

CANADA / JUDGMENT

Nungwana v. Canada (Attorney General)

2020 BCSC 1634

COURT

Supreme Court of British Columbia

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2020 BCSC 1634 Nungwana v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nungwana v. Canada (Attorney General),

2020 BCSC 1634

Date: 20201103

Docket: 181941

Registry: Victoria

Between:

Mariam Nungwana & Lazaro Nkomo

Plaintiffs

And

The Attorney General of Canada

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiffs:

R. Olorunjojon

Counsel for the Defendant:

M.E.W. East

Place and Date of Hearing:

Victoria, B.C.

June 30 and July 2, 2020

Place and Date of Judgment:

Victoria, B.C.

November 3, 2020

INTRODUCTION

- [1] On this summary trial application, the defendant seeks an order dismissing each of the plaintiffs' claims or, in the alternative, one or the other of them as they relate to different plaintiffs and different circumstances. In the further alternative, the defendant seeks an order striking portions of the plaintiffs' further amended notice of civil claim.
- [2] The plaintiffs' claims arise from their interactions with Canada Border Services Agency ("CBSA") Border Services Officers ("BSOs") on their respective arrivals at Vancouver International Airport, the plaintiff Mariam Nungwana on September 22, 2016, and the plaintiff Lazaro Nkomo on March 6, 2018. The plaintiffs allege the BSOs engaged in unreasonable and malicious bad faith conduct intended to injure them, and that such conduct included racial profiling and Charter violations. Ms. Nungwana claims damages for a litany of alleged losses including trauma, depression and other psychological effects, for loss of income and aggravated and punitive damages. Mr. Nkomo seeks a letter of apology.
- [3] The defendant states the claim of Ms. Nungwana is statute barred, while the claim of Mr. Nkomo is not capable of supporting a cause of action against the defendant as it is not based on facts or evidence.
- [4] I will first address the law governing entry into Canada.

LEGAL FRAMEWORK RESPECTING ENTRY INTO CANADA

- [5] The authority of BSOs to question, search and detain individuals entering Canada is found in the Customs Act, R.S.C., 1985, c. 1 (2nd Supp.) and the Immigration and Refugee Protection Act, S.C. 2001, c. 27, ("IRPA"). Given the nature of the allegations pleaded by the plaintiffs and applicable statutes, I refer in some detail to the statutory provisions that apply.
- [6] Section 18 of the IRPA provides that all persons entering Canada must appear for an examination to determine whether that individual may enter Canada:

18(1) Subject to the regulations, every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

[7] Pursuant to s. 11 of the Customs Act, other than in certain circumstances, persons arriving in Canada must only enter at designated customs offices (such as in this case an international airport), and present themselves without delay to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties.

[8] BSOs are "officers" under s. 2 of the Customs Act.

[9] BSOs also have authority to ask persons about any goods they are bringing into Canada. The Customs Act provides:

12(1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

(3) Goods shall be reported under subsection (1)

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of the person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

13 Every person who reports goods under section 12 inside or outside Canada or is stopped by an officer in accordance with section 99.1 shall

(a) answer truthfully any question asked by an officer with respect to the goods; and

(b) if an officer so requests, present the goods to the officer, remove any covering from the goods, unload any conveyance or open any part of the conveyance, or open or unpack any package or container that the officer wishes to examine.

[10] Section 99 of the Customs Act gives BSO's the power to inspect such goods:

99(1) An officer may

(a) at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts;

(e) where the officer suspects on reasonable grounds that this Act or the regulations or any other Act of Parliament administered or enforced by him or any regulations thereunder have been or might be contravened in respect of any goods, examine the goods and open or cause to be opened any package or container thereof; ...

[11] In addition, BSOs can conduct personal searches of individuals entering Canada. Section 98(1) of the Customs Act authorizes the personal search of a person if the BSO has reasonable grounds to believe that the person has on or about them anything that contravenes the Customs Act or any other Act of Parliament. A search of a person must be completed by a BSO of the same sex. Section 98 states:

98(1) An officer may search

(a) any person who has arrived in Canada, within a reasonable time after his arrival in Canada, if the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened, anything that would afford evidence with respect to a contravention of this Act or any goods the importation or exportation of which is prohibited, controlled or regulated under this or any other Act of Parliament.

(4) No person shall be searched under this section by a person who is not of the same sex, and if there is no officer of the same sex at the place at which the search is to take place, an officer may authorize any suitable person of the same sex to perform the search.

[12] The standard of "reasonable suspicion", indicated by the wording "suspects on reasonable grounds" in s. 98(1), has been held to mean "something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds": *R. v. Kang-Brown*, 2008 SCC 18 at para. 75.

[13] If a BSO is about to search a person, that individual can request to be taken before a senior officer who may, if they do not believe there are reasonable grounds to conduct a search, release the person from the search. Section 98 of the Customs Act provides:

(2) An officer who is about to search a person under this section shall, on the request of that person, forthwith take him before the senior officer at the place where the search is to take place.

(3) A senior officer before whom a person is taken pursuant to subsection (2) shall, if he sees no reasonable grounds for the search, discharge the person or, if he believes otherwise, direct that the person be searched.

[14] In addition to the above powers, if a foreign national is seeking entry to Canada, as was the case with Mr. Nkomo, a BSO has broad authority under the IRPA and the Immigration and Refugee Protection Regulations, SOR/2002-227 ("IRPR"). The individual must answer truthfully any questions put to them. The relevant provisions of the IRPA and the IRPR are:

IRPA

15(1) An officer is authorized to proceed with an examination if a person makes an application to the officer in accordance with this Act or if an application is made under subsection 11 (1.01).

16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

IRPR

7(1) A foreign national may not enter Canada to remain on a temporary basis without first obtaining a temporary resident visa.

28 For the purposes of subsection 15(1) of the Act, a person makes an application in accordance with the Act by

- (a) submitting an application in writing;
- (b) seeking to enter Canada;

...

37(1) Subject to subsection (2), the examination of a person who seeks to enter Canada, or who makes an application to transit through Canada, ends only when

- (a) a determination is made that the person has a right to enter Canada, or is authorized to enter Canada as a temporary resident or permanent resident, the person is authorized to leave the port of entry at which the examination takes place and the person leaves the port of entry;
- (b) if the person is an in-transit passenger, the person departs from Canada;
- (c) the person is authorized to withdraw their application to enter Canada and an officer verifies their departure from Canada; or
- (d) a decision in respect of the person is made under subsection 44(2) of the Act and the person leaves the port of entry.

179 An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

- (a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;
- (b) will leave Canada by the end of the period authorized for their stay under Division 2;
- (c) holds a passport or other document that they may use to enter the country that issued it or another country;
- (d) meets the requirements applicable to that class;
- (e) is not inadmissible;

[15] A person's Charter rights are not engaged by routine searches or questioning in the context of border crossings. Persons at border crossings have reduced expectations of privacy and expect that BSOs may ask them questions about their travels, search their belongings, or interfere with their freedom of movement. The reduced level of Charter engagement at borders is justified on the basis of furthering important societal interests, such as preserving national security and sovereignty, preventing the importation of narcotics, and protecting public health. See: *R. v. Simmons*, [1988] 2 S.C.R. 495 [Simmons] at para. 49; *R. v. Nagle*, 2012

BCCA 373 at paras. 31-35, R. v. Jones (2006), 81 O.R. (3d) 481 (Ont. C.A.) [Jones] at paras. 30-37.

- [16] However, that does not mean borders are Charter-free zones. An individual's Charter rights are engaged once a BSO goes beyond routine questioning and searching and moves to a more intrusive form of inquiry. For example, a search is no longer routine if it becomes more invasive, such as a personal search under s. 98 of the Customs Act, or if the search becomes focused on a particular suspicion of criminality: see Simmons at paras. 30, 50-59 and Jones at para. 42. At that point, a traveler becomes entitled to full Charter protections.
- [17] I turn next to the events in question. Given the different plaintiffs and incidents, I address them separately.

BACKGROUND - MARIAM NUNGWANA

- [18] The plaintiff, Ms. Nungwana, departed Canada on August 23, 2016, on a flight from Vancouver International Airport ("VIA") to Dar es Salaam, Tanzania, via New York City and Amsterdam. She was examined by CBSA BSOs prior to her outbound flight. As a result of this examination, a "lookout" was placed on Ms. Nungwana's traveler file with the CBSA, flagging her for further examination upon her return to Canada.
- [19] Ms. Nungwana returned to VIA on September 22, 2016, from Dar es Salaam, via Amsterdam and Seattle. At or about 18:06 hours, Ms. Nungwana presented herself to the VIA primary inspection line for international travelers, where a BSO referred her for secondary screening after she had retrieved her luggage.
- [20] Ms. Nungwana was examined by three BSOs in the secondary screening area. She was questioned and her baggage and personal effects were searched.
- [21] BSO Manjit Pooni, who was leading Ms. Nungwana's examination, deposes he formed the reasonable suspicion that Ms. Nungwana had secreted prohibited narcotics on or about her person. His suspicions were based on a number of factors:
- Ms. Nungwana was traveling from a known drug-source country;
 - she appeared to be travelling beyond her financial means;
 - she provided vague and contradictory details of her trip;
 - her demeanor was overly friendly and she was overly talkative;
 - she returned from Tanzania with a suitcase that was different from the suitcase that was in her possession when she departed Canada; and
 - she was in the possession of travel documents and a credit card that belonged to a different person.

