

SUPREME COURT OF NOVA SCOTIA

Citation: *Brady v. Canada (Attorney General)*, 2023 NSSC 241

Date: 20230726

Docket: *Halifax* No. 437080

Registry: Halifax

Between:

William and Collette Brady

Plaintiffs

v.

The Attorney General of Canada,
Representing Her Majesty the Queen in right of Canada

Defendant

LIBRARY HEADING

Judge: The Honourable Justice Mona Lynch

Heard: March 22 and 29, 2023, in Halifax, Nova Scotia

Written Decision: July 26, 2023

Subject: Summary Judgement on the Evidence; Negligent Investigation

Summary: The Plaintiffs had licences to grow marijuana. The Plaintiffs came to the attention of the RCMP by being in contact with a person the RCMP was targeting as part of a drug investigation. The Plaintiffs were charged with offences under the *CDSA*. The charges against one Plaintiff were dropped and the second Plaintiff was acquitted of all charges. The RCMP put out a news release about the drug operation which included the names of the Plaintiffs as being charged. The Plaintiffs filed an Action for negligent investigation. The Defendant filed a Motion seeking summary judgment on the evidence.

Issues: Should summary judgment on the evidence be granted?

Result: Summary judgment granted. There are no material facts in issue. The Plaintiffs failed to provide expert evidence on the standard of care owed to them. The Plaintiffs did not plead defamation.

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Counsel: Adam Rodgers, for the Plaintiffs
Patricia C. MacPhee, for the Defendant

By the Court:

Background:

[1] In 2012, the RCMP in Nova Scotia was engaged in an investigation of trafficking in illegal drugs. The investigation was called “Operation Hakon”. As a result of a lawful interception of communications of one of the targets (the Target) of the investigation, William Brady became of interest to the RCMP. There were text messages between the Target and William Brady in which he and the Target agreed to meet. At the time of the interception of communications, William Brady was not a suspect in the ongoing investigation. The RCMP conducted a criminal records check on William Brady and discovered that he had a previous drug conviction and a pending proceeds of crime proceeding in another province. William Brady met with the Target of the intercepted communications and their meet was monitored by the RCMP. Another meet a few days later was also monitored by the RCMP. After this meet, William Brady was observed meeting with another male, Wood, who was driving a vehicle owned by William Brady. Wood was pulled over by the RCMP and a search located suitcases containing 18 pounds of marijuana and a half pound of hash oil. Messages were intercepted between Collette Brady’s phone and the Target which discussed the stop of William Brady’s vehicle and the fact that the police kept the van “with the stuff”.

[2] The RCMP contacted Health Canada to determine if either of the Bradys had a licence to grow marijuana. They learned that William Brady was authorized to grow 49 marijuana plants and Collette Brady had two authorizations to grow for two individuals, one for 25 plants and one for 30 plants. The authorization for Collette Brady to grow the 30 plants was dated November 18, 2012.

[3] With the above information, the RCMP obtained a search warrant for the Bradys’ residence. Prior to executing the warrant, Sgt. Kutcha, the lead investigator on Operation Hakon, contacted an individual for whom Collette Brady was authorized to grow marijuana and determined, based on what was told to him, that there would be a significant excess of marijuana. This determination was based on the number of plants authorized, the expected yield from those plants and the amount of the marijuana purchased from Collette Brady by the person for whom she was authorized to grow the 25 plants.

[4] On December 7, 2012, a search warrant was executed. The Bradys’ house and outbuildings were searched. The RCMP found approximately 103 plants

along with 31 clones, dried marijuana and \$1,840 in cash. During the search the RCMP members also learned that, over the past three months, the Bradys had deposited approximately \$35,000 into a bank account, although neither was known to be employed.

