2003 SKQB 559

Q.B.G. A.D. 1994
No. 271 J.C.S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

THE ESTATE OF DENNIS KVELLO (by his personal representative, Diane Kvello), DIANE KVELLO, [S.K.], [S.K.], KARI KLASSEN, RICHARD KLASSEN, PAMELA SHARPE, THE ESTATE OF MARIE KLASSEN (by her personal representative Peter Dale Klassen), JOHN KLASSEN, MYRNA KLASSEN, PETER DALE KLASSEN, ANITA JANINE KLASSEN

PLAINTIFFS

- and -

MATTHEW MIAZGA, SONJA HANSEN, THE ESTATE OF RICHARD QUINNEY (by his personal representative Murray Brown), BRIAN DUECK, CAROL BUNKO-RUYS

DEFENDANTS

AND BETWEEN:

MATTHEW MIAZGA and SONJA HANSEN

PLAINTIFFS BY COUNTERCLAIM

- and -

RICHARD KLASSEN

DEFENDANT BY COUNTERCLAIM

Robert L. Borden and Edward Holgate — for all the plaintiffs except Richard Klassen

Richard Klassen on his own behalf

Donald A. McKillop, Q.C. and
Jerome A. Tholl — for all the defendants except Brian Dueck

David A. Gerrand and Stephen D. McLellan — for Brian Dueck

Nature of the Case

[1] In July 1991, 16 individuals were arrested and charged with over 70 counts of sexual assault against eight foster children. Many of the children's allegations of sexual abuse were bizarre and revolting because they involved group and ritualistic sex with satanic overtones, the sexual abuse and killing of babies and animals, the ingestion of human flesh, feces, urine, blood and other horrible, perverted and incredible acts. The case was labeled by the media as the "Scandal of the Century".

[2] The real scandal, however, is the travesty of justice that was visited upon 12 of those individuals, the plaintiffs in this civil action, by branding them as pedophiles even though each of them was innocent of the horrendous allegations and criminal offences charged against them. For a year and a half, they lived under the cloud of the serious charges and, after being committed for trial at a lengthy preliminary inquiry, faced a criminal trial and the potential of lengthy jail terms. Eventually, all the charges against each of them were stayed by the Crown, but most of the charges were not stayed until just before their criminal trial was to begin, more than a year and a half after the charges were laid. The three children who made most of the allegations of sexual and physical abuse subsequently recanted their allegations and these recantations were made public through the news media.

[3] The plaintiffs subsequently commenced a civil malicious prosecution action against the two prosecutors involved, the investigating police officer and the therapist for the three dysfunctional children who made most of the false allegations. A counterclaim for defamation was brought by the prosecutors against one of the plaintiffs.

The lengthy civil trial that was conducted before me demonstrates how lying children wreaked such havoc, not only in the lives of the innocent people who were charged with numerous serious criminal offences founded on the children's false allegations, but also in the lives of the individuals who foolishly and maliciously acted together to charge and prosecute the plaintiffs for those criminal offences. As Mr. Justice Wimmer of this court so aptly observed in the *Latimer* case, "there is no joy in this for anyone". The same can be said about this case.

[4] In many respects, the judgment that follows is more like a public inquiry report than a civil judgment. The civil action required the court to review the roles played by the defendants in their dealings with the children and their response to the incredible allegations of abuse. The review encompassed not only the lengthy criminal proceedings involving the plaintiffs, but also the related criminal proceedings involving four other individuals. One of those individuals pled guilty to one offence against each of four of the children. The other three individuals were convicted of several offences but their convictions were overturned by the Supreme Court of Canada. The series of events that are relevant to the civil action span a period of time in excess of a decade. The evidence pertaining to those events is voluminous. The judgment outlines my determination of the facts from all this evidence and sets out in detail my reasons for concluding that the plaintiffs have a valid cause of action. I recognize that the length of the judgment is beyond the endurance of all but highly motivated readers.

[5] I begin by giving an overview of the case to put it in perspective. Next I outline the issues and set out some background information. Then I set out in chronological order, to the extent allowed by the issues, the salient facts and inferences of fact I have drawn from the evidence respecting the issues. Then I will outline the applicable law and apply it to the facts that I have determined. In doing so, I will comment on some specific events upon which the defendants rely. I will then move on to

outline my reasons for allowing the plaintiffs to call rebuttal evidence. Finally, I will set out my disposition of the case and the counterclaim of the prosecutors against one of the plaintiffs for defamation.

An Overview of the Case and its Aftermath

[6] In my view, the outcome of the bizarre and unique case before me is determined largely by the uncontroverted circumstances of the case itself. The primary difficulty I encountered during the trial and in coming to grips with the issues, was in keeping the case in proper perspective. An analogy can be made to the zoom lens of a camera that is trained on a flower. Although the lens can be zoomed in to reveal a minute detail of the flower, the image of the whole flower is temporarily lost until the lens is zoomed back out. Throughout the lengthy trial, the images I was given of the case before me were ones of minute detail. It appears that during the investigation and prosecution of the case, the defendants focused on the minute detail and never stood back to view the case in full perspective. Had any of them done so, I would not be giving judgment in this case.

[7] In many respects, the continued focus on the minutiae of detail in this convoluted case during the trial has impaired the ability of the parties to see it in proper perspective. It has also impaired my ability to keep this judgment to a reasonable length. I would have preferred to have confined it solely to my determinations of facts from the evidence and to the inferences I have drawn from those facts. But in fairness to the parties involved in the lawsuit, and to provide an acceptable level of substantiation of my determinations for appeal purposes, I have no alternative but to relate many of the evidentiary details of the case. I have avoided cluttering up the judgment as much as possible, however, with references to court exhibits and transcript page numbers and with quotations from them or from the testimony of the witnesses. In many instances, reading

the transcripts in context is required to enable the reader to assess the accuracy of the facts that I have found and the inferences I have drawn from those facts. To simplify the repeated naming of the parties and the witnesses, I have referred to them in the main by their surnames only. I intend no disrespect in doing so.

[8] It is important to observe that the plaintiffs, from the outset of this trial, have not relied on the recantations of the children as proof of the malicious prosecution action. With one exception, the recantations of the children were made long after the stays of the charges against the plaintiffs were entered by the Crown. Obviously the defendants did not have the benefit of these subsequent recantations at the time they made their decisions and assessments. It would be improper and grossly unfair to them to judge their actions on the basis of information gained through hindsight.

[9] Each of the [R.] children testified in the trial before me and each confirmed the recantations he or she made previously. Each of them testified that all the allegations made, including mutilating and killing babies and animals, eating excrement and drinking urine and blood, being forced to participate in group sex, and in a multitude of oral, vaginal and anal sexual acts with the Klassen and Kvello families and their children, were fabricated by [M.R. 1] and adopted by [M.R. 2] and [K.R.]. The motive for [M.R. 1]'s initial fabrications was to induce Social Services to remove his two sisters from their Klassen foster home and reunite them with him in the Thompson foster home. [M.R. 1] says that the only person who abused him was his natural father. It was obvious from his testimony that he still resents his father. [M.R. 2] and [K.R.] say that the only person who sexually or physically abused them was [M.R. 1], their brother. It was obvious from their testimony that they still resent their brother, not the Klassens or the Kvellos.

[10] In my view, the main significance of the recantations of the [R.] children and their testimony in the trial before me is to stifle any view that may still be held by the

defendants or by the public that the plaintiffs are guilty of the horrible offences that were charged against them. It is now known as a fact that despite the public statements made on behalf of the prosecutors to the effect that the stays were entered because the children were too traumatized to testify, the allegations on which the charges were based are false and the plaintiffs are innocent of them. The recantations also underline the reality that children do sometimes lie and that those lies can include false and fabricated sexual abuse allegations.

[11] The recantations and the recent testimony of the [R.] children also demonstrate to Social Services officials, workers and personnel, as well as to police officers and prosecutors, the real threat to society of overzealous child protection responses fueled by politically correct or trendy ideologies of the day that are relied upon as a justification to overrule objectivity, reason, common sense and tested and tried legal traditions. These kinds of responses not only jeopardize the freedom of innocent people, but they indirectly harm, and at times even jeopardize, the safety and welfare of the very children that are the subject of the protection efforts. This is what happened in this case. The [R.] children testified that they all felt betrayed, for one reason or another, by their Social Services workers and therapists. It is also evident that with the exception of C.H., the other child complainants as well as the six children of the plaintiffs, were significantly harmed by the overzealous response that was made in this case.

[12] The two [R.] girls said that they were regularly sexually abused by [M.R. 1] in their birth home, in the Klassen home and in the Thompson home. At first, the abuse consisted only of genital touching but it soon escalated into sexual intercourse at the Klassen and Thompson homes. [M.R. 1] would sneak into the girls' bedroom and have sexual intercourse with them. The only respite they had from his abuse was during the six-month interval that began in December 1989 when [M.R. 1] was removed from the Klassen home. The respite ended when they were reunited with him in the Thompson

home. They say that the level of sexual abuse increased significantly after their move to the Thompson home despite verbal and written requests to Bunko-Ruys for help.

[13] As an undisputed example, [M.R. 1] had sexual intercourse with his sisters during a therapy session in Bunko-Ruys' office while Dueck and Bunko-Ruys left them alone in the office for a few minutes. When I related this incident as an evidentiary example in my non-suit judgment, I stated that Dueck and Bunko-Ruys were standing outside the office door when this incident occurred. This was the evidence before me at that time. The subsequent testimony of Dueck satisfies me that the incident likely occurred while Dueck and Bunko-Ruys were downstairs in the building. As another undisputed example, [M.R. 1] had sexual intercourse regularly with his sisters in the Thompson home and yard and on at least one occasion, considerable violence was used by him. [M.R. 2] and [K.R.] say that Bunko-Ruys, Dueck, Miazga and the Thompsons were aware of the ongoing sexual abuse but they did not seem to care. All they seemed to care about was getting more "disclosures" from them. Once the criminal proceedings were stayed, they lost interest in them.

[14] [M.R. 2] in particular still feels hurt and resents [M.R. 1] for what he did to her over a period of several years. Shortly after she publicly recanted the allegations that had been fabricated by [M.R. 1], [K.R.] and herself, she contacted [M.R. 1] at Egadz to seek an apology from him for what he had done to her over the years. She felt this would help her to forgive him. She was then 15 and had not been under [M.R. 1]'s domination for some time. But he was still intent on abusing her. He tried to fondle her under the table and when she resisted his advances, he got annoyed with her and choked her because she had publicly exposed his misconduct. Three days later he almost killed her for which he was charged, convicted and spent four months in jail. [M.R. 2] said that [M.R. 1] alternated between denying his abuse of her and then admitting it but not wanting to talk about it. She says that she recanted the allegations before having any

contact with the Klassen or Kvello families. She says she did not do so earlier because she was scared, knowing that these people had been wrongfully charged. She was also afraid to come out and say she was raped by [M.R. 1] because she did not know how people would respond. She says that when her drinking and drug friends found out about it, they accused her of "doing incest" and enjoying it.

[15] The defendants knew at the time they were involved in the case about the sexual abuse by [M.R. 1] of his sisters. In their testimony, they tried to minimize the consequences that their knowledge of this ongoing abuse has on the outcome of this case. They take no responsibility for failing to prevent the abuse.

[16] In fairness to them, neither a child therapist, a police officer nor a prosecutor has the power to remove children from foster homes or to place them in other foster care homes. That power is held by Social Services personnel who have the legal power and responsibility for child protection issues. But it is reprehensible that they took no meaningful action to have [M.R. 1] and the girls placed in separate foster homes to prevent further incidents of sexual abuse. Instead they relied on ropes and buzzers placed on [M.R. 1]'s bedroom door in the Thompson home in an attempt to prevent him from getting into the girls' bedroom at night to sexually abuse them. The defendants and Social Services personnel were so caught up in their zeal to pursue the plaintiffs for the harm they <u>suspected</u> they had inflicted on [M.R. 2] and [K.R.], that they ignored the harm they <u>knew</u> was being inflicted on them by [M.R. 1]. What is even more indicative of their misguided zeal is that they took no reasonable or effective measures to protect [M.R. 2] and [K.R.] from further harm by [M.R. 1].

[17] It appears that Social Services was given bad advice by Bunko-Ruys to the effect that, for therapeutic reasons, the children needed to be kept together and that the safety of the girls could be protected by the installation of the devices I have mentioned.

But in view of the zealous responses that Social Services routinely makes to unsubstantiated sexual abuse allegations, their ineffective response to this substantiated and ongoing sexual abuse on the part of [M.R. 1] was irresponsible, hypocritical and inexcusable.

[18] [M.R. 2] and [K.R.] testified that they had looked up to their older brother [M.R. 1] for as long as they could remember, including some of the time they were with him in their birth parents' home. He looked after them and protected them and, in a sense, they saw him as a parental figure because they were neglected by their natural parents. Although they felt hurt and betrayed when he sexually abused them, they still had feelings for him. Although they knew that [M.R. 1]'s stories of abuse were untrue, they eventually came to believe them and adopted them as their own. They say that they would often sit in the kitchen at the Thompson residence until two or three o'clock in the morning while Marilyn Thompson wrote down all the things they "disclosed" to her. Often she plied them with questions until they were exhausted. Marilyn Thompson regularly reported these "disclosures" to Social Services, Bunko-Ruys and Dueck.

[19] [M.R. 1] talked about his contempt for the lack of discipline he received for his sexual abuse of his sisters and said he preferred being made to stand in the corner than losing the sexual gratification his sisters provided to him. He admitted that he sodomized other boys and sexually assaulted other children. This was known to his care givers and the defendants and they relied on these events as evidence of his "sexualization".

[20] The children realize the enormity of the tragedy that has been suffered by the plaintiffs as a result of their false allegations. Although they are to be commended for their courage in admitting the wrongs that they committed, I am not convinced that they yet accept responsibility for them. Instead, they appear to blame their social workers and child therapist, Bunko-Ruys. My reading of the transcripts of the preliminary inquiries

and of the trial, and my viewing of the comments made by Dueck and Bunko-Ruys during the videotaped interviews of the children, demonstrate that the children were led to believe that they were not responsible for their sexualization. They were repeatedly told that their inappropriate sexual activity was the responsibility of their alleged perpetrators.

[21] I mention this to illustrate that it is neither kind nor helpful to children to instill in them these kinds of questionable views. Until a person, even a child, begins to take responsibility for his or her actions, there is little likelihood that long-term therapy or counselling will be of much benefit. In my respectful view, this case demonstrates that the years of therapy the children received from Bunko-Ruys, provided them with few lasting benefits. Instead, it appears to have harmed them.

[22] The reader cannot be faulted for wondering how any reasonable person could have believed and acted upon the bizarre allegations I outlined previously. Not only was the nature of the allegations bizarre, but the fact that it implicated 16 individuals was of itself bizarre. These individuals had little in common other than the fact that some were related by blood or marriage and some were, or had been, foster parents. The individuals charged included several unrelated mothers who had their own children. Some of these mothers were pregnant during the time that some of the assaults charged against them were alleged to have taken place. None of these children had ever been abused. One of the plaintiffs was an aged grandmother who was practically blind and had limited mobility. Some of the plaintiffs had been approved as foster parents and had successfully parented many other foster children who made no allegations of abuse.

[23] The ritualistic and satanic aspect of the allegations was the only possible explanation of why so many apparently normal people would perpetrate such unspeakable acts on young children. But there was not a shred of evidence that the

plaintiffs were members of a cult, that they practised witchcraft, or that they were involved in any other type of satanic or ritualistic practices. The defendants knew that the natural parents of the [R.] children were deaf and that Peter Klassen had fondled two neighbour girls. But the defendants never seriously paused to consider that it was highly unlikely that such a large number of apparently normal people would conduct themselves in the fashion alleged. Nor did the defendants ever seriously consider that such unlikely allegations were false, even though they knew that the children were extremely dysfunctional and often told lies.

[24] What makes the defendants' conduct toward the plaintiffs even more astounding, is that the horrific allegations of the [R.] children were not restricted to the 16 individuals charged. Numerous other identifiable individuals, who were never charged by the defendants, were named by the [R.] children as abusing them. In fact the [R.] children named just about every individual with whom they had ever had any significant contact, such as grandparents, aunts, neighbours and other children. None of these other individuals, although most were known to the defendants, was ever investigated or charged.

[25] I make these observations to show that this was not a case where the circumstances themselves called out for an explanation by the alleged perpetrators. The reverse was true. It was a case that called out for an explanation by the defendants as to how the allegations could possibly be true. Somewhat surprisingly, the defendants maintain that they either did not believe or did not place any significance on the ritualistic or satanic aspect of the allegations. But as I have outlined, this is the only possible explanation of why so many people would do such strange things in concert as alleged by the [R.] children. As well, if the defendants did not believe this material aspect of the allegations of the [R.] children, how could any reasonable belief be placed in the truth of what remained of their allegations?

[26] Although I have attempted to set out the salient events of the case in a chronological fashion, I have been required in many instances to interrupt the chronological sequence by jumping back or ahead in time to comment on incidents that pertain to a particular issue or to a particular defendant. Unfortunately this has required me at times to repeat segments of the evidence to give context to the issue or the particular defendant under consideration. I have also deemed it necessary, from time to time, to zoom back out, so to speak, to view the case in full and proper perspective in the quest to determine if any of the defendants maliciously prosecuted the plaintiffs within the parameters of this cause of action.

[27] Unfortunately, I have no other alternative but to make many critical and negative comments about each of the defendants named in this lawsuit. This does not imply that the defendants lack repute or are incompetent. Reputable and competent people at times make mistakes and do things that they should not have done. Although such people must be held accountable for their mistakes, they can learn from those mistakes and, in doing so will be better equipped to carry on their respective professional practices. Although I have considerable empathy for the negative impact this judgment will have on each of the defendants, I have even greater empathy for the negative impact the wrongful prosecution has had on the plaintiffs. The plaintiffs did nothing to deserve what the defendants wrongfully caused to be done to them. The defendants have no one to blame but themselves for being held accountable for their actions.

Issues

[28] There are two primary issues that remain to be determined by this final judgment:

1. Whether the defendants maliciously prosecuted the plaintiffs within the meaning ascribed to this cause of action by the case law as claimed in the main action.

2. Whether the plaintiff (defendant by counterclaim) Richard Klassen, defamed the defendants (plaintiffs by counterclaim) Matthew Miazga and Sonja Hansen as claimed in the counterclaim to the main action.

There is also a secondary issue that is dealt with in this judgment. During the trial, I permitted the plaintiffs to call a rebuttal witness after the close of the defendants' case and undertook to provide my reasons for doing so in this judgment.

Background

The Civil Action

[29] The 12 plaintiffs in this action consist of a brother and sister who were charged as "young offenders", four pairs of spouses (one is deceased and two pairs were foster parents), a single woman who was a foster parent and a grandmother (now deceased) who was partially blind and physically disabled and who had been a foster parent at one time.

[30] The nub of the plaintiffs' action is a claim for damages for malicious prosecution against the four remaining defendants consisting of a child therapist, Carol Bunko-Ruys, a police officer, Brian Dueck and two prosecutors, Matthew Miazga and Sonja Hansen. The fifth defendant named in the style of cause is the estate of a former director of public prosecutions, Richard Quinney, now deceased, but the action against the estate was dismissed for the reasons set out in the non-suit judgment.

[31] The plaintiffs' action also includes other causes of action collateral to the malicious prosecution action including a negligence claim against the defendant child therapist, a negligent investigation claim against the defendant police officer and a claim that he breached the plaintiffs' s. 7 rights guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The action also alleges conspiracies on the part of the police officer and therapist to injure the plaintiffs. Although the plaintiffs have not formally abandoned their collateral causes of action, they presented their case as a malicious prosecution action and focussed their submissions on this cause of action.

The Prior Criminal Proceedings

[32] As I noted previously, the criminal proceedings involved four individuals who are not plaintiffs in this civil action. These four individuals were also charged in connection with alleged assaults on some of the same children who had made false allegations against the plaintiffs. Three of these individuals are the natural father and mother and a boyfriend of the mother of the [R.] children (the three children who testified in the case before me). These three individuals were prosecuted by means of a separate preliminary inquiry and trial. They were convicted and sentenced at trial, their convictions were upheld by a majority decision of the Court of Appeal but those convictions were overturned by the Supreme Court of Canada. The boyfriend was acquitted and a new trial was directed respecting the father and mother. The Crown did not proceed with the new trial or take any further action against these three individuals. I will refer to the criminal proceedings involving them as the "[R.], [R.] and White" proceedings.

[33] The fourth individual charged who is not a plaintiff in the malicious

prosecution case before me is Peter Klassen. He is the husband of the deceased grandmother, Marie Klassen, whose estate is a plaintiff in this action. He is the father of Dale Klassen, John Klassen, Richard Klassen and Pamela Sharpe, who are plaintiffs in this action. He had a criminal record as a consequence of his prior conviction and jail sentence in 1989 for sexually assaulting two neighbour children. Those sexual assaults consisted of the fondling of the neighbour children. He pled guilty to those offences. The two neighbour children were not implicated in any way in the subsequent sexual assault charges that were brought against him. None of the allegations against the plaintiffs were made until after Peter Klassen had been convicted for the sexual fondling of the neighbour children.

[34] Peter Klassen and 10 of the plaintiffs in the civil case before me, were prosecuted jointly by the Crown. [R.], [R.] and White, who are not plaintiffs, were prosecuted jointly as well. But the criminal proceedings involving them were prosecuted separately from the criminal proceedings involving the other eleven individuals. I will refer to the proceedings involving the 11 individuals as the "Klassen - Kvello" proceedings. Two of the individuals, who are the remaining plaintiffs in the civil action, were proceeded against as young offenders due to their ages at the time of their alleged sexual assaults against the child complainants. I will outline in more detail these three separate proceedings later.

[35] The 11 individuals prosecuted jointly in the Klassen - Kvello proceedings consisted of nine Klassen family members and two Kvello family members. The nine Klassens consisted of the two grandparents, Peter and Marie Klassen, one daughter, Pamela Sharpe, and the three sons and their three wives, Dale and Anita Klassen, Richard and Kari Klassen and John and Myrna Klassen. The Klassen family was initially represented by Daryl Labach. After the preliminary inquiry, for reasons I will outline later, the two grandparents retained their own counsel, Jay Watson. Daryl Labach

continued to represent the remaining seven Klassen family members. The two Kvellos consisted of a husband and wife, Dennis and Diane Kvello and were represented throughout by Robert Borden. The only connection between the Klassen and Kvello families is that Diane Kvello (a Kvello by marriage) is a sister to Anita Klassen (a Klassen by marriage).

[36] The two individuals prosecuted as young offenders, were a son and daughter of the Kvellos, S.K. (male) and S.K. (female). They were also represented throughout by Robert Borden.

[37] Peter Klassen eventually pled guilty to one count of sexual assault against each of the three [R.] children and against C.H., a child not included as one of the eight foster children I referred to previously. The assaults alleged by C.H. were against Peter Klassen only and he was not charged respecting them until November 1991. The nature of the allegations consisted of sexual fondling, similar to the nature of the unrelated sexual assaults of the two neighbour girls for which he had previously pled guilty. The assaults alleged against him by the [R.] children were of a much more serious nature and included some of the bizarre things I related previously.

The Related Judgment Respecting Non-suit Motions

[38] A few weeks ago, in a lengthy judgment dated October 27, 2003, *Kvello v. Miazga*, 2003 SKQB 451, [2003] S.J. No. 650 (QL) (Q.B.), I reviewed the law pertaining to this case in the context of non-suit motions brought by the defendants. The detailed analysis of the law set out in that interim judgment is an integral part of my ultimate decision in this case. I will only repeat the portions of it which are required to give context to my conclusions in this final judgment. But I adopt, as if repeated in this final judgment, the observations I made and the conclusions I reached in the non-suit judgment

about the law and the collateral causes of action. It should accordingly be read in conjunction with this judgment.

[39] At the time I wrote the non-suit judgment, I was required to consider the evidence adduced in this case up to that point to determine, in effect, whether the plaintiffs had made out a *prima facie* case against each of the then five defendants. In other words, I had to determine if a reasonable trier of fact (a judge or a properly instructed jury) could find in the plaintiffs' favour on the basis of the uncontradicted evidence then before me. Because this case requires the drawing of inferences of fact from other facts established by direct evidence, I was required to determine whether the inferences of fact relied upon by the plaintiffs could reasonably be drawn by the trier of fact from the direct evidence. It would have been inappropriate for me at that stage to have made any actual findings of fact. In para. 47 of the non-suit judgment, I observed that I would confine my comments on the evidence to a few examples of the nature of the evidence I considered in concluding that the plaintiffs had made out a *prima facie* case.

[40] I held that the plaintiffs had met the required evidentiary threshold respecting each of the defendants in the lawsuit except for the estate of Richard Quinney. The non-suit motion respecting his estate was allowed and the action against it was dismissed. The non-suit motion respecting the false imprisonment cause of action was allowed and that cause of action was dismissed. The trial then proceeded against the remaining four defendants on all the remaining causes of action. Each of them, with the exception of Carol Bunko-Ruys, testified at length. Further documents were adduced into evidence and the plaintiffs called a rebuttal witness.

[41] I am now required to consider afresh all the evidence adduced in this case using a different evidentiary standard than before. In describing this standard, I will use the malicious prosecution cause of action as an example. But my comments pertain as

well to all the other causes of action relied upon by the plaintiffs. In this final judgment, I now have the role of the notional trier of fact referred to in my non-suit judgment. I must determine the facts of this case, the inferences of fact to be drawn from those facts and then I must apply the applicable law to these facts.

[42] By way of general comment, other than for a couple of minor clarifications I will make later, I accept all the examples of the direct evidence I referred to in my non-suit judgment as facts and I accept all the inferences I referred to in it as inferences of fact. There was nothing in the evidence subsequently adduced in this case which refuted or contradicted my description of the evidence.

[43] The onus of proof is on the plaintiffs to satisfy me that each element of the malicious prosecution cause of action has been proven against each defendant. If it is not proven against a particular defendant, then that defendant is not liable to the plaintiffs. The standard of proof is on a balance of probabilities. This simply means that unless it is more likely than not that the defendant in question did in fact maliciously prosecute the plaintiffs, that defendant is not liable to the plaintiffs.

The Facts and the Inferences to be Drawn from those Facts

Nature of the Evidence

[44] The evidence adduced through this trial was somewhat unique in that most of it consisted of thousands of pages of transcripts and documents. Many of these transcripts were of the lengthy criminal proceedings that I referred to previously including the [R.], [R.] and White preliminary inquiry, the Klassen - Kvello preliminary inquiry, the [R.], [R.] and White trial, the two appeals from it and Peter Klassen's application to the Court of Appeal respecting his guilty plea. The remaining transcripts

were of the lengthy examinations for discovery of the five defendants which were tendered almost in their entirety by the plaintiffs by way of "read-in" evidence and of portions of the examinations for discovery of some of the plaintiffs.

[45] The numerous documents tendered into evidence include medical reports, police and prosecution records, memos of various Social Services personnel, sexual abuse of children protocols, police and prosecution notes, memos, correspondence and other like documents. The remaining evidence consists of the testimony at the civil trial of some 40 witnesses and of the numerous lengthy videotaped and audiotaped interviews of the plaintiffs and numerous children that were viewed in their entirety during the trial. Many of these videotaped interviews were of the child complainants who testified at the various criminal proceedings I have related.

[46] Unfortunately, the parties were not able to agree on the preparation of common document binders. Because of this, incomplete copies of some documents were tendered into evidence by one party despite the fact that a complete copy had been tendered into evidence by another. Common document numbers were not always utilized. The reference in the testimony of the witnesses to the documentary exhibits is accordingly confusing at times.

[47] My findings of fact are based on the evidence that I have just outlined. Much of that evidence is not in dispute. The primary dispute between the parties pertains to the inferences of fact that they ask the court to draw from all the bits and pieces that make up the totality of the evidence I have just described. There is no single piece of evidence from which such inferences can be drawn. The inferences can only be drawn from the cumulative effect of the evidence as a whole and from the nature and circumstances of the case itself.

[48] It is not practical nor necessary that I comment on all the testimony and documentary evidence adduced in this case. The transcripts and the documents that were admitted into evidence speak for themselves. Much of this evidence and the testimony I heard in court is duplicitous and has marginal relevance. My task is to determine from this evidence the facts which are relevant to the legal issues raised by the litigation. In addition to relating these facts from a chronological perspective, I will attempt to illustrate what each of the parties knew or should have known at various stages of the criminal investigation and the prosecution in which they were involved.

[49] Before beginning to relate the factual details of this case, I will outline some of the difficulties with the evidence.

Difficulties with the Evidence

[50] The facts that I relate in this judgment involve in part the actions of various Social Services workers, personnel and officials. None of them testified in the case before me. The testimony of even one of these individuals would have been helpful in clarifying many of the material issues in dispute. Section 73 of *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, provides these individuals with very broad protections from being compelled to appear and give evidence in a court of law. The benefit of those protections was relied upon by Social Services in applying to quash a subpoena issued at the request of the plaintiffs against one of the senior workers. An agreement was reached however respecting the application and a letter was provided by the worker that clarified the issue in question.

[51] As well, most of the parties and the witnesses who testified at the civil trial or who gave evidence at their respective examinations for discovery, understandably had considerable difficulty recalling specific details of dates, conversations, motives, thought

processes and like matters that pertained to events that took place well over a decade ago. But I was not impressed by the inability of some of these individuals to recall even memorable and significant events. In many instances it was obvious that some of the witnesses, particularly Dueck and Miazga, were reluctant to testify about or acknowledge such events. I am not satisfied that the professed lack of recall was always genuine. In other instances, admissions against interest had to be laboriously extracted from the defendants and other witnesses through lengthy cross-examination and by reference to uncontroverted documentary evidence. This process considerably lengthened the trial.

[52] For the reasons I have outlined, some of the facts I relate often lack specific dates or other specific details because I was often not provided with reliable evidence of specific details. Although I take full responsibility for any errors of detail that I may make in relating the evidence, in some instances the details of the evidence itself may be in error.

The Manner in which the Criminal Charges Originated

[53] Some background information respecting the [R.] children is required to give the case some context. This background information was either known or was readily available to each of the defendants in this action. It explains in large part how the bizarre allegations of the [R.] children were given credence and how the travesty of justice occurred.

[54] [M.R. 1], [M.R. 2] and [K.R.] were born into a dysfunctional family. [M.R. 1], the oldest, was born on October 18, 1979. [M.R. 2] and [K.R.] were twins and were born on March 4, 1982. Their parents, [D.R.] and [H.R.] were deaf mutes, they were alcoholics, they did not get along well together and they neglected their three children. [H.R.] was a prostitute and regularly brought three or four male customers home with her

at a time. She acquired a boyfriend, Donald White. The children, at an early age, were exposed to unhealthy sexual activity in their birth home. They realized that they did not have good parents and they had little use for their mother who seemed to have no time for them.

[55] Their father attempted to parent them but was incapable of doing so. They were left on their own to do whatever they wanted to do. [K.R.] relied on [M.R. 2] for support and [M.R. 2] in turn relied on [M.R. 1] for support. In many ways, [M.R. 1] was the parent figure for them and he exercised a high degree of control over them. Social Services intervened and provided a degree of supervision of the children in the birth home to compensate for the neglect they suffered at the hands of their parents.

[56] [M.R. 1] says that he was sexually assaulted on several occasions by his natural father. He in turn sexually assaulted his sisters and his sisters in turn acted out sexually with one another. It appears that the whole [R.] family was dysfunctional and likely sexually perverted. The [R.] children were apprehended by Social Services in February 1987 and placed in foster care. At that time [M.R. 1] was seven and his sisters were almost five. Social Services chose the Dale and Anita Klassen foster home as the home in which to place the [R.] children. Dale and Anita Klassen had previously been assessed and approved as foster parents by Social Services. They had taken in foster children for some time without incident before the [R.] children were placed with them. Anita Klassen had been sexually assaulted as a child and, because of this, she advised Social Services that she did not want any children who had been sexually assaulted to be placed with her. She was concerned that her own experience would make it difficult for her to deal with an abused child.

[57] For some unexplained reason, Social Services ignored this request and, without disclosing to Dale and Anita Klassen that the [R.] children had been sexually

abused and were sexually dysfunctional, placed them in the Klassen home. It soon became evident to the Klassens that the children were abnormal and constituted a real parenting challenge. They required constant supervision to keep them from inappropriately touching one another and others. They created problems at school that were so outrageous that [M.R. 1] and [M.R. 2] were eventually assigned special supervisors to monitor their "touching problem" as it was termed by their therapist, Bunko-Ruys, when she became involved later on. In [M.R. 1]'s case, the supervisors even had to be with him in the washroom to prevent him from sexually abusing other children.

[58] Dale and Anita Klassen did what they could, within the limited resources available to them, to parent the [R.] children. At the time the [R.] children were placed with them, they had two of their own children, T.K., 8, born July 31, 1978, and J.K., almost 4, born March 17, 1983. The Klassen family treated the [R.] children as their own by involving them in all their family activities and outings. Their social contacts with others, including their extended families, were limited by the extreme "off the wall" conduct of the [R.] children, particularly [M.R. 1]. When they did get together with other family members outside their home, the conduct of the [R.] children was such that they usually had to cut their visit short and get them back home before they were told to leave.

[59] Anita Klassen repeatedly requested assistance from Social Services but, in the main, her requests were ignored. She did get some relief by means of "respite" workers and school supervisors. But she nevertheless was called to the school regularly to deal with problems relating to [M.R. 1]. She had to deal with [M.R. 1] being kicked out of school and kicked off the bus. She had to arrange for taxi transportation for [M.R. 1] and then deal with the irate drivers. She had to deal with the police when [M.R. 1] set fires and assaulted other children. She had to take the [R.] children for medical examinations and psychological assessments.

[60] The Klassens had to try to keep [M.R. 1] under supervision at all times to try and keep him from touching his sisters. At night, they had to try to keep him from sneaking into his sisters' bedroom. On one occasion, [M.R. 1] put a butter knife in [K.R.]'s vagina. On another he sexually assaulted [K.R.] and other girls in the playground. On another, he pushed [K.R.] out in front of a moving vehicle causing her to suffer serious facial and limb injuries that required hospitalization. Finally, the Klassens could take no more of this and advised Social Services that they could no longer care for [M.R. 1]. They requested that [M.R. 1] be removed from their home, but were prepared to continue to parent his sisters. The Klassens frequent requests of Social Services were either ignored or deferred.

[61] Notwithstanding the stress they were experiencing, they continued to care for [M.R. 1] because they had no other option except to put him out in the street. Anita Klassen became pregnant with a third child and [M.R. 1] became jealous and threatened to kill the baby, T.K. once he was born on April 1, 1989. The Klassens took his threats seriously and finally prevailed on Social Services to place [M.R. 1] in another foster home. Social Services did so on December 12, 1989, over a year after the Klassens had been requesting that [M.R. 1] be removed. He was placed with Lyle and Marilyn Thompson, a "therapeutic" foster home. [M.R. 2] and [K.R.] were left in the Klassen home.

