Court of Appeal for Saskatchewan **Citation: *Cook v Risling*, 2025 SKCA 65**
Docket: CACV4309 **Date: 2025-06-25**

Between:

Darren Cook

Appellant/Respondent by Cross-Appeal
(Plaintiff)

And

Robert Risling and Lost River Water Co. Ltd.

Respondents/Appellants by Cross-Appeal
(Defendants)

Before:	Jackson, McCreary and Bardai JJ.A.
Disposition:	Appeal and cross-appeal allowed
Written reasons by: In concurrence:	The Honourable Justice Naheed Bardai The Honourable Justice Georgina R. Jackson The Honourable Justice Meghan R. McCreary
On appeal from: Appeal heard:	2024 SKKB 1, Saskatoon October 3, 2024
Counsel:	Glenn A. Wright for the Appellant Stuart A. Busse, K.C., for Robert Risling and Lost River Water Co. Ltd.

Bardai J.A.

I. INTRODUCTION

[1] In 2019, Darren Cook commenced an action against Robert Risling and Lost River Water Co. Ltd. [Lost River] with respect to the supply of water by Lost River to Mr. Cook's home in Mission Ridge, Saskatchewan [Home]. Lost River is a company that provides water to homes in Mr. Cook's area. Mr. Risling is the principal of Lost River and is also named as a defendant in the action. Mr. Cook's lawsuit seeks damages for breach of contract, negligence, malicious prosecution, intentional infliction of emotional harm and abuse of process. The essence of Mr. Cook's claim is that water provided by Lost River to the Home was not sufficiently pressurized and that this lack of pressurization created – or may create – health and safety hazards for those in the Home. In addition, Mr. Cook contends that Mr. Risling initiated and pursued a criminal prosecution against him in which Mr. Risling alleged that Mr. Cook had stolen water from Lost River, wrongfully accused him of mischief and wrongfully identified him as the cause of a water drinking advisory being issued to area residents.

[2] Lost River and Mr. Risling applied to strike the claim against them pursuant to Rules 7-9(1) and (2) of *The Queen's Bench Rules* (now *The King's Bench Rules*) and for summary judgment pursuant to Rule 7-5(1), arguing that the claim was brought after expiration of the limitation period and that it amounted to an abuse of process. The Chambers judge summarily dismissed the claims in negligence and for breach of contract but declined to dismiss the allegations of malicious prosecution, intentional infliction of emotional harm or abuse of process: *Cook v Risling*, 2024 SKKB 1 [*Summary Decision*].

[3] Mr. Cook appeals from the *Summary Decision* and contends that the Chambers judge erred in dismissing the claims in negligence and for breach of contract. Lost River and Mr. Risling cross-appeal on the basis that the claims of malicious prosecution, intentional infliction of emotional harm and abuse of process made against them ought to have been dismissed.

[4] For the reasons that follow, both the appeal and the cross-appeal are allowed. The Chambers judge erred in his interpretation of the contract, the assessment of the standard of care, and the determination that the claims of malicious prosecution, intentional infliction of emotional harm and abuse of process require a trial.

II. BACKGROUND

[5] In 2009, Mr. Cook and his spouse moved into the Home which at the time was connected to the water supply system of Lost River.

[6] Soon after moving into the Home, a dispute arose between Mr. Cook and Lost River over whether Lost River was providing the Home with sufficient water pressure. Mr. Cook complained repeatedly about the inadequate water pressure to both Lost River and to the Water Security Agency [WSA]. WSA regulates waterworks distribution systems in Saskatchewan, including the system operated by Lost River.

[7] In an apparent effort to improve water pressure to the Home, and without the prior knowledge or consent of Lost River, Mr. Cook installed a bypass that resulted in water flowing to the Home without passing through or being recorded by the water meter.

[8] Lost River reported to the RCMP that Mr. Cook was, in effect, stealing water and ultimately stopped providing water to the Home. Mr. Cook thereafter commenced the action against Lost River and Mr. Risling. His claims in contract and negligence were founded on the following allegations:

(a) pursuant to a contract, its duty of care and *The Water Security Agency Act*, SS 2005, c W-8.1, Lost River owed Mr. Cook a duty to provide safe, potable water to the Home;

(b) the water provided is sporadic and inadequate in terms of its supply and pressure; and

(c) the equipment that Lost River installed failed to provide water in a safe and reliable manner.

