



COURT OF APPEAL FILE NO. CA48578

Action4Canada and others v. His Majesty the King in Right British Columbia and others
Respondents' Factum

COURT OF APPEAL

ON APPEAL FROM the order of Honourable Justice A. Ross of the Supreme Court of British Columbia, pronounced August 29, 2022.

BETWEEN:

Action4Canada, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Jane Doe #2, Ilona Zink, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Melissa Anne Neubauer, Jane Doe #3

Appellants
(Plaintiffs)

AND:

His Majesty the King in Right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Arian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Respondents
(Defendant)

RESPONDENTS' FACTUM

His Majesty the King in right of the Province of British Columbia, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General, and Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care
(the "Provincial Defendants")

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CHRONOLOGY

Date	Event
March 18, 2020	The Minister of Public Safety and Solicitor General (the “ Minister ”) declares a state of provincial emergency under the <i>Emergency Program Act</i> ¹ in response to the COVID-19 pandemic.
March 2020- January 2022	The Public Health Officer (the “ PHO ”) issues various orders under the <i>Public Health Act</i> ² in response to the COVID-19 pandemic.
August 17, 2021	The appellants file the notice of civil claim (the “ NOCC ”).
January 12, 2022	The defendants, His Majesty the King in right of the Province of British Columbia, PHO Dr. Bonnie Henry, Premier John Horgan, Minister of Health Adrian Dix, Minister of Education Jennifer Whiteside, and Minister of Public Safety and Solicitor General Mike Farnworth (collectively, the “ Province ” or “ Provincial Defendants ”), file a notice of application seeking to have the NOCC struck in its entirety, without leave to amend (the “ NOA ”).
August 29, 2022	Justice A. Ross issues reasons for judgment striking the NOCC in its entirety, with leave to amend (the “ Chambers Decision ”). Justice A. Ross also stays the action pending a fresh pleading and awards costs to the defendants payable forthwith in any event of the cause.
September 28, 2022	The appellants file a notice of appeal.

¹ R.S.B.C. 1996, c. 111 [EPA].

² S.B.C. 2008, c. 28 [PHA].

OPENING STATEMENT

Governments and public health officials across Canada and the world implemented a variety of measures designed to combat the spread of COVID-19, protect citizens from serious illness or death, and prevent health care systems from being overwhelmed. The appellants NOCC purports to challenge almost the entirety of the Provincial Defendants' response to COVID-19 between March 2020 and August 2021.

The NOCC is 391 pages long. It is replete with spurious and wide-ranging allegations against the defendants and various non-parties. In essence, the appellants allege a vast global conspiracy of misfeasance in public office and corporate and non-governmental organization corruption which they say has guided the defendants' response to the COVID-19 pandemic. In this respect, the NOCC seeks declaratory relief on a wide range of non-justiciable issues including questions of science, public health, and conspiracies. It also alleges numerous offences under the *Criminal Code* and violations of international legal instruments, none of which are justiciable in a civil action in the British Columbia Supreme Court.

The chambers judge struck the NOCC in its entirety under R. 9-5(1)(b), with leave to amend, on the basis that the claim is so prolix and convoluted that it is impossible for the defendants to respond. The appellants appeal that decision.

The chambers judge did not err in striking the NOCC. The appellants have failed to identify any reversible error in the Chambers Decision. It is plain and obvious that the NOCC is a scandalous, unnecessary, and frivolous pleading. This appeal should be dismissed with costs.

PART 1 - STATEMENT OF FACTS

a. Introduction

1. The appellants rely on the facts set out in the NOCC.³ Part 1 of the NOCC contains over 1300 paragraphs and sub-paragraphs over 226 pages. The prolix factual narrative is not amenable to a response and was addressed only summarily in the Province's response to civil claim (the "**RTCC**"). The Province provides the following brief factual summary of the circumstances surrounding the present action.

b. The COVID-19 Pandemic

2. The COVID-19 pandemic is an ongoing global pandemic of the novel coronavirus SARS-CoV-2, which causes the illness known as COVID-19. At the time the Province filed the RTCC in January 2022, the global death toll from COVID-19 exceeded 5.4 million. At that time, there had been over 2,400 deaths and 12,900 hospitalizations from COVID-19 in British Columbia.⁴

3. In response to the pandemic, governments across Canada and the world implemented a variety of public health measures designed to combat the spread of infection, protect citizens against serious illness and death, and prevent hospital and critical care facilities from being overwhelmed. The Province and PHO's response to the COVID-19 pandemic has at all times been guided by the best available scientific data.