[62] I go back a couple of years in time to relate a significant event. The [R.] children had been much happier in the Klassen foster home than they had been in their birth home. They still had some affection for their natural parents and Social Services allowed them unsupervised visits with their parents in their birth home. The Klassens were required by Social Services to facilitate those visits. On one occasion on September 21, 1987, when the [R.] children were returned after a visit with their natural father, Anita

Klassen noticed blood on [M.R. 2]'s panties as she was getting her ready for bed. When she asked [M.R. 2] about the blood, [M.R. 2] responded that her deaf daddy put his penis in her bum. Anita Klassen immediately contacted the Social Services mobile crisis unit and advised of her concern that [M.R. 2] may have been sexually assaulted. She took [M.R. 2] to the hospital as instructed and a report was provided by the examining doctor to Social Services. Two police officers attended the Klassen residence and interviewed the [R.] children. They were unable to obtain a reliable explanation for the incident. There was no suggestion from the children or from the circumstances of the incident, that the Klassens had in any way sexually assaulted or abused [M.R. 2]. On the further instructions of Social Services, Anita Klassen subsequently took [M.R. 2] to Dr. Anne McKenna to be examined for potential sexual abuse.

[63] Just prior to [M.R. 1] being removed from the Klassen home on December 12, 1989, Social Services engaged a therapist, Bunko-Ruys, to provide therapy for [M.R. 1]. Anita Klassen took [M.R. 1] to scheduled therapy appointments commencing in October 1989. This was the first involvement of Bunko-Ruys in the case. At about the same time, Dueck also became involved in the case. At the request of Social Services he interviewed the three [R.] children, likely in December 1989, about potential sexual abuse. He was unsuccessful in obtaining any "disclosures" to this effect. He made no notes or any report of this interview. It appears that Social Services had initiated an investigation of the Dale and Anita Klassen foster home and as well the Pamela Sharpe foster home, because Peter Klassen had pled guilty to the fondling of the two neighbour girls I referred to previously. All the foster children in these two homes were interviewed for "disclosures" of abuse with negative results.

[64] In order to provide some background information on what is to follow, it is necessary to relate that Pamela Sharpe had also been approved by Social Services as a foster parent several years before. One of the children placed in her home by Social

Services was a small boy (who I will refer to as "M.K."). M.K.'s mother had apparently abandoned him at birth because he had a disfiguring birth defect on his face. Pamela Sharpe accepted M.K. as if he had been her own child. She supported him throughout all the surgeries required to partially correct his birth defect. M.K. is one of the children who was pressured into making allegations of abuse against her even though he continued to deny such abuse for almost two years after he was first interviewed.

Placement of the [R.] Girls in the Thompson Home with [M.R. 1]

[65] Shortly after [M.R. 1] was placed in the Thompson home in December 1989, [M.R. 1] made a "disclosure" that he was concerned for the "safety" of his sisters who remained in the Klassen foster home because of some sexual abuse he had suffered there. He was annoyed with Anita Klassen for instigating his removal from her home and his objective was to have his sisters removed from her home as well and be reunited with him in the Thompson home. He did not appreciate being separated from his sisters whose proximity had previously provided him with opportunities to obtain sexual gratification. This "disclosure" to Marilyn Thompson was enough to rouse Social Services into action and accomplish [M.R. 1]'s objective. What followed was a frenzy of leading and suggestive interviews of all the foster children and all the natural children who lived in the Dale Klassen and Pamela Sharpe foster homes.

[66] I jump ahead to relate that on May 29, 1990, [M.R. 2] and [K.R.] were summarily removed from the Klassen home and placed in the Thompson home. The "disclosure" by [M.R. 1] was duly reported to Dueck and Bunko-Ruys. The only individuals who can give direct evidence of this and subsequent "disclosures" made by [M.R. 1] and his sisters to the Thompsons, is of course Lyle and Marilyn Thompson and the three [R.] children. Dueck, Bunko-Ruys and numerous Social Services personnel and officials were made aware of the "disclosures" of the [R.] children by Marilyn

Thompson, the new foster mother of the [R.] children.

[67] The present whereabouts of the Thompsons is unknown to the parties. Dueck testified that he had police services attempt to locate them without success, but I have reservations about the legitimacy of those attempts. The nature of these initial "disclosures" of the [R.] children and the manner in which they were made or obtained is, especially in the unique circumstances of this case, of critical importance. It has a significant bearing on the legitimacy of the investigation, the charges and the prosecutions. It was also of critical importance to the defence of all 16 individuals charged with the criminal offences. It has a significant bearing as well on the determination of issues raised by this civil case. Accordingly, the evidence of the Thompsons, tested by cross-examination, would have been of considerable assistance to me. Later on, I will relate how the potential evidence of the Thompsons in this regard was in the main kept from the scrutiny of defence counsel and the court on the basis of Miazga's objections.

[68] I did hear the uncontradicted evidence of the three [R.] children in this regard but for obvious reasons, I do not have a lot of confidence in their unsubstantiated evidence, particularly that of [M.R. 1]. For the most part, however, their evidence given at the trial before me has not been contradicted. Also in evidence are the voluminous "Thompson notes" which contain graphic details of some of the "disclosures" the children made to Marilyn Thompson prior to their videotaped "disclosures" to Dueck and Bunko-Ruys during the police investigation.

[69] The videotaped interviews of the [R.] children at the police station demonstrate graphically what "disclosures" were made to Dueck and Bunko-Ruys over a period of several weeks in the late fall of 1990. They also demonstrate the leading and suggestive manner in which they were obtained and the demeanour and behaviour the

children exhibited when making the "disclosures". Dueck's examinations for discovery read-ins and his testimony at trial illustrate that he is reluctant to admit what he had been previously told of the "disclosures" by the Thompsons. The same can be said about the examinations for discovery read-ins of Bunko-Ruys. She elected not to take the witness stand and testify at the trial. So it is not clear what was "disclosed" to her by the [R.] children, when those "disclosures" were made and under what circumstances they were made. Defence counsel for the 16 individuals charged, attempted at the two preliminary inquiries and at the trial, to obtain some of this information. But again Miazga, in the main, aggressively and successfully opposed those attempts.

[70] Nor is it clear how Social Services personnel learned of these "disclosures" or what other "disclosures" may have been made to them or passed on to them. Social Services officials and workers chose not to provide the information in their files respecting these issues to the plaintiffs. In fairness to them, however, it appears that at some point in the criminal proceedings that Miazga had made preliminary arrangements for defence counsel to view some materials at the offices of Social Services. In any event, it is known from the documents that the parties have been able to obtain, that [M.R. 1] disclosed to Nancy McGregor and Janet Kormish of Social Services that he had been sexually assaulted in two foster homes, the Dale and Anita Klassen home and the Pamela Sharpe home. Social Services personnel took [M.R. 1] to the police station to be interviewed about these "disclosures" on May 25, 1990. Dueck was apparently unavailable so [M.R. 1] was interviewed by Ronald Schindel who was then a Corporal in the Youth Division. Although Schindel testified at the trial, he had no recollection of the interview. He said he would have prepared a report of the interview. Although Dueck says he searched for the report at the police station, surprisingly he could not locate it. Fortunately, a memo dated June 4, 1990 authored by Carol Middleton, a Social Services worker, documents what transpired at that May 25 interview.

[71] The memo relates that Schindel chose not to interview [M.R. 1] on videotape. Nor would he interview [M.R. 1] in the presence of the social workers. Instead, he interviewed [M.R. 1] alone. He then called Middleton into the room to advise that [M.R. 1] was making disclosures against a large number of people who had supposedly abused him, including parents, uncles, aunts, etc. Schindel felt that [M.R. 1] was too confused to be believable and that he might be projecting a past abuse on the Klassen family. The only person Schindel was inclined to believe that might have sexually assaulted [M.R. 1], was Grandpa Peter Klassen who had previously pled guilty to fondling the neighbour children. Schindel's planned approach was to proceed with a charge against Peter Klassen if he refused to take a polygraph.

[72] The nature of the "disclosures" made by [M.R. 1] to Schindel are significant. [M.R. 1] alleged that Anita Klassen touched him on three occasions with her hand on his penis late at night when he pretended to be asleep. He alleged that J.K. (Anita's young daughter) also touched him in this manner on his penis. He said that on one occasion only, Dale Klassen had exposed his penis to him. He claimed that on two occasions, Grandpa Peter Klassen had put his penis in [M.R. 1]'s anus at Pamela Sharpe's home while several other adults were present. In response to further questions from Schindel, [M.R. 1] said that Anita Klassen often pulled the hair of the [R.] children when she was upset with them. Schindel suggested to [M.R. 1] that he was angry at Anita and it appeared that he would not mind seeing her in trouble. [M.R. 1] responded that he did not care what happened to Anita.

[73] I leave the Middleton memo for a moment to relate some other events that occurred on May 25, 1990 that are documented in a memo dated June 5, 1990, authored by Janet Matkowski, now deceased. Her memo indicates that the original complaint from [M.R. 1] included the allegation that Anita Klassen had fondled his sisters, [K.R.] and [M.R. 2], and that Dale Klassen had exposed himself to all the [R.] children. Matkowski

had a consultation on May 25, 1990 with Middleton and four other Social Services personnel. The strategy that emerged was to pick up the [R.] girls from school and place them in an alternative foster home. Social workers were also to interview T.K. and J.K. (Dale and Anita's Klassen's natural children) at school and either apprehend them or return them to their parents.

[74] Matkowski interviewed J.K. J.K. did not disclose any abuse but in fact became quite adamant that no one was touching her sexually or physically. The memo states: "She did not volunteer any information" and "became tearful when discussing 'bad touching'." Matkowski also interviewed T.K. but she was not able to obtain any "disclosures" of physical or sexual abuse from him either. But she noted that shortly after the interview began, "the tips of T.K.'s ears became red" and that as the interview progressed, "so did the redness on his ears." When he was asked whether or not anyone was touching him, he answered 'no'." He began to cry and "sobbed throughout the interview." He was too upset to return to class. Matkowski also interviewed Anita Klassen at her home and noted that she "became immediately defensive when advised of the nature of the investigation." She stated there was no abuse in her home and that "they were free to investigate."

[75] On May 29, 1990, Matkowski contacted Dale and Anita Klassen and requested they take J.K. and T.K. to be examined by Dr. Joel Yelland. The memo indicates that, "After a long period of silence, Dale agreed to do so." The memo also indicates that Dr. Yelland called and stated there were no physical signs of sexual abuse on either child.

[76] I return to the Middleton memo. It goes on to note that [on May 25, 1990], Middleton and five other Social Services personnel then met to "discuss our action from this point." It was 5:00 p.m. when it "was decided that we would continue pursuing (sic)

of this concern on Monday, May 28, 1990." On that date Middleton and two other Social Services personnel attended at Bunko-Ruys office to have [M.R. 1] "reinterviewed". The memo observes that: "The purpose of this interview was to allow me [Middleton] to hear [M.R. 1]'s disclosure and then to pursue the investigation and make a report for the Department of Social Services." [M.R. 1] enhanced some of his "disclosures" somewhat when Bunko-Ruys attempted to get further clarification from him but it appears that he forgot about other "disclosures" he had made and did not say anything to Bunko-Ruys about them. He stated that "he [was] not aware of any other sexual assaults which occurred". The memo notes however that on May 25 (presumably in his "disclosure" to Schindel) that [M.R. 1] said that C.M., a foster child living at Pamela Sharpe's home, had told him that Grandpa Peter Klassen has sex with his own daughter Pamela Sharpe.

[77] The following day, May 29, 1990, Dueck is back on the scene with five Social Services workers in a child apprehension operation to apprehend all the foster children from the two foster homes. M.K., then four years of age, was taken to the police station for an interview about potential sexual abuse at the hands of her foster mother Pamela Sharpe or her father Peter Klassen. He was presented with anatomical dolls to demonstrate what had supposedly happened to him. The videotape of the interview was viewed in the courtroom during the civil trial. Despite persistent, suggestive and leading questions, M.K. denied any abuse. The best "disclosure" that could be obtained from him was that he had a secret which he stated was that two older boys liked to hit him in his genital area.

[78] That did not satisfy Middleton so while she transported M.K. to his new foster home, she explained to him that the move was because "we were concerned about children at Pam's house and that the concern was that Grandpa touched children on their 'dinkies'." Not surprisingly, four-year-old M.K. became more compliant at this point and stated that Grandpa touches him on his dinky. Further questions elicited no more details

other than that the touching was done with Grandpa's hands. No questions were asked to determine whether this occurred while Grandpa was bathing him, changing his clothes or in some other fashion.

[79] The memo indicates that later in the day, Kormish left a message stating that [K.R.] has "disclosed" to Lyle Thompson that Anita Klassen "has a touching problem", an odd term to be used by an eight-year-old child. The memo also indicates that Peter Klassen previously pled guilty to sexually assaulting two children in Pamela Sharpe's garage. It further indicates that in December 1989, a sexual abuse investigation was done on the Pamela Sharpe and Dale and Anita Klassen foster homes and that, "No disclosures were made at this point." Middleton concludes on the basis of what is in reality M.K.'s "non-disclosure", that M.K. was sexually assaulted and should not be returned to Pamela Sharpe.

[80] It is obvious from the tone and content of the Middleton memo that Social Services personnel were dissatisfied with not only the manner in which Schindel had conducted the interview of [M.R. 1], but also with his decision not to press charges against everyone named by [M.R. 1] with the exception of Peter Klassen. It is also obvious that they were convinced that all the Klassens named by [M.R. 1] had abused him and they were not going to let any indications to the contrary shake them from that view. Their response to the Schindel set-back was to have [M.R. 1] re-interviewed by Bunko-Ruys, presumably to get more "disclosures" and to obtain an assessment that was more in line with their views. They also decided to interview all the children and the parents in the two foster homes that were implicated by [M.R. 1].

[81] Despite aggressive, suggestive and leading questions, they were not able to elicit any evidence of abuse that bolstered or supported [M.R. 1]'s allegations in any meaningful fashion. In fact the reverse occurred. Yet they chose to believe [M.R. 1] and

to disbelieve all the other children. There are no transcripts or videotapes of these interviews, but the comments in the Matkowski memo indicate that the children were pushed beyond their comfort levels, one child to the point of sobbing uncontrollably. This of itself impugns the pious concerns voiced by all the child care workers and therapists who testified in the criminal proceedings against the plaintiffs to the effect that the child complainants would be extremely traumatized by having to answer questions in court.

[82] It is obvious from the Matkowski memo and the testimony at the civil trial of some of the children who had been interviewed, that the manner in which their interviews were conducted and the intense pressure that was brought to bear on them to make "disclosures" of abuse on the part of their natural or foster parents, were far more traumatic than any court proceedings could have been. The children were taken from their parents and subjected to questioning that suggested they were not being honest if they did not admit to abuse on the part of their parents. By contrast, the court proceedings took place in a non-confrontational setting with the public excluded, the accused individuals hidden behind a screen and sympathetic judges dressed without robes. Examples that support this assessment are the trial testimonies of J.K. and S.K. who were subjected to this kind of pressure.

[83] The inferences I have drawn about the aggressive and unobjective approach taken by Social Services personnel and workers to sexual abuse "disclosures" are supported by Dueck's evidence to the effect that he was upset with the manner in which Schindel treated Social Services personnel and the manner in which Schindel conducted and responded to his May 25, 1990 interview of [M.R. 1] Dueck subsequently demonstrated his own approach and interview techniques in the videotaped interviews he conducted with Bunko-Ruys and Judy Hjertaas, both of whom testified extensively about child-court trauma at the criminal proceedings.

[84] Dueck undoubtedly learned of the Schindel interview when he was assisting Social Services personnel in apprehending the foster children on May 29, 1990. He was of the view that Schindel should have permitted Social Services personnel to attend the interview and should have put more reliance on [M.R. 1]'s allegations. He was also of the view that Schindel should have done more in regard to them. He took Schindel to task for not doing so. Had Dueck paid more heed to Schindel's assessment and properly performed his job as the investigating officer, it is unlikely that the debacle that ensued would have occurred.

The Police Investigation

[85] On June 5, 1990, within a few days of the placement of [M.R. 2] and [K.R.] in the Thompson foster home with [M.R. 1], Social Services instructed Marilyn Thompson to take the three [R.] children to Dr. Yelland for physical examinations to detect any indications of sexual abuse. Dr. Yelland is a family practitioner who performed numerous such examinations for Social Services. His testimony in the court proceedings that followed, was that he and Dr. Anne McKenna were likely the only two doctors in Saskatoon to whom Social Services referred children for such examinations. He said he had done between 200 to 400 of such exams. He described his findings in his June 7, 1990 reports to Social Services. He got his information from Marilyn Thompson and from his interviews of the children.

[86] I will discuss these medical reports in more detail later. In general terms, neither [M.R. 2] nor [K.R.] made any "disclosures" to Dr. Yelland of sexual or physical abuse. [M.R. 1] and Marilyn Thompson "disclosed" to him that [M.R. 1] had been sodomized on numerous occasions in his birth home and apparently on the most recent occasion in 1988 by Peter Klassen. He is the individual who had previously pled guilty to

the fondling type of sexual assault with a couple of neighbour girls and who is not involved in this civil action before me.

[87] Dr. Yelland's professional opinion of [M.R. 2] was that:

> . . . At the present time there is no evidence of penetration of the vagina itself and all I can say at the present time is that these findings would be consistent with sexual abuse in the form of fondling. . . .

This is consistent with the findings set out in the November 10, 1987 report of Dr. Anne McKenna who is an Assistant Professor at the Department of Paediatrics, University of Saskatchewan, University Hospital. She examined [M.R. 2] for indications of sexual abuse. [M.R. 2] was five at the time. The report was sent to Social Services who had requested Anita Klassen to take [M.R. 2] to Dr. McKenna for the physical examination. As I related before, Anita had called Social Services mobile crises unit to report her concern that [M.R. 2] might have been sexually abused by her natural father while on a visit with him.

[88] Dr. McKenna observed in her report that the child was well known to the institution due to developmental problems encountered by a "hearing child" being raised by "hearing impaired parents". There had also been concerns previously about adequate nutrition. She states that the [R.] children "were lost to followup to this institution in 1983." She says:

> I understand that the twins have been in care since February of this year [1987]. According to the foster mother, the natural mother was drinking and father could not cope with active children.
>
> On the past weekend, the twins had a visit with their father. When [M.R. 2] returned home, the foster mother noted some

> bleeding and redness in the perineum. [M.R. 2] stated to me that "my deaf daddy spanked my bumb (sic). Then he put his fingers in my bumb. It hurt."

[89] The physical examination performed by Dr. McKenna indicated that:

> . . . The hymen was intact. There was slight posterior labial fusion. On the left, there was a 2 centimeter shallow linear laceration along the labia minora. Examination of the rectum was unremarkable. . . .
>
> There is no question in my mind, given the history and the physical findings, that this child has been subjected to nonaccidental trauma of the genital area.

[90] I move forward again to 1990 and the physical examinations of the [R.] children by Dr. Yelland. This time I refer to his examination of [K.R.]. His opinion of [K.R.] was that:

> These findings are highly compatible with abuse having occurred in this child in the form of penetration of the vagina or rectum. The source of this abuse cannot be specified and may be from a penis, digital penetration, or penetration with a foreign body. . . .

His opinion of [M.R. 1] was that: "This child's rectal findings are compatible with a history of Sodomy."

[91] Dueck and Miazga relied on these medical reports as providing support or corroboration of the credibility of the [R.] children's allegations of sexual abuse that they made against the various persons charged, including the plaintiffs. I will have more to say about this later.

[92] Dueck in the meantime had made arrangements with the Thompsons for a

"chance" meeting at Taco Time so that he could reacquaint himself with the [R.] children. This meeting took place in early June 1990. [M.R. 1] recognized Dueck and came over to talk to him. Dueck told [M.R. 1] that he was glad the kids were now "safe" in the Thompson home. [M.R. 1] rose to the occasion and responded, "I only told enough to get my sisters safe. I have got a lot more to tell you about sexual abuse." Marilyn Thompson called Dueck the very next day to report that the "floodgates of information" had opened and that the [R.] children were making all kinds of "disclosures".

[93] According to Dueck's own evidence, he did absolutely nothing to try to determine how these "disclosures" were being obtained nor did he alert the Thompsons of the risk that if the "disclosures" were obtained through inappropriate or improper interview techniques, the successful prosecution of the case could be seriously jeopardized. Almost 100 pages of handwritten notes, drawings and comments came to the attention of the plaintiffs during the criminal proceedings a year and a half later. Most of the notes were made in Marilyn Thompson's handwriting and represented her representation of the bizarre and unbelievable "disclosures" of abuse made to her by the [R.] children in the mid 1990s.

[94] According to the [R.] children, Marilyn Thompson routinely sat up with them until the early hours of the morning asking them questions about what happened in their previous homes and pestering them for particulars of abuse. It is obvious that they obliged her. It is also obvious from Marilyn Thompson's notes that by obtaining these "disclosures" she was assisting Bunko-Ruys and Dueck in the police investigation of the Klassens and Kvellos.

[95] Although Dueck and Bunko-Ruys in their evidence (including the read-ins from their examinations for discovery), try to distance themselves from the Thompson notes, I am satisfied that they not only knew that these notes existed but that they knew in

graphic detail what the notes contained. Lyle and Marilyn Thompson regularly took the [R.] children to Bunko-Ruys for therapy sessions with a frequency on average of once or twice a week. Dueck met with the children and Bunko-Ruys in her office on at least three occasions and likely many more. Marilyn Thompson appeared to be motivated by the fact that she was providing valuable assistance to the investigation by passing on information of the children's "disclosures" to Bunko-Ruys and to Dueck. She met with Dueck and Bunko-Ruys on several occasions and talked to them on the phone quite often as well. It is highly unlikely that she would have kept these astounding and ongoing revelations to herself. It is also highly unlikely that she would have expended such an effort in committing these revelations of the children to writing for her own use and no other purpose. The notes consist of almost 100 pages. It is evident from the evidence that Dueck and Bunko-Ruys were given copies of the notes.

[96] From the extensive read-ins of the examinations for discovery of Bunko-Ruys, it is obvious that she has a poor overall recollection of what "disclosures" were made to her by the children or of what she may have reported of them to Social Services or to Dueck. Nor does Dueck have as good a recollection of any matters pertaining to the Thompson notes or of his dealings with Bunko-Ruys or of what "disclosures" she may have passed on to him than he has of many other aspects of the case. My previous comments respecting contrived lack of recall apply to these matters. Bunko-Ruys maintains that her sole role was to "support the children in expressing their perceptions" and that she had no role, obligation or responsibility to assess the veracity of these expressions of perceptions. Nor did she have any responsibility to caution anyone to whom she might pass on such expressions of perceptions that they may not be true. She even went so far as saying that she had no obligation to the court, or to the 16 individuals charged, to give any such caution despite the fact that she was qualified as an expert witness and testified in court on matters that would lend credibility to the "expression of perceptions" of the [R.] children contained in their sworn testimony in court.

[97] Dueck says that he was aware of the Thompson notes and of the fact that the [R.] children were making "disclosures" to Bunko-Ruys. But he says that he did not want to know about them before interviewing the children so that he would get their "disclosures" from his videotaped interviews of them. I have serious reservations about this assertion. It was obvious from his conduct of the videotaped interviews of the [R.] children and by the nature of his questions of the children, that he had previously received specific information that he was attempting to elicit from them. He knew that information came from "disclosures" of the [R.] children made previously to Marilyn Thompson or Bunko-Ruys because they were the only ones who were interviewing the children at that time. He could not have obtained it from any source other than from the Thompsons or Bunko-Ruys. Even if his assertion is true, there would be no utility in his not informing himself of what the children previously said to the Thompsons or to Bunko-Ruys. In fact, as the investigating officer, he had an obligation to inform himself of the particulars of those "disclosures" to assess the consistency or lack of it in the allegations made by the children.

[98] Dueck held himself out as an experienced interviewer of child complainants, and said he had conducted approximately 100 interviews before this case. He either knew, or should have known, that if the children had made detailed allegations before the interviews, the circumstances under which those allegations were obtained may well have contaminated the information he was about to receive. Surely, as a competent and experienced police officer with a duty to investigate these bizarre allegations, he knew that one of his main functions was to try and determine if in fact these horrible events had taken place. Trying to determine the credibility of the allegations was the most critical aspect of the investigation. If they were true, his witnesses were credible. If they were untrue, his witnesses were not credible. Another essential aspect of his investigation was to determine how the children's allegations

originated and how they were made or elicited. This in turn had a significant bearing on whether the events alleged truly occurred or were partly or completely comprised of fantasy or fabrications.

[99] The same can be said of Bunko-Ruys. She was an experienced therapist and held herself out as having expertise in dealing with sexually abused children. She testified in court as an expert in this area. She participated fully with Dueck in the child interviews, taking an active roll in asking specific questions of the children to elicit information that appeared to have been given to her previously, either by the children or by Marilyn Thompson. She also knew, or should have known, that the detailed "disclosures" of the children may have been obtained by Marilyn Thompson, who was not a professional, under circumstances which may have seriously prejudiced the credibility of "disclosures". She also knew, or should have known, that the extensive involvement of Lyle and Marilyn Thompson in this whole "disclosure" process over a period of several months before the police interviews, may have seriously contaminated the children and the truthfulness of any future allegations made by them.

[100] It must be kept in mind that this was not a case of a young child blurting out to her mother that her father had inappropriately touched her the week before. This was a case of repeated interrogations initiated by a foster parent in an attempt to obtain "disclosures" of abuse. The fact that the allegations were incredible, bizarre and named a host of adults with no common connection who acted in concert to do things that are inconsistent with human experience, would have alerted a lay person with any common sense to the necessity of proceeding with extreme caution. An experienced and competent therapist would also have been so alerted.

[101] It appears from their evidence and from the circumstances themselves however, that Dueck and Bunko-Ruys had little or no concern about these matters. Their

goal was to get as many of these "disclosures" as possible on videotape, not on investigating, exploring or even considering the veracity or reliability of them. The videotapes of the police interviews of the [R.] children formed the basis of the police investigation and the occurrence report which in turn was relied upon by Miazga. I will deal with this aspect of the case in due course.

Videotaped Interviews of the [R.] Children

[102] For over four months, Dueck sat in the wings, so to speak, waiting from a signal from Bunko-Ruys that the [R.] children were "ready to be interviewed". He knew that in the interim, they would be making "disclosures" to Marilyn Thompson. The videotaped interviews of each of the [R.] children were conducted in the "soft room" at the police station. Anatomical dolls and other props were utilized. The interviews were conducted jointly by Dueck and Bunko-Ruys, with Dueck taking the lead and Bunko-Ruys following up on his lead to elicit more "disclosures". Several lengthy interviews were conducted by Dueck and Bunko-Ruys in October and November of 1990. [M.R. 1] was interviewed three times – on October 20 and 28, and November 16, 1990. [M.R. 2] was interviewed three times – on October 21 and 28, and November 15, 1990. [K.R.] was interviewed four times – on October 21 and 28, and November 15 and 29, 1990.

[103] Each one of these interviews was viewed in its entirety in the courtroom during the trial. Although it was frustrating and exasperating to have to sit through each of them, they are likely one of the most convincing pieces of evidence in support of the plaintiffs' malicious prosecution cause of action. I made copious notes of what was said and what was left unsaid. I made detailed notes of the interview techniques that were utilized and of my perceptions of the conduct and demeanour of the children and of the interviewers themselves. It would serve no useful purpose to relate the details of these notes or to reproduce sections of the transcripts of the videotaped interviews of the [R.]

children that were prepared months later for the plaintiffs. The general comments I make apply to all the interviews of each of the [R.] children even though they apply more to some interviews than to others.

[104] The interviews depict the [R.] children, particularly [M.R. 1], as thoroughly enjoying the process. The children had a captive audience comprised of two gullible adults who hung on every word they uttered, nodding in unison at each "disclosure". [M.R. 1] often insisted that he be allowed to demonstrate what he was saying. He drew diagrams and demonstrated with knives that he had brought with him. The only time the children's interest in performing for their gullible interviewers began to wane, was when they began to get tired. Their interest then turned to requesting treats or invitations to eat out at a restaurant. The children were repeatedly lead by their interviewers with questions that suggested the answers they sought of them. It was obvious, in many instances, that the responses of the children were "off the cuff" fabrications to provide details or explanations for their previous fabrications.

[105] None of the "disclosures" of the children were gently or even obliquely questioned or challenged but were accepted at face value. Nor were the children properly cautioned about the need to tell the truth. In fact, they were repeatedly told by Dueck that kids do not lie and that he believed everything they said. They were also told repeatedly by Dueck that, as a police officer, he would get the adults that did these things to them and put them in jail, a comment that was welcomed by the children. Both Dueck and Bunko-Ruys intervened to divert the children from talking about their own "touching problems" and encouraged them to talk about the adults who had abused them and who were responsible for their "touching problems". On at least one occasion, in an interview of some of the other children from whom Dueck had obtained "disclosures", he referred to himself, Bunko-Ruys and the child being interviewed as part of the "team" that was going to get these perpetrators of abuse.

[106] The conduct and demeanour of the children during the interviews were in stark contrast with the reserved conduct and demeanour that is exhibited by most children when they are being asked questions about potential sexual abuse. Although I did not observe the conduct or demeanour of the children when they testified at the preliminary inquiries or at the trial, I did read all the transcripts which included not only their testimony and comments, but everything that was said to them. I have a great deal of difficulty accepting that these particular children were as traumatized by the court proceedings as has been made out by the defendants. As I will relate in more detail later, every concession conceivable was made to accommodate the "needs" of the children for frequent breaks during the day and adjournments to another day when they became tired. The transcripts reveal that the children expressed little fear or reservation of being required to testify when asked specifically if they were afraid or uneasy.

[107] I strongly suspect that if the children involved in the case before me were in fact traumatized, it was because they were finally confronted by someone who did not accept their allegations at face value and who had the audacity to gently challenge these allegations. They had to admit to lying when confronted with the glaring inconsistencies in their evidence. They found it difficult and stressful to attempt to maintain their fabricated allegations. The fact that the testimony of the children degenerated into a jumble of inconsistencies, not only in the testimony of one to another, but within each child's own testimony, was a strong indication that their allegations were fabrications. As mentioned before, the children were given numerous breaks, court was often adjourned to another day, and many other considerations were afforded to the children to minimize any discomfort, stress or trauma that might accrue to them by being required to testify. As one defence counsel observed in one of the proceedings, the length of time it took to complete the cross-examination was not because it was lengthy, but because of the numerous and lengthy breaks taken to accommodate the children.

[108] It must also be borne in mind that the Crown, over the objections of the plaintiffs, had convinced the courts to adopt special measures to minimize the potential trauma to the children. The public and the media was excluded from the proceedings when the children testified. The alleged perpetrators were hidden from the children by being huddled behind a screen. The judges doffed their gowns before conducting the proceedings. The children were given a special room in the judges' chambers and presumably entered and left the courtroom by the same doorway as was utilized by the judge. Their wishes for breaks were honoured and the court proceedings were adjusted to suit their convenience. One cannot fault the plaintiffs from perceiving that the deck was stacked against them.

[109] Like other judges of this court, I have conducted many sexual assault trials involving child complainants from age 4 to 17. My colleagues and I take time to develop a rapport with the child and take steps to ensure that child feels secure in the courtroom. This includes protecting them from contact with the persons accused by them and precluding aggressive, intimidating or unfair cross-examination. In most instances, as in the subject case, the prosecutor has previously familiarized the children with the courtroom and the court process and the children have the benefit of a support person and a "soft room".

[110] In only three cases has a child in my courtroom been "traumatized" on the witness stand. In one case it was because a high school class sat in during testimony given by a young teenager who had been sexually assaulted by her stepfather. Sending the class on to another courtroom where another trial was in progress solved the problem. In another case, it was because the child had fabricated a story that began to unravel when reliable independent evidence established that the story could not possibly be true. In the third case, it was because a parent was attempting to use the child as a sword in a

matrimonial matter by counselling the child to give false evidence. Fortunately, the child had the courage to refuse to do so.

[111] I relate this information to illustrate that the prosecutors deliberately overplayed the "trauma" concern to focus the criminal court proceedings on the "needs" of the children rather than on the validity of the allegations and the guilt or innocence of the plaintiffs. In some of the proceedings there was likely more testimony adduced by the Crown about the children's needs than there was about what the children said was done to them. As well, the "trauma" concern was successfully relied upon to supposedly explain the wholesale inconsistencies in the evidence of the children.

[112] There are several reasons why the videotaped interviews of the [R.] children that I have described are so critical to the case before me. The first is that the interviews by and large constitute the entire police "investigation" conducted by Dueck. His detailed police report was based primarily on the information he obtained from these interviews. He carried out virtually no other investigation respecting the allegations of the children and relied almost exclusively upon these allegations to found the charges brought against the plaintiffs. He considered that these allegations were corroborated in a fashion by the Yelland medical reports and by the similarity between the allegations of abuse of one [R.] child to that of the other. It should have been evident to him, however, that by the time he interviewed the children, they had made many of their "disclosures" as a group to Marilyn Thompson and may well have done so in this fashion to Bunko-Ruys. They also played together every day and had ample opportunity to discuss their allegations among themselves, particularly over the extended time involving several weeks when they were being interviewed.

[113] Dueck and Bunko-Ruys spent weeks interviewing the children. Dueck spent more weeks reviewing the videotaped interviews to make notes of them. From

these notes, he quite properly allocated the allegations into two categories. The first identified the allegations made by each individual [R.] child. The second identified the allegations made against each individual alleged perpetrator. This exercise lead to his detailed occurrence report. Although Dueck is to be commended for such attention to detail, he seems to be of the view that this exercise in itself constitutes an investigation. I am not convinced that this is so. The colloquial "garbage in, garbage out" principle of computer usage is instructive. If the allegations were fabrications, the categorization or segregation of those fabrications could not change the nature of them into credible complaints. They would still be fabrications, albeit categorized ones.

[114] If Dueck had utilized the process he adopted to critically assess the credibility or feasibility of the allegations, that process could truly constitute part of his investigation. Anyone sufficiently interested and willing to invest the time in such an exercise, would reject his contention that the similarity of the children's allegations corroborated their evidence. The inconsistencies that are readily discernable by means of such exercise, cannot stand together.

Medical Reports

[115] The medical reports of Dr. Yelland were relied upon by Dueck and Miazga as corroboration of the [R.] children's allegations of sexual abuse they made against the persons to be charged. The professional testimony of Dr. Yelland and his opinion evidence as an expert was adduced and relied upon by Miazga at each of the preliminary inquiries and at the trial. This reliance was, for the most part, unfounded for the reasons I will outline. It is first necessary however to review in detail the medical reports that Dr. Yelland gave to Social Services respecting each of the [R.] children which I previously referred to in general. These reports were available to and known by each of the defendants.

