

CANADA / JUDGMENT

Madadi v. British Columbia

2020 BCSC 765

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 765 Madadi v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Madadi v. British Columbia,

2020 BCSC 765

Date: 20200520

Docket: S157192

Registry: Vancouver

Between:

Behroz Madadi

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia, Teacher Regulation Branch

Defendants

Correction notice: The front page and paragraph 2 were corrected on June 16, 2020

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for Plaintiff:

B. Zargarian

Counsel for Defendants, Her Majesty the Queen In Right of the Province of British Columbia:

R. Elias, Articled Student

Counsel for the proposed Defendants, Norm Nichols, Rod McDonald and Trish Kelley:

C.E. Hunter, Q.C.

E.V. Madhur

Place and Date of Hearing:

Vancouver, B.C.

February 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 20, 2020

Introduction

- [1] The plaintiff, Behroz Madadi, is a former teacher who claims against Her Majesty the Queen in Right of the Province of British Columbia for wrongs he says were committed by the former British Columbia College of Teachers and its successor, the Teachers Regulation Branch, during disciplinary proceedings brought against him.
- [2] This application is to add the disciplinary panel members, Norm Nichols, Rod McDonald and Trish Kelley as defendants to this action as part of a suite of amendments to address the deficiencies identified in Mr. Madadi's pleadings relating to misfeasance in public office. Those deficiencies were identified on an application to strike brought by British Columbia, the result of which was to strike all of the claims except those brought as misfeasance in public office and for breach of contract.
- [3] The proposed defendants assert that the limitation period to bring a claim against them has expired. There is a dispute as to what the limitation period is and when it started running. However, Mr. Madadi argued the application on the basis that the limitation period expired because he concedes that if the limitation period started running at the "earliest possible time", it expired in June 2017.
- [4] Mr. Madadi argues that the overriding consideration on an application to add a party is the interests of justice which he says are furthered because he has adequately explained the delay in seeking to add the proposed defendants and because the proposed defendants are essential to his claim. He argues that the prejudice to them in losing a limitation defence is outweighed by the prejudice he would suffer if he is not permitted to add them to pursue his claim in misfeasance in public office.

- [5] The proposed defendants argue that the court should exercise its discretion to dismiss the application to add them as defendants because Mr. Madadi's delay is extensive and has not been adequately explained, the delay gives rise to both presumed and actual prejudice and the claims have no reasonable prospect of success.
- [6] British Columbia takes no position on the application to add the three proposed defendants.
- [7] The issues are:
- a) whether the proposed defendants' participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon (Rule 6-2(7)(b) of the Supreme Court Civil Rules) and/or that there is a question or issue relating to relief claimed in the proceeding or the subject matter of the proceeding that exists as between a current party and the proposed defendants that would be just and convenient to determine as between the proposed defendants and the party (Rule 6-2(7)(c)); and
 - b) whether it is just and convenient to add the proposed defendants particularly considering the balance of prejudice between the parties.

Do the facts meet the circumstances described in Rule 6-2(7) (b) or (c)?

- [8] The core allegations in Mr. Madadi's claim for misfeasance in public office are that the College, through unidentified members of the College's Qualifications Committee, the Fitness Investigation Sub-Committee, and the disciplinary panel on which the proposed defendants sat, acted in bad faith, knowing harm would ensue to Mr. Madadi, by:
- a) citing him for conduct that included failing to undertake tasks that he was not required to undertake by the terms of his contract;
 - b) taking 10 years to proceed to a hearing;
 - c) illegally maintaining the proceedings despite the 10 years between the conduct and hearing;
 - d) cancelling his teaching certificate in the meantime when Mr. Madadi inadvertently failed to pay his professional fees, an error which the College's Qualifications Committee refused to allow him to rectify for six years because of the investigation into his conduct and, subsequently, the disciplinary hearing;
 - e) engaging in illegal reasoning in determining his guilt; and
 - f) imposing an illegal penalty.
- [9] Mr. Madadi asserts that the illegality in reasoning and penalty imposition derives from conduct that is discriminatory under the Human Rights Code, R.S.B.C. 1996, c.100.
- [10] The disciplinary proceedings arose out of complaints made against Mr. Madadi in 2001 when he was a teacher-on-call in the New Westminster School District. Mr. Madadi deposed that as a result of his status as a teacher-on-call and the complaints, his ability to work as a teacher while the investigation proceeded was very limited. In 2005, due to inadvertence on the part

of Mr. Madadi, he did not pay his professional fees on time and his certificate was cancelled. He applied to have it reinstated, but the College's Qualifications Committee refused to reinstate him, in part citing the ongoing investigation. At that time, it had been four years since the complaints were made.

