SUPREME COURT OF NOVA SCOTIA

Citation: *Keleher v. Nova Scotia (Attorney General)*, 2019 NSSC 375

Date: 20191212
Docket: Bwt 458265
Registry: Bridgewater

Between:

Patrick Keleher

Plaintiff

-and-

Attorney General of Nova Scotia

Defendant

-and-

Nova Scotia Crown Prosecutor Herman Felderhof

Defendant

-and-

The Honourable Judge Anne E. Crawford

Defendant

-and-

Attorney General of Canada

Defendant

-and-

Royal Canadian Mounted Police,
Bridgewater, Nova Scotia Detachment
Constable Shelley Marriott

Defendant

Judge:	The Honourable Justice John A. Keith
Heard:	June 14, 2019
Counsel:	Patrick Keleher, self-represented Plaintiff (Respondents to the motions)
	Duane Eddy, counsel for the Defendant Attorney General of Nova Scotia and Herman Felderhof (Applicant to one of the Summary Judgment Motions)
	Jan Jensen, counsel for the Attorney General of Canada and for the Defendant Royal Canadian Mounted Police (Shelley Marriott) (Applicant to one of the Summary Judgment Motions)
	Justin Adams, counsel for the Defendant The Honourable Judge Anne E. Crawford (Applicant to one of the Summary Judgment Motions)

BY THE COURT:

INTRODUCTION

[1] On September 10, 2002, Plaintiff, Michael Keleher, was charged with committing an assault causing bodily harm contrary to Section 267(b) of the *Criminal Code*. The alleged incident occurred on August 30, 2002, and involved Mr. Keleher's spouse at the time, Anna Marie MacKinnon.

[2] The primary investigating officer was Constable Shelley Marriot who worked in the Bridgewater detachment of the Royal Canadian Mounted Police (the "**Investigating Officer**").

[3] On January 24, 2003, Mr. Keleher was tried and convicted of assault causing bodily harm. Judge Anne E. Crawford of the Nova Scotia Provincial Court (the "**Trial Judge**") presided. The Crown Prosecutor was Herman Felderhof.

[4] On March 20, 2003, Judge Crawford sentenced Mr. Keleher. She accepted a joint recommendation from the Crown and the defence for a suspended sentence, probation and a DNA "primary designated offences" order under Section 487.051(1) of the *Criminal Code*.

[5] On April 17, 2003, Mr. Keleher filed a Notice of Appeal. The appeal was heard by Justice Gerald R.P. Moir on November 16, 2004.

[6] On January 28, 2005, Moir J. released his decision. He granted Mr. Keleher's appeal, set aside the conviction and allowed for a new trial. The Crown subsequently dropped the charges.

[7] More than 11 years later, on November 28, 2016, Mr. Keleher filed the within Notice of Action and Statement of Claim. Mr. Keleher amended the Statement of Claim twice since the original filing. The details are below.

[8] Distilled to its essence, Mr. Keleher holds the Trial Judge, the Crown Prosecutor and the Investigating Officer (i.e. the primary actors in his original trial) civilly liable for damages allegedly suffered as a result of his overturned conviction. He lists numerous causes of action in support of this claim including fraud, conspiracy, negligence, breach of fiduciary duty, breach of the *Canadian Charter of Rights and Freedoms*, malicious prosecution and abuse of process.

[9] All of the Defendants eventually brought separate motions to summarily dismiss Mr. Keleher's claims. These motions were all brought early in the

proceeding and before pleadings had closed. That said, the legal and procedural basis for the various motions differ:

- The Trial Judge argues that the claims against her are prohibited by the absolute immunity extended to Provincial Court Judges and represent an abuse of process. The Trial Judge also seeks injunctive relief prohibiting Mr. Keleher from commencing further legal proceedings against the Trial Judge or her counsel without leave from the Court;
- The Crown Prosecutor and the Attorney General of Nova Scotia (collectively, the "**Crown Prosecutor**") seek summary judgment on the pleadings under Rule 13.03 on the basis that the claims are largely prohibited based on the limited immunity afforded Crown prosecutors. These defendants state that any remaining causes of action are absolutely unsustainable and statute-barred under Nova Scotia's *Limitation of Actions Act*. The Crown Prosecutor also seeks injunctive relief prohibiting Mr. Keleher from commencing further legal proceedings against the Crown Prosecutor, the Attorney General of Nova Scotia or its counsel without leave from the Court;
- The Investigating Officer and the Attorney General of Canada (collectively, the "**Investigating Officer**") seek summary judgment on the pleadings under Rule 13.03 on the basis that the claims are absolutely unsustainable. The Investigating Officer also requests that the style of cause be amended to properly reflect the legal entities who are named in this proceeding.

[10] For the reasons set out below, the claims against the Trial Judge are struck. Judge Crawford enjoys absolute immunity. The claims against her should never have been filed, let alone expanded to allege fraud and conspiracy. As to the Crown Prosecutor, all claims are struck except for those allegations relevant to the tort of malicious prosecution. As to the Investigating Officer, all claims are struck except for those allegations relevant to the tort of negligent investigation. In addition, the style of cause shall be amended to remove the reference to the "Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment" as it is neither a legal entity nor a proper party to this action.

[11] I decline to grant the injunctive relief sought by the Trial Judge and the Crown Prosecutor. As to the Crown Prosecutor, this proceeding will continue although limited, as indicated, to the allegation of malicious prosecution. As such, the requested injunctive relief would be inappropriate. As to the Trial Judge, Mr.

Keleher has commenced this single action. I agree that his decision to draw the Trial Judge into this dispute was ill-advised and the serious allegations made against the Trial Judge were misguided. Those may be issues for costs, but I do not find that this single proceeding constitutes the sort of repetitive, vexatious misconduct which typically precedes the injunctive relief sought. I trust Mr. Keleher recognizes both the import of this decision and the consequences which may flow from duplicative proceedings in the future – particularly as it relates to the Trial Judge or her counsel.

PROCEDURAL BACKGROUND

[12] In order to properly frame the motions before me, a few additional comments are required regarding the procedural background leading up to these motions.

[13] The Plaintiff, Patrick Keleher, filed his Notice of Action on November 23, 2016. At that time, Mr. Keleher named two Defendants described as "Attorney General of Nova Scotia Crown Prosecutor Herman Felderhof" and "Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment Constable Shelley Marriott". The Trial Judge was not included as a party.

[14] As against the Crown Prosecutor, the causes of action were listed as "malicious prosecution, abuse of process, and lack of duty of care" (para 4). No material facts were pleaded other than a brief reference in paragraph 3 that the "claim/debt [was] resulting from the criminal action against Patrick Keleher".

[15] As against Constable Shelley Marriott, the causes of action were listed as "negligent investigation, abuse of process, and lack of duty of care" (para 4). No material facts were provided beyond the same reference in paragraph 3 regarding "the criminal action against Patrick Keleher".

