No. VLC-S-S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **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)**

Defendants

RESPONDENTS' RESPONSE

Application Response of: The Plaintiffs (Respondents)

THIS IS A RESPONSE TO THE Notice of Application of the Plaintiffs (Applicants) Her Majesty the Queen in Right of British Columbia; Dr. Bonnie Henry; Premier John Horgan; Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General filed most recently April 28, 2022 and served on the Respondent Plaintiff(s) April 29th, 2022.

PART 1: ORDERS CONSENTED TO

The Respondent Plaintiffs do not consent to any order sought by the Applicant Defendants.

PART 2: ORDERS OPPOSED

The Respondent Plaintiffs oppose the motion to strike in whole and in part.

PART 3- ORDERS ON WHICH NO POSITION IS TAKEN

N/A

PART 4: FACTUAL BASIS:

The factual basis is as plead and set out in the Notice of Liability (Claim) filed by the Plaintiffs.

PART 5- LEGAL BASIS

1. It is submitted, as reflected by the Plaintiff's Notice of Liability, filed August 17th, 2021, that:

(a) all material facts necessary to support the causes of action have been properly plead and set out;

(b) that all the causes of action have been fully and properly plead; and

(c) there is no basis, in law to strike they Notice of Liability (Claim) in whole or in part.

- **Motion to Strike – General Principles**

2. It is submitted, by the Supreme Court of Canada, and the Appellate Courts, that:

(a) the facts pleaded by the Plaintiff must be taken as proven and fact:

- ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735***
- ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)***
- ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441***
- ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***
- ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279***
- ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989) 32 O.A.C. 327 (C.A.)***
- ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.)***
- ***Canada v. Arsenault 2009 FCA 242***
- ***R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45***

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
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> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
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> - ***Nelles, supra,*** **p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> "***It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'.***
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."
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> - ***Dumont, supra.*** **p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."
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> - ***Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
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> ...
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> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.
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> - ***Hunt, supra at p. 14***

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and

> emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson.* 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.**
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> - ***R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd, supra,* (Ont. C.A.).**

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***R. v. Imperial Tobacco Canada Ltd., supra.***
- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, the Defendant must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

- **Declaratory Relief Sought**

3. It is submitted that the Declaratory relief is plead with respect to the material facts and available to the Plaintiffs.

4. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **28** By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
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> ...
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> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits..,.

5. This Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect

of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.

- Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830

6. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
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> ...
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> [140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
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> ...
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> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available.*** As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: factum, Assembly of First Nations' at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by

Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

- ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

7. It has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".

- Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151
- Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @ paragraph 134

8. It is further submitted that, with respect to the mandatory order sought against crown actions, including the named word, based on constitutional grounds, that such remedies are available, pre as well as post Charter.

9. It has always been trite law, even prior to the ***Charter***, that where constitutional rights are engaged, the Courts may issue ***mandamus*** to the exercise of the highest order of discretion, namely royal ***fiat***.

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)
- ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44It

wherein the Court ruled @ pp. 545-6:

> ...
> All executive powers, whether they derive from statute, Common Law or prerogative, must be adapted to conform with constitutional imperatives.
> ...
> I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution ... .

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)

which ruling has been echoed by the Supreme Court of Canada in the ***Reference re Secession of Quebec***.

- ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, paragraphs 32, 44, 70-72.

10. It is further submitted that other relief for misfeasance public office is properly plead and remedies available.

- Roncarelli v. Duplessis, [1959] S.C.R. 121

- Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263, 2003 SCC 69

11. It is further submitted that relief by way of the tort of conspiracy is also properly plead and available as set out, **inter alia**, by the Supreme Court of Canada.

- Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959

12. It is lastly submitted that all other relief, including in monetary damages, without proof of **mala fides**, has been plead and available.

- Ward v. ***Canada*** [1993] 2 S.C.R. 689 (SCC) @ pp.724-25

13. It is lastly submitted that the Respondents intend to file a full written argument as permitted by the **Rules**, for the return date of the within application.

PART 6: MATERIAL TO BE RELIED ON

The Respondents (Plaintiffs) intend to rely on the following:

(a) the facts and Claim as set out in the Notice of Liability ruled August 17th, 2021;
(b) a written argument to be filed by the Respondents;
(c) the jurisprudence set out in within response and written argument of the Respondent Plaintiffs to filed;
(d) a Book of Authorities; and
(e) such further material as counsel may advise and this Honourable Court permits.

The Respondents (Plaintiffs) estimates that the application will take one day, which has been scheduled for May 31st, 2022.

The Respondents (Plaintiffs) has filed in this proceeding a document that contains the application respondent's address for service.

Date: May 2nd, 2022

Signature of
[ ] plaintiff [x]lawyer for plaintiff(s)
Samantha COOMARA, B.C.
Barrister

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