SUPREME COURT OF NOVA SCOTIA

Citation: *McDougall v. Nova Scotia (Workers' Compensation Board)*, 2016 NSSC 333

Date: 20161208
Docket: Hfx No. 442622
Registry: Halifax

Between:

Joseph McDougall

Plaintiff

v.

Nova Scotia Workers' Compensation Board

Defendant

Judge: The Honourable Justice John D. Murphy

Heard: May 10, 2016, in Halifax, Nova Scotia

Written Decision: December 8, 2016

Counsel: Michael Terrance Murphy, for the Plaintiff as *Respondent*
Rory Rogers, Q.C; Paula Arab, for the Defendant as *Applicant*

By the Court:

Introduction

[1] This is a motion for summary judgment on pleadings pursuant to *Civil Procedure Rule 13.03*. The plaintiff claims he suffered damages on account of the mishandling of his claim by staff of the Workers' Compensation Board. He seeks damages from the Board, which has brought this motion to strike out the proceeding on the basis that there is no sustainable cause of action pleaded.

Background

[2] In the Statement of Claim, the plaintiff asks for damages on account of alleged torts of misfeasance in public office and intentional infliction of mental suffering. The claims arise from alleged mishandling of the plaintiff's Workers' Compensation claim by various officials of the defendant Workers' Compensation Board. The plaintiff injured his knee in May 2007. He alleges that various officials, *inter alia*, questioned his honesty, denied or misrepresented medical evidence in order to undermine his claim, and acted in bad faith in order to deny him benefits. His physical injuries were compounded by mental illness. (He did, however, receive benefits at various times between 2007 and 2009, and has received Temporary Earnings Replacement Benefits since May 2009, except when he was working.) He says the mishandling of his claim caused "physical, mental, and economic harm foreseeable in the circumstances" (Statement of Claim, para. 59). The Board maintains that the claims relate to the handling of his file and are therefore subject to the immunity provision at s. 167 of the *Workers' Compensation Act,* S.N.S. 1994-95, c. 10.

Summary judgment on pleadings

[3] Rule 13.03 provides, in part:

> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;

> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
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> …
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> …
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.
>
> …
>
> (5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
>
> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.

[4] The principles governing summary judgment on pleadings have been summarized in several cases, including *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2010 NSSC 25, [2010] N.S.J. No. 92, *Murphy v. Murphy*, 2009 NSSC 138, [2009] N.S.J. No. 193, and *Crocker v. Dalhousie University*, 2013 NSSC 373, [2013] N.S.J. No. 657. In *Body Shop*, Bourgeois J. (as she then was) said:

> 10 A motion pursuant to Rule 13.03, on the pleadings, is analogous to the "application to strike" under Rule 14.25 of the former 1972 Civil Procedure Rules… [T]he implementation of the current Civil Procedure Rules on January 1, 2009, has not eroded the applicability of earlier case authorities. This approach has been recently endorsed by this Court in *Murphy v. Murphy* 2009 NSSC 138, where Warner, J. writes at para. 26 as follows:
>
> > The test in new CPR 13.03 (old CPR 14.25) - summary judgment on pleadings, is that the pleading discloses no cause of action

> [13.03(1)(a)], or the claim is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Supreme Court wrote that the question was: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of claim disclosed no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck.

11 The Court of Appeal has recently re-affirmed the rule for the striking of pleadings, which I find is still applicable to motions under new Rule 13.03. Writing for the Court in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, MacDonald, C.J.N.S. writes at para. 17 as follows:

> [17] Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.

12 The Court further, reaffirms the standard as articulated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, writing at para. 18 as follows:

> [18] In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25(1)(a), they must appear to be either "certain to fail" (2007 NSCA 70 at para. 13) or "absolutely unsustainable" (*CGU Insurance Co. of Canada v. Noble*, 2003 NSCA 102 at para. 13).

[5] In *Walsh v. Atlantic Lottery Corp. Inc.*, 2015 NSCA 16, [2015] N.S.J. No. 56, the Court of Appeal cited with approval the summary of the law set out by the chambers judge:

> 7 Justice LeBlanc was well aware of the heavy burden faced by the Government. It would have to establish that, assuming every alleged fact to be correct, the claim still would have no chance of success. He observed:
>
> > [16] Summary judgment on the pleadings should not be granted lightly. A party whose action is summarily dismissed under Rule 13.03 will be denied his or her day in court. The harsh nature of the remedy demands that the applicant meet a heavy burden. I must be satisfied, even after assuming that all allegations contained in the pleadings are true without the need to call evidence, that the claim

> "is certain to fail", or is "absolutely unsustainable" or "discloses no reasonable cause of action": *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para. 17, *Eisener v. Cragg*, 2012 NSCA 101 at para. 9.

