UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL SECTIONS

REPORT OF THE JOINT CRIMINAL/CIVIL SECTION WORKING GROUP ON MALICIOUS PROSECUTION

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[1] In its Report Of The Joint Criminal/Civil Section Working Group On: Malicious Prosecution at the proceedings of the September, 2007 annual meeting of the Uniform Law Conference of Canada (ULCC), it was recommended and the ULCC authorized that: (a) consideration be given to the preparation of a uniform law entrenching the criteria laid out in *Nelles v. Ontario (Attorney General)* as the exclusive basis on which Crown prosecutors may be sued for malicious prosecutorial acts; (b) a uniform law be prepared making Attorneys General solely liable for the torts committed by prosecutors as agents of the Attorneys General with the requirement that the only party to be named in actions for malicious prosecution and related claims; and (c) the preparation of other uniform jurisdictional responses that would fairly and effectively limit the harm caused by frivolous malicious prosecution lawsuits.

[2] At the ULCC's 2008 annual meeting this working group presented its report which included draft legislation for consideration by delegates. The report notes that the model legislation is intended to address specific concerns chief among which are those resulting from courts conflating the third and fourth elements of the test for liability for malicious prosecution as set out in the 1989 Supreme Court of Canada decision in *Nelles* v. *Ontario*. In this regard, the model provides that the four elements set out in *Nelles* to establish liability for malicious prosecution must always be proven in a civil action for prosecutorial misconduct, including evidence of improper motive as an indicator of malice. The report also notes that leave to appeal to the Supreme Court of Canada was granted in *Miazga* v. *Kvello Estate* on February 7, 2008 and that this working group will monitor the outcome of the decision before finalizing the model legislation.

[3] On December12, 2008, oral argument was presented in the *Miazga* case before a panel consisting of Chief Justice McLachlin and Justices Binnie, Lebel, Fish, Abella and Charron whose judgment continues to be reserved. Accordingly, this report briefly summarizes the submissions made by the parties and the numerous interveners, all of whom focused on either the third or fourth elements of the test in *Nelles* or both.

[4] Although leave to intervene was granted to the Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Saskatchewan, and the Attorney General of Alberta, they were each denied permission to present oral argument at the hearing of the appeal. Conversely, the Attorney General of New Brunswick, the Attorney General of Manitoba, the Attorney General of British Columbia, the Canadian Association of Crown Counsel, the Association in Defence of the Wrongfully Convicted, and the Criminal Lawyers Association (Ontario) were each allowed 10 minutes to present

oral argument. And, 5 minutes of oral argument was allotted to each of The Attorney General of Quebec and the Director of Criminal and Penal Prosecutions of Quebec, the Attorney General of Nova Scotia, and the Canadian Civil Liberties Association.

The Third Element of the *Nelles* Test

[5] The factums in appeal have put squarely into issue the third element of the test established in *Nelles* which requires proof of an absence of reasonable and probable cause. The gist of a number of the arguments is whether this standard is appropriately applicable to Crown conduct, and, if so, how it should be interpreted. One issue in this regard is whether it is enough to establish reasonable and probable cause to prosecute upon showing that there is an "arguable case" against the accused or must the prosecutor also honestly believe the accused was probably guilty. Appellant and Crown interveners generally argue for the latter with, in some cases, variations, while others support the former.

[6] The Attorney General for Manitoba supports the Appellant's submission that there is little reason to scrutinize a prosecutor's subjective belief in the guilt of the accused when an objective test has been met in relation to the sufficiency of the evidence. This Attorney General proposes that in order to satisfy the third test in *Nelles*, the plaintiff must show there was no reasonable prospect of conviction to ensure consistency with its policy regarding when prosecutions should go forward. Manitoba argues that the current test when practically applied, along with the difficulty of establishing a negative proposition, has the inadvertent result of shifting the burden to the defendant to provide evidence about his or her subjective belief in the guilt of the accused. And, Manitoba argues that proof of this element should be separate from the distinct requirement to prove subjective malice on the part of the defendant.

