SUPREME COURT OF NOVA SCOTIA
Citation: Barton v. Nova Scotia (Attorney General), 2013 NSSC 121

Date: 20130417
Docket: Hfx. No. 396602
Registry: Halifax

Between:

Gerald Gaston Barton

Plaintiff

-and-

The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia and **The Attorney General of Canada**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: April 4, 2013 at Halifax, Nova Scotia

Written Decision: April 17, 2013

Counsel:
Counsel for the Plaintiff - W. Dale Dunlop and Sean MacDonald
Counsel for the Defendant (AGNS) - Darlene Willcott
Counsel for the Defendant (AG of Canada) - Jessica Harris

Wright, J.

BACKGROUND

[1] Before me are motions for summary judgment on the pleadings filed in tandem by both defendants, for the second time in this proceeding, under Civil Procedure Rules 13.01 and 13.03.

[2] Similar motions were earlier heard by Justice Coady on November 1, 2012 whose decision is reported at 2012 NSSC 405. In his decision, Justice Coady recited the relevant facts underlying the motions, based on the Statement of Claim as then filed, which are reproduced as follows:

> [1] The Attorney Generals of Canada and Nova Scotia have filed motions for summary judgment on the pleadings. These defendants seek an order setting aside Mr. Barton's Amended Statement of Claim on the grounds that it fails to plead a reasonable cause of action. It is their view that this action is unsustainable.
>
> [2] These motions arise from a tragic and somewhat unique set of circumstances. In 1970 a young woman became pregnant. She was 14 years old and living with her parents in a small rural community near Digby. Under pressure from her family she went to the RCMP and accused Mr. Barton of having sexual intercourse with her which resulted in her pregnancy.
>
> [3] The RCMP arrested and charged Mr. Barton with having sexual intercourse with a female between the ages of fourteen and sixteen years of age contrary to Section 138(2) of the 1954 **Criminal Code of Canada**. Mr. Barton was convicted of this charge and given one year of probation. Mr. Barton was 19 years old at the time. No records of a court proceeding or an RCMP investigation are known to exist.
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> [4] Mr. Barton's pleadings state that he was convicted without a trial or guilty plea. He alleges that the then crown prosecutor was a friend of the complainant's father. Given the lack of any record, it is difficult, if not impossible, to know what happened. It appears that Mr. Barton was not provided with legal counsel or any kind of support.
>
> [5] In 2008 the RCMP began a criminal investigation involving the complainant's brother. They took a statement from the complainant in which she advised that her brother had repeatedly sexually assaulted her when she was between the ages of nine and thirteen years of age. During this interview she stated as follows:

> •That in 1969 she gave birth to a child who was conceived by her brother's sexual contact.
>
> •That her 1970 accusation against Mr. Barton was a lie.
>
> •That she was pressured by her father to explain her pregnancy.
>
> •That her father was not willing to accept that her brother sexually assaulted her and caused her pregnancy.
>
> [6] The RCMP obtained DNA samples from all involved and testing overwhelming eliminated Mr. Barton as the father of the child born to the complainant. These tests also overwhelmingly indicated that the complainant's brother was the father of the child. On the basis of the above Mr. Barton appealed his conviction.
>
> [7] In 2011 the Nova Scotia Court of Appeal allowed Mr. Barton's appeal and acquitted him of the 1970 charge. In doing so the court concluded that a miscarriage of justice had occurred. In 2012 Mr. Barton started this action.

[3] After examining the Statement of Claim then filed, Justice Coady concluded that the plaintiff's pleading was insufficient on the issue of malice. Rather than dismissing the motions, however, he permitted the plaintiff to amend his Statement of Claim, with leave to the defendants to make another motion for summary judgment if the amended pleadings still failed to disclose a sustainable cause of action. Justice Coady made no express finding in his decision on the sufficiency of the pleadings with respect to the cause of action for negligent investigation.