[6] In considering an application for summary judgment on pleadings, the court is required to "take as proven all of the allegations in the statement of claim. It must then determine whether the claims as pleaded are clearly unsustainable": *Andrews v. Duncan*, 2016 NSSC 103, [2016] N.S.J. No. 148, at para. 7.

[7] The defendant's submissions include references to case-law dealing with summary judgment on evidence pursuant to Rule 13.04. I agree with the plaintiff that these authorities are of little or no relevance on a pleadings motion.

The motion

[8] The defendant Board submits that the plaintiff's claim is bound to fail by virtue of the "immunity from suit" provisions of s. 167 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, which states:

> Immunity from suit
>
> No person may bring an action or other proceeding for damages in any court of law against
>
> (a) the Board;
>
> …
>
> for any action or omission within the jurisdiction conferred by this Part, or beyond the jurisdiction conferred by this Part, where the person responsible for the action or omission acted in good faith.

[9] The Board submits that s. 167 creates complete immunity from the plaintiff's claims and asks that the action be dismissed on the basis that it is clearly unsustainable. The Board maintains that the allegations in the Statement of Claim relate to its decisions respecting the plaintiff's workers' compensation claims. The Board says it is plain and obvious that the plaintiff's claim is certain to fail in view of the statutory immunity accorded to the Board by s 167.

[10] The Board interprets s. 167 as creating two thresholds for immunity: first, for any action or omission which is within the Board's jurisdiction, whether or not taken in good faith; and second, for any action or omission outside jurisdiction, if taken in good faith. As such, the Board submits, it can only be liable for actions or

omissions that are (1) outside its jurisdiction, and (2) taken in bad faith. In this case, the Board says, the plaintiff's allegations relate to actions or omissions within its jurisdiction pursuant to Part I of the Act, and thus there is complete statutory immunity.

[11] In *Nova Scotia (Workers' Compensation Board) v. Bowles*, 2002 NSCA 160, [2002] N.S.J. No. 521, the plaintiff commenced a negligence action against the Board, alleging that negligent advice was given by a Board staff member. The Court of Appeal held that the claim was statute-barred by s. 167 because the staff member had been acting within the Board's jurisdiction. The plaintiff also alleged bad faith. On that issue, Roscoe JA said, for the court, "[a]lthough the respondent claims that s. 167 of the Act provides a right of action if the Board's employee acted in bad faith, it is on a plain reading of the section, the exact opposite" (para. 7). She continued:

> 8 By operation of this section, all actions against the Board and its employees "for any action or omission within the jurisdiction conferred by this part" are unequivocally prohibited. Actions and omissions beyond the jurisdiction of Part 1 are prohibited where the person acted in good faith. In other words, actions for bad faith are permitted only when the Board or the employee acted beyond the jurisdiction conferred by this Part 1 of the Act. Part 11 of the Act begins at s. 238. This interpretation is consistent to that noted by Cromwell, J.A. in *Martin v. Nova Scotia (Workers' Compensation Board)*, 2000 NSCA 126; [2000] N.S.J. No. 353 (Quicklaw) at para 113:
>
> > …Members of the Board have immunity from suit for action within their jurisdiction and good faith action outside it: s. 167. The Board is given exclusive decision-making authority in these terms: ... [Emphasis added.]

[12] The Court of Appeal repeated this reasoning in *Cook v. Nova Scotia (Attorney General)*, 2005 NSCA 23, [2005] N.S.J. No. 45, where Roscoe JA said:

> [i]n the absence of any factual claim that the Board or its employees acted outside the scope of their jurisdiction, the action against the Workers' Compensation Board and its CEO is statute barred by virtue of s. 167 of the *Workers' Compensation Act* (para. 4).

[13] In *MacLean v. Nova Scotia (Workers' Compensation Board)*, 2006 NSSC 338, [2006] N.S.J. No. 450, the plaintiff commenced an action against the Board, and the Board applied to have the statement of claim struck out under Rule 14.25

of the *Civil Procedure Rules 1972* for disclosing no reasonable cause of action. Edwards J. struck out the claim. He held that

> [u]nless the Plaintiff has pleaded facts to support an allegation that the WCB or any of its employees acted outside the scope of the jurisdiction conferred by Part I of the Act and in so doing, acted in bad faith, the Plaintiff's claim has not met the requirements of Section 167 of the Act" (para. 32).

