IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Besler v. Clausen,*
2025 BCSC 1353

Date: 20250716
Docket: S49713
Registry: Penticton

Between:

Bradley H. Besler, Darren W. Besler

Plaintiffs

And

Thorsten Clausen, Brian Callow, Faith Callow, Arlene Fenrich, Clayton Fenrich, King Campbell, What the Fungus Mushrooms (Garnet Valley Holdings Ltd.), Bartlett Tree Experts

Defendants

Docket: S45001
Registry: Penticton

Between:

Vicki J. Besler, Bradley H. Besler, Darren W. Besler

Plaintiffs

And

What the Fungus, Thorsten Clausen, Brian Callow, King Campbell, Faith Arroyo Callow, Arlene Fenrich, Clayton Fenrich, Garnet Valley Holdings Ltd., Agricultural Land Commission, The Corporation of the District of Summerland

Defendants

Before: The Honourable Justice Hardwick

Reasons for Judgment

Appearing on his own behalf and on behalf of the Plaintiffs Vicki J. Besler and Darren W. Besler:	B. Besler
Counsel for the Defendants, What the Fungus, Thorsten Clausen, Brian Callow, King Campbell, Faith Arroyo Callow, Arlene Fenrich, Clayton Fenrich and Garnet Valley Holdings Ltd.:	D. Horvath
Counsel for the Defendant, Agricultural Land Commission	J.K. Yamashita
Counsel for the Corporation of the District of Summerland	N. Krueger
Place and Date of Hearing:	Kelowna, B.C. November 5 – 8, 2024
Place and Date of Judgment:	Kelowna, B.C. July 16, 2025

Table of Contents

Introduction

[1] By way of introductory overview, this is the first of three reasons for judgment resulting from a multi-day day hearing involving numerous applications in two separate but related legal proceedings. Those actions are:

a) Supreme Court of British Columbia, Penticton Registry, Action No. S45001 (the "Primary Action"); and

b) Supreme Court of British Columbia, Penticton Registry, Action No. S49713 (the "MP Action").

[2] I shall only make orders in respect of the MP Action herein but my two subsequent and related reasons for judgment addressing the relief sought in respect of the Primary Action should properly be read together with this judgment for overall consistency and continuity.

[3] I have also, as set out below, referred to certain individual parties by their first names and certain individual parties with reference to their surnames. I mean no disrespect in this regard. Given the number of parties involved and the commonality of some surnames, it is simply most practicable to adopt the naming nomenclature most commonly used in the extensive materials before the C6ourt.

Overview of the Individuals and Entities Involved

[4] Vicki Besler ("Ms. Besler"), is the sole registered owner of the lands and premises civically known as 18816 Garnet Valley Road, Summerland, British Columbia (the "Besler Property").

[5] Bradley Besler ("Brad") and Darren Besler ("Darren"), are the sons of Ms. Besler.

[6] Garnet Valley Holdings Ltd. ("Garnet Valley") is a company incorporated pursuant to the laws of British Columbia. The shareholders of Garnet Valley are the defendants, Brian Callow ("Mr. Callow") and Thorsten ("Thor") Clausen. Garnet Valley does business under the trade name "What the Fungus Mushrooms" ("WTFM").

[7] WTFM operates a mushroom growing business on the lands and premises civically known as 18420 Garnet Valley Road, Summerland, British Columbia (the "WTFM Property").

[8] Thor is the sole registered owner of the WTFM Property. Thor is an arborist by training.

[9] The Besler Property and the WTFM Property are adjoining and share a property line.

[10] The Besler Property and the WTFM Property are located within the municipal boundaries of the District of Summerland (the "District"). The District is not a party to the MP Action.

[11] King Campbell ("Mr. Campbell") was an investor in WTFM between 2016 and 2019. Mr. Campbell does not reside on the WTFM Property.

[12] Faith Callow ("Ms. Callow") is the spouse of Brian Callow and resides on the WTFM Property. Ms. Callow assists, or at least previously assisted, with WTFM operations from time to time.

[13] Clayton Fenrich ("Mr. Fenrich") has been an employee of WTFM since 2016.

[14] Bartlett Tree Experts ("Bartlett") is, I accept, a federally incorporated company which has a registered and records office within the province of British Columbia. In the pleadings and application materials, Bartlett is described as being both a sole proprietorship and an international tree-cutting company that has over 100 offices worldwide. I cannot and shall not even try to reconcile the inconsistencies in those two statements as, for the reasons that follow, I am satisfied Bartlett has proper notice of these proceedings and has not chosen, to date, to take specific issue with the lack of precision in its being named as a party.