[4] Since then, the plaintiff has amended his Statement of Claim, primarily in respect of his allegations of malice, in pursuit of his claims for damages against both defendants for malicious prosecution and negligent investigation. I have set out below the pertinent provisions of this amended pleading to be considered on the hearing of these motions:

4. On or about January 14th, 1970 Barton without pleading guilty or having a trial was convicted on a charge of having sexual intercourse with a female between fourteen and sixteen years of age in contravention of section 138(2) of the 1954 Criminal Code of Canada and was sentenced to one year probation.

5. The charge against Barton was brought as a consequence of the impregnation of the complainant [M] who lived in the same small community as Barton just outside of Digby and whose brother [] was an acquaintance of Barton's.

. . . .

8. Prior to the charges being laid against Barton, [M's father] had attended at Barton's residence and demanded that Barton's parents pay the sum of $900.00 to prevent charges from being laid against Barton. No sum of money was ever provided to [M's father] by Barton's parents.

9. After failing to obtain any money from Barton's parents, [M's father] contacted then Crown Prosecutor John R. Nichols, who was a close personal friend of [M's father].

10. Barton had had no previous interactions with the RCMP before being arrested and charged.

11. Barton was taken before a Provincial Court Judge in Digby and without benefit of counsel, and with John R. Nichols providing submissions on behalf of the Crown, was found guilty of the charge following which he was briefly incarcerated.

. . . .

22. At the time of his conviction, Barton was nineteen years old and faced significant pressure as a mixed race teenager charged with a serious offence with the potential imposition of jail time.

. . . .

24. Furthermore, the Crown Prosecutor of the charge against Barton was a Mr. John R. Nichols (now Justice Nichols), who was also from Digby and was a close personal friend of the complainant's father.

25. As a result of the Defendants' acts and omissions, Barton was convicted of the crime of statutory rape, a crime which he did not commit.

. . . .

27. Barton claims that his conviction was caused by the actions of both the Attorney General of Canada and the Attorney General, and that such acts were motivated by malice or gross negligence, the particulars of which include but are not limited to:

a. Failing to properly investigate the true perpetrator of the sexual assault against [M].;
b. Willfully or negligently disregarding exculpatory evidence that was available at the time or ought to have been available through minimal diligence;
c. Convicting Barton despite his not having legal representation and despite his not understanding the legal process that he was facing;
d. Allowing a Crown Prosecutor to proceed with the prosecution of the allegations against Barton despite a potential conflict of interest arising out of the Crown Prosecutor's long-standing close personal relationship with the complainant's father; and
e. Such other failures, whether negligent or intentional, as may be proven at trial.

. . . .

29. Barton therefore claims against each of the Attorney General of Canada and the Attorney General, jointly and severally:
b. General damages for malicious prosecution
c. General damages for negligent investigation
d. Special damages for the negligent and/or intentional acts related to Barton's wrongful conviction as outlined above. . . .

[5] On receipt of this amended Statement of Claim, the Attorney General of Canada filed and served a Demand for Particulars looking for specifics of the acts or omissions or other impugned conduct alleged against the RCMP. The relevant Answers filed in response are also reproduced as follows:

3. Answer: The defendant deliberately chose to accept [M's father] statement about the plaintiff being the father of [M.'s] child and did not conduct an adequate investigation into the crime. By arresting and charging the plaintiff without an adequate investigation, the defendant caused the plaintiff's losses.

4. Answer: As a result of the defendant's acts and omissions, the plaintiff was wrongfully convicted of statutory rape. He spent 41 years with a criminal record he had done nothing to deserve , and as a result suffered the loss of educational and employment prospects. He was prohibited from traveling to the United States, and he has lived with the stigma of being a convicted rapist for most of his life. All of these losses are directly attributable to the conduct of

the defendants.

