generous interpretation of the relevant portions of the SAN OCC to establish a duty of care owing to Ms. Besler (or Brad or Darren).

[56] Accordingly, the claims in negligence and/or gross negligence as against the WTFM defendants do not disclose a reasonable cause of action and are accordingly struck pursuant to R. 9-5(1)(a). Further, I find that the claims in negligence and/or gross negligence as against the WTFM defendants also constitute an abuse of process and shall also be struck pursuant to R. 9-5(1)(d).

[57] For clarity, those are paragraphs 5, 14, 17 and 217-235 of Part 1 of the SAN OCC, paragraph 13 of Part 2 of the SAN OCC and paragraphs 4-6 of Part 3 of the SAN OCC.

[58] As it pertains to the District:

- a) There is no basis at law for a private duty of care owed by the District to Brad or Darren;
- b) There are no material facts plead which could whatsoever support a claim for gross negligence by any of the plaintiffs; and
- c) The material facts, as plead, are woefully inadequate to support a claim for a limited scope private duty of care in respect of Ms. Besler. While certain said material facts are buried in the prolix narrative, they are not,

as indicated above, actually tied to the legal basis portion of the SANOCC in Part 3 as required by the *Rules*.

[59] Accordingly, I order that:

- a) any claims by Ms. Besler in negligence against the District are struck pursuant to R. 9-5(1)(a) as failing to disclose a reasonable cause of action;
- b) any claims by Ms. Besler against the District in gross negligence are struck pursuant to R. 9-5(1)(a) as failing to disclose a reasonable cause of action and further constitute an abuse of process and shall be struck pursuant to R. 9-5(1)(d); and
- c) any claims in negligence and/or gross negligence advanced on behalf of Brad or Darren against the District are struck pursuant to R. 9-5(1)(a) as failing to disclose a reasonable cause of action and also constitute an abuse of process and shall be struck pursuant to R. 9-5(1)(d).

[60] For clarity, those are paragraphs 4, 7, 9, 16, 17 and 33 to 169 of Part 1 of the SANOCC, paragraph 14 of Part 2 of the SANOCC, and paragraphs 1-3 of Part 3 of the SANOCC.

**Conspiracy**

[61] The tort of conspiracy is a well recognized cause of action in civil proceedings; albeit a much criticized one historically: see *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at p. 473.

[62] There are two types of conspiracy in tort law, namely: (1) predominant purpose conspiracy; and (2) unlawful means conspiracy: See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 73.

[63] The elements of predominant purpose conspiracy are as follows:

- a) An agreement or concerted action between two or more persons;

- b) With a predominant purpose of causing injury to the plaintiff; and
- c) Overt acts committed that cause damage to the plaintiff.

See: *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 125.

[64] Like predominant purpose conspiracy, unlawful means conspiracy requires an agreement or concerted action between two or more persons. The additional elements of unlawful means conspiracy are that:

- a) The conduct of the defendants is unlawful;
- b) The conduct is directed towards the plaintiff (alone or with others);
- c) The defendants should know that injury to the plaintiff is likely to result;  
and
- d) Injury to the plaintiff does occur.

See: *Watson* at para. 56.

[65] The pleading of conspiracy must be as specific as possible. Generally speaking, a notice of civil claim should:

- a) Describe who the parties to the conspiracy are;
- b) Describe the relationship between the parties to the conspiracy;
- c) Allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued;
- d) State precisely the objects and means of the alleged conspiracy to injure, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy; and
- e) The injury and damage occasioned by the plaintiff.

See: 311165 *B.C. Ltd. v. Canada (Attorney General)*, 2016 BCSC 2068 at para. 56 citing *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 1993 CanLII 6870 (BC CA) at para. 8.

[66] The “Conspiracy” section of Part 3 of the SAN OCC is the most detailed, by a considerable margin. The plaintiffs thus, I conclude, took additional time in drafting this portion of the pleadings. That is indicative of the subjective significance of this particular aspect of the array of claims advanced by the plaintiffs against the defendants collectively. For that reason, I am going to include the *verbatim* text of 4 of the 12 paragraphs in Part 3 of the SAN OCC to illustrate the court’s difficulty in ascertaining whether a predominant purpose conspiracy is being plead, an unlawful means conspiracy is being plead, or possibly both. Moreover, even where it appears the pleading might be attempting to assert a predominant purpose conspiracy, these paragraphs highlight that there is no description of overt acts. Rather, there are just broad sweeping conclusions which, ultimately, include every single named defendant in some capacity.

[67] The four paragraphs of Part 3 of the SAN OCC which I have chosen to highlight currently read as follows:

[14] On various occasions since 2019 two or more of the Defendants have acted in concert with a common design or intention; the co-conspirators have engaged in conduct that was unlawful which, in this case, included negligence and defamation; the conduct was directed towards the Plaintiffs; given the circumstances, the Defendants should have known that injury was likely to result; and injury or harm to the Plaintiffs did result.

[15] Since May 2019, District staff have conspired to defame the Plaintiffs on various occasions. The purpose of the District’s conspiracy to defame the Plaintiffs is to discredit the Plaintiffs’ reputations so any legitimate concerns regarding violations at 19420 Garnet Valley Road are automatically dismissed as frivolous and vexatious. This has allowed further bylaw and building violations to continue on the property without deterrence.

