Citation: Grant v Manitoba (AG), 2026 MBCA 40
Date: 20260501
Docket: AI24-30-10109

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

B E T W E E N:

MARK GRANT	)	***J. M. Mann*** *and*
	)	***T. Sandulak***
(Plaintiff) Respondent	)	*for the Appellants*
	)	
- and -	)	***L. Greenspon***
	)	*for the Respondent*
THE ATTORNEY GENERAL OF MANITOBA and THE GOVERNMENT OF MANITOBA	)	***B. Barnes Trickett*** *and*
	)	***T. Nichini***
	)	*for City of Winnipeg*
(Defendants) Appellants	)	
	)	*Appeal heard:*
- and -	)	***November 17, 2025***
	)	
CITY OF WINNIPEG	)	*Judgment delivered:*
	)	***May 1, 2026***
(Defendant)	)	

On appeal from *Grant v The Government of Manitoba et al*, 2024 MBKB 77 [*KB decision*]

MAINELLA JA

Introduction

[1] This appeal turns on the scope of the qualified immunity of prosecutors from civil liability for discretionary decisions.

[2] The defendants, the Attorney General of Manitoba and the Government of Manitoba (the provincial defendants), appeal an order refusing to strike the entirety of an amended amended statement of claim arising from a criminal prosecution where the plaintiff was ultimately acquitted of the murder of an abducted child (the claim).

[3] The motion to strike put into conflict the right of a litigant to their day in court on the merits of a claim, save in rare situations, and the public interest in the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice without undue interference by potential civil litigation.

[4] The key feature of the claim is that it does not rely on a typical occurrence of prosecutorial misconduct, such as a breach of a disclosure duty, a conflict of interest, dishonesty or some form of improper in-court conduct. Rather, the claim rests entirely on the premise that civil liability should arise because of a loss of objectivity in the decision to prosecute as weaknesses with the case against the plaintiff arose. This is commonly called prosecutorial "[t]unnel vision" (Robert J Frater, *Prosecutorial Misconduct*, 2nd ed (Toronto: Thomson Reuters, 2017) at 13-14).

[5] The provincial defendants were largely unsuccessful in their attempts before a senior Master (now senior associate judge) and a judge of the Court of King's Bench (the KB judge) to have the claim struck out in its entirety either on the basis of it failing to disclose a reasonable cause of action or it being an abuse of process (see *KB decision*; *Grant v The Attorney General of Manitoba et al*, 2023 MBKB 137 [*Grant* 2023]).

[6] For the following reasons, I would allow the appeal; it is plain and obvious that the plaintiff's causes of action against the provincial defendants, as pleaded, are certain to fail.

[7] In particular, in my respectful view, the KB judge erred in law in concluding that the claim properly pleaded malice. The pleading here falls far short of an allegation that could support establishing that the prosecutors in the murder case deliberately and improperly used their office for ends that were improper and inconsistent with the traditional prosecutorial functions (see *Nelles v Ontario*, [1989] 2 SCR 170 at 193-94, 196-97, 1989 CanLII 77 (SCC) [*Nelles*]). The plaintiff's pleading amounts to nothing more than second-guessing the decision by prosecutors to prosecute him with the benefit of hindsight, which, at law, cannot give rise to civil liability, standing alone (see *ibid* at 196-97).

Factual Background

The Criminal Prosecution Against the Plaintiff

[8] On November 30, 1984, Candace Derksen (Derksen), a thirteen-year-old girl, disappeared in Winnipeg on her way home from school. On January 17, 1985, Derksen's frozen body was found in a shed in an industrial yard. Her wrists and ankles were hog-tied together behind her back with twine. Her cause of death was hypothermia because of exposure.

[9] The investigation of Derksen's disappearance and subsequent murder was inconclusive; the case sat unsolved for more than twenty years. At the time of Derksen's abduction and murder, forensic DNA testing did not exist in Canada.

[10] In 2001, DNA samples were extracted from the twine by the RCMP; they did not match the profile of anyone in their database.

[11] In 2006, the Winnipeg Police Service (WPS) received information from two witnesses who claimed that the plaintiff had confessed to abducting and killing Derksen. On May 16, 2007, after further investigation, the plaintiff was arrested for murder.

[12] The key evidence linking the plaintiff to the murder was DNA evidence purportedly from him in relation to hairs found at the crime scene and on the twine that had bound Derksen (the DNA evidence).

[13] The DNA evidence arose from testing done by a private laboratory in Ontario, Molecular World, under the direction of Dr. Chahal. Molecular World's initial testing of the DNA evidence did not result in any usable findings. A "match" to the DNA profile of the plaintiff only came about when a sample of the plaintiff's DNA was provided by the WPS to Molecular World. The DNA testing of the twine by Molecular World resulted in the destruction of the DNA sample on the twine (thereby eliminating the possibility of an independent re-test); this was done with the prior knowledge and consent of the WPS.

[14] On September 10, 2009, after a preliminary inquiry, the plaintiff was committed to stand trial for first degree murder.

[15] On February 18, 2011, after a trial by judge and jury, the plaintiff was convicted of second degree murder (the first trial). Two aspects of the first trial are significant to this appeal.

[16] First, the plaintiff attempted to lead third party suspect evidence as to a twelve-year-old girl being found on September 6, 1985, after being abducted and tied up in a manner similar in pattern and location to Derksen (the third party suspect evidence). The plaintiff was in custody at that time and that eliminated him from being a suspect in this other abduction. The trial judge refused to allow the admissibility of the third party suspect evidence.

[17] Second, the plaintiff challenged the reliability of the DNA evidence as to the testing and analysis done by Molecular World. The jury heard conflicting opinion evidence from the Crown's expert, Dr. Chahal, and the plaintiff's expert, Dr. Waye.

[18] Dr. Chahal testified that there was a one in fifty million chance of a coincidental match in relation to the DNA evidence. Dr. Waye disagreed and testified that the DNA evidence was unreliable.

[19] After his conviction, the plaintiff hired another DNA expert, Dr. Budowle. Dr. Budowle's view was that Molecular World had either purposely or negligently tampered with the DNA evidence. Dr. Budowle swore an affidavit on May 21, 2012 to that effect and the plaintiff sought to adduce fresh evidence of flawed science on his conviction appeal.

[20] On October 30, 2013, this Court allowed the plaintiff's conviction appeal and ordered a new trial (see *R v Grant (ME)*, 2013 MBCA 95 [*Grant* CA 2013], aff'd 2015 SCC 9 [*Grant* SCC]). This Court ruled that the trial judge erred in law by excluding the third party suspect evidence. This Court made some relevant comments on the reasonableness of the jury's verdict given the "contradictory DNA evidence" that was provided by Drs. Chahal and Waye (*Grant* CA 2013 at para 5).

[21] To begin, this Court was satisfied that the trial judge adequately instructed the jury on the contested DNA evidence.

[22] Next, while this Court expressed "some unease" with the murder conviction being based on the contested DNA evidence, it was satisfied that the verdict was not unreasonable (*ibid* at para 19). As Monnin JA explained, "[t]here was evidence, if believed, and it was, on which a properly instructed jury could convict and just because I may view it differently, I cannot conclude that the jury's decision was unreasonable" (*ibid*).

[23] In allowing the appeal, this Court explained that the third party suspect evidence was relevant in two ways. If believed, it could have been the basis for the jury to acquit the plaintiff because he was in custody during the other abduction. Also, it was a fact that was "relevant in the context of assessing the expert's evidence, particularly Dr. Waye's evidence excluding the [plaintiff]" (*ibid* at para 70).

[24] Finally, this Court went on to comment, in *obiter*, that Dr. Budowle's post-conviction opinion was not fresh evidence; it was simply a repetition of the opinion of Dr. Waye at trial critiquing the work of Molecular World and Dr. Chahal's opinion as to the DNA evidence.

[25] The Crown successfully sought leave to appeal to the Supreme Court of Canada. On March 5, 2015, the Supreme Court dismissed the Crown's appeal, upholding the Court of Appeal's decision to overturn the conviction and order a new trial on the basis of the trial judge's exclusion of the third party suspect evidence (see *Grant* SCC). In its decision, the Supreme Court refused to consider the plaintiff's attempt to introduce Dr. Budowle's opinion as fresh evidence.

[26] The plaintiff's retrial in 2017 on the second degree murder charge was by judge alone (the second trial). The reliability of the DNA evidence was again challenged by the plaintiff with conflicting opinion evidence called by the Crown (Dr. Chahal) and the plaintiff (Drs. Budowle and Bieber). In its closing submission, the Crown conceded that the trial judge should place no weight on one of the three types of the DNA evidence due to concerns about reliability.

[27] During the second trial, the Crown called a witness (who did not testify at the first trial) who testified to alleged incriminating admissions she heard the plaintiff make about killing Derksen. The credibility of this witness was contested.

[28] On October 18, 2017, the trial judge delivered her verdict (see *R v Grant*, 2017 MBQB 176). She acquitted the plaintiff on the basis that the totality of the evidence fell short of the criminal standard of proof of beyond a reasonable doubt. The Crown did not appeal the acquittal, thus ending the plaintiff's criminal prosecution.

The Plaintiff's Civil Claim

[29] On October 16, 2019, the plaintiff filed a statement of claim as a result of his "wrongful conviction and imprisonment for the abduction and murder of [Derksen]."

[30] The claim was amended twice prior to the motion to strike that gives rise to this appeal.

[31] The three causes of action set out in the claim are malicious prosecution, breach of *Charter* rights (see *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]) and misfeasance in public office. In particular, the allegations of malicious prosecution and breach of *Charter* rights focus on the conduct of five named "crown lawyers employed by the Attorney General of Manitoba": one lawyer in relation to the first trial; two lawyers in relation to the appeal process; and two other lawyers in relation to the second trial.