[16] Mr. Keleher sought compensation (characterized as "debt") in the amount of $97,951.88. He also claimed $250,000.00 in punitive damages and costs together with certain other relief including the return of DNA samples and the removal of Mr. Keleher's name from "the violent offender's listing".

[17] Neither Defendant filed a defence in the first instance. Instead, each filed a motion for summary judgment on the pleadings. The Crown Prosecutor also sought an injunction prohibiting Mr. Keleher from initiating any other proceedings against the Provincial Crown or its agents without first seeking leave from the Nova Scotia Supreme Court.

[18] The motions for summary judgment were initially scheduled to be heard on December 20, 2018, but were adjourned to January 23, 2019, because Mr. Keleher sought to amend his Statement of Claim.

[19] On January 17, 2019, Mr. Keleher filed his brief opposing the summary judgment motions together with a draft Amended Statement of Claim identified in the brief as "Exhibit "A". Among other things, the proposed amendments:

a. Purported to add the Trial Judge as a new defendant alleging "malicious prosecution, abuse of process, lack of duty of care, lack of fiduciary duty of care and conspiracy"[1];

b. Added eight pages (34 paragraphs) introduced as "the material facts which give rise to the plaintiff's statement of claim";

c. Added "lack of fiduciary duty of care and conspiracy" to his clams against the Crown Prosecutor and he also added "lack of fiduciary duty of care" to his claims against the Investigating Officer; and

d. Added the Attorney General of Canada as a defendant in response to a complaint that the "Royal Canadian Mounted Police, Bridgewater, Nova Scotia, Detachment" was not a legal entity. Again, I return to this issue below.

[20] As a result of these amendments, the motions for summary judgment were again adjourned to April 29, 2019.

[21] Both the Crown Prosecutor and the Investigating Officer decided to proceed with their existing motions.

[22] On March 19, 2019, the new defendant, the Trial Judge, filed her own motion seeking to strike Mr. Keleher's amended claim and for certain injunctive relief, as indicated.

[23] The motions were originally scheduled to be heard by Justice Wood on April 29, 2019 but had to be adjourned after Justice Wood's elevation to Chief Justice of Nova Scotia.

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[1]It does not appear that leave was formally sought for this amendment to the extent it sought to add a new party (Rule 83.11). That said, the issue of the amendment was raised with counsel and copies of the Amended Claim was filed (see Rule 83.09). The decision of *Garian Construction Ltd* v *Dixon Marine Group 2000 Inc*, 2019 NSSC 357, reviews the law around amended pleadings. Regardless, for the reasons discussed below, the issue is academic as the claims against the Trial Judge are struck in any event.

[24] I was assigned to hear these motions. During a conference call held on April 26, 2019, I scheduled the hearing of these motions for June 14, 2019, in Halifax. I also set a number of pre-hearing deadlines. Among other things, and to ensure clarity and every opportunity to confirm the claims being advanced, I directed Mr. Keleher to consider and file any further proposed amendments by no later than May 3, 2019.

[25] At Mr. Keleher's request, I extended the deadline to file any further proposed amendments from May 3, 2019, to May 10, 2019.

[26] On June 10, 2019 (a month after the deadline had passed), Mr. Keleher filed a request to further amend his Statement of Claim. In particular:

a. He added "fraud and violations of the Canadian Charter of Rights and freedoms, specifically sections 7, 11(d) and 15(1)" as causes of action against the Defendant Herman Felderhof. No new facts were added in support of these claims. That is, Mr. Keleher relied upon the same material facts previously pleaded;

b. He added the same "fraud and violations of the Canadian Charter of Rights and freedoms, specifically sections 7, 11(d) and 15(1)" as causes of action against the Defendant Judge Anne E. Crawford. No new material facts were added in support of these claims. Again, Mr. Keleher relied upon the same material facts previously pleaded;

c. He did not allege fraud against the Defendant RCMP Constable Shelley Marriott but did claim "violations of the Canadian Charter of Rights and freedoms, specifically sections 7, 11(d) and 15(1)". Again, Mr. Keleher relied upon the same material facts previously pleaded.

[27] The Defendants agreed to proceed notwithstanding these last-minute amendments. The motions were heard on June 14, 2019.

CLAIMS AGAINST JUDGE CRAWFORD

[28] All parties appear to agree that the Trial Judge enjoys judicial immunity in the performance of her judicial functions. That singular principle is well-established in legislation and the related jurisprudence: *McPherson* v *Campbell*, 2019 NSCA 23 ("***McPherson***"), at para 24, leave to appeal to the SCC dismissed on December 12, 2019; *Cormier* v *Nova Scotia*, 2015 NSSC 352 ("***Cormier***"); *Morier* v *Rivard*, [1985] 2 SCR 716 ("***Morier***"), *Baryluk (Wyrd Sisters)* v *Campbell*, 2008 CarswellOnt 6355, 61 CCLT (3d) 292 (Sup Ct J)

[29] However, Mr. Keleher argues that judicial immunity is not absolute. He concedes that a judge might be immune from civil liability where he/she is acting within her judicial capacity but says that the Trial Judge "stepped outside the boundaries of her judicial capacity." In particular, Mr. Keleher alleges that she "stepped outside" her role as a judge by becoming singularly focussed on convicting him, without regard to the rules of evidence or the presumption of innocence – even though she was acting as a trial judge throughout.

[30] Respectfully, I disagree with Mr. Keleher for the following reasons:

a. There is no argument that the Trial Judge enjoys the same measure of immunity from civil liability as a superior court judge (*Provincial Courts Act*, RSNS 1989, c 238, as amended, s. 4A)). In my view, that judicial immunity is absolute. In *Morier*, at paragraphs 85 to 109, Chouinard J. acknowledged English jurisprudence that opened the possibility of limits to judicial immunity and, in particular, suggested that the immunity may be lost if a judge knowingly acts outside her jurisdiction. However, it was not necessary for Chouinard J. to resolve that issue in the case before the Court. As such, the issue of absolute immunity (or whether there was a bad faith exception to judicial immunity) was left unresolved. Pausing here, in written submissions filed May 22, 2019, Mr. Keleher argued that paragraph 102 of *Morier* supports his position. In that paragraph, Chouinard J. referred to an English decision in which a judge was found to be liable to a civil action where the judge decided to pass a sentence of imprisonment even though the accused had been acquitted by a jury. That circumstance obviously does not apply here;

b. Subsequent jurisprudence confirms that judicial immunity is absolute with respect to the performance of judicial functions. In *Tsai* v *Klug*, [2005] OJ No 2277, [2005] OTC 480 (Sup Ct J); aff'd [2006] OJ No 665, 207 OAC 225 (Ont CA), leave to appeal to SCC refused [2006] SCCA No 169, Karakatsanis J. (as she then was) confirmed that civil immunity for judges was absolute for any acts related to or in connection with their judicial capacity, whether proper or not:

> The civil immunity is absolute for any acts related to or in connection with their judicial capacity – whether they are proper judicial actions or not. The immunity relates to civil liability only. The right to be tried by an independent and impartial tribunal is an integral part of the fundamental justice protected by s. 7 of the Charter. The constitutional protection is there to ensure that judges

> can perform their duties independently, impartially and free from concern that they will be personally sued for unpopular decisions. [para 7]

Notably, in that decision, the plaintiff alleged that the judges were part of a scheme with the other party to collaborate against him, and that they fraudulently represented evidence to make findings against him. That is not dissimilar to Mr. Keleher's claim that the Trial Judge and the Crown Prosecutor were somehow acting together to "endorse" one another's mistakes, painting Mr. Keleher in a negative light for the purposes of securing a conviction.

c. The principle of absolute judicial immunity has been endorsed by both the Nova Scotia Supreme Court in *Cormier* in 2015, and, more recently, by the Nova Scotia Court of Appeal in *McPherson*. The policy reasons behind this jurisprudence and the associated constitutional imperative are clear: judges must be able to think freely and act independently, without the adjudicative function being contaminated by the fear of civil liability.

d. The only clear limit to the principle of judicial immunity seems to be that it will not extend to acts or omissions that have no connection to a judge's adjudicative functions. That exception does not apply here. There is no doubt that the Trial Judge was acting in her judicial capacity at all material times. Indeed, Mr. Keleher's complaints are entirely fixated on her conduct as the trial judge. The affidavit evidence filed on behalf of the Trial Judge similarly makes it clear that her only contact with Mr. Keleher was during the performance of her duties as a Provincial Court judge. On this, I note that, in support of his arguments, Mr. Keleher cites two decisions involving complaints to the Judicial Council of Canada. Respectfully, these decisions merely confirm that judges are immune from civil liability while acting in their judicial function. Judges are not entirely unaccountable and are not, for example, immunized from disciplinary proceedings.

[31] In his written submissions, Mr. Keleher refers to *Taylor* v *Canada (Attorney General)*, [2000] FCJ No 268, [2000] 3 FC 298 (FCA), leave to appeal to SCC refused [2000] SCCA No 213 ("***Taylor***"), in support of the proposition that "courts are open to liability on the part of judges where they act beyond/outside of their jurisdiction". By way of response, I would note that the decision of our Court of Appeal in *McPherson* is binding upon me. Moreover, and reading Mr. Keleher's complaints against the Trial Judge as generously as possible, the concerns relate to

her assessment of the evidence and his testimony. The Trial Judge may have been wrong at law, but those legal errors would have been made in her capacity as a judge and properly within her jurisdiction.

[32] The circumstances surrounding the *Taylor* decision are also instructive. In that case, Whealy J. of the Ontario Court, General Division was presiding over the criminal trial of Dudley Laws. During trial, he made a ruling regarding the wearing of headdress in his courtroom. One person (Michael Taylor) was not a party but sought to observe the trial. He requested the opportunity to do so wearing a headdress and explained that this was in observance of his beliefs as a Muslim. Whealy J. denied the request. Initially, neither the Canadian Human Rights Commission nor the Canadian Judicial Council took action. The Ontario Court of Appeal was ultimately asked to consider the propriety of Whealy J.'s decision in the context of Mr. Laws' appeal from his conviction and sentence (*R v Laws*, [1998] OJ No 3623, 165 DLR (4th) 301). It determined, among other things, that Whealy J. erred in the exercise of his discretion when he distinguished "between a requirement of a particular faith and a chosen religious practice," since "freedom of religion under the *Charter* surely extends beyond obligatory doctrine" (para 23). Mr. Taylor subsequently resurrected his complaint with the Canadian Judicial Council. The Council expressed disapproval of Whealy J.'s comments but did not take any further action. Mr. Taylor sought judicial review of that decision. Mr. Taylor also resurrected his complaint to the Canadian Human Rights Commission, which dismissed the application on the basis that Whealy J.'s ruling was made in his capacity as a judge and he was therefore protected by reason of judicial immunity from suit. Mr. Taylor appealed. The Federal Court of Appeal recognized a "bad faith" exception to the principle of judicial immunity but concluded that the decision of Whealy, J. (while wrong) did not apply "because Whealy J. had jurisdiction to make the order he made" (para 42). The same principle could equally apply here. The Trial Judge clearly had the jurisdiction to make the decisions she made. The principle of judicial immunity remains intact. The Trial Judge made an appealable error acting within the scope of her jurisdiction. She is not exposed to civil liability for having done so.

[33] Finally, I note the Federal Court of Appeal decision in *Bourbonnais* v *Canada (Procureur général)*, 2006 FCA 62, [2006] FCJ No 206. In that case, an adjudicator with the Immigration and Refugee Board ("**IRB**") faced over 100 criminal charges alleging bribery and corruption. He insisted that the IRB pay for his legal defence and argued that the principle of judicial immunity included indemnity for these types of costs. The IRB refused and the matter came before the Federal Court of Appeal. Writing for the Court, Nadon, J.A. stated that judicial

independence "will constitute a barrier against any external constraint tending to influence the judge in the performance of his or her duties" (para 23). He went on to conclude that judicial immunity does not extend to an indemnity for legal fees associated with the defence of actual criminal charges for corruption and bribery.

[34] This case involved illegal collateral actions occurring independently of the decision-maker's adjudicative duties. By contrast, the allegations made by Mr. Keleher against the Trial Judge in the performance of her duties as a judge when assessing the evidence before her did not give rise to criminal charges and do not even begin to come close to this level of alleged corruption – even if she made a reversible legal error.

[35] Judges are not infallible. A quick review of appellate decisions readily demonstrates that decisions may be overturned based on mistakes made by a lower court. Our appellate system exists to provide that oversight and better ensure that mistakes might be corrected. It worked in this case.

[36] I do not expect Mr. Keleher to express gratitude that appellate intervention was available to him. I equally understand that he may feel frustration that appellate intervention was required. However, I am compelled to stress the importance of judicial immunity and the constitutional guarantee of judicial independence. They are fundamental to our constitutional democracy and system of justice.

[37] Judges must be afforded the freedom to perform their judicial functions without being exposed to the threat of civil liability. Appellate judges must similarly be afforded the freedom to overturn errors without inviting civil claims.

[38] Mr. Keleher's appeal was allowed and the Trial Judge's decision was overturned - all in accordance with the appellate processes available in a properly functioning system of justice.

[39] The claims against the Trial Judge are dismissed.

CLAIMS AGAINST THE CROWN PROSECUTOR

[40] Mr. Keleher's claims against the Crown Prosecutor are described in paragraph 4(b) of the first Amended Statement of Claim as:

a. Malicious prosecution;

b. Abuse of process;

c. Negligence and breach of fiduciary duty (described generally as a "lack of duty of care"); and

d. Conspiracy.

[41] In a second set of amendments filed on June 10, 2019, Mr. Keleher added "fraud and violations of the *Canadian Charter of Rights and Freedoms*, specifically sections 7, 11(d) and 15(1)".