- [22] At or about 22:13 hours, BSO Pooni requested that his supervising officer, Acting Superintendent ("A/Supt.") Raymond Louie, approve a personal search of Ms. Nungwana pursuant to s. 98(1) of the Customs Act.
- [23] A/Supt. Louie approved a s. 98 personal search of Ms. Nungwana on the basis of the grounds presented by BSO Pooni. A/Supt. Louie assigned two female officers, BSOs Bains and Veerapen, to conduct the personal search. At or about 22:38 hours, CBSA officers detained Ms. Nungwana for the purposes of conducting the search.
- [24] BSO Bains informed Ms. Nungwana of the reason for her detention and advised her that she had the right to retain and instruct legal counsel without delay and speak with a senior officer. Ms. Nungwana advised BSO Bains that she understood the reason for her detention and that she did not wish to speak with legal counsel or a senior officer.
- [25] BSO Bains also read a standard CBSA caution to Ms. Nungwana informing her that she had the right to remain silent. Ms. Nungwana indicated that she understood the caution.
- [26] At or about 22:54 hours, BSOs Bains and Veerapen conducted a personal search of Ms. Nungwana. The search, which concluded at or about 23:01 hours, produced nothing relevant.
- [27] BSOs continued to examine Ms. Nungwana. She requested - and was provided - an opportunity to speak to legal counsel on two occasions during the examination.
- [28] At or about 03:25 hours on September 23, 2016, BSO Pooni conveyed his grounds to A/Supt. Louie to request approval to move Ms. Nungwana to the Specimen Isolation Unit ("SIU" - known colloquially as the "drug loo") to perform a monitored bowel movement. BSO Pooni also sought authority to, if necessary, escort Ms. Nungwana to a hospital to perform an x-ray of her internal organs. BSO Pooni requested the use of the SIU based on the following:
- a) Ms. Nungwana appeared to be travelling beyond her financial means; she admitted to being \$4,000 CAD in debt and having minimal savings;
 - b) she was travelling from a known drug-source country;
 - c) she was at times overly friendly, and at other times uncooperative;
 - d) she provided vague and contradictory details of some aspects of her trip, yet she was overly talkative about details unrelated to her trip;
 - e) her answers appeared to be rehearsed;
 - f) she tried to change the subject when questioned about drugs; she professed her innocence about using or selling drugs, but did not answer questions about smuggling drugs;
 - g) she stated that she could only produce a bowel movement every seven days, but provided no details of a medical condition and was not taking medication for any bowel condition. However, she was in possession of a laxative;

- h) she returned to Canada with a suitcase that was different from a suitcase in her possession when she left Canada for Tanzania;
- i) her cellphone provided no information about her activities between September 18 and 21, 2016;
- j) she was unable to provide details of her activities in the previous 48 hours; and
- k) she could not provide an explanation for a text she received while in Tanzania.

[29] A/Supt. Louie, in accordance with CBSA policy and procedure, presented these grounds to his supervising officer, Superintendent Lucky Paul, who approved the use of the SIU and, if necessary, the x-ray examination. BSO Leung (a female officer) then provided Ms. Nungwana with a standard caution about her rights, including her right to speak with a lawyer. Ms. Nungwana declined to speak to a lawyer.

[30] At or about 04:01 hours, BSOs Bains and Leung, the female officers, escorted Ms. Nungwana to the SIU. She was unable to produce a stool sample.

[31] At or about 04:15 hours, Ms. Nungwana consented in writing to undergo an X-ray to examine her internal organs for the possible presence of narcotics or contraband. CBSA officers escorted Ms. Nungwana to Richmond General Hospital, where the x-ray scan did not show the presence of narcotics or contraband.

[32] CBSA officers escorted Ms. Nungwana back to the VIA, where she was released from detention at or about 07:10 hours on September 23, 2016.

[33] On October 4, 2016, Ms. Nungwana filed a written complaint with the CBSA concerning her interactions with the BSOs at YVR on September 22 and 23, 2016. The contents of Ms. Nungwana's complaint are substantively similar to her allegations in this claim. That is:

- a) the searches were conducted unreasonably;
- b) they were carried out in bad faith;
- c) they were motivated by malice;
- d) they were motivated by racial discrimination as she is black;
- e) they were done with the intention of injuring her; and
- f) they occurred in breach of her Charter rights.

[34] On October 6, 2016, Ms. Nungwana spoke by telephone with Superintendent Wendy Liang, then Superintendent of Passenger Operations at VIA, about her complaint.

- [35] On December 12, 2016, counsel for Ms. Nungwana filed another complaint on behalf of Ms. Nungwana by way of letter addressed to the Recourse Directorate of the CBSA. Ms. Nungwana's December 12th complaint set out detailed particulars of her complaint and demanded production of documents identifying the BSOs who examined her.
- [36] The CBSA responded to Ms. Nungwana's counsel by way of a letter dated January 24, 2017. In that letter, CBSA advised her the examinations of Ms. Nungwana were carried out in "keeping with established procedures and guidelines".
- [37] On January 30, 2017, counsel for Ms. Nungwana requested, through the CBSA's Access to Information and Privacy ("ATIP") process, pursuant to the Access to Information Act, R.S.C. 1985, c. A-1 ("ATIA"), that the CBSA provide her with documents relating to her arrival at VIA on September 22 and 23, 2016. On or about May 3, 2017, the CBSA responded to Ms. Nungwana's ATIP request. The CBSA enclosed records at this time and noted that some information was exempted from disclosure pursuant to exemptions and exclusions of the ATIA.
- [38] On April 20, 2018 the notice of civil claim commencing this action was filed.

BACKGROUND - LAZARO NKOMO

- [39] The plaintiff Mr. Nkomo, a Tanzanian national, is related to Ms. Nungwana. He arrived at VIA on March 6, 2018, on flights from Dar es Salaam, via Addis Ababa and Frankfurt. A CBSA intelligence "target" had been placed on Mr. Nkomo's traveler profile. Mr. Nkomo presented himself to the VIA international arrivals primary inspection line, where he was referred to the secondary screening area for further examination.
- [40] BSO Patrick Lai and another BSO examined Mr. Nkomo with the services of a Swahili-English language interpreter. BSO Lai asked Mr. Nkomo questions about his personal background, business and finances, flight routing, travel history, reasons for visiting Canada and other matters. BSOs searched Mr. Nkomo's baggage and conducted background checks, which produced no relevant evidence.
- [41] The BSO's examination negated any customs or immigration concerns. He determined that Mr. Nkomo was a genuine visitor to Canada and he was permitted to enter Canada at or about 16:01 hours on March 6, 2018.
- [42] Mr. Nkomo in the notice of civil claim alleges the following.
- a) He was detained and interrogated by CBSA. He was asked about his relationship with Ms. Nungwana, the purpose of his trip, his businesses, his family and many more.
 - b) CBSA asked him whether Ms. Nungwana had given him anything to bring into Canada to which he said no.

- c) CBSA asked him several questions about Ms. Nungwana including why he was visiting her, whether she bought his air ticket, his relationship with her and more.
- d) CBSA informed him that persons coming from Tanzania are prime suspects of smuggling, and that was the reason he was being interrogated.
- e) He was asked to empty his pockets, and a pat down was done on his person.
- f) He was held around 5 hours by CBSA.

[43] In the further amended notice of civil claim filed December 20, 2018, he alleges he was detained on exaggerated and fabricated grounds because of his race and country of origin.

POSITION OF THE DEFENDANT APPLICANT

- [44] The defendant submits the evidence before the court is sufficient for the court to dismiss the action on a summary trial and that it is fair and appropriate to do so.
- [45] The defendant also submits the plaintiff Ms. Nungwana's claim is statute barred by operation of s. 106(1) of the Customs Act which establishes a three-month limitation period for claims made against an officer, including a BSO, for anything done in the performance of their duties. As noted, her cause of action arises from her interactions with the officers on September 22-23, 2016 and she did not commence her claim until April 20, 2018.
- [46] Regarding the claim of the plaintiff Mr. Nkomo, the defendant submits Mr. Nkomo has failed to plead facts or lead evidence that could support a claim against the defendant given he only pleads interactions that fall under routine screening by the officers. As a result, it is submitted his claim should be dismissed as disclosing no reasonable cause of action.

POSITION OF THE PLAINTIFF RESPONDENTS

- [47] Ms. Nungwana acknowledges the limitation period issue can be resolved summarily. She submits that s. 106(1) does not apply to her claim and is unconstitutional, hence her submissions on this summary trial would be no different than if made at a conventional trial.
- [48] Ms. Nungwana argues her claim is not statute barred by s. 106(1) of the Customs Act because:
- a) such a limitation period is arbitrary and protects the defendant but is unfair to the plaintiff given proceeding to court at the earliest opportunity is to be discouraged;
 - b) it is not applicable because, where remedies are sought for Charter breaches, the provincial limitation period of general application should apply as such claims cannot be barred by a short limitation period which "effectively insulates" the government from claims;
 - c) even if it is applicable, the BSOs cannot rely on s. 106(1) because they were not acting in the performance of their duties; and

- d) the limitation period is unconstitutional because it violates s. 2(e) of the Canadian Bill of Rights and s. 15 of the Charter.

[49] Further, the plaintiffs submit it would be unjust to dispose of the remaining issues and their claims summarily noting:

- a) the substantial damages claimed by Ms. Nungwana;
- b) the complexity of the matter given the need to assess, both objectively and subjectively, the conduct of the officers;
- c) the "far-reaching implications" of the decision;
- d) the cost of a conventional trial is not excessive given the damages claimed;
- e) the fact that credibility is raised by the affidavits filed;
- f) the issue of good faith cannot be addressed by affidavit evidence;
- g) the evidence and material before the court is incomplete; and
- h) there is no urgency given the matter was scheduled for trial in September 2020 but has now been adjourned.

[50] Regarding the claim of Mr. Nkomo, it is submitted that it is not plain and obvious it will not succeed given there are credibility issues.

ISSUES

[51] The issues as summarized by the parties are:

- a) Is this matter suitable for summary trial?
- b) Does s. 106(1) of the Customs Act bar the plaintiff Ms. Nungwana's claim against the defendant?
- c) Is s. 106(1) unconstitutional?
- d) Does Mr. Nkomo's claim disclose a reasonable cause of action against the defendant?

THE SUMMARY TRIAL ISSUE

Law on Summary Trials

[52] A successful application for summary trial under Rule 9-7 of the Supreme Court Civil Rules requires that the court be able to find the facts necessary to decide the issue of facts or law, and it must not be unjust to decide the matter on a summary trial: *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 [Brisette] at paras. 19-20.

