IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rimmer v. North Cowichan (Municipality),* 2018 BCSC 1750

Date: 20181012
Docket: S172167
Registry: Victoria

Between:

Isabel Rimmer, Katharine Heather Mercer, Alan Ross Mercer, John Yarnold, Catherine MacNeill and John MacNeill

Plaintiffs

And

Municipality of North Cowichan, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Plaintiffs:	Lindsay R. LeBlanc
Counsel for the Defendant, Municipality of North Cowichan:	Sukhbir S. Manhas
Counsel for the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit:	Sean Hern
Place and Dates of Hearing:	Victoria, B.C. September 17 and 18, 2018
Place and Date of Judgment:	Victoria, B.C. October 12, 2018

[1] The Defendants apply to strike portions of the Plaintiffs' Notice of Civil Claim dated June 5, 2017. They rely on Supreme Court Rule 9-5(1)(a) and (d). Rule 9-5(1) reads as follows:

> **Scandalous, frivolous or vexatious matters**
>
> (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
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> [Emphasis added.]

[2] The Plaintiffs all live near a business owned by the two corporate Defendants, who operate in the Municipality of North Cowichan as the Vancouver Island Motorsport Circuit, or "VIMC". (A former Plaintiff, Sahtlam Neighbourhood Association, discontinued its claim against all the Defendants in February of this year. By consent, it is removed from the style of cause.)

[3] The Plaintiffs' claim is in nuisance as a result of the noise coming from the vehicles at the VIMC.

[4] The Municipality of North Cowichan takes the position that the VIMC's use of the site where it operates complies with the Municipality's Zoning Bylaw and its Noise Control Bylaw. In July of 2017, the VIMC applied to the Municipality to have the Zoning Bylaw amended to rezone the VIMC site and adjoining lands, and have them developed and used pursuant to a Comprehensive Development Plan. The current use of the VIMC site would be expressly permitted under the amended Zoning Bylaw, and the development of adjacent lands under the Comprehensive Development Plan would also be expressly permitted. The Municipality is in the

process of reviewing and considering the Comprehensive Development Plan rezoning application. Because the Municipality takes the position that VIMC's use of the site complies at present with the Zoning Bylaw and the Noise Control Bylaw, and because the Comprehensive Development Plan is being considered in the rezoning application, the Municipality has deferred consideration of any enforcement of any of its Bylaws in relation to the VIMC's use of the site until the Municipality has fully reviewed and considered the Comprehensive Development Plan rezoning application. (The facts stated above in this paragraph are taken from an affidavit filed by the Municipality. I can receive affidavit evidence under Rule 9-5(1)(d), but not under 9-5(1)(a). See Rule 9-5(2). However, what is stated above was also common ground among the parties throughout the application, and for the most part is found in the Notice of Civil Claim as well. I accept it as an admissible part of the narrative, even for the purposes of Rule 9-5(1)(a).)

[5] The Defendants want to have struck paragraphs 1–4 in Part 2 (Relief Sought) of the Notice of Civil Claim. Those paragraphs read as follows:

> 1. A declaration that the use of the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for recreational or "race" driving motor vehicles at high speeds is a contravention of the Land Use Bylaw;
> 2. An order requiring the Defendants, 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit to cease using the portion of the Lands zoned I-2 (Industrial – Heavy) as a motorcar racetrack and/or driving training track or otherwise for driving motor vehicles at high speeds contrary to the Land Use Bylaw;
> 3. A declaration that using an engine or motor vehicle without a muffler or other noise preventing device on the Lands is a contravention of the Noise Control Bylaw;
> 4. An order requiring the Defendants 1909988 Ontario Limited and 1946328 Ontario Limited doing business as Vancouver Island Motorsport Circuit to cease using or permitting the use of the Lands contrary to the Noise Control Bylaw;
>
> [Emphasis added.]

[6] The Defendants in their applications also want other paragraphs in the Plaintiffs' pleading struck, but those requests are contingent on having the pleaded

paragraphs quoted above struck, and are less important. I will address them toward the end of these reasons.

