IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *David Brace v. Watch Tower Bible and Tract Society of Pennsylvania et al* 2009NLTD171
Date: 2009 10 29
Docket: 2006 01T 1676

BETWEEN:

DAVID BRACE

PLAINTIFF

AND:

WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA

FIRST DEFENDANT

AND:

WATCH TOWER BIBLE AND TRACT SOCIETY OF NEW YORK INC.

SECOND DEFENDANT

AND:

WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA

THIRD DEFENDANT

AND:

BAY ROBERTS CONGREGATION OF JEHOVAH'S WITNESSES

FOURTH DEFENDANT

Before: The Honourable Chief Justice J. Derek Green*

Place of hearing: St. John's, Newfoundland and Labrador

J. Derek Green
Chief Justice

Summary: PRACTICE AND PROCEDURE – STRIKING OUT PLEADINGS – NO REASONABLE CAUSE OF ACTION – NON-JUSTICIABILITY BECAUSE CLAIM INTRUDES INTO REALM OF RELIGIOUS DOGMA

On an application to strike out a claim against a religious organization claiming undue influence exercised by the elders of the organization with respect to the plaintiff and other members of his family, allegedly leading to prevention of the plaintiff from obtaining a university education, consenting to inappropriate custodial arrangements for his son following the plaintiff's marriage breakdown and the disfellowshipping and shaming of the plaintiff by his family, the statement of claim was struck out in its entirety on the ground that it disclosed no reasonable cause of action and that deficiencies in the pleading could not be cured by amendment or ordering further particulars.

Appearances: David Brace, the Plaintiff, appearing on his own behalf
David C. Day, Q.C. & Jason Wise for the Defendants

AUTHORITIES CITED: **Frame v. Smith** [1987] 2 S.C.R. 99; **Seneca College of Applied Arts and Technology v. Bhadauria** [1981] 2 S.C. R. 181; **Keays v. Honda Canada Inc.** (2008), 294 D.L.R. (4th) 577 (SCC); **Syndicat Northcrest v. Amselem** [2004] 2 S.C.R. 551; **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87; **Roberts v. Browning Ferris Industries Ltd.** (1998), 170 Nfld. & P.E.I.R. 228 (NLCA); **LeDrew v. Conception Bay South (Town)** 2003 NLCA 56 (NLCA); **Montreal Trust Co. of Canada v. Hickman** (2001), 204 Nfld. & P.E.I.R. 58 (NLCA); **Currie v. Halton Regional Police Services Board** (2003), 233 D. L.R. (4th) 657 (Ont.C.A.); **Hughes (Estate) v. Hughes** 2007 ABCA 277; **Sturkenboom v. Davies** (1997), 187 A.R. 290 (C.A.); **MacLachlin v. Capilano Christian Assembly** 2003 ABQB 159; **Penney v. Canadian Imperial Bank of Commerce** (1996), 145 Nfld. & P.E.I.R. 355 (NLSCTD); **Rich v. Canada** (1999), 216 Nfld. & P.E.I.R. 241 (NLSCTD)

STATUTES CONSIDERED: *Rules of the Supreme Court, 1986*, Rule 14.24; *Limitations Act*, S.N. 1996, c. L-16.1, s. 5

*** Since the hearing of this matter Chief Justice Green has been appointed Chief Justice of Newfoundland and Labrador. This judgment is being filed in his capacity as *ex officio* judge of the Supreme Court of Newfoundland and Labrador, Trial Division, where the application was heard.**

REASONS FOR JUDGMENT

Green, C.J.:

[1] In this application, the defendants seek an order striking out the plaintiff's statement of claim on the grounds: (i) the claim does not disclose a reasonable cause of action; (ii) the claim is so fundamentally deficient that it is frivolous and vexatious; (iii) the claim is not justiciable because it invites the Court to become the arbiter of religious dogma; (iv) the claim is being made by a vexatious litigant and is an abuse of the court's process; and (v) the claim is in any event statute-barred.