4. Much of the Province's response to the pandemic was implemented by the PHO via the *PHA*. The PHO is the senior health official for the Province and is appointed under the *PHA*. On March 17, 2020, the PHO declared the transmission of SARS-CoV-2 to be a "regional event", as defined in s. 51 of the *PHA*. The designation of a regional event allows the PHO to exercise powers under Part 5 of the *PHA*, including the power to make oral or written public health orders.⁵

³ Appellants' Factum, Part 1 at para. 1 [A.F.].

⁴ Appellants' Appeal Book at 406, RTCC, Part 1, Division 2 at para. 1 [A.A.B.].

⁵ A.A.B. at 407, RTCC, Part 1, Division 2 at para. 8.

5. On March 18, 2020, the Minister declared a provincial state of emergency under the *EPA*. The declaration was extended numerous times and expired on June 30, 2021. The declaration of provincial state of emergency allowed the Minister to exercise powers under Part 3 of the *EPA*, including s. 10(1) which empowers the Minister to “do all acts and implement all procedures the minister considers necessary to prevent, respond to or alleviate the effects of an emergency.”⁶

6. From March 2020 to the date the Province filed the RTCC, the PHO made orders under the *PHA* in response to the COVID-19 regional event. These included orders relating to commercial establishments, types of gatherings, prescribed industries, prescribed recreational activities, preventative health measures, and orders varying, revoking or amending prior orders in responses to the changing circumstances of the pandemic (the “**PHA Orders**”).⁷

7. The aim of the *PHA* Orders was to prevent and contain the transmission of SARS-CoV-2 and maintain the capacity of the health care system in British Columbia. The Orders were crafted to protect the most vulnerable members of society while minimizing social disruption. To this end, many of the Orders included a section that advised people affected by them that they could obtain a variance by making a request for reconsideration to the PHO under s. 43 of the *PHA*.⁸

8. Similarly, the Minister issued various orders under the *EPA* meant to address a wide-variety issues which, in the Minister’s view, were necessary to address, prevent, respond to, or alleviate the effects of the COVID-19 pandemic in British Columbia (the “**EPA Orders**”). Among other things, the *EPA* Orders concerned limitation periods in court proceedings, travel, and the ongoing provision of critical care services, essential goods, and supplies.⁹

⁶ A.A.B. at 408, RTCC, Part 1, Division 2 at para. 18.

⁷ A.A.B. at 408, RTCC, Part 1, Division 2 at para. 20.

⁸ A.A.B. at 408-409, RTCC, Part 1, Division 2 at paras. 21, 24.

⁹ A.A.B. at 409-410, RTCC, Part 1, Division 2 at para. 27.

9. The *PHA* and *EPA* Orders were based on the best available and generally accepted scientific evidence and epidemiological data. Likewise, the *PHA* and *EPA* Orders were issued in good faith and for the purpose of preventing transmission of the SARS-CoV-2 virus, maintaining the capacity of the Province's health care system, protecting the most vulnerable members of society, or alleviating the effects of the COVID-19 pandemic in British Columbia.

c. The Notice of Civil Claim

10. As noted above, the NOCC is 391 pages long. The "Statement of Facts" section in Part 1 is set out over 226 pages.¹⁰ The "Relief Sought" section is 43 pages long.¹¹

11. The NOCC is replete with wide-ranging and unconstrained allegations against both the defendants and non-parties. It alleges a vast narrative of global conspiracy, misfeasance in public office, and corporate and non-governmental organization corruption. Non-parties against whom the appellants levy allegations include Bill Gates, the Rockefeller Foundation, and the World Health Organization.

