

CANADA / JUDGMENT

Powell Estate v. Workers' Compensation Board

2011 BCSC 1036

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Supreme Court of British Columbia

DECIDED

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2011 BCSC 1036 Powell Estate v. Workers' Compensation Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Powell Estate v. Workers' Compensation Board,

2011 BCSC 1036

Date: 20110729

Docket: 07-3756

Registry: Victoria

Between:

The Estate of Margaret E. Powell, Deceased,

By Her Executor, Duncan Leslie Atchison

Plaintiff

And:

The Workers' Compensation Board of British Columbia

and Ralph McGinn

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for Plaintiff:

D.A. Farquhar, Q.C.

Counsel for Defendants:

Counsel for Proposed Defendant,

Edward Bates:

M.P. Carroll, Q.C.

M. Campbell

J.J. Camp, Q.C.

(appearing on May 17, 2011 only)

J. Facchin

Place and Date of Hearing:

Victoria, B.C.

May 17-20, 2011

Place and Date of Judgment:

Victoria, B.C.

July 29, 2011

- [1] There are three applications to be decided: the first is the plaintiff's application to add Edward Bates as a defendant and to amend the statement of claim to incorporate allegations against Mr. Bates. The second is the defendants' summary trial application, heard pursuant to Rule 9-7, in which the defendants seeks a dismissal of portions of the plaintiff's claims on the ground that they are barred by operation of the Limitation Act, R.S.B.C. 1996, c. 266. The third is the defendants' application, pursuant to Rule 9-5(1)(a), to strike portions of the plaintiff's statement of claim as disclosing no cause of action.
- [2] No one objected to the amendments sought by the plaintiff, as it was conceded that the plaintiff had a right to amend without order.
- [3] One of the grounds upon which Mr. Bates resists being added to this action is the expiry of the limitation period on action against him, and I shall therefore deal with the limitation issue first.
- [4] The plaintiff's claims, as against the present defendants and the proposed defendant Bates, are grounded in the tort of misfeasance in public office. The elements of this cause of action were summarized by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 32:

... the tort of misfeasance in public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

- [5] Issues to be decided include whether the applicable limitation period is two years or six years, when the right to bring the current action arose, and, if the action would otherwise be barred as having been started outside the relevant limitation period, if it is salvaged by the postponement provisions in the Limitation Act.
- [6] The plaintiff argues that the issues raised by the defendants' limitation argument are too complex and unwieldy to be decided fairly on summary trial. The plaintiff also argues that the issues that arise when questions of postponement of limitations applicable to the tort of misfeasance in public office, including whether the tort is a continuing tort as opposed to a tort arising from discrete acts of the alleged tortfeasor, are sufficiently complex and important that they should not be decided on affidavit evidence, but should be left to development on a full evidentiary record at trial.

Background

- [7] James L. Atchison was the father of the executor of the plaintiff estate and worked in the logging industry in the 1930s. In 1937, he was injured in a workplace accident when he fell from a tree and was then struck by a falling piece of equipment. The Workmen's Compensation Board (precursor to the present WorkSafeBC, which in the interim was called the Workers' Compensation Board, and all of which will be hereafter referred to in these reasons as the W.C.B.), accepted Mr. Atchison's injuries as compensable at the time.
- [8] Mr. Atchison developed complications that he apparently believed were related to or caused by his workplace injury, and it appears that some at least of Mr. Atchison's assertions were accepted by the W.C.B., as Mr. Atchison was granted a pension in the 1940s.
- [9] Mr. Atchison died in 1955 and his widow, Margaret Atchison (who later remarried to become Margaret Powell) applied to the W.C.B. for benefits arising out of Mr. Atchison's death. She was refused on the ground that the death was not related to the 1937 workplace accident. In 1956, the Commissioners of the W.C.B. upheld that decision, and in 1957, the Commissioners refused to reconsider their decision to deny those benefits.
- [10] The plaintiff is the son of Mr. and Mrs. Atchison, and the executor of Mrs. Atchison's estate. In 1996, he began to inquire of the W.C.B. on his mother's behalf about payment of benefits. Ms. Powell died in May 1997, but her son, as the executor, continued to communicate with the W.C.B. about widows' benefits. In 1999, the plaintiff applied under s. 96.1 of the Workers Compensation Act, R.S.B.C. 1996, c. 492 (since repealed), to the appeal division of the W.C.B. for reconsideration of the 1956 and 1957 commissioners' decisions to deny benefits arising

out of the death of Mr. Atchison. The plaintiff claims that a W.C.B. employee recommended this procedure to him. In October 1999, a panel of the appeal division of the W.C.B. determined that there was jurisdiction to reconsider a decision of the Commissioners and directed a reconsideration of the Commissioners' 1956 decision.