[9] Mr. Cook also asserted that Lost River pursued criminal complaints amounting to malicious prosecution against him, and that Mr. Risling provided false information to the RCMP, which amounted to an abuse of process. Mr. Cook contends that this conduct resulted in the infliction of emotional harm, caused him to be denied entry to the United States, and forced him to incur legal costs in order to defend himself against the criminal charges.

[10] The claim was issued on March 1, 2019, and amended on September 22, 2020, to allege negligence as against WSA, though that allegation was ultimately discontinued and subsequently pursued by way of an originating application seeking mandamus. The application for mandamus was dismissed in a separate decision by the same Chambers judge: *Cook v Water Security Agency*, 2023 SKKB 268.

III. *SUMMARY DECISION*

[11] In the *Summary Decision*, the Chambers judge found that Mr. Cook had failed to prove any obligation on the part of the defendants to provide water pressure of a certain level to the Home, or that there was any water safety issue. Accordingly, summary judgment was granted in the defendants' favour in relation to the allegations in negligence and for breach of contract, and Mr. Cook was allowed to pursue the balance of his allegations, being those related to the criminal complaint filed by Mr. Risling and Lost River.

[12] At issue before the Chambers judge was whether a contract between the parties required Lost River to supply a minimum volume of water and to meet a minimum pressure requirement or PSI. The Chambers judge began his analysis of the issues by identifying the general rules and principles governing summary judgment applications. He went on to find that he was in a position to make the necessary findings of fact, apply the law to the facts, and arrive at a just and proportionate determination such that there was no genuine issue with respect to the contract claim or negligence claim requiring a trial.

[13] The parties agreed that there was a contract between Mr. Cook and Lost River, however, neither party was in a position to produce a copy of the contract as part of the evidence in the summary judgment application. In the *Summary Decision*, the Chambers judge noted as follows:

> [5] All of the parties believe that there was a contract signed sometime in 2008 between Lost River and the plaintiff, whereby Lost River agreed to supply water to the plaintiff. However, neither party can produce a copy of the contract.
>
> …
>
> [22] The problem the plaintiff has is that he is unable to produce any contract demonstrating that Lost River is obligated to provide a specified PSI. To the extent there is meaningful evidence, it is from the regulator, WSA, whose officer avers that there is no minimum PSI required.

[14] Given this absence of evidence, the Chambers judge concluded that Mr. Cook had not established that the contract between him and Lost River required Lost River to supply water at a minimum PSI and, accordingly, dismissed the contract claim. With respect to the claim in negligence, the Chambers judge was presented with two competing interpretations of the regulatory requirements. Mr. Cook suggested that the regulations required a minimum water pressure of 14 PSI, whereas the evidence from Lee Reinhart, a representative of WSA, was that none of the permits made with respect to Mission Ridge included any pressure requirements. The system delivering water to the Home was a *trickle system*, which is designed to handle low flow rates of water to smaller or rural communities. Mr. Reinhart's affidavit indicated that trickle systems are typically found where there are no regulatory pressure requirements on a user's property. The Chambers judge accepted Mr. Reinhart's evidence over that of Mr. Cook's and found as follows:

> [20] With the greatest of respect to the plaintiff, Mr. Reinhart's conclusions respecting the regulatory framework is more convincing than the case advanced by the plaintiff. In addition, Mr. Reinhart's conclusions are consonant with my, admittedly less sophisticated, understanding of the regulatory framework. In sum, I adopt the position of Mr. Reinhart and reject that of the plaintiff.
>
> …
>
> [23] With respect to the issue of water safety, the plaintiff is unable to produce any evidence indicating that there is any concern with respect to water quality. In short, the evidentiary cupboard is bare.

[15] Finally, as concerns the claim of malicious prosecution, intentional infliction of emotional harm and abuse of process, the Chambers judge made the following finding:

> [24] The defendants assert that the core of the plaintiff's claim is his complaint with respect to the PSI and water safety issues, and he is unable to produce any evidence on either issue. It should follow that the entire claim should be struck.
>
> [25] With respect, I do not believe it is that simple. There are other allegations in the claim which do not turn on the issue of PSI or water quality. If the plaintiff wishes to pursue those, he may.

