Section 347 of the *Criminal Code* of Canada: Business Law Problems Remain

Presenter: Jennifer E. Babe, Miller Thomson LLP

The paper prepared by Ms. Babe provided an overview of the history of the 'criminal interest rate' provision in the *Criminal Code* (section 347) and summarized the issues raised in the paper prepared by Professor Mary Anne Waldron for the Conference in 2002 on the same issue.

In her presentation, Ms. Babe described the nature of legitimate business transactions involving interest payments that are seriously affected as a result of unenforceable contractual clauses offending section 347 of the *Criminal Code*. Examples of such transactions include bridge loans, start-up businesses, equity kickers and mezzanine financers. It was noted that while there are very few reported criminal cases considering section 347 of the *Criminal Code* there have been many cases where the section is relied on in commercial litigation – usually by a party to a transaction seeking an order that a contract term is unenforceable by reason of illegality due to section 347. This, the presenter noted, was not the activity that section 347 of the *Criminal Code* intended to address.

A report was then given on events since the presentation of the Waldron paper. The presenter reported that following the presentation of the paper to the Conference in 2003, the ULCC submitted the Waldron Report recommendations to the federal Minister of Justice for his consideration. The presenter then referred to a 2005 recommendation made by the Senate Banking Committee during its study of Bill S-19, *An Act to amend the Criminal Code (criminal interest rate)*, 1st sess, 38th Parl, 2005 (the Bill later died on the Order Paper). The Committee had recommended exempting from s. 347 of the *Criminal Code* loans where the principal amount was in excess of $100 000. The presenter also mentioned the tabling of Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, which focuses on payday lenders and others lending to financially vulnerable Canadians. However, it was noted that Bill C-26, does not address the problems with respect to large business transactions outlined in the Waldron Report and that no further bills addressing the issue relating to larger business transactions were presented by the Government since the Waldron Report was submitted to the then Minister of Justice in 2004.

The presenter noted that most provinces are now moving forward with legislation to regulate payday lenders and this type of legislation is a valuable piece of consumer protection. However, such legislation does not address the issues relating to interests for larger business transactions.

The presenter concluded that section 347 of the *Criminal Code* continues to pose serious difficulties for larger business transactions and proposed that the Criminal Section of the ULCC examine section 347 of the *Criminal Code* in light of the problems described above taking into consideration the criminal conduct it was intended to address.

Discussion:

Following the presentation, delegates proposed ways to study section 347 of the *Criminal Code* in light of issues facing the business community, as highlighted in the presentation.

During the discussion, it was submitted that this provision may not belong in the *Criminal Code* since consumer protection laws already exist. In response, some delegates noted that other *Criminal Code* offences, such as fraud and theft, also have a consumer protection component but that the true purpose of those provisions is to distinguish between what is right and wrong. It was noted that two distinct scenarios emerge from the paper: The first refers to sophisticated business transactions while the second encompasses situations such as in the case of *Garland* v *Consumers' Gas* [1998] 3

S.C.R. 112 dealing with consumers paying high interest rates on late payments of consumer gas bills. For the latter cases, it was argued that a set criminal interest rate may be the only way to target corporate behaviour against individuals by stating that these corporations are acting criminal when charging such high interest rates. Therefore, it was suggested that a proposal to amend s. 347 should be restricted to addressing the problem dealing with sophisticated business transactions without affecting other parts of the section because there is a need to maintain the current 60% baseline on which to have all types of commercial and consumer behaviour rest.

One delegate expressed the view that in searching ways to address the sophisticated business transactions aspect, care should be given not to ignore implications in other areas and noted that there may be sound policy reasons for maintaining section 347 in the *Criminal Code*.

Following discussion, the Chair of the Criminal Section noted that the Criminal Section would discuss and vote on a proposed resolution to consider creating a working group to study the issues described in the paper.

