

CANADA / JUDGMENT

Besler v. Rioux

2024 BCSC 978

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 978 Besler v. Rioux

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Besler v. Rioux,

2024 BCSC 978

Date: 20240605

Docket: S47002

Registry: Penticton

Between:

Bradley H. Besler, Darren W. Besler

Plaintiffs

And

Luc Rioux, Christopher Richardson, David Preston, Bob Vatamaniuck,

Brian Hunter, Royal Canadian Mounted Police, Attorney General of Canada,

BC's Minister of Public Safety and Solicitor General, Ann Lerchs,

Kurt Froehlich, Andrew Vandersluys, Cindy Curtain, Debra Drissell,

Assistant Deputy Attorney General of BC, BC Prosecution Service

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

The Plaintiffs appearing on their own behalf:

B.H. Besler

D.W. Besler

Counsel for the Crown Defendants:

F. de Lima

K. Kotliarsky

Counsel for the Police Defendants:

S. Werner

Place and Date of Hearing:

Penticton, B.C.

May 14 and 15, 2024

Place and Date of Judgment:

Penticton, B.C.

June 5, 2024

- [1] This is an application by the various defendants to strike the plaintiffs' claim against them, without liberty to amend.
- [2] By way of background, the plaintiffs were charged with mischief and criminal harassment pursuant to ss. 430(2) and 264 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. They were both acquitted following an appeal, and have since commenced this civil claim as against various defendants who are members of the Royal Canadian Mounted Police ("RCMP") or BC Prosecution Service ("BCPS").
- [3] The criminal charges arose out of a dispute between neighbours. The plaintiffs' neighbours started a commercial enterprise on their property--a mushroom growing facility operating under the name of "What the Fungus". The plaintiffs and their family objected, but ultimately the local authority with jurisdiction, the District of Summerland, granted a license to the neighbour albeit some time after the operation had in fact commenced.
- [4] The RCMP is the police force with jurisdiction in Summerland. They investigated complaints against the plaintiffs and recommended that corresponding charges be laid. The Penticton office of the BCPS approved the charges and the matter proceeded to trial in the Provincial Court.
- [5] On October 19, 2021, after a 12-day trial, the Provincial Court judge found that:
 - a. the plaintiffs had engaged in the prohibited conduct articulated in s. 264(2)(b) of the Code;

- b. various persons were harassed as a result thereof;
 - c. while engaging in the prohibited conduct the plaintiffs knew the complainant was harassed or were reckless or wilfully blind as to whether the complainant was harassed;
 - d. however, although the complainants were probably annoyed, irritated and bothered by the plaintiffs, they were not afraid of them, or if they were, their fear was not objectively reasonable; and,
 - f. in consequence of the finding that the complainants were not afraid, the plaintiffs were not guilty of criminal harassment.
- [6] The Provincial Court judge convicted Darren Besler on Count 1--mischief--but acquitted Bradley Besler. Nevertheless, the Provincial Court judge convicted both plaintiffs of the included offence of mischief pursuant to s. 430(4) of the Code. Lastly, the trial judge entered a conditional stay in favour of Darren Besler in relation to Count 1 pursuant to the principle set out in *R v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14.
- [7] The plaintiffs successfully appealed their conviction--with reasons reported at 2022 BCSC 484--on the basis that mischief was not an included offence of criminal harassment under s. 264 of the Code. Acquittals were entered in favour of both plaintiffs. This Court further found that the court did not have jurisdiction to hear an appeal of Count 1, which had been conditionally stayed in favour of the plaintiff Darren Besler, given the absence of an entered conviction.
- [8] The plaintiffs filed their notice of civil claim on October 22, 2021 (the "NOCC"). It contained allegations of wrongdoing on the part of both the RCMP and the BCPS relating to the prosecution.
- [9] The individual defendants Lerchs, Froehlich, Vandersluys, and Drissell are prosecutors employed by the BCPS; the defendant Curtain was at all relevant times the office manager of the Penticton Crown office (collectively, the "Crown Defendants"). The Crown Defendants, along with the Assistant Deputy Attorney General of BC and the BCPS were represented by Mr. de Lima from the Provincial Attorney General's Office. The Assistant Deputy Attorney General of BC and the BCPS are more properly named as His Majesty the King in Right of the Province of British Columbia pursuant to section 7 of the Crown Proceeding Act, R.S.B.C. 1996, c. 89, and s. 29 of the Interpretation Act, R.S.B.C. c. 238.
- [10] The defendants Rioux, Richardson, Preston, Vatamaniuck and Hunter are all members of the RCMP (collectively, the "Police Defendants"). The RCMP and the Attorney General of Canada are not proper parties to the proceeding but rather are covered by the Minister of Public Safety and Solicitor General. Although the Ministry is a Provincial ministry, they were represented in this application by counsel from the Department of Justice.

