IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kikla v. Ayong,*
2016 BCSC 465

Date: 20160317
Docket: S172166
Registry: New Westminster

Between:

Sunanda Kikla, Fraser Valley Community College

Plaintiffs

And

Moses Aseh Ayong, Yvette Enni Ayong, Elias Fokwak Ayong, Richard Dobila, Vandana Khetarpal, Grace Eghonghon Omonua, Paul Akhere Omonua, Canada International Career College Inc., Emily Pitcher, Claire Dollan

Defendants

- and -

Docket: S171964
Registry: New Westminster

Between:

Sunanda Kikla, Fraser Valley Community College Inc.

Plaintiffs

And

Saidu Conteh, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan, Private Career Training Institutions Agency

Defendants

- and -

Docket: S172005
Registry: New Westminster

Between:

Sunanda Kikla, Fraser Valley Community College

Plaintiffs

And

Monica Lust, Emily Pitcher, Jennifer Reid, Private Career Training Institutions Agency

Defendants

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Corrected Judgment: The front page and the text of this judgment was corrected at paragraph 99(2)(a) on April 4, 2016.

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Appearing on her own behalf and on behalf of Fraser Valley Community College Inc.:	The Plaintiff, S. Kikla
Counsel for Private Career Training Institutions Agency, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan, and Jennifer Reid:	C. Hunter
Written submissions received from M. Maynes, counsel for S. Conteh, defendant in Action No. S171964, on:	November 20, 2015
Place and Dates of Hearing:	New Westminster, B.C. November 25-27, 2015
Place and Date of Judgment:	New Westminster, B.C. March 17, 2016

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Introduction

[1] In British Columbia, privately owned career training institutions are regulated by the defendant Private Career Training Institutions Agency ("PCTIA" or the "Agency"), under a regulatory scheme established by the *Private Career Training Institutions Act*, S.B.C., 2003 c. 79 (the "*Act*"), and the *Private Career Training Institutions Regulation*, B.C. Reg. 466/2004 (the "Regulation").

[2] One such institution is the plaintiff Fraser Valley Community College ("FVCC"), which is owned by the plaintiff Ms. Sunanda Kikla.

[3] Under s. 5 of the *Act*, the board of directors of the Agency has the responsibility to serve the public interest, including the interests of students attending registered institutions, through governing, controlling, and administering the affairs of the Agency. To that end the directors, under the power granted by s. 6 of the *Act*, have enacted bylaws (the "Bylaws") that, among other things, establish requirements for registration of institutions, and establish requirements for renewal, suspension, cancellation or reinstatement of registration or accreditation. Generally, a registered institution may, under the Bylaws, apply for accreditation if it has continuously engaged in training of students for a period of 12 months.

[4] Since April 2014 the powers of the Agency's board of directors have been exercised by a Public Administrator, appointed by order-in-council.

[5] FVCC was registered with the Agency commencing in or about November 2010. It has never been accredited.

[6] FVCC's registration was suspended between July 22, 2014 and November 19, 2014. As will be seen, the pleadings in some of the proceedings referred to herein relate to that suspension.

[7] FVCC's registration was cancelled on October 26, 2015. This "Cancellation Decision" is not directly relevant to the subject matter of the present application as

argued, but it does have a bearing on the pleadings in related proceedings described later in these Reasons.

[8] The plaintiffs have commenced several petition proceedings in this court against the Agency, seeking judicial review of certain steps taken by the Agency in its regulation of FVCC.

[9] The plaintiffs have also commenced three actions – that is, proceedings commenced by way of Notice of Civil Claim – in which the Agency is named as a defendant. The actions - all commenced in New Westminster – are under Docket Nos. 172005 (the "Suspension Action"), 171964 (the "Conteh Action"), and 172166 (the "Ayong Action").

[10] Also named as defendants in one or more of these three actions are persons who were, at the material times, employees of the Agency (the "Employee Defendants"): Monica Lust, the Agency's Registrar and Chief Executive Officer; Emily Pitcher, the Agency's Legal Counsel; Joanna Cheng and Claire Dollan, who were Student Support Coordinators; and Jennifer Reid, Manager of Compliance and Investigation. The "Agency" and the "Employee Defendants" are referred to collectively herein as the "Agency Defendants". Another individual defendant, not named in the three impugned actions but named in related actions described below, is Sandra Carroll, who has at the material times served as Public Administrator.

[11] The Agency Defendants apply to have the three actions dismissed under subrule 9-5(1) (a), (b) and (d), as disclosing no reasonable claim, being frivolous and vexatious, and being an abuse of process of the court.

Background

[12] Some review of the background facts is necessary to explain the context of the three impugned actions.

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The 2014 Suspension Decision

[13] By way of a letter dated July 22, 2014, the Agency advised the plaintiffs that they had not remedied numerous concerns, previously communicated to FVCC, with respect to what were stated to have been significant non-compliance with basic education standards outlined in the Bylaws. FVCC's registration was therefore suspended. FVCC was directed to cease advertising, and to cease enrollment and career training of new students. I refer to this as the "Suspension Decision". The letter set out the conditions required to be met for FVCC's registration to be reinstated.

[14] FVCC requested reconsideration of the Suspension Decision on July 22, 2014. The Registrar of the Agency issued her reconsideration decision on September 23, 2014, upholding the suspension.