Nothing in the pleading indicated "that the alleged conduct by the Defendant was outside its jurisdiction and taken for malicious or ulterior purposes" (para. 33). The plaintiff's complaints were in relation to the Board's decision-making, "which was clearly within its jurisdiction" (para. 25). Similarly, in *McEachern v Workers Compensation Board*, 2016 NSSC 304, [2016] N.S.J. No. 437, Murray J. observed that "[p]roof that the Board or any of its employees acted outside the scope of their jurisdiction is essential if there is to be any liability under section 167" (para. 47).

[14] Based on the authorities, I am satisfied that the state of the law is that s. 167 provides a complete bar to any claim against the Board in respect of actions or omissions within the Board's jurisdiction. Subject to consideration of the plaintiff's alternative argument, I conclude that I am bound by the prevailing interpretation of s. 167. I add that I agree that this is the appropriate construction of the section; absent a substantial amendment to the legislation, any change to this interpretation is a matter for the Court of Appeal. Ultimately, this conclusion ends the matter; as I will now discuss, I conclude that the matters alleged are all acts and omissions within the Board's jurisdiction. Accordingly, there are no sustainable causes of action pleaded.

Causes of action and jurisdiction

[15] The Board's position is that the allegations in the Statement of Claim relate to actions or omissions within the Board's jurisdiction pursuant to Part I of the Act, which encompasses ss. 3-237. The general test for eligibility is at s. 10(1), which provides that "[w]here, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part." There are several forms of benefits, including permanent impairment benefits (s. 34), earnings-replacement benefits (s. 37), and annuities (s. 50). Section 72 provides that "[t]he Board may review and adjust its determination of the amount of compensation payable to a worker as a temporary earnings-replacement benefit at any time."

[16] General statements regarding jurisdiction, powers, and decisions appear at ss. 185-187:

> Jurisdiction and powers of Board
>
> 185(1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.
>
> (2) Notwithstanding subsection (1) but subject to Sections 71 to 73, the Board may (a) reconsider any decision, order or ruling made by it; and (b) confirm, vary or reverse the decision, order or ruling.
>
> Basis for decisions of Board
>
> 186The decisions, orders and rulings of the Board shall always be based upon the real merits and justice of the case and in accordance with this Act, the regulations and the policies of the Board.
>
> Applicant entitled to benefit of doubt
>
> 187 Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

[17] An appeal to a hearing officer from a decision made under s. 185 lies pursuant to s. 197. In addition to internal appeals, the Act contemplates appeals to the Workers' Compensation Appeal Tribunal and from there to the Court of Appeal.

[18] The Board submits that the actions or omissions that underlie the Statement of Claim are within the Board's jurisdiction pursuant to Part I of the Act. The Board points to specific paragraphs and allegations in the Statement of Claim to support this position:

> (a) The plaintiff filed a claim for Temporary Earnings Replacement (TERB) and received such benefits between July and October 2006 (para. 4);
>
> (b) The plaintiff requested that the Board review his claim in May 2007, and supplied medical evidence confirming his knee injury (para. 7);
>
> (c) Caseworker Peggy Earle was assigned to administer the plaintiff's claim, and went on to "cast aspersions on the Plaintiff and his claim amongst other Board employees … by implying he was only seeking benefits because he was

> unemployed and his EI was 'running out'." Ms. Earle denied the causal connection between the plaintiff's July 2006 injury and the condition of knee until at least September 24, 2007 (paras. 8, 10, and 18);
>
> (d) In August 2008 the plaintiff appealed the Board's decision. The board reopened his claim in September 2008 (paras. 28-29);
>
> (e) Caseworker Jackie Ryckman suspended the plaintiff's TERB benefits in May 2009 "pending further contact from the Plaintiff, notwithstanding that she was aware of the Plaintiff's mental health status, and that he remained incapable of returning to work" (para. 47);
>
> (f) The plaintiff provided reports confirming his inability to return to work due to compensable injuries in July 2014, but the Board "ignored" him and made him feel "as though he was not believed." In November 2014 the Board granted his benefits, finding that his earning losses after July 2014 were related to the 2006 injury, and finding him eligible for a review of compensation between May 2009 and July 2014. The plaintiff has received TERB benefits from May 2009 to the present, except for periods when he was not working (paras. 55 and 57-58);
>
> (g) The plaintiff alleges that between May 2007 and November 2014, "the Board and its employees exercised their discretion unlawfully and in bad faith by deliberately, or with serious carelessness, disregarding their official duty to handle the Plaintiff's claim with care while knowing the misconduct was likely to injure the Plaintiff, and in fact caused physical, mental, and economic harm foreseeable in the circumstances" (para. 59).
>
> (h) The plaintiff also pleads the Board employees "acted contrary to *Charter* values and violated s. 186 and 187 of the Act, as well as Board policies … by acting maliciously or with reckless indifference toward him based on personal opinion and dislike for the Plaintiff, rather than the real merits and justice of the case, and by refusing to give the Plaintiff the benefit of the doubt" (para. 60).
>
> (i) The plaintiff alleges that as a result of "the Board's seriously careless and/or willful mistreatment, the Plaintiff has declared bankruptcy and developed severe mental illnesses, including but not limited to major depressive episodes and post traumatic stress disorder. He has also become less capable of dealing with people in positions of authority, including employers and medical professionals, and is also unable to qualify for life or disability insurance" (para. 61).

