Malicious Prosecution - Working Group 2008

REPORT OF THE JOINT CRIMINAL / CIVIL SECTION WORKING GROUP ON:

MALICIOUS PROSECUTION

by Judy Mungovan

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

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Introduction

[1] In 2007, the Joint Criminal and Civil Section Working Group On Malicious Prosecution (Working Group)[1] delivered to the Uniform Law Conference of Canada (Conference) a report in which it recommended consideration be given to the preparation of a uniform law entrenching the *Nelles*[2] criteria as the exclusive basis on which a Crown prosecutor 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.

[2] The Working Group was authorized by the Conference to prepare uniform law and other jurisdictional responses as recommended. Accordingly, this paper provides draft model legislation in accordance with the mandate of the Conference, and discusses and proposes additional consideration of a variation to the model necessitated by the significance of leave to appeal to the Supreme Court of Canada having been granted in the *Miazga*[3] decision.

[3] The model legislation addresses specific concerns resulting from courts conflating of the 3rd and 4th elements of the test for liability for malicious prosecution set out in *Nelles* so that malice cannot be inferred solely from a finding of an absence of reasonable and probable cause. It prohibits the court from considering the subjective belief of the Crown Attorney in the guilt of the accused so as to ensure that the test to satisfy the third element is in keeping with the Crown Attorney's function – which is to objectively consider the sufficiency of the evidence in the determination of whether there are reasonable grounds to take the case forward to trial. It also may be helpful to note that a purely objective approach to reasonable and probable grounds is more akin to the test for committal to trial by a judge presiding over a preliminary hearing. In *USA v. Sheppard,* the Supreme Court of Canada established the test to be:

"Whether or not there is any evidence upon which a reasonable jury properly

instructed could return a verdict of guilty."*[4]*.

However, the proposed legislation does not cure the recent trend of courts not to show the same deference for prosecutorial discretion that is applied in reviewing prosecutorial discretion not to proceed with a private prosecution, albeit the underlying principles that require such deference in both cases are virtually indistinguishable.

Draft Model Legislation

[4] The draft Model Legislation is set out in Appendix A hereto.

[5] Sections 1 and 2 are intended to capture all causes of action against a Crown Attorney that have as their foundation complaints regarding prosecutorial conduct in a criminal prosecution no matter how those complaints may be advanced. In 2003 in *Folland v. Ontario*,[5] the Court of Appeal on a motion to strike a statement of claim for disclosing no cause of action held that the jurisprudence was not fully settled as to whether the four elements for the tort of malicious prosecution must always be proven in every civil action against a prosecutor and that it was also unclear that if the four elements were established, the plaintiff would be restricted to framing the action as one of malicious prosecution rather than as one of conspiracy, abuse of process or intentional infliction of harm. It is important to remember that liability for prosecutorial conduct for an improper purpose was carved out in *Nelles* as the only exception to absolute immunity enjoyed by Crown prosecutors. *Nelles* clearly set out requirements that must be established by the claimant in an action that involves prosecutorial misconduct - an abuse or perversion of criminal justice for ends it was not designed to serve.[6] Since the essential characteristic of all of the causes of action with respect to prosecutorial misconduct is basically the same, namely an intentional act as a result of a tangible improper motive, these sections have been drafted in order not to limit the types of torts that are captured. This will thus ensure that prospective plaintiffs cannot avoid the high threshold test of *Nelles* simply by framing what is essentially the same cause of action differently. Consequently, no attempt is made to categorize possible torts. Similarly, criminal prosecution has not been defined in order to allow for the broadest possible interpretation.

[6] Sections 3 is intended to require suits for malicious prosecution be brought only against the Attorney General but allows for the examination for discovery of the Crown Attorney who is an employee of the Attorney General and whose conduct is the subject of the cause of action. The section also better reflects the reality that in modern prosecution services, the decision to prosecute is not made by any one individual, but may be a collective decision for which the Attorney General should be answerable.

[7] Section 4 is intended to ensure that the exclusion of a Crown Attorney's immunity from prosecution is held to the standard established in *Nelles* and codifies the requirement that the four elements set out in *Nelles* to establish liability for malicious prosecution, including specific evidence of improper motive as an indicator of malice, must always be proven in every civil action for prosecutorial misconduct. A Crown Attorney's liability is therefore limited by this section to causes of action that have as their foundation conduct that gives rise to liability for malicious prosecution.