- [11] The NOCC included allegations that the prosecutors engaged in a malicious prosecution. The plaintiffs argued that the Crown Defendants "violated the Crown Counsel Act", "conspired to mislead the Court", "acted in bad faith and displayed unmistakable bias and negligence", "had conflicts of interest", "violated the BC Prosecution Service's charge assessment guidelines", "failed to objectively and fairly assess all available evidence" and "engaged in Misfeasance in Public Office". The plaintiffs alleged in the NOCC that the applicants "repeatedly demonstrated Misfeasance in Public Office" and their actions "were the result of negligence, defamation and/or other wrongful acts or omissions."
- [12] In the NOCC, the plaintiffs sought declarations that the applicants violated the Crown Counsel Act, R.S.B.C. 1996, c. 87, as well as the "Memorandum of Understanding on Disclosure between the BC Prosecution Service" and police. They also sought written apologies, damages and costs.
- [13] The NOCC included similar allegations against the Police Defendants.
- [14] The plaintiffs amended the NOCC on February 6, 2023, likely in response to the Crown Defendants' application to strike. The plaintiffs have since prepared a proposed further amended version of the NOCC ("FANOCC"), and filed a cross-application to permit its filing. On this application, they also seek to add two further defendants, Wendy Kavanagh and Neil Wiberg, both of whom were employed by the BCPS during the prosecution and subsequent appeal.

Legal Framework

- [15] Pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the court may order that the whole or any part of a pleading be amended or struck out on the ground that it discloses no reasonable claim.
- [16] For an application under Rule 9-5(1)(a) to succeed, it must be "plain and obvious" the claim discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. The court's analysis under Rule 9-5(1)(a) is limited to the pleadings. The material facts pleaded are assumed to be true, unless they are manifestly incapable of being proven.
- [17] A cause of action is not disclosed simply by naming it. The claims must be supported by more than a bald and conclusory narrative; they must be supported by a set of material facts that--assuming they could be proved--would establish the claims: *Canada v. Harris*, 2020 FCA 124 at para. 37. In other words, the Court does not need to assume that bare allegations or conclusory statements are true: *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, aff'd 2023 BCCA 289. Sufficient material facts must be pleaded to support any conclusions of law.
- [18] The parties agreed that this application would be argued based on the FANOCC, which is a sensible arrangement because the defendants seek a dismissal without the right to amend.

- [19] In addition to the two applications from the groups of defendants to dismiss the claim as disclosing no cause of action, the plaintiffs also apply to further amend their notice of civil claim, and to add the two additional Crown counsel as defendants. I will address those applications at the end of my decision.

Discussion

- [20] I will address the Police Defendants' application first before turning to the Crown Defendants' application.