[2] Alternatively, in the event that the statement of claim is not completely struck out, the defendants seek orders for further and better particulars of the claim, and postponement of the defendant's obligation to file a defence until the particulars are provided.

The Statement of Claim

[3] The plaintiff, David Brace, makes a number of allegations in his statement of claim concerning his relationship, or former relationship, with the Jehovah's Witnesses religious denomination.

[4] The claim names four entities as defendants: (i) the Watchtower Bible and Tract Society of Pennsylvania (First Defendant) which Mr. Brace alleges is the "founding entity and original organization" from which the second and third defendants evolved and is their "parent corporation"; (ii) the Watchtower Bible and Tract Society of New York, Inc. (Second Defendant) which is alleged to be a religious organization operating under the trade name "Jehovah's Witnesses" , the governing council of which, along with the First Defendant holds "authoritative influence" over all affiliates including the Third Defendant; (iii) the Watchtower Bible and Tract Society of Canada (Third Defendant) which Mr. Brace alleges is the

"Canadian affiliate" of the First and/or Second Defendants; and (iv) The Bay Roberts Congregation of Jehovah's Witnesses (the "Bay Roberts Congregation") which is alleged to be the "local chapter of the religious organization known as Watchtower Bible and Tract Society" and carries on business under its "direction and control".

[5] The statement of claim, amplified by certain replies by Mr. Brace to the defendants' demand for particulars, makes three general claims:

1. As a result of a decision made by his mother when Mr. Brace was five years old he became a regular attendee of religious meetings held by the Bay Roberts Congregation "under the control" of the Third Defendant and, as a result of the "undue, immense and unreasonable control" wielded over the people attending the religious meetings, he was "prevented from furthering his education at a university level". (paragraphs 6 and 7)

2. The elders of the Bay Roberts Congregation, "empowered" by the other defendants, intervened in respect of a matrimonial dispute involving custody of his son and used "undue influence and pressure" to cause him to agree to joint custody of his son with his son's mother. Mr. Brace alleges that the influence and pressure was exercised by persons untrained in the field, yet they "knowingly and willingly and wrongly" involved themselves in the "legal principles of custody, property and related fundamental principles", as a result of which the lives of the plaintiff and his son were "dramatically and negatively impacted" and this was done in an attempt by the Bay Roberts Congregation to "benefit itself". (paragraph 9)

3. The Bay Roberts Congregation and its affiliates "without just cause and without merit" caused the plaintiff "to be put in a position where all members of the plaintiff's family associated with the religion 'Jehovah's Witnesses' could no longer associate with, talk to, or interact in any way whatsoever" with the plaintiff and in particular, as a result of the "immense and undue and unreasonable influence and instructions" of the defendants, his own mother has not spoken to Mr. Brace in over five years. (paragraph 11)

[6] The plaintiff alleges that as a result of the foregoing actions, he suffered damages and he claims, amongst other things, general, special, punitive and exemplary damages.

The Current Application

[7] Shortly following the filing of the current application, the plaintiff filed a default judgment against the Bay Roberts Congregation. The Fourth Defendant applied to set aside that judgment. That application was heard by me immediately before the application to strike.

[8] Mr. Brace, in response, applied to postpone both applications on the ground that he was not ready to proceed because he had not been able to retain legal counsel. I denied the application to postpone because of the long period of time Mr. Brace had had since the filing of the applications to respond to them either with or without counsel.

[9] I allowed the application to set aside the default judgment against the Bay Roberts Congregation because I concluded there was arguable merit to the defendants' proposed defence and because they had good reason for not having filed their defence previously and acted promptly to apply to set aside the judgment upon becoming aware of it.

[10] That left for consideration the defendants' application to strike, to which this decision is directed.

[11] The defendants filed material relating to the allegation of vexatious litigation and abuse of process, indicating that Mr. Brace had sued upwards of 60 parties in 25 lawsuits during the past 12 years and that Mr. Brace, represented by counsel and with independent legal advice, had entered into a separation agreement with his former wife relating to custody of their son and that agreement was incorporated in a court order.