[16] Since May 2019 What the Fungus, Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich, Clayton Fenrich and Garnet Valley Holdings Ltd. have conspired to defame the Plaintiffs on various occasions. The purpose of the conspiracy with What the Fungus, Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich, Clayton Fenrich and Garnet Valley Holdings Ltd. was financially motivated. If DVP 19-010 was not approved, and subsequently Bartlett Tree Experts was ordered to comply with Zoning Bylaw 7.6, it would have negatively impacted the finances of

What the Fungus, Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich and Clayton Fenrich. What the Fungus projected the company's estimate revenue to be \$500,000 in 2020.

. . .

[24] In August 2022 and after, the District the ALC and Thor Clausen have conspired to allow Bartlett Tree Experts to expand at 18420 Garnet Valley Road in violation of Zoning Bylaw 7.6, ALR Use Regulation Policy, and previous ALC direction regarding the property.

[68] Being completely fair to the plaintiffs, some of the other paragraphs in the "Conspiracy" section of Part 3 of the SAN OCC do include more particulars in terms of dates and parties. However, those paragraphs almost inevitably dovetail in certain respects back to my above analysis of the law regarding the claims in negligence. Specifically, allegations of lack of compliance with District bylaws and failed enforcement of District bylaws permeate the narrative underlying the conspiracy claims. In this regard, I highlight paragraphs 23 and 26 of Part 3 of the SAN OCC as they presently stand:

[23] In March 2022, District staff conspired with Thor Clausen to continue allowing Zoning Bylaw 7.6 and 8.1.6.b. and other bylaw and building violations without deterrence. The District did not document this meeting with Thor Clausen in March 2022, despite the Plaintiffs' request to do so.

. . .

[26] In February 2023 Thor Clausen continued to expand Bartlett Tree Experts with the addition of yet another large commercial truck on his property, in further violation of District and ALC policy. The District and ALC staff were notified and formal complaints were filed; however, no action has been take to make Thor Clausen comply. The District, ALC and Thor Clausen continue to conspire to breach core policies in bad faith.

[69] On the above basis, I conclude that the claims in conspiracy disclose no reasonable cause of action as against either the WTFM defendants and/or the District and those claims are struck pursuant to R. 9-5(1)(a). I further conclude that those claims constitute an abuse of process on the basis they are being brought for an improper purpose and are additionally struck pursuant to R. 9-5(1)(d).

[70] For clarity, those portions of the SAN OCC are:

- a) Paragraph 19 of Part 1 of the SANOCC, paragraph 17 of Part 2 of the SANOCC, and paragraphs 14-26 of Part 3 of the SANOCC as it relates to the claims in conspiracy as against the WTFM defendants; and
- b) Paragraphs 4 and 19 of Part 1 of the SANOCC, paragraph 17 of Part 2 of the SANOCC and paragraphs 14-26 of Part 3 of the SANOCC as it relates to the claims in conspiracy as against the District.

### **Misfeasance in Public Office**

[71] Misfeasance in public office is an intentional tort recognized at law. Its ambit, however, is quite narrow for quite obvious policy considerations.

[72] The tort is very aptly described in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201, wherein Justice Dickson, after acknowledging that the particular appeal before the Court on that occasion was highly fact-driven, stated as follows:

[3] . . . claims for damages for the misuse of public power by dissatisfied citizens must be advanced, scrutinized and resolved with caution and restraint. As Justice Newbury explained in *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, the tort of misfeasance in public office provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties. For this reason, when addressing claims of misfeasance in public office, the courts strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions.

. . .

[150] As this Court explained in *Powder Mountain* and *J.P.*, the tort of misfeasance in public office is based on the premise that public officers must exercise their power only for the public good and not deliberately and unlawfully for ulterior or improper purposes. The underlying rationale of the tort is the protection of every citizen's reasonable expectation that those who hold public office will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of their public functions. Its ambit is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct: *Powder Mountain* at paras. 2, 8–9; *J.P.* at paras. 319–323, 329.

[73] In terms of the essential elements of the tort of misfeasance in public office, it consists of two different branches commonly referred to as Category A and Category B misfeasance. As again summarized by Justice Dickson in *Rain Coast*:

[152] ... As Justice Smith explained in *J.P.*, the two branches share common elements: i) deliberate unlawful conduct by a public officer in the exercise of his or her powers; and ii) knowledge that the unlawful conduct is likely to injure the plaintiff. As to the latter, she said this about the requisite mental elements:

[326] Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. *Three Rivers* described it as “targeted malice” that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23.

[327] Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is inconsistent with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act: *Odhavji* at para. 28 and *Powder Mountain* at para. 67.

[153] Justice Smith went on to describe the high standard of proof required to establish bad faith or dishonesty on the part of a public officer and the line between misfeasance in public office, on the one hand, and, on the other, negligent acts committed without knowledge or subjective recklessness as to their unlawfulness and probable consequences:

[329] The mental element of Category A or Category B misfeasance establishes the “bad faith” or “dishonesty” of the public officer. Accordingly, it requires “clear proof commensurate with the seriousness of the wrong”: *Powder Mountain* at para. 8 and *Odhavji* at para. 28. Awareness or knowledge that the unlawful act is likely to harm the plaintiff requires at least a subjective recklessness or wilful blindness, if not actual knowledge, of the likely consequences of the unlawful act: *Powder Mountain* at paras. 7 and *Odhavji* at paras. 25 and 38. Subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence. The mental element of the tort thus constrains its ambit from including inadvertent or negligent conduct by a public officer in the discharge of his or her official obligations: *Odhavji* at para. 26.

