

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gaucher v. British Columbia Institute of
Technology*,
2021 BCSC 289

Date: 20210224
Docket: S1812598
Registry: Vancouver

Between:

Carrie Gaucher

Plaintiff

And

British Columbia Institute of Technology

Defendant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

I. Sorenson

Counsel for the Defendant:

L. Tsang

Place and Dates of Hearing:

Vancouver, B.C.
January 21 – 22, 2021

Place and Date of Judgment:

Vancouver, B.C.
February 24, 2021

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Introduction

[1] This is an application by the Defendant, the British Columbia Institute of Technology (“BCIT”), seeking to strike the notice of civil claim filed by the plaintiff, Ms. Gaucher. Ms. Gaucher alleges in her notice of civil claim, both originally and as amended on January 22, 2020, that BCIT breached an educational contract with her and engaged in negligent conduct. She is seeking damages in contract and tort for lost opportunity and loss of income. She is also seeking damages for mental suffering.

[2] BCIT argues the claim should be struck pursuant to Rule 9-5(1) of the BC *Supreme Court Civil Rules* [*Rules*] for disclosing no reasonable cause of action and for being unnecessary, frivolous, vexatious, and an abuse of process. In the alternative, BCIT submits that the claim should be summarily dismissed pursuant to Rule 9-6 because the plaintiff has not alleged facts or evidence to support her claim. BCIT also seeks a ruling that the notice of civil claim is outside of the two year time limitation to commence a claim for breach of contract or tort.

[3] For the reasons that follow, I have determined the notice of civil claim should be struck pursuant to Rule 9-5(1) and Ms. Gaucher should not be provided leave to file a further amended pleading. Due to this conclusion, I need not consider BCIT’s other arguments and the claim is dismissed.

Background

[4] BCIT is a post-secondary institution under the *College and Institute Act*, R.S.B.C. 1996, c. 52 (“*Act*”). Ms. Gaucher was a student at BCIT between 2016 and 2017.

[5] BCIT has a bicameral governance structure, which consists of a Board of Governors and an Education Council. The powers, role, and duties of these bodies are set out in sections 19, 23, and 24 of the *Act*. They include the powers and duties to manage the educational and training programs that BCIT offers, including setting

policies and procedures for complaints by students and establishing a mechanism for appeals.

[6] In January 2016 Ms. Gaucher was enrolled in BCIT's Advanced Certificate of Critical Care Nursing Program (the "Program").

[7] As Ms. Gaucher had already completed an Advanced Certificate in Emergency Nursing, she was only required to complete four courses to obtain the certificate:

- a) NSCC 7320 - Critical Care Nursing Theory 3;
- b) NSCC 7420 - Clinical Care Nursing Clinical 1;
- c) NSCC 7520 - Critical Care Nursing Theory 4; and
- d) NSCC 7620 - Clinical Care Nursing Clinical 2.

[8] In February 2016, Ms. Gaucher enrolled in NSCC 7420, Clinical Care Nursing Clinical 1 ("course 7420"). Ms. Gaucher's instructors in this clinical course were Debbie Ellis-Tadros, a Fraser Health employee who was seconded from the Royal Columbian Hospital Intensive Care Unit for this clinical placement, and Cecilia Baylon, a BCIT faculty member who was assigned as Faculty Support for the clinical placement.

[9] Between February 29 and March 2, 2016, Ms. Ellis-Tadros and Ms. Baylon met with Ms. Gaucher to provide her with her midterm evaluation. Based on the academic judgment of Ms. Ellis-Tadros and Ms. Baylon, they determined that there were major areas of deficiency in Ms. Gaucher's performance in course 7420. Ms. Gaucher was provided with a student performance evaluation, also known as a learning contract, from the two instructors. The evaluation set out the deficiencies in performance and learning outcomes that Ms. Gaucher was required to meet to achieve a grade of satisfactory in course 7420.

[10] On March 9, 2016, Ms. Ellis-Tadros conducted a final evaluation of Ms. Gaucher's performance in the course 7420. Based on Ms. Ellis-Tadros' academic judgment, Ms. Gaucher failed to meet the learning outcomes required to achieve a satisfactory grade. As a result, Ms. Gaucher received a grade of unsatisfactory in course 7420.

Unsatisfactory Grade Complaints

[11] On March 10, 2016, Ms. Gaucher advised Andrea Ford, the Head of the Nursing Program at BCIT, she intended to appeal the unsatisfactory grade and file a formal complaint. The complaint would include unjustified and unfair treatment by her instructors during the process.

[12] There are several layers of complaints/appeals for academic decisions made within BCIT. Policy 5104, Academic Integrity and Appeals, provides for both formal and informal reviews of a student's academic standing. Procedure 5104-PR1, Academic Decision Review Process, sets out the process to challenge an unsatisfactory grade. Again, this can be formal or informal.