[116] Dr. Yelland had assessed the [R.] children in June 1990 within a few days of [M.R. 2] and [K.R.] being moved out of the Klassen home and into the Thompson home. He reassessed the children a year later on May 31, 1991, presumably at the request of Social Services on the suggestion of Miazga. By this time, Dueck had already made arrangements for the arrests of the plaintiffs, after being advised by Miazga to proceed with the charges. Dr. Yelland sets out his findings and opinions in his reports dated June 1, 1991 respecting [M.R. 2] and [K.R.] and in his report dated June 7, 1991 respecting [M.R. 1].

[117] In his court testimony, Dr. Yelland confirmed that complete physical examinations were done in each case on each of the children and that he was looking in particular for signs of sexual abuse which often involves physical abuse. I will refer to the marked difference between the 1990 report and the 1991 report respecting each child.

[118] In his 1990 report respecting [K.R.], then eight, he states that she made no disclosures of sexual abuse to him but reported an itchy bum that she had had for three months. She had only a remnant of hymen present. He noted that:

> These findings are highly compatible with abuse having occurred in this child in the form of penetration of the vagina or rectum. The source of this abuse cannot be specified and may be from a penis, digital penetration, or penetration with a foreign body.

There is no indication that [K.R.] disclosed any sexual abuse.

[119] In his 1991 report respecting [K.R.], he states:

> . . . Vaginal exam in (sic) abnormal for a remnant of the hymen only being present. There is marked injection of the perivaginal area. The vaginal diameter is 1.2 cm. . . . The rectal tone is decreased with fecal staining being present. . . . and the diameter is over 1 cm on digital exam. There are no scars in the rectal area, but there are mild rogous changes present. . . .

[120] In his 1990 report respecting [M.R. 2], then eight, he states that:

> . . . There is marked redness and injection of the labial minora area. She has scarring of the introitus. The hymen itself is intact and the rectal tone is normal.
> . . .
>
> This child has some minor redness of the labia minora area and scarring of the introitus. This may by (sic) suggestive of local irritation of the area secondary to infection or to manual manipulation. At the present time there is no evidence of penetration of the vagina itself and all I can say at the present time is that these findings would be consistent with sexual abuse in the form of fondling.

There is no indication that [M.R. 2] disclosed any abuse.

[121] In his 1991 report respecting [M.R. 2], he states that:

> . . . The vaginal examination is abnormal for the hymen being torn in a cresentic (sic) fashion with a total diameter of 7 mm. At the edge of the right labia she has cleft-like 2 mm tear at the edge of the hymen and the labia minora. She has a 3 cm scar in the anterior aspect of the rectum. The rectal tone is decreased and it is over 1 cm in diameter. There are increased markings in the rectal margins. There is also marked redness and agglutination in the labia minor area. . . .

> This child has both physical scars and vaginal and rectal findings that are compatible with her history of multiple sexual abuse.

[122] In his 1990 report respecting [M.R. 1], then 10, he states:

> . . . The rectal area showed soiling and excoriation present. There was decreased rectal tone. . . .
>
> This child's rectal findings are compatible with a history of Sodomy. At the present time there are no scars or lacerations suggestion (sic) recent abuse. The decreased rectal tone could be secondary to this cause. . . .

[123] In his 1991 report respecting [M.R. 1], he states:

> . . . The penis is noncircumcised (sic) and the scrotum is normal in appearance. There is marked decrease in rectal tone with soiling present. There is a .5 cm scar in the anterior edge of the rectum. . . .
>
> . . . He also has decreased rectal tone and scarring in the rectal area that is compatible with the history of sexual abuse that he reveals.

[124] Dr. Yelland's practice as indicated in his reports and his subsequent testimony in the civil case, was to obtain a "history" of any sexual abuse from the child brought in for examination and from the care giver who brought the child in. The 1990 reports demonstrate that neither [K.R.] nor [M.R. 2] gave a history of sexual abuse. The 1990 report respecting [M.R. 1] demonstrates otherwise. He, or Marilyn Thompson, obviously told Dr. Yelland about [M.R. 1]'s sexual abuse allegations. Somewhat surprisingly, Dr. Yelland makes unequivocal statements of fact about this alleged abuse

that is not demonstrated by his physical examination. He states:

> . . . This child has been extensively sexually abused in the past. This includes Sodomy. The child states that his most recent episode occurred in 1988 when grandpa Klassen put his penis in [M.R. 1]'s bum. There is an extensive history of Sodomy of this child in the natural parents' home that involved the father, mother, and boyfriends. . . .
>
> . . . This child does have a tendency to dress up in women's clothing.

These statements in the report were not qualified to simply represent what [M.R. 1] or Marilyn Thompson told him. There were stated as a matter of fact or opinion. The sole basis for them was [M.R. 1]'s unchallenged and unsubstantiated abuse allegations. These statements should not have been included in a supposedly professional report of a physical examination that is to be relied upon as independent evidence of the person alleging the abuse.

[125] The 1991 reports of the physical examinations by Dr. Yelland of the children, then 9 and 11, that I have outlined, demonstrate that there was more genital evidence of sexual abuse in 1991 than there was in 1990. This is so particularly for [M.R. 2] in that she no longer had an intact hymen or good rectal tone. Yet the children had not had any contact with their alleged perpetrators between the 1990 and 1991 examinations. In the 1991 examinations, Dr. Yelland found evidence of several scars on the children that in his opinion had been caused by cuts and burns. He had not noticed these scars the previous year despite doing a complete physical examination on each of the children.

[126] It is obvious from his 1991 reports that his observations about the scars were based on the allegations made to him by the children. It is also obvious from his 1991 reports that the girls were making allegations of horrendous incidents of past sexual

abuse despite the fact they had made none in 1990. The inescapable conclusion was that [M.R. 1] was continuing to abuse them in the Thompson home. Although the 1990 reports show that [M.R. 1] had "disclosed" one incident of abuse by Peter Klassen in 1988, the 1991 reports show that he had vastly expanded his repertory of abuse incidents and the number of the perpetrators who had abused him.

[127] In his 1991 medical reports, Dr. Yelland again makes statements of fact that are based solely on the unsubstantiated allegations of the children rather than on his physical examinations. In his report respecting [K.R.] he states:

> . . . These children are victims or (sic) ritual and sexual abuse. The initial ritual and sexual abuse had occurred in their natural parents' homes. They were subsequently sexually abused in the Klassen's foster home prior to this present placement with the Thompson family.

He goes on to say that all three children were sexually and ritually abused and that [K.R.] described in graphic detail some of the ritual abuse that had occurred from infancy. [K.R.] related being burned and cut with knives, having knives inserted into her bum and vagina, and ingesting blood, feces, urine and raw fish. He says that all three children described in graphic detail the sexual abuse that occurred which includes oral, vaginal and genital contact. He also observes: "The older brother, [M.R. 1], has had intercourse with both girls."

[128] In his report respecting [M.R. 2], he makes similar observations about the ritual and sexual abuse suffered by the children at the hands of their birth parents and Donald White and also at their previous foster home involving Dale and Anita Klassen and a Diane Klassen [presumably Diane Kvello]. Again it involved oral, vaginal and anal sex and cuts and burns. In his report respecting [M.R. 1], Dr. Yelland makes similar

observations and particulars of the ritual and sexual abuse at the hands of his natural parents and stepparents, including being deliberately burned by Anita Klassen. He also notes that [M.R. 1] has had sexual activity with his younger sisters.

[129] Each of the reports indicates that he is shown and notes physical scars which he states are consistent with the allegations of abuse by the children. He obviously is not told, nor does he appear to inquire, about any injuries the children may have suffered as a result of falls, school or home accidents and the like. Presumably, the serious injuries [K.R.] suffered when [M.R. 1] pushed her under the moving car would have accounted for many of the scars referred to by Dr. Yelland in his report.

[130] I make these rather lengthy observations to illustrate that the reliance on these medical reports by both Dueck and Miazga as bolstering the credibility of the children who made these incredible allegations, was not reasonable. They knew as a fact that [M.R. 1] was having sexual relations with his two sisters while he lived at the Klassens. They also knew as a fact that those relations continued while he lived at the Thompsons. They also knew as a fact that [M.R. 1] was sexually active with many other children. They knew as a fact that [M.R. 2] and [K.R.] were sexually active with one another and with others. For the most part, the medical reports merely confirmed that the children were sexually active. The findings outlined in the reports also suggested that the children became more sexually active after they left the Klassens and were placed together in the Thompson home. They also suggested that the injuries that had healed were suffered when the children were young and living with their birth parents.

[131] Yet Dueck and Miazga deliberately disregarded these facts known to them that strongly inferred that it was the sexual activity between the children themselves that provided the so-called independent medical evidence upon which they relied. Instead, they seized on the incredible allegations of the children, rather than on the known facts,

to infer that the medical evidence pointed to abuse on the part of the 12 plaintiffs.

[132] It appears that Dr. Yelland ignored the most feasible source of the abuse as well. In my respectful view, his involvement in establishing the Saskatoon Sexual Abuse of Children Protocol and the volume of his practice that resulted from Social Services referrals, clouded his professional judgment and blinded him to any other conclusion than one that was consistent with the wild stories the children were telling him. As well, his clouded judgment may have impacted on his testimony in the court proceedings which followed. I will comment on his involvement and testimony in these proceedings later.

Initial Prosecutorial Advice Obtained by Dueck from Hinz

[133] Dueck zealously continued to pursue his case despite the advice he had previously sought and obtained from Terry Hinz, an experienced Crown prosecutor at that time. Dueck consulted Hinz likely in early April 1991, a short time before Miazga became involved in the case as a prosecutor. In general terms, Dueck left the detailed occurrence report that he had prepared with Hinz to review and asked him to advise him of the merits of his case. The occurrence report set out the bizarre allegations of the [R.] children against the 16 individuals Dueck proposed to charge with various offences. It also named other individuals whom Dueck did not intend to charge.

[134] Hinz took the report home on the weekend to read it over. He advised Dueck that if the children's allegations were true, he was dealing with a murder case and needed to investigate the case further to find evidence that would support such bizarre allegations. Dueck obviously did not like the advice he received so he ignored it and sought out another prosecutor who would be more sympathetic to his cause and point of view. I will have more to say about the Hinz consultation later.

Prosecutorial Advice Given by Miazga to Dueck

[135] Both Dueck and Miazga have distanced themselves from the decision to lay the multitude of charges that were brought against the plaintiffs. Dueck claims he sought out the advice of the prosecutors because this was a difficult case and he did not want to lay charges without advice. He claims he was advised by Miazga as to what charges should be laid before he swore the informations that set out the charges. Miazga claims that although he reviewed the file and Dueck's police report, it was Dueck who decided who and what to charge. Miazga told Dueck to go ahead with the charges if he "believed the children".

[136] I find this advice somewhat puzzling as it fails to address a material element of what is required before a police officer can lawfully proceed to lay an indictable criminal charge. The charges laid in this case were indictable criminal charges. It is trite law that charges respecting indictable criminal offences cannot lawfully be laid unless the person who lays them has reasonable grounds to believe that the individuals charged have committed the indictable offences charged. See s. 504 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, and the wording of the form of an information set out in Form 2 of s. 849. Charges are laid by means of swearing an information in Form 2. This involves not only the subjective element of an honest and personal belief, but also the objective element of reasonable grounds for the holding of that belief. Accordingly, simply holding the belief is not sufficient to justify the laying of the information. There must be reasonable grounds for that belief.

[137] I realize that an experienced prosecutor like Miazga would not overlook such a material requirement of advising an investigating officer respecting the laying of charges that pertain to indictable criminal offences. But I can find no evidence that Miazga ever considered this issue or cautioned Dueck about it. Surely in the

circumstances of this bizarre and convoluted case that implicated at least 16 individuals, those involved in pursuing the case would have made an assessment of not only their respective beliefs but also of the grounds on which those beliefs could be reasonably founded. It may have been assumed that reasonable grounds existed, but considering the case in perspective as I have previously outlined, the apparent lack of reasonable grounds should have been seriously questioned, discussed and addressed, particularly by Dueck and Miazga.

[138] It was at this juncture of the case that the considerable quantity of exculpatory evidence should have been considered to determine what impact, if any, it had on any reasonable grounds that could be relied upon. The determination of whether reasonable grounds existed could not be determined without a consideration of the exculpatory evidence as well as the inculpatory evidence. By way of example, there were the protestations of innocence by numerous individuals, many in the course of voluntary police interviews granted without the benefit of legal counsel. As well, the credibility of the allegations made by the [R.] children were bizarre and most unusual and by their very nature were extremely suspect. The credibility of the allegations and of the [R.] children themselves was the most critical issue of the case. The police report was comprised solely of these allegations. They alone were what was relied upon to lay the proposed charges against the 16 individuals who had been singled out, and then to prosecute them on those charges. It was known even then that the [R.] children were not truthworthy.

[139] It was also at this juncture, in the unusual circumstances of this case and the potential for disaster if the allegations were false, that the potential frailties in the Crown's case should have been at least summarily considered.

[140] Before advising Dueck, Miazga did not avail himself of the opportunity to view any portions of the videotaped interviews of the children to observe their

demeanour or to assess the potential strengths or weaknesses of their allegations. Nor did he appear to consider the manner in which such critical allegations were "disclosed" to determine whether the evidence to be given by the children might have been contaminated by the significant involvement of individuals who were not professionals in obtaining those "disclosures". Again, this was not a simple and seemingly credible case of a child relating an inappropriate sexual touching or an assault by a parent or relative. I have great difficulty accepting that Miazga would have advised Dueck to proceed against so many people on so many serious allegations without even a preliminary consideration of these issues and a cursory look at the children on whom he would almost exclusively have to rely later at trial.

[141] Miazga obviously intended to eventually view the videotaped interviews of the children and to personally interview them prior to the preliminary inquiry. But in the unique circumstances of this case, Miazga could not responsibly or reliably determine the merits of the case before he had done one or the other. To advise Dueck to lay charges without doing so was not only irresponsible, but is a strong indication of malice. This was not a case where a snap decision had to be made because of urgent circumstances.

[142] The charges had been contemplated for a year after the initial "disclosures" were made. Dueck had deliberately deferred laying charges to give him time to obtain as many "disclosures" as possible from the children on which to base his proposed charges. There were no concerns about the immediate arrests of the plaintiffs. Dueck was not planning on arresting them until mid July when their children would be apprehended as well. Deferring the charges for a few weeks until these matters could be properly considered would not have jeopardized the case and would likely have prevented the disaster that followed.

[143] It appears that Miazga did not really care whether there was a case worthy

of prosecution or not. His attitude, and the rationale underpinning his advice, appeared to be that the children had uttered these allegations, Dueck had said he believed the children, so criminal charges should follow. If it turned out that the charges had no merit, let the courts sort the mess out later. But it was at this juncture, in the unusual circumstances of this case and the evident potential for disaster if the allegations were false, that the frailties in the Crown's case should have been seriously reviewed and considered. What should also have been considered is what impact the charges and the criminal proceedings that would follow, would have on the welfare of the children who would necessarily be drawn into it as crucial witnesses. There is no evidence that this even entered the minds of any of those involved in the prosecution despite their subsequent protestations that the children were being extremely traumatized and harmed by having to testify in court.

[144] Dueck and Miazga were aware of the Saskatoon Sexual Abuse of Children Protocol I will describe later. Both had participated in meetings with Social Services personnel and in particular with Bunko-Ruys. The exhortation in the Protocol to believe the allegations of children, undoubtedly had a bearing on the advice Miazga gave Dueck respecting the feasibility of the charges.

[145] I jump ahead to relate some significant events that subsequently took place in Red Deer respecting the arrests of the plaintiffs who lived in Red Deer and the apprehension of their children.

The Involvement of Social Services in Red Deer

[146] Sheila Verwey testified at the trial. She is a social worker with Alberta Family Services in Red Deer and has been involved for several years in child welfare investigations. She has had considerable experience in interviewing sexual assault

perpetrators as well as sexual assault victims and has taken several courses in this regard.

[147] Her supervisor was contacted on April 28, 1991 by a social worker with Social Services in Saskatoon. Alberta Family Services was asked to assist Saskatchewan Social Services respecting a police investigation. In particular it was asked to apprehend the eight children of three groups of parents who lived in Red Deer and who would be arrested in July for sexually assaulting children. Verwey was one of three workers assigned to the case. Alberta Family Services was not given much detail about the sexual and physical assaults alleged against the parents of these children. But the allegations included sexual and physical assaults against their former foster children, against other children and against their own children. Alberta Social Services was asked to take no immediate action but to be ready to get involved when the arrests were made.

[148] By May 27, 1991, Alberta Family Services personnel had heard nothing further from Saskatchewan Social Services personnel so the supervisor called Saskatoon to see what was happening. Dueck returned the call and left a phone message on June 21, 1991 to advise that he was coming to Red Deer on June 24, 1991 to interrogate all the Klassens who lived there. Dueck and his partner James Walker, met at the police station in Red Deer with Verwey and the other Alberta Family Services social workers assigned to the case the day before he interviewed the plaintiffs. Verwey observed that Dueck appeared to be confident of what he was doing and also appeared to be excited and enthusiastic. He felt that he had an important case and that he was in the middle of a big investigation.

[149] He gave the Alberta Family Service social workers some background information to the effect that foster children had made allegations of ritualistic and satanic sexual abuse involving the individuals, including the Klassens families and their former foster children and their own children. Dueck stated that the eight Klassen

children were also victims of the abuse and this was why he wanted them apprehended, examined medically for indications of abuse and then interviewed for "disclosures". The social workers were uneasy about the circumstances that Dueck was relating to them and they asked him a number of questions. Presumably to allay their concerns, Dueck gave them a copy of his occurrence report to review.

[150] The social workers went back to their office and discussed the matter for some time. They were unsure of their role as they were uncomfortable with what they had learned in the meeting and did not come to the same conclusions about the case as did Dueck. Dueck used the term "ritualistic abuse" to describe the events which, to Verwey, meant organized events that followed the same pattern. The Alberta Family Services social workers were not sure that they had been given enough information to justify the apprehension of the children. Verwey testified that part of the role of a social worker is to be open-minded and to screen information respecting alleged abuse even though proof of abuse is not expected. The Alberta Family Service social workers were not saying that what the foster children in Saskatoon were alleging was completely impossible, but they did not come to the same conclusions as did Dueck on the information he provided to them.

[151] The Alberta Family Services social workers acknowledged that their role was not to pass judgment on Dueck's investigation. But they were having trouble evaluating the bizarre allegations of the children and even after considering his occurrence report, still could not come to the same conclusions about their allegations as had Dueck. Verwey discussed her concerns with Cst. Richard Taylor, one of the Red Deer police officers whose assistance Dueck had enlisted, and asked him whether the Alberta Family Services had to agree that the sexual assaults alleged had in fact occurred.

[152] Verwey and Taylor concluded that this was not a question that had to be

addressed by Alberta Family Services. If arrest warrants were sent from Saskatchewan, Alberta Family Services had to carry out its support role of Saskatchewan Social Services that was not asking Alberta Family Services for its input. I pause to observe that Taylor was in effect telling Verwey that she need not be concerned about lack of honest belief or reasonable grounds if Dueck could get a warrant from Saskatchewan. It was Dueck's problem whether or not there were grounds, not her problem. Taylor said that it would be inappropriate for Saskatchewan Social Services to ask if Alberta Family Services agreed with the case. The role of Alberta Family Services was to apprehend the eight Klassen children, interview them about potential abuse and have them examined medically for indications of abuse. Verwey read the report again at home but it did not make her feel any less uncomfortable. The material did not answer her questions. She was distressed about the case and about the children she would be required to apprehend. I realize that Verwey's evidence about what Taylor said would be hearsay evidence if the truth of what he said was relied upon by the plaintiffs. They rely only on the fact it was said. This is similar to the evidence adduced by the defendants that I will outline later as to what the preliminary inquiry judge said to the prosecutors.

[153] Dueck advised Verwey that he would get the warrants that would be required to effect the arrests and that he would be back very shortly to effect the arrests. He wanted the Klassen children to be apprehended and interviewed concurrently with the arrests of their parents. Apprehension orders were then obtained by Alberta Family Services from an Alberta judge. The orders were sought and obtained not on the basis of the alleged abuse of the children, but on the basis that the parents were being arrested and the children would need guardians.

[154] Verwey apprehended the three children of Richard and Kari Klassen: K.K, eight, K.K., two and B.K., six months, from their home and took them into foster care on July 10, 1991, the date the other children were apprehended and the arrests of the

plaintiffs effected. Verwey testified that Richard and Kari Klassen were cooperative but shocked, angered and full of disbelief at what was happening. She observed that their three children were the focus of their home as evidenced by drawings on the fridge and the walls and the presence of toys. Kari Klassen was crying and concerned about giving instructions to the social workers for the care of her six-month-old baby. She sent toys and other things along with the child. Richard and Kari Klassen did not want their children to see them being taken away by the police. Other social workers apprehended the three children of Dale and Anita Klassen. The two children of John and Myrna Klassen were not apprehended or interviewed because they were holidaying with friends.

[155] The six Klassen children who were apprehended were subsequently interviewed on videotape and sent for medical examinations by doctors who were advised to look for signs of sexual abuse. The examinations revealed no indications of sexual abuse. Nor did the interviews of the children indicate or suggest that they had been sexually abused or that they had any knowledge of the sexual abuse of others. Alberta Family Services had no concerns about the potential sexual or physical abuse of the children nor any other protection concerns. The children were ultimately unconditionally returned to their parents once the parents had been released in Saskatoon from custody.

[156] Because Alberta Family Services did not have any protection concerns respecting the two children of John and Myrna Klassen who were not available to them, they did not apply for protection orders respecting them. All this information, including the results of the examinations and interviews, were communicated back to Saskatchewan with the views of Alberta Family Services personnel that the children had not been sexually or physically abused. Verwey had been advised that Dueck was in charge of the Saskatchewan Social Services investigation. Yet he never advised Alberta Family Services that some of the same children that he was asking them to apprehend, had been medically examined the previous year for potential sexual or physical abuse

with no indications being found. The documents tendered at trial establish that the two oldest children of Dale and Anita Klassen, T.K. and J.K., had been medically examined by Dr. Yelland for potential sexual abuse at the insistence of Saskatchewan Social Services with no indication of abuse being found. This is just another indication of Dueck's pre-judgment of the case and his desperate attempts to find some reliable evidence of abuse.

[157] Prior to being contacted by Dueck, Alberta Family Services had received no complaints respecting any of the Klassens or their children. In the two months that followed the apprehension, they received some malicious calls. After a preliminary investigation, they decided there was nothing to investigate further. Alberta Family Services has had no further contact by Dueck since July 10, 1991 nor has any Saskatchewan prosecutor ever contacted them about the case. To Verwey's knowledge, no one has ever asked for the videotapes of the children's interviews. Nor has anyone asked for a report or letter summarizing the outcome of the investigation. Again, this is an example of the mind-set of those involved in the investigation. This is indicative of how the defendants consistently ignored and suppressed any exculpatory evidence despite finding no support for the allegations they so diligently pursued.

[158] Verwey testified that Alberta Family Services has subscribed to a protocol similar to the Saskatoon Sexual Abuse of Children Protocol. One of its guidelines is that one must assume that child complainants are telling the truth. She testified that the protocol came about as a response to a generally held attitude prior to the 1980s. The attitude was that nice people do not assault children so that when children report sexual abuse they must be lying about it. The Alberta protocol was put in place to address the fact that sexual abuse does happen to children. She says that the protocol is a guiding principle, not a blanket statement. Children do not usually fabricate allegations out of the blue so their allegations must be taken seriously. But it is essential to then proceed with

an investigation to see what the allegations are all about. She says that the procedure followed is that after the initial complaint, the police are contacted, all the potential witnesses are interviewed and the dynamics of the family, including its strengths and weaknesses, are considered.

[159] In cross-examination, Verwey acknowledged that there was no note on the screening form (the intake memo form used by Alberta Family Services) that the Klassen children were victims of abuse as well as the other children involved. But she understood, from the information given to them by Dueck, that this was the assertion that had been made to them. She acknowledged that even though the children's allegations of abuse were very strange and unusual, and even though there were a large number of people implicated, the allegations could be true. But she said their concern was not that such things could not happen. Rather, their concern was that Dueck was coming to the conclusions he did based on the information he had. She assumed that he likely had other information to support his conclusions, but she was still of the view that the assessment of the child complainants was of critical importance.

[160] I found Verwey to be an honest and courageous witness. She is obviously an objective, competent and experienced social worker.

[161] Verwey's assessment of the underlying purpose and objective of a child sexual assault protocol, one that acknowledges the necessity for a proper investigation of sexual assault allegations of children, comports with common sense and is in accordance with what has been the law of free and democratic countries for years. No allegation from anyone, be they an adult or a child, can be taken blindly at face value and then acted upon without question. Doing so risks disastrous consequences including the wrongful conviction of innocent individuals. This case is a prime example of what happens when gullible child care workers, police officers and prosecutors ignore time-tested legal

principles and throw common sense to the wind. The plaintiffs were wrongfully and needlessly put at risk for lengthy terms of imprisonment up to a maximum of 10 years on each offence charged against them. They faced that risk for one and a half years until all the charges were stayed by the Crown. In the decade since the stays, they have lived under a cloud of suspicion. It is no credit to any of the defendants that the plaintiffs did not have to endure the jail terms for which they were put at risk.

[162] I move back to relate Taylor's evidence. He testified that he received a call from Dueck in June 1991 asking for assistance. Taylor's intended role was to locate the members of the Klassen family that Dueck proposed to charge so that Dueck could interview them at the police station. He was given a "*Reader's Digest* version" of the case which he understood involved fourteen children who had made "disclosures" of abuse. I pause to note that the 14 children had to have included the Klassen children in Red Deer because at that time there were at most the three [R.] children and four others whose abuse allegations were being relied upon to found charges.

[163] Taylor says he was advised by Dueck that after the Klassen adults had been arrested, the children in their homes would be apprehended for interviews. He said that Alberta Family Services would be responsible for interviewing the children. Dueck came to Red Deer on June 24, 1991 and the interviews of the Klassen adults took place on June 25, 1991. Taylor was not asked to assist in the interviews. Richard and Kari Klassen went voluntarily to the police station for their interviews as did Dale and Anita Klassen. Dueck later advised Taylor that none of the Klassens had made any inculpatory statements and that they had refused to answer any questions on the advice of counsel. The videotaped interviews clearly establish that this is false.

[164] Dueck called Taylor on July 9, 1991 to let him know that the charges had been laid and to request Taylor to make arrangements for the arrests of the Klassens on

July 10, 1991. Taylor was aware that Alberta Family Services would be apprehending the children. It is significant that he declined the request of Alberta Family Services to give evidence on their court application for the apprehension warrants respecting the Klassen children because he had no evidence to give that the children were at risk. The six Klassen adults were arrested on July 10, 1991 and at 7:00 p.m. on that date, a Justice of the Peace came to the remand centre and remanded them all for six days. After that period they were transported to Saskatchewan and spent another night in custody there. Taylor confirmed that all the medical examinations of the children who had been apprehended were negative for indications of abuse and that no disclosures had been made by them during their interviews.

[165] Taylor confirmed the importance of keeping a notebook and of updating the central registry file as soon as possible. He says that Dale Klassen was at the police station for over an hour when he was interviewed by Dueck. This tends to confirm the testimony of Dale Klassen that the short videotaped interview of him that was viewed in court, represented only a small segment of his full interview with Dueck. I will comment on this later.

[166] The evidence of Verwey and Taylor strongly suggests that neither Dueck nor Saskatchewan Social Services had any concerns about the safety of the eight Klassen children. If they had such concerns, surely they would have apprehended them in May or June when they first contacted Alberta Family Services rather than waiting until mid July to do so. This is just another indication that Dueck's only concern about the eight Klassen children was the possibility that he could get "disclosures" from them against their parents to bolster his non-existent case. Long before he interviewed the adult plaintiffs he had made plans to lay charges and obtain arrest warrants against them. It is obvious that he did not go to Red Deer to investigate the allegations against them or to try to determine the truthfulness of them. His only purpose was to try to get confessions from

the plaintiffs to strengthen his case.

[167] Taylor testified that he has no note of, and cannot remember, any discussion with Verwey or Alberta Family Services personnel respecting concerns about the validity of the charges. Where her testimony differs from Taylor's, I accept Verwey's. She was concentrating on the nature of the abuse allegations and whether they constituted grounds for the apprehension orders that Dueck was seeking. Taylor was concentrating on the mechanics of the arrests, not on the substance or strength of Dueck's case. In Taylor's view, such matters were no business of Alberta Family Services.

[168] He left child apprehension issues up to Alberta Family Services. He never considered questioning the charges and likely did not notice or place any importance on the reservations that were held by Verwey or other Alberta Family Services personnel. Verwey was very specific about their concerns and was able to give the most reliable account of those concerns.

[169] It is significant to note that even before the arrests were made, Dueck's case had been seriously questioned by two very competent and unrelated individuals. The first was by Hinz, an experienced prosecutor. The second was by Verwey, an experienced social worker whose concerns were also shared by her fellow social workers. It is obvious that Dueck gave no consideration to these concerns expressed to him by these professional individuals. The fact he chose to ignore the warning flags that these concerns should have been to him, indicates that he had tainted tunnel vision and a closed mind about his case.

Miazga's Involvement in Dueck's Investigation

[170] Miazga's best estimate of his first meeting with Dueck is in late April or in

early May of 1991. The evidence of Verwey establishes that Saskatchewan Social Services contacted Alberta Family Services on April 28, 1991 and Dueck himself called on June 21, 1991. It is more likely than not that Miazga first met with Dueck in April 1991 shortly after Dueck had met with Hinz. It is not clear whether Dueck contacted Alberta Family Services on his own initiative or on the suggestion of Miazga. Due to the professed inability of either of them to recall much in the way of detail respecting their meetings, what they discussed, what they determined to do or what they even thought about the proposed charges, there is little evidence before me to address these questions.

[171] But it is known that after receiving advice from Miazga, Dueck did a few things that were suggested to him. Up until then, his investigation consisted solely of eliciting and recording the "disclosures" of the children. At the suggestion of Miazga, he obtained a couple of search warrants respecting the related [R.], [R.] and White potential charges. It appears from the evidence that he made arrangements to interview the plaintiffs in Saskatoon and Red Deer because of Miazga's suggestion to do so. It would also appear from the evidence that he made arrangements to obtain the June 1991 Yelland medical reports respecting the [R.] children because of Miazga's suggestion to do so.

[172] I mention these matters to illustrate that Miazga had gotten quite involved in the case several weeks before the charges were laid and the plaintiffs were arrested. He does not deny this because he has no notes of his dealings with Dueck and only a poor recollection of them. He does remember that Dueck never told him of the previous consultation with Hinz for his opinion of the case. Nor did Miazga become aware until after the prosecution had long been concluded of what Hinz had advised Dueck. Dueck's withholding of this significant event from Miazga is a strong indication of malice. But despite the lack of evidence from Dueck and Miazga on what they considered and discussed among themselves about the case, surely Miazga would not have proceeded to

prosecute the case without more than the incredible allegations of the children. Surely he would have made inquiries of Dueck to learn what had come out of Dueck's investigation of the matters that he had previously suggested to him.

[173] In so doing, unless Dueck deliberately withheld all this information, Miazga would have known of the disappointment Dueck suffered in failing to obtain any confessions from the plaintiffs, in failing to obtain any "disclosures" from the apprehended children in Red Deer, in failing to obtain any medical reports with physical findings consistent with the sexual or physical abuse of [K.R.] or [M.R. 2] by any known person except [M.R. 1] and in failing to recover any useful evidence from the searches that were conducted pursuant to the search warrants.

[174] Miazga would also have known of the strange turn of events evidenced by the Yelland medical reports that set out more indications of sexual abuse of [M.R. 2] and [K.R.] than had been reported in the Yelland medical reports the year before. Miazga and Dueck knew that none of the plaintiffs or any others who had been charged, had access to the [R.] children during the time interval between the physical examinations of the [R.] children in 1990 and 1991. Miazga would likely have known, or should have known, from his discussions with Dueck or from a review of the police file, that Schindel had previously assessed [M.R. 1]'s "disclosures" as being vindictive toward Anita Klassen and projecting previous abuse suffered in his birth home to the Klassen family. Miazga would also likely have known, or should have known, from his discussions with Dueck or from viewing the police interviews of the persons charged, that Kari Klassen had recently made a similar perceptive observation even though she could not have known that Schindel had made a like assessment previously. She had made this observation to Dueck as a possible explanation for the allegations of abuse made against the Klassens in response to his unrelenting demands that she provide him with an explanation as to why the children would make such allegations.

[175] As Dueck did not tell Miazga about the negative reception he received from Hinz, he likely did not tell him either about the negative reception he got from Alberta Family Services. But it is astounding that Dueck and Miazga never reconsidered the merits of their case when all Miazga's investigative suggestions turned up negative. The little bit of investigation Dueck did actually weakened, rather than strengthened, their case. As well, the number of Dueck's prospective complainant witnesses with the potential of corroborating the wild allegations of the [R.] children had just dropped from fourteen to eight.

[176] I have a concern about the lack of evidence on another issue. Dueck, Taylor or Miazga never gave any explanation as to why three couples, who were presumed innocent until proven guilty according to law, were kept locked up for a full week before being released on bail. These three couples were obviously not considered a threat to society nor to their children because no steps had been taken to arrest them or apprehend their children for a year and a half after they were implicated in the so-called abuse "disclosures". None had any criminal record except for Richard Klassen who had a past record of unrelated offences that went back to his youth. Nor was any explanation given for the stringent non-contact provisions imposed on the plaintiffs as a condition of their release from custody. In fairness to Miazga, he did consent to an amendment of the non-contact provisions so that the families could spend Christmas together. But the way they were held in remand and were treated in remand in Saskatoon, are indications of malice.

Police Interviews of the Plaintiffs

[177] I step back to comment in more detail on the police interviews of the plaintiffs I referred to earlier. Four of the six plaintiffs who lived in Red Deer, Dale and Anita Klassen and Richard and Kari Klassen, agreed to be interviewed at the police

station there without the benefit of legal counsel. Walker, Dueck's assistant, interviewed Kari Klassen. Dueck interviewed all the others. Four of the six plaintiffs who lived in Saskatoon, Dennis and Diane Kvello and their two children, S.K. and S.K., also agreed to be interviewed at the police station there without the benefit of legal counsel. In the course of the interviews of the adult Kvellos, Dueck obtained their consent to interview their children about the offences alleged against those children. At the time of the subsequent arrests, Dueck interviewed the male Kvello child and as well either interviewed the female Kvello child or made arrangements for the interview of her. Although these two Kvello children had also been charged with sexual offences alleged against them, they were not asked questions about those allegations. Instead, they were aggressively questioned about being abused by their parents.