[15] FVCC appealed that reconsideration decision to the Public Administrator on October 6, 2014.

[16] Following a period of continuing review by the Agency and correspondence with the plaintiffs, the suspension was lifted effective November 19, 2014.

[17] The Public Administrator issued her appeal decision on November 13, 2015, upholding the suspension.

[18] While the suspension was in effect, and while the requested reconsideration was pending, FVCC filed a petition on July 28, 2014 under Docket No. 163009, naming PCTIA as respondent. This "Suspension Petition" seeks, *inter alia*, an order staying the effect of the July 22, 2014 Suspension Decision and an order setting aside that Suspension Decision, on the basis of an alleged lack of procedural fairness.

[19] The Suspension Petition also seeks judicial review of decisions made by the Agency against FVCC on May 9, 2014, respecting a refund of tuition fees in the amount of $3,750 to a former student, one Dominic Gatsivi, and respecting a refund

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of tuition fees in the amount of $3,020 each to former students Samuel Ebot Oben and Mani Etchi. These aspects of the Suspension Petition are not directly relevant to the present application, but again have a bearing on pleadings in related proceedings described later in these Reasons.

[20] FVCC amended the Suspension Petition on August 5, 2014. The Amended Petition did not set out any new matters of substance; the amendments dealt only with minor typographical errors.

[21] By way of a Notice of Civil Claim filed June 22, 2015, naming as defendants the Agency and its employees Lust, Pitcher and Reid, the plaintiffs commenced the Suspension Action, claiming various remedies – described in further detail below – in respect of the 2014 Suspension Decision.

The Conteh Complaint

[22] On or about August 18, 2014, a Mr. Saidu Conteh, father of a former student of FVCC named Alhassan Conteh, filed a complaint with the Agency alleging difficulties in obtaining a refund of tuition payments from FVCC (the “Conteh Complaint”). The complaint was formalized on or about December 15, 2014. On or about February 26, 2015, the Agency invited Saidu Conteh to reframe his complaint, and he filed a revised complaint on or about March 3, 2015, alleging that FVCC had misled him and his son with assurances regarding immigration assistance and with misrepresentations concerning the nature of FVCC’s program and courses.

[23] Following review of the complaint material and responses received from FVCC, the Public Administrator issued a decision dated July 31, 2015, finding that the complainant had been misled by FVCC. The Public Administrator ordered that the complainant Mr. Conteh receive a refund in the amount of $5,000, payable out of the Student Training Completion Fund established under s. 13 of the *Act* (the “Fund”). This “Conteh Refund Decision” was communicated to FVCC and to the complainant Saidu Conteh on August 26, 2015.

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[24] Decisions respecting claims against the Fund are subject to a privative clause set out in s. 16 of the *Act*. It provides:

> 16(3) The board has exclusive jurisdiction to hear and decide claims against the fund.
>
> (4) A decision, order or ruling of the board made under this Act in respect of a matter that relates to the fund and that is within the board's jurisdiction is final and conclusive and is not open to question or review in court except on a question of law or excess of jurisdiction.

The breadth of this privative clause implies that significant deference is owed the Agency's decision on a judicial review.

[25] I note parenthetically that it may be the case that the allegations in the Suspension Petition respecting refund payments to the former students Oben, Etchi and Gatsivi also relate to the Fund, though this is not spelled out in the pleadings.

[26] Prior to the Conteh Refund Decision being made, on June 11, 2015 FVCC as petitioner filed a petition under New Westminster Registry file 171800 against PCTIA and the Attorney General of British Columbia as respondents, seeking various orders respecting the Agency's investigation of the Conteh Complaint (the "Conteh Petition").

[27] The Agency's Response to Petition was filed June 19, 2015. The Agency's position was that the petition should be dismissed either on its merits or on the basis that it was premature, as no decision respecting the Conteh Complaint had been made at that time.

[28] Following the Conteh Refund Decision on July 31, 2015, the Agency filed an Amended Response to Petition on September 16, 2015. The Amended Response cited the aforementioned privative clauses. The Agency pleaded that the refund decision was reasonable, and that the procedure followed was fair. The Agency asked that the petition be dismissed.

[29] To date, there has been no amendment to the Conteh Petition challenging the Conteh Refund Decision.

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[30] By way of a Notice of Civil Claim filed June 19, 2015, naming as defendants the Agency, its employees Lust, Pitcher, Cheng and Dollan, and Saidu Conteh – the Conteh Action – Ms. Kikla and FVCC claim various remedies in respect of the Conteh Complaint, the Agency's investigation of the Conteh Complaint and the Agency's position on calculation of any refund.

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The Ayong Complaint

[31] On or about April 22, 2015 a former student of FVCC, Elias Ayong, filed a complaint with the Agency, alleging, generally, that he had been misled by FVCC in relation to the transferability of the credits and as to the program structure and schedule, and further complaining as to the manner in which his account with FVCC was handled (the "Ayong Complaint"). Following receipt of FVCC's response to the Ayong Complaint, Mr. Ayong was provided with a copy of FVCC's response, and Mr. Ayong made a reply on May 21, 2015.

[32] Upon receiving a copy of Mr. Ayong's reply, FVCC asked the Agency for the opportunity to make a sur-reply. This request was refused by the Agency's legal counsel, Ms. Pitcher, by way of an email dated June 8, 2015.