[13] If a student disagrees with the decision arising from the Academic Decision Review Process flowing from Procedure 5104-PR1, the next step is to have that decision reviewed by the Decision Review Board pursuant to Procedure 5104-PR2. If so, the Review Board would conduct a hearing. If the student disagrees with the Decision Review Board's decision, their final recourse is to have that decision reviewed by the Institutional Appeal Tribunal pursuant to Procedure 5104-PR3. In such cases, the Vice-President Education would appoint a tribunal from members of the Standing Committee.

[14] On March 17, 2016, Ms. Gaucher provided Cheryl Isaak, the Senior Associate Dean of Nursing and Specialty Nursing at BCIT, with an appeal document outlining her disagreement with her unsatisfactory grade in course 7420. The document alleged that Ms. Gaucher had a negative experience in the course and experienced harassing, bullying, inappropriate, intimidating, and humiliating treatment by her instructors. Ms. Gaucher requested, *inter alia*, that:

- BCIT overturn her unsatisfactory grade;
- BCIT review its policies regarding alleged bullying and harassment in the educational setting; and
- BCIT address issues with the Program.

[15] On March 18, 2016, Ms. Isaak met with Ms. Gaucher and a student advocate from the BCIT Student Association to discuss the various issues raised by Ms. Gaucher in her appeal document. They discussed BCIT policies and procedures that were available to Ms. Gaucher. They specifically discussed what policies and procedures to follow if she wished to proceed with a formal request for reassessment of her unsatisfactory grade or with respect to her complaint regarding the alleged harassing treatment by her instructors in course 7420.

[16] On March 23, 2016, Ms. Isaak advised Ms. Gaucher that she had reviewed the matter and she agreed with the academic judgments made by the instructors that there were significant gaps in Ms. Gaucher's performance. Ms. Gaucher had not met the learning outcomes in key practice areas required to obtain a satisfactory grade in course 7420. However, in an effort to resolve all of the issues raised by Ms. Gaucher, BCIT offered Ms. Gaucher two options to address the matter informally:

- 1) Ms. Gaucher would be given another opportunity to complete the learning outcomes required for course 7420 by attending an orientation and minimum of three shifts in the Surrey Memorial Hospital with an experienced instructor. The focus of this option would be for Ms. Gaucher to apply theory to practice, and to focus on meeting the learning outcomes required to successfully complete course 7420.
- 2) Ms. Gaucher could elect to receive a grade of provisional pass in course 7420 which could later be converted to a satisfactory grade if Ms. Gaucher successfully completed the second clinical course, NSCC 7620 ("course 7620"). If a satisfactory grade was not achieved by Ms. Gaucher in course

7620, then the Provisional Pass in course 7420 would revert back to the grade of unsatisfactory.

[17] Ms. Gaucher accepted BCIT's offer and advised BCIT on March 29, 2016 that she wished to proceed with the second option rather than filing a formal marks reassessment pursuant to Policy 5104 and Procedure 5104-PRI.

[18] Ms. Gaucher took steps to implement the second option. She enrolled and successfully completed NSCC 7520, Clinical Care Nursing Theory 4 ("course 7520"), in the summer of 2016. Between October and November 2016, Ms. Gaucher was provided with available dates to complete the clinical hours required for course 7620.

[19] On December 7, 2016, Ms. Gaucher wrote to Ms. Isaak and acknowledged that while she was provided with the two options to resolve the issues she had previously raised, she continued to have an issue with the way the process had been handled by BCIT. She also raised some concerns regarding delays. Ms. Gaucher demanded a response from BCIT by December 14, 2016.

[20] On December 8, 2016, Ms. Isaak reminded Ms. Gaucher that she had elected to proceed with the second option and had accepted a provisional pass in course 7420 while she completed courses 7520 and 7620. Ms. Isaak again provided Ms. Gaucher with the available dates to complete the clinical hours required for course 7620. Ms. Gaucher was advised to let Ms. Isaak know which dates worked by January 16, 2017.

[21] Rather than provide available dates by January 16, 2017, Ms. Gaucher requested, *inter alia*, that the time limits to proceed with a formal appeal of the unsatisfactory Grade under Policy 5104 and Procedure 5104-PR1 be extended.

[22] On February 23, 2017, a meeting was held with representatives of BCIT, Ms. Gaucher, two student advocates representing Ms. Gaucher, and Ms. Gaucher's family friend.

[23] At this meeting several options were explored. First, Ms. Gaucher could be given another opportunity to successfully complete course 7420 by attending an orientation and a minimum of three shifts in a different setting, with a different clinical instructor. This was intended to show that Ms. Gaucher could consistently meet the learning outcomes required for successful completion of course 7420. Ms. Gaucher advised that she was not interested in this option.

[24] Second, Ms. Gaucher would be given an opportunity to complete course 7620, as she was previously offered. If she successfully completed course 7620, the provisional pass in course 7420 would be changed to satisfactory. Ms. Gaucher advised that she was not interested in having to complete the second clinical course, course 7620. This is set out in Ms. Isaak's first Affidavit dated February 7, 2020 and filed in this Court on February 11, 2020. Ms. Gaucher provided no responsive affidavit.