12. The appellants seek declaratory relief on numerous non-justiciable issues pertaining to questions of science, public health, and conspiracy theories. The appellants also allege numerous offences under the *Criminal Code* and violations of international legal instruments—none of which are viable causes of action in a domestic civil action.

d. The Province's Application to Strike

13. In the NOA, the Province submitted the NOCC should be struck under R. 9-5(1)(a), (b), and (d) of the *Supreme Court Civil Rules*.

¹⁰ A.A.B. at 98-325.

¹¹ A.A.B. at 325-369.

14. With respect to R. 9-5(1)(a), the Province submitted that the NOCC is premised on a plethora of non-justiciable claims, many of which rely heavily on international treaties, *Criminal Code* provisions, and causes of action unknown to law.¹²

15. The central submission of the Province's NOA, however, focussed on R. 9-5(1)(b) and (d). Under R. 9-5(1)(b), the Province submitted the NOCC is so prolix and impenetrable that it is a scandalous and embarrassing pleading. The Province also submitted that the claim should be struck because it is a frivolous pleading, insofar as it relies upon fanciful conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the Province (as well as numerous non-parties).¹³

16. Under R. 9-5(1)(d), the Province submitted that the NOCC is an abuse of process. The Province submitted that the claim is an abuse of process because it seeks to leverage the judicial process to promote conspiracies and harass and oppress the defendants and non-parties by making scandalous accusations against them (e.g., "crimes against humanity", various criminal offences, fraud, "Stalinist censorship"). In the Province's submission, the claim was brought, at least in part, for the improper purposes of intimidating public officials and amplifying conspiracy theories and misinformation.¹⁴

e. The Chambers Decision

17. The chambers judge struck the NOCC in its entirety under R. 9-5(1)(b). He accepted that the pleadings' prolixity made it scandalous and unnecessary, as it was impossible for the defendants to understand the case to be met.¹⁵ He also noted that the pleadings describe "wide-ranging global theories that may, or may not, have influenced either the federal or the provincial governments", "seeks rulings of the court

¹² A.A.B. at 421, NOA, Part 3 at para. 11.

¹³ A.A.B. at 423-425, NOA, Part 3 at paras. 19-24.

¹⁴ A.A.B. at 425-427, NOA, Part 3 at paras. 28-29, 32-33.

¹⁵ Chamber Decision at para. 45.

on issues of science”, and includes various improper allegations.¹⁶ The chambers judge concluded that the NOCC is “bad beyond argument”.¹⁷

18. Although the chambers judge struck the NOCC under R. 9-5(1)(b) due to its prolixity, he also noted a myriad of other potentially fatal problems with the pleadings. For example, the judge noted that the NOCC was “not a piece of legal drafting that complies with the *Rules*, or basic tenets, of pleading”.¹⁸ In particular, the NOCC was found to contain “multiple allegations against the defendants individually and jointly”, such that “[i]t would be extremely difficult, if not impossible, for any individual defendant to determine whether it is required to respond to any particular allegation.”¹⁹ Accordingly, the NOCC “is not a document that can be properly answered in a response to civil claim.”²⁰ Likewise, the NOCC was found to breach other tenets of pleading, including: (a) pleading evidence; (b) alleging non-justiciable claims; and (c) alleging criminal conduct by the defendants.²¹ The chambers judge found that these deficiencies fell within the scope of R. 9-5(1)(a), in that they did not disclose a reasonable claim.²²

19. The chambers judge went on to find that the NOCC could not be saved by striking problematic portions. He held that “attempting to bring the NOCC into compliance with the *Rules* by piecemeal striking and amending would invite more confusion and greater expenditure of the resources of all concerned.”²³

20. In the result, the chambers judge elected not to dismiss the action and instead granted leave to file a new claim. The chambers judge observed that other *Charter* challenges to COVID-19 related orders were ongoing.²⁴ Although the NOCC before him was untenable, he accepted that “there... [was] a prospect that the plaintiffs could put

¹⁶ Chambers Decision at para. 45.

¹⁷ Chambers Decision at para. 45.

¹⁸ Chambers Decision at para. 35.

¹⁹ Chambers Decision at para. 35.

²⁰ Chambers Decision at para. 35.

²¹ Chambers Decision at para. 40.

²² Chambers Decision at para. 40.