[5] In January 2013, after the arrests of about 24 persons and the laying of numerous charges, the RCMP issued a news release in which the Bradys were identified as two of the approximately 20 persons charged under Operation Hakon. The news release indicated that there were serious cocaine and weapons charges. The RCMP news release drew a link between the drug trade and violence in the community; it noted that “these individuals were beyond your street-level drug dealers”, and it described those charged as “part of criminal groups that trafficked large quantities of drugs in and out of our community”. The news release noted that the individuals charged had access to guns, bullet-proof vests, drugs and cash and said they “used whatever means necessary to get their job done”. The list of items seized in the news release included an AK-47 assault rifle, a handgun and other firearms. No weapons were seized from the Bradys’ home.

[6] Both William Brady and Collette Brady were charged with offences under the *Controlled Drugs and Substances Act*, SC 1996, c. 19 (CDSA). Collette Brady’s charges were later withdrawn. William Brady went to trial on two counts of trafficking in marijuana and two counts of trafficking in cannabis resin. A jury convicted him of the trafficking offences in relation to marijuana and acquitted him on the trafficking in relation to cannabis resin. On appeal, the Nova Scotia Court of Appeal allowed William Brady’s appeal and entered acquittals on the trafficking in marijuana charges on the basis of inconsistent verdicts. As a result, neither William Brady nor Collette Brady was convicted of any offences arising from Operation Hakon.

[7] On March 10, 2015, the Bradys filed a Notice of Action and Statement of Claim against the RCMP alleging negligent investigation for failing to conduct themselves according to a standard that would be expected of RCMP officers under the circumstances. The Bradys are seeking compensation for the value of the plants and other material seized from their property and for damages to compensate them for the negative impact on their reputation and standing in the community. The Attorney General of Canada (AGC), representing the RCMP, filed a Notice of Defence.

[8] On November 24, 2022, the AGC filed a Notice of Motion seeking summary judgment on the evidence. The motion for summary judgment on the evidence was heard on March 22 and 29, 2023.

Issues:

Should the Court grant summary judgment and dismiss the Statement of Claim filed by the Bradys?

Positions of the Parties:

[9] The AGC's position is that the material facts are not in dispute. The Bradys were not targets of Operation Hakon. Communications between the Bradys and a target of Operation Hakon were intercepted which brought them to the attention of the RCMP. There was surveillance of the meetings between William Brady and the Target and between William Brady and Wood, who was driving William Brady's vehicle. William Brady had a prior record and was facing proceeds of crime proceedings at the time the RCMP checked. There is no dispute about the authorizations to grow marijuana or what was seized from their property. The search was authorized by a warrant. The considerations that guided the RCMP in deciding to seize the marijuana and lay charges are not disputed. The news release issued by the RCMP is not disputed.

[10] The AGC's position is that the only dispute is whether the RCMP met the duty of care in their investigation of the Bradys, which is a question of mixed fact and law.

[11] The AGC's position is that the Bradys did not plead defamation and, therefore, that is not a claim that they can pursue.

[12] The Bradys' position is that they are claiming defamation and negligent investigation. They assert that the *Criminal Code* allows for the return of anything seized and that the marijuana plants seized should not have been seized or destroyed.

[13] The surveillance conducted by the RCMP did not observe any direct evidence of trafficking in marijuana or any behaviour inconsistent with the terms of his authorization. In the Bradys' view, the RCMP had a preconceived notion that the Bradys were involved in illegal activity and misinterpreted innocuous observations accordingly. Part of this preconception arises from a prior search of

William Brady's residence where mature marijuana plants were improperly seized. The RCMP knew or should have known that the seized items were part of a lawfully-regulated operation.

[14] The Bradys' position is that there are material facts to be determined, including whether the Bradys exceeded their authorization and whether the RCMP news release should be interpreted as linking the Bradys to hard drugs, gangs and weapons, which harmed their reputation.

[15] The Bradys also assert that there are questions of law to be determined, such as whether they are entitled to compensation for the loss of their plants, since they cannot be returned in the condition they were seized. Another question of law is whether the RCMP news release is defamatory and whether the words used in the release are akin to saying the Bradys were guilty. The Bradys also assert that, for policy reasons, the RCMP treatment of them cannot be permitted, as it allows persons authorized to grow marijuana to have their homes searched where there is a tenuous connection to criminal activity.