- [11] In February 2000, a panel of three members of the appeal division granted the reconsideration sought and determined, on the basis of new medical evidence, not available in the mid 1950s, that Mr. Atchison's death was related to his workplace injury. The appeal division panel went no further, and did not decide what consequences might flow from their decision.
- [12] The W.C.B. staff then began to calculate the amount that had become payable as a result of the appeal division's decision. The executor was pressing for immediate payment, and when a preliminary calculation reached over \$734,000, Ms. Cohen, who was the person in charge of the calculation, provided a memorandum to Mr. McGinn, who was the president of the W.C.B. The memorandum, dated March 3, 2000, pointed out that with interest and other related payments due, the total payable as a result of the appeal division decision was likely to exceed \$1 million.
- [13] Mr. McGinn authorized staff to continue to process the payment, but also decided to seek the advice of the W.C.B. legal department concerning the decision underlying the payment. The proposed defendant Bates was then and remains general counsel to the W.C.B. When Mr. Bates reviewed the appeal division processes leading to the decision of February 16, 2000, he became concerned that the appeal division, which had not existed in the mid 1950s, lacked the jurisdiction to review a decision of the Commissioners.
- [14] Mr. Bates drafted a memorandum to be sent by Mr. McGinn to the chair of the Panel of Administrators (as the W.C.B. Board of Directors was styled in 2000), which outlined the concern about the decision and asked the Panel of Administrators to refer the matter back to the appeal division for reconsideration.
- [15] At the same time these steps were being taken at the senior management level, at a lower administrative level, Mr. Watson, who was in charge of processing any payment flowing from the appeal division's February 16, 2000 decision, concluded that the appeal division lacked the jurisdiction to decide as it had. He decided that no benefits would be paid as a result of that decision. Mr. Watson communicated that decision to the plaintiff executor and to his counsel on June 8, 2000. This appears to have been a unique step, as Mr. Bates has testified at examination for discovery that he is not aware before June 8, 2000 of any other refusal to implement a decision of the appeal division on the basis that the appeal division lacked jurisdiction to make that decision.
- [16] The appeal division agreed to reconsider its decision, perhaps (and the evidence, while imperfect, seems to support this) as a result of personal contact between Mr. Cott, who was the chair of the Panel of Administrators and the head of the appeal division. In any event, on April 24, 2001, the appeal division reconsidered the matter and concluded that its October

1999 decision that it had jurisdiction to review the Commissioners' decisions of 1956 and 1957 was wrong. By necessary implication, therefore, the appeal division decision of February 16, 2000 that the death was work-related would also have been without jurisdiction.

- [17] Informed of this, the plaintiff petitioned for judicial review of the April 24, 2001 decision. On November 21, 2001, in a decision indexed at 2001 BCSC 1661, Vickers J. ruled that the appeal division had the jurisdiction in April 2001 to review its earlier decision on the ground that it was made without jurisdiction. Mr. Justice Vickers also ruled that the appeal division was correct in its April 24, 2001 decision that it had lacked jurisdiction to review a decision of the Commissioners made in 1956 and 1957.
- [18] The plaintiff appealed, and in August 2003, the Court of Appeal upheld Vickers J. In reasons indexed at 2003 BCCA 470, the Court of Appeal held that the jurisdiction of the appeal division under s. 96.1 of the Workers Compensation Act, was restricted, and did not extend to reviewing historical decisions of Commissioners of the Workers' Compensation Board or its predecessors. The court went on to say that the Board itself, as opposed to the appeal division, continued to have jurisdiction under s. 96(2) of the Workers Compensation Act to reconsider its own earlier decision from the mid 1950s.
- [19] The plaintiff then applied to the Board under s. 96(2) of the Workers Compensation Act for reconsideration of the decision of 1956 and 1957.
- [20] In January 2004, the Board denied the plaintiff's request for reconsideration through the same Ms. Cohen who in March 2000 had written the memo to Mr. McGinn pointing out the size of the award that might flow from the impugned appeal division decision. The plaintiff alleges that Ms. Cohen's decision was written in whole or in part by Mr. Massing, a lawyer at the W.C.B., who appeared as counsel on the judicial review proceedings. The plaintiff alleges further in his amended pleadings that Mr. Bates was behind Mr. Massing's involvement in Ms. Cohen's decision of January 2004.
- [21] The plaintiff pursued internal appeal remedies at the W.C.B. through the review division and an appeal tribunal, both of which upheld Ms. Cohen's denial of reconsideration. The final decision denying the plaintiff's application for reconsideration was delivered by a Mr. Morton on November 7, 2005.
- [22] On September 19, 2007, the plaintiff sued Mr. McGinn and the W.C.B. for damages for misfeasance in public office.