[25] Third, Ms. Gaucher's friend asked whether Ms. Gaucher could obtain a combined certificate, an Emergency Nursing Speciality (Combined Emergency /Critical Care Option) instead of the Advanced Certificate. Ms. Gaucher was immediately interested. There was a subsequent discussion of how Ms. Gaucher could complete a Prior Learning Assessment and Recognition ("PLAR") assessment. This would allow Ms. Gaucher, through written work, to establish she met the course requirements.

[26] To obtain the Combined Certificate, Ms. Gaucher would not need to complete course 7620. The participants spent some time considering how Ms. Gaucher could obtain the certificate without course 7620. She would still need to complete the first clinical course 7420. Ms. Gaucher believed she could successfully fulfill the requirements for course 7420 using the PLAR assessment.

[27] As a result of the meeting, the following was agreed to between BCIT and Ms. Gaucher:

- a) The requirement for Ms. Gaucher to submit the Formal Request for Reassessment Application Form, the payment of the \$26.00 reassessment fee, and the time limitation to bring a Formal Request for Reassessment for her unsatisfactory grade in course 7420 would be waived by BCIT.
- b) If the Formal Marks Reassessment did not result in a satisfactory grade; an analysis would be conducted to determine whether a PLAR assessment could be used to evaluate Ms. Gaucher's achievement of the learning outcomes required in course 7420.
- c) If the PLAR assessment was found to be suitable, Ms. Gaucher would be entitled to submit a PLAR package with supporting evidence by a certain date. It would be reviewed by two faculty members to determine whether the relevant learning outcomes for course 7420 had been met.
- d) If so, the provisional pass in 7420 would be converted to a satisfied learning grade. This in turn would then enable Ms. Gaucher to obtain the Combined Certificate (but not the Advanced Certificate).

[28] It was made clear to Ms. Gaucher that this Formal Request for Reassessment would be the final point of appeal in relation to Ms. Gaucher's unsatisfactory grade in course 7420.

[29] Ms. Gaucher was satisfied with the process and it proceeded. The following steps were taken:

- a) A Formal Marks Reassessment was conducted by BCIT.
- b) The Formal Marks Reassessment did not result in a change to Ms. Gaucher's unsatisfactory grade in course 7420.
- c) As a result, a PLAR assessment was conducted. It was determined that Ms. Gaucher could proceed by submitting a PLAR package to support achievement of the learning outcomes for course 7420.

[30] On July 5, 2017, BCIT advised Ms. Gaucher that the PLAR process was complete. BCIT had determined that she had successfully met the PLAR criteria for reassessment. The provisional pass in course 7420 was therefore converted to a satisfied learning grade.

[31] On July 24, 2017, Ms. Gaucher submitted an application to BCIT to obtain the Combined Certificate. The application was granted and Ms. Gaucher received the Certificate.

Harassment Complaints

[32] On March 17, 2016, Ms. Gaucher filed a complaint pursuant to BCIT Policy 7507, Harassment and Discrimination, against her instructor Ms. Baylon. On February 23, 2017, Ms. Gaucher made a similar complaint against her instructor Ms. Ellis-Tadros alleging harassment.

[33] Investigations were conducted into both harassment complaints. Both concluded that there was no harassment within the meaning of the Policy. The evidence did not support the various allegations Ms. Gaucher made against her instructors.

[34] Ms. Gaucher, through her student advocate representative, appealed the Baylon harassment decision to the Board of Inquiry. On April 16, 2018, at the hearing, Ms. Gaucher withdrew her appeal.

[35] No steps were taken by Ms. Gaucher to appeal the Ellis-Tadros harassment decision to the Board of Inquiry.

Procedural History

[36] On November 23, 2018, Ms. Gaucher filed a notice of civil claim against BCIT alleging, *inter alia*, breach of contract and negligence.

[37] On January 14, 2019, BCIT filed a response to civil claim. It stated that the notice of civil claim did not allege the material facts necessary to plead a claim in contract or tort, or any other cause of action known to law.

[38] On August 2, 2019, BCIT filed and served a notice of application seeking to have Ms. Gaucher's claim dismissed pursuant to Rule 9-5(1), or alternatively summarily dismissed pursuant to Rule 9-6.

[39] On November 7, 2019, counsel for BCIT advised counsel for Ms. Gaucher that if Ms. Gaucher intended to take steps to amend her claim to plead a proper cause of action, Ms. Gaucher was to provide the defendant with a draft of the amended pleading by no later than December 2, 2019. Ms. Gaucher took no steps to deliver an amended notice of civil claim to counsel for BCIT.

[40] On January 13, 2020, the parties appeared before Justice Saunders to address BCIT's application. Justice Saunders adjourned the application to permit BCIT to file further affidavit evidence regarding its policies and procedures addressing the various issues raised by Ms. Gaucher. He thought the policies and procedures would be helpful for the chambers judge.