Analysis:

[16] Summary Judgment on the evidence is set out in Civil Procedure Rule 13.04:

13.04 Summary judgment on evidence in an action

- (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
 - (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
 - (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
- (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
- (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[17] The Nova Scotia Court of Appeal described the framework for analysis of summary judgment on the evidence in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, and set out five sequential questions for a judge hearing such a motion to ask:

1. Does the challenged pleading disclose a “genuine issue of material fact”, either pure or mixed with a question of law?
[Rules 13.04(1), (2) and (4)]

If the answer to the first question is yes, the matter cannot be determined by summary judgment. If the answer to the first question is no, you go on to the second question.

2. Does the challenged pleading require the determination of a question of law, either pure or mixed, with a question of fact?

If the answer to both questions 1 and 2 are no, summary judgment must be granted. If the answer to questions 1 and 2 are no to question 1 and yes to question 2, summary judgment may be granted or denied based on the answer to the 3rd question.

3. Does the challenged pleading have a real chance of success? It is up to the party whose claim is being challenged to show a real chance of success. If the claim has no real chance of success, summary judgment will be granted.

4. Should the judge exercise the “discretion” to finally determine the issue of law?
5. If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

In the present case, the AGC is not asking the Court to proceed to the fourth and fifth questions, should a real chance of success be found at question 3.

1 Does the challenged pleading disclose a “genuine issue of material fact”, either pure or mixed, with a question of law? [Rules 13.04(1), (2) and (4)]

[18] It is not any issue of fact that would cause a summary judgment motion to fail; it has to be a genuine issue of material fact. A “material fact” is one that would affect the result. The onus is on the moving party, the AGC, to show by evidence that there is no genuine issue of material fact (*Shannex*, para 34).

[19] In order to determine whether a fact is material, I have to look at the pleading to determine what is pleaded. In the Statement of Claim filed by the Bradys, they allege a negligent investigation by the RCMP.

[20] The test for whether an investigation was negligent was set out by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41:

50 The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect. Police are required to weigh evidence to some extent in the course of an investigation... But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorneys and judges. This distinction is properly reflected in the standard of care imposed, once a duty is recognized. The standard of care required to meet the duty is not that of a reasonable lawyer or judge, but that of a reasonable *police officer*. Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.

...

73 I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results... Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere “errors in judgment” which any reasonable professional might have made and therefore, which do not breach the standard of care ...

[Italics in original]

[21] The Bradys submit that the questions of material fact that are in issue are: whether the Bradys exceeded their licence allotment, whether the news release should be interpreted as linking the Bradys to hard drugs, gangs and weapons, and whether their reputations were harmed as a result of being so linked. I find that the facts which the Bradys say are in dispute are not material facts, as they do not go to the question of whether the RCMP met the standard of a reasonable police officer in similar circumstances. Whether, in fact, the Bradys exceeded their licence allotment is not a material question. The question is whether there is evidence to show the information that the RCMP acted on and whether their actions met the standard of a reasonable police officer in similar circumstances. As set out above in *Hill*, the standard of care is not whether the police officer exercised his discretion in a manner deemed optimal. The officer’s discretion must be exercised within the range of reasonableness. So the question is not whether the Bradys did, in fact, exceed their licence allotment, but whether the officer acted in a reasonable manner.

[22] The following are not in dispute:

- (a) The Bradys were not targets of Operation Hakon, but they came to the attention of the RCMP through the interception of private communications with a target of that operation;
- (b) The communications between the Bradys and the Target are not disputed, nor is the fact that William Brady met with the Target and Wood. The dispute is over the reason for the meetings and what occurred during the meetings;
- (c) William Brady's criminal record, and the fact that he was facing proceeds of crime proceedings in Newfoundland and Labrador at the time of the Operation, is not in dispute. The Bradys' position is that there were circumstances around the criminal record and the result of the proceeds of crime proceeding which should be considered;
- (d) There is no dispute regarding the Bradys' authorization to grow marijuana or with regard to what was seized by the RCMP;
- (e) There is no dispute that the search was authorized by a warrant and that warrant was not challenged;
- (f) There is no dispute that the RCMP issued a news release after Operation Hakon and there is no dispute regarding the contact of the news release or the media reports that followed.