[15] Important in understanding the foregoing conclusion, it is admitted that Thor is an employee of Bartlett. Thor holds a managerial position and has done so since in or about 2010. Prior to this, Thor ran his own independent tree-trimming business in the

south Okanagan region. It was after Thor sold his independent business to Bartlett that he became an employee of Bartlett.

[16] Arlene Fenrich ("Ms. Fenrich") is an employee of Bartlett. Ms. Fenrich is an administrative assistant and has worked in this capacity since in or about 2015.

Limited Procedural History Overview

[17] On October 24, 2019, the plaintiffs filed the original notice of civil claim initiating the Primary Action.

[18] On or about December 11, 2019, Brad and Darren were charged with two offences in the Provincial Court of British Columbia under file number 46826 (the "Criminal Proceeding"):

a) Count 1 alleged that from June 2 to June 24, 2019, Brad and Darren each committed mischief in relation to the property of Thor Clausen, contrary to s. 430(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]; and

b) Count 2 alleged that from June 1 to November 1, 2019, Brad and Darren each committed the offence of criminal harassment by engaging in conduct that caused Mr. Clausen to reasonably fear for his safety or the safety of anyone known to him, contrary to s. 264 of the *Code*.

[19] As described by Justice Horsman in the recent Court of Appeal decision in *Besler v. BC Prosecution Service*, indexed as 2025 BCCA 81 at para. 5, regarding the claims being advanced in a separate malicious prosecution action commenced by Brad and Darren, the background to the Criminal Proceeding can be succinctly summarized as follows:

> The appellants and Mr. Clausen reside on neighbouring properties in Summerland. In the spring of 2019, the appellants became aware that there was a commercial mushroom production facility operating on Mr. Clausen's property. The appellants objected to this facility, claiming that it created noxious odours. Over the objections of the appellants, the local government granted a variance to allow the facility to operate. It is within the context of this dispute that the appellants were alleged to have engaged in conduct that constituted the offences of mischief and criminal harassment. Complaints about this conduct were made

> to the RCMP by Mr. Clausen and others associated with his property and the mushroom facility.

[20] At the trial presided over by Judge Daneliuk in the Provincial Court of British Columbia, there were a total of 23 witnesses, including 9 civilians and 2 police officers, and some 33 numbered exhibits put into evidence including photographs, statements and letters, a compact disc and 6 USBs each of which contained multiple video clips from either cellular telephones or surveillance cameras.

[21] On October 19, 2021, Brad and Darren were convicted of mischief contrary to s. 430(4) of the *Code* on the basis of count 2 articulated above.

[22] Specifically, as summarized by Justice Horsman in *Besler v. BC Prosecution Service*:

> [9] The trial judge issued reasons for judgment on October 19, 2021. As to count 1, the mischief charge, the trial judge found Bradley Besler not guilty, and Darren Besler guilty. The finding of guilt against Darren Besler was based on an incident when he intentionally spun his truck tires to kick up a dust cloud during a social event on the Clausen property, as well as his interference with the work of an electrician hired to install cameras on the Clausen property.
>
> [10] As to count 2, the trial judge found both of the appellants not guilty on the charge of criminal harassment. The trial judge was satisfied beyond a reasonable doubt that the appellants had engaged in conduct prohibited by s. 264 of the Criminal Code, and that Mr. Clausen was harassed by the prohibited conduct. However, she was not satisfied beyond a reasonable doubt that the conduct caused Mr. Clausen to fear for his safety, or the safety of anyone known to him. Nor was she satisfied that any such fear was, in all the circumstances, objectively reasonable.
>
> [11] In relation to the issue of whether mischief was an included offence within criminal harassment, the trial judge concluded that it was. She found that the appellants had engaged in conduct amounting to mischief within the time period charged in count 2. Accordingly, while she found each of the appellants not guilty of criminal harassment as set out in count 2, she found them guilty of the included offence of mischief. Relying on the principles set out in Kineapple v. R., [1975] 1 S.C.R. 729, 1974 CanLII 14, the trial judge entered a stay of proceedings against Darren Besler on count 1.