[154] In *Odhavji Estate*, the Supreme Court of Canada considered the underlying rationale for the narrow application of the tort, namely, that public officers must retain the authority to make appropriate decisions that are

adverse to the interests of some citizens. Provided they are neither irrational nor taken in bad faith, government decisions based on public policy considerations, such as economic, social and political factors, are immune from tort liability: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 90; *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683 at para. 54. As Justice Iacobucci explained in *Odhavji Estate*:

[28] ...In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[155] Justice Iacobucci went on to explain the requisite nexus between a plaintiff who advances a misfeasance claim and the public officer against whom the allegations of wrongdoing are levelled:

[29] The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

[Emphasis in original.]

[74] Consistent with the foregoing, I am satisfied that to make out a claim for malfeasance in public office, the plaintiffs must prove two elements: (1) deliberate unlawful conduct in the exercise of public function; and (2) awareness that the conduct is unlawful and likely to injure them. The plaintiffs must also provide that the tortious conduct was the legal cause of their injuries, and that those injuries are compensable: see *Madadi v. Nichols*, 2021 BCCA 10 at para. 61.

[75] On the face of the SAN OCC, the plaintiffs appear to advance a claim for Category B misfeasance (see paragraph 13 of Part 1 of the SAN OCC). While

Category B misfeasance does not require a finding of specific intent to harm a plaintiff, the public officer must nevertheless knowingly engage in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiffs or a class of plaintiffs. Importantly, however, knowledge of harm alone is not sufficient to make out misfeasance because a public officer may, in good faith, make a decision that he or she knows to be adverse to the interests of certain members of the public: see *Rain Coast* at para. 152.

[76] The SANOCC fails to set out any material facts about the harmful consequences allegedly suffered by the plaintiffs as a result of the impugned decisions or deliberate unlawful acts.

[77] To the contrary, the SANOCC contains a smattering of paragraphs located within a much longer narrative that broadly complain of malicious and unlawful conduct by certain District officials (who I previously declined to order added as parties: see *Severance Reasons* at paras. 116 to 125) that purportedly support the very bald pleading at paragraph 13 of Part 3 which asserts that:

Since May 2019 District Staff have engaged in deliberate and unlawful conduct in their capacity as public officials, and they were aware that their conduct was unlawful and likely to harm the plaintiffs; this includes but is not limited to the handling of DVP 2019-010 and the plaintiffs' FOI requests.

[78] Accordingly, the claims against the District for the tort of misfeasance of public office do not disclose a reasonable cause of action and are accordingly struck pursuant to R. 9-5(1)(a).

[79] For clarity, those are paragraphs 10, 15, 16, 18, and 170-201 of Part 1 of the SANOCC, paragraphs 11 and 15 of Part 2 of the SANOCC and paragraph 13 of Part 3 of the SANOCC.

[80] Of note, many of those paragraphs also refer to bad faith (as do certain other paragraphs of the SANOCC). Again, this is where the prolix nature of the SANOCC makes this Court's job extremely difficult. It is very difficult to ascertain whether that is intended to be an, albeit ineffective, effort to also plead Category A malfeasance

or is simply part of, what I believe, appears to be a misunderstanding by the plaintiffs of the ratio in *Rimmer*.

[81] When I subsequently turn to the issue of whether the plaintiffs should be provided the opportunity to further amend the SAN OCC, I will address this point further.

**Intentional Infliction of Mental Distress**

[82] Although its exact name has varied somewhat over the course of the relevant jurisprudence, the tort of intentional infliction of mental distress is also long recognized at law: see *Thibeault v. Canadian Airlines International Ltd. et al*, 2000 BCSC 1191 at para. 11.

[83] The elements of the tort of intentional infliction of mental distress can be summarized as follows:

- a) Flagrant or outrageous conduct;
- b) That is calculated to produce harm; and
- c) Results in provable illness.

See: *Universe v. Fraser Health Authority*, 2019 BCCA 234 at para. 23 citing *Borzoni* at para. 24.

[84] This tort is meant to capture the most egregious conduct: see *Droszio v. Flather*, 2016 BCSC 786 at para. 76.

[85] Accepting for the purposes of the WTFM New Striking Application that the conduct outlined in paras. 284 to 299 of Part 1 of the SAN OCC was flagrant and/or outrageous and was calculated to produce harm, the plaintiffs failed to plead that this conduct resulted in “provable illness”.

[86] That, as set out above, is a clear and essential element of this intentional tort. An element of the tort that the plaintiffs, I find, ought to have been on clear notice of

and failed to plead despite having made the strategic decision to include this particular cause of action for the first time following the Original Striking Reasons.

[87] Accordingly, I am satisfied that the claim for intentional infliction of mental distress (or as the plaintiffs have referred to it “intentional infliction of emotional distress”) shall be struck as failing to disclose a reasonable cause of action pursuant to R. 9-5(1)(a).

[88] Given the complete overlap in the claims for intentional infliction of mental distress and harassment in the SANOCC, I shall address the specific paragraph numbers of the SANOCC covered by the above order in due course.