[12] With respect to the argument that the plaintiff's claims were statute barred, the defendants placed in evidence copies of letters written by Mr. Brace in 1994 and by counsel purporting to be instructed by him in 1995 threatening litigation against the Bay Roberts Congregation, its elders and the "corporate body nationally" for the consequences of their involvement in the custody and matrimonial issues involving him and his wife.

[13] For his part, Mr. Brace sought to put before the court a number of articles, website information and other materials containing, amongst other things, the opinions of others about the Jehovah's Witnesses as a religious

institution and some practices engaged in by the religious body that were deemed objectionable by some. The material also contained statements purporting to be the views of Jehovah's Witnesses on the lack of value of a university education. This material appeared to be intended to buttress the allegations that Mr. Brace had made about improper and undue control exercised by the religious body over adherents.

Applicable Rules and Principles

[14] Rule 14.24 of the Rules of the Supreme Court, 1986 provides in pertinent part:

> **14.24.** (1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that
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> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> ....
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the Court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under rule 14.24(1)(a).

[15] Where an application is made to strike out under paragraph (a) (no reasonable cause of action) the court will not generally receive evidence to contradict the allegations in the statement of claim and in a reply to a demand for particulars. It must assume the allegations are true and determine, on the assumption that the plaintiff can prove those allegations, whether they can sustain a cause of action known to the law. The test to be applied is a stringent one: whether it is plain and obvious that the plaintiff cannot succeed: **Roberts v. Browning Ferris Industries Ltd.** (1998), 170 Nfld. & P.E.I.R. 228 (NLCA). The approach to be taken is to examine the pleading to see if the plaintiff has pleaded any factual circumstance that could found the legal right asserted that would justify the granting of the remedy sought: **LeDrew v. Conception Bay South (Town)** 2003 NLCA 56,

per Wells CJN at para. 20. As noted in **LeDrew**, the pleading of a factual basis that could support the cause of action asserted is a "fundamental requirement". Each element of the asserted cause of action must have a pleaded factual substratum.

[16] Where the pleading does not meet the test I have just described, the court must nevertheless, before striking out the claim, consider whether the deficiency can be cured by either a realistic amendment or by an order for particulars: **Montreal Trust Co. of Canada v. Hickman** (2001), 204 Nfld. & P.E.I.R. 58 (NLCA).

[17] To allow an amendment, however, the intent of the pleader must be apparent from the existing pleading and at least the "skeleton" of a claim must be present: **Montreal Trust**, at paras 12 and 53. There will generally have to be evidence before the court (admissible on an application to amend) from which the court can conclude that if pleaded and proven, the new factual allegations could possibly sustain a cause of action.

[18] To justify an order for particulars as an alternative to striking out, the party resisting the application to strike will be required to provide, in response to the application, the type of particulars he or she believes will fill the gap in the existing pleading and thereby demonstrate a potential cause of action.

[19] It is to be noted in this case that the defendants delivered a demand for particulars to the plaintiff following service of the statement of claim. In his reply, a significant number of his answers contained a refusal to supply particulars on the ground that the information should be supplied instead, as evidence at trial or on oral discovery. In the current application the plaintiff gave no further indication of what would be in any particulars if they were to be ordered except to supply general information about the opinions of others as to what were asserted to be objectionable policies and practices of Jehovah's Witnesses respecting education and child custody disputes.

[20] In this case, the defendants argue that the allegations that the defendants exercised undue and unreasonable control and pressure over the plaintiff, wrongly and improperly interfered in his matrimonial affairs and caused members of the Congregation to "disfellowship" and shun him do not disclose any cause of action in tort or any other cause of action for that matter. Alternatively, they argue that the actions complained of are within a domain of religious activity with which the courts will not interfere and as such the plaintiff's complaints are not justiciable in a court of law.