[42] As indicated, the Amended Statement of Claim contains a separate section of separately numbered paragraphs described as "the material facts which give rise to the plaintiff's statement of claim". However, even though seven separate causes of action against the Crown Prosecutor are mentioned in the pleading, the "material facts" only address four in sections entitled: "Lack of duty of care", "Abuse of Process" and "Malicious Prosecution". There is no separate section or distinct material facts specifically alleged for fraud, conspiracy or breach of the *Charter*.

[43] By Notice of Motion filed on June 14, 2018, the Crown Prosecutor sought a dismissal of the claims made against them. They argue that:

a. The allegations in the Statement of Claim should be struck under Rule 13.03 (Summary Judgement on the Pleadings) on the basis that they are absolutely unsustainable on their face and, in any event, statute-barred pursuant to Nova Scotia's *Limitation of Actions Act*, RSNS 1989, c 258, the current *Limitations of Actions Act*, SNS 2014, c 35, as amended and the *Proceedings Against the Crown Act*, RSNS 1989, c 360; and

b. The entire proceeding amounts to an abuse of process contrary to Rule 88.03(2).

Rule 13.03 (Summary Judgment on the Pleadings)

[44] Four key principles govern motions for summary judgment on the pleadings:

a. For the purposes of the motion to strike, the facts contained in the challenged pleading must be taken as being proven and true (*Homburg Canada Inc* v *Halifax (Regional Municipality)* (2003), NSJ No 194, (2003), 216 NSR (2d) 67 (NSCA), at para 7).

b. Although the pleaded facts are deemed to be true, a plaintiff cannot simply stand on the mere possibility that the material facts necessary to sustain a cause of action might eventually pop up. A plaintiff "must

plead fact material to the causes of action they assert" (*Canada (Attorney General)* v *Walsh Estate*, 2016 NSCA 60, [2016] NSJ No 298, at para 18);

c. It must be "plain and obvious" that the claims as pleaded cannot succeed because, for example, "the pleading, on its face, discloses no reasonable cause of action; or … the claim is absolutely unsustainable; or … it is certain to fail because of a radical defect" (*Hunt* v *Carey Canada Inc*, [1990] 2 SCR 959, at paras 30-34; *Homburg Canada Inc.* v *Halifax (Regional Municipality)*, *supra*, at para 7)

d. "The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed" (*Canada (Attorney General)* v *Walsh Estate*, *supra*, at para 18).

Limitation of Actions

[45] The Crown Prosecutor states that Mr. Keleher's claims against him are statute-barred pursuant to Nova Scotia's current *Limitation of Actions Act*, SNS 2014, c 35 as amended (the "***LAA***") which came into force as of September 1, 2015. That date (September 1, 2015) is defined in the *LAA* as the "effective date" (s. 23(1)(a)).

[46] Under the transitional provisions of the *LAA*, the limitation period for any claim which was "discovered" prior to September 15, 2015, expired on the earlier of September 15, 2017, (i.e. two years from the effective date) or the date upon which any limitation period under the prior *Limitation of Actions Act* expired or would have expired (s. 23(3)).

[47] Mr. Keleher's Notice of Action was originally filed on November 23, 2016, and so the transitional provisions of the *LAA* apply. The questions become:

a. When did Mr. Keleher "discover" the claim?

b. When did the applicable limitation period under the prior *LAA* expire and, more specifically, did it expire prior to November 23, 2016, when Mr. Keleher originally filed his Statement of Claim in this proceeding?

[48] As to the first question, Section 8(2) of the *LAA* deems that a claim is "discovered" on the day which the claimant first knew or ought reasonably to have known each of the following four things:

a. That the injury, loss or damage had occurred (Section 8(2)(a));

b. That the injury, loss or damage was caused by or contributed to by an act or omission (Section 8(2)(b));

c. That the act or omission was that of the defendant (Section 8(2)(c)); and

d. That the injury, loss or damage is sufficiently serious to warrant a proceeding (Section 8(2)(d)).

[49] Given the foregoing, it must be said that a motion to strike a claim under Rule 13.03 on the basis of an expired limitation period is unusual for at least two reasons. First, as indicated above, the facts set out in a Statement of Claim are deemed to have been proven and true. Second, the factors which are identified in Section 8(2) of the *LAA* as relevant to the "discovery" of a claim are not always addressed in the context of a motion for summary judgment on the pleadings.

[50] That said, there are several unusual and unique aspects that bear upon the Crown Prosecutor's motion:

a. The claims against the Crown Prosecutor arise out of public, legal proceedings;

b. A generous reading of Mr. Keleher's amended pleadings make it clear that the claims made against the Trial Judge and the Crown Prosecutor relate entirely to their conduct during the original trial and, subsequently, during the appeal before Justice Moir. Those proceedings occurred on the public record and Mr. Keleher was present as a party to those legal proceedings. Not only was he an active participant, he was also represented by legal counsel;

c. The original trial occurred before the Trial Judge on January 24, 2003 – more than 16 years before Mr. Keleher filed his claim in this proceeding. The appeal before Justice Moir was determined by written reasons issued January 28, 2005 – more than 14 years before Mr. Keleher filed his claim;

d. In both the pleadings and in his response to this motion, Mr. Keleher confirms that the evidence which is relevant to his claims against the Crown Prosecutor and the Trial Judge[2] is limited to the documentation

[2] For reasons discussed above, it was not necessary to examine the Trial Judge's arguments around an expired limitations period. I note that the arguments may differ in that Judge Crawford also raises the question of whether

surrounding his original trial before the Trial Judge, including the appeal decision written by Justice Moir. In particular:

i. At paragraph 4 in the preamble section of Mr. Keleher's Amended Statement of Claim, he states that the alleged "debt" arose out of: "The circumstances and costs that resulted from the charging, trial and conviction of Patrick Keleher." He goes on to describe those circumstances as follows:

> On January 24, 2003, following a trial in Nova Scotia Provincial Court, before the Honourable Judge Anne E. Crawford, I was found guilty of the charge: section 267(b) CCC. The following appeal was successful and is referenced as *R* v *Keleher*, 2005 NSSC 14. The appeal was before the Honourable Justice Gerald R.P. Moir and the decision was rendered on January 28, 2005. On October 20, 2005, the following motion was granted: the order to allow the appeal, set aside the conviction, setting down of a new trial and consent by the Crown.