[7] The Attorney General for Alberta argues that the subjective component is not the prosecutor's personal belief in guilt but a professional belief that there is a prima facie case and that the assessment and analysis must be limited to what the Crown Attorney knew about the evidence at the time prosecutorial decisions were being made. Alberta also highlights the danger of melding the concepts of reasonable grounds with honest belief. It notes that in the case at bar, the trial judge and Court of Appeal, having concluded that there were no reasonable grounds, each found that therefore the defendant could not have an honest belief. This conclusion, as argued by Alberta, failed to consider that a belief may be honestly held even though it was reached through negligence, recklessness, bad judgement, or even good judgement diligently applied but wrong in law.

[8] The Attorney General of Canada similarly argues that the third element in the *Nelles* test should be recast to provide that there be proof of "the absence of admissible and reliable evidence sufficient to put the accused on trial". It argues that such a test is not only grounded in the test for committal to trial in the Criminal Code, but is more consistent with a common understanding of the prosecutorial role. It contends that such a test is a modified *prima facie* test in that prosecutors should turn their minds to issues of admissibility and reliability at the trial stage to ensure proper consideration of such things as the *Charter* on the ultimate admissibility of evidence. And, it further submits that the fact that an accused was committed for trial or was convicted should not always be irrelevant to the determination of an absence of reasonable and probable cause. It argues that "[n]either a committal after a preliminary inquiry nor a dismissal of a non-suit motion at the close of the Crown's case in a trial is necessarily determinative of the reasonable and probable cause issue, but those determinations are objectively compelling, at least where no new facts have emerged." While the majority of the Court in *Proulx* dismissed the relevance of committal and trial proceedings on the basis that the prosecutor could not bootstrap his own position in such a manner, Canada argues that the facts in *Proulx* were unique and thus marginalized the relevance of findings in earlier criminal proceedings.

[9] The Attorney General for Ontario submits that the 'arguable case' standard remains the appropriate standard to apply when civil courts review whether there was an absence of reasonable and probable cause.

[10] Ontario disagrees with the submissions of the Respondents that there should be a higher standard, and states that the 'arguable case' standard set out in *Nelles* and in *Proulx* is the appropriate standard to apply when civil courts review whether there was an absence of reasonable and probable cause, even though Crown Attorneys in Ontario use the higher standard of 'reasonable prospect of conviction' when deciding to prosecute.

[11] Ontario notes that Attorneys General throughout Canada have set charging standards that, notably, are not all alike, and are based in part on the respective policy of the Attorney General in each jurisdiction regarding the prosecution of crime. Ontario explains that the 'reasonable prospect of conviction' standard, as recommended in the *Martin Report*, was never meant to "give rise to some sort of actionable breach of duty", but rather was intended to provide transparency for the benefit of the public while also providing guidance to Crown Attorneys in the use of their discretion when deciding whether or not to prosecute.

[12] Ontario further contends that charging standards for Crown Attorneys include factors beyond the threshold evidentiary basis for charging which are irrelevant to a malicious prosecution action, such as whether the prosecution is in the public interest. Moreover, Ontario notes that should the Court find that the applicable standard with respect to this element of the tort mirrors Attorney Generals' current policy standards for criminal prosecution, Attorneys General throughout Canada may hesitate to adopt more stringent standards or guidelines out of fear that by so doing, it will have increased the exposure of Crown Attorneys to tort liability. Accordingly, Attorneys General should not be discouraged from raising the charging standards or guidelines for Crown Attorneys to a higher level than the standard set in the *Criminal Code* for laying a criminal charge or that was previously set by the Supreme Court of Canada as the standard for reasonable and probable cause as a requisite element of the tort of malicious prosecution.

[13] Ontario further notes that a correctness standard of review of the decision to prosecute does not accord with the Supreme Court of Canada's finding in *R. v. Powers* that courts ought to be reluctant to interfere with prosecutorial discretion. (*R. v. Power*, [1994] 1 S.C.R. 601 at para. 34).

