

CANADA / JUDGMENT

# Sandhu v. Surrey (City)

2021 BCSC 2519

## COURT

Supreme Court of British Columbia

## DECIDED

29 December 2021

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2021 BCSC 2519 Sandhu v. Surrey (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sandhu v. Surrey (City),

2021 BCSC 2519

Date: 20211229

Docket: S156314

Registry: Vancouver

Between:

Rajindar Sandhu, Balwinder Sandhu,

Sandip Sandhu, and Harinder Sandhu

Plaintiffs

And

City of Surrey, British Columbia Hydro and Power Authority,

Jane Doe, John Doe I, John Doe II and John Doe Ltd., John Doe III,

ABC Company Ltd., Minister of Public Safety and Solicitor General for British Columbia, Carissa Leeson, John Doe IV

## Defendants

Corrected Judgment: The cover page of these Reasons for Judgment has been corrected on January 11, 2022 and paragraph 5 has been corrected on

June 21, 2023

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, appearing via video conference:

**M.S. Smith**

Counsel for the Defendants, Minister of Public Safety and Solicitor General for British Columbia and Carissa Leeson, appearing via video conference:

D. Nuñez

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

December 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 29, 2021

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## Introduction

- [1] Certain defendants apply to strike portions of a notice of civil claim ("NoCC") and dismiss the action against them. The applicants are described in the pleadings as the "RCMP Defendants". They say that it is plain and obvious that the NoCC fails to state any reasonable cause of action against them and the pleading against them should therefore be struck pursuant to R. 9-5(1)(a) of the Supreme Court Civil Rules. Simply put, the applicants dispute the legal sufficiency of the claims pleaded against them in the NoCC.
- [2] The plaintiffs commenced the action in July 2015, but it has not gotten very far. The essence of the claim is that the plaintiffs, who own property in Surrey, British Columbia, were the subject of unfounded allegations that they were growing marihuana on their property, leading to an unlawful investigation and the disconnection of the electrical service to their property. The plaintiffs allege that the investigation was undertaken to assist an unidentified developer to acquire their property at a discount. They plead causes of action including conspiracy, misfeasance in public office, trespass, and others against the City of Surrey, British Columbia Hydro and Power Authority, and various persons the plaintiffs have not yet been able to identify.
- [3] In 2019, the plaintiffs applied to join the applicants as defendants and amend the NoCC to state claims against the applicants. The applicants opposed the joinder application. Master Muir allowed the joinder application on July 9, 2019. Her order granted the plaintiffs leave to amend the NoCC to its current form as the Third Amended Notice of Civil Claim.
- [4] The plaintiffs say that the defendants' present application fails for two reasons. First, it is an attempt to relitigate a question decided by Master Muir and is barred by the doctrine of issue estoppel. Second, they affirm that the NoCC states reasonable causes of action against the RCMP Defendants.

## Preliminary Objection Based on Issue Estoppel

- [5] Before turning to the substance of the argument based on issue estoppel, I must address an evidentiary objection that I heard and reserved on during the course of the hearing. The applicants object to the inclusion in the application record of an affidavit sworn by the plaintiff, Sandip Sandhu. The affidavit addresses the steps taken in the litigation leading to the order made by Master Muir. The plaintiffs tender it only in relation to the question of issue estoppel.