- [53] In *Gichuru v. Pallai*, 2013 BCCA 60 [Gichuru], the court at paras. 30-31 referred to *Inspiration Management Ltd. v. McDermid St. Lawrence Limited* (1989), 36 B.C.L.R. (2d) 202 (C.A.) and discussed the factors a court should consider when determining whether it would be unjust to proceed by way of summary trial, including:
- a) the amount involved;
 - b) the complexity of the matter;
 - c) its urgency;
 - d) any prejudice likely to arise by reason of delay;
 - e) costs of taking the case forward to a conventional trial;
 - f) the course of the proceedings;
 - g) the cost of the litigation and the time of the summary trial;
 - h) whether credibility is a critical factor in the determination of the dispute;
 - i) whether a summary trial may create an unnecessary complexity;
 - j) whether the application would result in litigating in slices; and
 - k) any other matters which arise for consideration.
- [54] In *Brisette*, the Court of Appeal encouraged the use of summary trials stating that "trial judges should not be timid in considering its suitability", particularly in light of two developments relating to the concept of proportionality (at para. 22). First, the Supreme Court Civil Rules now require that, in considering the object to secure the just, speedy and inexpensive determination of a proceeding on its merits, "the court is to consider conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues and the complexity of the proceeding" (at para. 23). Second, the Supreme Court of Canada ruling in *Hyrniak v. Mauldin*, 2014 SCC 7, discussed the need for a cultural shift in regards to access to justice, stating:
- [28] The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

- [29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.
- [55] Brissette encouraged the continuation of the shift in culture in British Columbia, with a "focus on proportionality" (at para. 25.)
- [56] When an application for summary judgement is set down, both parties must take reasonable steps to put forward their best case and ensure that their affidavit evidence places the necessary evidence before the court. A party cannot, by failing to take reasonable steps, frustrate the benefits of the summary trial process: Gichuru at para. 32, citing Everest Canadian Properties Ltd. v. Mallmann, 2008 BCCA 275 at para. 34.
- [57] Notwithstanding this is the application of the defendant by way of summary trial, the plaintiffs bear the onus of establishing their claims: Gichuru at para. 35.

Suitability for Summary Trial

- [58] The applicant defendant submits the claims of the plaintiffs are suitable for summary trial given the limitation defence regarding Ms. Nungwana's claim and the plaintiff Mr. Nkomo's failure to plead facts that support a cause of action.
- [59] The plaintiffs submit, while the limitation issue is suitable for summary resolution, their claims are not suitable for or capable of summary resolution for the above noted reasons, details of which follow:

The amount involved or the damages claimed

- [60] Ms. Nungwana claims the actions of CBSA have left her traumatized, unable to return to her previous employment and permanently psychologically damaged. As a result, she alleges she is entitled to significant damages, something not capable of summary assessment.

The complexity of the matter

- [61] Both plaintiffs submit a detailed review of the searches conducted is necessary to determine their reasonableness and their compliance with the Customs Act as this review engages an objective and subjective analysis. They note as well there is a dearth of judicial authority on the assessment of the reasonableness of these level of searches by the CBSA. That said, the plaintiffs do rely on R. v. Monney, [1999] 1 S.C.R. 652, where they submit the Supreme Court of Canada has come the closest to addressing such searches:
- [38] In assessing the constitutionality of a strip search conducted on a person travelling through Canada Customs, Dickson C.J. in Simmons correlated three categories of border searches, based on the degree of intrusion into personal privacy and bodily integrity, with an

increasing threshold of constitutional justification. In other words, the more intrusive the search, the greater the degree of constitutional protection required in terms of the standard of suspicion or belief which must be met prior to subjecting a traveller to a search by customs officers. Dickson C.J. articulated the necessary correlation as follows, at pp. 516-17:

It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.

I wish to make it clear that each of the different types of search raises different issues. We are here concerned with searches of the second type and what I have to say relates only to that type of search. Searches of the third or bodily cavity type may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection. I turn now to a consideration of the appellant's specific Charter claims.

[46] As to my determination that the passive "bedpan vigil" conducted by the customs officers is properly classified as a search within the second category, a review of the representative border searches provided by Dickson C.J. in his analytical framework reveals that the principal distinction between searches in the second and third categories is that all of the examples listed in the third category involve, to a greater or lesser degree, the intentional application of force. Search techniques such as the insertion of a probe into a body cavity or the administration of an emetic could all be characterized in the absence of lawful authority as an assault. Consequently, the potential degree of state interference with an individual's bodily integrity for searches in the third category requires a high threshold of constitutional justification. In *Stillman*, Cory J. affirmed the highly invasive nature of searches in the third category when he stated as follows, at para. 42:

It has often been clearly and forcefully expressed that state interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity. The invasive nature of body searches demands higher standards of justification. In *R. v. Pohoretsky*, [1987] 1 S.C.R. 945, at p. 949, Lamer J., as he then was, noted that, "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home". In addition, La Forest J. observed in *R. v. Dymnt*, [1988] 2 S.C.R. 417, at pp. 431-32, "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the

maintenance of his human dignity". Finally, in *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 517, Dickson C.J. stated:

The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.

[62] The plaintiffs submit the limited Supreme Court of Canada guidelines on such searches requires a traditional trial. They also submit the nature of the parties and their claims "will have far reaching implications" and require an elaborate review of facts and law at trial.

The cost of a conventional trial in relation to the amount involved

[63] Given the claims for pecuniary and non-pecuniary damages, aggravated and punitive damages, the plaintiff Ms. Nungwana submits the cost of a conventional trial is justified.

The issue of credibility

[64] Ms. Nungwana alleges several of the grounds for her search and detention were fabricated or unreasonable. The affidavits of the plaintiffs and the defendants are in sharp contrast; hence credibility is in issue and oral testimony is required.

The issue of good faith

[65] The plaintiffs also submit good faith issues are incapable of assessment by affidavit evidence. They refer to *Rain Coast Water Corp. v. British Columbia*, 2010 BCSC 54:

[33] In addition to the conflicts in evidence, the plaintiff is making claims of abuse of public office, which inherently involves allegations of bad faith. "Questions of bad faith are not easily amenable to resolution through affidavit evidence alone": *Iacobucci*, at paragraphs 25 and 31. To resolve such questions the judge should see and hear both evidence-in-chief and cross-examination to get the full picture of the evidence on both sides and be able to observe the witnesses before resolving questions of credibility: *W.I.B. Construction v. Central Okanagan School District No. 23*, 1997 CarswellBC 896 (B.C.S.C.).

Incomplete evidence/material

[66] The plaintiffs submit other officers were involved in dealing with Ms. Nungwana on her leaving Canada, on her return, and conducting of background searches on her. They note as well that the Customs Enforcement Manual, which sets out the procedures CBSA officers are to follow, is not before the Court and is required to assess the reasonableness of the searches and the CBSA's enforcement process. In addition, they note there is video evidence that lacks audio and requires viva voce explanation.

Urgency

[67] The plaintiffs submit that, while Ms. Nungwana seeks early resolution of her claims, she is not willing to sacrifice "due process and fair hearing" of a full trial. They submit there is no urgency on CBSA's part.

[68] Before determining the appropriateness of the matter generally for summary trial, the defendant raises the three-month limitation period in the Customs Act.

THE LIMITATION ISSUE

[69] Regarding Ms. Nungwana's claim, the initial issue is whether s.106(1) of the Customs Act bars her claim.

[70] Section 106(1) of the Customs Act creates a three-month limitation period for claims against officers for anything done in the performance of their duties under the Customs Act or any other act of Parliament. It states:

106(1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose.

[71] The defendant relies on s. 106 of the Customs Act pursuant to the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 ("CLPA"). Sections 3(b)(i) and 10 of the CLPA provide that the Crown is only liable in tort for wrongful conduct in circumstances where a Crown servant would have been liable:

3 The Crown is liable for the damages for which, if it were a person, it would be liable

(b) in any other province, in respect of

(i) a tort committed by a servant of the Crown,

...

10 No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

[72] In addition, the Crown may avail itself of any defence, including a limitation defence, that would have been available to its servant:

24 In any proceedings against the Crown, the Crown may raise

i. any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and

ii. any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

[73] A specific and relevant limitation period governs in place of any more general provincial limitation legislation:

32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[74] It is clear on the evidence that the cause of action arose on September 22 and 23, 2016. It is also uncontested that Ms. Nungwana did not file her notice of civil claim until April 20, 2018.

[75] As noted, the plaintiff Ms. Nungwana acknowledges that determination of whether her claim is statute-barred by s. 106(1) of the Customs Act is suitable for summary resolution on the narrow issue of whether the limitation applies. She submits the three-month limitation period in s. 106(1) of the Customs Act is not supportable in law leaving the two-year limitation period in the Limitation Act, S.B.C. 2012, c. 13, s. 6 to govern. Ms. Nungwana accepts the application of s. 106(1) is a question of law and suitable for summary resolution on that basis. She does not accept that the issue of whether the BSOs were acting in the performance of their duties can be summarily resolved.

[76] Ms. Nungwana submits that the three-month limitation period, despite the above factual circumstances, is not supportable in law because such a limited period is a "catch-all" so that whatever the cause of action is, whether founded in negligence (injury to person), Charter breach, or malicious conduct it purports to free CBSA from liability after only three months. She says that unfairly favours the defendant and is prejudicial to the plaintiff as it effectively insulates the government from claims.

[77] She further argues that, where the remedy sought is for a Charter breach, such a claim cannot be barred by any limitation period other than a limitation period of general application in the province where the action arose. Therefore, an action brought under s. 24(1) of the Charter is prescribed only if brought outside the general limitation period in that province. She submits s. 106(1) must be read down as not applicable to claims under the Charter or for injury to persons. The crux of her position is that such claims are subject to the two-year limitation period in s. 6 of the Limitation Act.

[78] She also submits that s. 106(1) is unconstitutional as it abrogates the guarantee of a fair hearing pursuant to s. 2(e) of the Canadian Bill of Rights, R.S.C. 1985, App. III as an unfair limitation period prejudices the interests of the plaintiff and favours the defendant, especially if the defendant is the state. She further submits s. 106(1) offends s. 15 of the Charter in that there is gross inequality in the protection and benefit offered to CBSA officers compared to other defendants.