I. Summary Trial Application

Which limitation applies to the action?

Parties' Positions

- [23] The plaintiff argues that the two year limitation period provided under s. 3(2)(a) of the Limitation Act applies to this action because it is an action for "damages in respect of injury to ... property, including economic loss arising from the injury, whether based on contract, tort or statutory duty."
- [24] The defendants argue that s. 3(2)(a) does not apply and that the limitation period is the six year period as set out in s. 3(5) for actions not otherwise specifically provided for in the Limitation Act. The defendants' argument is mainly concerned with establishing that the claims cannot be said to be "injury to person" or personal injury, apparently in a mistaken anticipation of the plaintiff's argument. The authorities relied on are of little assistance, as they do not reveal the reasoning behind the decisions reached (*Wong v. British Columbia (Securities Commission)*, 2011 BCSC 149; *Drader v. Boyes*, 2009 BCSC 1185), or deal with personal injury facts (*Martin v. Insurance Corporation of British Columbia* (1979), 101 D.L.R. (3d) 70 (B.C.S.C.); *Arndt v. Smith*, [1997] 2 S.C.R. 539).

Analysis

- [25] The meaning of "injury to property" was dealt with in *W.C.B. (B.C.) v. Genstar Corp.* (1986), 24 B.C.L.R. (2d) 157 (C.A.), where McLachlin J.A. (as she then was), writing for a 5-member panel of the Court of Appeal, stated at 161-162:

I am persuaded by the authorities that "injury to property" refers to the situation where property is damaged by an extrinsic act, and not for the situation where a claim is made for damage occasioned by defects in the property itself.

- [26] That this statement is not restricted to circumstances involving the apparent need to choose between externally caused injury to property and inherent defect in the property itself, may be taken from further down at 162:

Policy considerations support the conclusion that "injury to property" refers to damage caused by an identifiable external event. A short limitation period of two years is appropriate where the claim is based on an event which causes direct injury to property. Such a short limitation period may not be appropriate for a claim based on defects in the property which may not manifest themselves clearly for some time, even though with the benefit of hindsight one may be able to say that their onset was revealed at an earlier date.

- [27] The authorities tendered by counsel have focussed on damage caused by an identifiable external event, and have assumed that the external event acted upon tangible property. But one can have property in an intangible thing, and it is not clear that the authorities have meant to exclude from a two year limitation any case where an identifiable external event might have caused loss to intangible property.

- [28] I am mindful of Savage J.'s statement in *Camp Development Corporation v. Greater Vancouver (Transportation Authority)*, 2009 BCSC 819, aff'd 2010 BCCA 284, at para. 103 that "The phrase 'Injury to property' in section 3(2)(a) of the Limitation Act means physical harm by an external force". However, that case and the other authorities seem to have been more concerned with the nature of the source of a loss or an injury, and less concerned with the nature of the interest or "property" affected.
- [29] The arguments did not address whether it is possible to have an identifiable external event cause loss to an intangible property or asset. While it might be argued that the acts constituting the alleged tort of misfeasance in public office are such an identifiable external event, and that these acts have not caused direct injury to property, I am left in some doubt as to whether a two year limitation period can apply where wrongful acts, such as those alleged here, are claimed to cause losses short of physical injury to tangible property.
- [30] On the surface, it would seem that claims arising out of the tort of misfeasance in public office, which in this case are injuries to economic interests, but could be other types of damage in other fact situations, are not direct injury to property as contemplated in s. 3(2)(a), and as interpreted in *Genstar*. The result would be a six year limitation period as provided for in s. 3(5) of the Limitation Act, as this cause of action falls under the definition, "Any other action not specifically provided for in this Act or any other Act ", but I am reluctant to so find on the record before me.