- [6] In my view, the affidavit is admissible. The applicants say that the relevant facts pertaining to their preliminary objection are limited to what may be gleaned from Master Muir's oral reasons and the court record. However, the affidavit records information relevant to the exercise of my discretion that cannot be found in the court file, such as the details of the position taken by the applicants before Master Muir and at an earlier hearing before Master Tokarek.
- [7] The plaintiffs contend that it is not open to the applicants to seek to strike a pleading that was expressly approved by Master Muir. They note that the order sought and granted by the Master involved amendment of the NoCC pursuant to Rule 6-1, and that it is well established that leave to amend should only be granted in respect of amendments that state reasonable claims or defences, as the case may be; *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45 (S.C.) at 47, rev'd on other grounds (1982), 30 B.C.L.R. (2d) 50 (C.A.); *One West Holdings Ltd. v. The Owners, Strata Plan LMS2995*, 2019 BCSC 707 at para. 76; *W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership*, 2020 BCSC 1345 at para. 8. The same test is applied on an application for leave to amend pursuant to R. 6-1 as on an application to strike pursuant to R. 9-5(1)(a).
- [8] In response, the applicants argue that the real substance of the application before Master Muir was not an application to amend, but an application to join defendants. Master Muir was not asked to address an argument that the amendments failed to state a reasonable cause of action against the RCMP defendants. The applicants say that such an argument would not have been appropriate, citing *Byrd v. Cariboo (Regional District)*, 2014 BCSC 2239 at para. 24, aff'd 2016 BCCA 69. They submit that the position taken by the plaintiffs would deprive the court of the ability to control its own process in the manner contemplated by cases such as *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 19 and *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 18.
- [9] Each side has a point, and each side's point can be taken too far.
- [10] The plaintiffs are correct that the application before Master Muir involved an amendment to the NoCC. It would have been open to the applicants to oppose the application on the ground that the proposed claims against them are unknown to the law. It would be needlessly inefficient, and inconsistent with the reasoning in cases such as *Victoria Grey Metro Trust*, to require a party faced with such an application to reserve its attack on the legal sufficiency of the pleading to a subsequent application.
- [11] The applicants are correct that a firm rule that an attack on the legal sufficiency of a pleading proposed in a joinder application can never be deferred would have undesirable consequences. The application before Master Muir was one pursued on short notice, due to the anticipated expiration of a limitation period. The Master found that it was urgent and should be decided immediately. The applicants were not afforded much time to consider their position and all the possible legal arguments. Had they advanced the arguments canvassed before me on this application, it is unlikely that there would have been time to

address them on an application scheduled as one of many on the list in Master's chambers.

- [12] The Court's procedures exist to enable the just, speedy, and inexpensive resolution of cases on their merits; R. 1-3. Had the issue been raised, it would have been open to Master Muir to address it directly or to direct that it be pursued on an application to strike.
- [13] In my view, it makes no difference in this case that the issue was not raised before the Master, and no such direction was made. This was an interlocutory application and the doctrines of *res judicata* and issue estoppel do not apply in a hard and fast manner in this context; *Concord Pacific Acquisitions Inc. v. Oei*, 2020 BCSC 832 at para. 81; *Talbot v. Pan Ocean Oil Corp.* (1977), 3 Alta. L.R. (2d) 354, 5 A.R. 361 (C.A.); *Kent v. Watts*, 2019 ABCA 326 at para. 23. Rather, where it appears that a party is attempting to litigate a question that was or could have been determined on a previous interlocutory application, the Court may exercise its discretion to decline to hear the application.
- [14] In this case, I exercise my discretion to hear the application. I take into account that the application before Master Muir was urgent and was brought on short notice in circumstances that probably would not have permitted full argument addressing the legal sufficiency of the amendments in any event. Moreover, in my view, it is undesirable that this action proceed to trial against the applicants on the basis of this pleading without any judicial assessment of its legal sufficiency as against the applicants.

#### Application to Strike

#### Legal framework

- [15] Pursuant to R. 3-1(2)(a), a notice of civil claim must "set out a concise statement of the material facts giving rise to the claim". It must also set out the relief sought (sub-rule (b)) and provide a concise summary of the legal basis for the claim (sub-rule (c)).
- [16] A notice of civil claim must be in Form 1; R. 3-1(1). The form requires that the concise statement of material facts be set out in Part 1, the relief sought in Part 2, and the statement of the legal basis for the claim in Part 3. Where material factual allegations are found only in Part 3 and not in Part 1, the court may order that claim be restructured to bring it into compliance with the form; *Bains v. Green*, 2012 BCSC 1733 at para. 62; *311165 BC Ltd. v. Canada (Attorney General)*, 2017 BCCA 196 at para. 40, leave to appeal ref'd [2017] S.C.C.A. No. 297.
- [17] A notice of civil claim is a pleading and R. 3-7 deals with pleadings generally. Rule 3-7(1) prohibits pleading the evidence by which the facts alleged in a pleading are to be proved. Rule 3-7(18) requires the inclusion of appropriate particulars. It states:

### When particulars necessary

- [18] If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

Where particulars are lengthy, they may be provided in a separate document; R. 3-7(19).

