IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sahyoun v. Broadfoot***,
2008 BCSC 1836

Date: 20081217
Docket: S084539
Registry: Vancouver

Between:

Dr. Nabil Riad Sahyoun and Mrs. Sanaa Riad Sahyoun

Plaintiffs

And:

Susan Broadfoot, Trudy Damery, William Stephen Mullen, Bob MacFarlane, Kim Harder, Caroline Covil, Dave Jagpal, Mel Ferrabee, Bruce Curry, Scott Ritcey, Arla Swift, Alan Hughes, Linn Menzies, Gerry Mignault, Murray Coell, BC Ministry of Housing and Social Development (formerly Ministry of Employment and Income Assistance), Marilyn McNamara, Andrea Duncan, Kathleen McIsaac, Brian Gifford, Employment and Assistance Appeal Tribunal of BC, David Loukidelis, Celia Francis, Al Boyd, Office of the Information and Privacy Commissioner for BC and BC Ministry of Attorney General

Defendants

Before: The Honourable Mr. Justice Williams

Oral Reasons for Judgment

In Chambers

December 17, 2008

Appearing on their own behalf:	N.R. Sahyoun (via teleconference) S.R. Sahyoun (via teleconference)
Counsel for the Defendants Broadfoot, Damery, Mullen, MacFarlane, Harder, Covil, Jagpal, Ferrabee, Curry, Ritcey, Swift, Hughes, Menzies, Mignault, Coell, BC Ministry of Housing and Social Development, and BC Ministry of Attorney General:	B.A. Mackey
Counsel for the Defendants McNamara, Duncan, McIsaac, Gifford, and Employment and Assistance Appeal Tribunal of BC:	A.R. Westmacott
Counsel for Loukidelis, Francis, Boyd, and Office of the	S.E. Ross

Information and Privacy Commissioner for BC:

Place of Trial/Hearing: Victoria, B.C.

[1] **THE COURT:** There are two issues for determination in this matter. The first is an appeal by the plaintiffs from a decision of a master of the court. The other is an application by the defendants for an order that the plaintiffs' statement of claim herein discloses no reasonable cause of action and/or is unnecessary, scandalous, frivolous, or vexatious and is otherwise an abuse of process of the court and should be struck and the action dismissed, pursuant to Supreme Court Rule 19(24)(a),(b), and (d).

[2] NABIL SAHYOUN: Excuse me, Your Lordship. I have one issue I have to add. Mrs. Angela Westmacott sent me an email, okay, and in her email she said application of the Rule 19(24) does not require any affidavits.

[3] THE COURT: Sir --

[4] NABIL SAHYOUN: I repeat what she said. And if [indiscernible/ teleconference recording] one issue. She gave me the case of ***McNaughton v. Baker*** and that case does not require any affidavits under Rule 19(24). This is Mrs. Westmacott's email to me, so please add that to that case.

[5] THE COURT: Sir, I am adding --

[6] NABIL SAHYOUN: And she is there --

[7] THE COURT: Sir, listen to me.

[8] NABIL SAHYOUN: Yes, sir. Yeah.

[9] THE COURT: I am adding nothing to the case. I am here today for one purpose and one purpose only; that is to provide you with my reasons for decision.

[10] NABIL SAHYOUN: All right.

[11] THE COURT: Sir, if you have any concerns or anything you want to say following today, you can do that as you see fit, but I am not here today to listen to further submissions from you. Do you understand?

[12] NABIL SAHYOUN: Absolutely. Absolutely. But [indiscernible/teleconference recording] a case from Mrs. Westmacott [indiscernible/teleconference recording] remind Your Lordship that there is no necessity for any affidavits under Rule 19(24). I think it's agreed by everyone.

[13] THE COURT: I propose to set out something of an outline of the facts leading up to these applications and then to address each in turn. I will deal with the appeal from the master's decision and then the defendants' application.