### **Harassment**

[89] Quite unlike the tort of intentional infliction of mental distress, the issue of whether the tort of harassment exists in British Columbia remains unsettled.

[90] Almost 20 years ago, Justice Sinclair Prowse analyzed this issue in *Mainland Sawmills Ltd. v. IWA-Canada*, 2006 BCSC 1195 and concluded at paras. 14 to 20:

[14] The case law is divided. For example, some cases such *Canadian Tire Bank v. Roach*, 2006 BCPC 120 (B.C. Prov. Ct.); *Toban v. Total Credit Recovery (B.C.) Ltd.*, 2001 BCPC 465 (B.C. Prov. Ct.); *Jaremko v. Moro*, [2003] O.J. No. 2028 (Ont. S.C.J.) and *Garrett v. Mikalachki*, [2000] O.J. No. 1326 (Ont. S.C.J.) were decided on the assumption that the tort of harassment exists in Canada, whereas cases such as *510267 B.C. Ltd. v. Gilmore*, 2005 BCSC 756 (B.C. S.C.), *Campbell v. Wellfund Audio-Visual Ltd.* (1995), 1995 CanLII 294 (BC SC), 14 C.C.E.L. (2d) 240 (B.C. S.C.) and *Robertson v. Jones* (2003), 13 R.P.R. (4th) 39 (Ont. S.C.J.) have specifically found that no such tort exists in Canada. The cases that have assumed that the tort of harassment exists do not set out the basis for that assumption, nor do they set out the elements of the tort. Rather, these decisions focus on whether a particular conduct constitutes harassment.

[15] As was touched upon earlier, the Plaintiffs submit that if the tort of harassment has not been recognized in Canada the law has sufficiently evolved wherein it should be recognized, as has happened in such common law jurisdictions as the United States. The Plaintiffs contend that the tort of harassment is tantamount to the American tort of intentional infliction of emotional distress, and that the elements of the latter tort are outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress, and the actual and proximate causation of the emotional distress by the defendant's outrageous conduct: *Moore v.*

*Greene*, 431 F.2d 584 (U.S. C.A. 9th Cir. 1970); *U.S. ex rel. Benz v. Reddy*, 42 Fed. Appx. 941 (U.S. C.A. 9th Cir. 2002); *Canine v. Liberty Mut. Ins.*, LEXIS 11073 (District Court 2006); and *Graves v. City of Stockton*, LEXIS 13116 (District Court 2006).

[16] A material distinction between the American tort of intentional infliction of emotional distress and the clearly recognized Canadian tort of intentional infliction of mental suffering (also known as intentional infliction of nervous shock) is the fact that the tort of intentional infliction of mental suffering requires proof of a visible and provable illness (such as physical harm or a psychiatric illness) whereas proof of severe or extreme emotional distress (short of physical harm or a psychiatric illness) is sufficient for the tort of intentional infliction of emotional distress: *Rahemtulla v. Vanfed Credit Union*, 1984 CanLII 689 (BC SC), [1984] 3 W.W.R. 296 (B.C.S.C.); *Topgro Greenhouses Ltd. v. Houweling*, 2006 BCCA 183; *Rhodes v. C.N.R.* (1990), 1990 CanLII 5401 (BC CA), 50 B.C.L.R. (2d) 273 (C.A.); *Moore v. Greene*, *supra*; *United States ex rel. Benz v. Reddy*, *supra*; *Canine v. Liberty Mut. Ins.*, *supra*; and *Graves v. City of Stockton*, *supra*, respectively.

[17] To determine the issues raised in this application, I decided rather than addressing the issues of whether the tort of harassment is a recognized cause of action in Canada or, if not, whether the law has developed to the point wherein it should be recognized at the outset, to first address whether the evidence of these Plaintiffs established the tort of harassment, the elements of that tort being as the Plaintiffs claimed. That is, I began my analysis of the issues raised in this application by assuming the tort of harassment does or should exist in Canada and that the elements of this tort are outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress, and the actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

[18] Applying these elements to the undisputed evidence of the Plaintiffs (all of the evidence of the Plaintiffs was provided in their answers to the Interrogatories of the Defendants), I concluded that the evidence fell short of proving these harassment claims. In particular, I found that the Plaintiffs had failed to prove that they suffered severe or extreme emotional distress as the result of the Defendants' conduct.

[19] Though this tort does not require proof of a visible and provable illness, it does require proof of "severe or extreme emotional distress". As described in the *Graves* quoting, with approval from *Girard v. Ball* 125 Cal. App. 3d 772 (1981), "[s]evere emotional distress means ... emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it". For example, in *Moore* the Court held that the requirement was met as the Plaintiff had felt sick and full of fear and anxiety as a result of the Defendant's conduct for the whole period of their relationship which was four years. *Benz*, *Graves*, and *Canine* do not provide much assistance as the issue in them was whether the evidence was sufficient to go to the Jury, not whether it was substantial enough or enduring enough to meet the requirement of severe or extreme distress.

[20] The requirement of extreme or severe emotional distress is in keeping with the objective of this tort. That is, it is intended to provide a remedy to a plaintiff who is intentionally subjected to outrageous conduct by a defendant. Presumably, that a plaintiff prove that he/she has suffered severe or extreme emotional distress as a result of the conduct of a defendant (albeit not to the extent of physical harm or psychiatric illness) is required because it demonstrates a defendant's conduct as being sufficiently outrageous as to found a cause of action.