[19] The Board submits that none of the plaintiff's allegations can sustain an allegation that the Board was acting outside its jurisdiction. Rather, the allegations relate to the plaintiff's workers' compensation claim, and its handling by the Board. They relate to decision-making pursuant to s. 185 of the Act, as was the case in *MacLean*, *supra*. It was, for instance, within the Board's jurisdiction to engage in a fact-finding process and to reconsider its assessments of the injury as more information became available, as it was for the Board to assess the

connection between injuries and the workplace and to weigh the medical opinions respecting the injury. As such, the Board submits that the general allegations at paras. 59-61 of the Amended Statement of Claim relate to matters within the Board's jurisdiction and are statute-barred, and therefore cannot found sustainable causes of action.

[20] The plaintiff takes the position that the alleged "bad faith" actions and omissions of the Board and its employees were outside the jurisdiction conferred by Part I of the Act by virtue of being in violation of the Act and not in accordance with *Charter* values. Accordingly, the plaintiff submits, the claim is sustainable, since it rests on allegations of bad faith with respect to matters outside the board's jurisdiction.

Bad faith and *ultra vires*

[21] The plaintiff argues that workers' compensation legislation is remedial legislation, based on the principle that, *inter alia*, "injured workers should enjoy security of payment" and that compensation should be "provided quickly without court proceedings"; further, it creates a "comprehensive code for the establishment and administration of the workers' compensation system": *Martin v. Nova Scotia (Workers' Compensation Board)*, 2000 NSCA 126, [2000] N.S.J. No. 353, reversed on other grounds, 2003 SCC 54. The plaintiff also cites statements of purpose from case-law in other provinces and from inferior tribunals (such as the Freedom of Information and Protection of Privacy Report of Review Officer), and statements in Hansard. For present purposes, the statements in *Martin*, and the language of the Act itself, adequately address the purpose of the legislation.

[22] The plaintiff argues in his brief that it is "contrary to prevailing law to maintain that a Board employee who has acted in bad faith has also somehow acted within the scope of his or her jurisdiction under the Act", particularly where (in his view) ss. 186 and 187 expressly require good faith. Section 186 requires the Board to base decisions on "the real merits and justice of the case"; s 187 requires the Board to accord an applicant "the benefit of the doubt" and rule in the worker's favour "where there is doubt on an issue … and the disputed possibilities are evenly balanced…" It follows, according to the plaintiff, that "the very act of public misfeasance committed in the course of one's duty automatically means that said employee has acted without jurisdiction" (emphasis by plaintiff's counsel). The alleged misfeasance consisted of intentionally inflicting mental suffering on the plaintiff.

[23] It has been said that where a power is entrusted to a public officer to exercise in the public interest, exercising that power for another purpose "is essentially to act *ultra vires*": Erika Chamberlain, *Misfeasance in a Public Office* (Toronto: Thomson Reuters, 2016) at 120. In *Roncarelli v. Duplessis*, [1959] SCR 121, Rand J discussed "good faith" in the exercise of a public duty in the following terms, at 143:

> "Good faith" in this context … means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

[24] In *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] S.C.J. No. 57, Deschamps J, speaking for the court on this point, remarked:

> 25 …The concept of bad faith is flexible, and its content will vary from one area of law to another. As LeBel J. noted in *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36, the content of the concept of bad faith may go beyond intentional fault (at para. 39):
>
> > Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised ...
>
> 26 Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, <u>but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith</u>. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it. [Emphasis added.]