[23] The dispute, with regard to the news release, is about its effect on the Bradys' reputation, which only becomes relevant if the RCMP breached their duty of care to the Bradys. The circumstances around the William Brady's prior conviction is not a material fact, he did have a prior conviction. The fact that the result of the proceeds of crime proceeding was in his favour is not a material fact.

[24] I agree with the AGC that the dispute is whether the RCMP met the duty of care in their investigation of the Bradys, which is a question of mixed law and fact. Therefore, I find that there is no material fact in dispute and the answer to question one is "no".

2 Does the challenged pleading require the determination of a question of law, either pure or mixed, with a question of fact?

[25] The AGC concedes that the Bradys' claim requires a determination of mixed fact and law requiring in order to ascertain whether the Bradys' claim has a real chance of success. The answer to question two is "yes".

3 Does the challenged pleading have a real chance of success?

[26] The onus is on the Bradys to show a real chance of success.

[27] The test for negligent investigation is set out above and the standard is that of a reasonable police officer in the circumstances. The Bradys' submission is primarily based on the fact that the reasonable and probable grounds relied on by the RCMP were not true; however, that is not the test. The question, as stated in *Cave v. Bambury*, 2012 NSSC 129, at para. 13, is whether there were reasonable and probable grounds to charge the Bradys. The fact that the charges were dropped in relation to Collette Brady and that William Brady was acquitted does not answer that question. As stated in *Hill*, the standard is not perfection or even the optimum judged from the vantage of hindsight.

[28] To determine whether the investigation was negligent I require evidence to establish the relevant standard of care. To determine the relevant standard of care expert evidence is generally required. In *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656, the Ontario Court of Appeal concluded that the trial judge erred by deciding the content of the standard of care without expert evidence in a case of negligent investigation (para. 45, see also *Tremblay v. Ottawa (Police Services Board)*, 2018 ONCA 497). The Court stated:

[53] The general rule is that the content of the standard of care of a professional, such as a police officer, will require expert evidence: *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6, 329 O.A.C. 173, at paras. 34-35; *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 130, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 319; *Bergen v. Guliker*, 2015 BCCA 283, 75 B.C.L.R. (5th) 351, at paras. 114-131; *Camaso Estate v. Saanich (District)*, 2013 BCCA 6, at paras. 71-72, leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 92.

[54] As Smith J.A. explained on behalf of the Court of Appeal for British Columbia in *Bergen v. Guliker*, at para. 131:

While there are cases in which the breach of the standard of care will be apparent without expert evidence, typically when a suit is brought for professional negligence it is customary (and generally necessary), for there to be expert evidence on the standard of care. As the analysis in *Hill* makes clear, police officers are professionals and their conduct should be assessed in the same way that other professional negligence claims are evaluated. [Citations omitted in original.]

On the particular facts in *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192, expert evidence was not needed to determine the appropriate standard of care.

[29] In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, the Nova Scotia Court of Appeal noted cases where expert evidence was lacking and summary judgment was granted:

[39] The case of *Chan v. White*, 2014 NSSC 383, also referred to by the motions judge (¶53), is analogous to *Kiden* in this respect: the plaintiff failed to produce an expert report linking the plaintiff's death to the medical treatment he received. Summary judgment was granted in favour of the defendant.

[40] In *Szubielski v. Price*, 2013 NSCA 151, another case referred to by the motions judge, the responding party had no expert evidence to support one of her claims with respect to use of an improper device in her medical treatment. As in *Kiden* and *Chan*, it was necessary to have expert evidence capable of proving causation. Summary judgment followed.