[33] By way of a decision forwarded to the plaintiffs on August 26, 2015, the Public Administrator of the Agency determined that Mr. Ayong had been misled by FVCC, and ordered that the complainant be paid $4,500 out of the Fund.

[34] By way of a petition filed June 11, 2015 – prior to the Agency's decision having been made – naming PCTIA and the Attorney General of British Columbia as respondents (the "Ayong Petition", New Westminster File 171801), FVCC seeks orders respecting the Agency's investigation of the Ayong Complaint. FVCC alleges that Mr. Ayong's May 21st reply contained fresh allegations, and claimed that the Agency's failure to allow for a sur-reply constituted a denial of natural justice.

[35] The third of the actions that are the subject of the present application, the Ayong Action, was commenced by way of a Notice of Civil Claim filed June 29, 2015. Named as defendants are several individuals including the aforesaid

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Mr. Ayong and members of his family, who are – generally – alleged to have been engaged in a conspiracy to undermine the reputation of FVCC. Also named as defendants are Vandana Khetarpal, who is alleged to be a former instructor at FVCC and who is alleged to have mishandled confidential information; and two Employee Defendants, Ms. Pitcher and Ms. Dollan, who are alleged to have mishandled the Ayong Complaint and to have acted in bad faith. Further details of the allegations against Pitcher and Dollan are set out below.

The Cancellation Decision

[36] By way of a letter dated September 1, 2015, the Agency served the plaintiffs with notice that FVCC's registration would be cancelled effective September 11, 2015, unless it was, prior to that date, able to show just cause that cancellation was inappropriate.

[37] In reply to that notice, the Agency received from FVCC approximately 1,700 page of material. The Agency's decision was delayed while those materials were reviewed.

[38] Ultimately, the registration of FVCC was cancelled effective October 26, 2015.

[39] Subsequent to the hearing of the present application on November 25-27, 2015, FVCC filed a petition on December 24, 2015, under Vancouver Registry file S-1510739. The substance of this Petition – the Cancellation Petition – appears to consist in part of a claim for judicial review in respect of the Cancellation Decision. The allegations in the Cancellation Petition are confusing and difficult to follow. They are described, in general terms, later in these Reasons. Again, these allegations have no direct bearing on the present application, but they give context to the proceedings as a whole.

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The Pleadings in Issue – Specific Allegations

The Suspension Action

[40] The Amended Notice of Civil Claim in Action 172005 is particularly prolix, the "Statement of Facts" in Part 1 constituting 62 paragraphs that are a mix of fact, evidence, speculation and argument. The essential nature of the claim appears to be set out in three of the first five paragraphs of the Amended Notice of Civil Claim:

> 1. That the defendants between Jan 2014 and Nov 2014 made various acts of Negligence, Acts of bad Faith, Acts of Falsifying True facts of the Case, Willfully and Knowingly causing Damage, Public humiliation and Continuous Abuse of Process, position and Power to Deny Natural Justice and a Fair Process that directly caused Irreparable damage to the image and Business of the Plaintiffs.
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> …
>
> 3. On June 13, 2014 a Letter sent by the defendant Monica Lust set the stage of a predetermined decision of the Defendant to strategically cause "Suspension" of the Plaintiffs by series of actions planned to damage and intentional harm to the businesses and images of the plaintiffs. The Letter dated June 13, 2014 which set 7 Conditions were created with Full intention to cause Suspension.
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> …
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> 5. After June 13, 2014 various acts of Bad Faith, Acts of Negligence, Intentional acts of Improper use of Power and Process by the Defendants directly caused the +18 weeks of Open ended Suspension of the Plaintiffs business and Caused irreparable harm to the reputation, Image, credibility and worthiness of the Plaintiffs Business and caused Financial loss of a great magnitude to the plaintiffs.

[41] The balance of the Statement of Facts consists of a confused narrative, in which Lust, Pitcher and Reid are alleged to have acted in bad faith or committed wrongful acts in relation to the 2014 suspension of FVCC's registration. The allegations appear to relate to failure to carry out a proper audit until November 2014, failure to disclose all correspondence between the Agency and students of FVCC, and failure to respond to enquiries made by FVCC as to FVCC's attempts to comply with the Bylaws.

[42] Under Part 2 of the Amended Notice of Civil Claim, "Relief Sought", the plaintiffs ask that the Employee Defendants Lust, Pitcher and Reid be held liable for

acts of bad faith and intention to cause irreparable harm to the business and image of the plaintiffs; that they be held liable for financial loss due to negligent acts, improper practices, acts of bad faith and abusive use of their office; that they be held accountable for falsifying material facts, for non-disclosure of material facts to the plaintiffs – thereby denying the plaintiffs fair opportunity to defend their position – and for improper practices and abusive use of their office; and that they be held liable and directly responsible for harassment, humiliation, stress and financial loss.

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[43] It may be inferred that the plaintiffs intend to claim damages against those Employee Defendants, but that form of relief is not specifically stated.

[44] Notwithstanding the fact that the Agency is named as a defendant, no relief is claimed as against the Agency.