[23] On March 25, 2022, Brad and Darren successfully appealed their convictions of mischief on the basis that Judge Daneliuk erred in ruling that such a charge is a lesser included offence of criminal harassment. The reasons for judgment, written by Justice Wilson, are indexed at 2022 BCSC 484.

[24] On March 4, 2024, Brad and Darren commenced the MP Action. The defendants in the MP Action are Thor, Mr. Callow, Ms. Callow, Ms. Fenrich, Mr. Fenrich, Mr. Campbell, Garnet Valley (collectively, the "MP Defendants") and Bartlett.

[25] The MP Action was commenced within the two-year limitation provided for under s. 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13.

[26] The notice of civil claim (the "MP NOCC") filed consists of 25 pages. Part 1, the statement of facts, has 155 paragraphs. The crux of the claims in the MP Action, I conclude, is set out at para. 34 of the MP NOCC wherein Brad and Darren plead that "since May 2019", the MP Defendants "have relentlessly pressured the RCMP to criminally charge the Plaintiffs".

[27] The balance of the claims in the MP NOCC can be fairly summarized as follows:

a) The MP Defendants procured the institution of criminal proceedings by providing false information to the RCMP and Crown counsel that was relevant to whether or not charges should be recommended and approved which led to Brad and Darren being charged with mischief and criminal harassment, as described above, in the Criminal Proceeding (para. 2 of Part 1 of the MP NOCC);

b) Allegations of violations of bylaws which closely mirror claims advanced in the Primary Action (paras. 19-33 of Part 1 of the MP NOCC);

c) Alleged reports made by the MP Defendants to the RCMP regarding ongoing harassment by Brad (paras. 34-58, 63-66, 70, 71, 75, 79, and 86-90 of Part 1 of the MP NOCC);

d) Allegations of breach of privacy, harassment, and bylaw and regulatory compliance (paras. 59-62, 77, 78, 80-85, and 100 of Part 1 of the MP NOCC);

e) Allegations of "Further Malicious Prosecution in 2020" including various alleged complaints by the MP Defendants, and/or some of them to the RCMP

after the initiation of the Criminal Proceeding (paras. 92-98 of Part 1 of the MP NOCC);

f) Details of civilian review and complaints to the Commissioner for the RCMP initiated by Brad and Darren (paras. 108-111 of Part 1 of the MP NOCC);

g) Alleged "malicious statements" made by the MP Defendants and/or some of them and further alleged property violations (paras. 112-128 of Part 1 of the MP NOCC);

h) Chronology of a dispute over security cameras on the Besler Property being repositioned to record the WTFM Property culminating in an "attempted" malicious prosecution of Brad and Darren in 2023 (paras. 129-133, 136, and 137 of Part 1 of the MP NOCC);

i) Further various property dispute issues (paras. 134, 135, and 138-141 of Part 1 of the MP NOCC);

j) Alleged "unjust enrichment" of MP Defendants and Bartlett as a result of the alleged malicious prosecution claim (paras. 142-145 of Part 1 of the MP NOCC); and

k) Damages that Brad and Darren allege they suffered as a result of the MP Defendants' abuse of the criminal justice system and malicious prosecution of them in the Criminal Proceeding (paras. 146-155 of Part 1 of the MP NOCC).

[28] The relief sought in Part 2 of the MP Action by Brad and Darren includes general damages, aggravated damages, punitive damages, costs and such further and other relief as this Honourable Court may deem appropriate. The quantum of damages sought are specifically plead in part 2 of the MP NOCC but Brad and Darren concede this is not permitted by the *Supreme Court Civil Rules* [*Rules*].

[29] On March 27, 2024, the MP Defendants filed a notice of application to dismiss the MP Action in its entirety pursuant to R. 9-5, specifically R. 9-5(1)(a)(b) and/or (d), together with special costs (the "MP Application"). The MP Application also seeks a

declaration that Brad and Darren are vexatious litigants and corollary orders flowing from such a declaration but that relief is expressly not before me at this time.

[30] Given that Bartlett did not participate in the hearing and has not brought its own application, I consider it necessary to summarize Bartlett's role in the MP Action somewhat more specifically. Thor, as noted, is an employee of Bartlett. Bartlett leases a portion of the WTFM Property for the purposes of conducting Bartlett's business operations in the south Okanagan region of the province. These facts are not controversial. The claims against Bartlett, apart from various claims about "property violations" in relation to the WTFM Property, are that Bartlett (as well as the other MP Defendants) was "unjustly enriched by the malicious prosecution of the Plaintiffs" (para. 145 of Part 1 of the MP NOCC) and that Bartlett can be held vicariously liable for the wrongful acts of its employees in the course or scope of their employment (para. 6 of Part 3 of the MP NOCC). Simply stated, there are no independent claims advanced as against Bartlett in the MP Action.

