NOVA SCOTIA COURT OF APPEAL

Citation: ***Symington v. Halifax (Regional Municipality)***, 2013 NSCA 152

Date: 20131220
Docket: CA 374381
Registry: Halifax

Between:

James Symington

Appellant

v.

Halifax Regional Municipality and
Halifax Regional Police Service

Respondents

Judges:	MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A.
Appeal Heard:	September 24, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Hamilton, JJ.A. concurring, with costs on appeal of $5,600 (representing 40% of the costs below) together with reasonable disbursements to be agreed upon or taxed.
Counsel:	Stephen J. Moreau, for the appellant Daniel W. Ingersoll and Ezra B. van Gelder, for the respondent

Reasons for judgment:

OVERVIEW

[1] For over a decade now, the appellant James Symington has been battling his former employer, the respondent Halifax Regional Police Service. The dispute began in 2001 when, according to Mr. Symington, his superiors used abusive tactics while resisting his claim for medical leave. For example, they invoked their discipline process against him and also launched a criminal fraud investigation. This prompted the present action which Mr. Symington commenced in the Supreme Court of Nova Scotia back in 2004. His original statement of claim included allegations of malicious prosecution, defamation, negligence and intentional infliction of mental harm. The malicious prosecution claim had two aspects: (a) alleged abuse of the *Police Act* discipline process, and (b) alleged abuse of the criminal process.

[2] However, in earlier proceedings (2007 NSCA 90), this Court confirmed that, subject to one exception, the claim should be struck from the Supreme Court and instead resolved under the dispute resolution process set out in the parties' collective agreement. The one exception involved the malicious prosecution/abuse of criminal process claim. This, we felt, fell outside the collective agreement and could therefore proceed in the Supreme Court.

[3] However, this surviving remnant has now also been terminated summarily by order of Justice Heather Robertson. She did so because (a) the pleadings were unsustainable on their face (*Nova Scotia Civil Procedure Rule* 13.03) or, alternatively, (b) Mr. Symington failed to raise an arguable issue on the merits (*Rule* 13.04).

[4] Mr. Symington now asks us to overturn this latest ruling, asserting that his pleadings were in order or, even if they were faulty, that he should have been afforded the chance to amend them. He also insists that arguable issues remain warranting a full trial.

[5] For the reasons that follow, I would dismiss the appeal. Essentially (the pleadings issue aside) the judge was correct to conclude that Mr. Symington offered no arguable issue to justify a trial.

BACKGROUND

[6] Mr. Symington was sworn in as police constable in 1988 and remained with the Halifax Regional Police until he took long term disability in 2005. His very lengthy affidavit evidence depicts a dedicated, enthusiastic and community-minded police officer who, over the years, felt more and more maligned by his superiors, to the point that he was forced to take sick leave. This, he theorizes, prompted his superiors to come down on him even harder. Their alleged tactics included instigating the fraud investigation that lies at the heart of this appeal. This investigation lasted six weeks and included the issuance of four search warrants before a decision was made not to proceed with charges. Mr. Symington explains his plight in his factum:

> 10. Due to this hostile environment, Symington saw his family physician in 1999 to deal with the stress and other psychological problems he was feeling by that point in time due to his work. Symington's evidence is that, in 2001, the hostile environment detailed in his affidavit left him with a feeling of despair, insomnia, and weight loss. Others spoke to Symington about his weight loss as well.
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> 11. Symington went on sick leave in June 2001 for an elbow injury suffered around June 11, 2001. Shortly thereafter, he was diagnosed as suffering from a stress-related illness directly brought on by his hostile work environment. All of his treating physicians and an eminent psycholol gist**[sic]** hired by the HRP to independently examine Symington all confirmed this diagnosis. All of Symington's treating physicians advised him to continue with activities outside of the work environment as part of his treatment process.
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> 12. At first, the HRP treated the sick leave request with suspicion. They ordered Symington to see their doctor who issued a note suggesting that Symington could perform some light duties. Symington obtained a second note from his physician recommending he stay off work. This note was provided to the HRP's Occupational Health Services ("OHS"), the department that managed the sick leave plan. OHS accepted it. Despite this, the HRP issued an APB to track Symington down (something normally reserved for persons who need to be apprehended). Symington's supervisor quipped that Symington was playing some sort of game with them.
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> 13. Following this initial resistance, OHS approved the sick leave claim. OHS never challenged the validity of Symington's absence at any material time, and Symington remained on sick leave, and then LTD leave, until 2005.

[7] One of the more controversial aspects of this case involved Mr. Symington's activities while on sick leave. These included offering assistance to victims of New York's 9/11 tragedy. From Mr. Symington's perspective, this (completely justified) activity prompted the abusive investigation. Again, I refer to his factum:

> 14. Following the 9/11 tragedy, Symington and his rescue dog Trakr were driven to Manhattan to take part in the rescue effort. Symington is credited with finding the last Twin Towers' survivor. This naturally led to some publicity, including a news item in Canada on the 14th which officers and members of the HRP watched on television.
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> 15. On seeing this story, the HRP launched disciplinary and criminal proceedings. The HRP's Chief ordered the investigations, telling the affiant Insp. Darnborough by email that "he [wants] the above file completed in three days". Insp. Darnborough's evidence is that he spoke about this matter with Symington's supervisor, the one who had first resisted Symington's sick leave, only to be overridden by OHS.
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> 16. The investigator assigned, the Respondents' primary affiant Sgt. Moser, then investigated Symington's June to September acting activities against a standard of criminal fraud. The 9/11 rescue efforts were not investigated.
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> 17. From the very start, the Respondents made a public show of their investigation, misleading the media by saying that Symington was being investigated for his rescue work when all the evidence is that the investigations focused on the previous acting. They suspended Symington and told all staff of this. They leaked information to the media that they were investigating Symington for fraud related to 9/11 activities: the Chief even said so directly in an interview. The Respondents' misleading picture was picked up by the local, national, and international media.
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> ***Sgt. Moser's Investigation***
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> 18. Sgt. Moser then conducted his investigation, the central focus of the motion below. He sought advice from Crown counsel who told him what to look for, reviewed materials, obtained four (4) search warrants, and was then advised by counsel that there was insufficient evidence to proceed.
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> 19. The criminal proceedings were determined in Symington's favour about six weeks after the investigation had started.

[8] Not surprisingly, the police force offers a totally different perspective. I refer to its factum:

8. Symington's claim and this appeal centers on a fraud investigation which Symington alleges was performed with malice and without cause. The facts underlying that investigation are these:

   a) In early September 2001, Insp. Darnbrough spoke with Lisa Ferguson while investigating a complaint against Symington under the *Police Act* unrelated to this proceeding. From that conversation he learned that Symington had been employed as an actor in June 2001 while on leave and receiving sick benefits from HRP.

   b) Insp. Darnbrough spoke with Ms. Ferguson again on September 21, 2001, this time with Sgt. Moser present. Ms. Ferguson indicated that Symington had been employed as an actor on May 24 to 25, 2001, and for the last two weeks in June.

   c) Following their conversation with Ms. Ferguson, Insp. Darnbrough asked Sgt. Moser to commence a criminal investigation to determine whether Symington had defrauded HRP by receiving sick benefits while employed elsewhere. He gave no instructions to Sgt. Moser about how to conduct the investigation or what conclusions he should draw, other than that he should consult with the Crown Prosecutor once the investigation was completed.

   d) At the time he commenced his investigation, Sgt. Moser knew the following:

      (i) Symington called in sick on June 11, 2001, because of an off-duty elbow injury and requested a leave of four to six weeks;

      (ii) Through a referral by HRP Human Resources ("**HR**"), Dr. Howard Conter examined Symington on June 13 and cleared him for modified duties commencing the following day;

      (iii) On June 14 Symington reported a second diagnosis (the nature of which Sgt. Moser did not know until near the end of his investigation) which prevented him from returning to work; and

      (iv) Symington proceeded to work on the movie "K-19 Widowmaker", which was being filmed in Halifax at the time, from June 15 to 30, 2001, and was paid an hourly or daily wage for his services.

   e) Sgt. Moser had full control over the investigation. He received no instructions from Insp. Darnbrough or anyone else in HRP about how to conduct the investigation or what findings he should make.

   f) Sgt. Moser interviewed eight witnesses between October 2 and 5 and learned the following:

(i) Symington had requested and was granted June 8 off work so he could work on a movie set;

(ii) Symington's request for additional days off was denied;

(iii) Symington's request to work evenings the week of June 11 was granted;

(iv) Symington reported an off-duty injury on June 11 and that he would be off work for four to six weeks;

(v) At HR's request, Dr. Conter examined Symington on June 13 and concluded that Symington could perform modified duties commencing June 14 and return to full duties on June 26;

(vi) On June 14 Constable Mike Balcom, a representative from the Municipal Association of Police Personnel, advised HR that Symington was unable to work because of a second diagnosis;

(vii) By June 21 HR had still been unable to contact Symington and decided that a second IME should be completed for the second diagnosis; and

(viii) The second IME confirmed that Symington would be "unavailable to work with no anticipated return to work date".

g) At no time during this period did Sgt. Moser learn the nature of Symington's second diagnosis.

h) On October 8, Sgt. Moser met with Crown Prosecutor Mark Scott and received advice about doctor/patient privilege, case law on sick benefits, and whether Sgt. Moser was in a conflict of interest for investigating a fellow police officer. Mr. Scott did not then advise Sgt. Moser to discontinue the investigation or that there was no evidence which could support a conviction.

i) On October 9, Sgt. Moser met with Dr. Conter who advised that at the time of Symington's first IME he saw no signs of any medical condition other than Symington's elbow injury.

j) Following his conversation with Dr. Conter and based on the information he had obtained to that point, Sgt. Moser believed that Symington had defrauded HRP by seeking and receiving sick benefits in June 2001 while at the same time working elsewhere.

k) On October 12, Sgt. Moser received a letter from William Leahey, Symington's counsel. Leahey enclosed with his letter a report prepared by Dr. Joseph Gabriel in which Dr. Gabriel stated that he had first seen Symington on August 13, 2001. Dr. Gabriel's letter

did not identify the second diagnosis for which Symington had been off work in June.

l) Later that day Sgt. Moser obtained and executed two search warrants at the offices of ACTRA Maritimes and Nova Scotia Medical Services Insurance. He seized documents confirming that Symington had:

(i) worked on the set of K19-Widowmaker on June 4, 5, 6, 7, 8, 11, 14, 15, 18 and 19, 2001; and

(ii) seen his family physician, Dr. Jeffrey Colp, on June 12 for "unspec disorder joint upper arm" and on June 14 and 22 for "anxiety state unspecified".

m) On October 16, Sgt. Moser obtained and executed a third warrant to obtain records in the possession of HRM Occupational Health Services ("**OHS**"). Among other things he seized the physician notes which Symington had provided OHS in support of his sick leave. It was only then that Sgt. Moser learned the second diagnosis related to stress.

n) Following a conversation with Dr. Colp on October 16 (during which a fellow police officer, Sergeant Worrell, was also present), Sgt. Moser obtained a fourth warrant to obtain the medical records at Dr. Colp's office. The information Sgt. Moser swore on October 18 detailed all of the information he had uncovered thus far, *including that Symington's second diagnosis related to stress and anxiety*.

o) On October 18 Dr. Colp told Sgt. Moser that he had not advised Symington to take four to six weeks off work for his elbow injury but that he had told Symington he could continue acting if it helped with Symington's stress. Dr. Colp also told Sgt. Moser that he had not seen Symington for stress until June 14, 2001.

p) On October 22, 2001, Sgt. Moser met again with Mr. Scott to review the evidence gathered to date and obtain Mr. Scott's advice on whether the evidence could support a criminal charge. Mr. Scott requested an opportunity to review the evidence and consider his opinion.

q) Sgt. Moser took no further steps in his investigation until October 31, 2001, when he met with Mr. Scott and a second senior Crown Prosecutor, Bernadette MacDonald. They told Sgt. Moser that in their opinion there was insufficient evidence to obtain a conviction. Sgt. Moser immediately discontinued his investigation. He laid no charges.

[9] In the end, the motions judge concluded that Mr. Symington's assertions of malice were not enough to raise a genuine issue for trial.

> ¶129 Each element of malicious prosecution must be independently proven, malice being the fourth and last element.
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> ¶130 I do not see on the pleadings and affidavit evidence before me that the plaintiff can show that either Inspector Darnbrough or Sergeant Moser acted with malice or that any improper purpose can be established even by the merest inference. Their evidence remains almost entirely unchallenged by the plaintiff.
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> ¶131 In my view, the plaintiff is simply unable to meet the threshold required in cases of this sort. These police officers will not be held to a standard of perfection nor will they be required to understand the application of the law to the standard exacted of Crown counsel. Their work need not be flawless, but must be reasonable in the circumstances.
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> ¶132 The plaintiff has referenced a myriad of cases. *Oniel v. Metropolitan Toronto (Municipality) Police Force* (2001), 195 D.L.R. (4th) 59 (Ont. C.A.); *Schaal v. Reeves*, [1918] S.J. No. 26 (T.D.); *Proulx v. Quebec (Attorney General)*, 2001 3 S.C.R. 9; *Watters v. Pacific Delivery Service Ltd. Sandover and Cotter*, [1963] B.C.J. No. 80 (S.C.); *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] S.C.J. 57; *Montreal (City) v. Hall* (1885), 12 S.C.R. 74 [Q/L]; *Khanna v. Royal College of Dental Surgeons of Ontario*, [2000] O. J. No. 946 (C.A.); and *Mammoliti v. Niagara Regional Police* indexed as: *Ferri v. Ontario (Attorney General)* 2007 O.J. No. 397 (C.A.). Each of these distinguish**[sic]** on its fact situation, but in my view, they do not change the reality of this case, that the plaintiff simply cannot succeed in a claim for malicious prosecution.
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> ¶133 With respect to the threshold of proving malice, the ground has shifted where non-Crown defendants are involved, but that is not to say police officers are left without any discretion, in the exercise of their duties. There must be some evidence that these officers intended to use the criminal justice system for an improper purpose. In other words it must be shown that they have acted without reasonable and probable cause, in their investigation or in their quest for search warrants.
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> ¶134 The pleadings and evidence on pleadings do not meet the threshold. Accusations alone will not suffice. There is simply no genuine issue for trial. Nor do I believe the substantial deficiencies could be cured by a further drafting of the pleadings.
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> ¶135 Accordingly, the applicants' application is successful and the plaintiff's pleadings are struck. I will be happy to hear submissions on costs.

ISSUES

[10] An initial issue before the motions judge involved an interpretation of this Court's decision in the first appeal. Specifically, the parties disputed the parameters of the remnant claim that we allowed to continue in the Supreme Court. Here is what my colleague Justice Fichaud, on our behalf, wrote in the first appeal (2007 NSCA 90):

> ¶127 I would allow the appeal in part, to permit Cst. Symington to pursue in court his cause of action for malicious prosecution resulting from alleged abuse of the criminal process. In all other respects I would dismiss the appeal, and dismiss the grounds in the notice of contention. Rather than parsing the pleadings to strike passages and retain only those that relate to the permitted cause of action, I prefer the remedy applied by the Alberta Court of Appeal in *Edmonton Police*, ¶ 29-30. I would retain the basic pleading of malicious prosecution for abuse of the criminal process to avoid a limitations issue, but would strike the rest of the amended statement of claim, with leave to Cst. Symington to amend to support his claim for malicious prosecution for alleged abuse of the criminal process.