[91] A handful of other cases thereafter brought in this Court similarly did not decide whether harassment is a tort in Canada, but did assume hypothetically that it exists and resolved the matter by finding there was no harassment. In light of their outcome, they offer somewhat limited assistance to my task of determining whether, at the pleadings stage alone, the plaintiffs' claim should be allowed to proceed. In *Fowler*, however, (then) Associate Chief Justice Cullen did strike a harassment pleading pursuant to 9-5(1)(a) on the basis that it fell short of alleging facts capable of establishing such a cause of action: see para. 59. Importantly, the striking was done without leave to amend: see para. 62.

[92] The issue then substantively came back again, this time before the Provincial Court of British Columbia in *Veeken v. Spratt*, 2019 BCPC 204. Of some import, *Veeken* bears some combined similarities with both the Primary Action and the MP Action. Broadly summarizing, the plaintiff sued the Minister of Public Safety and Solicitor General alleging a number of torts including negligent investigation and harassment by an individual RCMP officer (and any superiors that he may have consulted and/or taken direction from) as a result of an investigation into allegations of the plaintiff's breach of judicial interim release conditions. The plaintiff also sued his sister alleging the torts of harassment, conspiracy, and negligence as a result of what he submitted was a pattern of historical persecution by her, which culminated with her initiating the above-referenced "false" allegations: see para. 1.

[93] Considering that factual matrix, Judge McDermick held as follows regarding the claims based on the potential tort of harassment:

[51] A number of other British Columbia cases, similarly do not decide whether harassment is a tort in Canada but assume hypothetically that it exists and resolve the matter by finding there was no harassment. One

Ontario case, *Merrifield v. Canada (Attorney General)*, 2017 ONSC 1333, has recognized that harassment is a tort in Canada.

[52] Without determining the issue, I will proceed on the assumption that the tort of harassment exists in Canada, and more specifically, British Columbia. In summary, the elements of the tort of harassment, if it exists, are as follows:

1. Outrageous conduct by the defendant
2. The defendant's intention of causing or reckless disregard of causing emotional distress;
3. The plaintiff's suffering of severe or extreme emotional distress; and
4. That the actual and proximate cause of the plaintiff's extreme emotional distress was the defendant's outrageous conduct.

[53] In *Merrifield v. Canada (Attorney General)*, at para. 720, Justice Vallee examined the meaning of "outrageous" and concluded as follows:

[720] The Canadian Oxford Dictionary defines outrageous as follows:  
1. Deeply shocking and unacceptable; 2. Grossly cruel; 3. Immoral, offensive; and 4. Highly unusual or unconventional.

[54] This is obviously a very high standard...

[94] The next authority I will refer to in this regard is *Alberta Health Services v. Johnston*, 2023 ABKB 209. In *Johnston*, Justice Feasby expressly recognized a "new" tort of "harassment" in Alberta. The four essential elements of the tort he found are:

- a) The defendant engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through other means;
- b) That the defendant knew or ought to have known was unwelcome;
- c) which impugned the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and
- d) which caused harm.

[95] *Johnston* was considered by Justice Branch in *Sandher Fruit Packers Ltd. v. MacAskill*, 2024 BCSC 1855, where, in the context of an application for an interlocutory injunction, he held as follows:

[19] No court in British Columbia has yet decided on the merits whether the tort of harassment is recognized at law. Courts in British Columbia have referred to, but explicitly declined to decide, whether the tort of harassment exists. The Court has, however, considered the test that may apply if a tort of harassment exists, finding in *obiter* that the plaintiff would be required to establish:

. . . [citations omitted]

[20] The Alberta Court of King's Bench and the Ontario Superior Court of Justice have recognized the torts of harassment and internet harassment, respectively. The Alberta Court of King's Bench has recognized [in *Johnston*] a tort of harassment and developed a test requiring the plaintiff to establish that the defendant:

. . . [citation omitted]

[23] The plaintiffs thus face two challenges:

- a) establishing that there is an arguable case that the tort of harassment will be recognized in BC; and
- b) establishing that they have adequately established that the tort is available to these plaintiffs on the facts pled.

[24] Although the harassment tort has not yet been formally recognized in BC, I am prepared to accept that the state of the law is such that there is a good arguable case that it would be recognized:

- a) In *Mainland*, the court recognized this possibility and went so far as to discuss the test that should be used if the tort was adopted; and
- b) There is pan-Canadian trial-level support for the establishment of such a new common law tort.

[25] As such, it is not so much the viability of the tort generally that is the difficulty for the plaintiff here, but the tort's specific viability in this case. In terms of the proper approach to cases alleging harassment in BC, I find that it would be improper to:

- a) invoke *Mainland's obiter* discussion to help establish the tort's viability in BC,
- b) but simultaneously ignore *Mainland's obiter* recitation of the test for the new tort, in favour of more easily satisfied tests recently adopted by trial courts in other jurisdictions.

[26] The proposed *Mainland* test requires that the plaintiffs suffer "severe or extreme emotional distress." The plaintiffs' difficulty in the present case is that I do not see that they have pleaded such effects, nor does the affidavit evidence support a finding that such a high level of distress was reached.