[30] The RCMP obtained a search warrant for the Bradys' residence on December 7, 2012. The RCMP contacted Health Canada to determine if either of the Bradys had a licence to grow marijuana and found that they did. They learned that William Brady had authorization to grow 49 plants. Collette Brady had authorization to grow for other individuals (25 plants for one and 30 plants for another). The 30-plant authorization was given to her on November 18, 2012. The RCMP contacted one of the individuals for whom Collette Brady was authorized to grow marijuana to determine how much marijuana he purchased from Collette Brady.

[31] The AGC points to the affidavit evidence of the RCMP officer as to his reasonable and probable grounds to lay the charges against the Bradys and to seize the marijuana found. The basis for the reasonable and probable grounds are set out in the affidavit as:

- (a) 103 mature plants were found at the Bradys' residence even though one would only expect there to be 74 (49 for William Brady and 25 for the first individual for whom Collette Brady was growing). As Collette Brady had only been authorized to grow for a second individual as of November 18, 2012, one would not expect those plants to have reached maturity;
- (b) 31 clone plants were found on scene for which there was no authorization;
- (c) Cannabis resin was found on scene. Two containers found elsewhere on the property contained cannabis resin and a box of five-gram vial containers which were consistent with those found in the vehicle Wood was driving at the time of his arrest;
- (d) Collette Brady was only selling a relatively small amount of marijuana to the individual for whom she was growing given the expected yield of the marijuana plants;
- (e) William Brady had a previous criminal conviction for growing marijuana and was facing the proceeds of crime proceedings;
- (f) The intercepted communications between William Brady and the Target and the subsequent arrest of Wood; and
- (g) The Bradys' recent deposits of a large amount of money into a bank account despite the fact that they had no known employment.

[32] To determine what a reasonable police officer would do in the circumstances requires expert evidence. The circumstances are complicated by the authorizations held by the Bradys, the question of whether the clones are considered "plants", and the time it takes for a marijuana plant to grow to full maturity.

[33] In the present case I find that I cannot determine the appropriate standard of care owed to the Bradys without expert evidence. The onus at this stage is on the Bradys to show a real chance of success and, to do that, the Court needs expert evidence as to the standard of care, which the Bradys have not provided.

[34] The Bradys claim that the news release and the subsequent media stories about Operation Hakon caused them harm. It is conceded that the RCMP made public statements about Operation Hakon and that the charges against the Bradys were identified publicly as being part of that larger operation which involved over 20 people. The Bradys claim that the RCMP's link between them and the larger operation which included cocaine, weapons, etc., was negligent or deliberate and caused them damage.

[35] The Statement of Claim does not plead defamation, although they claim compensation for the negative impact on their reputation and standing in the community.

[36] A public statement that a person is under criminal investigation will not generally be defamatory if, as is the case here, the statement is true. In *Supreme Auto Group Inc. v. Chief William Blair*, 2020 ONSC 1223 the Court said:

[52] As a general rule, courts have found that a statement to the effect that someone has been charged with an offence is not defamatory. A reasonable person of ordinary intelligence, knowledge, and experience understands the difference between being suspected or charged and being found guilty: [Citations omitted]

[37] There are rules governing pleadings in defamation which include the requirement that the exact words complained of and other particulars must be pled (*Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2010 NSSC 25, and *Sapra v. Cato*, 2020 NSSC 30). That was not done here. In the present case, the Statement of Claim does not contain the word "defamation" and does not plead the necessary material facts. I find that the Bradys have not made a claim in defamation.

[38] I find that the Bradys' claim is in negligent investigation. A successful negligent investigation claim would allow the Bradys to recover damages for reputational harm (*Hill*, para. 34 and 70).

[39] To recover damages, the Bradys would need to show that the RCMP breached the standard of care owed to them. Here, I do not have the evidence required to determine the standard of care owed to them. In a summary judgment motion, each party is expected to put their best foot forward with evidence and legal submissions on all of the questions (*Shannex*, para 36). The Bradys have not met the onus to show that their claim has a real chance of success.

Conclusion:

[40] Summary judgment is granted.

Lynch, J.