[178] It is significant that Dueck made arrangements to interview the plaintiffs only after being prompted to do so by Miazga. The interviews were scheduled less than a month before the plaintiffs were arrested. Long before Dueck made arrangements to interview the plaintiffs, he had made up his mind to charge them. This is evident from the evidence as a whole and from the statements he made at that time to others, including Alberta Family Services personnel and to the plaintiffs whom he interviewed.

[179] Quite understandably, Dueck's objective in conducting videotaped interviews of those he planned to charge, was to obtain confessions from them. But again, it is significant that he did not question or have the two children questioned for the purposes of obtaining a confession from them. Instead, they were questioned in an attempt to obtain "disclosures" that they had been sexually abused by their parents. Had such "disclosures" been obtained, it is apparent that Dueck and Miazga would not have proceeded with the young offender charges but would have arranged with Social Services to apprehend them, and call them as witnesses against their parents on new charges to be added to those already proposed. The contents of the Matkowski memo introduced into

evidence inferred as much.

[180] It was obvious from the nature of Dueck's "investigation" and from his timing and conduct of the videotaped interviews of the plaintiffs, that he had no genuine interest in hearing anything that they might say to suggest that the potential charges he had previously determined to lay were unfounded. The evidence establishes that he ignored all other exculpatory evidence even though it was available to him. The evidence also strongly suggests that he would continue to ignore any such evidence that might later become available to him. He had committed himself to pursue the charges and he was not prepared to risk his reputation or jeopardize the case he had immersed himself in for the past year and a half by backing off at this juncture. His questions of the plaintiffs were not designed to elicit their responses to specific allegations of abuse. They could not do so because Dueck would not give them anything specific to respond to. His questions consisted primarily of bullying them with a question they were incapable of responding to, namely why the children would lie about being abused by them.

[181] The fact that he was more interested in pursuing the charges than learning the truth of the allegations is also demonstrated by his involvement with Alberta Family Services in Red Deer. He arranged for them to apprehend all the biological children of the plaintiffs who lived there with the objective of obtaining "disclosures" of sexual abuse and medical examinations that indicated abuse. Although he told others that the children had been sexually abused by their parents, he knew that they were not apprehended on this basis because there were no grounds to do so. Interviews and examinations of the children had previously indicated that they had not been abused, a result that was inconsistent with the wild allegations of some of the [R.] children. The only basis for the apprehension of the children in Red Deer was that they would have no one to care for them once their parents were arrested as planned.

[182] As he had done with the Kvello children, the interviews of the Klassen children took place on the very day that the plaintiffs were arrested on the charges that had been laid a few days before. Even if these child interviews had resulted in "disclosures", they could not have been taken into account by either Dueck or Miazga in determining whether there were reasonable and probable grounds to lay the charges. This was so because Dueck had already laid the charges on the advice of Miazga several days beforehand. In like fashion, even if the adult interviews had resulted in confessions, they could not have been taken into account in determining the issue of whether reasonable and probable grounds existed because Dueck and Miazga had already made up their minds to lay the charges and I am satisfied that nothing the adults said could have swayed them from their objective to pursue them.

[183] During the trial, counsel for Dueck pointed out that I had stated in my non-suit judgment that "many" of the plaintiffs who were interviewed by the police had offered to take a polygraph test. He is correct that this term is somewhat misleading and should be clarified. To provide the context in which this statement was made I reproduce the two relevant paragraphs from the non-suit judgment:

> [52] The mental and emotional state of each of the [R.] children, particularly [M.R. 1], was abnormal to the extent that [M.R. 1], and to a lesser degree, [M.R. 2], required almost constant supervision, not only at school but elsewhere including their home. The children made allegations against numerous perpetrators and although most of these allegations were not pursued by Dueck, he caused charges to be laid against some 16 individuals, two of whom were themselves children of one of the couples who were also charged. The proceedings against these two children proceeded under the then *Young Offenders Act*, R.S.C. 1985, c. Y-1. Many of the plaintiffs who were charged volunteered to be interviewed without the benefit of counsel. All who were interviewed denied they had sexually abused the

> children and many offered to take a polygraph test in an attempt to establish their innocence.
>
> [53] For many of the reasons enunciated by Klebuc J. in *Klein v. Seiferling, supra,* that I have previously outlined, I conclude that a reasonable person might consider this evidence to constitute a warning flag that called for further investigation and an attempt to obtain evidence to support or discredit the bizarre allegations of the [R.] children. The evidence indicates that the police investigation consisted almost entirely of interviews of the children to obtain and document their disclosures and interviews of the plaintiffs in an attempt to obtain their confessions. Lacking a proper or at least a more thorough investigation of the horrendous and serious allegations made in this case against so many different individuals, I am satisfied that a reasonable person could conclude, in these circumstances, that the plaintiffs were probably not guilty of the host of serious offences alleged against them.

[184] I will elaborate on my previous reference to the polygraph test. The majority of the plaintiffs who did offer to take a polygraph test did so in response to the suggestion made by Dueck and his assistant that they do so. The offer of at least one of the plaintiffs was conditional on the reliability of the polygraph and on the confirmation of his legal counsel. But Dueck, becoming frustrated with the plaintiffs' repeated denials of the sexual assault allegations, withdrew his offer to make the polygraph test available to the plaintiffs. It appeared to me from viewing the videotapes, that the plaintiffs had called his bluff and he did not want to run the risk that the polygraph tests might prove to be in the plaintiffs' favour. Not all the plaintiffs who voluntarily submitted to an interview by Dueck or his assistant were given the option of taking a polygraph test. Having clarified this issue, I move on to make some additional observations about the police interviews conducted by Dueck.

[185] Dueck's lengthy grilling of the plaintiffs, particularly Anita Klassen and

Diane Kvello, was far more aggressive, intimidating and humiliating than was required in the circumstances. It is one thing to grill a suspect and to use deception and other disgusting aspects of subterfuge that are at times a necessary aspect of police investigations when dealing with sophisticated, case hardened or street-smart criminals. But the pressure he brought to bear on these two female plaintiffs in particular, was reprehensible. To expedite the description of the interviews, I will comment on the things in common about both interviews even though the interviews were conducted separately and in different provinces.

[186] Both of the former foster mothers unconditionally volunteered to be interviewed by Dueck on videotape at the police station without the benefit of counsel. Anita Klassen's interview took place in Red Deer. Diane Kvello's interview took place in Saskatoon. Both consented to answer Dueck's questions without contacting a lawyer even though they were cautioned by Dueck at the outset of the interview about their rights to remain silent and about their rights to legal counsel. They were also told that anything they said could be used in evidence against them. Each of them was cooperative and each gave the appearance of having nothing to hide but simply wanting to get to the bottom of what was being alleged against them. Dueck gave them very few details of the allegations so they were never advised of what the children were saying they did to them. Instead, Dueck kept on telling them that the children who had been taken out of their respective foster homes had been in therapy and had made multiple "disclosures" of abuse against them.

[187] Dueck told the two female plaintiffs that children never lie about these things and that other children, who had also said they had been abused by them, were corroborating one another's evidence. He kept on asking the plaintiffs how they could explain why young children would make such allegations against them if they were not true. Understandably, the poor women could not provide him with a satisfactory answer

other than to deny that they had ever done anything to any children, including the foster children that had been taken from their respective foster homes. Neither of the women gave any indication throughout that she was being untruthful in her answers nor was holding back any information.

[188] What was particularly reprehensible and uncalled for was that Dueck probed each of them about the personal details of sexual abuse they had experienced as young girls, telling them that those who are sexually abused become sexual abusers. As will be noted later in this judgment, this was a proposition that was advanced throughout the subsequent criminal proceedings by the testimony of the various child care givers in an attempt to justify the sexually abusive conduct of the [R.] children. Rather than telling Dueck to mind his own business as they had every right to do, the two women cooperated further with him and provided him with the details he sought of the sexual abuse they had previously suffered. It is difficult to conceive how the details of the sexual abuse that these two women had suffered years before had any relevance to Dueck's police investigation. His purpose in pursuing this line of question was to put these women under even more emotional stress by getting them to relive the traumatic experiences they had attempted to put behind them.

[189] Dueck succeeded in putting so much stress on Anita Klassen that she burst into tears and sobbed uncontrollably. When he kept bullying her she tried to run out of the room. He kept calling her back and when she returned, she curled up into a fetal position, still sobbing. In desperation, she finally requested to see a lawyer. Dueck ignored her repeated requests and kept on questioning her and demanding that she give him an explanation as to why these children would make such allegations if they were not true. She was so upset by the time he had finished with her, that he drove her to the sexual assault centre. It was obvious that she was in no condition to walk home. She was later admitted to the psychiatric ward in the hospital.

[190] Diane Kvello said that after the videotaped interview was concluded, Dueck told her that if she did not plead guilty, he would charge her children. Although I do not base any of my conclusions on this evidence, it is likely true.

[191] Dueck's grilling of Richard Klassen and Dennis Kvello was just about as brutal. He also tried to get them to admit that they had been sexually abused as children. Fortunately he was not successful in putting them under the same degree of emotional pressure he had brought to bear on Anita Klassen and Diane Kvello. It appears that only a part of the interview of Dale Klassen was videotaped so a comparison cannot be made as to what kind of pressure was exerted by Dueck on him. Except for Richard Klassen, who had a criminal record as a youth for unrelated offences, none of the other plaintiffs had police records and were just normal ordinary people trying to make a living like other normal ordinary people.

[192] Dale Klassen claims that Dueck interviewed him for twenty to thirty minutes during which time he kept on telling Dueck that he had been advised by his lawyer not to say anything. Dueck ignored this information and kept on questioning him. Dale Klassen continued to deny that he had abused any children. The videotape is of much shorter duration than twenty minutes and simply depicts Dueck advising Dale Klassen of his legal rights and Dale Klassen responding that he was advised by his lawyer not to say anything. The tape does illustrate however, that Dale Klassen told Dueck of the instructions he had received from his legal counsel. Despite this, Dueck keeps questioning him, saying that he is obliged by the prosecutors to interview him. Dale Klassen finally asks if he can go and the tape ends.

[193] It was put to Dueck in cross-examination that he had consistently denied Anita Klassen's *Charter* rights to counsel. He replied that his understanding of the law at

that time was that once he had given a person the right to counsel and the person declined that right, he could keep on asking the person questions as long as the person kept talking to him. He said it mattered not whether the person continued to make repeated requests for counsel. Dueck had no qualms about stating that this was his practice. The kindest observation I can make about Dueck's interview practices, is that they demonstrate his tendency to push his powers as a police officer to the limits while affording those in his custody with the most minimal compliance as possible with their basic *Charter* rights. For this reason alone, I prefer the evidence of Dale Klassen that most of his interview by Dueck was not videotaped.

[194] By way of stark comparison, the interview of Kari Klassen by Walker, Dueck's assistant, was done in a much more humane fashion. Although he pressed her for a confession and challenged her with questions, he did so in a gentlemanly manner and without putting undue pressure on her. As was the case with Diane Kvello and Anita Klassen, Kari Klassen seemed stunned and taken aback by the fact that child abuse allegations had been made against her. Kari Klassen had never been a foster mother. She consistently denied ever abusing any children, including any of the foster children who had made allegations against her. When she was asked for an explanation as to why the children were saying these things if they were not true, she responded with the only possible reason she could suggest. She had been advised that the children had been neglected or abused in their birth home and she suggested that they likely were making such allegations because they resented their parents.

[195] In fairness to Dueck, I recognize that a police officer has a difficult job and it often involves unpleasant duties. Even competent police officers are sometimes zealous and aggressive. But there are limits to the degree of zeal and aggression that is acceptable in a free and democratic society. Dueck's conduct in this case exceeds that limit. He often asked the plaintiffs he interviewed to respond to hypothetical fact situations that he posed

to them that were not representative of the circumstances of the incredible allegations they faced. As an example, he asked some of the plaintiffs if they would disbelieve their children who ran into the house and reported being sexually assaulted in the park. What is particularly troubling about his zeal and aggression against the plaintiffs is that it so tainted and distorted his so-called investigation, that he was not willing to even consider the possibility that the plaintiffs could be innocent of the horrible allegations made against them. I conclude that his "investigation" was in reality no investigation. The conduct he exhibited in his interviews of the plaintiffs is a strong indication of malice.

Charges Laid Against the Plaintiffs

[196] The particulars of the various criminal charges laid against the plaintiffs are somewhat convoluted because some were withdrawn and replaced by other charges and some were not laid until after the court proceedings had commenced. My summary is not strictly accurate but is adequate for the purposes of this judgment.

[197] All the plaintiffs, except those who were proceeded separately against as young offenders, were jointly charged on July 6, 1991 with sexual assaults against [M.R. 1], [M.R. 2] and [K.R.], (the foster children in the Dale and Anita Klassen home), over a seven-year period of time between January 1, 1984 and December 31, 1990.

[198] Pamela Sharpe was additionally charged on the same date with sexual assault against T.H., (a foster child in her home), over the same period of time.

[199] S.K. (male) and S.K. (female), the two plaintiffs who were proceeded with as young offenders, were jointly charged on the same date with sexual assault against [M.R. 2], (a foster child in the Dale and Anita Klassen home), over the same period of time.

[200] S.K. (male) was additionally charged on the same date with sexual assault against S.L.H., (a foster child in the Kvello home), over the same period of time.

[201] John and Myrna Klassen and Dennis and Diane Kvello were additionally jointly charged on July 15, 1991 with sexual assaults against each of S.W.H., S.E.H. and S.L.H., (foster children in the Kvello home), over the same period of time.

[202] S.K. (male) and S.K. (female) were additionally jointly charged on July 18, 1991 with sexual assault against [M.R. 2], (a foster child in the Dale and Anita Klassen home), over the same period of time.

[203] S.K. (male) and S.K. (female) were additionally jointly charged on November 19, 1991 with sexual assaults against [K.R.], [M.R. 2] and S.W.H., (the two [R.] children being foster children in the Dale and Anita Klassen home and S.W.H. being a foster child in the Kvello home).

[204] S.K. (male) and S.K. (female) were additionally jointly charged on November 26, 1991 with sexual assaults against [K.R.], [M.R. 2] and S.W.H., (the two [R.] children being foster children in the Dale and Anita Klassen home and S.W.H. being a foster child in the Kvello home).

[205] Pamela Sharpe was charged on November 27, 1991 with sexual assaults against M.K. and T.K., (foster children in her home).

Arrests of the Plaintiffs

[206] As indicated previously, the arrests of the plaintiffs and the apprehension of their children were orchestrated by Dueck and Social Services well in advance of the

planned charges and arrests and long before Dueck travelled to Red Deer, Alberta to interview the plaintiffs who lived there. It was only because the plaintiffs and their children who resided in Red Deer were outside the jurisdiction of Saskatchewan Social Services, that the assistance of Alberta Family Services personnel in Red Deer had to be secured. The six plaintiffs who lived in Red Deer were arrested on July 10, 1991.

[207] The trauma associated with the arrest of Richard and Kari Klassen from their homes was accentuated by the stress of seeing their children apprehended from them by Alberta Family Services. It was also an emotional experience for Dale Klassen when he was arrested at his home and his three children were taken from him. Anita Klassen was arrested at her place of employment. John and Myrna Klassen were arrested at their home after their children had left for an outing with friends. During the time these three couples were remanded in custody in Red Deer for six days, the wives were held together and the husbands were held together. The three couples were all returned to Saskatoon where they spent another night in custody before being released on bail. They then had to find a means of getting back home to reconnect with their children who had been placed into foster care.

[208] Some of the six Red Deer plaintiffs testified that they were well treated while in custody in Red Deer but were given a much "cooler" reception by the police in Saskatoon by being treated with contempt and being placed for the night in a cold cell without a bunk.

[209] The remaining six Saskatoon plaintiffs, Pamela Sharpe, Marie Klassen and the four Kvellos, were also arrested on July 10, 1991. They too suffered the humiliation and trauma of being arrested. Marie Klassen had to be taken to the police station in her wheelchair. She is now deceased and the desire that she carried to her grave was that she and her sons and daughters-in-law would be exonerated of the criminal charges in the

eyes of the public. Dennis Kvello is also now deceased. The proceedings affected him so deeply that he had his company switch him from his position as a residential electrician to one as a commercial electrician so that he could avoid coming in contact with any children. He was no longer able to touch his own children and lost the desire to have sexual relations with his wife, circumstances that continued until his death.

[210] S.K., one of the young offenders testified that she was interviewed when she was arrested by Dueck and by Bunko-Ruys in an attempt to get her to make "disclosures" of sexual abuse on the part of her parents and her brother. She felt particularly "threatened" when Bunko-Ruys "tried to make me say that my parents abused me". She testified that Bunko-Ruys told her twice that if she did not admit this, she (Bunko-Ruys) would lose her job. She denied any abuse or inappropriate touching on the part of her brother or anyone else. She broke down on the witness stand as she related this incident that occurred over 12 years before.

[211] In fairness to Dueck and Bunko-Ruys, it appears from the Social Services memos, (one of the few that the parties were able to secure from the defendants' records and tender into evidence), that the interview was conducted by Walker and by Matkowski. Surprisingly, there is no videotape of this interview even though it was conducted by a police officer in the soft room furnished with a video camera and in the presence of a therapist or social worker. As well, Bunko-Ruys did not take the witness stand to deny this assertion respecting her. It is also troubling that the videotape of this interview cannot be located. This is particularly so when other potentially damaging pieces of evidence which should have been in the possession of police cannot be found. I refer to the Schindel report as an example. S.K. may be mistaken about the identity of her interviewers, but I am satisfied that her vivid memory of what she recalls was said to her is accurate. Even if it was Matkowski who made the comment, the point is that it demonstrates the level of pressure that was routinely put on children by Social Services personnel or by the police to "disclose" abuse on the part of their family members in

cases where no such abuse had ever occurred. Such conduct is reprehensible and is a form of child abuse committed by agencies to whom children are entrusted.

The Reliance on the Saskatoon Sexual Abuse of Children Protocol

[212] The defendants all rely heavily on the Saskatoon Sexual Abuse of Children Protocol in their attempts to justify why they took a subjective rather than an objective view of the children's allegations. There are two such Protocols, one released in 1986 (before the allegations that are the subject of this case were acted upon) and the other in December 1991 (after the prosecutions based on those allegations were begun). The difference between them is so insignificant that I will restrict my comments to the provisions of the 1986 Protocol. The Protocol represented an interdisciplinary approach that had been agreed upon among various agencies, including the Saskatoon City Police, Child and Youth Services (Social Services), Public Prosecutions and other agencies. It was spawned to address what was undoubtedly an attitude that the sexual assault allegations of children were unreliable.

[213] Prior to the mid 1980s, the social and justice system did not do enough to investigate allegations by children of sexual abuse and then bring to justice the perpetrators of such abuse on those defenseless children. Some of the most heinous criminals in our society, child molesters and pedophiles, were never charged and prosecuted primarily because their victims were considered to be unreliable witnesses.

[214] As with many well-intentioned responses to social problems in our society, the Protocol may have gone too far in its laudable objective by creating another potential social problem of the same magnitude. The case before me demonstrates how the Protocol was interpreted and utilized to justify a cause of action that ignored time-tested

legal traditions and violated the basic legal rights enjoyed by the plaintiffs in conjunction with all other members of our free and democratic society. The lives of the plaintiffs have been irrevocably damaged. The unlawful actions of the defendants caused them to be held up to hatred and public ridicule by being branded as pedophiles and wrongfully charged with the most horrible and distasteful crimes in our society. The social problem caused by these consequences would not have materialized had the basic democratic and legal protections and presumptions guaranteed by our Constitution not been sacrificed to address another social problem, the reluctance to accept allegations of child abuse. The laudable objective of the Protocol in addressing this social problem does not justify the violation of constitutional rights.

[215] But in fairness to those who are responsible for the Protocol, I am of the view that Social Services and the defendants put a "spin" on it that is taken out of context by relying solely on one aspect of it and ignoring the others. The main criticism of the Protocol is that it tends to be lopsided. It overemphasizes the need to accept the allegations of children and underemphasizes the equal or higher need to properly investigate those allegations to avoid the likelihood of wrongfully charging and convicting innocent people. Some of its provisions appear to minimize or understate the requirement of the law for reasonable grounds to justify the duty to report child abuse and the duty to investigate it. In view of what happened in this case that demonstrates the prevailing attitude of Social Services and child care workers in the late 1980s and early 1990s, it is important to emphasize this requirement.

[216] Sections 12(1) and (4) and 13 of *The Child and Family Services Act* provides as follows:

> 12(1) Subject to subsections (2) and (3), every person who has *reasonable grounds* to believe that a child is in need of

> protection shall report the information to an officer or peace officer.
>
> . . .
>
> (4) Every peace officer who has *reasonable grounds* to believe that a child is in need of protection shall immediately report the information to an officer.
>
> . . .
>
> 13 Where a report is made pursuant to subsection 12(1) or (4), an officer or peace officer shall investigate the information set out in the report if, in the opinion of the officer or peace officer, *reasonable grounds* exist to believe that a child is in need of protection.
>
> [Emphasis added]

The version of the legislation that was in effect in 1990 is for all intents and purposes the same.

[217] The Protocol addresses the respective roles of individuals who are involved in the sexual abuse of children. It integrates those roles, particularly that of the police officer and that of the adult who bring forward the complaint, more closely than was the case traditionally. The Protocol is essentially a list of instructions to give directions and provide a consistent approach to those responsible for the reporting and investigation of child abuse. The instructions are set out in sections and beside the instructions are explanatory guidelines. Although not part of the instructions, the Protocol contains a Statement of Beliefs.

[218] I am loathe to clutter up this judgment by referring to specific provisions in the Protocol. But there is no other means by which I can demonstrate that the interpretation placed on the Protocol by the defendants is erroneous and that their reliance

upon that erroneous interpretation is of no assistance to them. I will comment on only those provisions that are relevant to this case to establish three principles. First, an objective standard is incorporated into the reporting and investigation of child abuse. Second, a proper police investigation, independent of the child's allegations, is required. Third, justice issues must be considered and adhered to. The Protocol clearly does not purport to override criminal laws and procedures or the protections granted by the law and the *Charter* to members of the public who may be charged with a sexual abuse offence. A careful reading of the provisions also demonstrates that many of the things done by Social Services personnel and by at least some of the defendants, were not done in accordance with the provisions of the Protocol.

[219] The relevant part of the Statement of Beliefs is Clause C which provides: "Children bear no responsibility for their victimization by adults. They will be assumed to be telling the truth when reporting abuse." This provision in the 1991 Protocol was expanded to add: "Their statements will be accepted and investigated." I now move on to the Protocol provisions themselves.

[220] Section 1 reflects the legal requirement to report "suspected abuse" which is defined by s. 1.1 to mean a "reasonable suspicion" of that abuse. The term "reasonable" implies an objective consideration as well as a subjective one. Upon receipt of a report of reasonably suspected sexual abuse, the police are required by s. 1.2 to document the report and by s. 2.1 to initiate the "appropriate investigation" which, as the guideline indicates, includes "checking for available information relevant to the case".

[221] The s. 2.1.2 guideline provides that: "The Department and the Police are commonly concerned first about the immediate safety of the child. Secondly, they are concerned about the protection and justice issues ". Section 2.1.2.3 requires the police "to investigate the circumstances and facts of the alleged offence." The guideline states that:

"Facts and descriptive information regarding the alleged offence will be necessary to determine the potential impact upon the child and the culpability of the alleged offender."

[222] An "appropriate interview procedure with the reported victim" is required by s. 3.1. The guideline provides that: "IDEALLY, one interview with both an officer of the Department and a Police Officer present, should be sufficient in the initial investigation to determine if sexual abuse has occurred." Section 3.1.3 provides that: "The interview will focus upon information related to: 1) the safety needs of the child, 2) psycho/social needs of the child, and 3) facts related to the incident(s) of abuse." The explanatory guideline provides that: "Detail of the incident(s) will assist to assess: 1) substantiation of the allegation, and 2) impact upon the child, short-term and long-term."

[223] Section 3.1.5 provides that: "The investigating officer will ensure adequate documentation of the interview." The guideline provides: "Documentation of Interview As may be necessary to establish: 1) that a child is, or is not, in need of protection, 2) that an offence has, or has not, been committed, and 3) what further action may be required, the investigating officer(s) will keep such records as may be necessary to assist in the fulfillment of their respective mandates. The primary responsibility of the Department of Social Services Officer will be to attend to the protection needs of the child(ren). The police will be primarily responsible for those issues related to the criminal nature of the alleged offence."

[224] Section 4.1 provides that: "Following the interview with the child, the investigating officer(s) will: 1) Advise the non-offending guardian(s) of the circumstances and that the interview has taken place." The guideline provides that: "If the report of abuse cannot be substantiated, the officer may counsel the child and/or guardian regarding the management of the situation at hand and/or the management of responses to abusive situations."

[225] Section 5.2.1 provides that: "The Officer may refer the child and/or others for any of: . . . 2) a medical assessment report." The guideline provides that: "A medical assessment will be requested whenever there is suspicion of physical abuse or sexual violation of the child."

[226] Section 6.1 provides that: "Given sufficient cause, a Police Officer will initiate the appropriate investigative procedures to gather facts regarding the reported incident(s) of the sexual abuse of a child." The guideline provides: "Upon receipt of a report, or a request for investigative assistance from the Department of Social Services, the police will initiate an investigation, to the extent necessary, to determine: 1) the authenticity of the report, 2) the facts of the reported incident(s), 3) whether or not a crime has been committed, and 4) the culpability of the reported perpetrator. The investigation may include: 1) the initial interview with the child and family, 2) an interview(s) with the alleged perpetrator, and 3) such other contacts as deemed suitable."

[227] Section 6.2 provides that: "ON COMPLETION OF THE INVESTIGATION, THE POLICE SHALL: 1) decide upon the appropriate charge(s), if necessary in consultation with prosecutors, 2) swear the appropriate information(s), 3) notify the appropriate officer of the Department of Social Services of the investigative conclusions, and 4) ensure the attendance of the accused at court." The guideline for 6.2.1 provides that: "With sufficient evidence, the police may, in consultation with crown prosecutors if necessary, lay charges appropriate to the apparent crime." The guideline for s. 6.2.3 provides: "The police will notify the Department of: 1) the conclusion of their investigation, 2) what charges, if any, have been laid, 3) the status of the alleged offender - vis-a-vis his access to the child(ren) in question, and 4) where applicable, the date of the first scheduled appearance of the accused in court."

[228] Section 6.5 sets out procedures to minimize the trauma to a child caused by a court appearance. These include arrangements for the introduction of the child to the prosecutor, an interview, a courtroom tour and possibly a request of the court that the case be placed at end of docket to protect the identity of the witnesses. Nowhere in the Protocol is the use of a screen or the "ungowning" of the judge suggested.

[229] Taken in context, these provisions make it clear that the complaints of children respecting abuse are not to be blindly believed or accepted without question. But on the other hand, they are certainly not to be rejected out of hand because of the age of the child, because the alleged perpetrator is an otherwise upstanding citizen or because the allegations may be difficult to prove in a court of law. The Protocol envisages, and in fact calls for, an independent investigation and assessment of the complaints of children respecting abuse. The term "investigation" implies that a proper and competent police investigation will be conducted to explore the possibility of independent evidence that either supports the allegations that comprise the complaint or that tends to cast doubt upon them. The term "assessment" implies that there will be an objective and independent consideration of the allegations with proper deference being given to them. Appropriate records are to be kept.

[230] In other words, those involved in obtaining or investigating child allegations of abuse are not mere recorders of them. They have the duty (within their respective roles) to investigate and assess those allegations before proceeding with the laying of serious charges. Nor is there any indication in the Protocol to support the contention that a belief in the truth of the allegations must be maintained no matter how the allegations might subsequently unravel or become inconsistent with other credible evidence.

[231] I move on to comment on how Bunko-Ruys and Dueck failed to comply

with the Protocol. In her examinations for discovery, Bunko-Ruys says that she had no obligation to even consider the truth of what the [R.] children were disclosing because that was not part of her "role" as a therapist. She says that this is so even though she admits she was told that [M.R. 1] was an accomplished liar before she became his therapist. She says that this is so even though she admits that he lied to her on occasion both before the charges were laid and while the prosecution was underway. She maintains that she had no obligation to advise the court of [M.R. 1]'s propensity to lie even though she appeared as a supporting witness for the children and the Crown, even though she knew that the whole case depended on the credibility of the children, and even though she knew that the liberty of 16 individuals was at stake largely because of her testimony.

[232] As I outlined previously, Bunko-Ruys saw her "role" as a therapist to be restricted to helping the children to express their perceptions. She obviously continued with that view even after all the proceedings were stayed on the basis that the [R.] children were too traumatized to continue with the prosecution of the plaintiffs. When her therapy patient, [K.R.], told her that she had lied at the trial, Bunko-Ruys told her to forget it and that nothing could be done about it. One would think that a professional therapist would have felt some moral obligation, if not a legal one, to advise the authorities, or at least the plaintiffs, of this turn of events.

[233] It is particularly reprehensible that Bunko-Ruys stifled the recantation because it was made to her by one of the children whose allegations of abuse and whose credibility had been supported by her from the time the allegations were made until the charges were stayed. Three individuals still remained convicted because the court had accepted the truth of those allegations to a large degree because of the evidence of Bunko-Ruys herself. Her view in such circumstances that she has no "role" or obligation respecting the truth is beyond comprehension.

[234] In this particular case, Bunko-Ruys became far more involved in its investigation and prosecution than would most therapists in the normal course of events. Had she remained within the confines of her office and carried out her duties as a therapist and a therapist only, her "role" would have remained that of a therapist and her obligations would be confined primarily to the children who were being treated by her. But she left the confines of her office and not only became integrally involved in the police investigation in gathering and recording evidence on which to found charges, but also became integrally involved in the prosecution of those charges. She met regularly with the prosecutors, provided advice to them, attempted to assist them to find expert witnesses, appeared in every court proceeding as an expert witness for the Crown, testified in every court proceeding on behalf of the Crown respecting the children.

[235] By conducting herself in this fashion, Bunko-Ruys expanded her "role" far beyond that of a therapist. In doing so, her professional obligations expanded accordingly and became much more onerous and significant than those associated with the role of a therapist. Another way of putting it is that Bunko-Ruys voluntarily became part of the team that investigated and prosecuted the plaintiffs. She cannot avoid civil liability on the basis that she is a therapist any more than a driver who negligently injures someone can avoid liability on the basis that he is a police officer. Her involvement or "role" in this case is characterized and determined on the basis of what she in fact did throughout. It is not governed by the occupational title or the name of the role that she ascribes to herself. For the reasons I have outlined, Bunko-Ruys cannot rely on the Protocol to exclude her from liability.

[236] The same can be said for Dueck. He was, for all intents and purposes, the sole police officer involved in the investigation of the case. He made the case his own and appeared to keep it pretty much to himself, the Thompsons, Bunko-Ruys and the children. None of his superiors who testified at the trial before me seemed to know much

about the case he was investigating or about his involvement in it. Nor did Walker, his assistant who he utilized from time to time when he needed another police officer to assist with arrests and the like, seemed to know much about it. Dueck clearly had an obligation under the Protocol to do a proper independent investigation and assessment. I set out my reasons previously for concluding that he did not do so.

[237] Dueck conducted himself during the first year and a half as if he was a social worker, not a police officer. He recruited Bunko-Ruys and Marilyn Thompson as his assistants and abrogated a significant part of his investigative role to them for over four months. The manner in which he conducted himself and his failure to comply with the provisions of the Protocol that he claims to rely on to justify his actions throughout the case, clearly demonstrate that the Protocol does not exclude him from liability even if it had the status of a statute.

[238] I will discuss the duties and obligations of a prosecutor later in this judgment. I will also relate how Miazga and Hansen failed to perform some of those duties. Both of them dealt with the allegations and testimony of child witnesses in a fashion that was contrary to some of their duties and obligations as prosecutors. Miazga and Hansen attempted to justify how they dealt with the child witnesses on the basis of the Protocol. The Protocol does not supersede the law nor does it purport to do so. The prosecutors cannot rely on the Protocol to exclude them from liability. As in the case of the defendants, they did not comply with it. Even if they had done so, it could not relieve them of their legal obligations.

The Nature of the Criminal Proceedings

[239] At the outset of this judgment, I outlined in general terms the different criminal proceedings that were initiated to prosecute all the allegations of the [R.] children and those of the other foster children that were drawn into the case. A more

detailed description of the nature of the criminal proceedings that followed the arrests is required to provide context for the events that followed that have a bearing on this civil case.

[240] The prosecutors were faced with the daunting task of prosecuting 16 persons charged with committing over 70 sexual assaults on eight children and one additional child as the case continued. I have previously outlined the details of those charges. The prosecutors proceeded with the charges against all the individuals in three separate cases. The first case was comprised of the three [R.], [R.] and White individuals. This is the [R.], [R.] and White related proceedings that I referred to earlier in this judgment. The second case was comprised of the 10 adult Klassen - Kvello plaintiffs in the civil action before me and Peter Klassen, the individual who is not a plaintiff in this civil case and who eventually pled guilty to four of the charges. As the second case progressed, some of the existing charges were stayed by the Crown while some new charges were laid. The effect of this was that some of the child complainants were removed from the second case while others were added to it.

[241] The third case was comprised of the two plaintiff young offenders to whom the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which was in effect at the time, applied.

[242] Much of what occurred during the one and a half years that these criminal proceedings occupied has little relevance to the civil case before me. But all the parties quite properly rely on these events to provide further evidence of the conduct of the defendants from which inferences of fact can be drawn that pertain to the material issues in the civil case before me. The parties disagree as to what those inferences should be.

[243] The [R.], [R.] and White preliminary inquiry commenced on November 21, 1991 and ended on December 2, 1991. No child complainants other than the [R.] children

were involved in the case so Miazga alone handled the prosecution for the Crown. Hansen did little more than sit in for a couple of partial days to observe [M.R. 2] and [K.R.] testify. [D.R.] was represented by Roger Kergoat, [H.R.] was represented by Jack Hillson and Donald White was represented by Donald Mullord. At the conclusion of the preliminary inquiry, [R.], [R.] and White were committed to stand trial on the charges brought against them.

[244] The Klassen - Kvello preliminary inquiry commenced on December 2, 1991 and ended on January 16, 1992. Daryl Labach represented the Klassen family. Robert Borden represented the Kvello family. On December 2, 1991, at the outset of the preliminary inquiry, the charges brought against John and Myrna Klassen, Dale and Anita Klassen and Dennis and Diane Kvello on the allegations of S.E.H. and S.L.H. were stayed by the Crown as were the charges brought against Peter Klassen on the allegations of M.K. Shortly after, on December 10, 1991, the charges brought against Pamela Sharpe and Peter Klassen on the allegations by T.H. were stayed by the Crown. On January 14, 1992, near the end of the preliminary inquiry, the charges brought against John and Myrna Klassen, Dale and Anita Klassen and Dennis and Diane Kvello on the allegations of S.W.H. were stayed by the Crown.