[25] The plaintiff says the duty of good faith is further confirmed by the obligation of the Board and its employees to act in accordance with *Charter* values

in carrying out their statutory objectives; see, for instance, *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] S.C.J. No. 12,, where the court said, "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values" (para. 24). The obligation to comply with *Charter* values applies to both adjudicative and non-adjudicative decision makers, the Board being of the latter kind: Martin (C.A.) at para 129; B*onitto v. Halifax Regional School Board*, 2015 NSCA 80, [2015] N.S.J. No. 357, at para. 49, leave to appeal refused, [2015] S.C.C.A. No. 379.

[26] The plaintiff argues that the *Charter* values allegedly infringed are equality rights under s. 15(1) (on the ground of disability) and "security of the person", on the ground that state action with the likely effect of impairing the plaintiff's health engages s. 7. On the s. 7 point, the plaintiff cites *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, where Wilson J. (speaking for half the panel) cited, with apparent approval, a passage from *Collin v. Lussier*, [1983] 1 F.C. 218, where the court said of an inmate challenging a transfer from a medium security to a maximum security prison, "such detention, by increasing applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person" (cited in *Singh* at para. 48).

[27] According to the plaintiff, it follows that statutory action is *ultra vires* if it does not accord with *Charter* values. In this case, the plaintiff argues, the facts pleaded lead to the conclusion that the Board and its employees treated him unfairly and failed to deal with his claim on the basis of the "real merits and justice of the case" as required by the Act, as well as failing to give him the benefit of the doubt. Further, he alleges, the Board made a deliberate decision not to act. All of this, he alleges, was contrary to *Charter* values, and therefore rendered the Board's actions *ultra vires*, resulting in s. 167 being inapplicable in the circumstances.

[28] The plaintiff does not clearly explain how the Board (and its staff) could have been acting *ultra vires* when they were, in fact, making determinations in respect of his alleged workplace injuries. The authorities the plaintiff relies on do not lead to the conclusion that as a matter a law, bad faith equates to a loss of jurisdiction. As such, even assuming bad faith were proven, this would not establish lack of jurisdiction. Moreover, s. 167 itself sets up jurisdiction and bad faith as distinct concepts. Accordingly, the pleading of bad faith is not sufficient to establish a cause of action in view of the case-law and the statutory language.

[29] The plaintiff also argues that the Board's conduct, as alleged, makes out the elements of the torts of public misfeasance and intentional infliction of mental suffering.

Misfeasance in public office

[30] The elements of public misfeasance were set out in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] S.C.J. No. 74:

> 32 To summarize, I am of the opinion that the tort of misfeasance in a 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.

[31] The plaintiff relies on *Shuchuk v. Wolfert*, 2001 ABQB 937, [2001] A.J. No. 1598, where the claimant brought an action against the Alberta Workers' Compensation Board, as well as certain staff, for allegedly requiring him to undergo a psychological assessment "against all treating medical and psychological advice" (para. 9). A Master had struck out the claim on a pleadings motion, holding that it was "an attempt to have the Court reassess the actions of the WCB in regard to his claim for disability" (para. 3). On appeal of the Master's order, Marceau J. considered the effect of an immunity provision in the Act on a claim for misfeasance or abuse of public office:

> 25 Borins J.A. in *Odhavji Estate v. Woodhouse*, *supra*, wrote that dishonesty, bad faith and improper purpose are terms that can be used interchangeably in characterizing the tort of abuse of public office. *The Workers' Compensation Act* in s. 12(2) grants immunity to the Board for acts done in "the honest belief that it was within the jurisdiction of the Board". I conclude that if the tort of abuse of public office is made out, so also has it been proved that the acts of the Board are not acts done with such an "honest belief" with the result that the Act does not grant immunity to the Board's actions. [Emphasis added.]

[32] Marceau J. went on to consider the allegations in the statement of claim:

> 27 Reviewing the Statement of Claim and in particular paragraphs 14 and 24 solely from the point of view of whether it sets out a cause of action, it is clear that the following is alleged:

> 1. Wolfert and Mudry are public officers.
>
> 2. They exercised a power.
>
> 3. It is alleged that they did so in a way that was vindictive, biased, without any medical indication or basis, deliberately disregarding the Plaintiff's rights and the opinions of the treating physicians and psychologists. The allegations go on to characterize these actions as being in breach of the duty of good faith. Lord Millett certainly used similar terms: spite, malice, revenge, self-advancement.
>
> 4. There must be an intent to injure and injury must follow. The Statement of Claim, by alleging in effect bad faith in the exercise of the power, satisfies the intent to injure. The Statement of Claim clearly alleges that the very result cautioned against by the caregivers, the worsening of the Plaintiff's condition, is exactly what was foreseen by the alleged abuse of power.