BACKGROUND

[14] The plaintiff Dr. Sahyoun is a former academic who resides in Vancouver. He is afflicted with several significant medical conditions. The other plaintiff is his spouse. She provides him with assistance that he needs as a result of his conditions.

[15] On April 30, 1992, Dr. Sahyoun's case for financial assistance was considered by a tribunal exercising its jurisdiction under the then applicable legislation governing assistance for persons in need, the ***Guaranteed Available Income for Need Act***, RSBC 1979, c. 158 (the "***GAIN***" Act). The tribunal ruled that because of his handicap and unemployable status, he was entitled to receive a medical disability pension. He continued to receive that for some period of time.

[16] The ***GAIN*** Act was replaced by the ***Disability Benefits Program Act***, RSBC 1996, c. 97 in 1997. It appears that Dr. Sahyoun was automatically transferred to that regime. He had the designation of "person with disabilities" and continued to receive assistance under the new legislation. Evidently, there are different categories of persons with disability. Dr. Sahyoun contends that he was erroneously assigned to a category that is not the proper one. It is really that alleged mis-categorization which has given rise to the disputes which have followed and which form the foundation of the grievances which underlie his legal actions against a number of individuals and

agencies.

[17] On May 30, 2002, that legislation was superseded by the ***Employment and Assistance for Persons with Disabilities Act***, SBC 2002, c. 41 (the "***EAPWD***" Act). Under that enactment, and specifically the transitional provisions, those designated under the previous Act as persons with disabilities were deemed to be persons with disabilities as well, but in order to continue to receive benefits, such persons were required to satisfy initial and continuing conditions of eligibility. The specific requirement was that the applicant's medical condition directly and significantly restrict his or her ability to perform daily living activities.

[18] Dr. Sahyoun's case came before the Ministry for a consideration of his eligibility going forward. (In these Reasons, I use the term Ministry when referring to both the Ministry of Housing and Social Development and its predecessor the Ministry of Employment and Income Assistance, each of which were charged with administration of the social benefit programs in issue.) On July 27, 2002, on the basis of the material that was made available, it was decided that he did not meet the legislative criteria for persons with disability designation. Specifically, the Ministry determined the criteria for a severe mental or physical impairment were not met. There was no confirmation from a medical practitioner that the impairment significantly and directly restricted his ability to perform daily living activities either continuously or periodically for extended periods, and a medical practitioner had not confirmed that as a result of those restrictions his daily living activities required significant help or supervision of another person, an assistive device, or the service of an assistance animal. His status had changed. Under the new legislation, he was no longer considered to be a person with disabilities.

[19] Dr. Sahyoun was dissatisfied with that ruling and so he filed an appeal from it.

[20] The matter came before a panel of the Employment and Assistance Appeal Tribunal on December 17, 2003. The panel considered the record, the appellant's submissions, and those of the Ministry. In its decision, it is noted that on September 30, 2003, the Ministry had requested that the appellant submit a persons with disabilities review form. As there was no form provided in response to that request, the matter was decided on medical evidence that had been previously submitted. Evidently, the appellant took the position that he was not required to provide the requested information.

[21] The panel confirmed the Ministry's decision was a reasonable application of the legislation, observing that the successor Act had transitional provisions and that persons such as the appellant who had been previously deemed persons with disabilities were required to satisfy the continuing conditions of eligibility. It concluded that there was insufficient medical evidence to establish that the appellant's medical condition directly and significantly restricted his ability to perform daily living activities as defined. His appeal was dismissed.

[22] Dr. Sahyoun alleges error and wrongdoing by the tribunal and its members in the course of the conduct of the hearing in December 2003. He also alleges wrongdoing in that there was a refusal to conduct an appeal hearing in 2008.

[23] In the course of dealing with the Ministry and its staff, and his view that his file had not been properly handled, Dr. Sahyoun wrote to the Information and Privacy Commissioner on September 12, 2003, requesting a review of certain decisions and actions taken by personnel of the Ministry.