[245] The preliminary inquiry judge discharged Pamela Sharpe and Peter Klassen respecting the other charges brought against them by M.K. He also discharged Marie Klassen respecting the charges brought against her on the allegations of [M.R. 1]. He committed Peter Klassen and the 10 plaintiffs for trial on all the other charges. The net effect of all this was that the outstanding charges that then remained in the Klassen - Kvello case were reduced to those laid on the basis of the allegations of [M.R. 1], [M.R. 2] and [K.R.] with two exceptions. The first was a charge against Pamela Sharpe by T.H. All the charges against the other individuals that were based on T.H.'s allegations had been stayed by the Crown. The second was a charge against Peter Klassen by C.H., a

child who had made no allegations against anyone but Peter Klassen.

[246] The [R.], [R.] and White trial commenced on October 29, 1992 and ended on December 18, 1992. These three individuals were convicted of some of the charges. Each of [D.R.] and [H.R.] were subsequently sentenced to six years imprisonment. Donald White was subsequently sentenced to three years imprisonment. Each of them appealed their convictions and ultimately the Supreme Court of Canada allowed their appeals, overturned their convictions, entered an acquittal respecting Donald White and directed new trials for [D.R.] and [H.R.]. The Crown did not proceed to retry [D.R.] and [H.R.].

[247] The third case involving the plaintiff young offenders, was never proceeded with. On November 27, 1991, the charges brought against them on the allegations of [K.R.], [M.R. 2], S.L.H. and S.W.H., were stayed by the Crown. In late January or early February 1992, all the remaining charges outstanding against them were stayed by the Crown.

The Role of the Defendants in the Criminal Proceedings

[248] I previously outlined the roles that Bunko-Ruys, Dueck and Miazga played in the cases from their inception until the charges were laid and the arrests were made. I now move on to outline the roles that Bunko-Ruys, Miazga and Hansen played in these cases thereafter. Dueck had little involvement in the prosecution of the cases.

[249] Hansen was assigned to assist Miazga as co-counsel to prosecute the plaintiffs and the other four individuals charged. Both she and Miazga were experienced prosecutors, each having in excess of a decade of prosecution experience. Each was employed in Saskatoon by Saskatchewan Justice. Wilf Tucker and Fred Dehm were their

immediate superiors during the time they were involved in the prosecution of the plaintiffs. Miazga and Hansen divided up their workloads so that Miazga could concentrate on the charges involving the [R.] children while Hansen could concentrate on those involving the other foster children.

[250] This meant that both prosecutors jointly prosecuted all those charged. But Miazga was responsible for the preparation and presentation of the [R.] children and the evidence pertaining to the charges brought respecting them, while Hansen was responsible for the preparation and presentation of all other child witnesses and the evidence pertaining to the charges brought respecting them.

[251] Hansen was not involved in any prosecutorial advice that was given to Dueck before the informations were sworn that formalized the charges. Nor did she have any input into the case until after the initial charges were laid and the arrests were made. Her initial task was to interview six child complainants who had already made sexual assault allegations that had lead to charges being laid before Hansen's involvement. She was not responsible for the three [R.] children so she did not interview them or review their videotaped interviews. Her only exposure to their evidence prior to the Klassen - Kvello preliminary inquiry was her observation, for two partial days of testimony, of [M.R. 2] and [K.R.] in the [R.], [R.] and White preliminary inquiry that I referred to previously.

[252] Hansen had received Dueck's occurrence report in the fall of 1991 but she was not aware of the Thompson notes until they became an issue at the preliminary inquiries. She reviewed the videotaped interviews of the children for whom she was responsible. She had some concerns about the manner in which the children had been led by Dueck, their interviewer.

[253] The prosecutors had several scheduled meetings with Social Services workers, foster parents and the therapists for the children. It appears that the focus of the meetings was on the "needs" of the children and on what could be done to minimize the "trauma" of their appearances in court. Miazga took the position at the first preliminary inquiry, one that involved the [R.] children only, that the court should make special arrangements for the children to lessen the trauma they would experience by appearing in the courtroom and testifying. He tendered Bunko-Ruys and had her qualified to give evidence as an expert in the area of identification and treatment of sexually abused children. She testified that the [R.] children were very agitated and fearful to come to court, that they were "quite terrorized", that they had experienced "extreme trauma" and that they "don't want to see their parents".

[254] In the course of her testimony, she said she had obtained "disclosures" from them. But she said it took a year to get them from [M.R. 1] and six months to get them from [K.R.]. She said that the [R.] children were suffering guilt, shame and embarrassment. She said that [M.R. 1] and [M.R. 2] were supervised in class and all three [R.] children were supervised at all other times because of their propensity to touch others and themselves.

[255] The court ordered that the special arrangements sought by Miazga be granted. The first was that the accused individuals would be hidden behind a screen so that the children would never have to look at them. The second was that everyone, including the media, would be excluded from the courtroom while the children were testifying. Only Social Services support personnel for the children, the lawyers directly involved and the accused individuals behind the screen, were allowed to be present. Miazga successfully opposed the application of Robert Borden to sit in as an officer of the court to simply observe the proceedings. Mr. Borden was one of the defence lawyers who would be involved in the Klassen - Kvello preliminary inquiry that would soon

follow. The allegations of the [R.] children and, to a lesser extent, the other six children involved, would be an issue in the Klassen - Kvello preliminary inquiry.

[256] The third concession was that the judges would doff their gowns and wear suits. The fourth was that the children would have access to the courtroom via the judges' hallway from a room in the judges' chambers. This was done so that the children could avoid passing through the public hallway where they might see the individuals they had alleged as sexually assaulting them. Miazga also suggested at one point that the lawyers remain seated when asking questions of the children and that the children be removed when the lawyers objected, argued or made submissions. This was acceded to in part. The transcripts set out the comments made by the preliminary inquiry judge which speak for themselves. It is sufficient to observe that he repeatedly commended the children for their courage in testifying in court, commended Marilyn Thompson for the tremendous job she was doing with the children and acceded to just about every request and whim of the children. The unfortunate consequence of these types of remarks was that it impaired the perception of the impartiality of the court.

[257] Right from the start, the allegations of the [R.] children did not fare well, even during their examinations-in-chief. They fared even more poorly in the face of gentle cross-examination. This was likely the first time anyone had called into question what they were saying. The poor performance of the [R.] children cannot be attributed to intimidating cross-examination. Throughout all three proceedings, all defence counsel involved were polite, courteous and considerate toward the children. They did not harass them or take advantage of them. The trial judge and the judge conducting the preliminary inquiries complemented defence counsel in this respect. Nor can the poor performance of the children be attributed to fear, trauma or exhaustion as the child care workers and the prosecutors would have the court and the public believe. It should have been obvious that the poor performance of the [R.] children was caused primarily by their inability to

accurately relate the fabrications they had previously made and their inability to weave new fabrications consistent with those they had previously made.

[258] I previously outlined my reasons for concluding that the [R.] children were not traumatized and they need not be repeated. But I did not outline my observations about all the glaring inconsistencies I noted in what the [R.] children said at various times about the abuse they supposedly suffered and about who abused them. These inconsistencies can readily be determined from a careful perusal of various sources, including what they said to Marilyn Thompson as set out in her detailed notes of their initial "disclosures", what they said in their videotaped interviews, what they said to Dr. Yelland and what they said in their respective examinations-in-chief and cross-examinations at the three court proceedings. These inconsistencies pertained not only to what one child said compared to another, but also to what one child said on one occasion compared to what he or she said on other occasions. These significant inconsistencies not only pertained to the particulars of what was allegedly done to them, but to the identity of those who allegedly did these things to them.

[259] Hansen, at the request of Miazga, sat in on the [R.], [R.] and White preliminary inquiry for parts of two days to listen to some of the evidence given by [K.R.] and [M.R. 2]. Hansen relied on this brief and limited exposure to the [R.] children to later tell her superiors that she "believed the children".

The Use of "Child Experts"

[260] Miazga made extensive use in the criminal proceedings of what I will term as "child experts". The experts called by Miazga in the criminal proceedings in this case could also be referred to as child "oath helpers". I will outline later the apparent rationale of Miazga in adducing this "expert" evidence. But before doing so, I need to relate the

gist of the type of expert evidence that was given and comment on the lack of objectivity of those witnesses in matters involving child abuse. I begin with the medical evidence.

[261] Dr. Yelland was tendered by Miazga at the [R.], [R.] and White preliminary inquiry as an expert witness to give an opinion on the possible causes of physical injuries. Miazga aggressively led Dr. Yelland in his examination-in-chief to get him to say in effect that notwithstanding the clear findings set out in his 1990 and 1991 medical reports to the contrary, as I detailed earlier on in this judgment, there was really no more evidence of sexual and physical abuse in 1991 than there was in 1990. The compliant explanation for this rather astounding conclusion by the doctor was twofold. First, after completing the 1990 reports, he took a course that made him more aware of what to look for as indications of abuse. Second, he had a better "history of abuse" from the children and the foster mother when he did the 1991 examinations than he had when he did the 1990 examinations.

[262] Dr. Yelland acknowledged that he did a complete physical examination of the children in 1990 with the sole and specific objective of detecting child abuse, the same thing that he did in 1991. He testified that he had gotten 200-400 referrals from Social Services over a four-year period prior to November 1991. In the following preliminary inquiry, he testified that he knew of only Dr. McKenna besides himself that did these physical examinations for Social Services. I have difficulty accepting that, with all his experience, he in effect botched his 1990 examinations. If I reject this conclusion, then I am left with the conclusion that he bases his medical reports more on the subjective "history" with which he is provided than on his own professional and objective observations gleaned from his physical examination of the children's anatomy.

[263] His evidence at the civil trial confirms my second conclusion. He outlined the graphic details of the bizarre and ritualistic abuse alleged to him by the [R.] children

at the time he conducted his 1991 examinations. These allegations included the incredible and distasteful acts that I have described before and that I have no desire to repeat. These allegations were of a totally different nature from what he was told when he examined the children in 1990. At that time, the girls denied any abuse and the abuse related by [M.R. 1] was that he had been sodomized by his natural father. There were no allegations of being cut with knives or being burned. Dr. Yelland concluded that all these allegations were true based on the Thompson histories and the detailed allegations of the children.

[264] Dr. Yelland located the scars on the children that they pointed to as being caused by the abuse. He said that his findings were compatible with ritualistic abuse even though he admits that he has no experience with ritualistic abuse. He says however that he was extensively involved with Social Services in developing the Saskatoon Sexual Abuse of Children Protocol. He confirmed his previous testimony that Social Services send children to Dr. Anne McKenna and himself respecting sexual abuse allegations. He said that his role is to try to document physical evidence compatible with the history of abuse provided to him.

[265] He testified that he tries to objectively assess the allegations of abuse yet he admits that it is not his role to interview the children. He also said that it took a lot of time to get the degree of information he got from [M.R. 1] and that it is not unusual when interviewing children to spend the amount of time he spent interviewing the [R.] children. The little confidence I had in his objectivity and professionalism left me when he unabashedly stated that "he believes the kids, absolutely" and that he believes the ritualistic abuse in the Klassen home because "the children's evidence is clear". The fact that he could be so certain of the Klassens' guilt or involvement in such distasteful acts, solely on the basis that their names were given to him by a child who also concurrently named many others as abusers, is an example of an irrational belief that I describe later in this judgment.

[266] Dr. Yelland did acknowledge that the damaged hymen he described was consistent with having been caused by [M.R. 1] having sex with his sister. It is strange that he would attribute all the relatively minor scars on the children to the abuse described by them without considering if there were natural causes or other causal events that might be recorded in the medical history of the children. This is particularly so when he knew his medical report and opinion respecting the physical evidence of scars would be relied upon by Social Services and likely by the Crown as independent proof of heinous and deliberate physical abuse.

[267] Had Dr. Yelland reviewed the medical history of the children, he would have discovered at least two events that may well have altered his opinion. First he would have known of the record of [K.R.]'s hospitalization for serious injuries she received when she was pushed by [M.R. 1] and run over by a car, an event that obviously left her with scars. Second, he would have known of the record of Dr. Anne McKenna's report in which she examined [M.R. 2] for potential sexual abuse when Anita Klassen contacted Social Services about the concern she had when she found blood on [M.R. 2]'s panties after a visit with her natural father. Dr. Yelland cannot be faulted for noting and describing any scars that were borne by the children or even in proffering an opinion as to what type of injury might have caused each of he scars. But the question as to how they got there or who, if anyone, caused the injuries represented by the scars, was beyond his knowledge and his capacity to determine.

[268] I take no delight in making adverse comments about Dr. Yelland's objectivity. But I do not apologize for doing so in view of the fact that innocent individuals were charged, prosecuted and in some instances convicted, on the basis, in part, that the incredible evidence of the [R.] children was corroborated by independent medical evidence. Dr. Yelland either knew or should have known that his written reports

would likely be utilized by the police and by the prosecution in laying and prosecuting criminal charges. As a medical doctor, he has a professional responsibility to ensure that his reports represent an accurate account of his professional findings and conclusions based on his physical examinations.

[269] Once he contaminates his professional findings by basing them in part on the allegations of the child he examines, any value of the report as corroboration of the child's allegations is lost because the report is no longer evidence that is independent of the child's allegations. A medical doctor has no more expertise than a lay person in determining the veracity of a child's allegations by simply listening to the recounting of them. I acknowledge that this would not be the case if the doctor, for example, had some special expertise in child psychology and utilized the disciplines of that specialty to test or question the child in an attempt to verify the allegations. The examinations conducted by Dr. Yelland, however, were physical examinations, not psychological examinations.

[270] The unobjective attitude displayed by Dr. Yelland respecting sexual abuse allegations is not unlike that of many of the child care workers who gave extensive evidence in the criminal proceedings. Many of the individuals who testified in those proceedings had a financial interest in referrals from Social Services. Numerous witnesses testified about the floodgates opening in the late 1980s in the number of child sexual assaults that began to be reported. As is demonstrated by the evidence in this case, this has created a growth industry for professional child care workers, professional child therapists and medical care professionals. This is understandable and likely beneficial, but if these professionals are to effectively serve the interests of the children entrusted to them, they must conduct themselves as professionals with a level of objectivity and independence that is apparent to anyone who is asked to rely on their opinions and reports. If they fail to do so, courts and other institutions or agencies that routinely receive these opinions and reports will lose confidence in them and will not rely upon

them.

[271] I have related the evidence of Dr. Yelland respecting his medical reports because these reports were relied upon by the courts as providing some independent support for the allegations of the [R.] children. The evidence pertaining to the manner in which this medical evidence was presented to the court is another example of how zealously Miazga prosecuted the charges based on the incredible allegations of the [R.] children. The manner in which he presented the medical information bordered on an attempt to distort the inferences that would otherwise be drawn from that evidence and to mask the difficulties that it posed to the successful prosecution of the plaintiffs. In my respectful view, this is an indication of malice on his part.

[272] Miazga called Bunko-Ruys in three of the proceedings and Marilyn Thompson in two of the proceedings, as witnesses to satisfy the court that the [R.] children were extremely dysfunctional and sexually abused children who should be expected to have inconsistencies in their perceptions and in their allegations and testimony. These two witnesses and all the other child therapists of the various child complainants in effect became oath helpers for the children to prop up an otherwise hopeless case. The extent to which Miazga used such witnesses as oath helpers is again, in my respectful view, an indication of malice on his part. This is particularly so in a case involving so many individuals and such incredible allegations presented by inconsistent testimony. Miazga knew the disastrous consequences that would accrue to the plaintiff families if the allegations of the children were false. Even if his view of the role of a prosecutor was to record all allegations and let the courts decide, he should not have pushed so aggressively to mask evidence that would have helped the court in making an accurate assessment of the credibility of the allegations.

<u>The Case Starts to Crumble</u>

[273] The Crown's case began to crumble during the first preliminary inquiry when the lies of the [R.] children began to catch up with them. A particularly embarrassing fabrication was [M.R. 1]'s story at the [R.], [R.] and White preliminary inquiry about making and keeping notes of abuse. The proceedings were adjourned so that [M.R. 1] could produce his notes. The next day Miazga had to advise the court that [M.R. 1] was lying about the notes.

[274] I appreciate the fact that Miazga was obviously shaken by [M.R. 1] lying to him and to the court about making notes. The [R.], [R.] and White case was Miazga's strongest case and the credibility of his star witness was in serious jeopardy. In fairness to Miazga, he did on November 28, 1991, verbalize his concerns to the preliminary inquiry judge who, in my respectful view, once again jeopardized the perception of the impartiality of the court by appearing to encourage the Crown to proceed. He implied that he was not concerned about the fact [M.R. 1] would lie. Miazga and Hansen however were so concerned about the utility in continuing with any of the proceedings that on November 29, 1991 they sought advice from their superiors who were attending a prosecutors' conference in Moose Jaw.

[275] They engaged in a telephone conference call with Wilf Tucker, Ellen Gunn, Richard Quinney and Fred Dehm and expressed their concerns about the case including [M.R. 1]'s fabrication about the notes. When they asked what they should do, Hansen was asked by Ellen Gunn if she honestly believed the children and what opinion she held regarding them. Hansen responded that she honestly believed that what she saw and heard in court supported their allegations. The prosecutors were advised to proceed. They got the committals from the judge that they sought. That same day they began the Klassen - Kvello preliminary inquiry.

[276] The prosecutors, despite Miazga's aggressive pursuit of the case, were once again shaken by the continued deterioration of the testimony of the [R.] children. The testimony of [M.R. 2] and [K.R.] was becoming embarrassing because of the wholesale inconsistencies in their evidence. Another conference call was put through to their superiors in Regina on January 7, 1992. This time they spoke to Richard Quinney, now deceased, and Mr. Brown. Although there is a dearth of reliable evidence as to what was said during the conference call, the outcome was that the prosecutors should proceed and let the preliminary inquiry judge decide. I am satisfied from the comments made by the prosecutors in other conference calls, and in correspondence, that they emphasized the traumatization of the children rather than their lack of credibility. In all cases, the prosecutors were told that if they believed the children, they should proceed on. Miazga continued on with his prosecution with renewed vigour. I will comment in more detail on the conference calls in connection with my comments on the submissions of the defendants.

[277] Miazga and Hansen conducted the Klassen - Kvello preliminary inquiry in the same manner as the [R.], [R.] and White preliminary inquiry had been conducted. The main difference were the stays entered by the Crown. Even before the Klassen - Kvello preliminary inquiry began, there was a flurry of stays entered respecting children in whom Hansen had lost confidence. Stays on other children in whom she had lost confidence followed later on during the preliminary inquiry as it became evident that these child witnesses were unreliable. Miazga forged on with the [R.] children but their evidence was even more incredible than it had been at the previous preliminary inquiry. Again, the prosecutors got most of the committals that they sought. I provided details previously.

[278] Despite the preliminary inquiry committals, Hansen and Miazga were having second thoughts about proceeding against the two plaintiff "young offenders".

Their trial was set to begin on February 3, 1992. The Crown eventually entered stays on all the charges against them. Miazga's January 21, 1992 memo to the file and Hansen's January 27, 1992 memo to the file, detail how unreliable all their remaining child complainants were as witnesses. The allegations of S.W.H. and [M.R. 2] and [K.R.] against the young offenders had been materially revised then recanted. The memos characterize the evidence of [K.R.] as "weak and sometimes incredible" and that of [M.R. 2] as having repeatedly "recanted on her testimony" in a fashion that ruled out a mistake or misunderstanding. The memos indicate the views of the prosecutors that the likelihood of convictions of the young offenders was low. Despite this dismal view of their primary witnesses, Miazga and Hansen continued on with the criminal proceedings respecting the adults.

[279] The Crown wanted to proceed first with the [R.], [R.] and White trial and then with the Klassen - Kvello trial. The plaintiffs and their lawyers began to get ready for trial. The three Klassen families in Red Deer made arrangements to move to Saskatoon at the end of 1992 and to put their children in the Saskatoon school system.

[280] Miazga prepared for the [R.] trial. Hansen helped him to locate more expert witnesses. In general terms, with a few exceptions, the same group of witnesses appeared at the trial as had appeared on the two preliminary inquiries. As the ritual and satanic abuse allegations of the children had come out in cross-examination and been examined in detail at the preliminary inquiries, Miazga called a psychologist, Dr. Santa Barbara, to try and explain how the children could be credible and yet make such untrue allegations. The defence called Michael Elterman, another psychologist. Again, the [R.] children's testimony was incredible, full of inconsistencies and contradictions. Again, Miazga relied on the sexualization of the [R.] children to establish that they had been sexually abused. By this time, there was little left of their evidence that had not been recanted or contradicted.

[281] Based on the testimony I heard at the civil trial, the conviction of [R.], [R.] and White came as quite a surprise to all those involved, including Miazga and Hansen. It strengthened the resolve of the Crown to proceed with the Klassen - Kvello trial. But the [R.], [R.] and White trial judge had made a plea in her judgment that the children not be put through yet another criminal proceeding. The defendants seized on this, and the weakness of the Crown's case, as reasons why the Crown should stay all the remaining charges against the plaintiffs and against Peter Klassen. Miazga and Hansen refused this proposal but were open to other suggestions which would involve some guilty pleas. Some preliminary plea bargain discussions began between Miazga and Hansen and Jay Watson, counsel for Peter and Marie Klassen. I will outline the facts pertaining to this later in my analysis of the second element of the malicious prosecution cause of action. The plaintiffs refused to plead guilty to any charges in exchange for stays by the Crown of the remaining charges against them and were prepared to go to trial.

[282] The potential plea bargain I referred to was eventually entered into by Miazga, Hansen and Jay Watson. It provided that Jay Watson's client, Peter Klassen, would plead guilty to the one charge respecting C.H. and one charge respecting each of the three [R.] children. All other charges against him would be stayed. He pled guilty on February 2, 1993 and was sentenced on February 8, 1993 to four years in prison. All remaining charges against the plaintiffs were stayed on February 10, 1993 by the Crown. The plea bargain and the stays were reluctantly approved by the prosecutors' superiors in Regina. I will deal with this aspect of the case later. I have already outlined the appeals that were taken and the results of those appeals.

[283] The plaintiffs then began their malicious prosecution action in 1994. It finally came on for trial on September 8, 2003. The trial concluded on November 13, 2003.

The Subjective Beliefs of the Defendants Respecting the [R.] Children

[284] The respective subjective beliefs of the defendants in the guilt of the plaintiffs respecting the criminal charges brought against them by the [R.] children are of significance to the outcome of this civil action. Their testimony that they "believed the children", that they "believed the substance of the complaints of the children" and that they "believed that the children believed what they were saying", was sorely tested and tried throughout the trial. I previously set out some of the evidence upon which I have relied in attempting to determine the state of the subjective beliefs of the defendants at differing periods of time. I will relate some more of that evidence.

[285] Miazga testified that he had Dueck's occurrence report to review in May or June 1991. It included the allegations of mutilation and killing of animals and babies. He met with Dueck and talked about the case several times. He has a note that they met on May 9, 1991 and again in June. Dueck had asked him to look at the file and to advise him what could be or should be done based on the nature of the evidence. Miazga says that his memory is not clear of many of the details of his initial involvement in the case. This is surprising in view of his own admissions that he had never had another case like it that involved such bizarre allegations and so many alleged perpetrators.

[286] Miazga did not speak to the children before the charges were laid nor did he view the videotapes until sometime in September 1991. Again this is surprising and somewhat appalling in view of the fact that the videotapes of the children's evidence were equivalent to their witness statements. Surely in view of the incredible allegations and the nature of the case, he would have wanted to know the details of what the children had previously claimed had been done to them.

[287] Later on in his testimony he said that as a prosecutor, he relied primarily on what witnesses told him rather than on what they had said previously. But again this is a troubling statement in a case that depends almost solely on the credibility of the witnesses. Surely he would have wanted to know what the children had said previously so that he would be aware of any glaring inconsistencies in their allegations that might be fatal to his case once that information got into the hands of the defence. Although he did not say that he relied on Dueck to take care of these potential problems for him, it would be irresponsible for him to rely on Dueck for such an assessment because Dueck had come to him for advice about the strength of his case.

[288] Miazga testified that he spoke to Bunko-Ruys before the charges were laid and that he likely spoke to the social workers involved beforehand as well. He knew Bunko-Ruys personally. As well, she had been a therapist for a child (or children) on a previous case that he had prosecuted. He and she were both members of the Saskatoon Child Sexual Abuse Council, the council responsible for the Protocol I described previously. He said he may have mentioned the case to the child sexual assault group because it was an unusual case. Although he has no recall of doing so, he may have suggested that Dueck get further medical reports on the [R.] children. This is likely what initiated the Dr. Yelland June 1991 medical reports I referred to previously.

[289] The affidavits sworn by Dueck to obtain the warrants as suggested by Miazga to search the birth parents' home for blood containers and photos, set out in effect that he believed the allegations of the children concerning them. But the list of criminal offences alleged to have been committed included only bestiality and incest that were not some form of sexual assault as were the other charges. He said in response to cross-examination by Robert Borden that by the time he talked to Hinz (a date preceding this affidavit) he no longer believed the bizarre aspects of the children's allegations. Both Dueck and Miazga said that although they did not believe these bizarre aspects of the

allegations, they believed that the children believed them.

[290] The testimony of Dueck and Miazga about their respective belief or lack of belief in these bizarre allegations was at best confusing and more likely was misleading. The evidence demonstrates that Dueck's statements about his belief at critical stages in his investigation is inconsistent and contradictory. Miazga attributed his inability to provide details of his belief at critical stages in his involvement in the case to lack of recollection of events that occurred over a decade ago. I can understand a lack of recollection of mundane events that occurred years before. But I do not accept that he would have difficulty remembering his perceptions or beliefs respecting such a bizarre issue that was an integral aspect of a bizarre and unique case that occupied so many months of his time.

[291] In any event, Miazga said that by the time he had focused on what charges should be laid, he had decided not to pursue any "special charges" other than the sexual abuse charges. He said he has no reason to dispute what Dueck says in his occurrence report. The ritualistic and satanic allegations of the [R.] children comprise likely half of that detailed report. Miazga is consistent in his evidence that he told Dueck that "if he believed the children, he could swear the informations".

[292] Again this is surprising because, as is set out later, this is not the proper test to justify the laying of serious criminal charges for two reasons. First, Dueck had to have a subjective belief that the persons he was going to charge had committed those offences. Second, his subjective belief had to be founded on reasonable and probable grounds that existed at the time he decided to charge those persons. Although Miazga's advice to Dueck partially identifies the first requirement of the test, there is no evidence from any source that either Dueck or himself ever put their minds to the second requirement of the test.

[293] After the charges were laid and the plaintiffs were arrested, Miazga had little involvement in the case until fall. He was away from his office most of August 1991. In September and October he started to interview the [R.] children and he looked at their videotaped interviews that had been conducted by Dueck and Bunko-Ruys. Miazga admitted that he knew that the children were not telling the truth at times and he said he would admonish them to do so. He never said that he ever challenged or even seriously questioned the children's allegations, presumably because he was of the view that doing so would be inconsistent with what he understood to be the Protocol guidelines.

[294] He said that he reviewed the allegations of the children to justify the charges that were laid against each of the plaintiffs. He in effect went through the same exercise as did Dueck. That was simply to see if each of the respective plaintiffs charged with the alleged acts of sexual assault given by rote by the children had been named as the perpetrator by at least one of the children. This does not constitute an investigation or an assessment. All it does is categorize the allegations. It does not amount to an assessment of their feasibility or credibility.

[295] It is essential to distinguish between the abuse allegations made by the [R.] children and those made by the other children. In general terms, the allegations of the other children pertain primarily to isolated fondling incidents that were committed by one or two individuals. The allegations of the [R.] children pertain to a multitude of bizarre, serious and disgusting incidents, including a memorized rote incident, that were repeatedly committed by a large number of individuals in a random fashion at various places. The truth of the former kinds of allegations is within the realm of probability. The truth of the latter kinds of allegations is not even within the realm of possibility.

[296] The rote incident allegation to which I refer appears literally hundreds of

times in the Thompson notes, the videotaped “disclosures”, and in the interviews and the transcripts of the various court proceedings. If [M.R. 1] was naming a female perpetrator, he would say: “she put her finger in my bum and touched my penis and I had to put my penis in her vagina and bum”. Often he would add: “and I had to suck her boobs”. If he was naming a male perpetrator, he would say: “he put his penis in my bum and touched my penis and I had to suck his penis and put my penis in his bum”. [M.R. 2] and [K.R.] made the same type of rote allegation. If they were naming a male as the perpetrator, they would say: “he put his penis in my vagina and bum and I had to put my finger in his bum and suck his penis”. If they were naming a female perpetrator, they would say: “she put her finger in my vagina and bum and I had to put my finger in her vagina and bum”. Often they would add: “and I had to suck her boobs”.

[297] The [R.] children said that these incidents took place time and time again in various rooms of the various homes occupied by the plaintiff Klassen and Kvello families. Although they did not include things like the killing of babies as was alleged to have occurred in the birth home, they did include cutting and burning the children and drinking blood.

Analysis

[298] Having related the findings of fact that I made from the evidence and some of the inferences of fact that I drew from those facts, I move on to apply the law to these facts and to outline some additional inferences of fact that I have drawn in connection with the four elements of malicious prosecution. I have reproduced only those parts of my previous non-suit judgment that are necessary to give some context to the legal principles pertaining to a malicious prosecution action. A more detailed analysis of the law is set out in the non-suit judgment.

The Law Respecting the Tort of Malicious Prosecution

1. The Classic Elements and their Definition (*Nelles*)

[299] The elements of this cause of action were clearly identified several years ago in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 193 as follows:

> a) the proceedings must have been initiated by the defendant;
>
> b) the proceedings must have terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.

[300] The court observed at p. 193 that the first two elements are straightforward and largely speak for themselves but went on to comment on the last two elements. It stated that the third element contains both a subjective element (an actual belief) and an objective element (a belief that is reasonable in the circumstances). The court adopted the definition of reasonable and probable cause set out by Hawkins J. in *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 at 171:

> . . . "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". . . .

[301] The court defined at p. 193 the fourth element as follows:

> The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). . . .

[302] As observed by the court at p. 199, "malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve". It is more than "errors in judgment or discretion or even professional negligence".

[303] At p. 194, the court commented on the difficult task facing a plaintiff in a malicious prosecution action:

> By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, op. cit., at p. 606, and *Mitchell v. John Heine and Son Ltd.* (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):
>
> > The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

[304] The role of a Crown prosecutor was described years ago by the Supreme Court of Canada in *Boucher v. R.*, [1955] S.C.R. 16 at 23-24:

> 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.

[305] This definition has been referred to with approval by the Supreme Court in each of the *Nelles* and *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, 2001 SCC 66 decisions.

2. Further Clarification (*Proulx*)

[306] The Supreme Court of Canada adopted the *Nelles* elements and policy considerations in *Proulx*. The court held that the circumstances of the case were exceptional and upheld the damage award granted by the trial judge in the malicious prosecution action. The court again focussed on the third and fourth elements of the cause of action and made some additional comments and findings that further clarify the nature of such actions. They are summarized as follows:

1. The court must determine in its opinion, whether the Crown had sufficient evidence to believe that guilt *could* properly be proved

beyond a reasonable doubt. Only then would reasonable and probable cause exist to permit criminal proceedings to be initiated. A lower threshold for initiating prosecutions would be incompatible with the prosecutor's role as a public officer charged with ensuring that justice is respected and pursued. (para. 31)

2. In certain cases involving the credibility of a key witness, the court may consider why the prosecutor did not question or scrutinize the credibility of that witness. (para. 43)

3. A prosecutor cannot bootstrap his own position on the basis of preliminary inquiry committals or flawed court decisions that were swept away by an appeal acquittal. This is so because these events post-dated the prosecutor's decision and were decisions governed by different considerations. (para. 32)

4. The fact that a prosecutor may have been persuaded of the accused's guilt is not the sole issue. The question for him when he laid the charge was whether he could prove it. (para. 18)

5. A prosecutor cannot rely on consultations that he had with colleagues and superiors if he knew more about the case than they did. As the holder of an important office under the *Criminal Code*, the decision to lay the charge was his and his alone: *R. v. Campbell*, [1999] 1 S.C.R. 565. (para. 33)

6. A suit for malicious prosecution must be based on more than recklessness or gross negligence. It requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort

its proper role within the criminal justice system. The key to a malicious prosecution action is malice, but the concept of malice in this context includes prosecutorial conduct that is fueled by an "improper purpose", a purpose that is "inconsistent with the status of 'minister of justice'". (para. 35)

7. There may be various factors that are indicators of an improper purpose underlying the Crown's decision to initiate proceedings against the accused. One may be no more significant than another. In the final analysis, it is the totality of all the circumstances that are to be considered. (para. 37)

8. The lack of reasonable and probable cause may be an indicator of malice in exceptional circumstances, where in the opinion of the court, no prosecutor acting in good faith would have proceeded to trial on a serious charge with such a substandard and incomplete proof. (para. 38)

9. The court must determine the issue on a balance of probabilities. The question for the court is what motivated the prosecutor. If it was a simple lapse of judgment, the plaintiff has no cause of action. But if the prosecutor allowed his office to be used in aid of another cause, this is a perversion of powers and an abuse of prosecutorial power. This constitutes malice in law. It is also malice if the prosecutor decided to go after the accused to secure a conviction at all costs and conducted the case with not only "tunnel vision", but "tainted tunnel vision". In either case, there would be a flagrant disregard for the rights of the accused fueled by motives that were

improper. (para. 44)

10. In highly exceptional cases, unless *Nelles* is to be read as staking out a remedy that is available only in theory and not in practice, the accused is entitled to hold the prosecutor accountable in the civil action brought following the abusive prosecution. (para. 44)

3. Recent Lower Court Decisions

[307] Recent lower court decisions have elaborated on these third and fourth elements of malicious prosecution. They are particularly helpful in that they are examples of how the courts have applied the law to the facts of different kinds of cases. I have summarized the findings in many of them because they have precedential application to many of the issues in the case before me.

[308] In *Klein v. Seiferling*, [1999] 10 W.W.R. 554 (Sask. Q.B.), my colleague Klebuc J. dealt with a case that involved claims of malicious prosecution and false imprisonment. He reviewed many of the authorities that I have referred to in the case before me. Many of the factual issues he was required to deal with were of a similar nature to those alleged in the case before me. He relied on the comments of Cory J. in *R. v. Storrey* (1990), 75 C.R. (3d) 1 at 8-9 (S.C.C.), respecting what constitutes reasonable and probable grounds in connection with an arrest empowered by s. 495 of the *Criminal Code*. I realize that these comments focus on the right to arrest as opposed to a malicious prosecution action, but they do give some insight into the term "reasonable and probable": (p. 566)

> . . . In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a

> warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. . . .
>
> . . .
>
> There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist, that is to say, a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest . . .
>
> [Emphasis added]

The *Hicks v. Faulkner* objective test approved in *Nelles*, was applied by Klebuc J. and was quoted with approval in *Dix v. Canada (Attorney General)*, 2002 ABQB 580, [2003] 1 W.W.R. 436 at para. 354 (Alta. Q.B.).

