

Date: 20030610
Docket: 53426
Registry: Kelowna

In the Supreme Court of British Columbia

Oral Reasons for Judgment
The Honourable Mr. Justice Sigurdson
June 10, 2003

BETWEEN:

THOMAS WILLIAM SOFIAK and LAUDALINA DEJESUS SOFIAK

PLAINTIFFS

AND:

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

DEFENDANT

Representative for the Plaintiffs:

L. Blanchette

Counsel for the Defendant:

S. Nielsen
L. Courtenay

Place and Date of Hearing:

Kelowna, B.C.
June 10, 2003

- [1] **THE COURT:** This is an application by the Workers' Compensation Board to dismiss the plaintiffs' action pursuant to Rule 19(24) (a), (b) and (d). The essential grounds are that the claim does not disclose a cause of action and that it is *res judicata*.
- [2] A similar application came on before Madam Justice Beames in October 2001. As Madam Justice Beames pointed out, the allegations in the Statement of Claim relate to issues concerning Mr. Sofiak's entitlement to Workers' Compensation benefits and that given the privative clause in s. 96 of the *Workers' Compensation Act* (the "Act"), any challenge must be brought within the provisions of the *Judicial Review Procedure Act*. Mr. Blanchette, who appeared for the plaintiffs, had submitted that the plaintiffs have a claim that goes beyond a claim for judicial review, and their allegations (which had not been pleaded when the matter was before Justice Beames), he said, included a breach of a duty of care, negligence, and something that might be described as abuse of public office.
- [3] Justice Beames concluded that the Statement of Claim as presently drafted could not stand. She gave the plaintiffs an opportunity to amend the Statement of Claim, and if they did, that the defendant was at liberty to apply again under Rule 19(24) to apply to strike out the Amended Statement of Claim on the ground that it does not disclose a cause of action.

- [4] Madam Justice Beames pointed out that if Mr. Sofiak wished to challenge the defendant's decisions with respect to his entitlement to compensation, he must bring a separate proceeding pursuant to the *Judicial Review Procedure Act*.
- [5] The Sofiaks then did that. That petition, No. 55159, was filed by the Sofiaks and came on for hearing before Mr. Justice Brooke, who in reasons issued April 16, 2002 dismissed the application for judicial review, 2002 BCSC 550. He provided certain background and I will repeat part of his reasons for judgment for the purposes of putting this matter in context at ¶2-8:

By way of background, Mr. Sofiak was employed as a full-time temporary driver on August 19, 1997. In addition to driving a truck laden with wood chips, Mr. Sofiak's job description required some shovelling. He says that on August 19, 1997, he injured his back in the course of shovelling and then twisting to alight from the truck bed. Mr. Sofiak had suffered from similar back pain, and he did not report the injury to his employer or to the Workers' Compensation Board. His reasons were that he was on holiday for the following week, during which time he thought the injury would resolve, and he hesitated to report an injury given his temporary status with his employer.

On September 2nd, Mr. Sofiak returned to work, but his back had not improved to the extent that he was without pain. He, therefore, attended at a walk-in clinic on September 6th where he saw Dr. Powter. On September 27th, he returned to Dr. Powter and in the interval saw a physiotherapist. On November 4, 1997, Mr. Sofiak saw his family doctor, Dr. Remmington, who advised him to discontinue work. In the result, on November 4, 1997, Mr. Sofiak made a claim for worker's compensation and reported the injury to his employer.

The claims adjudicator declined to accept the claim as one for an injury arising out of, and in the course of, his employment. Mr. Rivard relied upon the failure of Mr. Sofiak to seek prompt medical attention and the failure of Mr. Sofiak to report the injury or make a claim until November 5th. The claims adjudicator pointed out that Mr. Sofiak had previous claims and was aware of the reporting procedure.

Dr. Powter filed a report with the Workers' Compensation Board on or about November 6, 1997. He described the date and time of the injury as "August 19, 1997" and the date and time of treatment as "September 6, 1997". Dr. Powter described the worker's statement of what happened in this report as "acute onset back pain" and the presenting complaint as "back pain". Dr. Powter did not respond to the question on the report form of whether he understood the tasks/activities of the worker's job but answered "no" to the question whether the patient would miss work due to accident/injury/disease.