5. Answer: The particulars are as follows:

a) The defendant conducted an inadequate investigation and arrested the plaintiff wrongfully. Without the defendant's willfully inadequate investigation, the plaintiff would not have been convicted.

b) The plaintiff alleges that the defendant arrested and charged him based entirely on the word of the complainant's father. In this, the defendant acted maliciously to charge a man whose innocence would have been obvious if the defendant had acted without malice.

c) The defendant's investigation was grossly negligent from start to finish, as they failed to investigate the crime in any meaningful way, instead simply accepting the word of the complainant's father.

6. Answer: The particulars are as follows:
a) The defendant conducted no interviews and failed to inquire as to whether the plaintiff had ever committed the crime he was accused of.

b) The defendant disregarded evidence that [M's father] had attended the Barton's house to demand a $900 payment. Doing so was either willful or grossly negligent.

c) As referred to in b) the evidence that [M's father] had gone to the Barton's house was at the very least evidence that should have led to a fuller investigation.

d) The defendant conducted no meaningful investigation and simply accepted the word of [M's father]. This was not diligent.

[6] Although the plaintiff pleads both torts of malicious prosecution and negligent investigation against both defendants, his Statement of Claim is essentially directed at the investigation side by the RCMP and the prosecution side by the Crown attorney. Both defendants nonetheless maintain their position that the amended pleadings continue to be deficient and fail to disclose a cause of action, whether framed in either negligent investigation or malicious prosecution.

They have therefore again brought these motions seeking summary judgment on the pleadings. No defences have yet been filed.

LAW OF SUMMARY JUDGMENT ON THE PLEADINGS

[7] The Civil Procedure Rule under which these motions are brought is 13.03(1) which reads as follows:

> A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
> (a) it discloses no cause of action or basis for a defence or contest;
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[8] Sub-section (3) of the Rule goes on to say that:

> A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[9] To be read in conjunction with Civil Procedure Rule 13.03 is Rule 38.02 which sets out the general principles of pleading. The latter reads as follows:

> **38.02 (1)** A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> **(2)** The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> **(3)** Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

[10] Also to be noted is Civil Procedure Rule 38.03(3) which stipulates that a pleading must provide full particulars of a claim alleging unconscionable conduct such as, *inter alia*, malice.

[11] Civil Procedure Rule 13.03(1) was preceded by s. 14.25 of the Civil Procedure Rules (1972). The jurisprudence under the old rule remains applicable, however, to the present rule which was merely expanded somewhat to reflect that jurisprudence. The test therefore remains as enunciated by the Nova Scotia Court of Appeal in **Cape Breton (Regional Muncipality) v. Nova Scotia (Attorney General)**, 2009 NSCA 44. In that decision, Chief Justice MacDonald wrote as follows:

> [17] *Rule* 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action. In **Hunt v. Carey Canada Inc.**,1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at p. 980, the Supreme Court of Canada, when considering the corresponding British Columbia provision:
>
>> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).
>
> [18] In following **Hunt**, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1)(a), they must appear to be either "certain to fail" (**Sable Offshore Energy Inc. v. Ameron International Corp.**, 2007 NSCA 70 (CanLII), 2007 NSCA 70 at para. 13) or "absolutely unsustainable" (**CGU Insurance Co. of Canada v. Noble**, 2003 NSCA 102 (CanLII), 2003 NSCA 102 at para. 13).

[12] The Nova Scotia Court of Appeal suggested no modification to this test under the new Civil Procedure Rules in recently dismissing an appeal in **Mercier v. Nova Scotia (Attorney General)** [2012] NSJ. No. 498. It therefore remains incumbent upon the defendants to satisfy the court that even with the assumption that all pleaded facts are true, it is plain and obvious that the claim cannot succeed either because the pleadings on their face show no reasonable cause of action, or that the claim is absolutely unsustainable, or that it is certain to fail because of a radical defect.