[41] Justice Saunders also told counsel for Ms. Gaucher that the notice of civil claim, as it currently stood, was deficient in that it failed to plead material facts to support any causes of action, whether in contract or in negligence. He further stated that a proper pleading would assist the justice that would be hearing the application. Justice Saunders made orders and directions. One of the directions was Ms. Gaucher was to consider amending her notice of civil claim.

[42] On January 22, 2020, Ms. Gaucher filed and served BCIT with an amended notice of civil claim, which is the subject of this application.

[43] On February 12, 2020, BCIT filed and served Ms. Gaucher with its amended application. Two additional affidavits were filed in support of the amended application.

[44] On December 11, 2020, counsel for Ms. Gaucher sent a proposed draft second amended notice of civil claim to counsel for BCIT.

[45] On January 5, 2021, counsel for BCIT advised counsel for Ms. Gaucher that the draft second amended notice of civil claim still did not disclose a reasonable claim and that the pith and substance of the draft claims continued to be academic in nature. She advised counsel for Ms. Gaucher that academic matters are not within the jurisdiction of the court, except through the judicial review process. BCIT did not consent to Ms. Gaucher filing the second amended notice of civil claim, and it remains unfiled.

Positions of the Parties

[46] BCIT submits that Ms. Gaucher's amended notice of civil claim ought to be struck pursuant to Rule 9-5(1) on the basis that it fails to plead a reasonable cause of action and for being unnecessary, frivolous, vexatious, and an abuse of process. In the alternative, BCIT submits that Ms. Gaucher's claim should be summarily dismissed pursuant to Rule 9-6 as there is no evidence to support the claims, there is no genuine issue for trial, and Ms. Gaucher is bound to lose.

[47] BCIT contends that the pith and substance of Ms. Gaucher's claim is in relation to academic judgments and decisions that were made by Ms. Gaucher's instructors and BCIT regarding grades and/or in relation to BCIT's oversight, administration, organization, and implementation of its programs and internal policies and procedures. Either way, this court has no jurisdiction because these are academic matters. The only way in which this court has jurisdiction is where such matters are judicially reviewed, which is an avenue Ms. Gaucher has not pursued.

[48] BCIT argues that despite repeated opportunities, Ms. Gaucher failed to cure the defects in her original notice of civil claim. BCIT asserts she has not pleaded the material facts necessary to support her pleaded causes of action.

[49] Ms. Gaucher argues that Rule 9-5(1) is a blunt tool that should be used sparingly. It should not be used when discoveries have not yet taken place.

[50] Ms. Gaucher contends this dispute arises from the violation or disregard of BCIT's course descriptions and various policies which collectively constitute the

express terms of a binding contract between the parties. Ms. Gaucher relied upon these as representations when applying to the Program.

[51] Ms. Gaucher alleges there is an “educational contract” between BCIT and her which includes an implied term: for the consideration of tuition, BCIT will provide the student with a reasonable chance of successfully completing their course of studies. She argues BCIT breached the educational contract through its conduct in reviewing her complaints and being unwilling to act in accordance with its policies and procedures.

[52] The plaintiff further argues that BCIT failed to honour and implement Ms. Gaucher's "completion plan" as agreed to in March 2016. Instead, BCIT unilaterally repudiated its 2016 promise on February 23, 2017. This forced Ms. Gaucher to complete a meaningless combined certificate rather than the advanced certificate for which she applied. As a result, BCIT breached its educational contract with Ms. Gaucher.

[53] Ms. Gaucher says because this dispute is not about grades, but is about breaches of contract and tort, it is not an academic matter. Ms. Gaucher points out that she is not asking me to review an educational decision or a grade or appeal decision from the Appeal Tribunal within BCIT. Ms. Gaucher argues she has pleaded a reasonable cause of action and the matter should not be dismissed at this early stage. In the alternative, the appropriate order is to provide Ms. Gaucher with leave to file an amended pleading.

Analysis

Striking the Notice of Civil Claim Pursuant to Rule 9-5(1)

[54] Rule 9-5(1), striking pleadings, provides:

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

- (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[55] The test under Rule 9-5(1) is whether it is "plain and obvious" that the action is certain to fail due to a radical defect in the pleading: *Johnson v. Smith*, 2018 BCSC 836 at para. 12.

[56] The "plain and obvious" test applies to all branches of Rule 9-5(1) but different evidentiary rules apply. Evidence is inadmissible on an application under Rule 9-5(1)(a) to strike on the basis that the pleading discloses no reasonable claim: Rule 9-5(2). Under Rule 9-5(1)(a), the matter proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Young v. Borzoni et al*, 2007 BCCA 16 at paras. 30–32.

[57] Evidence is admissible on applications under Rules 9-5(1)(b) to (d) for the purpose of showing whether it is "plain and obvious" that the claim ought to be struck as unnecessary, scandalous, frivolous, vexatious, embarrassing, or as an abuse of process: *Johnson* at paras. 12, 15.

