

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

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B. STATEMENT OF FACTS

3. For the purposes of the Attorney General's argument, the relevant "facts" are:

a) the "absence of reasonable and probable cause" test, as explained in *Nelles*:

Reasonable and probable cause has been defined as "**an honest belief in the guilt of the accused** based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, **placed in the position of the accuser**, to the conclusion **that the person charged was probably guilty** of the crime imputed."...

This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances.¹

b) the following statements of the trial judge:

i) The issue is whether the defendants had an honest belief that the plaintiffs were **probably guilty** of the crimes they imputed to the plaintiffs. **The term "probably" simply means more likely than not.** To my recollection, not one of the defendants ever said that he or she had an honest belief in the probable guilt of the plaintiffs.²

ii) ... I now move on to comment on the objective considerations. It is not enough that the defendants had an honest belief in the guilt of the plaintiffs as charged. Any honest belief of the defendants had to be founded on reasonable grounds. In other words, on a state of circumstances that would reasonably lead any ordinarily prudent and cautious person, **placed in the**

¹ *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at 193

² Appellant's Record, Vol. 1, Reasons for Judgment of Baynton J. ("Trial Judgment) p. 141, para. 357

position of the defendants, to the conclusion that the plaintiffs were probably guilty of the crimes imputed to them by the defendants.³

- c) the following statements from the majority of the Court of Appeal:
- i) In this case, there is one aspect of the trial judge's determination that there was lack of reasonable and probable cause that clearly and unequivocally tips the balance against Miazga: the finding of fact by the trial judge that **Miazga did not have an honest belief** that the respondents had committed the assaults alleged by the [R.] children, **nor an honest belief that the respondents were guilty of the offences charged**.⁴
 - ii) We are satisfied, upon a consideration of the whole of the evidence, that the trial judge's finding was a reasonable one. ... The finding sets out the trial judge's firm opinion ... that **it should have been apparent to anyone** that the children's evidence, because of the bizarre and incredible nature of some of their allegations, and their propensity to lie, was not sufficiently credible without some independent corroboration, to support the many charges against the twelve respondents⁵
 - iii) Although the convictions of the [R.] parents and D.W., as well as the committal to trial of all of the respondents would seem to support Miazga's faith in the credibility of the children, the judgment in *Proulx*, at p. 32, makes the point that a prosecutor cannot bootstrap his own position on the basis of such evidence since those events post-date the prosecutor's decision, and because the conviction was flawed and later set aside, with a new trial ordered by the Supreme Court.⁶

PART II – POINTS IN ISSUE

4. The Attorney General will address the following issues:
- 1) What does step three of the *Nelles* test – “the absence of reasonable and probable cause” - mean when applied to the actions of a Crown prosecutor as a defendant in a malicious prosecution?

³ Appellant's Record, Vol. 1, Trial Judgment, p. 144, para. 364

⁴ Appellant's Record, Vol. II, Reasons for Judgment of the Court of Appeal (“Appeal Reasons”), pp. 282-283, para. 132

⁵ Appellant's Record, Vol. II, Appeal Reasons, p. 284, para. 135

⁶ Appellant's Record, Vol. II, Appeal Reasons, p.285, para. 136

- 2) What relevance do decisions in the antecedent criminal proceedings have in a malicious prosecution action?

PART III – STATEMENT OF ARGUMENT

A. The Need to Reconsider the “Absence of Reasonable and Probable Cause” Test

5. In *Nelles*, this Court adopted the four part formulation of the test for malicious prosecution articulated in 1878 in *Hicks v. Faulkner*.⁷ As Vancise J.A. correctly noted, the test was

...developed at common law during the 19th century...to deal with actions against private individuals who brought actions against another without reasonable and probable cause, not to deal with actions against the Crown.⁸