POSITIONS OF THE PARTIES

[13] The main thrust of the submission made on behalf of the Attorney General of Nova Scotia is twofold:

(a) As a matter of law, no action lies against a Crown prosecutor in the performance of his or her duties by reason of incompetence, inexperience, honest mistake, negligence or even gross negligence (citing, *inter alia* **Miazga v. Kvello** 2009 SCC 51); and

(b) The plaintiff's pleadings do not contain the material facts necessary to support a cause of action for malicious prosecution (as prescribed in **Miazga** to be later referred to).

[14] More specifically in the latter regard, defence counsel argues that there are no material facts plead by the plaintiff to show either that the prosecution was undertaken without reasonable and probable cause, or that the prosecution was conducted for an improper purpose to subvert the criminal justice system.

[15] The main thrust of the submission made on behalf of the Attorney General of Canada is that no material facts are pleaded by the plaintiff to underlie a cause of action whether framed in negligent investigation or malicious prosecution. With respect to the former, the Attorney General of Canada says that although a duty of care is owed by the police to the suspect, the pleadings do not contain any material facts as to how the standard of care to be met by the police was breached (which is to be measured by the standard of a reasonable police officer similarly placed). In the absence of such material facts, it is maintained that the plaintiff's pleadings disclose no reasonable cause of action and it is certain to fail.

[16] It is further submitted by this defendant that in order to support a claim for malicious prosecution, the plaintiff has to plead facts intended to prove that the RCMP deliberately used the criminal process for an improper purpose and that making a bare allegation of malice is not sufficient. No such material facts are plead here, in the submission of defence counsel, who adds that making allegations of failure to do an adequate investigation is far different from making an allegation of using the criminal process for subversive purposes. In the absence of such material facts being plead, defence counsel contends that no reasonable cause of action has been disclosed and that this claim is certain to fail.

[17] Counsel for the plaintiff takes a broader approach in his submissions. It is argued that the starting point in examining these motions is to look at the overall context of this case, which distinguishes it from many others. That context is a

wrongful conviction of a 19 year old mixed race teenager (characterized by the Nova Scotia Court of Appeal as "a miscarriage of justice"), who had no legal counsel, and which conviction could not have happened without the actions or omissions of both police and the Crown prosecutor.

[18] It is further argued that the plaintiff is at a disadvantage here in the extent to which he can plead specific material facts because of the long passage of time (over 40 years), his youthful age at the time, and the fact that no records are currently known to exist.

[19] Plaintiff's counsel adds that it is in the interests of both the plaintiff and public confidence in the administration of justice generally, that a trial judge determine how such a miscarriage of justice was permitted to occur. It is urged that it would be unjust to deprive the plaintiff of the right to pursue his claims in this context at this stage, without even being able to get so far as to get discovery of documents and witnesses from both defendants.

[20] Although plaintiff's counsel acknowledges that this action is primarily driven by the claim of negligent investigation against the police, and the claim of malicious prosecution as against the provincial Crown, it is urged that the plaintiff be permitted to pursue both causes of action against both defendants.

MOTION OF THE ATTORNEY GENERAL OF NOVA SCOTIA

[21] In pleading both causes of action framed in negligence and malicious prosecution respectively, the plaintiff has disregarded the principle that even if a

prosecutor has failed to fulfill his or her proper role as a result of inexperience, incompetence, negligence or even gross negligence, none of that sort of conduct is actionable. Rather, the plaintiff must establish malice on the part of the Crown prosecutor in advancing a claim for malicious prosecution, which presents a much higher threshold for Crown liability (which will be addressed below). The Supreme Court of Canada so ruled in its recent decision in **Miazga** (see paras. 8 and 80).

[22] It is well settled that a question of law may be determined on a motion of this sort but that such should only occur where the applicable law is so clear that it is plain and obvious (see, for example, **C.G.U. Insurance Co. of Canada v. Noble et al.** 2003 NSCA 102). Here, I am satisfied from the decision of the Supreme Court of Canada in **Miazga** that the law is clear that the Crown prosecutor in the present case cannot be sued for negligent investigation in the performance of his duties. That aspect of the plaintiff's claim is absolutely unsustainable and certain to fail as a matter of law, and it is therefore struck from this proceeding.