The Conteh Action

[45] The allegations against the Agency Defendants in the Amended Notice of Civil Claim in Action 171964 are relatively concise. The plaintiffs allege as follows:

> 22. Even after substantiating that the claims made by defendant Saidu Conteh against the Plaintiffs were false the other defendant Emily pitcher continued to act as the counsel of the Defendant Saidu Conteh and suggested in her email to the Plaintiff that "Claimant Saidu Conteh has been advised of your determination and asked whether he wishes to proceed with the Complaint on the basis that the Institution failed to fulfill its obligations to the student in the period between enrollment and withdrawal."
>
> 23. On April 17, 2015 the Defendant Claire Dollan Wrote to the plaintiff FVCC about the new evidence of Phone calls Claimed to have been made by the defendant Saidu Conteh to the Plaintiffs and demanded the plaintiffs for additional response of the original claim now using a new tactic to falsely frame the Plaintiffs of any wrong doing.
>
> …
>
> 25. On May 9,2015 the Defendant Saidu Conteh continued to make false allegations against the Plaintiffs and the other defendants Claire Dollan, Emily Pitcher continue to use the power of their office by actively pursuing the denial of any response opportunity for the plaintiffs to respond to this matter and the damage of their actions still need to be quantified.

[46] The “Relief Sought” in Part 2 of the Amended Notice of Civil Claim, as against the Agency Defendants, is more extensive than the Statement of Facts. The plaintiffs plead:

> 4. That The Defendant PCTIA and Their Staff members Monica Lust be held accountable for intention for purposely not taking any action in this matter after FVCC filed their response and presented their facts on September 3, 2014 causing further damage to the Image, reputation of the businesses of the plaintiffs and causing irreparable harm.
>
> 5. That The Defendant Monica Lust be held accountable for intention for purposely not taking any action in this matter after FVCC filed their response and presented their facts on Sept 3, 2014 causing further damage to the Image, reputation of the businesses of the plaintiffs and causing irreparable harm and financial loss.
>
> 6. The Defendant Monica Lust and other Staff members Emily Pitcher, Joanna Cheng and Claire Dollan be held accountable for actively withholding the material facts of this matter and be held accountable for non disclosure without proper cause from the plaintiffs and thereby denying the Plaintiff an opportunity to defend these false claims made against them by defendant Saidu Conteh.
>
> 7. That The Defendant PCTIA and Their Staff Members Monica Lust, Emily Pitcher, Joanna Cheng and Claire Dollan be held accountable for “Non disclosure of Material facts” to the Plaintiffs thereby denying the Plaintiffs an opportunity to defend their position and be required to provide all email correspondence exchanged between them and Defendant Saidu Conteh which will further substantiate that the defendants acted in bad faith and intentionally caused damage to the business of the Plaintiffs.
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> 8. That the defendant Emily pitcher be held accountable for improper practices for denying the response sought in the refund calculations requested by FVCC in their meeting held at the Defendant PCTIA offices on June 13, 2014 where defendant Emily Pitcher directed the accounts staff “Alice Chua” for not giving answer to the specific query of the refund calculations which were requested by FVCC in this matter during the meeting held with Alice Chua on June 13, 2014.
>
> 9. That the defendant Emily pitcher and Claire Dollan be held accountable for improper practices and abusive use of their office and positon and for assisting and acting as a counsel for the defendant Saidu Conteh to make the false claim against the Plaintiffs causing [continuous] damage to the business of the plaintiffs.
>
> 10. That the defendant Emily pitcher and Claire Dollan be held accountable for improper practices and abusive use of their office and positon and for assisting and acting as a counsel for the defendant Saidu Conteh to make the false claim against the Plaintiffs causing continuous damage to the business of the plaintiffs.

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[47] The plaintiffs specifically seek general, aggravated and special damages, and also punitive damages:

> … for the Defendant's Persistent, Intentional and Continuing interference with the Plaintiffs Rights, True Facts and Constant attempt to damage the image and Business of the Plaintiffs inter alia the loss of Goodwill and Plaintiffs Economic Relations.

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The Ayong Action

[48] The Statement of Facts in the Notice of Civil Claim in Action 172166 is also excessively detailed. The bulk of the allegations are directed against other defendants, against whom various wrongful acts are alleged. The allegations against the Employee Defendants Pitcher and Dollan appear to relate solely to the Ayong Complaint. The nature of the allegations, generally are that:

(a) Ms. Dollan provided advice to students of FVCC with respect to complaints, acting as counsel and not as an independent adjudicator;

(b) that Ms. Dollan and Ms. Pitcher counselled the defendants Yvette Ayong and Elias Ayong and acted in a manner to conspire jointly with them to damage and harm the image of Ms. Kikla and the business of FVCC;

(c) that Ms. Pitcher treated FVCC in a humiliating and biased manner; and

(d) that Ms. Dollan and Ms. Pitcher intentionally interfered with FVCC's own internal dispute resolution policy, and acted in bad faith, outside their role with the Agency and in an abuse of their power, to intentionally cause damage to the plaintiffs.

[49] The relief sought against Ms. Dollan and Ms. Pitcher includes pleas similar to those in the other two impugned actions, i.e. that they be held liable for abuse of power, intentional acts and acts of bad faith, and that they be held accountable for non-disclosure of material facts, giving rise to intentionally caused damage.