6. As a standard against which to measure the actions of a prosecutor/defendant, the test is outdated, and was recognized as outdated by the House of Lords almost 50 years ago.⁹ It predates the development of modern policing and prosecution agencies, the latter of which have rigorous, publicly-available charge approval standards, and peer review of decisions to prosecute. The test uses a term, “reasonable and probable cause” which, though still conceptually apt, has largely disappeared from statute law,¹⁰ as has the similar phrase “reasonable and probable grounds.”¹¹ The test predates significant developments such as the advent of the *Charter*, the emergence of the abuse of process doctrine, and the adoption of prosecutorial standards, developments which assist in defining prosecutorial duties and protecting accused persons. In short, there is now a much more sophisticated understanding of when prosecutors should proceed with charges, and what conduct falls below acceptable standards.
7. This is not to suggest the phrase ought to be jettisoned. Because the tort may be applied to different tortfeasors such as complainants, police officers and prosecutors, a

⁷ (1878) 8 Q.B.D. 167 at 171

⁸ Appellant’s Record, Vol.II, Appeal Reasons, pp.296-297, para. 176 (per Vancise J.A., dissenting)

⁹ *Glinski v. McIver*, [1962] AC 726 at 758,767

¹⁰ *National Defence Act*, s. 270 (barring of civil actions)

¹¹ *Criminal Code*, s.512 (issuance of summons)

common statement of the test is useful. However, because the understanding of what constitutes tortious conduct varies among defendants, it is necessary to refine what the standard means when considering the actions of the modern Canadian prosecutor.

8. Indeed, this Court began such a process in *Proulx*. With respect to the *Nelles* requirement that the prosecutor believe in “probable guilt”, the *Proulx* majority held:

To say that a prosecutor must be convinced beyond a reasonable doubt of an accused person’s guilt before bringing charges is obviously incorrect. That is the ultimate question for the trier of fact, and not the prosecutor, to decide. However, in our opinion, the Crown must have sufficient evidence to believe that guilt *could* properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated.¹²

This is not the test the trial judge employed. Rather than the foregoing “could” test, the trial judge used a “more likely guilty than not” test.¹³ However, the subjective component of the test must, for a prosecutor, focus on the belief that the case is legally provable, rather than a specific belief in guilt. For its part, the majority of the Court of Appeal gave deference to the trial judge’s flawed analysis.¹⁴ This amounted to a “reasonableness” standard of review when “correctness” was called for.

9. It is also notable that in *Proulx* the majority criticized the prosecutor for not realizing both that some of the evidence would be inadmissible,¹⁵ and that other evidence was unreliable.¹⁶ Those factors demand that a prosecutor apply legal judgment: such factors would not be used in applying the “absence of reasonable and probable cause” test to complainants or police officers. Thus, it is clear that the understanding of the “absence of reasonable and probable cause” test has evolved, at least vis-à-vis professional prosecutors, since the 19th century *Hicks* formulation.

B. A Better Standard

¹² *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9 at para. 31

¹³ Appellant’s Record, Vol.I, Trial Judgment, p. 141, para. 357

¹⁴ Appellant’s Record, Vol.II, Appeal Reasons, pp.284-286, paras. 135-140

¹⁵ *Proulx*, at paras 26-28, 34

¹⁶ *Proulx*, at paras 21-25, 34

10. The Attorney General proposes that the “absence of reasonable cause” standard, in relation to professional prosecutors, be understood as requiring proof of

“the absence of admissible and reliable evidence sufficient to put the accused on trial.”