- [11] In 2010, the disciplinary panel found Mr. Madadi guilty of some of the allegations and not guilty of others. In 2011, the disciplinary panel imposed a penalty prohibiting the College from issuing a certificate of qualification to Mr. Madadi for 12 months.
- [12] Mr. Madadi appealed both decisions to this court. In 2013, the College agreed to an order setting aside both decisions.
- [13] Mr. Madadi commenced the current action by notice of civil claim filed on September 1, 2015 naming the Teachers Regulation Branch, formerly known as the British Columbia College of Teachers, as the defendant. Shortly thereafter he named British Columbia as a defendant. It is not clear how the Teachers Regulation Branch ceased to be a party, but British Columbia has been the only defendant since mid-September 2015. Mr. Madadi sought compensatory and punitive damages for misfeasance in public office, Charter damages, defamation, breach of contract and negligence as well as declaratory relief to address the impugned conduct of unnamed officials.
- [14] In September 2018, British Columbia applied to strike Mr. Madadi's claims for disclosing no cause of action or to dismiss them summarily under Rule 9-6(4). On November 1, 2018, Mr. Justice Milman issued reasons for judgment striking or dismissing some of the claims and granting leave to amend the claims in misfeasance in public office against the College officials and breach of contract against British Columbia: *Madadi v. British Columbia*, 2018 BCSC 1891 at paras. 72, 98, 131, 145.
- [15] In doing so, Mr. Justice Milman held that Mr. Madadi's misfeasance in public office claim against the College officials, including the allegations pertaining to the disciplinary panel, was deficiently pleaded but could be amended to properly plead the missing elements, including naming those whose identity he knows and by identifying others in reference to what they are alleged to have done or failed to do. Mr. Justice Milman addressed British Columbia's argument that the misfeasance in public office claim against the College officials, including the allegations pertaining to the disciplinary panel, had no chance of success but he did not accede to that argument.
- [16] Mr. Madadi filed a further amended notice of civil claim on January 11, 2019. By notice of application dated September 12, 2019, he seeks to add the proposed defendants and seeks an order requiring British Columbia to disclose the names of the members of the Qualifications Committee and Fitness Investigation Sub-Committee who made decisions, conducted investigations or otherwise were involved in any manner in Mr. Madadi's application for certification or prosecution for misconduct. British Columbia consented to the latter order and takes no position on the application to add the proposed defendants.

[17] Rule 6-2(7) reads as follows:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[18] It should be noted that this is the form of the rule taken from the British Columbia Gazette. Some publications do not indent the final portion of subrule (c), "that, in the opinion of the court, it would be just and convenient " such that it could be taken to apply to all of R. 6-2(7).

[19] Generally, as stated in *Ipsos S.A. et al v. Angus Reid et al*, 2005 BCSC 1114 at para. 107 (referring to the predecessor to Rule 6-2(7), Rule 15(5)(a)), unless the allegations are frivolous, the "court's discretion to add or substitute parties under Rule 15(5)(a) should be exercised generously to allow the effective determination of the issues, without delay, inconvenience or separate trials." See also *Meade v. Armstrong (City)*, 2011 BCSC 1591 at para. 16; and *Wong v. Spittal*, 2018 BCSC 1795 at paras. 21, 23.

[20] The parties take differing positions on the analytical framework related to adding a party under Rule 6-2(7). Mr. Madadi submits there are two preliminary issues, first, an explanation for the delay, and second, establishing a connection between the parties to be added and the existing claims. If those conditions are satisfied, the court proceeds to balance the prejudice between the parties.

[21] The proposed defendants submit there is only one overarching assessment, that being what is just and convenient.

[22] In *Alexis v. Duncan*, 2015 BCCA 135, the Court of Appeal described the three distinct circumstances in which a party can be added under Rule 6-2(7):