In Dr. Powter's clinical notes, which were obtained sometime after the claim was denied, the entry for September 6, 1997, is somewhat more extensive and says, in part, this:

Acute onset back pain x 1 1/2 wks
Shovelling wood chips
Tender over (R) (undecipherable) jt
Rx: heat

The entry for September 27th says this:

Was settling down
Started on physio T
Tender (undecipherable)
DTR's all (N)
Rx: heat

Following the refusal of his claim, Mr. Sofiak took an appeal under the *Act* to the Workers' Compensation Review Board. On December 1, 1999, the review board told Mr. Sofiak that they were in complete agreement with the claims adjudicator and that there was no significant new information.

[6] Mr. Justice Brooke continued at ¶9-10:

Mr. Sofiak then took an appeal to the appeal division, and a decision was rendered by the appeal commissioner on October 10, 2000. After hearing oral evidence, reviewing the background of the claim, and considering the extensive report of Dr. Andrew Travlos, a specialist in physical medicine and rehabilitation. Dr. Travlos noted that Mr. Sofiak had a history both of low back pain and workers' compensation claims prior to the injury alleged on August 19, 1997, and he also notes that Mr. Sofiak was involved in two motor vehicle accidents after August 19, 1997: one on November 14, 1997 and the other on September 5, 1998. It was noted that back and leg systems progressively deteriorated after the accident of November 14, 1997, but improvement occurred over the next several months. Following the accident of September 5, 1998, Mr. Sofiak complained of pain in the neck, which gradually resolved over the next three months. He also reported a fight in October of 1998 which led to a flare-up of pain in the back. Further investigation disclosed that Mr. Sofiak suffered from a large disc herniation, which Dr. Travlos believes was present before, but exacerbated by, the injury of August 19, 1997. Surgery was recommended and performed in June 1998. Dr. Travlos concluded that the herniated disc was in existence prior to August 19, 1997, and the accident that day "simply pushed him over the edge". Moreover, he finds that the subsequent accidents and assault exacerbated the back injury. Dr. Travlos thought it unlikely that Mr. Sofiak would return to truck driving, though capable of employment at a lighter level of activity.

The issue before the Workers' Compensation Board throughout has been whether Mr. Sofiak sustained an injury arising out of and in the course of his employment on August 19, 1997. The proceeding before the appeal division is in

the nature of a hearing *de novo* rather than a review of the decision of the claims adjudicator or the board of review. I am satisfied, having regard to the jurisdiction accorded the Workers' Compensation Board under s. 96 of the *Act* to finally and conclusively deal with all matters of fact and law arising under the *Act*, that in order for Mr. Sofiak to succeed in obtaining an order setting aside the decision of the appeal commissioner, he must establish that the decision was patently unreasonable [e] . (*Pasiechnyk v. Saskatchewan Workers' Compensation Board*, [1997] 2 S.C.R. 890.) To be patently unreasonable, the decision of the appeal commissioner must be "openly, evidently, clearly unreasonable". (*Canada Safeway Limited v. WCB* (1998), 59 B.C.L.R. (3d) 317 (B.C.C.A.) – leave to appeal to the Supreme Court of Canada refused.) In *Re Kovach* (1998), 52 B.C.L.R. (3d) 98, Donald J.A. determined that the test of "patently unreasonable" must be applied to the result, not to the reasons leading to the result and at para. 26 says:

In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning.

[7] At ¶16, Justice Brooke concluded this way. He said:

While I might not have reached the same conclusion, that is not the test. I am bound by the jurisdiction to be found in the *Judicial Review Procedure Act*, the complete and comprehensive privative clause in the *Act* and the authorities to which I have referred. There was evidence before the appeal division which provides a rational basis for its decision and, applying the appropriate deference to that decision within the standard of correctness, I must dismiss the petition.

[8] Mr. Justice Brooke, however, noted by way of *obiter* that, "[t]o the extent that the appeal division may reconsider Mr. Sofiak's claim, I would urge it to do so" (at ¶19).