[16] In the end result, the Chambers judge dismissed the claims in negligence and contract, and found that there was a genuine issue requiring a trial in relation to the claims for malicious prosecution, intentional infliction of emotional harm and abuse of process.

IV. POSITION OF THE PARTIES

[17] In his appeal from the *Summary Decision*, Mr. Cook contends that the Chambers judge erred in dismissing his claims in negligence and breach of contract, by: (a) mischaracterizing the claim and his concerns; (b) failing to apply the appropriate standard of review; (c) incorrectly determining that there are no water pressure requirements; (d) misapplying the summary judgment test; (e) improperly accepting opinion evidence; and (f) finding that there are no genuine issues requiring a trial, at least in respect of the negligence and breach of contract claims.

[18] Lost River, meanwhile, argues that no such errors were committed by the Chambers judge.

[19] In their cross-appeal, Mr. Risling and Lost River contend that the Chambers judge erred by not granting summary judgment dismissing Mr. Cook's claims of malicious prosecution, abuse of process and intentional infliction of emotional harm. They posit that there is no genuine issue requiring a trial, and that these claims ought to have been dismissed.

V. STANDARD OF REVIEW AND ISSUES

[20] In this case, the key issues are whether the Chambers judge erred in the application of the summary judgment test when:

(a) interpreting the contract;

(b) determining the standard of care for the purposes of deciding the negligence claim; and

(c) assessing the claims of malicious prosecution, intentional infliction of emotional harm and abuse of process.

[21] In the context of a summary judgment application, the central question is whether there is a genuine issue requiring a trial. Determining whether there is a genuine issue requiring a trial involves a question of mixed fact and law, and, accordingly, absent an error in principle, such a finding should not be overturned in the absence of palpable and overriding error: see *Hryniak v Mauldin*, 2014 SCC 7 at para 81, [2014] 1 SCR 87 [*Hryniak*]. This same standard will apply to questions of contract interpretation – *Ledcor Construction Ltd. v Northbridge Indemnity Insurance*

Co., 2016 SCC 37 at para 21, [2016] 2 SCR 23, and *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at paras 51–52, [2014] 2 SCR 633 [*Sattva*] – as well as to questions involving the acceptance of evidence for the purposes of determining the standard of care: see *Prevost v Ali*, 2011 SKCA 50 at para 22, [2011] 9 WWR 494; *Borgfjord v Boizard*, 2016 BCCA 317 at para 20, 403 DLR (4th) 745; *Zoerb v Saskatoon Regional Health Authority*, 2022 SKCA 111 at paras 37–41, 86 CCLT (4th) 271; and *Saloojee v Gibsons (Town)*, 2025 BCCA 49 at para 35.

[22] At issue in this appeal, and the cross-appeal, is whether the Chambers judge committed a palpable and overriding error in:

(a) dismissing the claim in contract brought by Mr. Cook against Lost River;

(b) dismissing Mr. Cook's negligence claim against Lost River; or

(c) determining that Mr. Cook's claims against Lost River for malicious prosecution, intentional infliction of emotional harm and abuse of process raised genuine issues requiring a trial.

VI. ANALYSIS

A. Mr. Cook's appeal

[23] The law as it relates to summary judgment applications is well-settled. Summary judgment is appropriate where the Chambers judge is satisfied that there is no genuine issue requiring a trial. In deciding this question, a Chambers judge must assess whether they are in a position to confidently make the necessary findings of fact, apply the law to the facts and arrive at a just result that is more proportionate, more expeditious and less expensive than would be the case in a conventional trial: see *Hryniak* at paras 49–50.

[24] The summary judgment procedure has been the subject of numerous decisions in our province, notably: *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at paras 30–31, 429 DLR (4th) 269; *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 31–32, [2017] 1 WWR 685; *A.C. Forestry Ltd. v Big River First Nation*, 2023 SKCA 96 at paras 32–46, [2023] 10 WWR 563; *Holmes v Jastek Master Builder 2004 Inc.*, 2019 SKCA 132 at paras 77–90, [2020] 6 WWR 386 [*Holmes*]; *Tchozewski v*

Lamontagne, 2014 SKQB 71 at paras 27–33, 440 Sask R 34; *White v Turanich*, 2020 SKQB 5 at paras 3–15; *Cicansky v Beggs*, 2018 SKQB 91 at paras 14–25, 25 CPC (8th) 182; *Shephard v 101093126 Saskatchewan Ltd. (Whitewood Inn)*, 2020 SKQB 346 at paras 13–18; *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd*., 2017 SKQB 341 at para 28; and *Smith v Hawryliw*, 2020 SKQB 169 at paras 20–24.

