IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arbutus Bay Estates Ltd. v. Canada (Attorney General),* 2023 BCSC 1726

Date: 20231004
Docket: S203959
Registry: Victoria

Between:

Arbutus Bay Estates Ltd.

Plaintiff

And

Attorney General of Canada, Capital Regional District and The King in Right of the Province of British Columbia

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Appearing on behalf of the Plaintiff:	P. Buchholz
Counsel for the Attorney General of Canada and the Capital Regional District:	M. Taylor
Counsel for the Province of British Columbia:	M. Butler
Place and Date of Trial/Hearing:	Victoria, B.C. September 6 and 7, 2023
Place and Date of Judgment:	Victoria, B.C. October 4, 2023

[1] This is an application by the three defendants to strike the plaintiff's claim. They say the notice of civil claim, which alleges fraud and conspiracy, discloses no reasonable cause of action, is frivolous or vexatious, and constitutes an abuse of the court's process.

Background Facts

[2] The plaintiff previously sued these same three defendants and the matter proceeded to trial. The defendants were largely successful. The trial decision is reported at 2016 BCSC 2083 ("Trial Decision"). The plaintiff appealed and the defendants were also largely successful at the Court of Appeal. The Court of Appeal's decisions are reported at 2017 BCCA 374 ("First Appeal Decision") and 2018 BCCA 259 ("Second Appeal Decision"). The plaintiff sought leave to appeal from the Supreme Court of Canada, but leave was denied.

[3] Shortly after the plaintiff's appeals were exhausted, two of the three defendants, the Capital Regional District ("CRD") and Canada, signed an agreement that touched on matters that arose during the litigation. The agreement is dated November 30, 2018.

[4] The plaintiff's claim in this action is that the agreement between CRD and Canada, referred to in the notice of civil claim as the "Undisclosed Agreement", should have been disclosed and, had it been disclosed, the plaintiff would never have initiated and continued the original litigation. It seeks recovery of all of its costs incurred in the original litigation.

[5] I will refer in these reasons to the agreement between CRD and Canada as the Undisclosed Agreement because that is how it is defined in the notice of civil claim. By so doing, I am not finding that an agreement actually existed during the original litigation as alleged, nor am I finding that it necessarily ought to have been disclosed to the plaintiff even if it had existed previously.

[6] It is necessary to review the background that gave rise to the earlier litigation in some greater detail.

[7] The plaintiff company's principals. Ms. Buchholz—purchased approximately 155 acres on Mayne Island in or around 1973. The property was upland and appurtenant to a public wharf in Horton Bay Harbour (the "Horton Bay Wharf"). The Horton Bay Wharf had been constructed by the federal Ministry of Fisheries in or about 1960, and an easement had been secured from a predecessor in title, a Mr. Pratt. Ms. Buchholz transferred the property to the plaintiff about a half dozen years after she had acquired it.

[8] The plaintiff commenced its claim on January 22, 2013, and proceeded to trial starting in October 2015. The relief sought in the plaintiff's amended notice of civil claim included the following:

> **AS AGAINST ALL DEFENDANTS**
>
> 1. A declaration that the defendant CRD's operation of wharf facilities interferes with the riparian rights of the plaintiff;
> 2. Damages for breach of the plaintiff's riparian rights;
> 3. An injunction restraining the defendants, or any of them, from interfering with the plaintiff's riparian rights;
> 4. Damages for nuisance and trespass;
> 5. A declaration that accessing the harbour over the Registered Easement constitutes a trespass;
> 6. A declaration that the Registered Easement is invalid or unenforceable and its registration be cancelled;
> 7. An order directing the Registrar of Land Titles to cancel the registration of the Registered Easement;
> 8. A declaration that the defendants and public cease and desist from trespassing on Lot A, including parking upon the plaintiff's land and traversing the Registered Easement;
> 9. Extinguishment of the Registered Easement;
> 10. An Order pursuant to the *Property Law Act*, s35(2) cancelling the registration of the Registered Easement;
> 11. Punitive damages;
> 12. Damages for unjust enrichment;
> 13. Interest pursuant to the *Court Order Interest Act*;
> 14. Special costs or alternatively increased costs, or costs of this action; and
> 15. Such further and other relief as this Honourable Court deems just.

