



No. 15703  
Rossland Registry

**In the Supreme Court of British Columbia**

BETWEEN:

HAMMER HEAD EQUITIES INC., 0897306 BC LTD., 0708752 BC LTD.  
and ROCK CUT NEIGHBORHOOD PUB LTD.

PLAINTIFFS

AND:

KATHY MOORE, DIRK LEWIS, ANDY MOREL,  
STEWART SPOONER and TERRY MILLER

DEFENDANTS

**NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiffs for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiffs and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL** to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiffs,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **CLAIMS OF THE PLAINTIFFS**

### **Part 1: STATEMENT OF FACTS**

1. The Plaintiffs are all companies incorporated pursuant to the laws of the Province of British Columbia with their registered and records offices located at 1432 Bay Avenue, Trail, British Columbia.
2. The Plaintiffs are in the business of property development.
3. The Defendant Kathy Moore is the former Mayor of the City of Rossland and resides at an address unknown to the Plaintiffs in the City of Rossland, Province of British Columbia.
4. The Defendant Andy Morel is a former city councilor of the City of Rossland and the current Mayor of the City of Rossland, and resides at an address unknown to the Plaintiffs in the City of Rossland, Province of British Columbia.
5. The Defendant Stewart Spooner is and has been a city councilor of the City of Rossland at all material times, and resides at an address unknown to the Plaintiffs in the City of Rossland, Province of British Columbia.
6. The Defendants Terry Miller and Dirk Lewis are former city councilors of the City of Rossland who did not run for re-election in the 2022 municipal election. Both reside at addresses unknown to the Plaintiffs in the City of Rossland, Province of British Columbia.
7. All of the Defendants were members of the city council of the City of Rossland on August 9, 2021.
8. The Plaintiffs are the legal owners of lands located within the City of Rossland.
9. All four Plaintiffs submitted Development Permit applications (bearing reference numbers 3060.20/06-2021, 3060.20/07-2021, 3060.20/08-2021 and 3060.20/09-2021) to the City of Rossland on or about May 20, 2021, in which all four Plaintiffs proposed timber harvesting at their respective lands.
10. After filing the development permit applications seeking timber harvesting, the applications were reviewed and evaluated by City of Rossland staff for compliance with the City's OCP, the Zoning Bylaw No. 2518, and all other applicable bylaws, plans and policies previously approved by Council, in accordance with paragraph 3 of Schedule C of Rossland City Bylaw No. 2690 (land development processing procedure bylaw).

11. In reliance upon the provisions of City of Rossland Bylaw No. 2389, and other authority, and in reliance on representations made by City of Rossland agents, the Plaintiffs expended monies, engaged professionals, and entered into timber harvesting contracts and time-limited fixed-price timber sale contracts in relation to their lands and the timber thereon.
12. City of Rossland staff then presented the development permit applications of the Plaintiffs to Rossland City Council on July 12, 2021. The motion for approval of the development permits was adjourned to August 9, 2021 so that the City of Rossland by its agents could obtain legal advice regarding the issue of approving and issuing the development permits.
13. When the matter was recalled before the Rossland City Council on August 9, 2021, the five Defendants, acting in their public offices, voted to deny issuance of the Plaintiffs' development permit applications. The two remaining City councilors, being Chris Bowman and Janice Nightingale, who are not named to this lawsuit, voted in favour of issuance of the four development permits.
14. On September 7, 2021, the City of Rossland, by its then councilors, including all five Defendants, conducted first, second and third readings of a new tree management bylaw. No person tabled the new tree management bylaw and no substantive debate occurred in public.
15. Then on September 20, 2021, the City of Rossland adopted the new Tree Management Bylaw No. 2769 with no substantive debate. The new Tree Management Bylaw, had the practical effect of preventing the Plaintiffs from carrying out their proposals for timber harvesting at their lands.
16. The Plaintiffs all filed Petitions for judicial review of the August 9, 2021 Rossland City Council decisions to reject their development permits.
17. The Petitions of the Plaintiffs were heard together in the Nelson Supreme Court on March 29 – 31, 2022 in Rossland Supreme Court File 15048, before Justice Lyster, and reasons for judgment issued on January 16, 2023, reported at 2023 BCSC 73. No appeal was taken from the judgment.
18. The Court held (at paragraph 246) that "...the City rejected the petitioners' applications, knowing that they ought to have been granted, and then adopted a new bylaw, the application of which would have practically prevented the petitioners from proceeding if their petitions for judicial review of Council's decisions were successful ... I find that the City's actions in this case do rise to the level of bad faith."
19. The Court in Rossland Supreme Court File 15048 quashed the August 9, 2021 decisions of the City of Rossland on the basis of *certiorari*, and furthermore issued orders in *mandamus* compelling issuance of the four development permits by the City of Rossland.
20. Despite the orders of *mandamus* made on January 16, 2023, the City of Rossland, including by its current agents councilor Stewart Spooner and Mayor Andy Morel, has failed and refused to obey the orders of the Court and has failed to issue the development permits.