[33] In view of the language of the pleadings, the court held that the defendants had not met the burden required to strike the claim (para. 28). The court did, however, go on to strike out the claim on summary judgment (para. 41). The Alberta Court of Appeal affirmed this decision, noting specifically the conclusion of Marceau J. that the tort of abuse of public office "was not statute-barred, as decisions based on malice, bad faith or blind eye knowledge on the part of The Board's decision-maker are not made with an honest belief that they are within the jurisdiction of The Board": 2003 ABCA 109, at para. 3, leave to appeal denied, [2003] S.C.C.A. No. 195.

[34] Edwards J. cited *Shuchuk* in *MacLean*; he went on to say:

> 23 In a subsequent decision of the Court of Alberta's Queen Bench in *Taylor v. Alberta (Workers' Compensation Board)*, [2005] A.J. No. 967, at para. 10, the Court put the issue as follows:
>
> > "In essence, the plaintiff seeks a determination of this Court that the plaintiffs neurological problems are "connected to the exposure of chemicals during the plaintiff s [sic] employment". Such a determination is within the jurisdiction of the board and the Appeals Commission in accordance with the *Workers Compensation Act* and is not a mattes [sic] to be determined by the Court of Queen's Bench except in accordance with the statutory appeal process. The privative clause contained in s. 17(2) of the *Workers Compensation Act* bars the action of the plaintiff against the board in much the same way as similar actions against superior and inferior Court Judges are barred."
>
> …

> 25 Similarly, Mr. MacLean, appears, to be complaining about the decision-making of the WCB which was clearly within its jurisdiction. A review of the pleadings make this evident. If Mr. MacLean feels the WCB's decisions were erroneous and irrational, those are matters for appeal to the Workers' Compensation Appeals Tribunal ("WCAT"), to which Mr. MacLean has availed himself.

[35] The plaintiff argues that the actions and omissions of the Board and its staff as alleged in the Statement of Claim make out the elements of the Woodhouse test for misfeasance in public office. In particular, the pleading alleges that (1) the Board is a public body; (2) the named employees were acting on the Board's behalf; (3) the employees engaged in deliberately unlawful conduct – such as accusing the plaintiff of fraud and casting aspersions on him and his claim – in the exercise of their functions, or were reckless or seriously careless, such as by failing to follow their own doctor's recommendations, and by intentionally letting the plaintiff's claim languish; (4) the Board staffers knew or ought to have known that their conduct was likely to injure the plaintiff; and (5) the Board and its staff's conduct injured the plaintiff.

Intentional infliction of mental suffering

[36] As to the tort of intentional infliction of mental suffering, the plaintiff cites *Butler v. Newfoundland (Workers' Compensation Commission)* (1998), 165 Nfld. & P.E.I.R. 84, [1998] N.J. No. 190 (Nfld. S.C.T.D.), where such a claim was allowed against the Newfoundland Workers' Compensation Commission. The immunity provision in the Newfoundland Act was worded similarly to that in the Alberta Act considered in *Shuchuk*, *supra*: "An action for damages shall not be brought in a court of law against the commission or a director in respect of anything done by it, him or her beyond the jurisdiction as conferred by this Act if it was done in the good faith belief that it was within its, his or her jurisdiction" (para. 24). The court held that various aspects of abusive conduct by the CEO of the Commission in handling the plaintiff's claim – such as making false accusations against him – established intentional infliction of mental suffering. The Board was not protected by the immunity provision "as the conduct which led to this finding cannot be said to have been in good faith as that term has been interpreted in *Roncarelli v. Duplessis*" (paras. 89-99).

[37] While the plaintiff has cited *Butler* case, with respect, I prefer to rely for the elements on more recent authority from this province. In *MacLellan v. Canada*

(Attorney General), 2014 NSSC 280, [2014] N.S.J. No. 412, LeBlanc J. struck such a claim, with the following comments about the elements:

> The elements of this cause of action are set out in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, [2002] O.J. No. 2712 (Ont. C.A.), at para. 48:
>
> > A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness...

[38] Stewart J. recently considered this tort in a motion for summary judgment on the pleadings in *Kelleher v. Langille-Westhaver*, 2016 NSSC 200, [2016] N.S.J. No. 306:

> 38 The tort of intentional infliction of mental suffering (or infliction of nervous shock) occurs when an individual acts without legal basis, so as to intentionally cause mental suffering to another person. This tort requires the plaintiff to prove that the defendant calculated to intentionally cause harm to the plaintiff by communicating a knowingly false statement that would give rise to a presumption of harm or through extremely flagrant and outrageous conduct.
>
> …
>
> 40 The Supreme Court of Canada has said, while discussing psychological injury in the context of negligence, that "[t]he law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept..." (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para 9.)