Police Defendants

- [21] The application by the Police Defendants did not take up much time at the hearing.
- [22] The plaintiffs' claims against the Police Defendants in the FANOC are for negligent investigation and malicious prosecution.
- [23] The tort of negligent investigation was recognized by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41. The Court confirmed that investigating officers owe a duty of care in negligence to suspects being investigated: para. 39.
- [24] During the course of submissions, counsel for the Police Defendants conceded that the proposed FANOC pleaded with sufficient particularity a claim for negligent investigation. Therefore, I do not need to make any findings on this point.
- [25] As noted, the second cause of action alleged against the Police Defendants is malicious prosecution. The Supreme Court of Canada affirmed the common law test for malicious prosecution--set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CanLII 77 and *Proulx v. Québec (Attorney General)*, 2001 SCC 66--more recently in *Miazga v. Kvello Estate*, 2009 SCC 51. The Court confirmed that there are four elements that must be proven by the plaintiff as follows:
- [3] To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.
- [26] However, whether an action from malicious prosecution lies against police officers in their personal capacity in British Columbia remains an open question: *Reilly v. Bissonnette*, 2008 BCCA 167 at para. 57; *Brandreth-Gibbs v. The Attorney General of Canada*, 2011 BCSC 806 at para. 78. Although the Supreme Court of Canada concluded that such a claim could be brought in *Nelles* and *Proulx*, those cases both arose from jurisdictions where charges are laid by police. By contrast, in British Columbia, charges are approved by prosecutors.

- [27] Counsel for the Police Defendants acknowledges that based upon both the Reilly and Brandreth-Gibbs decisions, it would be inappropriate to strike a claim for malicious prosecution against the Police Defendants at the pleadings stage as disclosing no cause of action.
- [28] The only consideration as it relates to the Police Defendants is whether the pleading is sufficient to fall within the exception in s. 21(3) of the Police Act, R.S.B.C. 1996, c. 367, such that the individual officers would remain as defendants. Individual RCMP members are not personally liable absent proof of any of the circumstances outlined in an exception to the general exclusion found in s. 21(3) of the Police Act:
- (3) Subsection (2) does not provide a defence if
- (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
- (b) the cause of action is libel or slander.
- [29] The plaintiffs' allegations in the FANOCOC involve matters such as lack of fairness, lack of integrity, providing false information to Crown counsel, and abusing their authority. Assuming the facts as pled to be true, the allegations against the individual Police Defendants would include matters that would fall within the exception to personal liability in the legislation.
- [30] The application by the Police Defendants to strike the plaintiffs' claim against them is therefore dismissed.
- [31] In so saying, this decision should not be interpreted as a comment on the merits of the claim, but rather that the claim simply cannot be dismissed based solely on a review of the pleadings.
- [32] By agreement of the plaintiffs and the Police Defendants, the claims as against the RCMP and the Attorney General of Canada are dismissed because the proper party to be named in claims against police officers in the course of their duties is the Minister of Public Safety and Solicitor General, who has already been included as a defendant.

Crown Defendants

- [33] I turn now to the plaintiffs' claim of malicious prosecution against the Crown Defendants.
- [34] In *Watchel v. British Columbia*, 2019 BCSC 108, aff'd 2020 BCCA 100, Justice Norell concluded that the court will only review claims that challenge prosecutorial discretion in very limited circumstances, which are flagrant impropriety or malicious prosecution: para. 18. This application focusses on malicious prosecution.

[35] The Crown Defendants concede the first two elements of the malicious prosecution test as noted in *Miazga*--i.e. that the prosecution was initiated by the defendants and was terminated in favour of the plaintiffs. I will therefore focus the analysis on the other two aspects of the claim. I will first set out the applicable legal principles with the discussion to follow.

Undertaken Without Reasonable and Probable Cause

[36] The third element of the malicious prosecution test requires the plaintiff to prove an absence of reasonable and probable cause for initiating the prosecution. In *Miazga*, the Court stated:

[58] . . . It is well established that the reasonable and probable cause inquiry comprises both a subjective and an objective component, such that for grounds to exist, "[t]here must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances" (Nelles, at p. 193). Although stated in the affirmative, the onus is clearly on the plaintiff to prove the absence of reasonable and probable cause.