- [14] Rule 6-2(7) governs the addition and substitution of parties. A court may add a party if one of three circumstances exist. Two of the circumstances are set out in R. 6-2(7)(b). Rule 6-2(7)(c) sets out the third circumstance.
- [15] Rule 6-2(7)(b) is concerned with remedying defects in the proceedings as they stood prior to the application to add a party. It has a narrow application. Under R. 6-2(7)(b) the court must decide if the person ought to have been joined as a party or the person's participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated: see *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd.* (1979), 13 B.C.L.R. 293 (C.A.). The discretion to add a party under R. 6-2(7)(b) exists if one of the conditions in subsections (i) and (ii) is established: *Enterprise Realty Ltd.* at 296. However, "if neither of the prerequisite conditions is established then there is no discretion in the chambers Judge and he must refuse the application": *Enterprise Realty Ltd.* at 296.
- [16] The predecessor to R. 6-2(7)(c) was added to the Rules in 1980 shortly after and presumably to counter the narrow interpretation adopted in *Enterprise Realty*. I note that the broad interpretation considered but rejected in *Enterprise Realty Ltd.* by this Court was "that parties should be added if, after balancing the interests of all the parties, existing and prospective, it is just and convenient to do so": *Enterprise Realty Ltd.* at 296.
- [17] Under R. 6-2(7)(c) the court can order a person be added as a party if there exists, between the person sought to be added and any party to the proceeding, "a question or issue relating to or connected with the relief claimed in the proceeding or the subject matter of the proceeding" and, "if in the opinion of the court, it would be just and convenient to do so" (emphasis added by Goepel J.A.). The decision as to whether to add a party under R. 6-2(7)(c) is discretionary. It is up to the presiding judge to determine whether or not joinder of the new defendant is just and convenient in any particular case: see e.g., *Letvad v. Fenwick*, 2000 BCCA 630. It cannot be said with any assurance that a claim for professional negligence will automatically be joined: see *Zymtech Development Inc. v. Sport Central Enterprises Ltd. et al.*, 2004 BCSC 309.
- [23] In *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 [Byrd CA], the Court of Appeal referred to its previous decisions in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, *Letvad Fenwick*, 2000 BCCA 630, 82 B.C.L.R. (3d) 296; and *Chouinard v. O'Connor*, 2011 BCCA 161, 16 B.C.L.R. (5th) 272 at para. 21 and explained that when exercising discretion to add a party, the overarching assessment is whether it would be just and convenient. While *Byrd CA* was a case that considered both subrules 6-2(7)(b) and (c), the focus was on 6-2(7)(c) because of the narrow scope of 6-2(7)(b). The cases cited in *Byrd CA* considered what was "just and convenient" in connection with analyses under Rule 6-2(7)(c) and its predecessor, Rule 15(5)(a)(iii).
- [24] It is certainly true that most cases that deal with adding parties focus on what is just and convenient as an overarching assessment. The lack of the words "just and convenient" in Rule 6-2(7)(b) does not, in practice, eliminate the just and convenient inquiry because as the

Court of Appeal observed at para. 38 of *Teal Cedar Products*, where a decision to be made under the rules of court is discretionary, the discretion is fettered by the requirements if acting judicially, which must include ensuring that the decision accords with what is just and convenient, even if the rule in question does not expressly say so (in that case, the rule under consideration was Rule 24(1)):

Discretionary powers are, of course, always to be exercised judicially. It would clearly be unjudicial to permit an amendment to pleadings under Rule 24(1) if it appeared to be either unjust or inconvenient to do so. So, even though the words "just and convenient" are not found in Rule 24, justice and convenience would, in my view, be relevant criteria for the exercise of the discretion found in that rule.

- [25] Where, as in this case, the proposed limitation period has expired, there is presumed prejudice to the parties being added as they will lose their limitation defence. Accordingly, the court must be satisfied that it is just to add the parties despite that presumed prejudice. This requires a balancing of the prejudice as between the party seeking to add the party and the party who will lose its limitation defence. This analysis is an aspect of a "just and convenient" analysis that specifically requires the consideration of whether the plaintiff has explained its delay reasonably: *Byrd CA* at para. 31-33 citing *Chouinard* and *Letvad*.
- [26] Other differences in the way the parties approached the analytical framework included whether there is a preliminary threshold of establishing a connection between the proposed defendants and the claims to be brought and the role, if any, that the plaintiff's chances of success play.
- [27] The proposed defendants submit the court can consider the strength of the plaintiff's claim when balancing the prejudice between the parties. In this regard, the proposed defendants rely on *Byrd CA* at para. 44, where the Court of Appeal said:

In assessing what was just and convenient, the chambers judge, as she was entitled to do, gave more weight to the prejudice the Province would suffer if it lost the right to rely on the limitation period, than to the prejudice Mr. Byrd would suffer if he lost his right to bring an action against the Province. She did so because the delay was lengthy and because Mr. Byrd had failed to provide a satisfactory explanation for the delay. In addition, she had regard to the fact that it was unlikely Mr. Byrd would be able to bring the matter to trial in the foreseeable future.