Law

[50] The conventional remedy for breach of statutory duty by a public authority is judicial review for invalidity: see *Holland v. Saskatchewan*, 2008 SCC 42, at para. 9. No action for damages may be maintained against a regulatory authority exercising its statutory powers, either in relation to the fairness of the authority's processes, or to the basis for its decisions. Such claims constitute collateral attacks upon the authority's decision-making powers, and may be struck as an abuse of process under sub-rule 9-5(1)(d).

[51] Recent decisions of this court have applied this general statement of the law to claims brought against the Agency. In *Willow v. Chong*, 2013 BCSC 1083 [*Willow*], Madam Justice Fisher dealt with the doctrine of collateral attack in the following terms:

> [40] Neither Shanghai College nor the other plaintiffs pursued this matter by launching an appeal to the board or seeking judicial review. To the extent that the plaintiffs' claims relate to the fairness of the process and the basis for the decisions and actions taken by the registrar and PCTIA, they ought to have pursued the remedies available to them under the legislation. In my opinion, it is improper to pursue such claims in an action for damages. …

[52] It was further held by Fisher J. that, on the facts of the case before her, the unavailability of a damages remedy in judicial review was not sufficient grounds to allow the action to proceed:

> [47] It is well known that damages are not available in applications for judicial review [citations omitted]. However, that principal alone is not sufficient to ground an action for damages where the essential complaint stems from dissatisfaction with the conduct and the decisions of an administrative agency. The plaintiffs must have viable causes of action in and of themselves.

[53] A similar result was obtained more recently in *Honborg v. Private Career Training Institutions Agency*, 2015 BCSC 965. Madam Justice Sharma said, at para. 36:

> [36] I agree with the Agency that the claim must be struck as constituting both an abuse of process and as disclosing no reasonable claim. On behalf of the plaintiffs, Mr. Honborg freely admitted that he chose not to pursue any mechanism for internal review because, in his submission, no process

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> conducted by the Agency could be fair. His pleadings and the statements he made in court allege bias, prejudice and discriminatory attitude against Agency officials. Other than his suspicion, there is no evidence on the record to give an air of reality to those accusations. Mr. Honborg admitted in court that his main complaint is that he believes the decision to suspend the College's registration was wrong; he wants the court to overturn it. He alleges many other things, but I am satisfied that, in substance, the civil claim is a challenge to the impending (at the time) suspension of the College. …
>
> [37] There can be no doubt that the claim is nothing more than a collateral attack on the Agency's statement of its intent to suspend the College and, ultimately, the suspension. ...

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[54] In respect of the Employee Defendants, the personal liability protection afforded by s. 21 of the *Act* will be germane. It provides:

> 21 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a board member or an officer or employee of the agency because of anything done or omitted
>
> > (a) in the performance or intended performance of any duty under this Act, or
> >
> > (b) in the exercise or intended exercise of any power under this Act.
>
> (2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

[55] Actions taken by an employee in bad faith will therefore not benefit from the protection afforded by the *Act*. However, a litigant will not be permitted to subvert the principles of judicial review, including deference to the decision-making authority, through making unfounded allegations against an employee. The pleadings and evidence will still be subject to being scrutinized to determine whether there is any plausible basis for a claim of bad faith, engaging subsection 21(2) of the *Act*: see *Willow*, at para. 51. If the pleadings and the evidence do not disclose a reasonable basis for claims being made personally against the employee, it will be open to the court to conclude that the action, in substance, is nothing more than a collateral attack.

[56] Further, in addition to the doctrine of collateral attack, pleadings may be struck as an abuse of process where they essentially duplicate claims being advanced in another extant proceeding. In such circumstances, the principle of

judicial economy is engaged; the court is compelled in such circumstances to determine if it is in the public interest to allocate scarce judicial resources to essentially duplicative proceedings. There is the related principle that allowing duplicative proceedings is an affront to the integrity of the judicial system, given the burden that unnecessary litigation imposes on the parties. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Madam Justice Arbour, in the majority judgment, stated:

> [37] … the doctrine of abuse of process engages “the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute” … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[57] In addition, as noted above, Rule 9-5(1)(a) provides that a pleading may be struck where it discloses no reasonable claim. The test for striking a pleading on this basis, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 42, is whether, assuming the facts pleaded are true, it is “plain and obvious” that a claim discloses no reasonable cause of action, has no reasonable prospect of success, or is certain to fail. Although Rule 9-5(2) provides that no evidence is admissible in respect of an application brought under subrule (1)(a), the pleadings may be subject to a “skeptical analysis” that accounts for the circumstances and the litigation history, as well as the bare allegations made in the pleadings: *Young v. Borzoni*, 2007 BCCA 16, at para. 31.

[58] The applicants herein also rely on subrule 9-5(1)(b). Generally, a pleading may be struck as unnecessary or vexatious when, among other things, it is obvious that the action cannot succeed, where it would serve no useful purpose or would be a waste of public resources, and may be struck as unnecessary, frivolous or vexatious when it is difficult to understand what is pleaded: *Willow*, at para. 20. In regard to the latter, in the words of Mr. Justice Voith in *Sahyoun v. Ho*, 2013 BCSC 1143, at para 54:

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> Neither a defendant nor a trier of fact should have to parse through a notice of civil claim and either cobble together or speculate about what cause of action is being advanced against which defendant.