[309] Klebuc J. allowed the malicious prosecution and false imprisonment actions against the police officers. He held that they had no reasonable and probable grounds because the circumstances would have alerted a prudent person to proceed cautiously, to make further inquiries, to question the credibility of the witnesses' statements and to try to get some corroboration. Numerous inconsistencies in the evidence of different witnesses were warning signs that would have lead a prudent person to question the credibility of the evidence. Information subsequently received would have caused a reasonable person to reassess the information that was previously relied upon by the police officers.

[310] Instead, the officers went into a state of denial. Their desire for recognition by turning a suicide into a high profile murder, impaired their skills and judgment. Their

haste, lack of concern for the frailty and inconsistency of the evidence and disregard for information inconsistent with their objective, were illustrative of their state of mind. They acted on flimsy and inadequate grounds and whatever belief they held was not objectively reasonable.

[311] He also held that the police officers had malice. The manner in which they conducted their investigation constituted more than mere negligence or poor judgment. It was so reckless and devoid of reason and respect for the rights and security of the plaintiffs and the administration of justice that it was directly and inferentially malicious. They withheld vital information from the prosecutor regarding the limitations of a witness which they knew might have a bearing on his advice and the manner in which the Attorney General would deal with the plaintiffs. They deliberately ignored the quantity and quality of the evidence. Their primary motivation for arresting the plaintiffs, seeking a warrant for the arrest of another plaintiff and subsequently participating in the prosecution of them, was so inconsistent with their legal responsibilities and the administration of justice, that it alone constituted malice.

[312] He dismissed the actions against the Attorney General, holding that the police officers misrepresented to the prosecutor that a material witness was a person with no material limitations or difficulties and thereby avoided any discussion of whether his information should be questioned. In like manner the inconsistencies and conflicts in the information gleaned from other witnesses were never fully disclosed or discussed with the prosecutor. Thus the police officers knew that the opinion of the prosecutor was not an informed one based on the facts.

[313] Ritter J. in *Dix v. Canada (Attorney General), supra*, determined that the police and prosecutors lacked reasonable and probable grounds. He stated at para. 356:

> It is also not sufficient for police to simply say they received information and relied upon it. The police have a duty to explore the reliability of that information (*Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.); *Campbell v. Hudyma* (1985), 66 A.R. 222 (C.A.)).

He also observed at para. 357:

> In addition, a police officer must take into account all the information available. A police officer is only entitled to disregard that which there is good reason to believe is not reliable. (*Chartier v. Quebec (Attorney General*), [1979] 2 S.C.R. 474 (S.C.C.); *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), appeal discontinued [1997] S.C.C.A. No. 571 (S.C.C.)).

At para. 368 he states:

> By these words [*Proulx*, para. 34], the Supreme Court has made it clear that the objective element of the test involves consideration by the Court of the evidence the police or prosecutor considered or did not consider, and its evidentiary value at trial. . . .

At para. 376 he states:

> Police are not able simply to pay attention to only that evidence which might serve to incriminate and to disregard that which might serve to exonerate (*Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474). . . .

[314] Ritter J. also determined that certain of the police and prosecutor defendants had malice. He considered the issue of whether an absence of reasonable and probable cause by itself may lead to an inference of malice, as is the conclusion reached

in *Oniel v. Metropolitan Toronto Police Force* (2001), 195 D.L.R. (4th) 59 at para. 49 (Ont. C.A.), leave to appeal dismissed without reasons, [2001] S.C.C.A. No. 121, (2001), 158 O.A.C. 199 (S.C.C.). He states at para. 527:

> I am fortified in my conclusion of the existence of malice on the further basis that prosecuting in the face of, or disregarding evidence which suggests that the Plaintiff is probably not guilty of the offence, can, even if not to a level sufficient on its own to raise an inference under *Oniel*, can form one element or factor which can be considered as going to proof of malice under the fourth part of the test set out in *Nelles* and *Proulx*. . . .

[315] This is the interpretation placed on this aspect of the *Dix v. Canada (Attorney General)* decision by Paisley J. in *Gabadon v. Toronto Police Services Board* (2003), 16 C.C.L.T. (3d) 225 (Ont. Sup. Ct. J.). In my view, proceeding with a prosecution in a case where there is no reasonable and probable cause may not of itself constitute malice, but it is certainly evidence from which an inference of malice can be drawn in an appropriate case. See *Lacombe et al. v. André et al.* (2003), 11 C.R. (6th) 92 at para. 86 (Que. C.A.). There is nothing in *Nelles* or *Proulx* to suggest otherwise. Malice can usually be established only by inference from the other facts and circumstances of the case, including the conduct of the prosecutor. Proceeding without reasonable and probable cause is contrary to the law and demands a credible explanation, failing which the inference of malice can be drawn.

[316] The court observes in *Lacombe et al. v. André et al., supra*, at paras. 52-54, that in cases involving serious charges where the complainant's credibility is the very crux of the decision-making process of whether to lay charges, an investigation must take into consideration all the information available. The court held that a more thorough investigation would have made it possible to cast serious doubt on the authenticity of the

charges and would have allowed the prosecutor to make a more informed decision.

[317] In cases involving defendants other than police officers and prosecutors, the law is not clear as to what circumstances must be established before these other classes of defendants can be found to "initiate proceedings" within the meaning of the first element of malicious prosecution. Successful malicious prosecution actions have been brought against persons other than police officers or prosecutors. In *Romegialli v. Marceau* (1963), 42 D.L.R. (2d) 481 (Ont. C.A.), the court stated at p. 482:

> . . . The gist of an action for damages for malicious prosecution is that it is an abuse of the process of the Court by wrongfully setting the law in motion on a criminal charge. . . .

[318] Walker J. in *Berman v. Jenson* (1989), 77 Sask. R. 161 at 163 (Q.B.) stated:

> . . . The defendant must have been "actively instrumental" in setting the law in motion. Simply giving a candid account, however incriminating, to the police is not the equivalent of launching a prosecution. The critical decision to prosecute is not that of the private person. . . .

[319] Failing to give a frank and candid account of events to police or participating in or interfering with the investigation and prosecution, may attract liability. *Hinde v. Skibinski* (1994), 21 C.C.L.T. (2d) 314 (Ont. Gen. Div.). A person may "institute proceedings" by giving information to the police which the person knew or ought to have known was false, misleading or incomplete or was given for reasons of malice. *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1998), 66 O.T.C. 16 at para. 32 (Gen. Div.). Such a defendant may be liable if the inevitable result of his or her

conduct is such that a charge will be laid against the plaintiff. *Fitzjohn v. Mackinder* (1861), 9 C.B.N.S. 505 (Eng. Ex. Ct.).

[320] In *Wood v. Kennedy* (1998), 165 D.L.R. (4th) 542 (Ont. Gen. Div.), the court observed at p. 561:

> . . . The nature of her allegations was such that it was difficult, if not impossible, for the police to exercise any independent discretion or judgment, and in the circumstances, the police had little choice but to charge Robert Wood.

[321] In the recent case of *Small v. Newfoundland*, 2003 NLSCTD 90, (2003), 227 Nfld. & P.E.I.R. 1 at para. 103 (S.C.(T.D.)), the court adopted the statement in *Clerk & Lindsell on Torts*, 18th ed. (London: Sweet & Maxwell, 2000) at para. 16-12:

> This first element, initiation of the proceedings, was not discussed by the Supreme Court of Canada in *Nelles* or *Proulx*. Whether an informant can be held responsible for initiating a prosecution when police act on information offered was considered by the House of Lords in *Martin v. Watson*, [1996] A.C. 74. That case established that a person who gives information to the police on the basis of which a decision to prosecute is made by the police will not be liable for malicious prosecution unless:
>
> (1) The defendant falsely and maliciously gave information about an alleged crime to a police officer stating a willingness to testify against the claimant and in such a manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.

> (2) The circumstances are such that the facts relating to the alleged crime are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgment on the matter.
>
> (3) The conduct of the defendant must be shown to be such that he makes it virtually inevitable that a prosecution will result from the complaint. His conduct is of a nature that "…if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant".

The Law Respecting the Tort of Conspiracy

[322] Under the heading "Civil Conspiracy" at para. 11 of her judgment in *Stillwater Forest Inc. v. Clearwater Forest Products Ltd. Partnership,* 2000 SKQB 110, [2000] S.J. No. 211 (Q.B.), Pritchard J. sets out the elements of the tort of conspiracy:

> [11] At page 265-266 in *The Law of Torts in Canada,* Vol 2 (Toronto: Carswell, 1990) Fridman summarizes the three distinct situations that can give rise to the tort of conspiracy:
>
> > In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of

> injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances . . .

The Law Respecting Collateral Causes of Action

[323] The "collateral" causes of action alleged by the plaintiffs consist of s. 24 remedy claims for alleged breaches of their rights under the *Charter*, for abuse of "power" (public office), for negligence, including negligent investigation, and for conspiracy to injure.

[324] Some of the causes of action collateral to a malicious prosecution action, such as abuse of public office, breach of *Charter* rights and conspiracy to injure, are for policy reasons, subsumed into the malicious prosecution cause of action and do not exist as stand alone causes of action.

[325] In *Dix v. Canada (Attorney General), supra*, Ritter J. dismissed the "collateral" causes of action brought by the plaintiff consisting of s. 24 remedy claims for alleged breaches of his rights under the *Charter*, for abuse of public office, for negligence, including negligent investigation, for abuse of process, for conspiracy and for false imprisonment. He found that certain of the defendants had breached several *Charter* rights of the plaintiff. At para. 553, he held that even though a situation may exist where there is a breach of a *Charter* right which occurs in circumstances of *mala fides* and which does not equate to malicious prosecution, he did not need to determine that issue because the plaintiff was not left without a remedy for breaches of his *Charter* rights. His

remedy for those breaches was subsumed within and awarded by means of his cause of action for malicious prosecution.

[326] At para. 554, Ritter J. observed that if the claim for abuse of public office is made out, so is the claim for malicious prosecution. He was also of the view that the converse was true so that the claim was subsumed within malicious prosecution claim once it had been established. This is so because it involves the same conduct alleged in each separate cause of action.

[327] The abuse of process cause of action is also subsumed. At para. 580, Ritter J. concludes that the abuse of process cause of action is a repetition of, or is subsumed within, the malicious prosecution action and award. Having more than one cause of action with duplicate constituents does not increase the plaintiff's award because he can be awarded damages only once for the same conduct. He reaches the same conclusion at para. 581 respecting the conspiracy claim.

Application of the Law to the Facts

[328] For the reasons which follow, I am satisfied that the plaintiffs have established on a balance of probabilities that they were maliciously prosecuted by each of the defendants, Miazga, Dueck and Bunko-Ruys.

[329] I need not comment further on the collateral causes of action respecting these three defendants because the collateral causes of action are subsumed within the malicious prosecution action that the plaintiffs have successfully proven.

[330] For the reasons set out later in this judgment, I am not satisfied that the plaintiffs have established that they were maliciously prosecuted by Hansen, so none of

the collateral causes of action apply to her. The conspiracy to injure alleged by the plaintiffs names Dueck and Bunko-Ruys only. As well, it was not sufficiently plead or pursued at trial.

[331] On the basis of the case law cited and the reasons I have outlined, all the collateral causes of action, including conspiracy, that are claimed by the plaintiffs are dismissed against all the defendants.

[332] I now move on to set out my reasons for concluding that the plaintiffs have proven that the three defendants maliciously prosecuted them. I will deal with each of the four elements of the tort of malicious prosecution in turn.

1. The Initiation of the Proceedings Element

[333] Neither Dueck nor Miazga took much issue with this element. Dueck conducted the investigation, obtained Miazga's advice and swore the informations. Miazga took the case and was prepared to prosecute it all the way to trial if the children had not been too "traumatized" to continue.

[334] Understandably, Bunko-Ruys does take issue with this element. She was a child care worker and a child therapist, not an investigating police officer or a prosecutor. I was not able to find any case in which a child care worker or a therapist has been found liable for malicious prosecution. But nor could I find a case in which a child care worker or therapist became so integrally involved in an investigation or prosecution. Bunko-Ruys did not testify herself but the plaintiffs read in most of her testimony given at her examinations for discoveries in which she valiantly tried to distance herself from her involvement in the investigation and the prosecution. Each of the other defendants testified that she had no role in laying the charges or in prosecuting the charges. But the

facts and their conduct belie these bald statements. Bunko-Ruys took a very active role in the whole matter, a role far broader than simply performing her duties as a child care worker or a child therapist.

[335] Until she became involved with the [R.] children in October 1989, they had made no "disclosures" of abuse. In fact, all three [R.] children denied any abuse even though they were interviewed by Dueck who was adept at getting "disclosures". By her own evidence at the criminal trial, Bunko-Ruys said it took her a year to get "disclosures" from [M.R. 1] and six months to get "disclosures" from [M.R. 2]. But [M.R. 1] began to make "disclosures" to the Thompsons in March or April of 1990 and he was taken in May 1990 by Social Services to be interviewed by Schindel. Social Services was upset by Schindel's assessment and the fact he had not begun an investigation. [M.R. 1] was then taken within a day or two to Bunko-Ruys to be "reassessed" and he made some more "disclosures" to her. [M.R. 2] also made "disclosures" to her long before six months. The testimony of Bunko-Ruys on this issue is not credible.

[336] The "reassessment" by Bunko-Ruys in reality replaced police officer Schindel as the investigator of [M.R. 1]'s allegation of abuse. It was on the basis of her reassessment of Schindel's assessment that the child apprehension operation I referred to previously was set in motion and the investigation to gather evidence continued. But Social Services and Bunko-Ruys did not want to risk a repeat performance at the police station. This time they contacted Dueck, not to interview [M.R. 1], [M.R. 2] or [K.R.], but to coordinate the investigation of Bunko-Ruys and Marilyn Thompson which was already underway.

[337] Dueck met informally with the children on June 5, 1990 at Taco Time, but he deliberately avoided interviewing them even though [M.R. 1] told him he had a lot more to tell him about sexual abuse. Rather than taking the "disclosures" of the children

at that time, or at least within a reasonable time, which is what would be done in the normal course of events, Dueck deferred interviewing the children for over four months until October 1990. He testified that he deferred his interviews so that Bunko-Ruys could work with the children until she felt they were ready from an emotional perspective to be interviewed by him. But it is evident that the primary object of this whole exercise by Dueck and Bunko-Ruys and likely Social Services was not to rehabilitate the children through therapy. Rather it was to defer the investigation until more "disclosures" could be obtained to provide evidence on which criminal charges could be laid and prosecuted against the perpetrators named in the "disclosures".

[338] Dueck knew that the children had made bizarre abuse allegations to the Thompsons that had implicated numerous individuals. He also knew that Bunko-Ruys had obtained "disclosures" and that she likely could obtain further "disclosures". Both he and Bunko-Ruys knew that further "disclosures" were also being made by the children to Marilyn Thompson and that she would continue to pass these disclosures on to them. Dueck had taken out an occurrence report number but never completed his occurrence report until almost a year later in April 1991. Even after the interviews of the [R.] children had been completed in the late fall of 1990, Dueck had not filed any information or report with central records at the police station respecting "his" investigation into their abuse allegations. These procedures followed by Dueck were not in accordance with the procedures usually followed by other police officers.

[339] Dueck and Bunko-Ruys and various Social Services officials and personnel attended one or two ritual and satanic abuse seminars in Saskatoon. No one had any explanation as to why a topic of this nature would merit at least two seminars. Hinz testified that in 1991 there was a perception about satanic abuse. This might explain the seminars. But it might also explain what the perceptions of Dueck, Bunko-Ruys and certain Social Services personnel may have been about the case they were developing.

[340] Bunko-Ruys met on numerous occasions with the [R.] children and with Dueck during this four-month period. When she pronounced that the children were finally "ready" for their videotaped interviews, they were conducted jointly by Dueck and Bunko-Ruys. Although Dueck took the lead, by his own evidence, Bunko-Ruys was there to ask follow-up questions. The hours and hours of videotaped interviews bear this out. She and Dueck portrayed themselves to the children as part of the "team" and they engaged the children in discussions about what would happen to their alleged perpetrators. I am satisfied that by this time, the decision had been made to charge the plaintiffs. All that remained was to record the evidence from the children on videotape. Donald Mullord, one of the defence counsel at the [R.], [R.] and White trial, observed that in one of the interviews of [M.R. 2], Dueck asked 345 questions while Bunko-Ruys was a fairly close second in asking 240 questions. I acknowledge that I did not count the questions to verify this observation, but I did view all the child interviews and the observation of Donald Mullord is consistent with my recollection of the degree of Bunko-Ruys' active involvement in the interviews.

[341] The active involvement of Bunko-Ruys in the police investigation did not end with the laying of the charges. She became significantly involved in the prosecution of the charges as well. I mention this even though usually events that take place after the charges have been laid are not matters that are relevant to whether a person played a part in the initiation of the proceedings against the plaintiffs. But it characterizes the real role she was playing in this case from its inception to its finalization. It refutes her claims that her role was simply that of a therapist of the children. This is substantiated in part by the fact that for some time, she was retained and paid by the Justice Department, not Social Services.

[342] She had numerous meetings and telephone calls with Miazga, some before the charges were even laid. Although she did not participate in Miazga's interviews of the children, she did attend his office on occasion. She was the primary advisory and evidentiary resource utilized and relied upon by the prosecutors in each of the three court proceedings in their quest for the special concessions for the children that I outlined previously. As an example of her interest and involvement in the case, she authored a memo to the prosecutors respecting her role in recruiting Dr. Zillah Parker, a psychiatrist to work with her in viewing the tapes, a matter that pertained to the evidence of the children, not their therapy. She states:

> Zillah is going to be a great help . . . – call me about details – I am feeling better after meeting with her today and yesterday – she requests to view the tapes with me – I need copies for early next week – O.K. –
>
> home later 343-8775
>
> The sun is shinning (sic)

[343] Bunko-Ruys was also tendered by Miazga as a witness in each of the three court proceedings and was qualified as an expert in the area of identification and treatment of sexually abused children. She testified that she met [M.R. 1] in October 1989 and [K.R.] and [M.R. 2] in June 1990. She saw the children on average once or twice per week. She obtained "disclosures" from each of them. She testified that the children were very agitated and fearful to come to court, that they were "quite terrorized", and unlike most children, they did not want to see their parents. They were filled with guilt, shame and embarrassment. [M.R. 1] and [M.R. 2] had to be supervised in class at school and all three had to be supervised at all other times because of their "touching problems" with each other and with other children. In her opinion, each of the [R.] children had been sexually abused and had experienced "extreme" trauma.

[344] As I outlined previously, the opinion evidence Bunko-Ruys gave as an expert in child care was tendered to demonstrate that the sexually inappropriate conduct of the children between themselves and others was, of itself, a strong indication that they had been sexually abused. What is particularly unfortunate is that the prosecution then focused on calling evidence to establish that the children acted out sexually, a fact that was not in dispute and was only too well known to all the parties at that stage of the proceedings. The subtle inference was that proof that the children had been abused was proof of the abuse allegations of the children and, in turn, proof of the offences charged. Bunko-Ruys carried out all of these functions knowing full well that 16 people had been branded as pedophiles and were facing significant jail terms on the basis of the incredible "disclosures" of the children that she was supporting at all stages of the investigation and prosecution.

[345] The professional status, experience and expertise attributed to Bunko-Ruys, and her prominence as a primary witness in each of the three criminal proceedings, lent credibility not only to the children's allegations, but also to Dueck's investigation, the prosecution conducted by Miazga and Hansen and the court testimony of the children. I am satisfied that but for the involvement of Bunko-Ruys, the plaintiffs would never have been charged and even if charges had been laid, the prosecutors would never have proceeded with the court hearings. I conclude that Bunko-Ruys was instrumental in initiating and maintaining the criminal proceedings against the plaintiffs.

[346] As a final comment in this regard, I conclude that some of the testimony Bunko-Ruys gave at the court proceedings was not credible. In fairness to her, she likely confuses fantasy with reality for she repeatedly testified that her role was to "support the children in expressing their perceptions" and that it mattered not whether those perceptions had any basis in reality. The [R.] children testified at the trial before me that they never requested all the special arrangements that were made for them. They refuted

just about everything else Bunko-Ruys said about them in her testimony in the criminal proceedings.

[347] It was evident from the testimony given by the [R.] children at the court proceedings that none were traumatized in the least until they were gently confronted by defence counsel who had the temerity to question their perceptions. [M.R. 1] eventually got his way and was permitted to look at his parents behind the screen. At least one of the other children made the same type of request. It is evident from their comments and the number of requests that they made for breaks, that each of the [R.] children became easily bored with the proceedings

[348] I am satisfied that Bunko-Ruys, as well as Dueck and Miazga, initiated the proceedings against the plaintiffs within the meaning of the case law I have cited.

2. The Resolution of the Proceedings in Favor of the Plaintiffs Element

[349] Although the defendants took no issue with this element on the non-suit application, they did take issue with it in their final arguments at the conclusion of the trial. They maintain that although all the charges were stayed by the Crown against the plaintiffs, they were stayed as part of a plea bargain in which Peter Klassen pled guilty to four counts of sexual assault as outlined previously. The case law cited by the defendants establishes that if multiple criminal charges are resolved against a plaintiff by means of a combination of stays and guilty pleas, the proceedings are not resolved in favor of that plaintiff within the meaning of the second requirement of a malicious prosecution action.

[350] But counsel for the defendants frankly admit that none of these cases is directly on point and as well, that all pertain to a plea bargain entered into between the Crown and the individual who has pled guilty. Here, none of the plaintiffs pled guilty to

anything. It was Peter Klassen, not one of the plaintiffs in this action, who pled guilty to some of the charges brought against him. He was represented by Jay Watson, a lawyer who does not act for and never did act for any of the plaintiffs with the exception of Marie Klassen, the wife of Peter Klassen. Nothing that Jay Watson or Peter Klassen did could commit the other counsel or their clients to any plea bargain involving them without their consent. Likewise nothing Peter Klassen did could bind his wife, Marie, to any plea bargain involving her without her consent. Nor was Peter Klassen's guilty plea given in exchange for stays by the Crown respecting any of the charges brought against any of the plaintiffs.

[351] The defence counsel involved in the criminal proceedings taken against the defendants were Robert Borden, Daryl Labach and Jay Watson. The latter two testified at the trial before me. From their testimony it is clear that no deal was made between the Crown and the plaintiffs respecting any plea bargain. Each of their clients adamantly maintained his or her innocence from the outset of the proceedings. Each declined to enter into any plea bargain by which he or she would plead guilty to one charge in exchange for stays entered by the Crown of his or her remaining charges. The plaintiffs' unequivocal instructions to their respective counsel were to proceed to trial.

[352] It is trite law that a "bargain" or contract pertains only to those who are party to it. The parties to a bargain cannot impose obligations on someone who is not a party to that bargain. I am satisfied from all the evidence I read and heard on this issue, that none of the plaintiffs was a party to the plea bargain between the Crown and Peter Klassen.

[353] It appears from the evidence and from the views held by the parties and their counsel, that the only valid sexual abuse complaint against Peter Klassen was that made by C.H. She appeared to be the only complainant who was credible and her

complaint pertained to Peter Klassen only. Jay Watson testified that his client Peter Klassen denied assaulting any of the [R.] children but pled guilty to one count respecting each of them just to get it over with. He had a previous unrelated conviction for a similar fondling type of sexual assault as was alleged by C.H. which weighed heavily against him. It may be that part of his motivation for pleading guilty to these three counts and the count respecting C.H. was a desire to induce the Crown to stay the charges against the plaintiffs. But obviously his guilty plea pertained only to assaults alleged against him and him alone. It did not in any way involve any of the assaults alleged against any of the plaintiffs nor could it absolve them from any moral or legal culpability for the assaults alleged against them.

[354] As a final observation on this issue, I am convinced that the Crown stayed the charges against the plaintiffs, not because of Peter Klassen's guilty plea, but because the Crown was left with no case to pursue against the plaintiffs. The prosecutors and their superiors tried valiantly to obtain a guilty plea from even one of the plaintiffs in exchange for the stays of all the other charges against them. The tentative offer was flatly rejected by all the plaintiffs. Despite a trip by the prosecutors to Regina and a subsequent trip by Miazga to Regina, all efforts to obtain guilty pleas from the plaintiffs failed. Even though this failure made it more difficult for the prosecutors and their superiors to explain to the public and the media why stays were entered on all the charges brought against 10 adult pedophiles, the Crown nevertheless entered the stays. In press releases that were carefully crafted, the traumatization of the children by the proceedings was relied upon as the justification for abandoning the criminal proceedings against all these pedophiles. For these reasons, I reject this submission of the defendants on this issue.

[355] I am accordingly satisfied that the criminal proceedings have terminated in favour of the plaintiffs within the meaning of the case law I have cited.

3. The Absence of Reasonable and Probable Cause Element

[356] This element of malicious prosecution involves two sub-elements: a subjective element and an objective element. I previously outlined the evidence I have considered that pertains to the subjective and objective beliefs of the defendants respecting the allegations of the [R.] children. I have also outlined the vast difference between the nature and substance of their allegations and those of the allegations of the other child complainants. I will deal first with my conclusions respecting the subjective considerations that apply to the charges based on the allegations of the [R.] children.

[357] The issue is whether the defendants had an honest belief that the plaintiffs were probably guilty of the crimes they imputed to the plaintiffs. The term "probably" simply means more likely than not. To my recollection, not one of the defendants ever said that he or she had an honest belief in the probable guilt of the plaintiffs. In any event, what would such a statement mean? Would it mean a belief that each plaintiff was guilty of each count charged respecting each complainant? Or would it mean a belief that each plaintiff was guilty of one of the counts charged respecting one of the complainants? All the defendants however did say that they "believed the children" whatever that may mean in the circumstances of this case.

[358] All the defendants testified in one forum or another to the effect that the children told them lies and fabricated stories on occasion. All of them said they did not believe everything that the children alleged. Dueck and Miazga said they disbelieved all the ritualistic and satanic abuse allegations of the children. These allegations were a substantial component of the children's "disclosure" allegations and the evidence they

gave in court. None of the defendants has ever clarified just what it is that he or she did believe of the various allegations made by the children. The testimony of each of the defendants that "I believed the children" is meaningless when each defendant has testified that he or she has been lied to by the children and does not believe a substantial number of their allegations.

[359] Neither Dueck or Miazga, with few exceptions, was prepared to say with any degree of certainty what he could remember about his state of mind or beliefs about the children's allegations at specific times. In some of those instances in which they did give direct evidence as to what they disbelieved about the children's allegations, I find that evidence to be inconsistent with the circumstantial evidence of those beliefs that can be inferred from the direct evidence of their respective conduct.

[360] In the case of Bunko-Ruys, if her testimony is taken at face value, she did not even address the issue of her belief of the children's allegations. In her testimony in her examination for discoveries' read-ins and in the testimony she gave in the criminal court proceedings, she says that it was not her role to make judgments as to whether what the children were "disclosing" was true. Nor was it her role to help the children differentiate between their perceptions and reality. Her role was simply to support the children in expressing their perceptions, whatever they might be. But she too, had to acknowledge that the children routinely lied to her. In order to make that determination she obviously had to make judgments about the truth of their statements.

[361] Again, I seriously question the credibility of the evidence that Bunko-Ruys gave about the proper role of a therapist in responding to "disclosures" of children that are incredible or inconsistent with reality. She said that she would not question or challenge such "disclosures" and was of the view that she had no obligation even to the child who made the "disclosures" to try and correct the erroneous perception. This flies in

the face of the expert opinion evidence given by Dr. Santa Barbara, the psychologist called by the Crown that I referred to previously. It also flies in the face of the expert opinion evidence given by [M.R. 1] Elterman, the psychologist called by the defence. Both of them were of a totally opposite view to that expressed by Bunko-Ruys. This illustrates the difficulty that Bunko-Ruys got herself into when she undertook to expand her role as a therapist to include holding herself out to give expert advice on matters that were outside her expertise and in the exclusive domain of psychiatrists and psychologists.

[362] I am satisfied that none of the defendants believed many of the [R.] children's allegations. As the case against the plaintiffs was based solely on these allegations, it is difficult for me to accept that any of the defendants honestly believed in the guilt of each of the plaintiffs respecting each of the offences charged against them. The evidence overwhelmingly points to the opposite conclusion. Even if each defendant had testified that he or she believed that each of the plaintiffs was guilty of each of the offences charged, I could not have accepted such evidence as truthful in the face of the unique circumstances of this case and the circumstantial evidence of belief.

[363] I am satisfied by all the evidence on this issue that the defendants did not have an honest belief that the plaintiffs had committed the assaults alleged by the [R.] children nor did they have an honest belief that the plaintiffs were guilty of the offences charged against them. In my view, the subjective belief held by each of the defendants was that the children had been sexually abused and that one or more of the 12 plaintiffs who were charged must have done it. I need not comment on what belief the defendants may have had respecting the [R.], [R.] and White allegations because those individuals have not brought a malicious prosecution action and the evidence that pertains to them is quite different than that which pertains to the plaintiffs.

[364] Having commented on the subjective considerations, I now move on to comment on the objective considerations. It is not enough that the defendants had an honest belief in the guilt of the plaintiffs as charged. Any honest belief of the defendants had to be founded on reasonable grounds. In other words, on a state of circumstances that would reasonably lead any ordinarily prudent and cautious person, placed in the position of the defendants, to the conclusion that the plaintiffs were probably guilty of the crimes imputed to them by the defendants. The requirement for an objective consideration is an essential element in a free and democratic society where individuals are presumed innocent until proven guilty. No one, including a police officer or a prosecutor, can cause serious criminal charges to be brought against an individual absent reasonable and probable grounds to support an honestly held belief that the individual has committed the offences charged.

[365] Were it not so, any innocent person could be subjected to serious and lengthy criminal proceedings by an individual who holds an honest but irrational belief that the person is guilty of a criminal offence. Fortunately most people are not irrational and do not form beliefs about the criminal liability of others that are strong enough to motivate them to lay criminal charges unless their beliefs are supported by reasonable and probable grounds. This is why persons who charge others without reasonable and probable grounds to do so, usually act out of malice.

[366] I will not repeat the numerous facts that I previously related to demonstrate the absence of reasonable and probable grounds at any stage of this case upon which any of the defendants could have based an honest belief that the plaintiffs were guilty of all the offences charged against them. In general terms, the charges were brought solely on the allegations of the three dysfunctional [R.] children who were known to be untruthful and who demonstrated that they were witnesses who lacked credibility. The independent physical signs of abuse referred to in the Yelland medical reports did not point to the

plaintiffs. They pointed to sexual activity between the children themselves and to experiences encountered before they were ever in the Klassen home. Nor was any independent physical evidence found by the police "investigation" that should have been available to support some of the bizarre allegations that the children made if the allegations of the children were substantially true.

[367] The allegations of the other children from whom "disclosures" were obtained by the time the initial charges were laid, were of such a different nature that they tended to refute rather than support the allegations of the [R.] children. Some of those children who disclosed abuse by one of the plaintiffs denied any abuse by the other plaintiffs. Yet the [R.] children claimed they had witnessed the abuse that was denied by the other children. Some of the incidents that were "disclosed" by the other children were so capable of misinterpretation by a young child that they should never have been relied upon as a sexual assault. An example is the allegation of M.K. that his foster mother touched his dinky and his bum with a washcloth when he was four years of age.

[368] Not only was there no corroboration or independent support of the allegations made by the [R.] children, the nature of their allegations done was so unbelievable as to be patently absurd. This is so even if the ritualistic and satanic aspects of their allegations are ignored. If their allegations against the 12 plaintiffs are believed, young couples with their own families to care for were routinely abusing the [R.] children in the same rote manner in different houses practically every time the children visited. The other adults who were present must have been oblivious to all these goings on even though the children lined up at the bedroom door, as if in a theatre lineup, to await their turn with one of the plaintiffs. As an example, [M.R. 2] testified at the Klassen - Kvello preliminary inquiry that after abusing her in the rote fashion she uses to describe sexual abuse, Dennis Kvello never put his pants back on until he had performed the same rote abuse on one after the other of the eight or more children lined up at the bedroom door.

[369] Although the same children say they were present at many of these incidents, some testified to things happening that would have been seen by the others. Yet the others said such things never occurred. Many of the allegations were highly improbable and next to impossible. The sheer number of perpetrators acting in almost exactly the same fashion is of itself almost incapable of belief without some plausible explanation, such as the perpetrators being members of some strange and evil cult. Not only was there no such explanation, but the defendants have testified that they did not believe this to be so. Hansen laughed when asked by Robert Borden in cross-examination at the trial before me if anyone had suggested to her that the plaintiffs were associated with a satanic cult.

[370] A significant amount of exculpatory evidence was ignored by the defendants that tended to show the absence of reasonable and probable grounds for believing that the plaintiffs had committed the offences alleged. Although each piece of evidence is not conclusive and might be capable of being explained away, the cumulative effect of the exculpatory evidence is significant. It is beyond dispute that not one of the natural children of the plaintiffs was abused. Despite numerous physical examinations conducted on behalf of Social Services on many of the natural children of the plaintiffs on different occasions, there was not one shred of evidence to indicate that any of them had been sexually or physically abused. This was so even though some of the [R.] children alleged that some of these natural children were sexually abused by their parents and that some of them were involved in sexual relations with the [R.] children.

[371] It is also beyond dispute that Anita Klassen on her own initiative reported to Social Services the potential sexual abuse incident involving [M.R. 2] and her father that I related previously. Had Anita Klassen and her family been routinely abusing the children as alleged, it is highly improbable that she would have risked the physical

medical examination and the police investigation into the incident that she knew would follow and which did follow. The fact that Miazga presented her at the [R.], [R.] and White trial as a Crown witness respecting this incident, suggests that he believed she was credible and that [M.R. 2] had been assaulted, not in Dale and Anita Klassen's home, but in her natural parents' home.

[372] The defendants closed their eyes to the obvious inference that the increased evidence of sexual abuse on [K.R.] and particularly [M.R. 2], as disclosed by the Yelland 1990 and 1991 medical reports, was caused by the continued sexual assaults by [M.R. 1] on his sisters in the Thompson home, in their yard, at school and in Bunko-Ruys' office. The evidence of abuse in the 1990 reports respecting examinations done at a time when [M.R. 1] had not been with his sisters in the Dale and Anita Klassen foster home for about six months, did not rule out his responsibility for the presence of old healed tears in their vaginal and anal areas which were more than three to six months old and likely older. The only potential recent evidence of abuse was that [K.R.] had an itchy bum and [M.R. 2]'s vagina was red. Neither condition confirmed sexual abuse by the Klassens. The evidence of prior abuse pointed more toward abuse in the birth home. This was the thrust of Miazga's case against [R.], [R.] and White.