[11] Before the motions judge, the respondents used this passage to insist that the appellant could plead only the tort of malicious prosecution. However, from the appellant's perspective, our direction allowed him to prosecute, not that specific tort, but the impugned conduct generally; namely the alleged "abuse of the criminal justice system". Under this umbrella, he insisted that two additional torts can be accommodated, namely negligent investigation and misfeasance of public office.

[12] The motions judge allowed only the tort of malicious prosecution to proceed, albeit with the respondents' concession that this would encompass procuring the four search warrants:

> ¶19 The applicants in this case concede that it is reasonable to infer that the plaintiff's claim for malicious procurement of a search warrant is sufficiently related to the malicious prosecution claim, to allow these two causes to proceed subject to an examination of their merit pursuant to *Rules* 13.03 and 13.04. I agree.
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> ¶20 I can place no other interpretation on the Court of Appeal decision, than to recognize that the Court was very specific in precluding four of the five causes of action. The plaintiff can only proceed with the cause of action of malicious prosecution.

[13] However, for the first time in its factum before us, the respondents conceded that all three potential torts could be accommodated by our direction:

> 27. Symington spends considerable time discussing *Piko v Hudson's Bay Company* (1998), 41 OR (2d) 379. With respect, this decision does not go to the issue here. *The Respondents readily concede that Symington may allege the torts of malicious prosecution, negligent investigation and misfeasance while still complying with the First Appellate Decision*. What he may not do is continue to make allegations unrelated to these claims. The impugned paragraphs do precisely that and we submit Justice Robertson was correct to strike them. [Emphasis added]

[14] I have a problem with this concession for the following reasons.

[15] Firstly, I agree with Mr. Symington that this surviving claim ought not be confined to the tort of malicious prosecution. After all (aside from the search warrant concession), such a claim would be a non-starter because, here, the investigation ended without charges ever being laid. Therefore, without an actual prosecution, there can be no tort of malicious prosecution. See **Nelles v. Ontario**, [1989] 2 S.C.R. 170, at pp. 192-193. So our direction was not confined to the search warrants. Instead Mr. Symington can claim all damages flowing from all aspects of the alleged abusive investigation.

[16] However, my concern involves the respondents' concession *vis-à-vis* the tort of negligent investigation. Mr. Symington explains this aspect of the claim in his factum:

> 70. Given that Sgt. Moser was acting from day 1 on legal advice, and given the reasonable assumption that the legal advice would have been correct, there is a genuine issue here as well requiring a trial. Where a police investigator ignores or fails to follow legal advice concerning how to conduct an investigation, this provides evidence both of an absence of cause and malice.
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> 71. If this is wrong, and Sgt. Moser did stumble unwittingly into an investigation into Symington's actual illness in order to determine whether his acting was inconsistent with the illness, his investigation was so poor that there is a genuine issue of negligence and absence of cause for this reason too.

[17] Yet our ruling had nothing to do with negligence. We allowed Mr. Symington to advance a claim for "malicious prosecution resulting from alleged abuse of the criminal process". As noted, this connotes malice which, as I will explain, involves intentional wrongdoing. For this reason, our direction could never be stretched to accommodate the unintentional tort of negligence.

[18] Furthermore, the case law is clear that claims alleging malicious use of the criminal process involve much more than negligence. For example, in **Nelles,** *supra* (at page 193), the Supreme Court of Canada's concept of malice included "a deliberate and improper use of the office". Later in **Miazga v. Kvello Estate**, 2009 SCC 51, the Supreme Court confirmed that to act maliciously, one must act wilfully and even gross negligence will not suffice:

> ¶80 The inverse proposition, however, is not true. The absence of a subjective belief in sufficient grounds, while a relevant factor, does not equate with malice. It will not always be possible for a plaintiff to adduce direct evidence of the prosecutor's lack of belief. As is often the case, a state of mind may be inferred from other facts. In appropriate circumstances, for example when the existence of objective grounds is woefully inadequate, the absence of a subjective belief in the existence of sufficient grounds may well be inferred. However, even if the plaintiff should succeed in proving that the prosecutor did *not* have a subjective belief in the existence of reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable: *Nelles*, at p. 199; *Proulx*, at para. 35. *Malice requires a plaintiff to prove that the prosecutor* ***wilfully*** *perverted or abused the office of the Attorney General or the process of criminal justice*. The third and fourth elements of the tort must not be conflated. [Emphasis added]

I recognize that these cases involve allegations of malicious prosecution by Crown attorneys but, in my view, their logic should extend to police officers who are accused of malicious investigation.

[19] That said, I am less concerned about the Crown's concession as it applies to the alleged misfeasance of public office. I say this because this tort, like malicious prosecution, involves intentional wrongdoing. See **Odhavji Estate v. Woodhouse**, 2003 SCC 69:

> ¶32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[20] Therefore, to be successful in the Supreme Court, Mr. Symington, regardless of the label used to describe his cause of action, would have to prove that the police wilfully abused their office when they initiated and then continued their 6-week criminal investigation. In other words, he must prove that the police were motivated by malice. As I will now explain (in our summary judgment context) this means establishing malice as a genuine issue for trial. Here the motions judge concluded that Mr. Symington failed to do so. Whether she was correct in doing so, represents the main issue on appeal.