When did the right to bring the action arise?

- [31] Generally speaking, the right to bring an action in tort arises when the tortious conduct causes damage. In *Wittman v. Emmott* (1991), 53 B.C.L.R. (2d) 228 (C.A.), the court said at 236 that the right to bring an action in tort arises "... when the negligence and consequent damage occurs". The same reasoning applies to intentional torts.
- [32] Beginning at paragraph 24 of the amended statement of claim, the plaintiff alleges acts of misfeasance against the defendant McGinn that arise from his statements and actions that the plaintiff says wrongfully interfered in the internal processes of the W.C.B., which in turn led to depriving the estate of the benefits that would have been paid to it pursuant to the appeal division's February 16, 2000 decision. The wrongful actions are particularized in paragraph 25, and all are said to have occurred in 2000, or, at the latest, April 2001 when the appeal division reversed its earlier decision for lack of jurisdiction. I gather that the March 31, 2002 date stated in paragraph 28 is a typographical error and should read March 31, 2000.
- [33] Paragraph 4 of the amended statement of claim alleges that the acts of misfeasance are continuing to the commencement of the action, if not the present.

- [34] The defendants assert that the right to bring the action arose on June 8, 2000, when Mr. Watson concluded that the appeal division had no jurisdiction to decide that Mr. Atchison's death related to a work injury. In the alternative, the defendants say that at the latest, the right to bring the action arose on April 24, 2001, when the appeal division reconsidered its earlier decision and concluded that it had been made without jurisdiction.
- [35] The defendants say that because the plaintiff cannot qualify for postponement, the limitation period began to run at the time that the right to bring the action arose.
- [36] The plaintiff, however, argues that the damage did not occur until November 7, 2005, when he had exhausted his internal appeals from Ms. Cohen's January 2004 decision to deny reconsideration under s. 96(2). Until that time, it could not be said that the plaintiff had suffered damage as a result of the defendants' wrongful conduct. This is because up until that final decision, the W.C.B. could have exercised its discretion under s. 96(2) and awarded the benefits sought and the acts of misfeasance complained of would have been without consequences. As a result, there was no right to bring an action until that date.
- [37] However, the amended statement of claim does not allege that any misfeasance by Mr. McGinn had any impact on the decisions under s. 96(2), except perhaps for the allegation that Ms. Cohen had or appeared to have a conflict of interest arising out of her communications with Mr. McGinn concerning the implementation of the appeal division decision under s. 96.1 in 2000.
- [38] The plaintiff does allege that Mr. Bates abused his office by directing Mr. Massing, who had appeared as counsel for the W.C.B. at the judicial review hearing in this court in 2001 (but not at the appeal in 2003), to write Ms. Cohen's 2004 decision, and then reviewed it himself.
- [39] Mr. Bates's actions in January 2004 are alleged to form part of his continuing misfeasance in public office. Those acts are alleged to have contributed to the decision to deny the application for review under s. 96(2), and to have caused damage to the plaintiff. Indeed, the plaintiff alleges in paragraph 4 of the amended statement of claim that:

The Plaintiffs' action against the Defendants is for damages for misfeasance in a public office arising from acts of misconduct that commenced in 1997 and continue through to the present time.

- [40] Whether the actions of Mr. McGinn and Mr. Bates in 2000 and 2001, which led to the reversal of the appeal division decision that Mr. Atchison's death was related to his workplace injury, were capable of causing damage to the plaintiff may depend on whether causation can be established in a circumstance where it has been subsequently determined that the decision with which the defendants are said to have wrongfully interfered was, in any event, made without jurisdiction. That the appeal division had no jurisdiction to make the decision in question was decided in this court and the Court of Appeal.

