Court of Queen's Bench of Alberta

Citation: Kozina v Redlick, 2019 ABQB 749

Date: 20190925
Docket: 1503 14832
Registry: Edmonton

Between:

Kazimierz Kozina

Plaintiff

- and -

**Jack Redlick, Craig Offin, Jason Kemp,
Phil Leeman, Regan James, David Kabyn,
Steven Chwok, Danielle Campbell,
and Michael Boyd and Rod Knecht,
Chiefs of the Edmonton Police Service**

Defendants

**Reasons for Decision
of
L.A. Smart, Master, Court of Queen's Bench of Alberta**

Introduction & Background

[1] On February 11, 2010, the Respondent/Plaintiff, Kazimierz Kozina, was arrested by the Defendant Edmonton Police Service (EPS) Officers Jack Redlick, Craig Offin, Jason Kemp, and Phil Leeman during a "buy-and-bust" operation. During the course of the arrest, Mr. Kozina suffered a broken orbital bone and spinal injuries.

[2] Mr. Kozina alleges that the Defendants covered up the incident and there was a failure to disclose the brutality allegations from a police witness to the arrest.

[3] The Defendants Boyd and Knecht (the Applicants) have applied to strike all or part the Statement of Claim, or alternatively summary dismissal. The basis for this application includes several arguments, including a limitations defence, abuse of process, bad faith, and unavailable remedies.

[4] Mr. Kozina initiated a complaint against the arresting officers. The then Chief of Police Michael Boyd, dismissed this initial complaint on November 23, 2010. Later, in ***Kozina v Kemp***, 2014 CanLII 10796 (ABLERB) at para 20, the Alberta Law Enforcement Review Board (LERB) found that the Chief of Police "did not effectively advise the appellant of the disposition and the appellant's right of appeal in 2010."

[5] On October 25, 2011, Mr. Kozina pleaded guilty to two charges in relation to the arrest: trafficking in a controlled substance and obstruction of a peace officer.

[6] On September 27, 2013, a CBC program was aired which documented former EPS Officer Derek Huff witnessing brutality and alleged corruption during the arrest of Mr. Kozina. According to ***Kozina v Kemp*** at para 1, Mr. Kozina first became aware of these allegations because of the CBC program. At no point from the arrest on February 11, 2010, until September 27, 2013, was any of Mr. Huff's reporting or any subsequent documentation into the conduct of the arrest (outside of the formal investigative documentation and decisions) disclosed to Mr. Kozina.

[7] Specifically, Mr. Kozina's Statement of Claim alleges that Mr. Huff continually reported his concerns to numerous EPS employees (including EPS supervisors, Human Resources, and the Deputy Chief of Police) about the conduct of the arrest of Mr. Kozina, as well as how the arrest was characterized by the arresting officers in written reports. The Statement of Claim extensively details allegations that Mr. Huff was mistreated by his colleagues and that EPS did not investigate his allegations.

[8] According to ***Kozina v Edmonton (Police Service)***, 2014 ABLERB 46 at para 2:

> … in light of concerns brought forward in 2012 by [Mr. Huff] about the level of force used during the appellant's arrest, the matter had been referred to the Alberta Serious Incident Response Team ("ASIRT"), for investigation of possible criminal charges.

[9] In May of 2014, the ASIRT investigation concluded and no criminal charges were laid.

[10] Soon after the CBC program aired, Mr. Kozina contacted legal counsel who requested a copy of the Chief of Police's 2010 decision disposing of Mr. Kozina's complaint. The Board in

Kozina v Kemp found that service of this disposition was effected on October 18, 2013 when Mr. Kozina's legal counsel obtained a copy.

[11] Mr. Kozina then appealed the Chief of Police's 2010 dismissal to the LERB. On September 5, 2014, the LERB directed the Chief of Police (at that time, Rod Knecht) to again investigate Mr. Kozina's complaints. Further investigation led the Chief to direct a disciplinary hearing into the complaint.