[21] Mr. Symington also raises a discrete issue involving costs. Specifically, he accuses the respondents of splitting their case by first raising the jurisdictional question (that eventually led to most of the claim being vitiated) only to then, in a separate summary process, seek to dismiss that which remained. This tactic, he argues, should result in him receiving his costs throughout even if unsuccessful on appeal or, alternatively, he argues that, at least, he should not be responsible to pay the respondents' costs.

ANALYSIS

Malice as a Genuine Issue for Trial?

[22] It would be helpful to begin with the test for "summary judgment on the evidence" as set out in our *Rule* 13.04. This court in **Burton Canada Company v. Coady**, 2013 NSCA 95, recently restated the two-stage approach:

> ¶27 In **Guarantee** the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
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> > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra,* at para. 15).
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> ¶28 That statement was affirmed by the Supreme Court of Canada in **Canada (Attorney General) v. Lameman**, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:

> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.
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> [29] The Rules have not changed these well-established legal principles. Rather, they attempt to codify the legal principles that emerge from the case law into a workable, effective matrix of procedural directives and deadlines.

[23] The Court then offered this guidance on each of the two stages:

> ¶42 At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is <u>not</u> – as the judge put it here – to see if the "undisputed facts ... give rise to a genuine issue for trial". That is a misstatement of the test established in **Guarantee**. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party

> shown, on the undisputed facts, that its claim or defence has a real chance of success?
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> ¶43 In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
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> ¶44 The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
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> *Is there a reasonable prospect for success on the undisputed facts?*
>
> the answer would be yes.

[24] Here, the respondents premise their motion on the fact that Mr. Symington simply cannot establish malice and, without malice, there can be no claim. In support, they filed affidavit evidence asserting a complete absence of malice. Instead they insist that they embarked upon a legitimate, above-board fraud investigation, where reasonable steps were taken at every stage and which ended without charges being laid.

[25] For example, Officer Moser explains that the investigation was triggered over concerns that Mr. Symington was working as an actor while on sick leave:

> 5. My involvement in this investigation began when I was requested by Inspector William Darnbrough, also of the Halifax Regional Police, to attend with him on September 21, 2001 at the home of Lisa Ferguson for the purposes of interviewing Ms. Ferguson in relation to an internal complaint which had been advanced against Mr. Symington.
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> 6. That prior to being asked to accompany Inspector Darnbrough when he interviewed Lisa Ferguson I had had no involvement with any investigation regarding Mr. Symington under either the *Police Act* or the *Criminal Code of Canada*. Prior to being requested to accompany Inspector Darnbrough on this interview, I was not aware of any issues regarding Mr. Symington's activities in June of 2001.
>
> 7. During this interview Ms. Ferguson disclosed, and I do verily believe, that:
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> (a) she had hired Mr. Symington to work on the movie "K-19 Widowmaker" and that Mr. Symington had worked 12 to 15 hours per day on various sets between the l5th and 30th of June, 2001.

(b) that Mr. Symington was paid either $17.00 per hour or $150.00 per day, plus overtime for any time exceeding 8 hours per day.

(c) that Mr. Symington was a union member of ACTRA and that he would have been paid through Bullock Entertainment which was responsible for the payroll/financial/accounting of the movie.

8. That I was advised by Inspector Darnbrough and did verily believe that the following facts regarding Mr. Symington's recent employment experience with the Halifax Regional Police:

(a) That on June 11, 2001, Mr. Symington reported off-duty sick and subsequently advised his superior, Sergeant Hollinshead that he would be off sick due to an off-duty injury for four to six weeks.

(b) That Mr. Symington was referred to Occupational Health and Safety who, in turn, requested an individual medical examination with Dr. Conter.

(c) That Mr. Symington saw Dr. Conter on June 13, 2001 who advised Mr. Symington and Halifax Regional Police Occupation and Safety that Mr. Symington was to return to modified duties on June 14, 2001.

(d) That on June 14, 2001, a further Doctor's note was received in respect of Mr. Symington which advised that he was unable to return to work.

9. That based on the information provided to me by Inspector Darnbrough and based on the interview with Lisa Ferguson I concluded that an investigation was warranted as I believed there were reasonable and probable grounds to believe that Mr. Symington had perpetrated a fraud by collecting sick benefits while working as an actor. Following our interview with Lisa Ferguson I advised Inspector Darnbrough that I thought an investigation was warranted but that I would look to him to advise me if an investigation should be commenced. I looked to Inspector Darnbrough for direction in this matter as it was the police department that was the victim of the possible fraud and that as a result the decision to investigate should be made by a member of the force senior to me.

10. On September 24, 2001, Inspector Darnbrough requested that I initiate a criminal investigation to determine if Mr. Symington committed fraud.

[26] Then, once mandated as the lead investigator, Officer Moser insisted that he acted alone:

11. In requesting that I undertake this investigation, Inspector Darnbrough did not instruct me or attempt to instruct me as to how I should undertake the investigation or as to what results should flow from this investigation.

> 12. Once I commenced this investigation it was fully within my control. I did not look to any member of Halifax Regional Police for direction on the investigation nor was I given any direction by a member of the Halifax Police Service as to how I should conduct the investigation or what the outcome of the investigation should be.