Particulars need only be pleaded to the extent that they are known at the date of pleading, in which case further particulars may be required later; R. 3-7(20).

- [18] As noted above, the application is brought pursuant to R. 9-5(1)(a), maintaining that the NoCC "discloses no reasonable claim" against the RCMP Defendants. The law is that a claim must not be struck under R. 9-5(1)(a) unless, assuming the facts pleaded to be true, it is plain and obvious that the claim has no reasonable prospect of success or is frivolous or vexatious; *Imperial Tobacco* at para. 17; *Willow v. Chong*, 2013 BCSC 1083 at para. 20; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 64-66.
- [19] In *Imperial Tobacco*, Chief Justice McLachlin gave judgment for the Court. She noted that the power to strike out claims that do not have a reasonable prospect of success is important for effective and fair litigation. She stated at para. 19:
- [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
- [20] On the other hand, the power to strike claims must not be used to stultify the law by shutting down arguable claims that have not yet been legally recognized. Accordingly, the Chief Justice stated at para. 21:

The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*, [[1932] A.C. 562 (H.L.)]. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[Emphasis added.]

### The claims pleaded against the RCMP Defendants

- [21] In Parts 2 and 3 of the NoCC, the plaintiffs name the following causes of action against the RCMP Defendants:
- a) Trespass,
  - b) Breach of Charter rights,

- c) Negligence and gross negligence,
- d) Dishonesty,
- e) Injurious falsehood,
- f) Nuisance and invasion of privacy;
- g) Conspiracy,
- h) Misfeasance in public office; and
- i) Misfeasance.

[22] All of these claims must be evaluated on the basis of the facts pleaded in Part 1 of the NoCC. These factual allegations may be summarized as follows:

- a) The plaintiffs, Rajindar and Balwinder Sandhu are the owners of a property (the "Property") in Surrey (para. 12);
- b) The property contains a house (the "House") (para. 14);
- c) On or about January 8, 2015, four members of the RCMP attended the property following a break-in reported by the plaintiff, Sandip Sandhu, entered the House, apprehended two youths at gunpoint, and cleared the House (para. 21);
- d) The RCMP members observed nothing untoward on this occasion (para. 50(e));
- e) Unidentified city employees, Jane and John Doe, conspired with a developer who wished to purchase the Property "with the purpose of coercing the plaintiffs into selling the Property to the Developer, and at price and terms more favorable to the Developer" (para. 121);
- f) One of the RCMP Defendants, Cpl. Leeson, "knowingly and wilfully participated in a conspiracy with Jane Doe and/or John Doe and/or agents for those in order for the City of Surrey to stage and effect an EFSIT [City] inspection for a grow-op on the Property. Leeson specifically had Cst. Dennis Bell and By-law officer Kim Jackson attend the Property" (para. 122);
- g) Cpl. Leeson knew or ought to have known that the City's EFSIT inspection of the Property would be unwarranted and unlawful (para. 128);
- h) On or about January 23, 2015, Cst. Bell and another member of the RCMP entered the Property without notice and without the plaintiffs' knowledge or consent to perform an inspection (paras. 22, 31);
- i) The Property was gated and marked with a "no trespassing" sign (para. 33);
- j) The inspection was a warrantless perimeter search (paras. 33.1, 34);
- k) Cst. Bell reported to Cpl. Leeson the claim of a grow op on the Property, though he knew or ought to have known that the claim was patently false (paras. 125-126);