[59] Applications under sub-rules 9-5(1)(b) and (d) may be supported by evidence.

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Discussion

[60] The claims advanced against the Agency Defendants in the Notices of Civil Claim concern the Agency's exercise of its statutory responsibilities in respect of regulating FVCC's compliance with the Bylaws, and administering the claims against the Fund. The proper channel for the hearing of the plaintiffs' grievances against the Agency is a judicial review by way of petition proceeding, to be determined under the principals of administrative law. The claims against the Agency constitute an impermissible collateral attack on the Agency's process and decisions, and must be struck as an abuse of process.

[61] The claims are not saved through the allegations of bad faith, abuse of process, etc. on the part of the employees. There is no substance to these allegations. There are no material facts pleaded in support, only bald assertions of wrongdoing. Furthermore, the extensive evidence – hundreds of pages of affidavit exhibits – relied upon by Ms. Kikla does not demonstrate any bad faith, malice, or abuse of power by individual officers of the Agency; to the contrary, the evidence cited by Ms. Kikla demonstrates a transparent decision-making process.

[62] In the course of her oral submissions, Ms. Kikla offered a new theory: that the sheer number of errors made by the Agency, and the nature of those errors, are so extreme that they are only explicable on the basis of there having been a pre-determined result, motivated by racial bias, or by some other form of bias unknown to her.

[63] There are two answers to this theory, in the context of the present application. The first is that Ms. Kikla's apprehension of bias appears to be only a matter of her own subjective impressions or beliefs. Even taking her claim that she apprehends bias at face value, it is not founded on the evidence, only on her own speculation.

Indeed, in the course of her submissions she acknowledged the subjective aspect of her allegations. Arguing that evidence concerning interactions between Mr. Conteh and the Agency's investigative staff was suspicious, Ms. Kikla acknowledged the court's difficulty in seeing the evidence in that light. She stated:

> I agree with your point of view, My Lord, because when you are not involved in the facts, you tend to see them as non-relevant. But when you know that the complaints are false, and you know that they are tailor-made, you tend to think differently than I do. Because I am part of it.

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[64] The second answer to this theory is that even if Ms. Kikla is able to demonstrate bias, the allegation of bias may be pursued through judicial review.

[65] The claims made against the Agency Defendants are an abuse of process by reasons of the doctrine of collateral attack. The pleadings against the Agency Defendants are struck, and the three actions dismissed as against them.

[66] The actions are also an abuse of process by way of being duplicative of the allegations made in each of the parallel petition proceedings. Ms. Kikla acknowledged the duplicative nature of the Suspension Petition and the Suspension Action in her written submission (made in the form of her 6th Affidavit filed in Action 172005), in which she said:

> 273. If Justice Saunders Did not allow these matters to be dealt with now it is only a matter of time when I will bring these to light when I deal with Judicial petitions as the evidenced already exists and once its surfaced these cases will come up again and no court will deny me justice as the Prima facea evidence is already in place [sic].

[67] In her oral submissions, Ms. Kikla acknowledged that the claims made against the Employee Defendants in the Conteh Action mirror those in the Conteh Petition. The same can be said of the allegations made in the two proceedings respecting the Ayong Complaint.

[68] These duplicative proceedings are an affront to the principal of judicial economy, and necessitate the actions against these defendants being dismissed by reason of abuse of process.

[69] Further, I would find the Notices of Civil Claim deficient by way of their failure to plead the essential elements of the torts alleged. Given my conclusions regarding abuse of process, it is not necessary to catalogue these deficiencies. Suffice it to say that the Notices of Civil Claim do not plead the essential elements of conspiracy, deceit, defamation, injurious falsehood or misfeasance in public office. The allegations of negligence cannot succeed, as the Agency clearly owes a duty to the public to ensure that the Bylaws are complied with, and can owe no duty of care to an institution. I would find the pleadings made against the Agency Defendants to meet the test of being frivolous and vexatious on those grounds. Whether the actions should be struck on those grounds or simply stayed pending amendment is something I need not consider in the circumstances, having found the claims to be an abuse of process on other grounds.

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Conclusion

[70] The application of the defendants Private Career Training Institutions Agency, Monica Lust, Emily Pitcher, Joanna Cheng, Claire Dollan and Jennifer Reid is allowed, and Action Nos. 172005, 171964 and 172166 are dismissed as against them.

Claims Against the Defendant Saidu Conteh

[71] Mr. Conteh filed an application response to the present application to strike the Notice of Civil Claim in the Suspension Action (172005) and striking the Amended Notice of Civil Claim in the Conteh Action (171964). Mr. Conteh consented to the granting of the orders set out in Part 1 of the Notice of Application.

[72] Mr. Conteh did not file his own Notice of Application seeking to have the claim against him dismissed.

[73] Mr. Conteh is represented by counsel. Counsel was given leave to make written submissions on the present application, and did so. The written submissions set out arguments in favour of dismissing the claims against Mr. Conteh. The written submissions also asked that the plaintiffs be declared vexatious litigants.

[74] The present Notices of Application were framed as applications for orders seeking dismissal of the actions in their entirety. However, the substance of the Notices of Application dealt only with the dismissal of the actions as against the Agency Defendants, and the applicants proceeded on that basis when the application was heard. The plaintiffs' application responses, and the plaintiffs' written arguments (presented in the form of affidavits), addressed only those claims brought against the applicants.