11. This is, in effect, a modified *prima facie* case standard. It is “modified” in the sense that it demands that prosecutors turn their minds to issues of admissibility and reliability. Although a prosecutor might believe a committal for trial may be obtained because key evidence could not be excluded by a preliminary hearing judge lacking *Charter* jurisdiction, it would be inappropriate to proceed if that critical evidence supporting guilt would be manifestly inadmissible because of a *Charter* violation.
12. There are four justifications for this standard. First, the language is grounded in the test set out in s. 548 of the *Criminal Code* to guide justices at preliminary hearings. It is thus a known standard, just as relevant to the prosecutor who presents the case as the justice who decides on committal. The test as modified may also be seen as consistent with this Court’s interpretation of the s. 548 standard (in *R. v. Arcuri*¹⁷) or the modified committal standard for extradition (*Ferras v. U.S.A.*¹⁸).
13. Second, the standard is consistent with a common understanding of the prosecutorial role, as expressed by the prosecuting agencies themselves in Canada and abroad, in their policy manuals. All such agencies have policies regarding the “decision to prosecute” or “charge approval.” Each has a two-part test, with an “evidential” component, and a “public interest” component. The “evidential” component varies among prosecution services. In Canada, it is higher than a *prima facie* case. The *Federal Prosecution Services (“FPS”) Deskbook* standard used by the Public Prosecution Service of Canada, speaks of a “reasonable prospect of conviction,”¹⁹ and

¹⁷ [2001] 2 S.C.R. 828, at para.23

¹⁸ [2006] 2 SCR 77, at paras. 46-50

¹⁹ *FPS Deskbook*, Chapter 15, “The Decision to Prosecute, s. 15.3.1 (<http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch15.html>)

most others use a similar standard.²⁰ British Columbia, however, uses a higher standard of “substantial likelihood of conviction.”²¹ Elsewhere, the standard varies: in New Zealand²² and Ireland,²³ *prima facie* case is the standard; in the U.K. and other jurisdictions, “reasonable prospect of conviction” is the common standard.²⁴

14. The fact that most prosecuting agencies use a standard higher than a *prima facie* case does not mean the higher standard should be the tort standard. Prosecution agencies have good reasons to employ a more stringent standard; as the *FPS Deskbook* notes, “the resources available for prosecution are not limitless.”²⁵ The modified *prima facie* case standard suggested above represents a standard *necessary* for prosecution and leaves it to prosecution agencies to raise the bar of sufficiency if they so choose. The failure of prosecutors to adhere to their own policy standard should be a matter of internal discipline, not tort liability. Professional custom is not, in any event, determinative of tort standards, even in the law of negligence.²⁶

²⁰ Nova Scotia Crown Attorney Manual, “The Decision to Prosecute” (“realistic prospect of conviction”) (http://www.gov.ns.ca/pps/ca_manual.htm); Director of Military Prosecutions, “Prosecutorial Discretion and Post-Charge Screening”, (“reasonable prospect of conviction”) http://www.forces.gc.ca/jag/military_justice/cmpps/policy_and_directives/default_e.asp; Manitoba “Role of the Manitoba Prosecution Service”, (“reasonable likelihood of conviction”) <http://www.gov.mb.ca/justice/prosecutions/mbprosecutionservice.html#3>; New Brunswick, Attorney General’s Policy – Public Prosecutions, (“reasonable prospect of conviction”) <http://www.gnb.ca/0227/PPOM/index-e.asp>; Alberta Crown Prosecutors’ Policy Manual, “The Decision to Prosecute”; (“reasonable likelihood of conviction”) http://justiceuat.gov.ab.ca/criminal_pros/default.aspx?id=5495; Ontario Crown Policy Manual, “Change Screening” (“reasonable prospect of conviction”) <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp>

²¹ B.C. Crown Counsel Policy Manual, “Charge Assessment Guidelines” (<http://www.ag.gov.bc.ca/public/criminal-justice/CJBPolicyManual.pdf>)

²² New Zealand Solicitor-General’s Prosecution Guidelines, “The Decision to Prosecute” http://www.crownlaw.govt.nz/artman/docs/article_159.asp)

²³ Ireland, Director of Public Prosecutions, Guidelines for Prosecutors, “The Decision whether to Prosecute,” http://www.dppireland.ie/publications/general_information/