21. The Plaintiffs plead that the failure of the City of Rossland, including by its Mayor Andy Morel and its councilor Stewart Spooner, amount to contempt of court, and are a continuation of and exacerbation of the bad faith conduct identified by this Court in its January 16, 2023 reasons for judgment.
22. The Plaintiffs state that the bad faith actions of the Defendants were deliberate and unlawful conduct perpetrated in the exercise of their public function as councilors of the City of Rossland.
23. The Plaintiffs state that the Defendants, in engaging in the bad faith conduct set out herein, intended to cause economic harm to the Plaintiffs and to the principals of the Plaintiffs.
24. The Plaintiffs plead that the Defendants breached their duty to act fairly in the exercise of their official duties.
25. The Plaintiffs plead that the Defendants, in relation to the conduct that is the subject matter of this action, have been guilty of malicious or willful misconduct.
26. The Plaintiffs state that all of the Defendants were aware at all material times, including at the August 9, 2021 council meeting, that their conduct was unlawful and likely to injure the Plaintiffs.
27. As a result of the bad faith actions of the Defendants, the Plaintiffs were unable to conduct development of their lands in a timely way and were unable to harvest and sell timber during a market of high timber prices.
28. As a result of the bad faith actions of the Defendants, the Plaintiffs have further suffered increased carrying costs as a result of the passage of time and rising interest rates, leading to further loss and damage.
29. As a result of the bad faith actions of the Defendants, the Plaintiffs have been unable to develop, build and sell serviced municipal lots, townhomes and other real estate for over two years, causing economic loss and loss of opportunity.
30. The Plaintiffs have all suffered economic loss, loss of profit, loss of opportunity, costs, and other loss and damage, the particulars of which will be provided prior to the trial of this action, all occurring as a result of the bad faith conduct of the Defendants and as a result of the misfeasance in public office perpetrated by the Defendants, and the Plaintiffs seek damages to compensate for these losses.
31. The Plaintiffs state that the actions of the Defendants amount to misfeasance in public office, and the Plaintiffs seek damages therefor.
32. The Plaintiffs state that the actions of the Defendants amount to interference with economic relations, and the Plaintiffs seek damages therefor.

## **Part 2: RELIEF SOUGHT**

1. Judgment estimated to be in the amount of \$1.037 million dollars, or other such amount as determined by the Court at the date of trial.

2. Damages for misfeasance in public office.
3. Damages for tortious interference with economic relations.
4. Punitive or exemplary damages.
5. Interest pursuant to the *Court Order Interest Act* [RSBC 1996] c. 79.
6. Costs.

### Part 3: LEGAL BASIS

1. A bad faith exercise of a statutory, public power can, in law, provide a basis for a tort claim: see *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.).
2. The tort of misfeasance in public office is based on unlawful conduct in the exercise of public functions generally. The tort of misfeasance in a public office is an intentional tort with two distinguishing elements: a public officer must engage in deliberate unlawful conduct in the exercise of his or her public functions, and he or she must be aware that his or her conduct is unlawful and likely to injure the plaintiff. The plaintiff must prove, in addition to the deliberate unlawful conduct and the requisite knowledge, the requirements common to all torts, namely, that the tortious conduct was the legal cause of his or her injuries and that the injuries suffered are compensable in tort law. See *Odhavji Estate v. Woodhouse* 2003 SCC 69.
3. Economic loss is recoverable in an action for misfeasance in public office based in bad faith conduct: see *Rosenhek v. Windsor Regional Hospital* 2010 ONCA 13. In that case the plaintiff was awarded \$3,000,000 after the Board of Governors of the Hospital in bad faith and for improper and oblique motives revoked his hospital privileges, causing the plaintiff loss of income and loss of income earning opportunity.
4. In order to succeed in a claim for tortious interference with economic relations, a plaintiff must demonstrate that (i) the defendant intended to injure the plaintiff; (ii) the defendant interfered with the plaintiff's business by illegal or unlawful means; and (iii) as a result of the interference, plaintiff suffered economic loss. See *A. & B. Sound Ltd. v. Future Shop Ltd.* (1995), 25 C.C.L.T. (2d) 1 (BCSC) and *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (ONCA).
5. Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. See *Hill v. Church of Scientology of Toronto* [1995] S.C.J. No. 64 at paragraph 199.
6. Principles of *res judicata* and issue estoppel.

7. *Local Government Act* [RSBC 2015] c. 1 including section 738(3)(a).
8. *Court Order Interest Act* [RSBC 1996] c. 79.
9. *Supreme Court Civil Rules* including Rule 14-1.

Plaintiff's address for service:

McEwan & Co. Law Corporation  
1432 Bay Avenue  
Trail, British Columbia V1R 4B1

Fax number address for service: (250) 368-9401

Place of trial: Rossland, British Columbia

The address of the registry is:

Court House  
2288 Columbia Avenue  
P.O. Box 639  
Rossland, British Columbia V0G 1Y0

Date: August 2, 2023

  
Signature of Jesse Gelber  
Lawyer for the Plaintiffs

**Rule 7-1(1) of the Supreme Court Civil Rules states:**

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

## APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

### Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Plaintiff claims against the Defendants for damages arising out of misfeasance in public office.

### Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

- a motor vehicle accident
- personal injury, other than one arising from a motor vehicle accident
- a dispute about real property (real estate)
- a dispute about personal property
- the lending of money
- the provision of goods or services or other general commercial matters
- an employment relationship
- a dispute about a will or other issues concerning the probate of an estate
- a matter not listed here

### Part 3: ENACTMENTS RELIED ON:

1. *Local Government Act* [RSBC 2015] c. 1.
2. *Court Order Interest Act* [RSBC 1996] c. 79.
3. *Supreme Court Civil Rules* [B.C. Reg. 168/2009], a regulation made pursuant to the *Court Rules Act* [R.S.B.C. 1996] c. 80.