- l) Cpl. Leeson knew or ought to have known that the Property was not being used as a grow-op, and knowingly neglected her duties as Cst. Bell's superior officer in failing to correct his false claim (para. 127);
- m) Cpl. Leeson unreasonably made no attempt to reconcile the false information provided to her with the earlier information provided to her by the RCMP members who entered the House on January 8, 2015 (para. 129);
- n) Alternatively, Cpl. Leeson's failure to investigate the claim of a grow-op was grossly incompetent and reckless (para. 130).
- o) On February 3, 2015, City employees requested access to the Property and the House and the plaintiffs granted them access to the Property but not the House (paras. 35-43);
- p) On February 17, 2015, City employees again requested admission to the House and were again refused by the plaintiffs (paras. 45-47);
- q) On February 18, 2015, electrical power to the Property was disconnected (para. 57);
- r) On July 6, 2016, the plaintiffs' lawyer wrote to the City asking whether the City would be seeking a warrant to enter the Property. The City did not reply to the letter (para. 64.2);
- s) In response to the letter, Cpl. Leeson and an unidentified member of the RCMP (John Doe IV) "conspired with Jane Doe and/or John Doe and/or agents for those to have the RCMP perform a warrantless search on the plaintiffs['] property" (para. 135);
- t) On July 10, 2016, at the City's request, four members of the RCMP trespassed on the Property and conducted an illegal perimeter search, opening the gate and entering past the "no trespassing" sign (paras. 64.3-64.4, 134);
- u) When the RCMP members left the Property, they left the gate open and fallen on the ground (para. 46);
- v) Cpl. Leeson and John Doe IV lacked lawful or reasonable grounds to direct a warrantless search of the plaintiffs' Property (para. 136);
- w) In August 2016, shortly after this action was commenced and the NoCC was served on the City, the RCMP commenced flying helicopters over the Property and an adjacent acreage property owned by the plaintiffs, collectively described as the Properties (para. 149); and
- x) The actions of the RCMP Defendants were malicious, high-handed, oppressive, unconscionable, deliberate, and showed a callous disregard for the plaintiffs' rights (para. 153).

## Claim of trespass

- [23] Trespass is a tort that protects the rights of persons who are lawfully in possession of land; *Gillespie v. Gill*, 1999 BCPC 39 at para. 45. A tenant in lawful possession of property can sue for trespass while the landlord cannot, because the landlord has ceded the right of possession to the tenant for the duration of the tenancy; *Monaco v. Coquitlam (City)*, 2015 BCSC 2421 at para. 136.
- [24] The applicants submit that the plaintiffs have not pleaded a reasonable claim for trespass because they have not pleaded that they were lawfully in possession of the Property and the House. They have only pleaded that two of them own the Property.
- [25] The plea of trespass is adequate because there is more than just a plea that two of the plaintiffs are owners of the Property. The NoCC pleads facts from which it can be inferred that the plaintiffs were in possession of the Property. In February 2015, City employees requested access to the Property and the House, and the plaintiffs granted them access to the Property but not the House. Later that month, City employees repeated their request for access to the House, and were again refused by the plaintiffs. The Property was gated and marked with a "no trespassing" sign. On July 10, 2016, members of the RCMP opened the gate and entered the Property, and left the gate open and fallen to the ground when they left.
- [26] The claim of trespass should not be struck.

## Claim of breach of Charter rights

- [27] The NoCC pleads that the RCMP defendants breached the plaintiffs' right to be free from unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms [Charter].
- [28] There is a passing reference in paragraph 7 of Part 3 of the NoCC (legal basis) to a breach of the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice under s. 7 of the Charter. The applicants do not seek to strike this paragraph and it was not addressed in argument. I will say no more about it.
- [29] A claim under s. 8 of the Charter requires a plaintiff to establish a violation of a personal right to privacy grounded in a reasonable expectation of privacy. Section 8 protects people and not places. Determining whether a plaintiff possessed a reasonable expectation of privacy requires an analysis of the circumstances of the search and the plaintiff's expectations in the circumstances; *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45.
- [30] The applicants submit that the NoCC fails to plead that the plaintiffs possessed a reasonable expectation of privacy or material facts from which a reasonable expectation of privacy might be inferred. The plaintiffs submit that "individuals have a reasonable expectation of privacy in their own home", citing *Wasserman v. Hall*, 2009 BCSC 1318 at para. 75.