[24] On November 19, 2003, he again wrote to the Information and Privacy Commissioner requesting an inquiry with respect to information in the files of the Ministry of Human Resources and with respect to certain decisions taken by the Ministry and members of its staff.

[25] Stated summarily, Dr. Sahyoun alleges that the Ministry and members of its staff have made many errors in decisions respecting his case and procedural steps taken in the conduct of this file. He also alleges that the Information and Privacy Commissioner and certain of his staff have mishandled his file and have failed in the execution of their duties.

[26] I have not described all of the background events in full detail. The facts are complicated and intricate. My summary is a general one gleaned from the material that has been filed in this application, and I do not hold it out as anything more than a broad-brush description.

[27] On June 24, 2008, acting on his belief that these members of the public service and others had not properly discharged their duties, Dr. Sahyoun initiated a lawsuit. It would not be inaccurate to describe it as something of an omnibus legal action. In all, it names as defendants 22 individuals, including at least one Minister of the Crown, the

Office of the Information and Privacy Commissioner, the Employment and Assistance Appeal Tribunal, and two Ministries of the Crown. The allegations of wrongdoing date back to 1992 and extend through 2008. The pleadings repeatedly allege professional malpractice, including neglect of duty, perjury, forgery, bad faith, and fabricating evidence.

[28] In their prayer for relief, the plaintiffs seek to have the decision of July 27, 2002, struck down and to have all subsequent decisions that flow from it struck down. They also seek to have Dr. Sahyoun granted permanent handicap and unemployable status and that he receive disability pension and benefits, including retroactively, and that he be compensated for any and all medical expenditures that he has incurred since the time that his status changed. As well, they seek general, special, punitive, aggravated, and exemplary damages.

[29] After commencing this action, the plaintiffs embarked directly onto document discovery and, as I understand, pursued default judgment against one or more of the defendants. At that time, the defendants had filed their application to have the action dismissed pursuant to Rule 19(24). What followed is described in a subsequent part of these reasons where I will deal with the issue of the plaintiffs' appeal from the decision of a master of the court. I will not go into that detail here.

ISSUES

[30] As indicated at the outset, there are two matters for determination. The first is to adjudicate the plaintiffs' appeal from a decision of Master Taylor on August 19, 2008, when the defendants' Rule 19(24) application first came before the court. That ruling dealt with an application to adjourn and with costs.

[31] The second issue for decision is the substantive application of the defendants that the plaintiffs' action be struck in accordance with Rule 19(24).

THE APPEAL FROM THE MASTER

[32] The application of the defendants to have the plaintiffs' action struck was set down on the chambers list in Vancouver for August 19, 2008. It was put before a master of the court. The plaintiffs were present, as were counsel for each of the applicant defendants. It became readily apparent that there were some problems arising from the fact that certain material had been filed late. There was also an issue as to whether the application could be heard by a master or whether it should be placed before a judge.

[33] In the initial comments that were made, it was indicated to the master that the plaintiffs wished to have the hearing adjourned to another day. I quote from the transcript of the proceedings in chambers at page 2. The master said:

> Sir, was Mr. Mackey correct in making the assumptions, sir, that you are or will be seeking an adjournment of today's hearing?

Dr. Sahyoun replied:

> Absolutely, yes.

[34] Following that, the master heard from each of the counsel and from Dr. Sahyoun. Briefly stated, the defendants did not wish to have the matter adjourned. They wanted to have it heard. In the course of outlining their position that it not be delayed, they made known to the master that they were especially concerned that, should there be some delay, the plaintiffs would use that opportunity to press for document production that was extensive and, in their view, both disruptive and mischievous, and because, in the submission of the defendants, there was good reason to believe that their application to strike the application was likely to succeed, it would be entirely wasted.

[35] After hearing from the parties, the master decided that the matter should be adjourned in order that the plaintiffs would have sufficient time to review the materials that had been served in respect of the application under Rule 19(24) but that the adjournment should be brief.

[36] The matter was set over to August 29, some 10 days later.