[25] A summary judgment decision can be fair even though it does not allow for the exhaustive fact-finding process of a trial. If a Chambers judge can decide the necessary facts and apply the pertinent legal principles to arrive at a fair, timely, cost-effective and proportionate resolution, the summary judgment process should be used, and its use is no less legitimate than deciding the issues through a conventional trial (*Hryniak* at paras 2, 27).

[26] The applicant bears the onus of establishing that there is no genuine issue requiring a trial. If a genuine issue exists, it does not necessarily mean that summary judgment is inappropriate. Rule 7-5(2) of *The King's Bench Rules* allows the court to craft a procedure to help determine issues, if the court has confidence that through a limited and more restricted fact-finding process, a just result can be achieved (*Holmes* at para 81). This proportional approach might include allowing some cross-examination, a trial of a particular issue, or some other hybrid approach. Rule 7-5(2)(b) allows for a tailored approach, one that considers the complexity of the claim, the amounts in issue, the importance of the questions in dispute, the cost of a trial, whether better evidence on key issues will be available at trial, whether the court can fairly evaluate the evidence, and whether summary judgment can resolve the entire claim or portions of it.

[27] Summary judgment enables the court to determine some or all of the issues in dispute without resorting to an expensive trial. The summary judgment process gives the court and the parties flexibility by recognizing that a simplified or streamlined proportionate process can be fair and help avoid costs of a full trial (see Rules 7-5(5) and (6)). Fundamentally, the summary judgment process is aimed at improving access to justice by saving both time and money for the parties (*Hryniak* at paras 1–3). That said, where the tailored approach does not allow the court to confidently weigh the evidence, assess credibility (if required), draw the necessary inferences, make the determinations of fact and apply the law to those facts to arrive at a just result, summary judgment should be denied.

1. The contract and summary judgment

[28] In order to advance a claim for breach of contract, Mr. Cook had to establish the existence of a contract – and its breach – together with damages: see *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 91, [2020] 2 SCR 420.

[29] In interpreting a contract, a court adopts "a practical, common-sense approach", which seeks "to determine 'the intent of the parties and the scope of their understanding'" (*Sattva* at para 47, quoting *Jesuit Fathers of Upper Canada v Guardian Insurance Co. of Canada*, 2006 SCC 21 at para 27, [2006] 1 SCR 744). In *Sattva*, the Supreme Court of Canada provided the following principles by which contracts are to be interpreted:

(a) contract provisions are not to be read in isolation – rather, the contract must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at para 47);

(b) "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" (at para 47);

(c) regard is to be given to the surrounding circumstances known to the parties when the contract was formed – this factual matrix is an important element in the interpretation of a contract because no contract is made in a vacuum (at paras 47–50);

(d) the factual matrix or surrounding circumstances, while important, cannot be used "to overwhelm the words" chosen by the parties (at para 57); as well, they cannot be used to "add to, subtract from, vary, or contradict" the stated intention of the parties (at para 59); and

(e) contract interpretation "involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (at para 50).

[30] As stated above, the parties agreed that a contract exists between Mr. Cook and Lost River. However, the evidence as to the terms of the agreement between the parties was sparse. In his February 16, 2021, affidavit, Mr. Risling stated as follows:

> 16. The water supply party (SaskWater) charges Lost River for the water that it delivers to the users on the basis of volume used. In turn, Lost River charges the individual users of that water on the basis of volume used.
>
> 17. To monitor the volume of water used at each user an appropriate meter is installed and all water being used at that location is to go through the meter such that appropriate charge can be made for the volume used.
>
> 18. Lost River requires water users to sign a contract for the consumption of water and the items listed above (flow restrictor, back flow protector and meter) are all required to be installed by the user and the user is to allow the meter to be read and is to pay for the water used.