[12] On June 3, 2015, Mr. Kozina appealed his guilty convictions. The Court of Appeal set aside his guilty pleas and quashed the conviction on July 14, 2015.

[13] On September 25, 2015, Mr. Kozina filed the Statement of Claim in this matter. The Statement of Claim was amended on February 24, 2017. Paragraph 26 of the Amended Statement of Claim alleges: "The Plaintiff's claim is for damages arising out of the cover-up and failure to disclose."

[14] On July 18, 2016, the disciplinary charges against the arresting officers were dismissed by Presiding Officer Binder (the Binder Decision). Mr. Kozina appealed the decision to the LERB which upheld the dismissal. Mr. Kozina has initiated a judicial review of this LERB decision, however, that application has not yet been heard.

The Applicants' Position

[15] The Applicants argue that Mr. Kozina's claim is statute barred by the *Limitations Act*, RSA 2000, c L-12, s 3 because the Statement of Claim was not filed within two years from the date the Plaintiff knew or ought to have known of the injury against him. More specifically, they claim the limitation period began to run on February 11, 2010, the date Mr. Kozina was arrested, since that was the only incident where Mr. Kozina could have suffered injury.

[16] Alternatively, some or all of the allegations in the Amended Statement of Claim do not disclose a reasonable or any claim against the Defendants or the claims are frivolous, improper, vexatious, and/or an abuse of process.

[17] Specifically, the Amended Statement of Claim is an abusive attempt to advance litigation on behalf of a non-party by alleging mistreatment of Mr. Huff. If there is any cover-up, the proper recourse is through the statutory police discipline process set out in the *Police Act*, RSA 2000, c P-17. Regardless, the allegations have already been assessed in the Binder Decision so this action is an attempt to relitigate the proceedings currently under judicial review.

[18] In the further alternative, the Defendants suggest I can reach a fair and just determination as there is no genuine issue for trial. As such, they argue that some or all of the allegations in the Amended Statement of Claim be dismissed pursuant to r 7.3(1) of the Alberta *Rules of Court*, Alta Reg 124/2010.

[19] Neither EPS officers, nor the Chiefs as named in this action, can be liable for damages for *Charter* breaches since the *Charter* does not bind private individuals. Further, Mr. Kozina has not alleged facts that the Defendants have disclosure obligations to provide the Crown with information relating to the complaints made by Mr. Huff. Therefore, the Defendants cannot be found liable for civil damages.

[20] Finally, the Applicants argue that the Amended Statement of Claim can only be construed as pleading either malicious prosecution or misfeasance in a public office, and that neither tort is properly plead nor supported by the evidence.

[21] None of the Defendants initiated prosecution against Mr. Kozina, and they cannot form a belief about reasonable and probable grounds in any event. Alternatively, even if reasonable and probable grounds existed in relation to the conviction for obstructing a peace officer, no damages were suffered since the sentence imposed for that charge was shorter and concurrent to the sentence for trafficking to which he pleaded guilty.

[22] The bald allegations of a cover-up have not been substantiated by evidence and the allegations of Mr. Huff have been declared unsubstantiated and not credible through the EPS disciplinary hearing process and should not be relitigated here. Further, the Plaintiff has not suffered any compensable damages for the same reason as above for malicious prosecution.

Mr. Kozina's Position

[23] Mr. Kozina argues that the limitation period started running when the cover-up was allegedly first discovered on September 27, 2013 when the CBC program first came to Mr. Kozina's attention. Since the Statement of Claim in this action was filed on September 25, 2015, the claim is not statute barred by the *Limitations Act*.

[24] Mr. Kozina disagrees with the characterizing of this action as an attempt to "relitigate matters determined." The disciplinary hearing and the current civil action are different kinds of proceedings with different remedies. Based on Mr. Kozina's reading of ***Penner v Niagra (Regional Police Services Board)***, 2013 SCC 19, relying on the outcome of the Binder decision to preclude this action would be "fundamentally unfair." In any event, "it is obvious that a just and fair determination of the claim cannot be made on the basis of the documentary evidence before this court" (Respondent's Brief at para 6).