[32] The three causes of action set out in the pleading against the defendant, the City of Winnipeg (the City defendant), are negligent investigation, malicious prosecution and breach of *Charter* rights. Considering the fact that this appeal does not address the allegations against the City defendant, it is unnecessary to discuss them in further detail.

Decision of the Senior Associate Judge

[33] The provincial defendants moved to strike the claim pursuant to MB, *King's Bench Rules*, Man Reg 553/88, r 25.11(1) [the *Rules*]. That rule provides:

25.11(1) The court may on motion strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,	**25.11(1)** Le tribunal peut, sur motion, radier ou supprimer un acte de procédure ou un autre document, en tout ou en partie, avec ou sans autorisation de le modifier, parce que l'acte de procédure ou le document, selon le cas :

(a) may prejudice or delay the fair trial of the action;	a) peut compromettre ou retarder l'instruction équitable de l'action;
(b) is scandalous, frivolous or vexatious;	b) est scandaleux, frivole ou vexatoire;
(c) is an abuse of the process of the court; or	c) constitue un recours abusif au tribunal;
(d) does not disclose a reasonable cause of action or defence.	d) ne révèle pas une cause d'action ou une défense raisonnable.

[34] On September 22, 2023, the senior associate judge delivered her decision (see *Grant* 2023). She struck paragraph 65 of the claim that alleged systemic bias in the criminal justice system in Manitoba without particulars, pursuant to rules 25.11(1)(a) and (c) of the *Rules*, without leave to amend. She otherwise dismissed the provincial defendants' motion.

[35] The provincial defendants appealed; the plaintiff did not (see the *Rules*, r 62.01).

Decision of the KB Judge

[36] On May 31, 2024, the KB judge delivered his decision on the provincial defendants' appeal (see *KB decision*). He struck parts of paragraph 62(a) as a collateral attack on the committal to stand trial or as allegations falling outside the tort of malicious prosecution pursuant to rules 25.11(1)(c) and (d) of the *Rules*. He otherwise dismissed the provincial defendants' appeal.

[37] The provincial defendants sought leave to appeal the KB judge's interlocutory order to this Court; the plaintiff did not (see *The Court of Appeal Act*, CCSM c C240, s 25.2).

Decision on Leave to Appeal

[38] On the motion for leave to appeal, the provincial defendants argued that the KB judge erred in finding that the remaining parts of the claim disclosed a reasonable cause of action and were not an abuse of process. On January 24, 2025, a judge of this Court granted the provincial defendants' motion for leave to appeal in relation to both grounds raised (see *Grant v Manitoba (AG)*, 2025 MBCA 7).

Discussion

Overview

[39] I will begin with the less controversial aspects of this appeal that relate to the standard of review; the relevant principles in relation to rules 25.11(1)(c) and (d) of the *Rules*; and the plaintiff's allegation of misfeasance in public office. I will then discuss the more controversial features of this appeal that relate to the plaintiff's allegation of malicious prosecution and breach of *Charter* rights.

Standard of Review

[40] The applicable standard of review in this appeal has two aspects.

[41] A decision under rule 25.11(1) of the *Rules* as to whether a pleading or other document constitutes an abuse of process or fails to disclose a

reasonable cause of action or defence is a question of law reviewable on a standard of correctness (see *Saskatchewan (Environment) v Métis Nation – Saskatchewan*, 2025 SCC 4 at para 31 [*SK Environment*]; *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 57).

[42] However, the ultimate decision to strike a pleading or other document under rule 25.11(1) is entitled to more appellate deference because that is an exercise of discretion (see *SK Environment* at para 32). The judge's choice of remedy (*ibid*)

> may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being 'so clearly wrong as to amount to an injustice').
>
> [citations omitted]

Relevant Principles: Rule 25.11(1)(c) of the Rules

[43] The relevant principles for this appeal as to striking a pleading or other document pursuant to rule 25.11(1)(c) are:

i) The abuse of process doctrine "is concerned with the administration of justice and fairness" (*SK Environment* at para 33). The doctrine is a flexible concept that engages the court's inherent power to prevent misuse of its procedure that would bring the administration of justice into disrepute (see *ibid*, citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37 [*CUPE*]).

ii) Striking a pleading or other document as an abuse of process is a "drastic remedy" that is reserved only for "the 'clearest of cases',

when the abuse falls at the high end of the spectrum" (*SK Environment* at para 60, quoting *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 83).

iii) One, but not the exclusive, form of abuse of process is the re-litigation of a claim that has already been determined. Such litigation is contrary to principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (*SK Environment* at para 35, quoting *CUPE* at para 37; see also *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 41).

iv) Consistent with the flexibility of the abuse of process doctrine, not every situation of re-litigation is an abuse of process. As was explained in *Culligan v Norman*, 2024 MBCA 102 at para 17:

> Re-litigation should only be permitted if it can be shown that it is necessary to enhance, rather than impeach, the integrity of the justice system. The Supreme Court provided three examples of when that may be the case: (1) where the first proceeding was tainted by fraud or dishonesty; (2) where new, fresh evidence, which was previously not available, conclusively impeaches the original result; or (3) where fairness dictates the original result ought not to be binding in the new context.
>
> [citation omitted]

v) It can be applied to a claim already decided against a party or litigation giving rise to a collateral attack of a prior decision (see *Hyra v Manitoba et al*, 2015 MBCA 55 at para 47 [*Hyra*]; *MRF v KD*, 2005 MBCA 58 at para 22 [*MRF*]).

vi) As Scott CJM explained in *Glenko Enterprises Ltd v Keller*, 2000 MBCA 7, the question of whether current litigation is an abuse of process because of historic litigation "depends on whether 'the same question has been decided'" (at para 1; see also *SK Environment* at para 35). To answer this question, in the context of a claim of improper re-litigation, several comments made in *SK Environment* are of assistance:

(a) What question(s) does each legal proceeding deal with? This requires consideration of the purpose, remedies, and results of the current and historic litigation.

(b) To what degree does the historic litigation dispose of the question(s) raised in the current litigation? While the existence of a multiplicity of proceedings can give rise to an abuse of process, some overlap in subject matter or issue is not determinative. A finding of abuse of process is reserved for a serious misuse of the court process that would bring the administration of justice into disrepute.

(c) If the concern raised is the undermining of the principle of finality due to potential inconsistent verdicts, the court should consider whether this concern can be realistically addressed by active case management of the current litigation as opposed to the more drastic remedy of striking.

vii) The admissible record on a motion pursuant to rule 25.11(1)(c) is different than on a motion under rule 25.11(1)(d). Because of the flexibility that applies to the doctrine of abuse of process, the record

on a motion pursuant to rule 25.11(1)(c) is not restricted to accepting the pleading or other document that the moving party seeks to strike as true. A court applying rule 25.11(1)(c) may consider other admissible evidence (see *SK Environment*; *MRF* at para 23). This can include a prior court decision in earlier litigation (see *Plate v Atlas Copco Canada Inc*, 2019 ONCA 196 at paras 53-58; *Jane Doe et al v Manitoba*, 2005 MBCA 109 at paras 10-16).

viii) An important caveat as to the parameters of the admissible record for the purposes of a motion under rule 25.11(1)(c) is that the fact-finding process of the court for such a motion is narrow and not comparable to a trial or a motion for summary judgment (see *Baradaran v Alexanian*, 2016 ONCA 533 at paras 15-16).

Relevant Principles: Rule 25.11(1)(d) of the Rules

[44] The relevant principles for this appeal as to striking a pleading or other document pursuant to rule 25.11(1)(d) are:

i) The purpose "is to ensure the effectiveness and fairness of the litigation process by the weeding out of hopeless claims or defences, without the necessity and cost of the full civil process" (*Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para 35 [*WRHA*]).

ii) There is a high threshold on the moving party to strike a pleading or other document (*ibid* at para 36):

> The remedy of striking out a pleading, however, is to be used sparingly. It is reserved only for the "clearest of cases". A claim

> or defence, or part thereof, should not be struck out unless the moving party demonstrates that it is "plain and obvious" that the cause of action or defence, as pleaded, is certain to fail.
>
> [citations omitted]

iii) No evidence is admissible, save for the pleading or other document sought to be struck. It should be read generously despite imprecise language, and it should be assumed that the facts contained therein can be proven save for facts that are patently ridiculous, incapable of proof or are bald assertions of misconduct without reasonable particulars (see *Dennis v The Attorney General of Canada et al*, 2020 MBCA 118 at para 8 [*Dennis*]; *WRHA* at paras 7, 37, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22 [*Imperial*]; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980, 1990 CanLII 90 (SCC)).

iv) As was explained in *Operation Dismantle v The Queen*, 1985 CanLII 74 at para 27 (SCC) [*Operation Dismantle*]:

> The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

v) The relative merits is not a matter for consideration on a motion to strike (*WRHA* at para 37):

> Factors such as the novelty of a claim or defence, the length or complexity of the issues raised by it, or the likelihood that the opposing party has a strong position that will likely defeat the claim or defence are not reasons alone to strike out the pleading. If a claim or defence has a reasonable prospect of success, it should not be struck out.
>
> [citations omitted]

vi) For actions involving a claim of malicious prosecution in relation to the conduct of a crown attorney, the policy behind the tort of malicious prosecution should not be overlooked. While the general rule is that a litigant is entitled to their day in court on the merits of a claim save in rare situations, in *Nelles*, the Supreme Court explained that one of the reasons why prosecutorial immunity from civil liability is not necessary in Canada to address the possible chilling effect on the administration of justice due to potential civil liability arising from prosecutorial decision making is because there are "ample mechanisms exist within the system" to weed out frivolous claims, such as a motion to strike (at 197; see also *Smith v Ontario (Attorney General)*, 2019 ONCA 651 at paras 91-94).

vii) A claim that, on its face, cannot satisfy the onerous and strict requirements of the tort of malicious prosecution should be struck. For example, as noted in *Nelles*, the pleading must demonstrate that the prosecution was commenced or continued due to an "improper motive or purpose; errors in the exercise of discretion and judgment are not actionable" (at 197).

viii) Courts considering motions to strike are reminded that, while the remedy must be effective to weed out frivolous claims of malicious

prosecution, such a procedure cannot be conducted in the same fashion as a motion for summary judgment (see the *Rules*, r 20), where the merits will be more carefully considered in light of the admissible evidence (see *Miguna v Toronto Police Services Board*, 2008 ONCA 799 at para 26). A failure to keep the two processes separate, as they have different evidentiary rules and thresholds, is an error in principle (see *McIlvenna v 1887401 Ontario Ltd*, 2015 ONCA 830 at para 20).

ix) Finally, special care must be taken in striking a claim for *Charter* damages based on an allegation of a breach of a constitutional right by the state, as this area of the law is emerging (see *WRHA* at para 38).

