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Prosecutorial Discretion and Solicitor-Client Costs

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Case commented on: *R v Leonard*, 2013 ABQB 531

In *R v Leonard*, 2013 ABQB 531, Justice Thomas awarded solicitor-client costs against the Crown on the basis that the Crown continued with the prosecution of Leonard after the point where it "should have realized it had no realistic basis to continue" (at para 97). He did so after rejecting an application by the Crown that he should recuse himself. The Crown had argued for recusal because Justice Thomas had tried the underlying criminal case and, in the course of doing so, had reserved jurisdiction to award costs, had suggested that the Crown's conduct warranted review by the Minister of Justice and Solicitor General of Alberta, and had emphasized the weakness of the Crown's case.

Justice Thomas's decision not to recuse himself seems justified. He properly noted the "presumption of judicial integrity and independence" that "protects against allegations of bias, influence or conspiracy" (at para 15). He also noted that (1) a decision (or decisions) made in one party's favour do not warrant recusal simply because other matters remain to be decided (at para 16); (2) bias does not arise from a judge initially favouring "a particular approach, outcome, or result" (at para 17); and (3) a judge is not biased simply because he or she does "not mince words and may be direct and emphatic in disapproval of conduct" (at para 19).

On those facts, that Justice Thomas had indicated that costs *might* be available did not create bias (at para 20). Nor did his reference to review by the Alberta Ministry of Justice and the Solicitor General, given that that "is a distinct process separate from my role in ensuring that justice is provided by this Court" (at para 21). Finally, that Justice Thomas was critical of the Crown's conduct represents a proper exercise of his jurisdiction to comment on the conduct of counsel appearing before him in a "forthright way" (at para 26):

> [29] I believe an aspect of my role, as a judge, is that I clearly identify instances where I observe a Crown Prosecutor has acted in a manner that is inconsistent with that lawyer's duty as an officer of the court. That commentary should be in a manner that leaves no potential for misapprehension, not just for the education of the criminal bar and as a common law precedent, but also maintain public confidence in the courts….
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> [32] I do not believe a reasonable apprehension of bias would therefore arise when I explicitly indicated the shortcomings I had detected and which, unfortunately, I believe would have been obvious to that objective and informed member of the public, had that person observed the same trial and testimony as myself.

As noted, this conclusion on bias seems reasonable. Justice Thomas's second point, that a finding of bias should not arise simply because a party has had decisions go against it in the course of a trial or proceedings, seems particularly persuasive. Justice Thomas did not make comments against the Crown that were personal, dismissive or unjudicial in tone. He simply found that the Crown had failed to discharge its onus of proof, and that its case was in substance so weak as to cast doubt on the validity of the decision to have brought it. That result is adverse to the Crown, but it does not suggest that Justice Thomas has lost the ability to be fair and impartial in his decision-making.

Awarding solicitor-client costs against a Crown who has improperly brought a prosecution also seems reasonable. It addresses the wrongful injury suffered by a person subject to a meritless prosecution, and creates a form of accountability for the Crown's office when it proceeds in such cases.

Having said that, however, the actual decision on the facts reached by Justice Thomas seems very difficult to justify. Further, his legal analysis is problematic given the usual deference granted by courts to the Crown's exercise of prosecutorial discretion, and to their reluctance to impose consequences on Crown counsel who do so improperly. In *Miazga v Kvello Estate,* 2009 SCC 51[*Miazga*], the Supreme Court held that a Crown could only be sued for wrongful prosecution where the prosecutor "deliberately intended to subvert or abuse the office of the Attorney General or the process of Criminal Justice" (*Miazga*, at para 89). Demonstrating "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" would be insufficient to justify liability (*Miazga*, at para 81).

Justice Thomas distinguished the wrongful prosecution cases on the basis that they are "distinct in their origin, operation, and objective" (at para 46). In particular, the purpose of a cost award is part of a court's "jurisdiction to control trial process" (at para 46). He notes cases that have awarded costs against the Crown, including for wrongful prosecution (at para 57). Costs have been awarded where the prosecution has engaged in "oppressive or improper conduct" (at para 57, citing *R v Garcia*, [2004] OTC 472 (Ont Sup Ct J)). In the case of prosecutorial discretion, costs have been awarded "… where the prosecution has been frivolous, or where the prosecution has been conducted for an oblique motive" (at para 57, citing *R v King* (1986), 26 CCC (3d) 349).

With respect, however, the cases on awarding costs for improper exercises of prosecutorial discretion that Justice Thomas noted predate the Supreme Court's decision in *Miazga*. They do not account for the statement by the Supreme Court in that decision that courts ought to be very reluctant to interfere in exercises of prosecutorial discretion so as to ensure that prosecutors "will not be hindered in the proper execution of their important public duties" (*Miazga*, at para 81). It may be, as I have suggested, that *Miazga* is unduly protective of the Crown, and that the Supreme Court ought to have been more willing to subject incompetent, negligent, reckless or grossly negligent exercises of prosecutorial discretion to civil liability (On *Miazga* see in general, Alice Woolley, "Prosecutorial Accountability", ABlawg, November 12, 2009: here). That the Court did not do so, however, suggests that any attempt by a court to discipline Crown exercises of prosecutorial discretion, whether in the form of civil liability or a costs award, must be done cautiously and only in extreme circumstances.