- [28] The proposed defendants emphasize the last sentence and say it opens the door to consideration of chances of success. This sentence must be understood in the context of the chamber judge's analysis that the Court of Appeal upheld. In *Byrd v. Cariboo* (Regional District), 2014 BCSC 2239 [*Byrd SC*], Madam Justice Bruce started her analysis by setting out that the threshold test was satisfied, stating "the claims against the Province ride in tandem with the claims against the CRD" (at para. 23). The Province appeared to make a similar submission as the defendants in this case about the strength of the claims. At para. 24, Bruce J. said:

The question is whether it would be just and convenient to determine these issues in the same proceeding. The primary hurdles for the plaintiff are the extensive delay in bringing this application and the expiration of the limitation period. Although the Province argues that the causes of action against it are not well-founded, the ultimate viability of the claims is not a consideration at this stage of the process. Provided the claim is not frivolous, and would not obviously waste the court's time, it is not the function of the court in an application to add a party to weigh the chances of the plaintiff succeeding against the Province: *MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.) at 175. In my view, the claims against the Province meet this low threshold. Should the Court grant the plaintiff's application, the Province would be at liberty to apply to have the action summarily dismissed pursuant to Rule 9-5.

[Emphasis added.]

[29] The proposed defendants' approach is also inconsistent with several authorities including: *MacMillan Bloedel Limited and MacMillan Bloedel Ltd. v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.) at 175; *Wong* at para. 25; *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578; and *Meade* at para. 16.

[30] So long as the plaintiff can establish the connection, there is no analysis of the merits of the claim to be made against the proposed defendants. In *Meade* Mr. Justice Dley held that:

[16]

- 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined.

Rule 6-2 (7)(b)

[31] Rule 6-2(7)(b) has a narrow application. It applies where the applicant has satisfied one of two threshold issues: the person ought to have been joined as a party or the person's participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated: *Alexis* at para. 15. The nature of these two circumstances are described in *Byrd* (CA):

[36] . [Rule 6-2(7)(b)] is intended to remedy defects in the proceeding as it stood prior to the application to add a party. "Ought to have been joined" deals with the situation where the person sought to be added has a direct interest in the outcome of the existing action. "[N]ecessary to ensure that all matters may be effectually adjudicated" deals with a situation where the participation of the person sought to be added is required in order for the existing claim to be fully and properly adjudicated. See also: *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562 at paras. 28-32, 61 B.C.L.R. (4th) 295.

[32] The proposed defendants note that Mr. Madadi has not specified whether he relies on (b) or (c) of Rule 6-2(7). However, Mr. Madadi has cited both subrules 6-2(7)(b) and (c) and argues that the proposed defendants are "essential to the claim proceeding" because the persons

alleged to have undertaken the acts of misfeasance must be named in a claim for misfeasance in public office. I accept this as an argument under Rule 6-2(7)(b). He also argues that the facts satisfy the necessary connection requirement which I accept to be an argument under Rule 6-2(7)(c).

- [33] In my view, it is necessary to add the proposed defendants in order for the claim to be fully and properly adjudicated because in order to pursue a claim of misfeasance in public office, an intentional tort, the individuals whom the plaintiff alleges carried out the acts of misfeasance must be named otherwise the requisite intention cannot be proved: *Wu v. Vancouver (City)*, 2019 BCCA 23 at paras. 91-93, citing *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 319 and 350, *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 44 and *Barbour v. UBC*, 2006 BCSC 1897 at para. 45.
- [34] I conclude that the circumstances of this case meet Rule 6-2(7)(b)(ii).

Rule 6-2 (7)(c)

- [35] Rule 6-2(7)(c) requires a court "to determine whether or not joinder of the new defendant is just and convenient in any particular case": *Alexis* at para. 17. Like Rule 6-2(7)(b), there is a threshold question. The Court of Appeal described it this way in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45:

must show that there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding. The threshold is low. It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party. This requirement may be met solely on the basis of proposed amendments to the statement of claim, or the parties may provide affidavit evidence addressing it.

- [36] If the parties address this threshold requirement through affidavit evidence, its role is limited to assisting the court to determine whether the evidence supports that a real issue exists between the parties. The court is not called on to weigh the evidence to determine which party is likely to be successful: *Strata Plan LMS 1816* at paras. 3-5.
- [37] Although the proposed defendants argue that the claim against them lacks merit and that ought to be taken into account in balancing prejudice, they do not argue that the pleadings and affidavit evidence fail to disclose an issue between Mr. Madadi and the proposed defendants that relates to the proceeding. The proposed defendants submit that pleadings are "boilerplate" because they lack supporting material facts and so they do not warrant joinder. Although pleadings may be general, "they must be specific enough to show on what grounds the proposed defendant is being sued": *Forde v. Interior Health Authority*, 2007 BCSC 1706 at para. 15. The court in *Forde* said, at para. 16:

it is inappropriate to lump defendants together and make blanket allegations against them, unless those defendants were in an identical relationship to the plaintiff. Standard or "boilerplate" allegations in a statement of claim will often not satisfy the requirements under the first stage of the Rule 15(5)(a)(iii) test.