Again, Mr. Keleher was a party to all of these legal proceedings;

ii. Paragraph 1 of Mr. Keleher's Amended Statement of Claim concludes with the sentence: "The case of the plaintiff is based upon the trial transcript, the appeal documents and the decision by [Justice] Moir." All of these documents would be legally required for the summary conviction appeal before Justice Moir and, indeed, portions of the transcript were referenced in the decision by Justice Moir (see s. 821(3) of the *Criminal Code*, Rule 63.08 and, for example, pages 11 – 12 of Justice Moir's decision at *R* v *Keleher*, 2005 NSSC 14)

iii. At paragraph 17 of written submissions filed on January 17, 2019, Mr. Keleher concedes that "<u>the evidence for the case is entirely in writing, being the trial transcript and associated documents</u>. So, the passage of time brings not prejudice to

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she should have been added as a new party without leave of the Court and the ability to fully examine applicable limitations periods. I make no findings or further comments on this issue beyond noting that the evidence surrounding how and when Mr. Keleher filed the amended claim adding Judge Crawford as a party would obviously be relevant to that discussion.

> the case of the defendants" (emphasis added). Mr. Keleher repeats (as a quote) this same statement at paragraph 39 of subsequent submissions filed on April 16, 2019.

[51] In sum, the material facts that give rise to the claims against the Trial Judge and the Crown Prosecutor were known and available to Mr. Keleher by January 28, 2005, when Justice Moir issued his decision overturning Mr. Keleher's conviction and allowing for a new trial. Indeed, as Mr. Keleher indicates, the claims against the Trial Judge and the Crown Prosecutor are based largely on comments made by Justice Moir in his January 28, 2005, decision.

[52] Mr. Keleher's primary defences to the arguments advanced in respect of an expired limitation period are that:

a. "In July 2005, Mr. Ferrier [Mr. Keleher's legal counsel at the time] was of the view that the plaintiff [Mr. Keleher] did not have a case to proceed upon." (para 38, Mr. Keleher's submissions filed April 16, 2019). Mr. Keleher had previously described the legal advice he received on this issue as "poor" (para 14, written submissions filed January 17, 2019). It was only years later when Mr. Keleher personally began to read caselaw that he became convinced as to the strength of his case – and that his legal counsel was wrong. Mr. Keleher further argues that his claim has merit and that the jurisprudence suggests that he was unfairly treated (para 38, written submissions filed April 16, 2019). Related to this issue, Mr. Keleher continues that he personally did not have the "needed legal knowledge to challenge these opinions" and that it would not be until 2016 that he "began reading in civil law and how he might develop this case." (para 38, written submissions filed April 16, 2019). Mr. Keleher submits that the limitation period did not begin to run until 2016 when he began to personally research possible legal arguments.

b. In addition, Mr. Keleher states that the Trial Judge and the Crown Prosecutor have not filed sufficient evidence to demonstrate when a self-represented litigant like himself should be deemed to have discovered a claim (para 40, written submissions filed April 16, 2019).[3]

[3] Mr. Keleher also raises a "second less obvious factor" relating to "family and personal loss that [he] has experienced in the last three years" (para 14 of Mr. Keleher's written submissions filed January 19, 2019). I do not have any. evidence on these matters which appear to be highly subjective in nature. Moreover, these matters might, at most, influence the granting of an extension of the 6 year limitation period under the previous legislation by a maximum of four years. However, the applicable limitation period would have begun to toll well before the events of the last three years.

c. Mr. Keleher also argues that a case released by the Supreme Court of Canada (*Kvello Estate* v *Miazga*, 2009 SCC 51, referred to as "***Miazga*"** below) "was also a deterrent to the plaintiff developing his own case".

[53] Dealing with this final issue, Mr. Keleher does not clearly explain how the decision in *Miazga* (rendered about four years after Justice Moir's decision was released) served to delay or deter his claims. In any event, I do not agree that the limitation period in this matter was suspended based on decisions which may or may not be released in unrelated proceedings.

[54] As to the balance of Mr. Keleher's arguments, and respectfully, the question is not how much time a self-represented litigant should be given to personally become sufficiently educated or well-read in the law to challenge an existing legal opinion. Rather, the issue of discoverability focusses on the four specific issues identified in Sections 8(2)(a) – (d) of the *LAA*. Here, Mr. Keleher states in the amended Statement of Claim that he suffered an injury and he stipulates that those injuries were caused by the Trial Judge and the Crown Prosecutor during the original trial and then on appeal to Justice Moir. The first three components set out in Sections 8(2)(a) – (d) of the *LAA* are clearly satisfied by the allegations in the Amended Statement of Claim.

[55] I turn to the critical issue of when Mr. Keleher first ought to have known that an existing injury (including the "debt" claimed by Mr. Keleher) was "sufficiently serious to warrant a proceeding" (s. 8(2)(d) of the *LAA*).

[56] This issue is assessed objectively. The question is not when Mr. Keleher subjectively knew than an existing injury was "sufficiently serious to warrant a proceeding". Rather, the issue is when a person reasonably ought to have known.

[57] In this case, I note that Mr. Keleher specifically acknowledges having sought legal advice in July 2005 on this very issue. This admission was made in the context of this motion itself – as opposed to, for example, seeking to introduce discovery evidence or other evidence in the context of a motion for summary judgment on the pleadings.

[58] Admittedly, Mr. Keleher's counsel at the time advised against bringing this claim. However, by that time, Mr. Keleher was clearly capable of obtaining legal advice (he did so). The issue was whether Mr. Keleher was prepared to accept the legal advice he received - or seek another opinion. Mr. Keleher did not seek a second opinion. Eleven years then passed until, at some point in 2016, Mr.

Keleher began reading law and decided that his lawyer's original opinions were wrong.

[59] The *LAA* does not contemplate that a claimant may indefinitely suspend the running of a limitation period for however long it might take to acquire a legal education – or for however long a claimant might need to challenge an existing legal opinion. Limitation periods presumptively include the time to acquire a legal opinion based on an injury suffered. Under the previous *Limitations of Actions Act*, a claimant had six years to obtain the necessary legal advice plus another four years if a "forgiveness" extension was appropriate in the circumstances.

[60] In this case, Mr. Keleher had the ability to seek out a legal opinion based on the injuries he suffered. He may now disagree with the original opinion he received but he may not reasonably insist that potential defendants wait on tenterhooks for more than 11 years while he takes the time to personally develop his own legal theories.

[61] At the same time, Mr. Keleher is entitled to a degree of latitude in these matters where his claims are at risk of being summarily rejected. While I am not prepared to accept Mr. Keleher's position that the limitation period only began to run in 2016, I am equally not prepared to summarily dismiss his claims on the pleadings. There must be evidence on the issue of discoverability. On this, and again, Mr. Keleher has made several admissions on this motion which may bear upon this issue in the future. However, at present and operating from the Amended Statement of Claim on its own, it would be unsafe (and I am not prepared) to declare these proceedings statute-barred.

Crown Prosecutor's Immunity

[62] In *Nelles* v *Ontario*, [1989] SCJ No 86, [1989] 2 SCR 170 ("***Nelles***"), the Supreme Court of Canada confirmed that Crown prosecutors do not enjoy absolute immunity from civil actions and, further, that they could be liable for claims of malicious prosecution. A similar conclusion was subsequently reached in *Miazga*. There is no viable claim against a Crown prosecutor in negligence, for example.