- [31] Wasserman is unhelpful. It involved the statutory tort under s. 1 of the Privacy Act, R.S.B.C. 1996, c. 373, not s. 8 of the Charter. It does not address the legal analysis mandated by the Charter jurisprudence. More fundamentally, the plaintiffs have not pleaded that any of them were residing in the House. There is no plea that any of the defendants entered the House. The complaint concerns perimeter searches and the conduct of the RCMP Defendants on the Property but not in the House.
- [32] I agree with the applicants it is plain and obvious that the pleading of a breach of rights under s. 8 of the Charter fails to state a reasonable cause of action because there is no pleading from which a reasonable expectation of privacy might be discerned. In *Monaco* at paras. 116-122, *Abrioux J.* (as he then was) held that even a bare plea of a reasonable expectation of privacy, unsupported by material facts lending substance to the plea, would not suffice.
- [33] The paragraphs in the NoCC specific to the claim of a breach of rights under s. 8 of the Charter will be struck. They are the references to s. 8 in paragraphs 124 and 144 of Part 1; the reference to breach of Charter rights in paragraph 1 under the heading of the claim against the Minister in Part 2, paragraphs 2 and 4 under the same heading; and the references to Charter rights in paragraphs 13, 16 and 24 of Part 3.

### **Claim of negligence or gross negligence**

- [34] The applicants submit that the claims of negligence or gross negligence must fail because the NoCC fails to articulate a factual basis for a finding that they owed the plaintiffs a duty of care, citing *Sekhon v. Canada (Attorney General)*, 2019 BCSC 1164 at paras. 18 and 31. They rely on the principle that the police do not generally owe a private law duty of care to victims or potential victims of crime in relation to their investigations; *Callan v. Cooke*, 2012 BCSC 1589 at paras. 44-68. They acknowledge that this principle is subject to limited exceptions: a duty may be owed to the suspects of a criminal investigation; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; or where the police are aware of specific ascertainable threats to a specific victim; *Burnett v. Moir*, 2011 BCSC 1469 at para. 405.
- [35] The applicants submit that there is no pleading of facts that would bring the plaintiffs within the ambit of one of the exceptions. They say that the pleading is not sufficient to establish a relationship of proximity between the RCMP Defendants and the plaintiffs. They say that the City was in a relationship of proximity with the plaintiffs, but the RCMP Defendants were not.
- [36] The plaintiffs respond that the requirement of proximity is satisfied because they were the subject of the investigation and the likelihood of loss and damage resulting from an unfounded allegation that they were operating a grow-op is obvious.
- [37] In my opinion, the factual pleading is sufficient to arguably bring this case into one of the exceptions to the general rule and establish a relationship of proximity sufficient to found a private law duty of care, owed by the RCMP defendants to the plaintiffs. According to the

pleading, the plaintiffs were the subject of investigation into the possibility that the House was the site of a grow-op. This was an investigation into criminal activity. That is why the RCMP were involved. Although members of the RCMP knew or ought to have known that the Property was not being used as a grow-op, they nevertheless cooperated in and facilitated the investigation.

- [38] It is not plain and obvious that the negligence claim is bound to fail. The applicants do not suggest that the gross negligence claim should fall even if the negligence claim stands. Neither claim will be struck.

### **Claim of dishonesty**

- [39] There is not a bare tort of dishonesty. Dishonest behaviour is often tortious. For example, a dishonest representation relied upon by a plaintiff to its detriment constitutes the tort of deceit. But something more than simple dishonesty is required to constitute a tortious cause of action.
- [40] The references in the NoCC to dishonesty as a claim in its own right will be struck. They are found in paragraph 1 of the relief sought against the Minister in Part 2 and in paragraph 14 of Part 3.

### **Claim of injurious falsehood**

- [41] It is common ground that the elements of the tort of injurious falsehood are: (1) a false statement disparaging the plaintiff's business, goods or property; (2) published to a third person; (3) maliciously and without just cause or excuse; and (4) resulting in special damages in the form of pecuniary loss; 311165 B.C. Ltd. v. Canada (Attorney General), 2016 BCSC 2068 at para. 36, varied on other grounds 2017 BCCA 196.
- [42] The applicants submit that the third element of malice is missing. This submission overlooks the allegation, at para. 153 of the NoCC, that the RCMP Defendants acted maliciously.
- [43] The other three elements of the tort are also pleaded. Cst. Bell reported to Cpl. Leeson the false claim of a grow-op on the Property. Cpl. Leeson conspired with others to have the City inspect the Property in January 2015, and to have a further warrantless search conducted in July 2016. The NoCC pleads:
131. The actions, inactions and omissions of Leeson resulted in unlawful and unwarranted demands for an inspection by EFSIT, and the electrical service ultimately being terminated to the plaintiffs[] Property, and all the events that followed thereafter, as set out in this claim.
132. As a consequence of the actions, inactions, omissions and conduct of Leeson, the plaintiffs suffered harm, loss and injury.