[58] An unnecessary, scandalous, frivolous, or vexatious pleading, as contemplated by Rule 9-5(1)(b), is one that does not go to establishing the plaintiff's cause of action, does not advance any claim known in law, where it is obvious that an action cannot succeed, and where it would serve no useful purpose and would be a waste of the court's time and public resources: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 65, citing *Willow v. Chong*, 2013 BCSC 1083 at para. 20.

[59] In *Willson v. British Columbia*, 2012 BCSC 1256, this Court held that the subsections of Rule 9-5(1) can be read together to dismiss a claim:

[17] I do not consider R. 9-5(1), subsections (a) to (d), to be entirely discrete grounds on which to dismiss a claim. They are capable of being read

together. It can be seen, for example, that a pleading that discloses no reasonable cause of action contrary to R. 9-5(1)(a) could also be unnecessary, or frivolous or vexatious within the meaning of R. 9-5(1)(b).

[60] The doctrine of abuse of process, as engaged by Rule 9-1(5)(d), is flexible. It engages the court's inherent jurisdiction to prevent the misuse of its procedures. Claims that violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice are to be struck as an abuse of process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37; *Roeder v. Lang Michener Lawrence & Shaw*, 2007 BCCA 152 at para. 22.

[61] The focus of the abuse of process doctrine is the integrity of the administration of justice, not the interests of any particular party: *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 [*M.K. (BCCA)*] at para. 36. It should not be used to hinder the development of the law: *Chingee v. British Columbia*, 2017 BCCA 250 at para. 52.

[62] An application to strike a notice of civil claim due to an abuse of process is a question of law regarding the legal legitimacy of the pleadings. The primary purpose of a notice of civil claim is to clearly and concisely set out the issues of fact and law to be determined in an action. A plaintiff must define each cause of action and set out a concise statement of material facts supporting each cause of action, the relief claimed, and the legal basis for the relief sought: *Sahyoun v. Ho*, 2015 BCSC 392 at para. 73.

Academic Matters/Educational Contract

Legal Principles

[63] As set out in *Shafique v. University of Waterloo*, 2019 ONSC 2418:

[35] In an action for breach of contract a plaintiff must plead with sufficient clarity all the required elements of such a claim, namely,

- (a) the particulars of the alleged contract, including its terms;
- (b) the nature of the alleged breach;
- (c) causation; and
- (d) the damages that are alleged to have flowed from the breach.

[64] The Act grants educational institutions significant powers. The powers of the Board are set out in s. 19:

19 (1) Subject to this Act, a board may do the following:

- (a) make bylaws for the orderly conduct of its affairs;
- (b) manage, administer and control the property, revenue, expenditures, business and affairs of the institution;
-
- (c) establish committees it considers necessary and advisable;
- (d) determine courses or programs to be offered or cancelled at the institution;
- (e) manage and promote the educational or training programs offered at the institution, subject to sections 24 and 25;
- (f) determine all questions relating to the qualifications for admission, subject to section 24;
- (g) provide for the granting of diplomas, certificates and associate degrees and, subject to designation under section 5.1, baccalaureate degrees, applied baccalaureate degrees, applied masters degrees and honorary degrees to be awarded by the institution;
- (h) establish and administer trust funds for scholarships, fellowships, exhibitions, bursaries, prizes and student loans out of money donated or made available for that purpose;
- (h.1) impose and collect penalties, including fines, in relation to a contravention of a bylaw or other instrument made in the exercise of a power under this section;
- (h.2) provide for the hearing and determination of disputes arising in relation to
 - (i) the contravention of a bylaw or other instrument made in the exercise of a power under this section, and
 - (ii) the imposition of a penalty under paragraph (h.1);
- (i) perform other functions consistent with this Act that the board considers advisable for the proper administration and advancement of the institution.

....

[65] The Education Council advises the Board on the development of educational policy. This includes the “evaluation of programs and educational services”, “adjudication procedure for appealable matters of student discipline”, and “criteria for awarding certificates, diplomas and degrees”: s. 23. The powers of the Education Council are set out in s. 24:

24 (1) An education council must make bylaws for the conduct of the business of the education council including bylaws specifying the duties of members of the education council in conflict of interest situations.

(2) Subject to the policy and directives established under section 2 (1) (a), the education council has the power and duty to do all of the following:

- (a) set policies concerning examinations and evaluation of student performance;
- (b) set policies concerning student withdrawal from courses, programs and the institution;
- (c) set criteria for academic standing, academic standards and the grading system;
- (d) set criteria for awards recognizing academic excellence;
- (e) set policies and procedures for appeals by students on academic matters and establish a final appeal tribunal for these appeals;
- (f) set curriculum content for courses leading to certificates, diplomas or degrees.