[37] The master also imposed a condition, namely, that the plaintiffs would not seek any orders against the defendants that would require the production of documents pursuant to a demand for discovery of documents until the application had been heard. Rights of document discovery were temporarily suspended.

[38] As well, the master made an order that the defendants would have their costs for preparation and attendance of the day in any event of the cause.

[39] I have examined the notice of appeal and the grounds set out therein, and I have also taken into account the submissions that Dr. Sahyoun made before me. To a significant extent, the grounds set out in the notice of appeal seem directed to complaints that the master did not consider the appellants' position with respect to the substantive matter, the application to strike.

[40] With great respect, that is not relevant because the substantive matter was not dealt with by the master. In fact, there may be reason to believe that he did not have jurisdiction to hear it. However, that is not the point for now. What is material is that the master's alleged failure to consider the merits of the appellants' case does not assist the appellant because the master was not adjudicating that issue.

[41] Dr. Sahyoun also complains that the master neglected to take appropriate measures to determine an appropriate date for the matter to proceed.

[42] My examination of the transcript of the proceedings satisfies me that there is no merit to that claim. There was discussion among all concerned with respect to the new date. At page 6 of the Reasons of the master, when the date of August 29 was proposed and Dr. Sahyoun was asked about his availability, he replied: "Friday, no problem for Friday." He does not appear to have taken issue with that date.

[43] There is no basis to find any error in the manner in which the master dealt with the fixing of the date to continue.

[44] The appellant also objects to the imposition by the master of the condition that the document discovery process be suspended pending the hearing of the application. He contends that the order was unjust. Again, given the fact that it was the appellants' application to adjourn, given the relative brevity of the delay and taking into account the concerns that were articulated by counsel for the applicants, who were ready to proceed and who did not want to adjourn, the decision that the master made was entirely reasonable.

[45] There was no significant prejudice to the appellant. It should not be forgotten that the adjournment of the application was at the behest of the appellant.

[46] I find no error in the master's decision.

[47] Finally, the appellant takes issue with the master's order that he would be assessed costs for the preparation and attendance for the day. He says that was unjust, presumably because he had been granted indigent status by the court, and he also appears to suggest that there was a mistake made by the registry in setting the matter before a master, and the consequences of that should not be visited upon him.

[48] The master was aware that the appellant had indigent status at the time he made his order, but he had heard submissions from counsel which satisfied him that the order was appropriate in the circumstances, namely, that Dr. Sahyoun had demonstrated a pattern of conducting the litigation with an apparent disdain for the convenience of others, almost to the point of appearing to manipulate the process for tactical benefit. On that basis, the master concluded that the usual practice of granting costs in such a situation was warranted.

[49] As for the fact of the appellant's indigency, that was within the contemplation of the master when he made his order, and he evidently recognized that there was a salutary purpose to be served. The issue of actual collection of the award of costs is another matter, one that is not before me at this time. However, I am not persuaded that the master was in error when he exercised his jurisdiction to make the cost order in the circumstances of the case. After all, being conferred with the status of an indigent litigant surely cannot inoculate a party against any consequences for conduct in the litigation process.

[50] There was also the proposition that there should not have been an award of costs because the registry apparently erred in setting the application before the master. I find little merit in that argument. From the record, I

cannot conclude that this matter would have been adjourned for that reason. If the parties had all been ready to proceed, there is no basis to believe that it would not have been put before a justice of the court. It never came to that because the appellants' application to adjourn prevailed and that is why the matter did not proceed as scheduled.

[51] For the reasons set out, the appeal from Master Taylor's decision is dismissed.

THE DEFENDANTS' APPLICATION TO STRIKE THE PLEADINGS

[52] I turn now to the application of the defendants to strike this action.

[53] Rule 19(24) provides as follows:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
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> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[54] The doctrine of collateral attack bars the use of a civil action to challenge decisions of administrative tribunals for which rights of appeal and judicial review are provided. It has been found by this court on numerous occasions that an action which is an attempt to collaterally attack such a tribunal decision is an abuse of the process of the court and will be struck out under Rule 19(24).