[75] In the circumstances, no separate application having been made by Mr. Conteh, it would clearly be inappropriate to address the validity of the present actions as regards Mr. Conteh.

[76] Should Mr. Conteh wish to proceed with his own Notice of Application to have pleadings against him struck under Rule 9-5, leave will be granted to have the application made and responded to by way of written submissions.

<u>**Costs**</u>

[77] Having succeeded on this application, the Agency Defendants are entitled to their costs in the actions.

[78] Rule 9-5(1) specifically provides that upon ordering a proceeding stayed or dismissed under the Rule, the court may order the costs of the application (though not of the action as a whole) to be paid as special costs.

[79] Rule 14-1(15) provides the court with discretion in awarding costs of a proceeding to fix the amount of costs.

[80] The Agency Defendants seek fixed costs. They have tendered as evidence three draft bills of costs – one in each of the three actions – with the costs and disbursements totalling $17,081.05. They seek a lump sum award limited to $10,000.

[81] The Agency Defendants submit that this is an appropriate case for the court to exercise its discretion in favour of lump sum costs, given the disproportionate time

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expended by court staff on these matters to date, and the possibility of further time and expense that could result from a prolonged assessment and a potential appeal.

[82] Given my familiarity with these proceedings as the case management judge, I believe this is an appropriate case for the positive exercise of my discretion. The costs sought represent a very significant discount over the amount the Agency Defendants would likely obtain in an assessment of costs at Scale B. I note that the draft bills of costs were prepared only at Scale B and did not incorporate a potential award of special costs in respect of the present application, as allowed for in Rule 9-5(1).

[83] The Agency Defendants will have their costs of the three actions in the fixed amount of $10,000.

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Vexatious Litigant Declaration

[84] Ms. Kikla has commenced several other actions relating to the Agency, in addition to the duplicative proceedings referred to above in these Reasons.

[85] First, as noted above, Ms. Kikla commenced the Cancellation Petition on December 24, 2015 under the style of cause:

> Between
>
> FRASER VALLEY COMMUNITY COLLEGE INC
>
> Petitioner
>
> And
>
> Monica Lust, PRIVATE CAREER TRAINING INSTITUTIONS AGENCY,
> Sandra Carroll-Public Administrator, Minister of Advanced Education,
> ATTORNEY GENERAL OF BRITISH COLUMBIA
>
> Respondents

[86] The body of the Cancellation Petition refers to Ms. Kikla as a Petitioner, though she is not named as such in the style of cause.

[87] The Cancellation Petition appears to seek, *inter alia*, judicial review of several matters: the July 2014 Suspension; the plaintiff's subsequent attempts to obtain, first, a reconsideration, and second, an appeal of the Suspension Decision; and the

October 26, 2015 Cancellation Decision. There are also, as far as can be determined, claims for declarations and mandatory injunctive relief in respect of various matters concerning the respondent Minister. The petition makes numerous claims and seeks numerous forms of relief regarding the July 22, 2014 Suspension Decision, including a declaration that one of the forms of relief sought in the Suspension Petition – file 163009 – be considered moot. Furthermore, despite this proceeding being commenced as a petition, not as an action, there are also claims for damages advanced against Ms. Lust and Ms. Carroll.

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[88] In this Cancellation Petition's List of Material to be Relied On, the petitioners list all affidavit materials made by Ms. Kikla in the three petitions and three actions referred to herein, and also all affidavit materials made by Ms. Kikla in two other actions commenced by Ms. Kikla in B.C. Supreme Court. Those other two actions are *Kikla and FVCC v. Carine Dzuo*, New Westminster Action No. 172242; and *Kikla and FVCC v. Saihou Kinteh, Mbinki Jarjue, Isatou Jarju*, New Westminster Action No. 172291. None of the Agency Defendants are named as parties in these actions, but in both actions the relief sought includes demands that Emily Pitcher and Claire Dollan be discovered under oath.

[89] Second, although it was not part of the application record before me – my understanding from comments made by counsel during a recent case conference is that Ms. Kikla had not given notice of the action – Ms. Kikla as plaintiff commenced an action on October 22, 2015 under New Westminster Registry No. 174934 against Sandra Carroll as defendant, alleging obstruction of justice, defamation, bias and abuse of power by Ms. Carroll in her role as Public Administrator of PCTIA, in respect of a decision made in a complaint by a former student, Carine Dzuo (the defendant in Action 172242) – a decision, apparently, that went in favour of FVCC.

[90] Third, although it was not part of the application record before me, I take judicial notice of the existence of yet another action commenced by FVCC, on November 30, 2015 under New Westminster Action No. 175888. This action, the "Ebot Action", names Elias Ayong as one of the nine defendants – the same

individual named in the Ayong Action. The claims made against Mr. Ayong in the Ebot Action are allegations of making false complaints to the Agency, making defamatory statements against FVCC, and engaging in conspiratorial conduct. Those allegations, while they may be "new" in that they are not advanced in the same terms in the Ayong Action and the Ayong Petition, clearly overlap allegations made in those other two proceedings. Further, to the extent that the allegations in the Ebot Action with respect to the Ayong Complaint challenge the accuracy of findings made by the Agency, the allegations appear on their face to be a collateral attack and would thus stand to be dismissed as an abuse of process.