[66] The powers of these two bodies include setting policies concerning evaluation of student performance and setting criteria for academic standing, academic standards, and the grading system. Pursuant to the *Act*, the Board and Council set policies and procedures for complaints by students and establish a mechanism for appeals. The Board and Council also set curriculum content for courses leading to certificates, diplomas, and degrees.

[67] Based on this legislative scheme, courts have consistently held that they do not have jurisdiction over matters where the essential character of the dispute is of an academic nature. In *Williams v. Simon Fraser University*, 2018 BCSC 1787, aff'd 2019 BCCA 41, Justice Myers quotes the Alberta Court of Queen's Bench in finding that the only remedy available to the plaintiff before him was judicial review:

[10] The gravamen of all these complaints is the manner in which the University evaluated the plaintiff and her ultimate dismissal from the programme. ... In *Cruickshank v. University of Lethbridge*, 2010 ABQB 186, the court held that these matters are academic, and as such, there is no cause of action in relation to them:

12 A matter is fundamentally academic if it focuses on the academic requirements, rules and regulations that the University applies to students. The issues in this case meet this criteria as they relate to the interpretation of an academic

offence, the application of the discipline process and the penalties imposed for academic misconduct. Such matters do not fall within the jurisdiction of this Court, except when they are reviewable on an application for judicial review. A civil suit for damages is not an available remedy.

Other courts have said the same: See *Dawson v. University of Toronto*, [2007] O.J. No. 591 (S.C.); aff'd 2007 ONCA 875, *Warraich v. University of Manitoba*, 2003 MBCA 58; *Fufa v. University of Alberta*, 2012 ABQB 594.

[68] The *Williams* case addressed similar matters to those before me. *Williams* stands for the principle that matters arising from the manner of evaluation of a student, a student's dismissal from an educational institution, the conduct of a student's instructors during a course, academic requirements set by the institution, and rules and regulations that educational institutions apply to their students are all academic matters which are not to be pursued through a civil suit for damages.

[69] These principles are also adopted in *Abara, et al v. Georgie, et al*, 2019 ONSC 2654 at paras. 18, 29, and *Shafique* at paras. 42–43. The Ontario Court of Appeal specifically includes within the academic purview matters arising from the educational institution's oversight, organization, implementation, and administration of its programs, policies, and practices, and internal academic decision-making: *King v. Ryerson University*, 2015 ONCA 648 at paras. 6–7.

[70] In *Albu v. The University of British Columbia*, 2019 BCCA 222, the Court of Appeal confirmed that this Court lacks jurisdiction to adjudicate academic matters. This includes matters arising from the quality and nature of supervision to a student, the evaluation of a student, assessment of the quality of a student's work, and the organization, investigation, implementation, and compliance with the educational institutions' programs, policies, and procedures.

Analysis

[71] Ms. Gaucher amended her notice of civil claim after appearing before Saunders J. The amended notice of civil claim adds a few more facts in Part 3, the Legal Basis, and a few more details about BCIT's alleged repudiation of the agreement made in the spring of 2017.

[72] Ms. Gaucher relies on BCIT's alleged violation and disregard of its obligations as set out in course descriptions and various policies to support her claim in contract. Ms. Gaucher alleges that BCIT's conduct in reviewing her complaint and its unwillingness to act in accordance with its obligations or policies and procedures constitutes a breach of an implied term in the educational contract to ensure its students succeed.

[73] Ms. Gaucher directed my attention to *Edgar v. The British Columbia Institute of Technology*, 2015 BCSC 710, asserting it is similar to the case at bar. I first note that *Edgar* was decided prior to the Court of Appeal's decisions in *Albu* and *Williams* and does not refer to the line of cases addressing academic matters. Further, the conclusion reached in *Edgar* was not that the plaintiff had a claim in contract against the educational institution, but only that it was "not manifestly clear that there [was] no triable issue" with respect to the defendant's Rule 9-6 application. As well, here BCIT asserts that Ms. Gaucher has not pleaded sufficient material facts to establish her claim in contract. That did not appear to be an issue in *Edgar* and it is distinguishable upon that basis.

[74] To support her claim in contract, Ms. Gaucher refers in Part 3, Legal Basis, to the "essential character" of the contract claim and to BCIT's course description and policies. This includes policies which Ms. Gaucher alleges form part of the express contract terms. However, there are no material facts pleaded regarding which specific contractual terms she relies upon and how they were breached by BCIT. Her allegations are vague, at best.

[75] Despite her assertions, the notice of civil claim concerns BCIT's oversight, administration, implementation, and internal policies and procedures. Although framed as contract and tort claims, it is plain and obvious that Ms. Gaucher's claims are in relation to matters that are academic in nature. They do not form the basis of a cause of action: *Williams*; *Albu*. Her claims are non-justiciable in the way they have been brought before this Court.

[76] Before me, counsel for Ms. Gaucher conceded that Ms. Gaucher's claim is novel. He argued that Rule 9-5 should not be used to dismiss such claims: *Chingee* at para. 52. However, Ms. Gaucher has not pleaded any facts that would support a novel claim. Her pleading raises academic matters which have been addressed many times by courts.