There is no evidence that any of the plaintiffs have sought medical assistance for the challenges they have faced because of the alleged harassment. They discuss the serious damage to their family's reputation, but provide far less evidence about the impact on each of them personally.

[27] As such, I find that, based on the present pleadings and legal framework in British Columbia, there is no serious question to be tried in relation to the potential tort of harassment. As such, no injunction may be issued based on this plea.

[Emphasis in original]

[96] The final, extremely recent, authority I will refer to is *Salloum v. Oyen Wiggs Green and Mutala LLP*, 2025 BCSC 1708. *Salloum* was also an application to strike pleadings pursuant to R. 9-5(1). Specifically, there were apparently four applications in three separate actions. Justice Forth's commentary in *Salloum* regarding the general principles of law regarding the application of R. 9-5(1)(a), (b), and (d) reads quite similarly to my above independent review of the same law: see paras. 78-88. As it relates specifically to claims pursuant to the potential tort of harassment, Justice Forth considered *Sandher*, *Johnston* and referenced Ontario authorities on the tort of "internet harassment" before concluding as follows at para. 151:

The courts in British Columbia have not recognized the tort of harassment and the plaintiffs' claim for harassment is struck and cannot be pursued.

[97] Although Justice Branch's analysis of the issue in *Sandher* was made in the context of an injunction application, I ultimately prefer it over the outright dismissal of the claim pursuant to R. 9-5(1)(a) in *Salloum* on the basis that the potential tort of harassment simply fails to disclose a reasonable cause of action in this province.

[98] However, despite clearing that pleadings hurdle, the plaintiffs here also face the further challenge of adequately establishing, even when the facts as pleaded are accepted as true, that the potential tort is available to "them". Currently, they do not. Specifically, even accepting that proof of severe or extreme emotional distress is sufficient, the SAN OCC simply culminates in conclusory statements about the plaintiffs suffering severe stress and anxiety. There is no attempt whatsoever, I note, to differentiate as between the individual plaintiffs.

[99] In this regard, I am going to quote directly from para. 12 of Part 3 of the SANOCC:

Pursuant to the facts described in paragraph 284-299 of Part 1, Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich and Clayton Fenrich displayed flagrant and outrageous conduct towards the Plaintiffs; their conduct was intended to cause the Plaintiffs emotional distress; the Plaintiffs suffered severe emotional distress; and the actual cause of the Plaintiffs' sever emotional distress was Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich and Clayton Fenrich's outrageous conduct. In 2019 Thor Clausen, Brian Callow, King Campbell, Faith Callow, Arlene Fenrich and Clayton Fenrich had the intention of inflicting emotional distress on the Plaintiffs, and they did.

[100] In the result, I conclude that the claim for the potential tort of harassment shall be struck as failing to disclose a reasonable cause of action pursuant to R. 9-5(1)(a) based upon the facts as currently pleaded.

[101] Given the complete overlap in the plaintiffs' claims for intentional infliction of mental distress and harassment in the SANOCC, the relevant paragraphs which are collectively struck are paragraphs 12, and 284-299 of Part 1 of the SANOCC, paragraph 16 of Part 2 of the SANOCC, and paragraph 12 of Part 3 of the SANOCC.

**Other Impugned Paragraphs**

[102] In the WTFM New Striking Application, the WTFM defendants also seek to strike paragraphs 300-307 of Part 1 of the SANOCC. These paragraphs, found under the heading "Court File 46826", refer exclusively to the Criminal Proceedings. The contents of those paragraphs, which include a combination of material facts, evidence and bald conclusions, are an abuse of process given the MP Action. They are accordingly struck pursuant to R. 9-5(1)d).

[103] Similarly, paragraphs 10 and 12 of Part 2 of the SANOCC constitute an obvious abuse of process pursuant to R. 9-5(1)(d). For context, those paragraphs seek an order that the WTFM defendants reimburse the plaintiffs for the cost of all transcripts in Penticton Court File No. 46826 (which was the summary conviction appeal in this court related to the Criminal Proceedings) and a further order that the

WTFM defendants pay costs for that same court action at Scale C. This, again, is the very subject matter of the MP Action.

[104] Paragraphs 1 to 9 of Part 2 of the SANOCC purport to seek declaratory relief regarding bylaw infractions, violations of the *Local Government Act*, and the like, along with mandatory injunctive relief related to bylaw compliance. All are struck pursuant to R. 9-5(1)(a) as failing to disclose a reasonable cause of action and further struck pursuant to R. 9-5(1)(d) as being an abuse of process. I will not delve into the legal analysis on this point further as the plaintiffs appear to have independently recognized the failings of this portion of the SANOCC.

[105] The final impugned portions of the SANOCC are paragraphs 349 to 359 of the SANOCC which fall under the heading of “Undue Hardship”.

[106] Undue hardship is not an independent cause of action. To the extent that it is actually being asserted, any such claim is struck pursuant to R. 9-5(1)(a).

[107] However, when one reviews these particular paragraphs, I believe they actually represent an attempt to plead certain damages that the plaintiffs assert that they have collectively sustained as a result of various causes of action attempted to be plead in the SANOCC. They just do so presently in a quite rambling and haphazard way.

[108] With one exception, I am not going to outright strike these particular paragraphs from the SANOCC as there are some material facts contained therein and I am genuinely concerned that striking them might create prospective difficulties. Rather, my expectation is that what material facts are actually contained in these paragraphs will, in due course, appropriately find their way into any amended pleadings which I may give leave to permit and that the extraneous narrative and bald conclusions will be removed.