The Law Regarding Striking Pleadings

[31] Rule 3-1(2)(a) of the *Rules* requires that a notice of civil claim set out a concise statement of the material facts giving rise to a claim.

[32] The statement of facts component of the notice of civil claim must set out at part 1 the material facts which a plaintiff must prove in order to support their claims to ground the relief sought in this court. It is not sufficient for the plaintiff to state a legal conclusion. The plaintiff must plead the facts that constitute the required elements of the cause of action and inform the defendant of the "outline" of the case they must meet: see *Basyal v. Mac's Convivence Stores Inc*., 2018 BCCA 235 at para. 39

[33] Rule 9-5(1) of the *Rules* provides that at any stage of the proceedings, this court may order pleadings be struck out in whole or in part and make certain ancillary permitted orders (including as to costs) on the grounds that the pleadings:

a) disclose no reasonable claim or defence, as the case may be;

b) are unnecessary, scandalous, frivolous or vexatious;

c) may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

d) are otherwise an abuse of the process of the court.

[34] With respect to an application brought pursuant to R. 9-5(1)(a), the court must:

a) assume the facts in the pleading can be proven except that acts pleaded based purely on assumptions or speculation, or which are incapable of proof, need not be assumed to be true:

b) ask the question, is it plain and obvious that the plaintiff's claim discloses no reasonable cause of action in the sense that it is certain to fail because it contains a radical defect;

c) consider if there is a chance a plaintiff might succeed? If so, a plaintiff should not be driven from the judgment seat;

d) Not let length and complexity of the issue, the novelty of the cause of action, and potential strength of the defendant's case prevent the claim from proceeding. Rather, the approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

See: *Kindylides v. John Does,* 2020 BCCA 330 at para. 34; *Frazier v. Kendall*, 2021 BCSC 1791 at para. 14; and *Sahyoun v. Ho*, 2015 BCSC 392 at para. 57.

[35] While no evidence is admissible on an application to strike pursuant to R. 9-5(1)(a), pursuant to R. 9-5(2), evidence is admissible for limited purposes under the other sub-paragraphs of Rule 9-5. Indeed, applications seeking relief under these rules are contextually driven and that context is usually provided through evidence: see *Krist v. British Columbia*, 2017 BCCA 78.

[36] In *Willow v. Chong*, 2013 BCSC 1083, Justice Fisher summarized the test for striking pleadings under Rule 9-5(1)(b) on the basis that the pleading in question is unnecessary, scandalous, frivolous or vexatious as follows at para. 20:

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress, 1999 CanLII 5860 (BC SC), [1999] BCJ No. 2160 (SC); Skender v Farley, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

[37] The Court in *Sahyoun* held that an abuse of process in the context of R. 9-5(1)(d) derives from a flexible doctrine whereby the court can prevent a claim from proceeding where to do so would violate the principles of judicial economy, consistency, finality and the integrity of the administration of justice. Rule 9-5(1)(d) engages the court's inherent jurisdiction to prevent the misuse of its procedures: see para. 60.

[38] A claim may be dismissed as an abuse of process where the court process is being used for an improper purpose. The discretion under the codification of inherent jurisdiction under R. 9-5(1)(d) affords the courts the authority to dismiss actions on the ground of abuse of process, however the categories of abuse of process are open. In this regard, (then) Chief Justice Hinkson in *Chernan v. Robertson*, 2014 BCSC 1358, at para. 29, cited Madam Justice Baker in *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 1993 CarswellBC 2950, at para. 18:

> [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression... .

[39] The above includes situations where a plaintiff is using the court system as a plaything to harass others they do not like. That is also where the plaintiff is using the court system dishonestly or unfairly or for some ulterior or improper purpose: see *Young v. Borzoni et al*, 2007 BCCA 16 at paras. 64-65 and 95.

[40] While each subsection of R. 9-5(1) provides a basis to strike pleadings, subsections (a) to (d) should not be considered discrete grounds on which to dismiss a claim but they are capable of being read together. That is, a claim that discloses no reasonable cause of action contrary to R. 9-5(1)(a) could also be unnecessary, or frivolous or vexatious within the meaning of R. 9-5(1)(b): see *Willson v. British Columbia*, 2012 BCSC 1256 at para. 17.