- [41] Counsel for Mr. Bates argued in passing that a decision made without jurisdiction is not enforceable, and that no damages could flow from an act interfering with the implementation of such a decision, however wrongful that act. However, this issue was not addressed in his written argument, and this point, which seems quite important to questions such as when a cause of action for misfeasance in public office arose, and whether postponement under s. 6 of the Limitation Act operates, was not developed by either the plaintiff or the defendants on the summary trial.
- [42] The allegations of misfeasance in public office are rooted in the actions of the defendant Mr. McGinn and of Mr. Bates. Their responsibility for those actions is personal, and any liability of the defendant W.C.B. for the actions of either would be vicarious.
- [43] The bulk of Mr. McGinn's actions alleged to constitute misfeasance in office occurred before September 18, 2001, six years before the writ of summons was issued, so the action against him based on those acts would be barred by even the six year limitation period under the Limitation Act unless the running of time were postponed under s. 6.
- [44] The action against the W.C.B. based on the alleged misfeasance in office by Mr. Bates, arising out of any involvement in Ms. Cohen's January 2004 decision, was brought in time if the six year limitation applies, but not if the two year limitation applies, again subject to postponement.

Postponement

- [45] Section 6(6) of the Limitation Act places the burden of establishing that the running of time has been postponed on the party claiming the benefit of the postponement - in this case, the plaintiff.
- [46] Section 6(4) of the Limitation Act sets out the test a plaintiff has to meet to gain the protection of the postponement provisions. The subsection reads:

Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
- (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

- [47] To qualify for postponement, an action must fall under one of the categories listed in s. 6(3) (a) to (h). The plaintiff seeks to bring himself under s. 6(3)(b) on the basis that his action is for "damage to property". Although his written argument seems to also invoke s. 6(3)(e),

which would require he show that "material facts relating to the cause of action have been willfully concealed," he made clear in submissions that he was relying on s. 6(3)(b) alone. As a result, it is unnecessary to consider the defendants' arguments based on their anticipation that the plaintiff would try to bring himself under that subsection (e).

- [48] The plaintiff relies on *Strata Plan VR 2000 v. Shaw* (1998), 55 B.C.L.R. (3d) 103 (S.C.), and *Armstrong v. West Vancouver (District)* 2003 BCCA 73. The reasoning in *Strata Plan VR 2000* was adopted in *Armstrong*, where the Court of Appeal concluded that the phrase "damage to property" in s. 6(3)(b) does not exclude pure economic loss. The phrase "damage to property" in the context of postponement is different than "injury to property" under s. 3(2)(a) of the Limitation Act, which, as mentioned, sets out a two year limitation period for an action for damages arising from such injury. As the Court in *Armstrong* points out at para. 10: "it is now settled that a claim for pure economic loss is not 'injury to property' within s. 3(2)(a) of the Limitation Act." See also *British Columbia (Minister of Forests) v. Tnasem Logging Ltd.*, 2006 BCCA 54 at para. 20.
- [49] Again, it may be argued that this distinction may be based upon the source or cause of a loss, as opposed to the nature of the interest or "property" affected.
- [50] There are four components to s. 6(4), each of which must be satisfied in order for time to begin to run. In *Cowie v. Draper*, 2010 BCSC 686, the court at para. 38 adopted the explanation of these components provided in *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, as follows:
- [38] This Court in *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, referred to the four components of s. 6(4):
1. The identity of the defendant is known to the plaintiff.
 2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
 3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
 4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.
- [39] All four components must be satisfied before time begins to run.
- [51] Section 6(5)(b), referred to in the second component above, provides:
- (5) For the purpose of subsection (4)

(b) "facts" include

- (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
- (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

[52] The plaintiff argues that the running of time for action based on acts of misfeasance by Mr. McGinn and Mr. Bates, or either of them, in 2000 and 2001 has been postponed, and time did not begin to run until July 15, 2008, when he obtained an unredacted version of Mr. McGinn's March 7, 2000, memorandum. The plaintiff says that until that date, the third element of s. 6(4) was not satisfied as he did not have sufficient knowledge of facts on which he, as a reasonable person, having taken the appropriate advice a reasonable person would seek on those facts, would regard as showing that he ought in his own interests, and taking his circumstances into account, to be able to bring an action.

[53] The plaintiff says furthermore that the fourth component of s. 6(4) was only satisfied on November 7, 2005, when the Board finally denied his application for reconsideration, as until that point he had been required by s. 10 of the Workers Compensation Act to exhaust internal review and appeal procedures, and would not have been able to bring an action. In this regard, he relies on *Evans v. Vancouver Port Corp.* (1989), 42 B.C.L.R. (2d) 174 (C.A.).