Misfeasance in Public Office

[45] In terms of the allegation of misfeasance in public office in the claim, the starting point is that Canada is a signatory to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [the *ICCPR*]. Article 14(6) of the *ICCPR* provides:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

[46] According to the claim, on September 5, 2018, counsel for the plaintiff requested, by way of letter, that the Minister of Justice for Manitoba (the Minister) appoint an inquiry pursuant to the Canada, Department of the Attorney-General, *Compensation for Wrongfully Convicted and Imprisoned Persons: Guidelines* (Ottawa: DAG, 11 July 1986), online (PDF): <news.gov.mb.ca/news/archives/1986/07/1986-07-11-compensation_for_ wrongfully_and_imprisoned_persons.pdf> [the *Guidelines*], to examine compensation for the plaintiff for his wrongful conviction and imprisonment.

[47] The Minister did not respond to this letter.

[48] In the claim, the plaintiff alleges that the Minister's failure to appoint an inquiry pursuant to the *Guidelines* "constitutes an intentional abuse of its statutory powers" that has resulted in damages to the plaintiff. The plaintiff relies on the *ICCPR* and the *Guidelines* to ground his action for misfeasance in public office against the provincial defendants.

[49] It is common ground that the parties did not address this part of the claim under rule 25.11(1)(d) before either the senior associate judge or the KB judge. Both sets of reasons are silent as to this cause of action.

[50] At the appeal, the panel was advised that this cause of action was discussed for the first time at the motion for leave to appeal to this Court.

[51] The parties addressed striking this part of the claim pursuant to rule 25.11(1)(d) in their written and oral submissions to this Court. Despite this being a new issue, it was conceded that this was an appropriate case for this Court to exercise its discretion to hear and decide the issue (see *Samborski*

Garden Supplies Ltd v MacDonald (Rural Municipality), 2015 MBCA 26 at para 27; *Guindon v Canada*, 2015 SCC 41 at paras 21-23).

[52] The tort of misfeasance in public office "involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff" (*Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 23 [*Odhavji*]; see also *6165347 Manitoba Inc v Robinson*, 2025 MBCA 33 at para 170).

[53] The concern for this Court is whether the act of the Minister in refusing to answer the plaintiff's request for an inquiry pursuant to the *Guidelines* was unlawful. If the Minister had no legal obligation to act, the tort of misfeasance in public office cannot be established (see *Odhavji* at para 24).

[54] It is trite, but important to appreciate, that Canada's international obligations do not automatically form part of domestic law; there are rules of reception, particularly as a result of Canada being a federation with a division of powers (see *Interlake Reserves Tribal Council Inc et al v The Government of Manitoba*, 2020 MBCA 126 at para 38).

[55] There are two distinct reasons why the plaintiff's allegation as to misfeasance in public office is doomed to fail and should be struck pursuant to rule 25.11(1)(d).

[56] First, the *Guidelines* do not create actionable rights that would give rise to a claim in tort in Manitoba. As was explained in *Hinse v Canada (Attorney General)*, 2015 SCC 35 [*Hinse*], "[t]he *Guidelines* are not binding legislation" (at para 85), incorporating the *ICCPR* into domestic law (see also

Henry v British Columbia (Attorney General), 2015 SCC 24 at para 136 [*Henry*]).

[57] It is plain and obvious that the Minister did not breach a statutory obligation by failing to establish a compensation inquiry, as the plaintiff alleges in the claim. The Minister does not have such a statutory obligation; accordingly, no tort claim can arise for misfeasance in public office (see *Hinse*).

[58] Second, it is also plain and obvious that the plaintiff's circumstances fall outside of the *Guidelines*, taking the most generous view of the facts in his favour. Consistent with the *ICCPR*, the *Guidelines* draw a distinction between someone who has been declared factually innocent, after a specific process, as opposed to someone found not guilty, after a trial (see *Hinse* at para 86). Only the former may be entitled to compensation.

[59] The *Guidelines* state:

> 4. As a condition precedent to compensation, there must be a free pardon granted under Section 683(2) [*now 748(2)*] of the *Criminal Code* or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [*now 696.1 and following of the Criminal Code*].
>
> . . .
>
> As compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:
>
> a) If a pardon is granted under Section 683, a statement on the face of the pardon based on an investigation, that the individual did not commit the offence; or
>
> b) If a reference is made by the Minister of Justice under Section 617(b), a statement by the Appellate Court, in

> response to a question asked by the Minister of Justice pursuant to Section 617(c), to the effect that the person did not commit the offence.

[60] The facts alleged in the claim simply state that the plaintiff was acquitted of second degree murder after the second trial. There is no dispute that he does not satisfy the specific eligibility criteria for compensation set out in the *Guidelines* that are meant to reflect Canada's *ICCPR* obligations.

[61] After the submissions of the provincial defendants at the appeal, counsel for the plaintiff conceded that this part of the claim should be struck pursuant to rule 25.11(1)(d). For the reasons provided, that concession was entirely appropriate.

Malicious Prosecution

Overview

[62] It is important to highlight that my comments about the tort of malicious prosecution are directed to a particular type of "prosecutor", namely, a lawyer appointed by the Attorney General to act as their agent who is employed in a public prosecution service, typically known as a crown attorney (see e.g. *The Crown Attorneys Act*, CCSM c C330, s 1).

[63] Actions against a private prosecutor or a police officer for the malicious institution of criminal proceedings give rise to different considerations that are not necessary to comment on in this case. Also, not germane to this case is the use of the tort of malicious prosecution after an unsuccessful civil or administrative proceeding.

[64] To set the stage for a review of the *KB decision*, it is necessary to say something at the outset on three topics: the role of the prosecutor; the nature of independence in prosecutorial decision making; and forms of prosecutorial accountability, particularly the intentional tort of malicious prosecution.

The Role of the Prosecutor

[65] The prosecutor is a central figure in the criminal justice system as they are entrusted, as agent for the Attorney General, to decide which individuals enter the system and under what conditions they move through it. As Jackson J of the US Supreme Court remarked, prosecutorial authority has enormous implications for "life, liberty, and reputation" because the "discretion [of a prosecutor] is tremendous" (Robert H Jackson, "The Federal Prosecutor" (1940) 31:1 J Crim L & Criminology at 3, online: <scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2931&context=jclc>; see also Alexander Heinze & Shannon Fyfe, *Core Concepts in Criminal Law and Criminal Justice*: *Anglo-German Dialogues*: *The Role of the Prosecutor*, ed by Kai Ambos et al, vol 1 (Cambridge: Cambridge University Press, 2020) at 558).

[66] The leading statement in Canada of how a prosecutor should discharge their role in our system of justice is that of Rand J in *Boucher v The Queen*, 1954 CanLII 3 at 23-24 (SCC) [*Boucher*], where he stated:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done

> firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

[67] This pithy statement captures several essential attributes of a prosecutor, such as "the overriding commitment to fairness; the need to maintain a sense of professional detachment from the result of cases; the recognition of the gravity of prosecutorial authority; and the importance of presenting the Crown's case in its best light" (Frater at 2). As Locke J explained in *Boucher*, there is a distinctive role of the prosecutor in our criminal justice system: "prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates" (at 26). This is understood to be a "*quasi*-judicial role" (*Miazga v Kvello Estate*, 2009 SCC 51 at para 47 [*Miazga*]).

[68] Adhering to the *Boucher* standard that "[i]t takes good judgment and firm resolve" and an acceptance of the ethos that a prosecutor "must focus on achieving a just outcome, and a just outcome, whether conviction or acquittal, will be one that follows a trial that was fair to all the participants" (Frater at 2-3). This means that the focus for a prosecutor "cannot be on getting to conviction, or competing with defence counsel, or carrying out the wishes of the investigative agency or victims" (*ibid* at 3).

Prosecutorial Independence in Decision Making

[69] A key feature of prosecutorial decision making is prosecutorial independence. This concept is so fundamental that is has been recognized to

be a constitutional principle in Canada (see *R v Cawthorne*, 2016 SCC 32 at para 26).

[70] Prosecutorial independence takes two forms: "institutional independence, which concerns how prosecutions services are structured to enhance independence, primarily from politicians; and personal independence, which ensures individual Crown counsel can make objective decisions" (Frater at 4).

[71] As this Court explained in *R v Catagas* (1977), 81 DLR (3d) 396, 1977 CanLII 1636 (MBCA): "Not every infraction of the law . . . results in the institution [or continuation] of criminal proceedings" (at 401). Our system of criminal justice relies on the wise use of prosecutorial discretion in charging decisions based on an independent and objective assessment of "the particular facts of a given case" (*ibid*).

[72] In terms of the prosecutorial independence of a prosecutor in decision making, the Supreme Court has highlighted that courts have a very limited role when it comes to reviewing prosecutorial charging decisions, provided they are made honestly and in good faith (see *R v Anderson*, 2014 SCC 41 at para 44 [*Anderson*], quoting *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 46 [*Krieger*]; *R v Power*, [1994] 1 SCR 601, 1994 CanLII 126 (SCC) [*Power*]). To that end, a prosecutor's decision to initiate or continue criminal proceedings lies at the core of prosecutorial discretion (see *Hinse* at para 4; *Miazga* at para 45).