- [38] Mr. Justice Milman found that the pleading before him was deficient, including failing to name the proposed defendants. However he did not strike the claim or dismiss on a summary judgment basis because he determined that the pleading could be amended to address the deficiencies he identified and if it was, it could not be said that there was no chance of success such that it ought to be dismissed summarily.
- [39] In response to Milman J.'s ruling, Mr. Madadi has amended his claim and brought this application to add the proposed defendants and to be advised of the names of the other committee members. The proposed defendants submit that the amended pleading cannot succeed because it alleges "discrimination" which is not compensable in tort law and cannot amount to "unlawful conduct" for Category B misfeasance. I do not accept this argument. Mr. Justice Milman addressed the allegation of discrimination and held that if other deficiencies he described in the pleadings were corrected, the allegation of discrimination could "suffice to make out the first element of deliberate and unlawful conduct as against them, at least" (at para. 67 of 2018 BCSC 1891). Mr. Madadi does not plead discrimination as a cause of action giving rise to a remedy, he pleads discrimination as the unlawfulness underlying the first and second elements of the tort of misfeasance in public office. Although the proposed defendants were not before Milman J. and the filed amended notice of civil claim may be different than the draft amendments before Milman J., the conclusion Milman J. drew is applicable and I will not entertain a re-argument of it.
- [40] The proposed defendants also assert that Mr. Madadi will not succeed in proving discriminatory influence based on comments made by the proposed defendants that Mr. Madadi ought to have known that his comments would be taken as a threat because he was a long-time resident of Canada. I decline to take into account whether such a claim and such a comment will be satisfactory proof that discriminatory viewpoints infused the reasoning or the decisions of the proposed defendants.
- [41] The proposed defendants assert that the pleadings relating to the penalty as misfeasance cannot stand because they are not adequately particularized. I consider this to have been addressed by Milman J. when he concluded that the claim pleaded that the penalty was imposed for an improper purpose, namely discrimination.
- [42] I conclude that the circumstances of this application satisfy Rule 6-2(7)(b) and the connection preliminary threshold in Rule 6-2(7)(c). I turn to whether it is just and convenient to add the proposed defendants.

Just and Convenient

- [43] Because this application was argued on the basis that the applicable limitation periods have lapsed, exercising discretion judicially under any of the provisions is guided by the considerations set out in *Letvad* at para. 29 regardless of whether the circumstances otherwise meet Rule 6-2(7)(b) or (c). The *Letvad* factors are not exhaustive and include:
- a) the extent of the delay in seeking to add the parties;
 - b) the reasons for the delay;
 - c) any explanation to account for the delay;
 - d) the degree of prejudice caused by the delay; and
 - e) the extent of the connection, if any, between the existing claims and the proposed parties or claims.
- [44] The court must not engage in a checklist approach to determining what is just and convenient: *Chouinard* citing *Letvad*,

Delay - extent, reasons and explanation to account for it

- [45] The proposed defendants assert the delay is extensive, not adequately explained, and gives rise to presumed and actual prejudice. They argue that the loss of a limitation period gives rise to a presumption of prejudice and the passage of time coupled with the evidence that records pertaining to the disciplinary proceedings have been destroyed are evidence of actual prejudice. The proposed defendants submit the facts of this application create "an obligation on the applicant to clearly and in a detailed and straightforward manner, explain the delay", relying on *Brar v. Abbotsford (City)*, 2013 BCSC 1694 at para. 54.
- [46] Mr. Madadi asserts that he has adequately explained the delay and that his prejudice of not being able to pursue his claim of misfeasance in public office in relation to the disciplinary panel outweighs the prejudice to the defendants in losing a limitation defence.
- [47] On review of the cases referred to by the parties, including *Byrd CA*; *Chouinard*; *Brar*; *Moldovan v. Republic Western Insurance Company*, 2011 BCCA 418, I summarize principles in assessing delay as follows:
- a) explanations should be specific and not contradicted by other evidence in order to amount to reasonable explanation;
 - b) where a party is represented, delay that is attributable to counsel or based on the failure to give any or adequate advice is not held against the plaintiff to the same degree as it would be if the plaintiff was personally responsible for it;
 - c) where a party is self-represented, the court should give consideration to that status;

- d) whether the delay was tactical is relevant; and
- e) in order for delay to give rise to prejudice, the prejudice must be associated with the delay.