Purpose of Limitation Periods

- [79] In *Novak v. Bond*, [1999] 1 S.C.R. 808 [Novak] at para. 64, citing *M.(K.) v. M(H.)*, [1992] 3 S.C.R. 6 at 29-30, the Court noted that traditionally, statutes of limitation are necessary because at some point a potential defendant should be secure in knowing he will not be held to account for an ancient obligation, and at some point claims based on stale evidence should end and the potential defendant satisfied that preservation of evidence respecting the claim is no longer required. In addition, plaintiffs "are expected to act diligently" and are not entitled to "sleep on their rights". Hence, a limitation statute provides an incentive for plaintiffs to pursue their claims in a timely fashion. The Court, however, noted these traditional rationales favour the interests of the potential defendant.
- [80] The Court then discussed the modernization of limitations statutes which seek to address the interests of plaintiffs, not just defendants:
- [65] Over the last several decades, however, many legislatures have moved to modernize their limitation statutes renewed attention has been given to ensuring that the limitations statutes are framed in a manner that addresses more consistently the plaintiff's interests, not just those of the defendant. This trend has also been reflected in the more balanced way that courts have sought to interpret these statutes. Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action [citations omitted] Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably.
- [81] The Court then stated "a limitations scheme must attempt to balance the interests of both sides" (at para. 66) and summarized:
- [67] The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitation's statute seeks to give effect to each of these characteristics.
- [82] The plaintiff notes as well that in *Novak* the Court at para. 88 (referring to *Royal North Shore Hospital v. Henderson* (1986), 7 N.S.W.L.R. 283 (C.A)), stated that, as a matter of policy, potential plaintiffs "should not be encouraged to run to court at the earliest opportunity". However, this statement was made in reference to the postponement of the running of time, for example, where a plaintiff only learned of more serious consequences of their injury after the expiration of a limitation period. Hence, in considering whether the postponement

of time is appropriate, the facts govern when the failure to bring an action within a limitation period is justified.

- [83] No postponement of time is argued by the plaintiff, who clearly had knowledge of her cause of action as well as the facts and evidence required to commence it well within the three-month period imposed by s. 106(1) of the Customs Act. The unfairness concern addressed in Novak does not arise on the facts of this case.

The Plaintiffs' Authorities

- [84] The plaintiffs rely on Prete v. Ontario (1993), 110 D.L.R. (4th) 94 (Ont. C.A.) [Prete], leave to appeal ref'd [1994] S.C.C.A. No 46 as authority that a statutory enactment such as a limitation period cannot stand in the way of a constitutional entitlement under s. 24(1) of the Charter.

- [85] In Prete, the appellant had been acquitted of first degree murder and, thereafter, commenced an action seeking damages under s. 24(1) of the Charter for infringement of his s. 7 Charter rights. He alleged the Crown "arbitrarily, capriciously and without reasonable grounds preferred a direct indictment of a charge of murder against him" and that the subsequent prosecution of the indictment was conducted maliciously. At issue was the applicability of s. 11 of the Public Authorities Protection Act, R.S.O. 1980, c. 406 which, as set out in para. 3 of Prete, read:

11. (1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

- [86] The court also considered the immunity provisions set out in s. 5 of the Proceedings Against the Crown Act, R.S.O. 1990, c.P.27 which provided:

5. (1) Except as otherwise provided in this Act, and despite section 11 of the Interpretation Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
- (a) in respect of a tort committed by any of its servants or agents;
 - (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
 - (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
 - (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

- (6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process.

[87] On the issue of Crown immunity, the court at para. 7 referred to *Nelles v. Ontario*, [1989] 2 S.C.R. 170, where Lamer J. stated:

I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.

[88] The court concluded that neither the immunity provisions under the Proceedings Against the Crown Act nor the limitation period under the Public Authorities Protection Act applied to claims against the government for remedies under s. 24(1) of the Charter:

[8] The reasons of Lamer J., standing alone, are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the Charter provides that the Charter applies to the legislature and government of each province. The remedy section of the Charter would be emasculated if the provincial government, as one of the very powers the Charter seeks to control, could declare itself immune.

[9] Therefore s. 5(6) of the Proceedings Against the Crown Act must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of that Act, and cannot infringe upon a s. 24(1) Charter remedy.

[12] It is true that in conflict of law jurisprudence, limitation periods have been considered procedural rather than substantive. However, in the context of the Charter, limitation periods are very different from the rules of procedure which effect a dismissal for failure to meet time requirements. First and foremost, the rules are subject to the discretion of the court, whereas the statute is not. In practice, a meritorious claim will be permitted to proceed, perhaps on terms, despite a breach of the rules. In the few cases where relief is denied, it is being denied by a court of competent jurisdiction to deal with s. 24(1) relief. The court is simply saying that in the circumstances presented this is not a case for a hearing and s. 24(1) relief is denied.

[13] In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 29-30, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, in so far as it controls excesses by governments, is not at all served by permitting those same

governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint. [Emphasis added.]

- [89] While Prete has never been directly followed to deny the application of a shortened limitation period for the Crown, it has been frequently cited by courts expressing concern about the application of such provisions in the context of claims for Charter remedies. For example, in *Pearson v. Canada*, 2006 FC 931, aff'd 2007 FCA 380, de Montigny J. (as he then was) stated in reference to Prete:
- [53] Even if that decision has not been followed, it is fair to say that the concerns as to the possibility for a government to immunize itself from the Charter have been echoed in subsequent cases. Referring explicitly to that decision, Justice Hugessen stated in *Duplessis v. The Queen*, 2004 FC 154 that he had "serious doubt" that a government could insulate itself from a Charter based claim by adopting legislation that would be applicable only to its servants, and creating "short draconian prescriptive periods" that would be a mere fraction of what would apply to any other claim (see also, in the same vein, *Ravndahl v. Saskatchewan*, 2004 SKQB 260 [2004] S.J. No. 374 (Sask. Q.B.)).
- [90] Hugessen J.'s comments in *Duplessis v. The Queen*, 2004 FC 154, as cited in *Pearson*, were in relation to the six-month limitation period under s. 269 of the National Defence Act, R.S.C. 1985, c. N-5, as it then read:
- 269(1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or any such duty or authority, unless it is commenced within six months after the act, neglect or default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof.
- [91] This provision reads similarly to s. 106(1) of the Customs Act. I note that s. 269 of the National Defence Act was amended in 2013 and now prescribes a two-year limitation period instead of six months.
- [92] The plaintiffs acknowledge that numerous cases have distinguished Prete holding that Charter claims are not immune from general limitation statutes. They submit therefore that claims brought under s. 24(1) of the Charter are subject to the limitation period of general application in the province where the action arose so that an action brought under s. 24(1) is prescribed only if brought outside that provincial limitation period. In British Columbia, s. 6 of the Limitation Act fixes a two-year period as the provincial limitation period of general application.
- [93] In this case, the notice of civil claim was issued within that two-year period. In support of her submission that the two-year limitation period applies, the plaintiff refers to a number of authorities addressing the issue of limitation periods and constitutional claims under the Charter.

- [94] In *Nagy v. Phillips*, 1996 ABCA 280, the Alberta Court of Appeal held that the two-year limitation period in Alberta's Limitation of Actions Act, R.S.A. 1980, c. L-15 applied to claims brought under s. 24(1) of the Charter as it is "a claim for damages in respect of injuries arising out of a breach of a duty to refrain from breaching the Charter" (at paras. 8-12). To similar effect, see *St-Onge v. Canada*, [1999] F.C.J. No. 1842 at para. 4, aff'd 2001 FCA 308.
- [95] In *Ravndahl v. Saskatchewan*, 2004 SKQB 260, the limitation period of general application was six years. After considering *Prete*, *Nagy* and *St-Onge*, the court concluded that the six-year limitation period applied and the plaintiff's action based on s. 24 of the Charter was statute barred:
- [14] In *Prete*, the limitation period was not of general application. Even more significantly, the window for commencement of proceeding was only six months and this short limitation period was for the sole benefit and protection of the Crown. This latter consideration appears to have been the focus of the court's concern and its willingness to circumscribe the applicability of the limitation period...
- [96] On appeal, the Saskatchewan Court of Appeal at 2007 SKCA 66, aff'd 2009 SCC 7, upheld the lower court's decision that the general limitation applied to the plaintiff's personal claim for damages.
- [97] *Bush v. City of Vancouver et al.*, 2006 BCSC 1207 [*Bush*], addressed a claim for breaches of ss. 7, 8 and 9 of the Charter brought outside the two-year limitation period in the Limitation Act. After considering *Nagy*, *St-Onge* and *Ravndahl* the court stated:
- [24] I find the reasoning in *Nagy* persuasive and applicable to the proper interpretation of s. 3(2) (a) of our Limitation Act. I conclude that Mr. Bush's claims relating to alleged Charter breaches are for "damages in respect of injury to person ... based on ... statutory duty" and are therefore governed by a two-year limitation period.
- [25] It is true that a claim for damages based on s. 24(1) of the Charter will not always constitute a claim for damages in respect of injury to person or property. Such was the case in *Ravndahl v. Saskatchewan*, 2004 SKQB 260 ("*Ravndahl*"), where the plaintiff claimed that her s. 15 Charter rights had been violated when her monthly pension, which she had been receiving since the death of her husband, was cut off when she remarried.
- [26] In this case, however, Mr. Bush's claims all stem from his arrest and detention by the VPD and the Vancouver Jail staff. His claims are properly classified as tort claims or claims for breach of statutory duty. The plaintiff has not pointed to any act by any of the defendants that constitutes a breach of his Charter rights independent of any damage he suffered to his person or property arising from tort or breach of statutory duty.
- [34] It is clear that the Limitation Act applies to claims for damages based on s. 24(1) of the Charter.