Prosecutorial Accountability: The Intentional Tort of Malicious Prosecution

[73] Individual prosecutors are accountable for their decision making in various ways.

[74] Individual prosecutors are accountable to the Attorney General for the performance of their duties (see *R v Regan*, 2002 SCC 12 at para 66 [*Regan*], quoting Nova Scotia, *Royal Commission on the Donald Marshall, Jr, Prosecution*: *Volume 1 Findings and Recommendations* (Halifax: 1989) (Chief Justice T Alexander Hickman) at 227-28, 232).

[75] Individual prosecutors are also accountable to the governing body of the legal profession—the Law Society—for decision making that falls outside the nature and extent of a prosecution and the Attorney General's participation in it (see *Anderson* at para 44, quoting *Krieger* at para 44). Made clear in *Krieger* is that the failure to meet a legal obligation, such as disclosure of relevant evidence to an accused, is not an exercise of prosecutorial discretion that must be insulated from outside scrutiny to preserve prosecutorial independence (see para 5).

[76] Most relevant to this case is prosecutorial accountability by virtue of the civil justice system. I will deal with an action for *Charter* damages later in my decision. The most common example of prosecutorial accountability by way of the civil justice system is the intentional tort of malicious prosecution.

[77] The tort of malicious prosecution "is designed to remedy damage suffered by a person as a result of unjustifiably having been prosecuted" (Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 68). The tort

addresses "the abuse of public powers" (John Murphy, "Malice as an Ingredient of Tort Liability" (2019) 78:2 Cambridge LJ 355 at 364). As Professor Osborne notes, the history of this tort, in the context of claims arising from a criminal prosecution, is one of a "delicate balance" between the interests of individuals to be free from groundless criminal prosecutions that result in damage to their reputation, a loss of liberty and financial loss, and the public interest in the effective and uninhibited prosecution of criminal wrongdoing (Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 276; see also *Clerk and Lindsell on Torts*, 22nd ed by Michael A Jones et al (London, UK: Thomson Reuters, 2018) at para 16-03).

[78] A trilogy of cases from the Supreme Court make clear that the scope of civil liability of prosecutors is a policy choice that attempts to balance prosecutorial discretion and, thus, independence with accountability (see *Miazga* at para 81, quoting *Nelles* at 196-97; *Proulx v Quebec (Attorney General)*, 2001 SCC 66 at para 4 [*Proulx*]). On a conceptual level, the tort of malicious prosecution is closely related in its structure and purpose to the public law doctrine of abuse of process. As Charron J stated in *Miazga* at para 51, they are

> two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.

[79] As Abella J commented in *Ontario (Attorney General) v Clark*, 2021 SCC 18 at para 26:

> Since *Nelles*, our judgments on prosecutorial liability have been underscored by a careful balancing between the policy consequences of exposing prosecutors to liability, versus the need to safeguard and vindicate the rights of the accused, who is uniquely vulnerable to the misuse of prosecutorial power.

See also *Hinse* at paras 40-41.

[80] The features of the post-*Nelles* jurisprudence relevant to this appeal as to an action for malicious prosecution against a prosecutor are:

i) Unlike other jurisdictions, in Canada, the Attorney General and crown attorneys are not absolutely immune from malicious prosecution suits (see *Nelles* at 199-200).

ii) The threshold for civil liability in relation to a judgment call of a prosecutor during a criminal prosecution is "very high", with liability reserved for "only the most exceptional circumstances" (*Proulx* at para 4).

iii) A successful action for malicious prosecution requires proof (see *Miazga* at para 3; *Proulx* at para 9; *Nelles* at 193):

   (a) that the prosecution was initiated by the defendant;

   (b) that the prosecution terminated in favour of the plaintiff;

   (c) that the prosecution was undertaken without reasonable and probable cause; and

   (d) that the prosecution was motivated by malice or a primary purpose other than that of carrying the law into effect.

iv) A claim for malicious prosecution is not about second-guessing decisions of prosecutors (see *Nelles* at 196-97). As explained in *Miazga*, the strictures of the requirements of the tort of malicious prosecution make clear that "the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (at para 7). To repeat, a prosecutor's decision whether to initiate or continue a criminal proceeding is "at the core of prosecutorial discretion" (*ibid* at para 45).

v) Insistence on the strict proof of all of the elements of malicious prosecution is necessary to preserve the independence of prosecutors, which is essential to the proper functioning of the criminal justice system (see *Henry* at para 48, quoting *Miazga* at paras 6, 8).

vi) The third element of the tort of malicious prosecution—proof of the absence of reasonable and probable cause—contains both a subjective and objective element (see *Miazga* at para 58, quoting *Nelles* at 193). This requirement gives the plaintiff the "difficult task of establishing a negative" (*ibid* at 194). This requirement "is intended to weed out those cases where there was a basis for invoking the criminal process" (*Miazga* at para 68).

vii) The fourth element of the tort of malicious prosecution—malice—is a matter of the subjective mindset of the prosecutor (see *Miazga* at para 78). Malice is not to be construed narrowly to just situations of "spite, ill-will or a spirit of vengeance" (*Nelles* at 193). In *Miazga*, *Proulx* and *Nelles*, the Supreme Court equated malice with a

prosecutor impelled by an "improper purpose" in initiating or continuing a prosecution (*Miazga* at paras 78-79; *Proulx* at para 35, quoting *Nelles* at 193-94, 196-97). The malice threshold was "deliberately chosen to insulate core prosecutorial functions from judicial scrutiny" in order to safeguard the public interest (*Henry* at para 62; see also *Miazga* at para 51).

viii) Ascertaining whether a prosecutor was motivated by an improper purpose "requires an assessment of the 'totality of all the circumstances"' that bear on the prosecutor's state of mind, including their subjective belief (*Miazga* at para 85, quoting *Proulx* at para 37).

ix) The "[e]vidence [that] the prosecutor lack[ed] [the] subjective belief in reasonable and probable cause may assist in proving that the prosecution was driven by an improper purpose" (*Miazga* at para 86). Malice cannot be inferred simply from the prosecutor having that state of mind because liability does not arise "in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (*ibid* at para 81).

x) A finding of an absence of reasonable and probable grounds on the objective standard, without some independent evidence to conclude the decision was tainted, "is entirely equivocal in terms of a Crown prosecutor's purpose, particularly given that reasonable prosecutors

may differ on whether a certain body of evidence rises to the requisite threshold" (*ibid* at para 88).

xi) The requirement to prove an absence of reasonable and probable cause and malice are separate and discrete elements of the tort. The two requirements "must not be conflated" (*ibid* at para 80). The reason for this is (*ibid* at para 88):

> To permit an inference of malice from absence of reasonable and probable grounds alone would nullify the very purpose of the malice requirement in an action for malicious prosecution and risk subjecting Crown prosecutors to liability when they err within the boundaries of their proper role as "ministers of justice".

xii) Examples of independent evidence of a wilful and intentional effort to abuse or distort the proper functioning of the office of a prosecutor and the process of criminal justice that could give rise to a finding of malice include:

(a) criminal conduct by the prosecutor (see *Nelles* at 194);

(b) prosecutorial infringement of an accused's *Charter* rights (see *ibid*);

(c) the prosecution was for a collateral advantage (see *ibid* at 193; see also *Proulx* at paras 38, 43);

(d) the prosecution was based on evidence that the prosecutor knew was inadmissible and without which there was no case (see *ibid* at paras 39, 44);

(e) prosecutorial misconduct during the trial, including attempting to persuade the trier of fact to convict other than by reason (see *Biladeau v Ontario (Attorney General)*, 2014 ONCA 848 at paras 20, 34-36 [*Biladeau*]; *Proulx* at para 40);

(f) lying to the court by a prosecutor (see *Gilbert v Gilkinson*, 2005 CanLII 46386 at para 13 (ONCA));

(g) a failure to address an apparent conflict of interest in the prosecution (see *Proulx* at para 42);

(h) prosecuting an accused solely because of their race (see *Prince v Attorney General of Ontario*, 2018 ONSC 750 at para 19 [*Prince*]); and

(i) the prosecution was without reasonable and probable cause and occurred due to succumbing to outside pressure (see *A v New South Wales*, [2007] HCA 10 (AustLII) [*NSW*]).

[81] The provincial defendants conceded during the motion to strike proceedings that the claim satisfied the first two elements of the tort of malicious prosecution (that the prosecution was initiated by them and that it terminated in favour of the plaintiff). Accordingly, nothing more needs to be said about those aspects of the claim.

Absence of Reasonable and Probable Cause

[82] The provincial defendants argue that the claim cannot establish the absence of the reasonable and probable requirement of the tort of malicious

prosecution because that assertion is in conflict with a legal conclusion drawn by this Court in the criminal process, namely, that there was evidence during the first trial, if believed, "on which a properly instructed jury could convict" (*Grant* CA 2013 at para 19).

[83] The provincial defendants say that the claim is the re-litigation of a question already determined, thus making it an abuse of process that should be struck pursuant to rule 25.11(1)(c).

[84] In my view, this argument fails.

[85] While it is accurate to say that this Court decided that the jury's verdict was reasonable based on the evidence at the first trial, that is not the extent of this Court's reasons. In its decision, this Court also alluded to the fact that the jury's assessment of "the credibility of the experts" (*Grant* CA 2013 at para 13) might have been different had the jurors known about the third party suspect evidence (see *ibid* at para 70). The third party suspect evidence would have provided the jury with a reason to prefer the evidence of Dr. Waye over Dr. Chalal. Contrary to the submission of the provincial defendants, the claim does not seek to litigate the precise question of law this Court determined in the plaintiff's conviction appeal.

[86] While there is some merit to the provincial defendants' submission that the KB judge may have misinterpreted this Court's decision as to the strength of the DNA evidence, I am satisfied that the KB judge reached the correct conclusion when he said: "I do not accept that [the] claim is a collateral attack on decisions of the courts or is any other way an abuse of process" (*KB decision* at para 26).