[21] Where an application is made to strike out under paragraphs (b) (frivolous and vexatious action) and (d) (abuse of process) of Rule 14.24(1), the court may receive evidence addressing those issues. Indeed, it often will be necessary for the court to have evidence on such matters since vexatious litigation or litigation that is an abuse of process may not be readily apparent from a perusal of the language of the claim alone. Background facts and evidence of motive may well be relevant. Context is often important.

[22] In addition to reliance on Rule 14.24(1)(b) and (d) a litigant complaining that a claim is vexatious and an abuse of process may also invoke the common law and the inherent right of the court to control its own process as a means of either striking out a claim or restraining a litigant from proceeding: **Penney v. Canadian Imperial Bank of Commerce** (1996), 145 Nfld. & P.E.I.R. 355 (NLSCTD), per L.D. Barry J. at para. 14; **Currie v. Halton Regional Police Services Board** (2003), 233 D. L.R. (4th) 657 (Ont.C.A.) per Armstrong J.A. at para. 16.

[23] In support of their arguments the defendants rely on the fact that Mr. Brace apparently acted with the benefit of independent legal advice in settling issues as to custody with his wife on their separation, thus negating any allegation of undue or improper influence or pressure by the defendants. They argue that this means that the claims of the plaintiff in this regard are without substance and therefore frivolous, and to permit them to be pursued in these circumstances would be to allow vexatious litigation into the court, which would be an abuse of process. They also rely on the apparent propensity of Mr. Brace to engage in litigation in a wide variety of differing circumstances as evidence that he tends to use the court system for improper purposes.

[24] An application to strike a statement of claim on grounds of an expired limitation period may also be made in advance of trial in some circumstances: **Rich v. Canada** (1999), 216 Nfld. & P.E.I.R. 241 (NLSCTD), per Hall J. at para. 28. If it is apparent from the statement of claim that the cause of action arose outside of the applicable limitation period and there is no issue as to the possible postponement of the running of the limitation period because of such things as lack of knowledge or incapacity (which might depend on assessment of conflicting evidence) then the matter could be dealt with on the basis that the claim discloses no reasonable (i.e. active) cause of action.

[25] Even where the issue of expiration of a limitation period cannot be decided by reference to the statement of claim alone, there may be other

incontrovertible evidence placed before the court that establishes when the cause of action arose and that there could not be any postponement of the running of the period. In such cases, it could be said that it would be an abuse of process either under Rule 14.24(1)(d) or the common law to allow the claim to proceed.

[26] Where, however, the determination of the running of the limitation period may be the subject of conflicting evidence a preliminary application to strike should not generally be allowed; the matter should either proceed to trial or be the subject of an evidentiary pre-trial hearing.

[27] In the current case, the defendants rely on the fact that the events as pleaded by Mr. Brace all took place many years ago and the applicable limitation period would have expired long before the current proceeding was commenced.

Considerations

(a) No reasonable cause of action?

[28] The essence of each of the claims made by Mr. Brace (dissuading or preventing him from getting a university education; improperly influencing his child custody arrangements on marriage breakdown; and disfellowshipping and shunning him) is that they were brought about by the undue influence, pressure and control of the defendants exercised either against him or against those with whom he was dealing. He does not identify the nature of that undue influence, how it was exercised or why it would have had the effect of turning him and those around him effectively into automatons that were sapped of free will. The pleading merely asserts that undue influence was exercised and certain results occurred, without indicating the causal connection between the two. It is as if he is saying that by the inherent nature of the church, such results would necessarily occur. That conclusion is not self-evident and cannot be assumed.

[29] Pleading undue or unreasonable influence - or its derivatives, pressure, control and improper instructions – in itself does not amount to a cause of action. It is not an actionable tort. The fact that undue influence may be relied upon in an equitable proceeding to nullify consent so as to achieve rescission of certain types of transactions does not mean that it can support an independent claim for damages. In **Hughes (Estate) v. Hughes** 2007 ABCA 277, the Alberta Court of Appeal observed:

> [34] The learned chambers judge concluded that there is no independent tort of undue influence recognized in Canadian law … We agree that there is no such cause of action, and the pleadings with respect thereto were properly struck.