[Emphasis in original.]

[37] A plaintiff's obligation under the third part of the test requires proof of a negative, that being that the prosecutor did not have an objective belief. It is inevitably very difficult to prove. The Court in *Miazga* commented that it is important not to view matters with the benefit of hindsight:

[76] In carrying out the objective assessment, care must be taken in retroactively reviewing the facts actually known to the prosecutor at the relevant time -- that is, when the decision to initiate or continue the proceeding was made. The reviewing court must be mindful that many aspects of a case only come to light during the course of a trial: witnesses may not testify in accordance with their earlier statements; weaknesses in the evidence may be revealed during cross-examination; scientific evidence may be proved faulty; or defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.

[38] Of note, the Court in *Miazga* concluded that the inquiry into the prosecutor's subjective state of mind belongs at the fourth step of the process--proof of malice. The Court concluded that proof of malice is a separate inquiry, and that malice cannot be inferred from a lack of reasonable grounds when viewed objectively. Other explanations for proceeding in the absence of objectively reasonable grounds, such as a prosecutor's inexperience, would not give rise to liability: *Miazga* at paras. 77-80.

- [39] It is also important to note that there is a public interest in ensuring that Crown counsel can pursue their role in Canada's constitutional democracy: Miazga at paras. 46-47. Crown counsel are obligated to make decisions as to whether to initiate or continue a prosecution with reference to the public interest. The fact that a matter is ultimately dismissed does not undermine the decisions made by Crown counsel in laying or continuing with charges. In Miazga, the Court stated the following:
- [73] The prosecutor's mere lack of subjective belief in sufficient cause, where objective reasonable grounds do in fact exist, cannot provide the same determinative answer on the third element in the context of a public prosecution. Unlike the situation in a purely private dispute, the public interest is engaged in a public prosecution and the Crown attorney is duty-bound to act solely in the public interest in making the decision whether to initiate or continue a prosecution. Consequently, where objective reasonable grounds did in fact exist at the relevant time, it cannot be said that the criminal process was wrongfully invoked. Further, as discussed above, the decision to initiate or continue the prosecution may not entirely accord with the individual prosecutor's personal views about a case as Crown counsel must take care not to substitute his or her own views for that of the judge or the jury. Therefore, in the context of a public prosecution, the third element of the test necessarily turns on an objective assessment of the existence of sufficient cause. As we shall see, the presence or absence of the prosecutor's subjective belief in sufficient cause is nonetheless a relevant factor on the fourth element of the test, the inquiry into malice.

[Emphasis added.]

Malice

- [40] The final element of the test for malicious prosecution is an inquiry into the prosecutor's state of mind. Malice in this context does not mean animus directed at the plaintiff, but rather refers to an improper purpose. The Court in Miazga wrote as follows:
- [79] In order to prove malice, a plaintiff must, in accordance with Nelles, bring evidence that the defendant Crown was acting pursuant to an improper purpose inconsistent with the office of the Crown attorney. As we have seen, in deciding whether to initiate or continue a prosecution, the prosecutor must assess the legal strength of the case against the accused. The prosecutor should invoke the criminal process only where he or she believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law. It follows that, if the court concludes that the prosecutor initiated or continued the prosecution based on an honest, albeit mistaken, professional belief that reasonable and probable cause did in fact exist, he or she will have acted for the proper purpose of carrying the law into effect and the action must fail.
- [41] Malice can therefore be any improper purpose and does not require that the conduct be intended to harm the plaintiff.