[48] The chronology relating to the disciplinary proceedings by the College is:

Year

Events

2001

The complaints about Mr. Madadi were made.

2003

The College advised Mr. Madadi that it was investigating the complaints.

2005

The College cancelled Mr. Madadi's teaching certificate due to his inadvertent failure to pay his professional fees on time and Mr. Madadi applied to be reinstated.

2007

Mr. Madadi was cited with misconduct at the conclusion of the investigation into the complaints.

2009

The hearing commenced before the disciplinary panel.

2009

The Qualifications Committee decided it would not hear Mr. Madadi's application to be reinstated.

February 2010

The first phase of the disciplinary hearing concluded.

November 2010

The disciplinary panel issued reasons.

2011

The penalty hearing commenced.

June 2011

The disciplinary panel imposed a penalty of a one year period where Mr. Madadi would not be eligible to teach.

November 1, 2011

Mr. Madadi filed appeals of both decisions of the disciplinary panel to this court.

2012

The Qualifications Committee granted Mr. Madadi's application for recertification.

2012

Mr. Madadi brought a complaint to the B.C. Human Rights Tribunal on the basis that the disciplinary panel discriminated against him based on his place of origin.

October 30, 2012

The B.C. Human Rights Tribunal dismissed Mr. Madadi's complaint on the basis that what he sought to achieve was akin to judicial review and the Supreme Court should be the body that determines whether discriminatory considerations influenced the decision of the panel.

December 2013

The College consented to an order setting aside the disciplinary panel's decisions on the basis that the parties bear their own costs. Mr. Madadi refused to agree to a no costs order and continued with a claim for compensation as part of his appeals.

June 2014

Madam Justice Gropper granted the orders setting aside the decisions and the ancillary orders relating to publication but determined she could not order compensation on judicial review. She ordered that no costs were payable by either party.

[49] Mr. Madadi commenced this action in September 2015. He represented himself at the hearing before Madam Justice Gropper and until September 2018 when British Columbia sought to strike his claims or have them dismissed summarily. Through counsel, he prepared and delivered an amended notice of civil claim which was unfiled but which was before Milman J. at the hearing of British Columbia's application. On November 1, 2018 Milman J. issued reasons for judgment permitting Mr. Madadi to amend his claims. Mr. Madadi filed the further amended notice of civil claim on January 11, 2019. In March 2019, Mr. Madadi's counsel requested the names of the unknown College officials who were members of the Qualifications Committee and Fitness Sub-committee. Counsel for British Columbia advised that he could not disclose the names without a court order and suggested that it be combined with the application to add the proposed defendants.

[50] This application was the subject of scheduling discussions commencing in May 2019, at which time the parties were able to secure a date in July 2019 for a lengthy chambers application. In June 2019, counsel for Mr. Madadi received contact information for the proposed defendants through skip tracing and in July 2019 he served persons at those locations with the unfiled application to add them. One of the proposed defendants was served and he retained counsel. Some of the addresses were wrong and the process

commenced again. In August 2019 the remaining proposed defendants were located and served. By then, the available dates for a lengthy chambers hearing were in late November 2019. I understand that the matter was not able to be heard on the date it was set. The next hearing date that counsel could obtain was February 7, 2020.