- [98] The plaintiffs also refer to *Garry v. Canada*, 2007 ABCA 234; *Zadworny v. Manitoba (Attorney General)*, 2007 MBCA 142 at paras. 11-13; *R.K.S. v. S.A.S. et al*, 2008 MBQB 253 at paras. 74-79; *Jourdain v. Ontario* (2008), 91 O.R. (3d) 506 at paras. 30-32; and *Alexis v. Darnley*, 2009 ONCA 847.
- [99] In *Newman v. Canada*, 2016 FCA 213, the Court addressed Charter damages claims and their relationship to provincial limitation statutes as follows:
- [30] the weight of authority supports the proposition that personal Charter remedies are subject to provincial limitation statutes. Furthermore, the jurisprudence is to the effect that Charter damages claims arising from bodily injury are subject to the limitation periods governing actions seeking private law remedies for bodily injury.
- [33] A 2 year limitation period for claims for Charter damages arising from "injury to the person" can be justified, in cases of bodily injury, by the same considerations which justify shorter limitation period for bodily injuries generally. Those considerations include the need for timely investigation which may be more acute in the case of bodily injury because of the importance of eyewitness evidence, which deteriorates rapidly over time, and because of the more limited role of documentary evidence in bodily injury cases, at least with respect to the liability portion of the claim. These factors reflect the evidentiary concerns which apply to all limitation periods: see *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, [1997] S.C.J. No. 31 (QL) at para. 34. I would venture to add that short limitation periods are not exclusively a function of the premium placed on those statutes as statutes of repose, as the Supreme Court suggested in *Peixeiro v. Haberman*. See for example *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 at paras. 57-58. For these reasons, it is appropriate that a Charter damages claim based on a bodily injury should be subject to the same limitation period which would apply to a tort claim arising out of the same injury.
- [34] Furthermore, it is not desirable, as a matter of policy, that claims for bodily injury should have different limitation periods depending upon the identity of the defendant. Charter damages claims can only be made against state actors. The position advocated by Mr. Newman would result in a longer limitation period for bodily injury claims against state actors while non-state actors would have the benefit of a shorter limitation period. Public entities have the same need for finality and protection from stale claims as individual or corporate tortfeasors, perhaps more so, given their size and the scope of their operations: see *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281, [1999] S.C.J. No. 53 (QL) at para. 1. As a result, I am of the view that the Federal Court Judge was correct in concluding that Mr. Newman's claim for Charter damages was subject to the 2 year limitation in paragraph 3(2)(a).

- [100] In *Surakka v. Canada (Attorney General)*, 2018 BCSC 236 [Surakka], the plaintiff sought declaratory relief and damages under s. 24(1) of the Charter, alleging negligent investigation by the RCMP. The defendant Canada sought dismissal of the damages claim as statute barred by the Limitation Act, but did not seek dismissal of the claim for declaratory relief. With respect to the limitation issue, Smith J. noted the underlying nature of the claim for Charter damages:
- [21] The plaintiff's claim is analogous to a medical negligence action in which a plaintiff alleges that a doctor failed to diagnose or properly treat an injury or illness. Although the doctor did not cause the injury or illness, the absence of proper or timely treatment worsened the plaintiff's physical condition and the plaintiff's claim is for damages for that further injury. There has never been any question that such cases are claims for injury to the person and subject to the two-year limitation period. The plaintiff in this case claims Charter damages as a remedy, as opposed to damages for negligence, but the authorities make clear that that does not change the underlying nature of the claim.
- [101] Relying on *Surakka*, the plaintiffs submit the same limitation period applicable to the Charter breaches should apply to the claim for negligence.
- [102] The plaintiffs argue that the above authorities make clear that it is settled law that claims for damages for personal injury based on the Charter will be subject to the two-year limitation period in s. 6 of the Limitation Act.

The Defendant's Authorities

- [103] As noted earlier, the defendant submits that the claim of Ms. Nungwana is statute barred by the expiration of the three-month limitation period under s. 106(1) of the Customs Act and that, as a result, her claim should be struck in its entirety. The defendant takes issue with the plaintiff's submission that the general limitation period under the Limitation Act applies. The defendant submits the three-month limitation period under s. 106(1) is justified in the particular circumstances arising from border controls and in the circumstances of this case. The defendant refers to a number of additional authorities.
- [104] In *P.H. v. Canada (Attorney General)*, 2015 BCSC 2266, the court confirmed the six-month limitation period prescribed by s. 269 of the National Defence Act applied to bar a claim for damages under s. 24(1) for alleged breaches of Charter rights. Truscott J. discussed Prete and went on to apply Allan J.'s decision in *Bush*:
- [97] In 2006, Madam Justice Allan in *Bush* cited a decision of the Federal Court of Appeal in *St-Onge v. Canada*, [2001] F.C.J. No. 1569 where the Court concluded that general limitation statutes do apply to claims of alleged Charter breaches.

- [98] In addition, she cited *R. v. Mills*, [1986] 1 S.C.R. 863 at p. 953 which concluded that the task of the court is to fit the application for a Charter remedy into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated by s. 24(1). The absence of jurisdictional provisions and directions in the Charter confirmed the view that the Charter was not intended to turn the Canadian legal system upside down but what was required was to fit the Charter into the existing scheme of Canadian legal procedure.
- [99] That was a conclusion also reached in *R. v. 974649 Ontario Inc.* (2001), 206 D.L.R. (4th) 444 (S.C.C.) where McLachlin C.J.C. said the same thing.
- [100] Madam Justice Allan concluded that the Limitation Act of British Columbia does not limit a person's Charter rights, but rather their right to recovery a monetary remedy after a certain time, and it was clear the Limitation Act applies to claims for damages based on s. 24(1) of the Charter.
- [101] Similarly I conclude s. 269 of the NDA together with s. 24(a) of the CLPA require this action to be dismissed.
- [105] In *Coffey v. Fraser Valley (Regional District)*, 2018 BCSC 959 [Coffey], the court applied the six-month limitation period in s. 735 of the Local Government Act, R.S.B.C. 2015, c. 1, to dismiss an action against the defendant regional district for breaching the plaintiff's rights under s. 8 of the Charter.
- [106] In *Coffey* the plaintiff sued for s. 24(1) Charter damages in connection with local authorities' entry onto and inspection of the plaintiff's property. The court noted that the cause of action arose on the date of the inspection, and the plaintiff's counsel sent a letter within five days of the incident to the regional district alleging that the authorities' conduct amounted to an unlawful trespass. Yet, for reasons not explained, the plaintiff did not file the notice of civil claim until approximately 10 1/2 months later. The court found that, in these circumstances, there was no unfairness to the plaintiff arising from the enforcement of the applicable limitation period.
- [107] After reviewing the applicable authorities Brown J. stated:
- [44] I found the analysis of Justice de Montigny in *Pearson v. Canada*, 2006 FC 931 [Pearson] most instructive.
- [45] In *Pearson*, the plaintiff had commenced an action for alleged wilful abuse of process and malicious violations of his Charter rights by the Crown and her officers, servants and agents in his criminal prosecution in the Québec courts. The case evidently had a procedurally complex history. The relevant issue here was whether Mr. Pearson's claim had lapsed as result of time limitations in the Civil Code of Québec, S.Q. 1991, c. 64 and whether Pearson's claim was prescribed.

- [46] Counsel for the Crown argued that a claim for damages based on s. 24 of the Charter is to be assimilated and treated as a civil claim and that, as a result, the Québec law relating to prescription should govern since the cause of action arose in the Province of Québec. The Civil Code of Québec provided that an action to enforce a personal right is prescribed by three years. Mr. Pearson argued that a limitation period in a provincial statute could not bar a Charter claim.
- [47] Justice de Montigny found it was clear that damages could be awarded for breaches of Charter rights though they had only been awarded in a few cases. He concluded at para. 50:
- [50] ... [T]here is a clear consensus that an award of damages contingent on a Charter violation must take place within the general legal regime of the province where the cause of action (or the alleged violation of a fundamental right) has taken place. This is to say that the rules governing evidence, procedure and jurisdiction related to this field of the law must generally find application, since the Charter itself does not provide a parallel architecture to that found in the various provincial and federal statutory schemes.
- [48] Justice de Montigny discussed Prete and the concern that governments could immunize themselves from Charter claims through the use of preferential limitation periods and adopted a "flexible approach" balancing the needs to ensure Charter rights would not lack proper enforcement and the lack of procedural provisions in the Charter. He concluded at para. 54:
- [54] ... [I]t will be for the person seeking damages under section 24(1) of the Charter to prove that a particular time limitation deprives him or her of an appropriate and just remedy; only then will the burden shift on the government to justify the limitation on the right to sue the state for damages as a result of its actions. In other words, prescriptions found in provincial and federal statutes are not, in and of themselves, antithetical to section 24(1) of the Charter. The purposes of limitation periods are as valid in the context of a Charter claim as they are for any other type of claims; a claimant should not be entitled to sue the Crown indefinitely just because the basis of his complaint is the violation of a constitutional right. As long as the government is not trying to do indirectly what it could not do directly, I see no reason not to apply a limitation period.
- [49] Justice de Montigny found in this case that the limitation did not deprive the plaintiff of an appropriate remedy as the limitation in question was not overly short and was a limitation of general application that did not favour the state over ordinary citizens.
- ...
- [52] Counsel for the plaintiff submitted that shortened limitation timelines are "not withstanding judicial scrutiny". I do not find that accurately captures the tenor of the cases, which have not come to the unified conclusion argued by the plaintiff.

- [53] It is clear from the cases that claims brought under the Charter are generally subject to provincial limitation periods of general application. However in this case, the limitation period in question is not one of general application, it is a limitation that only applies to claims brought against bodies to which the LGA applies, i.e. government. The holding in *Prete* would seem to lead to the conclusion that the limitation in the LGA should not bar a claim for a Charter remedy.
- [54] However, I find the decision of *de Montigny J.* more instructive. The statutory limitation should apply absent evidence it would operate unfairly or deprive the plaintiff of a just remedy in this case.
- [56] Given Counsel's initially quick response followed by a lengthy unexplained delay in filing a claim. I conclude there is no unfairness to the plaintiff arising from the enforcement of the six-month limitation period in the LGA in this case.
- [57] I find the plaintiff's claim is out of time and is statute barred...
- [108] The defendant submits the facts in *Coffey* are similar to this case given Ms. Nungwana immediately filed a complaint with CBSA with particulars of her cause of action, retained counsel and notified CBSA that legal proceedings might result, yet then waited for 19 months to file her claim. The defendant also submits, as in *Coffey*, there is no basis to argue that s. 106(1) of the Customs Act acts unfairly to bar her claim given these circumstances.
- [109] In *Brandreth-Gibbs v. The Attorney General of Canada*, 2011 BCSC 806, the court applied s. 106(1) of the Customs Act and s. 32 of the CLPA though not in the context of a Charter claim. The plaintiff was detained by CBSA officers and later arrested at the Boundary Bay border crossing. She advanced claims for unlawful detention and arrest based on alleged false statements made by the officers in relation to the plaintiff's conduct on the date in question. She also filed a second claim for malicious prosecution in relation to criminal charges against her that arose from the incident. *Voith J.* (as he then was) concluded the plaintiff's claims were statute barred by s. 106(1). As in the present case, there was no issue of postponement or discovery. *Voith J.* held:
- [54] Section 32 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 establishes that where a specific and relevant limitation period is found in a federal statute that limitation period governs and replaces more general provincial limitation legislation. The foregoing proposition was confirmed in *Ingredia S.A. v. Canada*, 2010 FCA 176 at para. 32. It is further confirmed in *Graeme Mew, The Law of Limitations*, 2nd ed. (Markham, Ont.: LexisNexis, 2004) at 36-37.
- [55] I am satisfied, based on the facts and conclusions I have described, that each of the Defendant Inspectors was acting within the scope of their authority or duties on the evening of December 23, 2002. Those duties are defined, in part, in the Customs Act at ss. 163.4 and 164.5, as well as in the Criminal Code at s. 495. The Defendant Inspectors were "peace officers" as defined in s. 2 of the Criminal Code. The role of customs officers is further

described in *Public Service Alliance of Canada v. Treasury Board*, 2009 PSLRB 155 at paras. 17-21. Their role as "peace officers" under the Criminal Code is further explained in *Thibeault v. R.*, 2007 NBCA 67 at para. 15, 287 D.L.R. (4th) 128.