RESOLVED:

> **THAT** the Criminal Section of the Uniform Law Conference of Canada consider examining the issue of the usefulness for criminal law purposes of section 347 of the *Criminal Code*, and the range of options for possible reform of this offence

Carried: 13-0-7

Report of the Working Group on Collateral Use of Crown Brief Disclosure

Presenter: Denise Dwyer, Acting Deputy Director, Litigation, Crown Law Office – Civil, Ministry of the Attorney General of Ontario and
David Marriott, Appellate Counsel, Alberta Justice

The Working Group, established at the August 2006 meeting of the Conference, was tasked with considering the issues raised in the paper *Collateral Use of Crown Brief Disclosure* (prepared by Crystal O'Donnell and David Marriott, and presented to the Conference in 2006) and with making recommendations to the Conference in 2007 "respecting the desirability and feasibility of legislative or non-legislative initiatives to promote uniformity in the use of Crown Brief material in collateral proceedings".

The Working Group examined the impact of the Ontario Court of Appeal decision in *D.P.* v. *Wagg* respecting production of the Crown brief in civil proceedings, and similar issues being argued in the context of child protection litigation and administrative law proceedings.

For the purpose of informing the Working Group's approach to drafting recommendations that would achieve uniformity in the use of production of Crown Brief information for collateral purposes, the following guiding principles were established by the Working Group:

1. Generally, it is in the public interest to control disclosure and use of Crown Brief materials for collateral purposes in order to maintain the integrity of the criminal justice system, and to protect third party privacy and confidentiality concerns.

2. There is a public interest in protecting the administration of civil justice by ensuring that parties to a civil proceeding have full access to all relevant information.

3. The '*Wagg* screening mechanism' applies in quasi-criminal and civil proceedings, including child protection proceedings, labour arbitrations and administrative law proceedings.

4. The public interest balancing test, which is part of the *Wagg* process, must be applied in a fair and consistent manner. This requires a decision-maker with the required legal expertise to recognize administration of justice concerns that are critical to the protection of the integrity of the criminal and civil law systems.

5. Freedom of information legislation should not be used to access Crown Brief materials in circumstances where the public interest in confidentiality should prevail. Freedom of information legislation ought not to facilitate access to Crown Brief materials where consideration of the public interest concerns identified in *Wagg* would lead to the opposite conclusion.

The Working Group examined a number of issues including the 'implied undertaking rule' and concluded that the Canadian jurisprudence on the relationship between the implied undertaking rule and materials disclosed or produced in a criminal trial should be clarified. The Working Group identified issues that need to be addressed and proposed that guidelines be developed for the purpose of determining when the public interest requires ordering production, notwithstanding the existence of the undertaking.

The following recommendations were made by the Working Group:

Recommendation 1

The *Criminal Co*de or the Rules of Criminal Practice should be amended to create an undertaking of confidentiality that applies to all persons, including third parties, who receive Crown disclosure.

Recommendation 2

The provinces and territories should uniformly legislate amendments to their rules of civil procedure to codify the *Wagg* screen process in those rules.

Recommendation 3

Where feasible, Protocols and Memoranda of Understanding between key stakeholders such the police and child protection agencies, and disciplinary tribunals, should be established to regulate the sharing of vital information in urge cases and in particular types of proceedings.

Recommendation 4

The provinces and territories should uniformly codify the *Wagg* screening process in the enabling legislation of their child protection agencies and their legislation governing the procedures and processes that apply to administrative tribunals.

Recommendation 5

Freedom of information legislation throughout Canada should be uniform in its treatment of access requests for Crown Brief materials.

Discussion:

During the discussion, a number of issues were raised by delegates. It was noted that the paper was well researched, well written and thought provoking.

One question was posed regarding the need to address whether the 1999 Supreme Court of Canada case of *Campbell and Shirose* would apply since Crown brief materials often contain the subjective assessment of the evidence retrieved by police forces. It was noted in response that there is usually not much privileged materials dealing with the Crown's assessment of the case.