[25] Mr. Kozina further argues that because the EPS is a creature of statute (namely, enacted through the *Police Act*), this means that the police are "the state" and Mr. Kozina can seek *Charter* remedies against the Defendants.

[26] Despite this contention, Mr. Kozina notes that their claim is not restricted to *Charter* relief and that they seek common law remedies as well. Specifically,

> … the police have a duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused, which would obviously include information relating to the very investigation that resulted in Kozina being charged (Respondent's Brief at para 28).

[27] Mr. Kozina asserts that this duty was breached, and he is therefore entitled to damages.

[28] Mr. Kozina admits that the claim should not be characterized as malicious prosecution or negligence. Instead, "the tort is probably more properly described as misfeasance in public office" (Respondent's Brief at para 15). He further argues that the elements of the tort are made out on the alleged facts: the officers engaged in deliberate and unlawful conduct in their capacity as public officers, they were aware that the conduct was likely to harm Mr. Kozina, and the conduct actually caused compensable injury to him.

Issues

[29] To determine whether or not all or part of the Amended Statement of Claim should be struck, or if summary dismissal should be granted, the following issues must be considered:

(a) Does the *Limitations Act* bar Mr. Kozina from recovery in this action?
(b) Is the Amended Statement of Claim properly pleaded, or is the remedy sought unavailable?
(c) Is the Amended Statement of Claim an abuse of process?
(d) Does the Amended Statement of Claim advance a claim in bad faith?
(e) Should the Amended Statement of Claim be otherwise summarily dismissed?

Striking Out Pleadings

[30] Rule 3.68 provides that all or part of a claim may be struck out if there is either no reasonable claim, or the claim is frivolous, irrelevant, improper, or an abuse of process.

[31] The test of "reasonableness" is "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed" (***Ernst v Alberta (Energy Resources Conservation Board)***, 2014 ABCA 285). William A. Stevenson & Jean E. Côté, *Alberta Civil Procedure Handbook*, vol 1 (Edmonton: Juriliber, 2018) explain at 3-123 that "frivolity, irrelevance, and improperness" are "not really ... independent ground[s] of attack, because it is probably impossible to have any relevant pleading disclosing a cause of action ... which would fit within" those conditions.

Law of Summary Dismissal

[32] Under r 7.3 of the *Rules*, a court may "dismiss one or more claims in the action" if "there is no merit to a claim or part of it." The Alberta Court of Appeal recently refined the law regarding summary dismissal (***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47):

> The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

The Limitations Act

[33] Section 3(1) of the *Limitations Act* provides that if a claimant does not file a Statement of Claim within two years after the date the claimant first knew, or ought to have known, that the injury occurred and that it was attributable to the conduct of the defendant, then the defendant is entitled to immunity from liability.

[34] The Applicants argue that if Mr. Kozina suffered any harm at all, that harm occurred when he was arrested on February 11, 2010, meaning the limitation period expired on February 11, 2012. If this is correct, then Mr. Kozina would be statute barred from recovery and the Applicants would be successful on this application for summary dismissal.

[35] However, based on the evidence before me that Mr. Kozina was unaware of any potential cover-up and failure to disclose until he watched the CBC program on September 27, 2013, a claim based on such a cover-up or failure to disclose could potentially start the limitation clock at that time. The Statement of Claim would then be within the limitation period. The cover-up or failure to disclose must nonetheless be an "injury" to Mr. Kozina which the Defendants deny. "Injury" is defined in the *Limitations Act* at s 1(e) as meaning:

> (i) personal injury,
>
> (ii) property damage,
>
> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty.

[36] The most relevant types of injury alleged by Mr. Kozina on the facts of this case would appear to arise from the "non-performance of an obligation" or "the breach of a duty."