[30] To the extent that the pleading that the elders used undue influence and pressure to influence the plaintiff to agree to joint custody of his son instead of some other arrangement could amount, alternatively, to an allegation of some sort of wrong of interference with domestic relations, such a claim also does not involve a recognized cause of action.

[31] In **Frame v. Smith** [1987] 2 S.C.R. 99 the Supreme Court of Canada held that no cause of action in tort exists for wrongful interference with child access rights. In that case, a father whose access to his children was frustrated by the wife moving away without telling him where she was going and otherwise taking steps to prevent the father from seeing the children, sued the mother and her new husband for damages for wrongful interference with his legal relationship with his children. The Court held that historic causes of action which were based on the notion that a father had some sort of proprietary interest in or right to his children had been abolished and the tort of conspiracy could not be extended to cover the situation. Access was regarded as a right of the child, not the parent. Furthermore, legislative schemes dealing with family breakdown and custody and access issues flowing therefrom were intended to create a comprehensive remedial scheme and did not contemplate additional civil action. Wilson, J. in dissent (but not on this point), observed that although the law recognizes a tortious action for wrongful interference with *economic* relationships, it should not be extended to non-economic ones and concluded at para. 27: "There would appear to be no generalized tort of 'wrongful interference with another's relationship'"

[32] In like manner, the Alberta Court of Appeal in **Sturkenboom v. Davies** (1997), 187 A.R. 290 held that no cause of action for interference with a parent/child relationship existed that would justify a proceeding against the other parent, members of the parent's family or friends who assist the parent in frustrating access to children. McFadyen J.A. stated:

> [14] The Supreme Court of Canada in *Frame v. Smith* found that no common law right of access existed. The common law accorded no right of action for interference with the love and companionship of one's child. LaForest J for the majority stated (at 108):
>
> > Despite their deep human and social importance, the interest of parents in the love and companionship of their children and the reciprocal interest of

> children in the love and companionship of their parents were not, at common law, accorded specific protection.

[33] To the extent that the allegations in paragraph 9 of the statement of claim amount to assertions that the Bay Roberts Congregation and the other defendants wrongfully interfered with his relationship with his child, those allegations are not supported by any cause of action known to the law.

[34] I also gave consideration to whether it might be possible, however, to interpret the allegation in paragraph 9 as suggesting something more. Could it be said that Mr. Brace is not merely alleging wrongful interference but that it was the *advice of the Congregation to him* that caused him to agree to a custodial arrangement that that was inappropriate? He alleges that the Bay Roberts Congregation "knowingly and willingly and wrongly *advised* on matters, through its [elders] that extended well into the legal principles of custody ..." That suggests the Congregation was purporting to take on itself the role of legal advisor when they were not qualified to do so. I therefore gave consideration to whether or not this part of the pleading could be regarded as a sufficient assertion of a cause of action on the basis of negligent misrepresentation.

[35] There are five elements to the proof of negligent misrepresentation; (i) a duty of care based on a special relationship; (ii) an untrue inaccurate or misleading representation; (iii) carelessness (i.e., falling below an appropriate standard of care) in the making of the representation; (iv) reasonable reliance on the representation; and (v) detriment to the representee as a result of the reliance: **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87, per Iacobucci J. at para. 33. Each of these elements must have a pleaded factual substratum in the statement of claim.

[36] The statement of claim does not, however, say what advice was given; whether the advice given was factually or legally incorrect; whether it was represented to Mr. Brace that the elders were qualified to give legal advice and Mr. Brace believed them; in what manner Mr. Brace may have relied on any advice; how acting on it may have been to his detriment; and what losses compensable in damages flowed from the advice. These matters are important because the result of the negotiations between Mr. Brace and his wife (a regime of joint custody negotiated with separate legal advice) is certainly an unremarkable result even where it could be said that one side was "at fault" in the sense of having committed adultery. It is the type of resolution that occurs in many custody/access disputes.