AS AGAINST THE CRD

16. An injunction restraining the CRD and its servants, agents or invitees from trespassing on Lot A including parking on Lot A:

THE RELIEF SOUGHT HEREAFTER IS ADVANCED ONLY IN ALTERNATIVE TO INTERPRETATION OF THE REGISTERED EASEMENT AND ENFORCEMENT OF SUCH REGISTERED EASEMENT PURSUANT TO ITS TERMS:

AS AGAINST THE PROVINCIAL CROWN AND FEDERAL CROWN

17. The plaintiff claims rectification of the deed to more accurately incorporate the terms of the 1960 Agreement, including:
    a. The permitted size of the footpath and wharf structures; and
    b. The requirement that if the federal crown ceases operation of the permitted wharf that all rights of access cease and determine.
18. Damages for breach of the 1960 Agreement to be assessed at a fair commercial rate for access to the wharf from 2007 to date;
19. A declaration that the right of the Provincial Crown, Federal Crown and any person claiming such right under or through the Provincial Crown, Federal Crown to use the Registered Easement has come to an end pursuant to the terms of the 1960 Agreement.

AS AGAINST THE PROVINCIAL CROWN

20. An order that the Province indemnify and hold the plaintiff harmless for its costs incurred on a solicitor-client basis and any costs awarded against the plaintiff and for loss of opportunity to utilize Lot A, and more specifically the portion of Lot A which falls within Registered Easement by reason of the Province failing to accurately record the 1960 Agreement on title.

[9] The trial concluded in 2016 with the trial judge awarding the plaintiff nominal damages but otherwise dismissing its claims. The Court's conclusions are summarized in the Trial Decision as follows:

> [168] Accordingly, I am granting nominal damages to the plaintiff for the infringement to its rights that has resulted from a small portion of the pathway and wharf structure being outside of the easement in the amount of $7,500. I am dismissing the remainder of the plaintiff's action.
>
> [169] I am making the following declarations:
>
> - The easement allows the Province and its servants, agents and assign, visitors and invitees, including Canada, the CRD and members of the public to use the footpath to access the Horton Bay harbour public wharf from Horton Bay Road;

> - The easement allows Canada, the CRD and their assigns to maintain and operate the Horton Bay harbour public wharf in its present location.
>
> - Any impairment of riparian rights attached to the part of Lot A that fronts the right-of-way, the footpath and the Horton Bay wharf is authorized so long as the operation of the Horton Bay harbour public wharf continues.
>
> [170] I also order that the registered easement be rectified to include all of the area on which the footpath and wharf structures are located. I further order that the defendants bear the costs of preparing and registering the new right of way and other documents required to rectify the right of way.
>
> [171] In the alternative, in the event I am incorrect in my interpretation of the easement, and for the reasons set out, I am of the view an order should be made that the easement be rectified to contain the agreement made between the Province and Mr. Pratt at the time the registered easement was executed. If necessary, the easement should be rectified to allow the Province, and its servants, agents, assigns, visitors and invitees, including Canada, the CRD and members of the public to use the footpath to access the Horton Bay harbour public wharf, and to authorize Canada, the CRD and their assigns to maintain and operate the Horton Bay wharf in its present location.

[10] The Court of Appeal largely upheld the Trial Decision, but disagreed with the trial judge's interpretation of the easement as including access over the easement to members of the public. Instead, they ordered that the easement be rectified. The Court of Appeal also set aside the nominal damages award relating to the trial judge's finding that the footpath strayed beyond the bounds of the registered easement but granted a nominal amount of damages because the easement did not provide for parking. In all other respects, the trial judge's decision was upheld.

[11] The plaintiff claims in the current action that shortly after the plaintiff's avenues of appeal were finally exhausted, the defendants, CRD and Canada, entered into the Undisclosed Agreement whereby the Horton Bay Wharf that was appurtenant to the plaintiff’s lot would be decommissioned and a new wharf built nearby in the vicinity of Anson Road. The Undisclosed Agreement included the following terms:

> 2.01 Canada hereby sells, assigns, and transfers the Goods and all the right, title, interest, property, claim and demand of Canada thereto and therein, to the CRD, to and for its sole and only use forever as of the Transfer Date. The CRD agrees to remove the Existing Wharf at Horton Bay as soon as

> conveniently possible, and provide a brief report and photographs to Canada documenting the removal immediately thereafter.
>
> 2.02. CRD agrees to construct a new public wharf, with a minimum moorage capacity of 300 feet, at the terminus of Anson Road, approximately 400 meters north of the Existing Wharf at Horton Bay, Mayne Island. CRD estimate the new wharf will be in operation in 12 to 24 months.
>
> 2.03 Immediately after the Transfer Date, Canada will send a duly executed Transfer of Administration and Control to the Province of British Columbia cancelling District Lot 431 in the form attached as Schedule "B" cancelling District Lot 431 and concurrently therewith will provide a copy of the executed Transfer of Administration and Control to the CRD.