The following views expressed during the Criminal Section debates were summarized and reported to joint session delegates as follows:

- Privacy interests of an accused person ought to be specifically recognized;

- With respect to the recommendation to codify implied undertakings of confidentiality, interests of defence counsel and unrepresented accused ought to be carefully considered, including whether undertakings that bind defence counsel would prevent them from sharing information with journalists;

- A court power to set aside or vary an implied undertaking should perhaps not be restricted to judges of the superior court;

- Third parties who come into possession of disclosure materials might not know that they are subject to the implied undertaking;

- There may be a difficulty for accused persons to fully appreciate the reasons why they cannot use disclosure materials in collateral proceedings in which they may be engaged, such as family proceedings;

- Unrepresented accused may not fully appreciate the obligation of an undertaking of confidentiality; and

- The starting point of the paper should be that a presumption of non-confidentiality applies to Crown brief materials and documents should generally be made available to the public before a screening process applies.

During the discussion, it was suggested that it may be more appropriate to remove the presumption of confidentiality to expedite proceedings and avoid the need to make submissions that there are special circumstances in child protection cases and other administrative proceedings where a decision must be rendered promptly. It was noted in response that in the context of *Wagg*-type motions, it is recognized that child protection proceedings and similar matters are of such importance that they would proceed expeditiously but that in cases where it is less evident that the situation constitutes a special circumstance, a determination would need to be made.

In response to the question of the proper court jurisdiction to hear *Wagg*-type applications, it was submitted that the recommendation flowed naturally from the explanation provided by the Court in *Wagg* in which it was stated that the origin of the power of the Superior Court to hear such applications stemmed from the Superior Court's inherent power. In addition, it was noted that the main concern of the Working Group is that the question be handled by a court of proper expertise so the Court may fully appreciate the impact of decisions on the fairness of criminal proceedings. However, it was agreed that the proper court jurisdiction could be changed if delegates felt it was appropriate.

One delegate observed that the creation of a right of appeal similar to the one pursuant to section 37 of the *Canada Evidence Act* where the court makes an interlocutory order not to restrict access to Crown brief materials should be considered.

Also raised was the situation where a special procedure is created in the criminal context to obtain sensitive information (e.g. s. 278.2 of the *Criminal Code* – production of records to accused) but where the accused commences an action against the victim before the criminal proceedings have been instituted and obtains the information that would not otherwise be available to the accused in the criminal context. It was noted in response that most situations are usually the reverse: the plaintiff, who is the alleged victim in the criminal trial, does not have access to crown brief materials for the purpose of the civil action against the defendant who is the accused in the criminal trial; but the accused receives Crown brief materials through disclosure.

In reference to Recommendation 2.c, it was suggested that accused persons who require Crown brief materials to defend themselves in a civil proceeding should have access to these materials in the same manner as the police and Crown without being required to follow the screening mechanism described in the *Wagg* decision. In response, it was noted that the Court in *Wagg* determined that the screening mechanism does not apply to the police and the Crown brief materials could be used by police officers to defend themselves in a collateral proceeding. In addition, it was submitted that the Crown brief is created in anticipation of a criminal prosecution and that it would give rise to an odd situation if the creator of the record could not access it to defend himself or herself in a litigation that arises from the creation of the record. It was further submitted that the screening mechanism is not a complete barrier to accessing Crown brief materials.

The vote on the following resolution was deferred to the closing plenary and was adopted.

RESOLVED:
1. That recommendation number one of the Report, as amended*, be adopted.

2. That the Joint Civil/Criminal Working Group continue and that it consider the issues raised in the Report and the directions of the Conference and:

(a) prepare model uniform rules of civil procedure to codify the Wagg screening process in those rules;

(b) prepare uniform provisions to codify the Wagg screening process to govern production of Crown Brief materials in the child protection and administrative tribunal regimes; and

(c) prepare uniform access to information provisions governing access requests for Crown Brief materials

for consideration at the 2008 meeting.