Judicial Review of Crown Discretion

[8] Judicial review of Crown discretion has been traditionally subject to a rigorous and deferential standard of review, for the reasons given by Justice L'Heureux-Dubé for the majority in *R. v. Power* [7], namely that prosecutorial discretion is especially ill-suited to judicial review.[8] In that case the Court had under review a refusal by the Crown Attorney to intervene to prosecute a private complaint. The majority recognized that judicial review of prosecutorial discretion is unworkable and declared that "[a]s a matter of law, principle and policy, the Court of Appeal is not empowered to inquire into prosecutorial discretion," except to remedy an abuse of the court's process in the clearest of cases. Despite this ruling, the trend in recent malicious prosecution cases has been to lower the high threshold required to constitute an abuse of process.

[9] Underlying the need for deference with respect to the exercise of Crown discretion, is the notion that reasonableness does not preclude a range of interpretations of evidence.While a court may disagree with a Crown Attorney's view of the evidence, it does not make the Crown Attorney's view unreasonable. The *Miazga* case demonstrates the possible problems and inconsistencies that can arise by trying to determine reasonableness. There was agreement in *Miazga* between the Crown and both the trial judge and Court of Appeal in the criminal prosecution with respect to the validity of the criminal prosecution, yet the trial judge presiding over the malicious prosecution case found an absence of reasonable and probable cause to proceed with the prosecution.Similarly, in *Ferri v. Ontario*[9] there was agreement between both the Crown Attorney and the summary conviction court with respect to the validity of the prosecution and disagreement on the part of the Court of Appeal. These cases suggest that even an innocent mistake regarding whether there was reasonable and probable cause can be enough to support an inference of malice.

[10] Although alert to the attractiveness of the argument that if a judge convicts, there must have been a reasonable prospect of conviction, Justices Iacobucci and Binnie in *Proulx* [10] nonetheless ruled that it is not open for a Crown Attorney to rely upon the decision of a judge that has been swept away on appeal as an answer to the claim that the Crown Attorney acted without reasonable and probable grounds and thus by inference acted with malice. The difficulty with this reasoning is that the inference of malice is no less applicable to the judge's decision to convict than to the Crown Attorney's decision to prosecute. It also ignores the fact that there can be a legitimate range of opinion as to whether the evidence reasonably viewed supports the decision to prosecute. An example of this difference in approach is underscored by the Ontario Court

of Appeal decision in *Ferri* where justices on the same panel agreed on the facts but applied them differently. Justice Juriansz took issue with the tone used by Justice LaForme and the difference in what he highlighted with the result that they reached different conclusions on whether summary judgment dismissing a prosecutorial misconduct action ought to have been overturned by the judge of first instance. It is therefore difficult to escape the conclusion that the reviewing court is frequently doing no more than second-guessing a Crown Attorney's judgment in the prosecution of a case.

[11] The law should be consistent in according proper deference to prosecutorial discretion. The trial judge in a malicious prosecution suit is considering the terminated criminal prosecution from a privileged position. He or she has the advantage of viewing all of the evidence with the benefit of cross-examination and presentation of the defence evidence and argument. The Crown Attorney, on the other hand, must make decisions in the context of an unfolding narrative, which is never complete until the matter is finished.

[12] The approach to the assessment of credibility is different in the case of the trial judge in the malicious prosecution case and the Crown Attorney in the originating criminal proceedings. According to the Martin Report,[11] in a case that depends upon the credibility of witnesses, a Crown Attorney should only reject evidence as unreliable when there is irrefutable evidence that it is not true. To do otherwise would result in the Crown Attorney overstepping his or her bounds and moving into the realm reserved for the trier of fact. Yet, the review of evidence by the trial judge in a malicious prosecution, as demonstrated in both *Ferri* and *Miazga*, can only be described as unfettered. For instance, in *Miazga*, the trial judge not only engaged in credibility assessments of the child victims, but additionally, each Crown Attorney action, such as the use of child witness tools, was explored as a potential indicator of malice notwithstanding that the use of such tools had been approved by the trial judge in the criminal proceeding. As the dissenting judge, Vancise J.A., said:

"The trial judge concludes that all of these "concessions" were exacted from the court and that the prosecutors deliberately overplayed the trauma of the children to focus the criminal proceedings on the needs of the children rather than on the validity of the allegations. Surely one must ask where were the courts in all of this? Didn't the preliminary court judge and the trial judge in the [R.] trial have a role in this? Surely the very experienced trial judge was capable of saying, I'm going to decide how the trial is conducted?" *[12]*

[13] It is worth repeating the words of Kozinski J. as he highlights the dangers in reviewing a prosecutors' conduct in *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), at p. 1299:

Such decisions [to charge, to prosecute and to plea-bargain] are normally made as a result of a careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge.