[63] As a result, the allegations of conspiracy, fraud, "lack of duty" and "lack of fiduciary care of duty" and violations of the *Charter* are clearly unsustainable as grounding a claim for civil liability against the Crown Prosecutor. They are also discrete claims within the pleading and clearly distinguishable from the balance of

the allegations sounding in abuse of process and malicious prosecution. These specific causes of action are doomed to fail and are struck.[4]

[64] As to the torts of malicious prosecution and abuse of process, the following legal principles are germane:

a. Both torts involve unconscionable conduct. Rule 38.03(3) applies and requires the claimant to provide "full particulars". A party facing such serious allegations must be extended the opportunity to fully understand (and respond to) the claim;

b. The torts of malicious prosecution and abuse of process are related, but not identical. In *Miazga*, the Supreme Court of Canada set out the elements of malicious prosecution as follows:

> [3] To succeed in an action for malicious prosecution, a plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect.

c. The tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. Decisions of this nature lie at the core of prosecutorial discretion and are "generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process" (*Miazga*, at para 6). The Court in *Miazga* described the public law doctrine of abuse of process and the private law tort of malicious prosecution as "two sides of the same coin" (para 51). Both are exceptions to the general rule of judicial

[4]Were it to become necessary, it is also plain and obvious that the claims of fraud and conspiracy would not succeed. As to conspiracy, Mr. Keleher makes a fleeting reference to a conspiracy between the Trial Judge and the Crown at paragraph 26 of the amended claim. The details are sparse, but the premise appears to be a concerted effort to secure a conviction at all cost by ignoring errors and advancing positions which were biased and unsupported by the evidence. The claim is plainly unsustainable and doomed to fail. Mr. Keleher does not allege an actual agreement between the Provincial Crown and the Trial Judge. At most, he states that the Trial Judge "endorsed" positions for the "shared purpose" of securing a conviction (see paras 4, 9, 11 and 26, for example). These bare allegations are insufficient to sustain a plea of conspiracy. See *Kasheke* v *Canada (Attorney General)*, 2017 NSSC 61, at para 64 for a summary of the elements behind the tort of conspiracy. As to fraud, this cause of action only first appeared as part of a second set of amendments filed on June 10, 2019, immediately before the motion to amend. Mr. Keleher simply added the word "fraud" to the alleged causes of actions but did not expand or amend the material facts which were already pleaded. Nor did he specify the particular facts being alleged in support of this new cause of action. Rule 38.02(3) requires a party to plead material facts. Rule 38.03(3) requires "full particulars" of any claim alleging unconscionable conduct, which includes fraud. No such particulars were provided here. Respectfully and setting aside the issue of immunity, the amendment was ill-conceived and unnecessarily inflammatory.

non-intervention with Crown discretion that "provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice" (para 51).[5]

d. Section 3(2)(e) of Nova Scotia's *Proceedings Against the Crown Act* is consistent with the jurisprudence, barring proceedings against the Crown "in respect of anything done in the due enforcement of the criminal law" (emphasis added).

e. The third element of the tort of malicious prosecution requires the Plaintiff to prove that the Crown had reasonable and probable grounds for initiating criminal proceedings. That issue "necessarily turns on an objective assessment of the existence of sufficient cause" (*Miazga*, para 73). Moreover, a Court may consider any factual inadequacy in the pleadings in assessing whether the allegation should be struck pre-trial (*Miazga*, para 74).

f. The fourth element of the tort of malicious prosecution is malice and it is the most onerous, from the plaintiff's perspective. Courts are not seeking to second-guess Crown prosecutorial decisions or punish a prosecutor even if there is evidence of incompetence, poor judgement or gross negligence, for example (*Miazga*, para 81). An improper purpose driven by malice based on a review of all the evidence must be established (*Miazga*, para 85). The presence (or absence) of malice involves a consideration of "the defendant prosecutor's mental state in respect of the prosecution at issue" (*Miazga*, para 78). The prosecutor must be proven to have "wilfully perverted or abused the Office of the Attorney General or the process of criminal justice" (*Miazga*, para 80). A malicious state of mind may be inferred based on the facts, but malice must be proven.

g. The tort of abuse of process, like malicious prosecution, provides a remedy to the plaintiff who has been injured by the initiation of a legal process against him. Both torts require the plaintiff to show that the defendant acted maliciously. The differences between the two torts, however, are significant:

> However, unlike malicious prosecution, the gist of the tort of abuse of process lies not in the wrongful procurement of legal process or

[5] It is important to stress the difference between the public law doctrine of abuse of process and the tort of abuse of process. They are entirely different concepts. When the Supreme Court of Canada in *Miazga* referred to malicious prosecution and the doctrine of abuse of process as being "two sides of the same coin", it was not speaking to the tort of abuse of process. The tort of abuse of process is on a different coin and discussed separately below.

> launching of criminal proceedings, but in the misuse of process predominantly for a purpose other than that which it was designed to serve. While the defendant must be shown to have acted without reasonable and probable cause in order to establish a claim of malicious prosecution, this element need not be proven to establish abuse of process. While the proceedings in question must have been terminated in favour of the plaintiff now suing if malicious prosecution is to be shown, this is not an essential element of the tort of abuse of process.
> [Linda D. Rainaldi, ed, *Remedies in Tort*, Vol 1 (updated to 2019), at §5]

h. In *Body Shop Canada Ltd v Dawn Carson Enterprises Ltd*, 2010 NSSC 25, Bourgeois J. (as she then was) reviewed the law on the tort of abuse of process in Nova Scotia and set out the relevant test:

> [33] "Abuse of process" is a term utilized in several fashions, by way of example, as in the present case, as a tortious act, or alternately, as a defence where a proceeding has been commenced which is contrary to the principles of fundamental justice - most often in criminal or quasi-criminal settings. This distinction has been concisely articulated by the Federal Court of Appeal in *Levi Strauss & Co. v. Roadrunner Apparel Inc.*, [1997] F.C.J. No. 1432, where Letourneau, J.A., writes:
>
> > 9 The concept of abuse of process has developed both in substantive and procedural law. It is well settled law, from the point of view of substantive law, that an abuse of process is an actionable tort. As Henry J. stated in *Tsiopoulous v. Commercial Union Assurance Co.* when dealing with a counterclaim for damages for abuse of process:
> >
> > > "This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate. It occurs when the process of the court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose."
> >
> > 10 In Fleming's *The Law of Torts*, the learned author distinguishes between certain forms of abuse of legal procedure such as malicious arrest and execution and the concept of abuse of process:
> >
> > > "Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted for some extraneous purpose, such as extortion or oppression. Here an action will lie at the