[55] The matter was discussed in ***Berscheid v. Ensign***, [1999] B.C.J. No. 1172. There, Drossos J. said as follows:

> [51] As a result of this distinction between judicial review and civil litigation, a party cannot seek a remedy statutorily provided for by judicial review through civil proceedings. Such an evasion of the judicial review process is known as a collateral attack and is prohibited. Where the legislature clearly intends to confer jurisdiction on an appeal tribunal to hear and determine certain matters, the court lacks the jurisdiction to do so . . .

[56] This principle has been applied on many occasions to strike out actions where parties have either exhausted their statutory rights of appeal and rights of judicial review, or have chosen not to pursue those but, rather, have commenced a civil action in the court in the same matter. That is not an avenue of recourse available in such circumstances. On that, the law is clear.

[57] In the present case, the legislation that governs the administration of the program of benefits for persons with disabilities makes specific provisions for appeals from the decisions that are made in the course of that administration. Part 3 of the ***Employment and Assistance for Persons with Disabilities Act*** deals with appeals, particularly ss. 16 and 17.

[58] Also relevant are certain provisions of the ***Employment and Assistance Act***, SBC 2002, c. 40 particularly Part 3 - Appeals, ss. 17 through 24. These provide for a party to request reconsideration of a decision. There is provision for an appeal from the decision of such a request. The act also stipulates that the *Employment and Assistance Appeal Tribunal* is the mechanism to determine appeals of decisions that are appealable and provides that certain sections of the ***Administrative Tribunals Act***, SBC 2004, c. 45 shall apply.

[59] Particularly relevant is s. 24, which provides that a panel is required to determine whether the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment and requires that the panel confirm the decision or, alternatively, rescind the decision. It also provides that the

panel must give written reasons for its decision.

[60] Finally, I refer to subsections (6) and (7):

> (6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.
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> (7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[61] The effect of these provisions, very simply stated, is as follows. Where a party such as Dr. Sahyoun disagrees with a decision made in the course of administering the benefit program, he or she may ask the Minister to reconsider the decision. If that party is dissatisfied with the outcome of the reconsideration, he or she may appeal that decision to a tribunal. The tribunal will confirm or rescind the decision. The decision of the tribunal is final, except that there remains a right of judicial review under the ***Judicial Review Procedure Act***, RSBC 1996, c. 241.

[62] Also relevant is the following provision of the ***Administrative Tribunals Act***. Section 56 provides immunity protection for tribunal and members. Subsections (2) and (3) state as follows:

> (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted
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> (a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or
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> (b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.
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> (3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

[63] Finally, I note the following provision of the ***Freedom of Information and Protection of Privacy Act***, RSBC 1996, c. 165 which is also relevant to the matter at hand:

> 48. No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

[64] Before embarking on my analysis of the defendants' application, the standard of assessment must be made clear. The test that the court will apply on a motion to strike is a strict one. The issue under Rule 19(24) is whether, assuming all the facts alleged can be proved, it is plain and obvious that the statement of claim, as it exists or may be amended, is bound to fail. That is the standard that must be applied here.

[65] In the case at bar, I have determined that the application can be decided under the abuse of process analysis. I have also considered whether that outcome would be affected by considering the grounds enumerated in subsections (a), (b), or (c). In my view, it would not, and so I will deal with this under the abuse of process analysis only, that is, the collateral attack doctrine.

[66] I will deal first with the plaintiffs' actions against the Employment and Assistance Appeal Tribunal, Marilyn McNamara, Andrea Duncan, Kathleen McIsaac, and Brian Gifford.

[67] Each of these defendants was part of the mechanism by which claimants such as Dr. Sahyoun could challenge decisions made with respect to the disposition of a claim. That was their role in the matter at hand.