[87] Given the limited fact-finding that can be undertaken under rule 25.11(1)(c) and the absence of any rationale by the jury, as there are no reasons for its decision making, it is impossible to say with any confidence that the principles of judicial economy, consistency, finality and the integrity of the administration of justice would be jeopardized if the claim advanced beyond the pleadings stage.

[88] While the provincial defendants also raise rule 25.11(1)(d) as to the requirement of the plaintiff establishing an absence of reasonable and probable cause, that issue was, appropriately, not pressed.

[89] While a committal to stand trial or dismissal of a motion for a directed verdict is not necessarily determinative as to the objective element of reasonable and probable cause, they are relevant considerations absent some deep flaw in process (see *Proulx* at para 105; see also *Kleysen et al v The Attorney General of Canada et al*, 2001 MBQB 205 at paras 42-44). Here, the KB judge was of the view that the plaintiff's committal to stand trial for murder "established that objectively, the [p]rovincial [d]efendants had reasonable and probable grounds to commence the prosecution and it [was] not open to review by [that] court in [those] proceedings" (*KB decision* at para 27).

[90] The effect of the KB judge's decision that the provincial defendants' initial decision to prosecute the plaintiff is not actionable; the claim is limited to the ongoing decision to prosecute after the preliminary inquiry.

[91] As the KB judge correctly noted in the *KB decision*, a prosecutor has a continuing duty of objectivity and fairness at every stage of the criminal

process (see *ibid* at para 14); this is "a check against tunnel vision" (*Regan* at para 89). As was explained by Frater at 340:

> It is important to bear in mind that there is an ongoing duty on a prosecutor to assess the strength of the case. If circumstances change – witnesses are shown to be unreliable, evidence formerly thought to be admissible is no longer so because of recent binding jurisprudence – the prosecutor must ask whether the "reasonable prospect of conviction" (or the equivalent charging standard), can still be met. Failing to continuously reassess the case may demonstrate the absence of an objective basis for proceeding and perhaps an absence of a subjective belief, as for example, where the preliminary hearing revealed serious credibility problems for key Crown witnesses. The civil court must, however, be careful to look at the prosecutorial decision based on the facts known to the prosecutor at the time.
>
> [footnotes omitted]

See *Miazga* at paras 55, 73; *Alexander v Halley et al*, 2009 MBQB 228 at para 8.

[92] The difficulty here is the provincial defendants' decision to continue the prosecution against the plaintiff once the plaintiff disclosed concerns about the work of Molecular World raises questions of evidence. I am mindful that there is a prohibition against a rule 25.11(1)(d) motion being a disguised form of summary judgment process.

[93] As previously mentioned, as part of their duty to maintain objectivity and fairness, a prosecutor must constantly reassess the strength of a case as it proceeds through the criminal justice system. Vigilance to that duty is particularly important when there is reason to have a concern about the reliability of important evidence as that is often a cause of wrongful convictions (see *R v Hart*, 2014 SCC 52 at para 8).

[94] According to the claim, during the first trial, the plaintiff disclosed evidence that called into question the analysis of Molecular World. That disclosure was tested before the jury. During the appellate process, more evidence was disclosed by the plaintiff from Dr. Budowle that Molecular World had either purposely or negligently tampered with the DNA evidence.

[95] Neither this Court nor the Supreme Court was prepared to admit Dr. Budowle's evidence, thus leaving his opinion for assessment during the second trial. Moreover, this Court ordered the remedy of a retrial as opposed to an acquittal. That assumes a reasonable trier of fact could convict based on the record before the Court of Appeal (see *R v Turner*, 2023 MBCA 40 at para 54).

[96] During the second trial, another DNA expert, Dr. Bieber, testified for the defence. Exactly when Dr. Bieber's opinion was disclosed to the provincial defendants is impossible to tell from reading the claim, as is what, if anything, new Dr. Bieber adds to the conclusions of Dr. Budowle.

[97] The difficulty at this stage of the plaintiff's action is it is impossible to determine, with any confidence, what impact the concerns raised with the analysis of the DNA evidence by Molecular World had on the provincial defendants' determination of whether there was reasonable and probable cause to continue the murder prosecution.

[98] In terms of the subjective aspect of reasonable and probable cause, the following comments are instructive (*Miazga* at para 63):

> [T]he reasonable and probable cause inquiry is *not* concerned with a prosecutor's personal views as to the accused's guilt, but with his or her *professional* assessment of the legal strength of the case.

> Given the burden of proof in a criminal trial, belief in "probable" guilt therefore means that the prosecutor believes, based on the existing state of circumstances, that proof beyond a reasonable doubt could be made out in a court of law.
>
> [emphasis in original]

[99] While the claim makes clear that the provincial defendants were aware that there were frailties with the DNA evidence during the first trial, that knowledge in no way addresses their professional assessment of the legal strength of the case during the appellate process and the second trial.

[100] The decision of *Boudreault v Barrett*, 1998 ABCA 232 [*Boudreault*] is of assistance.

[101] In *Boudreault*, a murder charge against the appellant rested entirely on the evidence of an accomplice who refused to testify at a preliminary inquiry. The civil claim for malicious prosecution was dismissed on a motion for summary judgment.

[102] On the question of an absence of reasonable and probable cause, the Alberta Court of Appeal commented that, to succeed in his action, the appellant had to prove that prosecutors "could not reasonably have believed the statements of [the accomplice] and concluded from them that the appellant was probably guilty" (*ibid* at para 12).

[103] The reasoning in *Boudreault* requires an evaluation of evidence that is beyond the purview of a motion under rule 25.11(1)(d) save in the most obvious of examples, which this case is not.

[104] While I appreciate that, in an action for malicious prosecution, the judge, as opposed to the jury, shall determine whether or not there has been reasonable and probable cause for instituting the prosecution (see *The Court of King's Bench Act*, CCSM c C280, s 64(4)), the tools do not exist on this record, and I am not convinced that now is the time to take a hard look at the merits of the plaintiff's action as to the question of an absence of reasonable and probable cause.

Malice

[105] Rules 25.06(1) and 25.06(11) of the *Rules* are of relevance in reviewing the KB's judge's decision to not strike the claim for a failure to properly plead circumstances that could give rise to malice. Those rules provide as follows:

Material facts **25.06(1)** Every pleading shall contain a concise statement of the material facts on which the party relies for a claim or defence, but not the evidence by which those facts are to be proved.	**Faits pertinents** **25.06(1)** L'acte de procédure expose de façon concise les faits pertinents sur lesquels la partie fonde sa demande ou sa défense, mais non les éléments de preuve devant les établir.
Nature of act or condition of mind **25.06(11)** Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.	**Nature de l'acte ou état d'esprit** **25.06(11)** En cas d'allégation de fraude, de déclaration inexacte des faits ou d'abus de confiance, l'acte de procédure comprend toutes les précisions sur l'allégation. L'intention, notamment l'intention de nuire, ou la connaissance peut toutefois être alléguée comme un fait sans

> préciser la situation dont on l'infère.

[106] The plaintiff had the obligation "to clearly plead the facts" upon which he relied on to make his allegation of malice, whether or not he was in a position to prove those facts at the time the motion to strike was brought (*Imperial* at para 22). This is critical as the provincial defendants have the right to know the case against them and to define the scope of the litigation (see *RIS Equities Inc et al v Spivak et al* (1992), 78 Man R (2d) 230, 1992 CanLII 13013 (MBCA) [*RIS*]).

[107] Counsel for the plaintiff argues that the allegations will become clearer after the discovery process; I reject this submission. The provincial defendants are entitled to sufficient notice of the material facts to respond to the claim and "[a] plaintiff is not entitled to use the discovery process as a fishing expedition" (*Prince* at para 23).

[108] The starting point here is that malice forms "a discrete touchstone of liability" for the tort of malicious prosecution (Murphy at 358). The tort of malicious prosecution is one of the few instances in tort law where proof of a particular motive of a prosecutor is necessary to the establishment of liability.

[109] The presence of such a heightened threshold has consequences for pleadings (see *Henry* at para 43). It was incumbent on the plaintiff to plead in the claim the material facts to establish that the provincial defendants acted for an improper purpose other than achieving justice. A failure to do so is fatal; bald or vague assertions on a heightened threshold are insufficient (see *Canada (Attorney General) v Power*, 2024 SCC 26 at para 112).

[110] A litigant's duty under rule 25.06(1) to plead the material facts was well explained by Roy J in *Al Omani v Canada*, 2017 FC 786, under the equivalent Federal Court rule, where he stated that "[a] modicum of story-telling is required", such that there are "enough facts" in the pleading for it to be understood; "conclusions or bald allegations" are insufficient (at para 17; see also *Peguis First Nation et al v Canada (Attorney General) et al*, 2014 MBQB 98). In my view, this approach is entirely consistent with the comments in *Operation Dismantle* that, on a motion to strike, "assumptions and speculations" in a pleading do not have to be accepted as true (at para 27).

[111] While a litigant is entitled to their day in court on the merits of their claim, save in rare situations, an allegation of malicious prosecution is a delicate matter as it affects not only individuals but the proper functioning of the criminal justice system generally.

[112] The general rule is courts should not take a casual attitude towards allegations of prosecutorial misconduct without a proper foundation to such a claim (see *Jhanji v The Law Society of Manitoba*, 2022 MBCA 78 at paras 62-63). An allegation of malicious prosecution "is serious, as it affects [the prosecutor's] professional reputation and questions [their] integrity" (*Coulter v Toronto Police Services Board*, 2006 CanLII 23919 at para 6 (ONSC)). As was stated in *Henry*, "[l]ike all lawyers, Crown counsel are professionals who jealously guard their reputations and whose actions are motivated by more than personal financial consequences" (at para 80). Moreover, it would be detrimental to the administration of justice if a prosecutor is "continually haunted by the spectre of pending civil litigation for each decision that is made in the performance of their duties" (*Howell v Ontario*, 1998 CanLII 14945 at para 27 (ONSC)).