[39] Stewart J. concluded that, while some of the alleged conduct "could be characterized as harassment, threats, or abuse", there were no material facts pleaded that could support the "general allegation" that the defendants' actions caused the plaintiffs "severe emotional distress and humiliation" (para. 39).

[40] The plaintiff submits that the intentional infliction of mental suffering claim is made out on the pleadings by allegations that (1) the Board and its employees committed overt acts, (2) which were intended to cause harm, and (3) which did cause the plaintiff mental suffering.

Conclusion respecting torts

[41] For the same reasons as pertained to bad faith, I am unable to conclude that the s. 167 immunity is displaced by the pleading of the specific torts of misfeasance in public office or intentional infliction of mental suffering. I cannot conclude that the acts and omissions pleaded were actually outside the Board's jurisdiction, given that they were all integrated into the handling of the plaintiff's file. Accordingly, there are no sustainable causes of action. As Edwards J. said in *MacLean*, *supra*, these acts and omissions were part of the Board's decision-making power, and therefore within jurisdiction, and an appeal is available to the Workers' Compensation Appeal Tribunal.

[42] I add the general observation that the case-law from other provinces is of limited assistance in this case. None of the statutory language involved in those cases bears enough resemblance to the wording of s. 167 to be of much persuasive value.

Alternative argument: reinterpretation of s. 167

[43] In the alternative, the plaintiff submits that the prior case-law has misinterpreted s. 167 of the Act, and asks me to decline to follow it. As noted earlier, s. 167 bars an action against the Board "for any action or omission within the jurisdiction conferred by this Part, or beyond the jurisdiction conferred by this Part, where the person responsible for the action or omission acted in good faith." The plaintiff's position is that an action should only be barred where there is no allegation of bad faith, regardless of whether the Board was acting within or beyond its jurisdiction. As I have held above, this is contrary to the prevailing interpretation of the provision. As such, the plaintiff submits, in the alternative, that I should depart from the existing law.

[44] The plaintiff says *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] S.C.J. No. 72, authorizes this court to revisit the existing law; in that case the court held that a trial judge could reconsider binding precedent in view of new constitutional arguments that had not been raised in the prior case (paras. 42-47). McLachlin C.J. stated for the court, at para. 44, that:

> a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[45] In this case, the plaintiff submits that the present motion raises legal issues not raised before the Court of Appeal in *Bowles*, *supra*, or in any of the cases following it; he further submits that there have been "significant changes" in the law respecting good faith and public misfeasance, as well as statutory interpretation and *Charter* values.

[46] The plaintiff suggests, first, that the Court of Appeal in *Bowles* applied a "plain language" interpretation to s 167, contrary to the prevailing "modern approach" to statutory interpretation described, for instance, in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, [2009] N.S.J. No. 200, at paras. 36-41, leave to appeal refused, [2009] S.C.C.A. No. 284. It is true that in *Bowles* the court used the phrase "plain reading of the section", and that the Supreme Court of Canada had criticized "plain meaning" as an interpretive approach – to which the modern approach was preferred – in *Re Rizzo & Rizzo*

Shoes Ltd., [1998] 1 S.C.R. 27. I am not convinced that the Court of Appeal was in fact applying a narrow "plain meaning" analysis and ignoring the broader context of the statutory scheme; moreover, by the time the *Bowles* interpretation of s. 167 was reiterated in *Cook*, *supra*, the Court of Appeal had itself made specific reference to the "modern approach": see *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, 2003 NSCA 10, [2003] N.S.J. No. 26, at paras. 46-49. Accordingly, I do not accept the argument that the Court of Appeal's interpretation of s. 167 was rooted in an erroneous form of statutory construction.

[47] The plaintiff goes on to argue that "by its plain language" s. 167 provides immunity for good faith acts or omissions whether or not they are within jurisdiction. He argues that the word "or" in the phrase "or beyond the jurisdiction" should be read inclusively, in accordance with a presumption derived from Sullivan's *Construction of Statutes*. I note that Sullivan writes that the presumption is "easily rebutted by linguistic considerations or by knowledge of the world" (*Sullivan on the Construction of Statutes*, 5th edn., p. 83). If by "inclusively" the plaintiff means that "or" should be read as if it meant "and", I am not convinced that this necessarily changes the meaning of s. 167.