[109] The one exception to the above conclusion is paragraph 351 which asserts, as best as I can succinctly summarize, that Brad and Darren had to attend numerous court dates, including a 12-day trial, because of false and defamatory

statements that “improperly set the criminal case in motion”. This, again, is the crux of the MP Action. Its inclusion in the Primary Action is an abuse of process and is accordingly struck pursuant to R. 9-5(1)(d).

**Further Amendments to Pleadings: The Law**

[110] As alluded to above, when dealing with applications to strike, the courts must generally also consider whether the defective pleadings can be cured by amendment: see *Wong v. Wilson*, 2013 BCSC 1465 at para. 25 and *Caron v. A.*, 2015 BCCA 47 at para. 60, citing with approval *Minnes v. Minnes* (1962), 1962 CanLII 350 (B.C.C.A.).

[111] In *Gosal v. Gill*, 2019 BCCA 147, the Court of Appeal revisited this issue and ruled that a decision not to permit further amendments before striking pleadings is discretionary in nature, in the sense that the term is described in *Kish v. Sobchak Estate*, 2016 BCCA 65: see para. 19.

[112] In so doing, it is not the Court’s role to articulate for a litigant a comprehensible and legally cognizable cause of action: *M.P.W. v. City of Victoria*, 2019 BCSC 1448 at para. 20.

[113] In *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47, the Court of Appeal, in a somewhat but admittedly not completely analogous situation, considered the decision of the chambers judge to deny a further amendment to the pleadings during the course of an application pursuant to R. 9-5.

[114] Justice DeWitt-Van Oosten, writing for the Court, held that the chambers judge did not error in refusing to permit a further amendment on the basis that allowing the litigation to continue through such amendments would violate the principles of judicial economy, consistency and finality: see para. 74.

[115] I do recognize that where a plaintiff (or in this case, plaintiffs) are self-represented, the court must be vigilant to ensure fairness to such litigants. However, this does not relieve self-represented plaintiffs of the obligations to comply with the

Rules: see *Skyllar v. The University of British Columbia*, 2022 BCSC 439 at para. 64.

[116] In this regard, I was also directed to *Hutcheson v. British Columbia*, 2021 BCSC 2493, wherein Justice Lyster dismissed a self-represented plaintiff's claims based in breach of contract, fraud, collusion with the RCMP and defamation. Although the plaintiff therein had only amended the pleadings once, Justice Lyster declined to exercise the court's discretion to allow the plaintiff a further opportunity to amend the claims on the basis that no such amendments could cure the issue and were a waste of time: see paras. 85-90.

**Further Amendment Application: Analysis**

[117] Although I recognize why the plaintiffs put forward the PTANOCC and the PFANOCC for consideration by this Court, particularly in light of the position of the Commission, they frankly do not assist. With the exception of deletion of the declaratory relief in Part 2, neither pleading fixes the core deficiencies identified above and both pleadings continue to be extremely prolix and run afoul of many of the foundational rules for pleadings set out in R. 3-7.

[118] What I find I must really consider is whether I ought to, yet again, exercise my discretion to give the plaintiffs one final opportunity to prepare and serve a further amended notice of civil claim with specific parameters on what causes of action they are permitted to even attempt to advance.

[119] In this regard, and after considerable contemplation as to how to appropriately exercise my discretion, I have ultimately concluded that:

- a) The deficiencies with any claim in negligence against the WTFM defendants cannot be cured by an amendment. The paragraphs identified above are thus struck without leave to amend;

- b) The deficiencies with any claims in gross negligence against the WTFM defendants and/or the District cannot be cured by an amendment. The paragraphs identified above are thus struck without leave to amend;
- c) The deficiencies with the claims in negligence against the District can potentially be cured by an amendment that, *inter alia*, pleads the material facts to establish sufficient proximity arising out of specific actions or representations by the District. The pleading must also clearly outline the material facts necessary otherwise to prove all of the essential elements of a claim in negligence as articulated above. The paragraphs identified above are thus struck with leave to amend in accordance with my other orders made herein;
- d) The deficiencies with the claims pursuant to the tort of conspiracy (as predominant purpose or unlawful purpose) as against the WTFM defendants and/or the District cannot be cured by an amendment. The paragraphs identified above are thus struck without leave to amend;
- e) The deficiencies with the claim for malfeasance in public office against the District can potentially be cured by an amendment that pleads the material facts to establish the essential elements of either or both categories of malfeasance as articulated above. The paragraphs identified above are thus struck with leave to amend in accordance with my other orders made herein;
- f) The plaintiffs are not granted leave to amend the deficiencies in relation to the tort of intentional infliction of mental distress (or as alternatively described as the tort of intentional infliction of emotional distress). No pleading advancing this cause of action is permitted;
- g) The deficiencies with the claim in relation to the tort of harassment can potentially be cured by an amendment. The paragraphs identified above

are thus struck with leave to amend solely in relation to the tort of harassment and in accordance with my other orders made herein;

- h) Paragraphs 300-307 of Part 1 and paragraphs 10 and 12 of Part 2 of the SAN OCC are struck without leave to amend;
- i) Paragraphs 1 to 9 of Part 2 of the SAN OCC are struck without leave to amend;
- j) Paragraph 351 of Part 1 of the SAN OCC is struck without leave to amend; and
- k) Any paragraph of the SAN OCC asserting a claim to undue hardship as a cause of action is struck without leave to amend. No pleading advancing this cause of action is permitted.