[7] With respect to the declaratory relief the Plaintiffs seek in paragraphs 1 and 3 quoted above, the Plaintiffs know that the Municipality would be expected to act in accordance with the declarations they seek. Paragraph 8 in Part 3 of the Notice of Civil Claim (Legal Basis), under a sub-heading of "Declaratory Relief", reads as follows:

> Whether or not the court should order enforcement of a bylaw, a declaration serves a useful purpose, on the basis that the court will assume the government agents will follow the law.

[8] The Plaintiffs are asking the Court, in their requested declarations, to interpret the two Bylaws differently from how the Municipality interprets them. In the other two paragraphs, paragraphs 2 and 4, the Plaintiffs are asking the Court to enforce compliance with the Bylaws on the Plaintiffs' behalf. The Municipality's position, noted earlier, is that the other Defendants are not violating the Bylaws. The Municipality is not intending to enforce the Bylaws as the Plaintiffs would like, or any differently from how they are being administered by the Municipality at present. The only reason the Municipality is a party is because of this fact, that the Plaintiffs are seeking enforcement of the Bylaws contrary to how the Municipality is deciding to apply them.

[9] It is important for this application to keep in mind that the Plaintiffs' claim against the corporate Defendants is in nuisance because of the noise coming from the VIMC operation. Pursuant to their nuisance claim, the Plaintiffs seek damages and injunctive relief against the corporate Defendants.

[10] In my view, for the reasons that follow, the Plaintiffs are not permitted to appropriate to themselves the powers of municipal governance which these four paragraphs in their pleading would necessitate. The Plaintiffs, as a matter of law, cannot seek to compel the enforcement of a municipal bylaw, absent an allegation of bad faith, which is not made here. (Incidentally, any allegation of bad faith would

require an application for judicial review by petition. See *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342; and *Gulf Coast Materials Ltd. v. British Columbia (Minister of Jobs, Tourism and Skills Training)*, 2016 BCSC 980.) Accordingly, the four paragraphs will be struck.

[11] In proving their nuisance claim, the Plaintiffs are entitled to make reference to all available *indicia* of nuisance. That can include showing the Court in the nuisance trial what the Municipality's noise control requirements may be, which the Plaintiffs may decide to do if the noise emanating from the VIMC is above the limits permitted by the applicable bylaws. Such evidence could be one plank in the Plaintiffs' platform, along, for example, with the testimony of the Plaintiffs themselves and their neighbours, expert evidence about sound levels, and so on. However, the decisions of how and when to enforce municipal bylaws are within the sole province of the enacting municipality.

[12] In *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.), the Court denied to an aggrieved land owner an injunction to have enforced a Toronto bylaw which established street setback limits for buildings. The applicant complained that a new apartment building going up near his property would adversely affect his property. Duff J., as he then was, wrote for the majority. He said in part:

> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty. *Atkinson v. Newcastle Waterworks Company*.
>
> In substance, the proposition advanced by the appellant is that any proprietor, whose property might suffer in value by reason of the failure of some other proprietor to observe the building restrictions established by a by-law promulgated under the authority of this enactment, has a right to invoke the jurisdiction of the courts to prevent by injunction the obnoxious act and to recover damages in respect of any loss actually suffered in consequence of it if wholly or partly completed. <u>In effect, if this contention be sound, such a by-law creates in favour of any proprietor who may be prejudicially affected in his property by an infringement of any of the prohibitions of such a by-law, a</u>

> negative easement (enforceable in the same manner as a restrictive covenant) over the property within the area where the by-law operates.
>
> It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith C.J. said, in *Tomkins v. The Brockville Rink Company*, when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it; and it seems highly unlikely, as Farwell J., said in *Mullis v. Hubbard*, that the legislature contemplated as the result of this legislation that "the numerous individuals" in the vicinity of a residential area, should be entitled to bring their private actions against a man who had built a few feet in front of the line allowed, even though the municipal authorities themselves should not consider it a proper case for interference.
>
> [Emphasis added.]