[31] The Chambers judge recognized that the parties had, at some point, signed a contract, though "neither party [could] produce a copy of the contract" (*Summary Decision* at para 5). The Chambers judge then found that, to the "extent there is meaningful evidence, it is from the regulator, WSA, whose officer avers that there is no minimum PSI required" (at para 22).

[32] With respect, I see several problems with the Chambers judge's analysis. Summary judgment requires that a judge be in a position to confidently determine the facts and apply the law to the facts, so as to arrive at a just result having regard to the principle of proportionality. Where this is not possible, a trial is required.

[33] In this case, there was a contract, but the Chambers judge was not in a position to determine its terms. In short, he was unable to ascertain what the parties had agreed to, which made it impossible to confidently assess whether a breach had occurred and, if so, when (which was relevant to Lost River's assertion that the claim in breach of contract was time-barred).

[34] *Sattva* instructs that courts are to apply a common sense approach to contract interpretation and to read the contract terms in their ordinary and grammatical sense, having regard to the contract as a whole, and to consider the factual matrix when interpreting those terms. Without knowing what the contract terms are, those contract interpretation principles cannot be applied.

[35] With respect, it was a palpable and overriding error for the Chambers judge to find that no contract terms had been breached in a situation where he was unable to determine what the terms of the contract were. The evidence before the Chambers judge did not suggest that WSA was a

party to the contract between Mr. Cook and Lost River, so it is not clear how WSA's representative, Mr. Reinhart, could provide "meaningful evidence" concerning the terms of the contract between the parties.

[36] In my view, given the state of the evidence, the Chambers judge was simply not in a position to determine the necessary facts – i.e., what contract terms the parties had agreed to – and, as such, he could not apply the law to arrive at a just result. In other words, there was a genuine issue requiring a trial. It follows, then, that the Chambers judge committed a palpable and overriding error in dismissing this claim using the summary judgment process.

2. Standard of care, negligence and summary judgment

[37] In relation to his claim in negligence, Mr. Cook suggests that there are two components to the standard of care Lost River owed to him. The first is that the water be safe; the second is that there be sufficient water pressure.

[38] In order to succeed in his claim in negligence, Mr. Cook would have to establish the following:

(a) that there existed a proximate relationship between himself and Lost River that gave rise to a duty of care;

(b) the standard of care that Lost River owed to him;

(c) a breach of that standard of care by Lost River;

(d) that damages flowed from or were caused by such breach; and

(e) that the damages were reasonably foreseeable and would not have been occasioned but for the breach.

See *Young v Bella*, 2006 SCC 3 at para 27, [2006] 1 SCR 108, and *Mustapha v Culligan of Canada Ltd*., 2008 SCC 27 at para 18, [2008] 2 SCR 114.

[39] In this case, there was no debate that Lost River owed a duty of care to Mr. Cook, as it was providing water to the Home. The real questions for the Chambers judge were determining the

standard of care owed by Lost River to Mr. Cook, whether such standard was breached, and what damages, if any, flowed from such breach.

[40] In concluding that the standard of care was not breached, the Chambers judge made a number of key findings:

(a) Mr. Reinhart's "conclusions respecting the regulatory framework [were] more convincing" than that of Mr. Cook (*Summary Decision* at para 20);

(b) Mr. Cook was unable to produce any evidence indicating a concern with respect to water quality such that, on this point, "the evidentiary cupboard [was] bare" (at para 23); and

(c) Mr. Cook was "unable to produce any contract demonstrating that Lost River is obligated to provide a specified PSI" (at para 22).

[41] Mr. Cook contends that the Chambers judge erred in accepting the opinion evidence of Mr. Reinhart and in determining the standard of care.

[42] I am persuaded that the Chambers judge erred in his analysis on the standard of care by relying on the evidence of Mr. Reinhart as a basis for defining that standard. The question raised in the application was not what standard of care WSA owed to Mr. Cook, or even what the relevant statutory provisions mean; at issue was the standard of care owed by Lost River to Mr. Cook. Mr. Reinhart's evidence was not determinative of that latter question.