Discussion

[42] The plaintiffs' allegations against the Crown Defendants in malicious prosecution are set out at paras. 15 and 16 of the FANOC as follows:

15. The Crown Counsel Defendants Ann Lerchs, Kurt Froehlich, Andrew Vandersluys, Cindy Curtain, Debra Drissell, Wendy Kavanagh and Neil Wiberg intentionally breached the Crown Counsel Policy Manual, the Standards of Conduct for BC Public Service employees, and the Public Service Act in order to maliciously prosecute the Plaintiffs. The Crown Counsel Defendants acted in bad faith with respect to Court File 46826, RCMP File 2020-146, and complaints made by the Plaintiffs, by breaching the following sections of the Crown Counsel Policy Manual:

- Charge Assessment Guidelines (CHA 1);
- Criminal Harassment (CRI 1);
- Disclosure (DIS 1);
- Standards of Conduct - Conflict of Interest and Protection of Confidential Information (STA 1).

16. The Crown Counsel Defendants breached the aforementioned policies by, among other actions:

- k) Mishandling and concealing evidence;
- l) Conducting charge assessments in bad faith;
- m) Failing to conduct new charge assessments after becoming aware of new and exculpatory evidence;
- n) Allowing individuals at 18420 Garnet Valley Road to threaten and harass the Plaintiffs;
- o) Intentionally misleading the Court with respect to events and evidence;
- p) Having a personal relationship with the complainants while having conduct of Court File 46826 at the same time, and failing to keep any records of attending the complainants' property prior to trial;
- q) Concluding investigations into Crown Counsel misconduct before reviewing relevant evidence;
- r) Investigating complaints against Crown Counsel who work in the same Crown Counsel office and are a direct subordinate of the investigator;
- s) Failing to hold accountable those known to be in breach of the applicable policies, procedures, codes of conduct and guidelines;
- t) Intentionally lying to a BC Supreme Court Justice that Crown Counsel would contact the Summerland RCMP regarding the Plaintiffs' disclosure requests.

- [43] The essence of the plaintiffs' malicious prosecution claim is two-fold: (1) the police recommended charges against them without evidence; and (2) that prosecutors laid and continued to prosecute charges against them, while ignoring clear evidence that it was the complainants who were the aggressors, and not the plaintiffs.
- [44] The plaintiffs point to a number of pieces of evidence that they say support their position:
- a) there was a recording on a video camera that showed one of the complainants threatening to sexually assault female family members of the plaintiffs, amongst other video recordings;
 - b) one of the complainants told police that he had a gun and would not be afraid to use it and if the plaintiffs went onto the complainants' property they would not come out alive; and
 - c) one police officer who attended at the property in response to a complaint had noted that the plaintiffs were very polite and had welcomed the police officer's attendance.
- [45] The plaintiffs argue this was a volatile situation with a serious potential for violence, yet the police did nothing to assist them. In their view, the Police Defendants characterized them as the perpetrators when they were actually the victims.
- [46] The plaintiffs say they gave five videos to the police in Summerland in December 2019, but police deliberately withheld them from Crown counsel. Although the videos were supposed to be forwarded to Crown counsel, they were not. As a result, the plaintiffs delivered them directly to the Crown office again in January 2020. After delivering the videos, the plaintiffs went to the Crown office and confirmed with the Crown office manager, Ms. Curtain, that Ms. Lerchs had, in fact, seen the videos.
- [47] At that time, Ms. Lerchs was the Crown counsel assigned to the plaintiffs' criminal matter. At the end of January 2020, the plaintiffs asked Ms. Lerchs if she had reviewed the videos that had been provided to the Crown counsel office approximately two-and-a-half weeks prior. Ms. Lerchs advised that she had not.
- [48] The plaintiffs argue that when Ms. Lerchs became aware that the Crown office had not been provided with the videos--what they say was exculpatory evidence in the criminal matter--she engaged in a cover up to protect the police, rather than dealing with what she had discovered. The file was eventually reassigned to Mr. Vandersluys. According to the plaintiffs, when Mr. Vandersluys assumed conduct of the file, he and the other Crown Defendants, including the proposed additional defendants, engaged in a further cover up to the detriment of the plaintiffs.
- [49] The plaintiffs' allegations regarding Mr. Froehlich are that he failed to approve charges against one of the complainants regarding the threat against female members of the plaintiffs' family.