- [51] The proposed defendants assert that the delay is more than seven years from the time the cause of action arose and more than four years after the limitation period expired. As noted above, while there is debate as to when the limitation period expired for the purpose of calculating delay, the matter was argued on the basis of an expired limitation period which gives rise to presumed prejudice.
- [52] There are apparent and reasonable explanations for the delay between July 2011 when the decision was issued and June 2014 when Madam Justice Gropper's decision was issued. During that timeframe, Mr. Madadi was pursuing remedies for alleged discrimination in the disciplinary process, the same goal he pursues through this claim. Although the proposed defendants were not named, it is common to name the administrative body responsible and Mr. Madadi was represented by counsel who commenced both those proceedings.
- [53] Accordingly, the delay that needs to be explained is June 2014 to February 2020, a period of five years and seven months. The delay between September 2018 and November 2018 is explained by the hearing before Mr. Justice Milman. Similarly, the delay between July 2019, when Mr. Madadi's counsel tried to locate the proposed defendants, and February 2020 when this application was finally heard, was caused by difficulties locating the proposed defendants and by scheduling circumstances beyond Mr. Madadi's control. That leaves four years and nine months.
- [54] Mr. Madadi deposed that he was advised by his counsel in February 2019 that he needed to add the officeholders whom he alleged to have carried out the misfeasance. He was only aware of the identity of three and he instructed his counsel to bring this application to add them.
- [55] I conclude that Mr. Madadi was not aware of the requirement that the officers responsible for alleged misfeasance in public office must be named personally as opposed to the entity in whose names they carry out their official duties until February 2019. He certainly should have known that by early November 2018 when Mr. Justice Milman issued his reasons. However, the jurisprudence shows sparse statements of the requirement starting in 2006 with the first clear statement by the Court of Appeal in 2017. Given that he was self-represented, I am not surprised, and it is not unreasonable, that he did not know he needed to name the officeholders.
- [56] Against this, I consider that it appears that Mr. Madadi did little, if anything, to advance his claim between September 2015 when he commenced it, until the summer of 2018 when he retained counsel. Had he advanced it, matters may have been brought to a head earlier and he may have become aware of this deficiency.

- [57] Mr. Madadi's explanation includes that the disciplinary proceedings effectively ended his teaching career. He was a teacher-on-call in New Westminster School District in 2001 at the time the complaints were made, and as a result of the complaints was not called to work. After he resigned from that district in 2002, he was able to get some sporadic work until 2005 when he lost his certification due to the late payment of fees. Although he sought reinstatement, it was refused and he was unable to work as a teacher until 2012. He deposed that he had developed a central nervous system disorder that caused him significant disability and impaired his ability to work. He deposed he suffered severe financial constraints as a result and was unable to afford to retain counsel until the summer of 2018. I will not make findings of fact as to whether the circumstances described by Mr. Madadi occurred as he described them and whether they were caused by the disciplinary process as those will likely be matters for consideration at a trial of his claims. However, I accept that given his inability to work during most of the period, and the many years he was under investigation and disciplinary proceedings, he had experienced loss of income and stress that interfered with his ability to retain counsel in these proceedings and proceed without delay.
- [58] The court will provide a self-represented litigant with some reasonable accommodation for mistakes "where it does not cause significant prejudice to the other party or the fairness of the hearing process": *Owers v. Viskaris*, 2012 BCSC 1534 at para. 42; and *Cole v. British Columbia Nurses' Union*, 2014 BCCA 2.
- [59] *Cole* was not a Rule 6-2(7) application but deals with the issue of delay that prejudices the opposing party. The Court of Appeal said:
- [36] It is right and just to accommodate self-represented litigants on procedural matters, recognizing their relative disadvantage in an unfamiliar setting. In 2006, the Canadian Judicial Council adopted a "Statement of Principles on Self-represented Litigants and Accused Persons". It contains advice to participants in the justice system, including this admonition to the judiciary: "Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons" (at 7).
- [37] The Statement also includes the following commentary under the heading "Promoting Equal Justice" (at 5):
2. Judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation. The Council's statement of Ethical Principles for Judges (1998) has already established the principle of equality in principles governing judicial conduct. That document states that, "Judges should conduct themselves and proceedings before them so as to ensure equality according to law."

4. Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.
- [38] The delay in the present case is not a mere slip or misunderstanding of time requirements brought about by Mr. Cole's unfamiliarity with court practice. Courts routinely extend some latitude to self-represented litigants on time limits, as they should, while trying to maintain a balance of interests and an orderly process. The test for dismissal for want of prosecution requires inordinate delay. Even making a generous allowance for Mr. Cole as a layperson, the Court must take into account the delay he created by his stubborn preoccupation with document discovery, which was inordinate, as the judge found. The Union gave Mr. Cole full notice of its intention to move to strike out his petition if he did nothing. His decision to do nothing is not related to being self-represented. It was, in my respectful opinion, wrong for the judge to use his bare status as a basis for dismissing the Union's motion.

[Emphasis in the original.]

- [60] In this case, the delay was not tactical and so how it is viewed should take into account Mr. Madadi's self-representation due to financial constraints and issues with his health. However, his explanation did not provide specifics of how those issues prevented him from advancing his case.
- [61] On the whole I conclude there is some explanation, not well detailed, for the failure to advance matters while Mr. Madadi was self-represented. For this reason, the entire delay is not entirely explained and so not entirely reasonable.
- [62] Lacking a reasonable explanation is not an absolute bar to adding a party under R. 6-2(7): Letvad at paras. 26-28. Demonstrating a reasonable explanation merely creates an onus related to prejudice. The party opposing the addition can no longer rely on the presumed prejudice as a result of not being able to mount a limitation defence; the party has to show actual prejudice: Neilson at para. 94. In any case, both the presumed and actual prejudice must be weighed and considered as to what is just and convenient, they are not determinative.