[113] I would highlight the comments made in *Nelles* that, given prosecutors can be civilly liable for their decisions in Canada, frivolous claims must not be allowed to advance beyond the pleadings stage and should be struck out. That approach is in no way in conflict with reasonable access to justice for a litigant who believes they have been wronged by a criminal prosecution.

[114] The concept of malice in an action for malicious prosecution has been slippery and at times opaque. The modern understanding requires proof that the primary purpose for a prosecution was for an improper purpose other than achieving justice. As Professor Fridman explains (GHL Fridman, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 819):

> The idea of malice revolves around the misuse or abuse of criminal procedure to attain an end or purpose that is wholly unconnected with the laudable and legitimate aim of enforcing the criminal law and bringing criminals to justice. The core meaning of malice in this context is the use of the criminal justice system for an improper purpose. Malice means an intent to use the legal process for some purpose other than its legally appointed and appropriate one. It connotes an improper, wrong or indirect motive.
>
> [footnotes omitted]

See also *Fleming's The Law of Torts*, 10th ed by Carolyn Sappideen & Prue Vines (Sydney: Lawbook Co, 2011) at 705-06.

[115] Professor Fridman also notes the difficulty of proving malice. The courts require substantial evidence of malice. A finding of malice may be made if the exact improper motive of the prosecutor is proven, "or by way of inference from the facts, where the circumstances necessarily lead to the conclusion that the defendant could only have been bringing the prosecution

from some improper motive" (*ibid* at 820; see also *Willers v Joyce & Anor (Re: Gubay (deceased) No 1)*, [2016] UKSC 43 (BAILII) at paras 54-56 [*Willers*]; Sappideen at 706).

[116] The KB judge was correct to summarily disregard some aspects of the malice alleged in the claim. For example, it was entirely speculative that Molecular World was motivated for reasons of future profit to provide an opinion on the DNA evidence consistent with the WPS' theory that the plaintiff abducted and murdered Derksen (see *Operation Dismantle* at para 27). The KB judge also correctly struck aspects of the claim such that they cannot be relied upon by the plaintiff on the allegation of malice (paras 62(a)(i)-(iii); 62(a)(vii); 62(a)(x); 62(a)(xiv) of the claim) (see *KB decision* at para 29).

[117] In light of the *KB decision*, what remains of the claim are five allegations of malice against the provincial defendants that he said were "inconsistent with the role of the prosecutor" (*ibid*):

i) They failed "to continually evaluate the prosecution in light of evidence that the DNA evidence and DNA expert were demonstrably unreliable" (*ibid*, referencing paras 62(a)iv, v, ix, xi, xii, xiii of the claim).

ii) They "actively sought to have exculpatory evidence excluded 'for the purpose of getting a conviction'" (*ibid*, referencing para 62(a)viii of the claim).

iii) They "continued the prosecution for the purpose of closing an outstanding cold case" (*ibid*, referencing paras 62(a)xv, 64 of the claim).

iv) They continued the prosecution "to protect themselves against a [civil] claim such as this one" (*ibid*, referencing paras 62(a)xv, 64 of the claim).

v) They continued the prosecution "to protect their own reputations" (*ibid*, referencing paras 62(a)xv, 64 of the claim).

The KB judge was satisfied that any of the examples of malice in the claim "may well be proof that the [p]rovincial [d]efendants wilfully perverted or abused the Office of the Attorney General in the process of criminal justice" (*ibid* at para 28).

[118] The law as to malice in the tort of malicious prosecution is well settled by the combined effect of *Miazga*, *Proulx* and *Nelles*. A plaintiff suing a prosecutor faces the "monumental task" of proving malice (*AB v Rodgers*, 2021 SKCA 96 at para 52). An error in assessing a case, even one that is reckless or grossly negligent, is not sufficient to satisfy the requirements of malice without much more. As was stated in *Miazga*, where a "prosecutor initiate[s] or continue[s] the prosecution based on an *honest*, albeit mistaken, professional belief that reasonable and probable cause did in fact exist, he or she will have acted for the proper purpose of carrying the law into effect and the action must fail" (at para 79) (emphasis in original).

[119] It is well understood that the question of the evidentiary sufficiency of a criminal case is not a matter of "subjective guesswork about likely

results" of a prosecution; rather, a prosecutor must make a professional assessment of the legal merits of the case based on the circumstances known at the time (Frater at 29; see *Miazga* at paras 59, 63, 65).

[120] I agree with the comment made by Frater that "[t]he courts should not be in the business of second-guessing [particularly after the fact with the benefit of hindsight] the prosecutor's judgment as to the sufficiency of the evidence" (at 38). That view echoes the Supreme Court's approach to the tort of malicious prosecution since *Nelles*.

[121] I am mindful that prosecutors assess cases as to the decision to prosecute based on a departmental standard of the Attorney General that has an evidentiary sufficiency consideration and a public interest consideration. For provincial prosecutors in Manitoba, that departmental standard is as follows (Manitoba Department of Justice Prosecutions, "Laying, Staying and Proceeding on Charges" (June 2017), online (PDF): <gov.mb.ca/justice/crown/prosecutions/pubs/laying_and_staying_of_charges.pdf>):

> Crown attorneys shall continue to use the following twofold test in exercising their professional judgment to determine whether charges ought to be laid or proceeded upon:
>
> 1. Is there a reasonable likelihood of conviction; and
> 2. Is it in the public interest to proceed?
>
> The first arm of this test requires prosecutors to bring all of their professional skills to bear on making a determination of whether a conviction to the criminal law standard of beyond a reasonable doubt is the more likely outcome if the matter was to proceed to trial.

> The second arm requires prosecutors to recognize that many societal values impact the criminal justice system. Prosecutions advance the important societal interest in the deterrence, denunciation and punishment of criminal conduct. But society equally values other important ideals, including:
>
> - the timely prosecution of criminal matters in accordance with s.11(b) of the [*Charter*];
> - support to victims of crime and respect for their views; and
> - the legal duty to further reconciliation with Canada's Indigenous peoples and to enhance equality.
>
> Prosecutors are expected to exercise their professional judgment to consider these and other societal interests in determining whether a prosecution is in the public interest, recognizing that the more serious the offence and the more dangerous the offender the more likely that the value in prosecution will outweigh other public interest concerns.

[122] This departmental standard is similar to those used by other public prosecution services in Canada, both provincially and federally (see Frater at 336). It is important to understand that this departmental standard is simply a policy. It does not set the duty of care, as there is no cause of action for negligent prosecution (see *Hyra* at para 27). Nor is it a substitute for the tort standard of a plaintiff having to establish the prosecution was done in the absence of reasonable and probable cause (i.e., the "probable guilt standard" (*Miazga* at paras 60-63)). The existence of the departmental standard on charging decisions, which is a more rigorous standard than the probable guilt standard used in tort law, is simply a feature of modern public prosecutions to ensure objective and independent decision making (see *ibid* at para 64).

[123] In terms of the KB's judge's suggestion that malice could arise from the provincial defendants failing to continually evaluate the case considering frailties with the DNA evidence, the Court must be sensitive to the reality that

reasonable lawyers can disagree about the strength of a case. It is not surprising that defence counsel will typically focus on the weaknesses of a criminal case; that is their professional responsibility. As well, an assessment of the sufficiency of evidence is dependent on the facts known at the "relevant time", not those known after the fact with the benefit of hindsight (*Miazga* at paras 73, 75).

[124] Accordingly, there is a significant difference in law, between a case with frailties and live issues for counsel to argue about and the Court to resolve, and one where the prosecutor becomes aware that the prosecution has become groundless such that the only reasonable explanation for it proceeding is the deliberate misuse of the court process for an improper purpose (see *Rees & Ors v Commissioner of Police for the Metropolis (Rev 1)*, [2017] EWHC 273 (BAILII) at para 154; *Willers* at para 55; *Miazga* at paras 80-87; *Mammoliti v Niagara Regional Police Service*, 2007 ONCA 79 at paras 87, 94; *Tims v John Lewis & Co Ld*, [1951] 2 KB 459 at 472 (CAUK), rev'd on another point [1952] AC 676 (HLUK)).

[125] It is important to highlight that the claim treats the five prosecutors as an amorphous and homogenous group and not as individuals, even though each of them had different perspectives on the case: during the first trial, during the appellate process and during the second trial. The claim says nothing about the individual mindset of the five prosecutors as to who, what, where, when, why and how.

[126] As previously stated, in *Miazga*, it was explained that evidence that a prosecutor lacked a subjective belief in reasonable and probable cause may assist in proving the prosecution was driven by an improper purpose, but

malice cannot simply be inferred from a prosecutor lacking a subjective belief in reasonable and probable cause (see para 63).

[127] There is nothing in the claim to suggest that *any* of the five prosecutors formed the professional assessment that, based on the existing state of circumstances as to when they became involved in the case, proof of the murder charge against the plaintiff could not be made out (i.e., the probable guilt standard). The only reasonable inference arising from the claim is that each of the five prosecutors concluded, based on their professional judgment, that the prosecution should be continued despite frailties raised with the DNA evidence by counsel for the plaintiff during the criminal process. It falls to the plaintiff to identify something that taints that decision such that it can be said to be contrary to the understood role of a prosecutor in cases such as *Boucher*.

[128] The plaintiff's action for malicious prosecution really amounts to the assertion that there was an absence of reasonable grounds objectively and that the provincial defendants' failure to reassess their case amounts to malice (see *Miazga* at para 70). This argument must be rejected considering *Miazga*, *Proulx* and *Nelles*.

[129] The difficulty with this argument is, as noted in *Miazga*, the tort requirements of proof of an absence of reasonable and probable cause *and* malice cannot be conflated; while the evidence relating to these two concepts is often intertwined, they are separate legal requirements.