[12] The significance of a removal of the Horton Bay Wharf as contemplated in clause 2.01 would be that if the wharf were removed, all rights under the easement would cease on its terms.

[13] The plaintiff claims in conspiracy and fraud and says that had it been aware of the agreement to remove the Horton Bay Wharf and build a new wharf at Anson Road, it would not have brought or continued with the original claim. The relevant portions of the extant notice of civil claim are as follows:

> 22. It was only after that date, after all the costs had been incurred and the litigation was over, that Canada and the CRD disclosed their intention to remove the Lot A Wharf and build a new public wharf at Anson Road. This was in the form of an agreement dated November 30, 2018 between Canada and the CRD, subject to CRD Board approval, which included the following terms (emphasis added):
>
> 23. While dated November 30, 2020, the agreement to remove the Lot A Wharf after the Lawsuit and construct a new public wharf at the Anson Road Property reflected an earlier agreement among the Defendants that was made prior to, or during, the Lawsuit and kept a secret (the "Undisclosed Agreement"). The Undisclosed Agreement was not, however, information that was properly subject to any common interest privilege among the Defendants, and all records relating to it were, under the court rules, required to be produced to Arbutus Bay within the Lawsuit as part of the Defendants' document disclosure obligations.
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> 24. During the trial of the Lawsuit, the court was intentionally steered away from considering the Anson Road Property to protect the Undisclosed Agreement from being revealed. This was done by way of numerous objections that the Anson Road Property had no relevance to the proceedings. The court sustained those objections, but in the absence of knowing about the Undisclosed Agreement.
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> 25. In making those objections, however, the Defendants knew, that the Undisclosed Agreement and the Anson Road Property were directly

relevant to the Lawsuit, because a central issue at trial was whether the Easement should be rectified. Rectification is an equitable, discretionary remedy. The fact that the Easement would not ultimately be needed by the Defendants for a public wharf in light of the Undisclosed Agreement was directly relevant to the exercise of the court's discretion.

26. The Undisclosed Agreement was never acknowledged or discussed publicly by the CRD or Canada until the November 30, 2018 agreement was disclosed to the public on December 10, 2018.

27. Had Arbutus Bay known the Lot A Wharf would be removed on divestiture, Arbutus Bay would not have brought or carried on with the Lawsuit. Indeed, Arbutus Bay waited many years before bringing the lawsuit in 2013 because it hoped that litigation would not be necessary.

28. Furthermore, some of the Defendants' statements in the past lawsuit before the Court of Appeal were not just lies, but fraudulent statements in order to pervert the course of justice, to withhold, suppress the true facts to come out, to interfere with the orderly administration of the laws, and of justice. Truth did not matter, only winning did.

. . .

Part 3: LEGALBASIS

1. Arbutus Bay claims in the law of conspiracy and fraud on the court.

2. In the Lawsuit, the Defendants had a positive, continuing obligation under the court rules to disclose all records relating to the Undisclosed Agreement. Their decision to keep it a secret breached their obligations of disclosure and was a product of the Defendants knowingly and intentionally misleading the court as to the true state of affairs in order to enhance their defence to Arbutus Bay's claims and enhance the success of their counterclaims for rectification in the Lawsuit.

3. Arbutus Bay had no knowledge of the Undisclosed Agreement during the Lawsuit, or that records relating to it were being withheld.

4. The withholding of the Undisclosed Agreement affected the result of the Lawsuit. The Court of Appeal's decision to rectify the Easement was a discretionary one, and the Defendants presented it as being integral to the continued existence of a public wharf that was essential infrastructure on Mayne Island. Had the court known that in fact it was not integral and would shortly be removed was highly relevant and had a significant chance of changing the result.

5. Arbutus Bay has acted on this fraud on the court in a timely way, in all the circumstances. Because of the outcome of the Lawsuit, the fact is that Arbutus Bay has been in extreme financial distress from the costs of litigation, and has acted as quickly as it has reasonably been able to in notifying the Defendants of this claim and advancing it.

6. The withholding of the Undisclosed Agreement was an unlawful action taken in concert by the Defendants in order to cause Arbutus Bay to lose the Lawsuit and thereby suffer substantial losses.

