

# Blakes Bulletin

## Litigation

### Supreme Court of Canada Places Crown Prosecutors Above the Law Again?

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On November 6, 2009, the Supreme Court of Canada released its decision in *Miazga v. Kvello Estate*. In its decision, the unanimous Court departs from the law on the tort of malicious prosecution which it laid down 20 years ago in the case of Nurse Susan Nelles. In *Nelles*, the Court had held that equality under the law demands that Crown prosecutors cannot be immune from malicious prosecution lawsuits and that the same test must apply to Crown prosecutors as applies to private prosecutors. In *Miazga*, the Court has now carved out a special test for suing Crown prosecutors for malicious prosecution, virtually reinstating the immunity it rejected in *Nelles*.

This was a significant opportunity for our highest court to confirm and clarify the responsibility of government agents in the criminal justice system, recognizing the devastating impact that the transgression of public duties can have on wrongfully targeted individuals. The Court recently emphasised the importance of such principles in its unprecedented decision to allow suits against police officers for negligent investigation. Unfortunately, the *Miazga* decision appears to backtrack on the ability to hold public officials accountable.

#### BACKGROUND

The malicious prosecution action was brought by two sets of foster families in Saskatchewan after sexual assault charges were stayed against them. The charges were numerous and were founded almost entirely on wildly bizarre and disturbing allegations by three foster children, including allegations of satanic rituals and human sacrifice. The criminal case had been labelled by the media as the "Scandal of the Century". The financial, emotional and reputational harm caused to the plaintiffs by the criminal prosecution was widely acknowledged. One of them committed suicide. All charges against the plaintiffs were eventually dropped, as the children's allegations were ultimately found to be almost entirely incredible. The children also ultimately recanted their allegations.

At the malicious prosecution trial, the plaintiffs succeeded against one of the two Crown prosecutors who prosecuted the case (Matthew Miazga), among others. Mr. Miazga appealed to the Saskatchewan Court of Appeal and lost. He then appealed to the Supreme Court of Canada.

#### SCC CLOAKS CROWN PROSECUTORS WITH EFFECTIVE IMMUNITY

The Court granted Mr. Miazga's appeal by apparently backtracking on the original *Nelles* test in the following main ways:

- 1) removing the requirement that the Crown prosecutor form an honest professional belief that guilt could be proven based on the evidence;
  - 2) requiring that the plaintiff identify the *particular* personal animus or corrupt motive that fuelled the Crown prosecutor's actions; and
  - 3) precluding an inference of malice based on the absence of reasonable and probable cause.
- The overall test for the tort of malicious prosecution has four parts. The plaintiff must establish that the prosecution was:
- 1) initiated by the defendant prosecutor;
  - 2) terminated in favour of the plaintiff;
  - 3) undertaken without reasonable and probable cause; and
  - 4) motivated by malice or a primary purpose other than that of carrying the law into effect.

The Court has now practically ensured that parts 3 and 4 cannot be met in relation to Crown prosecutors. Under part 3, the Court ruled that as long as a reasonable person could believe that the accused could have been found guilty, there is objective reasonable and probable cause and the suit against the Crown prosecutor must fail, even if this Crown prosecutor did not believe the person was probably guilty. This has the perverse effect that, in such circumstances, a Crown prosecutor could, in fact, be motivated by racial, political or other forms of bias, but the wrongfully prosecuted person would still have no recourse.

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As for establishing malice under part 4, the Court appears to have resiled from the broad definition of malice that it adopted in *Nelles*. It has now ruled that a plaintiff must prove that “the prosecutor *willfully* perverted or abused the office of the Attorney General or the process of criminal justice” and that this cannot be inferred from a finding of absence of professional belief in reasonable and probable cause alone. According to the Court, this (heightened) standard is necessary since “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.” This statement is remarkable, particularly when viewed against the Court’s repeated rulings that Crown prosecutors are “ministers of justice” whose role is to assess the evidence and prosecute only in the interest of justice and that their role is not to seek a conviction.

Now that the lower court decisions in *Miazga* have been overturned, there have been only two cases in Canada in more than 20 years in which plaintiffs have successfully sued Crown prosecutors for malicious prosecution. As long as the heightened *Miazga* test applies, regrettably, these may be the last two successful claims in Canadian legal history. Crown prosecutors appear to have been effectively returned to their special seats above the law.

Blakes was selected to represent the Canadian Civil Liberties Association as an intervener in this important case.

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