[37] Having considered the matter, I have concluded that it is not sufficiently clear that the allegations in paragraph 9 are intended to constitute an assertion of negligent misrepresentation in the giving of legal advice. They could equally amount, for example, simply to assertions that the elders brought (unspecified) church doctrine to bear on the discussions and advised him to make choices and to agree to positions according to what he believed was consistent with church beliefs when, on reflection, he now disagrees with the degree and nature of influence – an influence he deems improper – and should not have been influenced by it. Alternatively, the allegation could amount simply to an assertion that the elders expressed personal (non-legal and non-religious) opinions (in which case there would be no basis for a special relationship, an essential element of the tort of negligent misrepresentation).

[38] Of course all of this is speculative. The fact is that the allegation in the statement of claim is too vague to attribute any specific meaning to it, in terms of its legal characterization. In their demand for particulars, the defendants specifically asked the plaintiff for particulars of the advice that was allegedly given by the elders and he refused to give those particulars.

[39] No facts supporting the elements of a possible cause of action in negligent misrepresentation were alleged nor is there anything in the materials filed by Mr. Brace in response to the defendants' application that could support such an allegation and form the basis for an application to amend the statement of claim to keep it alive for this purpose, nor do the materials give any indication as to what additional particulars could be furnished to enable me to conclude that particulars could fill the gap in the existing pleading to enable a cause of action to be properly pleaded. It is not sufficient to offer further particulars in the abstract; the nature and specifics of the particulars should be identified so the court can determine whether, if ordered, they will cure the existing deficiency.

[40] Finally, with respect to the allegations in paragraph 11 of the statement of claim, causing people to refuse to associate with the plaintiff (disfellowshipping and shunning), such a claim is not actionable in itself. People are legally free to advocate that persons should not associate with others provided the basis is not on a prohibited ground of discrimination that is regarded as socially unacceptable under human rights legislation. Even in such circumstances, however, legally prohibited discrimination does not normally give rise to civil claims outside of the applicable human rights regimes: **Seneca College of Applied Arts and Technology v. Bhadauria**

[1981] 2 S.C. R. 181; **Keays v. Honda Canada Inc.** (2008), 294 D.L.R. (4th) 577 (SCC).

[41] Of course, it might also be possible for a person, in the course of advocating that people refuse to associate with a person, to make false and defamatory statements against that person. In that case, the defamation itself would be actionable. There is nothing in the statement of claim, the reply to the demand for particulars or the materials filed by Mr. Brace, however, that could form a basis for suggesting that a claim was being made because the "influence and instructions" of the Congregation were defamatory. Indeed, there is nothing to indicate the nature and content of any statements or "instructions" that were allegedly given. The defendants sought answers, by way of a demand for particulars, as to how the defendants allegedly put Mr. Brace in a position where his family could no longer associate with him and as to the nature of the instructions they allegedly gave. The plaintiff refused to provide that information.

[42] In these circumstances, one cannot discern any basis for saying that any cause of action exists. The complete absence of a pleaded factual underpinning of the broad claims in the statement of claim, even when it is amplified by the few answers the plaintiff was prepared to give to the defendants' demand for particulars or by the other material filed, means that one is not able to discern the specific intent of the plaintiff, in order to conclude from the broad nature of the claims he is asserting that a skeleton of a claim could be found. Applying the principles in **LeDrew** and **Montreal Trust**, there is no basis for allowing the plaintiff to amend his statement of claim or to supply further particulars. To do so in these circumstances would be for the court to effectively take over the case and refashion it based on the court's assumptions as to what might work if there were facts to support it.