[37] In ***R v Gubbins***, 2018 SCC 44 at para 23:

> In addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is "obviously relevant" to the accused's case. The phrase "obviously relevant" should not be taken as indicating a new standard or degree of relevance: ***Jackson***, at para. 125, per Watt. J.A. Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under ***Stinchcombe*** because it relates to the accused's ability to meet the Crown's case, raise a defence, or otherwise consider the conduct of the defence. ***R v McNeil***, 2009 SCC 3, requires the police to hand such information to the Crown.

[38] The Defendants argue that "Mr. Huff's allegations are not findings of serious misconduct nor are they 'fruits of the investigation' by EPS into conduct of the Plaintiff." This may be true, but that does not mean that the allegations were not "obviously relevant" as described in ***Gubbins***.

[39] However, "not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused's case" (***McNeil***, supra para 37 at para 59). Examples of irrelevance may include the officer playing "a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer's evidence" (***McNeil***).

[40] The multiple allegations made by Mr. Huff up to the date of Mr. Kozina's conviction were arguably relevant to Mr. Kozina's case. Had this information been disclosed to the Crown, and then to Mr. Kozina, he would have had this information to defend against the charges laid. The officers in question did not play "a peripheral role in the investigation" and the misconduct

may have had a "bearing on the credibility or reliability of the evidence." While it is true that the dismissal of the initial complaint in 2010 by Chief Boyd concluded that "there was [no] reasonable prospect of success for charges against Kemp, Redlick and Offin" (Brief of the Defendants at para 52), the dismissal makes no reference to Mr. Huff's allegations being made to multiple individuals at EPS. This dismissal alone is not sufficient to establish that the Huff allegations were not relevant.

[41] Mr. Kozina may well have suffered an injury from the non-performance of an absolute disclosure obligation as contemplated in s 1(e) of the *Limitations Act*. The fact that the Crown, after having been made aware of the Mr. Huff allegations, consented to a striking of pleas and invited a stay of proceedings is evidence that the allegations lend support to Mr. Kozina's argument.

[42] The facts do not suggest that this action should be barred under a limitations defence. The Statement of Claim cannot be summarily dismissed on this basis.

Improper Pleadings/Unavailable Remedy

[43] According to paragraph 26 of Mr. Kozina's Amended Statement of Claim, "the Plaintiff's claim is for damages arising out of the cover-up and failure to disclose." The Applicants in paragraphs 54-55 of their Brief argue:

> On its face, and read generously, the Amended Statement of Claim could potentially be construed to allege two tortious causes of action: malicious prosecution and misfeasance in public office. The Plaintiff has not pleaded negligence.
>
> Neither malicious prosecution nor misfeasance in public office is adequately pleaded.

[44] Paragraph 15 of Mr. Kozina's Brief says: "the claim may not be properly characterized as one of malicious prosecution as suggested by the Applicants. Nor is it a claim in negligence... [T]he tort is probably more properly described as misfeasance in public office."

[45] Misfeasance in public office does not need to be specifically pleaded, unlike that of defamation (see Abrams & McGuinness, *Canadian Civil Procedure Law*, 2d (2010) at §10.35: "[w]here a party wishes to rely upon a private Act of Parliament or of the Legislature or a municipal by-law, the existence of such a law must be specially pleaded"; *Defamation Act*, RSA 2000, c D-7). The general abolition of pleading the law was an innovation introduced by the *Judicature Act*:

> Under the modern rules of pleading, it is not generally necessary to plead law, for the assumption is made that the disposition of actions is better served by having the parties outline the facts that they intend to prove in support of their respective

> cases, rather than to summarize the points of law that they believe entitle them to relief (Abrams & McGuinness, *ibid* at §10.31).

[46] With this in mind, I find that it is not necessary for misfeasance in a public office to be specifically pleaded. According to Stevenson & Côté, para 31 at 3-125: "No one style of pleading is mandatory, and though pleading related facts ... contiguously is often desirable, that is not legally necessary. Misfeasance in public office still needs some details" (***AF v Alberta***, 2014 ABQB 216). In AF, the problem in the pleadings identified by Justice Graesser was that "the Plaintiffs [did] not [comply] with the requirement to specify exactly who the offending Crown agent or authority was, and what he or she did or failed to do." This is not the situation here. Mr. Kozina has listed the Applicants specifically, as well as the misfeasance in question. These preliminary "details" found in the Amended Statement of Claim are sufficiently plead.