[43] The Chambers judge examined the statutory framework to try to determine the standard of care. There is no stand-alone common law tort of breach of statute, but a statutory breach can be used as evidence of negligence. In this sense, the civil consequences for a statutory breach (absent specific language in the statute) are "subsumed in the law of negligence" (*Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 227; *Holowachuk v Saskatchewan Workers' Compensation Board*, 2025 SKCA 58 at para 13; similarly, see *Ari v Insurance Corporation of British Columbia*, 2015 BCCA 468 at paras 37–38, 392 DLR (4th) 671).

[44] In a case such as this, where there is a contract between the parties, the statute alone may not be determinative of the standard of care owed by one party to the other. The nature of the relationship and contract between the parties must also be examined, as the standard of care may

be modified by a contract between the parties: see *Mabe Canada Inc. v United Floor Ltd.*, 2017 ONCA 879 at para 4, 74 CLR (4th) 1; *Musa v Carleton Condominium Corporation No. 255*, 2023 ONCA 605 at para 42, leave to appeal to SCC refused 2024 CanLII 43104; *Crowley v Halifax (Regional Municipality)*, 2022 NSSC 294 at para 23; *Larochelle v Saskatchewan Government Insurance*, 2017 SKPC 1 at para 30; and *Emil Anderson Maintenance Co. Ltd. v Taylor*, 2024 BCCA 156 at para 149, 496 DLR (4th) 442.

[45] As the terms of the contract were not in evidence, the Chambers judge was not in a position to confidently determine the applicable standard of care and whether it had been modified by the contract between the parties. Without being in a position to confidently determine the standard of care, the Chambers judge was not in a position to decide if such a standard was breached. In my view, therefore, the Chambers judge committed a palpable and overriding error in his determination of the standard of care, which led him to an erroneous conclusion that Mr. Cook's claim in negligence could be appropriately disposed of by way of summary judgment. In the circumstances, the determination of the standard of care and whether such standard was breached represent genuine issues requiring a trial.

[46] The second problem in the Chambers judge's analysis lies in his conclusion that Mr. Cook was unable to produce any evidence raising concerns with respect to water quality. A finding that there was no evidence in this regard is contradicted by the record, which included communications between Lost River and WSA:

From:	Kerry Desjarlais [WSA]
Sent:	March 3, 2017 9:13 AM
To:	Lee Reinhart [WSA]
Subject:	FW: 2017-03-03-LRWC (Mission Ridge Developments) PDWA
Attachments:	2017-03-03-LRWC (Mission Redge Devts) PDWA Letter.pdf; 2017-03-03-LRWC (Mission Redge Devts) PDWA Poster.pdf

> Hi Lee, I had a good discussion with John Buller [a Lost River employee] regarding the suspected bypassing of the water meter/backflow preventers on some of the properties within Mission Ridge. John requested that due to low pressures/depressurizations occurring frequently in this part of the distribution system, a PDWA [Precautionary Drinking Water Advisory] be issued in hopes that it will stimulate conversation and make those that are not following the rules remedy the connections. I have just done so, and told John that I would make the suggestion to you that maybe WSA could involve the [Medical Health Officer], as there could be an inherent risk to the residents, as no one really knows what is going on in the houses.
>
> I left the rescinding conditions pretty basic and you can change them if required when you come back on Monday.

> Cheers,
> Kerry
>
> ---
>
> From: Kerry Desjarlais
> Sent: March-03-17 9:02 AM
> To: [John Buller at Lost River]
> Cc: Bill Miller; Lee Reinhart; WATER ADVISORIES; … saskatoonhealthregion.ca); PHIOC
> Subject: 2017-03-03-LRWC (Mission Ridge Developments) PDWA
>
> Please be advised that as a result of a depressurization, a Precautionary Drinking Water Advisory has been issued to the users of the drinking water system at Mission Ridge Developments. Please ensure that all affected users are notified of the conditions of this advisory – I have attached a poster for your use.
>
> If there are any questions or concerns related to the above, please contact me … .

[47] The foregoing email exchange refers to "propert*ies*" (plural) and contains a statement that "no one really knows what is going on in the house*s*" (again, plural). When the evidence is examined, questions remain about whether Mr. Cook was the cause of depressurizations, or whether others or the system or some combination of factors caused the depressurization. The communications quoted above establish the potential of an "inherent risk to the residents, as no one really knows what is going on in the houses".