[43] This conclusion that the statement of claim does not disclose a reasonable cause of action and that there is no basis for allowing the claim to be kept alive by amendment or the giving of further particulars effectively ends the matter. However, because other bases for the defendants' position were put forward, I will briefly comment on them as well.

(b) Is the claim justiciable?

[44] The defendants also submitted that the plaintiff's claim is not justiciable because it invites the court to be the arbiter of religious dogma.

[45] Underlying the specifics of the plaintiff's claims is the latent suggestion that the defendants as a religious body espouse doctrines that are destructive in terms of individual human development and of normal human relationships. The plaintiff's claims in effect assert the social inappropriateness of certain religious doctrines affecting the Congregation's approach to education, regulation of family relationships and disfellowshipping and shunning.

[46] To the extent that the religious doctrine of the defendants is sought to be put on trial for the purpose of determining its appropriateness, it will transgress the judicial reluctance to engage in issues that will likely result in the court having to decide upon the correctness of religious dogma. In **Syndicat Northcrest v. Amselem** [2004] 2 S.C.R. 551 Iacobucci J. observed:

> [50] ... the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, the courts should avoid judicially interpreting and thus determining either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

[47] Applying this approach to an application to strike a claim on the basis of failure to plead a cause of action, Macklin J in **MacLachlin v. Capilano Christian Assembly** 2003 ABQB 159 reasoned:

> [26] While the statement of claim technically does not ask for the Court to interfere with or reverse the decision of the Elders, it does seek damages and relief arising from the decisions and actions of the Elders. That is, it seeks to have the Court determine that the actions of the Elders were improper and order relief to flow to the Plaintiff. It is an attempt to hold the defendant responsible for the decisions the Elders are entitled to make and are within their jurisdiction. *These are decisions over which the court would not interfere in the first instance and, therefore, it would be improper for the court to consider their propriety and effect in a claim for damages arising from them.* ... Even if all of the allegations in the statement of claim are true, I am satisfied that the statement of claim discloses no cause of action. [Italics added]

[48] To the extent, therefore, that the plaintiff's complaint is, without more, that the Elders of the Congregation acted or failed to act or made a judgment based on religious doctrine the matter is not justiciable.

[49] Having said that, it does not follow that all actions or decisions of the elders of a religious body are necessarily shielded from consideration by the courts. To the extent that the actions or decisions constitute separate torts or otherwise transgress legal norms that are applicable to all (even if the motivation for doing so is founded on religious doctrine), or allege malice in decision-making or that the religious body failed to follow its own substantive or procedural rules or the rules of natural justice, they could continue to be subject to judicial scrutiny. See, for example, **Hughes (Estate) v. Hughes** holding that properly pleaded deceit and negligent misrepresentation will not necessarily be struck out simply because they emanate from honestly held religious belief. In the instant case, however, I have already concluded that no such independent causes of action exist.

(c) Are the Claims frivolous and vexatious and an abuse of the court's process?

[50] A statement of claim that does not disclose a cause of action is one that has no merit and must therefore be regarded as frivolous. To allow it to proceed within the court system would make it a vexatious proceeding: **Currie,** paras. 14 and 17. That is enough to dispose of the case under this head (although it is not really necessary to make this finding since the same result has been achieved simply by the application of Rule 14.24(1)(a)).

[51] I would add, however, that I do not agree with the suggestion of counsel for the defendants that the part of the statement of claim alleging improperly influencing Mr. Brace to agree to a custody arrangement for his child is "a vexatious attempt to revisit an issue which has already been determined" by the court over 10 years ago when it confirmed, by order, the separation agreement containing custody provisions. I agree that litigation that improperly amounts to a collateral attack on a previous, unappealable court order could be regarded as a vexatious proceeding. However, the plaintiff's claim does not seek to set aside or have declared incorrect the previous court order; his claim appears to accept the immutability of the events that occurred but instead seeks damages from a third party for improperly influencing him to agree to a particular result which he cannot now change. It is not therefore a collateral attack on a previous court order and not vexatious for that reason.