(* Recommendation number one, at paragraph 146 of the Paper, is amended by replacing the terms “superior court” with the terms “court of competent jurisdiction”.)

Report of the Joint Criminal/Civil Section Working Group on dentity Theft

Presenter: Josh Hawkes, Appellate Counsel, Criminal Justice Division, Alberta Justice

In 2006, a Joint Criminal/Civil Section Working Group on Identity Theft was established to look at:

- What ancillary orders or declarations might be made in conjunction with a criminal prosecution to assist a victim in the process of rehabilitating their financial and other aspects of their identity; and

- The issue of mandatory breach reporting or breach notification.

The working group was also tasked with the responsibility of identifying areas for further research and examination.

The presenter described the scope of the problem of identity theft including the potential for significant financial losses and lasting consequential harm to its victims such as harm to credit ratings, financial reputation as well as erroneous criminal records created in the name of the victim where stolen identity is being used by an individual apprehended for a different crime. Criminal identity theft also potentially raises national security concerns. It has been the subject of extensive study by a wide range of groups, organizations and governments both in Canada and abroad.

In terms of victim impact, the presenter indicated that studies have identified four major issues: discovery of identity theft; time spent by victims repairing or restoring their financial history; consequences of identity theft; and benefits of early discovery.

The working group examined the following two options for assisting victims under the criminal law:

1. A broader approach used in the state of South Australia, which consists of legislation that provides for a court to issue a certificate to victims of identity theft following the conviction of a person found guilty of identity theft;

2. A narrower approach based on California' 'factual declaration of innocence' model, which defines "criminal identity theft" as identity theft that occurs when a suspect in a criminal investigation identifies himself or herself using the identity of another innocent person. Under this model, the victim of criminal identity theft may apply for a declaration of factual innocence, which could lead to the sealing and destruction of records. The victim who is granted an order may also apply for inclusion in the Identity Theft Registry.

The presenter noted that in the Canadian context, the approach to victim assistance in the *Criminal Code* has a narrow focus – sections 738 to 741.2 address the circumstances in which a restitution order may be given either to the victim or to others, and deal with the enforcement of such orders and the relationship of these provisions to other civil remedies.

The paper notes that there are limits to the extent to which the two approaches may be applied to the Canadian context. The working group noted the constitutional constraints and other operational limits in following the broad approach taken in South Australia or the narrow approach based on the California model including the fact that the issuance of a certificate or declaration at the conclusion of a criminal proceeding would not be provided in sufficient time for the victim to rehabilitate his or her credit history or limiting the amount of loss. Such process commences shortly after the victim is made aware of the theft.

The Paper also notes that identity theft resulting in the issuance of criminal process or criminal conviction in the name of an innocent individual - which name may appear in local or national police records or databases or shared between jurisdictions both nationally and internationally - is a serious problem. The presenter noted, however, that before any solutions are proposed, further study is indicated including an examination of current practices as well further research to determine the scope of the problem in order to evaluate the need to implement a similar approach in Canada.

The working group also examined the legal and policy issues relating to mandatory reporting of data loss (or "breach notification"), which, among other, enables potential victims of identity theft to protect themselves. The most effective measures to minimize the risk of identity theft continue to be the subject of debate. The working group favoured a consistent approach to breach notification by all levels of government. Many organizations in Canada have operations and hold data from individuals in more than one jurisdiction. They would greatly benefit from uniform rules about responding to a data breach.

In considering the role of the Conference regarding the subject of identity theft, it was noted that the work of the several existing working groups and organizations looking at the issue of identity theft will need to be monitored to ensure there is no unnecessary duplication or overlap in any future work undertaken by this Conference.