[23] The larger question is whether or not the plaintiff's pleadings set out sufficient material facts to sustain a cause of action for malicious prosecution. As the Supreme Court of Canada noted in its decision in **R. v. Imperial Tobacco Canada Ltd.**, 2011 SCC 42 (at para. 22), "It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses". The court added that if new developments raise new possibilities, the

remedy is to amend the pleadings to plead new facts at that time.

[24] This requirement to be met by the plaintiff invokes a consideration of the elements of the cause of action for malicious prosecution that must ultimately be proven to succeed. These elements were identified in **Miazga** as follows:
(1) The prosecution was initiated by the defendant;
(2) It was terminated in favour of the plaintiff;
(3) It was undertaken without reasonable and probable cause; and
(4) It was motivated by malice or a primary purpose other than that of carrying the law into effect.

[25] As in **Miazga**, only the last two of these elements are at issue in this case.

[26] It is not necessary for purposes of this decision to engage in a lengthy review of the law of malice which was so well articulated by the Supreme Court of Canada in **Miazga**. Suffice it to say on these motions (as captured by the case headnote) that malice is a question of fact, ultimately requiring evidence that the prosecutor was impelled by an improper purpose. The malice element of the test will be made out when a court is satisfied, on a balance of probabilities, that the Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a minister of justice. The plaintiff must ultimately demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the

process of criminal justice such that he or she exceeded the boundaries of that office. By requiring proof of an improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, honest mistake, negligence or even gross negligence.

[27] As concisely stated in **Miazga** (at para. 45), an allegation of malicious prosecution against a Crown attorney constitutes an after-the-fact attack on the propriety of the prosecutor's decision to initiate or continue criminal proceedings against the plaintiff. In the present case, this attack appears to be threefold, according to the material facts pleaded:

(1) The unusual overall circumstances of the wrongful conviction of a 19 year old mixed race teenager charged with a serious offence, without his having plead guilty or having a trial and without the benefit of legal counsel;

(2) A charge that was laid and prosecuted on the uncorroborated statement of the 14 year old complainant, without the plaintiff ever having been interviewed, and thereby wilfully disregarding exculpatory evidence that ought to have been available with minimal diligence; and

(3) The prosecution arose from a complainant by M.'s father made directly to the Crown prosecutor who stood in a potential conflict of interest because of their longstanding close personal friendship.

[28] The innuendo that can be taken from the latter point is that the prosecutor, acting in a potential conflict of interest and lacking objectivity, put his close personal friendship with M.'s father ahead of the proper fulfillment of his

prosecutorial duties as a Crown attorney. Whether or not that can ultimately be established, of course, remains to be seen.

[29] While these material facts are sparsely pleaded, I have reached the conclusion that they are sufficient on their face to disclose a reasonable cause of action for malicious prosecution. I am not persuaded, despite the able arguments of defence counsel, that this defendant has discharged the heavy burden of satisfying the court that it is plain and obvious that this claim cannot succeed or that it is absolutely unsustainable and certain to fail. The summary judgment motion in respect of the cause of action for malicious prosecution is therefore dismissed.

MOTION OF THE ATTORNEY GENERAL OF CANADA

[30] I turn now to the motion by the Attorney General of Canada and will first deal with the cause of action set out in the Statement of Claim for negligent investigation by the RCMP.

[31] The tort of negligent investigation by police was recognized in the seminal case decided by the Supreme Court of Canada in **Hill v. Hamilton-Wentworth Regional Police Services Board**, 2007 SCC 41. It was established in that case that police officers owe a duty of care to a suspect when conducting their investigations. That requires them to meet the standard of care of a reasonable police officer in similar circumstances (see para. 74). The other essential elements of a successful negligence action are, of course, the establishment of

causation of damages that are compensable in law. As was further stated in **Hill** (at para. 94), the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, may have contributed to a wrongful conviction causing compensable damage.