[9] On July 9, 2002 the appeal division did reconsider the matter and by decision of John Steeves, chief appeal commissioner, concluded that the application for reconsideration ought to be denied. Now, that is all by way of background to the current situation.

[10] The Statement of Claim in Action 53426, the action that we are dealing with here, was amended with seven additional paragraphs and a new prayer for relief.

[11] The final paragraph (before the amendments) alleged that the W.C.B. has failed to fulfill their obligation to administer policy under the *Act* and, as a result, denied Mr. Sofiak benefits he was legally entitled to, and claimed retroactive compensation, medical costs, and general and punitive damages for stress, hardship, pain, and suffering.

[12] In the amendments to the Statement of Claim, the plaintiffs say that they are making claims for damages due to: the Board's negligence; breach of duty of care; abuse of public office; not acting in a manner consistent with their duties as administrators as dictated by the legislation; imposing a bias on Mr. Sofiak in the judicial process and acting on those assumptions; openly challenging his credibility and integrity in facts pertaining to the events; being negligent in making allegations questioning his credibility and integrity without supporting evidence

beyond bias; acting upon unsupported facts and allegations resulting in harm; refusing to provide supporting evidence to establish the allegations against Mr. Sofiak, thereby denying him fundamental justice and fairness; negligently misleading the plaintiff as to his rights under the law; justifying its conduct under the pretence of absolute and unchallenged discretionary authority; acting in a blatantly unreasonable manner that can be viewed as an abuse of power; failing to perform duties and obligations prescribed by law; and, failing to find contributory negligence given the evidence of the Board's access to knowledge and information that should have alerted the authorities to errors in the administration of the claim.

- [13] The plaintiffs seek \$800,000.00 for psychological pain and suffering and punitive and general damages.
- [14] Under the applicable law, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, on a motion to strike pleadings as not disclosing a cause of action, the court must proceed on the assumption that all the facts pleaded are true. The claim may only be struck out if it is plain and obvious that it cannot succeed and the court should be aware that a claim may be amended and further amended.
- [15] Under Rule 19(24) (d) a claim may be struck out as *res judicata*.
- [16] I should note that although there is no actual plea of a breach of fiduciary duty, the notice of trial purportedly setting the action for trial does refer to that as a cause of action.
- [17] The central contention of the defendant on this application is that the Workers' Compensation Board establishes a system under which the Board is authorized and responsible for adjudicating claims in the workplace and establishes a no fault system for compensation for personal injury "arising out of and in the course of employment". A decision of the W.C.B. officer is appealable to the Review Board, which in turn is appealable to the Appeal Division. Under the *Act* the decision is final and conclusive. Although there is no appeal to the court, decisions are reviewable for excess of jurisdiction under the *Judicial Review Procedure Act*. See for example, *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.
- [18] This proceeding began as a challenge to the decision of the Workers' Compensation Board and as noted by Justice Beames, that had to be brought by way of judicial review. That was then done. It was fully argued before Mr. Justice Brooke and the proceeding was dismissed.
- [19] Where the proper route to challenge the decision of the W.C.B. is by judicial review, and that has been done and decided by this court, the question is whether this action, to the extent that it purports to do the same thing again, should be struck out either as a collateral attack where the proper remedy is judicial review or as *res judicata*, on the basis that this court has already determined the issues on their merits, or both.
- [20] Not only is judicial review by way of petition and affidavit under the *Judicial Review Procedure Act* the appropriate course, but that route has already been taken. The application has been heard by Justice Brooke and dismissed. To the extent that the allegations in the Statement of Claim, as amended, merely duplicate the petitioner's claim for judicial review that has been dismissed, then they are *res judicata*.