[77] Lastly, Ms. Gaucher argues that notwithstanding BCIT is an academic institution, the *Act* does not remove the inherent jurisdiction of this Court to hear her civil claim. She states at paras. 15 and 29 of her written submissions:

[I]t is incomprehensible to believe that by passing the *Act* the Legislative intent was to confer BCIT with the authority to act as defendant and judge when accused of breaching its promises and contractual or other obligations to its students. ... While the *Act* plays a role in the relationship at issue and grants BCIT authority over its internal "academic" decisions and guidelines for various grading systems, etc., the *Act* should not be used to lower the standards when considering parties' contractual obligations, which have been relied on, or to affect the principles of contract and how that may relate to the parties' promises, and covenants in this action.

[78] She further states at para. 84 of her submissions:

The case law relied on by BCIT in this Application is distinguished because the cases do not say, the Legislative intent was to unseat the Court's jurisdictions [sic] on hearing a question of educational contracts and the obligations and liabilities attracted to such relationships.

[79] Ms. Gaucher appears to be challenging the legislation itself. This line of attack is not included in her amended notice of civil claim, either by way of supporting facts or in the legal basis.

[80] I find that Ms. Gaucher's claim, as it relates to breach of contract, ought to be struck pursuant to Rule 9-5(1)(a), (b) and (d) on the basis that it fails to plead a reasonable cause of action and for being unnecessary, frivolous, vexatious, and an abuse of process.

Negligence and Mental Suffering

Legal Principles

[81] In an action for negligence, a plaintiff must plead with sufficient clarity all of the required elements to support the claim. As set out in *Shafique* at para. 33:

- 1) the defendant owed the plaintiff a duty of care;
- 2) the defendant's behaviour breached the standard of care;
- 3) the plaintiff sustained damage; and
- 4) the damage was caused by the defendant's breach.

[82] Specifically, in the context of a claim in tort by a student against an academic institution, the plaintiff must also plead facts which take the behaviour of the defendant beyond the discretionary scope granted to academic institutions by the applicable legislation: *Shafique* at para. 34.

Analysis

[83] Ms. Gaucher alleges negligence by BCIT and is seeking damages for mental distress. In order to establish a cause of action for the tort of infliction of mental or emotional distress, Ms. Gaucher must plead the following material facts: the acts by the defendant that were extreme, flagrant, or outrageous; the acts were calculated to produce harm to Ms. Gaucher; and the acts caused harm to Ms. Gaucher: *Shafique* at para. 36.

[84] Ms. Gaucher has failed to plead the necessary material facts to support such a claim. In the amended notice of civil claim, and in the draft second amended notice of civil claim, Ms. Gaucher failed to plead any facts which, if proved, would establish that the actions of BCIT, or the instructors in question, engaged in any behaviour that would meet the test for mental distress.

[85] Ms. Gaucher does assert in her amended notice of civil claim that her interactions with Ms. Ellis-Tadros and Ms. Baylon became increasingly negative and were publicly embarrassing to her. She pleads that she was "increasingly humiliated, intimidated, and demoralized." Ms. Gaucher provides no factual examples to meet

the threshold requirement that the actions of her instructors, or BCIT, were extreme, flagrant, or outrageous. Ms. Gaucher pleads no facts relating to alleged emotional or mental distress since engaging in BCIT's formal appeal/reassessment processes. She failed to plead any material facts to support this cause of action.

[86] If Ms. Gaucher is simply alleging a cause of action for harassment, such a tort is not recognized in Canada: *Stein v. Waddell*, 2020 BCSC 253; *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205.

[87] Ms. Gaucher relies upon *Young v. Bella*, 2006 SCC 3. *Young* addresses a situation where a student was, without investigation, reported to Child Protection Services ("CPS") for child sexual abuse. Once CPS investigated, it became immediately clear the allegations had no merit. The Supreme Court of Canada held that universities are "required to take the necessary care to get their facts straight before taking a potential career-ending action in relation to a student": at para. 34. By not establishing reasonable cause before reporting the student, the university could not avail itself of protection of similar legislation to the *Act* before me. The conduct was outside the university's broad discretion concerning academic matters. Further, the facts satisfied the elements of the tort of negligence.

[88] Ms. Gaucher cannot say BCIT did not take the time to investigate her complaints. BCIT held multiple meetings with her to attempt to resolve the grading complaints and conducted investigations into her complaints of harassment. As a result, *Young* is of no assistance to Ms. Gaucher.

[89] Ms. Gaucher has failed to plead facts that establish her circumstances fall outside the discretionary scope granted to academic institutions and instructors by the *Act*. Just as her claims in contract, her negligence pleadings address academic matters for which this Court does not have jurisdiction to adjudicate disputes.

Collateral Attack

Legal Principles

[90] A claim may be struck as being an "abuse of process" where it is a collateral attack on an administrative decision, or where it is an attempt to re-litigate issues that have already been determined: *M.K. (BCCA)*.