[48] The plaintiff also argues that an examination of the placement of commas in s. 167 leads to a different construction from the prevailing one. He cites *Bell v. Canada (Attorney General)*, 2001 NSSC 112, [2001] N.S.J. No. 303, where Davison J. interpreted the definition of "employer" in s. 2(g)(vi) of the *Workers' Compensation Act*, which included within the definition "the Crown in the Right of Nova Scotia, and in the Right of Canada insofar as it submits to the operation of this Act." He said, at para. 33:

> … There is no comma before the qualifying words "in so far as it submits to the operation of this Act", and that would indicate the qualifying words only apply to the last antecedent - the Crown in the Right of Canada. The comma after "the Crown in the Right of Nova Scotia" assists in separating the two entities. It need not be there, and it is absent in an equivalent definition in the Prince Edward Island Workers' Compensation Act. Its presence, however, lends special emphasis on the two entities being demarcated when considering the qualifying words. The comma renders it clearer that the qualifying words do not relate to the Crown in the Right of Nova Scotia.

[49] The Court of Appeal, varying on other grounds, approved of this definition in *obiter*: 2002 NSCA 8 at para 18, leave to appeal denied, [2002] S.C.C.A. No. 135.

[50] The plaintiff argues that the phrase "or beyond the jurisdiction conferred by this Part" in s. 167 is a subordinate clause intended only to expand the scope of the provision "to grant immunity for good faith actions or omissions that are within the jurisdiction of the Board, as well as actions or omissions that are beyond the jurisdiction of the Board" (emphasis by plaintiff's counsel). The words good faith, by this reasoning, modify both categories, subjecting the Board to potential liability for bad faith conduct whether inside or outside jurisdiction. The plaintiff argues that this is the "grammatical and ordinary meaning" of s. 167. As has already been discussed, the Court of Appeal has taken a contrary view.

[51] Additionally, the plaintiff argues that, as a general principle, social welfare legislation should receive a liberal construction, with "reasonable doubts or ambiguities" resolved in the claimant's favour: Sullivan at p. 486. He also submits that similar legislation in other provinces provides more restrictive immunity. He does not suggest, however, that the language in other acts is similar to the language of s. 167. General principles of this kind cannot displace interpretation based on the actual language of the section.

[52] As to the consequences of his proposed interpretation, the plaintiff submits that s. 167 would thus permit victims of bad faith conduct to seek "compensation and vindication", while deterring the Board from acting in such a fashion in the future. He also argues that the prevailing interpretation leads to absurd results, such as permitting immunity for bad faith actions and omissions inside jurisdiction, and making a distinction between bad faith inside and outside jurisdiction that he says should be regarded as contrary to public policy. The plaintiff cites *Woodhouse*, *supra*, where the Supreme Court of Canada held, at para. 30, that there was

> no principled reason … why a public officer who wilfully injures a member of the public through intentional abuse of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. [Emphasis in original.]

[53] The plaintiff further maintains that it is an absurdity for the statute to deprive injured and vulnerable individuals of a remedy, and notes the presumption that the legislature does not intend to deprive citizens of their rights.

[54] The principal flaw in the plaintiff's line of argument, creative though it is, is that it runs afoul of the Court of Appeal precedents, which I have concluded are binding, and more generally of the Legislature's power to make law as it sees fit. The charges of absurdity laid by the plaintiff do not describe absurd outcomes, but rather outcomes that are obstacles for potential litigants. That is within the Legislature's power, within the bounds of the Constitution, and I note that there is no direct challenge to the constitutionality of s. 167. Further, I am not convinced that *Woodhouse* has the effect asserted by the plaintiff; in that case, the court was considering the elements of the tort of misfeasance in public office. It does not follow that a statutory immunity provision could not oust a right of action for that tort. On a related point, the plaintiff refers to the presumption against changing the common law; but that is within the Legislature's power if, as I have concluded here, the statutory language has that meaning. Finally, the plaintiff argues that s. 167 should be interpreted in his favour by means of the application of *Charter* values due to ambiguity. But this argument too must fail on the ground that I have not found that the section is ambiguous.

[55] Accordingly, on the plaintiff's alternative ground, I am satisfied that I am bound by the prior authorities and that this is not a situation where it would be appropriate to decline to follow the prevailing interpretation.

Conclusion

[56] Accordingly, I conclude that the pleading must be struck out. The motion for summary judgment on the pleadings is granted. If the parties are unable to agree respecting costs, submissions in writing may be provided by January 31, 2017.

J.