- [50] The plaintiffs' allegations against Ms. Drissell are that she was tasked with investigating their complaints against Ms. Lerchs, Mr. Froehlich and Mr. Vandersluys, but did not do so in good faith. They say she acted improperly by concluding counsel had done nothing wrong. In turn, the plaintiffs allege that Ms. Kavanagh failed to properly investigate the plaintiffs' complaints about Ms. Drissell's inadequate investigation. As noted, the plaintiffs have applied to add Ms. Kavanagh as a defendant to this action.
- [51] In my view, the pleadings in the FANOC do not include any allegations of fact to support a claim in malicious prosecution against the Crown Defendants because there is no allegation that the prosecution was undertaken without reasonable and probable cause. I note that all of the claims in malicious prosecution against the Crown Defendants only relate to the Crown prosecutors. I will address the claims against the office manager at the Crown office in Penticton, Ms. Curtain, later in these reasons.
- [52] The allegations conflate the Crown Defendants' decision to proceed with the charges against them with the decision not to prosecute the complainants. They are not two sides of the same coin.
- [53] It is clearly of great concern to the plaintiffs that they were the only ones who were charged. This is apparent because the plaintiffs' complaints are not limited to the fact that they were prosecuted, but also because the complainants were not. This is the sole allegation with regard to Mr. Froehlich. However, a refusal to prosecute someone else cannot give rise to a claim in malicious prosecution. The analysis is focused on what occurred in a plaintiff's own prosecution.
- [54] Second, and related to the first point, the plaintiffs assume that if the Crown was acting appropriately, the case would not have proceeded to trial. They say that a stay of proceedings would have been the only possible reasonable outcome had Crown counsel reviewed all of the evidence, including their videos, as it came up and through the lens of the charge approval standard. However, even if the Crown had considered the videos in their exercise of their discretion and found they provided sufficient evidence on which to prosecute the complainants, that finding would not bear on the outstanding charges against the plaintiffs. There is no reason at law as to why both sides of this longstanding neighbour dispute could not have been prosecuted concurrently for their respective roles, had Crown counsel considered it appropriate to do so.
- [55] Notwithstanding the plaintiffs' submissions, this does not appear to be a case where prosecutors suppressed or ignored exculpatory evidence. As for the videos, the plaintiffs obviously had them because they were their videos. The plaintiffs also refer to an occurrence report when another police officer, Constable Bond, attended at the plaintiffs' property around the time of the charging. The plaintiffs say that Cst. Bond noted the plaintiffs were calm, polite and receptive to police presence. She then noted that she went to the complainants' home where the neighbour indicated that he was prepared to take matters into his own hands, had slept with a gun the night before, and that if either of the plaintiffs

set foot on his property he would beat them to death. However, Cst. Bond's evidence, assuming it was in accordance with her occurrence report which was provided to the plaintiffs before trial, would not be exculpatory for the plaintiffs.