[47] As identified in ***Odhavji Estate v Woodhouse***, 2003 SCC 69 at para 32:

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

[48] If as alleged there was a cover-up, falsification of documentation, and breach of a duty to disclose, then there was a "deliberate unlawful conduct in the exercise of public functions." For example, falsification of documentation is a deliberate course of unlawful conduct, and in the context of this case, includes awareness that the falsification would likely injure the plaintiff since his defence in the subsequent criminal proceedings would be stunted.

[49] This in turn would have caused injury to Mr. Kozina to the extent that the Crown may not have pursued a prosecution on certain charges, and at the very least, Mr. Kozina would have had more defence ammunition. This is regardless of whether Mr. Kozina pleaded guilty since his subsequent actions in ignorance of any cover-up included paying certain legal expenses up to and including when he pleaded guilty and included a modified litigation strategy to accept a plea bargain.

[50] The Defendants also argue that any *Charter* remedies are not accessible since the police are private individuals and damages for a *Charter* breach may only be pursued against the state. However, arguably police officers and Chiefs of Police, are government actors, as contemplated by s 32 of the *Charter*. As explained in Patrick Macklem et al, *Canadian Constitutional Law*, 4th ed (Toronto: Emond, 2010) at 802:

> "Government" in s. 32 includes the executive branch of government, including cabinet, … ministers, officials employed in government departments, **police officers**, and other public agencies or agents that are subject to ministerial control or charged with the performance of government responsibilities (emphasis added).

[51] The Supreme Court of Canada has recently clarified the test for when *Charter* damages lie against the Crown when information is withheld (***Henry v British Columbia (Attorney General)***, 2015 SCC 24 at para 82):

> … a cause of action for *Charter* damages will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.

[52] To strike the *Charter* relief sought under r 3.68 of the *Rules*, there must be no reasonable prospect that the plaintiff's claim will succeed (see e.g. ***Ernst v Encanca Corp***, 2014 ABCA 285). As noted in Stevenson & Côté, *supra* para 30 at 3-133: "If the statement of claim is unambiguous and sets up a fact situation or a legal proposition which would mean that the defendant's liability to the plaintiff would be novel or dubious, the claim cannot be struck out" (citing, among many others, ***Deloitte & Touche Inc v Boychuk***, 2001 ABQB 712).

[53] There is a reasonable argument to be made that the Defendants fall under application of the *Charter* and the test from ***Henry*** could analogously apply to police officers who withhold information. That is, I cannot say that there is absolutely no reasonable prospect that Mr. Kozina's claim for *Charter* damages against the Defendants could succeed at trial.

[54] The elements of misfeasance in a public office have been met on the facts alleged in Amended Statement of Claim and should not be struck for being improperly pleaded. Similarly, the *Charter* remedy sought at paragraph 29 of the Amended Statement of Claim should remain as part of the pleadings.

Is the Amended Statement of Claim an abuse of process?

[55] The Defendants claim that "[t]o the extent that the Amended Statement of Claim makes allegations regarding the treatment of Mr. Huff, [this] is an abusive attempt to advance busybody litigation on behalf of a person who is not party to this action." Further, they contend that this action is duplicative in that much of the Amended Statement of Claim duplicates the claims made in a related Statement of Claim filed by Mr. Huff albeit later discontinued. Finally, the Defendants argue that the appropriate venue for this claim is the statutory disciplinary process that is currently under judicial review.

[56] This claim is for misfeasance in a public office with Mr. Kozina claiming damages. The disciplinary proceeding is a process that is confined to disciplinary remedies without the

possibility of compensation. In light of this substantive difference, the disciplinary proceedings (and the subsequent judicial review) cannot be the exclusive venue for the disposition of these matters. Nor can this claim be described as duplicative in the context of the Statement of Claim filed by Mr. Huff. The current claim is, again, one of misfeasance in a public office with damages assessed in the context of Kozina's injuries. This is not "busybody litigation on behalf of a person who is not party to this action" albeit the extensive context provided regarding Mr. Huff's employment at EPS might be considered somewhat more than necessary to inform this claim.