Malicious Prosecution – The Law

[41] Malicious prosecution is a cause of action recognized at law. The seminal case continues to be *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

[42] In order to establish a claim for malicious prosecution, the plaintiff must be able to establish each element of a 4-part test. Specifically, the plaintiff must establish that the prosecution was:

a) initiated by the defendant;

b) terminated in favour of the plaintiff;

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: *Degen v. British Columbia*, 2019 BCSC 2498 at para. 16 and *Nelles* at para. 42.

[43] The burden of proof for malicious prosecution is a difficult one to meet and any plaintiff alleging such a claim is held to a high standard of proof if they are to avoid a non-suit or directed verdict. Failure to establish any of the requisite elements of the tort is fatal to the action: see *Degen* at para. 17.

[44] The tort of malicious prosecution lies only against a defendant who initiated a criminal proceeding in the sense of having been “actively instrumental” in setting the law in motion. Whether a private person was the person instrumental in the relevant sense

centers on whether the state authorities were able to exercise independent discretion: see *Universe v. Fraser Health Authority*, 2020 BCSC 1398 at para. 193.

[45] A private citizen or complainant will be found to have initiated prosecution for the purposes of a malicious prosecution only in “exceptional circumstances”. In order to establish such a claim, a plaintiff must establish the following:

a) the complainant desired and intended the plaintiff to be prosecuted;

b) the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor or police officer to exercise any independent discretion or judgment in determining whether or not to lay the charge; and

c) the complainant procured the institution of proceedings by the professional prosecutor or the police officer, either by furnishing information relevant to the determination of whether or not the charge should be laid that he knew to be false, or by withholding information that he knew to be true, or both.

See: *Chaudhry v. Khan*, 2015 ONSC 1847 at para. 13.

[46] Absent such exceptional circumstances, it is the police or prosecution service who lays the charge, and, as such, is “the person who initiated the prosecution”: see *Degen* at para. 23**.**

[47] In *D’Addario v. Smith*, 2015 ONSC 6652, the Court considered circumstances in which it is impossible for the police not to charge, as it is the practice in Ontario. These are situations when the police officer, or the Crown prosecutor in British Columbia, has no discretion to proceed with charging the accused. Such discretion is generally possible unless the victim was the sole witness. Where there are other witnesses, the police (again, or Crown) have discretion to interview and assess them prior to proceeding with charges. A clear example the Court in *D’Addario* refers to is a case of sexual assault by a person well known to the complainant in respect to whom consent is objectively plausible: see paras. 24-30.

[48] In cases where a plaintiff has established a claim of malicious prosecution as against a private individual, the determining factor appears to be highly tied to point (b) from *Chaudhry* identified above - namely that the facts were so peculiarly within the complainant's knowledge that it is virtually impossible for the professional prosecutor to exercise any independent discretion or judgment. By way of certain examples, I conclude this occurred in the following cases which were cited in the materials:

a) *Chatha v. Uppal*, 2018 BCSC 6, is a decision following a lengthy trial in a complex predominantly family law matter. The claimant testified that the personal respondent threatened to kill both her and the two children in an incident that occurred in the former matrimonial home. The claimant further claimed the personal respondent chased her with a knife to her room before she was able to call the police. The Court had "no confidence" that they would ever know precisely what occurred on the specific evening in question, but concluded that it was not what the claimant told the police, Crown counsel, the provincial court judge who acquitted the personal respondent or to the Court during the course of the family case. The Court simply did not accept, on the evidence presented, that the respondent threatened to kill the claimant and made motions to grab a knife from one of the kitchen drawers. A claim for malicious prosecution was accordingly made out against the claimant on its merits and the personal respondent was awarded general damages of $20,000 and special damages of $11,000 on account of legal fees incurred in successfully defending the criminal prosecution;

b) *Neff v. Patry,* 2008 BCSC 163, is a decision following a lengthy trial. The plaintiff, a former lawyer, had engaged in an on-off romantic relationship with one of the defendants, Ms. Anderson, for a number of years. Ms. Anderson blamed the plaintiff for seducing her to leave her previous marriage and further accused the plaintiff of making death threats, physical violence and sexual improprieties with his (now adult) daughter. On balance, the plaintiff strenuously denied all such allegations. Ms. Anderson and the other defendant, Ms. Patry, delivered written statements to the police. On the basis