> suit of the injured party for what has come to be called "abuse of process"."
>
> 11 A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions.
>
> 12 Abuse of process has also been invoked as a procedural defence, especially in criminal law when the proceedings were oppressive or vexatious or offensive to the principles of fundamental justice and fair play. When successful, the defence has resulted in a stay of the proceedings.
>
> [34] What constitutes tortious abuse of process? There does appear to be consensus regarding the required elements. As set out in *Amirault v. Westminer Canada Ltd.* (1994), 127 N.S.R. (2d) 241 the Court of Appeal quotes the trial judge at paragraph 123 as follows:
>
> > Though the tort of abuse of process is also alleged it is unnecessary for me to deal with it other than to say it is a separate tort distinct from the tort of malicious prosecution with its own list of essential requirements, namely:
> >
> > 1. The Defendant must have used the legal process;
> > 2. He must have done so for a purpose other than that which the process in question was designed to serve, that is, for a collateral and illicit purpose.
> > 3. He must have done some definite act or made some definite threat in furtherance of the purpose; and
> > 4. Some measure of special damages must be shown.

i. The collateral purpose requirement "is a demanding standard that is applied very strictly. The collateral purpose must be something more than the usual difficulties that such applications can cause, however devastating the effects of those proceedings may be upon the plaintiff" (*Casino v. Pang*, 2009 CarswellOnt 2114, [2009] O.J. No. 1650 (Sup Ct J), at para 17)

[65] In written submissions, the Crown Prosecutor quotes extensively from *Miazga* and then simply concludes that the Amended Statement of Claim "fails to disclose a cause of action based on malicious prosecution" (para 33). The Crown Prosecutor states that "reasonable and probable cause existed for proceeding with

the prosecution" and that "[t]here are absolutely no facts that exist to support a claim that the criminal process involving the Plaintiff was fueled by malice or an improper motive" (para 33).

[66] Unfortunately, the Crown does not compare these declarative statements against the allegations contained in the Amended Statement of Claim or conduct a detailed analysis of those allegations.

[67] As indicated, the jurisprudence and the Rules clearly confirm that the allegations in the Amended Statement of Claim are presumed to be proven facts for the purposes of this motion alone.

[68] Focussing solely on the claims made against the Crown Prosecutor, Mr. Keleher generally alleges that the Crown Prosecutor was fixated on convicting Mr. Keleher and acted improperly to unjustly achieve that singular goal. He states that the Crown Prosecutor's "sole motive is the search for the truth" and that they failed to properly perform their role with integrity. Instead, Mr. Keleher alleges, they were apathetic and adopted "an attitude towards the plaintiff of 'guilty [as] charged'". This same basic allegation is expressed in different ways throughout the pleading.

[69] The more specific allegations made against the Crown Prosecutor include:

a. The Crown Prosecutor improperly "put forward his own theory" as to how the complainant's lip became cut during a physical encounter with Mr. Keleher (para 4, Amended Statement of Claim). Mr. Keleher alleges that this this theory was inconsistent with the "only" evidence before the Court which supported Mr. Keleher's "deflection explanation" (para 4, Amended Statement of Claim). Mr. Keleher states that the Crown Prosecutor relied upon an incomplete investigation to advance a "suggestion" that the complainant's lip was cut by a "substantial amount of force but does not explain why" (para 4, Amended Statement of Claim);

b. The Crown Prosecutor "ignored concrete evidence in testimony" that raised a reasonable doubt (para 7, Amended Statement of Claim). Two particulars are offered by Mr. Keleher is support of this allegation:

    i. The Crown Prosecutor "focussed on the negative that supported a conviction" when addressing a 20-second confrontation between the complainant and Mr. Keleher. By way of background leading up to the confrontation, Mr. Keleher

acknowledges in the pleading that the "the parties [i.e. he and the complainant] had their differences". However, he states that "the evidence showed they were cooperating, and the plaintiff was very supportive of the Complainant in this period"" (para 8, Amended Statement of Claim);

ii. The Crown Prosecutor "painted [Mr. Keleher] as a negligent father, despite the Complainant agreeing with [Mr. Keleher's] course of action with regard to settling the baby" (para 10, Amended Statement of Claim);

c. The Crown Prosecutor misrepresented the evidence regarding whether Mr. Keleher's infant child needed a bug net on the night when the alleged assault occurred. He states that both he and the complainant testified that the bug net was necessary in the circumstances but that the Crown Prosecutor decided to deliberately "twist" and "manipulate" the evidence by suggesting that the bug net "was maybe not totally necessary" and then suggesting that, from what he (i.e. the Crown Prosecutor) could determine "wasn't even required" (para 14, Amended Statement of Claim). On this issue, Mr. Keleher concludes that the Crown Prosecutor and the Trial Judge "threw common sense out the window" (para 15, Amended Statement of Claim);

d. The Crown Prosecutor failed to "evaluate" the evidence and considered only those issues which supported a conviction (para 21, Amended Statement of Claim). The Crown Prosecutor was "uncritical" in their consideration of the evidence (para 21, Amended Statement of Claim);

e. The Crown Prosecutor "refused to consider evidence that raised a reasonable doubt" and failed to deal "with the Complainant's comments that she did not believe that the plaintiff intended to harm her" (para 22, Amended Statement of Claim). Mr. Keleher states that the Crown Prosecutor "avoided this testimony and the concerns that it raises, in favour of discrediting the plaintiff." (para 22, Amended Statement of Claim);

f. The Crown Prosecutor "chose to commit the errors" described above for the purpose of gaining an unjust conviction" (para 26, Amended Statement of Claim).

[70] Mr. Keleher also alleges that the Crown Prosecutor relied upon a recent case during the appeal before Moir J. where the father was convicted of shaken baby syndrome. Mr. Keleher contends that this case was distinguishable because, unlike his situation, that case was properly investigated with expert opinion (para 10, Amended Statement of Claim).

[71] Again, I am bound to accept the allegations being made as proven for the purposes of this motion. Moreover, I am required to consider the Statement of Claim "on its own" (Rule 13.03(1)(c)) and I must make my determination "only on the pleadings" (Rule 13.03(3)).

[72] Nevertheless, reading the allegations generously and without the benefit of any evidence beyond what is stated in the Amended Statement of Claim alone, I do not find that the claim of malicious prosecution is absolutely unsustainable.

[73] I recognize that these allegations should be considered to have fully particularized the alleged unconscionable conduct such as malice (Rule 38.03(3)). I also recognize that certain allegations may, by themselves, be easily shaken with further evidence or close scrutiny. In addition, some of the allegations contained in the pleading clearly cannot rise to the level of proving malice. For example, even accepting that the Crown Prosecutor relied upon a case that may be distinguishable, this allegation alone could not support an allegation of malicious prosecution or abuse of process.

[74] However, I am not to consider sources of evidence beyond the allegations in the Amended Statement of Claim which are deemed to be true. I am not to question the veracity of that information and I approach the matter with a degree of generosity rather than skepticism. Whatever reservations or doubts may arise in respect of Mr. Keleher's allegations are left for another day when they will be subjected to greater scrutiny.