[57] In ***Penner***, *supra* para 23, the Supreme Court of Canada allowed for two related claims to proceed in parallel: a civil action and an administrative decision. As the Supreme Court described at para 42:

> Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness … such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context.

[58] Kozina's civil action was filed in September 2015, almost a year before the Binder Decision was released. As such, and borrowing the words of Justice Binnie in ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at para 70 (quoted with favour in ***Penner*** at para 56): "...the [Defendants] were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings."

[59] Secondly, again adopting the reasoning of the Supreme Court in ***Penner*** at para 58: "a person in [Mr. Kozina's] position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action."

[60] Following further along and adopting the policy considerations of the Supreme Court of Canada in ***Penner*** at para 62:

> It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants

> in Mr. Penner's position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.
>
> In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of the disciplinary hearing, or the fairness to the officers in that hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

[61] These are the same kinds of considerations that are at play in this case and the logic of the Supreme Court of Canada applies here.

[62] Finally, the Supreme Court of Canada explained that under the complaints process that was in effect in ***Penner***, "the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer." With this fact in mind, the Supreme Court reasoned that:

> Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

[63] This situation is exactly what we have in the current Application. The Chief of Police, in ordering Kozina's complaint proceed to a disciplinary hearing, was operating under s 45(3) of the *Police Act*, RSA 2000, c P-17. It is the Chief of Police themselves, "or a person designated by the Chief of Police...who shall conduct a hearing into the matter." As such, summarily dismissing this civil claim on the basis of "relitigating matters already addressed ... through the legislated police discipline process" would have the "effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability." This would be "a serious affront to basic principles of fairness."

[64] Concern is expressed that if the Binder Decision is found to be reasonable on judicial review and this claim is allowed to go to trial, there could be conflicting judicial decisions as an outcome. This disregards the role of a judge which is to weigh the Binder Decision in light of all the evidence and the circumstances of the prior and present proceedings at trial. For example, in ***Day v Woodburn***, 2019 ABQB 356 at para 14, Justice Renke explained that:

> In separate reasons (2019 ABQB 232), I admitted the transcript of the sentencing submissions and the decision of Justice Sanderman of March 30, 2011 (the Transcript). Justice Sanderman found that at least one officer had used excessive force in the arrest of Mr. Day. I found that Justice Sanderman's excessive force

> determination was admissible in these proceedings but that this determination was not conclusive. It remains my responsibility to determine whether excessive force was used and to assess the weight of Justice Sanderman's determination in these proceedings.

[65] If the Binder decision is found to be admissible as evidence during the trial of this action, then the trial judge will assess the weight of that decision in the context of all of the evidence given at trial. It is the place of the trial judge to determine whether or not excessive force was used, and whether or not there was a subsequent cover-up, despite the fact that the Binder decision has already made a determination on this point in the context of a very different kind of proceeding.

[66] In summary, I am not satisfied that the claim is an abuse of process on the basis of the Defendants arguments.

Does the Amended Statement of Claim advance a claim in bad faith?

[67] The Defendants argue that Mr. Kozina "deliberately failed to disclose the true nature of the conduct leading to his charges and guilty plea." Further, they claim that Mr. Kozina

> …specifically stated at paragraph 26 of the Amended Statement of Claim that the damages sought are based on the alleged treatment of Mr. Huff by his former EPS colleagues, not anything relating to the actual Plaintiff, illustrating that this action is brought on the basis of improper or ulterior motives.

[68] While it is true that the Amended Statement of Claim does not explicitly disclose the charges of trafficking, this claim is not explicitly in relation to that charge. This claim is an action for misfeasance in a public office with damages arising from a cover-up and failure to disclose subsequent to arrest.