[27] Officer Moser then proceeded to justify each incremental step in the six-week process culminating in a decision not to lay charges:

> 72. I met again with Crown Prosecutors Mark Scott on October 31, 2001. On this occasion we were joined by senior crown prosecutor Bernadette MacDonald. The purpose of that meeting was to discuss the evidence which I had gathered and to obtain advice as to the likelihood of conviction that Mr. Symington had defrauded the Halifax Regional Police by accepting benefits under the Sick Leave Policy while working as an actor and accepting pay for that work. I was advised by the Crown Prosecutor that to prove fraud in these circumstances would require that the Crown disprove the illness which formed the basis of Mr. Symington's absence from work and his receipt of sick benefits. In this case, as there were two separate illnesses (the June 13 elbow injury and the June 22 stress issue) both illnesses would have to be disproven.
>
> 73. The Crown Prosecutors told me that there was insufficient evidence to establish each element of the allegation that Mr. Symington had defrauded the Halifax Regional Police.
>
> 74. Although in my opinion the doctors' conclusions were based on Mr. Symington's subjective report (as opposed to objective examination) I determined that I did not have sufficient evidence in my file at that point to disprove the illnesses beyond a reasonable doubt.
>
> 75. That it was not until I met with the Crown Prosecutors on October 31, 2001 that I concluded that I could not, based on the evidence I had gathered, disprove the illnesses which were the basis of Mr. Symington's absences from active duty as a police officer in June of 2001. Following this meeting with the Crown Prosecutors I determined that it would not be in the public interest to attempt to gather additional evidence and as a result I concluded that the investigation should be discontinued.

[28] There appears to be no dispute that with this evidence the respondents met stage-one of the analysis by establishing "no genuine issue of material fact requiring trial".

[29] However, as noted, Mr. Symington engaged stage-two with his own comprehensive affidavit attempting to establish malice as a genuine issue for trial.

While he could offer no direct evidence of malice, he instead invited the Court to infer it:

> 3. (vii) Prior to swearing his Information, Sgt. Moser as well as other senior members of the HRP, had evidence confirming that I was suffering from a psychological illness that was specific to my workplace and not a physical injury (see Exhibit 28). As well, while Sgt. Moser sought and obtained a search warrant to search the premises of my family physician Dr. Colp, at no time did Sgt. Moser seek to obtain a search warrant to recover the reports and files of Dr. Hayes and Dr. Gabriel, both of who are psychologists and who were on Sgt. Moser's witness list.
>
> (viii) Sgt. Moser as well as other senior members of the HRP also ignored correspondence from my former counsel (all of which pre-date the dates on which Sgt. Moser swore his Information) offering information which confirmed that my illness was:
>
> a) psychological in nature;
>
> b) specific to my workplace at the HRP; and,
>
> c) not a bar to extra-employment activities which were explicitly encouraged.
>
> See said correspondence at Exhibits 27, 28 and 29.
>
> (ix) For these and other reasons set out below, I believe that Sgt. Moser's investigation was malicious and motivated by bad faith. This bad faith was manifested by the deceptive and incomplete information provided by Sgt. Moser to His Honour Judge William Digby in order to obtain search warrants which otherwise would never have been issued.
>
> . . .
>
> 22. With respect to the knowledge of those individuals referenced in paragraph 16 above, no investigation or allegation of fraud was raised against me until September 21, 2001, after I was seen on television because of my rescue work at the World Trade Center.
>
> 23. On June 15, 2001 however, S/Sgt. Fox was directed by Supt. McNeil to locate my whereabouts and subsequently issued an All Points Bulletin (10-3) to all police personnel to be on the look-out for me and my vehicle (as referenced at paragraph 14 of Sgt. Moser's sworn Informations (Exhibits "N", "Q", 'T' and "W" to Sgt. Moser's Affidavit)). I have attached a copy of this All Points Bulletin to my affidavit as **Exhibit 3**.
>
> 24. As referenced at paragraph 14 of Sgt. Moser's sworn Informations, S/Sgt Fox stated that the intent of putting out the All Points Bulletin was to have me sign a medical release form.

> 25. At this point in time my employer had already received two separate medical reports dated June 12 and 14 (Exhibit 1(A and B)) that confirmed my inability to return to work at the HRP.
>
> 26. Moreover, in my many years working as a police officer, the only occasion I am aware of (by word-of-mouth) when an All Points Bulletin was issued for a police officer was one instance when an officer was believed to be armed and dangerous. In day-to-day policing a 10-3 is issued to officers to advise them to be on the lookout for dangerous offenders, stolen vehicles and, at times, missing persons. None of these applied to me.