[130] As explained in *Miazga*, the "context" (at para 88) of modern prosecutions, with its foundations of institutional and individual independence, dispel the likelihood that malice can be inferred from an

absence of reasonable and probable grounds objectively without some independent reason to conclude a decision to prosecute was tainted by an improper motive (*ibid*):

> A finding of absence of reasonable and probable grounds on the objective standard is entirely equivocal in terms of a Crown prosecutor's purpose, particularly given that reasonable prosecutors may differ on whether a certain body of evidence rises to the requisite threshold. Likewise, a conclusion that a prosecutor lacked a subjective belief in sufficient cause but proceeded anyways is equally consistent with non-actionable conduct as with an improper purpose. To permit an inference of malice from absence of reasonable and probable grounds alone would nullify the very purpose of the malice requirement in an action for malicious prosecution and risk subjecting Crown prosecutors to liability when they err within the boundaries of their proper role as "ministers of justice".

[131] Accordingly, it was incumbent on the plaintiff to show something in the claim that tainted the decision to continue the prosecution against him, thus taking his situation outside an error of a prosecutor as to the sufficiency of evidence, which is within the boundaries of the proper role of a prosecutor and which, according to *Miazga*, *Proulx* and *Nelles*, cannot give rise to civil liability.

[132] When a generous and holistic assessment is taken of the facts asserted in the claim, there is a complete absence of "indicators of an improper purpose" (*Proulx* at para 37) in relation to the five prosecutors that would taint the decision to continue the murder prosecution, such as proceeding in the absence of *any* admissible evidence that could ground a conviction; prosecutorial misconduct; a conflict of interest; or an "improper mixing of public and private business" (*ibid* at para 38). There is nothing in the claim

that could give rise to the type of "tainted tunnel vision" that amounts to malice (*ibid* at para 44).

[133] The comments of Gordon J in *Ettinger v Peters, Dunlop et al*, 2010 ONSC 176 at para 17 are apposite:

> When the defendant is a crown attorney, the Supreme Court has held in *Miazga, supra,* that malice cannot simply be inferred from the absence of reasonable and probable cause. Accordingly, although the Plaintiff in this action again alleges that the crown acted for the purposes of harming the plaintiff and points to the lack of reasonable and probable grounds to continue the prosecution as of evidence of this, this simple allegation is insufficient to allow for a finding of malice. Since the Plaintiff has pleaded no facts which if proven could support a finding of malice, the claim of malicious prosecution relating to [the crown attorney] shall be struck.

[134] The next instance of malice identified by the KB judge—that the provincial defendants attempted to exclude exculpatory evidence for the purpose of getting a conviction—is not persuasive. This is not a case like *Proulx* where a prosecutor proceeded with a prosecution based on evidence that, according to binding authority from the Supreme Court, was inadmissible. The decisions of this Court and the Supreme Court about the admissibility of third party suspect evidence were landmark, as they settled a complex area of law as to the "framework for determining the admissibility of defence-led [third party suspect] evidence" and the role a trial judge must take as a gatekeeper to such evidence (*Grant* SCC at para 2).

[135] Prosecutors cannot be faulted for not having a crystal ball as to how the law may change; they must exercise their professional judgment based on the law as generally understood at the time. Here, the provincial defendants

proceeded with the law as it was, which the trial judge in the first trial determined was correct considering the facts (see Jones at 1192).

[136] The provincial defendants had the legal right to resist the plaintiff's appeal and to challenge the decision of this Court. The situation here is far removed from the "clearest of cases", where the decision to challenge this Court's decision in the Supreme Court is "conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice" (*Power* at 603).

[137] There is nothing in the claim to suggest the provincial defendants acted outside of their duties, as explained in *Boucher*, during the appellate phase of the plaintiff's criminal proceeding. An appeal is not a "tea party" (*R v Van Wissen*, 2018 MBCA 100 at para 20). Appellate counsel was entitled to press the position of the Crown firmly in this Court and the Supreme Court; this is an essential feature of our system of justice (see *R v Cook*, 1997 CanLII 392 at para 21 (SCC)). The claim is devoid of any concrete example of abuse of the office of the Attorney General during the appellate phase that could give rise to a finding of malice.

[138] The plaintiff's assertion in the claim that the provincial defendants continued the prosecution for the purpose of closing an outstanding cold case is not a malicious intention. Leaving aside the opaqueness of that allegation, nothing about such a mindset is objectionable. The provincial defendants had no control as to how old the case was according to the pleading. This is not an exceptional situation like *Proulx*, where a prosecutor forms the professional belief that a prosecution should not be commenced but then does so in the

future based on plainly inadmissible evidence, for a collateral purpose, and, during that prosecution, engages in prosecutorial misconduct.

[139] The other two indicia of malice in the claim identified by the KB judge are to protect against a civil claim such as this one and to protect reputations. The provincial defendants describe this part of the claim as "nonsense" and a "spin". They say the Court cannot accept "patently ridiculous" assertions (*Dennis* at para 8). I agree.

[140] As previously mentioned, reading a pleading generously and accepting assertions as being true for the purpose of rule 25.11(1)(d) does not mean that bald assertions of misconduct must be assumed without reasonable particulars.

[141] These two allegations are also difficult to understand. According to the claim, the five prosecutors were public servants and members of the Bar. An allegation of professional misconduct is a serious matter; the maker of such a claim needs to be specific. Reading a pleading generously does not mean that the reader must be a cynic who must assume the worst without reasonable particulars. How and why each of the five prosecutors had tunnel vision that was tainted by improper motives to protect themselves against civil liability and to protect their reputations is unexplained in the claim. This is insufficient.

[142] The Australian case of *NSW* is of some assistance, as it addresses the question of the need for evidence to establish succumbing to pressure in decision making.

[143] In *NSW*, child abuse offences were laid against a civilian employee of a police service. The investigator did not believe the appellant had committed the offences but laid charges anyway because of "succumb[ing] to the pressure" from superior officers who wanted the charges laid because the appellant worked for the police (i.e., to make an example) (*ibid* at para 23). The High Court of Australia agreed that the requirement of malice could be established where the "dominant purpose . . . was not to bring a wrongdoer to justice but to secure at least the absence of criticism by, perhaps even [in] favour of, his superiors" (*ibid* at para 110).

[144] The claim here makes no allegation of a breakdown of either institutional or individual independence in the prosecution office of the provincial defendants, such that any of the five prosecutors succumbed to some pressure in their decision making or acted to protect or enhance their reputations (see *Wiche v Ontario*, 2001 CanLII 28413 at para 37 (ONSC)).

[145] As well, there is nothing in the claim to suggest that any of the five prosecutors in the case were ever threatened with civil liability unless they discontinued the prosecution. There is also nothing in the claim to explain how the reputations of any of the five prosecutors would have been impacted by not continuing with the prosecution. The apparent coincidence that five different lawyers each engaged in defensive lawyering out of fear of being sued or to protect their reputations is insufficient without some material facts directed to each of the five prosecutors individually.

[146] The Supreme Court has cautioned against too lightly assuming a compromise of a prosecutor's objectivity (see *Application Under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 95). In *R v Varennes*, 2025 SCC

22, it was explained that, "[w]hen a prosecutor exercises discretion, they are presumed to do so in good faith, consistent with their *Boucher* responsibilities" (at para 45). In the absence of material facts in the claim as to how the threat of civil liability or the individual prosecutor's reputation caused the prosecution to be continued for an improper purpose, it was a material error of the KB judge to leap to that conclusion. Bald boilerplate conclusory statements as to malice in a pleading without a proper foundation are insufficient (see *Dunkley v York Regional Police Services Board, et al*, 2019 ONSC 159 at para 34; *Clark v Hunka*, 2017 ABCA 346 at para 31).

[147] As I read the claim, no tangible misconduct is alleged against any of the five prosecutors. The worst that can be said is that one or more of them *may* have misread the sufficiency of the evidence at some point after the plaintiff was committed to stand trial. I use the expression "may" because there is a difference between the probable guilt standard that the law of torts is concerned with and the higher criminal standard of proof beyond a reasonable doubt, which is what the trial judge in the second trial applied. Ironically, according to the claim, one of the prosecutors, in his closing argument, conceded part of the Crown's case that could not meet the requisite criminal standard. He advised the trial judge in the second trial not to rely on part of Dr. Chahal's opinion as to one of the three types of DNA evidence, based on the concern that aspect of the opinion was unreliable. That is entirely in keeping with objective decision making and the role of the Crown set out in *Boucher*.

[148] The plaintiff relied heavily on the decision in *Biladeau* as a reason why the claim should not be struck. What is quite different between *Biladeau* and the situation here is that, in *Biladeau*, the Ontario Court of Appeal relied

on serious prosecutorial misconduct during the criminal trial as proof of a "wilful and intentional" act (at para 34), that could support "the inference . . . that the trial Crown may have been motivated by the improper purpose of getting a conviction at all costs, or that he may have been attempting to get a mistrial" (at para 35). There is no parallel in this case; this is a case of no prosecutorial misconduct.

[149] In summary, none of the five instances of malice that the KB judge highlighted in the *KB decision* can, as pleaded in the claim, satisfy the legal requirements of malice in the tort of malicious prosecution.

[150] I have also considered whether the claim can survive a motion to strike without any particulars of malice, considering the wording of rule 25.06(11) (see *Strauss v Jarvi*s, 2007 BCCA 605, for a similarly worded rule in British Columbia). On its face, rule 25.06(11) requires full particulars of any allegation of "fraud" but "malice" may be alleged as a fact without pleading the circumstances to be inferred.

[151] The difficulty for the plaintiff is that, in *Miazga*, *Proulx* and *Nelles*, the Supreme Court explained that the nature of "malice" in the tort of malicious prosecution is akin to the commission of a "fraud" in the criminal justice system (see *Miazga* at para 8; *Proulx* at para 45; *Nelles* at 193-94).