[58] In this case, the plaintiff's cause of action for unlawful arrest and detention arose on November 23, 2002. The First Action was not filed until April 8, 2004, well beyond the three-month limitation period that is described in s. 106 of the Customs Act.

[59] It is noteworthy that the First Action only names the Attorney General of Canada as a defendant. Three provisions of the Crown Liability and Proceedings Act are directly relevant. Sections 3, 10 and 24 respectively provide:

3. The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(b) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

...

10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

...

24. In any proceedings against the Crown, the Crown may raise

(a) any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and

(b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

[60] These provisions establish (i) that the Attorney General is only liable for wrongful conduct in circumstances where a Crown servant would have been liable and (ii) that the Crown can avail itself of any defence, including a limitation defence, that would have been available to its servant. Thus s. 106 of the Customs Act also bars the plaintiff's claim against the Attorney General of Canada. The interaction of ss. 3 and 10 of the Crown Liability and Proceedings Act and of s. 106 of the Customs Act was explained by the court in *Ingredia S.A.* at paras.

35-38.

[110] As a result, there are circumstances in which s. 106(1) of the Customs Act applies to bar claims against the Crown in British Columbia

SHOULD SECTION 106(1) APPLY TO THE PLAINTIFF'S CLAIMS?

[111] The analysis of Brown J. in Coffey provides a framework for determining if the application of the three-month limitation in s. 106(1) of the Customs Act would "operate unfairly or deprive the plaintiff of a just remedy". The contextual approach Brown J. advocates for permits the balancing of the opposing factors of fairness and justice for plaintiffs seeking Charter remedies with policy considerations favouring the application of validly enacted limitation legislation.

[112] The plaintiff argues there is nothing special about the CBSA or their mandate entitling them to a shorter limitation period. However, Parliament evidently disagrees, given the very existence of s. 106(1), and as noted by McLachlin C.J.C. in *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81:

[24] the task of the court in interpreting s. 24 of the Charter is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just Charter remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals [Emphasis added.]

[113] There are factors in the present case which distinguish it from Prete. Section 106(1) of the Customs Act is less broad than the limitation criticized in Prete. The provision applies only to actions "commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament " It does not provide sweeping immunization for the Crown against Charter actions generally. The context of Prete is also different: the plaintiff alleged abuse of process and malicious prosecution by the Crown, yet the impugned legislation would have rendered the Crown completely immune and the plaintiff without any recourse. While any Charter breach by the Crown is problematic, the claims in Prete struck at the core of our criminal justice system and the Court's concerns were the unjustness of Crown immunity.

[114] As well in Prete, the six-month limitation period at issue was an exception to the six-year general limitation period that would have otherwise been applicable. In the present case, the three-month limitation under s. 106(1) must be compared against the two-year limitation under the Limitation Act. The contrast between the two potential limitation periods is not as dramatic as it was in Prete. That said, a three-month limitation period is clearly very short, shorter than any other considered in the above authorities, including the six-month limitation in Coffey, which Brown J. described as "relatively short" (at para. 55.)

- [115] While three months is a short limitation period, its rationale arises from the activities of BSOs in carrying out their duties which exposes them to the thousands of individuals who access the country. The three-month limitation period in part recognizes that volume and the resulting issues of retention of evidence, its preservation and the recollection of officers faced with the sheer number of interactions.
- [116] Ms. Nungwana's claims arise from her interactions with BSOs at VIA on September 22 and September 23, 2016. Therefore, her cause of action arose no later than September 23, 2016. She pleads the following causes of action:
- a) breach of her rights under ss. 7, 8, 9, 10, 12 and 15 of the Charter and damages under s. 24;
 - b) negligence, and
 - c) misfeasance in public office.
- [117] It is clear that Ms. Nungwana was aware of the basis for her claim shortly after the incident occurred. There is no real issue of discoverability. This is evidenced by her complaint to the CBSA submitted on October 4, 2016, less than two weeks after her detention. The complaint set out her claim in detail in four consecutive emails. On October 6, 2017 Superintendent Wendy Liang of the CBSA spoke to Ms. Nungwana by phone regarding her complaint. In evidence are a detailed summary of the call prepared by Ms. Liang and a transcript of those portions of the call recorded by Ms. Nungwana. As in the emails, the basis of the cause of action is described in detail in the transcript of that call.
- [118] The evidence also establishes that Ms. Nungwana had counsel well within three months of the date of the incident on September 22-23, 2016. In a letter dated October 24, 2016, she provided authorization to the CBSA allowing the release of her personal information to her legal counsel. In a letter dated December 12, 2016, her legal counsel wrote to CBSA setting out in detail the particulars of Ms. Nungwana's cause of action. The letter also demanded information from the CBSA. In the letter, counsel stated: "It is Ms. Nungwana's claim that the acts of these officer [sic] in detaining her for over 12 hours without reasonable or probable cause and without due process constitutes a breach of her fundamental rights for which she will be seeking damages which may involve legal recourse".
- [119] Despite Ms. Nungwana's counsel requesting additional information from the CBSA, which requests were not fulfilled until sometime later in 2017, there is no evidence as to why there was any delay in commencing the action within the three-month limitation period. Similarly, in Coffey, the plaintiff retained counsel early on. For convenience I repeat Brown J.'s discussion on this point:
- [55] Though a six-month limitation is relatively short, there is no evidence that applying it in this case would be unfair to the plaintiff. The claim arose on the date of the inspection, January 13, 2016, the FVRD officers made no secret of the inspection and posted notices on the buildings that were found in violation of the Building Bylaw. Counsel for the plaintiff sent a letter to the FVRD advising them he considered their actions to constitute trespass on

January 18, 2016, just five days after the inspection. The plaintiff's NCC was not filed until November 3, 2016, approximately 10½ months after counsel's letter.

- [56] Given Counsel's initially quick response followed by a lengthy unexplained delay in filing a claim. I conclude there is no unfairness to the plaintiff arising from the enforcement of the six-month limitation period in the LGA in this case.
- [120] While the timelines at issue are shorter in the present case, the circumstances are similar to those in Coffey which Brown J. found did not lead to unfairness to the plaintiff such that the limitation should apply.
- [121] The plaintiff's claim and her application response to this application provide no facts or explanation for her failure to commence this action within the three-month period. As noted during submissions, counsel for the plaintiffs referred to Novak at para. 88 where McLachlin J. for the majority noted that "potential plaintiffs should not be encouraged to run to court at the earliest opportunity". However, as noted earlier, Novak is distinguishable as the court was considering the proper interpretation of s. 6(4)(b) of the Limitation Act, R.S.B.C. 1996, c. 266, which "allows the running of a limitation period for certain actions to be postponed until a reasonable person would consider that the plaintiff 'ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action': at para. 34. Factually in this matter, such an issue simply does not arise.
- [122] I am satisfied that the admitted and uncontradicted evidence establishes that Ms. Nungwana was aware of her cause of action immediately after the events of September 22-23, 2016 and took steps to pursue her claim on her own behalf very shortly after by retaining counsel who sought information in anticipation of legal proceedings. The evidence also establishes that Ms. Nungwana had the knowledge of her cause of action as well as the facts and evidence required to commence her action within the three-month limitation period. That is, she had the material facts necessary to discover and commence her action.
- [123] In addition, shortly after the expiration of the three-month limitation, she received further information in January 2017, yet still did not commence a claim until a year later.
- [124] As well access to information request was filed by the plaintiff on or about January 30, 2017 and CBSA disclosed documents to Ms. Nungwana's counsel on May 3, 2017. CBSA allowed her counsel to review the video evidence in April 2017 with copies provided in August 2017.
- [125] The facts relevant to the limitation issue are clear and, as conceded, a trial of the issue is not required. I conclude the plaintiff Ms. Nungwana had the necessary information, knowledge and legal assistance to commence her action within the three-month limitation period in the Customs Act. Given these circumstances, the application of the three-month limitation period under s. 106(1) would not "operate unfairly or deprive the plaintiff of a just remedy". As such, s. 106(1) is applicable to the plaintiff's claim regarding Charter damages.

Can Section 106(1) Be Relied on Given the Actions of the BSOs?

[126] The application of s. 106(1) also raises the question of whether the BSOs were acting in the performance of their duties. The plaintiffs submit that, even if s. 106(1) applies to their claim for Charter damages, the defendant cannot rely on it because the "CBSA and its officers acted outside their authority, in bad faith with the intention to injure" while "aware their actions would cause injury to the Plaintiffs". Section 106(1) applies to "anything done in the performance of his [or her] duties under this or any other Act of Parliament". That includes alleged wrongdoing or illegality by CBSA officers. It is only where a BSO acts outside the performance of their duties by engaging in conduct amounting to misfeasance in public office, with malice and for a clearly improper purpose, that s. 106(1) does not apply.

Is there sufficient evidence before the court to decide this issue summarily?

[127] The defendant submits there is sufficient evidence for the court to summarily decide this issue, noting the affidavit evidence of BSO Pooni and A/Supt. Louie provide an account of the BSOs' actions on September 22 and 23, 2016, and those accounts and other evidence in the record enable the Court to determine if the BSOs' actions were in the performance of their duties. They submit that, despite the presence of some conflicting evidence as to the substance of the communications between the BSOs and the plaintiffs, the factual basis is sufficient to summarily determine the matter.