[30] Furthermore, Mr. Symington highlights several factors that, he says, singularly or combined, point to (or at least raise a genuine issue for) a malicious investigation. His main plank involves Officer Moser's alleged lack of reasonable and probable cause to secure the four search warrants. He asserts in his factum:

> 82. In her Reasons, the Chambers Judge was dismissive of the 2nd Am. Claim and the evidence as merely asserting bald claims of malice, or an improper purpose, in utilizing the criminal proceedings. Her Ladyship failed to observe that, legally, malice or improper purpose is something that – absent a Crown counsel defendant – can be inferred (and often is inferred) from the absence of reasonable and probable cause. That, combined with the other evidence that the Respondents were actuated by improper motives, should have moved the Chambers Judge to allow Symington to proceed to productions, discoveries, and ultimately trial.
>
> 83. On this point, we refer the Court to *Miazga*, where the Supreme Court outlined how, when the defendant is not a Crown lawyer, the absence of reasonable and probable cause is a key element in a finding of malice. The Ontario Court of Appeal confirmed this in a recent case as well.
>
> 84. Malice, or improper purpose, exists in cases where the defendant lacks an honest subjective belief in the plaintiff's guilt, the defendant deliberately or recklessly ignores exculpatory evidence or easy suggestions of steps they ought to take in their investigation, there is proof of a wanton disregard of one's duties to investigate, or the investigator engages in a kind of "tunnel vision" investigation where securing the conviction becomes the main focus as opposed to conducting a proper investigation.
>
> 85. Given Sgt. Moser's baffling blindness in the face of evidence he possessed that Symington's diagnosis was workplace-stress related and that his acting was not inconsistent with the diagnosis, given that Sgt. Moser had legal advice on what to look for, given his admission in cross-examination that the nature of the illness was not relevant to him until the end of the investigation, the use of intrusive search warrants can only be attributed to the type of "tunnel vision" and lack of honest belief in guilt consistent with malice. At the very least, this evidence creates a genuine issue here.

[31] While, I acknowledge that, in certain circumstances, malice can be inferred (**Miazga,** *supra*, at ¶ 80-87), this record offers no basis to do so. There is simply no evidence to support an inference of "baffling blindness" or "tunnel vision" on Officer Moser's part. Instead, by going through all of Officer Moser's actions with hindsight and a fine-tooth comb, Mr. Symington has managed, at most, to establish that Officer Moser may not have conducted a perfect investigation. For example, perhaps he should have realized sooner that Mr. Symington was off work due to work-related stress. Perhaps acting in a movie would not have been inconsistent with this diagnosis. However, as the motions judge observed, perfection is far from the standard at play here. Instead, Mr. Symington must raise a genuine issue that Officer Moser abused his position of authority as a police officer. The fact that (a) Mr. Symington had ongoing hostilities with his superiors, and (b) Officer Moser's investigation may have fallen short of perfection does not provide an evidentiary foundation upon which an allegation of malice can be established.

[32] Mr. Symington also questions why he was not asked to tell his own version of events as part of the investigation. After all, he was willing to cooperate. He explains in his factum:

> 86. Further, in his affidavit, Symington outlined how he and his lawyers made every effort to contact the Respondents and then Sgt. Moser directly to lay bare the facts before him, including the medical evidence. Symington wanted his situation to be an open book and was quite willing to cooperate from the very outset of Sgt. Moser's investigation. Sgt. Moser's investigation file notes receiving two (2) letters from counsel offering Symington's cooperation.
>
> 87. Sgt. Moser, without explanation, chose not to pursue this most obvious avenue of inquiry. In cross-examinations, Sgt. Moser admitted that an investigator should pursue such an avenue of interviewing a willing suspect, including the one under investigation. He agreed that such evidence is of "high probative value" and that he would want a cooperative person under suspicion to be given the chance to speak.
>
> 88. From here, the Chambers Judge, instead of treating Sgt. Moser's investigation as reasonable and free from any taint of malice, should have asked herself why it is that Sgt. Moser would say on the one hand that Symington's highly valuable evidence should have been gathered, while inexplicably he chose not to respond to Symington's offer of cooperation. At minimum, this evidence supports the assertion that Sgt. Moser was not open-minded, engaged in tunnel vision, and was essentially going through the motions to get to his desired conclusion, a charge of fraud.

[33] Again, this is just another suggestion of what Officer Moser could have done in a perfect world. Yet Officer Moser was under no duty to talk to Mr. Symington. He had discretion to conduct his investigation as he saw fit and to go where the evidence took him. The evidence eventually took him to a potential legitimate stress-related basis for Mr. Symington's sick leave and shortly thereafter, a decision was made to discontinue the investigation without charges.

[34] Mr. Symington also asserts that Officer Moser was succumbing to pressure from his superiors by conducting this investigation. I again refer to his factum.

> 89. But in addition to inferring malice in this manner, there is a genuine issue that Sgt. Moser succumbed to the pressure to find something to pin on Symington. As outlined earlier, orders to investigate came from the very top. Sgt. Moser's own notes, as he admitted in cross, show that all that he worked on for 5-6 weeks was the Symington matter. Sgt. Moser's own affidavit indicated that he felt pressure: he consulted Crown counsel on whether he should even conduct the investigation given the situation.

[35] There is simply no evidence to support this assertion. The only evidence is that Officer Moser acted independently. Furthermore, if anything, the fact that he consulted the Crown speaks to his prudence. In fact, one would expect an officer suffering from "tunnel vision" to avoid the Crown's guidance, let alone seek it and then follow it.

[36] Finally, Mr. Symington alleges that Officer Moser used the investigation to bolster the coincidental disciplinary process:

> 90. Indeed, despite being advised by Crown counsel that he had uncovered insufficient evidence to justify a charge, Sgt. Moser proceeded anyway to use his investigation to initiate disciplinary proceedings on the same facts, proceedings dismissed in three months. Clearly, Sgt. Moser felt that something had to come of his labours, to justify his actions to those who had ordered the investigation. Certainly, the Chambers Judge should have at minimum treated this evidence as raising a low threshold genuine issue for trial.