²³ Chambers Decision at para. 47.

²⁴ Chambers Decision at para. 69.

forward a valid claim that certain of the COVID-based health restrictions instituted by the Federal or Provincial governments infringed their *Charter* rights.”²⁵

PART 2 - ISSUES ON APPEAL

21. The appellants make numerous arguments in their factum but fail to identify any reversible error. The Province submits that the issues on appeal are as follows:

- a. Whether the chambers judge committed a palpable and overriding error by striking the NOCC as prolix under R. 9-5(1)(b).
- b. Whether the appellants have raised any grounds of appeal capable of establishing a reversible error.
- c. Whether the chambers judge erred in awarding the defendants costs payable forthwith in any event of the cause.

PART 3 – ARGUMENT

- a. The Court did not commit a palpable and overriding error by striking the NOCC as prolix under R. 9-5(1)(b)**

Standard of Review

22. The subsections of R. 9-5(1) attract different standards of review. The chambers judge struck the NOCC pursuant to 9-5(1)(b). The application of this rule is discretionary and determined by contextual and factual considerations, thus attracting the deferential “palpable and overriding error” standard of review.²⁶

²⁵ Chambers Decision at para. 71.

²⁶ *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at paras. 14-15.

Legal Principles

Purpose of Pleadings

23. Rule 3-1(2) provides, in relevant part, as follows:

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

[...]

(g) otherwise comply with Rule 3-7.

[Emphasis added.]

24. Rule 3-7 provides, in relevant part:

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

[...]

(9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

25. The function of pleadings is to clearly define the issues of fact and law to be determined by the court.²⁷ The plaintiff must clearly set out each cause of action and the material facts necessary to prove them. Based on the causes of action and material facts pleaded by the plaintiff, the defendant then sees the case to be met and is able to respond to the allegations in a way that allows the court to understand the issues of fact and law it is called upon to decide.²⁸

²⁷ *Harry et al v. H.M.T.Q.* (1998), 25 C.P.C. (4th) 107 at para. 5, 1998 CanLII 6658 (B.C.S.C.) [Harry].

²⁸ *Harry* at para. 5.

26. Pleadings do not give the parties an opportunity to present a “story”.²⁹ Rather, the *Rules* contemplate and require reasonably disciplined drafting by the parties to ensure the causes of action and material facts are clearly and concisely set out, both for the benefit of the parties and the Court.³⁰ Parties are not permitted to present sweeping, narrativized pleadings wherein the allegations are made unclear or obfuscated by their length or nebulous nature.

Unnecessary, Scandalous, Frivolous, or Vexatious Pleadings

27. Rule 9-5(1)(b) provides as follows:

(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

[...]

(b) it is unnecessary, scandalous, frivolous or vexatious...

28. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake needless expense to litigate an irrelevant or unmeritorious claim.³¹ Likewise, a claim is scandalous or embarrassing if it is prolix and includes irrelevant facts, argument, or evidence, such that it is nearly impossible for the defendant to understand the case to meet and reply to the allegations brought.³²

Analysis

29. The chambers judge appropriately struck the NOCC as a scandalous pleading. He held that the NOCC is not a pleading that can be properly answered by the defendants. The pleading describes wide-ranging global conspiracies that allegedly shaped the provincial and federal governments’ COVID-19 response. It seeks rulings on science and declarations relating to the conduct or actions of numerous non-parties. It

²⁹ *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 44 [*Mercantile*].

³⁰ *Mercantile* at para. 44.

³¹ *Gill v. Canada*, 2013 BCSC 1703 at para. 9.