On this note, there is little doubt that the trial decision in *Miazga* has caused serious concern among Crown Attorneys. The underlying prosecution that led to the malicious prosecution suit in *Miazga* was protracted and complex. It included historical and serious allegations involving child victims. It should go without saying that the proper administration of justice requires that Crown Attorneys be given sufficient scope within which to make their decisions, or else Crown Attorneys will understandably shy away from prosecuting difficult cases, even though reasonable grounds appear to exist.

[14] Equally worrisome are a number of aspects of the recent decision of the Saskatchewan Court of Appeal in *Miazga*, from which an appeal is pending before the Supreme Court of Canada. Arguably the Court of Appeal has determined that a Crown Attorney must be convinced beyond a reasonable doubt of an accused person's guilt before bringing charges, even though this is the ultimate question for the trier of fact.[13] This conclusion should be contrasted with the suggestion in the Martin Report, that a prosecution should only proceed when there is a reasonable prospect of conviction and the prosecution is in the public interest, uninfluenced by his or her subjective view of the guilt of the accused.

[15] In addition, the Saskatchewan Court of Appeal's and other courts' tendency to infer malice from a finding of an absence of reasonable and probable cause for a criminal prosecution may well have been due to an incorrect assumption that the elements in the *Nelles* test were set out in their order of importance so that the requirement to find malice being listed as the last step may have led to the conclusion that it could be inferred as a result of the first three steps having been satisfied. Whatever may be the reason that has led courts into error, inferring malice has the undesirable effect of the court showing both a lack of deference for Crown discretion and effectively shifting the onus onto the Crown Attorney to show an absence of malice.

[16] Undoubtedly, it would be beneficial if a court presiding over a claim for malicious prosecution were required to extend the same deference as it does in a case where it is asked to compel a Crown Attorney to intervene and proceed with a private prosecution. The court in the latter case will not interfere unless there has been a flagrant impropriety.[14] In order therefore to try to ensure that proper deference is afforded to the discretion of the Attorney General it is important to monitor how the Supreme Court of Canada deals with this issue when it decides the *Miazga* appeal. One option, depending upon the outcome of *Miazga,* is to give further and serious consideration to requiring leave of the court first being obtained so that a potential plaintiff will be obliged to disclose at an early stage tangible evidence of malice or improper purpose.

CONCLUSION

[17] Accordingly, the Working Group recommends that the Conference receive this paper and the draft model legislation. However, before acting on this proposal, it is recommended that the ULCC wait for the reasons of the Supreme Court of Canada in the *Miazga* appeal, and that the Working Group reconvene upon the release of the decision to consider its implications so that ultimately any uniform law in this area is current and properly informed.

Appendix A

Uniform Proceedings Against Crown Attorneys Act

Comment: *As an alternative to a separate statute, a jurisdiction may wish to enact the provisions of this Act as an amendment to a Crown Attorneys Act.*

Definition

1. In this Act,

"Crown Attorney" means,

(a) a Crown Attorney, Deputy Crown Attorney or assistant Crown Attorney appointed under the *Crown Attorneys Act*, ***[fill in name of applicable provincial statute]***

(b) a member of the bar of Ontario temporarily appointed under that Act to act as a Crown Attorney, Deputy Crown Attorney or assistant Crown Attorney,

(c) a public servant authorized under that Act by the Attorney General to be a provincial prosecutor, and

(d) a person who was, but no longer is, a person described in clause (a), (b) or (c).

Application

2. This Act applies to every civil proceeding respecting a Crown Attorney's conduct in a criminal prosecution ('prosecution") that is brought by a plaintiff who was the subject of the prosecution.

Protection from liability

3. (1) No civil proceeding shall be instituted against a Crown Attorney for anything done in the conduct of a prosecution or in the intended performance of a duty with respect to a prosecution or in the exercise or intended exercise of a power with respect to a criminal prosecution or any neglect or failure in the performance or exercise of a duty or power with respect to a prosecution.