[37] Of course, and as I have explained, any alleged abuse of the discipline process is off the table in this appeal. Furthermore, there is simply no evidence to support this allegation which essentially amounts to unsubstantiated conjecture.

[38] In short, none of these complaints, either alone or combined, can support the allegation of malice as a genuine issue for trial. In fact, I would add that this

record would not even support a potential allegation of negligence (had we not earlier ruled that out as a remnant cause of action).

[39] I would therefore dismiss this aspect of the appeal.

Costs

[40] As noted, Mr. Symington seeks costs regardless of the outcome. He explains it this way in his factum:

> 110. If this Court allows the appeal, Symington should receive his costs throughout. However, if the Court dismisses the appeal, it ought nevertheless to award Symington his costs here and allow the appeal from the Chamber[s] Judge's Costs Decision.
>
> 111. Before the Chambers Judge, Symington argued that, even though the Respondents were successful, costs should be disallowed because the Respondents unnecessarily took several motions and bifurcated them. Symington argued that this tactic, litigation by instalments, was unnecessary and costly, resulting in two (2) sets of motions and two (2) sets of appeals, when the second motion (that the evidence shows no genuine issue for trial) was available to the Respondents when they brought their first motion. Symington requested that the Chambers Judge sanction the Respondents for this conduct with a costs award in his favour given this important fact.
>
> 112. The Chambers Judge made no mention of this argument in her brief costs decision, instead rejecting what she said was Symington's argument that the jurisdictional motion was not legitimate. Symington made no such argument: he had argued that two legitimate motions ought not to have been bifurcated. Symington relied on Rule 77.07(2)(e)&(f) and jurisprudence to the effect that, in setting costs, the Court ought to consider whether any steps taken by the Respondents caused undue delay and expense and whether the conduct had an element of strategy to it.
>
> 113. Symington cited the Supreme Court's decision in *Garland* before the Chambers Judge, where the Court found that "litigation by instalments … should be avoided". In *Garland*, the unsuccessful party was awarded significant costs due to the instalments strategy. Again, this clearly articulated argument was ignored by the Chambers Judge.
>
> 114. This Court should not show deference to the Chambers Judge's costs order, a discretionary order made without taking into account, at all, Symington's primary argument, and an important factor taken from the *Rules* and jurisprudence that ought to be considered in granting or refusing costs.
>
> 115. The simple truth is that the Claim, since 2004, has articulated facts to support a cause of action related to the alleged abuse of the criminal justice

> system. Those facts and pleadings have not changed since 2004. If the Respondents believed when they were considering their first set of motions that the Claim was defective on more than one ground, they ought, in one summary judgment motion, to have articulated all of their concerns. Instead, Symington faced two motions and appeals and a process that remains stuck at the pleadings stage ten (10) years on. The Respondents engaged in litigation by instalments. This ought to have been considered by the Chambers Judge.
>
> 116. This Court should now consider this factor and: (a) award Symington his costs here and below, in any event of the cause; or, alternatively, (b) disallow any costs to the Respondents even if the Respondents are successful.

[41] First of all, it is baffling to suggest that the motions judge "made no mention" of this issue in her decision when in fact she addressed it head on:

> ¶7 The plaintiff complains that as a tactical choice, the defendants conducted "litigation by installments" causing substantial and unnecessary cost to the plaintiff, as the motion heard by this court was a second set of preliminary summary judgment motions brought five years apart. The plaintiff also complains that the defendants' "material non disclosure compelled the Plaintiff to, quite appropriately, incur the significant cost of filling in this gap."
>
> ¶8 I disagree with the plaintiff that the defendants earlier motion for summary judgment on the basis of the lack of jurisdiction was inappropriate. The defendants largely won that earlier motion, which was upheld by the Nova Scotia Court of Appeal 2007 NSCA 90, but for the survival of the claim of malicious prosecution.
>
> ¶9 In the motion before this court, the second amended statement of claim was in large part a restatement of the earlier pleadings and thus the subject of the defendants' motion to strike.
>
> ¶10 I cannot agree with the plaintiff's position that they are the party entitled to costs in the circumstances or even that no costs ought to be payable.

[42] Furthermore, costs are a discretionary matter for the motions judge. Short of some error in principle or manifest injustice, we will respect the judge's ruling. I see no error here. In fact, at the time, it would have arguably made sense to neatly bifurcate a narrow jurisdictional issue from any challenge on the merits. Had the respondents been completely successful, it would have been viewed as an efficient use of everyone's time. Yet, had a challenge to the merits been initially dragged along, the opposite would have been true. Therefore, we should not use hindsight to now suggest that an omnibus motion was required from the outset. Otherwise costs should normally follow the event and that is what happened here. I see no merit to this aspect of the appeal.

[43] In these circumstances, there is no need to address the pleadings issue.

DISPOSITION

[44] I would dismiss the appeal with costs on appeal of $5,600 (representing 40% of the costs below) together with reasonable disbursements to be agreed upon or taxed.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Hamilton, J.A.