³² *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 36, aff’d on this point 2012 BCCA 196 at paras. 21, 27, 75, 92.

also contains improper and baseless allegations against public health officials and politicians, such as criminal conduct and “crimes against humanity”.³³

30. The Chambers Decision demonstrates the NOCC’s prolixity. The Province highlights the following aspects of the pleadings in support of chambers judge’s reasoning:

- a. The NOCC is 391 pages long, pleads dozens of causes of action and *Charter* breaches, and seeks over 200 declarations. A significant portion of these allegations are unspecified and it is not clear which defendant they are levied against. As a result, it is nearly impossible to know the case to be met.
- b. The NOCC contains extensive passages of completely irrelevant information, including:
 - i. A COVID-19 timeline beginning in 2000 with Bill Gates stepping down as the CEO of Microsoft, and including numerous other events involving Mr. Gates, such as him pledging \$10 billion in funding in 2010 for the WHO and announcing the “Decade of Vaccines”.³⁴
 - ii. A lengthy narrative describing an alleged “global political agenda behind [the] unwarranted measures.”³⁵
 - iii. A detailed 81-page narrative about the individual appellants’ dealings with government employees, health care professionals, and police officers.³⁶
- c. The NOCC relies extensively on the *Criminal Code of Canada*.³⁷

³³ Chambers Decision at para. 45.

³⁴ A.A.B. at 98-99, NOCC, Part 1 at paras. 44, 50.

³⁵ A.A.B. at 201-260, NOCC, Part 1 at paras. 207-300.

³⁶ A.A.B. at 18-81, NOCC, Part 1 at paras. 1-14.

³⁷ A.A.B. at 70-71, 122, 259, 330, 351-353, 375, 395-397, NOCC, Part 1 at paras. 11(b) and (h), 141(h), 299, Part 2 at para. 291, 323(f) and (k)(iv), 333, 361(f) and (k)(iv).

- d. The NOCC contains lengthy and convoluted legal arguments.³⁸
 - e. The NOCC raises allegations against individuals and entities who are not named as parties, such as Bill Gates, Facebook, Amazon, Google, Yahoo, and Premier Doug Ford of Ontario.³⁹
31. In addition, the NOCC fails to meet the basic tenets of pleadings:
- a. It contains over 1600 paragraphs and subparagraphs. The NOCC fails to set out a concise statement of the material facts, relief sought, and legal basis, in violation of R. 3-1(1)-(3).
 - b. In contravention of R. 3-7(1), the NOCC pleads evidence, such as lengthy quotations from various COVID-19 commentators and activists, and hundreds of footnotes to miscellaneous websites, articles, and policy documents.
 - c. The NOCC pleads conclusions of law which are unsupported by facts, in contravention of R. 3-7(9).
32. The chambers judge did not commit a palpable and overriding error by striking the NOCC under R. 9-5(1)(b). As he correctly concluded, the NOCC is replete with inflammatory allegations against parties and non-parties, fails to particularize which parties must respond to these allegations, and fails to accord with the most basic principles of pleading. The prolix and convoluted nature of the pleadings renders it effectively impossible for the defendants to understand the case to be met. The NOCC is “bad beyond argument”.⁴⁰ The chambers judge properly exercised his discretion in striking the NOCC.

³⁸ A.A.B. at 121, 326-327, 354, 391, NOCC, Part 1 at para. 141, Part 2 at paras. 286, 324, Part 3 at para. 358.

³⁹ A.A.B. at 130, 172, 221, NOCC, Part 1 at paras. 152(c), 174, 216.

⁴⁰ Chambers Decision at para. 45.

b. The appellants have not raised any grounds of appeal capable of establishing a reversible error

33. The appellants fail to identify any reversible error in the Chambers Decision. As noted above, the chambers judge dismissed the claim under R. 9-5(1)(b) on the basis that it is so prolix and convoluted that it is impossible for the defendants to know the case to be met.⁴¹ The appellants' factum fails to challenge this central point. Rather, the appellants take issue with discrete passages or quotations in the Chambers Decision which they say demonstrate the chambers judge exceeded the jurisdiction of the court on a pleadings motion. None of these arguments have merit. However, even if they did, they would not constitute reversible errors because they do not undermine the chambers judge's central holding that the NOCC is prolix and impossible to respond to.

34. As best the Province can discern, the appellants' arguments on appeal are twofold:

- a. the chambers judge erred by making findings of fact or failing to take the facts pleaded as true; and
- b. the chambers judge erred by directing the appellants on the sort of relief or causes of action which may be appropriately pleaded on a subsequent amendment to the NOCC.