> 7. The damages suffered by Arbutus Bay include incurring its own costs of advancing the unsuccessful Lawsuit, incurring the costs now payable to the Defendants as a result of not succeeding in the Lawsuit, and suffering the many costs relating to the foreclosure of Arbutus Bay's properties as a result of the financial distress from the unsuccessful result in the Lawsuit.

[14] Although the plaintiff was not represented by counsel at the application, the claim was drafted by previous counsel.

[15] The defendants argue that the notice of civil claim fails to disclose a cause of action, is frivolous or vexatious, and is otherwise an abuse of process.

[16] For the reasons that follow, the defendants' applications are granted and the plaintiff's claim is struck.

Current Application

[17] The first application filed was by the Province of British Columbia in September 2022. When the matter was first scheduled for hearing, the plaintiff had counsel who sought to withdraw. The matter was adjourned in February 2023. In April 2023, the matter was rescheduled before Madam Justice Blake. By this time, the other defendants, CRD and Canada, had filed an application seeking identical relief. Ms. Buchholz, on behalf of the plaintiff, sought and was granted an adjournment until the week of September 5, 2023, and the matter was set peremptory on the plaintiff.

[18] When the plaintiff attended on day one of this two-day hearing, it was Ms. Buchholz who attended on behalf of the plaintiff. The plaintiff did not have counsel. Ms. Buchholz was asked on more than one occasion as to whether she was seeking an adjournment but she confirmed that she was not. She had, however, filed a 600-page affidavit the day before. In that affidavit, Ms. Buchholz deposes that she has attempted to find counsel but has been unsuccessful and says that she is unable to find counsel who would be prepared to take on the case. After having confirmed that no adjournment was sought by the plaintiff, the matter proceeded.

Legal Framework

[19] The application is brought pursuant to Rule 9-5(1)(a)(b) and (d):

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> . . .
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[20] For an application under Rule 9-5(1)(a) to succeed, it must be “plain and obvious" that the claim discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. The court's analysis under Rule 9-5(1)(a) is limited to the pleadings. The material facts pleaded are assumed to be true, unless they are manifestly incapable of being proven. However, the courts are under no obligation to assume that conclusory statements or bare allegations are true. Justice Baird in *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, stated:

> [23] I am not obliged to assume that bare allegations or conclusory statements are true: *Stephen v. British Columbia (Ministry of Children and Family Development)*, 2008 BCSC 1656 at paras. 49 and 60; *Sidhu v. Canada (Attorney General)*, 2016 YKCA 6 at paras. 15-17. The pleadings must disclose a concrete factual basis upon which the defendant could be said to have failed K.O. in the discharge of the legal obligations alleged. It is not enough to assert without resort to subjective material facts that a given state of affairs exists and then to propose that it gives rise to an actionable claim for personal injury, infringement of individual *Charter* rights, and compensatory damages: see, for example, *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, especially at paras. 50-51.

[21] In all cases, sufficient material facts must be pleaded to support the conclusions of law.

[22] The plaintiff’s claims here are for fraud and conspiracy, each of which has strict pleadings requirements.

[23] The elements of civil fraud, as set out in *Bruno Appliance and Furniture, Inc.* v. *Hryniak,* 2014 SCC 8 at para. 21, are as follows:

1. a false representation made by the defendant;
2. some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
3. the false representation caused the plaintiff to act; and
4. the plaintiff's actions resulted in a loss.

[24] In *Watson v. Bank of America Corporation,* 2015 BCCA 362 at para. 125, the Court describes the requisite elements of the tort of conspiracy to injure:

1. an agreement or concerted action between two or more persons;
2. with the predominant purpose of causing injury to the plaintiff; and
3. overt acts committed that cause damage to the plaintiff.

[25] The Court in *Watson* at para. 127*,* citing *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at para. 8, 1993 CanLII 6870 (C.A.), sets out the material facts that must, in addition to the essential elements noted above, be plead for conspiracy:

1. the names of the parties to the conspiracy and their relationship to each other;
2. particulars of the conspiracy itself;
3. the date on which, or dates between which the conspiracy was entered into or continued; and
4. the overt acts alleged to have been done by each of the conspirators in pursuing the conspiracy.

[26] Pleadings alleging conspiracy must be as specific as possible: *Watson* at para. 132; see also *Can-Dive at* para. 9.