[48] The evidence before the Chambers judge also included the Water Security Agency, *Waterworks Design Standard EPB 501* (Regina: Saskatchewan Ministry of Environment, November 15, 2012) [*EPB 501*]. In his factum on this issue, Mr. Cook draws attention to that document:

> 27. The Waterworks Design Standard ("EPB501") outlines requirements with respect to distribution systems at section 5 wherein it states: "… positive pressure must be maintained at all times to prevent intrusion of contaminants".
>
> 28. EPB 501 also clearly discusses minimum pressure requirements:
>
> > Systems must be designed to prevent depressurization which occurs when any disruption causes a loss of continuous positive pressure to below 20 psi. The potential for public health risks associated with depressurized distribution system is directly linked to pathogen contamination, harmful chemical intrusion, and exposure to excess disinfectant residual. For more information see publication System Depressurization.
>
> (Original emphasis omitted)

[49] Accordingly, in finding that the "evidentiary cupboard [was] bare", the Chambers judge committed a palpable and overriding error, as there was at least some evidence before him supporting Mr. Cook's contention.

[50] In the result, Mr. Cook's appeal must be allowed, and the *Summary Decision* dismissing his claims in breach of contract and in negligence must be set aside. To be clear, just because I have found that the Chambers judge erred by summarily dismissing these portions of Mr. Cook's claim does not mean that Mr. Cook will necessarily succeed at trial in relation to those causes of action. It simply means that there are genuine issues requiring a trial.

B. Mr. Risling's and Lost River's CACV4309 cross-appeal

[51] Mr. Risling and Lost River sought summary judgment in respect of the entirety of the claim, including the allegation of malicious prosecution in their notice of application. The claims of intentional infliction of emotional harm and abuse of process are based on the malicious prosecution allegation. Malicious prosecution is an intentional tort, the aim of which is to provide a remedy to those who have been wronged by an unjust prosecution motivated by malice or a purpose other than carrying the law into effect (see *Miazga v Kvello Estate*, 2009 SCC 51 at paras 7–8, 42, [2009] 3 SCR 339 [*Miazga*]).

[52] To succeed in a malicious prosecution claim, Mr. Cook would need to establish that the prosecution against him was:

(a) initiated by the defendant;

(b) terminated in his favour;

(c) undertaken without reasonable and probable cause; and

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

See *Miazga* at paras 3, 53–56; *Nelles v Ontario*, [1989] 2 SCR 170 at 192–193.

[53] The elements of malicious prosecution do not appear to have been the focus of the argument before the Chambers judge, so it is perhaps understandable that the issue was not dealt with in any detail in the *Summary Decision*. The Chambers judge briefly stated the following in this regard: "With respect, I do not believe it is that simple. There are other allegations in the claim which do not turn on the issue of PSI or water quality. If the plaintiff wishes to pursue those, he may" (*Summary Decision* at para 25).

[54] In my view, the Chambers judge's omission to address the question of malicious prosecution in any detail was a palpable and overriding error, notwithstanding that it was not the focus of the parties' argument before him. The application of Lost River and Mr. Risling sought a dismissal of the claim in its entirety. It was, therefore, incumbent upon the Chambers judge to fully analyse the question raised by that application, and he did not do so. Accordingly, the cross-appeal must be allowed. Given the absence of analysis by the Chambers judge on this issue, the question becomes whether this matter should be remitted to the Court of King's Bench or, rather, whether this Court should decide the question.

[55] In circumstances where it is in the interests of justice, where there is a sufficient evidentiary record, and "if, in light of the nature of the factual issues, and the state of the trial record, the appellate court can confidently make the necessary factual findings without working any unfairness to either party" (*Direct General Partner Corporation v Canadian Pacific Railway Company*, 2025 SKCA 29 at para 164, [2025] 5 WWR 169, citing *Pucci v The Wawanesa Mutual Insurance Company*, 2020 ONCA 265 at para 62, 2 CCLI (6th) 165), an appellate court may decide the issue rather than returning the question to the trial court.

[56] Given the uncontroverted facts and the evidentiary record, this is an appropriate case for intervention and determination by this Court. Cutting directly to the bottom line, it is my view that Mr. Cook's claims for malicious prosecution, intentional infliction of emotional harm, and abuse of process ought to have been dismissed, as they have no chance of success and fail to raise any genuine issues requiring a trial.