[373] There is also evidence of the willingness of most of the plaintiffs to submit themselves to videotaped police interviews by Dueck without the benefit of counsel. Despite an aggressive grilling and the use of police interview techniques by Dueck, each one who was interviewed emphatically denied the allegations of abuse. Although the conduct and demeanour of a person is not determinative of credibility, the plaintiffs did appear in their videotaped interviews to be honest, forthright and truthful. By stark comparison, this was totally lacking in the demeanour of the [R.] children in their videotaped interviews.

[374] Another piece of exculpatory evidence is the concern expressed to Social Services on September 29, 1988 by Diane Kvello, one of the plaintiffs, respecting the three foster children, S.W.H., aged 6, S.E.H., aged 3, and S.L.H., aged 2, that had been placed in her home. She was concerned because of the sexualized behaviour exhibited by the boy, the foul smell of the genitals of the two girls and their aversion to having their "bottoms wiped". She took the children to Dr. Anne McKenna for a physical examination for potential sexual abuse.

[375] In her November 25, 1988 report to Social Services, Dr. McKenna observed respecting the boy: "The penis was normal with no evidence of infection or trauma. Examination of the rectum revealed a tight anal sphincter. There was no evidence of previous trauma." She observed that the three-year-old girl had " . . . an intact hymen and no evidence of infection or trauma. Rectums appeared normal." She noted that the youngest girl had been "having intermittent problems with constipation since the age of 9 months. The hymenal ring was intact. There was no evidence of recent trauma or infection." Her understanding was that the children had made no disclosures of sexual abuse. The report contained the usual qualifier: "There are no physical findings of sexual abuse. This does not imply that sexual abuse has not occurred."

[376] Again, it is highly unlikely that an abuser would, on her own initiative, express a concern to Social Services knowing that she would then be required to take all her foster children to be physically examined for potential sexual abuse. It is also significant that none of the children exhibited evidence of sexual abuse despite the wild allegations of the [R.] children about groups of children being abused by the Kvellos in their home.

[377] Another piece of exculpatory evidence is the undisputed fact that, for at least a year before [M.R. 1] left their home, Dale and Anita Klassen had been requesting

Social Services to remove him because they could no longer handle him. Again, it is improbable that people who are routinely abusing children would make such a request knowing that it not only would precipitate an increase in the attention paid by Social Services to their home, but also would involve an investigation, an interview, more therapy and likely a physical examination. This is what in fact occurred.

[378] I am satisfied on a consideration of the evidence as a whole, that there were no reasonable grounds on which the defendants could base an honest belief in the probable guilt of the plaintiffs of the crimes charged against them. I am also satisfied that the three defendants did not have reasonable and probable cause to initiate and continue the proceedings against the plaintiffs within the meaning of the case law I have cited.

4. The Presence of Malice Element

[379] This is likely the most difficult issue raised by the case. I previously reviewed the cases that define and elaborate upon this element. The defendants contend that the plaintiffs must prove they acted dishonestly in order to establish this element of a malicious prosecution cause of action. I reject this contention if the defendants interpret the concept of dishonesty narrowly to exclude all improper or unlawful conduct except serious misconduct such as fabricating evidence or accepting a bribe. The case law I have cited, particularly the recent case law, does not equate the concept of malice with a narrow interpretation of dishonesty. A much broader interpretation is given to the concept of malice as an essential element of a malicious prosecution cause of action.

[380] The comments of Klebuc J. in *Klein v. Seiferling, supra,* at paras. 67 and 70 are instructive:

> 67 The manner in which the Officers conducted their investigation constitutes more than mere negligence or poor judgment. It was so reckless and devoid of reason and respect for the rights and security of the plaintiffs and the administration of justice that it directly and inferentially was malicious. They withheld vital information from Connelly regarding Weist's limitations which they knew might have a bearing on his advice and the manner in which the Attorney General would deal with the plaintiffs. They deliberately ignored the quantity and quality of the evidence . . . These factors and those previously noted in my view establish malice of the character contemplated in *Nelles, supra*. In addition, Seiferling's and Turcotte's primary motivation for arresting Klein, Kozar and Moore and seeking a warrant for the arrest of Ransom and their subsequent participation in prosecuting them was so inconsistent with their legal responsibilities and the administration of justice that it alone constitutes malice.
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> 70 . . . the Officers represented Weist to be a person with no material limitations or difficulties and thereby avoided any discussion of whether his information should be questioned. In like manner the inconsistencies and conflicts in the information gleaned from Lawrence and Weist were never fully discussed with Connelly. Thus they knew Connelly's opinion was not an informed one based on the facts. . . .

[381] Some of the cases I cited hold that in extraordinary circumstances, laying criminal charges and proceeding with the prosecution of them in the absence of reasonable and probable cause, can of itself constitute malice or at least constitute an indication of malice. Surely if a malicious prosecution case with extraordinary circumstances exists, it is the case before me. It is a high profile case that charged many individuals with serious criminal offences. It had the potential to visit disastrous consequences on those charged even if they were later found to be innocent. There was a

glaring absence of any reasonable and probable cause to lay and prosecute the charges. If these factors do not constitute extraordinary circumstances, I cannot conceive of a set of circumstances that would do so. In my view, proceeding with charges in such an extraordinary case in the absence of reasonable and probable cause constitutes a strong presumption of malice. The same consequences flow from continuing on with the prosecution of such a case.

[382] In any event, even if I am in error in finding that such a case raises a presumption of malice, the law is clear that there is a strong indication of malice in such a case. As well, there are many other strong indications of malice that are inferred from the conduct of the defendants. I have previously outlined many of those indications of malice, but will comment briefly on some of the more salient ones.

[383] There is no evidence to indicate why Dueck never considered or sought some explanation for why such a large number of people would act in such a concerted, unusual, repetitive and perverted fashion with so many children. In fact, the evidence, including that of Amy Jo Ehman, suggests that Dueck was blinded by his zeal to turn the wild allegations of the [R.] children into a high profile case that would portray him as a diligent and unrelenting protector of abused children. He had a close working relationship with Social Services personnel and workers and with child therapists. He had attended at least two seminars on ritualistic abuse around the same time that he had obtained, or was obtaining, the “disclosures” of ritualistic and satanic sexual abuse through other members on his “team”.

[384] It is almost beyond belief that none of those involved in the prosecution of the plaintiffs stood back, so to speak, and asked themselves if any of this made any sense and whether it could reasonably be true. In failing to do so, Dueck totally abrogated his duty as the primary investigating officer to carry out a proper investigation. Miazga

totally abrogated his duty as the primary prosecutor to make an objective and competent assessment of the case he was consulted about and which he aggressively prosecuted.

[385] This case is rife with examples of the failures of the defendants to carry out their respective responsibilities. In the interests of brevity, a couple will suffice. Dueck and the prosecutors maintained that Marie Klassen, a crippled, elderly and almost blind grandmother, was not as infirm as she made out. Hansen claimed that she thought one of her child witnesses had said that Marie Klassen could get around on her own without using a wheelchair. But a review of the evidence given by the child witnesses indicates that they said that Marie Klassen could get around out of the wheelchair only with difficulty. The distinction of whether she was bedridden or got about with difficulty using a cane or a walker is of little moment as to whether she was physically capable of performing the gymnastic feats attributed to her by the [R.] children. These included getting on top of them and having sex with them in the bathtub. They also said that they tried to flush her down the toilet several times. Although her feet went down the hole, she was able to jump right out of the toilet and onto the floor.

[386] Another example is that Richard Klassen was charged with a sexual assault on [K.R.] even though [K.R.] had never named him as one of the individuals who had assaulted her. A "disclosure" by [M.R. 1] to the effect he had witnessed an assault on [K.R.] by Richard Klassen was relied upon to continue to prosecute the charge. A similar blunder was the charging of Kari Klassen with a sexual assault on [K.R.] even though [K.R.] had never named her as one of the individuals who had assaulted her and even though neither [M.R. 1] nor [M.R. 2] had "disclosed" that they had witnessed her assaulting [K.R.].

[387] No explanation was ever given as to why one or more seminars dealing with ritualistic and satanic abuse, a rare and unusual type of child abuse, would find an

audience in a small community like Saskatoon. The circumstances leading up to this case and the nature of the rapidly evolving attitudes of child care workers and therapists respecting child abuse, cause me to suspect that Dueck and Social Services personnel believed that this unusual kind of abuse was taking place in Saskatoon and were looking for evidence of it. It is obvious that they pressed very hard to find it. Throughout his involvement in the case, Dueck appeared at times to be conducting and expressing himself more as a social worker than as an investigating police officer.

[388] There is no evidence that Dueck ever meaningfully compared the allegations he had obtained from the children to determine if they contained any significant inconsistencies that would detract from their credibility. Nor did he ever compare those allegations with the ones they had previously "disclosed" to the Thompsons or to Bunko-Ruys. Had he done so, he could not have avoided seriously questioning whether the allegations were true in substance or were fabrications made by extremely dysfunctional children. This is so because it is beyond dispute that there were numerous significant and irreconcilable inconsistencies within the allegations of each child and even more between the allegations of each child.

[389] Dueck in effect did no real or meaningful investigation of the allegations of abuse as he was required by law to do. Even the provisions of the Saskatoon Sexual Abuse of Children Protocol, upon which he so heavily relied, acknowledged that child abuse allegations must be investigated and assessed. What he did in effect was to simply extract, by shamelessly leading questions, the incredible allegations that the children "disclosed". Then he recorded them. Finally he allocated them among the respective individuals who were named in the "disclosures". There is no evidence that Dueck ever paused to consider whether the allegations could reasonably be true. In his interviews of the children and of the plaintiffs he was going to charge, he kept stating that children never lie and that they always tell the truth about sexual abuse. He obviously convinced

himself that his statement applied to the child complainants he had interviewed even though he knew that children did in a fact lie on occasion.

[390] Another indication of malice on the part of Dueck and Miazga is that they were not evenhanded in their zeal to charge and prosecute all the alleged perpetrators named by the [R.] children. There were numerous identifiable individuals, many of them blood relatives of the children, who the children named as perpetrating serious sexual and physical assaults upon them. Some of these assaults were far more serious than those alleged against some of the plaintiffs. Some of them were more serious than any of those alleged by some of the child complainants other than the [R.] children. Yet only the Klassen - Kvello families were targeted. These other individuals were not investigated, charged or prosecuted. The excuses proffered for this discriminatory exercise of police and prosecution powers were not convincing.

[391] Almost from the outset until the charges were laid, Dueck consistently conducted himself as if he had tainted tunnel vision. I previously related incident after incident to demonstrate that his mind was completely closed to any indication that the plaintiffs might be innocent of what was alleged by the children against them. One of the clearest examples is the manner in which he rejected the advice that was given to him by Hinz. In my respectful view, the advice Hinz gave him was right on the mark. Although Hinz is no longer a prosecutor, he was highly regarded as a tough but fair and a competent prosecutor. I respect his views, his judgment and his integrity. Some of the observations he made on the witness stand in the case before me are relevant to the issue of malice on the part of Dueck and, to a lesser extent, on the part of Miazga.

[392] Hinz testified that the abuse alleged by the children in the material given to him by Dueck to review, was done within a ritualistic context and involved human sacrifice. It reminded Hinz of the 17th century Salem witchcraft trials. In his opinion, the

allegations were so bizarre as to be incredible unless they were corroborated in some material way. He wondered how the truth of these extraordinary claims could be demonstrated. In his opinion, a conviction was unlikely without corroboration of the allegations. He observed that it is a common sense proposition that the stranger the evidence is, the stronger the proof that is required. As well, if a witness is not credible on a significant point, it is hard to accept the evidence of that witness on other points. The problem facing Dueck was that if the allegations of the children about murder and ritualistic sacrifice were untrue, the other allegations of the children about sexual abuse were not credible.

[393] Hinz testified that in 1991 there was a public perception respecting satanic abuse. He observed that this case was the only case in Saskatchewan, until the Martensville case, that involved such allegations. He told Dueck that he was investigating murders, not just sexual assaults and he advised him to investigate further to try and locate the bodies of the babies which supposedly had been killed, partially eaten and buried.

[394] Dueck's response to Hinz was that these cultists were "far too clever for that and would have already disposed of the body". Hinz then suggested that Dueck investigate to see if any children were missing. Dueck responded that this would be fruitless because "these cultists have brood mares who are willing to bear children". Hinz was dismayed at this response as he had never heard such a comment before. He said the conversation ended then because he had run out of ideas. Dueck took back his file and Hinz had no further contact with him.

[395] Hinz testified that prosecutors were under intense pressure from Social Services and the police not to stay charges on the basis of lack of corroboration. He said that he likely would not have had the backbone to tell this huge constituency to stay the charges that followed in this case. He says he was never a member of the camp that held

to the ideological view that children never lie and strongly maintained that to proceed with criminal charges on this basis was not in accordance with the law. He said that to stay charges in the face of having to answer to Regina and the small "p" political pressure was not feasible. But failing to do so only makes it worse. Nor will it get any better if all the Crown has are wild allegations and inconsistencies.

[396] He said that some prosecutors believed it was their duty to take a case to court and let the judge decide. He did not favor this approach as the majority of committals in these kinds of cases resulted in acquittals at trial. If he noted material inconsistencies in the child's stories, he would bring that to the attention of the defence lawyer and likely would shut the case down. He said that the "Rand statement" as to the role of a prosecutor was "stamped on their foreheads at prosecutors' school". He remembered the two facets to it: "to convict the guilty and to protect the innocent".

[397] My colleagues and I discussed concerns about the increase we observed in the early 1990s in the number of sexual assault prosecutions that were brought before the court without the allegations being properly investigated. We expected a large increase in the incidence of sexual assault prosecutions. We did not expect a large increase in the prosecution of allegations that had not been objectively assessed. It was apparent in many instances that the prosecutor had not vetted the case nor carried out his or her role as a gatekeeper. No objective assessment had been made of the case which was supposedly presented on behalf of and in the name of the Crown. The prevailing attitude among some prosecutors appeared to be that their role in sexual assault cases was now different from other cases. It was simply to take an allegation of sexual abuse to court and let the judge decide. As clearly indicated by the case law I have cited, such an attitude or practice on the part of a prosecutor is not only contrary to law but is professionally irresponsible.

[398] The case before me is a prime example of why the law requires prosecutors to be more than the legal counsel for a parent, a child complainant, a foster parent and Social Services. Notwithstanding the views of some prosecutors, these individuals are not their clients. Nor does a prosecutor act on behalf of such individuals. A prosecutor is an officer of the court who represents the Crown. There is a very compelling rationale for requiring prosecutors to be principled, fair, open-minded and cognizant of the risk of ruining the lives of innocent people by taking unworthy cases to court. A prosecutor has a much greater opportunity to make credibility assessments of his or her witnesses than does the court. The court usually sees a complainant or witness only once for a brief interval in somewhat of a staged setting. Judges are discouraged from becoming actively involved in the questioning of witnesses or in raising issues not placed before them by the Crown or defence.

[399] A prosecutor on the other hand is able to meet a crucial witness on several occasions if required. The police force and its files, and additionally in the case of foster children, the resources of Social Services and its files, are a resource available to the prosecutor that is not available to the court. The prosecutor can assess, probe, confirm and reassess the allegations of a complainant, including that of a child complainant. At times other independent information or third party witnesses can be accessed in this respect. The court does not have these resources or opportunities. It must do the best it can with what is put before it. The information gathered through a competent, thorough and objective investigation, is an effective tool in the hands of a prosecutor to obtain a guilty plea. Without it a trial is assured and the risk of a wrongful conviction is increased. It is not an easy task for defence counsel to successfully challenge a fabricated rote allegation of abuse absent a proper investigation by the police and a fair prosecution on behalf of the Crown.

[400] Although the role of a police officer differs considerably from that of a prosecutor, an officer of the law does have prescribed legal responsibilities and obligations. As indicated by the case law I cited previously, a police officer abrogates his or her responsibility and acts contrary to law if he or she simply lays a charge because a complaint has been made. The laying of a charge is not lawful absent an honest belief in probable guilt based on reasonable grounds. Usually these two requirements cannot be met without some form of an investigation. Any investigation requires a rational consideration with an open mind of all relevant circumstances, including those that are exculpatory as well as those that are inculpatory. Many of the observations I have just made about the responsibility of prosecutors to act independently of a complainant, applies to police officers as well.

[401] While addressing this issue, I express my concern about Hansen's testimony to the effect that she has heard judges instruct juries that they are entitled to accept all, some or none of the testimony of a witness. She understands this to apply as well to her discretion as a prosecutor. This is an ill-conceived conclusion on her part. The form of jury charge she refers to is directed to witnesses in general. Other considerations apply to certain kinds of witnesses such as an accused or a complainant. In any event, a jury charge applies only to juries and defines their roles and responsibilities. It does not apply to prosecutors nor does it attempt to define their roles and obligations.

[402] It is beyond the scope of this judgment to comment on the impropriety of a prosecutor presenting a witness to the court that the prosecutor knows is not credible in many respects. Whether the prosecutor has made a timely and a full disclosure to the defence and the court of all matters touching on the issue would certainly be a relevant consideration. But the point to be made in this case is that both prosecutors presented witnesses to the court that they knew were not credible in the sense that much of their evidence was false and inconsistent and some of it had been previously recanted. What is

particularly reprehensible is that some of this was not disclosed to the defence, at least on a timely basis, and much of it was kept from being placed before the court. In fairness to the prosecutors, it appears that they did advise the court on a few occasions when the children fabricated a story in the face of the court. An example is when Miazga advised the court that [M.R. 1] lied when he told the court he had kept notes of the abuse and offered to produce them.

[403] Another clear example of Dueck's tainted tunnel vision is his failure to heed the concerns expressed by Verwey of Alberta Family Services in Red Deer. After reading pages of transcripts filled with the questionable opinions of child care workers and therapists unqualified to give such opinions, the practical observations of Verwey were like a breath of fresh air. The same can be said about the observations of Hinz compared to some of the observations made by Miazga and Hansen about child witnesses throughout the three criminal proceedings and, to a lesser extent, during the civil trial.

[404] One aspect of the evidence of each of the defendants is particularly telling. I read pages of the testimony of Bunko-Ruys in the form of evidence given in each of the court proceedings and in the read-ins of her testimony in her examinations for discovery. In that testimony she went on and on about her concern for the needs and welfare of the children, for the need to support them, for the importance of believing their assertions and for the need to prevent them from being traumatized by the court process. Yet I read not a word by way of an apology to any of the plaintiffs, not a word by way of an expression of any regret or remorse for the part she played in the wrongful charging and prosecution of the plaintiffs and not a word for the disastrous consequences and significant trauma that were suffered by the plaintiffs as a result of her involvement in the case.

[405] I also read pages and heard hours of testimony of Dueck, Miazga and Hansen. The same that I said about Bunko-Ruys applies to each of them. In my respectful view, the lack of any regret or remorse for what was done to the plaintiffs is a strong indicator of malice on the part of each of the defendants, including Hansen.

[406] Another indicator of malice on the part of each of the defendants, including Hansen, is his or her obvious lack of any concern or even interest about whether the common and ordinary people he or she was proceeding against on the basis of such incredible allegations, might be innocent of the serious criminal offences alleged against them. The presumption of innocence is likely the most basic principle of our criminal law and our democratic system. It appears from the testimony in the read-ins from her examinations for discovery that the concept is not one known to Bunko-Ruys. But Dueck, an experienced police officer, and Miazga and Hansen, both experienced prosecutors, knew otherwise. Nor did I hear a word of concern expressed by any of the defendants, including Hansen, about what effect the prosecution would have on the public confidence in the justice system if the incredible allegations were untrue. The only thing that came close to this was Hansen's reference in her prosecutorial memo to the risk of a "disastrous acquittal" if the proceedings were not stayed against the two "young offender" plaintiffs.

[407] In a similar vein, there was not a hint from any of the defendants, including Hansen, of any remorse for the negative effect that the prosecution of the plaintiffs on false child sexual abuse allegations has had on the credibility previously afforded to sexual assault complaints of child witnesses. This case illustrates that the overzealous and mindless prosecution of sexual abuse allegations that are made by unreliable child witnesses, defeats the underlying objective of the very Protocol that is relied upon to supposedly justify such a cause of action. The ideological pendulum in our society has a history of swinging from one extreme to the other. In the early 1990s, pursuing child

allegations of child abuse was the idealogy of the day. At the outset of the 21st century, pursuing wrongful prosecutions and convictions appears to be the idealogy of the day. Hopefully a balance of these idealogies will prevail. I am cognizant of the potential for prosecution chill or for wrongful convictions if a balance is not maintained.

[408] Another strong indicator of malice on the part of Bunko-Ruys is the manner in which she responded to [K.R.] when [K.R.] confessed to her that she had lied in court about being abused. At the time she was made aware of this, the appeal from the conviction of [R.], [R.] and White in the related proceedings had likely been taken but definitely had not been concluded. Although the Supreme Court overturned the convictions as I outlined previously, had the recantation been properly communicated to the authorities it would likely have constituted fresh evidence that the Court of Appeal in the first instance could have considered.

[409] By withholding and in effect attempting to stifle such evidence, Bunko-Ruys may, in the circumstances, have run the risk of being charged with the criminal offence of obstructing justice. At the least, her conduct shows bad faith and malice towards all the individuals who were charged, including the plaintiffs. All the defendants, except for Dueck, maintained that the stays were entered by the Crown because the [R.] children were too traumatized to testify again in another court proceeding. They did not reveal that the stays were entered because the evidence of the [R.] children was inherently unreliable. By adopting such a position, the defendants, except Dueck, caused the public to presume that the plaintiffs were guilty as charged. The response of Bunko-Ruys to the recantation that was made to her, constituted a deliberate decision on her part to stifle the truth so that this public perception of the guilt of the plaintiffs would remain unchallenged.

[410] I indicated previously that I am skeptical of any statements, made in or out of court, of the [R.] children. I have no reliable grounds to question or disbelieve the evidence that [M.R. 1], [M.R. 2] and [K.R.], now adults, gave in the trial before me. But in view of the fabrications and lies they told a decade ago, I do not have the same degree of trust in their credibility as I would have in the credibility of a witness who has not been known to lie or give perjured evidence. The credibility of the testimony of [M.R. 1], [M.R. 2] and [K.R.] in the civil trial was bolstered by the fact that it was not seriously challenged. Their testimony tends to be consistent with known circumstances that are independent of their testimony. In the criminal proceedings that took place over a decade ago, the reverse pertained.

[411] As well, the substance of their evidence and their demeanour and conduct demonstrated at the civil trial, were more consistent with the demeanour and conduct of persons who give truthful testimony than with those who are untruthful. It was unlike the demeanour and conduct that they exhibited in their videotaped interviews and subsequent testimony at the criminal proceedings a decade ago. One of the most reliable indicators of the credibility of the testimony of [K.R.] that she recanted her abuse allegations to Bunko-Ruys, is the failure of Bunko-Ruys to take the witness stand and deny what [K.R.] said to her.

[412] Another indicator of malice on the part of Miazga is the manner in which he conducted himself throughout the criminal proceedings. One cannot fault a hard-nosed or an aggressive prosecutor provided that the prosecutor is fair and objective. A careful reading of the transcripts of the two preliminary inquiries and the trial, demonstrates that he was at times neither fair nor objective. He cannot be faulted for the tremendous effort he successfully invested in convincing the two judges involved to turn the court on its head, so to speak, to accommodate the perceived needs of the children. Nor can he be faulted for the appearance, induced by all these special arrangements and concessions for

the children, that the plaintiffs huddled behind the screen were on the same playing field as the child complainants who apparently accessed the courtroom through the judges' entrance and into a special room in the judges' chambers.

[413] But he can be faulted for successfully objecting to Mr. Borden's request that, as an officer of the court, he be permitted to sit in the courtroom as an observer during the first preliminary inquiry so that he could hear what evidence the children would give. Mr. Borden undertook to comply with any conditions that might be imposed on him, but to no avail. Two consequences flowed from Mr. Borden's exclusion. First, it made it more difficult for him to effectively represent his clients at the subsequent preliminary inquiry. Second, it sheltered the children to a considerable degree from subsequent successful attacks on the credibility of their evidence. This was not a case of protecting a fragile and truthful child from a subsequent unfair and aggressive cross-examination of his or her credible allegation of abuse. It was a case of protecting the fabrications of dysfunctional and untruthful children from a subsequent effective challenge of their fabrications of abuse.

[414] In a similar way, Miazga was routinely aggressive and diligent in objecting to the cross-examination of the children on what they had previously "disclosed" in their videotaped interviews or to others. Although the defence lawyers were able to cross-examine the children on many significant inconsistencies between their court testimony and their videotaped "disclosures", Miazga successfully objected at the preliminary inquiries and at the trial to the court viewing the videotaped interviews or to reading the transcripts of them that had been prepared respecting those of the [R.] children.

[415] These objections have special significance to this case because the best evidence the defence had was the videotaped interviews of the children. In my respectful view, no right thinking individual could have viewed those videos without concluding

that the children were repeating fabricated allegations and then fabricating other allegations. Yet because of Miazga's efforts, the courts were denied the benefit of those videotaped interviews in making their assessments of the credibility of the [R.] children and the strength of the Crown's case.

[416] In the average case, an overly aggressive prosecution would not of itself constitute an indication of malice. But in this unique case, where the freedom of so many individuals hung in the balance and where Miazga himself had obvious and legitimate concerns about the veracity of the evidence of the children, he should have afforded defence counsel with every reasonable opportunity to challenge those allegations. What was of critical importance in the proceedings he was conducting was not winning the case, but determining the truth of the questionable allegations. By taking the overly protective stand that he did, he seriously increased the risk of the wrongful convictions of a large number of innocent individuals.

[417] Another similar example is Miazga's handling of many of the expert witnesses he called at the [R.], [R.] and White trial, and to a lesser degree, the expert witnesses he called at the preliminary inquiries. Professional witnesses are usually able to fend for themselves. Yet Miazga led some of his expert witnesses to the point of telling them what to say and he aggressively, and at times improperly, objected to their cross-examination by defence counsel. His objections were significant enough respecting the cross-examination of Dr. Santa Barbara, his expert psychologist witness, that the trial judge on her own initiative warned him that he was being overly protective of her. On other occasions he unduly took issue with the rulings that had already been made by the presiding judges, presumably in an attempt to get the judges to reverse their rulings, an objective he realized on more than one occasion.

[418] Again, one can understand any prosecutor becoming overly zealous in the heat of the moment, but the inescapable inference to be drawn from Miazga's approach, attitude and conduct throughout the criminal proceedings is that he was going to get committals or convictions no matter how unreliable his witnesses were and that he was not going to let the truth get in the way. He attempted to minimize the significant inconsistencies in the children's evidence by attributing them to the extreme trauma the children were supposedly experiencing in giving their evidence and being subjected to cross-examination by the defence. At one point he accused Mr. Borden of conduct bordering on the unethical. But to his credit, when prompted by the judge, he quite properly apologized for his comments.

[419] Miazga is generally held in high regard as a competent and principled prosecutor. In fairness to him, I am of the view that he likely bowed to pressure from his superiors, Social Services personnel and workers, Dueck, his child sexual council abuse peers and the prevailing attitude of the day, to accept the child sexual abuse allegations of the [R.] children without question and to vigorously prosecute those that they named as their abusers. He likely got himself into a prosecution that he knew was doomed from the start and did not know how to extricate himself from it. In so doing, he abdicated his legal and professional responsibilities as a prosecutor and was responsible for the malicious prosecution of the plaintiffs that ensued.

[420] I am satisfied that Miazga, Dueck and Bunko-Ruys had malice and a primary purpose other than that of carrying the law into effect in initiating and continuing the criminal proceedings against the plaintiffs within the meaning of the case law I have cited. I have outlined various indications of malice on the part of Hansen. In view of my disposition respecting her I express no final conclusion as to whether this element of the cause of action was established against her.

Comments on Submissions by the Defendants

[421] The defendants in their submissions referred to four specific events involving the views of third parties. They say that these views show that they had no malice and as well, had reasonable and probable cause to lay charges and to continue on with the prosecution. As the absence of malice or the presence of reasonable and probable cause is a complete bar to the plaintiffs' action, I will deal with each submission in turn.

The Credibility Finding by the Trial Judge

[422] The first event is that a judge of this court found that the [R.] children were credible because she convicted [R.], [R.] and White on the strength of the [R.] children's evidence. This is of no assistance to the defendants for six reasons. First, on the admission of Miazga himself, the case against [R.], [R.] and White was stronger than the case against the plaintiffs.

[423] Second, the decision of the trial judge was overturned by the Supreme Court of Canada. It is improper to rely upon the decision of the trial judge other than for the proposition that the decision she made on the basis of her belief in the credibility of the [R.] children was found by a higher judicial authority to be in error. The defendants cannot accordingly utilize her decision or belief to validate their beliefs or actions. Nor can they rely upon her decision or belief to preclude this court from determining that the [R.] children were not credible witnesses. I have read all the evidence that was presented to the trial judge and have the added benefit of viewing the videotaped interviews of the [R.] children.

[424] Third, Miazga was successful in keeping the videotaped interviews of the [R.] children's "disclosures" from the scrutiny of the trial judge. This was the most

damaging evidence respecting the credibility of the [R.] children. Yet the trial judge did not have the benefit of this evidence in assessing the credibility of the [R.] children. I am convinced that had she reviewed these videotapes, her conclusions and findings respecting the [R.] children would have been vastly different.

[425] Fourth, Miazga focused his case not on establishing the truthfulness of the allegations of abuse that the [R.] children made, but on establishing that the [R.] children were sexualized. He then relied on the opinion evidence of Bunko-Ruys' to establish the premise that sexualized children are sexually abused children and that the sexualization of the [R.] children was so extreme that it demonstrated very traumatic abuse early in their development. The message inherent in the case he presented to the trial judge was that the [R.] children had to have been sexually abused, that they had to have been sexually abused while in the home of their birth parents when [M.R. 1] was seven and under and the girls were four and under, and that it must have been the birth parents and the boyfriend who had abused them.

[426] The fact that what the [R.] children said about that abuse was inconsistent or made little sense, was an obvious concern for Miazga and Bunko-Ruys. At the preliminary inquiry, Miazga had taken care not to ask the children questions that would elicit their previous allegations of ritualistic or satanic abuse. But he could not prevent it from coming out in cross-examination and becoming a major hurdle to the credibility of the children. Hansen testified that the prosecutors were aware this would become an issue at trial and solicited the assistance of an expert in an attempt to explain how the [R.] children could have made these allegations which even the investigating officer and the prosecutors say they did not believe.

[427] Miazga called Dr. Santa Barbara, a psychologist from Toronto, as an expert witness at the trial. She had been involved in a case or two that included elements of

satanic ritualistic abuse in which a sophisticated effort had been made by the abusing adults to deceive the children into believing they were witnessing things that were really not happening. This might have provided an explanation for the bizarre allegations the [R.] children made if the nature and circumstances of the abuse they described was similar to that of the case described by Dr. Santa Barbara. But they were not. Additionally, the evidence clearly established that [R.], [R.] and White lacked the sophistication and means to orchestrate performances of the complexity required to deceive even young children about the nature and details of what they said they observed.

[428] Most of the details of the allegations made by the [R.] children of ritualistic or satanic abuse are to be found in their videotaped interviews which were not seen by the trial judge. She was accordingly not in a position to determine whether the hypothetical assumptions utilized by the expert witness in giving her opinion evidence were comparable to the ritualistic and satanic abuse allegations which had been made by the [R.] children. Yet the opinion of Dr. Santa Barbara was relied upon by Miazga to explain why the children had made those false allegations. Having explained that they were tricked into believing them, the fact they were false did not detract from their credibility. In my respectful view, this is one of the most blatant attempts at oath helping that I have seen.

[429] Fifth, through the dubious testimony of several self-professed child care experts, Miazga focused his case on the “needs” of the [R.] children and on the “extreme trauma” that they had to suffer by being required to testify and have their allegations challenged. This tended to mask or even justify the significant discrepancies of the children’s evidence and, at times, to divert the focus of the trial from the real issue to be determined, namely whether [R.], [R.] and White were guilty or not guilty of the incredible allegations brought against them.

[430] Sixth, for the reasons set out in the case law I have cited, a prosecutor cannot bootstrap his or her position by relying on the decisions of a third party. The facts of some of those cases are similar to the facts of this case.

The Credibility Comments of the Preliminary Inquiries Judge

[431] The second event relied upon by the defendants is that the Provincial Court judge who conducted the two preliminary inquiries, supposedly said that he believed the testimony of the [R.] children. This is of no assistance to the defendants for three reasons. First, as mentioned previously, a prosecutor cannot bootstrap his or her position by relying on the decision of a third party.

[432] Second, it is well known that the function of a Provincial Court judge who conducts a preliminary inquiry does not include making assessments of the credibility of witnesses. It is limited to determine if there is a sufficient case to go to trial in accordance with the test set out in *United States of America v. Sheppard* (1977), 30 C.C.C. (2d) 424 (S.C.C.). Any statement the Provincial Court judge made about the credibility of the [R.] children did not have the weight of a judicial determination of credibility.

[433] Third, this evidence was introduced through the testimony of the two prosecutors on the basis of an exception to the hearsay rule. The statement was tendered as proof that it was made, not as proof of its truthfulness. Hansen and Miazga invited the judge out to lunch after the two preliminary inquires had been concluded but before the [R.], [R.] and White trial was to begin. I place little reliance on the alleged statement of the judge for four reasons. First, it is not the best evidence but is only second-hand evidence. The judge was not called as a witness to affirm or deny the statement attributed

to him. The plaintiffs were not able to cross-examine him about his alleged statement, the context in which it was given or whether it was made with qualifications.

[434] Second, it is highly unusual and questionable for a judge to discuss an ongoing case with a party in the absence of the other parties. Although the judge had completed the preliminary inquiry by committing [R.], [R.] and White for trial, the trial in this court was still pending. One might ask what would have happened had the prosecutors attempted to adduce this evidence at the trial, whether by their own testimony or by calling the judge as a witness. Other oath helping witnesses were allowed to testify.

[435] Third, this same judge appeared to have grave reservations about the credibility of the [R.] children within a short time before he allegedly said the reverse to the prosecutors. In his reasons for committing the plaintiffs for trial after their preliminary inquiry that followed on the heels of the [R.], [R.] and White preliminary inquiry, he has this to say respecting the counts pertaining to the [R.] children:

> . . . persuasive arguments were made to me that, in essence, said that I - in my view, said that I shouldn't believe the testimony. My function as a Provincial Court Judge presiding over a preliminary hearing . . . is not to make a determination of innocence or guilt but merely to decide whether there is before the Court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably could convict. It is not my function to weigh the evidence or to test its quality or reliability.