[69] Paragraph 26 of the Amended Statement of Claim reads: "The Plaintiff's claim is for damages arising out of the cover-up and failure to disclose as set out in paragraphs 10-21 above." While paragraphs 10-21 deal almost exclusively with the alleged treatment of Mr. Huff by his former EPS colleagues, the paragraph is also clear that the damages being sought arise out of the cover-up and failure to disclose. The details from Mr. Huff's circumstances assist in establishing the story of how Kozina got from point A (his arrest) to point B (filing his statement of claim). The pleading is sufficiently clear to appreciate that the claim is not for damages relating to Mr. Huff and does not support a conclusion that it was made with an improper or ulterior motive.

[70] The Amended Statement of Claim should not be struck pursuant to r 3.68(2) of the *Rules*.

Summary Dismissal

[71] Despite finding that no particular part of the Amended Statement of Claim should be struck nor that the entire claim should be summarily dismissed for some sort of immediate fatal

error (such as a limitations defence), what remains is to determine whether or not the Amended Statement of Claim should be summarily dismissed under the ***Weir-Jones*** framework.

[72] One of the key considerations set out in ***Weir-Jones*** is that "[h]aving regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?" In my opinion, there are sufficient uncertainties in the facts and the law that it would be inappropriate for me to resolve the dispute on a summary basis. In other words, adopting the language of ***Weir-Jones***, I do not have confidence in the state of the record to exercise my discretion to summarily resolve the dispute.

[73] Counsel for the Defendants at the hearing of this Application argued that Mr. Kozina's evidence (set out primarily in the affidavit of Leanne Fliczuk, filed November 14, 2018) are

> ... documents that have nothing to do with Mr. Kozina ... We have affidavits in his appeal where he is attempting to get a stay entered and the conviction overturned. ... None of these documents are Mr. Kozina's documents. We don't have any evidence from him, and most certainly no evidence about what harms he claims he suffered in his Statement of Claim. So I think we can say that the best foot forward that has been out forward by the Plaintiff here is that there is no evidence of harm.

[74] In my view, the affidavit of Leanne Fliczuk provides evidence which contradicts the evidence of the Defendants. Arguably there is significant evidence through documentation produced by Mr. Huff which helps to establish the tort of misfeasance in a public office. This, combined with the evidence regarding Kozina's sentencing history for the charges laid against him are arguably sufficient to establish the tort. As noted, the Binder decision is not conclusive of a finding that Huff's account of harm done to Kozina did not happen although it is evidence to be weighed by a trial judge. There is conflicting evidence that cannot be resolved by me on a summary basis.

[75] In reaching the foregoing conclusion, I am mindful that the Plaintiff has claimed damages of $1,000,000 inclusive of aggravated and punitive damages and relief as the Court may give under s.24(1) of the *Charter*. The injuries described in paragraph 27 of the Amended Statement of Claim setup a basis for damages but there is no evidence to assist the Court in establishing the quantum. Charter damages, if awarded, are at best difficult to quantify and dependent on the discretion of the Court. In my view, at this stage of the proceedings this is not fatal to the action.

Conclusion

[76] The application by the Applicants is dismissed.

Costs

[77] Counsel for Kozina seeks full indemnity costs on the basis that the argument made regarding the bad faith of the Plaintiff and the apparent alleged attempt in the Amended Statement of Claim to re-litigate Mr. Huff's claim amount to allegations of misconduct against the Plaintiff's lawyer. In my view, the arguments are directed at Mr. Kozina's pleadings and in no way were intended to nor did they reflect on the conduct of Plaintiff's counsel.

[78] Regardless, the Plaintiff has been successful and is entitled to his costs for resisting this application. Noting the lack of evidence supporting the amount claimed, I am the view that costs should be awarded on Column 2 of Schedule C of the *Rules*.

Dated at the City of Edmonton, Alberta this 25th day of September, 2019.

L.A. Smart
M.C.Q.B.A.

Appearances:

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for the Plaintiff/Respondent

Sharon A. Roberts, Field Law
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