[54] There are very real questions surrounding the causal connection between the alleged acts of misfeasance related to the appeal division reconsideration in 2001 and the Board's refusal to reconsider its decision under s. 96(2). Although the plaintiff has an obligation to bring its best case to a summary trial, the argument over whether a causal connection had been established was not well developed.

[55] I will first deal with the plaintiff's argument regarding the fourth component. *Evans* involved an injury to a "worker" as defined in the Workers Compensation Act, caused by a defendant who was not an "employer" under that Act (see the trial decision: *Evans v. Vancouver Port Corp.* (1988), 30 B.C.L.R. (2d) 265 (S.C.) at 270). The plaintiff in *Evans* had an election under s. 10(2) of the Workers Compensation Act whether to receive benefits or sue the tortfeasor. When Mr. Evans elected to receive benefits, any cause of action he had against the tortfeasor was subrogated to the W.C.B. pursuant to s. 10(6). The Court of Appeal determined that it was not until the W.C.B. decided it would not exercise its subrogated rights, and communicated that decision to Mr. Evans, that his time began to run under the Limitation Act, having been postponed pursuant to s. 6(3)(a).

[56] The decision in *Evans* does not seem to assist the plaintiff here. Section 10 of the Workers Compensation Act has no application to this plaintiff's application either for reconsideration of earlier decisions or for benefits, and there was no requirement that this plaintiff elect between benefits and an action against a wrongdoer. The plaintiff here has not been obliged to wait until the W.C.B. decided whether it would exercise any subrogated rights, as no rights were subrogated to the W.C.B. in this case.

- [57] The plaintiff's argument regarding the third element, that he did not have within his means of knowledge the facts surrounding the misfeasance of either or both Mr. McGinn and Mr. Bates until he obtained the unredacted copy of Mr. Cott's March 7, 2000, memorandum, is met by the defendants pointing out that the plaintiff had already sued for misfeasance in public office ten months before he got the unedited version of the document.
- [58] The plaintiff responds that prudence required him to sue before knowing all the facts in order to avoid being barred by operation of limitations, particularly as he believed when he sued that he was subject to a two year limitation under s. 3(2)(a).
- [59] I do not consider it appropriate to draw inferences about what the plaintiff knew and when he knew it from the date the action was commenced on the basis of the evidence available on this summary trial, and I decline to do so.
- [60] A redacted copy of the March 7, 2000, memorandum was given to the plaintiff on June 29, 2001, as a result of a ruling of the Information and Privacy Commissioner. In it, Mr. McGinn, as president and chief executive officer, expresses the hope the Panel of Administrators might request a reconsideration of the appeal division decision in the plaintiff's favour to Mr. Cott, as chair of the Panel. Redacted from the memorandum was a paragraph in which Mr. McGinn was critical of the experience and training of the appeal commissioners who had decided the matter, and a final paragraph requesting that the Panel refer the matter back to the appeal division " for further consideration and specifically legal analysis."
- [61] This memorandum was drafted by Mr. Bates for Mr. McGinn, a fact that was disclosed in an August 2000 affidavit sworn by Mr. McGinn in relation to the plaintiff's request under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.
- [62] Mr. Bates has testified on discovery that the Panel of Administrators' policy manual informed the members of the Panel that legislation indicated that administrators may not interfere with decision-making authority of the appeal division on individual matters, and that it would be considered inappropriate for administrators to contact the chief appeal commissioner or individual appeal commissioners to influence their decisions, or to make personal representations to the appeal division.
- [63] It seems to me that the plaintiff has a point here, and that is that the redacted version of the memorandum expressed the hope that the Panel of Administrators would request a reconsideration by the appeal division, whereas arguably the unredacted version directly asked the Panel to do so, and added the request for legal analysis, presumably by the appeal division.
- [64] The concluding request for both reconsideration and legal analysis was not something the plaintiff knew before mid-2008, when he finally got the unredacted version of the memorandum, nor is it something he could or should reasonably have known, given the W.C.B. opposition to full disclosure before then, and the redaction directed by the Information and Privacy Commissioner.

