Court Allows Police Crossclaim Against Crown Attorneys To Continue

December 15, 2016

Smith v. Her Majesty the Queen in right of Ontario et al., 2016 ONSC 7222

After a murder charge against him was dismissed, the plaintiff commenced an action against the Attorney General, individual Crown Attorneys and police officers involved in the related "Mr. Big" investigation which had led to the murder charge. The Attorney General and the individual Crown Attorneys (collectively the "Crown") were successful in striking the plaintiff's claim against them on the strength of the body of case law severely restricting Crown liability to those who are investigated or prosecuted for an offence. However, the Court allowed the police crossclaims against the Crown to proceed in part. This bulletin will focus on the analysis of the crossclaims.

This action arises out of an investigation into a murder which had gone unsolved since 1974. Although initially interviewed, the plaintiff was never charged at that time. The case was re-opened in 2007, following which the plaintiff was charged with murder. The charges were withdrawn shortly thereafter but a further investigation ensued. Subsequently, a year-long "Mr. Big" type investigation ensued and a charge was again laid. The plaintiff spent a number of years in pre-trial custody and was released when a confession which had been obtained following the investigation was ruled inadmissible and he was ultimately acquitted.

In their crossclaim the police defendants alleged that they relied on the Crown Attorneys legal advice in conducting the impugned investigation and, accordingly, should be entitled to claim over against the Crown Attorneys in respect of the plaintiff's claim against the police. The Crown sought to strike out both this crossclaim and the plaintiff's direct claim against the Crown Attorneys. All parties accepted that the police were advancing a novel cause of action in their crossclaim. Accordingly, the Court undertook a fresh *Cooper-Anns* negligence analysis to determine whether a duty of care existed in this scenario. The Court ultimately found that the case law supported the submission that the relationship between Crown Attorneys and the police may give rise to sufficient proximity. Therefore, it was not "plain and obvious" that a *prima facie*duty of care did not exist. As such, the Court refused to strike out the crossclaim as it related to the alleged negligent legal advice of the Crown Attorneys.

The Crown also relied on s. 8 of the *Ministry of the Attorney General Act* ("MAGA") which is designed to provide personal immunity for individual Crown Attorneys. This was cast as a question of law. Section 8 of MAGA states that no action shall be commenced against the Crown by a "*person who is or was the subject of a prosecution*, in respect of any act done or omitted to be done in the performance or purported performance of a duty or authority *in relation to the prosecution*." The Court allowed the crossclaims to continue against the Crown Attorneys as it was clear that the police defendants were not persons who were the subject of a prosecution, a requirement under s. 8(1).

The decision raises the interesting issue of whether there can be shared responsibility between police investigators and advising Crown Attorney's in the event of a successful claim by a plaintiff who asserts that a given investigation was negligently conducted.

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