²⁴ Crown Prosecution Service (U.K.), Code for Crown Prosecutors, “The Decision to Prosecute” (“realistic prospect of conviction”)(http://www.cps.gov.uk/victims_witnesses/codetest.html); Australia: 1) Tasmania Director of Public Prosecutions, Prosecution Guidelines (“reasonable prospect of conviction”, which the policy claims is used throughout Australia (http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines); 2)Queensland, Director of Public Prosecutions, Director’s Guidelines (“reasonable prospect of conviction”); <http://www.justice.qld.gov.au/576.htm>); Hong Kong, Department of Justice, The Statement of Prosecution Policy and Practice,(reasonable prospect of conviction) (<http://www.doj.gov.hk/eng/public/pub20021031con.htm>

²⁵ *FPS Deskbook*, “The Decision to Prosecute,” s. 15.3.2

²⁶ *Roberge v. Bolduc*, [1991] 1 S.C.R. 374

15. The third justification for the proposed standard is that it is consistent with a proper appreciation of the role of the prosecutor. As this Court noted in *Proulx*, it is “obviously incorrect” to demand a literal reading of the “probable guilt” requirement; to do so would usurp the trier of fact’s function. Similarly, concern for the admissibility of evidence means being satisfied the evidence is *arguably* admissible, and concern for reliability means “*threshold* reliability,” as that term was used by this Court in *Ferras*.²⁷ Prosecutors must use their professional judgment, but that does not involve acting as if they are judge and jury as well.

16. The final justification is that the modified *prima facie* test is consistent with case law. As pointed out above, the *Proulx* test demands that prosecutors have regard to issues of evidentiary admissibility and reliability. The standard is also consistent with the recent decision of the Australian High Court in *A. v. New South Wales* which characterized the subjective component of the test as a belief in “the sufficiency of material...to warrant setting the process of the criminal law in motion.”²⁸ The House of Lords has referred to the standard as being “a case fit to be tried.”²⁹

C. The Relevance of Committal and/or Conviction

17. In *Proulx*, the majority dismissed the relevance of committal and trial proceedings on the basis the prosecutor could not “bootstrap” his own position on the basis of “flawed court decisions;”³⁰ Vancise J.A., disagreed.³¹ The majority of the Court of Appeal appeared to take *Proulx* as having decided that the judicial decisions on committal, non-suit applications and conviction have no relevance. Other courts, however, have continued to regard such decisions as relevant in malicious prosecution actions³² and

²⁷ *Ferras v. U.S.A.*, at para. 53

²⁸ *A. v. New South Wales* [2007] HCA 10, at para. 71

²⁹ *Glinski v. McIver* [1962] AC 726 at 766-767 (per Lord Devlin); 758 (per Lord Denning); *Thacker v. Crown Prosecution Service* [1997] EWCA Civ. 3000

³⁰ *Proulx*, at para. 32

³¹ Appellant’s Record, Vol. II, Appeal Reasons, pp.323-324, at paras. 255-256 (per Vancise J.A., dissenting)

³² *Gabadon v. Toronto Police Services Board* (2003), 64 O.R. (3d) 726 (Ont. S.C.J.) at para. 23; *affd* 68 O.R.(3d) 480 (C.A.); *Fitzpatrick v. Durham Regional Police Services Board* (2005), 76 O.R. (3d) 240 (Ont. S.C.J.) at para. 18; *Kabbabe v. Quebec (A.G.)* 2007 QCCA 1471 at para. 11, leave to appeal dismissed May 15, 2008

in principle, such decisions may often offer cogent evidence that there was an objective basis for pursuing the prosecution.