[21] *Bersheid v. Ensign*, [1999] B.C.J. No. 1172 (S.C.), is one authority that is apt. It concerned a claim where the *Water Act* provided the code for water use in British Columbia and the relationship to owners and users. The *Water Act* provided for a determination of rates by the Comptroller with an appeal to the Environmental Appeal Board. Mr. Justice Drossos considered the matter *res judicata* in the sense of claims that could have been brought but were not. Under heading *res judicata* he said (at ¶49):

Failure by the plaintiff to avail himself of the requisite administrative procedures regarding the Comptroller of Water Rights and EAB orders concerning the water licences in question results in the validity of these licences now being *res judicata*. See *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* . . . [1998] B.C.J. No. 1043 (C.A.) at 9. The EAB is clearly a judicial tribunal of competent jurisdiction for the purposes of determining the validity of a decision of the Comptroller of Water Rights. . . .

[22] Here the issue of the validity of the decision of the Workers' Compensation Board was determined upon judicial review. I note that many of the claims in this proceeding were, in fact, advanced in the judicial review proceedings. In *Berscheid v. Ensign*, *supra*, the doctrine of *res judicata* applied simply because the claims could have been properly raised.

[23] Mr. Justice Drossos also spoke of collateral attack and said this at ¶50–52:

It should be noted that there is a valid distinction between a judicial review and other types of proceedings which, for policy reasons, ought to be maintained: *O'Reilly et al v. Mackmin et al*, [1983] 2 A.C. 237 (H.L.). As our Court of Appeal has recognized, it would be a retrograde step to sublimate the process of judicial review with 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. . . . It is only after the complainant has completed the statutorily imposed administrative process that the avenue of judicial review becomes available and, it should be noted, such judicial review is only available in limited circumstances.

Further, where the plaintiff has already commenced proceedings by way of petition for judicial review under the *Judicial Review Procedure Act* to challenge the orders of an administrative tribunal, it is an abuse of process to commence subsequent civil proceedings seeking substantially the same remedies against the same parties as set out in the petition.

[24] I conclude that the claim insofar as it is an attack on the decision of the Board, and it is in large part, must fail for two grounds. First, it is an impermissible collateral attack because judicial review is the appropriate remedy. Second, not only could they have been raised, but many of the same allegations were raised and determined and to that extent the claim is *res judicata*. They cannot be litigated any further, other than by a proper appeal from Justice Brooke's decision.

- [25] The plaintiff however says that this is a different case, that it is a plea of breach of duty. His representative says that he does not challenge the decision in this proceeding (notwithstanding the wording of the pleadings) but what he challenges are breaches of duties of investigation and administration. He says that there cannot be immunity for discretionary acts. He says that the Workers' Compensation Board is not like a court and there are applicable statutory duties. He says that he relies on cases such as *Dorman Timber Ltd. v. British Columbia* (1997), 40 B.C.L.R. (3d) 230 (C.A.), *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, and *R.A.R.B. v. British Columbia*, 2001 BCSC 667, and says that the traditional tort law duty of care will apply to a government agency the same way that it applies to an individual. He says that the privative clause does not remove a claim for breach of duty of care, breach of fiduciary duty or abuse of public office.
- [26] The allegations in the Amended Statement of Claim, in my view, attack the quasi-judicial aspects of the Board's decision. The defendant points to these passages in the pleading: blatantly failing to follow its statutory mandate; violating his rights under a judicial process; negligently questioning his credibility; acting upon unsupported allegations; perceived bias; and, failing to find contributory negligence.
- [27] The defendant relies on a number of authorities that claims of this kind are not maintainable, but I think the reference to a couple will suffice.
- [28] In *Ridgecrest Investment Consultants Ltd. (c.o.b. Ridgecrest Builder Consultants) v. British Columbia (Workers' Compensation Board)*, [1985] B.C.J. No. 1555, Mr. Justice Spencer said at ¶2-5:

The cause of action alleged against the defendants is unusual. The defendants Gunn and Van Buekenhout were officers of the Workers' Compensation Board. The defendants Hall and Parr are commissioners of the Board and so was the defendant Scollan at the material times alleged. All, together with the Board itself, are sued for general and special damages for economic loss and for general and punitive damages for negligence or abuse of power in the exercise of a statutory power in excess of their jurisdiction. As well, a declaration is sought against the Board only to the effect that its decision of June 14, 1982 was beyond its jurisdiction. In essence what is happening is that the plaintiffs, being dissatisfied with a decision of the Board that Ridgecrest Investment Consultants Ltd. was an employer and therefore assessable under the provisions of the *Workers' Compensation Act*, sue for damages to recover the amount of the assessments and for the economic loss caused to them by the impact which the assessments had upon the Company's business. . . .