[120] Having regard to the foregoing and in light of the particular circumstances of this proceeding, which includes my involvement as the case management judge, I am going to make an order, which I am satisfied I have the ability to do under R. 9-5(1) and, if necessary, pursuant to my inherent jurisdiction, that:

- a) The plaintiffs' new pleading, which shall technically be the Third Amended Notice of Civil Claim (the "TAN OCC"), shall again be a fresh pleading. There is no need to attach the SAN OCC as an appendix as when I made that Order back on January 4, 2023, I did so in the anticipation it would, in all probability, likely not be me presiding over the trial of the action and did not want to "saddle" that future trial judge with an overly cumbersome pleading: see paras. 41-31 of the Original Striking Reasons. By virtue of the case assignment in August of 2024, I will be the trial judge in the event that the Primary Action (and/or the MP Action) proceeds to trial. Having reviewed the SAN OCC with a fine-tooth comb on multiple occasions for the purpose of writing these reasons, I do not need it as an appendix;

- b) The TANOCC, including Parts 1, 2 and 3, shall not exceed 20 pages in length. The TANOCC must be in not less than 12-inch font and use standard margins. In this regard, as was succinctly submitted by counsel for the Commission, who has taken a quite measured position in the Primary Action, “it should not take an hour to read a notice of civil claim”. Even with recognition of the fact that the plaintiffs are self-represented and while acknowledging the defamation claims, which are not subject of either the WTFM New Striking Application or the District Striking Application, are quite lengthy, I conclude that 20 pages is more than sufficient for the plaintiffs to draft concise and coherent pleadings that comply with the *Rules*;
- c) The TANOCC shall not include any new causes of action;
- d) To comply with the 20-page limit, the plaintiffs may need consider deleting or redrafting some paragraphs in relation to the defamation claims which offend R. 3-7, provided they do not advance new allegations. I am exercising my discretion to say such amendments are permitted even though that issue is not directly before me as it is consistent with the overall intent of these reasons to rein in the drafting of the TANOCC to strictly comply with both this order and, very importantly, the *Rules*; and
- e) The TANOCC must be filed, unless otherwise agreed by all the defendants, by December 15, 2025. I have provided the plaintiffs, perhaps generously, with three months in order to allow them the opportunity to meaningfully review these reasons for judgment and potentially, if they so chose, to obtain some legal advice about drafting pleadings both in light of the *Rules* and particularly in light of these reasons and my orders made herein.

**Scandalous, Vexatious and Embarrassing Pleadings**

[121] In my above overview of the law regarding the striking of pleadings generally, I specifically referred to caselaw regarding striking pleadings that are frivolous, vexatious or embarrassing.

[122] I have not, however, made any orders herein pursuant to R. 9-5(1)(b).

[123] Rather, with a few articulated exceptions where I concluded that the portions of the SAN OCC were an abuse of process contrary to R. 9-5(1)(d), all other paragraphs of the SAN OCC were struck pursuant to R. 9-5(1)(a).

[124] I did so very mindfully.

[125] Specifically, I did so on the basis that until such time as the plaintiffs have had the opportunity to prepare and file the TANOCC in accordance with my orders herein and with reference to the provisions of the *Rules* I have expressly highlighted, determining whether the plaintiffs' pleadings are scandalous, vexatious or embarrassing is premature.

[126] In this regard, as I strived to make clear in both the Original Striking Reasons and in the MP Striking Reasons, as well as again herein, there are real difficulties with the prolix and rambling nature of the plaintiffs' style of pleading. There are however, material facts in the narrative that, when considered in conjunction with Part 3, have satisfied me that certain causes of action should be allowed to be advanced if appropriately amended.

[127] Ultimately, given my ongoing role as both the case management justice and the trial judge, I consider it appropriate to wait and see if the TANOCC can, if sufficiently reined in to the causes of actions articulated and within the precise page limitation mandated, satisfy the requirements of the *Rules* and the caselaw interpreting those *Rules* which I have expressly referred to herein.

[128] If "the defendants" (collectively, individually or in some combination thereof) believe they do not, they shall be at liberty to bring on a further and final application

to strike any continuing alleged impugned portion(s) of the TANOCC and I shall consider any such application on the basis of the pleadings and, if applicable, other materials before me at that time.

**Costs**

[129] On the issue of costs, I am generally going to reiterate what I previously stated in the Severance Reasons.

[130] Namely, having regard to the number of applications before me and the differing positions in respect of different applications, I am not making any orders to costs with respect to any of the applications in the Primary Action at this time.

[131] Rather, I direct that a 30-minute judicial management conference shall be held to determine a schedule for delivery of written submissions and, if necessary, an oral hearing to deal with the issue of costs.

[132] I am generally prepared to make myself available at 9:15 AM for said conference unless I have a previously scheduled matter. Accordingly, for efficiency, as previously directed, all counsel and Mr. Besler shall please have discussions offline regarding availability so that they can contact Supreme Court Scheduling with a list of their proposed dates for review as against my calendar.

“Hardwick J.”