[44] The claim of injurious falsehood should not be struck.

### Claims of nuisance and invasion of privacy

[45] A claim of nuisance requires a substantial and unreasonable interference with the use or enjoyment of land; *Baker v. Rendle*, 2017 BCCA 72 at para. 41; *Northern Cross (Yukon) Ltd. v. Yukon (Energy, Mines and Resources)*, 2021 YKCA 6 at para. 104. The focus of the tort is on the harm suffered by the plaintiff. In *Northern Cross*, Voith J.A., speaking for the Court at para. 111, cited with approval the following statement from Allen M. Linden et al., *Canadian Tort Law*, 11th ed. (Toronto: LexisNexis, 2018) at 535:

The essence of the nuisance tort is the interference with a plaintiff's rights in or arising from property. Nuisance is, accordingly, plaintiff-focused--'a field of liability that focuses on the harm suffered rather than on prohibited conduct'.

[46] The applicants submit that the NoCC fails to state a reasonable claim in nuisance because, while it pleads that "[the] helicopters flying over the Properties resulted in noise, disturbance, and the invasion of privacy of the plaintiffs" (at para. 150), it fails to plead facts describing how the noise or disturbance prevented the plaintiffs from using or enjoying their properties.

[47] The plaintiffs respond that the pleading is sufficient because it provides the following particulars of the helicopter flights over the Properties (at para. 149):

- a. flying over the Properties at low flight speeds;
- b. circling over the Properties at low flight speeds;
- c. making multiple passes over the Properties over short time frames;
- d. making multiple passes over the Properties on the same day;
- e. flying over the Properties at inappropriately low altitudes in a built out residential urban area;
- f. surveilling the Properties and the plaintiffs on them;
- g. All of the above (a. to f.) commonly included times late at night and early morning.

[48] I agree with the applicants that the pleading as it stands is inadequate to state a reasonable claim for nuisance. The conduct particularized in the NoCC could only constitute a nuisance if it substantially and unreasonably interfered with the plaintiffs' use or enjoyment of their properties. There is nothing in the NoCC to indicate how the plaintiffs used or enjoyed their properties. As noted above, there is nothing to indicate that any of the plaintiffs resided in the House. The NoCC describes the conduct of the RCMP defendants, but fails to address the critical question of the impact of that conduct on the plaintiffs.

- [49] Breach of privacy is a statutory tort established by s. 1 of the Privacy Act. The tort requires interference by the defendant with the plaintiff's reasonable expectation of privacy; Wasserman at paras. 73-77; TaBaerts v. Penta Builders Group Inc., 2015 BCSC 2008 at paras. 117-128. It also requires that the interference be wilful.
- [50] The NoCC does not state a reasonable claim for breach of privacy because it does not plead facts from which a violation of a reasonable expectation of privacy on the part of the plaintiffs might be inferred. The closest it comes to pleading that the plaintiffs were even present while the helicopter flights were taking place is in the plea that the flights were "surveilling the Properties and the plaintiffs on them". This does not suffice to establish interference with the plaintiffs' reasonable expectation of privacy, an essential element of this cause of action.
- [51] The paragraphs in the NoCC stating claims in nuisance and for breach of privacy should be struck. They are paragraphs 149 to 152 of Part 1, the references to nuisance and invasion of privacy in para. 1 of the relief sought against the Minister in Part 2, and paragraph 18 of Part 3.