[13] As the legislation stood in Ontario at the time of *Orpen*, an express statutory right granting citizens the status to bring an action to enforce municipal bylaws had been repealed. After the legislative amendments, only the municipality could bring proceedings to enforce its enactments. In British Columbia today, it is the same. Only municipalities are legislatively empowered to bring civil proceedings to enforce their enactments. See, s. 274 of the *Community Charter*, S.B.C. 2003, c. 26. The only exception is in the City of Vancouver, where the *Vancouver Charter* expressly confers on private property owners authority to seek enforcement of city bylaws. See s. 334 of the *Vancouver Charter*, S.B.C. 1953, c. 55.

[14] This Court, in *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 M.P.L.R. 160 (B.C.S.C.), after a fully-considered analysis, found that it is a municipality alone who is entitled to decide whether and how its bylaws are to be enforced, absent an allegation of bad faith. (The local government in *Dusevic* was a regional district, but the relevant legal principles are identical for a municipality.)

[15] The petitioners in *Dusevic* applied for an order of *mandamus* to compel the regional district to enforce its bylaw and regulation against a heli-skiing business that was using land for a helipad in contravention of the bylaw and regulation. In denying the petition, the Court, to begin its analysis, found no legislative provision obligating

the regional district to act. I note there is no such provision before me in this case. The Court then found there was no common law duty of the local government to enforce its bylaws, adopting the following analysis by McIntyre J., in *Kamloops v. Nielson* (1984), 2 S.C.R. 2, quoted below at paras. 9–11 in *Dusevic*:

> 9 There are no other sections in the statute which would compel the Regional District to enforce its by-laws. Absent any statutory duty to enforce the by-law, is there common law duty to enforce? Certainly prior to *Kamloops v. Nelson*, [1984] 5 W.W.R. (S.C.C.), no such common law duty existed. McIntyre, J. (Estey, J. concurring) said, at p. 12:
>
> > It has been held that a municipality has no duty to enforce by-laws passed under statutory powers which leave a discretion as to whether such powers may be exercised or not. The provisions of the Municipal Act of British Columbia which empower the passage of a building by-law are found in s. 714 of the Act and are clearly permissive. The provisions of ss. 734, 735 and 715, cited above, give a power to take legal steps towards enforcement but impose no duty.
>
> (The *Kamloops* decision involved the predecessor provision to s. 750(1).)
>
> 10 McIntyre, J. then went on to review several judgments which dealt with the issue of the common law duty to enforce a by-law by instituting legal proceedings. He stated at p. 12:
>
> > In *Brown v. Hamilton* (1902), 4 O.L.R. 249 (H.C.), the city of Hamilton had passed a by-law which prohibited the setting off of fireworks in the city streets. The by-law had for many years been ignored by the public and, presumably, by the city. The plaintiff was injured by a roman candle during a display of fireworks in the streets. He sued the city for damages arising from its failure to enforce its by-law. In the High Court, Chancellor Boyd said, at p. 251:
>
> *Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement.*
>
> [Emphasis added] McIntyre, J. then quoted, at p. 15, from *Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) (affirmed [1973] S.C.R. 38), where it was held at pp. 707-8:
>
> > Municipal council has a discretion as to when it will prosecute for a breach of or sue to enforce the provisions of the zoning by-law. To deny the discretion in municipal council would be to place the most technical breach of the by-law beside the most blatant and to remove from consideration the harm done to the offender and the value to the community of the proposed proceedings when considering when they ought to be taken. <u>The discretion when to prosecute or when to sue which rests with the municipal corporation or the comparable discretion which rests with public authorities charged with the responsibility of enforcing the rights of the public when they are violated, is one of the great strengths of our system of justice</u>.