35. The appellants' first argument is premised on a single sentence. The impugned paragraph from the Chambers Decision provides as follows:

[26] Many of the allegations contained in the NOCC do not accord with, and specifically challenge, the mainstream understanding of the science underlying both the existence of, and the government's responses to the COVID-19 pandemic. The defendants submit that the allegations in the NOCC constitute "conspiracy theories". submit that they have pled material facts that expose "conspiracies". The former expression, used by the defendants, is recognized as a pejorative term. The latter, used by the plaintiffs, alleges that the NOCC is exposing an underlying systemic issue relating to the pandemic. Those

⁴¹ Chambers Decision at para. 45.

allegations are, in turn, tied to allegations of misfeasance in public office. The plaintiffs also allege criminal conduct by the defendants.

[Emphasis added.]

36. The appellants take issue with the underlined portion of the above-noted paragraph. They say that this statement constitutes a “global finding of what the ‘mainstream understanding of the science underlying both the existence of, and the government’s response to the COVID-19 pandemic’, is.”⁴²

37. This argument misconstrues the chambers judge’s reasons and has no merit. The paragraphs surrounding the impugned sentence show that the judge was merely describing the nature of the claim, not engaging in a fact-finding exercise. His observation that the NOCC challenges conventional wisdom is uncontroversial and readily apparent on the face of the NOCC. The NOCC attacks nearly every decision made by public health officials within the relevant timeframe. For example, the plaintiffs plead that:

176. The Plaintiffs state, and the fact is, that the World Health Organization, (“WHO”), our federal, provincial, and municipal governments, and the mainstream media, propagate that we are facing the biggest threat to humanity in our lifetime. This is false.⁴³

38. The chambers judge did not err by making a “global finding of fact”.

39. Similarly, the appellants assert the chambers judge failed to take the facts pleaded as true for the purposes of the application to strike.⁴⁴ This argument has no merit for at least three reasons. First, it is inaccurate: the chambers judge specifically turned his mind to this requirement and, where possible, accepted the pleadings as true.⁴⁵ Second, the NOCC was struck on the basis of its prolixity. Whether or not the facts pleaded were taken as true does not impact this central finding. Third, even if the pleaded facts were not accepted as true in their entirety, this is an appropriate conclusion in the circumstances. The NOCC is replete with speculation, assumptions,

⁴² A.F., Part 2 at para. 2(a).

⁴³ A.A.B. at 173, NOCC, Part 1 at para. 176.

⁴⁴ A.F., Part 3 at para. 20(c).

⁴⁵ Chamber Decision at paras. 27, 50.

and conspiracy theories which are manifestly incapable of being proven, and thus cannot constitute material facts.⁴⁶ Courts are not bound to accept such “sweeping and speculative” narratives as fact.⁴⁷ Rather, material facts must be “specific, careful, measured and faithful to the evidence”.⁴⁸

40. The appellants’ second argument (concerning the viability of various causes of action and declaratory relief sought) also fails to raise any reversible error for at least two reasons.⁴⁹ First, the chambers judge correctly concluded that certain causes of action and remedies sought were improper and bound to fail (*e.g.*, seeking declarations on issues of science or alleging violations of the *Criminal Code*).⁵⁰ His conclusions in this respect are unassailable. Second, even if the chambers judge was wrong (he was not), these R. 9-5(1)(a) findings are *obiter*. The central finding of proximity under R. 9-5(1)(b) does not depend upon them.

41. In their factum, the appellants appear to take issue with the chambers judge’s listing of portions of the NOCC which, in his view, were not properly brought by way of civil claim.⁵¹ These include allegations of criminal conduct and requests for declaratory relief relating to factual determinations or criminal and international law.⁵²

42. The chambers judge correctly found these claims to be non-justiciable: they are either premised on causes of action not known to law or seek declarations of fact. The chambers judge held, correctly, that numerous requested declarations were “detached from law generally” and had “little to do with the rights of the parties and instead [impugn]... the motives of a non-party international organization.”⁵³

⁴⁶ *Kindylides v. John Does*, 2020 BCCA 330 at paras. 32-36.

⁴⁷ *Kindylides* at para. 36. See also, *Fowler v. Canada (Attorney General)*, 2012 BCSC 367 at para. 54: Where it is impossible to “separate the material from the immaterial, the fabric of one potential cause of action from that of another, and the conjecture [and conspiracy]... from the asserted fact[s]”, the Court is not obliged to accept a pleaded factual basis as true.