[68] In my view, the action that the plaintiffs have initiated against these defendants is plainly an attack on the decision that was made by the tribunal. By virtue of the statute, it is clear that there is no jurisdiction for the court to

hear a substantive appeal from that decision. The only recourse is by way of a proceeding under the ***Judicial Review Procedure Act***. That is not what this is. There is, as well, the statutory immunity that protects the tribunal and its members. That is effective unless there is a claim of bad faith.

[69] In this case, a careful examination of the pleadings satisfies me that there is no basis to permit the action to proceed in that way. In the result, the action, as it concerns these defendants, must be struck out.

[70] Next, there is the aspect of the action which claims against David Loukidelis, Celia Francis, Al Boyd, and the Office of the Information and Privacy Commissioner for British Columbia. The allegations arise from the complaints that Dr. Sahyoun made and his view that the matter was mishandled by that office and its personnel.

[71] Section 48 of the ***Freedom of Information and Protection of Privacy Act*** noted earlier provides a complete answer to this claim. The Commissioner and those acting on his behalf, which I find Ms. Francis and Mr. Boyd to have been doing, are protected from an action such as this by the statute. The protection applies to acts done in good faith. I arrive at this conclusion in spite of the fact that the plaintiffs allege that there was bad faith on the part of the Office of the Information and Privacy Commissioner. Specifically, in paragraph 62, the following statement appears:

> Dr. Riad feels that this repeated loss or neglect of his affidavit is indicative of bad faith on the part of the Office of the Information and Privacy Commissioner [et cetera].

[72] In my view, the following passage from the decision of Mr. Justice McEwan in ***Speckling v. Kearney***, 2006 BCSC 506 is instructive and applicable. There he said:

> I am satisfied, having reviewed the statement of claim in its entirely that, in any event, the discontinued claims brought against the Labour Relations Board and the named adjudicators are simply collateral attacks on the manner in which they carried out their quasi-judicial functions. The complaint against Sharon Kearney is that she "deliberately did not use [her] knowledge", a complaint which, if true, could be addressed on judicial review. The complaint against Michael Fleming is that he "failed to address" or "deliberately failed to adjudicate" a number of matters. These could also be addressed on judicial review. There is nothing pleaded in the statement of claim that would take what the named defendants did out of the realm of their responsibilities under the *Code*. <u>It is not enough to simply characterize the exercise of a quasi-judicial function in terms approximating bad faith to strip an adjudicator of the immunity afforded to such decision makers</u> [cites are provided]. [Emphasis added.]

[73] It is my conclusion that the pleading herein as it relates to the claim against the Commissioner and his staff and office is of this type. There are no facts pled that would legitimately take the conduct complained against into the realm of bad faith, and given the general flavour of the plaintiffs' statement of claim at large, with frequent assertions of professional malpractice and more, I find this is simply a characterization of bad faith to overcome the immunity provision of the legislation and nothing more.

[74] Finally, there is the matter as it applies to the other defendants. This group includes some 14 past and present employees of the British Columbia Ministry of Housing and Social Development, as well as a former Minister and the Ministry of the Attorney General. Apart from the latter, the common denominator of the other defendants is that they have had some involvement in the handling of Dr. Sahyoun's file over the years.

[75] In my view, it is quite apparent that this lawsuit is, plainly and simply, an effort by the plaintiffs to challenge the administrative decisions that have been made over the history of the claim. They allege that the claims were not properly handled and decided, and they seek, first and foremost, to have the decisions rescinded and the sought-after status granted. Following that, of course, is retroactive monetary compensation for benefits denied and payment of benefits going forward.

[76] That is really the essence of the action. The basis upon which it is structured is a lengthy series of allegations of misconduct by members of the Ministry staff. In fact, the wrongs that they allege could have and should have been asserted in the course of the statutory mechanisms that are provided for challenging decisions related to benefit clams and, if appropriate, through an action in the court under the ***Judicial Review Procedure***

Act.

[77] That, of course, would lead to final decisions that this court would have no jurisdiction to reconsider substantively. For that reason, it is, to my mind, fair to characterize this component of the plaintiffs' claim as a collateral attack upon the administrative decisions that have been made. That being so, for most of the claim, that is, except the portions that I will discuss in a moment, it is an abuse of the process of the court and should be struck.