> 11 Much like the Attorney General's prosecutorial discretion, the exercise of a municipality's discretion is not a matter that is judicially reviewable unless it is exercised in bad faith. As stated by Schroeder, J.A. in *Toronto v. Polai*, *supra*, at pp. 696-7:
>
> > As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.
>
> This statement was adopted by McIntyre, J. at p. 13. At p. 20, McIntyre, J. concluded:
>
> > At common law, a municipality has no duty to enforce its by-laws by court proceedings. The matter is discretionary. Failure to exercise enforcement powers in court does not give rise to a private cause of action in negligence to those suffering harm from non-enforcement.
>
> [Emphasis added.]

[16] Justice Maczko in *Dusevic* then distinguished the majority decision in *Kamloops*, addressing issues which are not before me in the case at bar.

[17] *Scholton v. Chemanius Health Care Centre* (1995), 29 M.P.L.R. (2d) 249 applied *Orpen* and *Dusevic*, and found that an individual suing in nuisance has no right to seek injunctive relief to enforce compliance with a bylaw unless such right is specifically conferred in an enactment. In *Scholton*, the petitioner in effect was seeking an order that a retaining wall near the property line between her property and a hospital be removed. The Court, at para. 25, introduced its consideration of *Orpen* as follows:

> It was held in *Orpen v. Roberts*, [1925] 1 D.L.R. 1101 (S.C.C.) that unless a by-law expressly confers a right of private civil action between parties to enforce planning regulations, a private citizen has no status to proceed against another private citizen on the basis of a breach of a by-law. The issue was whether the plaintiff had status to complain of an infraction of a by-law which had been breached by the erection of a building. It was not disputed

> that the erection of the apartment was in breach nor that it affected the plaintiff's amenities and property value. Duff J. stated at pp. 1106-1107 ...

[18] After quoting extensively from *Orpen*, the Court in *Scholton* continued as follows:

> 26 The decision in *Orpen v. Roberts*, *supra*, was applied in *Singer v. Town n' Country Holding Co.* (1966), 56 D.L.R. (2d) 339 (Man. Q.B.) and in *Caldwell v. Saskatoon (City)* (1969), 71 W.W.R. 152 (Sask. Q.B.). It was also applied in *Emil Becze v. Edmonton (City)* (1993), 17 M.P.L.R. (2d) 109 (Alta. Q.B.) wherein Nash J. at p. 118 concluded:
>
> > The foregoing cases confirm that unless a statute or by-law expressly confers a right, a private citizen has no status to bring injunction proceedings against an offender to restrain a breach of planning rules. ...
> >
> > Thus, the matters complained of by the plaintiff in the present case can only be redressed, if at all, through statutory remedies or by establishing the common law tort of nuisance.
>
> 27 These cases clearly enunciate the law with respect to a citizen bringing an action against an "offender". If it is suggested that the "offender" in this case is the hospital, and if it is suggested that the right of action nevertheless still lies against the Corporation, the Corporation disagrees. It contends that the cases go so far as to hold that, "an individual has no right to bring injunctive proceedings in respect of a bylaw violation, unless that right is specifically conferred by an enactment."
>
> 28 I agree. That was clearly the view of this Court in *Tchaperoff v. City of Victoria* [1948] 2 W.W.R. 722. At page 726 Macfarlane J. said:
>
> > The question here is whether any right of property is given in any sense personal to the plaintiff by such a by-law at all. I can read the case of *Orpen v. Roberts*, *supra*, only as rejecting that contention. ... In the circumstances here I do not think that the by-law creates any right personal to the plaintiff upon which a cause of action is conferred upon him. [my underlining]
>
> 29 I also accept as sound the proposition that even prior to the repeal of the set-back requirement the petitioner could not, in the absence of bad faith, compel the Corporation to enforce the by-law. In *Dusevic v. Columbia Shuswap (Regional District)* (1989), 44 M.P.L.R. 160 (B.C.S.C.) the petitioners sought mandamus to compel the local government to seek an injunction which would prohibit an helicopter skiing business which was operating in contravention of a zoning by-law.
>
> 30 Maczko J. said that a municipality cannot adopt a general policy not to enforce its by-laws. However, it can decide against enforcement of a by-law for valid policy reasons or while the by-law is under review.
>
> [Emphasis added.]