⁴⁸ *Kindylides* at para. 36.

⁴⁹ A.F., Part 3 at paras. 11, 20(c).

⁵⁰ See *e.g.*, Chambers Decision at paras. 52-53, 55.

⁵¹ A.F., Part 3 at para. 20(c).

⁵² Chambers Decision at para. 52.

⁵³ Chambers Decision at para. 58.

43. As the judge correctly held, it is improper to seek declaratory relief about questions of motive and science, such as:

A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual 'pandemic', and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs.^{54 55}

44. Part 2 of the NOCC contains dozens of equally inappropriate requests for declaratory relief.⁵⁶

45. But even if the chambers judge had incorrectly labelled a cause of action or declaration as non-justiciable (he did not), this would not amount to a reversible error. The chambers judge's findings under R. 9-5(1)(a) were *obiter* remarks intended to identify the hopeless claims and provide direction on what might be viable should the appellants elect to refile.

46. Contrary to the appellants' submissions, the chambers judge in no way prohibited the appellants from making any claim in a subsequent amendment to the NOCC. He merely provided guidance about the types of claims he considered more likely to survive a strike application should the appellants file a new NOCC. In this respect, the chambers judge warned that "if the next iteration of NOCC contains the same, or similar, problems, then the defendants' arguments [that the entire claim is an abuse of process]... will be strengthened."⁵⁷ This ground of appeal has no merit and should be dismissed.

c. The Court did not err by awarding the defendants costs

47. Costs awards are subject to a highly deferential standard of review. Appellate courts will only interfere "if there is misdirection or the decision is so clearly wrong as to

⁵⁴ A.A.B. at 336, NOCC, Part 2 at para. 302.

⁵⁵ Chambers Decision at paras. 52(c), 57-58.

⁵⁶ See e.g., A.A.B. at 328, 330-332, 334, 336, 341-344, NOCC, Part 2 at paras. 289, 292, 293, 298, 302, 307, 308, 311, 312.

⁵⁷ Chambers Decision at para. 73.

amount to an injustice”.⁵⁸ Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to account for relevant factors—all of which amount to an error in principle.⁵⁹

48. The chambers judge made no such error in principle. He appropriately found that the NOA was necessary because of the infirmities in the NOCC and held that the defendants were the successful parties. This assessment of success was within the discretion of the chambers judge and not based on an error in principle. The appellants have failed to identify any grounds to reverse this exercise of discretion.

PART 4 - NATURE OF ORDER SOUGHT

49. The Province seeks an Order dismissing the appeal, with costs against the appellants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Dated this 23rd of January, 2023.

Mark Witten and Rory Shaw,
Counsel for the Provincial Respondents

⁵⁸ *Agar v. Morgan*, 2005 BCCA 579 at para. 26.

⁵⁹ *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170 at para. 17.

LIST OF AUTHORITIES

Case Law	Para(s).
<i>Agar v. Morgan</i> , 2005 BCCA 579	47
<i>FORCOMP Forestry Consulting Ltd. v. British Columbia</i> , 2021 BCCA 465	22
<i>Fowler v. Canada (Attorney General)</i> , 2012 BCSC 367	39
<i>Gill v. Canada</i> , 2013 BCSC 1703	28
<i>Harry et al v. H.M.T.Q.</i> (1998), 25 C.P.C. (4th) 107; 1998 CanLII 6658 (B.C.S.C.)	25
<i>Kindylides v. John Does</i> , 2020 BCCA 330	39
<i>Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.</i> , 2021 BCCA 362	26
<i>Strata Plan LMS3259 v. Sze Hang Holding Inc.</i> , 2009 BCSC 473, aff'd 2012 BCCA 196	28
<i>Yung v. Jade Flower Investments Ltd.</i> , 2013 BCCA 170	47
Enactments	
<i>Emergency Program Act</i> , R.S.B.C. 1996, c. 111	5, 8, 9
<i>Public Health Act</i> , S.B.C. 2008, c. 28	4, 6, 7, 9
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