[57] It is not in dispute that Mr. Cook installed a bypass that resulted in water not passing through the meter or that Lost River, through Mr. Risling, made a complaint to the RCMP. The complaint was resolved through Saskatoon Mediation Services and the resolution is set out in a letter dated May 30, 2019:

> Dear Sir/Mada'm [*sic*]:
>
> Enclosed is a cheque as part of the restitution owing to you as a result of an incident involving you and the person indicated below:
>
> Name Darren Cook
>
> Cheque Amount $1,000.00
>
> As you may recall, criminal charges were laid as a result of the said incident. Subsequently, the Crown Prosecutor of the Saskatchewan Provincial Court in Saskatoon decided to refer the matter to our office.

> We developed a contract by which Darren Cook took responsibility for the offense(s) wrote a letter of apology to Lost River Water Company and agreed to pay restitution of $1000.00.
>
> The contract was completed and the charges were withdrawn in court.
>
> If you have questions regarding this matter, please feel free to call me.
>
> Sincerely,
>
> David Paisley
> Caseworker

[58] The letter of apology referred to by Mediation Services states as follows:

> Attention: Robert Risling
>
> Dear Sir:
>
> > RE: My actions relating to the supply of water to my acreage at […], RM of Aberdeen.
>
> I sincerely regret my action of installing an emergency bypass in June of 2015. At that time I was not educated on the topic of waterworks and pipelines for human consumption and their minimum requirements, as well as being misinformed about these requirements. This lack of knowledge led me to install an emergency water bypass around the combined flow restrictor/check valve/flow meter as a temporary solution to the lack of flow problem that I was experiencing. I am now informed that the installation of this emergency bypass eventually led to Lost River Water requesting that a Precautionary Drinking Water Advisory be issued for the waterworks.
>
> I sincerely regret the inconvenience this may have caused any residents. Since then I have educated myself on the issues relating to water distribution and water security and am now aware of more appropriate measures that I should have taken.
>
> Sincerely,
>
> Darren Cook

[59] In light of that evidence, in my view, it cannot be said that Lost River "initiated the proceeding" against Mr. Cook. While Lost River made a complaint, it was the police and prosecutor that "initiated the proceeding" in the circumstances of this case.

[60] The purpose of the tort of malicious prosecution is to make sure those who wield the power of the state do so for the purposes for which such power is intended. As a result, the tort has limited application in disputes between private citizens: see *New Brunswick Real Estate Association v Estabrooks*, 2014 NBCA 48 at para 48, 375 DLR (4th) 323, leave to appeal to SCC refused 2015 CanLII 1811. There are, however, some exceptions in which a civilian may be regarded as having "initiated a proceeding", for example, where misleading information is provided to police or a private citizen is instrumental in setting a prosecution in motion: see *Radford v Stewart*, 2006 ABCA 157 at para 9, 384 AR 167, and *Stout v Track*, 2013 ABQB 751 at paras 39–40, 51 CPC (7th) 327, aff'd 2015 ABCA 10. That is not the situation here; there is nothing in the evidence to

suggest that any of the information provided to the police by Lost River was false or misleading, or that Lost River played any significant role in setting a prosecution in motion.

[61] Moreover, the evidence is clear that Lost River's complaint was undertaken with reasonable and probable cause, and that it was not resolved in Mr. Cook's favour. In fact, Mr. Cook took responsibility for the conduct complained of by Lost River, as Mr. Cook admitted to installing the bypass, which is what gave rise to Lost River's complaint. Bearing all of that in mind, it is clear from the evidence that Mr. Cook cannot establish the elements of malicious prosecution. Accordingly, that claim and his claims framed in abuse of process and intentional infliction of emotional harm have no chance of success and fail to raise any genuine issue requiring a trial. They are properly dismissed.

VII. CONCLUSION

[62] In the end result, both the appeal and the cross-appeal are allowed. The claims for malicious prosecution, abuse of process and intentional infliction of emotional harm are dismissed, while the claims of breach of contract and negligence are remitted to the Court of King's Bench for trial.

[63] Given the divided success, I make no order as to costs.

"Bardai J.A."
Bardai J.A.

I concur. "Jackson J.A."
Jackson J.A.

I concur. "McCreary J.A."
McCreary J.A.