[91] In the lower court decision in *M.K.*, the chambers judge dismissed the notice of civil claim before him on the ground that it was, *inter alia*, a collateral attack on appellate decisions in previous proceedings between the parties: *M.K. v. British Columbia (Attorney General)*, 2019 BCSC 166 at para. 39. He noted that the doctrine of collateral attack can be invoked if a party is attempting to challenge the validity of a binding order in the wrong forum, instead of using direct attack procedures such as an appeal or judicial review: at para. 30.

Analysis

[92] Ms. Gaucher's issues were addressed by BCIT in the complaints filed by Ms. Gaucher pursuant to Policy 7507 and Procedure 7507-PR1. In the harassment investigation process, the decision makers found that there was no evidence to support any of Ms. Gaucher's allegations. Ms. Gaucher did not appeal the decision with respect to Ms. Ellis-Tadros through BCIT's internal appeals process and procedures. Ms. Gaucher did appeal the decision relating to Ms. Baylon, but withdrew the appeal before it was heard.

[93] Ms. Gaucher's concerns regarding her grades were addressed through a formal request of reassessment. Ms. Gaucher agreed to an informal process and later to a formal process and their outcomes. She ultimately received a combined certificate from BCIT.

[94] It is an abuse of process to permit Ms. Gaucher to collaterally attack decisions and agreements that have previously been made in relation to Ms. Gaucher's allegations. If dissatisfied, Ms. Gaucher's remedy was to appeal

internally. If she continued to be dissatisfied, after exhausting the internal avenues, she could have filed a petition for judicial review.

Amending the Pleadings

[95] Ms. Gaucher was expressly told that her pleadings were deficient. According to BCIT, Ms. Gaucher's draft second amended notice of civil claim fails to cure the defects. Like the amended notice of civil claim, it fails to plead the material facts necessary to support a cause of action for breach of contract.

[96] Ms. Gaucher continues to advance the same claims and issues, in the same way, in her amended pleadings. To the extent that there is another draft amended pleading, I was not directly taken to it and counsel for Ms. Gaucher did not provide any submissions on how it would address the various deficiencies outlined above.

[97] I am not persuaded that a further amended pleading can overcome the serious deficiencies in Ms. Gaucher's previous two pleadings: *King* at para. 12. The deficiencies arise not only from a lack of pleading of material facts, but also from the general nature of her claim being academic.

[98] I do not believe it is premature to strike the claim. I decline to grant leave for Ms. Gaucher to further amend her notice of civil claim.

Summary

[99] The matters raised by Ms. Gaucher in her amended notice of civil claim are in pith and substance academic in nature. As concluded recently by this Court in *Williams* and *Albu*, both affirmed on appeal, there is no cause of action in relation to academic matters. Ms. Gaucher makes vague allegations of a contractual or tortious claim but does not sufficiently plead either of these claims in a way that distinguishes them from academic matters.

[100] Ms. Gaucher argues that although her claim is "possibly advanced in a novel way", it is not "whimsical or trifling with the Court's time". I disagree. The courts have

determined that academic matters are outside its jurisdiction except by way of judicial review. Ms. Gaucher pleads relief this Court cannot grant.

[101] I find it is an abuse of process for Ms. Gaucher to attempt to challenge academic decisions or alleged failures by BCIT to comply with its policies, processes, and procedures by commencing a civil action. Ms. Gaucher should have appealed internally and, if dissatisfied, filed a petition for judicial review. The way in which she has proceeded is a collateral attack on the prior administrative decisions.

[102] Ms. Gaucher's notice of civil claim, as amended, is to be struck pursuant to Rule 9-5(1) on the basis that the claim fails to plead a reasonable cause of action, is unnecessary, frivolous, and vexatious, is a collateral attack on prior administrative decisions, and is an abuse of process.

[103] Given my decision, I need not address the remaining issues in the application including summary dismissal pursuant to Rule 9-6. Nevertheless, even if I were to accept that these academic matters could support a breach of contract, the facts I was taken to do not appear to support Ms. Gaucher's allegation. A transcript of the February 23, 2017 meeting was introduced by Ms. Gaucher into evidence. It is from a recording made by Ms. Gaucher without the knowledge of BCIT. A review of the transcript demonstrates that Ms. Gaucher was reluctant to complete the second clinical course, course 7620. It was Ms. Gaucher, through her family friend, who requested that she be able to pursue the combined certification which eliminated the requirement for course 7620. Although I am not deciding the matter under Rule 9-6, it appears that Ms. Gaucher's allegation of a unilateral repudiation of a contract by BCIT is not supported on the facts.

Disposition

[104] I strike the Amended Notice of Civil Claim, without leave to amend, pursuant to Rule 9-5(1)(a), (b) and (d).

[105] Unless the parties request to make submissions before me, the defendant is entitled to its costs.

“D. MacDonald J.”