To further guide the work of the working group, three broad conclusions were presented:

- Empirical research indicates both that identity theft is significantly underreported to police or other agencies, and that time is of the essence in providing effective assistance to victims in overcoming the effects of identity theft;
- Breach notification should be the subject of continued examination including civil and penal remedies such as those already developed in various jurisdictions; and
- As preventive measures are a critical component of any solution to the problem of identity theft, the Conference should consider examining ways to enhance identity security with a view to reducing the risks of identity theft.

In light of these conclusions, the working group recommended:

1. That the working group develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes.

2. That the working group conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.

3. That the long term objective of the group be to examine identity security, and what steps might be taken to enhance the security of identification documents and practices with a view to reducing the risks of identity theft.

Discussion:

During the discussion, several questions were raised regarding the various aspects of identity theft. One issue raised for discussion was that while remedial measures are essential in addressing identity theft, prevention is equally important. It was noted that the Working Group explored whether they should study the preventive measures component in the Paper but concluded that a number of existing groups were already currently studying that aspect of identity theft. Also raised was whether

the Working Group had the opportunity to consider the notion of issuing one single piece of identification. In response, it was noted that the narrow mandate of the Working Group did not extend to this issue. In addition, it was mentioned that at least one security expert did not favour this approach because such an item would become the single factor identification that will not be questioned and this would cause more challenges in an identity theft situation.

One member of the Working Group noted the importance of having persons with the proper expertise and experience, such as representatives of a privacy office, to assist the working group, in particular to examine the issue of breach notification.

After the discussion, the following resolution was presented:

RESOLVED:

1. **THAT** the Joint Criminal/Civil Section Working Group on Identity Theft:

   (a) develop a principled framework for a breach notification scheme that could be used in all jurisdictions, together with an examination of related civil remedies and processes; and

   (b) conduct a detailed examination of remedies and processes to aid victims of identity theft where criminal or other official records have erroneously been created in the name of the victim.

2. **THAT** the Working Group report back to the Conference in 2008.

Report of the Joint Criminal/Civil Section Working Group on Malicious Prosecution

Presenter: Judy Mungovan, Counsel, Policy Division, Ministry of the Attorney General of Ontario

In 2006, a Joint Criminal/Civil Section Working Group was established to consider the need for uniform legislation to respond to concerns being reported across Canada regarding common law developments in the intentional tort of malicious prosecution.

The presenter provided an overview of the Supreme Court of Canada decision of *Nelles* v. *Ontario* as well as subsequent interpretations by the Courts including the latest Saskatchewan Court of appeal decision in *Miazga* v. *Kvello* Estate.

It was noted that, in *Nelles*, the Supreme Court of Canada (largely on policy grounds) brought an end to the notion of complete immunity for Crown prosecutors but that it is clear from the Supreme Court's reasons that the exception it intended to carve out from the doctrine of absolute immunity for the Crown was to be sufficiently narrow and onerous so as to catch only Crown conduct that was truly maliciously motivated. Despite the policy rationale stated in *Nelles* regarding the balance between preventing absolute immunity for Crowns in malicious prosecution actions, while ensuring a healthy respect for Crown discretion in prosecutorial decisions, the subsequent jurisprudence has diminished the safeguards the Supreme Court of Canada created.

The *Nelles* case set out four discrete grounds for the tort of malicious prosecution against a Crown prosecutor. However, with regard to the third element (absence of reasonable and probable cause), cases subsequent to *Nelles* show an increasing judicial willingness to review the Crown's reasoning in determining that a prosecution should go forward. Also, it was noted that there is a disconnect between the standard a Court uses to review the decision to prosecute (reasonable and probable cause), and the standard a prosecutor is instructed to follow when deciding to prosecute (reasonable prospect of conviction). Of even more concern, where courts have determined that no reasonable and probable cause exists, some have used this to infer malice on the part of the Crown, thereby 'conflating' the fourth element (requiring malice or some improper purpose) with the third. Indeed, the Saskatchewan Court of Appeal, in *Miazga*, ultimately concluded that a Crown's subjective views about the accused's guilt or innocence spoke directly to the existence of reasonable and probable cause and may in turn be evidence of malice. The fourth element of malice was intended by the Supreme Court to be a bulwark against frivolous actions and actions based solely on negligence, but the jurisprudence has not evolved in this manner.