of these statements, the plaintiff was charged with criminal harassment contrary to s. 264(1) of the *Criminal Code.* The plaintiff was arrested at his (then) law office and remanded into custody. This had quite a devastating impact on the plaintiff. The Crown ultimately stayed the charges some 24 days later. The Court held that the plaintiff established all of the elements of the tort of malicious prosecution, and awarded general damages of $50,000 to which the defendants were jointly and severally liable for and punitive damages of $10,000 solely against Ms. Patry as she was a medical doctor whom the Court found owed the plaintiff a duty of care to avoid making negligent and false accusations regarding his mental health; and

c) *Khan v. Bujold*, 2023 ONSC 6618, is yet another decision following a lengthy trial. The parties to the action were neighbours and this was but one of various disputes between them. Importantly, the defendant personally filled out a peace bond application pursuant to s. 810 of the *Code*. This obviated any requirement for charge approval by the police or the Crown. The Court found that the defendant lacked reasonable and probable cause for the filing of the peace bond application because there was no objectively reasonable basis to fear for her personal safety. The Court determined that the plaintiff never threatened her physically or did anything to damage her property nor threatened to do so. The plaintiff was also vulnerable due to his mental health and status as a police officer. In the result, the Court awarded the plaintiff $5,000 in damages for malicious prosecution. Additional damages were awarded for other tortious conduct described in the reasons.

Analysis

[49] As indicated, the MP Defendants do not apply to strike certain identified portions of the MP NOCC. Nor do only some of the MP Defendants seek the dismissal of the claims in the MP NOCC as against them alone. Nor do the MP Defendants seek dismissal of the entirety of the MP NOCC pursuant to R. 9-6 (the summary judgment rule). Rather, the only order before me sought by the MP Defendants is that the entirety

of the MP NOCC be dismissed as against all of the MP Defendants pursuant to R. 9-5(1)(a), (b) and (d).

[50] In light of this, I conclude that the relief sought by the MP Defendants must be dismissed.

[51] Specifically, and most importantly, I am simply not satisfied on the basis of the pleadings alone that I am in a position to determine whether the allegations made by the MP Defendants related to the Criminal Proceeding were or were not so peculiarly within their knowledge that it was virtually impossible for the assigned Crown to exercise any independent discretion or judgment in determining whether or not to lay the charges.

[52] In reaching this conclusion, as I noted above, R. 9-5(2) provides that no evidence is admissible on an application under subrule (1)(a). However, the Court of Appeal in *Hamouth v. Edwards & Angell*, 2005 BCCA 172, confirmed that there is an exception where the pleadings do not set out the facts necessary to understand the claim which permits the court to look to other material to fill out its understanding of the pleadings: see para. 18.

[53] In this regard, I conclude that the reasons for judgment of both Judge Daneliuk and Justice Wilson can be considered by this Court in addressing the MP Defendant's application to dismiss the MP Action. Certain conclusions from both of those decisions are already expressly plead at paras. 106 to 107 of the MP NOCC and it would be artificial, in my view, for the court to ignore the judicial findings of fact giving rise to the termination of the Criminal Proceeding in favour of Brad and Darren (which is second component of the 4-part test from *Nelles).*

[54] This conclusion is consistent with the decision in *Seyedalikhani v. Mansouri*, 2023 BCSC 1902, wherein the Court relied on this particular exception to engage with bylaws that the subject pleading was referring to because the bylaws were facts that were not in dispute and were facts that are essential to the understanding of the pleadings: see para. 38.

[55] Even taking into account this other material, which operates to the benefit of the MP Defendants in expanding the record before me beyond just the strict four corners of the MP NOCC, I still come back to the significant difficulty in being asked to conclude, within the context of a R. 9-5(1)(a) application, to decide whether the facts were or were not so peculiarly within their knowledge that it was virtually impossible for the professional prosecutor or police officers to exercise any independent discretion or judgment in determining whether or not to lay the charges.

[56] Further, and consistent with the foregoing:

a) I am not satisfied that it is plain and obvious that the claims in the MP NOCC disclose no reasonable cause of action in the sense that it is certain to fail because it contains a radical defect;

b) There is a chance the plaintiffs may succeed in advancing a claim for damages pursuant to the tort of malicious prosecution. Given that, the plaintiffs should not be driven from the judgment seat strictly on the basis of the pleadings;

c) In this same vein, whilst the MP Defendants have put forward the basis for a strong defence, this is not the trial on the merits. At this pleadings stage, I am directed to be generous and err on the side of caution in not striking a claim at this juncture.