Prejudice

- [63] If added, the proposed defendants will lose their limitation defence. This is presumed prejudice. It is serious.
- [64] If not added, Mr. Madadi will lose his chance to argue misfeasance in public office. This is serious prejudice. It is clear that Mr. Madadi has been trying, one way or another, sometimes assiduously and sometimes not, since 2012 to redress what he perceives as discrimination in the College's disciplinary proceedings.

- [65] If Mr. Madadi is precluded from advancing the allegations of misfeasance in public office claim pertaining to the proposed defendants it will be in part due to his conduct in delay, some of which is not adequately explained. However, if the proposed defendants are added, it will be to defend a case in which the delay in the College disciplinary process spanned 13 years. None of the College's delay has ever been explained, including that in which the proposed defendants were involved.
- [66] Prejudice in losing a cause of action is usually considered to be more serious than the prejudice of losing a limitation defence: *Takenaka et al. v. Stanley et al.*, 2000 BCSC 242 at paras. 41 and 42, cited with approval in *Wadsworth v. McLeod*, 2004 BCSC 1824 at paras. 22-24 and *Moldovan* at para. 35.
- [67] With regard to actual prejudice, the proposed defendants all depose that they have no independent recollection of the details of the proceedings and would rely on notes they made, which they no longer have. An employee of the former College deposed that the practice at the time was to collect those notes after the final decision was rendered and securely destroy them six months after the decision date. If that was done in this case, those notes were destroyed notwithstanding that Mr. Madadi had commenced an appeal to this court alleging the same discriminatory conduct by the proposed defendants that he alleges in this case. Accordingly, there is no actual prejudice from the loss of notes that is due to the delay.
- [68] Mr. Madadi has procured transcripts of every day of the hearings so the loss of recollection of what went on during the public portion of the hearings can be addressed.
- [69] The same employee testified that the person at the College who had the most involvement in this matter passed away in September 2019. That is prejudice that is due to the delay and which cannot be addressed. However, for the same reason that the proposed defendants must be added, because it is an intentional tort and it is their intentions that are determinative, the College's deceased employee's evidence would not be central to the allegations pertaining to the alleged misfeasance. I conclude this is actual prejudice that is due to Mr. Madadi's delay but its significance is not great.
- [70] One of the proposed defendants has cancer. She lives in the interior of the province. At the time she deposed her affidavit (in late 2019), she had months of treatment ahead of her. She deposed that she has no ability to focus on anything except her health. This actual prejudice related to the delay. However, unfortunately, this sort of situation arises from time to time. The rules of court provide for the participation of parties to accommodate such circumstances. This would be the case whether this proposed defendant has been a party all along or is added at this time. Any order adding her would be subject to her right to seek accommodations as provided for in the rules to address her health issues when the time comes.

[71] I conclude that the presumed prejudice to Mr. Madadi is greater than that to the proposed defendants. There is some of the actual prejudice that is only slight. Other actual prejudice can be ameliorated as discussed above.

Strength of the connection between the parties sought to be added and the claim

[72] The strength of the connection is strong, perhaps absolute: the claim pertaining to misfeasance in the hearing portion of the disciplinary process, which is where the allegation of discrimination is focussed, cannot proceed unless the proposed defendants are added.

[73] I decline to consider the likelihood of success.

Conclusion on just and convenient

[74] The balance of prejudice favours adding the proposed defendants and I conclude it is just and convenient to do so.

[75] Mr. Madadi's delay is marked but not extensive when his explanations for much of it are taken into account and considered against other cases. While it is not completely adequately explained other than his evidence of health issues and financial constraints, those explanations go some way and certainly there is no suggestion of tactical or knowing delay. When viewed in the totality of the timeline from the beginning of the College proceedings, his delay takes on less significance.

[76] There is presumed prejudice to both. I consider the proposed defendants' losses of limitation defences to be less detrimental than the loss of the claim Mr. Madadi has been trying to pursue over many years despite significant disadvantages.

[77] I order that the proposed defendants be added and that British Columbia provide Mr. Madadi's counsel with the names of the members of the Qualifications Committee (including any of its sub-committees) and the Fitness Investigation Sub-Committee from February 20, 2006 to July 4, 2012.

Costs

[78] Costs shall be to Mr. Madadi in the cause.

"Matthews J."

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