I shall deal first with the claim for damages. **In my opinion the law prevents the plaintiffs from claiming damages against any of the defendants in this case. Whatever was done by the defendants Gunn and Van Buekenhout as officers employed by the Board was dealt with by the Board's commissioners on appeal by their decision of June 14, 1982. That decision stands in the place of any administrative decisions made formerly by the officers and insulates them from any liability, absent a fraudulent manipulation of the Board on their part. None is alleged.** They are insulated because the operative decision which required the plaintiff Company to pay assessments to the Board was that of the Board's commissioners on June 14, 1982.

Even though the Board's commissioners may have been wrong in that decision, a point about which I am not required here to venture an opinion, error on their part cannot, as a matter of law, found an action for damages. Mr. Stark argued that the commissioners' decision in this case was so patently wrong and unreasonable that it is not protected by the privative clause. **Even if that were so there is authority in this Province, based upon public policy and common sense, which provides that absolute malice, a person discharging a judicial or quasi-judicial office cannot be made liable in damages for an erroneous decision.** Were it otherwise it would be difficult indeed for society to persuade any of its members to assume the already onerous role of a judge. See *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg* (1970), 22 D.L.R. (3d) 470 per Laskin, J. (as he then was) at 476; *McGillivray v. Kimber*, [1915] 52 S.C.R. 146 and, *Stark v. Auerbach*, [1979] 3 W.W.R. 563. In the latter case Legg, J. said at p. 565:--

"Authorities of long standing have held that the Workers' Compensation Board exercises a judicial function when it determines a right of a claimant to compensation:"

Later at p. 567 he said:--

"I respectfully agree with the reasoning of Munroe, J. in *Perry v. Heatherington*, *supra*, that public policy and convenience require that absolute immunity be extended to members of a judicial or quasi-judicial tribunal from action for any statement appearing in a decision made pursuant to a statutory duty imposed on the tribunal."

That was a case involving an alleged libel contained within the reasons for judgment of a board of review under the *Workers' Compensation Act*. Although its facts are quite different from this case I am persuaded that there is no difference in principle in granting that immunity to the Board as it was done there and in granting immunity to it or its members against the claim for damages advanced in this case.

The claim for damages against the officers of the Board, the commissioners and the Board itself will therefore be struck out.

[emphasis added]

[291] I refer as well to the decision of Mr. Justice Coultas in *Polson v. Workers' Compensation Board* (19 May 1988), Vancouver C881656 (B.C.S.C.), which relied on the same authorities as in *Ridgecrest* and reached the same conclusion. There the judge said that the issue that he must determine was whether the Board was exercising a judicial or a quasi-judicial function in its determination of Mr. Polson's right to compensation and in its dealings with him as described in the Statement of Claim. Justice Coultas held that it was and struck out the claim as disclosing no reasonable cause of action. I think that decision is applicable here.

- [30] The plaintiff says that he is complaining about the investigative, administrative, regulatory and adjudicative functions. He says in his argument that there is a categorical difference between judicial review and a cause of action, in that judicial review, he argues, focuses on the result, not the reasoning. Judicial review, he says, does not take into account the events leading up to the decision and judicial review does not provide for compensation. He refers to the right to be treated fairly and that there is a duty to act fairly.
- [31] The fact that the allegations concern different aspects of the adjudicative process do not, in my view, make the defendant's overall function less a quasi-judicial process particularly as there were a series of internal appeals available to the plaintiff in this situation.
- [32] The plaintiff says there is a common law duty of care. The allegation in the pleadings is that the Board did not act in the manner prescribed by the statute.
- [33] The plaintiff, as I have mentioned, referred to a number of authorities including and primarily *Dorman Timber*, *supra*, *Lewis*, *supra*, *Ryan*, *supra*, and *R.A.R.B.*, *supra*. I do not find that these cases establish that there is a duty of care as the plaintiff contends in these circumstances. First, they are factually very different. *Lewis* was a case of a rock falling and killing a driver and the court found that the duty of care established in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) was applicable once the Ministry undertook maintenance work of the highway. *Dorman*, *supra*, applied *Anns*, *supra*, and, in that respect, let me refer to ¶36 of *Dorman*:

The second is the general common law duty of care imposed when the test set out by Lord Wilberforce in his speech in *Anns v. Merton L.B.C.*, [1978] A.C. 728 (H.L.), is met. Lord Wilberforce said (at pp. 751–752, quoted in *Kripps*, *supra* at para. 26):

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .

- [34] The court held in *Dorman*, *supra*, that the district forest manager had a duty to be mindful of the plaintiff's interest which he failed to do by advising that the plaintiff's rights under a timber sale were suspended, when they were not, causing the plaintiff loss. *Ryan* was a case where the city of Victoria was responsible for traffic regulation and failed to warn of an obstacle. *R.A.R.B. v. British Columbia* concerned a claim for wrongful placement for the children in the care of the Superintendent of Child Welfare.
- [35] Obviously, the circumstances were quite different in those cases. To the extent that it could be said that there was sufficient proximity for there to be a *prima facie* duty of care in this case, which I need not decide, I think that there are sound policy reasons against that duty. Those

are that the interaction of the plaintiff and the defendant, which the plaintiff refers to, is in the context of a quasi-judicial function performed by the Board, one in which there is a detailed statutory process with internal appeals that remain subject to judicial review.

- [36] I agree with the defendant's submission in that when the Board is, as here, determining the statutory right of the worker to benefits that a private law duty of care is inconsistent with the Board's quasi-judicial function. The recent decision of the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 at ¶52 is consistent with that conclusion.
- [37] The allegations that I have summarized above appear to be allegations that various members of the Board made an erroneous decision. There is no factually pleaded basis for any allegation of malice in the Board's exercise of its quasi-judicial functions.
- [38] The claim on this basis does not disclose a cause of action and must be struck.
- [39] The plaintiff's Amended Statement of Claim also contains unparticularized pleadings of abuse of public office and breach of fiduciary duty.
- [40] As to the former cause of action, that is the allegation of abuse of public office, it was recently considered by the Court of Appeal in *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 ECCA 619 (at ¶7-8):

Absent some ruling to the contrary by Supreme Court of Canada, it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. . . .

Because abuse of public office remains an intentional tort requiring proof of bad faith, it will in the minds of most observers carry the 'stench of dishonesty'. This court has suggested that where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided. . . .

- [41] There is no material pleading of an allegation of malice or that the defendant's action were deliberately calculated to injure the plaintiff. That is hardly surprising because at its heart, this action is really a collateral attack on the Board's decision on the merits, something I have said it also cannot do. The allegation of abuse of public office, therefore, must fail.
- [42] The final claim of breach of fiduciary duty is one that appears in passing only as it does not directly appear in the Statement of Claim but appears in a document purportedly setting this action for trial. The Board has a duty to act judicially. That matter is reviewable under the *Judicial Review Procedure Act*. An allegation of a fiduciary duty is inconsistent with this quasi-judicial decision making process. Therefore, for the reasons I have expressed, the plaintiff's claim is dismissed. Is the defendant seeking costs?

(SUBMISSIONS RE COSTS)

[43] **THE COURT:** I think this is a very tragic case, obviously. I think in the circumstances, I am going to exercise my discretion not to order costs. I do that on the basis of representations of Mr. Sofiak's mental health and emotional well-being and, on that basis, I decline to make an order of costs.

[44] **MR. NIELSEN:** My Lord, we request an order dispensing with approval as to form and I acknowledge there are no costs.

[45] **THE COURT:** I would like the order to reflect what my judgment is and I think you should send it to Mr. Blanchette. He can look at it. Mr. Blanchette, if the order does not reflect what I have said here, you can get in touch with the registry. The defendant can lodge it for entry ten days after you forward it to Mr. Blanchette. If he has any comments, he can notify the registry that the order is inaccurate.

“Mr. Justice Sigurdson”