[27] The applicants argue that the allegations of fraud and conspiracy are unsupported by sufficient material facts and are simply conclusory. As such, the court is not required to accept for the purposes of the Rule 9-5(1)(a) aspect of the application that the facts as pleaded are true. In this case, the inference from the

pleadings as drafted is that CRD and Canada must have agreed on all of the essential terms of the Undisclosed Agreement prior to the date of its execution, which was after the plaintiff's appeals had been exhausted, and prior to the conclusion of the litigation.

[28] The defendants also apply under Rule 9-5(1)(b) on the basis that the plaintiff's claim is “unnecessary, scandalous, frivolous or vexatious”. A pleading may be considered unnecessary or vexatious if it would serve no useful purpose or would be a waste of the court’s time and public resources: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 65, citing *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

[29] Finally, the defendants apply under Rule 9-15(1)(d) and submit that the plaintiff's claim is an abuse of process. The doctrine of abuse of process is described in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*C.U.P.E.*] at para. 37, as engaging the court's inherent power to prevent a misuse of its procedure in a way that would be manifestly unfair to a litigant or would otherwise bring the administration of justice into disrepute.

[30] The Court’s comments in *C.U.P.E.* as follows are of particular relevance to the case at bar:

> 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts’ and the litigants’ resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[31] I will now apply these principles to the plaintiff’s notice of civil claim.

Discussion

[32] The plaintiff's claim in its notice of civil claim is that it would not have initiated and continued the previous litigation had it known of the Undisclosed Agreement. The underlying premise of this argument is that if the Horton Bay Wharf is decommissioned as contemplated in the Undisclosed Agreement, the easement registered on the plaintiff's property would be cancelled in accordance with its terms. Implicit in this position is that cancelling the easement was always the plaintiff's sole, or at least its principal, objective in pursuing the earlier litigation.

[33] It is apparent from a review of both the plaintiff's notice of civil claim and the Undisclosed Agreement itself that the document was not dated until November 30, 2018. As such, the document was not one that could have been considered by the trial judge. The plaintiff's theory is that the Undisclosed Agreement between CRD and Canada to decommission the Horton Bay Wharf and build a new wharf at Anson Road was actually entered into prior to November 30, 2018, but that they had wrongfully chosen not to document or disclose it until the case was completed.

[34] The possibility of an alternative wharf site was in evidence before the trial judge. Mr. Robert Kojima, a regional planning manager with Islands Trust testified. During his evidence, he was referred to a staff report prepared by a planner with the Southern Gulf Islands Harbours Commission, a body of the CRD, about the possibility of constructing a new wharf adjacent to Anson Road. The proposal was described as in its preliminary stages and that rezoning, community information meetings, and consultation, including with First Nations, would be required.

[35] Mr. Kojima was cross-examined by Mr. Scherr, who was at that point of the trial counsel for the plaintiff. There was no suggestion at trial that an arrangement between CRD and Canada had already been concluded, nor is it alleged in this case that Mr. Kojima's evidence on the issue was untrue.

[36] In the notice of civil claim, the plaintiff pleads at paragraphs 23 to 25 that the defendants were obligated to have disclosed the Undisclosed Agreement and wrongfully diverted the court's attention from the plan and indeed the agreement to

construct a wharf at Anson Road. However, it is important to recognize that the trial judge was not being asked to determine the best site for a wharf, which is a policy decision for one or more of the government defendants. Rather, what was before the trial judge was the validity and enforceability of the easement registered over the plaintiff's property at Horton Bay, amongst other things.

[37] Notwithstanding the plaintiff's assertion that having the Horton Bay Wharf removed and the resulting easement cancellation were its primary objectives in the earlier litigation, a review of the pleadings and the Trial Decision suggests otherwise. The plaintiff sought declaratory relief; damages for trespass, nuisance; and for a breach of the plaintiff's riparian rights; punitive damages; and special costs. The plaintiff further sought a declaration that the easement was invalid.

[38] A claim for damages is one where monetary compensation is asserted to remedy a wrong. I am satisfied from a review of the Trial Decision that damages were an important focus of the trial. There is no suggestion in either the pleadings or the Trial Decision that cancellation of the easement was the primary purpose of the suit or that the various claims in damages were only sought in the alternative. As such, even if the easement had been cancelled, it does not follow that the claim for damages would not have been pursued.

[39] Since the conclusion of the previous litigation and after the Undisclosed Agreement was executed, a new wharf has been constructed at Anson Road. However, notwithstanding the terms of the Undisclosed Agreement whereby the Horton Bay Wharf was to be decommissioned, the CRD has since decided that the Horton Bay Wharf is to be revitalized. Evidence of this may be found in Ms. Buchholz's affidavit by way of a staff report to the Southern Gulf Islands Harbours Commission for a meeting of July 25, 2023.