Conclusion on Summary Trial Application

[65] Supreme Court Civil Rule 9-7(15)(a) permits the Court to determine a summary trial application as follows:

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[66] In my view, this is a circumstance where subsection (i) applies. There are too many uncertainties, including possibility that the facts of this case might bring it under the two year limitation in s. 3(2)(a), that no loss may have been possible from the decisions of the appeal division made without jurisdiction, and that the causal connection between the allegedly wrongful acts of 2000 or 2001 and any loss as a result of the 2005 Board refusal to reconsider are too complex, the arguments on them not sufficiently developed, and the evidence surrounding the questions too uncertain to enable me to say that the limitations issue is suitable for disposition on summary trial.

[67] I note as well that there is a lot of money involved, the matter does not appear urgent, a trial is scheduled for November 2011, there is no prejudice likely to arise from delay, and the cost of allowing the matter to proceed is not substantial given the amount at stake. These are some of the factors discussed by Romilly J. in *Grant v. Sun Life Assurance Co. of Canada*, 1997 CarswellBC 1746 (S.C.), in relation to whether it would be unjust to decide the issues on a summary trial application. See also: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214 (C.A.).

[68] As I am unable to grant judgment on this summary trial application, this matter will proceed by way of the scheduled trial.

II. Application Under Rule 9-5(1)(a)

[69] The defendants seek to have paragraphs 34-36, 40, 48-52, 57-60 and portions of paragraph 62 of the statement of claim struck as disclosing no cause of action.

[70] Rule 9-5(1)(a) reads:

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,

[71] The test under Rule 9-5(1) is whether it is plain and obvious that the statement of claim discloses no cause of action, assuming that the facts stated can be proved. The defendants cite for that proposition the decision of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, decided under the predecessor Rule 19(24)(a). That same paragraph sets out the meaning of the "plain and obvious" test in this way:

As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[72] Paragraphs 34, 35 and 36 of the statement of claim allege certain actions on the part of Mr. McGinn in which he is said to be responsible for advising the Ministry of Labour that jurisdiction is not an issue with respect to the plaintiff's claims (para. 34), and informing Mr. Sinclair of the B.C. Federation of Labour that jurisdiction does not arise from the plaintiff's claims (para. 35), and it would be inappropriate for Mr. McGinn to intervene in decision-making on individual cases (para. 36).

[73] In paragraph 40, the plaintiff alleges that the defendant Mr. McGinn was responsible for the appointment of counsel to argue the position of the Employers' Advisors Bureau on the hearing of the plaintiff's petition for judicial review, as the Employers' Advisors Bureau did not participate in the judicial review.

[74] Paragraphs 48 through 52 relate to Ms. Cohen and allege that she became the adjudicator of the plaintiff's application to the Panel of Administrators/Board under s. 96(2) following the decisions in this court and the Court of Appeal on judicial review. Paragraph 49 states that Ms. Cohen had approved the initial decision to pay the plaintiff \$734,731.57 as a result of the appeal division decision in 2000. Paragraph 50 states that Ms. Cohen had been privy to discussions between Mr. McGinn and the W.C.B. Legal Services Division that led to the McGinn memorandum of March 7, 2000, to the chair of the Panel of Administrators, and swore an affidavit in the proceedings before the Information and Privacy Commissioner. Paragraph 51 alleges that Ms. Cohen wrote the decision of January 14, 2004, in which she found the plaintiff was out of time to apply for a reconsideration of the Commissioners' decision of 1956. Paragraph 51 also alleges that Ms. Cohen's January 14 decision was in fact written by Mr. Massing, associate general counsel to the W.C.B., and Mr. Massing had appeared as counsel on the judicial review proceedings. Paragraph 52 recites the bases on which the plaintiff sought a review of Ms. Cohen's January 14 decision including an allegation that she had a conflict of interest. To this recital should be added the plaintiff's amendment in para. 62, where one of the actions by Mr. Bates alleged to form part of his misfeasance is said to be that he directed Mr. Massing to involve himself in Ms. Cohen's decision and then reviewed the decision before Ms. Cohen signed it.