[75] Based on the Amended Statement of Claim, Mr. Keleher levels serious criticisms as to the nature of the evidence and the Crown Prosecutor's conduct. If Mr. Keleher's allegations are accepted and given a generous interpretation (as I must for the purposes of this motion), a finding of malicious prosecution is not absolutely unsustainable. For example, it is not plain and obvious that "reasonable and probable grounds" actually existed if one accepts Mr. Keleher's allegations that the Crown Prosecutor ignored or manipulated evidence or created theories inconsistent with the "only" evidence before him.

[76] The element of malice is more problematic not simply because the allegations in the claim are deemed to be true, but also because the law emphasizes the Crown Prosecutor's state of mind. In the motion before me, I am only given Mr. Keleher's perspective. On this basis, the inference of malice is not absolutely unsustainable.

[77] Turning to the abuse of process claim, the Crown Prosecutor states in written submissions that "there does not exist an independent cause of action for abuse of process. As stated in *Miazga*, at paragraph 51, the tort of abuse of process and malicious prosecution are "two sides of the same coin". (para 36 of the Crown Prosecutor's written submissions). No additional authority is given for these statements beyond *Miazga* and, as stated in footnote 5 above, the reference to abuse of process at paragraph 51 of *Miazga* is in reference to the public law doctrine of abuse of process – not the tort of abuse of process. I do not agree that *Miazga* compressed the tort of abuse of process into a single tort called malicious prosecution.

[78] That said, there is some authority holding that the tort of abuse of process is only available where the defendant is alleged to have instituted a civil proceeding against the plaintiff, not a criminal one (*311165 BC Ltd v Canada (Attorney General)*, 2017 BCCA 196, [2017] BCJ No 1009, leave to appeal to SCC denied [2017] SCCA No 297, at para 52; *JO v Alberta*, 2013 ABQB 693, [2013] AJ No 1312, at para 48). This point does not appear to have been judicially considered in Nova Scotia. I need not decide the issue on this motion, however. Even if the tort of abuse of process is available in relation to the exercise of prosecutorial discretion by a crown prosecutor or the Attorney General, Mr. Keleher's pleadings do not satisfy its elements. Even reading the pleadings as generously as possible, the only alleged "abusive" purpose was to secure a conviction at all costs. That is not a "collateral" purpose sufficient to satisfy the elements of the tort.

[79] The motion for summary judgment on the pleadings with respect to the tort of malicious prosecution as against the Crown Prosecutor is dismissed. The motion for summary judgment on the remaining allegations made against the Crown Prosecutor is granted.

CLAIMS AGAINST THE INVESTIGATING OFFICER

[80] As indicated, I agree that the term "Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment" is not a legal entity and should be struck from the style of cause. The Notice of Action (As Amended) refers to the Attorney

General of Canada and Constable Shelly Marriott, both of whom are proper legal entities.

[81] The specific cause of action made against the Investigating Officer are limited to "negligent investigation, lack of duty of care and lack of fiduciary duty of care". Mr. Keleher does not allege malicious prosecution or abuse of process (para 4, Preamble to the Statement of Claim).

[82] That said, in the section of the Amended Statement of Claim described as "material facts", Mr. Keleher does attempt to implicate the Investigating Officer in the allegations of abuse of process and malicious prosecution by referring broadly to the "defendants" without specifying which defendant (see, for example, para 7, of the Amended Statement of Claim). In another instance, he refers specifically to the "RCMP" (para 20, of the Amended Statement of Claim).

[83] The allegations regarding the torts of abuse of process and malicious prosecution are almost exclusively targeting the Trial Judge and the Crown Prosecutor. Mr. Keleher was required to provide "full particulars" in respect of these claims (Rule 38.03(3), as indicated). Yet, the allegations made against the RCMP or the Investigating Officer are sparse and certainly not sufficient to address the constituent elements of these two torts. For example, there is nothing in the pleadings that would even approach the malice required for malicious prosecution. If it was Mr. Keleher's intent to bring allegations of abuse of process and malicious prosecution against the Investigating Officer, I find that they are absolutely unsustainable on their face and are struck.

[84] As to the alleged breach of fiduciary duty, I agree with the Investigating Officer that fiduciary obligations are premised on an undertaking to act in the best interests of the beneficiary (*Alberta* v *Elder Advocates of Alberta Society*, 2011 SCC 24). No such undertaking is alleged, and for good reason: the Investigating Officer's loyalties do not lie with Mr. Keleher but with the broader societal interests around preserving public order and the rule of law. The allegation that the Investigating Officer owed (and breached) a fiduciary obligation to Mr. Keleher personally is clearly separate and distinguishable from the main allegation made against the Investigating Officer (i.e. negligent investigation). The claim of breach of fiduciary duty is unsustainable on the face of the pleadings and is struck.

[85] As to the allegations of "lack of duty of care" and negligent misrepresentation, there is no separate tort called "lack of duty of care". It may be that Mr. Keleher sought to use this phrase as a synonym for negligence. Whatever the reason, I find that these allegations are entirely subsumed within the single

claim of negligent investigation, consistent with how the "material facts" are alleged in the pleadings. For that reason, the phrase "lack of duty of care" is struck as a separate cause of action and is otherwise addressed by the claim for negligent investigation.

[86] I have carefully reviewed the allegations of negligent investigation contained in paragraphs 27 to 34 of the Amended Statement of Claim. Accepting these allegations as proven facts, the claim in the Amended Statement of Claim is not absolutely unsustainable.

[87] In written legal submissions, the Investigating Officer focusses on Mr. Keleher's complaints as being limited to alleged shortcomings in the investigation of Mr. Keleher. However, Mr. Keleher's pleadings are broader and they refer to lapses in the Investigating Officer's notes in respect of "essential" evidence; "neglect" in recording important evidence (paras 30 and 31); a failure to consider relevant evidence (para 30); and a lack of a thorough investigation due to bias (para 34). Read generously, these allegations are not simply alternate investigative techniques but speak to active errors in the investigation which did occur; and indicate that the errors were either deliberate or the result of improper bias.

[88] Again, I make no comment on the strength of these allegations when compared with evidence outside the four corners of the Amended Statement of Claim and tested under the forensic scrutiny of the litigation process.

[89] However, for the purposes of this motion and assuming these allegations to be proven for the purposes of this motion, they do not render the claim of negligent investigation absolutely unsustainable.

[90] The Investigating Officer's motion for summary judgment on the pleadings with respect to negligent investigation is dismissed. The motion for summary judgment on the balance of the allegations made against the Investigating Officer is granted.

[91] I ask that counsel for the Trial Judge please take the lead on preparing a draft Order reflecting my decision on these matters and distribute that draft to Mr. Keleher, the Crown Prosecutor and the Investigating Officer for comment. I also ask that all parties please comply with Rule 78.04(3) so that the Order may be finalized in a timely fashion. I will make myself available to settle the form of Order in the event there are any disputes.

[92] As a separate matter, if the parties cannot agree on costs, I will accept written submissions (limited to 10 pages) on or before January 31, 2019.

Keith, J.