[40] The fatal flaw in the plaintiff's argument is that it assumes that the decommissioning of the Horton Bay Wharf was bound to follow from the Undisclosed Agreement. However, even if CRD and Canada had agreed that at some point in the future the Horton Bay Wharf may be decommissioned, this does not obligate either

of them to do anything at the instance of the plaintiff who is not a party to that contract. It is trite law that the only parties who can enforce a contract are the parties to the contract. As a stranger to the contract, the plaintiff has no ability to compel CRD to decommission the Horton Bay Wharf as contemplated in the Undisclosed Agreement, even if Canada may theoretically have the ability to do so.

[41] Paragraph 22 of the notice of civil claim pleads as follows:

> 22. It was only after that date, after all the costs had been incurred and the litigation was over, that Canada and the CRD disclosed their intention to remove the Lot A Wharf and build a new public wharf at Anson Road. This was in the form of an agreement dated November 30, 2018 between Canada and the CRD, subject to CRD Board approval, which included the following terms (emphasis added): (terms omitted)

[42] What was contemplated in the Undisclosed Agreement never occurred and the Horton Bay Wharf is to remain. As long as it exists, the easement on the plaintiff's property remains valid as previously determined in the prior litigation.

[43] As such, even if the Undisclosed Agreement was in fact the written manifestation of a prior unwritten agreement between Canada and CRD—for which there is no evidence, only a conclusory statement in the plaintiff's pleadings—its disclosure would not have changed anything because it provides only a statement of an intention. The Undisclosed Agreement was irrelevant to the plaintiff's claims in the previous action because it could not change the plaintiff's legal position with regard to the defendants.

[44] Put another way, even if one were to accept at face value that the sole or primary goal of the earlier litigation was to ensure the easement would be cancelled, and I make no such finding, earlier disclosure of the Undisclosed Agreement could not have assured the plaintiff that it would secure its desired outcome. Rather, only the actual decommissioning of the Horton Bay Wharf, which had not happened by then and is unlikely to happen now, could provide the assurance the plaintiff now asserts.

[45] I return now to the underlying principles to be applied on this application. In *Willow*, Justice Fisher (as she then was) described the principles on an application under Rule 9-5(1)(b) 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] 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. An application under this sub-rule may be supported by evidence.

[46] The plaintiff's claim serves no useful purpose and, if litigated further, would be a waste of the court's time and public resources. There is no possibility that the plaintiff could persuade a court that it would not have commenced or continued with the previous litigation had it been aware of the Undisclosed Agreement. The Undisclosed Agreement is nothing more than a statement of intention that was never acted upon by the two parties to it. The plaintiff was not a party. The claim is doomed to fail and it is therefore unnecessary and vexatious.

[47] In *Willow*, Fisher J. also summarized the relevant considerations on an application under Rule 9-5(1)(d) regarding whether or not a claim constitutes an abuse of process:

> [21] Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

[48] I find that the plaintiff's claim is also an abuse of process. The overarching claim is that the actions of the various levels of government throughout the years

amount to an expropriation of its property without compensation. During her submissions in response to the defendants' applications, Ms. Buchholz went to great lengths to explain the history of the various events that have occurred since she purchased the property in 1973, and the various litigated claims since that time. Much of her 600-page affidavit filed on the eve of the application was dedicated to the history of her grievances with the various levels of government.

[49] Ultimately, it is apparent that the plaintiff remains dissatisfied with the Trial Decision and believes that the Court of Appeal went beyond its authority when it ordered that the easement be rectified. Notwithstanding her concerns about both levels of court and the allegations levied at the lawyers who acted for the various levels of government, the essence of the plaintiff's claim remains that she wishes that the easement would be cancelled.

[50] However, the courts have finally and conclusively ruled on the validity and enforceability of the easement. In the result, I am satisfied there is nothing left to decide between these parties, and it would constitute an abuse of process if the plaintiff were permitted to try to relitigate those matters that were previously adjudicated.

[51] Because of my conclusions above, it is not necessary to comment on the defendants' submissions as to the adequacy of the pleadings regarding the torts of conspiracy and civil fraud.

Disposition

[52] The defendants' applications are granted, and the plaintiff's claim is dismissed without leave to amend, there being no amendments that could remedy the fundamental flaws with the plaintiff's claim.

[53] The defendants are entitled to their costs.

"Wilson J."