UNIFORM LAW CONFERENCE OF CANADA

JOINT CIVIL AND CRIMINAL SECTIONS

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

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Background

[1] In 2006, the Executive Committee of the Uniform Law Conference of Canada recommended the creation of a joint working group composed of members from the Civil and Criminal Sections to consider whether there was a need for uniform legislation to respond to concerns about the common law evolution of the tort of malicious prosecution. A joint working group was created. Judy Mungavon, Crown counsel from Ontario, graciously agreed to take on the duties of chairing the committee's work.

[2] Largely as a result of Ms. Mungavon's generous contributions, the working group presented a detailed report at the 2007 annual meeting of the Conference. The working group recommended that consideration be given to the preparation of a uniform law entrenching the *Nelles* 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.

[3] The Conference directed the working group to prepare a draft Act and commentaries and to recommend other uniform jurisdictional responses that would limit the harm caused by frivolous malicious prosecution lawsuits.

[4] The working group was aware of an important case that was winding its way through the courts. In May 2007, the Saskatchewan Court of Appeal dismissed an appeal from a finding that a Saskatchewan Crown prosecutor was liable for malicious prosecution. The issue at the heart of the decision in *Kvello v. Miazga* was the same issue that most concerned the working group: were the courts conflating the *Nelles* criteria for liability such that proof of actual malice or improper purpose was no longer required to found liability for malicious prosecution? That issue was at the heart of the *Miazga* appeal.

[5] The working group was aware that the defendant Miazga was seeking leave to appeal the decision to the Supreme Court of Canada. The working group was informed that leave had been granted in February 2008.

[6] The working group prepared draft model legislation and a report for the 2008 annual meeting. The working group recommended that the Conference receive the 2008 report and the draft model legislation. The working group also recommended that the Conference wait for the decision in the *Miazga* appeal before doing anything else. The Conference accepted the report and directed the working group to continue its work on the issues identified, monitor the results of the *Miazga* appeal and report back to the Conference at the 2009 annual meeting.

[7] The appeal in *Miazga* was argued on December 12, 2008. The Court reserved judgment. Judgment was still reserved when the Conference held its annual meeting in August 2009. Accordingly, the working group reported that it was still awaiting the decision in *Miazga.* The Conference directed the working group to continue its work on the issues raised in the report, monitor the results of the *Miazga* appeal and its impact on the recommendations of the working group and report back to the Conference at the 2010 annual meeting.

The *Miazga* Appeal Decision

[8] On November 6, 2009, the Supreme Court of Canada issued judgment in the *Miazga* appeal (see 2009 SCC 51). In a unanimous decision, the Court allowed the appeal and overturned the malicious prosecution finding.

[9] The Court held that the tort of malicious prosecution requires proof that a prosecutor was impelled to act for an improper purpose inconsistent with the office of a Crown attorney. The absence of reasonable and probable grounds to prosecute, standing alone, is not a sufficient basis to infer malice. As stated in paragraph 89:

> The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the boundaries of the office of the

> Attorney General. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose.

[9] The Court also made it clear that there can be no finding of malice if a prosecutor initiates or continues a prosecution based on an honest, albeit mistaken, professional belief that reasonable and probable cause exists. The absence of reasonable and probable grounds to prosecute may be relevant to the issue of malice if the prosecutor did not honestly believe such grounds existed, but even then, the plaintiff must adduce further evidence. As the Court explained in paragraph 88:

> Likewise, a conclusion that a prosecutor lacked a subjective belief in sufficient cause but proceeded anyways is equally consistent with non-actionable conduct as with an improper purpose. To permit an inference of malice from absence of reasonable and probable grounds alone would nullify the very purpose of the malice requirement in an action for malicious prosecution and risk subjecting Crown prosecutors to liability when they err within the boundaries of their proper role as "ministers of justice".

[10] In summary, the Court reached precisely the same conclusion the working group did when it observed in paragraph 80:

> Malice requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice. The third and fourth elements of the tort must not be conflated.

The Impact of the *Miazga* Decision on the Working Group's Recommendations

[11] We met to consider the impact of the *Miazga* decision on the working group's recommendation for uniform legislation to codify the essential elements of the tort of malicious prosecution. Members were unanimous in concluding that the Supreme Court's judgment in *Miazga* has eliminated that need. The Court's unanimous and unequivocal statement of law that malice may not be inferred solely from the absence of reasonable and probable grounds obviates the most important aspect of the malicious prosecutions project.

[12] The working group considered the impact of the Miazga decision on the subsidiary issues identified in the paper presented to the Conference in 2007 and the draft legislation presented to the Conference in 2008. For example, the working group proposed that in a malicious prosecution lawsuit the plaintiff should be required to sue the Attorney General and should not be permitted to name individual prosecutors as defendants.

[13] The working group concluded that this issue was not sufficiently important to warrant the Conference's attention. The working group was aware that the Advisory Committee on Program Development and Management considered whether there was a need for uniform legislation that would prevent all government employees, not just Crown attorneys and prosecutors, from being personally named as defendants in civil lawsuits concerning acts or omissions in the course of their employment. The working group concluded that the issue was best left for future consideration by the Advisory Committee and the Civil Section.

[14] We reached similar conclusions on all other subsidiary issues identified by the working group. None of them, in the working group's opinion, warrant further consideration of the Uniform Law Conference of Canada at this time.

Conclusion

[17] Accordingly, the Working Group recommends that the Conference receive this paper and conclude the Malicious Prosecution project.