[14] The Attorney General of Saskatchewan takes a similar position for the third test, namely that the assessment of the absence of reasonable and probable grounds to initiate or continue a prosecution should be based primarily on objective grounds with only a limited subjective component. And, it submits that the subjective component is only to determine whether the Crown prosecutor subjectively believed that there was sufficient evidence from which the guilt of the accused was legally capable of being proved beyond a reasonable doubt, and upon being so satisfied, then to determine whether that belief was reasonable. This Attorney General explains that taking the matter forward is presumptively demonstrative of the prosecutor's subjective belief and it is for the plaintiff to establish by convincing evidence that this presumption is incorrect. Such a standard, it argues, should be contrasted with the 'probably guilty' test that requires a subjective belief in guilt, which is a test entrenched in a private prosecution historical context, but is not in keeping with the role of the Crown.

[15] The Canadian Civil Liberties Association (CCLA) asserts that the arguable case standard is vague and unhelpful in defining the nature of the duty owed. It submits that a prosecutor should proceed only when there is an honest belief that there is sufficient evidence, having reviewed it for its credibility, reliability, admissibility and probative value, to probably prove guilt beyond a reasonable doubt.

[16] On the other hand, The Association in Defence of the Wrongfully Convicted (AIDWYC) argues for maintaining a subjective element of the *Nelles* third test. In

addressing the Appellant's reference to this working group's concerns with the manner in which the subjective element is being applied by courts, AIDWYC seeks to somehow distinguish between what it describes as a prosecutor's professional obligation to apply his "judgment as a lawyer" from a prosecutor's "impressionistic views" about the accused's factual guilt. It is only in the former sense that the subjective belief comes into play.

The Fourth Element of the *Nelles* Test

[17] Regarding the fourth test in *Nelles*, the Appellant and Crown interveners argue that in practice the lower courts have slipped into error by inferring malice from the absence of reasonable and probable cause. In presenting their arguments they have generally adopted the position set out by this working group on malicious prosecution presented to delegates at ULCC's September, 2007 conference.

[18] The Attorney General of Nova Scotia reference the Nova Scotia Public Prosecutions Act that came into force in 1990 shortly after the release of the Royal Commission on the Donald Marshall Jr. Prosecution as having been passed for the purpose of ensuring fair and equal treatment in the prosecution of offences by establishing the position of Director of Public Prosecutions.

[19] The Attorney General of British Columbia highlights that the independence of prosecutors mandates something much greater than the absence of probable cause. Its factum argues that the constitutionally protected independence of prosecutors requires that a plaintiff must provide evidence of a wilful and intentional effort to abuse or distort the role of the prosecution.

[20] The Attorney General of Ontario argues that consistent with Lamer J.'s reasoning in *Nelles*, a finding of malicious prosecution is tantamount to a finding that the Crown Attorney perpetrated a fraud on the court. On that basis, and given the universal requirement that when fraud is alleged, it must be "systemically pleaded and proven", these factors further support the logic that malice must be expressly proven. Without specific evidence of malice, contends Ontario, plaintiffs otherwise can turn every civil action into a retrial of the criminal proceeding.

[21] The Attorney General of New Brunswick contends that the *Nelles* test needs to be reformulated. Its position basically is aligned with the argument being made by all of the other Crown interveners that there is a presumption of integrity afforded a prosecutor that requires, in the case of a successful claim for malicious prosecution, that the plaintiff

show more than simply that the prosecutor could not have and did not believe s/he could prove guilt. The Criminal Lawyers Association (Ontario), however, argues that this would make it impossible from a practical prospective for any malicious prosecution suit to succeed.

[22] The CCLA supports the status quo as presently presented in lower courts. It asks the Court to reject the "chilling effect" arguments raised by the Appellant and Crown interveners and assert that there is no empirical evidence in the 20 years since *Nelles* that Crown prosecutors are unable to perform their functions without a “special, higher threshold” for malicious prosecution actions taken against them. It asserts that since the prosecutors honesty and integrity are at the core of the fourth element there should be no deference shown to the role of prosecutor in the form of a presumption of prosecutorial integrity. The CCLA also contends that to impose a requirement that the plaintiff must prove the particular personal animus or motive would amount to adding a fifth element to the test for malicious prosecution.

Conclusion

[23] The decision of the Supreme Court of Canada is expected imminently. The average reserve time for its decisions is approximately 7 months. The Working Group will continue to monitor the matter, and when a decision is forthcoming, will undertake a full analysis to inform a further report and potential uniform legislative response at the 2010 Uniform Law Conference of Canada.