[128] As noted earlier, the plaintiff Ms. Nungwana submits that the factors referred to above raise issues that would be unjust to dispose of summarily. She notes that the effect of the incident has been significant and that she has a substantial claim for damages. Further, she argues that the matter is complex and requires a thorough and elaborate review to consider the reasonableness of the search and its compliance with the Customs Act. She also submits the decision in this matter will address guidelines for a search of this nature requiring a full trial, that the cost of a conventional trial is not significant given the amount claimed, there are serious questions of credibility, that allegations of bad faith raise questions of the weight to be given to the evidence of the officers and assessment of their credibility and that the evidence before the court is incomplete.

[129] The issue on this application however, does not require resolution of factual disputes over, for example, whether Ms. Nungwana had appropriate access to counsel, or if the BSOs' suspicions were sufficiently reasonable to meet the requirements of s. 98(1) of the Customs Act. That is, the Court need only be able to make findings of fact concerning whether the BSOs were acting in the performance of their duties for the limitation to apply.

[130] To a certain extent there is conflicting affidavit evidence before the Court including issues of credibility. That in itself does not mean summary resolution is inappropriate. In Brissette at para. 27, Tysoe J.A. stated:

[27] As noted in *Inspiration Management*, the court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. This was recently reiterated in *Cory v. Cory*, 2016 BCCA 409 at para. 10: there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.

[131] For the reasons that follow, I have concluded there is sufficient evidence before the Court to decide this issue summarily, despite conflicting affidavit evidence.

The scope of section 106(1) and the phrase "anything done in the performance of his duties".

[132] In *Zolotow v. Canada (Attorney General)*, 2011 FC 816, aff'd 2012 FCA 164, at paras. 26-33, the Federal Court of Appeal held that s. 106(1) provides a defence to officers who act in an honest desire to execute their statutory duties but commit unlawful actions or wrongdoing in doing so. Section 106(1) "does not protect the rogue officer who was not acting in pursuance or execution or intended execution of his or her duties under the Customs Act" (at para. 31).

[133] In *Lapshinoff v. Wray*, 2020 BCCA 31, the plaintiff alleged a police officer used excessive force in his arrest. At trial, the court found that to be the case. However, the court held that the police officer was not liable for use of excessive force as s. 21 of the Police Act, R.S.B.C. 1996, c. 367, protects police officers from individual liability unless they are guilty of dishonesty, gross negligence, or malicious or willful misconduct. On appeal, the plaintiff argued that s. 21 of the Police Act did not provide a defence to the police officer. He argued that "police officers can only be said to be acting in the performance of their duties when they are acting lawfully and properly" and that the "legislature could not have intended to shield police officers from personal liability for actions which would constitute criminal offences" (at paras. 28 and 23).

[134] That argument was rejected by the Court of Appeal finding that a "tort action against a police officer will always allege some impropriety or default on the officer's part" (at para. 28). The Court of Appeal, referring to *Sulz v. Canada (Attorney General)*, 2006 BCCA 582, held the phrase "tort committed in the performance of... duties" should be given a broad scope in the context of the Police Act (at para. 30.)

[135] The plaintiffs rely on *144096 Canada Ltd. (USA) v. Canada (Attorney General)* (2003), 222 D.L.R. (4th) 577 (Ont. C.A.), where the appellant plaintiffs sought damages from the Crown for the alleged wrongful seizure and storage of aircraft brought into Canada in breach of the Customs Act. The court below, on a summary judgment application by the respondent defendants, had dismissed the plaintiffs' action on the ground it was not commenced within the three-month limitation period under s. 106(1). The plaintiffs argued the defendants were not entitled to rely on s. 106(1) because the defendant's seizure and storage of the aircraft was not "done in the performance of his duties under [the Customs Act] or any other Act of Parliament" (at para. 31.)

- [136] In that case the plaintiffs pleaded and provided affidavit evidence that a CBSA officer had lied to a Justice of the Peace to obtain a warrant to search and seize the aircraft, deliberately falsified valuations of the aircraft to increase penalties with the goal of preventing the plaintiffs from obtaining their release and knowingly acted in contravention of the law in order to harm the plaintiffs. The respondents did not provide evidence contesting those allegations nor directly rebut them. The court held that "by reason of the allegation and evidence of malice and intention to injure on the part of [the defendant], the application of the relevant limitation periods must await a trial" (at para. 40). [Emphasis added.]
- [137] I conclude a broad interpretation is to be applied to s. 106(1) of the Customs Act and the phrase "anything done in the performance of his duties". Section 106(1) applies to claims of wrongdoing unless there is clear evidence that the BSOs acted unlawfully, maliciously, for an improper purpose or with an intention to cause harm to the plaintiff.

The Tort of Misfeasance in Public Office

- [138] The plaintiffs have made allegations of malice and bad faith against the CBSA officers generally in the context of pleading the tort of misfeasance in public office. Allegations of malice and bad faith must be pleaded and name the individual against whom the allegations are made personally as a defendant: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 [J.P.] at paras. 319, 350. The plaintiffs have not named as a party any public official and, as noted, allege malice, bad faith and misfeasance only against BSO Pooni and A/Supt. Louie. The reason for naming individuals as parties is that an allegation of misfeasance is exceptionally serious and requires that the individual be named so they have the opportunity to defend themselves: *J.P.* at para. 350. The Court of Appeal in *J. P.* at para. 320 and *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 [Powder Mountain] at para. 2, noted it involves "the most egregious of tortious misconduct", and therefore "must be used cautiously".
- [139] The Court of Appeal in *Rain Coast Water Corp v. British Columbia*, 2019 BCCA 201, summarized the rationale and narrow application of the tort of misfeasance in public office:
- [150] As this Court explained in *Powder Mountain* and *J.P.*, the tort of misfeasance in public office is based on the premise that public officers must exercise their power only for the public good and not deliberately and unlawfully for ulterior or improper purposes. The underlying rationale of the tort is the protection of every citizen's reasonable expectation that those who hold public office will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of their public functions. Its ambit is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct: *Powder Mountain* at paras. 2, 8-9; *J.P.* at paras. 319-323, 329.
- [140] The Court of Appeal in *J.P.* set out the test for establishing the tort of misfeasance as:

- [326] Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. Three Rivers described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23.
- [327] Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is inconsistent with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act: *Odhavji* at para. 28 and *Powder Mountain* at para. 67.
- [141] In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, the Supreme Court of Canada confirmed that mere inadvertence or negligence in discharging a duty is not misfeasance in public office stating:
- [28] ...In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
- [142] The core of Ms. Nungwana's complaint is the BSOs were wrong to suspect her of importing an illegal narcotic into Canada. However, as noted in *Foote v. Canada (Attorney General)*, 2015 BCSC 849 [Foote] at para. 110, citing *Canus Fisheries Ltd. v. Canada (Customs & Revenue Agency)*, 2005 NSSC 283, "being wrong is not sufficient to commit the tort of public misfeasance".
- [143] Her allegation that the BSOs were motivated by malice, bad faith or an intention to harm her for an improper purpose is made without credible or objective evidence. The claim does not provide sufficient particulars. Her allegations are based on how she perceived events. They lack evidentiary substance and are speculative. In addition, the evidence of the defendants and the documentary evidence is to the contrary.
- [144] I turn to the claims naming A/Supt. Louie and BSO Pooni.

A/Supt. Louie

- [145] The plaintiffs' further amended notice of civil claim alleges A/Supt. Louie "exaggerated and fabricated grounds to justify searches under s. 98 of the Customs Act" and that he "lied that necessary procedures under s. 98 were followed knowing too well the procedures were not followed". Those allegations are not addressed in Ms. Nungwana's application response, nor in her affidavit in support.
- [146] The uncontested evidence of A/Supt. Louie is that, at the start of his shift on September 22, 2016, he was made aware of an intelligence lookout previously placed on Ms. Nungwana's CBSA traveler file. He had no previous knowledge or connection to Ms. Nungwana other than what was on the file.
- [147] One of the intelligence documents noted that Ms. Nungwana was examined prior to her outbound flight from VIA on August 24, 2016, (Ms. Nungwana says August 23, 2016) to Tanzania, and that she was flagged because she had provided "inconsistent information regarding [her] intended trip and reasons for travel". A/Supt. Louie stated that Tanzania was, and currently is, a known drug-source country, particularly for heroin.
- [148] That intelligence document instructed BSOs with regards to Ms. Nungwana to "conduct a progressive exam while developing your own grounds for further search" with particular attention to be paid to concealment of contraband in luggage or objects "or internal carry (swallowing)". It further noted CBSA officers were interested in any of her communications.
- [149] Ms. Nungwana's affidavit appends A/Supt. Louie's emails which confirm that her arrival at VIA was anticipated, that her examination was of interest to CBSA intelligence officers and to the RCMP and that the RCMP had a particular interest in Ms. Nungwana's "business partner". This was believed to be her friend "Sam."
- [150] Ms. Nungwana alleges the emails are evidence that "CBSA officers" had placed her friend "Sam" on a "watch list" for "organized smuggling" and demonstrate that the CBSA "cooked up" false information in order to search her and to cause her harm.
- [151] The documentary evidence and the affidavit evidence of A/Supt. Louie are consistent. There is no evidence that the interest of CBSA or the RCMP in Ms. Nungwana or her associates was fabricated or "cooked up" either before or after the events in issue. A/Supt. Louie was not the individual that flagged her for a secondary inspection. There is no evidence he "exaggerated and fabricated" grounds for the s. 98 search. His handwritten notes indicate he reviewed the grounds for the s. 98 search presented to him by BSO Pooni and he approved them. Ms. Nungwana offers no evidence to support her allegation the concerns of the BSO officers was "cooked up". In fact, she simply says "I strongly believe CBSA and/or BSO Pooni cooked up this story." She makes that bare allegation without any explanation why she so believed other than they did it to have a reason to search her and cause her harm.