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[91] Likewise, the Ebot Action also names as defendants Samuel Oben Ebot, Manyi Ebot Etchi, and Dominic Gatsivi, whose complaints against FVCC are the subject matter of allegations in the Suspension Petition. In that respect, these allegations in the Ebot Action would also appear on their face to be an abuse of process by reason of collateral attack.

[92] Fourth, I take judicial notice of a recent development, in which 17 separate Small Claims Court actions commenced in the Provincial Court of B.C. by FVCC have been ordered consolidated and transferred into Supreme Court, by way of an order made by Judge E. Gordon on January 20, 2016. At least one of those actions, commenced under Surrey Registry No. 77516 under the style of cause *FVCC v. Chi*, has been assigned a Supreme Court file number, New Westminster Registry No. 177197. One of those 17 actions appears to name defendant Elias Ayong, the same defendant named in the Ayong Action and referred to in the Ayong Petition, again giving rise to concern as to duplicative proceedings and collateral attack.

[93] In addition to concerns arising out of the abusive nature of many of the proceedings instituted by Ms. Kikla, there is a concern as to demands she has placed, or has announced an intention to place, on the court system and on the parties to these actions through interlocutory applications. Since I was assigned case management of these matters in mid-October 2015, and prior to the hearing of the present applications toward the end of November, one full day of court time was

devoted to a related application brought by Ms. Kikla that, as I found, was completely without merit; see the reasons for judgment indexed at 2015 BCSC 2067. Other Notices of Application have been filed by Ms. Kikla, and further applications are contemplated.

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[94] In one such application, filed September 23, 2015, FVCC will be seeking to add “Sandra Carroll – Public Administrator” as a respondent to the Suspension Petition, the Conteh Petition and the Ayong Petition, and to add both the “Ministry of Advanced Education” and the Lieutenant Governor in Council as respondents in the Ayong Petition. Other forms of relief are also being sought. The application is scheduled to be heard over two days, March 31 and April 1, 2016.

[95] By way of an order I made in a judicial management conference on January 4, 2016, that application is to be heard and determined prior to further applications filed by FVCC on June 11th in the Conteh Petition and the Ayong Petition, and on July 20, 2015 in the Suspension Petition.

[96] Ms. Kikla is and has been self-represented in these proceedings. She has not demonstrated a sound grasp of procedure. Her Notices of Application, her Petitions and her Notices of Civil Claim are prolix, confused and duplicative. It is clear that Ms. Kikla is in need of some form of judicial restraint. If only for the sake of efficiency, some mechanism is necessary in order to screen Ms. Kikla’s applications and ensure that the public’s resources are only spent on matters which usefully advance the litigation and have at least some *prima face* merit.

[97] As noted by Mr. Justice Hall in *S. v. S.* (1998), 60 B.C.L.R. (3d) 232 (C.A.), leave to appeal ref’d [1999] S.C.C.A. No. 11, the deeply enshrined democratic right of unfettered access to the courts is subject to the corollary that continuing abuse of this right must be dealt with.

[98] Ms. Kikla has abused the court’s processes. I am therefore, on the court’s own motion and without a hearing, declaring Fraser Valley Community College and Ms. Sunanda Kikla to be vexatious litigants.

[99] In addition, as corollaries to that declaration, I order as follows:

1. No civil legal proceeding may be instituted in the Supreme Court of British Columbia or the Provincial Court of British Columbia by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc., either by way of notice of civil claim, petition or requisition in the Supreme Court, or by way of notice of claim in Provincial Court, without leave of such court;

2. No notice of application, notice of hearing or notice of trial may be filed by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc. in any civil legal proceeding extant before the Supreme Court of British Columbia as of the date of this order, including, but not limited to, proceedings under the following File numbers:

    a. In the New Westminster Registry, Action Nos. 163009, 171800, 171801, 172005, 172166, 172242, 172291, 174934, 171964, 175888, 177197; and

    b. In the Vancouver Registry, Action No. 1510739;

    without leave of the court;

3. Any civil legal proceeding and any notice of application, notice of hearing or notice of trial filed in contravention of this Order is a nullity, and no party named as a defendant or respondent need respond;

4. No notice of application or notice of hearing currently filed in the Supreme Court of British Columbia by or on behalf of Sunanda Kikla or Fraser Valley Community College Inc. in any extant civil legal proceeding may be heard before this court without leave, save and except for the applications referred to in paragraphs 1 and 4 of the Case Plan attached to the Case Plan Order made January 4, 2016 in File No. 171800, New Westminster Registry;

5. Sunanda Kikla and Fraser Valley Community College Inc. may apply to vary the terms of this order on 7 days' notice but may only make such application if

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represented by a member in good standing of the Law Society of British Columbia;

6. This Vexatious Litigant order is to be entered in each of the proceedings listed in paragraph 2 above; and,
7. The Supreme Court Registry of New Westminster shall advise all Supreme Court and Provincial Court Registries within the province of British Columbia of the terms of this order.

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Forms of Order

[100] The forms of order resulting from these Reasons are to be drawn by counsel for the Agency Defendants, and endorsed by counsel for Mr. Conteh prior to entry. The requirement for endorsement by Ms. Kikla and Fraser Valley Community College is waived.

"A. Saunders J."