### Claim of conspiracy

- [52] The conspiracies alleged in this case are "unlawful means" conspiracies, that is, conspiracies alleging unlawful conduct directed towards the plaintiffs that the defendants knew or should have known would cause the plaintiffs harm; Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate, [1983] 1 S.C.R. 452 at 471-72. The elements of an unlawful means conspiracy are:
- a) An agreement between two or more persons;
  - b) Concerted unlawful action taken pursuant to the agreement;
  - c) Evidence that the conspirators knew or ought to have known that their actions would injure the plaintiffs; and
  - d) Actual damage suffered by the plaintiffs;

See: Can-Dive Services Ltd. v. Pacific Coast Energy Corp. (1993), 96 B.C.L.R. (2d) 156, 26 C.P.C. (3d) 395 (C.A.) at paras. 4-5.

- [53] Pleadings of conspiracy must be as specific as possible; Can-Dive at para. 9. However, a plaintiff is not required to plead details extending beyond the scope of information reasonably available to the plaintiff at the present stage of the litigation; H.M.B. Holdings Limited v. Replay Resorts Inc., 2021 BCCA 142 at para. 75, citing Watson v. Bank of America Corporation, 2015 BCCA 362 at paras. 131-135. In Watson, at para. 135, the Court upheld as sufficient a plea in which:

the parties to the conspiracy are identified; their impugned business arrangements are identified; the flow of monies is identified; the alleged harm to merchants is identified; and the start and end time in respect to which the claim is brought is identified.

[54] In my view, the present pleading of conspiracy is legally insufficient for several reasons.

[55] Three conspiracies are pleaded in the NoCC. The first is the 2015 conspiracy between the developer and City employees to coerce the plaintiffs into selling the Property to the developer. The second is the 2015 conspiracy between Cpl. Leeson and City employees or agent to stage an unwarranted and unlawful inspection for a grow-op on the Property. The third is the 2016 conspiracy between Cpl. Leeson and another unidentified member of the RCMP with City employees or agents to have the RCMP perform a warrantless search of the Property.

[56] There is no express plea of an agreement or agreements constituting the three conspiracies. The existence of agreements is left to be inferred by the reader from the pleading that there were conspiracies. (At para. 104, there is a plea of a scheme or agreement involving two employees of the City to cause an investigation of the Property in furtherance of the developer's plans to obtain the Property. Curiously, it is not pleaded that the developer was a party to this agreement, which differentiates it from the 2015 conspiracy with the developer alleged at para. 121 of the NoCC.)

[57] The parties to the three conspiracies are different. Their purposes are distinct. The first two seem closely connected in time, and the third is more than a year later. The first conspiracy is expressly pleaded under the heading, "Misconduct of Leeson", but it is not expressly connected to anything Leeson knew or did.

[58] The plaintiffs are entitled to abstain from pleading details that they could not reasonably possess prior to discovery, but they must at least commit to a coherent and reasonably specific theory of the conspiracy or conspiracies at this stage. They have not done so in the NoCC.

[59] The paragraphs in the NoCC stating a claim in conspiracy against the RCMP defendants should be struck except to the extent that they provide a factual underpinning for other claims properly advanced in the NoCC. The portions of the NoCC that should be struck are paragraph 121 of Part 1, the reference to the tort of conspiracy in the paragraph 1 of the relief claimed as against the Minister, Leeson and John Doe IV in Part 2, and paragraph 10 of Part 3. Paragraphs 122 and 135 should not be struck because they form part of the factual underpinning for the plea of injurious falsehood, even though they do not in law support a stand-alone claim of conspiracy.