[32] The focus in the present motion is on the question of whether or not the plaintiff has pleaded sufficient material facts as to how the standard of care was breached by the investigating officer(s). The plaintiff here has alleged that the RCMP conducted an inadequate investigation which caused his losses. The particulars of negligence pleaded are essentially threefold:

(1) The police charged the plaintiff, leading to his prosecution, based entirely on the word of M.'s father and thereby failed to investigate the crime in any meaningful way. Instead, the police simply accepted the word of M.'s father with whom the prosecutor had a close personal friendship;

(2) The police negligently disregarded exculpatory evidence that was available at the time through minimal diligence. That is to say, the police did not conduct an interview of the plaintiff at all and disregarded evidence that M.'s father had demanded and been refused the payment of the sum of $900 from the plaintiff's parents; and

(3) The police failed to take any steps to properly investigate the true perpetrator of the offence.

[33] Again, while these material facts are sparsely pleaded, I am satisfied that on their face, they are sufficient to disclose a reasonable cause of action. I am not persuaded, notwithstanding the able arguments of counsel, that it is plain and

obvious that this aspect of the claim cannot succeed, or that it is absolutely unsustainable or certain to fail. In the result, the summary judgment motion with respect to the cause of action for negligent investigation by the RCMP is dismissed.

[34] Lastly, I turn to the cause of action pleaded against this defendant for the tort of malicious prosecution.

[35] During the course of oral submissions, I queried counsel whether or not the cause of action of malicious prosecution as against the police has ever been recognized in law. Counsel informed the court that in recent years, there have been a few cases in which plaintiffs have combined a cause of action for malicious prosecution together with that of negligent investigation by the police, but that so far as is known, a claim for malicious prosecution has never been successfully made as against the police in this jurisdiction.

[36] For purposes of this motion, it cannot be said that the law is so clear as to deny any possibility that such a cause of action might be successful in the evolution of the common law. This aspect of the motion must therefore be decided on the sufficiency of the plaintiff's pleadings.

[37] I need not repeat here my earlier references to the law of malicious prosecution and the elements of that cause of action. Suffice it to say that I am persuaded that even if the material facts pleaded in support of this cause of action against the RCMP are assumed to be true (as they must be), they are insufficient to

set out any basis for the absence of the reasonable and probable cause element with respect to belief in the plaintiff's guilt (under the so-called "probable guilt" standard). The pleadings are further insufficient to set out any basis for the establishment of the fourth element of malice, namely, that the police deliberately used the criminal process for an improper purpose.

[38] I therefore conclude that this aspect of the plaintiff's claim is absolutely unsustainable and certain to fail and should thereby be struck.

CONCLUSION

[39] The result of the foregoing findings is that the plaintiff will be at liberty to continue this action against the Attorney General of Nova Scotia with respect to the tort of malicious prosecution only, and against the Attorney General of Canada with respect to the tort of negligent police investigation only. To touch upon one of the concerns expressed by plaintiff's counsel during his submissions, I do not anticipate that the forward progress of this proceeding will in any way diminish the obligation of either defendant to make full disclosure of all documents in their possession which relate in any way to the plaintiff's wrongful conviction (to the extent to which they are found to exist).

[40] I would add in closing that in making the foregoing findings, I have borne in mind the overall context of this case where there has been a wrongful conviction, now recognized to have been a miscarriage justice, that occurred at the hands of the RCMP and the Crown prosecutor involved in the case some 43 years ago. To have granted both these summary judgment motions in their entirety at

this stage of the proceeding would indeed be a drastic remedy which would prevent the plaintiff from ever having any means of trying to determine how such a miscarriage of justice was permitted to occur. In my view, that would be an unjust result.

[41] In light of the mixed results in the outcome of these motions, costs will not be awarded to any party.

J.