[152] The general rule of pleadings is that an allegation of fraud must be pleaded with the utmost particularity (see *RIS*; see also *Alexander v Sabourin*, 2025 MBCA 106 at para 10). In *Tingley v The Attorney General of Canada et al*, 2021 NBCA 18 [*Tingley*], Leblond JA considered identical wording to rule 25.06(11) in New Brunswick. He determined that, in light of *Miazga*, *Proulx* and *Nelles*, and to avoid a conflict in the interpretation of the rule, the

meaning of the word malice in the context of an action for malicious prosecution "should not be interpreted so as to permit a bald pleading of malice without more" (*Tingley* at para 134). I agree; in an action for malicious prosecution in Manitoba, rule 25.06(11) requires that full particulars of the malice be set out in the pleading.

[153] In conclusion, the claim alleges the provincial defendants were actuated by malice but provides no material facts that could support that conclusion, let alone full particulars of same as is required under rule 25.06(11). This is improper and is contrary to a litigant's duty, as set out in *Imperial*, to plead a legally sufficient case at the time the pleading is filed (see *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34). The claim is devoid of proper particulars of an ulterior motive on the part of any of the five prosecutors named in the claim that takes them outside the traditional role of the prosecutor, as explained in *Boucher*.

[154] While prosecutors in Canada do not enjoy absolute immunity from civil liability, such liability is reserved only for the most exceptional cases. In my respectful view, the KB judge erred in law by dismissing the provincial defendant's motion pursuant to rule 25.11(1)(d) on the question of malice. His legal error was conflating an absence of reasonable and probable cause with malice without any concrete particulars in the claim that could establish "an 'abuse of prosecutorial power', or the perpetuation of a 'fraud on the process of criminal justice'" (*Miazga* at para 8). His decision allows for a civil process to second-guess prosecutorial decision making about the sufficiency of evidence, after the fact, an idea that has been foreclosed by *Miazga*, *Proulx* and *Nelles* absent unambiguous, independent evidence that the prosecutor improperly stepped outside their role as a minister of justice.

Charter Damages

Background

[155] Section 24(1) of *the Charter* provides as follows:

Enforcement of guaranteed rights and freedoms **24 (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**Recours en cas d'atteinte aux droits et libertés** **24 (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[156] In the claim, the plaintiff requests the remedy of damages pursuant to section 24(1) for the provincial defendants violating his rights under sections 7 and 9 of the *Charter*. No separate particulars are alleged in the claim as to *Charter* damages; the same acts and/or omissions giving rise to the actions for misfeasance in public office and malicious prosecution are relied upon.

[157] The KB judge refused to strike the plaintiff's request for *Charter* damages, even though it was based on the same particulars as the causes of action for misfeasance in public office and malicious prosecution. He said: "Either the facts entitled him to *Charter* damages or they do not; that is a decision for the trial judge" (*KB decision* at para 32).

Action for Charter Damages: Requirements

[158] The requirement for "[a]n action for public law damages 'is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable'" (*Vancouver (City) v Ward*, 2010 SCC 27 at para 22 [*Ward*]).

[159] The Supreme Court established a four-step framework as to when the *Charter* remedy of damages will be "appropriate and just" as per section 24(1) of the *Charter* (*Ward* at para 4):

> The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

Analysis

[160] At the appeal, counsel for the plaintiff conceded that the allegation of the plaintiff's rights under section 9 of the *Charter* being violated cannot succeed and should be struck. The plaintiff's claim for *Charter* damages rests on section 7 of the *Charter* and the complaint that the state is liable because the five prosecutors failed to re-evaluate the murder prosecution as it proceeded through the first trial, the appellate process and the second trial after concerns were raised about the reliability of the DNA evidence.

[161] Section 7 of the *Charter* provides as follows:

> **Life, liberty and security of person**
> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **Vie, liberté et sécurité**
> **7** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[162] For the purpose of my analysis, I am prepared to assume that the first two requirements of *Ward* in relation to the claim are satisfied. I am mindful that special care must be taken in resolving *Charter* rights on a motion to strike (see *WRHA* at para 38). As I will explain, a glaring deficiency of the claim on the third requirement of *Ward* is dispositive of this appeal.

[163] In *Ward*, it was explained that countervailing factors that may establish damages pursuant to section 24(1) of the *Charter* to be inappropriate or unjust include the existence of alternative remedies or concerns for good governance (see *Ward* at paras 32-45).

[164] In cases such as *Ernst v Alberta Energy Regulator*, 2017 SCC 1 [*Ernst*], *Henry* and *Ward*, the Supreme Court explained that the parameters of traditional heads of tort liability provide "a certain amount of 'practical wisdom' concerning the type of situation in which it is or is not appropriate to make an award of damages against the state" (*Ernst* at para 43).

[165] For example (*Henry* at para 126):

> *Ward* recognizes that there may be a need for limited immunity from s. 24(1) damages for a *Charter* breach that arises from the exercise of discretion. This is "because the law does not wish to

> chill the exercise of policy-making discretion" (para. 40). In this context, *Ward* mentions malice as a possible threshold for exercise of prosecutorial discretion.

[166] The question raised in this appeal is whether any legal difference flows from the plaintiff challenging, on the same facts, the provincial defendants' decision to continue the murder prosecution against him by way of the tort of malicious prosecution *and* a claim for *Charter* damages.

[167] Counsel for the plaintiff candidly admitted at the appeal that the claim advances two causes of action on the same facts because the requirements of the tort of malicious prosecution are onerous as a result of *Miazga*, *Proulx* and *Nelles*, particularly the requirement to demonstrate malice (see *Payne v Mak*, 2017 ONSC 243 at para 91, aff'd 2018 ONCA 622). The difficulty for the plaintiff is that "*Charter* damages are not a silver bullet" when private law remedies are adequate or there is a strong policy reason to limit liability (*Henry* at para 36).

[168] The Alberta Court of Appeal rejected, on the basis of *Henry*, that there are different legal standards for a claimant challenging the decision to prosecute under both tort law *and* the *Charter* (*Shodunke v Alberta*, 2025 ABCA 320 at para 32):

> The decision to prosecute is highly discretionary, and liability for the exercise of prosecutorial discretion must be proven to a high standard to protect prosecutorial independence[.]An action against the Crown challenging prosecutorial discretion, whether for *Charter* damages or for malicious prosecution, requires proof of *mala fides*, malice, or an improper purpose; a malicious prosecution claim further requires the absence of reasonable and probable cause[.]
>
> [citations omitted]

[169] I agree with this reasoning. Prior to the Supreme Court's decision in *Henry*, the Ontario Court of Appeal noted that there was "a high degree of overlap between the elements of the tort [of malicious prosecution] and a corresponding claim for *Charter* damages" and, while "[t]he precise extent of the overlap is unclear", it can be said that "malice appears to be an integral component of both actions" (*Biladeau* at para 41).

[170] In *Henry*, both the majority decision (see paras 58-66) and the minority decision (see paras 127-33) endorsed the reasoning in *Miazga*, *Proulx* and *Nelles* that the malice requirement applies to liability related to the discretionary decision to prosecute but that standard is not applicable to a failure to fulfill a constitutional duty, such as material non-disclosure.

[171] The disagreement in *Henry*, which is not relevant to this case, was the nature of the burden that applies to a claimant seeking *Charter* damages for material non-disclosure during the criminal process.

[172] The following comments of Moldaver J in the majority decision in *Henry* at para 62 are instructive to this appeal:

> Third, the decision to initiate or continue a prosecution falls within the core of prosecutorial discretion, whereas disclosure decisions do not. Whether in private or public law, the threshold to intrude upon that core discretion must be onerous, since it squarely implicates the independence of prosecutors. As this Court held in *Krieger*:
>
> > Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
>
> . . .

> . . . these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts . . . . [paras. 43 and 45]
>
> Both *malice* and abuse of process therefore *represent very high thresholds deliberately chosen to insulate core prosecutorial functions from judicial scrutiny.* In contrast, disclosure decisions are not part of core prosecutorial discretion[.]
>
> [emphasis added]

See also *Henry* at para 127.

[173] The plaintiff gains no litigation advantage by challenging the decision to continue the prosecution against him, by way of an action for *Charter* damages pursuant to section 24(1), as an alternative to his claim for malicious prosecution.

[174] To survive a motion to strike for *Charter* damages, it was incumbent on the plaintiff to plead sufficient facts to disclose a reasonable cause of action, in particular, facts that could establish malice at law. A failure to particularize facts that, if proven, would be sufficient to establish that state conduct was motivated by malice is "fatal to the claim" (*Henry* at para 43; see also Andrew K Lokan & Michael Fenrick, *Constitutional Litigation in Canada* (November 2025) at s 6:10, online: (WL) Thomson Reuters Canada).

[175] In my respectful view, the KB judge erred when he failed to consider that the absence of malice in the claim was fatal to both of the plaintiff's

claims of malicious prosecution *and Charter* damages in relation to the decision of the five prosecutors to continue the murder prosecution beyond the preliminary inquiry.

Leave to Amend

[176] At the appeal, this Court inquired whether leave to amend the claim should be considered by it as an alternative to striking the claim if the Court allowed the appeal (see the *Rules*, r 25.11(1)).

[177] Counsel for the plaintiff fairly conceded that this was not an appropriate case for leave to amend the claim to correct any deficiency. The plaintiff has been represented by counsel throughout this civil process. The claim has been amended twice to address some minor concerns raised by the provincial defendants. However, despite the passage of six years since the claim was first filed, the plaintiff is in no better position to address any deficiency in the claim as to malice. As Feldman JA explained in *McDowell v Fortress Real Capital Inc*, 2019 ONCA 71: "If there were any relevant allegations, they would have been made already; no purpose would be served by granting leave to amend" (at para 64).

Disposition

[178] In the result, I would allow the appeal and strike the claim, in relation to the provincial defendants, without leave to amend, with costs.

Mainella JA

I agree: Edmond JA

I agree: Turner JA