## Claims of misfeasance in public office and misfeasance at large

- [60] Canadian law recognizes a tort of misfeasance in public office but not a stand-alone claim of misfeasance or malfeasance. Misfeasance in public office requires a plaintiff to prove that a public officer engaged in deliberate and unlawful conduct in his or her capacity as a public officer, being aware that the conduct was unlawful and was likely to harm the plaintiff; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at paras. 23-24.
- [61] The applicants submit that the pleading of misfeasance in public office is vague and unsupported by material facts. It seems to me that, reading the NoCC generously, as I must, the plaintiffs have pleaded the essential elements of the tort. According to the NoCC, Cst. Bell knowingly made a false report of a grow-op on the Property to a superior officer, and Cpl. Leeson, knowing that the report was false, acted on it to direct illegal searches of the Property in 2015 and 2016. These public officials acted high-handedly and maliciously and manifested a callous disregard for the plaintiffs' rights. It may be inferred that illegal searches were likely to harm the plaintiffs.
- [62] These kinds of allegations are exceptionally difficult to prove, but that is not a consideration on an application to strike.
- [63] The applicants' complaint that the allegations are vague is another way of saying that they want particularity. Want of particularity is addressed by a demand for particulars and, where warranted, an order that they be provided. I express no opinion as to whether particulars are required at this time or may be required following discovery.
- [64] The claims of misfeasance in public office should not be struck. The references in the NoCC to a claim for bare misfeasance or malfeasance are struck. They are contained in paragraph 153 of Part 1, paragraph 1 under the headings of the claims against the Minister and against Leeson and John Doe IV in Part 2, and in paragraphs 17 and 23 of Part 3.

### Should the Plaintiffs be Granted Liberty to Amend?

- [65] The plaintiffs ask for liberty to apply to amend to reinstate at least some of the claims I have struck. The applicants submit that liberty to amend should be refused.
- [66] If a pleading is inadequate, a plaintiff is generally to be permitted an opportunity to correct it by amendment unless the underlying problem rests in a fundamental flaw in the cause of action advanced; *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at paras. 40-41, varied 2012 BCCA 196; *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 133.
- [67] While the plaintiffs were assisted by counsel in the early stages of this action, they were on their own in the drafting of the amendments against the RCMP Defendants with which this application is concerned. In *Beach Estate v. Beach*, 2019 BCCA 277 at para. 68, Chief Justice Bauman, giving judgment for the Court, held that:

in the situation of a defective pleading on an issue that does not reach the "no triable issue" threshold, in a claim brought by a self-represented litigant (at least), the proper course would be to strike the pleading and permit the litigant to seek appropriate amendments. This is the practice in the Supreme Court in these matters: [citations omitted.]

[68] I am satisfied that the plaintiffs should be allowed to seek leave to amend in this case. This is a decision consistent with the practice of this Court described by the Chief Justice. Moreover, it seems to me that some of the deficits I have found in the NoCC involve the absence of necessary factual allegations and are, in principle, remediable. The plaintiffs were represented by counsel on the hearing of this application and, while Mr. Smith advised that he was appearing on a limited retainer, I would hope that the plaintiffs will secure his assistance, or that of another competent counsel, in drafting such amendments as they may wish to propose. It should be possible to avoid a further contested pleadings application in this case.

## Disposition

[69] For these reasons, I order that portions of the NoCC be struck as follows:

- a) The following references to a breach of rights under s. 8 of the Charter: the references to s. 8 in paragraphs 124 and 144 of Part 1, the reference to breach of Charter rights in paragraph 1 under the heading of the claim against the Minister and paragraphs 2 and 4 under the same heading in Part 2, and the references to Charter rights in paragraphs 13, 16 and 24 of Part 3;
- b) The references to dishonesty as a claim in its own right in paragraph 1 of the relief sought against the Minister in Part 2 and in paragraph 14 of Part 3;
- c) The paragraphs stating claims in nuisance and for breach of privacy, namely, paragraphs 149 to 152 of Part 1, the references to nuisance and invasion of privacy in para. 1 of the relief sought against the Minister in Part 2, and paragraph 18 of Part 3;
- d) The claim in conspiracy against the RCMP Defendants in paragraph 121 of Part 1, the reference to the tort of conspiracy in the paragraph 1 of the relief claimed as against the Minister, Leeson and John Doe IV in Part 2, and paragraph 10 of Part 3;
- e) The reference in the NoCC to claims for bare misfeasance or malfeasance contained in paragraph 153 of Part 1, paragraph 1 under the headings of the claims against the Minister and against Leeson and John Doe IV in Part 2, and in paragraphs 17 and 23 of Part 3.

[70] The plaintiffs may seek leave to amend to address claims I have struck on the basis of further factual allegations.

## Costs

[71] The defendants are awarded costs of this application.

"Gomery J."

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