[52] I would also not have been prepared, on the basis of the existing record, to declare that Mr. Brace is a vexatious litigant and is therefore

abusing the court process. The fact that he was party to a large number of proceedings over the past 12 years and sued a large number of individuals, corporations and government agencies, while out of the ordinary enough to raise a quizzical eyebrow, would not *in itself* be sufficient to conclude that he must necessarily be abusing his right of access to the courts. The ability to access the courts is a fundamental right in a democracy under the rule of law. It must not be taken away lightly. Without information as to the nature of the lawsuits, the circumstances under which they were undertaken, their results and the types of rulings that were made on them, it would be difficult to conclude that Mr. Brace's *modus operandi* was to commence actions that were bogus or without apparent substantial merit for the purpose of harassing defendants or otherwise acting for other than legitimate motives.

(d) Are the claims statute-barred?

[53] The defendants also submit, on the assumption, contrary to my conclusions above, that the plaintiff has pleaded justiciable causes of action that are not frivolous or vexatious, that each of the claims are statute-barred.

[54] Section 5 of the *Limitations Act*, S.N. 1995, c. L-16.1 provides in part:

> Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> > (a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;
> >
> > (b) for damages in respect of injury to person or property including economic loss arising from negligent misrepresentation and professional negligence whether based on contract, tort or statutory duty.

[55] I agree with counsel for the defendants that the claim in paragraph 9 of the statement of claim respecting influencing Mr. Brace's decision with respect to custody of his son would be statute-barred. In 1994 and again in 1995 Mr. Brace and his lawyer wrote the Bay Roberts Congregation and the lawyer for Canadian congregations of Jehovah's Witnesses in Canada complaining about, and threatening legal action relating to, the way in which the elders of the Congregation dealt with those issues, in light of the fact that it was Mr. Brace who was accusing his wife of adultery with another

member of the Congregation. It is clear from this correspondence that Mr. Brace was fully aware of the facts necessary to enable him to commence action at that time. No issue of delayed discoverability arises. Inasmuch as the statement of claim, alleging essentially the same matters and using partly identical language as in the claim letters, was filed over twelve years after the issue arose, it would be statute-barred.

[56] I do not agree, however, that the other claims should be struck out on the basis of expiration of a limitation period. While it is true that the influence that allegedly prevented Mr. Brace from going to university and that resulted in him being disfellowshipped occurred long ago – and well outside the applicable limitation period – it is unclear as to whether it could be said that that influence was still exercised and continued to operate up to the present time. Certainly, the shunning following the actual act of disfellowshipping appears to have continued at least up to the date of filing the statement of claim. If that were so, it might be argued that a cause of action likewise continued. It would therefore be inappropriate to decide the limitation issue in respect of these allegations on the basis, alone, of the statement of claim and the material submitted on this application. It would be one of those cases where, in the words in **Rich**, the present application has not properly put before the court "sufficient information to have the statute of limitations argument heard and decided." The facts necessary to decide this issue (assuming the claims were not otherwise struck out) are not fully beyond dispute. If I had not struck out the claim for other reasons, therefore, it would be more appropriate to establish an evidentiary base to deal with the limitation issue, (in respect of the allegations in paragraphs 6, 7 and 11) rather than deal with it on a pre-trial application dealing with the sufficiency of the pleadings.

Summary and Disposition

[57] The plaintiff's statement of claim, as augmented by the plaintiff's answers to the defendants' demand for particulars, discloses no reasonable cause of action. The pleading is so deficient that it cannot be cured by amendment or the ordering of further particulars. It must therefore be struck out in its entirety.

[58] In light of this disposition, it is not necessary to deal with the defendants' alternative requests for an order for further and better particulars

and for an order delaying the obligation to file defences until the particulars are supplied.

[59] The defendants are jointly entitled to party and party costs up to and including this application, as if there were one defendant, and with only one counsel fee.

J. DEREK GREEN
Chief Justice