[19] As this Court said in *Woodman v. Capital (Regional District)*, [1999] B.C.J. No. 2262 (S.C.), at paras. 44–45:

> 44 The breach of the bylaws alleged here does not give rise to a civil action in damages (see for example *Gillies v. Bortoluzzi* (1952), 6 W.W.R. (N.S.) 633 [1953] 1 D.L.R. 335, 60 Man. R. 397 (Man. Q.B.), and *Dub v. La-Ko Enterprises Ltd.* (1988), 92 N.B.R. (2d) 117 (Q.B.T.D.)).
>
> 45 The plaintiffs' entitlement to damages depends upon their success in proving an actionable nuisance.

[20] In *Woodman*, the plaintiffs' residential property stood next to a property whose owner, by agreement with the Capital Regional District, operated a small dog pound. The plaintiffs claimed the pound was constructed illegally in violation of various bylaws, and that its operation was a nuisance. The plaintiffs sought a declaration and an injunction requiring the Capital Regional District to remove the pound. The Court, at para. 42, found that the plaintiffs had standing to seek the declaratory and injunctive relief. The Court found that the pound was not a permitted use under the bylaw as it was then drafted, but did not grant an injunction. The finding of standing was based on the fact that the plaintiffs were immediate neighbours. Standing in that sense, based on proximity so as to be affected by the use complained of, is not in issue in the present case.

[21] Leading authorities in this province on the main issue before me, *Dusevic* from 1989, and *Scholton* from 1995, do not appear to have been presented for consideration by the Court in *Woodman*. Nor, apparently, were the arguments at the heart of *Dusevic* and *Scholton* presented to the Court in *Woodman*. The only standing issue in *Woodman*, as seen at para. 42 of that decision, was whether the plaintiffs lived close by, so as to be affected by the conduct complained of. By contrast, the issue in *Dusevic* and *Scholton*, and in this case, is whether any property owner in a municipality, near or far from the conduct complained of, has any right, or standing, to have a court enforce a bylaw at the request of a citizen when the municipality is electing not to enforce it, and bad faith is not alleged. Accordingly, in my view, to the extent that *Woodman* could be taken as somewhat supportive of the Plaintiffs' position before me, it is appropriate to invoke the

guidance of Wilson J., as he then was, in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.). There, in the well-known passage, Justice Wilson wrote that he would only go against the judgment of another judge of this Court if subsequent decisions have affected the validity of the impugned judgment; it is demonstrated that some binding authority in case law, or some relevant statute was not considered; or the judgment was unconsidered. In the case before me, I believe that had *Dusevic* and *Scholton* been presented to the Court in *Woodman*, the latter case would not have been decided as it was. Also, I believe that subsequent decisions, referred to below, have affected the validity of what, at least arguably, is stated in *Woodman*.

[22] Four decisions in this province after *Woodman* return to the reasoning found in *Dusevic* and *Scholton*. In *Palmer v. Burnaby (City)*, 2006 BCSC 165, the plaintiff sued Burnaby in nuisance and sought an injunction requiring Burnaby to comply with its noise bylaw, and end rock concerts being held on land owned by Burnaby. The decision in *Palmer* was summarized succinctly by this Court in *Spraggs v. Greater Vernon Services et al.*, 2006 BCSC 1176, at paras. 15–19:

> [15] Unless the plaintiff has standing to seek the relief noted above, there can be no serious issue to be tried. It is, therefore, first necessary to consider the question of standing.
>
> [16] In *Palmer v. Burnaby (City)*, 2006 BCSC 165 ["*Palmer*"], Josephson J. considered the issue of standing in similar circumstances. In that case the plaintiff resided adjacent to Deer Lake Park in Burnaby. The city had established a program of open air concerts in the park. Some of these concerts created noise that exceeded the levels permitted under the city's noise bylaw. This action was framed in nuisance and Josephson J. held that the plaintiff had standing to bring the action, not because the conduct in issue amounted to a breach of a bylaw, which, in and of itself, does not give one standing, but rather because the conduct was alleged to affect his private property rights.
>
> [17] Here, as pointed out above, the plaintiff is not challenging the validity of the bylaws that led to the acquisition of the property. Nor is he challenging the validity of the official community plan or the zoning bylaw. To the contrary, he relies on those bylaws to ground his claims.
>
> [18] As in *Palmer*, he is seeking an injunction, albeit it he has not pleaded that relief in precisely those words, directly against the defendants, and specifically against the district of Coldstream, to prevent it from violating its own bylaws. Neither the plaintiff, nor any other private citizen, has standing

> to compel a municipal authority to enforce its bylaws. The enforcement of bylaws is a matter within the discretion of the Municipality or the District (see *Palmer* and the authorities cited therein).
>
> [19] It follows from the foregoing that the relief sought by the plaintiff in paragraphs (e) through (h) is not available to the plaintiff, at least not directly. More accurately, the plaintiff does not have standing to seek that relief. In the result, to the extent this application turns on the question of the relief set out in paragraphs (e) through (h), there is no serious question to be tried.
>
> [Paragraphs (e) through (h) sought declarations to cause compliance with the applicable bylaws.]
>
> [Emphasis added.]

[23] *Palmer* and *Spraggs* were the first two relevant decisions after *Woodman*. *Woodman* was not cited in either case. The other two decisions after *Woodman* employing the reasoning in *Dusevic* and *Scholton* are *Gosse v. Terrace (City)*, 2008 BCCA 210, at paras. 5 and 8; and *Drager v. Lojstrup*, 2016 BCSC 1447, at para. 37, which reads as follows:

> Both parties agree that unless a statute or bylaw expressly confers a right to do so, a private citizen has no status to bring action against another private citizen on the basis that the latter is in breach of a municipal bylaw. So too, in the absence of bad faith, a private citizen has no standing to compel a municipality to enforce any such bylaw when confronted with a violation by another: see *Orpen v. Roberts*, [1925] 1 D.L.R. 1101 (S.C.C.), *Dusevic v. Columbia Shuswap (Regional District)* (1988), 44 M.P.L.R. 160 (B.C.S.C.), and *Scholten v. Chemanius Health Care Centre*, 1995 CanLII 319 (BC SC).

[24] Read as a whole, the law of this province makes clear that the four paragraphs in the Notice of Civil Claim, quoted above at para. [5] of these reasons, must be struck under Supreme Court Rule 9-5(1)(a). It is plain and obvious that the four paragraphs disclose no reasonable claim within the meaning of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. I would make the same ruling under Rule 9-5(1)(d). The four paragraphs constitute an abuse of process in the limited, but relevant, sense that they constitute a collateral attack on the Municipality's application of its bylaws, which could only be brought by way of judicial review, in accordance with the authorities cited above at para. [10] of these reasons.

[25] The Defendants ask that other parts of the Notice of Civil Claim also be struck as a result of my striking the four paragraphs analyzed to this point. I will simply list

here only those further paragraphs in the Plaintiffs' pleading which, in my view, need to be struck under Rule 9-5(1)(a) or (d). Those paragraphs could only have been maintained if I had allowed paragraphs 1–4 under Part 2 to remain: Notice of Civil Claim, page 4, within paragraph 18, I strike only the words "or neglected to"; page 8, I strike paragraphs 6, 7 and 8.

[26] Several of the paragraphs the Defendants wanted struck I have left in because, in my view, they may be relevant to the Plaintiffs' claim in nuisance. As I said earlier, the Plaintiffs, as part of their nuisance claim, are entitled to show, if they can, that any applicable bylaw noise limits are being violated by the VIMC. The Court in the nuisance trial is permitted to take that information into account in determining whether nuisance has occurred.

[27] The Defendants obtained the substantial success in the application. The Defendants together are entitled to a single set of ordinary costs from these applications.

"MACINTOSH J."