18. The case law that preceded the 2001 decision of this Court in *Proulx* held that absent a fundamentally flawed criminal process, (for example where key evidence was suppressed by the prosecution) if a *prima facie* case of guilt was established during the criminal proceeding, that conclusion was significant for the objective analysis of reasonable and probable cause in an action for malicious prosecution.³³ There is no indication that *Proulx* intended to overturn this law, as the majority of the Court of Appeal appears to suggest.
19. The determination of absence of reasonable and probable cause is a question of law.³⁴ Giving weight to the fact that a *prima facie* case of guilt was established in the criminal proceeding serves the purpose of ensuring consistency between the criminal and civil justice systems by weeding out cases that attempt to re-litigate facts and issues settled in the prior proceeding. It also serves to underscore that plaintiffs can't simply show that they prevailed in the criminal proceedings, but must show there was some fact known to the prosecutor that made the case inappropriate for prosecution.
20. Giving evidentiary weight in a civil action to the fact that a *prima facie* case of guilt was found in earlier criminal proceedings takes into account the jurisdiction of the criminal court and the similarity of the facts in dispute. Neither 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,³⁵ but those determinations are objectively compelling, at least where no new

³³ *Riches v. DPP*, [1973] 2 All E.R. 935 (C.A.), at 938 and 941; *German v. Major* (1985), 20 D.L.R. (4th) 703 (Alta. C.A.), at 711.

³⁴ *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at para. 52

³⁵ *Hall v. Geiger*, [1930] 2 W.W.R. 794 (B.C.C.A) at 794; *Temilini v. OPP (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.), at para. 10, leave refused [1991] 1 S.C.R. xi; *R. v. Arcuri*, [2001] 2 S.C.R. 828; *R. v. Charemski*, [1998] 1 S.C.R. 679

facts have emerged. The judicial decisions in the criminal process may thus support a finding by a civil court that reasonable and probable cause for prosecution existed.³⁶

21. This Court discounted the relevance of the judicial determinations in the prior criminal proceedings in *Proulx* because those proceedings were so fundamentally flawed, as evidenced by the fact that the Quebec Court of Appeal acquitted the accused rather than order a retrial.³⁷ A number of features of *Proulx* marginalized the relevance of the prior criminal proceedings in the subsequent civil action:
 - a) the prosecutor had the benefit of the coroner's inquest (which considered all of the police-gathered evidence and heard witness testimony including that of the accused) which concluded that the shooter could not be identified on the evidence gathered to date;³⁸
 - b) based on the finding of the coroner's inquest the prosecutor determined there was insufficient evidence to proceed with a murder charge against Proulx, because there was no reliable identification evidence;³⁹
 - c) the new identification evidence that came to light nine years after the murder was determined by the Court of Appeal to be totally lacking in probative value;
 - d) although Proulx was committed, the limited jurisdiction of the preliminary inquiry justice meant the court could not determine the admissibility of critical evidence (the intercepted conversations).
22. In contrast, in the case at bar the judicial assessments of the evidence during the prosecution of the criminal cases preceding the civil action -- including the recognition by this court that there was evidence of a crime⁴⁰ -- support Justice Vancise's view

³⁶ *Thompson v. Ontario* (1998), 113 OAC 82 (C.A.), at para. 39; *Noye v. Robbins and Crimmins*, [2007] WASC 98, at para. 314; *Temilini*, *supra*, at para. 10

³⁷ *R. v. Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.)

³⁸ *Ibid*, at 354. The Coroner's inquest occurred in March, 1986, approximately three and half years after the shooting of the victim.

³⁹ *Proulx v. Quebec*, [2001] 3 S.C.R. 9, at para. 1

⁴⁰ *R. v. R.(D.)*, [1996] 2 S.C.R. 29

that the prior criminal proceedings showed that some credible evidence underlying the allegations of sexual abuse against the plaintiffs existed.⁴¹

PART IV – ORDER SOUGHT

23. That the foregoing reasoning be considered in disposing of this appeal. The Intervener also requests the opportunity to make oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

⁴¹ Appellant's Record, Vol. II, Appeal Reasons, pp.323-324, at paras. 255-256 (per Vancise J.A., dissenting)