- [56] Third, the result of the Provincial Court trial is inconsistent with the notion that the prosecution was undertaken without reasonable and probable cause. As noted, the plaintiffs were both found guilty of mischief as an included offence of criminal harassment. Because this Court found on appeal that mischief was not an included offence of criminal harassment, the conviction of both plaintiffs was set aside and the Crown never returned to Provincial Court to set aside the stay.
- [57] The findings on appeal allowed the plaintiffs to bring a claim for malicious prosecution based on the fact that there was no conviction entered. At the same time, the overall circumstances suggest that the prosecution was objectively reasonable given that the Provincial Court judge made findings of guilt for both plaintiffs. The plaintiffs secured acquittals under both charges primarily because of how the matters were charged, rather than on a more exculpatory ground.
- [58] In the circumstances, it seems highly improbable that the plaintiffs would be able to prove on a balance of probabilities that the prosecution was undertaken without reasonable and probable grounds when they were both found guilty by the trial judge.
- [59] As for the trial process itself, the plaintiffs complain that Mr. Vandersluys objected to the admissibility of their videos at trial. The fact that a Crown counsel objected to the admissibility of certain evidence is of no moment and is a regular occurrence in a criminal trial. The Provincial Court judge was of the view that the videos were probative and admitted them into evidence. She then relied on the videos to confirm that even though she found the plaintiffs had engaged in behaviour that could be harassment, the complainants did not believe or take seriously the threats made. Counsel's objection is not evidence of malicious prosecution, but simply represents a common evidentiary dispute that the trial judge resolved in the plaintiffs' favour.
- [60] Therefore, assuming the material facts as pled in the FANOC to be true, I find that the plaintiffs' claim in malicious prosecution as against the Crown Defendants is bound to fail as they have no reasonable likelihood of success.
- [61] I have reviewed the plaintiffs' theory of the case in some detail to consider whether it would be appropriate to allow them to amend. I conclude that it would not given the issues outlined above. In all of the circumstances, the claims against the Crown Defendants must be dismissed, without leave for the plaintiffs to amend their claim of malicious prosecution.
- [62] The final Crown Defendant I must address is Ms. Curtain. Because she is not a Crown lawyer, the test as articulated in *Miazga* for a claim for malicious prosecution does not apply.

- [63] As it was explained by both Mr. de Lima for the Crown Defendants and the plaintiffs, the claim against Ms. Curtain could only be for misfeasance in public office. The Supreme Court of Canada confirmed the test for misfeasance in public office in Ontario (Attorney General) v. Clark, 2021 SCC 18 at para. 22, holding that the plaintiff must establish both that the public official engaged in deliberate and unlawful conduct in their capacity as a public official, and that the official was aware the conduct was unlawful and would likely harm the plaintiff. The Court summarized the typical categories as follows:
- [23] The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty. The minimum requirement of subjective awareness has been described as "subjective recklessness" or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff [citations omitted].
- [64] Here, the allegations against Ms. Curtain relate to the videos that the plaintiffs delivered to the Crown office. According to the plaintiffs, Ms. Curtain told them that Ms. Lerchs had viewed the videos, whereas Ms. Lerchs told the plaintiffs that she had not. According to Ms. Drissell's investigation, Ms. Curtain said that she had misspoken when she told the plaintiffs that Ms. Lerchs had viewed them. In my view, an error of this nature does not rise to the level of deliberate and unlawful conduct.
- [65] I find that the claim against Ms. Curtain must also be dismissed.
- [66] The plaintiffs did not assert in the FANOCC all of the elements of misfeasance in public office. As for the possibility of an amendment, regardless of whether Ms. Curtain was in error when she told the plaintiffs that Ms. Lerchs had already viewed the videos, the plaintiffs suffered no harm as a consequence of what she said. The videos were admitted into evidence at trial, and I have already rejected the plaintiffs' suggestion that had the Crown somehow viewed and fully appreciated the import of the videos the Crown would have directed a stay of proceedings.

Disposition

- [67] For the reasons set out above, the application to strike the plaintiffs' claim by the Police Defendants is dismissed. The Police Defendants conceded that the FANOCC, which was created after their application was prepared, now articulates a claim.
- [68] The claims against all of the Crown Defendants must be dismissed, without leave to amend. It follows that the application to add Ms. Kavanagh and Mr. Wiberg is similarly dismissed.
- [69] None of the parties made submissions about the specific contents of the FANOCC, other than as I have discussed above. It follows from what I have decided that the plaintiffs have leave to amend their pleadings in accordance with the FANOCC solely as it relates to the allegations against the Police Defendants.

[70] Finally, I am not awarding costs to any party in the circumstances. Although the Crown Defendants were successful, they did not seek costs. The Police Defendants' application was dismissed solely because of the proposed amendments contained in the FANOC and therefore the dismissal does not warrant an award for costs.

"Wilson J."

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