The presenter noted that the development of the jurisprudence is of serious concern to Crown prosecutors. The three provinces that do keep annual records (Alberta, Quebec and Ontario) show an increasing rate of malicious prosecution civil suits. The Working Group identified early on the dangers that stem from an apparent loosening of the criteria for bringing a claim of malicious prosecution against a Crown prosecutor:

- an increased risk of frivolous prosecution claims that demoralize both the Crown named and Crowns in general;
- an increased risk that this will lead not only to more malicious prosecution claims, but also to other actions in tort to which Crowns have been traditionally immune; and
- the lack of clarity in recent jurisprudence has left Crowns unsure how to best fulfil their quasi-judicial roles as "ministers of justice" due to an apparent gap between the standard that compels a Crown to proceed with a prosecution that is in the public interest and the standard a Court uses when subsequently reviewing that same decision to proceed.

It was also noted that Courts are reviewing the general exercise of Crown discretion in new ways. In addition to allowing actions alleging malicious prosecution, they have also reviewed decisions of Crowns to *not* prosecute.

Although the focus of the presentation and the paper was on recent interpretation of the *Nelles* test, the Working Group also identified other issues for further consideration, such as:

- do public policy considerations support suggestions in jurisprudence that prosecutorial liability can or should be founded on torts other than malicious prosecution (such as misfeasance in a public office, breach of fiduciary duty, conspiracy and interference with economic relations);
- is there a need for uniform rules of court that effectively and fairly screen out frivolous lawsuits against prosecutors; and
- is there a need to develop uniform legislation restricting the ability of plaintiffs to sue prosecutors in their personal capacity for professional decisions made as agents of the Attorney General?

The Working Group recommended that the Conference consider the following three issues:

- the preparation of a uniform law entrenching the *Nelles* criteria as the exclusive basis on which Crown prosecutors may be sued for malicious prosecutorial acts;
- the preparation of a uniform law making Attorneys General solely liable for the torts committed by prosecutors as agents of the Attorneys General and the only party to be named in actions for malicious prosecution and related claims; and
- the preparation of other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits.

Discussion:

During the discussion, it was noted that Criminal Section delegates generally supported the goals of the Working Group as well as their recommendations. The main points raised during the Criminal Section debates were reported as follows:

- There is general agreement that there is a disconnect between the standard of reasonable prospect of conviction applied in the context of a prosecution and the subjective component of the third element of the test enunciated in *Nelles*, which requires absence of reasonable and probable grounds that an offence has been committed to bring an action for malicious prosecution;

- From a public policy perspective, Crown prosecutors should be in a position to evaluate, at every stage of the process, whether there continues to be reasonable prospect of conviction and determine whether charges against the accused should be withdrawn without the possible threat of a lawsuit for malicious prosecution; and

- There is a need to define what constitutes improper purpose or malice in legislation and clarify the type of evidence required to prove malice or improper purpose so that cases that do not have merit can be promptly dismissed.

It was also noted during the joint session discussion that because claims in malicious prosecution are fact-based, the meaning given through legislation to the terms improper purpose and malice should not be too specific. It was further noted that what is needed is a requirement that only very flagrant evidence of malice be accepted and not simply evidence inferred from lack of reasonable and probable grounds.

After the discussion, the following resolution was presented:

RESOLVED:

That the Joint Civil/Criminal Working Group continue and, pursuant to the recommendations in the Report and the directions of the Conference:

(a) prepare a draft Act and commentaries; and
(b) recommend other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits

for consideration at the 2008 meeting.