[78] I say for most of the claim because there are certain of the allegations that I have concluded should not be struck out. They specifically plead conduct that is, if proven, beyond the ambit of the decision-making and file conduct process. The portions of the claim that fall into this category are the following:

> (a) paragraph 41, the allegation that William Stephen Mullen and Alan Hughes committed perjury each in their own sworn affidavits dated January 10, 2004, and January 22, 2004, and March 4, 2004, respectively, by stating that all disability benefit clients were required to fill out a persons with disability designation review form prior to receiving benefits under the ***EAPWD*** Act;
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> (b) paragraph 42, the allegation that Dave Jagpal fabricated evidence by stating that all handicap benefit clients were required to fill out a persons with disability designation review form prior to receiving benefits under the ***EAPWD*** Act;
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> (c) paragraph 56, the allegation that Linn Menzies committed professional malpractice sometime after December 3, 1991, by forging additional comments onto the worker's report section of Dr. Riad's application, thereby also committing forgery and fabricating evidence; and finally
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> (d) paragraph 58, the allegation that Gerry Mignault committed professional malpractice in March 1992 by fabricating evidence by stating that he spoke to Dr. Grymaloski and that Dr. Grymaloski told him that Dr. Riad's condition was not permanent, that he could be retrained for other types of work were he motivated to do so, and that Dr. Riad was capable of carrying out normal, daily functions.

[79] Each of these allegations is significant; each clearly asserts serious, deliberate, bad faith misconduct. In support of each allegation is pleaded specific conduct that on the face of the matter gives each an apparent validity such that it would be improper for this court to strike them, and so I will not do so at this time.

[80] I reach my conclusion having carefully examined the statement of claim. While it is important to be cautious of allegations that they are really just attacks on the decision dressed up to allege serious bad faith misconduct, the court must bear carefully in mind the test which is to be employed in assessing this application and to which I adverted earlier. It must be assumed that the facts alleged can be proved. Making that assumption, the application will only be granted if it is plain and obvious that the claim, as it exists or as it may be amended, is bound to fail. In respect of the particular claims that I have set out, specific conduct has been pleaded, and if it is assumed that conduct can be proved, it cannot be said that the claim is bound to fail.

[81] In arriving at this outcome, I make no assessment or judgment of the merit of the claims that the plaintiff makes against these defendants. Certainly, given the litany of allegations of wrongdoing and the liberal use of such characterizations as professional misconduct and more, one might be tempted to conclude that the statement of claim at bar has been drawn in an irresponsible and overambitious way. However, that is not an assessment that falls to this court to make in this application.

[82] Before summarizing my conclusions and the results which follow, it is necessary that I address another argument that was advanced by the plaintiffs in their defence against the present application. Essentially, it is this. They say that they were required to make an application to the court at the outset of the proceeding in order to be granted indigent status. That application was heard and granted by Mr. Justice Groves, who examined the writ of summons and determined that the proceeding does have merit. In the submission of the plaintiffs, that finding is binding on this court and so there can be no finding that the action is other than meritorious.

[83] I reject that argument. I do not in any way suggest that Mr. Justice Groves was in error, but I expect that he made his finding in a brief ex parte hearing and that his assessment of the claim was of a relatively cursory nature. He most certainly did not have the benefit of the arguments and the materials that have been placed before me in the course of this application, and his determination cannot fairly be characterized as a fully focused, informed, and

reasoned one. In my view, to consider the matter of the meritorious nature of the claims as *res judicata* on the basis of that process would not be reasonable.

[84] In the result, the plaintiffs' claims, with the exception of those specifically mentioned above, that is, those in paragraphs 41, 42, 56, and 58, are ordered struck out as an abuse of process of the court.

[SUBMISSIONS RE COSTS]

[85] THE COURT: I am going to make no order as to costs.

"Williams J."