Justice Thomas stated that costs should only be imposed on the Crown where the prosecutorial misconduct, including exercise of prosecutorial discretion, "goes well beyond inadvertence or carelessness, and amounts to oppressive or otherwise improper conduct; and… involves a

marked and unacceptable departure from the reasonable standards expected of the prosecution" (at para 67). As onerous as this test is, however, it is nonetheless less onerous than that imposed by the Court in *Miazga*. A marked and unacceptable departure from reasonable standards could arise from inadvertence or carelessness as much as from a deliberate intention to subvert or abuse the office of the Crown, which is the standard imposed in *Miazga*.

Further, the actual basis on which Justice Thomas imposed an award of solicitor-client costs suggests that in practice he does not view the conduct that creates a "marked and unacceptable departure" as equivalent to a deliberate intention "to subvert or abuse the office of the Attorney General or the process of Criminal Justice" (*Miazga*, at para 89). He locates the misconduct of the Crown in two decisions.

First, the Crown advanced the testimony of Ms. Foss, the mother of the children Leonard was alleged to have abused, who was also Leonard's former partner. She was found by Justice Thomas to be an unreliable witness – her testimony was "very suspect" (at para 87). He noted that previously Foss had sent "harassing e-mails" to Leonard, had been documented as stalking Leonard and was subject to a restraining order (at para 87). As a consequence, the Crown had abandoned a charge of a breach of a recognizance order against Leonard. Justice Thomas stated that he "can only conclude that [decision] was on the basis that Ms. Foss's account was not credible" (at para 88). Justice Thomas went on to state that he found it "difficult to understand how the Crown can, on one hand, implicitly acknowledge that it has a witness who is so unreliable that she cannot provide a reasonable basis for criminal charges, then advance that same person as an in any way credible witness" (at para 90). Further, the Crown knew of Foss's malice to Leonard. It is conceivable that her credibility could have been restored by her testimony at trial, but there was nothing in her testimony that "could, in my opinion, restore her credibility in the eyes of a reasonable and prudent prosecutor" (at para 93).

Second, the Crown continued with the trial against Leonard after the three complainants' "accounts all but collapsed on cross-examination" (at para 95). Justice Thomas noted an exchange with the defence counsel and one witness where she said "yeah" to questions suggesting that she was reluctant to testify because she was worried that the court proceedings would spin out of control. One part of that exchange was:

> Q. And the reason they have spun out of control is because none of this is true, right?
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> A. No.

These two decisions were, Justice Thomas concluded, each an "improper and a marked and unacceptable departure from the reasonable expected standard" (at para 97and 92).

The first of these decisions – the presentation of Foss's testimony – is not technically a decision related to prosecutorial discretion, since it is not about whether or not to proceed with a criminal case (see *Krieger v Law Society of Alberta*, 2002 SCC 65). This could mean that the concerns of inconsistency with *Miazga* are less significant. Justice Thomas also only awarded $1000 in costs against the Crown for this decision. Having said that, however, this aspect of the decision does appear to involve a serious amount of second-guessing by the Judge. The Crown advanced a witness who Justice Thomas *implicitly* determined that the Crown had previously judged not to be credible. He did not have any non-circumstantial evidence to support that conclusion, and did not consider the other reasons that may have led to the Crown dropping its breach of recognizance charge. This does not seem to amount to a sufficient basis for finding that the Crown had engaged in a *marked* departure from the appropriate conduct.

Further, on the issue of the testimony of the complainants Justice Thomas did impose significant costs – he assessed solicitor-client costs against the Crown for the entirety of the trial after the closure of the Crown's case. His assessment was that, at that point, the Crown ought not to have proceeded. In short, he was willing to impose solicitor-client costs for a decision that was clearly and entirely an act of prosecutorial discretion. Further, he did so because he viewed a cross-examination as so objectively destructive of a witness that the Crown ought not to proceed further with its case. He did not entertain the possibility that, to the Crown who presented the witness, the cross-examination may not have seemed so obviously devastating as it did to Justice Thomas. From my perspective, the statement quoted above, where the witness answered "no" to the question suggesting that none of her testimony was true, is not "as close to a recantation as can be imagined", despite Justice Thomas characterizing it that way (at para 95). And in any event, while it may be that a Crown lacks a strong independent grasp of the strength of his or her case, that does not demonstrate that the Crown is acting with the equivalent to the *mala fides* contemplated by *Miazga*.

I have been critical of the Supreme Court's decision in *Miazga*. It seems entirely reasonable to me to impose solicitor-client costs on the Crown where a prosecution ought not to have been brought forward, and where the decision to do so was grossly negligent or reckless. However, it also seems incoherent to suggest that wrongful prosecutions ought only to be permitted in cases of prosecutorial *mala fides* in order to ensure the independence of the Crown's exercise of its discretion, while then imposing solicitor-client costs on the Crown for the *bona fide*, albeit poorly judged, exercise of that discretion.

I understand Justice Thomas's dismay with the Crown's conduct here, particularly given the severity of the charges faced by Leonard, and his subsequent acquittal. The outcome and the reasons for that outcome offered by Justice Thomas suggest that Leonard ought not to have been prosecuted. At the same time, however, prosecutors need to be given the ability to exercise their discretion independently. When faced with an accusation of child molestation the Crown may reasonably be concerned not to be unduly hesitant in bringing the case forward. That they occasionally err ought not to be the basis for the court acting in a manner that undercuts their independence of judgment.

The ideal answer would be that prosecutors may be held liable for gross negligence or recklessness in exercising their discretion, and that solicitor-client costs ought also to be awarded in those circumstances. Yet even there, it does not seem obvious to me that that standard would have been met in this case. And, in any event, that more relaxed standard does not reflect the principles set out by the Court in *Miazga*, which ought to be governing in this area, whether imposing civil liability or awarding solicitor-client costs