[436] Fourth, at the outset of the Klassen - Kvello preliminary inquiry, defence counsel jointly applied to have this same judge recuse himself on the basis that he would be required to make similar rulings to those he had made previously in the [R.], [R.] and White preliminary inquiry. He would also be required to hear from essentially the same

witnesses that he had heard from before. Miazga successfully opposed the application on the basis that the judge would not be weighing the evidence or determining issues of credibility.

The Instructions of the Superiors of the Prosecutors

[437] The third event relied upon by the prosecutors is that on more than one occasion, the details of which I related previously, they sought the advice of their superiors and were told that if they still believed in the substance of the complaints, they should proceed with the prosecution. Again this is of no assistance to the prosecutors for three reasons. First, the advice of the superiors to proceed was qualified. I have previously outlined the ambiguity of this qualification. I also previously related the evidence on which I concluded that Miazga did not have an honest belief in the allegations of the children or in the probable guilt of all the plaintiffs on all the charges being prosecuted against them.

[438] Second, there is no evidence that the prosecutors informed their superiors of the full extent of the unreliability of the evidence of the children. Instead they emphasized how tired and traumatized the children had become by lengthy appearances in court. Had their superiors been informed of the sorry state of the case and the significant difficulties with the credibility of the children, it is highly unlikely that they would have instructed the prosecutors to continue despite whatever beliefs they may have had in the substance of the complaints. The sole consideration is not the subjective belief of a prosecutor. I have serious concerns that Miazga contacted his superiors not only to obtain their advice, but as well to attempt to minimize the risk of his exposure to liability if the whole case came crashing down around him as it eventually did.

[439] Third, for the reasons set out in the case law I mentioned previously, a prosecutor cannot bootstrap his or her position by relying on the decision of a third party even if that third party is a superior. The instructions or advice of a superior cannot justify an unlawful act such as the continuation of a malicious prosecution. If Miazga felt so insecure about the merits of his case that he had to continually obtain confirmation to proceed with it, he should have either stayed the charges or turned the case over to someone else. Nor can a prosecutor abrogate his professional responsibilities or offload them on a superior by using the advice of a superior as justification for his own wrongful actions. Even an employee in a master-and-servant relationship could not avoid liability on this basis.

[440] Miazga was exercising the powers and duties of the office of a prosecutor. As a Crown official and as legal counsel, he was an officer of the court with obligations not only to his employer, but to the court, his fellow counsel, the public and the plaintiffs who had been accused of the criminal offences. I previously cited the traditional legal description of the role of a prosecutor. That role does not permit a prosecutor to conduct himself as if he is counsel for child witnesses, for Social Services officials or personnel, for the police or for child therapists. Nor does it permit a prosecutor to forget that the object of a prosecution is not just to win. In fairness to a lawyer who has always been a prosecutor, and who deals for the most part with people who have committed serious and petty crimes, it is easy to become jaded about human nature and forget that some of the people that are accused of crimes are in fact innocent of them.

The Encouragement of the Preliminary Inquiry Judge to Proceed

[441] The fourth event relied upon by the defendants is the encouragement given to Miazga by the judge who conducted the [R.], [R.] and White preliminary inquiry. As

mentioned previously, Miazga's confidence in his case was badly shaken when [M.R. 1] lied in the face of the court about keeping notes of the abuse.

[442] Miazga told the judge that he was late for court because [M.R. 1] was not telling the truth about the notes. The judge responds that, "It doesn't surprise me." Miazga told the judge that he wanted to think over the weekend about what position to take on Monday. He frankly states that there may not be sufficient evidence for a committal and that he may not want to proceed with the next preliminary inquiry. He says that he wants to consider the likelihood of getting convictions on any of the charges. The judge responds, "I must express my surprise that you would be considering that way. . . I personally would have - I mean it's not my function to assess credibility but, simply voicing my own -". Miazga interrupts and outlines several factors he must consider.

[443] This ill-advised encouragement by the judge cannot provide Miazga with justification to continue on with a malicious prosecution action. For reasons given respecting the credibility comments of the same judge, these remarks, although made in a courtroom in this instance, do not have the status of a judicial determination of any issue that bears on the case before me. As I outlined previously, the court is not privy to the same information that is available to the Crown or the defence. A court can rule on or make determinations of the issues before it. But it is not in a position to direct or give advice to either the Crown or the defence on how to conduct their respective cases.

[444] Only Miazga as the Crown prosecutor was in a position to make a meaningful decision as to whether he had a case that should be pursued or should be stayed. He could not abrogate his responsibility as Crown counsel by relying on a decision or direction of the preliminary inquiry judge. The comments of the judge do not constitute reasonable and probable cause to continue, nor do they nullify the malice evidenced by Miazga in continuing on with the prosecution with the knowledge that he

did not have a credible case. Nor did Miazga's frank comments to the court about the weakness of his case provide him with justification to pursue that case.

The Reasons for Dismissing the Action Against Hansen

[445] The main strength of the plaintiffs' case, as I have detailed previously, is that they were charged and prosecuted on the basis of the allegations of the three [R.] children. The nature of those allegations cried out for a reasonable explanation as to how they could possibly be true in the circumstances. Miazga, Dueck and Bunko-Ruys had no reasonable and probable cause to initiate and continue the prosecution of the criminal proceedings against the plaintiffs. Dueck, Bunko-Ruys and Miazga acted in concert to pursue proceedings that would never have been pursued but for the involvement of each of them.

[446] The involvement of Hansen in the proceedings is markedly different from that of the other three defendants. She had little to do with Dueck and not much more to do with Bunko-Ruys. She was not involved in the case until after the initial charges were laid. As I have outlined previously, her involvement in the case was considerably less than that of Miazga. Although they prosecuted the plaintiffs jointly, the evidence demonstrates that she took a subordinate role. To her credit, she stayed most of the charges respecting the children for whom she was responsible when she lost confidence in their credibility. Miazga on the other hand failed to do so even when faced with three witnesses who were even more incredible than Hansen's witnesses.

[447] Hansen appeared throughout the proceedings to refrain from taking an aggressive approach. She was careful for the most part not to lead her witnesses in her examinations-in-chief nor was she overly protective of them when they were asked questions by defence counsel. She appeared to abide by the rulings of the court without contesting their validity. I am not aware of any instance in which she attempted to distort

or stifle the evidence. I do fault her however for trying to excuse the inconsistencies of her child witnesses on the basis that such inconsistencies are to be expected in children's evidence. Although this may be true respecting collateral details, it is not true respecting material or substantive matters. She should have also been more concerned about previous recantations by some of the children and by previous statements by some of the children that indicated they had been told what to say. The charges she pursued against the plaintiffs on the basis of the equivocal allegations of M.K. were unjustified.

[448] With the reservations that I outlined earlier, her testimony demonstrated her careful approach to the task to which she was assigned. She says that she did not rely on the police occurrence report to become informed as to the allegations of the children. She was more convinced than was Miazga, of the necessity to review the videotaped interviews of the children for whom she was responsible, as well as personally interviewing those children. Both were required to determine what the children would say in court and how they would present their evidence. She took notes of those videotaped interviews. She told the children about the importance of telling the truth. She interviewed the children in a formal setting on a one-on-one basis, asking the parents and others to leave. She was careful not to lead the children in her interviews of them. She interprets the Saskatoon Sexual Abuse of Children Protocol as a direction to accept what the child said but then to investigate what was said. An allegation should not be rejected just because it came from a child.

[449] She says that she is cognizant of the burden on the Crown to present a credible case to the court on a standard of proof beyond a reasonable doubt. Her own belief is that a child, just like anyone else, can lie. She said she is of the view that the evidence of children can be filled with inconsistencies yet not be as flawed as the evidence of an adult with the same degree of inconsistencies. Although this is likely true, her statement begs the question of whether any witness, child or adult, would be credible

if his or her evidence was filled with inconsistencies. She did acknowledge however, that in either case the standard of proof beyond a reasonable doubt is the same.

[450] I have outlined these observations about Hansen's initial involvement in the case and her evidence respecting her views, to demonstrate what she knew about the case, what she says about her beliefs and what her conduct reveals about her beliefs.

[451] Because of partial recantations and inconsistencies in the evidence of three of the children, S.W.H., S.E.H. and S.L.H., Hansen eventually concluded, likely not long before the Klassen - Kvello preliminary inquiry was to begin on December 2, 1991, that she had lost confidence in them as witnesses and could not offer them to the court. On November 26, 1991, she advised Robert Borden of her intention to stay the charges respecting S.L.H. She did so, along with the charges respecting a second child, S.E.H. on December 2, 1991.

[452] Hansen had several interviews with the third child, S.W.H. on November 1, 8 and 26, 1991. She asked Marilyn Gray, another prosecutor, to sit in on January 2, 1992 for an independent opinion and to take notes respecting his allegation against S.K. and S.K., the two plaintiff "young offenders". S.W.H. changed his story again and she concluded for this reason and because of Gray's assessment that S.W.H. was not credible, that he had reached a level of inconsistency beyond which she could not offer him to the court. All remaining charges respecting his allegations were stayed by the Crown shortly before the preliminary inquiry ended. This left her with only two persons charged by only two children.

[453] I am not satisfied on a balance of probabilities that Hansen maliciously prosecuted the plaintiffs. The plaintiffs' case against her fails because they have not made out the third element of the cause of action against her. The nature of the allegations of

the children with whom she was dealing was not inherently incredible as were those of the [R.] children. For the reasons I outlined previously, the nature of the evidence between the two groups of child complainants was vastly different. Hansen had one child complainant who was very credible, a fact acknowledged by each of the plaintiffs. That witness made no allegations of abuse against any of the plaintiffs.

[454] Hansen never saw the videotaped interviews of the [R.] children nor the Thompson notes because she was not responsible for the [R.] children. The only exposure she had to the [R.] children's allegations until the second preliminary inquiry was underway, was the two partial days of observing them in the first preliminary inquiry. She could not have known until later how incredible the [R.] children or their allegations really were. She never realized the extent of their inconsistencies that would have been demonstrated to her by the videotaped interviews. Because of the manner in which the prosecutors divided the division of labour, she was not under the same obligation as Miazga, to inform herself of any details and inconsistencies respecting the allegations of the [R.] children. She was primarily responsible for the other children assigned to her.

[455] When she initially prepared to present the witnesses who were her responsibility, she could reasonably take some comfort in the fact that charges had already been laid respecting the sexual assault allegations of the [R.] children. Those charges were against some of the same plaintiffs who were implicated in the sexual assault allegations of the children who were her responsibility. I am satisfied that Hansen had an honest belief in the guilt of all of the plaintiffs respecting all the charges brought against them by the child complainants under her responsibility.

[456] I am not satisfied that there was an absence of reasonable and probable grounds for her belief. The objectivity of her belief must be considered from the perspective of a reasonable person standing in her shoes, so to speak. On the basis of the

factors I have previously outlined, I am satisfied that they constituted a state of circumstances that would reasonably lead an ordinarily prudent and cautious person, placed in the position of Hansen, to the conclusion that the plaintiffs were probably guilty of the crimes imputed to them on the basis of the allegations of the child complainants under her responsibility. Although I have serious reservations about the charges based on the allegations of M.K., I am not convinced on a balance of probabilities by those reservations of the lack of reasonable and probable cause in connection with them. The burden of proof has not been met by the plaintiffs that the charges were proceeded with by Hansen absent reasonable and probable cause.

[457] I now move on to consider whether the plaintiffs have proven that Hansen maliciously prosecuted them respecting the offences based on the allegations of the three [R.] children. For ease of reference, I will refer to these offences as the "[R.] charges" to distinguish them from the charges based on the allegations of the other children that were the responsibility of Hansen. I will refer to these charges as the "other charges". I previously concluded that Hansen had reasonable and probable cause to prosecute the "other charges" that were initially laid and to subsequently lay and prosecute additional "other charges". My reasons for so concluding do not necessarily apply to Hansen's "prosecution" of the "[R.] charges" even though it appears that she initiated some of the additional "[R.] charges".

[458] But I am satisfied that unless Miazga's primary involvement in and responsibility for the prosecution of the "[R.] charges" relieves Hansen of liability to the plaintiffs, she maliciously prosecuted them respecting the "[R.] charges". Her involvement and conduct respecting these charges satisfies each of the four elements of the malicious cause of action. The second element obviously applies. The third element is satisfied in that even if she did have an honest belief in the guilt of the plaintiffs respecting the "[R.] charges", which I seriously doubt, there were no reasonable and

probable grounds to support that belief. The fourth element is satisfied by the numerous indicators of malice that I outlined previously. But the first element is in doubt, due to Miazga's primary involvement in and responsibility for the "[R.] charges" .

[459] I am troubled by the fact that Hansen did not, in the strict legal sense of the term, prosecute the plaintiffs for the "[R.] charges". They were in reality prosecuted by Miazga even though Hansen assisted in some respects and supported Miazga in his prosecution of them. But it does not follow from the simple fact that two prosecutors were involved in the overall prosecution of the plaintiffs, that they both maliciously prosecuted them on all the charges that were the subject of the prosecution. The malicious prosecution cases that I am aware of, do not address the type of case like the one before me where multiple prosecutors by agreement took different roles in the overall prosecution of the case. In many respects, the case involved two separate prosecutions that were conducted in common by different prosecutors. If this is so, the liability of the prosecutors should be considered in this context.

[460] The evidence satisfies me that even if Hansen had not been involved in the proceedings, the outcome of the prosecution of the "[R.] charges" would have been the same. Miazga would still be liable to the plaintiffs for the malicious prosecution of those charges but of course Hansen would not. It is more difficult to predict what would have pertained if Miazga had not been involved in the proceedings. Hansen became involved at a later date than Miazga not only in connection with the "[R.] charges" but also in connection with the proceedings themselves. She also had less initial involvement with the [R.] children than Miazga.

[461] If Hansen had been solely responsible for the proceedings, it is difficult to predict whether the outcome would have been the same. She may have lost confidence in the [R.] children and stayed the charges at an earlier stage in the proceedings than did

Miazga. In view of her demonstrated tendency to stay charges only as a last resort when the credibility of her child witnesses had become hopelessly impugned, I suspect she would have forged on despite the formidable odds. But this is primarily conjecture on my part. There is no solid evidence to support it as an inference.

[462] Although these considerations may be helpful to determine the unique nature of the prosecution of this case, it is evident that both prosecutors were very involved in it. Although the prosecutors had a common objective to convict the plaintiffs of the charges brought against them, they proceeded along different paths to realize this objective. I have already concluded that Hansen did not maliciously prosecute the plaintiffs respecting the "other charges". I have concluded as well that Miazga did maliciously prosecute the plaintiffs respecting the "[R.] charges". These findings were based on the same legal principles but on quite different facts.

[463] There is no evidence to suggest that Hansen did anything that encouraged Miazga to take a course of action respecting the "[R.] charges" that he otherwise would not have taken. Nor is there any evidence to suggest that she did or omitted to do anything that caused him to make or decline to make assessments or decisions respecting those charges that he otherwise would not have made or declined to have made. Hansen played a secondary role in the case from an overall perspective. She left all decisions respecting the "[R.] charges" to Miazga and even though she is undoubtedly a prosecutor in her own right, her role in this unique case respecting the "[R.] charges" was more that of an assistant to Miazga than a co-prosecutor.

[464] From a strict legal perspective, Hansen may have maliciously prosecuted the plaintiffs respecting the "[R.] charges" by assisting Miazga to do so. But from a functional perspective, she neither initiated nor continued these proceedings as a prosecutor in her own right. I am satisfied in the unique circumstances of this case that

the plaintiffs have failed to prove the first element of their malicious cause of action against Hansen respecting the "[R.] charges".

[465] On this narrow ground, I conclude that the plaintiffs have not proven their malicious cause of action against Hansen and it is dismissed against her.

The Reasons for Allowing the Plaintiffs to Call Rebuttal Evidence

The Context of the Application

[466] At the close of the defendants' case, the plaintiffs applied for leave to call a rebuttal witness. The witness of her own accord had contacted Robert Borden, one of the counsel for most of the plaintiffs, three days before the defendants closed their case. The witness, Amy Jo Ehman had been a CBC reporter in the spring of 1991 and related to Mr. Borden a conversation she had with Dueck at that time respecting his investigation. The plaintiffs sought to introduce her evidence on the basis that it pertained to malice, a material element in the case. She had heard that Dueck had testified at this civil trial that he did not believe the ritualistic and satanic aspect of the children's allegations. Her proposed evidence was to the effect that, as a CBC reporter, she had been advised by Dueck in 1991, before the charges were laid, that he did believe this aspect of the case.

[467] I was somewhat confused as to the nature of the plaintiffs' application. Robert Borden stated that the application was to call rebuttal evidence, not to reopen the plaintiffs' case. He said that the proposed evidence was tendered to show that Dueck had malice in that he was in effect telling the public through the media that the case involved ritualistic and satanic abuse when he had no belief in this aspect of the case. Yet he maintained that the plaintiffs were not attempting to bolster their case with the newly discovered evidence but tendered it to contradict Dueck's evidence as to what he said

about the case to others, an issue which he said had not been addressed as part of the plaintiffs' case. He also maintained that this was a material issue, not a collateral one and that it involved Dueck's credibility.

[468] The application was opposed by counsel for Dueck. He contended that the plaintiffs had been aware long before the trial of the issue of Dueck's belief respecting this aspect of the case. He referred to portions of Dueck's examinations for discovery in which he testified that he did not believe in the ritualistic or satanic aspect of the case. This testimony was read in by the plaintiffs as part of their case. Counsel for Dueck maintained that the proposed rebuttal evidence constituted a challenge to Dueck's testimony on a collateral matter and accordingly violated the collateral fact rule. He also maintained that Robert Borden had failed to disclose to the defendants and the court, in a timely fashion, that he would be seeking to call Ehman as a rebuttal witness. Although Dueck was no longer on the witness stand when Robert Borden learned that Ehman was a potential witness, Miazga was still on the witness stand.

[469] Robert Borden, with knowledge of Ehman's potential testimony, availed himself of the opportunity to cross-examine Miazga on matters that touched on Dueck's beliefs in the ritualistic and satanic aspect of the case. Robert Borden never advised counsel for the defendants or the court that he would be applying to call Ehman until Sonja Hansen had subsequently given evidence and the defendants had closed their case. Counsel for Dueck said that had he been aware of Ehman as a potential witness, he could have interviewed her and would have availed himself of the opportunity to ask questions of either of the prosecutors on this issue. He submitted that Dueck would be prejudiced if the plaintiffs were allowed to reopen their case or to call rebuttal evidence. Counsel for the other defendants took no position on the application provided the proposed witness did not refer to any of the other defendants in her testimony.

[470] Counsel for Dueck was not available to attend trial the following day, a Friday, so I reserved my decision on the application until the trial reconvened the following week. Over the weekend I received further written submissions from counsel respecting the issue of when Robert Borden was first contacted by Ehman and when he first disclosed to counsel for the defendants that he might be applying to the court for leave to call her as a rebuttal witness. When the trial resumed, I provided counsel with the opportunity to make any further submissions on the plaintiffs' application and, in particular, on the late disclosure issue referred to in the correspondence. I granted the plaintiffs' application to call rebuttal evidence with reasons to follow.

[471] As a condition of granting the plaintiffs' application, I granted leave to Dueck to call such surrebuttal evidence respecting the issue raised by the rebuttal evidence that his counsel deemed advisable. I was prepared to adjourn the trial, if necessary, to allow him to make arrangements to call or recall any witnesses in this respect. I also indicated that I was prepared to consider addressing the late disclosure issue with an order of costs against Robert Borden if Dueck wished to pursue the matter. I proceeded to hear the rebuttal evidence of Ehman which consisted of examination-in-chief by Robert Borden and cross-examination by David Gerrand. She was on the witness stand for only a few minutes. Dueck elected to call no further evidence and I heard the final submissions on behalf of the parties on the case itself. My reasons follow for allowing the plaintiffs to call rebuttal evidence.

The Law Pertaining to Rebuttal Evidence and Reopening a Case

[472] The plaintiffs relied upon *R. v. Krause*, [1986] 2 S.C.R. 466. The case sets out many of the principles to be considered by the court in an application of this nature but the ultimate outcome of the case does not assist the plaintiffs. The court overturned the conviction of the accused and directed a new trial on the basis that the trial judge had

erred in permitting the Crown to call rebuttal evidence. There are however several more recent appeal court decisions on this issue in the context of criminal cases. There are also a few appeal court and trial court decisions in civil cases that deal with this issue.

[473] It is trite law that neither a plaintiff nor the Crown can split its case by adducing evidence under the guise of reply evidence or by means of reopening its case. See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999), para. 16.158. It is also clear from the case law that there is a high onus that must be met by an applicant desiring to call rebuttal evidence or to reopen its case. Because of the significant potential for prejudice to an accused, the threshold is somewhat lower in civil cases than it is in criminal cases. Usually a new trial is directed in a criminal case if rebuttal evidence is improperly admitted. The law is also clear that adducing rebuttal evidence and reopening one's case are distinct issues.

[474] A recent case in our Court of Appeal, *R. v. Fisher*, 2003 SKCA 90, [2003] S.J. No. 597, reviews many of the cases on this issue. The conclusion of the court was that the trial judge did not err in allowing the Crown to adduce rebuttal evidence. Sherstobitoff J.A., writing for a unanimous court states at para. 83:

> 83 The Supreme Court of Canada in *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, defined the difference between allowing the Crown to re-open its case and allowing the Crown to call rebuttal evidence as follows at p. 737:
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> > [39] In particular, the Crown should not be permitted to gain the unfair advantage which will inevitably arise from "splitting its case". The rule against "splitting the case" developed primarily in the context of applications to adduce rebuttal evidence by the Crown. Applications to adduce rebuttal evidence and to reopen the case are "close cousins", but not "identical twins": *R. v. F.S.M.* (1996), 93 O.A.C. 201, at p. 208. Rebuttal evidence is

> properly admissible where the matter addressed arises out of the defence's case, where it is not collateral, and generally, where the Crown could not have foreseen its development: *R. v. Krause*, [1986] 2 S.C.R. 466, at p. 474; *R. v. Aalders*, [1993] 2 S.C.R. 482, at pp. 497-98. With rebuttal evidence, it is the rules of the adversarial process that justify the admission of the reply evidence. In an application to reopen, the Crown is required to establish that the evidence is material to an issue that is properly part of the Crown's case. In order to succeed, the Crown must also explain why the evidence was not led earlier and must justify this departure from the normal rules of the adversarial process. See *F.S.M.*, *supra*, at p. 208.

[475] In the circumstances of the case before me, the plaintiffs would also be entitled to the exercise of the court's discretion to permit them to reopen their case to admit the proposed evidence. Although the plaintiffs proffered the evidence on the basis of rebuttal evidence, they contend that it is material to an issue that is properly part of its case, namely the issue of malice. They obviously did not lead the evidence as part of their case because they were not aware of it when their case was closed or even when the defendants applied for their non-suit motions. The plaintiffs did not become aware of the potential evidence until the defendants were well into the presentation of their case.

[476] I will refer to some of the recent Supreme Court of Canada decisions in criminal cases that elaborate on the principles to be applied in considering whether rebuttal evidence (which is often referred to as "reply" evidence) should be allowed. In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at paras. 116 to 121, the court upheld the admission of rebuttal evidence respecting insanity. In *R. v. Biddle*, [1995] 1 S.C.R. 761 at 778, para. 30, the court held that the admission of rebuttal evidence by the Crown respecting alibi was improper and that the resulting prejudice to the accused could not be cured by granting the accused the right to call surrebuttal evidence. In *R. v. Melnichuk*, [1997] 1 S.C.R. 602, a new trial was ordered because the trial judge had permitted the Crown to

adduce rebuttal evidence (respecting the granting of a mortgage) in breach of the collateral fact rule.

[477] I have also considered *R. v. S.G.G.*, [1997] 2 S.C.R. 716, a decision in a criminal case referred to in the quotation from the *R. v. Fisher* decision cited above. It elaborates on the principles to be applied in considering whether the Crown should be permitted to reopen its case. A new trial was ordered because just before counsel were prepared to address the jury, the trial judge permitted the Crown to reopen its case and call a material witness who could place the accused at the scene of the crime. The court held that the discretion of the trial judge to permit the Crown to reopen its case narrows as the case proceeds. The primary consideration is the potential prejudice to the accused and this usually cannot be cured by allowing the accused to take the stand and testify in response to such evidence.

[478] *R. v. P.(M.B.),* [1994] 1 S.C.R. 555 is to the same effect. In that case the Crown was permitted to reopen its case before the defence called evidence but after stating its intention to call alibi evidence. A Crown witness was recalled to correct her previous evidence respecting the date the accused lived in her house, an issue related to the date of an alleged sexual assault. The decision of the Ontario Court of Appeal quashing the conviction was upheld.

[479] These criminal cases illustrate that only in exceptional circumstances is the Crown allowed to adduce rebuttal evidence or to reopen its case. The primary consideration is the potential prejudice to the accused. But newly-discovered evidence is one of the factors the trial judge can consider in the exercise of the discretion to permit rebuttal evidence. In *R. v. Proctor* (1992), 69 C.C.C. (3d) 436, the Manitoba Court of Appeal upheld the decision of the trial judge to permit the Crown, after the case for the defence was closed, to adduce the evidence of statements made by the accused to a

psychiatric nurse. This evidence was not known to the Crown beforehand. The accused's defence was insanity. Although a new trial was ordered on other grounds, the court upheld the decision of the trial judge to permit the Crown to adduce the rebuttal evidence. This case was quoted with approval in *R. v. Fisher*, *supra*, para. 86.

[480] There are not many civil cases that elaborate on the principles to be considered by a trial judge when confronted with an application by a plaintiff to adduce rebuttal evidence or to reopen its case. Some cases merely adopt the principles set out in the criminal cases I have referred to. See *Allcock, Laight & Westwood Ltd. v. Patten et al.*, [1967] 1 O.R. 18 (C.A.). In that case the trial judge was found to be in error in admitting rebuttal evidence that was in reality confirmatory only of the plaintiff's case. But in *Sood v. College of Physicians & Surgeons (Saskatchewan)*, [1996] 2 W.W.R. 668 (Sask. Q.B.), the court held that rebuttal evidence called to counter the testimony of a defence witness that was of the nature of alibi evidence, did not constitute a splitting of the case for the College. It was not a case of the College calling evidence to buttress its case on matters it was required to prove to establish its case.

[481] There is a discretionary power vested in a trial judge to allow a party to reopen its case to introduce evidence even though that evidence may not be the proper subject of reply. Sopinka, *supra*, at para. 16:159. Most civil cases that address the issue of reopening a case pertain to applications made after judgment has been entered. In some provinces there are rules of procedure which apply to such applications. That is not the case before me. It is sufficient to observe that the trial judge has a wider discretion in allowing a plaintiff to reopen its case before judgment has been entered. See A.W. Mewett, Q.C. & P.J. Sankoff, *Witnesses*, vol. 1 (Toronto: Carswell (current to Rel. 2003-1)), at para. 2.5(c)(i):

(c) Re-Opening the Case

(i) *Civil Cases*

> While this will normally constitute the totality of the evidence in the case, it is possible for the trial judge, in his or her discretion, to permit a party to "re-open" the case, after it has been closed. In civil cases, an application to re-open may be made after the evidence has been completed but before judgment has been delivered, after judgment has been delivered but before that judgment has been entered and after judgment has been entered. Needless to say, in the first two cases, the discretion of the trial judge is wider than in the last case, and will basically depend upon his or her view of whether the interests of justice demand it—usually because a party has been misled in some way by the other or because of some inadvertence on his or her own part. Most of the Rules permit re-opening in some form or other. . . .

[482] The historical rationale for the rule against splitting one's case in a civil action is set out in J. Sopinka & S.N. Lederman, *The Law of Evidence in Civil Cases*, (Toronto: Butterworths, 1974) at 517, as follows:

> At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:
>
> > ". . . first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning."

[483] The dynamics of a civil case are quite different from those of a criminal case. The potential of prejudice to a defendant by the admission of rebuttal evidence in a civil case is often less than that to an accused in a criminal case. On the other hand, the potential for "the interminable confusion that would be created by an unending alternation of successive fragments of each case" is greater in a civil case than a criminal case. It would appear that the courts are beginning to move away from the "categories" approach to this issue and take a more principled or functional approach, much like what has been taking place in the law of evidence where decisions are driven by the circumstances of each particular case.

The Ruling on the Application

[484] I concluded in the case before me that although the proposed evidence related to a material element of the plaintiffs' case that they are required to prove, the evidence was not known to the plaintiffs, nor could it have been known to them through proper diligence, when they closed their case. The admission of the evidence would not contravene the collateral fact rule as the evidence pertained to a substantive issue in the case rather than a subsidiary issue. In any event, even if it did pertain to a collateral fact, it would contradict a previous inconsistent statement made by Dueck respecting his belief about the ritualistic and satanic aspect of the case. As such it would constitute a recognized exception in law to the collateral fact rule and because Dueck is a party to the action, it would be admissible for the truth of its contents under the admission exception to the hearsay rule. See Sopinka, *supra*, at paras. 16.133-134 and 16.172.

[485] In the circumstances, I concluded that the plaintiffs were entitled to reopen their case to introduce the proposed evidence and were also entitled to the admission of it on the basis of reply evidence. I was of the view that any potential prejudice to Dueck could be addressed by affording him the opportunity, accompanied by an order for costs,

to give surrebuttal evidence himself or to call such evidence from the prosecutors or from any other witness with relevant evidence respecting the issue at hand. Dueck alleged no prejudice other than the loss of the opportunity to examine the two prosecutors on this issue. His belief on the issue was before the court in the read-ins from his examinations for discovery. He confirmed this evidence by his testimony at trial. It is unlikely that he would have conducted his defence or given his evidence differently even if he had been aware of the newly discovered evidence.

[486] I also considered the respective appeal consequences of allowing or disallowing the rebuttal evidence. It would not be available to the Court of Appeal if I disallowed it. If I was found on appeal to have erred in disallowing it, the Court of Appeal might well have no option but to order a new trial at tremendous cost and inconvenience to the parties. On the other hand, if I am found on appeal to have erred in allowing it, the Court of Appeal can ignore the rebuttal evidence and can likely render its decision without ordering a new trial.

The Disposition of the Case Itself

[487] The parties to this action previously consented to an order of Dovell J. severing the trials of the issues of liability and quantum of damages and deferring the determination of costs until the quantum of damages is determined. I conclude that the defendants, Matthew Miazga, Brian Dueck and Carol Bunko-Ruys, maliciously prosecuted the plaintiffs. They are entitled to have judgment against these defendants in the amount to be subsequently determined. I conclude that Sonja Hansen did not maliciously prosecute the plaintiffs. The plaintiffs' action against her is dismissed.

[488] The parties reached an agreement that the Estate of Richard Quinney would be neither entitled to costs nor liable for costs respecting the action. I direct that the

default costs provisions in *The Queen's Bench Rules* shall not apply to the dismissal of the action against the Estate of Richard Quinney or against Sonja Hansen, nor shall they apply to the judgment granted against Matthew Miazga, Brian Dueck and Carol Bunko-Ruys.

The Counterclaim

[489] Matthew Miazga and Sonja Hansen, two of the defendants in the main action, are the plaintiffs in the counterclaim against Richard Klassen. Richard Klassen is one of the plaintiffs in the main action and the sole defendant in the counterclaim. The Estate of Richard Quinney abandoned its counterclaim against Richard Klassen by agreement of the parties on the basis that no party would be entitled to costs nor liable for costs respecting the counterclaim. The evidence in the main action, by the agreement of the parties, was applied to the counterclaim. Portions of the examination for discovery of Richard Klassen were read in as evidence. No oral testimony was adduced by any of the parties because the whole of the evidence adduced in the main action applies to the counterclaim.

[490] Counsel for Miazga and Hansen suggested at trial that the outcome of the counterclaim would likely be governed by the outcome of the main action. If the plaintiffs were successful in the main action, the counterclaim should be dismissed and vice versa. But as there has been mixed success in the main action, I must consider the counterclaim on its merits.

[491] Miazga and Hansen, the two prosecutors, claim that Richard Klassen published and distributed two posters and a letter that contained statements of fact that defamed them. Richard Klassen resists the claim on the basis that any statements contained in the posters and the letter were true as established by the evidence in this trial

and any expressions of opinion constitute fair comment as defined by the law. He also contends that the first poster was not authored or published by him but he admits that one or two copies may have been inadvertently distributed by him in conjunction with the distribution of other papers. The words in the posters and letters relied upon by Miazga and Hansen as defamatory are as follows:

> (a) in a document distributed widely including the postering in public places in Saskatoon at various times since February 10, 1993:
>
> > "crooked prosecutors
> > Sonia Hanson (sic), a crooked prosecutor, used the above manufactured evidence to advance her career.
> > Matt Miazga, a crooked prosecutor, used the above manufactured evidence to advance his career."
>
> (b) in a document over the signature "Richard Allen Klassen" distributed widely including by postering in public places in Saskatoon at various times since February 10, 1993 included the following entry:
>
> > "I, Richard Allen Klassen, demand that Crown Prosecutor Matt Miazga be arrested for covering up the rape and sodomy of an eight year old girl, in order to keep his manufactured case together.
> >
> > I, Richard Allen Klassen, demand that Crown Prosecutor Sonia Hanson (sic), be arrested for covering up the rape and sodomy of an eight year old girl, in order to keep her manufactured case together.
>
> (c) in a letter dated November 11, 1993 and distributed widely including by postering in public places in Saskatoon at various times since February 10, 1993 included the entry:
>
> > "Crown Prosecutor Matt Miazga should be held criminally responsible for aiding and abetting the criminal actions of the aforementioned people."

[492] Some of the terms used, and the context in which they are used, are capable of different interpretations. Given a contextual yet literal interpretation, the statements of fact are not actionable because they have been proven to be true. In the circumstances of this case, the remaining terms are not actionable because they are expressions of opinion or desire and constitute fair comment.

[493] The publication and distribution by Richard Klassen of these kinds of materials was foolish. In most circumstances they would be defamatory. He unnecessarily risked incurring liability to the prosecutors for damages. But in view of what he suffered at the hands of the prosecutors and others involved in the criminal proceedings wrongfully brought against him, his frustration is understandable. Fortunately, he redirected it into the considerable effort he has been required to expend in the preparation and presentation of his civil case. It has provided him with a much more effective and beneficial remedy than he could have ever achieved through his posters or letters.

[494] The counterclaim of Matthew Miazga and Sonja Hansen is dismissed against Richard Klassen. I direct that the default costs provisions in *The Queen's Bench Rules* shall not apply to the dismissal of the counterclaim against Richard Klassen. The issue of costs shall be deferred until the issue of the quantum of damages is determined in the main action.

_____J.