- [152] The comments of the Court of Appeal in Powder Mountain are apposite respecting the evidence required to prove misfeasance, malice and bad faith having to be specific to the individual against whom the allegations are made:
- [9] Since the plaintiffs alleged vicarious liability on the part of the Province for the intentional wrongs of its agents... it is important to consider the actions and motivations of each of the individual actors separately. One should not attribute, for example, the detailed knowledge of persons at one level of administration to persons at another level who have only general knowledge of the subject and are largely dependent on the advice of others

BSO Pooni

- [153] As noted earlier in these reasons, BSO Pooni was the senior BSO tasked with Ms. Nungwana's examination. She alleges he engaged in similar misfeasance and conducted himself with malice and in bad faith claiming he "exaggerated and fabricated grounds for the purpose of obtaining approval of searches under s. 98 of the Customs Act", that he "cooked up" a story that she was a drug dealer, that he made derogatory comments about black and African people including her and that he threatened her with physical violence including threatening to personally cut open her stomach to "retrieve the cocaine".

Section 98 Search

- [154] Ms. Nungwana asserts BSO Pooni fabricated grounds for the search and refers to a post-incident report he prepared that summarized her examination. That report states Ms. Nungwana was linked to a CBSA intelligence file relating to heroin seizures in ports of entry into Canada and that CBSA was particularly interested in her "business partner" who was suspected of "organizing smugglers from Tanzania, Brussels and Rwanda." That person, "Sam", had provided her with an extra piece of luggage to bring back to Canada. Ms. Nungwana says this is proof that CBSA had listed her in their system as a "drug dealer." It is not. It is only evidence that CBSA had concerns about possible illegal importation of narcotics into Canada and that an alert had been placed on her file when she left Canada for Tanzania. This was prior to BSO Pooni's involvement in the file.
- [155] In addition, BSO Pooni was not involved in the CBSA decision to refer Ms. Nungwana for secondary screening as that was made by BSOs in the primary inspection line at the VIA point of entry. They had done so because of the intelligence lookout on her file and her note on her E311 Customs Declaration card that she was importing agricultural goods into Canada.
- [156] I note those two grounds are not disputed by Ms. Nungwana and further fall into the BSOs' powers under ss. 11-13 of the Customs Act.

- [157] BSO Pooni's initial interactions with Ms. Nungwana after he was assigned by A/Supt. Louie to lead the examination were at secondary screening which included searching her luggage, her four cell phones and asking her questions about her travels, associates and financial situation, all of which were authorized by the Customs Act.
- [158] Ms. Nungwana provides no evidence or allegation that BSO Pooni and the other officers acted for an improper purpose at the secondary screening, nor that they did anything improper in doing so.
- [159] The grounds for the s. 98 search and the additional grounds after the search have been summarized earlier. Ms. Nungwana does not challenge their existence but asserts BSO Pooni exaggerated or fabricated them. However, she offers no evidence in support, nor does she refer to anything from any examination for discovery that calls into question his good faith belief in the existence of the grounds. All Ms. Nungwana offers are her conclusory opinions.
- [160] To the contrary, the evidence is that BSO Pooni was detaining and examining Ms. Nungwana in order to determine if she was transporting illegal narcotics. Additionally, Ms. Nungwana's evidence corroborates some of the grounds BSO Pooni relied on to request the s. 98 search. Ms. Nungwana confirms she was travelling from a known drug-source country, she was returning with a bag that belonged to an individual that the CBSA suspected to be linked to organizing smugglers, and she was in possession of a credit card that belonged to a different person.
- [161] The search by means of the SIU and X-Ray followed the examination based on BSO Pooni's evidence that he formed grounds to do so. Ms. Nungwana alleges these grounds were fabricated but does not provide evidence contesting them. Indeed, the evidence is the BSOs sought approval for and used the SIU and X-Ray search because they believed Ms. Nungwana may have been transporting illegal narcotics. Ms. Nungwana offers no objective evidence to support her bald allegations of malice and bad faith. To establish malice or misfeasance, the unlawful conduct for an improper purpose must be done with the intention to harm the plaintiff (Foote at para. 106). Ms. Nungwana simply alleges in support of her claim that the BSOs acted maliciously with an intention to harm her.
- [162] As noted earlier, conflicting affidavit evidence, including where credibility issues arise, does not mean a court should refuse resolution by summary trial. Where there is an evidentiary basis for preferring certain affidavit evidence, such as uncontroverted objective evidence, documentary evidence or discovery evidence, a court may resolve factual issues. See Brissette at para. 27, Cory v. Cory, 2016 BCCA 409 at para.10.

- [163] The evidence of the officers, supported by the documentary evidence, is consistent with their authority and role as BSOs. The assertion of a threat to cut the plaintiff, Ms. Nungwana, open is likely a reference to surgical removal of drugs if found as result of the examinations carried out. In my view, given the plaintiff's language issues, and in the context of the overall evidence, such is more accurate and probable.
- [164] I am satisfied A/Supt. Louie acted on the intelligence lookout placed on Ms. Nungwana's traveler's file and reviewed and approved the grounds prepared by BSO Pooni for a s. 98 search in the course of undertaking his duties and responsibilities in good faith. As a result, s. 106 applies to his actions on September 22-23, 2016. The plaintiff has failed to provide factual evidence supporting the alleged misfeasance sufficient to prevent summary resolution of the claim.
- [165] I am satisfied that the evidence establishes that BSO Pooni and A/Supt. Louie were acting in the course of their duties as BSOs. The evidence does not meet the onerous threshold of proof required for findings of malice, bad faith and misfeasance in office. The allegations of Ms. Nungwana are entirely subjective, based on her belief and interpretations and are not supported objectively or corroborated by evidence. There is no basis to find that a trial with viva voce evidence would provide more evidence than is in her affidavit.
- [166] As a result, given the plaintiff Ms. Nungwana has not shown evidence of malice, bad faith and misfeasance in office, s. 106(1) of the Customs Act applies and her claim is statute barred.

MR. NKOMO'S CLAIM

Can the Necessary Facts be Determined Respecting Mr. Nkomo's Claims?

- [167] Regarding Mr. Nkomo's claims, his evidence for the most part describes a routine encounter with BSOs. It does not allege conduct that is either tortious or engages his Charter rights. The questions asked and the "pat down" search are within the BSOs permitted duties and do not engage an individual's Charter rights: *Simmons* at 516-517.
- [168] The SCC in *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 [Dehghani] at 1072, following *Simmons*, noted that "a factor indicating no detention of constitutional consequence occurs during routine questioning is the absence of stigma. Clearly, there is no stigma associated with a referral to a secondary examination." The Supreme Court further noted:

There is, however, no change in the character of the examination simply because it is necessary for reasons of time and space to continue it at a later time in a different section of the processing area. The examination remains a routine part of the general screening process for persons seeking entry to Canada. [Emphasis in original.]

[169] Mr. Nkomo asserts he was "detained", but as noted, secondary screening of international travelers does not constitute detention in law. The SCC in *Dehghani* expressly rejected that routine questioning of visitors to Canada during secondary screening is a detention that engages section 10(b) of the Charter (at 1074):

It is important to note that neither the existence of a statutory duty to answer the questions posed by the immigration officer nor the existence of criminal penalties for both the failure to answer questions and knowingly making a false or misleading statement necessitates the conclusion that the appellant was detained within the meaning of s. 10(b). These provisions are both logically and rationally connected to the role of immigration officials in examining those persons seeking to enter the country. Indeed, they are required to ensure that border examinations are taken seriously and are effective. Both of these types of provisions also exist in the Customs Act, and as I have already discussed, this Court held in *Simmons* at p. 517 that it would be absurd to suggest that routine questioning by a customs officer constitutes a detention for the purposes of s. 10(b).

[170] I find Mr. Nkomo was not detained and his Charter rights were not engaged.

[171] Mr. Nkomo alleges "the officers also told me I was being interrogated and searched because person [sic] coming into Canada from Tanzania are prime suspects of drug trafficking. Black people are prime suspects of drug smuggling... The officers said Africans cannot be trusted because most of the time, they bring drugs into Canada."

[172] Mr. Nkomo does not present any evidence to support his allegations of racial bias. Rather, the documentary evidence and Mr. Nkomo's own evidence show that the CBSA's questioning was motivated by reasons that did not pertain to race. The defendant denies Mr. Nkomo's characterization of BSO Lai's statements but Mr. Nkomo corroborates the evidence that the CBSA considers Tanzania a drug-source country. The evidence establishes he was referred to secondary screening because he had a target notification on his file which he does not contest. His evidence was also consistent with the CBSA evidence that his changes to his flight itinerary at the last minute resulted in a CBSA officer "in Ottawa" flagging his file.

[173] His allegations are not consistent with admissions he made on discovery. As his interview with BSO Lai was concluding he said he understood why he was being asked questions in secondary screening. He made no allegation of racial bias when he said to BSO Lai that "I know very well there are people [who] do those kind of things so I understand why you have to ask those questions." He affirmed the accuracy of his statement on examination for discovery.

[174] Further, BSO Lai's contemporaneous electronic record of the questions asked during the interview and Mr. Nkomo's responses do not support the plaintiff's allegations.

[175] I conclude his claim is bound to fail.

CONSTITUTIONALITY OF SECTION 106(1) OF THE CUSTOMS ACT

[176] The claim does not plead that s. 106(1) of the Customs Act is unconstitutional as contrary to the Charter, or that its application in this case infringes Ms. Nungwana's Charter rights. However, the plaintiffs filed a Notice of Constitutional Question, dated March 6, 2019, indicating that an application would be made to this Court in the week of March 25, 2019, questioning the validity and/or applicability of s. 106 of the Customs Act. No such application was made, and the application response for the summary trial does not raise this argument. Notwithstanding this, the plaintiffs' submissions briefly addressed the constitutionality of s. 106(1).

[177] Ms. Nungwana submits that, even if s. 106(1) of the Customs Act applies to her claim for Charter damages and to the actions A/Supt. Louie and BSO Pooni, it is unconstitutional because it violates s. 15 of the Charter and s. 2(e) of the Bill of Rights. The plaintiffs' submissions regarding these allegations are sparse and do not provide any applicable authorities nor supporting evidence. For this reason, it does not allow for any meaningful analysis.

[178] As stated by the Supreme Court of Canada in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357:

9 Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[179] I therefore decline to consider the constitutionality of s. 106(1) of the Customs Act.

[180] In light of the conclusions reached I need not address the alternative application of the defendant to strike portions of the pleadings.

Orders

[181] The plaintiffs' action is dismissed with costs to the defendant of this application and the proceeding generally.

The Honourable Mr. Justice Punnett

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