[57] I am also not prepared to dismiss the entire MP Action on the basis that it is an abuse of process. The MP Action is distinct and separate from *Besler v. BC Prosecution* but both actions have their genesis in certain core common facts relating to the Criminal Proceeding. Given the Court of Appeal's recent conclusion to allow Brad and Darren to continue their claim of malicious prosecution against the Crown respondents in accordance with the allegations set out against those individuals in the further amended notice of civil claim in *Besler v. BC Prosecution*, I conclude that the MP Action does not fall within the broad categories cited in *Chernen* such as a deception on the court or a mere sham. I do have genuine concerns that the MP Action is being pursued for an

ulterior purpose, but not to such a degree that I conclude would merit the complete dismissal of the proceeding at this juncture.

Further Steps Regarding the Pleadings In the MP Action

[58] Very importantly, my conclusion not to dismiss the MP Action at this juncture does not preclude the MP Defendants from bringing on a further application to strike specific portions of the MP NOCC pursuant to R. 9-5(1) or any amended version thereof. The MP NOCC is prolix and quite obviously runs afoul of R. 3-1(2)(a). Brad (along with Darren and Ms. Besler) were previously cautioned by me about the problems with prolix pleadings in the Primary Action prior to even commencing the MP Action: see 2023 BCSC 2590. Apparently, however, my caution did not fully resonate.

[59] Ultimately, the material facts necessary to advance a claim for malicious prosecution are relatively straightforward and Brad and Darren would be well advised to be proactive in reviewing the MP NOCC to determine what material facts should remain and what facts can and should clearly be removed when drafting the quite obviously necessary amended NOCC.

[60] By way of one extremely limited example to highlight the foregoing, para. 114 of the MP NOCC presently reads as follows:

> 114. In late 2021 WFTM built a kitchen facility and other construction in the large mushroom production building on the WTFM Property without permits, in violation of the District's Zoning Bylaw and the BC Fire Code.

[61] This assertion, which I accept to be true for the purposes of R. 9-5(1)(a), relates to conduct some two years after the prosecution against Brad and Darren was initiated and has absolutely no connection to the Criminal Proceeding. It is not a material fact that is, in my view, in any way connected to proving any of portion of the 4-part test from *Nelles*.

[62] If the amended NOCC does not materially address the deficiencies with the MP NOCC, Brad and Darren run the risk of the MP Action being dismissed in its entirety as against the MP Defendants as it is not the court's role or responsibility to be drafting pleadings or to be construed as providing legal advice: see *Mohebbi v. North*

Vancouver RCMP, 2015 BCSC 2083 at paras. 14-16. I am, however, simply not going to do so at this juncture for the reasons set forth above.

[63] In this regard, my conclusion not to dismiss the MP Action at this juncture similarly does not preclude the MP Defendants for seeking relief pursuant to R. 9-6 in the MP Action as that issue was not before me for determination.

Costs

[64] Costs are awardable at the discretion of the judge under Rule 14-1.

[65] Even though I have not granted the relief sought by the MP Defendants, the MP Defendants have good reason to take issue with the manner in which the MP NOCC is drafted. Particularly in light of my prior caution about pleadings in the Primary Action, it would have been prudent for Brad and Darren to have provided the MP Defendants and the Court with a draft amended NOCC that pleads the necessary material facts that, if proven, establish the tort of malicious prosecution in relation to the Criminal Proceeding and removes all extraneous facts, bald conclusions and conjecture. There was ample time to do so.

[66] As such, while I am dismissing the MP Application, I am ordering that the MP Defendants shall have their costs of the MP Application in any event of the cause but not payable forthwith. I make no order for costs in respect of Bartlett since Bartlett did not participate.

[67] By virtue of the fact that this was, as noted, one component of a multi-day hearing involving multiple applications, determining the amount of time allocated to it specifically is more challenging. To avoid the need for this to be a further point of argument between the parties, I consider it a fair exercise of my discretion under Rule 14-1 to conclude that the application consumed more than a half-day and accordingly costs under the Tariff set forth in Appendix B shall be assessed on the basis that the MP Application consumed one full day and was of ordinary difficulty.

"Hardwick J."