Liability of Attorney General

(2) Despite subsection (1) and subject to section 4, a plaintiff who was the subject of a prosecution may bring an action against the Attorney General in respect of the conduct of the prosecution by a Crown Attorney.

Discovery

(3) In a proceeding against the Attorney General under subsection (2), the Rules of Civil Procedure as to examination for discovery and inspection of documents apply in the same manner as if the Attorney General were a corporation, except that,

(a) the Attorney General may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;

(b) the person who shall attend to be examined for discovery shall be the Crown Attorney whose conduct is the subject of the civil proceeding unless he or she is no longer a Crown Attorney, in which case the person shall be an official designated in writing by the Deputy Attorney General; and

(c) the Attorney General is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Attorney General may be required to produce, signed by the Deputy Attorney General, shall be delivered.

Service on the Attorney General

(4) In a proceeding under this Act, a document to be served personally on the Attorney General shall be served by leaving a copy of the document with a […].

Trial without jury

(5)In a proceeding against the Attorney General under subsection (2), trial shall be without a jury.

Elements to be proved

4. (1) In a civil proceeding respecting a Crown Attorney's conduct in a prosecution, the plaintiff must establish that,

(a) the Crown Attorney initiated or continued the prosecution;

(b) the prosecution was terminated in favour of the plaintiff;

(c) there was an absence of reasonable and probable cause to initiate or continue the prosecution; and

(d) the actions of the Crown Attorney in the conduct of the prosecution were malicious or were done for an improper purpose.

Continuing a prosecution

(2) For the purposes of subsection (1), a Crown Attorney continued a prosecution if the Crown Attorney, at any stage of the prosecution,

(a) made a determination that the prosecution should proceed; or

(b) otherwise took a step in the prosecution to ensure that it proceeded.

Reasonable and Probable Cause

(3) For the purposes of subsection 4(c), the Crown Attorney's personal opinion about the guilt of the accused shall not be considered in the determination of whether there was an absence of reasonable and probable cause.

Malice, improper purpose

(4) For the purposes of clause (1)(d), malice or an improper purpose shall not be inferred solely from a finding that the Crown Attorney did not have reasonable and probable cause to initiate or continue the prosecution.

The short title of this Act is the *Proceedings Against Crown Attorneys Act, 2008.* If you have the action be against the AG, this title is misleading. It might be more accurate to say: *Proceedings with respect to the Conduct of Crown Attorneys Act, 2008*

FOOTNOTES

[1] The Working Group consists of the following members: Alberta: Kate Bridgett, Sarah Dafoe, Tim Hurlburt; Canada: Michel F. Denis, Robert Frater; Manitoba: Lynn Romeo, Robin Finlayson; Ontario: Erin Winocur, Michele Smith, Bill Manuel, Judy Mungovan (Chair); Quebec: Michel Breton; Saskatchewan: Darcy McGovern, Dean Sinclair; and ULCC/CHLC: Clark Dalton.

[2] *Nelles v. Ontario* [1989], 2 S.C.R. 170.

[3] *Miazga v. Kvello Estate,* [2007] S.J. No. 247*,* leave to appeal was granted on February 7, 2008. As of July 15, 2008, only the Attorney General for Nova Scotia has sought leave to intervene in the appeal although motions by other Attorneys General are expected to seek leave imminently.

[4] (1976), 30 C.C.C. (2d) 424 at 427 (S.C.C.)

[5] *Folland v. Ontario*, (2003), 64 O.R. (3d) 89.

[6] *Nelles,* at para 55.

[7] *R. v. Power* [1994] 1 S.C.R. 601.

[8] *Power*, at para. 34 repeating Powell J.'s comments in *Wayte v. United States,* 470 U.S. 598.

[9] *Ferri v. Ontario*, (2007), 279 D.L.R. (4^{th}) 643.

[10] *Proulx v. Quebec*, [2001] 3 S.C.R. 9.

[11] *The Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution,* (Ontario Ministry of the Attorney General, Toronto, 1993) ("Martin Report") at 71-73.

[12] *Miazga,* at para. 228.

[13] *Miazga*, at para 132.

[14] *Campbell v. A.G. of Ontario* (1987), 31 C.C.C. (3d) 289; aff'd. 35 C.C.C. (3d) 480 (C.A.). The court cannot review a decision by the Attorney General to stay a private prosecution, absent flagrant impropriety.