- [75] In paragraphs 57 through 60 of the statement of claim, the plaintiff alleges his attempts to obtain disclosure of documents relevant to allegations of misfeasance on Mr. McGinn's part, and the difficulties encountered, culminating in his complaint to the Office of the Information and Privacy Commissioner.
- [76] As to paragraph 62, the defendant asks that four bulleted paragraphs be struck. Paragraph 62 alleges acts of misfeasance in public office on the part of Mr. Bates. The impugned paragraphs are pleaded by way of particulars of actions alleged to constitute misfeasance on Mr. Bates's part, and generally track the allegations surrounding Ms. Cohen's involvement as described in paragraphs 48 through 52 above.
- [77] The defendants argue that the paragraphs in question, taken individually or grouped as the defendants have approached them in argument, are not capable of supporting a claim for abuse of public office or any other cause of action.
- [78] The plaintiff's obligation is to plead material facts concisely (Rule 3-1(2)(a)), avoid pleading the evidence by which the facts are to be proved (Rule 3-7(1)), and provide full particulars, where particulars may be necessary (Rule 3-7(18)). Whether or not the plaintiff here has run afoul of the injunction against pleading evidence was not argued, and is not raised in the defendants' notice of application.
- [79] While it may be that, taken in isolation, the pleadings attacked by the defendants here might not support a claim of misfeasance in public office, they might well constitute particulars of acts alleged to be misfeasance, and I hold the view that the nature of the cause of action in this case calls for some restraint in determining whether an allegation is a particular of wrongful conduct, or is evidence of a material fact, rather than a discrete allegation incapable of disclosing a cause of action if assumed true. I am not persuaded that the impugned pleadings should be struck under Rule 9-5(1).

III. Application to add Mr. Bates as Defendant

[80] This application is brought under Rule 6-2(7), the relevant portions of which read:

At any stage of a proceeding, the court, on application by any person may, subject to subrules (9) and (10),

...

- (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 other 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.

- [81] The plaintiff argues he only became aware of improper actions by Mr. Bates that were intended to frustrate and defeat his attempts to receive benefits that should have been paid him after his action began, that Mr. Bates's participation in the proceeding is necessary because he was responsible for interfering in the workings of the appeal division, and that there are questions or issues between himself and Mr. Bates that are related to or connected with the relief he claims against the present defendants.
- [82] Mr. Bates objects to being added, in part because his presence as a party is not necessary in order that matters in issue be adjudicated on, in part because his joinder would not be just and convenient, and in part because he would be deprived of a limitations defence if joined.
- [83] On the last point, the plaintiff is prepared to have Mr. Bates joined on the basis that he would have full right to argue his limitation defence at trial.
- [84] Mr. Carroll, as counsel for the defendant W.C.B., accepts that if misfeasance in public office can be proven based on the actions of Mr. Bates, those actions were in the course and scope of his employment and the defendant W.C.B. would be liable to pay any damages caused by the misfeasance, thus making Mr. Bates's joinder unnecessary to ensure that all matters in the proceeding might be effectively adjudicated.
- [85] The plaintiff explains the delay in seeking to bring Mr. Bates into the action on the basis that he did not get the complete and unredacted memorandum of March 7, 2000, until July 2008, and was not aware until the examination for discovery of Mr. McGinn in August 2008 and Mr. Bates in July 2009 that Mr. Bates had spoken to this memorandum to the Panel of Administrators. With respect, that explanation is insufficient. Mr. Bates's participation in the memorandum that features so prominently in the plaintiff's submissions on other issues has been known since August 2000, and while all of its contents were not known until 2008, that does not much matter on this issue.
- [86] It is significant in my view that the amendments to the notice of claim have been unopposed, and that the defendant W.C.B. is content to defend against the allegation that it is liable for Mr. Bates's alleged acts of misfeasance.
- [87] In my view, while ordinarily the factor of professional embarrassment might not loom large in deciding whether to order a person joined as a party, in this case it has some significance.

- [88] On balance, as I have not been shown any prejudice to the plaintiff if Mr. Bates is not joined, but, conversely, have been persuaded that the plaintiff's claims can be fully adjudicated based on allegations that Mr. Bates misconducted himself, and any damages proved to have been caused by any misfeasance in public office on the part of Mr. Bates will be payable by his employer, the defendant W.C.B., the application to join Mr. Bates as a defendant is dismissed.
- [89] If there are sufficient reasons to argue that costs should not be in the cause for the application of the defendants W.C.B. and Mr. McGinn, and that Mr. Bates should have his costs in any event of the cause, I will hear from counsel. Otherwise, that will be the disposition as to costs.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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